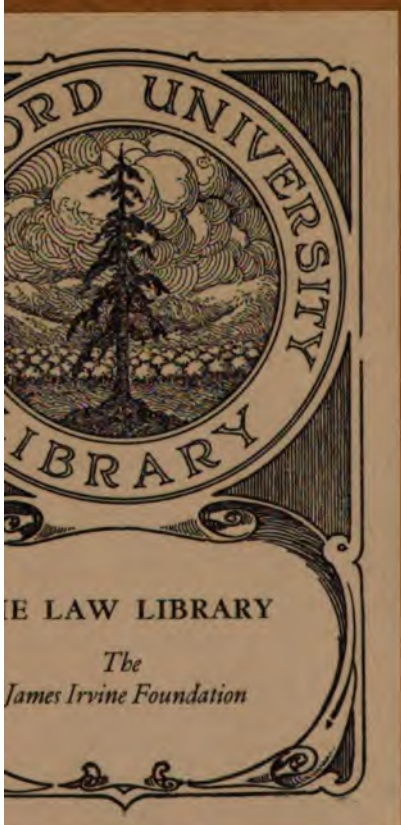

ORD UNIVERSITY
IBRARY
E LAW LIBRARY
The
James Irvine Foundation

ESSAY

ON

THE PENAL LAW

OF PENNSYLVANIA.

PUBLISHED BY ORDER OF THE LAW ACADEMY OF PHILADELPHIA.

By JOB R. TYSON,

Student of Law, and Member of the Law Academy.

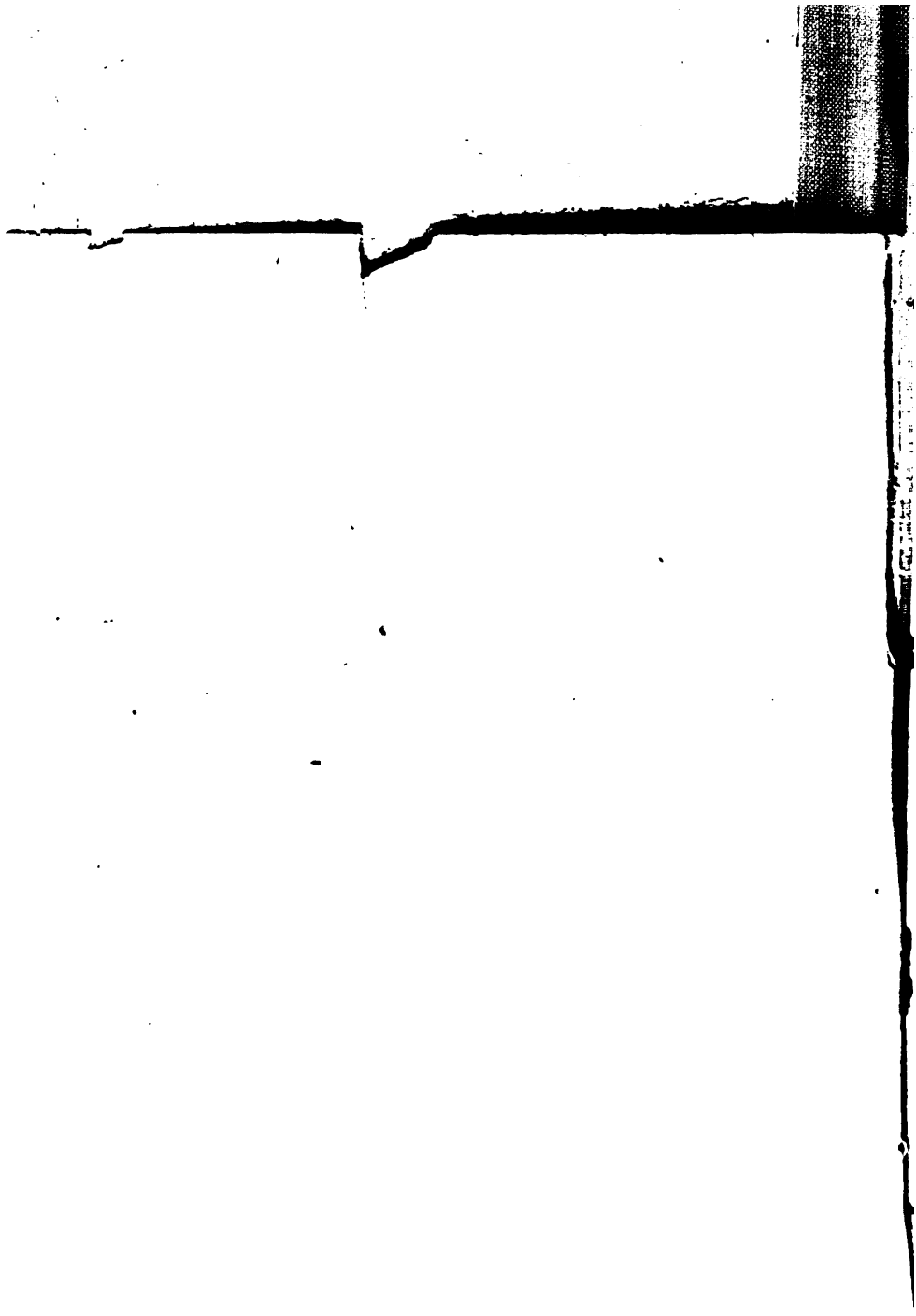
A very slight reflection on the numberless unforeseen events which a day may bring forth, will be sufficient to show that we are all liable to the imputation of guilt; and consequently all interested, not only in the protection of innocence, but in the assignment to every particular offence, of the *smallest punishment* compatible with the safety of society.—*Eden's Principles of Penal Law, p.* 330.

PHILADELPHIA:

PUBLISHED BY THE LAW ACADEMY.

Mifflin & Parry, Printers.

1827.



TO THE HONOURABLE

PETER S. DUPONCEAU, LL.D.

PROVOST,

JOSEPH HOPKINSON, LL.D. AND EDWARD D. INGRAHAM, ESQ.

VICE-PROVOSTS

OF THE

LAW ACADEMY OF PHILADELPHIA.

IN availing myself of your permission to inscribe to you this little work, I shall neither offer the incense of adulation nor invoke your auspices to what you have already so much distinguished. I will merely in a few words express the gratitude I feel, in common with my fellow members, for your luminous opinions on the nicest points of legal enquiry; opinions as learned as they are sound and elegant.

And though it may appear equally presumptuous and unpardonable for me either to approve or condemn what emanates from so high a source—such exalted authority—so much and various learning, yet the peculiarly complimentary tenor of your decision, induces me to distrust, for once, the infallibility of your judgment or the seriousness of your praise. For it is a question, whether my greatest friend in this matter has been your wisdom or your bias; the intrinsic merit, or the mere *moral strain* of the work. Under an imposing sense of obligation,

I have the honour to be,
with profound respect and
gratitude, yours, &c. &c.
JOB R. TYSON.

PREFACE.

THE penal code of this state, marking the progressive melioration of punishments up to the year 1794, has been deemed a proper subject for dissertations, at this crisis, by the very learned Faculty of the Law Academy of Philadelphia. At their instance the following pages were written, and by a resolution of the Academy, are now, with great diffidence, submitted to the public.

As a history of the criminal jurisprudence of Pennsylvania, they may be esteemed defective by the exclusion of most of the minor offences. But as an indiscriminate review of these, including a classification and notice of the long catalogue of injuries *contra bonos mores*, would add little to the cause of penal improvement, and were not necessary to an exhibition of the general state of penalties, they were discarded as alien to the objects of the essay.

Egregious arrogance may be ascribed to one, who, destitute of experience in the operation and effects of criminal laws, assumes the boldness and audacity of suggesting alterations in the penal system. For these suggestions, whenever they shall occur, the author seeks his excuse in the circumstance of their being only obvious inductions from sound premises or incontestible facts.

He has not been ambitious of learned display or the splendour of elegant writing, humbly content with the unostentatious expression of his meaning, without the aid of fanciful embellishment, or the frippery of meretricious ornament. The fault, imputed by Horace to Telephus and Pelus, he has endeavoured to avoid:

"Projicit ampullas et sesquipedalia verba."

In accuracy of relation and diligence of research, consist the primary duties of an historian. So far as the following sheets are historical, the writer has attempted the former; but though, in this respect, he is not sensible of errors, yet dares not claim exemption from defect. In relation to the latter, he feels deficiency, though, as will be seen, some labour has been employed. Indulgence is invoked, especially for the paucity of facts displayed on a subject, in reference to which, sufficient industry might accumulate so many; but it must be remembered that this industry is incompatible with the time and attention, due by a student to other and more abstruse parts of the science of law. Lame and imperfect execution, however, must be the lot of an essay, brought forward in the rustic garb of an almost unaltered exercise, prepared during the summer recess, without, at the time, the most distant view to publication.

Philadelphia, January 4, 1827.

CONTENTS.

ESSAY.

CHAPTER I.

HISTORICAL VIEW OF PUNISHMENTS IN PENNSYLVANIA.

In most countries it has been the fate of the criminal law, whose greatly important objects are honour, life, and property, to receive less attention than the civil branch of jurisprudence, which is confined in its operations exclusively to the last. This indifference and supineness are the certain appendages of despotic governments, in which history informs us, excessive punishments almost always prevail ;[a] in others they may be attributed to a want of the Christian dispensation, which requires us to bestow some value on the life of man; or to a remissness, that, in some instances, is indeed susceptible of neither extenuation nor apology. As a single example we might point to the penal code of England, which, though the theme of warm eulogy by Sir William Blackstone, is in a great degree liable to the latter imputation.

Pennsylvania enjoys a government free and republican, the blessing of Christianity, and, as almost a necessary consequence, a vigour in legislation, which, though it has improved the laws introduced during a state of colonial vassalage, yet, it is humbly submitted, has something still to perform before perfection shall be attained.

Very imperfect and unsatisfactory accounts are transmitted to us of legal science, whether civil or criminal, in Greece, whose first legislator appears to have been Theseus, famous for compiling a code borrowed from Crete, which is principally celebrated as the

---

a Montesq. S. L. c. 31. p. 62.

foundation of the laws of Lycurgus.[b] From Homer, anterior to the age of Lycurgus, is derived the greatest part of the little knowledge which we possess of their estimation of crimes. He gives us to understand that the murderer was rather the victim of private revenge, than of public justice; that conjugal infidelity by the wife was punished with inflexible rigour, but that the offending husband frequently escaped with impunity; and that the violation of virgin honour was scarcely esteemed worthy of the interference of law.

The laws of Lycurgus were promulgated about the year 926 before the Christian era.[c] This celebrated system was intended more for the cultivation of vigour of body and martial sentiments, than for the prevention of crime. The thief was punished, not for the moral guilt of taking the property of another, but for the want of cunning to conceal his dishonesty.[d] Draco, the Athenian legislator, who punished every crime as a treason to the state with death, was succeeded by Solon, who introduced a milder system of penalties. He committed the guardianship of the laws to the Court of Areopagus, which was a tribunal consecrated for ages by the justice of its decrees and the immaculate purity of its members.[e] To prevent the influence of prejudice, as well as the hazard of bias, they heard causes and passed sentences in the dark; even the speeches of orators before them were obliged to be divested of the graces and charms of eloquence.

The laws of Rome exhibited at different periods, very different aspects, and in consequence, it would seem, of the various forms which the government assumed. The laws of the *Twelve Tables* were very cruel, capital punishment being inflicted for what are considered the minor offences, even for theft. The Porcian law which succeeded it, with a forbearance very seldom seen among Pagans, ordained that no Roman citizen should be put to death for any crime. Sylla, the author of the Cornelian Code, appeared to be equally desirous to multiply offences, and to punish them, with the utmost inhumanity his savage nature could invent. A profound writer[f] on this system, with as much truth as brevity, says, "he laid snares,

---

b *Horæ Juridicæ Subsecivæ* by Butler, p. 4.

c Potter's Antiq. of Greece.

d Bruning's *Compendium Antiquitatum Græcarum.*

e Tytler's Elements of Ancient History, vol. 1. 51.

f Montesq. S. L.—B. 6. c. 16. p. 65.

sowed thorns, and opened precipices, wheresoever the citizens set their feet." Livy[g] could not have referred to Sylla's laws, when he compliments the Romans on their fondness for moderation in punishments. The subsequent constitutions,[h] made during the imperial government, superadded the confiscation of goods, crucifiction, exposure to wild beasts, and every other torture which malignity could suggest, to the interdiction of fire and water introduced by Sylla. The increased multiplicity of crime, during the latter ages of the empire, is, doubtless, in part, to be attributed to the augmented severity and variety of punishments.

In Turkey, where despotism is personified in the Sultan, and the most ignominious servitude in the people, the penal laws pay little regard to honour, life, or estate; the Sultan, as supreme judge, speedily decides, and the bashaw as speedily executes his mandates, with remorseless obedience. It is almost unnecessary to say that crimes are as frequent and outrageous as the laws are severe, for Turkish barbarity is grown into a proverb perhaps throughout the Christian world.

In Japan, according to Kempfer, all crimes are punished with death, and less for the correction of the offender than to maintain the authority of the prince, whose property is supposed to be directly invaded by the commission of crime, he being esteemed the universal proprietor. Montesquieu gives the following account of the effects of their laws at Meaco, in Japan: "The number of those who were suffocated or murdered in that city by ruffians, is incredible; young maids and boys were carried off by force, and afterwards found exposed in public places, at unseasonable hours, quite naked, and sown in linen bags, to prevent their knowing which way they had passed; robberies were committed in all parts; the bellies of horses were ripped open to bring their riders to the ground; and coaches were overturned in order to strip the ladies."

From laws, the greater number of which, if not written in blood, at least having bloodshed, not reformation for their object, let us turn with the disgust which they excite to the contemplation of our own, which, for wisdom in design, and clemency in execution, challenge, with proud security, a comparison with any other under heaven.

"The Constitution of Pennsylvania," says the "Historical Review of the Constitution and Government of Pennsylvania," as-

---

g Liber 1. h *Suet in Jul. Cæsare, Cornel de Sicariis, Jul. Cap. Maximini duo.*

cribed to Dr. Franklin, "is derived, first, from the *birthright* of every British subject; secondly, from the *Royal Charter* granted to William Penn by Charles II. and, thirdly, from the ***Charter of Privileges*** granted by the said William Penn, as proprietary and governor, in virtue of the former, to the freemen of the said province and territories."

The ***Royal Charter***, above alluded to, was granted by Charles II. to William Penn in the early part of the year 1681; the fourth, fifth, sixth, and seventh sections of which instrument delegate to him the legislative and executive powers which he exercised over the province. These grant to him and his heirs with the approbation of the freemen of the colony, the privilege of making whatsoever laws appertain either to the public state, peace, or safety, or the private utility of particular persons; the right to erect Courts of Judicature for the trial of civil and criminal causes; and the power of remitting and pardoning all offences, except treason, and wilful and malicious murder. They reserve to the King, the right of of receiving, hearing, and determining appeals; declare that the existing laws of England shall extend to the colony, as well those which regulate the enjoyment and succession of goods and chattels, as felonies, till altered by the proprietary and freemen of the province; and require that a duplicate or transcript of all laws made, shall, within five years from their enactment, be submitted to the supervision of the privy council; which, if they, within six months, declare to be inconsistent with the sovereignty of the King's prerogative, or repugnant to the rights and statutes of England, shall be void.

Thus invested with powers of sufficient plenitude for civil and criminal legislation, he published his "***Great Law***" in December, 1682, which was made in an Assembly, at Chester, convened for that purpose.[i] The principal discrepancy, discoverable between this code and his "***Certain conditions and concessions, &c.***" his "***Charter of Privileges,***" and a variety of other regulations or systems of polity, which the exigencies of the province required, can be found in the "***Conditions and concessions, &c.***"[k] where slanders, drunkenness, &c. are said to be punishable as in England, and in his "***Great Law***" different penalties are annexed.

---

i Historical Review, p. 8. in 2 Vol. Franklin's Works.
k 5 Smith. 412.

The merciful character and Christian piety of this distinguished man, whom we call the founder of our city, and the first civilized proprietor of our state, forbad the infliction of severe or oppressive punishments.[1] His "Great Law," promulgated nearly a century and a half ago, presents a delightful picture contrasted with the different codes of Europe, even now, when the meridian sun of science has dissipated much of the mist with which prejudice and bigotry had beclouded the understandings of mankind on this subject. The only crime capital, by the "Great Law," is killing with malice and premeditation, and being accessary to such homicide. He abolished forfeitures and deodands in all cases of self murder and death by accident.* Manslaughter, it is presumable, was punished at the discretion of the magistrate, for I know of no other construction for the words, "shall be punished according to the nature and circumstance of the offence." The penalties for adultery were whipping and one year's imprisonment, which latter was inflicted for rape, to which was likewise superadded, the forfeiture of one third of the offender's estate. Incest and sodomy were punished by the same forfeiture, but differed in the period of confinement; for the former a year's imprisonment was enjoined, for the latter six months. Bigamy, and a second conviction of adultery, were

---

1 Some little account of a man, to whom we owe, in a great measure, the mildness of our present penal system, cannot be altogether irrelevant or improper in an essay purporting to give a general history of it. William Penn, born in the year 1644, was the son of Sir W. Penn, who served as an Admiral in the English Navy, in the protectorate of Cromwell, and the reign of Charles II. The son, from principle and intimation of duty, in opposition to every minor consideration, joined the society of Friends, while the rancour of persecution continued in all its fury, with which that society, in its infancy, was peculiarly assailed. He was arraigned at the Old Bailey, for preaching agreeably to the principles of his sect, where he pleaded his own cause with the zeal of truth, and the magnanimity of innocence. The Jury having twice brought in a special verdict, "guilty of speaking in Grace street Church," were remanded to bring in a general one; after repeated menaces they brought in, "not guilty." For this acquittal, they were each fined forty marks, and imprisoned with the illustrious offender. It was during this incarceration, that he wrote his "No Cross, no Crown," that he conceived those liberal notions of toleration which he there displays, and cultivated that expanded philanthropy, which his government of the colony afterwards granted to him, so fully developes. He died in 1718. Ramsay's U. S. 1 vol. 190.

* The provisions contained in this sentence in the text, do not form a part of the "Great Law," though all the others do; it is one of the provisions of his *last* Charter of Privileges granted in 1701, and to be found in Proud's History of Pennsylvania, Vol. I. 448.

punishable by imprisonment at hard labour for life; the only two instances, I think, in which confinement for life was actually *imposed*. In burglary, were required four-fold restitution of the property purloined, and the burglar to undergo three months' imprisonment. The punishment of arson was to restore double the value of the property destroyed, to suffer imprisonment for one year, and corporal chastisement at the discretion of the justice in whose county the offence was committed. This mild system continued in operation till William Penn's death, in 1718, a period of thirty-five years.

That these punishments were not inadequate to their object, is demonstrative from the circumstance of the frequent re-enactment of the code, by the Legislature. The reluctance with which they were given up by the people, proves their beneficial effects. Perhaps the substitution of the sanguinary penalties of the mother country, obtained by the act of 1718, is to be ascribed to the panic that seized the Assembly by the jeopardy of their ancient privileges;[m] and the alarm produced among the Quakers[n] by the statute 1 Geo. 1. which requires an oath in criminal suits and on induction into office. These, together with the remonstrances of their Governor,[o] accelerated the surrender of their ancient system, and gained their consent for the admission of statutes, framed by the English Parliament. This act, which by Mr. Bradford is called the basis of the criminal law as it then stood,[p] revived, in most instances, the laws of England. High treason, and those respecting the coins, petit treason, murder, robbery, burglary, rape, sodomy, mayhem, manslaughter, witchcraft, conjuration, arson, and all other felonies, except larceny, are declared to be punishable according to the directions of the statutes of Great Britain, which inflict death. This statute, so opposite in regard to penalties to the former code, carries with it very little to sustain the propriety of Dr. Franklin's panegyric as to the excellence of the laws of the province during the administration of Sir William Keith.[q]

The next statutes in the order of time, worth noticing, were those of 1767 and 1772.[r] They extended the penalty of death to counterfeiting and uttering counterfeit bills of credit, and counter-

---

m Historical Review.
n Bradford's Enquiry, p. 17 & 18.
o Ibid. p. 18.
p Ibid p. 18..
q See Franklin's Works, 2 vol. p. 60.
r See the Acts, 1 Smith. 272. 382.

feiting any gold or silver coin. The latter declares that the burning of certain public buildings shall be deemed arson, while the former takes from arson the benefit of clergy, which, by later and sound interpretation of the statute of 1718, was judged to be within it.[s]

Mr. Bradford, late Attorney general of this state, in his elegant essay on the subject of the penal code, truly remarks,[t] in reference to the punishments inflicted after the laws of Penn: "the severity of our criminal law is an exotic plant, and not the native growth of Pennsylvania. It has been endured, but I believe has never been a favourite. The religious opinions of many of our citizens were in opposition to it; and as soon as the principles of Beccaria were disseminated, they found a soil that was prepared to receive them."

It is certain that not many years elapsed after these convulsions had subsided, consequent upon a change of government, when the Legislature, animated by an injunction contained in "The Plan or Frame of Government," of the first Constitution,[u] undertook a serious reform. The result of their beneficial labours was the act of 15th September 1786, by which, sodomy, robbery, and burglary, were punished by the forfeiture of real and personal estate, and imprisonment at hard labour not exceeding ten years, at the discretion of the court, instead of death. It abrogated the odious oppression of corruption of blood, and forfeiture of estate to the Commonwealth in case of attainder, except during the life of the offender; declared that no forfeiture shall accrue for death by casualty; and that the estate of a *felo de se* shall descend according to the ordinary rules of inheritance.

Among the humane provisions of this statute, two particulars must not be omitted:—1st. That the punishment for a variety of offences, not capital, which, by the laws in force, were punishable by burning in the hand, cutting off the ears, nailing the ear or ears to the pillory, placing in the pillory, whipping, or imprisonment for life, shall be TWO YEARS' IMPRISONMENT AT HARD LABOUR, AND A FINE.—2nd. That the presumption of murder for the concealment of the death of a bastard child was strained, and that probable presumptive *proof* must be given that the child was born alive. The remainder of the statute principally refers to the treat-

s See 1 Smith. 105.

t Bradford's Enquiry, p. 20.

u See sections 38 & 39 in 5 Smith. 429.

ment of convicts, which, with all the subsequent enactments in relation to the prison, will be reserved for a more minute examination under our third general division. The period for the continuance of this act was limited to three years from the first of of November 1786.

The following year is highly worthy of record and remembrance, by the formation of an association called "*The Philadelphia Society for Alleviating the Miseries of Public Prisons*,"[v] to whose indefatigable benevolence and philanthropic zeal we are greatly indebted for the melioration of the penal code, and for those beneficial changes which the penitentiary system has successfully undergone since the period under review.[w]

The succeeding statute of 27th of March, 1789, so far as it relates to penalties for crimes, altered, in very few respects, the punishments prescribed by its forerunner. It provides that any felon, escaping from prison, being pardoned, or having served out the period of his sentence, shall, upon a second conviction for the same or any offence which was not capital before the act of 1786, suffer death, without benefit of clergy.

In 1790, the Legislature revised the penal system with a view to its correction, which was probably suggested by the near expiration of the time limited for the probation of the preceding acts; and was, doubtless, quickened and accelerated by the representations of the society before referred to.[x] The statute commences by reciting that remarkable injunction of the Constitution of 1776,[y] which requires a mitigation of penalties. The great features of the former statutes are preserved in this. The few instances of variation shall be noticed under the proper heads, and these principally relate to the internal regulation of the prison. It was limited to five years from its enactment.

In the prosecution of the praise-worthy and humane reformation

---

v A similar society was instituted in 1776, named, "The Philadelphia Society for Assisting Distressed Prisoners," which survived only nineteen months, being stopped in its operations by the arrival of the British army. Vaux's Notices, &c. p. 9.

w Vaux's Notices, &c. p. 10.

x See their petition to the Legislature, in 1789, Vaux's Notices, &c. p. 23, and idem, 31.

y It was not until the 2d of September in this year that our present Constitution was ratified. See Purdon's Digest, p. 29.

which it had undertaken, the legislature made another declaration of its will, in regard to crimes, in the succeeding year. The act abolished that part of the statute of 1718, which extends the statute of Jac. I, C. 12, respecting conjuration. It prescribes the proceedings in case of contumacy by standing mute after the legal number of challenges are made, provides that the trial shall proceed as if the arraigned had pleaded the general issue, thereby disclaiming every tittle of that barbarous law of England, which inflicted a lingering and most excruciating death by what was called *peine forte et dure.*[z] The punishment of twenty-one lashes, imprisonment and branding, inflicted by a special act of 1705 for adultery, was commuted for a fine not exceeding fifty pounds, and imprisonment not exceeding a year. Accessaries in all capital felonies, and robbery and burglary, may be prosecuted, though the principal has eluded justice.

Hitherto we perceive in each successive statute a slow and gradual melioration in the system of criminal law. One change is only the precursor of another more lenient, each step serving to expand the view and open a vista for further improvement. Though encircled by the halo of a pure philanthropy, and guided by the benevolence of that Christian principle which distinguished the great innovator of European severity, the illustrious Penn, yet our Legislature proceeded in this transcendant work with great caution and circumspection. *Humanity* may have prompted them, without delay, to divest the penal code of the bloody garments with which she was disgraced, but they paused for the polar star *experience* to shed her illumining rays upon their efforts. Nearly eight years had elapsed since the passage of the statute, which, since the revolution, first assuaged the rigour of parliamentary enactment; since when many additions had been made, extending the prohibitions of capital and other ignominious inflictions. The experiment realised the anticipations and hopes of the friends of virtue and mercy. The effects were obvious in the diminution of the number of convicts; for in the case of burglary, according to the table appended to Mr. Bradford's "Enquiry," in the seven years succeeding the statute of 1786, there were nine convictions less than in the seven years preceding. And for the same crime, during the above period, sub-

z 4 Bl. Com. 326.

sequent to its passage, *one* only was executed for a second offence, under the provisions of the act of 1789; and during the same period, anterior to it, there were *twenty-five* hanged upon the gallows!— Of sodomy, two instances are noted before, and one since the statute; it must be owned, however, that robberies had increased, but a greater number took place during 1789-90 than in the remaining five years.

These facts excited the attention of the constituted authorities. Mr. Bradford, at the instance of the Governor,[a] in 1793, wrote his "Enquiry," in which he descants with much energy, eloquence, and reason, on the impolicy of punishing with death. To the result of these experiments, ably displayed as they were by Mr. Bradford, and perhaps to the irresistable cogency of his arguments against the sanguinary punishments then annexed to a multiplicity of crimes, are we to attribute the act of 1794.

Of this statute suffice it to say, as a general encomium, that the spirit of Penn dictated its provisions. By a single stroke the punishment of death was taken away from eight offences; that is to say, high treason, arson, rape, murder in the second degree, counterfeiting, or uttering and forging, or uttering coin or bank notes, mayhem, manslaughter, and a second offence capital, previous to 1786, leaving only the crime of "wilful, deliberate, and premeditated killing," to be punished with the deprivation of life. These several felonies have long confinement annexed to them, part of the time to be passed in solitude; and in mayhem, counterfeiting, and forging, exemplary fines are superadded. It abolishes the technical distinction between petit treason and other kinds of murder. The act of 1718 is repealed as regards clergyable transgressions, and these are declared punishable with imprisonment not more than two years. An offender, whose crime was capital in itself before the act of 1786, and rendered for its second commission capitally punishable by that of 1789, shall suffer incarceration for life. It recognises that equitable rule of evidence instituted by the statute of 1786, in reference to the concealment of the death of a bastard. The last section expressly repeals all former enactments, repugnant to, or supplied by the statute.

It will be recollected that the important act of 1790 was to remain in operation five years, which period having nearly expired,

a See preface to that work.

that of the 5th April, 1795, was passed to continue it three years longer. This is entirely a concurrent statute with the one it continued, except that it softened the severity of whipping prisoners, &c., all which will be more particularly noticed in their proper place. Finally, being convinced of the wisdom of the reform, so far as it was advanced, the Legislature, in 1799, made so much of the statute of 1790 as was continued by that of 1795, and the continuing act, *perpetual.*

Thus we arrive at the grand epoch in the history of the criminal jurisprudence of Pennsylvania. By the statute of 1786 three offences, to wit, sodomy, robbery, and burglary, were selected from that numerous catalogue of crimes, doomed by the bloody laws of the mother country to capital punishment, for a less severe infliction. The statute of 1789 inflicted death for the repetition of felonies, that were capital before its predecessor. That of 1790 incorporates and adopts the provisions of those two acts, but was limited to five years. The general commutation of imprisonment, of imprisonment and fine, for death, in murder of the second degree, high treason, arson, rape, counterfeiting and uttering, or forging and uttering counterfeit gold and silver coin or bank notes, mayhem, manslaughter, committing a second offence, capital before the 15th September 1786, was established by the act of 1794. The statute of 1790, with some few alterations respecting prison discipline, was continued for three years in 1795, both of which were perpetuated in 1799, except where the latter repealed the former.

Now the statute of 1794, regarding only the offences *left capital* by that of 1790, declared that the penalty of death was removed from *these*, except malicious and deliberate homicide. Wherefore sodomy, robbery, and burglary, were punished agreeably to the statute of 1790, which had a limitation; and if that had not been first extended and afterwards made perpetual, these crimes, on its expiration, had been capitally punished by virtue of the statute of 1718. But this was prevented by the passage of the act of 1799, by which all crimes known to the law, except murder in the first degree, are rendered punishable with imprisonment at hard labour. These statutes are law at this day.

A variety of successive penal statutes were enacted, regulating minor offences, but being of a restricted nature, some will be particularly noticed as occasion requires, when we come to treat of each offence separately; and others, not affecting the great features of

the criminal code, will be passed over in silence, as not coming within the design of the present essay.

CHAPTER II.

THE GENERAL NATURE OF CRIMES, PARTICULARLY THOSE AFFECTING THE DEITY, THE LAWS OF NATIONS, THE SOVEREIGN EXECUTIVE POWER OF THE STATE, AND THE COMMONWEALTH.

HAVING deduced in the preceding chapter, the statutory history of Pennsylvania, in relation to penalties, the next natural branch of such an enquiry, appears to be some general account and definition of the *objects* of those punishments. In the treatment of these, so far as the circumscribed limits of this dissertation permit I shall adopt the order of Sir William Blackstone. The lucid and beautiful arrangement of the numerous subjects of the Commentaries on the laws of England of which he is the author, must ever attract the admiring notice of the student, but cannot entirely *engross* it; for profundity of erudition, boundless extent of legal knowledge, happy copiousness yet severe accuracy of diction, unlaboured elegance and classic purity of style, meet him in almost every page. Who will deny the justice of Blackstone's claim to that highest encomium of Horace?

> "Omne tulit punctum, qui miscuit utile dulci
> Lectorem delectando, pariterque monendo."[a]

A crime then, or misdemeanor, as defined by this very distinguished lawyer, is "an act committed or omitted in violation of the public law, either forbidding or commanding it."[b] We shall have very little occasion for the latter and positive part of this definition, in an essay whose province is so restricted.

The offences known to the laws of England, most of which are punished by ours, may be distributed into five general divisions. 1. Those injurious to God and religion. 2. Those which violate the laws of nations. 3. Such as affect the sovereign executive power of the state. 4. Such as infringe the rights of the com-

a De Arte Poetica, v. 343. b 4 Bl. Com. 5.

monwealth. 5. And lastly, those which derogate from the rights and duties of individuals.

Of the offences injurious to the Deity by sinning against his religion, in the sense used by the laws of England, our laws are silent, except in blasphemy, profaneness, and perhaps some others.

I will merely observe in relation to blasphemy, that Penn decreed in his "Great Law" that no one should be molested for any conscientious persuasion, who believed in and acknowledged one Almighty God.[c] But for loose or profane speaking of God, Christ Jesus, the holy spirit, or the scriptures, imprisonment at hard labour, for the behoof of the public, with bread and water for sustenance, or a pecuniary mulct of five shillings, was imposed. This offence does not appear to have been distinguished in the "Great Law" from other profaneness, such as swearing by the Deity, and cursing one's self; for to them the same penalty was annexed. But an act of 1700,[d] passed eighteen years before the death of Penn, punished blasphemy with more rigour. It augmented the fine to 10*l.* and extended the period of incarceration to three months.

Under the head of injuries to the Deity, eleven are enumerated by Blackstone, as cognisable in England. They are apostacy, heresy, reviling the ordinances of the church, blasphemy, swearing and cursing, witchcraft, religious imposture, simony, profanation of the Sabbath, drunkenness, and lewdness.[e] The separation of church and state, disbelief in conjuration, witchcraft, and sorcery, and partly consequential from them, the absence of advowsons and universal toleration of religious sects in Pennsylvania, render a notice of the greater number of these unnecessary. The nature of this dissertation leads me not to discuss the others.

One of those mischievous crimes which violate the laws of nations, *jura gentium*, which may provoke wars to saturate the earth with blood and excite the tears of widows and orphans, receives plenary, I had said vindictive punishment. Piracy, whose exterminating ravages are felt on every sea, being a solemn and outrageous declaration of hostilities against the whole human race, is punished according to the *lex talionis* with death, by the laws of almost every society; for pirates are very justly denominated by Sir Edward Coke,[f] *hostes humani generis*. The United States,

---

c Rawle's Addresses, &c. p. 20.
d 1 Sm. Laws, p. 6.
e 4 Bl. Com. p. 43—64.
f 3 Just. p. 113.

of which Pennsylvania is but a constituent member, take cognisance of this, and the other crimes, which infringe the rights of nations.

The only crime which we shall notice, affecting the supreme executive power of the state, is treason. It is defined to import a betraying, treachery, or breach of faith.[g] High Treason, *alta proditio*, is esteemed the highest civil crime that can be committed, and as such is punished by the laws of England with death and confiscation, the former rendered more horrible by every terror which ingenious cruelty could invent.[h] The colony of William Penn was either too inconsiderable, and perhaps too simple, to require any prohibition of this crime in his "Great Law," or being *crimen læsæ majestatis*, it was supposed to be a legitimate object for the laws of the mother country, where the monarch resided. However this be, "the Act for the advancement of justice, &c." of 1718,[i] expressly enacted that its trial and punishment should be agreeable to the statute laws of Great Britain, and accordingly it so remained to the year 1777,[k] one year after the declaration of Independence. The last statute declares that levying war and adhering to enemies shall be high treason, and that *that* shall be deemed *misprison of treason*, which, by speaking or writing, incites any insurrection under the new form of government. High treason was rendered more diffuse by an act of 3d December, 1782,[l] which makes an endeavour to erect a new form of polity within the boundaries of this state, constitute the offence; either by writing, calling or requesting the people to convene for that purpose, or by recommending it at such a convention. The Constitution of the United States declares that treason shall consist only in levying war, or adhering or giving aid to enemies.[m]

Under these legislative enunciations, there have been several judicial decisions. It has been determined that the Constitution contemplates as *levying war* any insurrection of the people, by *force* or *violence*, to attain or effect any object of public and general concern;[n] but the assembling of men in hostile array, for a private pur-

---

g 4 Bl. Com. p. 74.

h Voltaire in his *Commentary on Crimes*, translated by E. D. Ingraham, Esq. gives the following account of a former method of punishing traitors in England: "they ripped up his belly, tore out his heart, dashed it in his face, and then threw it upon the fire."

i 1 Sm. Laws, p. 111.

k 1 Sm. Laws, p. 435.

l 2 Sm. Laws, p. 60.

m Art. 3. Sec. 1, 2.

n U. States v. Fries, C. C. 1800. Pamp.

pose only, is not treason within that instrument.[o] An insurrection to prevent the execution of any national statute, is within the contemplation of the Constitution.[p] Nothing but the apprehension of immediate death will excuse union with an enemy;[q] but if the supreme authority is unable to give protection to a subject, he may enter into an agreement of neutrality with a public enemy.[r] The word *persuading* in the statute of 1777,[s] means to *succeed*, and an actual enlistment of the person persuaded, is requisite to bring the defendant within the clause.[t] A variety of other adjudications has taken place, but which, in a work whose track is so narrow, it is unnecessary to record.

The present punishment of high treason by the laws of England, which Sir Edward Coke vindicates on the authority of scripture,[u] is very terrible and shocking. In a sledge or hurdle with great pain the traitor is dragged to the place of execution, where he is hanged by the neck, but cut down alive; his entrails are taken out and burned before he expires; he is decapitated and quartered. His head and body are at the King's disposal.[v]

In Pennsylvania, by the statute of 1777, death was accompanied by the forfeiture of estate to the commonwealth, except such portions as the judges in their mercy should order to be appropriated to the maintenance of the traitor's wife and children. This, though severe, was certainly a mitigation of the attainder consequent upon a conviction of high treason in England, by which he is not only incapable, by corruption of blood, of holding, inheriting, and transmitting an estate, but his children cannot inherit through him of any remoter ancestor, as the channel is obstructed by the father's attainder.[w] This forfeiture was confined to the life of the offender in 1786, which provision was virtually incorporated among the rest of that statute, in the act of 1790.[y] The statute of 1794[z] took

---

o U. States v. Fries, C. C. 1800. Pamp.

p U. States v. Mitchell, C. C. 2 Dall. 348.

q Respublica v. McCarty, 2 Dall. 87.

r Miller et al. v. The Resolution, 2 Dall. 10.

s The words in the statute are, "if any person, &c. shall aid or assist any enemies, &c. by *persuading* others to enlist for that purpose, &c. he shall be adjudged guilty of high treason." 1 Sm. Laws, p. 435.

t See Respublica v. Roberts. 1 Dall. 39.

u 3 Inst. p. 211.

v 4 Bl. Com. p. 92.

w 2 Bl. Com. p. 253.

y 2 Sm. Laws, p. 533.

z 3 Sm. Laws, p. 187.

from it the penalty of death, and imposed imprisonment, at hard labour, in the penitentiary, for a period not exceeding twelve years, but requires imprisonment for life on a second offence. Treason against the United States, is punished at the discretion of Congress.[a]

Misprison of treason remains punishable by the statute of 1777, which visits it with imprisonment during the existing war, and forfeiture of one half of the lands and tenements, goods, and chattels. The speaking or writing, tending to insurrection, must be uttered with a malicious and mischievous intention, which precludes a justification by ebriety.[b]

Injuries detrimental to the sovereign executive power, are branched out by the laws of England into felonies affecting the King, *premunire*, and other contempts, with either of which a system of laws subservient to a republican form of government, has no concern. The Constitutions of this State, and of the United States,[c] recognise no power superior to the people, in whom reside the supreme authority, and who constitute themselves the guardians and *paterfamiliæ* of their own rights and safety.

The misdemeanors and crimes which affect the Commonwealth, may be distributed into five divisions, to wit: those against public *justice*, against the public *peace*, against public *trade*, against the public *health*, and those injurious to the public *police* or *economy*. The only two offences against public justice, of which we shall treat, are perjury and bribery.

Perjury, according to the definition given by Sir Edward Coke, and adopted by Judge Blackstone,[d] happens "when a lawful oath is administered in some judicial proceeding, to a person who swears *wilfully*, *absolutely*, and *falsely*, in a matter *material* to the issue or point in question." *Subornation* is the crime of procuring another to take a false oath.

To constitute perjury, it is necessary that the oath be administered in some judicial proceeding; false swearing before a magistrate, before whom no cause is depending, does not amount to it as a legal offence.[e] A false oath *wilfully* taken, believed to be true, without a probable ground for the belief, has been adjudged to be

---

a Vide Constitution, Art. 3. Sec. iii. 2.
b Respublica v. Wiedle. 2 Dall. p. 91.
c Vide beginnings of both Constitutions.
d 4 Bl. Com. p. 137.
e Shaffner v. Ritner. 1 Binn. p. 542.

perjury.[f] For an oath is presumed to be *wilful* when taken with deliberation, and not through surprise, inadvertency, or mistake of the question.[g] Perjury, at common law, may be committed by a man in his own cause,[h] but under the statute 5 Eliz. c. 9. extended to Pennsylvania by the act of 1718,[i] perjury must be committed by a *witness* to be punishable.[k]

The act of April 3rd 1804[l] declares that the punishment shall be the forfeiture of a sum not exceeding five hundred dollars, imprisonment at hard labour not more than seven years, disqualification for any office under the commonwealth, and inadmissibility as a legal witness in any controversy. As this act prescribes no particular manner of treating persons convicted under it, the usual judgment to be confined, *fed*, *clothed*, and *treated* agreeably to the direction of the law, is erroneous and will be reversed.[m]

Our law in this instance has adopted the opinion of Cicero with regard to ignominy, but not to death; nor can it be by divine injunction: "perjurii pœna divina, exitium; humana, dedecus."[n] It is true that perjury may be a mean of depriving a man of his life, in which case, as its turpitude must be equal *in foro conscientiæ* to assassination, no reason can be discovered why it should not be punished with the severity of actual homicide. And true it strikes deeper than the knife of the assassin, since it may carry off a jewel dearer than existence, an unsullied name. But it will be humbly contended in the course of this attempt, that the deprivation of that life which is conferred by the Deity, is not delegated to man. Imprisonment and perpetual infamy seem to be peculiarly fitted for the visitation of this crime. In solitude the perjured can read the nature of its atrocity, and in public the finger of derision will point to him its disgrace. Perjury, when it aims at life, will be punished by the full penalty of the law, and proportionably less when its object is less.

Bribery is likewise an offence against public justice, and consists in any person's taking an undue reward to influence his beha-

---

f Commonwealth v. Cornish, 6 Binn. 249.
g Ibid.
h Respublica v. Newell, 3 Yeates p. 414.
i 1 Sm. Laws, p. 120.
k Respublica v. Newell, 3 Yeates p. 413.
l 4 Sm. Laws, p. 200.
m Kroemer v. the Commonwealth, 3 Binn. p. 577.
n De leg. 2. 9.

viour. We are informed by Blackstone,[o] that, in the east, it is customary, on petitioning a superior for justice, to accompany the remonstrance with a present. Plato[p] in his imaginary republic, and the laws of Athens,[q] ordered it to be punished with great severity. The common law esteems it so black an offence in superior officers of justice, that Chief Justice Thorpe was hanged for it in the reign of Edward III.[r] Magistrates, jurors, and others of inferior degree, concerned in the administration of justice, are punished by fine and imprisonment,[s] which must be the punishment recognised in Pennsylvania[t] in the absence of statutory provision. The malfeasance of receiving a bribe by a judge would fall within the words *any misdemeanor in office*, for which by the Constitution, impeachment would ensue.[u] A bribe, received by an elector for his vote at elections, is visited by the forfeiture of his right of suffrage, a fine not exceeding fifty dollars, and imprisonment not more than six months.[v]

A riot is a detriment to the public *peace*, and consists in an illegal act of violence done by three or more, or a lawful one if committed in a violent and tumultuous manner.[w] *Unlawful assemblies* to the number of twelve persons in particular cases, by the common law, are capital; the punishment of riots from three to eleven is by fine and imprisonment, to which the pillory in very flagrant instances is superadded.[x] A statute of Pennsylvania passed in 1705[y] declares that persons to the number of three or more, convening with clubs or other hurtful weapons, to the terror of peaceable people, with a design to commit violence or injury, shall be reputed and punished as rioters agreeably to the English laws. Under this statute there have been several convictions and adjudications. The noisy assemblage of persons in a town, in the dead of night, so as to annoy and disturb the citizens, is a riot.[z] In a convention of several persons for an unlawful purpose, every man is guilty of all acts committed in execution of, or contributing to that end.[a] And though the design for which they assembled was

---

o 4 Bl. Com. p. 139.
p De leg. 1. 12.
q Pott. Antiq. b. 1. c. 23.
r 4 Bl. Com. p. 139.
s 4 Bl. Com. p. 139.
t Vide Commonwealth v. Sippard, 6 Sand. R. p. 395.
u Art. iv. Sec. ii and iii.
v 3 Sm. Laws, p. 349-50.
w 4 Bl. Com. p. 146.
x 1 Hawk. P. C. p. 159.
y 1 Sm. Laws, p. 30.
z Penna. v. Cribs et al. Addis. p. 277.
a. Ibid.

lawful, a depredation will constitute it a riot.[b] The law gives protection to persons repelling rioters by force; for when they are engaged in treasonable practices, it is the duty of citizens to unite for their suppression.[c] And so far has this doctrine been carried, that information will lie against a justice of the peace, for not actively assisting to suppress a riot.[d] If several be indicted and there be proof against one only, all must be acquitted.[e] With this we end our remarks on injuries affecting the Commonwealth, since the offences reducible under public *trade*, *health*, and *police*, cannot with very great propriety be introduced in a sketch whose object is directed to the more heinous crimes.

CHAPTER III.

OF HOMICIDE.

THE brief view in the former chapter of four species or *genera* of crimes, must suffice in an essay one of whose objects is brevity, not circumlocution, generalness not minuteness. The crimes which *most* outrageously violate the rights of individuals, will now engage our attention. These affect either their *persons*, *habitations*, or *property*. Of these in their order; and first of those whose direction is to the *persons* of individuals.

Disregarding that multiplicity of offences of a less atrocious dye that might be congregated under this division, we shall briefly consider homicide, mayhem, rape, and sodomy. Homicide, though divisible into *justifiable*, *excusable*, and *felonious*, will be contemplated in its last sense alone, when it ascends to crime of a character truly shuddering and enormous. Its subdivisions by the law of Pennsylvania, are manslaughter, murder in the second degree, and murder in the first.

Manslaughter is the unlawful killing, without malice, either voluntarily or involuntarily, but in the commission of some unlawful act. To constitute the offence of manslaughter, the killing must

b. Ibid.
c. Respublica v. Montgomery, 1 Yeates p. 419.
d. Ibid.
e. Penna. v. Huston, et al. Addis. p. 334-6.

be perpetrated "*iracundiæ calore et impetu,*" according to Stiernhook; during the continuance of the *furor brevis*, that sudden paroxysm of passion, which, on sufficient provocation, instantaneously prompts a man to revenge himself by terminating the earthly career of his antagonist. The existence of malice or the the return of reason before the design is executed, augments its malignity.[a] Though intoxication does not incapacitate a man from forming a premeditated design of murder, yet as drunkenness clouds the understanding and excites passion, it may be evidence of passion only, and of the absence of malice and design.[b] It is a fixed principle, that if, from a weapon or the manner of striking, an intention to kill may or must be inferred, provocation by words only, is not sufficient to reduce the homicide to manslaughter.[c] Passion arising from sufficient provocation, is evidence of the absence of malice.[d] A blow which kills, in mutual conflict, without necessity either for the protection of life, or preservation of property, amounts to this crime.[e] But if given to protect life, or in vindication of property, it is homicide in self-defence.[f]

This offence is felony in England, within the benefit of clergy,[g] and is punished with forfeiture of goods and chattels, though one species of manslaughter, that by stabbing, agreeably to statute 1 Jac. 1., is visited as murder. The "Great Law" of William Penn leaves this crime to be punished at the discretion of the Court;[h] and considering its comprehensive nature, including on one hand any *involuntary* killing consequent upon the commission of an act in any respect unlawful, and on the other *voluntary* homicide, prompted by the unrestrained indulgence of vindictive phrensy, there should be a latitude of construction and a difference of punishment. But the act of 1718 revived the law of England. The successive statutes of 1786—89—90 and 91, which, in many particulars, softened the rigour of Parliamentary infliction, left this punishable by the act of 1718, which expressly referred to 1 Jac. 1.[i] But in the general revolution of penalties which occurred in 1794, the *voluntary* part of this crime was reduced to imprisonment at hard la-

a 4 Bl. Com. p. 190.
b Pennsylvania v. M'Fall, Addis. p. 257.
c Penn. v. Bell, Addis. p. 163.
d Penn. v. Bell, Addis. p. 162: and Penn. v. Honeyman, Addis. p. 149.
e Penn. v. Robertson, Addis. p. 248.
f Ibid.
g 4 Bl. Com. p. 193.
h See Rawle's Addresses, &c. p. 22.
i 1 Sm. Laws, p. 114.

bour for a period not more than ten years.[k] At the instance of Mr. Bradford,[l] who wrote in 1793, this act empowers the public prosecutor, by leave of the Court, to proceed against a person charged with *involuntary* manslaughter, as for a misdemeanor, and to give in evidence for either offence, so that the jury may find guilty in the charge which is properly sustained.

The English law disregards any distinction in the higher grade of homicide; for whatever is more flagitious than manslaughter, is roundly denominated *murder*, in which no distinction of degrees obtains. But with a tenderness for life marked as well by humanity as by reason and justice, the law of Pennsylvania ordains, that to constitute the highest offence, there must either be an *intention* to kill, manifested by circumstances,[m] or the use of a mortal weapon,[n] with malice propense or aforethought, or that it must be committed in the attempt to perpetrate arson, rape, robbery, or burglary.[o] The *intention* to take life, agreeably to the construction of the act of 1794, is the essence of the crime of murder in the first degree.[p] To constitute the crime of murder in the second degree under the act, the killing must be with a design to do some personal injury *less* than the termination of existence.[q] A very important distinction has been introduced by this celebrated statute, in relation to a rule of evidence. Anterior to 1794, malice, by the common law, was *presumed* in any unlawful homicide, and on the defendant reposed the duty of extenuation.[r] But now the *onus probandi* lies on the commonwealth, and unless malice is substantially proved, the offence is reduced to the second degree.[s] Thus we have found it necessary in the description of murder in the second degree to refer to murder in the first, in the supposition that an idea of one is indispensable to an accurate notion of the other.

This salutary, reasonable, and just distinction of murder, so far as I can ascertain, is peculiar to Pennsylvania, Louisiana, Maryland,

---

k 3 Sm. Laws, p. 188.
l Vide Bradford's Enquiry, p. 42.
m Respublica vs. Mulatto Bob, 4 Dall. p. 146.
n Pennsylvania v. Bell, Addis. p. 163.
o Commonwealth v. Dougherty, 1 Browne, app. xxiii.
p Ibid.
q Pennsylvania v. Lewis, Addis. p. 283.
r Pennsylvania v. Bell, Addis. p. 161. Penn. v. M'Fall, Ibid. p. 257. Penn. v. Lewis et al. Ibid. p. 282.
s Commonwealth v. O'Hara, before M'K. C. J. Pamph. p. 231.

Ohio, and Virginia.[t] Our Legislature first set the example by passing it into a law in 1794, though the conception probably originated with the humane and enlightened Mr. Bradford, late attorney general of this state. The punishment prescribed for murder in the second degree, is imprisonment at hard labour, or in solitude, for a period not less than five nor more than eighteen years. A second conviction of this crime and of manslaughter, is punished by imprisonment for life.

The third and last description of felonious homicide is murder in the first degree, a crime at whose enormity, to use the language of Sir William Blackstone, human nature starts.[u] Unlawful killing, with a design to kill, amounts to this crime.[v] If one without uttering a word should strike another on the head with an axe, this would be deemed a premeditated violence;[w] and *premeditation* is an essential ingredient to constitute murder in the first degree[x], under the act of 1794.[y] So the killing is, wherever it appears from the whole evidence that the crime was, *at the moment*, deliberately or intentionally executed.[z] If the circumstances of wilfulness and deliberation were proved, it is sufficient, although they arose and were engendered at the *period* of the transaction.[a] If the aggressor had time to think, and it was his intention to kill, a minute, as well as an hour or a day, it is deliberate, wilful, and premeditated killing, constituting this offence within the act of assembly.[b]

Murder in the sense it is here applied, is almost universally punished with the extinguishment of life. In some countries, and among them in England, the posthumous ignominy of dissection and hanging in chains is superadded,[c] to arm the law with greater terrors. An enunciation of law so terrific, so calculated to impress the imagination, and the execution of it rendered more terrible by the solemnity with which it is conducted, would be supposed to palsy the hand of the assassin, as it was uplifted to strike its victim.

---

t It was introduced in Louisiana in 1805, 2 vol. Martin's Digest, p. 254; in Ohio in 1816, Pamph. p. 10; in Virginia in 1819, Revised Code p. 616; Maryland—

u 4 Bl. Com. p. 193.

v Pennsylvania v. Lewis, Addis. p. 283.

w Respublica v. Mulatto Bob, 4 Dall. 146.

x Ibid.

y 3 Sm. Laws, p. 187.

z Com. v. Dougherty, before Rush, p. 1. Br. appx. 221.

a Pennsylvania v. M'Fall, Addis. p. 257.

b Com. v. R. Smith, before Rush, pamph. 231.—Com. v. O'Hara, before M'Kean C. J. cited ibid.

c 4 Bl. Com. p. 201.

But in England, death being inflicted for a multiplicity of crimes, the murderer is in little more peril for his life, than the thief. Executions are frequent, and, by their frequency, lose the horror they were expected to inspire.

In Pennsylvania it has always been capital, but stripped of those revolting appendages annexed to it by the laws of England. The example of William Penn has furnished sufficient reason for the continuance of capital punishment by his successors in Pennsylvania, though arguments and resolutions in the State Assembly have not been wanting to supersede the practice. It is worthy of recollection, that in 1793, a committee, appointed for the revision of the penal code, reported "that they have doubts, at present, whether the terrible punishment of death be, *in any case*, justifiable and necessary in Pennsylvania; and are desirous that public sentiment on this important subject may be more fully known." If doubts were then entertained, irresistible conviction on the minds of many now occupies their place; and though public sentiment was not *then* prepared for its abolition, it may be affirmed that *now* the commutation of solitary imprisonment would be universally greeted. But a full consideration of the propriety of removing this punishment, will be reserved for the last chapter.

From Stiernhook,[d] we learn, that high treason, parricide, petit treason, and suicide, were ranked together in the Gothic constitution. "Omnium gravissima censetur vis facta ab incolis in patriam, subditis in regem, liberis in parentes, maritis in uxores, (et vice versa,) servis in dominos, aut etiam ab homine in semet ipsum."

Parricide, by the Romans, was esteemed an atrocity of blacker hue than ordinary murder, and received a punishment ingenious for its cruelty.[e] The laws of England,[e] adopting the notion of the Persians, which Pennsylvania, in effect, has likewise followed, that children must be supposititious, who could take the life of those from whom they were supposed to derive existence, make no discrimination between this crime and the ordinary higher species of killing. But a distinction obtains in England between murder and petit treason, *parva proditio*, which is killing a master, a husband, or an ecclesiastical person by one of inferior order, or a lay-

d De Jure Goth. l. 3. c. 3.
e Ff. 48. 9. 9.
e 4 Bl. Com. p. 202.

man. The Druids, agreeable to Cæsar,[f] and which the law of Great Britain shamefully borrowed, condemned a woman to be drawn and burned for this offence,[g] though a man was drawn and hanged. Petit treason was a separate crime in Pennsylvania, till 1794, when the distinction between this, and other kinds of murder, was abolished.[h]

There is one species of murder, but not the subject of cognizance by our humane system of polity and laws, denominated suicide, which is the taking of one's own life. Many of the heathen philosophers not only approved of self-murder, but warmly recommended it by precept, and encouraged it by example. It was considered a virtue in stoicism, to abandon life when its sorrows were too acute for philosophical insensibility, and hence we find Brutus and Cato, two pillars of that haughty edifice, rushing upon death with the alacrity of maniacs. But in England, so far from receiving encouragement, the *felo de se* or suicide has a disgraceful interment in the highway, with a stake driven through his body, and has the consolation of reflecting that he leaves his family destitute, for his estate is forfeited to the King.[i] But that desperation, it is presumable, which would induce a man uncalled, to rush into the presence of his Maker, will hardly suffer him to think of the inflictions of the temporal law on his family. Voltaire,[k] in reference to the cruelty of this forfeiture, from which we may infer it obtained in France, says, "we punish the son, because he has lost his father; and the widow, because she has lost her husband."

---

f De Bell. Gall. 1. 6. c. 18.

g This is now repealed by 30 Geo. 3. vide C.'s Note, 4 Bl. Com. p. 204.

h 3 Sm. Laws, p. 187.

i 4 Bl. Com. p. 190.

k Com. on Beccaria, transla. by E. D. Ingraham, Esq. p. 231.

CHAPTER IV.

MAYHEM, RAPE, AND SODOMY.

MAYHEM is an aggravated species of wounding, and may admit of this definition: the deprivation of those members which are necessary to a man *se defendendo.*

Under the first clause of Sec. 6. of the statute of 22d April 1794, an indictment, in which the words "*lying in wait*" are omitted, is insufficient; and it is so under the second clause, if the word *voluntary* is excluded.[a] For conviction under the first clause, it is only necessary that there be a general intent to maim and disfigure; but under the second clause, a specific intent to pull or put out the eye must be satisfactorily exhibited to the jury.[b] The malice and lying in wait may be matter of inference from circumstances.[c] To convict for feloniously assaulting, and beating, with a design to disfigure, stronger circumstances of *malice aforethought* must be proved, than on an indictment for murder.[e] Positive evidence of such a design must be given.[d]

Considered as a crime, it is punished with death by the English law.[e] I cannot discover that it was distinguished from severe battery by William Penn, who perhaps deemed it unnecessary to provide a particular punishment for an offence that was not likely, in an infant colony, to be of very frequent occurrence. However this may be, by the reviving act of 1718, it was capitally punished, and so remained till 1794, when it partook of the clemency that was extended to a number of offences by that statute. Confinement at hard labour for not less than two, nor more than ten years, and the payment of a fine not exceeding one thousand dollars, (three-fourths whereof going to the party injured,) form the punishment at this day by the statute last mentioned.[f]

Rape, *raptus mulierum*, was merely punished with fine and compulsion to marry by the institution of Moses, unless the female

---

a Respublica v. Reiker, 3 Yea. p. 282.
b Respublica v. Langcake et al. 1 Yea. p. 415.
c Ibid.
d Pennsylvania v. M'Birnie, Addis. p. 30.
e 4 Bl. Com. p. 207.
f 3 Sm. Laws, p. 188.

s affianced to another, and then it was death.[g] Perhaps even at s day, the majority of communities inflict the severe penalty of ıth for this offence, which, though displaying a hardihood and lany truly detestable, argues not the *entire* destitution of virus feelings. "It may be perpetrated in the phrenzy of desire," is well observed by Mr. Bradford, but it surely betrays no inrigible depravity, which the penalty of death presumes. The il law[h] annexes death and confiscation to this crime, under which included abduction from a female's friends. The Saxon and ındinavian constitutions[e] inflicted death, and the English law[d] rsues it with the same relentless rigour.

But William Penn's "Great Law" punished it with the forıre of a third of the offender's estate to the female, whipping, and ɜ year's imprisonment. The act "for the advancement of jusɜ, &c." introduced after his death, again made it punishable in s state by the statutes of Great Britain. Before the passage of ı act of 1794, which took away this sanguinary penalty, a noble ımple was placed for the imitation of Pennsylvania by the Grand ke of Tuscany, who had repealed the punishment of death in ı dominions, substituting imprisonment measured by the circumnces of the case.[e]

This was not unattended to by our Legislature, who prescribed ınishment, humane, but not deficient in wholesome severity. Imsonment not less than ten nor more than twenty-one years, to spent in hard labour and in solitude, was inflicted and so reıins.

We come now to speak of an offence whose unblushing turpiıe and shameless guilt admits neither of apology nor palliation. ıe indictments of the old English law which Sir William Blackıne quotes, with an inexpressible abhorrence of the disgusting ime, have too much delicacy to mention it: "peccatum illud rribile, inter christianos non nominandum." It is known by the me of *Sodomy, or the crime against nature.* If arrived at scretion, both "agentes et consentientes pari pœna plectanr."[h]

---

g 22 Deut. c. 25.
h Cod. 9. tit. 13.
c Bracton l. 3. c. 28.
d 4 Bl. Com. 212.
e Bracton l. 3. c. 28.
d 4 Bl. Com. 212.
e Bradford's Enquiry, p. 30.
f See act 1794. 3 Smith, 187. Sec. 4.
g 4 Bl. Com. 215.
h 3 Inst. 59.

We read that some philosophers doubt the existence of so unnatural a crime; but the lamentable truth is, that in Italy it is not uncommon, and among the Greeks and Romans[i] it was by no means unknown. And it is a truth no less sad and sickening, that its perpetration in prisons is frequent, daring, and open.

The punishment of this offensive crime, in most countries, has rather been measured by the detestation which mankind feel at its commission,[k] than the principles of sound policy or immutable justice. To prove this I have only to quote these words of Beccaria; their truth he amply demonstrates: "To every crime, which, from its nature, must frequently remain unpunished, the punishment is an incentive."[l] Besides, when the penalty is graduated beyond the offence, on the same principle, an additional inducement is presented. And can the gratification of lechery on the one hand, and equally criminal passiveness on the other, justify the taking of that life conferred by the Creator?

Influenced by similar reasons we may presume were Penn, who inflicted whipping, one half year's imprisonment, and the forfeiture of one-third the delinquent's estate; and the Legislature, who, in the early period of 1786, took the severe penalty of death from robbery, burglary, and this crime. The act of 1796,[m] incorporating the provisions of that statute, imposed a servitude not exceeding ten years, and the forfeiture of lands and tenements, goods and chattels. In 1795, the period of this statute having nearly expired, these pe-

---

i Virgil's beautiful pastoral, *Alexis*, though said to be nothing more than a description of Platonic love, certainly contains sentiments too passionate for such a title. Witness this passage:

"Florentem cytisum sequitur lasciva capella
Te Corydon, O Alexi!"

Again, at the 68th verse:

"Me tamen urit amor. Quis enim modus adsit amori?
Ah, Corydon, Corydon; quæ te dementia cepit?

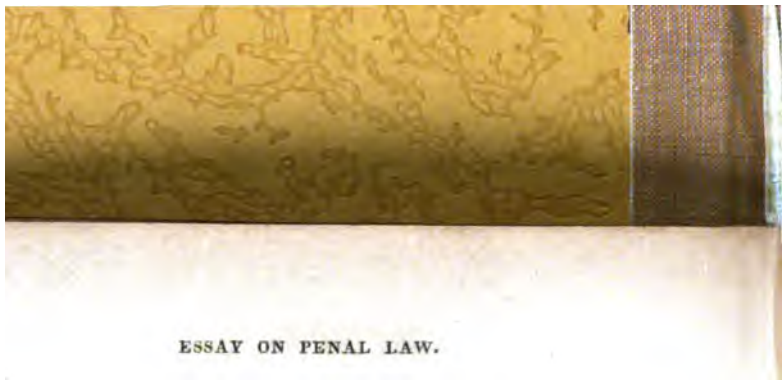
But I fear that the establishment of the notion that these are the effusions of illicit feeling, will no way exalt the character of Virgil; for we are told that Corydon was drawn for himself, and Alexis is a young slave of his patron, *Mæcenas*, to which Martial in these lines evidently alludes:

"Accipe divitias, et vatum maximus esto,
Tu licet, et nostrum, dixit, Alexin ames."

k See 4 Bl. Com. 215, where, in his zeal for its requital, he asserts that the divine law, reason, and nature, combine to denounce it capital.

l See Beccaria on Crimes, translated by E. D. Ingraham, Esq. p. 119.

m See the Statute 2 Smith. 531.



were continued three years longer, and were finally perpetu-
1799.
sons accused of this offence, or of robbery, or burglary,
ailable by the Supreme Court only to the year 1806, when
rivilege was conferred on the Court of Common Pleas.[n]

CHAPTER V.

OF ARSON AND BURGLARY.

ll the crimes affecting the persons of individuals which we
ed to consider, have received some attention, agreeably to
angement adopted, those felonies injurious to the *habita-*
f individuals now demand a brief historical notice. These
, arson and burglary.
n, *ab ardendo*, is defined to be, the malicious and wilful
g of a house or an outhouse of another man.[o]
supposed to be perpetrated from a motive of revenge, and,
ommission is generally under the protection of night, the
f the incendiary, and the weapon of the assassin, perform
honourable and courageous offices. Conflagrations are
t confined to the destruction of property, nor do they only
he immediate objects of resentment, but frequently involve
of the helpless and the innocent. Being too the offspring
illanimous revenge, and not only depriving the real owner
ossessions, but all mankind of the benefit by their virtual
ion, it would seem that a severe infliction for this offence
ired, if severity of punishment will suppress crime. Ac-
y, arson is not the object of peculiar clemency by the laws
untry.
candinavian constitutions, agreeably to Stiernhook,[p] pun-
ccording to the *lex talionis*, with burning the incendiary

h. 324.
om. 220.

p Stiernh. de Jure Goth. l. 3. c. 6.

to death. And this was the punishment in England in the reign of Edward the First; but is now punished by hanging, which is the kind of death at present suffered by all capital felons.[q] In the penal code of Napoleon, menaces, aggravated by ordering money, to set fire to a dwelling house, was punished by hard labour for life or deportation:[r] but the burning of writings of public authority or importance, shall be confinement, (*la reclusion;*) and those of a private nature by incarceration, it is presumable for a shorter period, since to this a fine of one hundred and fifty francs is superadded,[s] passing the different natures of the injuries.

The cautious secrecy and difficult demonstration of this flagitious crime, have screened, perhaps, the majority of offenders from their sacrifice to the laws. This difficulty has ever been known to increase, or diminish, in proportion to the severity or lenity of punishment. Impunity has, in most instances, been the consequence, either by the absence of *violent* presumptive proof, which has induced an acquittal, or, in case of conviction, by the extension of the executive's prerogative.[t]

This offence was capital in Pennsylvania, except during the jurisdiction of Penn's "Great Law," to the year 1794, when that penalty was exchanged for a fine not exceeding two thousand dollars, and imprisonment at hard labour for a period not exceeding twelve years. The punishment annexed by Penn to arson, was the forfeiture of double the value of the property consumed, one year's imprisonment, and corporal pain at the Court's discretion.

To constitute this offence by the act of 1718, a few buildings particularly designated must be burned,[u] otherwise it was indictable only as *malicious burning*. Under this statute there had been contradictory adjudications as to the benefit of clergy; it being first held felony without the benefit, and was subsequently determined to be clergyable.[v] Benefit of clergy was expressly taken away by the statute of 1767, which likewise increased the number and kinds of buildings, the burning of which was to be deemed arson.[w] Thus severity of infliction and multiplication of acts denominated arson, in this statute, contended for the mastery. The kinds of buildings were further extended in 1772, when it was declared that burning

---

q 4 Bl. Com. 222.
r See Art. 305 and 436.
s See Art. 439.
t Bradford, p. 31-2.
u See 13. Sec. 1. Smith. 115.
v See note of 1 Smith. 105.
w See Act, 1 Smith. 272.

e-house of the province, meeting-houses, and certain other difices, was punishable with death. The law continued in e till 1794, when a different punishment was inflicted, as tated. A supplement to the penal laws was made on the rch, 1806,[x] when the punishment prescribed in 1794 was l to burning barracks, ricks, &c. as well as to barns.

does not admire the wisdom of the Legislature, in punish- incendiary with fine and an imprisonment long enough to im to repair, in some measure, the ravages which he has ed? Would evil result from a little alteration, that he emain incarcerated till his labour *actually* amounted to the n produced by his torch? It would be just as regards the and could appear nothing but reasonable to the criminal, uld be taught to consider his labour in the light of expiation njury which he had perpetrated.

glar, as defined in the institutes of Sir Edward Coke,[y] is by night breaketh and entereth into a mansion-house with commit a felony. It is unnecessary, at present, to at- articular description of this crime, as it can be collected from ral statutes made for its suppression, which are no less ex- definition than in its punishment. But I shall notice that ment is good, if the expression *mansion-house* is used in- *dwelling-house.*[a]

ary being attended with the aggravating circumstances of a *fregit* with violence, and at a time when the persons and of individuals are at the mercy of the assailant, it is not g that the law should be more rigorous in its visitation of e than of simple larceny. The laws of Athens, which did e larceny capital, doomed the burglar to death.[b] Though non law of England made it felony within the benefit of et that was withdrawn by successive statutes, and now it g in the principals, as well as in abettors and accessaries e fact.[c]

fence, generally taken for burglary, as described in Penn's Law," does not exactly amount to that crime, as the time petration is not specified or designated as material.[d] The

---

th. 334
. 63.
. and R. 199. Com. vs. Pen-

b Pott. Antiq. b. 1. c. 26.
c 4 Bl. Com. 227.
d See Rawle's Address to the Philadelphia Bar, p. 25.

statute of 1718 has defined it with the precision necessary,[e] annexing the penalty of death to a conviction of burglarious entry into the dwelling-house of another with a felonious intent, whether executed or not. The act of 1772 declares that breaking and entering into the state-house, public offices, meeting-houses, and other buildings, particularly nominated, with intent, successful or not, to commit felony, shall be punished with standing in the pillory, excision of the ears, public whipping, and twelve months' incarceration.[f] The penalty of death was taken from burglary in 1786, when likewise sodomy and robbery had a commutation of punishment. The provisions of this statute, with regard to these offences, were incorporated in the act of 1790, which ordains for robbery, sodomy, and burglary, the total forfeiture of estate and servitude for a period not exceeding ten years.[g] The forfeiture in robbery and burglary was modified in 1791,[h] so as to require the *restitution* or *residue* of the effects taken from the felon's estate, if he had none, or only a part, of the purloined property in his possession. The general revolutionary statute of 1794 passed this offence; and the forfeiture, not being repealed in 1795, was rendered perpetual by the act of 1799.[i] The privilege of taking bail in burglary, as well as in robbery and sodomy, was granted to the Court of Common Pleas in 1806, which before, the Supreme Court alone had exercised.[k]

CHAPTER VI.

LARCENY AND FORGERY.

Of the various kinds of injuries, more particularly affecting private property, we shall principally consider the different *genera* of *larceny*, which are accompanied with a breach of the peace, and *forgery*, which has not that attendant.

---

e See 1 Smith. 115.
f 1 Smith. 382.
g 2 Smith. 531.
h 3 Smith. 41.
i See this recognised in 3 Serg. and R. 199. Com. v. Pennock.
k 4 Smith. 334.

Agreeable to Blackstone, larceny is a contraction of latrocinŷ, derived from *latrocinium*,[l] and has two general divisions, *simple* and *compound*. *Simple larceny* is subdivided into *grand* and *petit*, and may be said to be the felonious taking and carrying away of personal goods belonging to another.[m] The surreptitious taking of goods, not exceeding twelve pence in England, and twenty shillings in this state, is styled *petit larceny*, and over those amounts is *grand larceny;* the distinction is important only as regards the punishment, which very naturally is more severe in the latter.

A distinction has obtained in most countries, and partially recognised in Pennsylvania, between different objects of larceny, by punishing the felonious taking of some articles with greater severity than others. The laws of Athens punished with greater rigour the stealers of cattle, and the clothes of those who were bathing, than ordinary thieves.[o] The *abigei* and *balnearii fures* of the Roman law were likewise the objects of very severe infliction.[p] In England too, though simple larceny was generally within the benefit of clergy, yet by statutory provision, in a multiplicity of cases, it is denied.[q] In Pennsylvania, horse-stealing is selected for peculiar severity, and is the only kind of simple larceny which we will notice.

For the protection of husbandry and those engaged in it, this offence is punishable by the act of 1790,[r] afterwards perpetuated, by seven years' servitude, restoration of the horse to the owner, and the forfeiture of his value to the commonwealth. The reasons assigned why horse-stealing is thus punished, and other larceny, even of ten thousand dollars, with only three years' imprisonment at hard labour, restitution and forfeiture to the state as before, were two: 1st. The scarcity of horses: 2d. The facility of flight by the thief.

The paucity of animals for agriculture, in the early periods of the colony, was sensibly felt by farmers, in a new country, where the difficulty of tillage and its universality as an occupation, rendered many indispensable. This partly accounts for the severity with which horse-thieves were punished after the laws of Penn; for it was death till 1790, when the present penalty was introduced.

---

l 4 Bl. Com. 229.
m Ibid.
o Pott. Antiq. l. 1. c. 26.
p Ff. 47. t. 14.
q See 4 Bl. Com. 239.
r 2 Smith. 532.

The reason for the distinction does not now appear to exist; and farmers would feel the loss of cash more sensibly.

With regard to the felon's facilitating his escape on the horse which he had stolen, and thus, according to the solemn legal phrase, "make advantage of his own wrong," the change of times has rendered the argument void of application. Does it not apply more strongly to the thief who has money in his pocket, and who can elude justice by transporting himself to the remotest part of the country in a stage-coach, with greater expedition and less probability of detection?

Compound or *mixed larceny* is a species of stealing, attended with the aggravation of being from one's house or person. Larceny from the person is distinguishable into two kinds, *privately* stealing from a man, as picking his pocket, and openly and violently taking his property, which latter is denominated *robbery*. —This is the only branch of compound larceny which will engage our attention. Violence and putting in fear[s] are the distinguishing criteria of this crime, and render it more atrocious than private and secret larceny. This is likewise agreeable to a maxim of the civil law, cited by Blackstone: "*qui vi rapuit, fur improbior esse videtur.*" To constitute a robbery there must be a felonious taking of property from the person of another by *force*, either *actual* or *constructive*, or by threatening words or gesture; but if force be used, fear is not an essential ingredient.* It is not indispensable that the taking should be *from the person* of the owner; but it is sufficient if it be taken in his presence; as if by intimidation he is compelled to open his desk or throw down his purse.†

A crime so daring and flagitious seems to require a penalty, regulated by an eye to the security of individuals in their pursuits of business and excursions of pleasure. Though high notions of honour may be put into the mouths of highwaymen by dramatists, and a few remarkable instances of their generosity and chivalry may be recorded, yet it is not the business of the law to reward, because the better feelings of our nature, "those latent sparks of the divinity," of which every man, however debased by evil practices and corrupt association, is not entirely devoid, may occasionally appear beyond

---

s 4 Bl. Com. 243.

* Commonwealth v. Snelling, 4 Binn. p. 379.

† U. States v. Jones, C. C. April 1813, MS. Reports cited in Wharton's Digest, p. 151.

ower to suppress. He, who, disregarding the obligations of y and the inviolable rights of mankind, will wage war upon ecies, must be treated as a common enemy, a beast of prey, annot be allowed to urge, that, like the lion, he committed es only when he was hungry. The outraged dignity of muni- economy, the invaded natural rights of men, the insecurity of y, no less than the destruction of social order and the violated imperatively require plenary expiation.

eason likewise may be given why a peculiar kind of punish- ought to be inflicted for robbery, which applies to all kinds ceny, but particularly to this; that robbers are more difficult reclaimed than any other description of felons, and that refor- n must be the product of time and indefatigable care.[t] Death, nalty so much admired and applied in Europe, is the conse- e in England of robbery, either as principal or accessary the fact.[u] But the Legislature of Pennsylvania, so early as ar 1786, exchanged the punishment of this crime, which had apital since 1718, for the forfeiture of estate, and imprison- not exceeding ten years. The statute of 1791,[v] as has been y stated, required the restitution of the property stolen, in y and burglary, and if the felon had destroyed or transferred f it, the residue was to be made up from his estate. A sup- ntary statute to the penal law, passed in 1806,[w] to which n has likewise been had, delegated to the presidents of the of Common Pleas, the power of admitting bail, which autho- ad been confined exclusively to the judges of the Supreme . The act of 1817,[x] which repealed the statute of 1810 only larging it, extended the punishment, inflicted for the robbery ds and chattels, to the robbery of any promissory notes.

have before remarked that convictions of this crime in- d after the mitigation of its punishment in 1786. This must ribed not to any invitation presented by the penalty, but to ar circumstances of the prison and *injudicious* pardons, , according to Mr. Bradford, were unaccountably numer- He states, that of 68 different convictions of robbery and ry, previous to 1790, thirty were pardoned shortly after

---

Bradford's Enquiry, p. 23 & 26.
l. Com. 244.
mith. p. 41.

w See pages 35 & 41.
x 6 Smith. 412.

sentence, and 29 escaped, which abundantly accounts for their augmentation; for these were sure to resume their former vocation. And it is mentioned as fact, that among the subsequent convictions, very few were new offenders.[y]

Of *Forgery*, according to our order, we must now speak. This is *crimen falsi*, and distinguished by the laws of England from counterfeiting the coin, &c., which is considered a species of *crimen læsæ majestatis*, though Blackstone informs us that they are blended, the latter constituting but a branch of the former, by later civilians, Glanvil, Bracton, and Fleta.[z] No distinction obtaining in the statutes of Pennsylvania, both will be treated promiscuously.

The forgery of any writing, which may be prejudicial to another, is indictable at common law.[a] So is the *publishing*, with intent to defraud, of a forged writing of a private nature, not under seal.[b] Forgery of a *name* to an assignment of a bond, is indictable, as it allows a possibility to defraud.[c] A co-obligor may be guilty of this offence, by assigning a bill given by himself and another.[d] To utter and publish a bank bill is to declare, or assent, directly, or indirectly, by words or actions, that the note is good.[e]

It does not appear that Penn, in his "Great Law," thought proper to provide for an emergency which was not likely to happen, by affixing a penalty to this offence, for it is highly probable that the early settlers in the province were more desirous to cultivate harmony with the *aborigines*, to prostrate the forests, and increase the fertility of such land as was cleared, than to forge or counterfeit, when money too, perhaps, was an object of minor consequence. Simple and unambitious, they were ignorant of many of the vices of Europe; content with the productions of a luxuriant soil, they despised the opulence purchased at the expense of honour, and following the example of their virtuous governor, they courted rather the austerities than the luxuries and refinements of life. The early part of the period of Penn's administration, may be called the golden age of Pennsylvania; for the elegant description of the golden age of the world by Ovid, peculiarly applies to it.

---

y See Bradford's reasons for this increase, at length, from p. 22 to 26, inclusive.

z 4 Bl. Com. 88.

a Penn. v. M'Kee, Addis. p. 33-34.

b Com. v. Searle, 2 Binn. p. 332.

c Penn. v. Misner, Addis. p. 44.

d Ibid.

e Com. v. Searle, 2 Binn. p. 339.

"Pœna metusque aberant; nec *verba minacia* fixo
Ære legebantur; nec supplex turba timebant
Judicis ora sui."[a]

But although the proprietary may not have anticipated the commission of a crime in his little colony which is most frequent in an extensively commercial nation, yet before his death a prohibition of its more simple kinds was deemed necessary. In 1700,[b] that *false person* who could forge, deface, corrupt, or embezzle any charters, deeds, and other instruments, particularly enumerated, was to forfeit double the value of the damage sustained, to be discarded from all places of trust, and to be publicly disgraced in the pillory or otherwise, at the Court's discretion. And in 1705[c] counterfeiting the hand and seal of another, was punished by three months' imprisonment and forfeiture of treble the value of the fraud; but counterfeiting the privy or broad seal of the province, was, by the same statute, subject to a mulct of 100 pounds and seven years' imprisonment. The statute of 1715[d] annexes the same penalty to forging an entry of acknowledgments, certificates, or indorsements of a deed, as the act of 1700 inflicts for making a false deed. Forging or counterfeiting any gold or silver coin, and printing or signing any counterfeit notes of the banks of Pennsylvania, North America, or the United States, or uttering such, knowing them to be spurious, were, by the act of 1794,[e] punished with confinement at hard labour, for not less than four nor more than fifteen years, and a fine adjudged by the court, not exceeding one thousand dollars.

The act of 1824[f] reduces the punishment annexed in 1794, to counterfeiting the notes, &c. of certain banks; but extends the designated penalty, which is imprisonment at hard labour for a term not exceeding ten years, nor less than one year, with a fine not beyond one thousand dollars, to counterfeiting, &c. the bills or notes of *any* incorporated bank in the Commonwealth. The words of this statute are very comprehensive, and include every fraudulent attempt, either directly or indirectly, to circulate notes spurious originally, or made so by alteration. An act of Congress in

a Ov. Met. 1 lib. 90.
b 1 Smith. 4.
c 1 Smith. 49.
d 1 Smith. 95.
e 3 Smith. 187-8.
f Pamph. p. 59.

1816,[g] inflicts for forging, altering, or passing a false note of the bank of the United States, imprisonment not more than ten, nor less than three years, and a pecuniary fine, not greater than five thousand dollars.

The penalty, therefore, in reference to the *coin*, remains according to the act of 1794. This statute inflicts a long confinement; it being supposed, perhaps, that the example of European nations, most of which punish it with death, furnishes a justification. The Napoleon Code, for instance, affixes death and confiscation to counterfeiting or adulterating gold or silver coin, having currency in France.[h] The adulteration of brass or copper coin is imprisonment at hard labour for life.[i]

CHAPTER VII.

STATUTORY SKETCH OF THE PRISON.

THE wise and merciful commutation of the penalty of death, in all cases but in murder of the first degree, we have seen was not the product of a day, nor the result of a single year's deliberation. It was the work of long reflection, aided by the light of experience. For in so great an innovation, a multitude of objects indispensably required attention, and among these, it was obvious that correction of the loose system of prison discipline, which obtained in Great Britain, was a subject of paramount and primary importance. Before this period, it was esteemed unnecessary to regard with much care, the economy of an edifice that was, in the majority of instances, a sojournment perhaps only for a single night.

But in proportion as mercy characterises a code of laws by abolishing death, necessity will impose some reflection on the kind of confinement and occupation best adapted to the change. Commiseration too, for unnecessary suffering, the inseparable attendant of unsophisticated humanity, will minister unction even to the convict and the felon! To these mutations then as their proper con-

g Ing. Dig. p. 93.
h See under the head Du Faux, Art. 132.
i See Art. 133.

comitants, are we to attribute the origin and improvement of the penitentiary system.

As a necessary appendage to this dissertation, therefore, we propose to trace it from the imbecility and helplessness of childhood, through the waywardness of adolescence, to its present period of comparatively attained maturity, when its merits and defects are about beginning to have a thorough and substantial trial.

When speaking of prisons in Europe, the actively humane Howard uses this language:[a] "some are seen pining under diseases, '*sick and in prison,*' expiring on the floors, in loathsome cells, of pestilential fevers, and the confluent small-pox; victims, I must not say to the cruelty, but I will say to the inattention of sheriffs, and gentlemen in the commission of the peace." In the same page he states, that "many prisons are scantily supplied, and almost totally destitute of the necessaries of life." In another place, he says, "there are some *bridewells* in which prisoners have no allowance of food at all." Among the horrors which he enumerates, we cannot omit what he says of the consequence of the foul air in a dungeon at Calcutta, in Bengal, so late as 1756. Of a hundred and seventy prisoners deposited in it in the evening, he states that only sixteen were taken out alive in the morning. In relation to the impurity of the atmosphere of some prisons which he visited, he says, "my clothes were so offensive, that in a post-chaise I could not bear the windows drawn up; and was therefore obliged to travel commonly on horseback. The leaves of my memorandum-book were often so tainted, that I could not use it till after spreading it an hour or two before the fire; and even my antidote, a vial of vinegar, has, after using it in a few prisons, become intolerably disagreeable."[b]

After viewing the inertness of the governments of Europe on this very important subject, it is a pleasing relief to contemplate the exertions of the noble minded and illustrious Penn, in his humble and unaspiring colony. Though only the leader of a neglected and persecuted sect, he envied not the monarch the enjoyment of his diadem, nor the voluptuary the luxuries of his draught. Intent upon the establishment of principles, having for their object the moral and intellectual elevation of man, he despised the grovelling pursuits of sensual pleasure and the allurements of false ambition. The moral teachings of this gifted man, being almost a century be-

a Howard's State of Prisons, p. 4. b Ibid, p. 7.

yond the age in which he flourished, were neither understood nor appreciated. But his comprehensive soul, redeemed from the thraldom of prejudice, despising the insults of ignorance, and the fear of censure, reposed itself on a basis which is superior to the storms of hate, the bickerings of calumny, and the pangs inflicted by persecution. Let it not be forgotten too, that he was placed in a situation most uncongenial to the exercise of the benevolent affections. Surrounded by impenetrable forests, and worse than these, by suspicious and remorseless savages, we behold him not only taming the wildness of their ferocious nature, by the gentle arts of kind treatment, liberality, and pacific deportment, but promulgating such lessons of wisdom for the government of his own followers, as posterity has been glad to learn.

Of the numerous subjects which engaged his active and philanthropic mind, was humanity to prisoners, in providing for them every necessary during their confinement. Among other regulations respecting the internal arrangement of the prison, we find these remarkable words in his "Great Law:" "that gaolers shall not oppress their prisoners, and that all prisons shall be free as to room, and all prisoners shall have liberty to provide themselves bedding, food, and other necessaries during their confinement, except such whose punishment by law will not admit of that liberty."

It is much to be regretted that more minute accounts of his exertions, in this department of his labours, are not recorded. They would furnish at once a delightful and instructive chronicle, by which we could ascertain how much of the present system of the prisons, is due to the invention of posterior generations, and to what extent we are indebted to him for the improvements of which we boast.

The beneficial effects of this kindness to the convicts, we may presume, were sensibly felt, for we find these very provisions re-enacted in 1705.[c] The great variety of objects which occupied and distracted the mind of Penn, left him little leisure for the construction of prisons, in all respects suitable for the administration of restraining justice. This was intended to be supplied by the passage of an act in 1718,[d] which empowered the magistrates of each county throughout the state, to convene and erect suitable build-

c 1 Smith. 56. d Ibid. 101.

ings, as houses of correction, in the counties of Philadelphia, Bucks, and Chester. They were subject to the superintendence and control of a president, treasurer, and assistants, who themselves were accountable for their conduct and disbursements to the justices. These three houses of labour were to be built within three years from the passage of the statute.

The house of correction, erected in Philadelphia, by virtue of the statute of 1718, was located at the south-west corner of Market and Third streets, and was purchased from Joshua Carpenter, by the Mayor and commonalty of the city.[e] This building appears to have been entirely unfit for its purpose, and by no means calculated for the confinement of wicked men, desirous of liberty. It was subterraneous, close, and filthy; the whole lot containing but 240 feet in length and 66 feet in breadth.[f]

The Legislature in 1773,[g] being sensible, by the representations made to them, of its numerous and unalterable defects, not only as regarded the safe custody but the health of the criminals, deemed it proper to order the sale of the lot, and to authorise commissioners to purchase ground in a convenient part of the city for the construction of a commodious and substantial gaol. This prison was accordingly erected, and is yet the receptacle of felons; it is the one situated at the corner of Walnut and Sixth streets, extending south to Prune street. The space occupied by the lot is 400 feet by 200; the large stone building erected on it is 184 feet long, is divided into apartments of equal dimensions, and has two stories.[i] This was found sufficient in size and safety for the criminals placed in it; at least no account is transmitted of breaches, except shortly after the revision of the penal code in 1786. These are attributable to the unsettled state of the prison after the introduction of the new laws,[k] and perhaps to a relaxation of that vigilance in the keeper, which is necessary at all times, and under any circumstances.

It does not appear that the *internal* regulation of the prison was the subject of legislative enactment before the period of 1786, when the thunder of Liberty having pealed throughout the United States, left the conquerors the sacred privilege of seasoning the rigour of justice with the kind offices of humanity. The prison

---

e See this statement in an act of 1773, sec. 5, in 1 Smith. 405.

f 1 Smith. 404.

g 1 Smith. 403.

i Lownes' Account, &c. p. 80.

k See Bradford's Enquiry.

was spacious and strong, but the economy was lamentably defective. The statute passed this year made many useful provisions for the interior government of the prisons, in which we can see only the embryo of a more perfect reform. Hope of pardon and restoration to credit, were presented to such convicts as would induce, by their conduct, a belief of sincere repentance and change. There was one provision of the statute from which abundant benefit was anticipated, but from which much evil to the criminal, and peril to society, resulted.[l] This was labour "*publicly* and disgracefully imposed," according to the language of the preamble, and the wearing a particular uniform to distinguish them from the labouring and poorer classes in the streets. Lownes' Account of the prison informs us that crowds of idle boys assembled, either to teaze or converse with the criminals, who, rendered insensible by their exposure, and excited by liquor, held the most improper conversations with them; and sometimes irritated by the incivility with which they were treated, made desperate sallies on the citizens.

A few years' trial of this experiment proved its pernicious effects; and the Legislature, in consequence of a representation made to them, at the instance of the Supreme Executive Council, by the "Philadelphia Society for alleviating the miseries of public prisons," repealed in 1789 this odious and disgraceful servitude in public.[m]

Before we consider this statute, it may not be improper to exhibit a portrait of the scene *within* the prison, previous to this period. Human wretchedness, though invoked by crime, cannot be a pleasing contemplation to a mind not destitute of sensibility; but it is no less the province of the annalist to record, than it will be a subject of exultation to compare it with the subsequent history of prison economy. No apology, therefore, will be offered for the insertion of the following extract, from the elegant and feeling graphic pen of Roberts Vaux, Esq., whose opportunities for accurate information on this subject are unquestionable. After describing the miserable construction of the prison at Philadelphia, when located at the corner of Market and Third streets, he thus continues: "What a spectacle must this abode of guilt and wretchedness have presented, when in one common herd were kept by

l See Lownes' Account, &c. p. 76-7.

m See the Representation in Vaux's Notices, &c. p. 26.

day and by night, prisoners of all ages, colours, and sexes! No separation was made of the most flagrant offender and convict, from the prisoner who might be falsely suspected of some trifling misdemeanor; none of the old and hardened culprit, from the youthful and trembling novice in crime; none even of the fraudulent swindler, from the unfortunate and possibly the most estimable debtor; and when intermingled with all these, in one corrupt and corrupting assemblage, were to be found the disgusting object of popular contempt, besmeared with filth from the pillory—the unhappy victim of the lash, streaming with blood from the whipping post—the half naked vagrant—the loathsome drunkard—the sick suffering with various bodily pains, and too often the unaneled malefactor, whose precious hours of probation had been numbered by his earthly judge."[n]

This lamentable state of things existed even after the removal of the prison, and continued without any mitigation, till 1786, and partly till the passage of the statute of 1790. "The Society for alleviating the miseries of public prisons," for whose exertions on this interesting subject too much praise cannot be given, urged with most warmth, in the representation before alluded to, the removal of three great evils in the prison.[o] They were the mixture of the sexes, the use of spirituous liquors, and the promiscuous association of debtors and felons. In addition to these, there were two other evils complained of, perhaps as serious as either of the preceding. Proper apartments in the work-house of the building were wanted for the various descriptions of criminals; the consequence of which was, that boys and girls, inexperienced in vice, comparatively innocent, and confined perhaps by hard masters and mistresses for disobedience or neglect, associated with convicts, hardened by age and abandoned to the basest crimes. The public employment of the criminals, was the other mischief represented.[p]

It is easy to perceive that such a system was poorly calculated for the purposes of punishment, and the reformation of criminals. Is it surprising that a place, furnishing every means of debauchery and licentiousness, should confirm in guilt those confined in it, and after discharge that they should hasten, by new acts of depre-

n Vaux's Notices, &c. p. 13 & 14.
o See petition inserted in Vaux's Notices, &c. p. 28.
p See ibid. p. 29 & 30.

dation, to be reinstated, where pleasures congenial to depravity awaited them?

But a new order of things was about to commence. The energetic appeal of the "Society for alleviating the miseries of public prisons," awakened the attention of the Legislature to this alarming state of affairs. Inspectors, in the first instance, were appointed to superintend and conduct the business of the prison, by the act of 1789.[q] The keepers were made liable to a fine of ten pounds, if liquor was permitted to go to the felons, except in cases of sickness, or if they allowed any communication between the male and female convicts.

The alterations introduced in the following year,[r] when it will be recollected that the penal laws underwent a general revision, were more extensive and important. Cells were to be provided for the more atrocious offenders and idle and disorderly vagrants; all visitors, except inspectors, judges, justices, and lawyers, were excluded; assaults and other offences committed by the prisoners were to be punished; inspectors were to be appointed with prescribed powers and duties; the house of correction on Prune street, was to be called "The Debtors' Apartment," and exclusively appropriated to their reception and confinement; and a penalty was imposed on selling liquors in the gaol. And in that spirit of reform and mercy which has distinguished Pennsylvania, provision was made for the prevention of contagious disorders, by promoting cleanliness and ordaining separate lodgings among the prisoners—for *private* instead of public employment—and for establishing an infirmary in the west end of the gaol.

It has already been remarked, that after the passage of the law of 1786, there was a multiplication of convictions of robbery; and this increase was ascribed partly to the condition of the prison, and partly to the multitude of pardons. The former having been cursorily sketched, it remains that the prerogative of pardon should receive some trifling attention.

It is obvious, that for the purposes of justice, the power of pardon should reside somewhere, though it must be admitted, that its indiscreet exercise is subversive of all the ends of law. In whom this prerogative should be reposed, and when its interference may be otherwise than detrimental, are questions open for disquisition.

---

q 1 Smith. 106. r 2 Smith. 533.

By the Constitution of 1776, the Supreme Executive Power was vested in a President and Council of five,[s] to whom was delegated the privilege of granting reprieves and pardons, except in cases of impeachment. The present constitution, adopted in the year 1790,[t] has vested the power of pardon exclusively in the Governor, where it must remain, uncontrollable by the Legislature.

Previous to 1790, Mr. Bradford[u] states that pardons were profuse and unaccountable; that of sixty-eight convictions, thirty experienced this clemency by the President and Council.

After the change took place, he holds this language:—"the prerogative of pardon, since it has resided in a *single* Magistrate, is no longer weakly exercised." If then indiscretion was manifested by the injudicious use of this privilege, when reposed in six men, we may suppose *a fortiori* that a large body, like the Legislature, would be incompetent. From these facts, we are led to presume, that a change would scarcely benefit society, but its proper use will depend greatly on the individual who occupies the *gubernatorial* chair.

In what cases, does a regard for the public justify the intervention of this power? It is certain, that improper pardons deprive the law of all its terrors; for the more flagitious the crime, more severe the punishment, so much stronger are the expectation of pity and hope of impunity. But, as it may happen from a concurrence of anomalous contingencies, that the innocent may suffer, and the severity of the law be felt with peculiar hardship, it is but justice to acknowledge, that, in such cases, mercy ought to be extended. By the caution and humanity of our juries, innocence will seldom be convicted; but as it may occur in consequence of the fallibility of human judgment, a power should reside somewhere to reverse an erroneous decree. And when the general law applies with peculiar hardship to a particular case, it is obviously the grateful duty of the Executive, "to break its teeth," or mitigate its rigour.

But how is this hardship to be ascertained with sufficient certainty, to authorise the reversal of a judicial verdict? Is the remonstrance of a pitying multitude, to be relied on, whose judg-

---

s See sections 3d & 20th of "The Plan or Frame of Government," contained in 5 Smith. 426-8.

t See Art. 2. s. 9. in Purdon's Dig. p. 20.

u B. Enquiry, p. 23.

ments are blinded by their sympathies? Nor can the inspectors of the prison be better instructed on the subject.—Ought a representation to be noticed by the Governor, emanating from any one but the President of the Court, before whom the case was tried? Who so well as he can know all the circumstances from which severity is to be inferred? In England, the King, perhaps *always*, disregards the petition of the people, if not strengthened by the report of the judge who heard the case. The consequence is, that syren hope never flatters; for so surely as there is undoubted guilt, the law is rigidly administered. The cruelty of the *laws* of England disgraces the wisdom of their *administration;* but is not the latter worthy of our imitation?[v]

In 1791[w] the salutary enactments in reference to the prison received a little alteration and improvement. The appointment of inspectors, which had been vested, the year before, in the Mayor, aldermen, and justices, was placed in the Mayor and two aldermen. These inspectors, so appointed, were to prescribe the allowance of provisions to the criminals, ascertained by weight and measure.

A very important change was introduced in 1794, both as regards punishments, and the penitentiary at Philadelphia. By this statute[x] hither were to be removed, from every county in the state, persons convicted of crimes which were capital in Pennsylvania anterior to 1786, or of uttering counterfeit coin, or of printing, signing, or passing, counterfeit notes of certain banks. And it required that the Court, before whom the conviction was had, should report to the inspectors at Philadelphia, the nature of the offence, with the circumstances, if any, of extenuation or aggravation.

Several additions were made to the statute of 1790, and its disagreeable provisions were repealed, by an act of 1795.[y] The inspectors were enjoined to clothe, separate, and class the prisoners,

---

v Edward Livingston Esq., in his admirable criminal code of Louisiana, has these words: "the power of pardoning should be only exercised in cases of innocence discovered, or of *certain and unequivocal reformation.*" The severity of the law should undoubtedly be relaxed when its purpose has been accomplished by the reformation of the prisoner; but what kind of evidence is necessary to render it "unequivocal?" Mr. Bradford says, this is easily counterfeited

w See 3 Smith. 44.

x See sections 10 and 12. 3 Smith. 189.

y See 3 Smith. 247.

in such manner as would best promote the object of their confinement. The thirteenth section[z] of the former statute requires habits of coarse materials for the prisoners, their heads close shaven, and their labour to be of the most laborious and servile description. The twenty-first section[a] empowers the inspectors to inflict chastisement on the convicts, if confinement in the cells shall not be deemed sufficient punishment to restrain disorder. These were abrogated, and, for impropriety of conduct on the part of the prisoners, the inspectors were authorised to confine them to the cells, or dungeon, with bread and water only as sustenance, for a period not exceeding ten days for the first, and fifteen days for any subsequent transgression.[b] The power of appointing and removing the keeper, and fixing his salary, was vested in the inspectors, as individuals whose opportunities enabled them to judge the merits of the keeper, and what remuneration his services required. The five per cent. on the proceeds of the labour of the convicts, given to their keeper as an inducement for providence, industry, and attention, by the act of 1790, being perverted from its original purpose, was taken away by this statute. A special statute, passed on the 10th of April 1799,[c] authorises the removal of the prisoners from Philadelphia, if endangered by the visitation of a pestilential disease.

A notice of every provision, or of every statute, in relation to this subject, is foreign from our intention. Such would be an irksome, and, in a great measure, perhaps, a useless task. It must suffice to present the great features of the portrait, at the same time marking those revolutions, which enlightened zeal and well-directed benevolence have introduced.

From this period to 1803, the Legislature suffered the penitentiary system to remain unaltered. But in the meantime exertions were not wanting on the part of the "Philadelphia Society for alleviating the miseries of public prisons," to facilitate the great work of reform which they had begun. With this view they addressed a memorial[d] to the Legislature, in which they expressed their

z See this sec. of the statute of 1790. 2 Smith. 535.

a See ibid. 537.

b By the statement of Mr. Lownes in 1793, it would appear that so degrading an infliction to men as whipping, was not requisite, even then, to enforce observance of the rules of the prison. See his Account, &c. p. 87–88–89.

d See Memorial in Vaux's Notices, &c. p. 36.

strong conviction of the superiority of *solitude* and *labour* in preventing crimes and reforming criminals, to free social intercourse. There are charms in society which dissipate even the gloom of a prison, which man in a state of nature was born to enjoy, and without which he must be miserable. But as this is a positive pleasure, its privation can only be a negative punishment, which offenders against the natural and moral law ought to feel, particularly when that association deprives confinement of its great, primary, and ultimate purposes.

Of this, the very intelligent society, above alluded to, were properly sensible; and, as their first petition did not effect the object of their wishes, a joint address of its members and the inspectors of the gaol was presented to the legislative bodies in 1803,[e] setting forth the imperious necessity of another building for servants, apprentices, vagrants, and prisoners for trial, whom experience dictated the ruinous effects of suffering to be with the more atrocious offenders. An additional reason, cogently urged, was that the prison in Philadelphia was too full for a separation of the criminals, which the society had near at heart.

A statute, in compliance with their remonstrance, was passed in the same year,[f] authorising the inspectors of the prison to appropriate the proceeds of the sale of vacant public lots, in the city of Philadelphia, to the erection of a house of confinement for that identical description of persons named in the memorial. This was accordingly done, and the building located at the corner of Arch and Broad streets.

Further provision was not deemed necessary till 1807,[g] when a statute was enacted, inflicting on those charged with duties to the prison, larger penalties than had been hitherto annexed. Neglect or refusal on the part of the gaoler to furnish to the commissioners of the proper county, a complete calendar of persons under sentence of servitude, was to be punished with the forfeiture of 100 dollars; neglect by the commissioners, after the receipt of such notice, to procure materials for labour, or an omission of any other duty, was to be punished with the same sum; permitting the criminals to have liquor was to be punished with a forfeiture of fifty dollars

---

e See the Address in Vaux's Notices, &c. p. 37.

f See Act, 4 Smith. 87.

g 4 Smith. 393.

from the gaoler; and negligently suffering an escape was visited with a penalty of 300 dollars.

The prison having thus been provided with every necessary, to render the prisoners as comfortable as was consistent with the purposes of their incarceration and the dictates of humanity; proper penalties being suspended over officers entrusted with important duties, and every emergency guarded against, which experience had suggested or penetration could foresee, it remained that the Legislature should watch with tutelar solicitude the effects of their labour, to correct degeneracy, obviate innovation, and counteract remissness. These not occurring, no material change or alteration seemed to be required, and accordingly the only statutes, passed for nine years, worthy of recital, were those of 1812 and 1816. The former[i] appropriated twenty-five thousand dollars for the completion and improvement of the county gaol in Arch Street, and the latter[k] authorised the preparation of apartments in that prison for the reception of debtors hitherto confined in Prune Street, and their removal thither when the apartments should be prepared. The alteration of the house and part of the yard of the Debtors' Apartment, for the confinement of that description of persons, hitherto kept in the Arch Street edifice, and of the remainder of the yard for the employment of convicts, was enjoined, and composed the residue of the latter statute.

But this long interval was not, in other respects, altogether unemployed. Laws were not necessary, since enactments, relative to the condition of the *prison*, were sufficiently comprehensive for the purposes of humane and repressive justice; but it would be unpardonable to omit a notice of the efforts which the society, so often referred to, made to meliorate the *prisoners*. They distributed bibles and testaments among them. An enlarged philanthropy prompted them to enquire into the propriety of disseminating useful knowledge by means of other religious books, but a committee, appointed for the purpose, reported against the measure. Corresponding secretaries were constituted, to communicate with other states in the Union which had attended to their criminal jurisprudence and prison discipline, and to ascertain their effects on moral delinquency. Unwearied attention appears to have been paid to the

---

i See 5 Smith. 370.

k 6 Smith. 345.

state of the prison, and an earnest, undeviating eye to have been directed to the system of *solitude and hard labour*.[l]

The prison, at the corner of Sixth and Walnut streets, being the only repository in the state for such felons as were punished with death before 1786,[m] had become crowded, which defeated this one great object of the society. Wherefore, the Legislature was petitioned for the erection of other penitentiaries in other parts of the state, and in 1818[n] an act was passed appropriating sixty thousand dollars for a building "on the principle of solitary confinement," to be situated in Alleghany county, at the western extremity of the state. Supplementary statutes were made in 1819,[o] 20[p] and 21;[q] the two former describing its plan and formation, and the latter granting an additional appropriation.

These grants only prepared the way for greater extension of liberality; for the principal gaol, in this city, though enlarged by part of the Debtors' Apartment, and in other respects altered, was, by no means, suited to the improvements of which many years' experience and reflection had convinced the inspectors and the Prison Society, prisons were susceptible. To accomplish their ardent wishes on this subject, a memorial was presented to the Legislature, in 1821, enforcing their convictions, in a nervous and cogent manner.[r]—The petition was successful, and the munificence of the Legislature manifested, by appropriating, at that session,[s] one hundred thousand dollars to the construction of a penitentiary, similar to that at Pittsburg, within this city and county. The statute appoints eleven commissioners to superintend the building, who are authorized to build it on the plan of the Pittsburg penitentiary, with such alterations and improvements as they may deem proper, if approved by the governor, and "on the principle of solitary confinement."

The latter prison, it is understood, is now finished, and ready for the reception of convicts.

This penitentiary encloses an area of about 2¾ acres, is in shape an octagon, and contains 192 cells. The cells are one story high, and six feet by eight, each having an iron ring in the centre for

---

l See Vaux's Notices, &c. p. 40.
m By the statute of 1797, see page
n 7 Smith. 62.
o Ibid. 150.
p Ibid. 293.
q Ibid. 447.
r See Mem. in V's Notices, &c. p. 44—5.
s See 7 Smith. 389.

chaining the convict, if deemed necessary. Each apartment has two doors. The one on the inside, is composed of wood, and has a small opening for the admission of air, light, and provision; the other on the outside, is of heavy bar iron, and is secured with ingenious and powerful fastenings. The main or front building is 122 feet long, 46 high, and is flanked by two circular towers, surmounted with battlements. It has an exterior wall 25 feet high, with two other towers, equally distant from the principal building.[1]

The penitentiary erecting near to this city will be larger, and in many particulars essentially different. The area enclosed is 650 feet square, and the surrounding wall (which, by an inclined coping for its cover, projecting on the inside four feet, will frustrate the most active efforts to escape) is estimated to be thirty feet high from the level ground on the inside. There are seven blocks of buildings, each distributed into 38 cells, which are twelve feet long and seven feet wide, with separate exercising yards about the same width as the cells, and nineteen feet in length. To prevent conversation between the prisoners, the partition walls between the cells, are two feet in thickness. The wall next the passage is of similar thickness, and the floors, of solid masonry, are grouted two feet in thickness, and covered with a strong oaken floor, by which excavation and escape beneath will be impossible. The cells will be heated by hot air, supplied from furnaces under the passage at the head of each cell, near the centre building, called the observatory; which will obviate the necessity of introducing a separate fire place into each. More security and economy, and less superintendence are effected by such a diffusion of heat. For light and ventilation, convex reflectors, called *dead-eyes*, of eight inches diameter, are inserted in the barrelled ceiling. But besides this, there are ventilators in the form of funnels going through the roof, six inches in diameter, by which the cells will always be free from noisome and unwholesome air. A reservoir, which will be connected with the culvert of a neighbouring street, and by means of conduit pipes always filled with water, leading from each apartment, is most admirably contrived for draining all the filth of the prison. The doors of each cell are next the yard, of which there are two; that on the inside is wrought grated iron, and the other on the outside, wooden, which will be left open when

[1] See "The Pittsburg Directory" June 22, 1826.

occasion requires, particularly in warm weather. There is no door next the passage but a feeding drawer or peep-hole, answering every purpose for the admission of food and raiment, which can be given without the criminal's seeing the face of his keeper. A simple bed for each cell is intended to be provided, which will be hung against the wall, and be made to button with the bedding enclosed in it, out of the way, during the day time.

These seven blocks containing in all 266 cells, form *radii* to the observatory or watchhouse, which is so situated and constructed as to command a view of every prisoner without his knowledge or observation. By means of a platform to be erected on the outside of the observatory, a single watchman can overlook every cell, and detect every attempt to scale the minor walls. The belfry is placed over the keeper's building in front, to give alarm on the occurrence of any accident. That part of the lot over which the building will not extend is of triangular form, and intended for the cultivation of vegetables, whose effect on the atmosphere of the enclosure, it is hardly necessary to observe, will be purifying and salutary.[u]

From a building so wisely adapted to a fair experiment of the effects of solitude, combining the opposite advantages of entire privacy and absolute cleanliness, just punishment and true mercy, at an immense expense to the commonwealth, much is to be expected. In his solitary apartment, without a friend to soothe or an allurement to flatter, will the felon brood over the outrages he has committed on society, feel the compunctions of an offended conscience, and converse with that best admonisher—his heart. Who will say that the expectations entertained of it will not be realized?

---

u The knowledge of these particulars of the new penitentiary, has been derived from an examination of the prison, and the birds-eye view, with its accompanying description by Mr. Haviland, the ingenious architect.

CHAPTER VIII.

REFLECTIONS ON SOME OF THE EXISTING PUNISHMENTS.

It is obvious that an alteration of penalties is contemplated by the Legislature, to adapt them to the New Penitentiary.[a] The first query that presents on this subject is, are the present punishments relatively just, and if so what abbreviation in the *term*, and alteration in the *kind* of punishment should take place?

With reference to the relative justice of the present inflictions, I may be permitted to observe, that an *intent* to perpetrate a felony should be punished with a view to the character of the crime attempted, and in proportion to it. Without entering into detail, it is believed, that, in some instances, this is disregarded in the existing laws.

Rape, which is punished with not less than ten nor more than twenty-one years, is exalted beyond arson, the punishment of which cannot exceed twelve years; and beyond murder in the second degree, whose imprisonment is not less than five nor more than eighteen years. In no state in the union, that I can find, whose penal laws have been revised, since the revolution, is the punishment so long.‡ In Georgia[b] the period of incarceration is not less than two nor more than twenty years; and in New Jersey[c] not more than fifteen.

With regard to the punishment of arson, an alteration has already been suggested.[d]

Counterfeiting the coin is punished with not less than four nor more than fifteen years' incarceration, and voluntary manslaughter with not less than two nor more than ten years. Why is counterfeiting the coin elevated above other kinds of forgery, the latter being punished with not less than one nor more than ten years' incarceration? In this country counterfeiting the coin is not considered *crimen læsæ majestatis.*

---

a See Pamphlet Laws of the last Session, p. 413, where the governor is authorised and required to appoint three commissioners to revise the penal code.

‡ See the punishment in Missouri, Laws of Missouri, p. 283.

b Prince's Digest, p. 349.

c New Jersey, p. 246.

d See page 38.

The punishment of assault and battery, being at common law, may be for any period. Thus a malicious justiciary may sentence one for life for a simple battery, and though the executive may interpose his prerogative, yet it is presumed, for the security of society, all punishment should be fixed by written laws. In Rhode Island the penalty, imposed by a justice, is a fine not exceeding twenty dollars or imprisonment not exceeding twenty days;[e] but if this punishment appears to be inadequate to the offence, the party offending shall enter into a recognizance to appear before the supreme judicial court, where he may be imprisoned not exceeding six months or fined not exceeding one hundred dollars.[f]

For profane cursing and swearing in England, the fine is augmented in proportion to the rank of the aggressor.[g] Partially recognizing this distinction in Georgia,[h] profaneness by a public officer, is visited with the forfeiture of a greater sum than by an ordinary citizen. It is a little surprising that the laws of this state contain no similar provision, although the reasons of the difference seem to be satisfactory. These reasons are greater ability and responsibility, for surely the influence of evil example is commensurately increased with the eminence of the individual from whom it comes.

Drunkenness is punished with a fine of sixty-seven cents and imprisonment for twenty-four hours. Should not a crime, which endangers so much the peace of families and society, debases the nature of man, destroys his intellectual vigour and disqualifies him for all kinds of useful exertion, be visited with a severer penalty? And the same remark will apply in this case, with regard to the standing of the offender, as in profane swearing. It would appear from the great prevalence of this evil, that nothing less than doubling the penalty on its repetition will be efficient in diminishing it. A difference of punishment too ought certainly to take place in reference to occasional and habitual drunkenness. The habitual drunkard may be deprived of his property as one *non compos mentis;* but as a civil prosecution is seldom attempted, from the tenderness of those relatives at whose application it must be, estates are ruined and families reduced to penury. But should

---

e Laws R. I. p. 148.
f Ibid, p. 350.
g 4 Bl. Com. p. 59.
h Prince's Digest, p. 513.

not every well regulated community impose the duty on public functionaries to guard the rights of the defenceless and to punish the disorder of its citizens, for the sake of the public example? This can be done, only, by obliging the public prosecutor to bring offenders of this kind to trial, and upon proof of habitual drunkenness, by imposing confinement long enough to effect a reformation. A law of Rhode Island[i] requires, that on conviction of habitual intoxication, the sale of liquor to the drunkard shall be publicly prohibited under a penalty, by *posting* in conspicuous places in the town in which he resides, and the towns in the neighbourhood.

Reasons have already been assigned, why a distinction should not obtain between the punishment of horse-stealing and other larceny.[k] The grounds were two: that, the scarcity of horses not being felt, no peculiar severity is required for the protection of agriculture; and that the easy identity of the horse would be the sure means of detection. No distinction it seems obtains in New Jersey;[l] in Rhode Island[m] the punishment of horse-stealing is three years confinement, fine and whipping.

A kind of stealing, established in the case of Commonwealth vs. Tyson, and denominated *constructive* larceny, has excited some attention and discrepancy among lawyers. Indeed, it may be averred, that the principle of this case has very few advocates.

The defendant, a broker, falsely pretended that a man was waiting with stock-shares of the Commercial Bank, which the prosecutrix wanted; and on receipt of the money to purchase them, converted it to his own use. The check, given to him for the shares, included the amount of his commissions. This was declared to be *constructive* larceny. The circumstances of the case of Commonwealth vs. Lewer, very recently decided in the Supreme Court, were of a worse description. The defendant obtained goods and money under pretence of being his brother's factor. He went to a mercantile house in this city, spoke of purchasing goods as his brother's agent, and said he was in the daily expectancy of receiving funds. Again he called, pretended that a sum had been deposited for him in the Southwark Bank, and purchased. The amount of goods bought did not amount to the sum said to be deposited; and on settling for the goods he gave a check for the whole

---

i Laws R. I. p. 297.
k See page 40.
l Laws N. J. revised, p. 252.
m Laws R. I. p. 344.

sum, declared to be in the Bank, and received the difference in cash. On presenting the check it was discovered that he was no agent, nor had his brother any connection with the Bank.

Here was a case certainly of deliberate and systematic fraud, excluding all possibility of presuming in favour of intention, and yet was declared not to amount to constructive larceny. This decision was bottomed on a principle repeatedly recognized, to wit:[n] that a false assumption of agency is not larceny, if there was an intention on the part of the person deceived to relinquish the ownership of the property.

The case of Tyson appears to have less in it of the nature of larceny. The circumstance of his commissions being included in the check induced an opinion, on the part of the Recorder, that the prosecutrix had parted with the ownership of the money, and, therefore, was a sufficient ground for granting a new trial. Besides, from all the circumstances, we are warranted in presuming that the artifice was resorted to, under the pressure of pecuniary embarrassment, with the intention of appropriating the amount, at some future period, to the intended purchase. If it had been the intention of Tyson, at the time he obtained the money, to apply it to the purchase contemplated, and there had actually been a man waiting to buy, his embezzlement of the money, it is apprehended, would have been a mere *breach of trust*. As it was, it might be denominated, *obtaining money on a false pretence;* but the absence of Legislative provision, precluded so mild, but just an appellation. It is to be hoped that a case of such peculiar hardship, by the timely interference of the Legislature, will be the last,* as it is the first, of constructive larceny.

No rule or criterion that I am acquainted with, will enable the Legislature to calculate precisely, what diminution should be made in the term of imprisonment. As this is arbitrary and dependent upon opinion, I shall not presume to throw out a suggestion, but leave it to their intelligence and wisdom, aided by the well-informed commissioners appointed by the Governor, to instruct *them* on the subject.

---

n See 2 Russell, p. 106, Rex v. Adam, 2 East's P. C. 672. Rex v. Coleman, and Ibid, 673. Rex vs. Atkinson.

* Since writing the sentence in the text, the author has been informed that a subsequent case with which he was unacquainted, has been tried in the Mayor's Court, in which the same principle has been recognized, Com. v. Vanderslice.

We come now to speak of an alteration in the *kind* of punishment, and as it is the most important branch of this essay, so it has been reserved for the conclusion, for ample consideration. The only two kinds of corporal punishment, known to the Laws of Pennsylvania, are imprisonment at hard labour, and death by hanging. The propriety of altering the latter is now to be considered.

Men, to enjoy the benefits of society, have deprived themselves of some of their natural privileges and enjoyments, and because social were deemed preferable to natural rights, have they consented to the exchange. On this implied contract, governments are instituted, and laws are formed, which deprive transgressors of their estate and liberty. And why is not life surrendered, among the other things, which make it estimable? I think, for the plainest reason, that the abdication of natural for the enjoyment of social rights, implies a greater good to the surrenderor; and as life is itself the greatest gift of Heaven to man, nothing can be returned as an equivalent for its forfeiture. Would the parent consent to sacrifice the life of the child that prattles on his knee, or enter into stipulations which would take away his own? It is preposterous to believe it.

As it has never been contended on the authority of Divine revelation that man can kill himself, so we may contend that he cannot delegate that power to another.

The advocates of capital punishment rely upon a text in Genesis which has this language, "Whoso sheddeth man's blood, by man *shall* his blood *be shed.*o" But to maintain the idea of an *injunction* in the passage, they are driven to the most monstrous contradictions. Brackenridge and others, who endeavoured to sustain this notion, admit the justice of a division in homicide and the propriety of a power to pardon. But should not they who pertinaciously adhere to the text, as containing an inflexible *command*, lay aside that squeamish sense of justice with which they charge others, and proclaim "blood for blood," in the sanguinary temper of the *lex talionis*, and of our vindictive aborigines? To obviate the imputation of inconsistency, can they adopt any other sentiments? The text delegates no privilege of creating such offences as manslaughter and murder in the second degree; and as its strict

o 9 Gen. 6.

apparent meaning is taken in one part, why not in every part? The prerogative of pardon too, as a prerogative too merciful for the law of God, should be discarded as inimical to its letter and its spirit. These are the cruel consequences to which such an interpretation of the passage, would inevitably conduct us. But with becoming reverence on this subject, let us rescue the Deity from a charge altogether unworthy of His divinity and character. I assume it as truth, both in a spiritual and literal sense, that "Jehovah willeth not in the death of the wicked, but rather that they should repent and live."

Fratricide is the horrible species of murder, first recorded in the bible, and under circumstances of the most aggravated description. Cain, from a sentiment of jealousy, slew the pious Abel, in the absence of every thing like personal provocation. Filled with the consciousness of his diabolical turpitude as well as merited vengeance, and in anticipation of certain death, he exclaims, "I shall be a fugitive and a vagabond in the earth; and it shall come to pass that every one that findeth me shall slay me."[p] But was he hanged, broken, or beheaded; or in the words of Dr. Rush, did no lightning sweep the fratricide from the earth? No, neither; but vengeance seven fold was denounced against his murderer; he was driven from society, and the curse of heaven blasted his hopes.

Another murder is mentioned in the same book, under circumstances, it would seem, of even greater atrocity;[q] but its particulars are not related by the sacred historian. Suffice it that Lamech's hands had been imbrued in blood, that he anticipated seventy and seven fold vengeance on him and on his murderer.

Is it possible that, when such examples as these are presented, in holy writ, scepticism will rear her dastardly head—that Providence can be supposed unstable in his dispensations;—and that Noah and his descendants should be commanded to act in opposition to a promulged and confirmed decree?

But it is not a *command;* nor could it be without interfering with the expressed wishes of the Deity. It is plainly so far from being imperative in the translation, that it amounts to nothing but a prediction. The expression *shall be shed,* being only in the future indicative, cannot *enjoin,* for *will be shed* might be substi-

---

p 4 Gen. 14 q 4 Gen. 23—4.

without doing any injury to the original Hebrew.[r] And in this light, (as prescience and not an injunction,) which is r correct, the preceding verse will abundantly corroborate the ›ing examples of punishment by the Deity himself, and prove a reference to Cain and Abel; for it is said, "at the hand of man's *brother* will *I* require the life of man."—It is well n that Noah and his family were the only human beings who ved the general wreck of the world, at the deluge. Eight iduals alone remained of numerous and dense nations; and im-ıtely after the dispersion of the waters, they were told to be tful and multiply, and replenish the earth." Then say that denunciations were proclaimed against those, who, by the ıction of life, stopped the increase. Say that offended heaven l wither the impious hand which was raised against a brother, ıy not that the proscription of life was consistent with the ation of the world.

t further: in obedience to the law of Moses, the Jews con-ed the adulterer, in common with the murderer, to death. ›oth they had equal authority to kill, as both were heinous ›es. But our laws discard the notion, and deny the right, lict death for the former transgression of the moral law. And lifference, very probably, is ascribable to the example of t, who did not acknowledge the validity of the Mosaic canon he desired the innocent to throw the first stone at the woman t in the act of adultery, and eventually pardoned her. Does is conduct, on this occasion, convey a severe reprehension to laws of *erring* man, which take life? It is conclusive, too, ıis denial of death to the woman who had committed adultery, l have been extended to her, though guilty of murder, from rcumstances, 1st, of their being involved in the same punish-by the Jewish Pentateuch, and 2d, that the murderer was ırly treated in the beginning.

l he distinguish between the municipal regulations of the ites, and the commandments given in the infancy and com-ve purity of mankind? He said in reference to the laws of s, in almost so many words, the reasons which urged their ıtion do not remain; darkness and cruelty then were necessary, ı my dispensation will convert into mildness and light. Those

r The Hebrew word ישפך is in the future tense Indicative, from שפך.

rules of action, established in the infancy of the world, shall constitute a part of the system which I have come to form. Are not these comprised in the remarkable words: "Moses, for the hardness of your hearts, commanded this, but from the beginning it was not so?[s]"

Talk not of the Messiah's saying to Peter, "Put up again thy sword into his place, for all they who take the sword *shall perish* with the sword." This is a *commandment*, tantamount to that supposed to be given to Noah; for the original Greek[t] makes nothing about it obligatory or imperative. It palpably amounts only to a recognition of the principle of self-preservation, which is the first law of our nature. And his express declaration that he came to save men's lives and not to destroy them, is at once full and to the point, as to the divine illegality of Christian governments' permitting the infliction of death. Doctor Rush, with his finger on this passage, in the ardour of conviction, affirms that an angel declaring it, would not persuade him that the Scriptures authorise capital punishment.

Notwithstanding these, and perhaps better reasons that might be given for the want of a delegated right to take existence, with the infatuation of hoary prejudice, still we hug the darling delusion which hurries our fellow creatures into the presence of an omniscient God. Are they unprepared for the transition? How horrible! And the admission that they are fit to join the sacred choir of "angels and the just made perfect," in regions of beatific purity, precipitates us into the strangest absurdity. Will it be said that he, who was too base to live on earth, is qualified for a residence in heaven?

But Pennsylvanians seem to imagine, that the example of William Penn, who admitted the penalty of death for murder, constitutes a plenary justification for the continuance of this punishment. The institutions of our benevolent lawgiver were too merciful, as they *stood*, for their peaceful toleration by the Queen and Council. They were often repealed, but by the efforts of his mighty mind, were as frequently restored. May not the fear of an abrogation of his laws, finally, and *in toto*, have restrained him from displacing

---

s xix Matth. 8.

t See the passage in the original Greek, xxvi Matth. 59. which makes *shall perish* future indicative, by the word απολυται.

was then esteemed the safeguard of individual and social se-
r? And, indeed, to extricate him from the charge of incon-
r, we are driven to the necessity of ascribing his law against
er, to the operation of this fear. The religious sect, of which
is a member, and, at least in his colony, the support and pas-
enied the propriety of defensive war, and consequently could
prove of avenging the wrongs of a murdered man and society,
e deprivation of life in cold blood.

nat is there in the character of the people, or in accidental
nstances, to require so cruel and revolting a forfeiture? Ex-
ice has not disclosed a hopeless depravity on the part of
in this state, and according to Mr. Bradford, "the infliction
ith supposes the incorrigibility of the criminal."

ough it may be contended that circumstances hitherto, have
ed this severity, a new era is commencing, when the penalty
ith will be a stain upon our statute-book, which the humanity
r criminal code, in other respects, cannot efface. The new
entiary, (a hasty draught of which we have attempted in the
ing chapter,) is surely suitable for all the purposes of rigid
exorable justice. In a cell large enough to stand, and turn,
leep, without society, without even the sight of his keeper,
e murderer drag out his long days, and feverish, sleepless
, without the light of hope to shed a momentary sunshine on
ooping spirits, and with a gnawing at the heart by "that
which never dies;"—these surely are enough, if any thing is
gh, to strike terror, to punish and reform. Mr. Lownes,[u] in the
1793, relates this remarkable fact: "some old offenders have
r chosen to run the *risk* of being hanged in other states, than
nter the *certainty* of being confined in the penitentiary cells
s." And after all, perhaps, the certainty of their execution,
r than the severity of laws, strikes the greater terror.

I not borne out in the assertion by a very recent event, that
unishment is likely to defeat its object; which, it is presumed,
suppression of crime? The murderer, after the trial of
ne,[v] may rest secure from the apprehension of *death*, and, what
re fatal to the purposes of the law, may indulge the *hope* of
nity.

---

[u] wnes on the Prison, p. 93.

[v] This trial is reported in the National Gazette of May 26, 1826.

Ingenious counsel impress the minds of the jury with the awful weight of responsibility which they incur, by dooming a fellow creature to the gallows, and they, alarmed at the greatness of the penalty, though his guilt is irrefragably established, by a kind of "*pious perjury*," falter an acquittal, or call it an offence foreign to the evidence. And though the sympathies and religious opinions of jurors should form no obstacle to the faithful administration of the law, yet the pernicious influence of public executions more than countervails the terror which they excite. They are pernicious, because, if they do not render the heart callous to tender sentiments, by familiarizing the eye to scenes of death, they are so by the invocation of pity. The murderer, on whom is passed the sentence of death, has the gratification of knowing that he fills a large space in the eye of a sympathizing public—that dreams, whether he has had them or not, will be recorded, to heighten commiseration—that confessions, which he never wrote or dictated, will be bandied among the mob, with all the effrontery of falsehood, in extenuation or denial—that, though he ends his days disgracefully on the gallows, as the guerdon of his deeds, his name will be repeated with a sigh, the recollection of his civic and social *virtues* will live after his death, and the praises of the people will follow him as a saint! These are sad truths, which reference to instances is not required to elucidate and establish; and these, if not the mistaken tenderness of the jury, if not the exercise of ill-judged executive clemency, rob this penalty of the effects which it was intended to inspire.

But I have done. The expurgation of our statute book from this punishment, would be a source of just and laudable pride to Pennsylvanians. They might fancy the hovering spirit of Penn, and the large group of nations composing the world, looking on with approbation; and glancing through the long vista of time, anticipate the praises of future story, in commemoration of an event, alike honourable to the state, and glorious to the cause of humanity.

FINIS.