

VARIOUS

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STATE PROSECUTIONS

The Englishman who, however well inclined to defer to the wisdom "of former ages," should throw a glance at the stern realities of the past, as connected with the history of his country, will be little disposed to yield an implicit assent to the opinions or assertions of those, who maintain the superiority of the past, to the disparagement and depreciation of the present times. Maxims and sayings of this tendency have undoubtedly prevailed from periods of remote antiquity. The wise monarch of the Jewish nation even forbade his people to ask "the cause that the former days were better than these;" "for," he adds, "thou dost not enquire wisely concerning this." Far different would be the modern precept of a British monarch. Rather let the English subject "enquire *diligently* concerning this," for he cannot fail to enquire wisely. Let him enquire, and he will find that "the former days" of England were days of discord, tyranny, and oppression;

days when an Empson and a Dudley could harass the honest and well-disposed, through the medium of the process of the odious star-chamber; when the crown was possessed of almost arbitrary power, and when the liberty and personal independence of individuals were in no way considered or regarded; days when the severity of our criminal laws drew down from a French philosopher the sneer, that a history of England was a history of the executioner; when the doomed were sent out of the world in bands of twenty, and even thirty, at a time, at Tyburn or at "Execution dock;" and when, in the then unhealthy tone of public morals, criminals famous for their deeds of violence and rapine, were regarded rather as the heroes of romance, than as the pests and scourges of society. Let him enquire, and he will find that all these things have now long since passed away; that the rigours of the criminal law have been entirely mitigated, and that the great charters of our liberties, the fruits of accumulated wisdom and experience, have now been long confirmed. These facts, if universally known and duly pondered over, would go far to banish discontent and disaffection, and would tend to produce a well-founded confidence in the inherent power of adaptation to the necessities of the people, possessed by the constitution of our country. Thus, the social wants of the outer man having been in a great measure supplied, the philanthropy of modern times has been chiefly employed on the mental and moral improvement of the species; the wants of the inner man are now the objects of universal attention, and education has become the great necessity

of the age. Hitherto, the municipal laws and institutions of this country have been defective; inasmuch as they have made little or no provision for the adequate instruction of the people. Much, no doubt, has been already done, and education, even now, diffuses her benignant light over a large portion of the population; among whom, the children of the ignorant are able to instruct their parents, and impart, to those who gave them being, a share in the new-found blessing of modern times. Much, however, remains still to be done, and the splendid examples of princely munificence which a great minister of the crown has recently shown the wealthier classes of this wealthy nation, may, in the absence of a state provision, have the effect of stimulating private exertion and generosity. In spite, however, of the moral and intellectual advancement of the present age, the passions and evil designs of the vicious and discontented are still able to influence vast masses of the people. The experience of the last few years unfortunately teaches us, that increased knowledge has not yet banished disaffection, and that though, during the last quarter of a century, the general standard of the nation's morality may have been elevated above its former resting-place, that education, in its present state of advancement, has not as yet effectually disarmed discontent or disaffection, by showing the greater evil which ever attends the endeavour to effect the lesser good, by violent, factious, or seditious means.

Within the last thirteen years, the government has been compelled, on several occasions, to curb the violence and to

repress the outbreaks of men who had yet to learn the folly of such attempts; and the powers of the executive have been frequently evoked by those who, of late years, have wielded the destinies of this country. Several state prosecutions have taken place during this period. They never occur without exciting a lively interest; the public eye is critically intent upon the minutest detail of these proceedings; and the public attention is concentrated upon those to whom is confided the vindication of the public rights and the redressing of the public wrongs. It has been often asked by some of these critical observers, How is it that, when great crimes or misdemeanours are to be punished, when the bold and daring offender is to be brought to justice, when the body politic is the offended party, when the minister honours a supposed offender with his notice in the shape of criminal proceedings, and the government condescends to prosecute—how is it, it has been asked on such occasions, when the first talent, science, and practical skill, are all arranged against the unfortunate object of a nation's vengeance, that the course of justice should be ever broken or impeded? Is the machinery then set in motion in truth defective—is there some inherent vice in the construction of the state engine? Is the law weak when it should be strong? Is its boasted majesty, after all, nothing but the creation of a fond imagination, or a delusion of the past? Are the wheels of the state-machine no longer bright, polished, and fit for use as they once were? or are they choked and clogged with the rust and dust of accumulated ages? Or, if

not in the machine, does the fault, ask others of these bold critics, rest with the workmen who guide and superintend its action? Are the principles of its construction now no longer known or understood? Are they, like those of the engines of the Syracusan philosopher, lost in the lapse of time? Is the crown less efficiently served than private individuals? and can it be possible, it has even been demanded, that those who are actively employed on these occasions have been so long removed on the practice of what is often deemed the simpler portion of the law, and so long employed in the higher and more abstruse branches of the science, that they have forgotten the practice of their youth, and have lost the knowledge acquired in the commencement of their professional career? Lesser criminals, it is said, are every day convicted with ease and expedition—how is it, therefore, that the cobweb of the law holds fast the small ephemera which chance to stray across its filmy mesh, but that the gaudy insect of larger form and greater strength so often breaks through, his flight perhaps arrested for a moment, as he feels the insidious toil fold close about him? It is, however, only for a moment; one mighty effort breaks his bonds—he is free—and flies off in triumph and derision, trumpeting forth his victory, and proclaiming his escape from the snare, in which it was hoped to encompass him. The astute and practised gentlemen thus suspected, strong in the consciousness of deep legal knowledge, and ready practical skill and science, may justly despise the petty attacks of those who affect to doubt their professional ability and attainments. Some

in high places have not hesitated to hint, on one occasion, at collusion, and to assert, that a certain prosecution failed, because there was no real desire to punish.

Such is the substance of the various questions and speculations to which the legal events of the last thirteen years have given rise. We have now collected and enumerated them in a condensed form, for the purpose of tracing their rise and progress, and in order that we may demonstrate that, though there may possibly exist some reasons for these opinions, founded often on a misapprehension of the real circumstances of the cases quoted in their support, that they have, in fact, little or no substantial foundation. With this view, therefore, we shall briefly notice those trials, within the period of which we speak, which form the groundwork of these charges against the executive, before we proceed to state the real obstacles which do, in fact, occasionally oppose the smooth and *rapid* progress of a "State Prosecution."

The first of these proceedings, which occurred during the period of the last thirteen years, was the trial of Messrs O'Connell, Lawless, Steel, and others. This case perhaps originated the opinions which have partially prevailed, and was, in truth, not unlikely to make a permanent impression on the public mind. In the month of January 1831, true bills were found against these parties by the Grand Jury of Dublin, for assembling and meeting together for purposes prohibited by a proclamation of the Lord Lieutenant; and for conspiring to do an act forbidden by the law. By every possible device, by demurrers

and inconsistent pleas, delays were interposed; and though Mr O'Connell withdrew a former plea of not guilty, and pleaded guilty to the counts to which he had at first demurred—though Mr Stanley, in the House of Commons, in reply to a question put by the Marquis of Chandos, emphatically declared, that it was impossible for the Irish government, consistently with their dignity as a government, to enter into any negotiation implying the remotest compromise with the defendants—and that it was the unalterable determination of the law-officers of Ireland to let the law take its course against Mr O'Connell—and that, let him act as he pleased, judgment would be passed against him—still, in spite of this determination of the government, so emphatically announced by the Irish Secretary, the statute on which the proceedings were founded was actually suffered to expire, without any previous steps having been taken against the state delinquents. There has ever been that degree of mystery about this event, which invariably rouses attention and excites curiosity; the escape of those parties was a great triumph over the powers, or the expressed inclinations of the government, which was well calculated to set the public mind at work to discover the latent causes which produced such strange and unexpected results. After an interval of seven years, another case occurred, which was not calculated materially to lessen the impression already made upon the public; for although, in the following instance, the prosecution was conducted to a successful termination, yet questions of such grave importance were raised,

and fought with such ability, vigour, and determination, that the accomplishment of the ends of justice, if not prevented, was certainly long delayed.

On the 17th December 1838, twelve prisoners were brought to Liverpool, charged in execution of a sentence of transportation to Van Diemen's Land for having been concerned in the Canadian revolt. Here the offenders had been tried, convicted, sentenced, and actually transported. The prosecutors, therefore, might naturally be supposed to have got fairly *into* port, when they saw the objects of their tender solicitude fairly *out* of port, on their way to the distant land to which the offended laws of their country had consigned them.

If justice might not account her work as done, at a time when her victims had already traversed a thousand leagues of the wide Atlantic, when could it be expected that the law might take its course without further let or hindrance? On the 17th of December, as has been observed, the prisoners arrived at Liverpool, and were straightway consigned to the care and custody of Mr Batchelor, the governor of the borough jail of Liverpool; by whom they were duly immured in the stronghold of the borough, and safely placed under lock and key. Things, however, did not long continue in this state. In a few days twelve writs of *habeas corpus* made their sudden and unexpected appearance, by which Mr Batchelor was commanded forthwith to bring the bodies of his charges, together with the causes of detention, before the Lord Chief Justice of England. Mr

Batcheldor obeyed the command in both particulars; the judges of the Court of Queen's Bench met; counsel argued and re-argued the matter before them, but in vain—the prisoners were left in the governor's care, in which they remained, as if no effort had been made to remove them from his custody. All, however, was not yet over; for, as though labouring under a strange delusion, four of the prisoners actually made oath that they had never been arraigned, tried, convicted, or sentenced at all, either in Canada or elsewhere! Upon this four more writs of *habeas corpus* issued, commanding the unhappy Mr Batcheldor to bring the four deluded convicts before the Barons of the Exchequer. This was done; arguments, both old and new, were heard with exemplary patience and attention; the play was played over again; but the Barons were equally inexorable with the Court of Queen's Bench, and the four prisoners, after much consideration, were again remanded to the custody of the governor of the jail, and, together with their eight fellow-prisoners, were, in course of time, duly conveyed to the place of their original destination.

The next of these cases, in chronological order, is that of the Monmouthshire riots in 1839. This case, also, might tend to corroborate the opinion, that the service of the state, in legal matters, is attended with much difficulty and embarrassment. It will, however, be seen upon examination of the facts of the case, that the difficulty which then arose, proceeded solely from the lenity and indulgence shown to the prisoners by the crown. On New-Year's day 1840, John Frost and others, were

brought to trial, on a charge of high treason, before a special commission at Monmouth. The proceedings were interrupted by an objection taken by the prisoners' counsel, that the terms of a statute, which requires that a list of witnesses should be delivered to the prisoners *at the same time* with a copy of the indictment, had not been complied with. The indictment had, in fact, been delivered five days before the list of witnesses. This had been done in merciful consideration to the prisoners, in order that they might be put in possession of the charge, to be brought against them, as early as it was in the power of the crown to give them the information, and probably before it was *possible* that the list of witnesses could have been made out. The trial, however, proceeded, subject to the decision of the fifteen judges upon the question, thus raised upon the supposed informality, which nothing but the *anxious mercy* of the crown had introduced into the proceedings; and the parties were found guilty of the offence laid to their charge. In the ensuing term, all other business was, for a time, suspended; and the fifteen judges of the land, with all the stately majesty of the judicial office, were gathered together in solemn conclave in Westminster Hall. A godly array, tier above tier they sat—the heavy artillery of a vast legal battery about to open the fire of their learning, with that imposing dignity which becomes the avengers of the country's and the sovereign's wrongs. Day after day they met, heard, and deliberated upon arguments, which were conspicuous from their consummate learning and ability. At length these learned

persons delivered their judgments, and, amid much diversity of opinion, the majority thought, upon the whole, that the conviction was right, and that the terms of the statute had been virtually complied with. The criminals, however, probably in consequence of the doubts and difficulty of the case, were absolved on the most highly penal consequences of their crime, and were, by a sort of compromise, transported for life to one of the penal settlements.

The doubt which some have entertained of the real insanity of Oxford, and others who have recently attempted the same crime which he so nearly committed, has caused these cases also to be brought forward in confirmation of the opinions, which we contend rest upon no real foundation. The insanity of a prisoner is, however, a fact, upon which it is the province of the jury to decide, under the direction of the presiding judge. In each case the law was luminously laid down by the judge for the guidance of the jury, who were fully instructed as to what the law required to establish the insanity of its prisoner, and to prove that "lesion of the will" which would render a human being irresponsible for his acts. These verdicts, undoubtedly, gave rise to a grave discussion, whether the law, as it now stands, was sufficiently stringent to have reached these cases; and though this question was decided in the affirmative, the mere entertaining of the doubt afforded another specious confirmation of the impression, that a singular fatality was attendant upon a state prosecution. This idea received another support from the case of Lord Cardigan,

who, about this period, was unexpectedly acquitted, on technical grounds, from a grave and serious charge. This, however, was no state prosecution, and we do but notice it, *en passant*, in corroboration of our general argument.

We now come to the case of the Chartist in 1842. For some time previous to the summer of 1842, great distress, it will be remembered, prevailed among the manufacturing population of the northern and midland counties. The misery of the preceding winter had been dreadful in the extreme; emaciated, haggard beings might be daily seen wandering about the country half naked, in the coldest weather; sufferings, almost without a parallel, were borne with patience and resignation. Despair there might be in the hearts of thousands, but those thousands were mute and passive in their misery; all was dark, all was hopeless; the wintry wind of penury blew untempered, keen upon them, but still they cried not; hunger preyed upon their very vitals, but they uttered no complaint. Let us not, even now, refuse a passing tribute of honour and respect to the passive heroism which in many an instance marked the endurance of the hopeless misery of those dreadful times. At length, however, evil and designing men came among the sufferers—remedies for the pressing evil, and means of escape from the wretchedness of their condition, were darkly hinted at; redress was whispered to be near, and they, the hungry fathers of famished children, lent a greedy ear to the fair promises of men whom they deemed wiser than themselves. The tempter's seedtime had arrived, the ground was ready, and

the seed was sown. Day by day, nay, hour by hour, was the bud of disaffection fostered with the greatest care; and, day by day, its strength and vitality increased. When, at length, the people were deemed ripe for action, the mask was thrown off, treasonable schemes and projects were openly proclaimed by the leaders of the coming movement, and echoed, from a hundred hills, by vast multitudes of their deluded followers. Large meetings were daily held on the neighbouring moors, where bodies of men were openly trained and armed for active and offensive operations. At length the insurrection, for such in truth it was, broke forth. Then living torrents of excited and exasperated men poured down those hillsides; the peaceful and well-affected were compelled to join the insurgent ranks, busy in the work of destruction and intimidation; when each evening brought the work of havoc to a temporary close, they laid them down to rest where the darkness overtook them. The roads were thus continually blockaded, and those who, under cover of the night, sought to obtain aid and assistance from less disturbed districts, were often interrupted and turned back by bodies of these men. Authority was at an end, and a large extensive district was completely at the mercy of reckless multitudes, burning to avenge the sufferings of the past, and bent on preventing, as they thought, a recurrence of them in future. The very towns were in their hands; "in an evil hour" a vast body of insurgents was "admitted" into one of the largest mercantile towns of the kingdom, where they pillaged and laid waste in every direction. In another town of the district a

fearful riot was put down by force, some of the leaders of the mob being shot dead while heading a charge upon the military. The ascendancy of the law was at length asserted; many arrests took place; the jails were crowded with prisoners; and the multitudes without, deserted by those to whom they had looked up for advice, their friends in prison, with the unknown terrors of the law suspended over them, probably then felt that, miserable and lost as they had been before, they had now fallen even lower in the scale of human misery. Criminal proceedings were quickly instituted. Several commissions were sent down to the districts in which these disturbances had taken place, in order that the offenders might meet with *speedy* punishment. The law officers of the crown, with many and able assistants, in person conducted the proceedings. Temperate, mild, dignified, and forbearing was their demeanour; in no case was the individual the object of prosecution; it was the *crime*, through the person of the criminal, against which the government proceeded. No feelings of a personal nature were there exhibited; and a mild, but firm, as it were, a parental correction of erring and misguided children, seemed to be the sole object of those who then represented the government. Conviction was heaped upon conviction—sentence followed sentence—the miserable tool was distinguished from the man who made him what he was—the active emissary, the secret conspirator, also received each their proportionate amount of punishment. True, a few of the more cautious and crafty, all included in one indictment, eventually escaped the penalty due

to their crimes; but, among the multitude of cases which were then tried, this was, we believe, the only instance even of partial failure. In spite of this single miscarriage of the government, the great object of these proceedings was completely answered; the end of all punishment was attained; the vengeance which the law then took had all the effect which the most condign punishment of these few men could have accomplished; the constitutional maxim of "*poena ad paucos, metus ad omnes*," has been amply illustrated by these proceedings; Chartism has been suppressed, by the temperate application of the constitutional means which were then resorted to for the correction of its violence, and the prevention of its seditious schemes.

We must not omit to mention the instances of signal and complete success which have been, from time to time, exhibited in other prosecutions against Feargus O'Connor and different members of the Chartist body, within the period of which we speak. On none of these occasions has the course of justice been hindered, or even turned aside; but the defendants have, we believe, without exception, paid the penalty of their crimes by enduring the punishments awarded by the court.

The recent trials of the Rebecca rioters were also signally successful and effective; and the prejudices of a Welsh jury, which some feared would prove a fatal stumblingblock, were overcome by the dispassionate appeal to their better judgment then made by the officers of the crown.

From a review of the cases, it therefore appears, that the

failures of a state prosecution have been comparatively few; and that the crown has met with even more than the average success which the "glorious uncertainty of the law" in general permits to those who tempt its waywardness, and risk the perils of defeat. The welfare and interest of the nation, however, lie in the *general* results of these proceedings, rather than the *particular event* of an individual trial. Therefore, though we should assume that a part only of what was intended has been accomplished, still if that portion produces the same general results as were hoped for from the successful accomplishment of the whole, the object of the government has been attained. Now, it may be observed, that, with perhaps the single exception of the case of Mr O'Connell in 1831, the end and object of all state prosecution has been uniformly and completely accomplished, by the suppression of the evil which the crown in each instance was anxious to put down. When this has taken place, there can have been no failure. Beyond what is necessary for the welfare of the state, and the general safety and security of the persons and property of individuals, the crown has no interest in inflicting punishment; it never asks for more than is required to effect *these objects*, and it can scarcely be content with less.

There are, however, difficulties almost peculiar to the more serious offences against the state, but which are entirely different, in their nature, from those imaginary difficulties which have formed the subject of so much declamation. A passing glance at the proceedings now pending in Ireland, will give the most casual

observer some idea of what is sometimes to be encountered by those to whom is entrusted the arduous duty of conducting a state prosecution. Look back on the "tempest of provocation," which recently assailed the Irish Attorney-General, on the vexatious delays and frivolous objections which sprang up at every move of the crown lawyers, called forth by one who, though "*not valiant*," was well known to the government to be "most cunning offence" ere they challenged him, but who, "despite his cunning fence and active practice," may perhaps find, that this time the law has clutched him with a grasp of iron. In ordinary cases, criminals may, no doubt, be easily convicted; and in the great majority of the more common crimes and misdemeanours, the utmost legal ingenuity and acumen might be unable to detect a single error in the proceedings, from first to last. Still it must be remembered, that even among the more common of ordinary cases, in which the forms are simple, the practice certain, and in which the law may be supposed to be already defined beyond the possibility of doubt, error, or misconception—even in such cases, questions occasionally arise which scarcely admit of any satisfactory solution—questions in which the fifteen judges, to whom they may be referred, often find it impossible to agree, and which may therefore be reasonably supposed to be sufficiently perplexing to the rest of the world. State offences, such as treason and sedition, which are of comparatively rare occurrence, present many questions of greater intricacy than any other class of crimes. In treason especially, a well-founded jealousy of the

power and prerogatives of the crown has intrenched the subject behind a line of outposts, in the shape of forms and preliminary proceedings; the accused, for his greater security against a power which, if unwatched, might become arbitrary and oppressive, has been invested with rights which must be respected and complied with, and by the neglect of which the whole proceedings are rendered null and void. At this moment, in all treasons, except attempts upon the person of the sovereign, "the prisoner," in the language of Lord Erskine, "is covered all over with the armour of the law;" and there must be twice the amount of evidence which would be legally competent to establish his guilt in a criminal prosecution for any other offence, even by the meanest and most helpless of mankind. Sedition is a head of crime of a somewhat vague and indeterminate character, and, in many cases, it may be extremely difficult, even for an acute and practised lawyer, to decide whether the circumstances amount to sedition. Mr East, in his pleas of the crown, says, that "sedition is understood in a more general sense than treason, and extends to other offences, not capital, of a like tendency, but without any actual design against the king in contemplation, such as contempts of the king and his government, riotous assemblings for political purposes, and the like; and in general all contemptuous, indecent, or malicious observations upon his person and government, whether by writing or speaking, or by tokens, calculated to lessen him in the esteem of his subjects, or weaken his government, or raise jealousies of him amongst the people, will fall under the

notion of seditious acts." An offence which admits of so little precision in the terms in which it is defined, depending often upon the meaning to be attached to words, the real import of which is varied by the tone or gesture of the speaker, by the words which precede, and by those which follow, depending also upon the different ideas which men attach to the same words, evidently rests on very different grounds from those cases, where actual crimes have been perpetrated and deeds committed, which leave numerous traces behind, and which may be proved by the permanent results of which they have been the cause. Technical difficulties without number also exist: the most literal accuracy, which is indispensable—the artful inuendoes, the artistical averments, which are necessary, correctly to shape the charge ere it is submitted to the grand jury, may be well conceived to involve many niceties and refinements, on which the case may easily be wrecked. It must also be remembered that the utmost legal ingenuity is called into action, and the highest professional talent is engaged in the defence of the accused. The enormous pressure upon the accused himself, who, probably from the higher or middle classes, with ample means at his command, an ignominious death perhaps impending, or, at the least, imprisonment probably for years in threatening prospect close before him; his friends active, moving heaven and earth in his behalf, no scheme left untried, no plan or suggestion rejected, by which it may, even in the remotest degree be possible to avert the impending doom; the additional rancour which politics

sometimes infuse into the proceedings, the partisanship which has occasioned scenes such as should never be exhibited in the sacred arena of the halls of justice, animosities which give the defence the character of a party conflict, and which cause a conviction to be looked upon as a political defeat, and an acquittal to be regarded as a party triumph—all these circumstances, in their combined and concentrated force, must also be take into consideration. In such a case every step is fought with stern and dogged resolution; even mere delay is valuable, for when all other hope is gone, the chapter of accidents *may* befriend the accused; it is one chance more; and even one chance, however slight, is not to be thrown away. Such is a faint picture of the defensive operations on such occasions: how is this untiring, bitter energy met by those who represent the crown?

"Look on this picture and on that."

Here all is calm, dignified, generous, and forbearing; every consideration is shown, every indulgence is granted, to the unfortunate being who is in jeopardy. The crown has no interest to serve beyond that which the state possesses in the vindication of the law, and in that cool, deliberate, and impartial administration of justice which has so long distinguished this country. Nothing is unduly pressed against the prisoner, but every extenuating fact is fairly laid before the jury by the crown; it is, in short, generosity, candor, and forbearance, on the one side, matched against craft, cunning and the resolution *by any means* to win, upon the other. Such are the real difficulties which may

be often felt by those who conduct a state prosecution. Surely it is better far that these difficulties should, in some instances, be even wholly insuperable, and that the prosecution should be defeated, than that any change should come over the spirit in which these trials are now conducted; or that the crown should ever even attempt to make the criminal process of the law an instrument of tyranny and oppression, as it was in the days of Scroggs and Jefferies, and when juries, through intimidation, returned such verdicts as the crown desired. Our very tenacity of our liberties may tend to render these proceedings occasionally abortive; and the twelve men composing a jury of the country, though possibly all their sympathies would be at once enlisted in behalf of a wronged and injured subject, may, unconsciously to themselves, demand more stringent proof, in cases where the sovereign power appears before then as the party; and more especially, when the offence is of an impersonal nature, and where the theory of the constitution, rather than the person or property of individuals, is the object of aggression. In the olden time such was the power of the crown, that, whenever the arm of the state was uplifted, the blow fell with unerring accuracy and precision; but now, when each object of a state prosecution is a sort of modern Briareus, the blow must be dealt with consummate skill, or it will fail to strike where it was meant to fall. On this account, perhaps, in addition to then own intrinsic paramount importance, the proceedings now pending in Ireland, have become the object of universal and absorbing interest throughout the whole of the

United Kingdom. Under these circumstances it has occurred to us, that a popular and accurate review of the several stages of a criminal prosecution, by which the general reader will be able, in some degree, to understand the several steps of that proceeding which is now pending, might not be unacceptable or uninteresting at the present moment. It must, however, be observed, that it is scarcely possible to divest a subject so technical in its very nature from those terms of art which, however familiar they may be to many of our readers, cannot be understood by all without some explanation, which we shall endeavour to supply as we proceed.

The general importance of information of this nature has been well summed up by a great master of criminal law. "The learning touching these subjects," says Sir Michael Foster, "is a matter of great and universal concernment. For no rank, no elevation in life, and, let me add, no conduct, how circumspect soever, ought to tempt a reasonable man to conclude that these enquiries do not, nor possibly can, concern him. A moment's cool reflection on the utter instability of human affairs, and the numberless unforeseen events which a day may bring forth, will be sufficient to guard any man, conscious of his own infirmities, against a delusion of this kind."

Let us suppose the minister of the day, having before been made aware that, in a portion of the kingdom, a state of things existed that demanded his utmost vigilance and attention, to have ascertained the reality of the apparent danger, and to have procured accurate information as to the real character of the

proceedings, and to find that acts apparently treasonable or seditious, as the case may be, had been committed. Suppose him, charged with the safety of the state, and responsible for the peace, order, and well-being of the community, to set the constitutional process of the law in motion against the offending individuals, his first step, under such circumstances, must be to procure full and satisfactory evidence of the facts as they really exist. For this purpose agents must be employed, necessarily in secret, or the very end and object of their mission would be frustrated, to collect and gather information from every authentic source, and to watch, with their own eyes the proceedings which have attracted attention. This is a work of time, perhaps; but suppose that it is complete, and that the minister having before him in evidence, true and unmistakable, a complete case of crime to lay before a jury, what, under these circumstances, is the first step to be taken by the crown? Either of two distinct modes of procedure may be chosen; the one mode is by an *ex officio* information, the other is by indictment. An indictment is the mode by which all treasons and felonies must be proceeded against, and by which ordinary misdemeanours are usually brought to punishment. An *ex officio* information is an information at the suit of the sovereign, filed by the Attorney-General, as by virtue of his office, without applying to the court where filed for leave, and without giving the defendant any opportunity of showing cause why it should not be filed. The principal difference between this form of procedure and that by indictment, consists in the

manner in which the proceedings are commenced; in the latter case, the law requires that the accusation should be warranted by the oath of twelve men, before he be put to answer it—or in other words that the grand jury must give that information to the court, which, in the former case, is furnished by the law officer of the crown. The cases which are prosecuted by *ex officio* information, are properly such enormous misdemeanours as peculiarly tend to disturb and endanger the government or to molest or affront the sovereign in the discharge of the functions of the royal office. The necessity for the existence of a power of this nature in the state, is thus set forth by that learned and illustrious judge, Sir William Blackstone. "For offences so highly dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal: which power, thus necessary, not only to the ease and safety, but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the preservation of all its parts."

The crown, therefore, in a case such as we have imagined, must first make choice between these two modes of procedure. The leniency of modern governments has of late usually resorted to the process by indictment; and the crown, waiving all the privileges which appertain to the kingly office, appears before the constituted tribunals of the land, as the redresser of the public

wrongs, invested with no powers, and clothed with no authority beyond the simple rights possessed by the meanest of its subjects. We shall, for this reason, take no further notice of the *ex officio* information; and as treasons form a class of offences governed by laws and rules peculiar to itself, we shall also exclude this head of crime from our consideration, and confine ourselves solely to the ordinary criminal process by which offenders are brought to justice.

In, general, the first step in a criminal prosecution, is to obtain a warrant for the apprehension of the accused party. In ordinary cases, a warrant is granted by any justice of the peace upon information, on the oath of some credible witness, of facts from which it appears that a crime has been committed, and that the person against whom the warrant is sought to be obtained, is probably the guilty party, and is a document under the hand and seal of the justice, directed generally to the constable or other peace-officer, requiring him to bring the accused, either generally before *any* justice of the county, or only before the justice who granted it. This is the practice in ordinary cases; but in extraordinary cases, the warrant may issue from the Lord Chief Justice, or the Privy Council, the Secretaries of State, or from any justice of the Court of Queen's Bench. These latter warrants are, we believe, all tested, or dated England, and extend over the whole kingdom. So far the proceedings have been all *ex parte*, one side only has been heard, one party only has appeared, and all that has been done, is to procure or compel the appearance

of the other. The warrant is delivered to the officer, who is bound to obey the command which it contains. It would seem, however, that, as was done in a recent case in Ireland, it is sufficient if the appearance of the accused be virtually secured, even without the intervention of an actual arrest.

When the delinquent appears, in consequence of this process, before the authorities, they are bound immediately to examine into the circumstances of the alleged crime; and they are to take down in writing the examinations of the witnesses offered in support of the charge. If the evidence is defective, and grave suspicion should attach to the prisoner, he may be remanded, in order that fresh evidence may be procured; or the magistrate, if the case be surrounded with doubt and difficulty, may adjourn it for a reasonable time, in order to consider his final decision. The accused must also be examined, but not upon oath; and his examination also must be taken down in writing, and may be given in evidence against him at the trial; for although the maxim of the common law is "*nemo tenebitur prodere seipsum*," the legislature, as long ago as the year 1555, directed that, in cases of felony, the examination of the prisoner should be taken; which provision has recently been extended to misdemeanours also. Care must be taken that his examination should not even *appear* to have been taken on oath; for in a very recent case, in which *all* the examinations were contained upon one sheet of paper, and under one general heading—from which they all purported to have been taken upon oath, the prisoner's admission

of his guilt contained in that examination, was excluded on the trial, and the rest of the evidence being slight, he was accordingly acquitted. Now, if upon the enquiry thus instituted, and thus conducted, it appears, either that no such crime was committed, or that the suspicion entertained against the accused is wholly groundless, or that, however positively accused, if the balance of testimony be strongly in favour of his innocence, it is the duty of the magistrate to discharge him. But if, on the other hand, the case seems to have been entirely made out, or even if it should appear probable, that the alleged crime has in fact been perpetrated by the defendant, he must either be committed to prison, there to be kept, in safe custody, until the sitting of the court before which the trial is to be heard; or, he may be allowed to give bail—that is, to put in securities for his appearance to answer the charge against him. In either of these alternatives, whether the accused be committed or held to bail, it is the duty of the magistrate to subscribe the examinations, and cause them to be delivered to the proper officer, at, or before, the opening of the court. Bail may be taken by two justices in cases of felony, and by one in cases of misdemeanour. In this stage of the proceedings, as the commitment is only for safe custody, whenever bail will answer the same intention, it ought to be taken, as in inferior crimes and misdemeanours; but in offences of a capital nature, such as the heinous crimes of treason, murder, and the like, no bail can be a security equivalent to the actual custody of the person. The nature of bail has been explained, by

Mr Justice Blackstone, to be "a delivery or bailment of a person to his sureties, upon their giving, together with himself, sufficient security for his appearance: he being supposed to continue in their friendly custody, instead of going to gaol." To refuse, or even to delay bail to any personailable, is an offence against the liberty of the subject, in any magistrate, by the common law. And the Court of Queen's Bench will grant a criminal information against the magistrate who improperly refuses bail in a case in which it ought to have been received. It is obviously of great importance, in order to ensure the appearance of the accused at the time and place of trial, that the sureties should be men of substance; reasonable notice of bail, in general twenty-four or forty-eight hours, may be ordered to be given to the prosecutor, in order that he may have time to examine into their sufficiency and responsibility. When the bail appear, evidence may be heard on oath, and they may themselves be examined on oath upon this point; if they do not appear to possess property to the amount required by the magistrates, they may be rejected, and others must be procured, or the defender must go to prison. Excessive bail must not be required; and, on the other hand, the magistrate, if he take insufficient bail, is liable to be fined, if the criminal do not appear to take his trial. When the securities are found, the bail enter into a recognizance, together with the accused, by which they acknowledge themselves bound to the Queen in the required sums, if the accused does not appear to take his trial, at the appointed time and place. This recognizance must be subscribed

by the magistrates, and delivered with the examinations to the officer of the court in which the trial is to take place. With this, the preliminary proceedings close: the accused has had one opportunity of refuting the charge, or of clearing himself from the suspicion which has gathered round him; but as yet, there is no written accusation, no written statement of the offence which it is alleged he has committed. True, he has heard evidence—he has heard a charge made orally against him—but the law requires greater particularity than this before a man shall be put in peril upon a criminal accusation. The facts disclosed in the evidence before the magistrates must be put in a legal form; the offence must be clearly and accurately defined in writing, by which the accused may be informed what specific charge he is to answer, and from which he may be able to learn what liability he incurs; whether his life is put in peril, or whether he is in danger of transportation or of imprisonment, or merely of a pecuniary fine. This is done by means of the indictment. The indictment is a written accusation of one or more several persons, preferred to and presented upon oath by a grand jury. This written accusation, before being presented to the grand jury, is properly termed a "bill;" and, in ordinary cases, it is generally prepared by the clerk of the arraigns at the assizes, and by the clerk of the peace at the quarter sessions; but, in cases of difficulty, it is drawn by counsel. It consists of a formal technical statement of the offence, which is engrossed upon parchment, upon the back of which the names of the witnesses for the prosecution are indorsed. In

England it is delivered to the crier of the court, by whom the witnesses are sworn to the truth of the evidence they are about to give before the grand jury. In the trial now pending in the Court of Queen's Bench in Ireland, a great question was raised as to whether a recent statute, which, on the ground of convenience, enabled grand juries in Ireland themselves to swear the witnesses, extended to trials before the Queen's Bench. This question was decided in the affirmative; therefore, in that country, the oath, in every case, must be administered by the grand jury themselves; whereas, in this country, the witnesses are sworn *in court*, and by the crier, as we have already mentioned. The grand jury, ever since the days of King Ethelred, must consist of twelve at least, and not more than twenty-three. In the superior courts they are generally drawn from the magistracy or superior classes of the community, being, as Mr Justice Blackstone expresses it, "usually gentlemen of the best figure in the county." They are duly sworn and instructed in the articles of their enquiry by the judge who presides upon the bench. They then withdraw, to sit and receive all bills which may be presented to them. When a bill is thus presented, the witnesses are generally called in the order in which their names appear upon the back of the bill. The grand jury is, at most, to hear evidence only on behalf of the prosecution; "for," says the learned commentator already quoted, "the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to enquire upon their oaths, whether

there be sufficient cause to call upon a party to answer it." They ought, however, to be fully persuaded of the truth of an indictment as far as the evidence goes, and not to rest satisfied with remote probabilities; for the form of the indictment is, that they, "*upon their oath*, present" the party to have committed the crime. This form, Mr Justice Coleridge observes, is perhaps stronger than may be wished, and we believe that the criminal law commissioners are now seriously considering the propriety of abolishing it.

After hearing the evidence, the grand jury endorse upon the bill their judgment of the truth or falsehood of the charge. If they think the accusation groundless, they write upon it, "not found," or "not a true bill;" in which case the bill is said to be ignored: but, on the other hand, if twelve at least are satisfied of the truth of the accusation, the words "true bill" are placed upon it. The bill is then said to be found. It then becomes an indictment, and is brought into court by the grand jury, and publicly delivered by the foreman to the clerk of arraigns, or clerk of the peace, as the case may be, who states to the court the substance of the indictment and of the indorsement upon it. If the bill is ignored, and no other bill is preferred against the party, he is discharged, without further answer, when the grand jury have finished their labours, and have been themselves discharged. To find a bill, twelve at least of the jury must agree; for no man, under this form of proceeding at least, can be convicted even of a misdemeanour, unless by the unanimous voice of twenty-four of his equals; that

is, by twelve at least of the grand jury assenting to the accusation, and afterwards by the whole petit jury of twelve more finding him guilty upon the trial.

This proceeding is wholly *ex parte*. As the informal statement of the crime brought the supposed criminal to answer before the inferior tribunal, so does the formal accusation call upon him to answer before the superior court. The preliminary proceedings being now complete, and every step having been taken which is necessary to put the accused upon his trial, the *ex parte* character of the proceedings is at an end. The time approaches when the accused must again be brought face to face with his accusers; and when, if he has been admitted to bail, his sureties must deliver him up to the proper authorities, or their bond is forfeited; in which case, a bench warrant for the apprehension of the delinquent may issue; and if he cannot still be found, he may be pursued to outlawry. It may be here mentioned, that the proceedings may be, at any period, removed from any inferior court into the Queen's Bench, by what is called a writ of *certiorari*. When the offender appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is to be immediately arraigned. The arraignment is simply the calling upon the accused, at the bar of the court, to answer the matter charged upon him in the indictment, the substantial parts, at least, of which are then read over to him. This is indispensable, in order that he may fully understand the charge. So voluminous are the

counts of the indictment recently found against Mr O'Connell and others, that the reading of the charges they contained was the work of many hours. The accused is not always compelled immediately to answer the indictment; for if he appear in term-time to an indictment for a misdemeanour in the Queen's Bench, it is sufficient if he plead or demur within four days; the court has a discretionary power to enlarge the time; but if he neither pleads nor demurs within the time prescribed, judgment may be entered against him as for want of a plea. If he appear to such an indictment, having been committed or held to bail within twenty days before the assizes or sessions at which he is called upon to answer, he has the option of *traversing*, as it is termed, or of postponing his trial to the next assizes or sessions. He is also always entitled, before the trial, on payment of a trifling charge, to have copies of the examinations of the witnesses on whose evidence he was committed or held to bail; and at the trial he has a right to inspect the originals gratuitously. In prosecutions for misdemeanours at the suit of the Attorney-General, a copy of indictment must be delivered, free of expense, if demanded by the accused. These seem to be all the privileges except that of challenge, which we shall explain hereafter, which the accused possesses, or to which the law gives him an absolute indefeasible claim as a matter of right. The *practice* of different courts may possibly vary in some degree on points such as those which have been recently mooted in Ireland; for instance, as to whether the names of the witnesses should be furnished to the accused, and

whether their address and description should also be supplied. In such matters the practice might vary, in a considerable degree, in the superior courts of England and Ireland; and yet each course would be strictly legal, in the respective courts in which it was adopted; for, as it was clearly put by one of the Irish judges on a recent occasion, the practice of the court is the law of the court, and the law of the court is the law of the land.

When the time has arrived at which the accused must put in his answer to the indictment, if he do not confess the charge, or stand mute of malice, he may either plead, 1st, to the jurisdiction, which is a good plea when the court before whom the indictment is taken has no cognizance of the offence, as when a case of treason is prosecuted at the quarter sessions; or, 2dly, he may demur, by which he says, that, assuming that he has done every thing which the indictment lays to his charge, he has, nevertheless, been guilty of no crime, and is in nowise liable to punishment for the act there charged. A demurrer has been termed an issue in law—the question to be determined being, what construction the law puts upon admitted facts. If the question of law be adjudged *in favour* of the accused, it is attended with the same results as an acquittal in fact, except that he may be indicted afresh for the same offence; but if the question be determined *against* the prisoner, the law, in its tenderness, *will not* allow him, at least in cases of felony, to be punished for his misapprehension of the law, or for his mistake in the conduct of his pleadings, but will, in such case, permit him

to plead over to the indictment—that is, to plead not guilty; the consequences of which plea we will consider hereafter.

A third alternative is a plea of abatement, which is a plea praying that the indictment may be quashed, for some defect which the plea points out. This plea, though it was recently, made use of by the defendants in the case now pending in Ireland, is of very rare occurrence in ordinary practice—a recent statute having entirely superseded every advantage formerly to be derived from this plea, in cases of a misnomer, or a wrong name, and of a false addition or a wrong description of the defendant's rank and condition, which were the principal occasions on which it was resorted to.

The next alternative which the prisoners may adopt, is a special plea in bar. These pleas are of four kinds: 1. a former acquittal; 2. a former conviction; 3. a former attainder; 4. a former pardon, for the same offence. The first two of these pleas are founded on the maxim of the law of England, that no man is to be twice put in jeopardy for the same offence. A man is attainted of felony, only by judgment of death, or by outlawry; for by such judgment, the prisoner being already dead in law, and having forfeited all his property, there remains no further punishment to be awarded; and, therefore, any further proceeding would be superfluous. This plea has, however, been practically put an end to by a recent statute. A plea of pardon, is the converse of a plea of attainder; for a pardon at once destroys the end and purpose of the indictment, by remitting that

punishment which the prosecution was calculated to inflict.

All these pleas may be answered by the crown in two ways—issue may be joined on the facts they respectively set forth; or they may be demurred to; by which step, the facts, alleged in the plea, are denied to constitute a good and valid defence in law. In *felony*, if any of these pleas are, either in fact or in law, determined against the prisoner, he cannot be convicted or concluded by the adverse judgment; and for this reason. Formerly all felonies were punishable with death, and, in the words of Mr Justice Blackstone, "the law allows many pleas by which a prisoner may escape death; but only one plea in consequence whereof it can be inflicted, viz., the general issue, after an impartial examination and decision of the facts, by the unanimous verdict of a jury." The prisoner, therefore, although few felonies remain still capital, is nevertheless still allowed to plead over as before. In misdemeanours, however, which are never capital, and in which, therefore, no such principle could ever have applied, the judgment on these pleas appears to follow the analogy of a civil action. Thus, if, upon issue joined, a plea of abatement be found against the accused, the judgment, on that indictment, is final; though a second indictment may be preferred against him; but if, upon demurrer, the question of law is held to be against him, the judgment is, that he do answer the indictment. If a plea in bar, either on issue joined, or on demurrer, be determined against the defendant, the judgment is in such case final, and he stands convicted of the misdemeanour.

The general issue, or the plea of "not guilty," is the last and most usual of those answers to the indictment which we have enumerated, the others being all of extremely rare occurrence in the modern practice of the criminal law. By this plea, the accused puts himself upon his county, which county the jury are. The sheriff of the county must then return a panel of jurors. In England the jurors are taken from the "jurors' book" of the current year. It must be observed, that a new jurors' book comes into operation on the first of January in each year, having previously been copied from the lists of those liable to serve on juries, made out in the first instance, between the months of July and October, both inclusive, by the churchwardens and overseers of each parish, then reviewed and confirmed by the justices of the peace in petty sessions, and, through the high constable of the district, delivered to the next quarter sessions. If the proceedings are before the Queen's Bench, an interval is allowed by the court, in fixing the time of trial, for the impanneling of the jury, upon a writ issued to the sheriff for that purpose. The trial in a case of misdemeanour in the Queen's Bench is had at *nisi prius*, unless it be of such consequence as to merit a trial at bar, which is invariably had when the prisoner is tried for any capital offence in that court. But before the ordinary courts of assize, the sheriff, by virtue of a general precept directed to him beforehand, returns to the court a panel of not less than forty-eight nor more than seventy-two persons, unless the judges of assize direct a greater or smaller number to be summoned. When the time for the trial

has arrived, and the case is called on, jurors, to the number of twelve, are sworn, unless challenged as they appear; their names being generally taken promiscuously, one by one, out of a box containing a number of tickets, on each of which a juror's name is inserted. Challenges may be made, either on the part of the crown or on that of the accused, and either to the whole array or to the separate polls. The challenge to the array, which must be made in writing, is an exception to the whole panel, on account of some partiality or default in the sheriff, or his officer, who arrayed the panel, the ground of which is examined into before the court. Challenges to the polls—*in capita*—are exceptions to particular persons, and must be made in each instance, as the person comes to the box to be sworn, and before he is sworn; for when the oath is once taken the challenge is too late.

Sir Edward Coke reduces the heads of challenge to four. 1st, *propter honoris respectum*; as if a lord of Parliament be impannelled. 2d, *propter defectum*; as if a juryman be an alien born, or be in other respects generally objectionable. 3d, *propter affectum*; for suspicion of bias or partiality: and 4th, *propter delictum*; or, for some crime that affects the juror's credit, and renders him infamous; In treason and felony, the prisoner is allowed the privilege of a limited number of *peremptory* challenges; after which, as in misdemeanours, there is no limit to the number of challenges, if the party shows some cause for each challenge to the court. This cause is tried by persons appointed for that purpose by the court, when no jurymen have

been sworn; but when two jurymen have been sworn, they are the parties who must adjudicate upon the qualifications of those who are afterwards challenged, who, except when the challenge is *propter delictum*, may be themselves examined upon oath. The crown, also, we have seen, can exercise this privilege, but with this difference, that no cause for challenge need be shown by the crown, either in felonies or misdemeanours, till the panel is exhausted, and unless there cannot be a full jury without the persons so challenged.

When twelve men have been found, they are sworn to give a true verdict "according to the evidence," and the jury are then ready to hear the merits of the case. To fix their attention the closer to the facts which they are impannelled and sworn to try, the indictment, in cases of importance, is usually opened by the junior counsel for the crown—a proceeding, by which they are briefly informed of the charge which is brought against the accused. The leading counsel for the crown then lays the *facts* of the case before the jury, in a plain unvarnished statement; no appeal is made to the passions or prejudices of the twelve men, who are to pronounce upon the guilt or innocence of the accused; but every topic, every observation, which might warp their judgment, or direct their attention from the simple facts which are about to be proved before them, is anxiously deprecated and avoided by the counsel for the prosecution. The witnesses for the crown are called one by one, sworn, examined, and cross-examined by the accused, or his counsel. When the

case for the crown has been brought to a close, the defence commences, and the counsel for the defendant addresses the jury. It is the duty of the advocate, on such an occasion, to put forth all his powers in behalf of his client; to obtain acquittal is his object: he must sift the hostile evidence, he must apply every possible test to the accuracy of the testimony, and to the credibility of the witnesses; he may address himself to the reason, to the prejudices, to the sympathies, nay, even to the worst passions of the twelve men whose opinions he seeks to influence in favour of his client. He may proceed to call witnesses to disprove the facts adduced on the other side, or to show that the character of the accused stands too high for even a suspicion of the alleged crime; he has the utmost liberty of speech and action. He may indefinitely protract the proceedings, and there seems to be scarcely any limit, in point of law, beyond which the ultimate event of the trial may not be, by these means, deferred. Whenever the defence closes, in those cases in which the government is the real prosecutor, the representative of the crown has the general reply; at the close of which the presiding judge sums up the evidence to the jury, and informs them of the legal bearing of the facts, on the effect and existence of which the jury has to decide. This having been accomplished, it becomes the duty of the jury to deliberate, decide, and pronounce their verdict. If the verdict be "Not guilty," the accused is for ever quit and discharged of the accusation; but if the jury pronounce him guilty, he stands convicted of the crime which has been thus charged and proved

against him, and awaits the judgment of the court. In felonies and ordinary misdemeanours, judgment is generally pronounced immediately upon, or soon after, the delivery of the verdict; in other cases, when the trial has been had before the Queen's Bench, the judgment may, in England, be pronounced either immediately or during the ensuing term. But whenever this event occurs, the prisoner has still one chance more for escape: he can move an arrest of judgment, on the grounds either that the indictment is substantially defective, or that he has already been pardoned or punished for the same offense. These objections, if successful, will, even at this late stage of the proceedings, save the defendant from the consequences of his crime. But if these last resources fail, the court must give the judgment, or pronounce the measure of that punishment, which the law annexes to the crime of which the prisoner has been convicted.

By the law of this country, the *species* of punishment for every offence is always ascertained; but, between certain defined limits, the measure and degree of that punishment is, with very few exceptions, left to the discretion of the presiding judge. Treasons and some felonies are, indeed, capital: but, in the mercy of modern times, the great majority of felonies, and all misdemeanours, are visited, some with various terms of transportation or imprisonment, which, in most cases, may be with or without hard labour, at the discretion of the court. In these cases, the punishment is prescribed by the statute law; but there are some misdemeanours the punishment of which has

not been interfered with by any statute, and to which, therefore, the common law punishments are still attached. The case of Mr O'Connell, which is now in abeyance, seems to range itself under this head of misdemeanours. Such cases are punishable by fine or imprisonment, or by both; but the amount of the one, or the duration of the other, is each left at large to be estimated by the court, according to the more or less aggravated nature of the offence, and, as it is said, also according to the quality and condition of the parties. That a fine should, in all cases, be reasonable, has been declared by Magna Charta; and the Bill of Rights has also provided, that excessive fine, or cruel and unusual punishments, should not be inflicted; but what may or may not be unreasonable or excessive, cruel or unusual, is left entirely to the judgment of the executive.

For crimes of a dark political hue, which, by their tendency to subvert the government or destroy the institutions of the country, necessarily assume a character highly dangerous to the safety and well-being of the state, it might be difficult to say what degree of punishment would be excessive or unusual. It seems probable, that in cases of this nature, which include crimes, so varied in their circumstances that there appears no limit to the degree of guilt incurred—crimes, the nature and character of which could not possibly be foreseen or provided for, in all their infinite multiplicity of detail; it seems probable that, in such cases, a large discretion may have been purposely left by the framers of our constitution, in order that the degree of guilt, on

each occasion, should be measured by an expansive self-adjusting scale of punishment, applied, indeed, and administered by the judges of the land, but regulated and adjusted, in each succeeding age, by the influence of public opinion, and by the spirit and temper of the times.

Even at this latest stage of criminal prosecution, in the interval which must necessarily elapse between the pronouncing and the infliction of the sentence, the convicted delinquent is not without a remedy for any wrong he may sustain in the act which terminates the proceedings. If any judgement not warranted by law be given by the court, it may be reversed upon a *writ of error*, which lies from all inferior criminal jurisdictions to the Queen's Bench, and from the Queen's Bench to the House of Peers. These writs, however, in cases of misdemeanour, are not allowed, of course, but on probable cause shown to the Attorney General; and then they are understood to be grantable of common right, and *ex debito justitiæ*. The crown, if every other resource has failed the prisoner, has always the power of exercising the most amiable of its prerogatives. Though the sovereign herself condemns no man, "the great operation of her sceptre is mercy," and the chief magistrate, in the words of Sir William Blackstone, "holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment," is ever at liberty to grant a free, unconditional, and gracious pardon to the injured or repentant convict.

We have now rapidly traced the progress of a criminal prosecution from its commencement to its close, and we have given a summary of the *ordinary* proceedings on such occasions. Although it may be possible that the practice of the courts in Ireland on minor points, should occasionally differ in some degree from the practice of the English Courts, we may, nevertheless, have rendered the proceedings now pending in the sister isle, more intelligible to the general reader, who may now, perhaps, be enabled to see the bearing, and understand the importance of many struggles, which, to the unlearned, might probably appear to be wholly beside the real question now at issue between the crown and Mr O'Connell. Whatever be the result of that prosecution, whether those indicted be found guilty, or acquitted, of the misdemeanours laid to their charge; we feel assured, on the one hand, however long and grievous may have been the "provocation," that while there will be "nothing extenuate," neither will there be "set down aught in malice;" but that the measure of the retribution now demanded by the state, will be so temperately and equitably adjusted, that while the very semblance of oppression is carefully avoided, the majesty of the law, and the powers of the executive, will be amply and entirely vindicated. On the other hand, if Mr O'Connell, and his companions, in guilt or misfortune, should break through the cobwebs of the law, and hurl a *retrospective* defiance at the Government; we feel the utmost confidence, that the learning, foresight, and ability, of the eminent lawyers who represent the

crown, together with the firmness and integrity of the Irish bench, "*sans peur et sans reproche*," will demonstrate to the millions who look on, that the constitutional powers of the state still remain uninjured and unimpaired in all their pristine and legitimate energy and vigour; and that neither in the machinery now set in motion, nor with those who conduct or superintend its action, but with others on whom, in the course of these proceedings, will be thrown the execution of a grave and all-important duty, must rest the real blame, if blame there be, of the failure of *this* "State Prosecution."

ADVENTURES IN TEXAS.

No. III.

THE STRUGGLE

I had been but three or four months in Texas, when, in consequence of the oppressive conduct of the Mexican military authorities, symptoms of discontent showed themselves, and several skirmishes occurred between the American settlers and the soldiery. The two small forts of Velasco and Nacogdoches were taken by the former, and their garrisons and a couple of field-officers made prisoners; soon after which, however, the quarrel was made up by the intervention of Colonel Austin on the part of Texas, and Colonel Mejia on the part of the Mexican authorities.

But in the year '33 occurred Santa Anna's defection from the liberal party, and the imprisonment of Stephen F. Austin, the Texian representative in the Mexican congress, by the vice-president, Gomez Farias. This was followed by Texas adopting the constitution of 1824, and declaring itself an independent state of the Mexican republic. Finally, towards the close of 1835 Texas threw off the Mexican yoke altogether, voted itself a free and sovereign republic, and prepared to defend by arms its newly asserted liberty.

The first step to be taken was, to secure our communications

with the United States by getting possession of the sea-ports. General Cos had occupied Galveston harbour, and built and garrisoned a block-fort, nominally for the purpose of enforcing the customs laws, but in reality with a view to cut off our communications with New Orleans and the States. This fort it was necessary to get possession of, and my friend Fanning and myself were appointed to that duty by the Alcalde, who had taken a prominent part in all that had occurred.

Our whole force and equipment wherewith to accomplish this enterprise, consisted in a sealed despatch, to be opened at the town of Columbia, and a half-breed, named Agostino, who acted as our guide. On reaching Columbia, we called together the principal inhabitants of the place, and of the neighbouring towns of Bolivar and Marion, unsealed the letter in their presence, and six hours afterwards the forces therein specified were assembled, and we were on our march towards Galveston. The next day the fort was taken, and the garrison made prisoners, without our losing a single man.

We sent off our guide to the government at San Felipe with news of our success. In nine days he returned, bringing us the thanks of congress, and fresh orders. We were to leave a garrison in the fort, and then ascend Trinity river, and march towards San Antonio de Bexar. This route was all the more agreeable to Fanning and myself, as it would bring us into the immediate vicinity of the *haciendas*, or estates, of which we had some time previously obtained a grant from the Texian government; and we

did not doubt that we were indebted to our friend the Alcalde for the orders which thus conciliated our private convenience with our public duty.

As we marched along we found the whole country in commotion, the settlers all arming, and hastening to the distant place of rendezvous. We arrived at Trinity river one afternoon, and immediately sent messengers for forty miles in all directions to summon the inhabitants. At the period in question, the plantations in that part of the country were very few and far between, but nevertheless by the afternoon of the next day we had got together four-and-thirty men, mounted on mustangs, each equipped with rifle and bowie-knife, powder-horn and bullet-bag, and furnished with provisions for several days. With these we started for San Antonio de Bexar, a march of two hundred and fifty miles, through trackless prairies intersected with rivers and streams, which, although not quite so big as the Mississippi or Potomac, were yet deep and wide enough to have offered serious impediment to regular armies. But to Texian farmers and backwoodsmen, they were trifling obstacles. Those we could not wade through we swam over; and in due time, and without any incident worthy of note, reached the appointed place of rendezvous, which was on the river Salado, about fifteen miles from San Antonio, the principal city of the province. This latter place it was intended to attack—an enterprise of some boldness and risk, considering that the town was protected by a strong fort, amply provided with heavy artillery, and had a garrison of

nearly three thousand men, commanded by officers who had, for the most part, distinguished themselves in the revolutionary wars against the Spaniards. Our whole army, which we found encamped on the Salado, under the command of General Austin, did not exceed eight hundred men.

The day after that on which Fanning and myself, with our four and thirty recruits, reached headquarters, a council of war was held, and it was resolved to advance as far as the mission of Santa Espada. The advanced guard was to push forward immediately; the main body would follow the next day. Fanning and myself were appointed to the command of the vanguard, in conjunction with Mr Wharton, a wealthy planter, who had brought a strong party of volunteers with him, and whose mature age and cool judgment, it was thought, would counterbalance any excess of youthful heat and impetuosity on our part. Selecting ninety-two men out of the eight hundred, who, to a man, volunteered to accompany us, we set out for the mission.

These missions are a sort of picket-houses or outposts of the Catholic church, and are found in great numbers in all the frontier provinces of Spanish America, especially in Texas, Santa Fe, and Cohahuila. They are usually of sufficient strength to afford their inmates security against any predatory party of Indians or other marauders, and are occupied by priests, who, while using their endeavours to spread the doctrines of the Church of Rome, act also as spies and agents of the Mexican government.

On reaching San Espada we held a discussion as to the

propriety of remaining there until the general came up, or of advancing at once towards the river. Wharton inclined to the former plan, and it was certainly the most prudent, for the mission was a strong building, surrounded by a high wall, and might have been held against very superior numbers. Fanning and I, however, did not like the idea of being cooped up in a house, and at last Wharton yielded. We left our horses and mustangs in charge of eight men, and with the remainder set out in the direction of the Salado, which flows from north to south, a third of a mile to the westward of the mission. About half-way between the latter and the river, was a small group, or island, of muskeet trees, the only object that broke the uniformity of the prairie. The bank of the river on our side was tolerably steep, about eight or ten feet high, hollowed out here and there, and covered with a thick network of wild vines. The Salado at this spot describes a sort of bow-shaped curve, with a ford at either end, by which alone the river can be passed, for although not very broad, it is rapid and deep. We resolved to take up a position within this bow, calculating that we might manage to defend the two fords, which were not above a quarter of a mile apart.

At the same time we did not lose sight of the dangers of such a position, and of the almost certainty that if the enemy managed to cross the river, we should be surrounded and cut off. But our success on the few occasions on which we had hitherto come to blows with the Mexicans, at Velasco, Nacogdoches, and Galveston, had inspired us with so much confidence, that we

considered ourselves a match for thousands of such foes, and actually began to wish the enemy would attack us before our main body came up. We reconnoitred the ground, stationed a picket of twelve men at each ford, and an equal number in the island of muskeet trees; and established ourselves with the remainder amongst the vines and in the hollows on the river bank.

The commissariat department of the Texian army was, as may be supposed, not yet placed upon any very regular footing. In fact, every man was, for the present, his own commissary-general. Finding our stock of provisions to be very small, we sent out a party of foragers, who soon returned with three sheep, which they had taken from a *rancho*, within a mile of San Antonio. An old priest, whom they found there, had threatened them with the anger of Heaven and of General Cos; but they paid little attention to his denunciations, and, throwing down three dollars, walked off with the sheep. The priest became furious, got upon his mule, and trotted away in the direction of the City to complain to General Cos of the misconduct of the heretics.

After this we made no doubt that we should soon have a visit from the worthy Dons. Nevertheless the evening and the night passed away without incident. Day broke—still no signs of the Mexicans. This treacherous sort of calm, we thought, might forbode a storm, and we did not allow it to lull us into security. We let the men get their breakfast, which they had hardly finished when the picket from the upper ford came in with news that a strong body of cavalry was approaching the river, and that

their vanguard was already in the hollow way leading to the ford. We had scarcely received this intelligence when we heard the blare of the trumpets, and the next moment we saw the officers push their horses up the declivitous bank, closely followed by their men, whom they formed up in the prairie. We counted six small squadrons, about three hundred men in all. They were the Durango dragoons—smart troops enough to all appearance, capitally mounted and equipped, and armed with carbines and sabres.

Although the enemy had doubtless reconnoitred us from the opposite shore, and ascertained our position, he could not form any accurate idea of our numbers, for with a view to deceive him, we kept the men in constant motion, sometimes showing a part of them on the prairie, then causing them to disappear again behind the vines and bushes. This was all very knowing for young soldiers such as we were; but, on the other hand, we had committed a grievous error, and sinned against all established military rules, by not placing a picket on the further side of the river, to warn us of the approach of the enemy, and the direction in which he was coming. There can be little doubt that if we had earlier notice of their approach, thirty or forty good marksmen—and all our people were that—might not only have delayed the advance of the Mexicans, but perhaps even totally disgusted them of their attempt to cross the Salado. The hollow way on the other side of the river, leading to the ford, was narrow and tolerably steep, and the bank was at least six times as high as on our side.

Nothing would have been easier than to have stationed a party, so as to pick off the cavalry as they wound through this kind of pass, and emerged two by two upon the shore. Our error, however, did not strike us till it was too late to repair it; so we were fain to console ourselves with the reflection that the Mexicans would be much more likely to attribute our negligence to an excess of confidence in our resources, than to the inexperience in military matters, which was its real cause. We resolved to do our best to merit the good opinion which we thus supposed them to entertain of us.

When the whole of the dragoons had crossed the water, they marched on for a short distance in an easterly direction: then, wheeling to the right, proceeded southward, until within some five hundred paces of us, where they halted. In this position, the line of cavalry formed the chord of the arc described by the river, and occupied by us.

As soon as they halted, they opened their fire, although the could not see one of us, for we were completely sheltered by the bank. Our Mexican heroes, however, apparently did not think it necessary to be within sight or range of their opponents before firing, for they gave us a rattling volley at a distance which no carbine would carry. This done, others galloped on for about a hundred yards, halted again, loaded, fired another volley, and then giving another gallop, fired again. They continued this sort of *manège* till they found themselves within two hundred and fifty paces of us, and then appeared inclined to take a little time

for reflection.

We kept ourselves perfectly still. The dragoons evidently did not like the aspect of matters. Our remaining concealed, and not replying to their fire, seemed to bother them. We saw the officers taking a deal of pains to encourage their men, and at last two squadrons advanced, the others following more slowly, a short distance in rear. This was the moment we had waited for. No sooner had the dragoons got into a canter, than six of our men who had received orders to that effect, sprang up the bank, took steady aim at the officers, fired, and then jumped down again.

As we had expected, the small numbers that had shown themselves, encouraged the Mexicans to advance. They seemed at first taken rather aback by the fall of four of their officers; but nevertheless, after a moment's hesitation, they came thundering along full speed. They were within sixty or seventy yards of us, when Fanning and thirty of our riflemen ascended the bank, and with a coolness and precision that would have done credit to the most veteran troops, poured a steady fire into the ranks of the dragoons.

It requires some nerve and courage for men who have never gone through any regular military training, to stand their ground singly and unprotected, within fifty yards of an advancing line of cavalry. Our fellows did it, however, and fired, not all at once, or in a hurry, but slowly and deliberately; a running fire, every shot of which told. Saddle after saddle was emptied; the men, as they had been ordered, always picking out the foremost horsemen,

and as soon as they had fired, jumping down the bank to reload. When the whole of the thirty men had discharged their rifles, Wharton and myself, with the reserve of six and thirty more, took their places; but the dragoons had almost had enough already, and we had scarcely fired ten shots when they executed a right-about turn, with an uniformity and rapidity which did infinite credit to their drill, and went off at a pace that soon carried them out of reach of our bullets. They had probably not expected so warm a reception. We saw their officers doing every thing they could to check their flight, imploring, threatening, even cutting at them with their sabres, but it was no use; if they were to be killed, it must be in their own way, and they preferred being cut down by their officers to encountering the deadly precision of rifles, in the hands of men who, being sure of hitting a squirrel at a hundred yards, were not likely to miss a Durango dragoon at any point within range.

Our object in ordering the men to fire slowly was, always to have thirty or forty rifles loaded, wherewith to receive the enemy should he attempt a charge *en masse*. But our first greeting had been a sickener, and it appeared almost doubtful whether he would venture to attack us again, although the officers did every thing in their power to induce their men to advance. For a long time, neither threats, entreaties, nor reproaches produced any effect. We saw the officers gesticulating furiously, pointing to us with their sabres, and impatiently spurring their horses, till the fiery animals plunged and reared, and sprang with all four feet

from the ground. It is only just to say, that the officers exhibited a degree of courage far beyond any thing we had expected from them. Of the two squadrons that charged us, two-thirds of the officers had fallen; but those who remained, instead of appearing intimidated by their comrades' fate, redoubled their efforts to bring their men forward.

At last there appeared some probability of their accomplishing this, after a most curious and truly Mexican fashion. Posting themselves in front of their squadrons, they rode on alone for a hundred yards or so, halted, looked round, as much as to say—"You see there is no danger as far as this," and then galloping back, led their men on. Each time that they executed this manoeuvre, the dragoons would advance slowly some thirty or forty paces, and then halt as simultaneously as if the word of command had been given. Off went the officers again, some distance to the front, and then back again to their men, and got them on a little further. In this manner these heroes were inveigled once more to within a hundred and fifty yards of our position.

Of course, at each of the numerous halts which they made during their advance, they favoured us with a general, but most innocuous discharge of their carbines; and at last, gaining confidence, I suppose, from our passiveness, and from the noise and smoke they themselves had been making, three squadrons which had not yet been under fire, formed open column and advanced at a trot. Without giving them time to halt or reflect

—"Forward! Charge!" shouted the officers, urging their own horses to their utmost speed; and following the impulse thus given, the three squadrons came charging furiously along.

Up sprang thirty of our men to receive them. Their orders were to fire slowly, and not throw away a shot, but the gleaming sabres and rapid approach of the dragoons flurried some of them, and firing a hasty volley, they jumped down the bank again. This precipitation had nearly been fatal to us. Several of the dragoons fell, and there was some confusion and a momentary faltering amongst the others; but they still came on. At this critical moment, Wharton and myself, with the reserves, showed ourselves on the bank. "Slow and sure-mark your men!" shouted we both. Wharton on the right and I on the left. The command was obeyed: rifle after rifle cracked off, always aimed at the foremost of the dragoons, and at every report a saddle was emptied. Before we had all fired, Fanning and a dozen of his sharpest men had again loaded, and were by our side. For nearly a minute the Mexicans remained, as if stupefied by our murderous fire, and uncertain whether to advance or retire; but as those who attempted the former, were invariably shot down, they at last began a retreat, which was soon converted into a rout. We gave them a farewell volley, which eased a few more horses of their riders, and then got under cover again, to await what might next occur.

But the Mexican caballeros had no notion of coming up to the scratch a third time. They kept patrolling about, some three or

four hundred yards off, and firing volleys at us, which they were able to do with perfect impunity, as at that distance we did not think proper to return a shot.

The skirmish had lasted nearly three quarters of an hour. Strange to say, we had not had a single man wounded, although at times the bullets had fallen about us as thick as hail. We could not account for this. Many of us had been hit by the balls, but a bruise or a graze of the skin was the worst consequence that had ensued. We were in a fair way to deem ourselves invulnerable.

We were beginning to think that the fight was over for the day, when our videttes at the lower ford brought us the somewhat unpleasant intelligence that large masses of infantry were approaching the river, and would soon be in sight. The words were hardly uttered, when the roll of the drums, and shrill squeak of the fifes became audible, and in a few minutes the head of the column of infantry, having crossed the ford, ascended the sloping bank, and defiled in the prairie opposite the island of muskeet trees. As company after company appeared, we were able to form a pretty exact estimate of their numbers. There were two battalions, together about a thousand men; and they brought a field-piece with them.

These were certainly rather long odds to be opposed to seventy-two men and three officers' for it must be remembered that we had left twenty of our people at the mission, and in the island of trees. Two battalions of infantry, and six squadrons of dragoons—the latter, to be sure, disheartened and diminished

by the loss of some fifty men, but nevertheless formidable opponents, now they were supported by the foot soldiers. About twenty Mexicans to each of us. It was getting past a joke. We were all capital shots, and most of us, besides our rifles, had a brace of pistols in our belts; but what were seventy-five rifles, and five or six score of pistols against a thousand muskets and bayonets, two hundred and fifty dragoons, and a field-piece loaded with canister? If the Mexicans had a spark of courage or soldiership about them, our fate was sealed. But it was exactly this courage and soldiership, which we made sure would be wanting.

Nevertheless we, the officers, could not repress a feeling of anxiety and self-reproach, when we reflected that we had brought our comrades into such a hazardous predicament. But on looking around us, our apprehensions vanished. Nothing could exceed the perfect coolness and confidence with which the men were cleaning and preparing their rifles for the approaching conflict; no bravado—no boasting, talking, or laughing, but a calm decision of manner, which at once told us, that if it were possible to overcome such odds as were brought against us, those were the men to do it.

Our arrangements for the approaching struggle were soon completed. Fanning and Wharton were to make head against the infantry and cavalry. I was to capture the field-piece—an eight-pounder.

This gun was placed by the Mexicans upon their extreme

left, close to the river, the shores of which it commanded for a considerable distance. The bank on which we were posted was, as before mentioned, indented by caves and hollows, and covered with a thick tapestry of vines and other plants, which was now very useful in concealing us from the artillerymen. The latter made a pretty good guess at our position however, and at the first discharge, the canister whizzed past us at a very short distance. There was not a moment to lose, for one well-directed shot might exterminate half of us. Followed by a dozen men, I worked my way as well as I could through the labyrinth of vines and bushes, and was not more than fifty yards from the gun, when it was again fired. No one was hurt, although the shot was evidently intended for my party. The enemy could not see us; but the notion of the vines, as we passed through them, had betrayed our whereabouts: so, perceiving that we were discovered, I sprang up the bank into the prairie followed by my men, to whom I shouted, above all to aim at the artillerymen.

I had raised my own rifle to my shoulder, when I let it fall again in astonishment at an apparition that presented itself to my view. This was a tall, lean, wild figure, with a face overgrown by long beard that hung down upon his breast, and dressed in a leather cap, jacket, and mocassins. Where this man had sprung from was a perfect riddle. He was unknown to any of us, although I had some vague recollection of having seen him before, but where or when, I could not call to mind. He had a long rifle in his hands, which he must have fired once already, for one of the

artillerymen lay dead by the gun. At the moment I first caught sight of him, he shot down another, and then began reloading with a rapid dexterity, that proved him to be well used to the thing. My men were as much astonished as I was by this strange apparition, which appeared to have started out of the earth; and for a few seconds they forgot to fire, and stood gazing at the stranger. The latter did not seem to approve of their inaction.

"D—— yer eyes, ye starin' fools," shouted he in a rough hoarse voice, "don't ye see them art'lerymen? Why don't ye knock 'em on the head?"

It certainly was not the moment to remain idle. We fired; but our astonishment had thrown us off our balance, and we nearly all missed. We sprang down the bank again to load, just as the men serving the gun were slewing it around, so as to bring it to bear upon us. Before this was accomplished, we were under cover, and the stranger had the benefit of the discharge, of which he took no more notice than if he had borne a charmed life. Again we heard the crack of his rifle, and when, having reloaded, we once more ascended the bank, he was taking aim at the last artilleryman, who fell, as his companions had done.

"D—— ye, for laggin' fellers!" growled the stranger. "Why don't ye take that 'ere big gun?"

Our small numbers, the bad direction of our first volley, but, above all, the precipitation with which we had jumped down the bank after firing it, had so encouraged the enemy, that a company of infantry, drawn up some distance in rear of the

field-piece, fired a volley, and advanced at double-quick time, part of them making a small *détour* with the intention of cutting us off from our friends. At this moment, we saw Fanning and thirty men coming along the river bank to our assistance; so without minding the Mexicans who were getting behind us, we rushed forward to within twenty paces of those in our front, and taking steady aim, brought down every man his bird. The sort of desperate coolness with which this was done, produced the greater effect on our opponents, as being something quite out of their way. They would, perhaps, have stood firm against a volley from five times our number, at a rather greater distance; but they did not like having their mustaches singed by our powder; and after a moment's wavering and hesitation, they shouted out "Diabolos! Diabolos!" and throwing away their muskets, broke into precipitate flight.

Fanning and Wharton now came up with all the men. Under cover of the infantry's advance, the gun had been re-manned, but, luckily for us, only by infantry soldiers; for had there been artillerymen to seize the moment when we were all standing exposed on the prairie, they might have diminished our numbers not a little. The fuse was already burning, and we had just time to get under the bank when the gun went off. Up we jumped again, and looked about us to see what was next to be done.

Although hitherto all the advantages had been on our side, our situation was still a very perilous one. The company we had put to flight had rejoined its battalion, which was now beginning to

advance by *échelon* of companies. The second battalion, which was rather further from us, was moving forward in like manner, and in a parallel direction. We should probably, therefore, have to resist the attack of a dozen companies, one after the other; and it was to be feared that the Mexicans would finish by getting over their panic terror of our rifles, and exchange their distant and ineffectual platoon-firing for a charge with the bayonet, in which their superior numbers would tell. We observed, also, that the cavalry, which had been keeping itself at a safe distance, was now put in motion, and formed up close to the island of muskeet trees, to which the right flank of the infantry was also extending itself. Thence they had clear ground for a charge down upon us.

Meanwhile, what had become of the twelve men whom we had left in the island? Were they still there, or had they fallen back upon the mission in dismay at the overwhelming force of the Mexicans? If the latter, it was a bad business for us, for they were all capital shots, and well armed with rifles and pistols. We heartily wished we had brought them with us, as well as the eight men at the mission. Cut off from us as they were, what could they do against the whole of the cavalry and two companies of infantry which were now approaching the island? To add to our difficulties, our ammunition was beginning to run short. Many of us had only had enough powder and ball for fifteen or sixteen charges, which were now reduced to six or seven. It was no use desponding, however; and, after a hurried consultation, it was agreed that Fanning and Wharton should open a fire upon the

enemy's centre, while I made a dash at the field-piece before any more infantry had time to come up for its protection.

The infantry-men who had re-manned the gun were by this time shot down, and, as none had come to replace them, it was served by an officer alone. Just as I gave the order to advance to the twenty men who were to follow me, this officer fell. Simultaneously with his fall, I heard a sort of yell behind me, and, turning round, saw that it proceeded from the wild spectre-looking stranger, whom I had lost sight of during the last few minutes. A ball had struck him, and he fell heavily to the ground, his rifle, which had just been discharged, and was still smoking from muzzle and touchhole, clutched convulsively in both hands; his features distorted, his eyes rolling frightfully. There was something in the expression of his face at that moment which brought back to me, in vivid colouring, one of the earliest and most striking incidents of my residence in Texas. Had I not myself seen him hung, I could have sworn that *Bob Rock, the murderer*, now lay before me.

A second look at the man gave additional force to this idea.

"Bob!" I exclaimed.

"Bob!" repeated the wounded man, in a broken voice, and with a look of astonishment, almost of dismay. "Who calls Bob?"

A wild gleam shot from his eyes, which the next instant closed. He had become insensible.

It was neither the time nor the place to indulge in speculations on this singular resurrection of a man whose execution I had

myself witnessed. With twelve hundred foes around us, we had plenty to occupy all our thoughts and attention. My people were already masters of the gun, and some of them drew it forwards and pointed it against the enemy, while the others spread out right and left to protect it with their rifles. I was busy loading the piece when an exclamation of surprise from one of the men made me look up.

There seemed to be something extraordinary happening amongst the Mexicans, to judge from the degree of confusion which suddenly showed itself in their ranks, and which, beginning with the cavalry and right flank of the infantry, soon became general throughout their whole force. It was a sort of wavering and unsteadiness which, to us, was quite unaccountable, for Fanning and Wharton had not yet fired twenty shots, and, indeed, had only just come within range of the enemy. Not knowing what it could portend, I called in my men, and stationed them round the gun, which I had double-shotted, and stood ready to fire.

The confusion in the Mexican ranks increased. For about a minute they waved and reeled to and fro, as if uncertain which way to go; and, at last, the cavalry and right of the line fairly broke, and ran for it. This example was followed by the centre, and presently the whole of the two battalions and three hundred cavalry were scattered over the prairie, in the wildest and most disorderly flight. I gave them a parting salute from the eight-pounder, which would doubtless have accelerated their

movements had it been possible to run faster than they were already doing.

We stood staring after the fugitives in perfect bewilderment, totally unable to explain their apparently causeless panic. At last the report of several rifles from the island of trees gave us a clue to the mystery.

The infantry, whose left flank extended to the Salado, had pushed their right into the prairie as far as the island of muskeet trees, in order to connect their line with the dragoons, and then by making a general advance, to attack us on all sides at once, and get the full advantage of their superior numbers. The plan was not a bad one. Infantry and cavalry approached the island, quite unsuspecting of its being occupied. The twelve riflemen whom we had stationed there remained perfectly quiet, concealed behind the trees; allowed squadrons and companies to come within twenty paces of them, and then opened their fire, first from their pistols, then from their rifles.

Some six and thirty shots, every one of which told, fired suddenly from a cover close to their rear, were enough to startle even the best troops, much more so our Mexican dons, who, already sufficiently inclined to a panic, now believed themselves fallen into an ambuscade, and surrounded on all sides by the incarnate *diabulos*, as they called us. The cavalry, who had not yet recovered the thrashing we had given them, were ready enough for a run, and the infantry were not slow to follow them.

Our first impulse was naturally to pursue the flying enemy,

but a discovery made by some of the men, induced us to abandon that idea. They had opened the pouches of the dead Mexicans in order to supply themselves with ammunition, ours being nearly expended; but the powder of the cartridges turned out so bad as to be useless. It was little better than coal dust, and would not carry a ball fifty paces to kill or wound. This accounted for our apparent invulnerability to the fire of the Mexicans. The muskets also were of a very inferior description. Both they and the cartridges were of English make; the former being stamped Birmingham, and the latter having the name of an English powder manufactory, with the significant addition, "for exportation."

Under these circumstances, we had nothing to do but let the Mexicans run. We sent a detachment to the muskeet island, to unite itself with the twelve men who had done such good service there, and thence advance towards the ford. We ourselves proceeded slowly in the latter direction. This demonstration brought the fugitives back again, for they had, most of them, in the wild precipitation of their flight, passed the only place where they could cross the river. They began crowding over in the greatest confusion, foot and horse all mixed up together; and by the time we got within a hundred paces of the ford, the prairie was nearly clear of them. There were still a couple of hundred men on our side of the water, completely at our mercy, and Wharton, who was a little in front with thirty men, gave the word to fire upon them. No one obeyed. He repeated the command.

Not a rifle was raised. He stared at his men, astonished and impatient at this strange disobedience. An old weather-beaten bear-hunter stepped forward, squirting out his tobacco juice with all imaginable deliberation.

"I tell ye what, captin!" said he, passing his quid over from his right cheek to his left; "I calkilate, captin," he continued, "we'd better leave the poor devils of dons alone."

"The poor devils of dons alone!" repeated Wharton in a rage. "Are you mad, man?"

Fanning and I had just come up with our detachment, and were not less surprised and angry than Wharton was, at this breach of discipline. The man, however, did not allow himself to be disconcerted.

"There's a proverb, gentlemen," said he, turning to us, "which says, that one should build a golden bridge for a beaten enemy; and a good proverb it is, I calkilate—a considerable good one."

"What do you mean, man, with your golden bridge?" cried Fanning. "This is no time for proverbs."

"Do you know that you are liable to be punished for insubordination?" said I. "It's your duty to fire, and do the enemy all the harm you can; not to be quoting proverbs."

"Calkilate it is," replied the man very coolly. "Calkilate I could shoot 'em without either danger or trouble; but I reckon that would be like Spaniards or Mexicans; not like Americans—not prudent."

"Not like Americans? Would you let the enemy escape, then,

when we have him in our power?"

"Calkilate I would. Calkilate we should do ourselves more harm than him by shooting down his people. That was a considerable sensible commandment of yourn, always to shoot the foremost of the Mexicans when they attacked. It discouraged the bold ones, and was a sort of premium on cowardice. Them as lagged behind escaped, them as came bravely on were shot. It was a good calkilation. If we had shot 'em without discrimination, the cowards would have got bold, seein' that they weren't safer in rear than in front. The cowards are our best friends. Now them runaways," continued he, pointing to the Mexicans, who were crowding over the river, "are jest the most cowardly of 'em all, for in their fright they quite forgot the ford, and it's because they ran so far beyond it, that they are last to cross the water. And if you fire at 'em now, they'll find that they get nothin' by bein' cowards, and next time, I reckon, they'll sell their hides as dear as they can."

Untimely as this palaver, to use a popular word, undoubtedly was, we could scarcely forbear smiling at the simple *naïve* manner in which the old Yankee spoke his mind.

"Calkilate, captings," he concluded, "you'd better let the poor devils run. We shall get more profit by it than if we shot five hundred of 'em. Next time they'll run away directly to show their gratitude for our ginerosity."

The man stepped back into the ranks, and his comrades nodded approvingly, and calculated and reckoned that Zebediah

had spoke a true word; and meanwhile the enemy had crossed the river, and was out of our reach. We were forced to content ourselves with sending a party across the water to follow up the Mexicans, and observe the direction they took. We then returned to our old position.

My first thought on arriving there was to search for the body of Bob Rock—for he it undoubtedly was, who had so mysteriously appeared amongst us. I repaired to the spot where I had seen him fall; but could discover no signs of him, either dead or alive. I went over the whole scene of the fight, searched amongst the vines and along the bank of the river; there were plenty of dead Mexicans—cavalry, infantry, and artillery, but no Bob was to be found, nor could any one inform me what had become of him, although several had seen him fall.

I was continuing my search, when I met Wharton, who asked me what I was seeking, and on learning, shook his head gravely. He had seen the wild prairieman, he said, but whence he came, or whither he was gone, was more than he could tell. It was a long time since any thing had startled and astonished him so much as this man's appearance and proceedings. He (Wharton,) had been stationed with his party amongst the vines, about fifty paces in rear of Fanning's people, when just as the Mexican infantry had crossed the ford, and were forming up, he saw a man approaching at a brisk trot from the north side of the prairie. He halted about a couple of hundred yards from Wharton, tied his mustang to a bush, and with his rifle on his arm, strode along the edge of the

prairie in the direction of the Mexicans. When he passed near Wharton, the latter called out to him to halt, and say who he was, whence he came, and whither going.

"Who I am is no business of yourn," replied the man: "nor where I come from neither. You'll soon see where I'm goin'. I'm goin' agin' the enemy."

"Then you must come and join us," cried Wharton.

This the stranger testily refused to do. He'd fight on his own hook, he said.

Wharton told him he must not do that.

He should like to see who'd hinder him, he said, and walked on. The next moment he shot the first artilleryman. After that they let him take his own way.

Neither Wharton, nor any of his men, knew what had become of him; but at last I met with a bear-hunter, who gave me the following information.

"Calkilatin'," said he, "that the wild prairieman's rifle was a capital good one, as good a one as ever killed a bear, he tho't it a pity that it should fall into bad hands, so went to secure it himself, although the frontispiece of its dead owner warn't very invitin'. But when he stooped to take the gun, he got such a shove as knocked him backwards, and on getting up, he saw the prairieman openin' his jacket and examinin' a wound on his breast, which was neither deep nor dangerous, although it had taken away the man's senses for a while. The ball had struck the breast bone, and was quite near the skin, so that the wounded

man pushed it out with his fingers; and then supporting himself on his rifle, got up from the ground, and without either a thankye, or a d——nye, walked to where his mustang was tied up, got on its back, and rode slowly away in a northerly direction.

This was all the information I could obtain on the subject, and shortly afterwards the main body of our army came up, and I had other matters to occupy my attention. General Austin expressed his gratitude and approbation to our brave fellows, after a truly republican and democratic fashion. He shook hands with all the rough bear and buffalo hunters, and drank with them. Fanning and myself he promoted, on the spot, to the rank of colonel.

We were giving the general a detailed account of the morning's events, when a Mexican priest appeared with a flag of truce and several waggons, and craved permission to take away the dead. This was of course granted, and we had some talk with the padre, who, however, was too wily a customer to allow himself to be pumped. What little we did get out of him, determined us to advance the same afternoon against San Antonio. We thought there was some chance, that in the present panic-struck state of the Mexicans, we might obtain possession of the place by a bold and sudden assault.

In this, however, we were mistaken. We found the gates closed, and the enemy on his guard, but too dispirited to oppose our taking up a position at about cannon-shot from the great redoubt. We had soon invested all the outlets from the city.

San Antonio de Bexar lies in a fertile and well-irrigated valley,

stretching westward from the river Salado. In the centre of the town rises the fort of the Alamo, which at that time was armed with forty-eight pieces of artillery of various calibre. The garrison of the town and fortress was nearly three thousand strong.

Our artillery consisted of two batteries of four six, and five eight-pounders; our army of eleven hundred men, with which we had not only to carry on the siege, but also to make head against the forces that would be sent against us from Cohahuila, on the frontier of which province General Cos was stationed, with a strong body of troops.

We were not discouraged, however, and opened our fire upon the city. During the first week, not a day passed without smart skirmishes. General Cos's dragoons were swarming about us like so many Bedouins. But although well-mounted, and capital horsemen, they were no match for our backwoodsmen. Those from the western states especially, accustomed to Indian warfare and cunning, laid traps and ambuscades for the Mexicans, and were constantly destroying their detachments. As for the besieged, if one of them showed his head for ten seconds above the city wall, he was sure of getting a rifle bullet through it. I cannot say that our besieging army was a perfect model of military discipline; but any deficiencies in that respect were made good by the intelligence of the men, and the zeal and unanimity with which they pursued the accomplishment of one great object—the capture of the city—the liberty and independence of

Texas.

The badness of the gunpowder used by the Mexicans, was again of great service to us. Many of their cannon balls that fell far short of us, were collected and returned to them with powerful effect. We kept a sharp look-out for convoys, and captured no less than three—one of horses, another of provisions, and twenty thousand dollars in money.

After an eight weeks' siege, a breach having been made, the city surrendered, and a month later the fort followed the example. With a powerful park of artillery, we then advanced upon Goliad, the strongest fortress in Texas, which likewise capitulated in about four weeks' time. We were now masters of the whole country, and the war was apparently at an end.

But the Mexicans were not the people to give up their best province so easily. They have too much of the old Spanish character about them—that determined obstinacy which sustained the Spaniards during their protracted struggle against the Moors. The honour of their republic was compromised, and that must be redeemed. Thundering proclamations were issued, denouncing the Texians as rebels, who should be swept off the face of the earth, and threatening the United States for having aided us with money and volunteers. Ten thousand of the best troops in Mexico entered Texas and were shortly to be followed by ten thousand more. The President, General Santa Anna, himself came to take the command, attended by a numerous and brilliant staff.

The Texians laughed at the fanfarronades of the dons, and did not attach sufficient importance to these formidable preparations. Their good opinion of themselves, and contempt of their foes, had been increased to an unreasonable degree by their recent and rapid successes. They forgot that the troops to which they had hitherto been opposed were for the most part militia, and that those now advancing against them were of a far better description, and had probably better powder. The call to arms made by our president, Burnet, was disregarded by many, and we could only get together about two thousand men, of whom nearly two-thirds had to be left to garrison the forts of Goliad and Alamo. In the first named place we left seven hundred and sixty men, under the command of Fanning; in the latter, something more than five hundred. With the remaining seven or eight hundred, we took the field. The Mexicans advanced so rapidly, that they were upon us before we were aware of it, and we were compelled to retreat, leaving the garrisons of the two forts to their fate, and a right melancholy one it proved to be.

One morning news was brought to Goliad, that a number of country people, principally women and children, were on their way to the fort, closely pursued by the Mexicans. Fanning, losing sight of prudence in his compassion for these poor people, immediately ordered a battalion of five hundred men, under the command of Major Ward, to go and meet the fugitives and escort them in. The major, and several officers of the garrison, doubted as to the propriety of this measure; but Fanning, full of

sympathy for his unprotected country-women, insisted, and the battalion moved out. They soon came in sight of the fugitives, as they thought, but on drawing nearer, the latter turned out to be Mexican dragoons, who sprang upon their horses, which were concealed in the neighbouring islands of trees, and a desperate fight began. The Mexicans, far superior in numbers, received every moment accessions to their strength. The Louis-Potosi and Santa Fé cavalry, fellows who seem born on horseback, were there. Our unfortunate countrymen were hemmed in on all sides. The fight lasted two days, and only two men out of the five hundred escaped with their lives.

Before the news of this misfortune reached us, orders had been sent to Fanning to evacuate the fort and join us with six pieces of artillery. He received the order, and proceeded to execute it. But what might have been very practicable for eight hundred and sixty men, was impossible for three hundred and sixty. Nevertheless, Fanning began his march through the prairie. His little band was almost immediately surrounded by the enemy. After a gallant defence, which lasted twelve hours, they succeeded in reaching an island, but scarcely had they established themselves there, when they found that their ammunition was expended. There was nothing left for them, but to accept the terms offered by the Mexicans, who pledged themselves, that if they laid down their arms, they should be permitted to return to their homes. But the rifles were no sooner piled, than the Texians found themselves charged by their treacherous foes, who

butchered them without mercy. Only an advanced post of three men succeeded in escaping.

The five hundred men whom we had left in San Antonio de Bexar, fared no better. Not being sufficiently numerous to hold out the town as well as the Alamo, they retreated into the latter. The Mexican artillery soon laid a part of the fort in ruins. Still its defenders held out. After eight days' fighting, during which the loss of the besiegers was tremendously severe, the Alamo was taken, and not a single Texian left alive.

We thus, by these two cruel blows, lost two-thirds of our army, and little more than seven hundred men remained to resist the numerous legions of our victorious foe. The prospect before us, was one well calculated to daunt the stoutest heart.

The Mexican general, Santa Anna, moved his army forward in two divisions, one stretching along the coast towards Velasco, the other advancing towards San Felipe de Austin. He himself, with a small force, marched in the centre. At Fort Bend, twenty miles below San Felipe, he crossed the Brazos, and shortly afterwards established himself with about fifteen hundred men in an entrenched camp. Our army, under the command of General Houston, was in front of Harrisburg, to which place the congress had retreated.

It was on the night of the twentieth of April, and our whole disposable force, some seven hundred men, was bivouacking in and about an island of sycamores. It was a cloudy, stormy evening: high wind was blowing, and the branches of the trees

groaned and creaked above our heads. The weather harmonized well enough with our feelings, which were sad and desponding when we thought of the desperate state of our cause. We (the officers) were sitting in a circle round the general and Alcalde, both of whom appeared uneasy and anxious. More than once they got up, and walked backwards and forwards, seemingly impatient, and as if they were waiting for or expecting something. There was a deep silence throughout the whole bivouac; some were sleeping, and those who watched were in no humour for idle chat.

"Who goes there?" suddenly shouted one of the sentries. The answer we did not hear, but it was apparently satisfactory, for there was no further challenge, and a few seconds afterwards an orderly came up, and whispered something in the ear of the Alcalde. The latter hurried away, and, presently returning, spoke a few words in a low tone to the general, and then to us officers. In an instant we were all upon our feet. In less than ten minutes, the bivouac was broken up, and our little army on the march.

All our people were well mounted, and armed with rifles, pistols, and bowie-knives. We had six field-pieces, but we only took four, harnessed with twice the usual number of horses. We marched at a rapid trot the whole night, led by a tall, gaunt figure of a man who acted as our guide, and kept some distance in front. I more than once asked the Alcalde who this was. "You will know by and by," was his answer.

Before daybreak we had ridden five and twenty miles, but had

been compelled to abandon two more guns. As yet, no one knew the object of this forced march. The general commanded a halt, and ordered the men to refresh and strengthen themselves by food and drink. While they were doing this, he assembled the officers around him, and the meaning of our night march was explained to us. The camp in which the Mexican president and general-in-chief had entrenched himself was within a mile of us; General Parza, with two thousand men, was twenty miles further to the rear; General Filasola, with one thousand, eighteen miles lower down on the Brazos; Viesca, with fifteen hundred, twenty-five miles higher up. One bold and decided blow, and Texas might yet be free. There was not a moment to lose, nor was one lost. The general addressed the men.

"Friends! Brothers! Citizens! General Santa Anna is within a mile of us with fifteen hundred men. The hour that is to decide the question of Texian liberty is now arrived. What say you? Do we attack?"

"We do!" exclaimed the men with one voice, cheerfully and decidedly.

In the most perfect stillness, we arrived within two hundred paces of the enemy's camp. The *reveillé* of the sleeping Mexicans was the discharge of our two field-pieces loaded with canister. Rushing on to within twenty-five paces of the entrenchment, we gave them a deadly volley from our rifles, and then, throwing away the latter, bounded up the breast-works, a pistol in each hand. The Mexicans, scared and stupefied by

this sudden attack, were running about in the wildest confusion, seeking their arms, and not knowing which way to turn. After firing our pistols, we threw them away as we had done our rifles, and, drawing our bowie-knives, fell, with a shout, upon the masses of the terrified foe. It was more like the boarding of a ship than any land fight I had ever seen or imagined.

My station was on the right of the line, where the breastwork, ending in a redoubt, was steep and high. I made two attempts to climb up, but both times slipped back. On the third trial I nearly gained the summit; but was again slipping down, when a hand seized me by the collar, and pulled me up on the bank. In the darkness and confusion I did not distinguish the face of the man who rendered me this assistance. I only saw the glitter of a bayonet which a Mexican thrust into his shoulder, at the very moment he was helping me up. He neither flinched nor let go his hold of me till I was fairly on my feet; then, turning slowly round, he levelled a pistol at the soldier, who, at that very moment, was struck down by the Alcalde.

"No thanks to ye, squire!" exclaimed the man, in a voice which made me start, even at that moment of excitement and bustle. I looked at the speaker, but could only see his back, for he had already plunged into the thick of the fight, and was engaged with a party of Mexicans, who defended themselves desperately. He fought like a man more anxious to be killed than to kill, striking furiously right and left, but never guarding a blow, though the Alcalde, who was by his side, warded off several which were

aimed at him.

By this time my men had scrambled up after me. I looked round to see where our help was most wanted, and was about to lead them forward, when I heard the voice of the Alcalde.

"Are you badly hurt, Bob?" said he in an anxious tone.

I glanced at the spot whence the voice came. There lay Bob Rock, covered with blood, and apparently insensible. The Alcalde was supporting his head on his arm. Before I had time to give a second look I was hurried forward with the rest towards the centre of the camp, where the fight was at the hottest.

About five hundred men, the pick of the Mexican army, had collected round a knot of staff-officers, and were making a most gallant defence. General Houston had attacked them with three hundred of our people, but had not been able to break their ranks. His charge, however, had shaken them a little, and, before they had time to recover from it, I came up. Giving a wild hurrah, my men fired their pistols, hurled them at their enemies' heads, and then springing over the carcasses of the fallen, dashed like a thunderbolt into the broken ranks of the Mexicans.

A frightful butchery ensued. Our men, who were for the most part, and at most times, peaceable and humane in disposition, seemed converted into perfect fiends. Whole ranks of the enemy fell under their knives. Some idea may be formed of the horrible slaughter from the fact, that the fight, from beginning to end, did not last above ten minutes, and in that time nearly eight hundred Mexicans were shot or cut down. "No quarter!" was the cry of the

infuriated assailants: "Remember Alamo! Remember Goliad! Think of Fanning, Ward!" The Mexicans threw themselves on their knees, imploring mercy. "*Misericordia! Cuartel, por el amor de Dios!*" shrieked they in heart-rending tones but their supplications were not listened to, and every man of them would inevitably have been butchered, had not General Houston and the officers dashed in between the victors and the vanquished, and with the greatest difficulty, and by threats of cutting down our own men if they did not desist, put an end to this scene of bloodshed, and saved the Texian character from the stain of unmanly cruelty.

When all was over, I hurried back to the place where I had left the Alcalde with Bob—the latter lay, bleeding from six wounds, only a few paces from the spot where he had helped me up the breastwork. The bodies of two dead Mexicans served him for a pillow. The Alcalde was kneeling by his side, gazing sadly and earnestly into the face of the dying man.

For Bob was dying; but it was no longer the death of the despairing murderer. The expression of his features was calm and composed, and his eyes were raised to heaven with a look of hope and supplication.

I stooped down and asked him how he felt himself, but he made no answer, and evidently did not recollect me. After a minute or two,

"How goes it with the fight?" he asked in a broken voice.

"We have conquered, Bob. The enemy killed or taken. Not a

man escaped."

He paused a little, and then spoke again.

"Have I done my duty? May I hope to be forgiven?"

The Alcalde answered him in an agitated voice.

"He who forgave the sinner on the cross, will doubtless be merciful to you, Bob. His holy book says: There is more joy over one sinner that repenteth than over ninety and nine just men. Be of good hope, Bob! the Almighty will surely be merciful to you!"

"Thank ye, squire," gasped Bob "you're a true friend, a friend in life and in death. Well, it's come at last," said he, while a resigned and happy smile stole over his features. "I've prayed for it long enough. Thank God, it's come at last!"

He gazed up at the Alcalde with a kindly expression of countenance. There was a slight shuddering movement of his whole frame—Bob was dead.

The Alcalde remained kneeling for a short time by the side of the corpse, his lips moving in prayer. At last he rose to his feet.

"God desireth not the death of a sinner, but rather that he may turn from his wickedness and live," said he, in a low and solemn tone. "I had those words in my thoughts four years ago, when I cut him down from the branch of the Patriarch."

"Four years ago!" cried I. "Then you cut him down, and were in time to save him! Was it he who yesterday brought us the news of the vicinity of the foe?"

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