

MARYLAND GAZETTE.

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FOR crimes, which are denominated felonies within the benefit of clergy, the only punishment for the first time is burning in the hand, and, at most, a discretionary imprisonment, not exceeding one year. After this, they are discharged from all other offences of the kind before committed; he is restored to all capacities and credits; and it would even be probable to call him a felon. The slightest attention will demonstrate, that this punishment is much gentler than that of many inferior crimes. Here then is a violation of proportion; either the clergyable offences must be guarded, by severer penalties, or the punishment of inferior crimes must be mitigated.

It would be foreign to my purpose to examine the origin of this benefit of clergy; in all felonies, whether new created, or by common law, must be allowed, unless taken away by the express words of a statute. It extends to bigamy, manslaughter, and simple larceny. The benefit of clergy, if it were only for the hardness of its name, and its principle, should be abolished; burning the hand of a layman was probably intended, in the beginning, as a mark which the offender might be known upon arraignment; as a punishment, it is by no means adequate to the crime of bigamy. He who is guilty of this offence, disturbs the order which is wisely established in every christian country; and if he has used deception, as is commonly the case, with the second wife, the law cannot be thought inferior to a rape; but he was constant of the prior marriage, I should only punish him with a little more severity than I would a common adulterer. The injury which the first or the second husband sustains by an offence, committed by a woman, is not so considerable, as she should therefore be viewed in somewhat worse light than an adulteress. In all cases it should be left to the discretion of the first husband, or wife, to dissolve the bond of marriage.

The penalty for a rape, and for the seduction of a woman by the solemnity of a marriage, should be nearly the same; in the latter case it is more equitable, that the offender should be liable to an *infamia* corporal punishment; I mean the first part of that punishment which was inflicted by William the Conqueror; he should be totally divested of his property, one half to be given to the injured wife, provided she consents to dissolve the marriage, and the other to the woman upon whom he has practised so villainous an imposition. The same corporal punishment might be proper for a rape; and the compensation might be safely trusted to the discretion of the judges, upon a consideration of all the circumstances of the evidence.

The killing of a man is sometimes the consequence of duelling. There is no occasion for an elaborate argument, to expose the custom, which obliges each combatant to fight till he is slain, or to a fair and equal combat; but not including its manifest absurdity, and the violation of divine and human laws, there is a strong shield from violence to the man who is slain; he goes to preserve the reputation of the world, and writes that fate upon his side the ball; he kills an antagonist, whom his resentment has roused. I do not therefore think him with a moderate severity of the law, instead of repressing the custom, he evidently increased it; by furnishing an annual incentive to the slain, who, in his high opinion, *honour* consists in dying; and thus the legislature can devise means to repress duelling; dishonourable, as is nothing can abolish it; custom which goes to the very roots, and every where prevails in the lives of the great and the people in many countries. The law which provides, can be discovered, it is possible to consider the killing of a man, as a fair and equal combat, as a species of

manslaughter, which is defined, "the unlawful killing another, without malice express or implied."

The essential difference between voluntary manslaughter and murder is this; the latter is committed upon cool, deliberate, malice; the former during the heat of resentment; and, in the punishment, the law respects the frailty of human nature. Is it not as reasonable to grant some indulgence to a mistaken notion of honour, which is the frailty of most but noble minds; as to that petulance and irascibility, which we inherit in common with the brute creation? The degrees of guilt are different in almost every homicide which amounts to manslaughter; it therefore seems expedient, that the law should determine the nature of the punishment, and leave it to the judges to adjust the measure. On this account, fine and imprisonment are certainly more suitable than burning in the hand, or any other definite punishment, of which a slight transgressor could not fail of procuring a remission, upon application to the dispensing power.

If a due proportion between the crime and the penalty were observed, this power would be rarely exerted. Although I am not an advocate for the severity, I most strenuously contend for the certainty of penalties; I am fully convinced, that, without it, many of our laws will be despised and trampled upon.

We have an act of assembly, which punishes simple larceny, where the theft does not amount to 1000 lb. of tobacco, by whipping, pillorying, and an obligation to pay four shillings to the party upon whom the depredation has been committed; this law is wise and equitable, and therefore the penalty is never remitted. I wish the legislature would extend it, with some improvements, to every species of larceny, and to every secret destruction of property, not amounting to arson, or tending to endanger the life of a human creature.

The purloining of bonds, bills, notes, and other writings, should be put upon the same footing as stealing the money they are meant to secure; the stealing of any writings relating to a real estate, except wills, is now punished as a crime; but these distinctions between goods that *fracture the peace*, or those which are not *fractured from the peace*, and *movable chattels*, are ridiculous; he who steals injurious or immovable to invade a garden, an orchard, or a corn field, in a secret manner, and to take away the produce, that to steal a moveable chattel.

I am sensible that I argue against the prejudices of mankind, when I contend for a mitigation of the punishment for horse stealing and robbery of the highway; I may probably be honoured with the epithets of *liberalist*, *weak*, and *visionary*; but they will give me little pain, provided I can convey some useful hint to those who have power and inclination to improve it.

Of robberies, the instances are very rare; horse stealing is practised every day; and the experience we have had of the inefficacy of the law made to prevent it, sufficiently evinces the truth of this observation, *that criminals are more usually provoked by the certainty than the severity of punishment*. The penalty, being an outrage on the feelings of humanity, is never inflicted but upon the most notorious offenders; it has therefore lost its terrors, and that wretch, whose rigid fate condemns to suffer, may deem himself peculiarly unfortunate; he would have the penal law upon such a footing, that an injured party may not be restrained, by a venial tenderness to the life of the offender, from prosecuting that justice, from the same motive, may incline to misconstrue the evidence; and that pardon, after a full conviction, may not be granted, almost indiscriminately, to every offender.

The proposition therefore is, that for every species of larceny, and for every secret destruction of property, not amounting to arson, or tending to endanger the life of a human creature, the benefit of clergy, and the pains of death, should be exchanged for discretionary imprisonment, whipping, pillorying, and an obligation to repair the private wrong by servitude or works of the most servile kind. This mode of punishment is equally adapted

to every kind of forgery, and to the embezzlement of deeds or other writings. I believe the courts have never thought themselves authorized to extend any of the English penal statutes, enacted since "our first migration," but, unless some of these statutes have been introduced, the law does not punish one tenth of the offences of this class, and must therefore be acknowledged to be extremely defective.

If I did not think myself better qualified for suggesting short hints, than proposing regular schemes, I would delineate a plan for employing delinquents, till the sentence for reparation should be fulfilled; besides suspension is so expeditious a mode of ridding the community of a troublesome member, and the erroneous opinion of its efficacy, by way of example, is so obstinately rooted, that I despair of seeing mankind inspired by sentiments of justice and moderation.

Burglary, or the offence of breaking and entering a mansion house in the night, with an intention to commit felony, may tend to produce murder, but does not discover a depravity of heart beyond the hope or probability of amendment; the putting the inhabitants into fear, and the probable consequences, constitute the guilt, which is properly cognizable by an earthly tribunal. It is extremely odd, that this should be almost the only case in which the law of England punishes the bare intent, which can only be collected from presumptive evidence. I would punish the "breaking and entering," in the same manner as larceny and destruction.

I may be suspected of wanting a zeal for true religion, by attempting to extenuate the guilt of blasphemy. After denouncing severe penalties for the first and second offence, our act of assembly has decreed death for the third; but has this law, which was dictated by the genuine spirit of persecution, been executed in a single instance? How much wiser, and more effectual would it be, to bind a blasphemer to his good behaviour, upon information of the first offence, and to make the recognizance forfeitable upon a conviction of the second.

Adultery is a subject, which, in these days, must be handled with caution. I will not even undertake to determine, whether it should be considered as an indictable offence; our sentimental lawgivers of 1733 ordained, that an adulterer should be fined £. 3. If the penalty is proportionate to the crime, there is no necessity for an alteration of the law.

A REPUBLICAN.

For the MARYLAND GAZETTE.
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THE facility with which the ministry of England have conceded to the representatives of Ireland, and admitted the idea of an equal trade, is an evidence of their determined purpose to carry on the war against America. It is usual for those who have some main point in view, to sacrifice lesser matters, in order to carry those where their passion, or their interest, is more engaged. In the present case, it seems to be the policy of the enemy, to strike away every ground of difference amongst themselves, to sacrifice every interest at home and abroad, in order to prosecute the war against this country. The policy of Lord North, in proposing a repeal of every law, restrictive of the trade of Ireland, and giving her an equal trade, is of this nature. I taught by experience of the bad effect of the councils with regard to America, he has been willing to satisfy, in some degree, the demands of Ireland, in order that he may obtain the hearty concurrence of that kingdom in the war. Whether this kingdom may be fully satisfied with these terms, short of independence, I cannot tell; but, if satisfied, there is danger that, according to the expectation of the ministry, they may concur in the views against America; if so, there is a wide difference between a cold and averse mind, and that which they may now discover. It is natural for persons, who have found men in their opinion, reasonable, with respect to them, to believe that they are, and ever have been so, with regard to others. I find it in the language of the London papers, that "a compromise of the differences with Ireland, may bring about a reconciliation with the colonies."