

REPORT OF THE COMMISSION ON CAPITAL PUNISHMENT.

"any and what alteration is desirable in such laws, or any of them." This included the question of the abolition or maintenance of capital punishment, according to what the commissioners might, upon the evidence to be received, conclude to be the effect of that punishment in protecting society, as it is constituted in the United Kingdom, from the crimes for which death is here inflicted. If differences of opinion have prevented the commissioners from agreeing to any report on this subject, separate reports even would have been better than this attempt to veil the impracticability or inefficiency of the commission as a body, by treating as abstract that which is really of vital practical moment.

Regarding the entire investigation which it was thus the duty of the commissioners to make, the report is confined to that half which refers to the provisions of the existing laws. Here, again, the report, in a perfunctory manner, is thrown off in a single paragraph of a few lines, telling the public that the crimes "now punishable with death in the United Kingdom are treason and murder." Was it required that distinguished noblemen, members of Parliament and lawyers should be nominated under the Queen's hand to declare what might be learnt from any passer-by? "We say *practically*," continues the report, "because in Scotland there remain many other offences which are still, in point of law, liable to be so punished." And the commissioners "strongly recommend" that "all such obsolete laws" be repealed. It is too much we are sorry to say, the practice of commissioners who shirk the burden of the question really proposed to them, to make a show of strength in a vigorous piece of advice to abolish some thing which has already abolished itself. The curious, however, will have the advantage of being able to see these relics of Scotch criminal law in an appendix.

Having forborne to enter into the "abstract question" by reason of the differences of opinion, and imparted the valuable and recon-dite knowledge about the punishment of treason and murder, the report suggests the alteration which it deems desirable in addition to the repeal of the obsolete Scotch law. As to treason, the Treason Felony Act (12 & 13 Vict. c. 12), without abrogating the ancient law, introduced one more merciful. The maximum punishment under that law is penal servitude for life, which seems to the commissioners sufficiently severe in cases of constructive treason, unaccompanied by overt acts of rebellion, assassination or other violence. For treason of the last character, they are of opinion that the extreme penalty must remain.

The commissioners then arrive at the consideration of the crime of murder and its punishment. In order to get rid of the severity of the law existing for the legal imputation of malice—or, as it is commonly called, constructive malice—as distinguished from what the commissioners term "express," but which

would be better termed "actual," malice, the report proposes to follow the example of the United States,* and divide the crime of murder into two degrees. This plan of classifying murder they think better than an alteration of the definition itself of murder, namely, unlawfully killing with malice aforethought. The plan involves, they argue, no disturbance of the present distinction between murder and manslaughter, and does not make it necessary to remodel the statutes relating to attempt to murder, nor interfere with the Extradition Acts, with regard to that crime. The report therefore recommends:—

"1. That the punishment of death be retained for all murders deliberately committed with express malice aforethought, such malice to be found as a fact by the jury.

"2. That the punishment of death be also retained for all murders committed in, or with a view to, the perpetration or escape after the perpetration, or attempt at perpetration, of any of the following felonies:—murder, arson, rape, burglary, robbery, or piracy.

"3. That for all other cases of murder the punishment be penal servitude for life, or for any period not less than seven years, at the discretion of the Court."

In this manner the commissioners seek to make a legal separation between murder with actual malice, and murder with constructive malice; leaving both legally murder as distinguished from manslaughter, or killing without malice aforethought. "It is established," remarks the report, "that no provocation by words, looks, or gestures, however contemptuous and insulting, nor by any trespass merely against lands or goods, is sufficient to free the party killing from the guilt of murder, if he kills with a deadly weapon, or in any manner showing an intention to kill, or do grievous bodily harm." Such an offence would, under the third of the commissioners' recommendations, be not punishable with death, but by penal servitude for not less than seven years.* But this change would be technical rather than practical, for no man does now suffer death for such an offence of killing where there is no ground for charging actual malice, inasmuch as the jury would find a verdict, not of murder but of manslaughter; or if they were overborne by the authority of the bench, and so driven to find the prisoner guilty of murder, this would be so done as practically to insure a commutation of sentence at the hands of the Crown. If the minimum of punishment were the proposed seven years, a jury would still, in cases of the grossest provocation, depriving a person of self-control, and ending in an intention on his part to kill, prefer a verdict of manslaughter to one of murder in the second degree, with a view to reduce the punishment of imprisonment. An inconvenient result of retaining the same legal name for offences naturally different appears

* This distinction is abolished by the new penal code of New York.—Ed. L. J.