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THE INSOLVENT LAW.

In the course of the repeated discussions which have taken place in Parliament and elsewhere as to the expediency of abolishing the Insolvent Act, it has usually been claimed by the friends of the Act that the country could not get on at the present time without a law of this nature. It has been urged that business in these days has assumed such a form that bankruptcy legislation is an absolute necessity. The United States is a far more populous country than Canada; its business is much greater and more extended; and in progressiveness it is usually held to be exceeded by no other State. Yet the resolution has there been taken to dispense, entirely with a bankrupt law. The vote for abolition has been carried by considerable majorities of the Legislature; the President has not withheld his sanction; and on the 1st September the United States will be freed at one stroke from the entire bankruptcy machinery.

This is an experiment which will be watched with interest on our side of the line. The causes which have made our neighbours weary of the law have been operating to a very large extent in Canada. We have seen as well as they the demoralising effect of providing an easy relief from obligations which the debtor would in many cases have been well able to discharge, but for the collapse occasioned by reckless trading and speculation or extravagant expenditure. We have seen old-fashioned thrift and prudence becoming rare qualities; stability of business disappearing; universal uncertainty prevailing; and traders shaping their course, long before the final collapse, to the end that they may be enriched by their resort to the friendly shelter of the bankrupt law. A rottenness has eaten into the heart of the system, as disgusting here as it has proved to be in the United States, and business would breathe more freely if the tainted mass could be swept from sight, even were the abolition to be but temporary.

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Montreal, June 14, 1878.

Present:—Chief Justice Dorion, and Justices Monk, Ramsay, Tessier and Cross.

Prevost et al., Appellants; and Gauthier, Respondent.

Master and Servant—Travelling Agent.

The engagement of a clerk on a salary as travelling agent, to be engaged particularly in purchasing in the European markets, *held*, not to prevent his employers from using his time otherwise, so long as the occupation was not derogatory to his position in society.

Ramsay, J., said this was an action by a clerk for salary claimed after his dismissal from service. The appellants, who were merchants, engaged Gauthier as travelling agent, and it was stipulated that he was to be employed particularly in purchasing in the European markets. He was also to perform other services in the warehouse of the appellants. After a certain time Gauthier refused to travel in the Lower Provinces, on the ground that it did not come under the terms of his engagement. The Court here was of opinion that Gauthier was not correct in this pretension. His bargain was as a general traveller, and he was bound to go wherever he was told. He was paid for his time and his employers were entitled to use it as they pleased, so long as they did not ask him to do anything that would injure his position in society. The judgment, which had maintained Gauthier's action, must be reversed.

Lacoste & Globensky for appellant.
Jetté, Beique & Choquet for respondent.

Ryan *et vir*, appellants, and Laviolette, Respondent.

Malicious Prosecution—Reasonable and Probable Cause.

Where a woman, not with intention to steal, but apparently to annoy a neighbor, appropriated a quantity of ice delivered to the latter, who prosecuted her for larceny, *held*, that she was not entitled to damages for malicious prosecution.

Ramsay, J., said the case arose as follows:—One day Mrs. Crowley, the appellant, appropriated to herself about 130 pounds of ice that was intended for Laviolette. The latter caused her to be arrested, but she was discharged by the magistrate. She now brought an action of damages against Laviolette, who

pleaded that he had reasonable and probable cause for acting as he had done. It was possible, even probable, that Mrs. Crowley intended to annoy Laviolette, rather than to steal his ice, but there was no doubt that she did take the ice and carry it into her own premises. She knew it was not hers, for she had ordered no ice at the time, and had never ordered any such quantity as that. Laviolette had good ground, therefore, for his proceeding.

CROSS, J., thought the judgment of the magistrate in dismissing the case was perfectly correct, and he did not blame Mrs. Crowley. But all the probabilities were in favor of Laviolette supposing that his ice was intentionally taken. Consequently, the claim for damages could not be sustained.

MONK, J., said his first impression was that the judgment should be reversed, because Mrs. Crowley did not intend to steal the ice, but after consideration he came to the conclusion that Laviolette had cause of suspicion, and his Honor therefore concurred in the judgment dismissing the action.

Kerr & Carter for appellant.

Jetté, Beique & Choquet for respondent.

ARPIN, Appellant, and POULIN, Respondent.

Surety—Notes given to obtain Creditor's Assent to Composition.

Where a debtor settling with his creditors for 50c. secured, privately gave some of them unsecured notes for the balance to obtain their assent to the composition, *held*, that the endorser of the composition notes was freed from liability.

TESSIER, J. One Massé, an insolvent, made a composition with his creditors, and Dr. Poulin, the respondent, became surety for the payment of the composition notes, which he endorsed. It appears, however, that Arpin, a creditor, got other notes unsecured, from the insolvent, as a condition of signing the discharge. The insolvent had again become insolvent, and Poulin, having learned of the secret inducement to sign the composition deed, refused to pay one of the composition notes. He had got a subrogation of Massé's property, and he contended that his position as surety had been changed by the fraud. The judgment in Poulin's favor was correct and must be confirmed.

DORION, C. J., remarked that Poulin gave security on the faith of a deed of composition, signed by Arpin, by which Arpin gave a discharge to Massé for the whole debt, providing he got 50c. secured. After that was signed Poulin endorsed the composition notes, and got a transfer of the stock from the debtor. On the same day Massé gave his own notes for the other 50c. in the dollar. Massé paid the first note which was not endorsed, and then he failed again. His position was affected by giving these notes, and there was an evident fraud on Poulin.

Judgment confirmed.

Jetté & Lacoste, for appellant.

Lacoste & Globensky, for respondent.

STEVENS, appellant, and PERKINS, Respondent.

Insolvency—Fraudulent Collusion.

Where a trader, before insolvency, went to England, taking with him a sum of his own money and a sum belonging to his wife, and purchased goods there in connection with his trade, (*held*, that in the absence of any account of the money so taken from his assets,) it must be assumed the purchase of goods was made with such funds.

DORION, C. J., said this appeal arose out of a *saisie-revendication* which the respondent had taken as assignee to recover 21 cases of leather belting as belonging to the insolvent estate of Campbell. The appellant, wife of Campbell, intervened, claiming the goods as her property, as having been purchased with her money. The respondent alleged fraud, and the Court below maintained that the whole transaction was a fraudulent one, and that the assignee, Perkins, was entitled to recover possession of the goods. Campbell, who was doing a large business here, had correspondents in England of the name of MacDonald and Hutchinson. They got into difficulties which involved Campbell, and the latter went to England to try to settle them. He took with him $30,000 of his own money, and $15,000 of his wife's. In England he had to redeem goods to the amount of £600 which his correspondents had pledged. He paid the £600 and got a bill of sale in the name of his wife from Hutchinson & McDonald, and sent the goods back to Montreal where they were placed in the custody of Nelson Davis, a warehouseman of this city. There was evidence that Campbell had a power of attorney from his wife. It was said the $15,000 was given to him by his wife to invest in England, and that this was one of the modes of investment adopted by Campbell. He did not, however,

bring back his own money that he took to England, nor had he accounted for it. He put his wife's money instead of his own into this investment of belting. It seemed strange that Mrs. Campbell should purchase in England goods which had been exported from Canada, and which might much more cheaply have been purchased here, and then bring them back here, paying duty on them. His Honor thought the Court below judged rightly in saying that Campbell, in purchasing these goods in England, purchased them with his own money. If Campbell had brought back or accounted for the $30,000, the Court might have been disposed to accept the view that he used his wife's money for the purchase of these goods. But he had not done so, and on his return he became insolvent. The judgment declaring the seizure good must be confirmed

Gilman & Holton, for Appellant.

Geoffrion, Rinfret & Archambault, for Respondent.

SUPERIOR COURT.

Montreal, June 12, 1878.

PAPINEAU, J.

Ex parte MALHIOT et al., Petitioners, and BURROUGHS, Expropriated.

Practice—Taxation of costs—Quebec Railway Act, 1869, *s.* 9, *ss.* 10.

Held, that the taxation of a bill of costs by a Judge in Chambers, under the authority of the the Quebec Railway Act, 1869, s. 9, ss. 10, is not subject to revision by another Judge sitting in banc.

PAPINEAU, J., referring to the terms of the Act above cited, remarked that it gives power to a Judge to tax the bill of costs without giving the Court power to revise it. The common law gives no power to revise the judgments of another Judge, except in the cases mentioned in the code of Civil Procedure, which did not include the present case.

DeBellefeuille & Turgeon, for Petitioners.

Joseph & Burroughs, for party expropriated.

DISPUTED QUESTIONS OF CRIMINAL LAW.

I. Basis of Punishability.
II. Obscene Indictments.
III. Uncommunicated Threats.
IV. Defendants as Witnesses for themselves.

I. Basis of Punishability.—President Woolsey, in his late admirable work on Political Science, devotes a chapter to the examination of the various theories of the punitive power of the State. The question is one of such great importance to the lawyer, underlying as it does our criminal jurisprudence, that it will not be out of place in these columns to give a sketch of President Woolsey's exposition. Until we know what is our object in punishing, we can neither give a just adaptation to our sentences nor a philosophic construction to our jurisprudence.

President Woolsey begins by pointing out the distinction between Punishment and Redress, the one being called for as something due to the State, the other as something due to the Individual. "There are various wrong acts," he proceeds to say, "which excite no apprehension in society that the interests of the whole are in jeopardy. such as are breaches of contract, and many wrongs done in the way of business. On the other hand, there are wrongs done to society which do not affect any individual in particular. These arise in importance from petty disorder, which a single policeman can control, through all the grades of evil, to high treason, or the attempt to destroy the very existence of the State."

He proceeds to notice the variety of views entertained as to what he calls the "incidence" of forbidden actions—that is, "whether in particular cases they affect individuals only, or a community and individuals, or a community only." In imperfect states, he reminds us, homicide has been considered mainly in the light of an injury to individuals; and even among comparatively civilized communities (*e. g.*, Greece and Rome) theft was treated primarily as a breach of obligation. To this it might be added that even at the present moment the states in the North American Union differ as to how far embezzlement by trustees is a criminal offence punishable by the state, and how far it is to be regarded simply as a tort, to be prosecuted exclusively by the parties injured, in a civil court. Within the last few months we have witnessed in Massachusetts the failure, from want of due statutory provision, of a criminal prosecution against a defaulting trustee, under circumstances which, in New York or Pennsylvania, would have ensured a conviction. And in England, until recently, while the smallest larcenies were punished

capitally, the most scandalous embezzlements were regarded as out of the line of penal prosecution. And, as it is one of the incidents of embezzlement that the embezzled property should be secreted, this laxity enabled embezzlements to be carried on with comparative impunity.

We have next brought before us the important distinction between punishment and chastisement. "Correction," in its origin, is the act of "making completely straight, of bringing into a condition of rectitude;" chastisement is the act "of making the subject morally pure or innocent." These are acts of education, to be applied by a parent to a child, by a teacher to a pupil, by the head of a house of refuge or reformatory institution for children to his wards. Very different is the punitive function of the State. The reasons for the exercise of this function President Woolsey thus states:

"The principal reasons for the State's being invested with this power, that have been brought forward, are the following:

"1. That, by visiting the transgressor with some deprivation of something desirable, the State brings him to reflection and makes him better. The main end is *correction*.

"2. That it is *necessary for the State's own existence* to punish, in order to strike its subjects with awe, and deter them from evil-doing.

"3. That to do this is necessary for the security and protection of the members of the State. These two reasons are, in principle, one and the same.

"4. That the penalty is an *expiation* for the crime.

"5. That the State receives a *satisfaction*, by penalty, from the wrong-doer, or is *put in as good a situation as before*.

"6. That in punishment the State renders to evil-doers their *deserts*.

"The theory that correction is the main end of punishment will not bear examination. In the first place, the State is not mainly a humane institution; to administer justice and protect the society are more obvious and much higher ends, and the corrective power of State punishments has hardly been noticed by legislators, until quite modern times, as a thing of prime importance. In the second place, the theory makes no distinction between crimes. If a murderer is apparently reformed in a week, the ends of detention in a reformatory home are accomplished, and he should be set free while the petty offender against order and property must stay for months or years in the moral hospital, till the inoculation of good principles become manifest. And, again, What if an offender should prove incurable? Should he not be set at large, as being beyond the influences of the place? Still further, What kind of correction is to be aimed at? Is it such as will ensure society against his repeating the crime? In that case it is society, and not the person himself, who is to be benefited by the corrective process. Or, must a thorough cure, a recovery from selfishness and covetousness, an awakening of the highest principle of the soul, be aimed at—an established church, in short, be set up in the house of detention?

"2. The explanation that the State *protects its own existence* by striking its subjects with awe and deterring them from evil-doing doing through punishment is met by admitting that, while this effect is real and important, it is not as yet made out that the State has a right to do this. Crime and desert of punishment must be presupposed before the moral sense can be satisfied with the infliction of evil. And the measure of the amount of punishment, supplied by the public good for the time, is most fluctuating and tyrannical; moreover, mere awe, unaccompanied by an awakening of the sense of justice, is as much a source of hatred as a motive to obedience.

"3. The same objection lies against the reason for punishment—that it is needed *to protect the innocent inhabitants of a country* by the terrors which penal law presents to evil-doers. The end is important, but certainly great wrong may be done in attempting to reach it. The enquiry still remains, "Why, for this end, should pain or loss be visited on an evil-doer?" Vol. I, pp. 330, 331.

The next theory noticed is that of expiation. Punishment is "to be regarded as an expiation of the crime, made in order that divine wrath or punitive justice may not fall on society. The solidarity of a nation involves the whole in the guilt of an individual member, and it is necessary by an expression of common feeling, which shows that the body does not sympathise with the sinful member, to clear itself of defle-

ment, to save itself from being obnoxious to vengeance, or from evil viewed as the result of divine displeasure." Scriptural and classic authorities are cited sustaining this view; but, while it is admitted by President Woolsey that "these antique expressions of the moral sense, common to men, connect human and divine law together," he maintains that "no especially new rational basis of punishment is disclosed by them." * * * "One may say that the State, according to the conceptions of ancient times, was involved in the guilt of crimes committed on its soil—as, indeed, it often is in fact; but the rites expiatory of guilt simply imply a desert of the punishment, which the State derives from the criminal."

Another theory that is noticed only to be swept away as incomplete is that of satisfaction. "Satisfaction may mean fulfilling the desire of a person, or making him a compensation equivalent to a debt or wrong. In the first or more subjective sense it is fluctuating, and no explanation of the ground of punishing can be derived from the fact of its satisfying a spirit of vengeance or of wrath. Still less is there any measure to be derived, even from the nobler moral sentiments, to determine the proper wages of evil-doing—how much suffering ought to be a satisfaction for a certain kind or degree of crime. In the other sense—the objective one—there may be important truth couched under the expression of paying a debt of justice to the State, of satisfying the claims that the State has against the transgressor; or under the expression that the penalty suffered for crime has put the State in as good condition as it was before."

The true theory on which punishment by the State can be rested is then stated by President Woolsey, as follows: "The theory that in punishing an evil-doer the State renders to him his deserts, is the only one that seems to have a solid foundation. It assumes that moral evil has been committed by disobedience to rightful commands; that, according to a propriety which commends itself to our moral nature, it is fit and right that evil, physical or mental, suffering or shame, should be incurred by the wrong-doer; and that, in all forms of government over moral beings, there ought to be a power able to decide how much evil ought to follow special kinds and instances of transgression. Or, in other words, the State has the same power and right to punish as God has; it is, in fact, as St. Paul calls it, 'a minister of God to execute wrath upon him that doeth evil.' But it takes this office of a vicegerent of God only within a very limited sphere, and for special ends. It looks only at the outward manifestations of evil; it has no power to weigh the absolute criminality of actions; and, if it could measure guilt in purpose or thought with accuracy, this would not justify its going beyond positive acts hurtful to society; because, even in God's administration, this is not a world of retribution. Its province is confined to such actions as do harm to the State, or to interests which the State exists to protect. As the head of the family has a chastising power only within his family, so the State is not called upon—is even forbidden—to exercise a general moral government over the world. I would not say that, within these limits of actions not simply wrong, but hurtful to the State's interests, it is always *bound* by duty to God to punish, but only that it is *permitted* to punish. There is nothing wrong, but something right, in its sanctions, judgments, and inflictions. It is presupposed that punishment is put into its hands, and may be rightfully administered; but its object in punishing is not, in the first instance, to punish for the sake of punishing, because so much wrong demands so much physical suffering, but to punish—punishment being, in the circumstances, otherwise right—not directly for the ends of God's moral government, but for ends lying within, and far within, that sphere. It is, in fact, very restricted in its sphere. It punishes acts, not thoughts; intentions appearing in acts, not feelings; it punishes persons within a certain territory, over which it has the jurisdiction, and, perhaps, its subjects who do wrong elsewhere, but none else; it punishes acts hurtful to its own existence and to the community of its subjects; it punishes not according to an exact scale of deserts, for it cannot, without a revelation, find out what the deserts of individuals are, nor what is the relative guilt of different actions of different persons." Pages 334, 335.

It is remarkable, in view of the importance of the question before us in the moulding and in the application of criminal law, that it has

received such slight attention from English and American jurists. Beccaria—whose treatise on Crimes was translated early in the present century, and who held that as the State rests on social contract it has the right to punish only so far as it has power given to it by such contract—took the ground that the object of punishment was simply preventive and deterrent; and what Beccaria taught, it was natural that those who agreed with him in principle, and who were fascinated by the purity and dignity of his style, should adopt as if it were unquestionable. Bentham, though from another stand-point, came to substantially the same results. General prevention, he argued, in his "Rationale of Punishment," ought to be the chief end of punishment. General prevention he distinguished from particular prevention in this: that particular prevention has respect to the cause of the mischief and general prevention to the whole community. His system is, therefore, virtually the terroristic theory of Fenerbach, which will be presently discussed; with this qualification—that pleasure, as well as pain, are to be used by the law-giver as inducements to avoidance of criminal acts. To this, as we will soon see more fully, applies with great force President Woolsey's criticism, that the preventive theory, "by overlooking the ill-desert of wrong-doing, makes it and all similar systems immoral, and furnishes no measure of the amount of punishment except the law-giver's subjective opinion in regard to the sufficiency of the amount of preventive suffering."

Mr. Livingston repeatedly gives his adhesion to the Preventive, or Terroristic, theory. "We have established it as a maxim," he tells us in his report on the Penal Code (Livingston's Works, 1873, i. 26), that the object of punishment "is to prevent the commission of crime;" and, again (*Ibid* 31), "no punishments greater than are necessary to effect this work of prevention ought to be inflicted, and that those which produce it by uniting reformation with example are the best adapted to the end." Subsequently, however, (*Ibid.* 83), he quotes with approval the preamble to the statute of the Legislature of Louisiana establishing the Code. This preamble contains, *inter alia*, the following:

"The only object of punishment is to prevent the commission of offences; it should be calculated to operate—

"First, as to 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."

By Dr. Paley, in his Moral Philosophy, we are told that "the end of punishment is twofold—amendment and example." The same view is adopted by the great body of English commentators, with, perhaps, but two exceptions: Lord Auckland (Mr. Eden), in his Principles of Penal Law, chapter 2, vigorously maintains the absolute theory, as hereafter noticed, and Mr. Lorrimer, in his Institutes, page 346, rejects the Reformatory theory as inadequate and delusive. Mr. Austin and Sir W. Hamilton, as we will see, follow the modified scheme of Kant, to be presently noticed.

When we examine analytically the theories of Punishment which President Woolsey presents with such masterly power, we find that they fall into two general classes: first, the Absolute, based on the principle *punitur quia peccatum est;* and, secondly, the Relative, under which we may generally notice (1) the Reformatory, or that which aims at the reformation of the person inculpated; (2) the Preventive, or Terroristic, or that which aims at the frightening him, as well as the community generally, from the commission of crime; and (3) the Exemplary, or that which uses the particular trial as a means of public instruction.

As the Reformatory theory of punishment has recently been revived by leading humanitarian philosophers, it may call for a few observations which are rather an amplification of, than an addition to, the refutation which has been given by President Woolsey.

The first enquiry we may make, in meeting the theory that reformation is to be the reason and limit of penal justice, is, What right have we to reform a man by removing him from his business and putting him in a prison, unless he be guilty of a crime which requires a specific punishment? Would imprisonment be likely to reform me if I thought it undeserved and unjust, and if it were imposed without a due conviction of guilt?

The next enquiry is as to the constitutional power of a state to reform its citizens by force. In answering this question we may waive the provisions in our state as well as Federal constitutions limiting convictions of crime to cases where bills have been lawfully found by grand juries, and where the offender has the right to meet before the petit jury the witnesses against him, face to face. Aside from these restrictions, what power has a constitutional state to attempt to forcibly reform its adult citizens, unless as a mere subsidiary incident to penal justice? What power has it to make penal justice subordinate and auxiliary to ethics? Governments there have undoubtedly been which—sometimes on the paternal theory, sometimes because they were distrustful of the ordinary processes of law—have undertaken ethical reformation; but such governments have never been called constitutional. A prominent Russian officer, for instance, may require, in the opinion of his superiors, "reformation," and he may be sent to Siberia, or imprisoned in a fortress, in order to develop his better, and repress his worse, qualities. A group of leading French politicians may be banished or imprisoned as an incident to a *coup d' état*, in order to "reform" their political views. A vigilance committee may undertake to "reform" an obnoxious citizen by maltreating his person or destroying his property. We can conceive of such things in conditions of despotism or of anarchy; but we cannot conceive how, in a constitutional State, of which it is one of the fundamental sanctions that nothing is to be done by the government that can be properly executed by the voluntary moral power of the community, the reformation of individuals should be attempted by force. Houses of refuge and other asylums, as well as schools for children, we rightfully have. But it is beyond the scope of a constitutional government to open compulsory houses of reform for adults, or to make moral reform by force a primary function of State.

Supposing, however, we should hold that it is within the province of the State, the next question that would arise, in view of the fact that there must be discrimination, is, What persons are we to attempt to reform? To say, "those convicted of crime," is no answer, because this takes us back to the absolute theory that a person is to be punished because he is guilty, whereas the theory before us is that a person is to be punished because he is to be reformed. In a general sense, as all men are susceptible of reformation, all men, in this view, are to be punished. As this cannot be, we must, as has just been said, make a discrimination; and the interesting question for the advocates of the Reformatory theory remains as to where the line is to be drawn. Now, in view of the fact that it is dogma after all that is the fountain of action, are not those who hold what we conceive to be pernicious dogmas the proper persons to be punished? If *they* should be reformed, would not the reformation of those who are influenced by them follow? Why should not the State, therefore, undertake the reformation, by means of fine, imprisonment, and the whipping-post, of those teaching pernicious opinions? We have examples enough of this in old times; and, supposing that this mode of education proved effective—admitting for a moment that history shows us that heretics and other unsound teachers are really to be reformed in this way—why not revive the same machinery? Here, for instance, is a bold political swaggerer teaching what we, on the eastern sea-board, hold to be highly immoral principles of inflation; why not catch him, if he happen to be travelling among us, and put him in the stocks? and, if this does not reform him, why not apply severer treatment? Or an eastern hard money man, crammed with Adam Smith and Ricardo, is travelling in the West, promulgating from time to time doctrines whose tendency is to impoverish the community by the shrinkage of its currency; why not arrest him and subject him also to reformation?

Another interesting question will arise as to the distribution of punishment, if susceptibility to reform, and not guilt, is to be the test. Indeed, the only proper course, if we are to formulate the proceeding under such a system, would be to collect a number of persons, proper subjects for reformation, in the court-house, and then, without regard to the crimes of which they are suspected, call testimony to determine what degree of punishment would be necessary to a reformation in each particular case. A person, for instance, of extreme sensitiveness to discipline might be reformed by imprisonment of two or three weeks, if such imprisonment

were accompanied by the application of æsthetic influences, and by expressions of endearment calculated to awaken dormant affections. Another person, more callous, more defiant, or less gushing, might require years of severe treatment for his reformation. Now, it might happen, as has often been the case, that the sensitive and gushing defendant is a murderer; while one whose offence is limited to assault and battery, committed in defence of his rights, may be the obdurate and intractable person, who declines to be reformed at anything less than a long term of years. The consequence would be that the murderer would be let off after a few weeks' detention, solaced by music and painting, or whatever else was likely to develop his moral tone, while ten or twenty years might be a light punishment to him guilty of the assault and battery.

Another enquiry remains: What is to be done with the incorrigible offender? When the sole object of punishment is reformation, then, when there can be no reformation, there can be no punishment. The Pomeroy boy (now a full-grown man), who was convicted in Massachusetts some few years ago of at least one cruel murder, has been pronounced by competent specialists to be so desperate a case that no hope of his reformation could be indulged; and, if this be so, he should at once, on the reasoning now before us, be discharged. More than half of those on the trial lists of our criminal courts are marked as old convicts; and, by recent statutes in almost all our states, such old convicts, when reconvicted, are to have cumulative sentences, proportioned to the degree of their former conviction. Our penal system, therefore, goes on the hypothesis that the more incorrigible a man, by the record of his former convictions, appears to be, the longer should be his imprisonment when convicted. The theory we here contest is that the more incorrigible he is, the less he is to be punished. In other words, the criminal is to be punished severely for a first and comparatively light offence, and relieved in proportion to his obduracy and his persistency in crime.

After all, we have to fall back upon what has already been glanced at as the final and fatal objection to the Reformatory theory, and that is that it is not only immoral in principle in its ignoring ethical rule as the proper basis of punishment, but that it is immoral in practice, increasing, instead of extirpating, crime. No man forcibly punished by the state, not because he is convicted of crime, but because the state conceives forcible punishment would be good for him, but must nourish a sullen resentment to the state which thus capriciously and arbitrarily maltreats him. He may become a hypocrite—he may pretend reformation—but it is very unlikely that any moral change could be effected in him by what he must consider an atrocious outrage. And, as to others, it is not likely that they will be deterred from crime by witnessing the infliction of punishments which are not the logical consequences of crime. When it is said, "crime is to meet with punishment because it is crime," this is a strong argument to avoid crime. But when punishment as a usual sequence is not assigned to crime, then crime will not be avoided for the purpose of avoiding punishment.

To the terroristic system, as held by Feuerbach, by Bentham, and by Livingston, the objections stated by President Woolsey are conclusive. According to this theory, men are to be scared from crime, and, hence, punishment is to be made shocking and ghastly. Terrorism treats the offender, not as a *person*, but as a *thing*; not as a responsible being entitled to have justice meted out to him according to his deserts, but as a lay figure on whom punishment is to be inflicted in such a way as to affect the sensibilities of others. Example to others is right enough, when incident to a just punishment; when it is inflicted as a primary object, it is in itself, not only cruel and wanton, but it stimulates crime by destroying respect for the justice and candor of the government. A feeling that punishment is a subterfuge, whose object is to frighten, will have no moral effect on those to frighten whom this punishment is applied.

In closing this very inadequate survey of the topics discussed by President Woolsey in his admirable chapter on punishment, it may not be out of place to notice the views maintained in this relation by two great German thinkers, whose influence on juridical philosophy it is impossible to ignore. According to Kant, whose views have been partially reproduced by Sir W. Hamilton and Mr. Austin, judicial punishment cannot be employed as a means to ob-

tain a collateral good, but can, and must, always be imposed on, and made commensurate to, a violation of law. A man, so he argues, is not to be treated as a thing—to be sacrificed to the policy of the State; from this he is protected by his inherent personality. He must be justly convicted of crime before the State can punish him for the public benefit. Penal law is a categorical imperative. Punishment is inflicted, not because it is useful, but because it is demanded by reason. Social benefit, he insists, is no ground for punishment; and he forcibly illustrates this by saying that even if society, by the consent of all its members, should be on the point of dissolution, a murderer sentenced to death should first be executed, and that this would be right. As a rule, he recommends retaliation; the like is to be met by the like. This, however, is not to be, literally carried out, as in the Mosaic system "an eye for an eye, a tooth for a tooth." The principle of equality is to be substantially, not formally, applied. It has, however, been objected to Kant's theory that it contradicts his theory of government. In his view, law is the emanation of the united will of the people—following in this the social contract theory of Rousseau. The security of individuals by this view is the object of the State. It is difficult to reconcile with this the conception that the State inflicts punishment, not primarily for the sake of the individual, but primarily for the sake of justice. But however inconsistent in this respect Kant may be, his example shows that it is possible for the absolute theory of punishment to be held by an adherent of the social contract conception.

Of Hegel's exposition of the same topic, President Woolsey gives, I cannot but think, but a scant recognition: "Hegel's explanation of punishment," he says (p. 347), "seems to start from looking on a wrong as a negation (a *nichtigkeit*). The force used in a wrong is abolished by a counter-force—*i. e.*, by a superior power of the State. Punishment is a "*Zweiter Zwang der ein Aufhebung ein ersten Zwang ist.*" Phil. des Recht, sec. 93. How crimes are to be punished, 'thought' cannot determine, he says, but positive determinations (*i. e.*, of experience) are necessary to this end. With the advance of cultivation milder views of crime have come in, and now punishments have lost much of their ancient severity." A much fuller analysis of Hegel's philosophy in this relation, however, is found in the 9th edition of Berner's "Lehrbuch des Deutschen Strafrechtes," Leipsic, 1877, a work which is at once the most popular and the most authoritative of recent German treatises on criminal law, and which adopts as its basis the Hegelian philosophy in this relation.

Punishment, according to Hegel (so writes Berner, sec. 21), is to be regarded as an agency to annihilate wrong in its effort to annihilate right. It is, therefore, the negation of a negation. This is tantamount to saying that punishment is retribution (*Vergeltung*).

But the punitive negation must be so applied as to do no more than cancel the prior criminal negation. The punishment must find its measure in the crime. As the right that has been impaired has a specific scope and quality, so the punishment, to be a correspondent negation, must on its side have its quantitative and qualitative limitations.

The identity of crime and punishment, however, which is thus required, does not consist in a specific similarity. It is not requisite that the crime should be retaliated on the criminal. All that is asked is that the evil of the punishment should be proportioned in value (*nach dem Werthe*) to the evil of the crime.

It is not the mission of philosophy, so continues Hegel, to establish a valuation of punishment so as to apportion it duly to each particular crime. Philosophy deals with the principle, and leaves the application to the practical reason. All that philosophy can do is to assign a qualitative and quantitative certainty to an impaired right, to which its punishment is to correspond. Hegel, Rechtsphilosophie, 390, sgg.

Hegel's views may in this respect be criticised as speculative, but it must be remembered that that they have been accepted and elaborated as the basis of penal law by some of the most practical of contemporary jurists. Bismarck is no idealist, yet we find Bismarck, in a speech in the Prussian Herrenhouse, in 1872, adopting the Hegelian theory of punishment, and illustrating it by the famous maxim which Meyer has taken as the motto of his late valuable treatise on criminal law: "Laws are like medicines; they are usually nothing more than the healing of one disease by another disease

less, and more transient, than the first. Certainly Hegelianism, in adopting and sustaining philosophically the theory of a just retribution as the sole primary basis of punishment, exhibits a healthy contrast to the sentimentalism of humanitarian philosophers who ignore the moral and retributive element in punishment, making its primary object to be the reform of the alleged criminal, and example to the community. To such theorists the final answer is that, until a man is proved to be guilty of a crime, we have no right either forcibly to reform him or to punish him as an example to others; and that neither reformation nor example will be promoted by assigning to him, after he is convicted, a punishment disproportioned to his offence. At the same time, in the application of such punishment, reform and example are to be kept incidentally in view. Conviction and sentence are to be according to justice; but prison discipline is to be so applied as to make the punishment conduce as far as possible to the moral education of both criminal and community.

CURRENT EVENTS.

ENGLAND.

LAW LEGISLATION IN ENGLAND.—In a communication addressed to the *Albany Law Journal*, the following notice occurs of proposed legislation in England:—"On Tuesday night Sir John Holker, the Attorney-General, introduced in the House of Commons, his 'bill for modifying and amending the law relating to indictable offences,' otherwise known as the Criminal Code. The bill has been drawn up mainly by Sir James Stephen. The Attorney-General explained its provisions at some length, dwelling chiefly on the alterations it proposes to make in the law. It abolishes the distinction between felony and misdemeanor, and substitutes for them the term 'indictable offence.' Accessories before the fact are done away with, and accessories and criminals are dealt with on the same footing. There is a large diminution in the number of *maximum* punishments, with a provision against accumulated penalties of hard labour. The term 'malice' is entirely omitted from the law, constructive murder is done away with, and a more reasonable and intelligible definition of provocation is introduced. The definitions of larceny and theft are greatly simplified by sweeping away the present refinements, and the law of forgery is placed on a more definite and consistent footing. This part of the bill will supersede dozens of text-books, scores of acts of Parliament, and piles of legal decisions. The second part of the bill refers to procedure, and among the principal alterations under this head are the entire abolition of the subtleties of the law of *venue;* securities that ample notice shall be given to an accused person when proceedings are taken by indictment in the first instance; and provisions not only for changing the place of trial, but for conducting trials on the model of civil instead of criminal procedure. Right of appeal and power to grant new trials in criminal cases are given under certain conditions, and an improvement in criminal pleading is proposed which will sweep away the present system of verbose and technical indictments. Though the bill has been launched under government patronage, it is improbable that it will become law this year. On the motion of Mr. Osborne Morgan, a select committee of the House of Commons has been appointed to enquire what steps ought to be taken for simplifying the title and facilitating the transfer of land. In submitting this motion, Mr. Morgan called attention to the recent frauds of Dimsdale and others, and showed that they would have been prevented by even the rudest form of registration. He pointed out that each measure heretofore adopted with this view had failed from some defect in drafting, and said that as it was necessary to start afresh on entirely new lines, he would recommend a registration of deeds, a cadastral survey for purposes of identification and power of sale for every acre of land in the country, however held, and a registry of sales."

CONTRIBUTORY NEGLIGENCE.—In the case of *Clark* v. *Chambers*, 38 L. T. Rep. (N.S.) 454, decided by the Queen's Bench Division of the English High Court of Justice, on the 15th of April last, the defendant had placed in a private road adjoining his ground a hurdle with a *chevaux de frise* on the top, in order to prevent the public from looking over the barrier at athletic sports on his ground. Some one not known removed the hurdle to another spot

without the defendant's authority, and the plaintiff, passing of right along the road soon afterward in the dark, and knowing the original position of the hurdle, but not that it was moved, ran his eye against the *chevaux de frise* and lost his sight. The jury, in an action against defendant for the injury, found that the original erection of the hurdle was unauthorised and wrongful; that the *chevaux de frise* was dangerous to the safety of persons using the road, and that there was no contributory negligence, and gave plaintiff a substantial verdict. The Court held that plaintiff's injury was not an improbable consequence of defendant's act; that it was the defendant's duty to take all necessary precautions under the circumstances to protect persons exercising their right of way, and that the action was maintainable. The case is one of that class represented by the well-known squib case of *Scott* v. *Shepherd*, 3 Wils. 403; 2 W. Bl. 892, where defendant threw a lighted squib into a market house where several persons were assembled. It fell upon a standing, the owner of which, in self-defence, took it up and threw it across the market house. It fell upon another standing, the owner of which, also in self-defence, threw it off, when it struck plaintiff, and exploded and put out his eye, and defendant was held liable. In *Dixon* v. *Bell*, 5 M. & S. 198, the defendant, having left a loaded gun with another, sent a girl to get it, with directions to the other to draw the priming, which the latter attempted to do, and, as he thought, did. The girl, supposing the priming was withdrawn, pointed the gun at plaintiff's son, a child, and pulled the trigger. The gun went off and injured the child, and defendant was held liable for the injury. See, also, *Ilott* v. *Wilkes*, 3 B. & A. 304; *Jordan* v. *Crump*, 8 M. & W. 782; *Illedge* v. *Goodwin*, 5 C. & P. 190. In the latter case the defendant's horse and cart were left standing in the street, without any one to attend them. A person passing along whipped the horse, causing it to back the cart against plaintiff's window. Also, *Lynch* v. *Nurdin*, L. R., 1 Q. B. 29; *Daniels* v. *Potter*, 4 C. & P. 262; *Hughes* v. *Macfie*, 2 H. & C. 744; *Bird* v. *Holbrook*, 4 Bing. 628; *Harrison* v. *Gt. North Ry. Co.*, 3 H. & C. 231. See, also, *McCahill* v. *Kipp*, 2 E. D. Smith, 413; *Powell* v. *Deveney*, 3 Cush. 300; *Peck* v. *McNeal*, 3 McLean, 22.

IRELAND.

In the case of *Ex parte Singer Sewing Machine Co., re Blackwell*, 12 Ir. L. T. Rep. 57, decided recently by the Irish Court of Bankruptcy, a sewing machine contract question came up. A sewing machine was let on hire to a trader by the company mentioned, on an agreement that the trader should pay a certain monthly rent, and keep the machine in his own custody; and that, if he should fail to perform on his part, the machine might be taken by the company, which might also recover the amount of rent in arrear. He had an option to purchase the machine within a year, when the payments of rent were to apply toward the purchase-money. He paid rent for two months, and then did not pay for nine months, when he became bankrupt. The company claimed the machine from the assignee in bankruptcy, and asked to be permitted to prove for the balance of rent due. The matter was referred to a jury to determine whether there was a custom or usage in Ireland, allowing such contracts of sale as this one, where the title to the property was to remain in the vendor after he had parted with possession. The jury found that there was such a custom. The Court held that the custom was not an unreasonable one, and thus the company was entitled to resume possession of the machine, and this notwithstanding its laches in allowing the instalments of rent to remain so long overdue. The Court, however, expressed its disinclination to favor such contracts by refusing to grant the successful party any costs. The Irish *Law Times*, in an article upon the decision, gives instances where the Irish courts have condemned these contracts as "entirely at variance with all principles of fair trading." (*Mackintosh* v. *Kerwan*, Q. B. Div., Feb. 4, 1878; *ex parte Harpus, re Smith*, 9 Ir. L. T. Rep. 52).

FRANCE.

Society of Comparative Legislation.—The Society of Comparative Legislation at Paris takes advantage of the international exhibition held in that city this year to endeavor, in an informal way, to bring together lawyers from various countries, who may be visiting the exhibition, by throwing open its meetings to all foreign jurists who desire to attend. The society is made up of the leading

members of the bench and bar of France, and those interested in international law who attend its meetings are certain to be entertained and instructed. The topics of discussion for these meetings, as announced by the society, are: (1) Bills of exchange; (2) Maritime insurance; (3) What authority should a judgment delivered in one State be allowed in another, and under what conditions; (4) The conditions and effects of extradition; (5) To what extent ought foreigners to be admitted to share in the private law of the State in which they are commorant; (6) In what cases should crimes or delicts which have been committed be cognizable by the courts of the State of which the authors are subjects. The rooms of the society are in the "Hotel de la Société d'Encouragement," 44 Rue de Rennes.

UNITED STATES.

THE REPEAL OF THE BANKRUPT LAW.—The House of Representatives has concurred in the Senate Amendment to the bill for the repeal of the bankrupt law, the President has signed the bill and it is certain that the law will pass out of existence on the 1st September next. The *Albany Law Journal* says: "This is a result for which the greater portion of the people of the country have been anxious for the past eight years, but the friends of the law, though weak numerically, have wielded sufficient influence to prevent a compliance, by the National Legislature, with the wishes of the majority. It was at one time doubtful whether the present Congress would not follow the example of its predecessors, and fail to pass the bill, notwithstanding a very large majority in each house were in favor of it. But the friends of the bill have been active, and it has not failed. The postponement of the time when the act is to go into effect was a concession to a claim which was made by the friends of the existing law, that if it was repealed without notice, a very great number of unfortunate individuals, who were intending to take the benefit of the law, would be disappointed and ruined. Three months' time will enable all who have any claim to favor in this matter to take such action as they desire, and we anticipate that the bankrupt courts will do more business during that period than they have ever done in the same time.

"We imagine that the repeal of this law will be of considerable benefit to those of the profession engaged in general practice. The incoming of the bankrupt law nearly destroyed the collection business; a debtor that could be made to pay only by means of legal process being as a rule on the verge of bankruptcy, and a suit against him liable to be defeated by bankrupt proceedings. Then the law made certain acts, such as the non-payment of negotiable paper, acts of bankruptcy, and debtors were compelled to pay in cases where they would have resisted under other circumstances. In these two ways the statute discouraged litigation, and it was also injurious to the profession for the reason that the fees and expenses of bankruptcy proceedings were paid out of funds which, under the pre-existing laws, would have very generally been spent in litigation. But the profession will not alone receive advantage from repeal. Vigilant creditors will derive advantage from their vigilance, and distinction can be made by the insolvent between debts of different degrees of merit. In fact we think every one, debtor and creditor alike, will be benefited by the repeal."

ASSAULTS ON JUDGES.—The precedent which has been set in the English courts of assaulting judges, has been followed in the New York Court of Common Pleas, a lunatic, by the name of Chalmers, having, on the 7th instant, made an assault in open court on Mr. Justice Daly who was presiding at a trial there. The assailant, who had an hallucination that the police commissioners of New York were annoying him in various ways, had prepared a petition asking for their arrest, and had presented it to numerous judges and courts, the usual result being his ejection from the court rooms into which he had intruded. On the day mentioned he began to read the petition to Justice Daly, who at first kindly attended to his reading, but discovering the nature of the document requested him to desist, and upon his refusal to do so, directed his removal from the court. Thereupon, the petitioner, folding up the papers he had in his hand, forcibly hurled them at the head of Judge Daly, saying, as he did so, "You are like all the other judges, a liar and a trickster." Of course the belligerent suitor was immediately arrested, and he was subsequently committed by a police magistrate as a lunatic. The petition itself, parts of which were published in the daily press, indicates clearly that the assailant was insane.—*Albany Law Journal.*