

[XXXVth Year.]

THE

[No. 1735.]

MARYLAND GAZETTE.

F R I D A Y, A P R I L 14, 1780.

To the PEOPLE of MARYLAND. NUMBER III.

THE power of punishing offences, which are merely so, because they are prohibited by the laws of society, in the state of Maryland, is founded on the contract contained in the declaration of rights and the form of government. To this government is also transferred the right of punishing offences against the law of nature, which every individual, in a state of nature, would possess, and which is clearly derived from the principle of self-preservation. It is this alone which can justify capital punishment. Wherever the necessity of enforcing a law by the death of the transgressor, is not dictated by this ruling principle, I make no scruple of denying the right of a legislature to take away the life of a human creature.

That it is not vested in them by the consent of individuals, in the original compact, is evident, since man, having, by the law of nature, no power over his own life, cannot vest that power in others; it is therefore worthy of consideration, how far a legislature may incur the guilt of murder, by inflicting capital punishment, for the breach of a positive law.

An excessive severity is moreover so repugnant to common sense, that, in a government like ours, the transgressor frequently escapes with impunity; for this reason, the penalties denounced carry not the terrors of a much milder, but certain, punishment.

That the criminal law is every where more imperfect than the civil, may be ascribed to several causes.

The establishment of civil rights, and the regulations of property, are matters which deeply interest every member of the community; when a defect therein is discovered, and generally acknowledged, the remedy is applied. The civil law, therefore, in all free governments, approaches nearer to a state of perfection.

Penal laws are frequently enacted, when the passions are inflamed by a recent transaction; a perpetual law is sometimes applied to remedy a temporary evil; but the grand cause of the imperfection in the penal laws is this; they are framed by the rich and powerful, and contrived principally for their own security; most of the offences are of such a nature, that they conceive themselves exempt from a possibility of incurring the penalty; a man can seldom judge with propriety, unless he can bring the case home, and examine it by the touchstone of his feelings; if a law were proposed, to punish simple fornication by death, there is not a man who would not reject it with anger and disdain; but appeal to a wealthy citizen for his sentiments, with respect to the punishment of a nocturnal thief, and he will tell you at once, that property can never be secure, unless such invaders are cut off from the face of the earth. Hence it is, that truth and justice, the feelings of humanity, and the indelible rights of nature, are so often violated by tanginary laws.

The intention of human punishment is not to revenge the injury which an individual sustains, or to oblige the offender to expiate the public wrong; it is to caution him against future crimes, and to deter others, by the dread of an example.

From what has been said, may be collected this rule, that every punishment should be justifiable by the law of nature, and the original contract; that it should be proportionate to the offence, and be the most likely to produce the end proposed; which is the safety of the community, and of every individual.

By this standard, I purpose to examine some parts of our penal law.

For the crimes of murder, and high treason, the penalty of death is denounced; and, I think, in these cases the legislature has not exceeded its warrant. He that sheds man's blood, upon cool, deliberate malice, is guilty of a crime, which strikes at the very being of society. High treason, as defined by our treason act, is an offence tending to introduce every evil which society was instituted to guard against; it is a crime of deeper malignity than simple murder. Counterfeiting bills of credit, and other paper currency, has an evident tendency to weaken or destroy the means

of carrying on the war; this crime, and the offences against the "act to punish certain crimes," passed in October 1777, partake largely of the nature of treason; the punishment in all these cases is dictated by the first principle in the law of nature.

The secret and malicious burning of dwelling houses, or vessels in which a human creature may probably be in danger of perishing, requires the utmost depravity to perpetrate, and calls for as signal a punishment as murder itself. The burning or destroying of court houses, churches, magazines, and other public buildings, implies a diabolical malice against the whole community; it is nearly allied to treason, and should be punished with equal severity.

As to what is called the crime against nature, I will not shock the reader's delicacy, by dwelling a moment upon the subject; the voice of reason determines the punishment to be capital.

In the disgusting catalogue of capital offences, the crimes I have mentioned scarcely constitute a tenth; but in none, except these, do I think the penalty of death conformable to the rule before laid down.

If my memory does not deceive me, the marquis Beccaria denies the right of capital punishment, because it is not fairly derived from the original compact. He also contends, that the execution of a criminal does not operate so powerfully by way of example as some other punishments, which might in another view contribute to the benefit of the public.

With due submission to an authority, so much revered by every humane, intelligent, mind; the right, as I before remarked, is derived from a higher source, from the universal principle of self-preservation, which directs us to secure our safety, by the death of that transgressor, who manifests a disposition, beyond the power of human correction, or the probability of amendment. His pravity of soul must be imputed to a murderer, and the general sense of mankind, when it is not hardened by scenes of blood and slaughter, condemns him; in whatever situation you might place him, unless he were totally deprived of the exercise of his will, you might dread a repetition of his crime; to reduce him to that condition, would be far crueler than the loss of life; it is therefore necessary for society, and better for himself, that he be dismissed from a world, in which he no longer deserves to remain.

With respect to examples of superior efficacy, notwithstanding the ingenuity of the amiable author, who sets down the secret reasonings of a man, when about to perpetrate the blackest of crimes, I must freely declare my opinion, that no human sanctions will restrain him who can argue down the fear of death.

These reflections have, with difficulty, reconciled me to the idea of capital punishment. I am still shocked at the manner, directed by the terrible sentence in high treason; it may be milder than the wheel, or other infernal engines, invented in some countries in Europe, but every enlightened mind considers these as a disgrace among civilized nations.

That this sentence of the law has been so often mitigated by the dispensing power, is an argument for confining it to the single part of suspension; which is the only mode of capital punishment I wish to be known by our laws; it is the most simple, the easiest, and the most conspicuous.

Corruption of blood, and forfeiture, by the common law of England, which is the law of Maryland, wherever it has not been altered by statutes, are consequences of treason and felony; they are perhaps intended to restrain a man by his passions and affections. The reflection, that his conduct may involve his beloved offspring in misery and disgrace, in the moments of cool deliberations, may operate almost as powerfully as the fear of death; but is that species of punishment, which falls not upon the criminal, but his innocent dependents, consistent with the ideas of justice and humanity? To say, that they should be interested in keeping him within the bounds of his duty, is too pitiful a sophistry to convince a rational enquirer.

If the forfeiture of property ought to be added to the capital punishment in treason and mur-

der, I conceive, it should be with this restriction, that it shall not take place to the prejudice of a guiltless wife or children.

The distinction between a fine and forfeiture is obvious. I would not be understood to deny the propriety of fines, on the same principle of their affecting innocent persons; they are well adapted to the nature of some inferior offences; injurious consequences to the family of the delinquent are unavoidable in every kind of punishment.

Corruption of blood is so replete with absurdity, that I am persuaded it was owing to an oversight, that the doctrine was not exploded by the 24th article of the declaration.

In this place, I solicit the readers attention to the third article in the declaration: "the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law, and to the benefit of such of the English statutes, as existed at the time of their first migration, and which by experience have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great-Britain, and have been introduced, used, and practised, by the courts of law or equity." &c.

If at any time I am guilty of a mistake, in matters of law, the candid reader will be inclined to pardon, when he reflects how difficult it is for any one man, or even the whole fraternity of lawyers, to ascertain how much of the common law, and what English statutes, or parts of statutes, have been extended to this state by the practice of the courts.

The matter rests at the discretion of the judges. But to what record, or memorial, must they resort, for a guide to their decisions? In this respect we labour under the deplorable disadvantage of a vague and uncertain law.

Is it not therefore the indispensible duty of the legislature, unless they mean to institute an entire new code of penal law, to declare the law, otherwise than by general, unmeaning terms? Such an act would relieve the judges from a miserable perplexity; would prevent suits and contentions; and, in every case, entering the plea of unavoidable ignorance, which, in a court of conscience, might frequently be urged with success.

If in so great and national a concern, the emoluments of lawyers should be thought worthy of attention, I would cheerfully consent, that the same act should make each of them a compensation, to be estimated by his age, his reputation, the extent of his practice, and other circumstances.

A REPUBLICAN.

For the MARYLAND GAZETTE. NUMBER V.

IT is the language of the king of Great Britain, that "trusting in divine Providence, and in the justice of his cause, he is firmly resolved to prosecute the war with vigour, and to make every exertion, in order to compel his enemies to listen to equitable terms of peace, and accommodation." It is to be considered what are those terms of peace and accommodation which he will call equitable: Not certainly, that France shall continue in alliance with these states; or that these states shall retain their independence; but, that France shall withdraw, and leave them to their fate as before the alliance; that they shall fall back under the dominion of Great-Britain, and be subject to her laws. These are the terms which, in the judgment of his mind, he will call equitable. Driven from these, he will probably defend, and admitting the independence of some states, insist for a dominion over the remaining. From a paragraph of a very extraordinary nature, in the Baltimore journal, it would appear, that proposals of this kind have already originated in the British cabinet; and that "relaxing gradually, they will propose independence to eleven colonies" (as they still affect to stile them) "excepting Georgia and Carolina on the south."

This proposal will be inadmissible with the Americans. The whig inhabitants of Georgia, Carolina, and New-Hampshire, have a claim to liberty from nature, and from these