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Report

MADE TO THE

GENERAL ASSEMBLY

OF THE

STATE OF LOUISIANA,

OF THE

PLAN OF A PENAL CODE

For the said State.

By **EDWARD LIVINGSTON,**

MEMBER OF THE HOUSE OF REPRESENTATIVES FROM THE PARISH
OF PLAQUEMINES.

NEW-ORLEANS:

PRINTED BY BENJAMIN LEVY & CO.

42, Royal-street.

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1822.

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1903

AN ACT

RELATIVE

To the Criminal Laws of this State.

275
WHEREAS it is of primary importance, in every well regulated state, that the code of criminal law should be founded on one principle, viz. the prevention of crime, that all offences should be clearly and explicitly defined, in language generally understood; that punishments should be proportioned to offences; that the rules of evidence should be ascertained as applicable to each offence; that the mode of procedure should be simple, and the duty of magistrates, executive officers and individuals assisting them, should be pointed out by law; and whereas the system of criminal law, by which this state is now governed, is defective in many, or all of the points above enumerated, therefore.

16 March 1903
SECTION 1. *Be it enacted by the senate and house of representatives of the state of Louisiana, in general assembly convened,* That a person learned in the law, shall be appointed by the senate and house of representatives at this session, whose duty it shall be to prepare and present to the next general assembly, for its consideration, a code of criminal law in both the French and English languages, designat-

ing all criminal offences punishable by law; defining the same in clear and explicit terms; designating the punishment to be inflicted on each; laying down the rules of evidence on trials; directing the whole mode of procedure, and pointing out the duties of the judicial and executive officers in the performance of their functions under it.

SECTION 2. *And be it further enacted,* That the person so to be chosen, shall receive for his services such compensation as shall be determined by the general assembly, at their next session, and that a sum of five hundred dollars shall be paid to him on a warrant of the governor, upon the state treasury, to enable him to procure such information and documents relative to the operation of the improvements in criminal jurisprudence, particularly of the penitentiary system in the different states, as he may deem useful to report to the general assembly in considering the project of a code: he shall account to the general assembly, in what manner the said five hundred dollars has been disposed of.

Approved, February 10, 1820.

WE, the undersigned, secretary of the senate and clerk of the house of representatives of the state of Louisiana, do hereby certify, that on the thirteenth of February, in the year of our Lord, one thousand eight hundred and twenty-one, EDWARD LIVINGSTON, Esq. was elected and appointed by the joint ballot of the general assembly of said state, to draw and prepare a Criminal Code. In testimony whereof, we have herewith set our hands.

New-Orleans, March 28th, 1822.

(Signed)

J. CHABAUD,
Secretary of the Senate.

(Signed)

CANONGE,
Clerk of the House of Representatives.

RESOLUTIONS.

RESOLVED by the senate and house of representatives, in general assembly convened, That the general assembly do approve of the plan proposed by Edward Livingston, Esq., in his report, made in pursuance of the act, entitled "an act relative to the criminal laws of this state," and earnestly solicit Mr. Livingston to prosecute this work, according to said report; that two thousand copies of the same, together with the part of the projected code thereto annexed, be printed in pamphlet form; one thousand of which shall be printed in French and one thousand in English, under the direction of the said Edward Livingston, Esq. of which five copies be delivered to each member of the present general assembly, fifty copies to the governor, one copy to each of the judges of the supreme court, the district judges, the judge of the criminal court, the attorney-general and district attorneys, the parish judges, two hundred copies to the said Edward Livingston, Esq.; and that the balance shall be for the use of the state, of which one half shall be deposited into the hands of the secretary of the senate and clerk of the house of representatives, and the other half in the office of the secretary of the state.

And be it further Resolved, That the governor be requested, and is hereby made his duty to contract

for the printing of said work, and to pay for the same out of the contingent fund.

And be it further Resolved, That a sum of one thousand dollars be paid to Edward Livingston, Esq. on his warrant, out of the treasury of the state, to be on account of the compensation to him allowed, when his work shall be completed.

(Signed)

A. BEAUVAIS,
Speaker of the House of Representatives.

(Signed)

J. POYDRAS,
President of the Senate.

Approved, March 21, 1822.

(Signed)

T. B. ROBERTSON,
Governor of the State of Louisiana.

TO THE HONORABLE
The Senate and House of Representatives,
OF THE
STATE OF LOUISIANA,
IN GENERAL ASSEMBLY CONVENED.

HAVING been honored by an appointment at the last session, to perform the duties required by an "act relative to the criminal laws of the state," I have thought it necessary to report to the general assembly, the progress that has been made in the work, and the reasons which have prevented its completion. In undertaking those duties, I relied much on the aid which I expected to derive from the other states; for, although none of them has framed a code on so comprehensive a plan as that contemplated by our law, yet most of them have established the penitentiary system, which is intended to form the basis of our legislation on this subject. Before I could avail myself of the advantage which those experiments afforded, it was necessary to know, with precision, their results. This information could only be obtained by collecting the returns and official reports of the different establishments, and inducing men of eminence and abilities to communi-

cate their observations on the subject. Knowing also the advantage to be derived from a comparison of the opinions of eminent jurists and statesmen on other leading principles, which must be embodied in the system, I addressed several copies of the annexed circular letter to the governors of each state, with the request, that they might be put into the hands of men, from whom the desired information might be expected: these, as well as a number of similar applications, I did hope, would have procured a body of information useful not only to me in framing the work, but to the legislature in judging of it.

This hope has, however, as yet been but partially realized. I have received returns of the state, of the penitentiary only from Massachussets. Governor Wollcott and Judge Swift of Connecticut, Chancellor Kent of New York, Judge Holman of Ohio, Mr. Rawle of Pennsylvania, Mr. Bowen of Rhode Island, Mr. Brice of Maryland, and Colonel Johnson of Kentucky, have communicated to me some useful information; with these exceptions, the gentlemen to whom my letters were addressed, have been too much occupied in their own states to attend to the affairs of ours.

Our minister in England has had the goodness to send to me the reports of the committees of the house of commons, appointed to enquire into the propriety of a revision of their penal laws, documents of great utility, to shew the operation of the law we have partially adopted, in that country from which we have borrowed it.

It appears, that these reports are not easily procured, and that Mr. Rush was indebted for them to Mr. Jeremy Bentham, whose writings have thrown so much light on the subject of criminal legislation, and who, in a note addressed to Mr. Rush, on our undertaking, has made a suggestion which he will find has not been disregarded.

I certainly lost some time in waiting for answers to my letters, but I cannot, in candor, state this, (even with the necessary attention to my professional business) to have been the only cause why the task I have undertaken is not yet fully performed.

I never so far over-rated my own powers, as to suppose that the whole plan would be executed in the short interval between the two sessions, but I did think, that parts of it might be prepared, and submitted for the sanction of the present legislature, leaving the others to be acted upon at a future period. A closer view of the subject, however, convinced me of my error. In establishing the principles on which the work was to be framed, and tracing the plan of its different divisions, I found that its parts were so closely connected, and that continued references from the one to the other, were so unavoidable, as to render it difficult fairly to judge of, or decide on any part without examining the whole. I therefore determined to report to the general assembly, the progress I had made, to develop the plan on which I proposed to execute the work, to

give them some of the detached parts as specimens of the execution, and then to take their direction whether it should be completed or not.

The introductory notice herewith submitted, gives the different divisions of the code, into books, chapters and sections; the whole is subdivided into articles, numbered progressively through each book, so that citations may be made by referring to the article and book only. A continued numeration of the articles, through the whole work, has been found, in other instances, inconvenient, and carrying the numbers through each chapter or section only, increases the difficulty of reference. In the same notice, will be found some general provisions, made to obviate the necessity of those repetitions, which increased the barbarism of our legal language; but the omission of which has sometimes counteracted the intent of the legislature. The instance of two statutes, which were made in England, to punish, the one the stealing of *horses*, and the other the stealing of a *horse*, is familiar to lawyers; and indeed it has been doubted by some, whether a third statute were not necessary, to include the female part of the species.

One other article in this notice, points to a method, which will also, it is supposed; tend to render the code both explicit and concise. Technical terms are never used in the work, where common expressions could be found to give the same idea. The employment of them, however, is, in many instances, unavoi-

able. In all such cases, and whenever a word, or a phrase, is either ambiguous, or employed in any other sense than that which is given to it in common parlance, it becomes necessary to explain the precise meaning which is attached to it in the code. To this end, whenever any such expressions occur in the course of the work, they are to be printed in a particular character, which will serve as a notice, that they are defined and explained. These definitions and explanations form the first book.

This, though necessarily the first in numerical order, it is obvious, must be the last executed. The words requiring explanation are noted, and the definitions written, as the work progresses; when complete, it will be submitted to men unversed in the language of the law, and every word not fully understood by them, will be marked for explanation. The foregoing parts of the plan are believed to be new, and therefore require the stricter attention to the propriety of their enactment: they suggested themselves to me, as the means of making the work, at once concise, and easily comprehended by those who are most interested in understanding it.

The second book begins with a preamble, which states the reasons that called for the enactment of a criminal code, and which sanctions, by a solemn legislative declaration, the principles on which its several provisions are founded. These principles once studied, and after proper discussion adopted, will serve

as a standard to measure the propriety of every other part of the code : with these rules constantly before us, and duly impressed on our minds, we can proceed with confidence and comparative ease, to the task of penal legislation ; and we may see at a glance, or determine by a single thought, whether any proposed provision is consonant to those maxims which we have adopted as the dictates of truth. The incongruities which have pervaded our system will disappear ; every new enactment will be impressed with the character of the original body of laws ; and our penal legislation will no longer be a piece of fretwork exhibiting the passions of its several authors, their fears, their caprices, or the carelessness and inattention, with which legislators in all ages and in every country, have at times, endangered the lives, the liberties, and fortunes of the people, by inconsistent provisions, cruel or disproportioned punishments, and a legislation, weak and wavering, because guided by no principle, or by one that was continually changing, and therefore could seldom be right. This division of the code, is deemed to be of the highest importance, all the other parts will derive their character from this ; it is the foundation of the whole work, and if well laid, the superstructure raised in conformity to it, cannot be essentially faulty. It is the result of much reflection, guided by an anxiety to discover the truth, and to express it with precision.

The remainder of the second book is devoted to

the establishment of general dispositions, applicable to the exercise of legislative power in penal jurisprudence; to prosecutions and trials; to a designation of the persons who are amenable to the provisions of this code; to a statement of the circumstances under which, acts, that would otherwise be offences, may be justified or excused; to the repetition of offences; to the situation of different persons participating in the same offence, as principals, accomplices, or accessaries.

The enunciation of these general provisions, it is supposed, will greatly tend, not only to elucidate, but abridge the work; by throwing them into a single chapter, memory is assisted, order is better preserved, and repetition very much avoided. Among those which relate to the exercise of legislative power, are some that ought particularly to fix the attention of the general assembly; such is one for the exclusion of that class of offences, which figures in the English, and most other penal codes, under the vague description of offences against the laws of morality, of nature, and of religion. The will of the legislature is established as the only rule; and the crude and varying opinions of judges, as to the extent of this uncertain code of good morals, is no longer to usurp the authority of law. Connected with this, is the provision which prohibits the punishment of any act not expressly forbidden by the letter of the law, under the pretence, that it comes within its spirit.

By the criminal laws which now govern us, most offences are described in the technical words of the English jurisprudence, and we are referred to it for their explanation; hence our judges have deemed themselves bound to adopt those definitions which have been given by the English courts, and the whole train of constructive offences has been brought into our law. The institution of the trial by jury, the rare infliction of torture; and in latter times, the law of habeas corpus, gave a decided superiority to the penal law of England over that of its neighbours. The nation, unfortunately, mistook this superiority for perfection; and while they proudly looked down on the rest of Europe, and reproached them with their tortures, their inquisitions, and secret tribunals; they shut their eyes to the imperfections of their own code. Prisoners were denied the assistance of counsel; men were executed because they could not read; those who refused to answer, were condemned to die under the most cruel torture. Executions for some crimes, were attended with butchery that would disgust a savage. The life and honor of the accused, were made to depend on the uncertain issue of a judicial combat. A wretched sophistry introduced the doctrine of corrupted blood. Heretics and witches were committed to the flames. No proportion was preserved between crimes and punishments. The cutting of a twig and the assassination of a parent; breaking a fish-pond and poisoning a whole family, or murdering them in their sleep,

all incurred the same penalties; and two hundred different actions, many not deserving the name of offences, were punishable by death. This dreadful list was increased by the legislation of the judges, who declared acts which were not criminal under the letter of the law, to be punishable by virtue of its spirit. The statute gave the text, and the tribunals wrote the commentary in letters of blood; and extended its penalties by the creation of constructive offences. The vague, and sometimes unintelligible language, employed in the penal statutes; and the discordant opinions of elementary writers, gave a color of necessity to this assumption of power; and the English nation have submitted to the legislation of its courts, and seen their fellow subjects hanged for constructive felonies; quartered for constructive treasons; and roasted alive for constructive heresies, with a patience that would be astonishing, even if their written laws had sanctioned the butchery. The first constructive extension of a penal statute beyond its letter, is an *ex post facto* law, as regards the offence to which it is applied; and is an illegal assumption of legislative power, so far as it establishes a rule for future decisions. In our republic, where the different departments of government are constitutionally forbidden to interfere with each others functions, the exercise of this power, would be particularly dangerous; it was, therefore, thought proper to forbid it by an express prohibition. Some actions, injurious to society, may, by this means, be

permitted for a time, but it was deemed infinitely better to submit to this temporary inconvenience, than to allow the exercise of a power, so much at war with the principles of our government. It may be proper to observe, that the fear of these consequences is not ideal, and that the decisions of all tribunals, under the common law, justify the belief, that without some legislative restraint, our courts would not be more scrupulous than those of other countries, in sanctioning this dangerous abuse. In another part of the code, it is intended to insert a provision, to bring before the legislature, at stated periods, all those cases, in which the operation of the law is supposed to fall short of, or to extend beyond the intention of those who framed it; the defects, if really such, will then be cured by the power legally authorized to apply the remedy; the harmony of our constitutional distribution of powers will be undisturbed; and the ends of public justice attained with greater regularity and better effect.

Our constitution, containing a very imperfect declaration of rights, leaves the legislative power entirely uncontrolled in some points, where restraint has, in most free governments, been deemed essential; a majority may establish their religion, as that of the state; non-conformity may be punished as heresy; and even the toleration of other creeds may be refused; without violating any express constitutional law. Corruption of blood may be established, and it is even somewhat doubtful, whether, strictly speaking,

it does not, under the general terms in which the rules of the common law are adopted, now exist. No legislative act can apply an effectual remedy to these and other constitutional defects; but their existence has called for a longer enunciation of general principles in the code, than would otherwise have been necessary. Our successors will not be bound to observe them, but we shall evince our own conviction of their truth; and by impressing them on the minds of our constituents, render any attempt to undermine or destroy them, more difficult and more odious. Acknowledged truths in politics and jurisprudence, can never be too often repeated. When the true principles of legislation are impressed on the minds of the people; when they see the reasons of the laws by which they are governed, they will obey them with cheerfulness, if just, and know how to change them, if oppressive. The reporter, therefore, has thought it an essential part of his duty, to fortify the precepts of the projected code, by assigning the reasons on which they are founded; thus to open the arcana of penal legislation, and to shew that the mystery in which it has hitherto been involved, was not inherent in the subject, but must disappear, whenever its true principles are developed.

Among the general provisions, is also found one, asserting the right to publish, without restraint, the account of all proceedings in criminal courts, and freely to discuss the conduct of judges, and other

officers employed in administering justice. That this may be done more effectually, it is provided, that the judge shall, at the request either of the accused or of the prosecutor, state, and record his decisions, with the reasons on which they are founded. In a subsequent part of the work, it will be made the duty of a particular officer, to publish accurate accounts of all trials, remarkable either for the atrocity of the offence, or the importance of the principles decided in the course of the proceeding. Publicity is an object of such importance in free governments, that it not only ought to be permitted, but must be secured by a species of compulsion. The people must be forced to know what their servants are doing, or they will, like other masters, submit to imposition, rather than take the trouble of enquiring into the state of their affairs. No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers; but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured. In modern times, the press is so powerful an engine to effect this, that the nation which neglects to employ it, in promulgating the operations of every department in government, can neither know, nor deserve the blessings of freedom. The important task of spreading this kind of information, ought not, therefore, be left to the chance of private exertion; it must be made a public

duty; every one employed in the administration of justice, will then act under the conviction, that his official conduct and opinions will be discussed before a tribunal, in which he neither presides nor officiates. The effects of such a conviction may be easily imagined, and we may fairly conclude, that in proportion to its strength, will be the fidelity and diligence of those upon whom it operates.

By our constitution the right of a trial by jury is secured to the accused, but it is not exclusively established. This, however, may be done by law, and there are so many strong reasons in its favor, that it has been thought proper to insert in the code, a precise declaration, that in all criminal prosecutions, the trial by jury is a privilege which cannot be renounced. Were it left entirely at the option of the accused, a desire to propitiate the favor of the judge; ignorance of his true interest, or the confusion incident to his situation, might induce him to wave the advantage of a trial by his country, and thus, by degrees, accustom the people to a spectacle they ought never to behold; a single man determining the fact, applying the law, and disposing at his will, of the life, liberty, and reputation of a citizen.

In proposing this change in our law, I may be permitted to make a few reflections, to shew its importance. The trial by jury formed no part of the jurisprudence of the different powers which governed Louisiana, prior to its last cession. It was first introduced when the province became incorporated with

the united states, as one of its territories. By the first act for effecting this union, the trial by jury was established in capital cases; and in all others, both civil and criminal, was left, as in all cases it is now, optional with the parties. In the second grade of government, it was provided, that the people should have the benefit of the trial by jury, but it was not declared the only mode of trial; and our state constitution has adopted it in criminal cases, nearly in the same words. This indifference in our constitutional compacts, to an institution of such vital importance, has had the most injurious consequences, which have been encreased by subsequent provisions. In civil cases, it is already banished from our courts, or used only as an engine of delay, or as an awkward and oppressive vehicle for transmitting testimony, to be decided on by the supreme court. This degradation of the functions of jurors, in cases of property, certainly does not tend to render them respectable in cases affecting life and liberty. In criminal cases, the attorney-general, I believe, demands a trial by jury, as he has a right to do, in all serious cases, even where the accused is willing to wave it. But a prosecutor, less friendly to the institution, and a judge more desirous to encrease his powers, than the gentlemen who now fill those stations, could easily find means to make the jury as useless, as rarely employed, and as insignificant in a criminal court, as our laws have already made it in those of civil jurisdiction.

Those who advocate the present disposition of our law, say—admitting the trial by jury to be an advantage, the law does enough, when it gives the accused the option to avail himself of its benefits, he is the best judge whether it will be useful to him; and it would be unjust to direct him in so important a choice. This argument is specious, but not solid. There are reasons, and some have already been stated, to shew, that this option, in many cases, cannot be freely exercised. There is, moreover, another interest, besides that of the culprit, to be considered; if he be guilty, the state has an interest in his conviction; and whether guilty or innocent, it has a higher interest, that the fact should be fairly canvassed before judges inaccessible to influence, and unbiassed by any false views of official duty. It has an interest in the character of its administration of justice, and a paramount duty to perform, in rendering it free from suspicion. It is not true, therefore, to say, that the laws do enough, when they give the choice (even supposing it could be made with deliberation) between a fair and impartial trial, and one that is liable to the strongest objections. They must do more, they must restrict that choice, so as not to suffer an ill-advised individual to degrade them into instruments of ruin, though it should be voluntarily inflicted; or of death, though that death should be suicide.

Another advantage of rendering this mode of trial obligatory is, that it diffuses the most valuable infor-

mation among every rank of citizens ; it is a school, of which every jury that is empannelled, is a separate class ; where the dictates of the laws, and the consequences of disobedience to them, are practically taught. The frequent exercise of these important functions, moreover, gives a sense of dignity and self-respect, not only becoming to the character of a free citizen, but which adds to his private happiness. Neither party spirit, nor intrigue, nor power, can deprive him of this share in the administration of justice, though they can humble the pride of every other office, and vacate every other place. Every time he is called to act in this capacity, he must feel, that though perhaps placed in the humblest station, he is yet the guardian of the life, the liberty, and reputation of his fellow-citizens, against injustice and oppression ; and that, while his plain understanding has been found the best refuge for innocence, his incorruptible integrity is pronounced a sure pledge that guilt will not escape. A state, whose most obscure citizens are thus individually elevated to perform these august functions ; who are, alternately, the defenders of the injured, the dread of the guilty, the vigilant guardians of the constitution ; without whose consent no punishment can be inflicted, no disgrace incurred ; who can, by their voice, arrest the blow of oppression, and direct the hand of justice where to strike. Such a state can never sink into slavery, or easily submit to oppression :

corrupt rulers may pervert the constitution; ambitious demagogues may violate its precepts; foreign influence may control its operations; but while the people enjoy the trial by JURY, taken by lot from among themselves, they cannot cease to be free. The information it spreads; the sense of dignity and independence it inspires; the courage it creates, will always give them an energy of resistance, that can grapple with encroachment; and a renovating spirit that will make arbitrary power despair. The enemies of freedom know this; they know how admirable a vehicle it is to convey the contagion of those liberal principles, which attack the vitals of their power, and they guard against its introduction with more care, than they would take to avoid pestilential disease. In countries where it already exists, they insiduously endeavour to innovate, because they dare not openly destroy; changes inconsistent with the spirit of the institution are introduced, under the plausible pretext of improvement; the common class of citizens are too ill-informed to perform the duties of jurors—a selection is necessary. This choice must be confided to an agent of executive power, and must be made among the most eminent for education, wealth and respectability; so that, after several successive operations of political chemistry, a shining result may be obtained, freed, indeed, from all republican dross, but without any of the intrinsic value, that is found in the rugged, but inflexible integrity, and incorruptible worth of

the original composition. Men, impanelled by this process, bear no resemblance but in name, to the sturdy, honest, unlettered jurors, who derive no dignity but from the performance of their duties; and the momentary exercise of whose functions, gives no time for the work of corruption, or the effect of influence or fear. By innovations such as these, the institution is so changed, as to leave nothing to attach the affections, or awaken the interest of the people, and it is neglected as an useless, or abandoned as a mischievous contrivance.

In England, the panel is made up by an officer of the crown; but there are many correctives which lessen the effect of this vice. The return, except in very special cases, is made, not with a view to any particular cause, but for the trial of all that are at issue; and out of a large number returned on the panel, the twelve taken for the trial, are designated by lot: in capital cases also, the extent to which challenges are allowed, is calculated to defeat any improper practices; and when we add to this the general veneration for this mode of trial, the force of public opinion, guided by a spirit which it has created, and diffused, and perpetuated, we shall see the reason why the trial by jury, though by no means perfectly organized, is, in that country, justly considered as the best security for the liberties of the people; and why, though they behold with a shameful indifference, a domineering aristocracy, corrupting their legislative, and encroaching on their exe-

tive branches of government, they yet boast, with reason, of the independence of their judiciary, ennobled as it is with the trial by jury. We have received this invaluable inheritance from our British ancestors: let us defend, and improve, and perpetuate it; not only that we may ourselves enjoy its advantages, but, that if this, with the principle of free representation in government, and that admirable contrivance for securing personal liberty, the writ of habeas corpus, should chance to be corrupted or abolished in the country from whence we derived them, we may return the obligation we have received, by offering for adoption, to a regenerated state, those great institutions of freedom established by ancestors common to them and the race of freemen, by whose labors, experience and valor, they will have been perfected and preserved.

In France, this mode of trial was introduced during the revolution, but was afterwards found inconvenient to the exercise of the imperial power. By the code of 1808, it was so modified as to leave scarcely a resemblance of its origin; it became a select corps of sixty men, chosen by the prefect, who held his office at the will of the crown. It was reduced by successive operations (all by the king's officers) to twenty-one; out of which the accused had the illusory privilege of excepting to nine; and the votes of the majority of the remaining twelve, combined, in no very intelligible manner, with the opinions of the bench, decided his fate. Yet even

under this vicious constitution, juries have sometimes been found to interpose between executive power and its victims; and the very name (for it is, in fact, very little more) of the trial by jury, is now under the monarchy of France, the object of royal jealousy and fear.

With these examples before us, ought we not, in framing a new code, to impress on the minds of our constituents, a sacred attachment to this institution? So venerable for its antiquity! So wise in theory! So efficient in practice! So simple in form! In substance so well-adapted to its end! The terror of guilt, the best hope of innocence! Venerated by the friends of freedom, detested and abhorred by its foes! Can we too religiously guard this sanctuary into which liberty may retire in times, (God long avert them from our country) when corruption may pervert, and faction overturn, every other institution framed for its protection. Even in such times, the nation need not despair. A regenerating spirit will never be extinct, while this admirable contrivance for its preservation exists; fostered in this retreat, it will gradually gather strength, and in due time will walk abroad in its majesty over the land, arrest the progress of arbitrary power, strike off the shackles which it has imposed, and restore the blessings of freedom to a people still conscious of their right to enjoy them.

If these reflections should chance to be seen in the other states, they will be considered as a trite

repetition of acknowledged truths: here, I have some reason to apprehend they will be thought problematical assertions. But whatever may be their effect, I should, with my ideas of their importance, have been guilty of a dereliction of duty, had I failed to present them. All, however, I think on the subject, more than any language at my command can express, is contained in a single felicitous sentence, written by a man as eminent for learning and genius, as he is admired for the purity of his principles, and his attachment to the institutions of freedom—speaking of jurors, he calls them—

“Twelve invisible judges, whom the eye of the corrupter cannot see, and the influence of the powerful cannot reach, for they are no where to be found, until the moment when the balance of justice, being placed in their hands, they hear, weigh, determine, pronounce, and immediately disappear, and are lost in the crowd of their fellow-citizens.”*

The other provisions of this book, either require no particular elucidation, or will receive it when the work is presented for adoption.

It may, however, be proper to notice a change which is proposed in the law of principals and accessaries. As it now stands, two species of offenders are designated by this general name; distinguished by an awkward periphrase, into “accessaries before the fact,” and “accessaries after the fact.” As there

* Duponceaus' address at the opening of the law academy at Philadelphia.

is scarcely any feature in common between the offences designated by these two denominations, I have taken away the general appellation, and called the first an accomplice, leaving the description of accessory exclusively to the second. In fact, how can the odious offence of plotting a crime, and instigating another to perform that which the contriver has not courage himself to execute ; how can this be assimilated to the act of relieving a repentant and supplicant offender, who invokes our pity, and relies on our generosity ? An act, which, though justice may censure, humanity cannot always condemn. The first class now includes some acts which are so much identified with those which constitute the offence, that it was thought more simple, as well as more just, to arrange them under the same head, and by destroying useless distinctions, greatly restrict the number of crimes of *complicity*.

Under the second head, our law now calls for the punishment of acts, which, if not strictly virtues, are certainly too nearly allied to them to be designated as crimes. The ferocious legislation which first enacted this law, demands (and sometimes under the penalty of the most cruel death) the sacrifice of all the feelings of nature ; of all the sentiments of humanity ; breaks the ties of gratitude and honor ; makes obedience to the law to consist in a dereliction of every principle that gives dignity to man, and leaves the unfortunate wretch, who has himself been guilty of no offence, to decide between a life

of infamy and self-reproach, or a death of dishonor. Dreadful as this picture is, the original is found in the law of accessaries after the fact. If the father commit treason, the son must abandon, or deliver him up to the executioner. If the son be guilty of a crime, the stern dictates of our law require, that his parent; that the very mother who bore him; that his sisters and brothers, the companions of his infancy, should expel nature from their hearts, and humanity from their feelings; that they should barbarously discover his retreat, or with inhuman apathy, abandon him to his fate. The husband is even required to betray his wife, the mother of his children; every tie of nature or affection is to be broken, and men are required to be faithless, treacherous, unnatural and cruel, in order to prove that they are good citizens, and worthy members of society. This is one instance, and we shall see others, of the danger of indiscreetly adopting, as a divine precept applicable to all nations, those rules which were laid down for a particular people, in a remote and barbarous age. The provisions now under consideration, evidently have their origin in the Jewish law; that, however, went somewhat further, it required the person connusant of a crime committed by a relation, not only to perform the part of informer, but executioner also. "If thy brother, the son of thy mother; or thy son, or thy daughter, or the wife of thy bosom, or thy friend, which is as thine own soul, entice thee secretly, saying, let us

go and serve other gods, thou shalt not consent.... Neither shall thine eye pity him;.... neither shalt thou conceal him;.... thou shalt surely kill him;.... thou shalt stone him with stones." Almighty power might counteract, for its own purposes, the feelings of humanity, but a mortal legislator should not presume to do it; and in modern times, such laws are too repugnant to our feelings, to be frequently executed; but that they may never be enforced, they should be expunged from every code which they disgrace. The project presented to you, does this, with respect to ours. To put an end to that strife, which such provisions create in the minds of jurors, between their best feelings and their duty, their humanity and their oath; no relation to the principal offender, in the ascending or descending line, or in the collateral, as far as the first degree; no person united to him by marriage, or owing obedience to him as a servant, can be punished as an accessory. Cases of other particular ties of gratitude or friendship cannot be distinguished by law; they must be left for the consideration of the pardoning power.

I proceed to the plan of the third book, the most important in the work: it enumerates, classes, and defines all offences.

All contraventions of penal law are denominated by the general term, offences. Some division was necessary to distinguish between those of a greater and others of a less degree of guilt. No scale could be found for this measure, so proper as the injury

done to society by any given act ; and as the punishment is intended to be proportioned to the injury, the nature of the punishment was fixed on, as the boundary between smaller offences, which are designated as misdemeanors, and those of a more serious nature, which are called crimes. The last being such as are punished by hard labor, seclusion, or privation of civil rights, in addition to imprisonment. All other offences are called misdemeanors. In the progress of the work, I have felt some want of another denomination, to distinguish the lighter offences, which are punishable by pecuniary fines only, from those which are called in the English law, by the vague appellation of *high misdemeanors* ; and which are punished, as well by bodily restraint, as by fine. It is possible, that in the end, something like the "*infractions*" of the French law may be adopted ; but I am at present inclined to think, that the single division I have mentioned, will be sufficient.

This first division can be of no utility in the definition of offences, and therefore will find no place in that part of the work ; it is adopted, principally, from the necessity of such a distinction in the general provisions, and will also be found of use in common parlance, and for the purpose of reference.

Offences, including both crimes and misdemeanors, are next classed in relation to the object affected by them, into public, and private.

Here again, the law which divides the two classes, must, in some measure, be arbitrary, for scarcely

any public offence can be committed that does not injure an individual; and most of the outrages offered to individuals, in some sort, affect the public tranquillity; but the order of the work requires the division, and it is made with as close a view as could be given to the nature of the different offences, as follows:—

I. Under the head of public offences are ranked :

Those which affect the sovereignty of the state, in its legislative, executive, or judiciary power.

The public tranquillity.—The revenue of the state.—The right of suffrage.—The public records.—The current coin.—The commerce, manufactures, and trade of the country.—The freedom of the press.—The public health.—The public property.—The public roads, levees, bridges, navigable waters, and other property held by the sovereign power, for the common use of the people.—Those which prevent or restrain the free exercise of religion, or which corrupt the morals of the people.

II. Private offences are those which affect individuals and injure them

In their reputation.—Their persons.—Their political privileges.—Their civil rights.—Their profession, or trade.—Their property, or the means of acquiring or preserving it.

Under one or other of these heads, it is believed, that all such acts or omissions can be arranged, as it may be proper to constitute offence; unless, indeed, those which relate to societies or corporate

bodies, may be found, when they come to be defined, not properly assignable to any one of these divisions; in which case, a separate class will be created for them and other miscellaneous offences. It is obvious, that the classification cannot be complete until all the offences are enumerated and defined, and therefore, this sketch is submitted more to give a general idea of the method, than as a complete plan.

Melancholy, misfortune and despair, sometimes urge the unhappy to an act, which, by most criminal codes, is considered as an offence of the deepest die; and which, being directed principally against the offender himself, would have required a separate division, if it had been admitted in this code. It has not; because its insertion would be contrary to some of the fundamental principles which have been laid down for framing it.

Suicide can never be punished but by making the penalty (whether it be forfeiture or disgrace) fall exclusively upon the innocent. The English mangle the remains of the dead. The inanimate body feels neither the ignominy nor pain. The mind of the innocent survivor alone, is lacerated by this useless and savage butchery, and the disgrace of the execution is felt exclusively by him, although it ought to fall on the laws which inflict it. The father, by a rash act of self-destruction, deprives his family of the support he ought to afford them; and the law completes the work of ruin, by harrowing up their feelings; covering them with disgrace; and depriving them by forfeiture of their means of subsistence.

Vengeance, we have said, is unknown to our law ; it cannot, therefore, pursue the living offender, much less, with impotent rage should it pounce, like a vulture, on the body of the dead, to avenge a crime which the offender can never repeat, and which certainly holds out no lure for imitation : the innocent, we have assumed, should never be involved in the punishment inflicted on the guilty. But here, not only the innocent, but those most injured by the crime, are exclusively the sufferers by the punishment. We have established as a maxim, that the sole end of punishment is to prevent the commission of crimes ; the only means of effecting this, in the present case, must be by the force of example ; but what punishment can be devised to deter him, whose very crime consists in the infliction upon himself of the greatest penalty your law can denounce. Unless, therefore, you use the hold which natural affection gives you on his feelings, and restrain him by the fear of the disgrace and ruin with which you threaten his family, your law has no effective sanction ; but humanity forbids this ; the legislator that threatens it, is guilty of the most refined tyranny. If he carries it into execution, he is a savage. It is either a vain threat, and therefore cannot operate, or if executed, with an ill-directed rage, strikes the innocent because the guilty is beyond its reach.

Another species of offence is also omitted, though it figures in every code, from the Mosaic downward, to those of our days, and generally with capi-

tal punishments denounced against its commission ; yet I have not polluted the pages of the law, which I am preparing for you, by mentioning it; for several reasons.

First. Because, although it certainly prevailed among most of the ancient nations, and is said to be frequently committed in some of the modern, yet, I think, in all these cases, it may be traced to causes and institutions peculiar to the people where it has been known, but which cannot operate here; and that the repugnance, disgust, and even horror, which the very idea inspires, will be a sufficient security that it can never become a prevalent one in our country.

Secondly. Because, as every crime must be defined, the details of such a definition would inflict a lasting wound on the morals of the people. Your criminal code is no longer to be the study of a select few ; it is not the design of the framers that it should be exclusively the study even of our own sex ; and it is particularly desirable, that it should become a branch of early education for our youth. The shock which such a chapter must give to their pudicity; the familiarity their minds must acquire with the most disgusting images, would, it is firmly believed, be most injurious in its effects; and if there was no other objection, ought to make us pause before we submitted such details to public inspection.

Thirdly. It is an offence necessarily difficult of proof, and must generally be established by the evi-

dence of those who are sufficiently base and corrupt to have participated in the offence. Hence, persons shameless and depraved enough to incur this disgrace, have made it the engine of extortion against the innocent, by threatening them with a denunciation for this crime, and they were generally successful; because, against such an accusation, it was known that the infamy of the accuser furnished no sure defence.

My last reason for the omission was, that as all our criminal proceedings must be public, a single trial of this nature would do more injury to the morals of the people than the secret, and therefore always uncertain commission of the offence. I was not a little influenced also, by reflecting on the probability, that the innocent might suffer, either by malicious combinations of perjured witnesses, in a case so difficult of defence, or by the ready credit that would be given to circumstantial evidence, where direct proof is not easily procured, and where, from the nature of the crime, a prejudice is created by the very accusation.

In designating the acts which should be declared offences, I could not confine the selection to such as were already prevalent in the country; this would have required, in future, too frequent a recurrence to the work of amendment; nor could I, with propriety, include all the long list of offences which have been enumerated in the codes of other countries. A middle course has been pursued, embrac-

ing such prohibitions only as apply to acts which the present, and probable future state of society, in our country, may require to be repressed.

The penal laws of most countries have an ample department allotted to offences against religion, because most countries have an established religion which must be supported in its superiority by the penalties of temporal laws. Here, where no pre-eminence is acknowledged, but such as is acquired by persuasion and conviction of the truth; where all modes of faith, all forms of worship are equal in the eye of the law; and it is left to that of omniscience, to discover which is the one most pleasing in its sight; here, the task of legislation, on this head, is simple, and easily performed. It consists in a few provisions for scrupulously preserving this equality, and for punishing every species of disturbance to the exercise of all religious rites, while they do not interfere with public tranquillity; these are accordingly all that will be found in the code.

After thus accounting for the omissions, I have remarked, it may be proper to notice a new class inserted in the enumeration of public offences, under the head of offences against the freedom of the press; this is new in the legislation of those governments where the liberty of the press is best established and most prized. It has generally been thought a sufficient protection to declare, that no punishment should be inflicted on those who legally exercise the right of publishing; but hitherto no penalties

have been denounced against those who illegally abridge this liberty. Constitutional provisions are, in our republics, universally introduced, to assert the right, but no sanction is given to the law. Yet do not the soundest principles require it? If the liberty of publishing be a right, is it sufficient to say, that no one shall be punished for exercising it? I have a right to possess my property, yet the law does not confine itself to a declaration that I shall not be punished for using it; something more is done, and it is fenced round with penalties, imposed on those who deprive me of its enjoyment.

Why should there be this difference in the protection which the law affords to those different rights? Not certainly because the one in question is considered as of small moment: every bill of rights since the art of printing has been known, testifies how highly it has been prized. This anomaly may, in states governed by the common law, be accounted for by the reflection, that every breach of a constitutional privilege, might there be considered as a misdemeanor and punished as such, although no penalty were contained in the law. But here where nothing is an offence but that which is plainly and especially declared to be such by the letter of the law, where we have banished all constructive offences, here our code would be incomplete without the insertion of this class.

All violence or menace of violence, or any other of the means which are enumerated in the code; all exercise of official influence or authority

which may abridge this valuable privilege, is declared to be an offence. Nay, the project which will be presented to you, goes further. And considering the constitutional provision as paramount to any act of ordinary legislation, and consequently, that all laws in derogation of it are void; it declares all those guilty of an offence who shall execute any law abridging or restraining the liberty of the press, contrary to the privilege secured by the constitution. It may be said that this is nugatory, because, the same authority which makes the code may repeal it, and that the legislature which could so far forget their duty as to violate the constitution, would certainly abrogate the law by which it was made punishable. To this I answer, that the consequence does not follow. Attacks on constitutional rights are seldom openly or directly made; the repeal of this part of the code, would be an acknowledgment on the part of those who procured it, that they were hostile to the right secured by the constitution. This in a popular government, no representative would dare to avow; and however desirous a faction might be to get rid of this formidable censor of their principles, operations and plans, they would never dare openly to declare their fears. But by means of these provisions in your code, all those insidious attempts by which valuable privileges are generally destroyed will be prevented; the people will be put on their guard against them; and the judiciary will

be armed with legal authority for their punishment and suppression.

I wish to have it distinctly understood, that the preceding division and classification of offences, is introduced to give a method to the work, which will aid the memory; render reference more easy; enable the student to comprehend the whole plan, and future legislators to apply amendments and ameliorations with greater effect. But that they are not intended, in any manner, to have a constructive operation. Each offence is to be construed by the definition which is given of it, not by the division, or class in which it is placed. The mixed nature of many offences, and the impossibility of making any precise line of demarcation, even between the two great divisions, render this remark necessary.

After the prohibitory and mandatory part of the penal law, we naturally come to consider its sanction or the means of securing obedience to its provisions.

The first of these are the precautionary measures to prevent the commission of apprehended offences, or to arrest the completion of those which are begun. These are provided for, in the fourth book, and do not, very essentially, differ from those which are known to the English law.

In considering this important branch of the subject, we must refer to the principles established in the preliminary chapter. If those are right, the law punishes, not to avenge, but to prevent crimes;

it effects this, first, by deterring others by the example of its inflictions on the offender ; secondly, by its effects on the delinquent himself ; taking away, by restraint, his power ; and by reformation, his desire of repeating the offence. No punishments, greater than are necessary to effect this work of prevention, let us remember, ought to be inflicted ; and that those which produce it, by uniting reformation with example, are the best adapted to the end. It would be disgusting and unnecessary, to pass in review all the modes of punishment which have, even in modern times, been used ; rather it would seem to gratify vengeance, than to lessen the number of offences. A spirit of enlightened legislation, taught by Montesquieu, Beccaria, Eden, and others ; names dear to humanity ! has banished some of the most atrocious from the codes of Europe. But it has happened, in this branch of jurisprudence, as it has in most other departments of science, that long after the great principles are generally acknowledged, a diversity of opinion exists on their application to particular subjects. Thus, although the dislocation of the joints is no longer considered as the best mode of ascertaining innocence or discovering guilt ; although offences against the deity are no longer expiated by the burning faggot ; or those against the majesty of kings, avenged by the hot pincers, and the rack, and the wheel ; still many other modes of punishment have their advocates, which, if not equally cruel, are quite as inconsistent with the true maxims

of penal law; it may, therefore, be proper to pass some of them in review.

They may be reduced to these: Banishment.—Deportation.—Simple imprisonment.—Imprisonment in chains.—Confiscation of property.—Exposure to public derision.—Labour on public works.—Mutilation, and other indelible marks of disgrace.—Stripes, or the infliction of other bodily pain.—Death.

Banishment, even if it were an efficient remedy, can hardly, I think, be thought consistent with the duties which one nation owes to another. The convict who is forced from one country, must take refuge in another; and wherever he goes, he carries with him his disposition to break the laws and corrupt the morals of the country. The same crimes which make him unfit to reside in his own, render him mischievous to that which he chooses for his retreat. Every nation then, would have a right to complain of laws that made their territories the retreat of banditti, and other malefactors of their neighbours. Each, at least, would have a right to refuse their entrance. If all do it, then the punishment cannot be inflicted; or must be commuted into that which is denounced against those who return. If no laws are made to expel them, or guard against their entrance, the favor must be reciprocal, and each nation would be bound to receive from its neighbor, a number of foreign rogues, equal to that of the domestic villains they send out. The Romans, who commanded the civilized world, might employ

this punishment with effect. In modern times, it is only used (and that rarely) for state offences, and then it is generally dangerous; because, the man banished for political crimes, has frequently the power of doing more extensive mischief abroad than at home. It is also a very inefficient remedy; to many, it would have no terrors, and those upon whose love of country it might operate as a punishment, could find many means of evading it by an undiscovered return.

Deportation, or rather relegation, is more efficient, because, return is more difficult than from simple banishment. It also operates favorably sometimes, by producing reformation, and while enforced, effectually prevents a repetition of the offence; at least, on the society where it was first committed. But its effect, as an example, is nearly lost, because the culprit himself scarcely thinks it a punishment; and because, the distance causes both him and his crime to be forgotten as completely as if he was removed by death; and its practical operation in England, where it has been long tried under various forms, does not warrant the conclusion, that it ought to be adopted here.*

* A very respectable witness, examined before the house of commons, says, "as to transportation, I, with deference, think, it ought not to be adopted, except for incorrigible offenders, and then it ought to be for life; if it is for seven years, the novelty of the thing, and the prospect of returning to their friends and associates, reconciles offenders to it, so, that in fact, they consider it no punishment, and when this sentence is passed on men, they frequently say, *thank you, my lord.*"

The legislature of Pennsylvania have received, very favorably, a plan presented by Dr. Mease, recommending this mode of punishment; he has sent me a copy of his papers, which are at the disposal of the general assembly: they are written with ingenuity, but under the circumstances in which this state is placed, I cannot propose his scheme as either a practicable or an advisable mode of disposing of convicts.

Simple imprisonment has obvious defects; as a corrective, it is nearly the worst that could be applied. If solitary, it is, for most offences, too severe. If it be not solitary, it becomes a school for vice and every kind of corruption. The want of employment, even when men are at liberty, leads them to evil associations, and the proverb does not much exaggerate, which calls it the root of all evil. But when to idleness is joined an association with all that is most profligate and unprincipled, it may be easily imagined how quick must be the progress from innocence to vice, from vice to crime. The band of the guilty thus collected, acquire a knowledge of each other's capacity in the commission of offences; they feel their strength, they recruit their numbers, they organize themselves for their warfare on society, and come out completely disciplined and arrayed against the laws.

Imprisonment in irons has all the evils of simple imprisonment, and adds to them, that of inequality, and the danger of arbitrary imposition. The weight

of the chains, if regulated by law, must be a torture to the weak, while the robust delinquent will bear them without pain. If they are at the discretion of the goaler, there can be no better engine for petty tyranny and extortion.

Confiscation of property has few advocates, and ought to have none. It has every defect that can attach to a mode of punishment, except that it is in some degree remissible; it is unequal, because it forfeits for the same offence, the largest and the smallest fortune. It is cruel, because it deprives numbers of the means of subsistence for the fault of one. It is unjust, for it punishes without distinction, the innocent as well as the guilty. It is liable to the worst of abuses, because it makes it the interest of the government to multiply convictions. This last characteristic is perhaps the reason why it retains a place in the penal jurisprudence of Europe.

The four next heads may be classed together: the pillory, stocks, and other contrivances for public exposure, labour in chains, and on the public works, indelible marks of disgrace, (always attended with bodily pain) and the infliction of stripes, all are liable to the same radical objections; they all discard the idea of reformation; all are unequal, and subject to arbitrary imposition; with the exception of public labor, they are all momentary in their application, and when the operation is over, they impose a necessity on the patient, with the alternative of starving, immediately to repeat his

offence; he accordingly, with increased dexterity, commences a new career; forms a corps of similar associates to prey upon society; seduces others by the example of his impunity in the numerous instances in which he escapes detection; swells the list of convictions in those where his vigilance is defeated, and finally, becomes a fit subject for the grand remedy—the punishment of death. I approached the inquiry into the nature and effect of this punishment with the awe becoming a man who felt, most deeply, his liability to err, and the necessity of forming a correct opinion on a point so interesting to the justice of the country, the life of its citizens, and the character of its laws. I strove to clear my understanding from all prejudices which education, or early impressions might have created, and to produce a frame of mind, fitted for the investigation of truth and the impartial examination of the arguments on this great question. For this purpose, I not only consulted such writers on the subject as were within my reach, but endeavoured to procure a knowledge of the practical effect of this punishment on different crimes in the several countries where it is inflicted. In my situation, however, I could draw but a very limited advantage from either of these sources: very few books on penal law, even those most commonly referred to, are to be found in the scanty collections of this place, and my failure in procuring information from the other states, is more to be regretted on this than any other topic on which

it was requested. With these inadequate means, but after the best use that my faculties would enable me to make of them; after long reflection, and not until I had canvassed every argument that could suggest itself to my mind, I came to the conclusion, that the punishment of death should find no place in the code which you have directed me to present. In offering this result, I feel a diffidence, which arises, not from any doubt of its correctness; I entertain none; but from the fear of being thought presumptuous in going beyond the point of penal reform, at which the wisdom of the other states has hitherto thought proper to stop; and from a reluctance to offer my opinions in opposition to those (certainly more entitled to respect than my own) which still support the propriety of this punishment for certain offences. On a mere speculative question, I should yield to this authority; but here I could not justify the confidence you have reposed in me, were I to give you the opinions of others, no matter how respectable they may be, instead of those which my best judgment assured me were right.

The example of the other states is certainly entitled to great respect; the greater, because all, without exception, still retain this punishment; but this example loses some of its force when we reflect on the slow progress of all improvement, and on the stubborn principles of the common law, which have particularly retarded its advance in jurisprudence.

In England, their parliament had been debating

for near a century, before they would take off capital punishment from two or three cases, in which every body allowed it was manifestly cruel and absurd: they have retained it in at least an hundred others of the same description; and when we reflect on these facts, and observe the influence which the prevailing opinions of that country have always had on the literature and jurisprudence of ours, we may account for the several states having stopped short in the reform of their penal law, without supposing them to have arrived at the point of perfection, beyond which, it would be both unwise and presumptuous to pass. As to the authority of great names, it loses much of its force since the mass of the people have begun to think for themselves; and since legislation is no longer considered as a trade, which none can practise with success, but those who have been educated to understand the mystery; the plain matter of fact, practical manner, in which that business is conducted with us, refers more to experience of facts than theory of reasoning; more to ideas of utility drawn from the state of society, than from the opinions of authors on the subject. If the argument were to be carried by the authority of names, that of Beccaria, were there no other, would ensure the victory. But reason alone, not precedent nor authority, must justify me in proposing to the general assembly, this important change; reason alone can persuade them to adopt it. I proceed therefore to develop the considerations which carried conviction to my

mind, but which being perhaps now more feebly urged than they were then felt, may fail in producing the same effect upon others. A great part of my task is rendered unnecessary, by the general acknowledgment, universal, I may say, in the united states; that this punishment ought to be abolished in all cases, excepting those of treason, murder and rape. In some states arson is included; and lately, since so large a portion of our influential citizens have become bankers, brokers, and dealers in exchange, a strong inclination has been discovered to extend it to forgery, and uttering false bills of exchange. As it is acknowledged then to be an inadequate remedy for minor offences, the argument will be restricted to an enquiry, whether there is any probability that it will be more efficient in cases of greater importance. Let us have constantly before us, when we reason on this subject, the great principle, that the end of punishment is the prevention of crime. Death, indeed, operates this end most effectually, as respects the delinquent; but the great object of inflicting it is the force of the example on others. If this spectacle of horror is insufficient to deter men from the commission of slight offences, what good reason can be given to persuade us that it will have this operation where the crime is more atrocious? Can we believe, that the fear of a remote and uncertain death will stop the traitor in the intoxicating moment of fancied victory over the constitution and liberties of his country? While in

How

the proud confidence of success, he defies heaven and earth, and commits his existence to the chance of arms, that the dread of this punishment will "check his pride;" force him, like some magic spell, to yield obedience to the laws, and abandon a course, which he persuades himself, makes a "virtue" of his "ambition." Will it arrest the hand of the infuriate wretch, who, at a single blow, is about to gratify the strongest passion of his soul in the destruction of his deadly enemy? Will it turn aside the purpose of the secret assassin, who meditates the removal, of the only obstacle to his enjoyment of wealth and honors? Will it master the strongest passions and counteract the most powerful motives, while it is too weak to prevent the indulgence of the slightest criminal inclination? If this be true, it must be confessed, that it presents a paradox which will be found more difficult to solve, when we reflect that great crimes are, for the most part, committed by men, whose long habits of guilt have familiarised them to the idea of death; or to whom strong passions, or natural courage have rendered it, in some measure, indifferent; and that the cowardly poisoner or assassin always thinks that he has taken such precautions as will prevent any risk of discovery. The fear of death, therefore, will rarely deter from the commission of great crimes. It is, on the contrary, a remedy peculiarly inapplicable to those offences. Ambition, which usually inspires the crime of treason, soars above the fear of death; avarice, which whispers the

secret murder, creeps below it; and the brutal debasement of the passion that prompts the only other crime, thus punished by our law, is proverbially blind to consequences, and regardless of obstacles that impede its gratification—threats of death will never deter men who are actuated by these passions; many of them affront it in the very commission of the offence, and therefore, readily incur the lesser risk of suffering it, in what they think the impossible event of detection. But present other consequences more directly opposed to the enjoyments which were anticipated in the commission of the crime, make those consequences permanent and certain, and then, although milder, they will be less readily risked than the momentary pang attending the loss of life; study the passions which first suggested the offence, and apply your punishment to mortify and counteract them. The ambitious man cannot bear the ordinary restraints of government—subject him to those of a prison; he could not endure the superiority of the most dignified magistrate—force him to submit to the lowest officer of executive justice; he sought by his crimes, a superiority above all that was most respectable in society—reduce him in his punishment, to a level with the most vile and abject of mankind. If avarice suggested the murder; separate the wretch for ever from his hoard; realize the fable of antiquity; sentence him, from his place of penitence and punishment, to see his heirs rioting on his spoils; and the corroding reflection that others

are innocently enjoying the fruits of his crime, will be as appropriate a punishment in practical as it was feigned to be in poetical justice. The rapacious spendthrift, robs to support his extravagance, and murders to avoid detection; he exposes his life that he may either pass it in idleness, debauchery and sensual enjoyment, or lose it by a momentary pang—disappoint his profligate calculation; force him to live, but to live under those privations which he fears more than death; let him be reduced to the coarse diet, the hard lodging, and the incessant labor of a penitentiary.

Substitute these privations which all such offenders fear, which they have all risked their lives to avoid; substitute these, to that death which has little terror for men whose passions or depravity have forced them to plunge in guilt; and you establish a fitness in the punishment to the crime; instead of a momentary spectacle, you exhibit a lesson, that is every day renewed; and you make the very passions which caused the offence, the engines to punish it, and prevent its repetition.

Reformation is lost sight of in adopting this punishment, but ought it to be totally discarded? May not even great crimes be committed by persons, whose minds are not so corrupted, as to preclude the hope of this effect. They are, sometimes, produced by a single error. Often are the consequences of a concatenation of circumstances never likely again to occur, and are very frequently the effect of a

momentary hallucination, which, though not sufficient to excuse, ought sometimes to palliate the guilt; yet the operation of these several causes, the evident gradation in the degrees of guilt which they establish, are levelled before this destructive punishment. The man, who urged by an irresistible impulse of nature, sacrifices the base seducer who has destroyed his domestic happiness; he who having been calumniated, insulted and dishonored, at the risk of his own life takes that of the slanderer; are, in the eye of this harsh law, equally deserving of death with the vile assassin who murders for hire, or poisons for revenge; and the youth, whose weakness in the commission of a first offence, has yielded to the artful insinuations, or overbearing influence of a veteran in vice, must perish on the same scaffold with the hardened and irreclaimable instigator of his crime. It may be said, that the pardoning power is the proper remedy for this evil; but the pardoning power, in capital cases, must be exercised, if at all, without loss of time; without that insight into character, which the penitentiary system affords. It is therefore, necessarily liable to abuse; and there is this further objection to its exercise, that it leaves no alternative, between death, and entire exemption from punishment; but in every degree of crime, some punishment is necessary; the novice, if subject to no reclaiming discipline, will soon become a professor in guilt; but let the corrective be judiciously applied; and its progress will discover whether he

may be again trusted in society, or whether his depravity is so rooted, as to require continued confinement.

In coming to a resolution on this solemn subject, we must not forget another principle, we have established, and I think on the soundest reasons, that other things being equal, that punishment should be preferred, which gives us the means of correcting any false judgment, to which passion, indifference, false testimony, or deceiving appearances, may have given rise. Error from these, or other causes, is sometimes inevitable, its operation is instantaneous, and its fatal effects in the punishment of death, follow without delay: but time is required for its correction; we retrace our steps with difficulty; it is mortifying to acknowledge that we have been unjust, and during the time requisite for the discovery of the truth, for its operation on our unwilling minds, for the interposition of that power, which alone can stop the execution of the law, its stroke falls, and the innocent victim dies. What would not then the jurors who convicted; the judges who condemned; the mistaken witness who testified to his guilt; what would not the whole community who saw his dying agonies, who heard, at that solemn moment, his fruitless asseverations of innocence; what would they not all give to have yet within their reach, the means of repairing the wrongs they had witnessed or inflicted?

Instances of this kind are not unfrequent; many of them are on record; several have taken place in

our own day, and a very remarkable example which was given but a few years since, in one of the northern states, shews, in a striking manner, the danger of those punishments which cannot be recalled or compensated, even though the innocence of the sufferer is rendered clear to demonstration. A few such instances, even in a century, are sufficient to counteract the best effects that could be derived from example. There is no spectacle that takes such hold on the feelings, as that of an innocent man suffering by an unjust sentence; one such example is remembered, when twenty of merited punishment are forgotten; the best passions take part against the laws, and arraign their operation as iniquitous, and inhuman. This consideration alone, then, if there were no others, would be a most powerful argument for the abolition of capital punishments; but there are others no less cogent.

To see a human being in the full enjoyment of all the faculties of his mind, and all the energies of his body; his vital powers attacked by no disease; injured by no accident; the pulse beating high with youth and health; to see him doomed by the cool calculation of his fellow-men, to certain destruction, which no courage can repel, no art or persuasion avert; to see a mortal distribute the most awful dispensations of the Deity, usurp his attributes, and fix, by his own decree, an inevitable limit to that existence which Almighty power alone can give, and which its sentence alone should destroy; must

give rise to solemn reflections, which the imposing spectacle of a human sacrifice naturally produces, until its frequent recurrence renders the mind insensible to the impression. But in a country where the punishment of death is rarely inflicted, this sensation operates in all its force; the people are always strongly excited by every trial for a capital offence; they neglect their business, and crowd round the court; the accused, the witnesses, the counsel, every thing connected with the investigation becomes a matter of interest and curiosity; when the public mind is screwed up to this pitch, it will take a tone from the circumstances of the case, which will rarely be found to accord with the impartiality acquired by justice.

If the accused excites an interest from his youth, his good character, his connections, or even his countenance and appearance, the dreadful consequences of conviction, and that too, in the case of great crimes, as well as minor offences, lead prosecutors to relax their severity, witnesses to appear with reluctance, jurors to acquit against evidence, and the pardoning power improperly to interpose. If the public excitement takes another turn, the consequences are worse; indignation against the crime is converted into a ferocious thirst of vengeance; and if the real culprit cannot be found, the innocent suffers on the slightest presumption of guilt; when public zeal requires a victim, the innocent lamb is laid on the altar, while the scape-goat is suffered to fly to the

mountain. This savage disposition increases with the severity and the frequency of capital inflictions, so that, in atrocious, as well as in lighter offences, this species of punishment leads sometimes to the escape of the guilty, often to the conviction of the innocent.

Whoever has at all observed the course of criminal proceedings, must have witnessed what I have just endeavored to describe; undeserved indulgence, unjust severity; opposite effects proceeding from the same cause; the unnecessary harshness of the punishment.

But when no such fatal consequences are to be the result, the course of justice is rarely influenced by passion or prejudice. The evidence is produced without difficulty, and given without reluctance, it has its due effect on the minds of jurors, who are under no terrors of pronouncing an irremediable sentence: and pardons need not be granted, unless innocence is ascertained, or reformation becomes unequivocal.

Another consequence of the infliction of death is, that if frequent it loses its effect; the people become too much familiarised with it, to consider it as an example; it is changed into a spectacle, which must frequently be repeated to satisfy the ferocious taste it has formed. It would be extremely useful in legislation, if the true cause could be discovered of this atrocious passion for witnessing human agonies and beholding the slaughter of human beings. It has disgraced the history of all nations; in some it gave rise to permanent institutions, like that of

the gladiators in Rome; in others it has shewn itself like a moral epidemic, which raged with a violence proportioned to the density of population, for a limited time, and then yielded to the influence of reason and humanity. Every people has given us instances of this delirium; but the religious massacre of St. Bartholomew, and the political slaughters during the reign of terror in France, exemplify, in a striking manner, the idea I mean to convey. The history of our own country, young as it is, is not free from this stain. The judicial murder of the wizzards and witches of New-England, and of a great number of poor wretches, during, what was called, the negro plot at New-York, furnish us with domestic lessons on this subject. The human sacrifices which we find in the early history of almost every nation, proceeded from another cause, the idea of vicarious atonement for sins; but they were attended with the same heart-hardening effect. Human sufferings are never beheld, for the first time, but with aversion, terror, and disgust. Nature has strongly implanted this repugnance on our minds, for the wisest purposes: but this once conquered, it happens in the intellectual taste, as it does in that of the senses: in relation to which last, it is observed, that we become most fond of those enjoyments which required, in the beginning, some effort to overcome the disgust produced by their first use; and that our attachment to them is in proportion to the difficulty which was conquered in

becoming familiarised to them. Whatever may be the cause of this striking fact, in the history of the human mind, its effects ought to be studied by the legislator who desires to form a wise and permanent system. If the sight of one capital execution creates an inhuman taste to behold another; if a curiosity, satisfied at first with terror, increases with its gratification, and becomes a passion by indulgence, we ought to be extremely careful, how, by sanctioning the frequency of capital punishments, we lay the foundation for a depravity, the more to be dreaded, because, in our government, popular opinion must have the greatest influence on all its departments, and this vitiated taste would soon be discovered, in the decisions of our courts and the verdicts of our juries.

But if this punishment is kept for great occasions, and the people are seldom treated with the gratification of seeing one of their fellow-creatures expire by the sentence of the law; a most singular effect is produced; the sufferer, whatever be his crime, becomes a hero or a saint; he is the object of public attention, curiosity, admiration, and pity. Charity supplies all his wants, and religion proves her power, by exhibiting the outcast and murderer, though unworthy to enjoy existence upon earth, yet purified from the stain of his vices and crimes, converted by her agency into an accepted candidate for the happiness of heaven; he is lifted above the fear of death by the exhortations and

prayers of the pious ; the converted sinner receives the tender attentions of respectability, beauty and worth : his prison becomes a place of pilgrimage, its tenant, a saint awaiting the crown of martyrdom ; his last looks are watched, with affectionate solicitude ; his last words are carefully remembered and recorded ; his last agonies are beheld with affliction and despair ; and after suffering the ignominious sentence of the law, the body of the culprit, whose death was infamy, and whose life was crime, is attended respectfully and mournfully to the grave, by a train that would not have disgraced the obsequies of a patriot or a hero. This sketch, though highly coloured, is drawn from life, the inhabitants of one of the most refined and wealthy of our state capitals, sat for the picture ; and although such exalted feelings are not always excited, or are prudently repressed, yet they are found in nature, and in whatever degree they exist, it cannot be doubted, that in the same proportion, they counteract every good effect, that punishment is intended to produce. The hero of such a tragedy can never consider himself as the actor of a mean, or ignoble part ; nor can the people view in the object of their admiration or pity, a murderer and a robber, whom they would have regarded with horror, if their feelings had not been injudiciously enlisted in his favor. Thus the end of the law is defeated, the force of example is totally lost, and the place of execution is converted into a scene of triumph for the sufferer, whose crime is wholly forgotten,

while his courage, resignation, or piety, mark him as the martyr, not the guilty victim, of the laws.

Where laws are so directly at war with the feelings of the people whom they govern, as this, and many other instances prove them to be, these laws can never be wise or operative, and they ought to be abolished.

Quid leges sine moribus, vancæ proficiunt? But if laws unsupported by the morals of the people are inefficient, how can we reasonably expect that they will have any effect when they are counteracted by moral feelings as well as by ideas of religion. This is the effect of capital punishments in a country where they are not commonly inflicted. Let us now see what is their result, where they are unhappily too frequent.

In England, a great portion of the eloquence, and learning, and all the humanity of the nation are at work, in an endeavor, not to abolish the punishment of death, (that proposition would be too bold in a government where reform, in any department, might lead to revolution in all) but to restrict it to the more atrocious offences. This has produced a parliamentary enquiry, in the course of which, the reports to which I have alluded before, were made, one of them contains the examinations of witnesses before a committee of the house of commons. From one of these, that of a solicitor who had practiced for more than twenty years in the criminal courts, I make the following extracts :—

“ In the course of my practice, I have found, that the punishment of death has no terror upon a common thief; indeed, it is much more the subject of ridicule among them, than of serious deliberation. The certain approach of an ignominious death, does not seem to operate upon them; for after the warrant has come down, I have seen them treat it with levity. I once saw a man, for whom I had been concerned the day before his execution, and on offering him condolence, and expressing my concern at his situation, he replied with an air of indifference, ‘ players at bowls must expect rubbers;’ and this man I heard say, that it was only a few minutes, a kick and a struggle, and all was over. The fate of one set of culprits, in some instances, had no effect, even on those who were next to be reported for execution; they play at ball and pass their jokes as if nothing was the matter. I have seen the last separation of persons about to be executed, there was nothing of solemnity about it, and it was more like the parting for a country journey, than taking their last farewell. I mention these things, to shew what little fear common thieves entertain of capital punishment, and that so far from being arrested in their wicked courses, by the distant possibility of its infliction, they are not even intimidated by its certainty.”

Another of those respectable witnesses (a magistrate of the capital) being asked, whether he thought that capital punishment had much tendency to deter criminals from the commission of offences, answered,

I do not. I believe it is well known to those who are conversant with criminal associations in this town, that criminals live and act in gangs and confederacies, and that the execution of one or more of their body, seldom has a tendency to dissolve the confederacy, or to deter the remaining associates from the continuance of their former pursuits. Instances have occurred within my own jurisdiction, to confirm me in this opinion. During one sitting, as a magistrate, three persons were brought before me for uttering forged notes. During the investigation, I discovered that those notes were obtained from a room in which the body of a person named Wheller, (executed on the preceding day, for the same offence) then laid, and that the notes in question were delivered for circulation by a woman with whom he had been living. This is, (he adds) a strong case, but I have no doubt that it is but one of very many others."

The ordinary of Newgate, a witness better qualified than any other, to give information on this subject, being asked, "have you made any observations as to the effect of the sentence, of death upon the prisoners? Answers—It seems scarcely to have any effect upon them; the generality of people under sentence of death are thinking, or doing rather, any thing than preparing for their latter end." Being interrogated as to the effect produced by capital executions on the minds of the people, he answers, "I think, shock and horror at the moment, upon the

inexperienced and the young, but immediately after the scene is closed, forgetfulness altogether of it, leaving no impression on the young and inexperienced. The old and experienced thief says, the chances have gone against the man who has suffered; that it is of no consequence, that it is what was to be expected, making no serious impression on the mind. I have had occasion to go into the press-yard within an hour and a half after an execution, and I have there found them amusing themselves, playing at ball or marbles, and appearing precisely as if nothing had happened."

No colouring is necessary to heighten the effect of these sketches. Nothing, it appears to me, can more fully prove the utter inutility of this waste of human life, its utter inefficiency as a punishment, and its demoralizing operation on the minds of the people.

The want of authentic documents prevents me at present from laying before the general assembly some facts which would elucidate the subject, by examples, from the records of criminal courts in the different states. The prevalence of particular offences, as affected by the changes in their criminal laws; the number of commitments, compared with that of convictions, and the effect which the punishment of death has on the frequency of the crimes for which it is inflicted; accurate information on these heads would have much facilitated the investigation in which we are engaged. But although from the causes which I have stated, these are not

now within our reach; there are yet some facts generally known on the subject, which are not devoid of interest or instruction. Murder, in all the states, is punished with death; in most of them it is, except treason, (which never occurred under the state laws) the only crime that is so punished. If this were the most efficacious penalty to prevent crimes, this offence would be the one of which we should see the fewest instances. Is it so? To answer this question, we must establish a comparison, not between it and other offences; that would never lead us to a true result; there are some crimes that are so destructive of the very existence of society; create such universal alarm, and suppose so great a depravity, that the perpetrator is always viewed with abhorrence by the whole community, and public execration would inflict a punishment, even if the laws were silent: The number of such crimes, therefore, whatever may be the punishment assigned to them, must necessarily be fewer in proportion, than those which do not inspire the same horror, or spread the same alarm; of this nature is murder; we must, therefore, look to other countries, to establish our point of comparison.

Unfortunately, the crime is punished in the same manner as it is here, in the only country from which we have sufficient data to reason upon, and therefore the result of the enquiry cannot be conclusive; but if in that country a number of other offences are punished with death, which do not incur that penalty

here, and if those minor offences prevail in a much greater degree there than they do here, where they are not so punished, while murder, and robbery with intent to murder, (almost the only crimes punished in that manner here) be more frequently committed in this country than in that which I select for the comparison, then we shall have some reason to doubt the efficacy of this violent remedy.

In London and Middlesex, for sixteen years, ending in 1818, thirty-five persons were convicted of murder, and stabbing with intent to murder, which is an average of a fraction more than two in a year. In the city of New-Orleans, seven persons suffered for the same crime, in the space of the last four years, which is very little less than the same average; but the population of New-Orleans did not, during the period, amount to more than 35,000, which is to that of Middlesex and London, in round numbers, as one to twenty-seven; therefore, the crime of murder was nearly twenty-seven times as frequent, in proportion to numbers, as in London. Almost the same proportion holds between the whole state and England and Wales, in relation to this crime; nineteen executions having taken place for murder, in the last seven years, in Louisiana, and one hundred and fifty-four during the seven years, ending in 1818, in England and Wales. In London and Middlesex, eight hundred and eighty-five persons were convicted of forgery and counterfeiting, in seven years, ending in 1818. During an equal period, seven persons were convicted of the same of-

Yence in the whole state, which makes the crime eighteen times more frequent in London, in proportion to numbers, than it is here. 6974 convictions for larceny took place in the same seven years in London: and for a like period, in the state of Louisiana, one hundred, which is near ten to one more there, than here, in proportion to the population. Many capital convictions were had there, for crimes of which none were committed here, and which, if they had been, would have been punished only by imprisonment at hard labour. I well know, that the state of society, in the two countries, the degree of temptation, the ease or difficulty of obtaining subsistence, and other circumstances, as well as the operation of the laws, may produce the difference I have shewn. But does it not raise serious doubts as to the efficacy of the capital punishment, to observe this double effect, that almost the only crime which we punish in that manner, is more frequent in the proportion of twenty-seven to one, while those which are the object of a milder sanction, are almost in the same ratio less, than the country with which we make the comparison.

The laws of none of the states punish highway robbery with death; those of the united states, affix this punishment to the robbery of the mail, under circumstances which generally accompany it. Yet it is believed, that this last species of highway robbery is more frequent than the other—another proof that the fear of death is not a more powerful preventative of crime than other punishments.

would also operate as an example, so, as to reduce to a possibility, the chance of another being induced by the mildness of the punishment, to commit the crime, then the certain evil of taking away human life, ought not to be incurred; because the remote possibility of even a great evil, cannot justify it.

But before we adopt any of these calculations, (always liable to the greatest difficulty in practice) we ought to enquire whether the position, which alone renders them necessary, be true; whether the punishment of death is necessary to prevent offences. In the proper sense of the expression, we know this is not the case; to say that a certain single cause is necessary to produce a given effect, supposes, that if the cause exist, the effect will certainly follow; but it is not pretended, that the punishment of death will, in all cases, prevent the crime for which it is inflicted; all that is meant is, that it is better adapted to that end, than any other kind of punishment: some reasons have already been given to shew that it is not. Let us examine those which are usually given on the affirmative side of this interesting question.

First. There are those who support it by argument drawn from religion. The divine spirit infused into the great legislator of the Jews, from whose code these arguments are drawn, was never intended to inspire a system of universal jurisprudence. The theocracy given as a form of government to that extraordinary people, was not suited to any other; as little was the system of their penal laws,

given on the mysterious mountain, promulgated from the bosom of a dark cloud, amid thunder and lightning; they were intended to strike terror into the minds of a perverse and obdurate people; and as one means of effecting this, the punishment of death is freely denounced for a long list of crimes; but the same authority establishes the *lex talionis*, and other regulations, which those who quote this authority, would surely not wish to adopt. They forget, that the same Almighty author of that law, at a later period, inspired one of his prophets with a solemn assurance, that might with propriety, be placed over the gates of a penitentiary; and confirmed it with an awful asseveration,—“As I LIVE, saith the LORD GOD, I have no pleasure in the DEATH of a sinner, but rather that he should TURN FROM HIS WICKEDNESS AND LIVE.” They forget too, although they are Christians who use this argument, that the divine author of their religion, expressly forbids the retaliatory system, on which the punishment of death for murder is founded; they forget the mild benevolence of his precepts, the meekness of his spirit, the philanthropy that breathes in all his words, and directed all his actions; they lose sight of that golden rule which he established, “To do nothing to others that we would not desire them to do unto us;” and certainly pervert the spirit of his holy and merciful religion, when they give it as the sanction for sanguinary punishments. Indeed, if I were inclined to support my opinion by arguments drawn from

religion, the whole New Testament should be my text, and I could easily deduce from it, authority for a system of reform as opposed to one of extermination. But although the legislator would be unworthy of the name, who should prescribe any thing contrary to the dictates of religion, and particularly to those of that divine morality, on which the Christian system is founded, yet it would be not less dangerous, to make its dogmas the ground-work of his legislation, or to array them in defence of political systems. In a government where all religions have equal privileges, it would be obviously unjust; it would lessen the reverence for sacred, by mixing them with political institutions, and perverting to temporal uses those precepts which were given as rules for the attainment of eternal happiness.

Secondly. The practice of all nations, from the remotest antiquity, is urged in favor of this punishment; the fact, with some exceptions, is undoubtedly true, but is the inference just? There are general errors, and unfortunately for mankind, but few general truths, established by practice, in government and legislation. Make this the criterion, and despotism is, by many thousand degrees on the scale of antiquity, better than a representative government: the laws of Draco were more ancient than those of Solon, and consequently better; and the practice of torture quite as generally diffused, as that of which we are now treating. Idolatry in religion, tyranny in government, capital punishments, and inhuman tortures in juris-

prudence, are co-eval and co-extensive. Will the advocates of this punishment admit the force of their argument in favor of all these abuses? If they do not, how will they apply it to the one for which they argue?

The long and general usage of any institution gives us the means of examining its practical advantages or defects; but it ought to have no authority as a precedent, until it be proved, that the best laws are the most ancient, and that institutions for the happiness of the people are the most permanent, and most generally diffused. But this unfortunately cannot be maintained with truth; the melancholy reverse forces conviction on our minds. Every where, with but few exceptions, the interest of the many, has from the earliest ages been sacrificed, to the power of the few. Every where, penal laws have been framed to support this power, and those institutions, favorable to freedom, which have come down to us from our ancestors, form no part of any original plan; but are isolated privileges which have been wrested from the grasp of tyranny; or which have been suffered, from inattention to their importance, to grow into strength.

Every nation in Europe has, during the last eight or ten centuries, been involved in a continued state of internal discord or foreign war: kings and nobles continually contending for power; both oppressing the people, and driving them to desperation and revolt. Different pretenders, asserting their claims to the

throne of deposed or assassinated kings ; Religious wars ; cruel persecutions ; partition of kingdoms ; cessions of provinces ; succeeding each other with a complication and rapidity that defies the skill and diligence, of the historian to unravel and record. Add to this, the ignorance in which the human mind was involved, during the early and middle part of this period ; the intolerant bigotry, which from its close connection with government, stifled every improvement in politics as well as every reformation in religion ; and we shall see a state of things certainly not favorable for the formation of wise laws on any subject ; but particularly ill calculated for the establishment of a just or humane criminal code. From such legislators, acting in such times, what could be expected, but that which we actually find ; a mass of laws unjust, because made solely with a view to support the temporary views of a prevailing party ; unwise, obscure, inhuman, inconsistent, because they were the work of ignorance, dictated by interest, passion and intolerance. But it would scarcely seem prudent to surrender our reason, to authorities thus established, and to give the force of precedent to any of the incoherent collections of absurd, cruel, and contradictory provisions which have been dignified with the name of penal codes, in the jurisprudence of any nation of Europe, as their laws stood prior to the last century. No one would surely advise this ; why then select any part of the mass, and recommend it to us, merely because it has been

generally practised? If there is any other reason for adopting it, let that be urged, and it ought to have its weight; but my object here is to shew, that from the mode in which the penal laws of Europe have, until a very late period, been established, very little respect is due to them merely on account of their antiquity, or of the extent to which they have prevailed. If the criminal jurisprudence of the modern and middle ages, affords us little reason to revere either its humanity or justice; the ancient world does not give us more. The despotism of antiquity was like that of modern times, and such as it will always be; it can have but one character, which the rare occurrence, of a few mild or philosophic monarchs does not change: and in the laws of the republics, there was a mixture of severity and indulgence, that makes them very improper models for imitation. Yet in Rome, for about two hundred and fifty years, from the date of the valerian law, until the institutions of the republic were annihilated by the imperial power, it was not lawful to put a Roman citizen to death for any crime; and we cannot learn from history that offences were unusually prevalent during that period; but we do know that when executions became frequent, Rome was the receptacle of every crime and every vice. It must, however, be confessed, that we have not sufficient information to determine whether the frequency of capital punishments was the cause, or the effect of this depravity.

Modern history affords us two examples which deserve to be attended to in this discussion. The empress Elizabeth, of Russia, soon after she came to the throne, abolished the pain of death in all her extensive dominions; her reign lasted twenty years, giving ample time to try the effect of the experiment: and Beccaria speaks with enthusiasm of the consequences it had produced. I have not been able to procure the regulations by which this change was effected, but as I believe the *knout* (an infliction more cruel than a speedy death) was preserved, I do not urge this example as having the same weight it would have, if milder punishments had been substituted. Three years after Elizabeth had ceased to reign in the north of Europe, her great experiment was renewed in the south. Leopold became grand duke of Tuscany, and one of his first acts, was a declaration (rigidly adhered to during his reign) that no offence should be punished with death; he substituted a mild system of graduated punishments, and though I do not think they were very judiciously chosen, yet the consequence was, an immediate decrease in the number of offences. We are informed, that during a considerable period, the prisons were empty, and no complaints for atrocious offences occurred; and he himself, after an experiment of twenty years, declares, "that the mitigation of punishments, joined to a most scrupulous attention to prevent crimes, and also great dispatch in the trial, together with a certainty and suddenness of punishment to

real delinquents, had, instead of increasing the number of crimes, considerably diminished that of the smaller ones, and rendered those of an ATROCIOUS NATURE VERY RARE." This passage is extracted from the introduction to a code which he gave to his people, in the year 1786 : four years afterwards, he was called to the empire, and the further course of his noble experiment was interrupted. How far the old system was re-established, I am not accurately informed, but some travellers represent, that the new state of things forms a contrast very much in favor of the Leopold code. These instances, I think, turn the scale of argument as it applies to the authority of example ; if we can rely on that of Tuscany, (and it seems perfectly well authenticated) it proves the inefficiency of capital punishments, in great, as well as smaller offences, and it is of more weight than the united practice of all the nations of the world where the punishment is retained, but where it has never been found effectual to repress the prevalence of crimes.

The third and last argument I have heard urged, is nearly allied to the second ; it is, the danger to be apprehended from innovation. I confess, I always listen to this objection with some degree of suspicion. That men who owe their rank, their privileges, their emoluments, to abuses and impositions, originating in the darkness of antiquity, and consecrated by time, that such men, should preach the danger of in-

novations, I can well conceive; the wonder is, that they can find others, weak and credulous enough to believe them. But in a country where these abuses do not exist, a country whose admirable system of government is founded wholly on innovation, where there is no antiquity, to create a false veneration for abuses, and no apparent interest, to perpetuate them. In such a country, this argument will have little force against the strong reasons which assail it. Let those however, who honestly entertain this doubt, reflect that, most fortunately for themselves and for their posterity, they live in an age of advancement: not an art, not a science, that has not, in our day, made rapid progress towards perfection. The one of which we now speak has received, and is daily acquiring improvement; how long is it since torture was abolished? Since judges were made independent? Since personal liberty was secured, and religious persecution forbidden? All these were, in their time, innovations as bold at least, as the one now proposed. The true use of this objection, and there I confess it has force, is to prevent any hazardous experiment, or the introduction of any change that is not strongly recommended by reason. I desire no other test for the one that is now under discussion, but I respectfully urge, that it would be unwise to reject it, merely because it is untried, if we are convinced it will be beneficial. Should our expectations be disappointed, no extensive evil can be done; the remedy is always in our power. Although an experiment, it is not a

hazardous one, and the only enquiry seems to be, whether the arguments and facts stated in its favor, are sufficiently strong to justify us in making it. Indeed, it appears to me that the reasoning might with, some propriety, be retorted against those who use it, by saying—"all punishments are but experiments to discover what will best prevent crimes; your favorite one of death has been fully tried. By your own account, all nations, since the first institution of society, have practised it, but you, yourselves, must acknowledge, without success. All we ask then, is that you abandon an experiment which has for five or six thousand years, been progressing under all the variety of forms, which cruel ingenuity could invent; and which in all ages, under all governments, has been found wanting. You have been obliged reluctantly to confess, that it is inefficient, and to abandon it in minor offences; what charm has it then which makes you cling to it in those of a graver cast? You have made your experiment; it was attended in its operation with an incalculable waste of human life; a deplorable degradation of human intellect; it was found often fatal to the innocent, and it very frequently permitted the guilty to escape. Nor can you complain of any unseasonable interference with your plan that may account for its failure: during the centuries that your system has been in operation, humanity and justice have never interrupted its course; you went on in the work of destruction, always seeing an increase of crime, and always supposing that increased severity

was the only remedy to suppress it ; the mere forfeiture of life was too mild ; tortures were superadded, which nothing but the intelligence of a fiend could invent, to prolong its duration and increase its torments ; yet there was no diminution of crime ; and it never occurred to you, that mildness might accomplish that which could not be effected by severity." This great truth revealed itself to philosophers, who imparted it to the people ; the strength of popular opinion at length forced it upon kings, and the work of reformation, in spite of the cry against novelty, began. It has been progressive. Why should it stop when every argument, every fact, promises its complete success? We could not concur in the early stages of this reformation ; perhaps the credit may be reserved to us of completing it ; and I therefore make no apology to the general assembly for having so long occupied them with this discussion. In proposing so important a change it was necessary to state the prominent reasons which induced me to think it necessary ; many more have weighed upon my mind, and on reviewing these, I feel with humility and regret, how feebly they are urged. The nature of the subject alone will, however, create an interest sufficient to promote enquiry, and humanity will suggest arguments, which I have not had the sagacity to discover or the talent to enforce.

Having stated the reasons which induced me to discard all the different punishments which have been reviewed, I proceed to a short discussion of those which have been adopted. These are—

Pecuniary fines.—Degradation from office.—Simple imprisonment.—Temporary suspension of civil rights.—Permanent deprivation of civil rights. Imprisonment at hard labor.—Solitary confinement during certain intervals of the time of imprisonment, to be determined in the sentence.

The advantage of this scale of punishment is, that it is divisible almost to infinity, that there is no offence, however slight, for which it does not afford an appropriate corrective; and none, however atrocious, for which, by cumulating its different degrees, an adequate punishment cannot be found.

When to these are added the regulations which are made in certain cases, as to the nature of food and other comforts, during the term of punishment, it has in an almost perfect degree, the essential quality of being capable of apportionment, not only to any species of offence, but to every offender. Sex, age, habits, constitution, every circumstance which ought to determine the exercise of discretionary power, may have its proper weight.

Reformation of the criminal may reasonably be expected.

He is effectually restrained from a repetition of his crime.

A permanent and striking example is constantly operating to deter others.

The punishment being mild, public feeling will never enlist the passions of the people in opposition to the law.

The same cause will ensure a rigid performance of their duty by public officers.

Jurors, from a false compassion, will seldom acquit the guilty; and if by chance or prejudice they should convict the innocent, their error or fault is not as in the cases of infliction of stripes—permanent stigmas, or death—without the reach of redress.

These are advantages which render the penitentiary system decidedly superior to any other.

To detail the mode in which these different punishments are composed and applied to the different offences, would be to repeat the provisions of the whole book, which cannot be expected from the nature of this report; enough, and I fear more than enough, has been said on this division of the work.

I proceed to the plan of the fourth book, which, as we have seen, is intended to give rules of practise in all criminal proceedings.

It regulates the mode in which complaints and accusations are to be made; designates the proper persons to receive them, and directs their duty in conducting the examination; taking the evidence on the complaint, and ordering the arrest; prescribes the form of warrants; and designates precisely, the cases where arrests may be made without them. It prescribes minutely, the duties, and defines the authority, as well of officers as of individuals, who assist them in making arrests.

It regulates the mode of conducting the examina-

tion, and the manner of making committments, so as to avoid the frequent escapes of the guilty from the former defective practice on this head.

The manner in which the person is to be treated, during his confinement, is minutely detailed; provisions are introduced to prevent or punish all abuses of authority, in those who arrest, or have charge of the prisoner.

Rules are laid down for directing the discretion of the magistrate, and ascertaining his duties in admitting to bail.

The manner in which accusations and the evidence to support them, are to be brought before the proper court, is distinctly described.

Rules are presented for the organization and mode of conducting business before grand juries. Their duties are defined, as are those of the public prosecutor, in presenting indictments before them.

The cases are distinguished which are to be prosecuted by indictment, from those in which information may be filed.

Rules are laid down for drawing acts of accusation, so as to secure a proper degree of certainty in the allegation of the offence, but to prevent the escape of the guilty from formal defects.

The mode of making the arraignment; the manner of pleading; the rules for conducting the trial; the duties of the judge; of the advocate for the accused, and of the public prosecutor, in relation to it, are minutely marked out.

Regulations are made for summoning, swearing, and challenging jurors, and for their government on the trial, and on the delivery of the verdict.

Directions are given for summoning and securing the attendance of witnesses.

The causes are designated, for which judgments may be arrested and new trials granted, and all the proceedings subsequent to the verdict are provided for.

A chapter is dedicated to the regulation of the manner in which search-warrants are to be granted and executed, and another to the designation of the cases in which security may be required against the commission of apprehended offences. Contempts are defined, and the mode of trying and punishing them is marked out.

The last chapter of this book contains a system of proceeding on writs of *habeas corpus*.

This chapter will be the first act of legislation in our state on this subject; important enough (it would seem) to have sooner engaged our attention. This writ was known in a remote period of the English law, but it was a precept without a sanction, and therefore totally inefficient until the statute passed in the 31st year of Charles II. gave it force and efficacy, and made it a feature in their jurisprudence, of which any nation might be proud, and which all ought to imitate or adopt. The mechanism of this admirable contrivance for securing personal liberty is so simple, its effects are so decisive, that we are led to

wonder why it was not sooner put in operation, especially in a nation, which at so early a period made it a stipulation with their king, that "no freeman should be imprisoned but by the law of the land." Indeed the writ itself was known in the Roman law by the name of the *interdict de homine libero exhibendo*; but it was applicable only to the case of a freeman claimed as a slave, and we do not find, that even in that case there were any provisions to enforce its execution, on the contrary, there was one which permitted any person to refuse obedience, who chose rather to pay for the man, estimating his value as if he was a slave. In no stage of its history, therefore, was this writ of any importance until the spirit of liberty, nearly extinguished under the energetic despotism of the Tudors, rose superior to the weakness of the Stuarts, and inspired the declaration of those principles of personal and political rights, on which our republics are chiefly founded. One of the most important measures which this spirit suggested, was the habeas corpus act; it directs the manner in which the writ is to issue; imposes penalties for disobedience to it, and makes a number of salutary provisions to prevent delays and abuses in criminal proceedings. In all the Atlantic states, this statute was a part of the law by which they were governed at the time they became independent; and it was either expressly, or impliedly, adopted with the whole body of their municipal laws. In those states, therefore, nothing more was necessary than to guard against

its suspension by a constitutional clause. But here the case was different, the common law of England was not in force here, still less were its statutes. Neither could form part of our law, unless specially re-enacted. Yet the framers of our constitution, not attending to this difference, contented themselves with transcribing from the constitutions of other states, the provision that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." But no law had before, or has been since passed, defining what the writ of habeas corpus was, or directing the manner in which it was to be obtained, how it was to be executed, what was to be its effect, or what the penalty of disobeying it. If the writ alone be introduced without the provisions for enforcing it, it could be of as little use here as it was in England before the statute of Charles II. if the statute be introduced, do we stop at that of Charles? or are those of 16 George I. and 38 of George III. re-enacted by this laconic legislation? If either of them are, they involve as applied to us, great absurdities; for they contain many provisions, which are purely local, all of them refer to courts and to magistrates which do not exist under our laws; and impose penalties which are not recoverable here; and yet on which, the whole efficacy of the act depends. So that whatever construction we put on this clause in our constitution, it must be confessed, that without some statute to define and enforce the great

privilege of which it declares we shall not be deprived, the provision itself can be of little use. Hitherto the necessity for this remedy has been so strongly felt, that judges have not scrupulously examined their right to afford it; and even when improperly granted, so strongly is it supported by public opinion, that parties, though they have sometimes evaded its operation, have never thought proper to question its legality. It has held its authority therefore by the moral sense of the people, exerting its influence in support of an institution which they have been taught from their infancy to venerate and admire, rather than by the constraint of law. But times may come, in the natural progress of human affairs, must come; when public opinion will have less force, and without the aid of law for its support, will prove a feeble barrier against encroachment.

The offences against personal liberty, which are most dangerous; are those that are committed for political purposes, and as the means of silencing opposition to unconstitutional and revolutionary measures. All the energies of the law, armed with its strongest sanctions, and directed by the most efficient measures to secure its execution then become necessary. The magnitude of the evil, therefore, concurring with the probability of its occurrence, calls for the attention of the legislature to this important subject. In examining the different enactments of this justly celebrated statute, every friend of freedom must be grateful to its authors for

the extensive, and it is devoutly to be hoped the lasting benefit they have conferred on mankind. Ten millions of freemen have already consecrated it among their fundamental rights, and the rising republics of the new world will not fail to adopt so precious an institution when they review and finally establish their constitutional compacts.

This is the greatest glory a wise nation can desire: to see its principles recognized; its institutions adopted; its laws copied, not only by men speaking the same language, and bred in a similarity of manners, but translated into different languages, adapting themselves to different habits; incorporated in different codes, and in all, acknowledged as the first of blessings. And the trial of a cause, by an independent jury, on the banks of the La Plata or the Oroonook; or the writ of habeas corpus adopted by a representative assembly in Mexico and Peru, ought to afford more satisfaction to an Englishman, who loves the honor of his country, than the most splendid triumph of her arms. We must not, however, suffer our admiration of any institution to blind us to its faults, or prevent us when we are about to adopt it, from scrutinizing severely all its provisions, and carefully enquiring whether in its operation, defects have not been discovered, which a prudent attention might amend. In examining the English statute with this view, some important omissions have been observed; and in the project presented to you, an attempt has been made to remedy them. Some of the most important ought to be enumerated.

1. The great object of this writ; that, which constitutes its chief excellence; I may say its only use, is the promptitude and efficacy with which it acts. To borrow a phrase from another branch of jurisprudence, it is a writ for "specific performance," or it is nothing. In all civilized countries, there are actions given for injuries to personal liberty: but no nation, until England set the example, provided any means for the immediate cessation of the evil. This law enforces it by attachment, fines, and penalties; in most cases, these are effectual: but there are circumstances in which the party injured would obtain no relief, and the offender would escape punishment, notwithstanding the provisions of the statute. A person may be unlawfully arrested, and forcibly embarked, to be conveyed out of the country; the writ of habeas corpus may issue; it may even be served in time, but if the party to whom it is directed, choose to make an insufficient return, no other process can issue until that return has been received, debated, and determined to be insufficient; and then, it is not a compulsory process, but a penal one: which is awarded; not giving liberty to the prisoner, but punishing the party for his disobedience, who detains him; in the mean time, the sufferer may be conveyed out of the kingdom; or some other irreparable injury may be inflicted on him. This is a case which must probably have often occurred in England, by abuses under their press-warrants; by military encroachments, and for purposes of private vengeance

or public oppression. Recent as has been the establishment of our government, an outrageous and well-known example of this abuse took place here; an evasive return was made and repeated, and while the court was occupied in determining its validity, a number of citizens were carried out of the state, by a military officer, on a groundless charge of political crimes.

To prevent the recurrence of an evil of this kind, an article has been inserted, directing, whenever a case is made out to justify the issuing of this writ, accompanied by proof, that deportation, or any other irremediable injury is apprehended; or whenever the writ is disobeyed, that the magistrate shall, instead of the habeas corpus, issue his warrant to bring the prisoner and the party, in whose custody he is held, before him, that the one may be released, and the other committed for trial, in all cases in which those steps may be required by law.

2. Under the English law, the return is taken for true, and the only remedy, is an action against the person who makes a false return; a doctrine utterly subversive of the true intent of the act, and which, in many cases, has rendered it nugatory. This doctrine was established on a reference to the twelve judges, by the house of lords, in 1757, and was enforced in the case of American seamen impressed on board of English vessels; the captain returned, that they had voluntarily enlisted, and without any other evidence, they were remanded to their slavery, and told, that if, they survived the war, and could

find any one to bring an action for a false return, on proving it, they might obtain relief. This glaring defect is removed by the law presented to you; and the mode is prescribed for examining into the truth of a return when it is controverted.

3. The judges in the case alluded to, determined unanimously, that, the provisions made for awarding and returning writs of habeas corpus immediately, do not extend to any case but those of a criminal or supposed criminal nature. Mr. Justice Bathurst, it is true, adds to his opinion, that although the statute did not extend to other cases, yet the justices of the king's bench had, in favor of liberty, extended the same relief to all cases.

To give full effect to this remedy, it is proposed expressly, to extend it to every case of illegal imprisonment and restraint.

4. By the English practice, when a prisoner is brought up on habeas corpus, if the commitment be informal, he is discharged, although sufficient evidence may exist to justify his detention for trial. The plan proposes a remedy for this evil, by obliging the officer who brings up the prisoner, to produce the evidence on which he was committed, and directing the judge before whom the writ is returned, to recommit him if the evidence warrants it.

As the whole of this chapter is herewith submitted, it is not necessary to notice any other of the omissions which have been supplied, or the defects which it has been attempted to remedy. A strong impres-

sion of the utility of this great writ, has rendered me particularly desirous to increase the facility of procuring it; to enlarge the sphere of its relief; to give an adequate sanction to each of the provisions that are enacted; to impress upon the people the utility of preserving, and the danger of suffering it to be violated, and to shew the value we place on this and other institutions of freedom, not by suffering them to remain imperfect from a blind reverence for their antiquity, but by studying to improve, if possible, to perfect them; and by leaving to our children, not only unimpaired but augmented, those privileges bequeathed to us by the wisdom and patriotism of our fathers.

The great objects in the execution of this division of the work, have been to protect the innocent from ill-founded prosecutions, and even the guilty from vexation, in the manner of conducting those which were necessary to ascertain their guilt. But at the same time, to insure the exact execution of the laws, and as far as possible to destroy the effect of those devices, which professional ingenuity has so frequently used to procure the escape of the guilty. Some new provisions have been introduced to effect these objects, but where they could be obtained without innovation, none has been proposed. In those cases my endeavours have been confined to the arrangement of the law applicable to the different divisions, under its proper heads; and to giving precise and intelligible language to the rules of proce^r

dure. Even a slight notice of all the points in which changes or modifications of the present law have been suggested, would extend this report, already too long, to an inconvenient size. It may not be amiss, however, to mention a prohibition of those charges, which the judge frequently uses as the means of diffusing his political tenets, displaying his eloquence, and sometimes gratifying his passions; and of those presentments of the same nature, by which the jury recommend candidates to office, denounce public measures, or eulogize the virtues of men in office; such proceedings were thought beneath the dignity of the magistrate, and inconsistent with the sanctity of that body, whose functions of public accusers, and guardians of the liberty, and reputation of their fellow-citizens, require calm investigation undisturbed by intemperate discussions. If an ordinary court of justice be properly called the temple of that high attribute of the deity, we may, without too far extending the metaphor, term the tribunal of criminal jurisdiction, a shrine in that temple: the holy of holies, into which, impure or unworthy passion should find no admittance; and where no one ought to officiate until he has put off the habits of ordinary life, and assumed, with the holy robes of his function, that purity of intention, that ardent worship of truth, so inconsistent with the low pursuits of interest, the views of ambition or the vanity of false talent. Party spirit unfortunately will, in some degree, influence every other department; from the na-

ture of our government it must exist, but it will do no material injury, while it is felt in the legislative, or even in the executive branches; but if it once find admittance to the sanctuary of justice, we may be assured, that the vitals of our political constitution are affected, and I can imagine no better means of facilitating this corruption, than permitting your judges to make political harrangues to a jury, who reply by a party presentment.

Another article applicable to the trial, restricts the charge of the judge, to an opinion of the law, and to the repetition of the evidence, only when required by any one of the jury: the practice of repeating all the testimony from notes, always (from the nature of things) imperfectly, not seldom inaccurately, and sometimes carelessly, taken, has a double disadvantage; it makes the jurors who rely more on the judges notes than their own memory, inattentive to the evidence; and it gives them an imperfect copy of that, which the nature of the trial by jury requires, they should record in their own minds. Forced to rely upon themselves, the necessity will quicken their attention, and it will be only when they disagree in their recollection, that recourse will be had to the notes of the judge. There is also another and more cogent reason for the restriction. Judges are generally men who have grown old in the practice at the bar. With the knowlege which this experience gives, they also acquire a habit, very difficult to be shaken off, that of taking a side

in every question that they hear debated, and when the mind is once enlisted, their passions, prejudices, and their professional ingenuity are always arrayed on the same side, and furnish arms for the contest; neutrality cannot, under these circumstances, be expected; but the law should limit, as much as possible, the evil that this almost inevitable state of things must produce. In the theory of our law, judges are the counsel for the accused, in practice they are, with a few honourable exceptions, his most virulent prosecutors. The true principles of criminal jurisprudence require, that they should be neither. Perfect impartiality is incompatible with these duties. A good judge should have no wish that the guilty should escape, or that the innocent should suffer; no false pity, no undue severity should bias the unshaken rectitude of his judgment; calm in deliberation, firm in resolve, patient in investigating the truth, tenacious of it when discovered; he should join urbanity of manners, to dignity of demeanor, and an integrity above suspicion, to learning and talent; such a judge is what, according to the true structure of our courts, he ought to be—the protector, not the advocate of the accused; his judge, not his accuser; and while executing these functions, he is the organ by which the sacred will of the law is pronounced. Uttered by such a voice, it will be heard, respected, felt, obeyed; but impose on him the task of argument, of debate; degrade him from the bench to the bar; suffer him to overpower the accused with his influ-

ence, or to enter the lists with his advocate, to carry on the contest of sophisms, of angry arguments, of tart replies, and all the wordy war of forensic debate; suffer him to do this, and his dignity is lost; his decrees are no longer considered as the oracles of the law; they are submitted to, but not respected; and even the triumph of his eloquence or ingenuity, in the conviction of the accused, must be lessened by the suspicion, that it has owed its success to official influence, and the privilege of arguing without reply. For these reasons the judge is forbidden to express any opinion on the facts which are alleged in evidence, much less to address any argument to the jury, but his functions are confined to expounding the law, and stating the points of evidence on which the recollection of the members of the jury may differ.

I pass over other alterations of less importance, and proceed to the consideration of the fifth book.

This, as we have seen in the plan, is devoted to the rules of evidence as applicable to criminal law. In the execution of this part of the work, general principles will be first laid down, applicable to all cases of criminal enquiry from its incipient, to its final stage; they will be such only as have received the sanction of the learned and the wise, or such as can be supported by the clearest demonstration of their utility and truth. The evidence necessary to justify commitments, indictments, and convictions for each

offence specified in the third book, as well as that which may be admitted in the defence, will be detailed under separate heads, and such an arrangement will be studied as to make this part of the work easily comprehended and remembered without difficulty.

It is obvious, from the nature of this division of the subject, that illustrations of the rules it contains cannot be given without greatly exceeding the limits of an ordinary report. It may be proper, however, under this head, to notice that an attempt is made to enforce the sanction and add to the solemnity of oaths. From the careless and often unintelligible manner in which they are administered, it seems an idle ceremony rather than a sacred promise, accompanied by a renunciation of the blessings of the deity in case it should be broken. Rules are framed on this subject, which it is supposed may, in some measure, correct the evil, and make witnesses more cautious and circumspect in their testimony, by impressing upon the mind a proper sense of the serious consequences of its violation. If this impression should be insufficient to prevent deliberate perjury, it will at least, restrain the more prevalent evil of those aberrations from truth which are caused by exaggeration, carelessness or passion.

The sixth and last division of the work, is to contain rules for the establishment and government of the public prisons; comprehending those intended for

detention previous to trial; for simple confinement, and for correctional imprisonment at hard labor, or in solitude.

Upon these rules, and the proper execution of them, depend the success of the whole system. But it will be useless to make rules, because impossible to execute them, unless the edifice to be prepared for this purpose, be on a scale sufficiently extensive to permit the proper classification, the separate employment and proper seclusion, of the different offenders. Without these, we can neither produce reformation nor hope for any effect from example. And yet because it produces neither, we find fault with the system, when we should arraign only our want of attention to its principle. Vice is more infectious than disease; many maladies of the body are not communicated even by contact, but there is no vice that affects the mind, which is not imparted by constant association; and it would be more reasonable to put a man in a pest-house, to cure him of a head-ache, than to confine a young offender in a penitentiary, organized on the ordinary plan, in order to effect his reformation. Considering this interior arrangement as essential to the success of the whole plan, it was deemed improper to leave it to the discretion of the governors or warden; but by means of precise and somewhat minute regulations, to place the discipline of the prison on a basis that should not vary according to the different theories of those who are to enforce it, taking care, however, to allow a reasonable discretion in cases where considerations of humanity require it.

In order to frame these regulations to advantage, it would be very advisable to obtain more information than we now possess, of the practical operation of those which have been tried in the other states.

For this purpose I intend, if possible, to devote a few months of the summer to a personal examination of the different institutions of the kind in the Atlantic states, but if my circumstances should not permit me to execute this plan, I shall renew the efforts I have already made to procure the information which the different returns and reports can give.

Every system having reformation for its principal, or even incidental object, is imperfect, if it do not contain a regular and permanent provision for giving education to the young offenders, and moral and religious instruction to all.

Lessons of this nature, inculcated by men of piety and benevolence; enforced by a life of temperance and labor, and not counteracted by any evil associations, I firmly believe will make many a discharged convict, a more worthy member of society than some who have never committed any offence of sufficient magnitude to incur the same discipline. But reformation is not enough; although sincere, it will not be lasting, if the distrust of society shall drive the repentant sinner from its bosom; deny him the means of subsistence, and force him to seek it in a new association with his former companions in guilt. To avoid this consequence, means must be found to test by a

proper interval of probation, the sincerity of his reformation; to give him an opportunity of regaining confidence, by acts of gradual intercourse with the public, and after repeated trials, if it be found that he can withstand temptation, to assign him a place in society, which will enable him to subsist without reproach.

This part of the plan will be difficult of execution, but it is not deemed impracticable, and it will be facilitated and enforced by increased severity for a repetition of offences, as well in the duration of punishment as in the increase of privations while it lasts. Should the regulations which I suggest for this purpose be adopted, and be found efficient, it will complete the system which substitutes amendatory to vindictive punishments. A reformation in penal jurisprudence which reflects higher honor on modern times, than the greatest discoveries they have produced in arts, literature, or science.

This is the plan of the work, and these are the principles on which it is founded; if after examining them, it should be perceived that they are inconsistent with the views of the legislature, or that the execution falls short of their expectations, the evil is still within the reach of such remedy as their wisdom may suggest.

From such parts of the code as are in the state of greatest forwardness, I have selected the second book; and the last chapter of the fourth, as specimens of the execution. The one being chiefly an enun-

ciation of general principles, and the other necessarily confined to matters of practical detail, the general assembly can the better judge, whether a proper attention to sound theory, has been combined with efficient practical details; and whether the great object I have had in view, of rendering every rule intelligible, although concise, has, in a reasonable degree been attained.

Some parts of the third book are prepared, but the whole of this division is still in an unfinished state. The fourth is nearly complete. The fifth cannot, without great inconvenience, be put into form until the crimes to which the evidence is to apply are defined and definitively classed; this book must, therefore, necessarily be unfinished until the completion of the third; and the want of that information, which I hope to obtain by a personal inspection of the prisons, has unavoidably delayed what I have to add to the sixth and last book.

I have only to add, on this subject, that from the progress already made, I hope that the whole system will be presented at the next session. And I submit to the legislature, whether it would not be proper to direct, that when finished it shall be printed for the inspection of the members.

This report is intended to apprise the representatives of the people, what changes are proposed to be made in their criminal jurisprudence; to inform them why these changes are deemed necessary; to lay before them a plan of the whole work; to an-

nounce the principles on which it is established ; and by the exhibition of a part, to shew in what manner it may be reasonably expected that the whole will be executed.

In performing this duty, the line traced by the law, under which I was appointed, has been scrupulously adhered to. In its execution, I claim no other merit than that of diligence, and a most conscientious desire to perform it in such a manner as will best reconcile humanity with justice, and the great interests of freedom with both.

The representatives of a free people, although they may do nothing to forfeit the confidence of their constituents, cannot always expect to retain the power of serving them. A spirit of change is inherent in our government ; it gives it energy, and is even necessary to its existence. We appear in public life ; perform or neglect the duties assigned to us ; and then, pushed off the stage by younger, more active, or more popular candidates, we return to the mass of our fellow-citizens ; in common with them, to suffer the evils, or enjoy the benefits of the measures we have adopted. It is not always, that in the brief space allotted to us for the performance of our functions, we have an opportunity of making it an epoch in the annals of our country, by institutions, with which a grateful posterity will identify the names of those by whose patriotic labors they were established. This rare occasion now presents itself for your acceptance.

If the work, which your wisdom has directed, and which your sound judgment, experience, and care will modify and correct, should effect the object of giving to your country a penal code, founded on true principles—concise, correct, humane, easily understood, guarding with the same scrupulous care the rights of the poorest citizen, and of the most influential member of society; enforcing firmly, not harshly, a strict obedience to the laws; repressing with an even hand the abuses of office and the licence of insubordination; protecting the good, restraining, punishing, and reforming the wicked; arraying the best feelings and most powerful passions, as well as the understanding on the side of the law; making disobedience, unwise and in attractive, as well as dangerous; arming all your institutions with public opinion, and directing its irresistible force against vices and crimes; rendering your judges venerated as the oracles of justice, and your courts respected as its sanctuary. Should this be the result, few public bodies can boast a fairer claim than you will then have to the approbation of their constituents, and the gratitude of posterity. For you will have rendered an essential service, not only to your own country, by securing its internal peace, and establishing its reputation for wisdom and justice, but to the other states, by giving them an useful and honorable example, and to the whole world, by demonstrating the ease and safety with which abuses are corrected, and improvements introduced under a free

government, and exemplifying its superiority, by this proof of the rapid progress it has enabled you to make in the science of legislation, during the few years you have enjoyed it. And the grateful prayers of the innocent whom you will have saved; of the guilty you will have reformed, and of the whole community, whose feelings will no longer be lacerated by public exhibitions of suffering and of death, will combine with your own consciousness of rectitude, in drawing down a blessing on your lives, and diffusing a glow of happiness over that hour, when the remembrance of one measure effected for the interests of humanity, or the permanent good of our country, will be of more value, than all the fleeting and unsatisfactory recollections of success in the pursuits of fortune or ambition.

All which is respectfully submitted,

EDWARD LIVINGSTON.

DETACHED PARTS
OF THE
PROJECTED CODE.

Introductory Notice.

ART. 1. This code is divided into six books; each book into chapters and sections; the whole composed of articles numbered throughout each book.

The first book contains definitions explaining the sense in which certain words and phrases are used in the course of the work, and directs the mode in which this code shall be promulgated and taught.

The second contains a preamble; and general dispositions, applicable—

1. To the exercise of legislative power in penal jurisprudence.
2. To prosecutions and trials.
3. To the persons who are amenable to the provisions of the code and of the circumstances under which acts that would otherwise be offences, may be justified or excused.
4. To the repetition of offences.
5. To different persons participating in the same offence as principals, accomplices, and accessaries.

The third book defines offences and designates their punishment.

The fourth establishes a system of procedure in all criminal cases, relative to

Complaints or accusations.—Arrests.—Commitments.—Indictments.—Informations.—Arraignments and trials.—To the formation of grand juries, their duties and forms of proceeding.—To the securing the attendance of witnesses.—To the forms to be observed in all proceedings in court.—To the administration of oaths.—To the granting and executing search warrants.—To the requiring security against the commission of offences which are apprehended.—To the granting of writs of habeas corpus, and the provisions necessary to giving it effect.

The fifth contains rules of evidence as applicable to trials for each of the offences made punishable by this code.

The sixth relates to the establishment of a penitentiary, and contains rules for its government.

ART. 2. Whenever in this code, the office, trust, state, or relation of tutor, ward, administrator, executor, ancestor, heir, parent, child, minor, infant, master or servant; and the relative pronouns he or they, as referring to them, are used, they are intended to mean as well females as males, standing in those relations, or exercising the same offices, trusts, or duties, unless the contrary be expressed.

ART. 3. The general terms—whoever; any person; any one; and the relative pronouns—he, or

they, when they refer to them, are intended to include females as well as males, unless there is some expression to the contrary.

ART. 4. Whenever this code forbids or directs by using the general terms—any one; one; any person; whoever, or the relative pronoun—he; referring to any such general term, the same prohibition or direction (if the contrary be not expressed) is extended to more persons than one, doing or omitting the same act; and in like manner, when the plural—persons, or the relative—they, is used in any mandatory or prohibitory disposition of the law; the direction or prohibition applies to any one person, doing or omitting the same act.

ART. 5. Whenever any thing is directed or forbidden with respect to one object or thing, the same direction or prohibition extends to more than one of the same objects or things, and a direction or prohibition as to more objects than one, includes the same prohibition as to a single one of the same objects.

ART. 6. All words printed in the body of this work, in small capitals, are defined and explained in the first book, and when thus printed, are used in no other sense than that given to them by such definition or explanation.

ART. 7. Every word or phrase employed in this work, other than those so printed, is to be taken and construed in the sense in which it is commonly used, by men who understand the language.

ART. 8. It is not intended that each article should

contain in itself a complete expression of legislative will, on the subject of which it treats, independent of the other articles of the same section; the whole are to be considered together; to avoid repetition, a provision in one article, sometimes relates to something expressed in another; an example of which is found in the article immediately preceding this, where the words "so printed," relate to printing in "small capitals," provided for in the section preceding it.

BOOK SECOND.

PRELIMINARY CHAPTER.

Preamble.

No act of legislation can be, or ought to be immutable. Changes are required by the alteration of circumstances; amendments, by the imperfection of all human institutions; but laws ought never to be changed without great deliberation, and a due consideration as well of the reasons on which they were founded, as of the circumstances under which they were enacted. It is therefore proper, in the formation of new laws, to state clearly the motives for making them, and the principles by which the framers were governed in their enactment.

Without a knowledge of these, future legislatures cannot perform the task of amendment, and there can be neither consistency in legislation, nor uniformity in the interpretation of laws.

For these reasons the general assembly of the state of Louisiana, declare, that their objects in establishing the following code, are—

To remove doubts relative to the authority of any parts of the penal law of the different nations by which this state, before its independence was governed.

To embody into one law and to arrange into system, such of the various prohibitions enacted by different statutes as are proper to be retained in the penal code.

To include in the class of offences, acts injurious to the state and its inhabitants, which are not now forbidden by law.

To abrogate the reference (which now exists) to a foreign law for the definition of offences and the mode of prosecuting them.

To organize a connected system for the prevention as well as for the prosecution and punishment of offences.

To collect into one code, and to express in plain language, all the rules which it may be necessary to establish, for the protection of person, property, condition, reputation and government; the penalties and punishments attached to a breach of those rules; the legal means of preventing offences, and the forms

of prosecuting them when committed; the rules of evidence, by which the truth of accusations are to be tested, and the duties of executive and judicial officers, jurors and individuals, in preventing, prosecuting and punishing offences: to the end, that no one need be ignorant of any branch of criminal jurisprudence, which it concerns all to know.

And to change the present penal laws, in all those points in which they contravene the following principles; which the general assembly consider as fundamental truths, and which they have made the basis of their legislation on this subject; *to wit*:—

Vengeance is unknown to the law. The only object of punishment is to prevent the commission of offences, it should be calculated to operate.

First, on the delinquent, so as by seclusion to deprive him of the present means, and by habits of industry and temperance, of any future desire, to repeat the offence.

Secondly, on the rest of the community, so as to deter them by the example, from a like contravention of the laws. No punishments greater than are necessary to effect these ends, ought to be inflicted.

No acts or omissions should be declared to be offences, but such as are injurious to the state, to societies permitted by the laws, or to individuals.

But penal laws should not be multiplied without evident necessity; therefore acts, though injurious to individuals or societies, should not be made liable to public prosecution, where they may be sufficiently repressed by private suit.

From the imperfection of all human institutions, and the inevitable errors of those who manage them, it sometimes happens, that the innocent are condemned to suffer the punishment due to the guilty. Punishments should therefore be of such a nature, that they may be remitted (and as far as possible, compensated) in cases where the injustice of the sentence becomes apparent..

Where guilt is ascertained, the punishment should be speedily inflicted.

Penal laws should be written in plain language, clearly and unequivocally expressed; that they may neither be misunderstood nor perverted; they should be so concise, as to be remembered with ease; and all technical phrases or words they contain, should be clearly defined. They should be promulgated in such a manner as to force a knowledge of their provisions upon the people; to this end, they should not only be published, but taught in the schools; and publicly read on stated occasions.

The law should never command more than it can enforce. Therefore, whenever, from public opinion, or any other cause, a penal law cannot be carried into execution, it should be repealed.

The accused, in all cases, should be entitled to a public trial, conducted by known rules, before impartial judges, and an unbiassed jury; to a copy of the act of accusation against him, to the delay necessary to prepare for his trial; to process to enforce the attendance of his own witnesses; and to an op-

portunity of seeing, hearing, and examining those who are produced against him; to the assistance of counsel for his defence; to free communication with such counsel, if in confinement, and to be bailed in all cases, except those particularly specified by law. No presumption of guilt, however violent, can justify the infliction of any punishment before conviction; or of any bodily restraint greater than is necessary to prevent escape; and the nature and extent of this restraint should be determined by law.

Perfect liberty should be secured of hearing and publishing the proceedings of criminal courts; and no restraint whatsoever should be imposed on the free discussion of the official conduct of the judges, and other ministers of justice, in this branch of government.

Such a system of procedure, in criminal cases, should be established, as to be understood without long study; it should neither suffer the guilty to escape by formal objections, nor involve the innocent in difficulties, by errors in pleading.

For this purpose, amendments should be permitted in all cases, where neither the accused nor the public prosecutor can be surprized.

Those penal laws counteract their own effect, which, through a mistaken lenity, give greater comforts to a convict than those which he would probably have enjoyed, while at liberty.

The power of pardoning should be only exercised in cases of innocence discovered, or of certain and unequivocal reformation.

Provisions should be made for preventing the execution of intended offences, whenever the design to commit them is sufficiently apparent.

The remote means of preventing offences do not form the subject of penal laws. The general assembly will provide them in their proper place. They are the diffusion of knowledge, by the means of public education, and the promotion of industry, and consequently of ease and happiness among the people.

Religion is a source of happiness here, and the foundation of our hopes of it hereafter; but its observance can never, without the worst of oppression, form the subject of a penal code. All modes of belief, and all forms of worship, are equal in the eye of the law; when they interfere with no private or public rights, all are entitled to equal protection in their exercise.

Whatever may be the majority of the professions of one religion or sect in the state, it is a persecution to force any one to conform to any ceremonies, or to observe any festival or day, appropriated to worship by the members of a particular religious persuasion: this does not exclude a general law, establishing civil festivals or periodical cessations from labor, for civil purposes unconnected with religious worship, or the appointment of particular days on which citizens of all persuasions should join, each according to its own rites in rendering thanks to God for any signal blessing, or imploring his assistance in any public calamity.

The innocent should never be made to participate in the punishment inflicted on the guilty; therefore, no such effects should follow conviction, as to prevent the heir from claiming an inheritance through, or from the person convicted. Still less should the feelings of nature be converted into instruments of torture, by denouncing punishment against the children, to secure the good conduct of the parent.

Laws intended to suppress a temporary evil should be limited to the probable time of its duration, or carefully repealed after the reason for enacting them has ceased.

CHAPTER II.

Containing General Provisions.

Section First.

ART. 1. No act or omission done or made before the promulgation of the law which forbids it, can be punished as an offence.

ART. 2. If an act or omission be created an offence by one law, and the penalty be increased by another, no breach of the first law, committed before the promulgation of the second, can be punished by in-

flicting the penalty of the latter. But if the penalty be lessened by the second law, the offender may, at his request, undergo the penalty of the last law only.

ART. 3. After a penal law is repealed, no person can be arrested, imprisoned, tried, or condemned, for a breach of it, while it was in force, unless the repealing law has an express provision to that effect.

ART. 4. The distinction between a favorable and an unfavorable construction of laws is abolished. All penal laws whatever, are to be construed according to the plain import of their words, taken in their usual sense.

ART. 5. When a second penal law shall direct a new PENALTY, the penalty of the first law shall be deemed to be abolished, unless the contrary be expressed.

ART. 6. A law which simply commands or forbids an act to be done, but which contains no denunciation of a penalty, can have none but civil effects, the act or omission which is forbidden, cannot be punished as an offence.

ART. 7. The legislature alone has a right to declare what shall constitute an offence; therefore it is forbidden to punish any acts or omissions, not prohibited by statute, under pretence that they offend against the laws of nature, of religion, morality, or any other rule, except written law.

ART. 8. Courts are expressly prohibited from punishing any acts or omissions which are not forbidden by the letter of the law, under the pretence.

that they are within its spirit. It is better that acts of an evil tendency, should, for a time, be done with impunity, than that courts should assume legislative powers; which assumption, is itself an act more injurious than any it may purport to repress. There are, therefore, no constructive offences. The legislature, when the necessity appears, will bring such acts as ought to be punished, within the letter of the law.

ART. 9. When a competent tribunal, judging in the last resort, hath rendered a final judgment, acquitting or condemning the accused, he can never be again prosecuted for the same offence.

ART. 10. An accusation being an affirmation of guilt, it must be proved to the satisfaction of those whose province it is to decide. When they entertain doubts of the fact alleged, or of the application of the law, the accused cannot be convicted.

Section Second.

GENERAL PROVISIONS RELATIVE TO PROSECUTIONS AND TRIALS.

ART. 11. No person accused of any offence, shall be compelled by violence or menace, to answer any interrogations relative to his innocence or guilt; nor shall his confession, unless it be given freely, without violence, menace, or promise of indemnity or favor, be produced in evidence against him.

ART. 12. No person shall be arrested to answer for any offence but in the manner and on the evidence specially set forth in the fourth book of this code.

ART. 13. No SEARCH WARRANT shall issue in any case but in those provided for, and in the manner directed in the said fourth book.

ART. 14. The accused in every stage of the prosecution, is entitled to have the advice of such counsellor-at-law, or other person, as may be employed by him for his defence. If he declares himself unable to procure counsel, the court shall assign him an advocate in the manner directed by the fourth book, regulating the practice of criminal courts.

ART. 15. No trial for any offence shall be had, but in the presence of the accused. No examination of witnesses shall be used on such trial, but such as is taken in the joint presence of the court, the jury, the public prosecutor, and the accused. All of whom shall have leave to question the witness. Those cases in which testimony is allowed to be taken by commission, and which are specially provided for in the fourth book, are excepted from the provisions of this article.

ART. 16. All trials for offences shall be held in public. All persons without distinction, have a right to be present at such trials, provided however, that the court may, on the prayer of the prosecutor or the accused, direct witnesses to withdraw until they are called for examination; and may also, in the manner

directed by the provisions of the 4th book of this code, remove such persons as shall obstruct the administration of justice.

ART. 17. All final judgments in trials for offences, with the reasons on which they are founded, shall be distinctly pronounced in open court, in the presence of the accused (if he be in custody) and they shall be entered at large on the minutes of the court. And in like manner all other judgments, orders or decisions, shall be pronounced and entered on the minutes, whenever either the public prosecutor or the accused shall require the same.

ART. 18. It shall be lawful for any one, by printing and in writing, as well as by speech, to discuss the reasons of any judgment, order, or decree, given in the course of any prosecution for an offence, and to call in question the legality or propriety of the same.

ART. 19. The process to which the accused is entitled by the constitution, to compel the attendance of his witnesses, shall be granted for witnesses who may be in any part of the state, and the sheriff of any parish to whom the same may be directed, shall serve and return such process, and such witnesses shall be paid by the state, whenever the accused shall be acquitted, and whenever it shall appear to the court that the accused, if convicted, is unable to pay them.

ART. 20. All witnesses summoned to attend the trial of any offence, shall be protected from arrest in any civil suit, and in any penal suit for a misdemeanor, while attending on the court, and for a reasonable

time, while going to or returning therefrom; unless it shall appear that the witness was summoned by collusion merely to protect him from arrest. And in case of any arrest contrary to this article, any judge of any court of this state, either of criminal or civil jurisdiction, except justices of the peace, may grant relief by discharging the person arrested, first giving notice to the person causing the arrest, or to his agent.

ART. 21. No person, after being acquitted or ordered to be discharged, shall be detained for the payment of any fees or costs attending the prosecution for which he has been discharged, or for the reimbursement of the sum allowed by law for his support, or for any sums whatever due for his maintenance, or for services or supplies, while he was in prison. Nor shall any court or magistrate give judgment in any suit against a person acquitted or discharged for want of prosecution for any such fees, or for any such sum, as is allowed by law for the maintenance of prisoners.

ART. 22. The trial by jury, as regulated in the fourth book of this code, is declared to be the mode of trial for all offences, and it cannot be renounced.

Section Third.

OF PERSONS AMENABLE TO THE PROVISIONS OF THIS CODE; AND OF THE CIRCUMSTANCES UNDER WHICH ALL ACTS THAT WOULD OTHERWISE BE OFFENCES, MAY BE JUSTIFIED OR EXCUSED.

ART. 23. All persons, whether they be inhabitants of this State, or of any other of the United States, or aliens, are liable to be punished for any offence committed in this state, against the laws thereof. Citizens or inhabitants of the state may be punished for acts committed out of the limits thereof, in those cases in which there is a special provision of law, declaring that the act forbidden, shall be an offence, although done out of the state.

ART. 24. An offence is a voluntary act or omission done or made contrary to the directions of a penal law. There can, therefore, generally be no offence, if the will do not concur with the act; but the law has established exceptions to, and modifications of this rule; but no modifications or exceptions other than those expressly provided, are to be allowed.

ART. 25. No person shall be convicted of any offence committed when under ten years of age: nor of any offence when between ten and fifteen years of age, unless it shall appear by proof to the jury, that he had sufficient understanding to know the nature and illegality of the act which constituted the offence.

ART. 26. If a minor shall commit an offence by command or persuasion of any relation in the ascending line; of his tutor or curator, or any person acting as such, or of his master, if he be an apprentice or servant, then the minor shall be punished for such offence by simple imprisonment, during one half of the time to which he would have been sentenced, had he been of full age. Provided such minor have attained the age of fifteen years, at the time of the commission of the offence; if under that age, the command or persuasion of either of the persons, standing in either of the relations to him, which are above enumerated, shall excuse him from punishment, if the offence committed be a misdemeanor only; but if the offence be a crime, such minor under fifteen years of age, shall, by the order of any judge having cognizance of the offence, be bound as an apprentice to the warden of the state prison, for the purpose of being instructed in some trade, in the manner particularly provided for in the sixth book. And in all cases of crimes committed by minors, the court direct that the offender be, either in lieu of, or in addition to, the punishment generally provided for the offence, be so bound as an apprentice.

ART. 27. In like manner, a married woman committing an offence by the command or persuasion of her husband, shall suffer no greater punishment than simple imprisonment, for one half of the time to which she would have been sentenced, if she had committed the offence without such command or persuasion.

The relation of husband and wife, for the purposes of this article, need not be proved by testimony of the celebration of marriage contract. Living together at the time, and general reputation, shall be sufficient to reduce the punishment of the reputed wife, and to increase that of the reputed husband, in the manner hereafter directed.

ART. 28. In all cases where a minor shall be AIDED in the commission of an offence, by either of the persons standing in the relation to him enumerated in the twenty-sixth article, or if the husband or the reputed husband shall aid the wife in the commission of the offence, or shall be PRESENT during the time of its commission, without endeavoring to prevent it, either of these circumstances shall be proof that the offence was committed by their command or persuasion.

ART. 29. If any minor or married woman, shall have committed any offence, and the persons standing in relation to such minor, which are enumerated in the twenty-sixth article, or the husband of the wife, shall be convicted of having persuaded, commanded, or aided in the said offence, then said persons so convicted, shall be punished as follows, that is to say :—

If the minor be under fifteen years of age at the time of committing the offence, then the duration of the punishment, if the same shall consist of imprisonment, and the amount of the fine, if any, which would otherwise have been inflicted on such persons, shall

be increased one half. And if the minor shall be above fifteen years, then one-fourth; and in either case, if the punishment for such offence be imprisonment for life; then one month of such imprisonment, in every year, shall be in solitude.

ART. 30. No act done by a person in a state of *INSANITY* can be punished as an offence. No person becoming *INSANE* after he has committed an offence, can be tried for the same. No person becoming insane after he has been found guilty, shall be sentenced while in that state. No person sentenced shall be punished, if he afterwards become and continue insane.

And during the continuance of the punishment, if the convict is deprived of his reason, so much of the punishment as may consist of hard labor, shall, during such insanity, cease.

In all the cases mentioned in this article, the court having cognizance of the offence, shall make order for securing the person of the accused. The manner of ascertaining whether insanity is feigned or real, is provided for in the fourth book.

ART. 31. Private soldiers, nor non-commissioned officers in the army; or in the militia when in actual service, are not liable to punishment for misdemeanors committed by the order of any officer, whose legal military order they were bound to obey; but all officers giving or transmitting the command, are liable to the penalties of the law.

ART. 32. The order of a military superior is no justification or excuse for the commission of a crime.

ART. 33. The order, warrant, or writ issued by a magistrate or court, shall justify the person executing it for any act done in obedience thereto, only in cases wherein the following circumstances concur.—

1. The court or magistrate must have JURISDICTION of the cause, or COGNIZANCE of the matter in which the order, warrant, or writ was issued.

2. The writ, warrant or order, must have all the forms required by law for such writs, as it purports to be.

3. The person executing it, must be an officer bound to execute, by virtue of his office, such writs as it purports to be, or he must be a person legally called upon by such officer, to aid in the execution of the order, warrant or writ.

4. He must have no knowledge of any illegality in obtaining or executing the order, warrant, or writ.

ART. 34. The legal order of a COMPETENT magistrate or court, if executed by a person DULY AUTHORIZED, will justify those acts which are expressly commanded by such order, and also all those acts which are the necessary means of carrying the order into execution, but it will justify no other acts; the means allowed as necessary by law, are detailed in the fourth book.

ART. 35. If one be forced by threats or actual violence to do any act, which if voluntarily done, would be an offence, he shall be exempted from punishment, by proving the following circumstances.—

1. That he was threatened with the loss of life or

limb, if he did not perform the act; and that he had good reason to believe, that such threat would be executed.

2. That he made every endeavor which could be made by any man of common courage, to resist or escape from the power of the person using the threats.

3. That the act of which he is accused, was done while he was in the presence of the person using the threats or violence, and during the continuance of the same.

ART 36. If one intending to commit an offence, and in the act of preparing for, or executing the same, shall, through MISTAKE OF ACCIDENT, do another act, which if voluntarily done, would be an offence, he shall incur the penalty for the act really done. Provided, that if the act intended to be done, be a misdemeanor, he shall only incur the highest penalty provided by law for the offence he intended to commit, although the act done would, if he had intended it, have been a crime.

But if the intent was to commit a crime, although INFERIOR IN DEGREE, he shall incur the penalty provided by law, for the act really done.

ART. 37. No event happening through MISTAKE OR ACCIDENT in the performance of a lawful act, done with ORDINARY ATTENTION, is an offence.

ART. 38. An act forbidden by law, though done through MISTAKE OF ACCIDENT, from the want of ORDINARY CARE AND ATTENTION, is punishable. The several offences of this nature are enumerated in the third book.

ART. 39. The intention to commit an offence shall be presumed whenever the means used are such as, in the common course of events, must produce the event, which is forbidden.

ART. 40. The fact which constitutes an offence being proved, all facts or circumstances on which the accused relies to justify or excuse the prohibited act or omission, must be proved by him.

ART. 41. If any person who shall ATTEMPT TO COMMIT an offence, fail in completing the same, or is interrupted from any cause, not depending on his own will, he shall suffer ONE HALF OF THE PUNISHMENT, to which he would have been sentenced, if he had completed the whole.

ART. 42. Military offences are not comprehended in this code.

ART. 43. The Indian tribes residing within the boundaries of this state, being governed by their own usages, no act done within their boundaries by individuals belonging to such tribes, in their intercourse with each other, or with other tribes, and not affecting any other person, is considered as an offence against this code; in other respects they are considered in the same light with other persons in the state, both as to protection and liability to punishment.

ART. 44. Offences committed by slaves, form the subject of a separate code, they are not included in any of the provisions of this.

Section Fourth.

OF A REPETITION OF OFFENCES.

ART. 45. Any person, who having been convicted of a misdemeanor, shall afterwards repeat the same offence, or commit any other misdemeanor of the same nature, shall suffer ADDITION OF ONE HALF to the punishment he would otherwise have suffered. If the first conviction was for a crime, the punishment for the second offence of the same nature, shall be INCREASED ONE HALF.

ART. 46. And if any person having been twice previously convicted of crimes, no matter of what nature, shall a third time be convicted of any crime, he shall be considered as unfit for society, and be imprisoned at hard labour for life.

ART. 47. A previous conviction in any of the United States of America, operates the same effect as to the increase of punishment for subsequent offences, as if the same conviction had taken place in this state.

ART. 48. By offences of the SAME NATURE, in this section, are intended all such as are comprised within the same general division in the chapter of the third book, which relates to the nature of different offences.

ART. 49. Where the punishment of the crime of which the offender is a second or third time convicted, is imprisonment for life, the increased punish-

ment must consist in seclusion, or such other privations as the judges are empowered in the third book, to direct, with respect to offenders in general.

Section Fifth.

OF PRINCIPALS, ACCOMPLICES, AND ACCESSARIES.

ART. 50. An offence being the doing of an act which is forbidden under a penalty imposed by law, or omitting to do some act, which under like penalty is directed by law to be done; those are principal offenders who do the forbidden act, or who being bound to do the act enjoined, are guilty of the omission.

ART. 51. If the forbidden act be done by several, all are principal offenders. If several are bound to perform the act which is enjoined, all who omit it are principal offenders.

ART. 52. When the act constituting the offence is actually done by only one or more persons, but others are present, and knowing the unlawful intent, aid them by acts or encourage them by words or gestures; or if not being actually present, others shall keep watch to give notice of the approach of any one who might interrupt the commission of the offence; or shall be employed in procuring aid, or arms, or instruments for the performance of the act, while it is executing; or shall do any other act at the

time of executing the offence, to secure the safety or concealment of those who perform the offence, or to aid them in its execution. All such persons are also principal offenders, and may be prosecuted and convicted as such.

ART. 53. When the offence is committed by SECONDARY MEANS, without employing the agency of a person who may be convicted as a principal offender, the person employing and preparing those secondary means, is a principal offender, altho' he may not be present, when the means he had prepared took their effect.

ART. 54. Those persons are also principals, who having counselled or agreed to the performance of the act, shall be present when it is done, whether they aid in the execution or not.

ART. 55. There may be accessaries and accomplices to all offences.

ART. 56. There can be neither accomplice nor accessory, except in cases where an offence has been committed.

ART. 57. All those are accomplices who are not present at the commission of an offence, but who, before the act is done, verbally or in writing, shall advise or command, or encourage another to commit it.

Those who agree with the principal offender to aid him in committing the offence, although such aid may not have been given.

Those who shall promise money, or other reward, who shall offer any place or political favor, or any other inducement; or shall menace any injury or loss of favor, in order to procure the commission of an offence.

Those who shall prepare arms or instruments, men, money, or aid of any kind, or do any other act prior to the commission of the offence, to facilitate its execution, and knowing that it is intended, all these persons are accomplices.

ART. 58. No person can be found guilty as an accomplice to any offence, other than such as he has advised or encouraged by some of the means set forth in the last preceding article, but it is not necessary to render him guilty, that the advice should be strictly pursued; it is sufficient if the offence be of the SAME NATURE and for the same object, as the offence advised or encouraged.

ART. 59. If in the attempt to commit an offence, the principal offender shall make himself liable to punishment for any other act committed by mistake or accident, according to the 36th article of this book, his accomplices in the offence intended to be committed, shall be considered as accomplices in the act really committed, and shall be punished in the same manner as the principal.

ART. 60. If the principal offender be under fifteen years of age, whether he be found of sufficient intelligence to understand the nature and illegality of the act or not, and there be an accomplice of full age,

the punishment of such accomplice shall be INCREASED ONE HALF ; and if the principal offender be a minor, above fifteen, then the punishment of the accomplice shall be INCREASED ONE QUARTER.

ART. 61. In all other cases, the accomplice shall incur the same punishment with the principal offender.

ART. 62. Accessories are those, who knowing that an offence has been committed, conceal the offender, or give him any other aid, in order that he may effect his escape from arrest or trial, or the execution of his sentence; he who aids the offender in preparing and making his defence at law; or who procures him to be bailed, altho' he may afterwards abscond, shall not be considered as an accessory.

ART. 63. The following persons cannot be punished as accessories.

1. The husband or wife of the offender.
2. His relations in the ascending or descending line, either by affinity or consanguinity.
3. His brothers or sisters.
4. His domestic servants.

ART. 64. The accessory shall be punished by fine and simple imprisonment in the manner directed by the third book.

ART. 65. The accomplice may be arrested, tried and punished before the conviction of the principal offender, and the acquittal of the principal shall be no bar to the prosecution of the accomplice, but on the trial of such accomplice, the commission of the

offence must be clearly proved, or the accomplice cannot be convicted.

ART. 66. The accessory may be arrested, but not tried without his consent before the conviction of the principal, and the acquittal of the principal, shall discharge the person named as accessory.

BOOK FOURTH.

CHAPTER TENTH.

Of the Writ of Habeas Corpus.

Section First.

DEFINITION AND FORM OF THIS WRIT.

ART. 1. A writ of habeas corpus is an order in writing, issued in the name of the state, by a judge or court of competent jurisdiction, directed to any one having a person in his CUSTODY, or under his RESTRAINT, commanding him to produce such person at a certain time and place, and to state the reason why he is held in custody, or under restraint.

ART. 2. The writ of habeas corpus is to be, as nearly as circumstances will permit, in the following form, *to wit* :—

The state of Louisiana to A. B. You are com-

manded to have C. D. in your custody, as is said, detained, or under your restraint, kept, before E. F. judge of, (describing the office of the magistrate issuing the writ, or if issued by a court, inserting the STYLE of such court) on the day of
 at o'clock, in the forenoon or afternoon (as the case may be) of the same day, at (naming the place) and that you then and there state in writing, the cause of detaining the said person, and produce your authority for so doing, and hereof you are not to fail under the heavy penalties denounced by law against those who disobey this writ. E. F. judge, &c. or G. H. clerk of the court of. &c.

ART. 3. The writ of habeas corpus (if issued by a judge) must be signed by him, or (if issued by a court) must be signed by the clerk, and sealed with the seal of such court.

ART. 4. The proceedings under this writ are considered as the most effectual safeguard of personal liberty against public or private attempts to invade it. It is therefore declared, that in all cases where there may be any doubt on the construction of any provision in this chapter, that construction must be given which is most favorable to the person applying for relief under it, and which will give the most extensive operation in all cases, to the remedies hereby provided against illegal restraint.

ART. 5. The writ of habeas corpus is not to be disobeyed for any defect of form. It is sufficient; 1st. If the person to whom it is directed, be desig-

nated, either by the *STYLE* of his office (if he have any) or by such other appellation or description, as may make it understood by one of common understanding, that he is the person intended, and any one who may be served with this writ, who has in fact, the *CUSTODY* of the person directed to be produced, or who exercises a *RESTRAINT* over him, cannot avoid obedience thereto, although the writ may be directed to him by a wrong name, a false description, or even although it be directed to another. 2d. It is sufficient if the person who is directed to be produced, be designated by name, or if the name be unknown or uncertain, if he be described in any other way so as to make it be understood by one of common understanding, who is the person intended. 3d. The name and office of the judge, or the *STYLE* of the court issuing the writ, must be either stated in the body of the writ, or by the signature thereof, so as to shew sufficiently the authority for issuing the same. If the time of making the return should be omitted, the writ is to be obeyed without delay; if no place be inserted, it must be obeyed, by making the return at the dwelling of the judge or the usual place of holding the sessions of the court, whichever issued the same.

ART. 6. The insertion of words in the writ, other than those contained in the above given form, or the omission of any which are inserted in such form, shall not vitiate the writ, provided the substantial parts enumerated in the preceding article are preserved.

Section Second.

WHO HAS AUTHORITY TO ISSUE WRITS OF HABEAS CORPUS, AND IN WHAT CASE, AND HOW THEY ARE TO BE APPLIED FOR.

ART. 7. The district courts, and the criminal court, as now established, and all other courts which may hereafter be established, having jurisdiction in civil causes, to the amount of more than three hundred dollars, or of criminal cases where the punishment is more than one year's imprisonment at hard labour; and the judges of such courts have power to issue writs of habeas corpus, directed to any person within their respective districts.

ART. 8. When the judge of any district is absent, interested, or incapable, from whatever cause, of acting, and there is no judge of a criminal court in such district, a writ of habeas corpus may be issued by a judge, of competent authority, in any of the adjoining districts—provided, the absence, interest, or inability of the judge of the district, where the illegal imprisonment is said to exist, be made to appear by the oath of the party applying, or other sufficient evidence.

ART. 9. The writ of habeas corpus may be obtained by petition addressed to any court or judge, having authority to grant the same—signed either by the party, for whose relief it is intended, or any other person on his behalf. The petition must state in substance :—

1. That the party is illegally imprisoned or restrained in his liberty, and by whom, naming both parties—if their names are known, or designating or describing them, if they are not.

2. If the confinement or restraint is by virtue, or under colour of any judicial writ, order, or process, a copy thereof must be annexed, or it must be averred that such copy has been demanded and refused.

3. If the confinement or restraint be by virtue of judicial process, regular in form, but illegally obtained or executed, it must be set forth in what the illegality consists.

4. If the confinement or restraint is not by virtue of any judicial process, then the petitioner need only state that the party is illegally confined or restrained.

5. The petition must contain a prayer for the writ of habeas corpus.

6. It must be sworn to be true, at least according to the belief of the person making the application.

ART. 10. Any court or judge empowered to grant writs of habeas corpus, on receiving such petition, shall, without delay, grant the same; unless it appear from the petition itself, or from documents annexed, that the party can neither be discharged nor admitted to bail, nor in any other manner relieved.

ART. 11. A writ of habeas corpus is granted in court by the signature of the clerk, and affixing the seal of the court to the writ. It is granted by the judge, by his signature only.

ART. 12. Whenever the court or judge, duly au-

thorised, shall know, or have reason to believe, that any one, in the district of such judge or court, is illegally confined or restrained in his liberty, they shall issue a writ of habeas corpus for his relief, although no petition be presented, or application made for such writ.

ART. 13. Whenever it shall appear, by the oath of a credible witness, or other satisfactory evidence, that any one is held in illegal confinement or custody, and there is good reason to believe that he will be carried out of the state, or suffer some irreparable injury, before he can be relieved in the usual course of law; or whenever a writ of habeas corpus has been issued and disobeyed, any court or judge, empowered to issue writs of habeas corpus, shall make a warrant, directed to any sheriff or other executive officer of justice, or any other person who may agree to execute the same, commanding him to take and bring the prisoner, so illegally confined, before such judge, to be dealt with according to law.

ART. 14. Where the proof mentioned in the preceding article, is sufficient to justify an arrest of the person, having the prisoner in custody for any offence against the provisions of this code, in favour of personal liberty, the judge may add to the warrant an order of arrest of such person for such offence, who shall be brought before the judge, and shall be examined and committed, bailed or discharged, according to the directions contained in the chapter of this book, relative to arrests.

ART. 15. Any officer, or other person to whom the warrant mentioned in the two last preceding articles shall be delivered, shall execute the same, by bringing the person held in custody (and the person who detains him, if so commanded by the warrant,) before the judge or court, issuing the same, who shall inquire into the cause of his imprisonment or restraint, and either discharge, bail, or remand the party into custody, as is directed in this chapter in cases of returns of writs of habeas corpus.

ART. 16. The person to whom the warrant mentioned in the three last preceding articles may be directed, shall, for the execution thereof, have the same powers, and be bound by the same rules as are designated in the chapter relative to the execution of warrants of arrest; but the said warrant may be executed in any parish of the state, into which the party for whose relief it issued may have been carried, without any endorsement of such writ, as is required in cases of arrest.

ART. 17. No fees or emolument whatever shall be received by any judge, clerk, or other officer, for granting a writ of habeas corpus, but the expences of conducting the prisoner before the court or judge, must be tendered to the person having charge of him, at the rate of twenty-five cents for each mile, unless the judge granting the writ, be satisfied that the applicant is unable to pay such expences, and shall by writing on the back of said writ, direct that they be advanced by the person having the custody

of the prisoner, and the judge may on the return, either direct that such expences be paid by either party, or by the state, or the parish, as circumstances may render proper.

ART. 18. In all cases where the law does not otherwise specially provide, every one has a right to dispose of his own person UNCONTROLLED by any other individual. When the right is interfered with by detaining the person against his will, within certain limits, either by threats, by the fear of injury, or by bonds, or other physical and material obstacles, the party is said to be CONFINED OR IMPRISONED, and to be in CUSTODY of the person, who continues such detention. A person also has the CUSTODY of another, who does not confine him within certain limits, but by menace or force, directs his movements, and obliges him against his will, to go or remain where he directs.

When no such detention within certain limits exists, but an authority is claimed and exercised of general control over the actions of the party against his consent, he is said to be under the RESTRAINT of the person exercising such control.

In all cases whatever, where such imprisonment, confinement, custody or restraint exists, which is not authorised by positive law, or is exercised in a mode or degree not authorised by law, the party aggrieved may have relief by writ of habeas corpus.

ART. 19. When a person claiming to be free, shall be held as a slave, relief may be granted by habeas

corpus, and his discharge shall be full evidence of his liberty against the person claiming him as a slave, unless he shall within ten days after such discharge, institute a civil suit, in which he may obtain a sequestration of the body of the party so discharged, provided he give the security required by law in case of SEQUESTRATION, and produce such evidence of his property, as will satisfy the judge of any court having cognizance of the cause, that the party is a slave, and that the plaintiff is entitled to his services.

But unless such suit be instituted, within the time aforesaid, the party who held him as a slave, shall be forever barred from making any claim to the services of the person so discharged; and on the trial of such suit, the discharge shall be presumptive evidence of the liberty of the party discharged, and throw the burthen of proof on the person claiming him as a slave.

Section Third.

HOW THE WRIT OF HABEAS CORPUS IS SERVED AND RETURNED.

ART. 20. This writ is served by delivering the original to the person to whom it is directed, or to him in whose custody, or under whose restraint the party for whose relief it is intended, is detained. If he refuse to receive it, he must be informed verbally

of the purport of the writ. If he conceal himself, or refuse admittance to the person charged with the service, the writ must be fixed in some conspicuous place on the outside, either of his dwelling-house, or of the place where the party is confined.

ART. 21. Any free white male person, capable of giving testimony, may serve the writ.

ART. 22. Its service is proved by the declaration on oath, and in writing of the person making the service.

ART. 23. It is the duty of the person upon whom a writ of habeas corpus is served, whether such writ be directed to him or not, to obey and return the same without delay.

ART. 24. This is done by producing, as directed, the person intended to be released, if in his custody, or under his power or control, and by making a return in writing on the back of the writ, or annexed to it, which must state plainly and unequivocally:—

1st. Whether he have or have not the party in his power or custody, or under his restraint?

2d. By virtue of what authority, or for what cause he took or detains him.

3d. If he had the party in his power, or custody, or under his restraint at any time within three days prior to the date of the writ, but has transferred such custody, or restraint to another; then stating particular, to whom, at what time, for what cause, and by what authority such transfer took place.

4. If he have the party in his custody, or under

his restraint, by virtue of any writ, or warrant, or other written authority, the same must be annexed to the return.

ART. 25. The return must be signed by the persons making the same, and attested on oath.

ART. 26. • Whenever a writ of habeas corpus shall be taken out for any one in custody, by virtue of the final judgment, sentence or decree of any **COMPETENT** tribunal, either of civil or criminal jurisdiction, the officer having legal custody of such person, need not produce him, unless specially directed to do so, notwithstanding such final judgment in the cases hereafter provided for; but it shall be sufficient to make a return in writing, annexing the order or execution, by virtue of which the party is detained. Provided always: that for any special cause for which relief may legally be granted, either set forth in the affidavit, on which the writ of habeas corpus is issued, or appearing on the return, the judge may order the prisoner to be brought up, notwithstanding such final judgment, sentence, or decree, and may proceed to give the relief to which the party is entitled.

ART. 27. The return to a writ of habeas corpus must be made within twelve hours after the service, or sooner, if required by the writ, if the party to be relieved by it is within twelve miles of the place of return. If he be at a greater distance, then he must make the return, allowing one day for every twenty miles distance, which the party must travel, in order to

make the return, and in proportion for a greater, at less distance.

Section Fourth.

THE MODE OF ENFORCING A RETURN.

ART. 28. When it appears to the court or judge, issuing the writ, that it has been duly served, if the person intended to be relieved, is not produced at the time, which is required by the provisions of this chapter, the judge, who issued the writ, or if issued by a court, the said court, or any judge thereof, shall make a warrant, directed to any executive officer of justice, or other person willing to execute the same, commanding him to take the person who has disobeyed the writ, into custody, and to bring him before the judge or court, which issued the warrant, to be dealt with according to law; and if, on being brought before the court or judge, he shall refuse to return the writ, or does not produce the person he was ordered to bring up, in the cases wherein he is by the provisions of this chapter obliged to produce him, he shall be committed to prison, and remain there until the effect of the writ shall be produced, and until he shall pay all the costs of the procedure, and shall moreover be liable to the penalties imposed by law, for disobedience to the said writ, and for any other offences against personal liberty, of which he may have been

guilty, in the imprisonment or detention complained of.

ART. 29. In the case provided for by the last preceding article, the person intended to be relieved by the writ of habeas corpus, must be brought up in the manner directed by the 13th article of this section.

ART. 30. Whenever, from the sickness or infirmity of the person directed to be produced, he cannot, without danger of his life, be brought before the judge, the party in whose custody he is, may state that fact in the return of the writ; and if it be made to appear, by the certificate of a physician regularly admitted to practice, and the testimony of two other witnesses, and the signature of the party intended to be relieved, if he can write; then, if the judge be satisfied of the truth of the allegation, and if the return be otherwise sufficient, it shall be good without the production of the person, and the judge may either go to the place where the prisoner is confined, if he think justice requires it, or he may proceed, when he is satisfied with the truth of the allegation, as in other cases, to decide on the return.

ART. 31. The death of the prisoner, or any other INEVITABLE ACCIDENT, OR SUPERIOR FORCE, will be a good return to excuse the production of the prisoner; provided proof of such fact be given to the perfect satisfaction of the court or judge, issuing the writ; but this, as well as any other matter alleged in any return, may be contested in the manner hereinafter mentioned.

ART. 32. When any one shall die, while under imprisonment, it shall be the duty of the person in whose custody he was at the time of his death, without any delay, to give notice thereof to the coroner of the parish, or in case of his absence or inability to attend, to a justice of the peace, who shall summon a jury of householders in the said parish, to consist of not less than nine, nor more than thirteen, who shall view the body, and being first duly sworn, shall enquire into the manner in which the person came by his death; and the said jury shall, in all cases, cause the body to be inspected by a surgeon or physician duly admitted, and examine him, as well as all other persons they may call as witnesses, upon oath; and the coroner or justice shall have power to summon witnesses, and if they do not appear, compel their attendance by warrant. And the said jury, or a majority of them, shall make and sign an inquest or certificate, stating that they have examined witnesses, and are satisfied that the body produced to them, is that of such a person (naming him) and setting forth the manner in which he came by his death, which inquest shall be left with the person who had the custody of the deceased at the time of his death, unless it shall appear by the said inquest, that the death of such prisoner was caused by a crime; in which case the coroner or justice shall send the inquest to the court having cognizance of the crime, and shall immediately issue a warrant for the arrest and commitment of the party, who shall

appear by such inquest to be guilty. And wherever the death of a prisoner is returned as a reason for not producing him in the return of a habeas corpus, the inquest proving such death, must be annexed to the return.

Section Fifth.

OF THE PROCEEDINGS ON THE RETURN.

ART. 33. The judge or court before whom a person is brought on a habeas corpus, shall examine the return and the papers, if any, referred to in it, and if no legal cause be shewn for the imprisonment or restraint; or if it appear, altho' legally committed, he has not been prosecuted, tried, or sentenced, within the periods for those purposes respectively limited by the chapter of this book, or that for any other cause the imprisonment or restraint cannot legally be continued, he shall discharge him from the custody or restraint under which he is held.

ART. 34. If it appear that the party has been legally committed for an offence, BAILABLE OF RIGHT, or if he appear by the testimony offered with the return, to be guilty of such an offence, although the commitment be irregular, or there be no commitment, he shall bail the prisoner, if good bail be offered.

ART. 38. In cases which are NOT BAILABLE OF RIGHT, the judge has a discretion, the exercise of which in-

volves an high responsibility. It must of necessity be left to his sagacity and prudence to distinguish between those presumptions, which leave a strong probability of guilt, and those which are too slight to justify imprisonment, previous to the trial. In the latter case only of presumptions, which are not strong, he may admit to bail. This discretion, however, cannot be exercised at all. 1st. Where the crime has been freely confessed before a magistrate. 2d. Where it is positively and directly charged by the oath of a credible witness present at the act. 3d. Where an indictment has been found, charging the prisoner with an offence NOT BAILABLE OF RIGHT.

ART. 36. If the party be not entitled to his discharge, and cannot be bailed, the judge must remand him to the custody, or place him again under the restraint from which he was taken, if such custody or restraint be legal, or otherwise place him in the custody or power of such person, as by the law of the state, is entitled thereto.

ART. 37. If the judge cannot immediately determine the case, he may, until judgment be given on the return, either place him in the custody of the sheriff of the parish where the return is made, or place him under such care, and in such custody, as his age or other circumstances may require.

ART. 38. If it be shewn by the return that the person is detained by virtue of an informal or void commitment, yet if from the documents on which it was made, or from other proof, it appear that there

is good cause for commitment, the prisoner shall not be discharged—but the judge or court before whom he is brought, shall either commit him for trial, or admit him to bail, in cases where, by law, he may be bailed.

ART. 39. In order to enable the judge before whom a return to a writ of habeas corpus is made, to perform the duty required by the last preceding section, the officer having the custody of any person committed for any offence, for whose relief such writ is granted, must shew the same to the magistrate who made the commitment, or to the clerk of the court, (if the papers relative to the commitment have been delivered to him,) and it shall thereupon be the duty of such magistrate or clerk, to attend at the hour and place of the return, and exhibit to the judge or court, to which the same is made, all the proofs and documents relative to the said commitment; and if such magistrate or clerk neglect to attend, the judge or court is authorised, on proof of his having had the notice required by this article, to enforce his attendance by warrant of arrest, and the party when arrested, shall be kept in custody until he perform the duty required by this article.

ART. 40. When it appears by the return that the person soliciting his discharge, is in custody, on any civil process, or that any other person has an interest in continuing his imprisonment or restraint, no order shall be given for his discharge, until it appear that the plaintiff, in such civil suit, or the per-

son so interested, or their attorneys or agents, if either are within twenty miles, have had reasonable notice of the issuing and return of such writ of habeas corpus.

ART. 41. The party brought before the judge on the return of the habeas corpus, may deny any of the material facts set forth in the return, or allege any fact, to shew either that the imprisonment or detention is unlawful, or that he is then entitled to his discharge, which allegations or denials must be on oath—and thereupon the judge shall proceed in a summary way, to hear testimony, and the arguments, as well of the party interested, civilly, if any there be, as of the prisoner, and the person who holds him in custody, and shall dispose of the prisoner as the case may require.

ART. 42. If it appear on the return, that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged only in one of the following cases:—

1. Where the court has exceeded the limits of its jurisdiction, either as to matter, place, sum or person.

2. Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to his liberty.

3. Where the process is defective in some substantial form required by law.

4. Where the process, though in proper form, has been issued in a case, or under circumstances where the law does not allow process or orders for imprisonment, or arrest to issue.

5. Where, although in proper form, the process has been issued or executed by a person either unauthorised, or improperly authorised to issue or execute the same, or where the person having the custody of the prisoner under such process, is not the person empowered by law to detain him.

6. Where the process appears to have been obtained by false pretences or bribery.

7. Where there is no general law, nor any judgment, order, or decree of a court, to authorise the process, if in a civil suit, nor any conviction, if in a criminal proceeding.

But no judge or court, on the return of a habeas corpus, shall in any other matter inquire into the legality or justice of a judgment or decree of a court, legally constituted, and in all cases where it appears that there is a sufficient legal cause for the commitment of the prisoner for an offence, although it may have been informally made, or without due authority, or the process may have been executed by a person not duly authorised, the judge shall make a new commitment, in proper form, and directed to the proper officer, or admit the party to bail, if the case be bailable.

ART. 43. The order of discharge made by a court or judge, on the return of a habeas corpus, has no other effect than that of restoring the party to liberty, and securing him from any future imprisonment or restraint for the same cause; it is not conclusive, as to any other civil right, except with respect to per-

sons claimed as slaves, which is herein specially provided for.

ART. 44. No person who has been discharged by order of a court or judge, on a habeas corpus, shall be again imprisoned, restrained or kept in custody for the same cause, unless he be afterwards indicted for the same offence. But it shall not be deemed to be the same cause.

1. If after a discharge for defect of proof, or for any material defect in the commitment, in a criminal case, the prisoner should be again arrested on sufficient proof, and committed by legal process for the same offence.

2. If in a civil suit, the party has been discharged for any illegality in the judgment or process, and is afterwards imprisoned by legal process, for the same cause of action.

3. Generally, whenever the discharge has been ordered on account of the non-observance of any of the forms required by law, the party may be a second time imprisoned, if the cause be legal, and the forms required by law observed.

ART. 45. When a judge, authorised to grant writs of habeas corpus, shall be satisfied that any person in legal custody, on a charge for any offence, is afflicted with a disease, which will render a removal necessary for the preservation of his life, such judge may order his removal, on his giving bail with two securities, in such sum as shall be ordered by the judge, that he will surrender himself to the same

custody, whenever he shall be thereunto required, or the judge may in such case, where the prisoner is manifestly unable to procure bail, put him in the custody of an executive officer of justice, whose duty it shall be to watch over the said prisoner in the place to which he may be removed, to prevent his escape. Provided, that the fact of such disease, and the necessity of removal, shall appear by the oaths of two physicians or surgeons duly admitted to practice, and that the physician who shall attend on such prisoner after his removal shall also take an oath that he will give notice to a magistrate as soon as in his opinion the said prisoner may safely be returned to his imprisonment, which magistrate shall, on receiving such notice, issue a warrant for his removal to the place in which he was formerly confined.

Section Sixth.

GENERAL PROVISIONS.

ART. 46. No person shall be discharged under the provisions of this chapter, who is in custody on a commitment for any offence, exclusively cognizable by the courts of the United States, or by order, execution, or process, issuing out of such courts, in cases where they have jurisdiction, or who is held by virtue of any legal engagement, or enlistment in the

army, or who being subject to the rules and articles of war, is confined by any one, legally acting under the authority thereof, or who is held as prisoner of war, under the authority of the United States.

ART. 47. There is no other writ of habeas corpus known in the law of this state, but that described and provided for in this chapter—courts having occasion to direct the production of prisoners before them, either to prosecute, to give testimony, or for any other purposes than that of examining into the cause of their imprisonment, may command the production of such prisoners by an order of court, entered on their minutes, and certified to the officer having charge of such prisoner.

Section Seventh.

PENALTIES FOR THE BREACHES OF THE DUTIES ENJOINED BY THIS CHAPTER.

ART. 48. Any judge empowered by this chapter, to issue writs of habeas corpus, who shall refuse to issue such writ, when legally applied to, in a case where such writ may lawfully issue, or who shall unreasonably delay the issuing of such writ, or who in cases where such writ is allowed to issue, without any proof, shall wilfully omit to issue, or wilfully and unreasonably delay the issuing such

writ, shall for every offence forfeit the sum of two thousand dollars.

ART. 49. Any judge so authorised, who shall refuse, or wilfully omit to perform, any other of the duties imposed on him by this chapter, or shall unreasonably delay the performance thereof, by which refusal, omission or negligence, any illegal imprisonment is caused, or prolonged, shall forfeit one thousand dollars.

ART. 50. Any executive officer of justice to whom a writ of habeas corpus, or any other warrant, writ or order, authorised by this chapter, shall be directed, delivered, or tendered; who shall refuse, or neglect to serve, or execute the same, as by this chapter is directed, or who shall unreasonably delay the service or execution thereof, shall forfeit one thousand dollars.

ART. 51. Any one having the person in his custody, or under his restraint, power or control, for whose relief a writ of habeas corpus is issued, who, with intent to avoid the effect of such writ, shall transfer such person to the custody, or place him under the power or control of another, or shall conceal him, or change the place of his confinement, with intent to avoid the operation of such writ, or with intent to remove him out of the state, shall forfeit two thousand dollars and may be imprisoned at hard labor, not less than one, nor more than five years.

ART. 52. In a prosecution for any penalty in-

curred, under the last preceding article, it shall not be necessary to shew that the writ of habeas corpus had issued at the time of the removal, transfer, or concealment therein mentioned, if it be proved that the acts therein forbidden, were done with the intent to avoid the operation of such writ.

ART. 53. Any one having the person for whose relief a writ of habeas corpus is issued, in his custody, or under his power or control, who, (without being guilty of any of the acts made punishable by the last preceding article) shall, after being legally served with such writ, neglect or refuse to produce such person, in cases where, by the provisions of this chapter, he is bound to produce him, shall forfeit one thousand dollars.

ART. 54. Any person to whom a writ of habeas corpus is directed, and on whom it is duly served, who shall neglect or refuse to make return thereto, in the manner directed by the section of this chapter, shall forfeit five hundred dollars, even if he have not the party whom it is intended to relieve in his custody, or under his power or control.

ART. 55. Any sheriff, or his deputy, any goaler or coroner, having custody of any prisoner, committed on any civil or criminal process of any court or magistrate, who shall neglect to give such prisoner a copy of the process, order or commitment, by virtue of which he is imprisoned, within three hours after demand, shall forfeit five hundred dollars.

