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ENGLISH ADMINISTRATION OF THE CRIMINAL LAW.[1]

From circumstances of which some are temporary and accidental, but others, it may be feared, belong to the system of our jurisprudence, a more than ordinary anxiety prevails at the present time respecting our criminal law and its administration. This feeling has given rise to considerable alarm; and the usual effect of such a state of mind in the community has been, great exaggeration of the facts really existing, and a more than ordinary amount of fiction and thoughtlessness; of things supposed that had no reality; of consequences deduced from the object of apprehension, which had no manner of connection with it. Thus, all offences were imagined to be committed by convicts liberated before the term of their punishment had arrived; and, though it is impossible to deny that some were suffered to go free without due precaution before their discharge, or without needful supervision after it, the very same evils were plainly to be apprehended from the liberation of the great majority of culprits whose entire time of confinement had elapsed.

That some course must be taken by the legislature for improving our system of secondary punishments, either by partial recurrence

[1] From the London Law Magazine for February, 1857, p. 353.

to transportation, by well-devised plans of forced labor, or by more adequate terms of imprisonment, or by all these means combined, appears now nearly certain. But those who are the most convinced of that necessity, whatever difference of opinion may divide them as to the measures required, must agree in this, that the existing law ought to be administered with even more than ordinary care; that pains should be taken to prevent the introduction of erroneous maxims in the proceedings of criminal courts; and that the high and most delicate office of the executive power in respect of sentences pronounced by the judicial authorities, should be watched with an anxiety proportioned to the danger which must attend erroneous views in this important matter. When those who, like ourselves, have the duty cast upon them of examining the judicial and administrative processes of the day, see reason to question the soundness of either the views upon which courts act, or those which guide the government, it is their bounden duty to state their opinion firmly, though respectfully, and to bring the subject under the notice of the legal profession, indeed of the community at large. Some things have lately occurred which seem to call for such discussion, either because dangerous oversights have been committed by judges and juries, or because the power of remitting punishments, sometimes of changing them, should seem to have been exercised upon mistaken principles. We assume that all must be agreed in favor of a stern, unbending execution of the law for repressing the offences attended with violence, now so generally complained of, and that the false humanity, always to be put aside in dispensing the criminal law, is more peculiarly out of place when this class of delinquency has assumed more than ordinary proportions. If the published accounts of such trials are wholly erroneous (and we have taken great pains to consult and compare them,) then it is another instance of false humanity, if courts do not protect their proceedings from such misrepresentation, not only because the character and authority of the judges are thus impaired, but because a dangerous inference is suffered to mislead the community, and to encourage offenders by concealing the hazards to which their

crimes expose them. The first observation to which the attention of the reader is directed, arises upon a late trial for an aggravated assault.

The prisoner, a young gentleman, apparently of dissipated habits, was proved to have inflicted a severe wound upon a young woman, probably of the town; and the question, indeed the only possible question in the case, was whether he had or not given the blow with intent to do grievous bodily harm. That an aggravated assault had been committed there was no doubt pretended to be raised; the question was, whether a felonious act had not been committed. The crime was this: He had come out of a cassino, and showing a large clasp-knife, with a blade five inches long and exceedingly sharp, to a policeman, he said in a wild and vaporing manner, "If the landlord comes out I will stab him to the heart." The policeman took the knife from him and shut it, saying he must be in jest, and advising him to go home; but he said he should stab every one he met, and, before the man could seize the knife again, the prisoner accosted the girl with foul language, and on her saying she knew him not, he asked how she would like that, showing the knife, with which he instantly made a thrust at her, and inflicted a wound in her groin three-quarters of an inch long, cutting through her dress, and causing her to bleed profusely. At the trial, ten days afterwards, the girl was still suffering very much, and was carried out of court. She swore that she never had seen the prisoner before, and that nothing else had passed than the threat and the attack. The surgeon proved that the wound was dangerous; and the policeman said that the prisoner seemed thunderstruck at what he had done, when he saw the poor girl bleeding, and called himself a drunkard and a blackguard. There was not the least attempt even to prove him drunk; the only reliance for his defence lay upon his friends, and three officers, with whom he had served in a militia regiment, describing him as a quiet, inoffensive young man. The learned judge apparently did not, the jury certainly did not, consider the charge proved of intent to do grievous bodily harm; and he was sentenced, as for an aggravated assault only, to a year's imprisonment, with hard labor. He was proved by his friends to be only

eighteen years of age; but he had joined the regiment above a year before. The knife was proved to be of a dangerous nature from its size and sharpness, and it closed with a clasp. We take leave to consider the facts, if there be no question of sanity, and none was even hinted at, quite sufficient to prove, according to every principle of law, the intent to do grievous bodily harm; and we regard it as productive of the very worst possible consequences to shake the known rule, that every one must be held to intend that to effect which his actions have a natural—it was here an inevitable—tendency; but say only a natural and probable tendency, and the thing done converts this probability into certainty.

It was impossible the jury should have acquitted the prisoner of wounding with felonious intent, unless upon one or other of four suppositions, assuming his sanity not to be in dispute: *first*, that he only brandished the knife, and that the girl ran upon it; *secondly*, that he hit her but in play; *thirdly*, that he intended only to give a slight cut or scratch; *fourthly*, that he was drunk, and had not any precise intention. The *first* supposition is negatived by the whole evidence; that of the policeman as well as of the girl herself, both concerning the prisoner's words, his previous demeanor, and the act itself. Indeed, upon this supposition, there ought to have been an absolute acquittal; for it negatives not only the felonious intent, but all criminal intent, and reduces the act either to that of the prosecutrix herself, or to *chance medley*. The *second* supposition is wholly inadmissible as a ground of negativing the intent; because he was bound to know that such an instrument, if used to give any blow, might do grievous harm, as much so if used in play as if used with a serious design; and it is wholly impossible to draw a line, so that a certain degree of harm may be done in play, and anything beyond it is deliberate. The *third* supposition is as inadmissible as the second; for this plain reason, that the wrongdoer runs the risk of his act exceeding his intention, as much as of its exceeding his calculation; and nothing could possibly be more mischievous, than introducing the least subtlety or refinement into the question of men's intentions. If a man fires a pistol into a crowd, and death ensues, he is guilty, not of man-

slaughter, but of murder; and cannot be heard to aver either that he had no intent to kill, or that he did not believe he should hit any one. So if one, meaning to wound but no more, gives a blow that produces death, it is murder, though his intent of only wounding be admitted; and though his calculation, that the wound would not be mortal, be allowed to have had some foundation. It is possible that the learned judge may not have pressed this upon the jury with sufficient force, or with due precision. Certainly, if the reports which appear of the trial be correct, he concluded the "evidence of intent to have been slight;" but the act itself furnished sufficient evidence if its nature was such that bodily harm most probably would ensue from it, because the party doing that act must have been taken to know its consequences. Possibly the judge's attention had not been sufficiently called to the manner in which the knife, exceedingly sharp and five inches long, penetrated through the girl's dress or thick petticoat. But we come to the *fourth* supposition, which requires a few observations.

There was no evidence given of intoxication; but it is possible that the jury may have taken into their consideration the extravagance of the prisoner's conduct, and his exclaiming that he was a drunkard. The learned judge most fully stated that drunkenness was no defence; but he appears not to have sufficiently explained to them that it was to be laid out of view in considering the question of intent. We assume that he held the sound opinion, as we very clearly hold it to be, that intoxication is no more to be regarded on the point of motive or intent, than it is on the general question of guilt. But we are aware that in some late cases a doubt has been thrown upon this subject; and we hold it as exceedingly unfortunate that any such doctrine, if it can be so termed, should have been countenanced, or even suggested. If a person commits an offence while under the influence of such beastly intoxication that he was wholly ignorant of what he did, there cannot be a doubt that he is treated exactly as if he had been perfectly sober. Why is it so? For this reason—that the condition in which he was had been caused by his own voluntary act, and therefore could be no defence, nay, could not be taken into consideration at all, and

that he was answerable for all he did in that state. But this is not the whole ground of the rule. The consequences of allowing such a defence are most material points, the foundation of the rule; for, if drunkenness were admitted to excuse crimes, all criminals must escape punishment by adding intemperance to their offence. Then surely the very same reasons, both the one and the other, apply to the proposition, that in judging of a party's intent the condition into which he had voluntarily thrown himself must be dismissed from our view. In truth, the question of guilty or not guilty is transferred to the question of intent, and no reason can be assigned for allowing intoxication to cast doubt upon the intent, that might not be equally given for allowing intoxication to work a general acquittal. One of the cases referred to in considering this subject was of a peculiar kind, and is wholly inapplicable to the general question. In *Queen* vs. *Moor*, 3 Car. & Kir. 319, the chief justice (Jervis) considered that the prisoner, who was tried for an attempt to commit suicide, being found to have been so drunk as not to know what she was about, it could not be said that she contemplated self-destruction, and there was an acquittal. Strictly speaking, there may be more than a doubt if this direction to the jury was right; but, at any rate, the thing done was no offence at all; the whole crime consisted in the intention; and there is not the same certainty given to that intent by the act itself, as where a crime has been committed. If death had ensued, it seems clear that the state of deceased, when she was found to have meditated self-destruction, could not have been held to overrule that proof, when the question arose before the coroner. The great mischief of any rule being laid down which tends in the least to weaken the guards against intemperance as the cause of offences, need hardly be dwelt upon. The increase of outrages committed under the influence of intoxication, has been very remarkable of late years; for there can be no doubt that the outrages, so much and so justly complained of as more frequent than formerly, have in most instances been committed by drunken persons. It becomes, therefore, the bounden duty of all magistrates to avoid even an approach to the infringement of the rule which peremptorily excludes such a defence in all cases;

and we must regard the very anomalous dicta to which we have been referring as somewhat like an infraction of the rule. Even in the case cited, if the woman, having had a quarrel with her husband, and been turned out of the house to prevent her from attacking him, had, instead of attempting to drown herself, rushed upon him and inflicted a mortal wound; her drunkenness never could have been even given in evidence upon the trial for murder, and could only have been urged as some ground for a mitigation by the crown of the capital sentence which must have been pronounced by the court. It is difficult, then, to understand how the same state of intoxication could be taken into the account on the question, what were her intentions on throwing herself into the well, which could not even be listened to on the other question of intention, whether she killed her husband of malice aforethought.

The age of the prisoner in the stabbing case was very properly in all likelihood, not allowed to have any weight either with the jury, or in awarding the punishment on conviction. A person who had for a year been in the command of soldiers, could expect no benefit from such a topic. Indeed, it was probably recollected, both by the court and the jury, that about the same time a foreign seaman, of the same age, had been capitally convicted of murder, and that all attempts had failed to obtain a commutation of the sentence, the grounds of the application having probably been, not so much the lad's age, as his having been drawn or frightened by his elder associates into a participation of their guilt. The sentence of a year's imprisonment with hard labor in the case on which we have been commenting, has perhaps met with no disapprobation in any quarter on account of its severity. The prisoner's family gave, very properly, the sum of fifty pounds to the poor girl who had been so cruelly treated.

The subject of remission or commutation of punishment, to which we have just alluded, is one that urgently requires to be at least fully considered. Nothing can be more unsatisfactory than the manner in which this high prerogative of the crown is exercised. We do not in the least mean to complain of the excellent and able persons who perform the duties of the Home Department; but we

believe the opinion has become very generally prevalent, that the arrangements of the system are extremely faulty, both because the work of inquiry into the merits of each case is to be done without adequate assistance, and because the discretion vested in the office is exercised without any control or supervision.

It is necessary, first of all, to consider the great number of cases which must continually be brought before the Home Office, and must be disposed of either by the chief or some subordinate, probably the Under-Secretary of State. All the applications of convicts by their friends; the not rare interposition of humane persons, or persons who have strong feelings, and indeed opinions regarding punishments; the cases on which the judge had doubts, and suggested further inquiry, as well as those which he deemed fit for a merciful dispensation; the cases which others, and the officers of the department themselves, may think deserving of notice upon seeing reports of the trial,—all this investigation, anxious as it must be, laborious as it ought to be, is required of those whose other duties, both administrative and parliamentary, are sufficient to occupy their attention and indeed to employ their time. It is only by accident that the chief is a lawyer, and then he must rely upon an irresponsible subordinate. In all cases, no doubt the judge is consulted; but it often must be a question how far his opinions should be deemed conclusive. Then let it next be considered how many punishments are arbitrary, that is, in the discretion of the judge. In all cases of misdemeanor, and, as the law now stands, in almost all cases of felony, it depends upon the judge to what amount of punishment, most commonly indeed to what kind of punishment, the person convicted shall be sentenced. But there are fifteen judges, quite four times as many chairmen of Quarter Sessions, and about an equal number of Recorders; let us, however, only say the fifteen judges of the supreme courts. These may act on very various views of what is just and fit in apportioning the punishment to the offence. When the committee in the House of Lords, some years ago, examined the judges of the Court of Bankruptcy upon the important question of class certificates, it appears by the printed evidence[1] that these

[1] Report, 1853.

learned and experienced persons differed materially in the principles upon which they made their adjudication. It is certain that, if the criminal judges were examined in the same way, they might decline answering general questions as to the views which governed them, and would most probably say, "Each case must depend on its own circumstances;" yet if their opinions were sifted by the suggestion of particular instances, and one after another were asked how he would punish such an offence, proved to have been committed in such circumstances, there would be found no little discrepancy in their answers—those answers being concealed from each on all being examined successively. Therefore, it is manifest that a considerable latitude must, of necessity, be left to the Home Office, in deciding upon the matters brought before it, even in cases where the help of the judge is obtained. We may observe in passing, that a very powerful argument is raised, by the matter which we have just been stating, in favor of a Minister of Justice, whose watchful superintendence of all proceedings before the judges may be required to preserve uniformity of decision, not indeed by overruling the opinion of the judges, but by friendly and confidential discussion with them.

It must now be further stated, that beside the excessive labor, rendering a full examination of each case impossible, the system leaves too much to the discretion of the office. All authority exercised without control is liable to be abused; and we of course speak of no corrupt or unworthy influences as at all likely to interfere; but there is abuse if prejudice, preconceived opinions as to punishment, judgment too stern or too compassionate, or an alternation of severity and tenderness, nay, what may be termed caprice, shall be found to influence the decisions of the office. Nor is the possibility of this occurring lessened when we find it laid down as a rule in Parliament, that no explanations shall be given of the grounds upon which mercy has been extended to one case, and withheld from another. It is said that this would be an interference with the high and delicate office of administering mercy. Some years ago a person in the city was convicted of murder; he having rushed upon an eminent merchant and shot him dead with a pistol. It appeared soon after that he had been suffered to go free, and he went abroad;

no explanation was given. Very lately a woman was convicted of an atrocious murder: she had, with the greatest deliberation, killed her child, eleven years of age. The capital punishment was remitted. To the Italian lad's case we have already referred; there the sentence was executed. Now it is very likely that but for the rule against giving any explanation as to the grounds whereon the prerogative of mercy is exercised, reasons might have been assigned for the determination of the department in all these cases. Nevertheless, we cannot avoid applying Lord Coke's maxim to the administration of the law, as well as to the law itself. *Plus laudatur quando ratione probatur.*

There may be considerable difficulty in devising such an arrangement as may afford to the department the needful information, and subject it to the desired control. Nor, when we speak of control are we to be understood as meaning anything like an absolute veto upon the determination of the officer of State; but, in the greater number of cases, he would certainly adopt the suggestions of an able, learned, and experienced board, which ought to be composed for example, of a chief judge and two puisnes, taking the work in rotation. If, indeed, the legislature shall at length accede to the general desire among all friends of legal amendment, and of the most respectable men out of the profession, no less than of the legal authorities, and shall establish a Minister of Justice, he would of course preside over the department; and to him, as a minister of the crown, would naturally be transferred the power now vested in the Secretary of State. But, of course, neither would he be bound by the opinion of the other members of the board, nor would the crown be bound by his decision, any more than it now is by that of the Home Department.

This leads us to remark, that in what we are now suggesting, there is no interfering with the prerogative. The eminent and transcendant office of dispensing justice in mercy would still be vested, absolutely and entirely vested, in the sovereign, to be exercised, of course, like all the prerogatives, by the advice and through the hands of responsible advisers,—so of the crown's right in appeals; it has always been exercised through the Privy Council,