

kind from all other punishments than they are from each other. \* \* \* Murder is the offense to which the punishment of death is now almost universally restricted."

Then the Commission on Capital Punishment declared :

"There is one point upon which the witnesses whom we have examined are almost unanimous, viz., that the power of directing sentence of death to be recorded should be restored to the judges. We think this change desirable."

What was that? There was a power for some time allowed the judge, instead of passing the sentence of death, to permit it to be recorded, which was equivalent to a reprieve, and was invariably followed by a commutation, thus granting to the judge some measure of that judicial discretion, which here is applied wholly by the Executive. Then, if you deal with cases of political offence, as has already been pointed out, the severity of the law has been mitigated in France by the constitution of 1848, which abolished the punishment of death *en matière politique*. Now, let me come to the mode and extent of the exercise of this prerogative in these cases. The Commission on Capital Punishment examined, among others, Mr. Walpole, the Home Secretary. Mr. Hardy asks him :

"Q. You have the Chancellor and other judges ; in addition to that, I think you will remember that in your own time there was one case in which it became very important to ascertain the facts with regard to the locality?—A. Certainly.

"Q. And do you remember that you there authorised an intelligent person upon the spot to have the distances measured to show whether they were in conformity with the evidence, which was impugned upon that ground?—A. Certainly, I did."

So that you find that examinations of that kind took place where evidence given at the trial was impugned in order to test whether it was really accurate or not. Again, the Royal Commission on Indictable Offences, composed of the learned Judges Blackburn, Barry, Lush, and Stephen, report thus :

"Cases in which, under some peculiar state of facts, a miscarriage of justice takes place, may sometimes though rarely occur; but when they occur it is under circumstances for which fixed rule of procedure cannot provide.

"Experience has shown that the Secretary of State is a better judge of the existence of such circumstances than a court of justice can be. He has every facility for enquiring into the special circumstances; he can and does, if necessary, avail himself of the assistance of the judge who tried the case, and of the law officers. The position which he occupies is a guarantee of his known fitness to form an opinion. He is fettered by no rule, and his decision does not form a precedent for subsequent cases. We do not see how a better means could be provided for inquiry into the circumstances of the exceptional cases in question. The powers of the Secretary of State, however, as to disposing of the cases which come before him are not as satisfactory as his power of inquiring into their circumstances. He can advise Her Majesty to remit or commute a sentence; but, to say nothing of the inconsistency of pardoning a man for an offence on the ground that he did not commit it, such a course may be unsatisfactory. The result of the inquiries of the Secretary of State may be to show, not that the convict is clearly innocent, but that the propriety of the conviction is doubtful; that matters were left out of account which ought to have been considered; or that too little importance was attached to a view of the case, the bearing of which was not sufficiently apprehended at the trial."

Rather extensive powers, Sir. Then, I refer to a series of authorities of the highest character, being the explanations which have been given by successive Home Secretaries in the British Parliament, with reference to the discharge of their functions. In 1835, with regard to the Dorchester laborers, Lord Russell, then Home Secretary, said :

"What I have to say is, that in this case, as in any other that may be brought before me, whether in the House or out of it, I do not hold myself precluded from entering upon the consideration of any facts or circumstances that may come to my knowledge, or from forming a judgment upon them without reserve."

Lord Loughborough, who was at one time Chief Justice, said in the House of Lords :

"That he had tried prisoners who had been capitally convicted, and he had carefully examined and revised all the circumstances of their cases without being able to find a single reason which would justify his recommending mercy to be extended to them, and he had reported to the Government that he did not think himself warranted in saying that they were entitled to favorable consideration, and yet mercy had been

extended to them more than once, and, he verily believed, on fair and just principles."

Sir Geo. Grey, Home Secretary, said :

"I cannot accept the doctrine of the hon. member, that the Secretary of State is bound to consider the verdict of a jury in a capital case as absolutely final, and to refuse to investigate any alleged facts which may be stated to him tending to alter the view of the case submitted to the judge and jury. The duty of a Secretary of State would be easy if in all cases he refused to receive any appeal for mercy founded upon facts not stated at the trial. But he cannot shrink from the performance of the duty which is now imposed upon him however painful it may be; if he did his conduct would meet with universal condemnation."

Mr. Home Secretary Walpole said, that a murder referred to was one of aggravated enormity and barbarity; yet the sentence was commuted. Again Mr. Gathorne Hardy, Home Secretary, said :

"After the trial and condemnation facts might come out which it would be desirable to sift; and however long it might be after a man's conviction, if circumstances transpired showing that the conviction was unjust, or throwing such a doubt on it as to make it clear that there ought to be some interference, there must necessarily be some authority to exercise the prerogative of mercy."

Mr. Secretary Walpole, said :

"Do not it be supposed that I think that the Home Secretary has not a very large power vested in him of advising the Crown to exercise its prerogative of mercy. I think there is such a power vested in him, not for the purpose of re-hearing a case which can only be properly reheard before a judge and jury, but for the purpose of taking into consideration not only the facts proved at the trial, but any other facts and circumstances that may be brought to light subsequently, of weighing them, and of determining whether, under all the circumstances, it is his duty to recommend the Crown to exercise its prerogative of mercy, and to mitigate the severity of punishment. In no case, however, should he interfere against the decision both of judge and jury, unless the case is so plain as to leave no reasonable doubt on the mind of any intelligent man that a great injustice had been done."

Mr. Gathorne Hardy, Home Secretary, said :

"Certainly, in this instance, the jury did not neglect their duty, but found a verdict of 'wilful murder' in a case which was undoubtedly one of wilful murder according to the law of this country. As far as I am concerned in this transaction, I have no hesitation in explaining all that has taken place in regard to it. \* \* \* The memorial was sent down to the judge, and by return of post I received an answer in which the judge recommended that the sentence of death should be commuted to penal servitude."

And it was commuted. On the Bill to abolish capital punishment which came up in 1869, Mr. Secretary Bruce, said :

"He would undertake to say that the law (as to capital punishment) could not exist at all were it not for the large discretionary power entrusted to the Home Secretary, which devolved upon him duties, not only of the most difficult, but of the most painful character. \* \* \*

"It was hard, for instance, to justify the continued existence of a law under which it was not merely in the power, but became absolutely the duty of the Secretary of State to remit sentences of death solemnly passed by a judge after verdict found by the jury. In accordance with long tradition in his office, it was the duty of the Home Secretary to remit the extreme sentence in all cases of infanticide. Another custom which had grown to be invariable—at least he had not been able to find a single exception—was that no sentence of death was ever inflicted in a case where, in the opinion of the judge, it ought not to be inflicted. Everybody acquainted with the subject, must be aware that after every assize there were judges who hastened to inform the Home Secretary, that although, according to the definition of law, the jury had been right in finding the prisoner guilty of murder, and although the judge was himself bound to pass sentence of death, yet, in his opinion, that sentence ought not to be carried into execution. Then no inconsiderable number of cases arose where the judge passed sentence of death, himself disagreeing with the jury. In the two latter classes of cases, the Home Secretary, whether he agreed with the opinion of the judge or not, was bound, according to the practice, to abandon his own opinion and act upon that of the judge—morally bound, he meant; of course, for there was no legal obligation resting upon him beyond the precedents invariably recognised by his predecessors."

Mr. Bruce again said :

"A third class of cases, extremely difficult to deal with, and exposing the holder of the office to comments, harsh and very frequently unjust, was when fresh evidence arose after the conviction of the offender, and he must say that, in his opinion, this was the weakest part of our present system, and one deserving the most serious consideration of the Legislature. The case was that of a very poor class of persons, who either were unable to obtain legal assistance, or, from their position or perhaps from their previous character, excited but little sympathy in the neighborhood, and facts which might have told in their favor were not brought out till the consciences of those acquainted with those facts were aroused by the impending death of the convicts. Cases such as