A

CHARGE

TO THE

GRAND JURY OF THE COUNTY OF SUFFOLK,

FOR THE

COMMONWEALTH OF MASSACHUSETTS,

AT THE

OPENING OF THE MUNICIPAL COURT OF THE CITY OF BOSTON,

ON MONDAY, DECEMBER 7, A. D. 1835,

BEING THE DAY, ON WHICH THE COURT FIRST ASSEMBLED

IN THE

NEW COURT HOUSE, COURT STREET.

By PETER OXENBRIDGE THACHER,
Judge of that Court.

Boston:
DUTTON AND WENTWORTH, PRINTERS,
Nos. 10 & 12, Exchange Street.

1835.

At a meeting of the GRAND JURY for the County of Suffolk, December 7th, 1835 —

Voted unanimously, That the Hon. Judge THACHER be requested to furnish the Grand Jury with a copy of his Charge, given to them this day, to be published for their benefit, and that of their fellow citizens.

J. P. TOWNSEND,
Foreman of the Grand Jury.

Attest,

GEO. P. THOMAS,
Secretary.

NOTE.

The historical part of the following address was collected from ancient records, which are in a very decayed, and somewhat neglected state, and fast losing their interest and value. The occasion presented a fit opportunity to exhibit the facts to the public. In speaking of the munificent spirit of the present age, it was both natural and just to refer to the liberality of former times.

The writer had lately seen some remarks on that part of medical jurisprudence, which relates to mental alienation, in which, he thought, that the writer had betrayed some ignorance of the spirit of the criminal law on that subject. This circumstance, as well as recent trials in the Municipal Court, led to the attempt, to state, with some fulness and accuracy, the law on individual accountability and guilt in criminal cases. The favorable opinion of the Grand Jury and their request, have given to the writer an opportunity to submit his views to the candid judgment of the profession.

A CHARGE.

GENTLEMEN:—

Assembled for the first time in this splendid edifice, which has been erected by public munificence for the accommodation of the courts of justice; you will permit me to congratulate you upon the occasion. The many spacious structures for domestic habitation and commercial use, which adorn our city, are proof of individual and general wealth. A building which is dedicated to the administration of the public justice, should combine grandeur with convenience, and be calculated by its magnificence to impress the beholder with reverence for the laws. Nor is this inconsistent with the spirit of republican institutions. "In the Commonwealths of Greece and "Rome," says the elegant historian, "the modest "simplicity of private houses announced the equal "condition of freedom; while the sovereignty of the "people was represented in the majestic edifices "designed for the public use. Nor was this repub-

"lican spirit totally extinguished by the introduction "of wealth and monarchy."* To the eye of intelligence what can be more pleasing than communities of men living together in peace, and practicing truth and justice ? Truth is the natural language of man in a state of innocence. Justice is the first duty which the state owes to its citizens, and which it should require them to practise among themselves. It is the very element of social order, without which the body politic cannot subsist. Nations have usually acted on the principle, that good laws flow from good morals, and that virtue is the fruit of religious culture. Indeed, history is full of proof, that when a reverence for religion is lost, the love of virtue is seldom retained. Men have therefore, in every age, erected costly temples to the Supreme Being, where they might assemble, by common consent, to revere his power, to invoke his presence, to appease his displeasure, and to cultivate among themselves those social and personal virtues, which they deemed most likely to secure his approbation. Feeling that the generations of men were mortal, they yet wished, that the state itself should be immortal, and that their posterity might flourish under the divine protection.

* 1 Gibbon's Decline and Fall of the Roman Empire, 74.

Our community has ever reverenced the laws as the best guardians of the rights and liberties of a free state. At an early period, the inhabitants of Boston, few in numbers and straitened in means, provided for the honorable administration of justice. In the year 1657, they built by subscription a house, upon the spot where the City Hall now stands, which was used by the respective governments of the Colony, the County, and the Town. In the year 1660, the Town offered to the General Court the use of that building for legislative and other purposes of the government, praying at the same time, that, in consideration thereof, the court would remit the proportion of the colony tax, to which the town would be liable for one year. The court accepted the offer, and remitted the tax, but on the further condition, that the county of Suffolk should have the privilege of using the house for the sessions of its courts of justice. One half of the expense of keeping that building in repair, was paid by the Colony, one quarter by the County, and one quarter by the Town,—which proportion was, in the year 1693, established by law.

After the conflagration in the year 1711, in which the Old Town House was consumed, the Province designated the site of that building for a new State

House. Accordingly, a house, of which the walls of the present City Hall are part, was built at the expense of the Province, the County, and the Town, in the proportion which was established by the act of 1693. That house was partly consumed by fire in the year 1747, and was repaired by the same parties. In consequence, however, of the erection of Faneuil Hall, five years before, in which all municipal affairs were then transacted, the town had no further use for the State House, and remonstrated against their proportion of the burden. The General Court continued to occupy this building for their sessions, till the removal of the government to the State House on Beacon street, in the year 1798.*

I have gleaned these facts from ancient records of the Commonwealth, the County, and the Town, which were used in the trial of the controversy between the Commonwealth and the Town, respecting the right to the soil and building of the Old State House. It arose on a petition for Partition, presented by the Commonwealth, and was tried before the Supreme

* The corner stone of the New State House was laid on the fourth day of July, A. D. 1795, by the celebrated Samuel Adams, who was at the time Governor of the Commonwealth. On the eleventh of January, A. D. 1798, the several branches of the General Court marched in procession from the old State House to the new building, when, after a dedicatory prayer by the Rev. Peter Thacher, D. D. their Chaplain, they first took possession.

Judicial Court, in this County, in the year 1801. The County of Norfolk, which was, prior to the division, on the 26th of March, 1793, a part of the County of Suffolk, appeared by their attorney, the celebrated Fisher Ames, and claimed to be seized and entitled to a proportional part of the demanded premises. But this claim being considered by the court merely in aid of that of the Commonwealth, was not permitted to be prosecuted. The court consisted at that time of seven Justices. Two of them, Dana, the Chief Justice, and Sewall, expressed, in their addresses to the jury, opinions favorable to the right of the town; Bradbury and Strong instructed the jury that, in their opinion, the claim of the Commonwealth was preferable; Thatcher did not express any opinion; and Paine and Dawes, being citizens of Boston, did not sit in the trial. The jury returned a verdict, "that the Commonwealth had "no right to the soil, but were entitled to one half "of the building for the purposes for which it was "erected." As this verdict did not settle the question, which was involved in the issue; the case was afterwards, by agreement, referred to Oliver Wolcott, of Connecticut, Benjamin Bourne, of Rhode Island, and Jeremiah Smith, of New Hampshire, three of the Circuit Judges, under the memorable

act of Congress, passed on the 13th of February, 1801, for the organization of the courts of the United States. The parties were heard in the Senate Chamber of the New State House, and the report of the referees was accepted at the August term of the Supreme Court in the year 1802.* The controversy was settled on principles of equity, and the report was satisfactory to both parties. The Common-

* REPORT OF THE REFEREES.—*The Commonwealth of Massachusetts, by James Sullivan, Esq. Attorney General,* vs *the Selectmen of the Town of Boston.*

The Referees having fully heard the parties, their evidence, and the pleas and arguments of their learned counsel, report, that the said Commonwealth is not seized of any undivided part of the land, whereof partition is prayed for.

The Referees do further report and award, that the said Commonwealth hath a right to use and occupy the building in the said petition mentioned and described, for the purpose of holding the sessions of the Governor and Council, and the General Court of the said Commonwealth; and that certain bodies corporate have other rights and uses in the same building in such form and manner to be enjoyed, that the said building is not partible in the common and ordinary mode.

At the request of the said parties, and adopting their construction of the powers of the referees, under this rule, the referees do further award, that the Commonwealth, contributing to the necessary repairs of the said building, is entitled to receive one half of the rents or income of the same. And whenever all the parties interested in the said building shall agree to dispose of the same, that the said Commonwealth is entitled to one half of the proceeds of sale.

The referees further award, that the costs be borne equally by the parties to this rule.

OLIVER WOLCOTT,
BENJ. BOURNE,
JEREMIAH SMITH.

Boston, July 28, 1802.

Supreme Judicial Court, August Term, at Boston, A. D. 1802.

Report read and accepted, and judgment accordingly.

JNO. TUCKER, Clerk.

wealth was represented by James Sullivan, Attorney General, and afterwards Governor of the State. The Town was defended by Theophilus Parsons, afterwards Chief Justice, and by John Lowell, Junior. The case was of great interest, in which the eminent counsel on both sides displayed their rare learning to great effect.*

The Judicial Courts of the County were held in a chamber of the Old State House, at the west end, fronting on Cornhill, which is now called Washington street, until the population and wants of the County required more ample accommodation. A building, to whose venerable form my early recollections recur with pleasure, was erected in the year

* A report of this trial, though but a sketch, was published by this writer in the Monthly Anthology, for January, 1805.

"The Old State House is in length one hundred and twelve feet, in breadth thirty "six feet, and three stories high. In the centre of the roof is a tower, consisting of "three stories, finished according to the Tuscan, Dorick and Ionick orders. The "lower floor of the building served for a covered walk for the inhabitants. On this "floor were kept the offices of the Supreme Judicial Court and Court of Common "Pleas. The chambers over it were occupied by the General Court, the Senate in "one and the Representatives body in the opposite chamber. The third story was "appropriated for the use of the Committees of the General Court. On the lower "floor were ten pillars of the Dorick order, which supported the chambers occupied "by the Legislature."

See a History of Boston, by Caleb H. Snow, M. D. and published by Abel Bowen, 1825.

1768, on the spot where we now stand.* The county prison, which had before that time given name to the street, was removed to the rear of the lot, to accommodate the new structure, the plan of which was designed, after approved models in England, by Sir Francis Bernard, the Governor of the Province.† It was large and commodious, and for the correctness of the plan, its accommodations, and

* After considerable search, I have not been able to ascertain the exact date of the removal of the Courts to the new Court House in Prison Lane, which was afterwards called Queen Street, and since the American Revolution, Court Street. On the 27th of April, 1769, Mr. Alexander Young was appointed by the Court of General Sessions, to take care of the new Court House, lately built in Queen Street, and he being in Court, declared his acceptance of the same."

The Court of Sessions were desirous to secure to the County the exclusive possession, or at least the right to the property of that part of the Old State House, which had been occupied by the County for the sessions of the Courts. On the 2d May, 1769, John Ruddock, Belcher Noyes and Samuel Pemberton, Esquires, were appointed a Committee, "to cause the stairs in the late Court chamber, in the Town House so called, leading up to the gallery there, to be immediately taken down, and to cause the door leading into said chamber to be locked and so secured, as that no person shall enter said chamber without having leave of this Court, or the consent of the Committee, and said Committee are directed to open the other stairs leading up to the gallery. The said Committee declining to act in the above affair, ordered, that Richard Dana, Joseph Williams, and John Tudor, Esquires, be the Committee for the above purpose." Records of the Court of Sessions of Suffolk County.

† Governor Bernard was a friend to literature and the arts. He interested himself greatly in favor of Harvard College, when Harvard Hall, with the Library and philosophical apparatus, was destroyed by fire. He made considerable donations to the library. The plan of the building, which now bears the name of Harvard Hall, is a specimen of his taste in architecture, and from which, as designed by himself, he would not suffer any deviation. See Rev. Dr. Eliot's Biographical Dictionary, art. Francis Bernard.

its simple beauty, it did credit to the period in which it was built. On the lower floor was a convenient hall, which served for a covered walk for persons attending court. The offices of the Registers of Probate and of Deeds, and of the clerk of the Court of Sessions, were on this floor. A number of pillars of the Tuscan order supported the floor where the Court sat. The Court room was upon a liberal scale for the period, and served for all the judicial courts, which held their sessions successively in this County.* After the Courts were removed, from the Old Court House, in Court street, to the New Stone Building in Court square, in the year 1812, the second and third stories of the former were altered to

* At the May Term of the General Sessions, 1770, the Committee, Edmund Quincy, John Avery, and Samuel Pemberton, Esqrs. who were appointed to audit the accounts of the Committee appointed to erect the new Court House, reported, that the whole cost of building the same, including forty five pounds allowed to the Committee for their oversight, amounted to £2418 19*s* 10*d* 3*f* lawful money.

At the May Term of the General Sessions, 1769, the Committee appointed to examine the general account of the whole expense of building the new gaol in Queen Street, begun on the 12th day of August, 1766, and finished the 21st of March 1767, reported, that the whole expense amounted to £3466 13*s* 9*d* 2*f*.

The inside of the New Gaol was, on the night following the 30th January, 1769, entirely consumed by fire, no part thereof but the stone walls being left. The Sessions appointed Joshua Winslow, Foster Hutchinson, and John Tudor, Esquires, to rebuild the gaol, and authorised them to draw upon the County Treasurer for the amount. At the October Term, 1770, the Committee to whom the general account of the building Committee was referred for examination, reported, that the whole expense, including thirty pounds allowed to that Committee for their oversight, amounted to £1073 19*s* 4*d*.

accommodate the Courts of the United States for this District,—and since the city was incorporated in the year 1822, the Police and Justice Courts held their sessions on the lower floor, till the building was taken down in the year 1833.

The Stone Court House, in Court Square, was built in the year 1812. It is called by Dr. Snow, in his History of Boston, and is sometimes known by the name of JOHNSON HALL, in honor of Isaac Johnson, one of the first settlers of the town. That writer styles him, "The Father of Boston," as it was he that persuaded Governor Winthrop and the rest of the company to cross Charles River, and to settle on this peninsula. He married the Lady Arabella, a daughter of the Earl of Lincoln. The deep religious principle and conjugal affection of that lady, encouraged her to leave the elegant enjoyments of her native home, and to share with her husband the perils of the ocean and the wilderness. But her delicate frame was crushed by the adverse circumstances, to which she was exposed after her arrival. To her piety and affection she fell an early victim; and she was followed to the grave by the lamentations of the settlers, by whom she was regarded as "the pride of the Colony." The widowed spirit of her

partner was not long separated from its noble companion. So greatly was he beloved while he lived, and lamented at his death, that "the people ordered their bodies to be buried near him." This was the origin of the present Chapel Burying Place, which was the first public cemetery of the town.* We seem to walk on consecrated ground. Our annals direct us to many spots, hallowed by piety and patriotism, which, like the rural deities and household gods of antiquity, perpetually remind us of our Fathers. The Stone Court House being on a plan too contracted for the courts of the county, and not containing accommodations for those of the United States, has given place to this edifice, and is to be removed, to furnish to it a spacious opening, and a more convenient avenue.

Not only we ourselves, but the fairest specimens of human art and strength must yield to the hand of time. The autumnal leaf waves in melancholy luxuriance and triumph over their ruins both in the new and old world. This massive structure, like those which have preceded it, and which in their day claimed to be eternal, is destined to crumble to ruin. May Justice, Prudence, Fortitude and Moder-

* See Dr. Snow's History of Boston.

ation be inscribed on its pillars,* and shed lustre on those scenes which will here date their record. May justice be always administered in this Hall with clemency, which is among the choicest attributes of power, and yet with wisdom, so as best to prevent crimes, while it corrects the offender. May there never cease to preside over these judicial seats men of learning, firmness, and integrity, not avaricious of popularity, but desiring the approbation of the wise and good, fearing the Most High God, and devoted to those principles of social order, which emanate from his throne, and partake of his immortality.

You will naturally ask, gentlemen, upon entering on the duties of your office, on whom the criminal laws should operate, and who are answerable for their violation. To the Lawyer, and to the Judge, and especially to Jurors, called to assist in the administration of justice, without a previous course of legal study, the question is full of interest. Several recent trials in this court have attracted my atten-

* Nam cum illæ copulatæ connexæque sint, nec alia ab alia possit separari; tamen proprium suum cujusque munus est; ut fortitudo in laboribus, periculisque cernatur, temperantia in prætermittendis voluptatibus, prudentia in delectu bonorum et malorum, justitia in suo cuique tribuendo. De Fin. lib. v. par. XXIII. p. 411. edit Davis.

tion to this subject, and I will therefore devote a few moments to it.

In general, all are capable of committing crimes, and are punishable for their commission, who have not a want of will; and this may arise from defect of understanding, or from insanity. The motive which leads to the commission of an act, determines its merit or demerit. In the construction of penal statutes, they are to be taken favorably for those, on whom the penalty is to be inflicted. From this humane rule, it follows, that there must be a breach both of the letter and spirit of the law to make an offence. Language is perhaps inadequate to express all that the law commands or forbids. But the true meaning and intent of a law, when ascertained, is to guide in its application. Hence, when the words of a law have been broken, to avoid a greater inconvenience than the law was designed to prevent; it may be presumed, that this formed an exception to its operation in the mind of the lawgiver; and where an act has been done by necessity, or by compulsion, or by involuntary ignorance, the law itself is not broken.

1. The want of will may arise from defect of understanding, as from infancy. The law does not fix

the exact age, at which an infant must arrive, before he is presumed to have the capacity to commit a crime. An infant of fourteen years is undoubtedly amenable for an unlawful act. But if a child of more tender age commits an unlawful act, and it appears, that he possessed sufficient discretion to distinguish between moral good and evil, the proof of this discretion will supply the defect of years. It sometimes happens too, that the mind is imbecile even after the animal functions are developed, and the physical powers of the body have arrived at considerable maturity. If this mental imbecility should amount to an incapacity to distinguish between right and wrong, it would follow, that the agent was not a proper subject for punishment, and it would excuse a criminal act.

2. The want of will arising from a diseased state of the mind, when that noble faculty "wanders from its dwelling," and has become full of strange fancies, is called insanity. If this amounts to a total perversion of the intellectual faculty, it is an excuse for any enormity which may be committed under its influence.* But where there is only such a partial

* 3 Inst. 6. The ancient law was, that if a mad man had killed or offered to kill the king, it was holden for treason; and so it appeareth by king Alfred's laws before the conquest, and in lib. 4, in Beverlyes case. But now by the statute of

derangement as leaves the individual free to act or to forbear in the particular case in question; or, where he perpetrates the crime during a lucid interval; he will, according to the English law, be equally liable to punishment with those who are sane. Where the mind labors under a delirium as to the act in question, or as to the objects of its attack, the individual will not be accountable for the particular act, although he may discern other objects clearly.* There are degrees of madness as of folly; and a man who is very sober, and of a right understanding in all other things, may in one particular be frantick. The learned Master Plowden, who, among the ancient commentators of the law, is highly esteemed, observes on the subject of insanity:

25 E, 3, *de proditionibus*, and by force of these words, *fait compasser ou imaginer la mort*, he that is *non compos mentis*, and totally deprived of all compassings, and imaginations, cannot commit high treason by compassing or imagining the death of the king; for *furiosus solo furore punitur;* but it must be an absolute madnesse, and a total deprivation of memorie. And this appeareth by the statute of 33 H. 8. for thereby it is provided, that if a man being *compos mentis* commit high treason, and, after accusation, &c. fall to madnesse, that he might be tryed in his absence, &c. and suffer death, as if he were of perfect memory; for by this statute of 25 E. 3, a madman could not commit high treason. It was further provided by the said act of 33 H. 8, that if a man attainted of treason, became mad, that notwithstanding he should be executed; which cruell and inhuman law lived not long, but was repealed, for in that point also it was against the common law, because by intendment of law the execution of the offender is for example, *ut pœna ad paucos, metus ad omnes perveniat*, as before is said; but so it is not when a madman is executed, but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others.

* Hadfield's Case, Lord Erskine's Speeches, 1 v.

"if a man *non sanæ memoriæ* kills another, although "he has broken the words of the law, yet he has "not broken the law, because he had no mem- "ory nor understanding, but meer ignorance, which "came to him by the hands of God; and therefore "it is called involuntary ignorance, to which the "law imputes the act, inasmuch as there is no fault "in him, and for that reason, he shall be excused, "seeing he is ignorant by compulsion."* The best legal description of an insane man is, one who is devoid of a sound memory.† Because the memory, in an intellectual creature, is necessary in the next degree to perception. It is of so great moment, that where it is wanting, all the rest of our faculties are in a great measure useless.‡

The law of insanity in this Commonwealth was stated by the late Chief Justice Parker, in the trial of William McDonnough, for the murder of his wife. He instructed the jury, that, "if they were satisfied "that the prisoner was in a state of mental derange- "ment by the visitation of Providence, he was not a "moral agent, and could not be guilty. But such de- "rangement must appear to have existed at the time "the act was done, to have this effect. If it were "proved, that the prisoner had been subject to fits of

* Plowden's Com. 19. † Co. Lit. 246. ‡ 1 Locke's Essay, 114.

"lunacy at different periods of his life, still if he was "not under this infirmity at the time, he could not "on that account be acquitted."*

Insanity, when established, is followed by immunity from punishment, but not from constraint; and whenever a person is acquitted of a crime on the ground of insanity, and it appears, that it would be dangerous to the safety of the public, that he should be at large, the law makes it the duty of the court, before which he was tried, to order him into confinement, until he shall be restored to his right mind, or until the danger from his paroxysms shall cease.†

Some persons, led perhaps by a mistaken humanity, or influenced by medical theory, and not matured by practical observation, have imagined, that if the party accused was once insane, he ought never afterwards to be punished for a criminal act; because they say, it cannot be shown, that it was not the effect of insanity. If this is to be regarded as the true principle, it must op-

* Sup. Jud. Court, Suffolk, Nov. 1817. This trial was published by T. G. Bangs, and is particularly valuable for the arguments of B. Rand, and S. L. Knapp, Esqrs. the Prisoner's Counsel, and of the Hon. Perez Morton, the attorney General for the Commonwealth.

† Acts of 1797, c. 62—1816, c. 28—1834, c. 150.

erate as a great hardship both on individuals and the public. If the individual is not to be held an accountable being, he must be treated as insane. It would, of course, deprive him of the common privileges of a man and a citizen, and exclude him from the enjoyments of society. It would likewise impose on the public the burden and duty of keeping him in perpetual confinement, so as to restrain him from committing acts of violence to others or to himself. Of those who boast of their superior reason, and are confident in their high intellectual powers, how few possess at all times the well balanced mind. Very many, perhaps most men have, at times, and on some subjects, labored under a real insanity. I am sensible, that it is sometimes very difficult to decide, whether an act was done wilfully. If by a lucid interval be understood only a short relaxation or period of repose, while the system still labours under the disease ; the patient would not be held answerable for an unlawful act done at such time. But it would be otherwise, if it is understood by this phrase, "not a remission of the complaint, but a "temporary and total cessation of it, and complete "restoration to the perfect enjoyment of reason up-

"on which the mind was previously cognizant."* I doubt whether any physician, who has attentively observed this disease, will maintain, that the mind may not recover from insanity as from other maladies. Where the sufferer has recovered his natural character, and his judgment and affections have resumed their wonted tone and activity, we infer that he is restored to a sound mind. A relapse, or a recurrence of the disease afterwards, perhaps even a predisposition to that state, would not be inconsistent with a restoration for the time to pristine health and accountability. But it must always devolve on a jury to decide, under all the circumstances, whether an unlawful act proceeded from insanity, or from the voluntary indulgence of evil passions. For "in some "persons the instinct of resentment, by being habit-"ually cherished and indulged, becomes a passion, "which differs from insanity only in its duration." Evidence that the accused party has once been mad, would naturally lead to the most humane construction of his actions. It would, I think, lay upon the prosecutor the burden of shewing, from the circumstances of the act itself, or by other proof, that the act was deliberate and wilful, and that the actor was a suitable subject of punish-

* Shelford on Lunacy.

ment.* Under other circumstances, the law presumes every man *prima facie* to be of sound mind, and answerable for his conduct. Insanity is as difficult to be scanned as to be cured. But in a trial, every circumstance which has a near or even a remote tendency to establish the fact of insanity, would be pertinent to the issue. Not only the conduct of the party before and after, and at the time the deed was done, but facts which happened years before;—if he ever met with an injury, physical or moral, bodily or mental, which might have had a tendency to derange the intellect; if he had ever before labored under a fit of insanity; if it might have been the effect of an hereditary taint, and derived from an ancestor, near or remote, direct or collateral;—so likewise the opinions of learned physicians, and of others who have studied with attention and accuracy the phenomena of the mind; all would be entitled to great respect, and to be

* In a learned note of Lord Nottingham to Co Lit. 246, n. (1) he says, "melan-"choly and hypochondriac vapours are like storms at sea, which though they dis-"turb awhile, yet they do not hinder the returning to the former calm; *semel furi-*"*bundus, semper furibundus præsumitur*; and therefore where the question is of a "fact done *in lucido intervallo*, which may be either by remission or intermission, "it is not enough to show the act was *actus sapienti conveniens*, for that may hap-"pen many ways; but it must be proved to be *actus sapientis*, and to proceed from "judgment and deliberation, else the presumption continues." The whole note is excellent.

weighed by a jury in making up their verdict. For as it would be a great reflection upon the public justice, that an innocent man should be convicted; it would be equally unjust, and contrary to the principle of public punishment, that one, deprived of his reason by the act of Providence, and without the power of choosing between right and wrong, should, for an act done at such time, and under such circumstances, be punished as a criminal.

In closing these remarks, I ought to observe, that insanity has been so often alleged in excuse for criminal acts, when there was no ground for that defence, that it is apt to excite suspicion, and always requires discernment. From regard to the public safety, which is the supreme law, too much indulgence should not be yielded to this defence. Because mankind, and particularly the young, should learn, at an early period, to control their imaginations, and not to yield too much to excitement, the fruitful source of innumerable ills. Much depends on mental effort and early discipline to resist the first wanderings of a diseased fancy. I have thought that the course of education in modern times, and especially since the æra of the French revolution, has not been favorable to the growth of strong minds. Domestic restraint and the discipline of

the school have been much relaxed. Great men are seldom educated in the lap of indulgence. Our political institutions invite the young to aspire, at a very early period, to those stations, which would seem to be most safe in the hands of wisdom and experience. Where all may aim at distinction, and it is even thought commendable to indulge in the dreams of wealth and ambition; we must expect to meet with frequent instances of disappointment and failure, and those mental diseases which are apt to follow in their train. Party division in religion and politics, in all their rancour, and to the great injury of pure christianity and of good government, is the spirit of the times. The danger from excitement is not confined to our own sex. It is beginning to be fashionable here and in Europe, for woman, whom nature formed to temper man by her gentler virtues, to desert her domestic altar and fireside, and to engage with fanatic zeal in the work of political reformation. For the sake of the peace of society, and to prevent those collisions which would acquire a tenfold degree of virulence, were they mingled with the passions of the sex, the constitutions of our own country, in imitation of all wise systems of legislalation, ancient and modern, have excluded woman from a share in the administration of government. Is it not quite sufficient, that she has an appropriate

sphere of action, and an empire of her own ? The Author of nature has not formed her to engage in the strife of party : for that would convert our homes into scenes of domestic discord and rivalry. Nor is she qualified, by her physical conformation and temperament, for the defence of the state. But weapons thrown by feeble hands still indicate the martial spirit of the warriors :—and I fear, that some recent events in our own country will not well tell in history for the modesty of the sex.

If individuals have, either here or in England, fallen victims to a judicial sentence for acts done under the influence of insanity, it was against the clearly defined spirit of the law of both countries. But if such judgment was rendered under ignorance of the fact, which might have been made manifest by the defendant himself, at his trial, or by the care of his friends, or by the diligence of his counsel ; it must be regarded as a misfortune, and ought not to rest as an imputation on the public justice. For courts must decide according to what is alleged and made manifest at the time. It is to be hoped, that the increasing light of medical science, and the more accurate observations of its learned professors, will hereafter render such occurrences still more rare. Since it is not to be concealed, that the visions of

theory have in medicine, as in other important branches of science, often had an evil influence on the progress of truth.*

Where a man has voluntarily deprived himself of a rational will, by indulgence in wine, strong liquors, or other intoxicating and stupifying substances, it forms an exception to the general rule. Most persons charged with crimes proceeding from passion and violence, are apt to allege in excuse, that they were not at the time conscious of their actions. Human judicatures justly punish the transgressor in such cases, "because the fact "is proved against him, but want of conscious- "ness cannot be proved for him."† Drunkenness is a voluntary act. Where one, under its influence, commits a deed injurious to individuals or to society, the law imputes to him guilt. "There is guilt in "ignorance, when knowledge is within our reach; "there is guilt in heedless inattention, when truths

* By the favour of a learned medical friend, I have lately seen Dr. T. R. Beck's work, entitled, "Elements of Medical Jurisprudence," in 2 vols, 8vo. fifth edition, published in Albany, 1835. This treatise is dedicated "to the Medical and Legal Professions throughout the Union." For the learning and great labour bestowed on this work by Professor Beck, it is entited to be regarded as of great authority, and is worthy of the patronage of those to whom it is addressed.

† 1 Locke's Essay on Human Understanding, v. I, p. 294.

"and motives of the highest interest claim our "serious consideration."* Habits, good or evil, are formed by time and the repetition of individual acts. In becoming slaves to an odious vice, violence is done to the moral sense. For conscience is that spark of the Divinity within us, which always approves what is good, and condemns what is evil. It is not till after repeated neglect, that this faithful monitor and friend takes his departure. "One class of insane persons," says Lord Coke, "is hee that by his own vitious act, for a time de- "priveth himselfe of his memory and understanding, "as he that is drunken. But that kinde of *non com-* "*pos mentis*, in civil matters, gives no privilege or "benefit to him or his heirs." Again, "as for a "drunkard, who is *voluntarius dæmon*, he hath, (as "hath been said) no privilege thereby, but what "hurt or ill soever he doth, his drunkennesse doth "aggravate it."† That venerable sage, whom I have before quoted, says on this subject: "where a "man breaks the words of the law by voluntary "ignorance, there he shall not be excused. As if "a person that is drunk kills another, this shall be "felony, and he shall be hanged for it, and yet he

* Dr. Abercrombie, on the Intellectual Faculties, 169.

† Co. Lit. 247 b.

"did it through ignorance, for when he was drunk, "he had no understanding nor memory; but inas- "much as that ignorance was occasioned by his own "act and folly, and he might have avoided it, he "shall not be privileged thereby. And Aristotle "says, that such a person deserves double punish- "ment, because he has doubly offended, viz: in "being drunk to the evil example of others, and in "committing the crime of homicide. He is in such "case the cause of his own ignorance."* The Chief Justice Parker, in the trial of William McDonnough, also said, "that if the jury believed, that his "reason was impaired by intoxication only, no pal- "liating circumstances existing, he must be con- "victed."

Habits of intemperance equally violate divine and human law; and you perceive, that drunkenness is not admitted in this Commonwealth, as an excuse for a criminal act. The argument for temperance hencè acquires additional force; and those who are labouring in that good cause, are entitled to increased gratitude. Zeal in this, as in every good cause, is essential to its success. If this zeal sometines carries its advocates beyond the line of moder-

* Plowden's Com. 19.

ation, the cause itself furnishes the best apology for the error, though it will not excuse an unlawful act. Most intimate is the alliance of temperance with submission to the law, and consequently with the supremacy of the law, which is the only thing that has right in a free government to implicit obedience. The law has accomplished much, when it restrains the passions of men, and prevents the beginnings of strife and contention. Let it be remembered too, that abstinence from wine and strong drink is but one branch of temperance. "The virtue of temperance," says an admirable writer, "is a confirmed "habit of governing all the affections, passions, and "appetites of our nature, in a proper manner, by "placing our affections on proper objects, by re- "straining our angry passions, and by gratifying our "appetites in moderation. Where this virtue sub- "sists, the reasonable man is a law to himself, and "temptation can have little influence."*

I have occupied so much time in these remarks, on individual accountability and guilt, which I have written for my own admonition, as well as for your benefit, that I must refer you to the

* Note on 2 Peter, C. I. V. 6, by James McKnight, D. D. The writer takes pleasure in referring to the translation and commentary on the Apostolical Epistles, by Dr. McKnight.

learned attorney for the Commonwealth, to advise you in particulars, and to facilitate your investigations in the discharge of your duty. For the time being, you stand for the defence of the laws and liberties of this community :—"for that liberty "which is consistent with order, and that not only "exists with order and virtue, but cannot at all exist "without them. It inheres in good and steady gov- "ernment as in its substance and vital principle."* This is not the time to relax the law, or its wise and prompt administration. It is notorious, that the country abounds with great and daring offenders, both natives and foreigners. In some parts of the country, the dilatory and feeble administration of the law has been made the pretence by mobs to take its administration into their hands, and to execute summary justice on their victims. Experience proves, that at times, and for the moment, the strength of the law is unequal to contend with popular frenzy. But the repetition of such disorders is against the first pinciples of our social existence, and will tend, if not effectually resisted, to reduce society to a state of anarchy. There are those in every community who live by the arts of fraud. In my opinion, fraud is as great a crime as theft, and

* Dr. Parr.

deserves as severe a punishment. "Care and vigi-
"lance, with a very common understanding, may
"preserve a man's goods from thieves, but honesty
"has no fence against superior cunning; and since
"it is necessary that there should be a perpetual
"intercourse of buying and selling, and dealing
"upon credit; where fraud is permitted and con-
"nived at, or has no law to punish it, the honest
"dealer is always undone and the knave gets the
"advantage."

Our admirable constitution guarantees to each citizen the safety of his person,—the sacred rights of his property,—the fruits of his labour and talent, —wise and equal laws,—and the prompt and impartial administration of justice. It places poor and rich on equal political ground, making labor honorable, and securing its reward. Our laws and institutions, political, civil, and religious, are the fruit of the collected wisdom of the people, matured by the experience of generations. The present year furnishes a convincing proof of the desire of the Legislature to perfect the laws. To three eminent jurists, enjoying the highest reputation in the profession, and the full confidence of the community, was committed the whole body of the statutes, to be revised by their care, and to be presented in a

condensed form, simple and intelligible, and stripped of needless phraseology, so as to combine the acts of the Legislature with the solemn decisions of the Supreme Judicial Court after debate and consideration. This great work was completed by the Commissioners, at great expense of learning and diligence, and to their great honor.* After patient and laborious examination, and full debate, first by a grand Committee of the Legislature, and afterwards by both branches of the General Court, in an extraordinary session, the Code has been adopted with unexampled unanimity, and waits only to be sent to the people, to constitute the rule of their future action. I congratulate you on the completion of this magnificent work, containing the principles of ancient and modern jurisprudence, adapted to our times and to our own condition and wants. It is of the highest importance to the citizens of a state, that its laws should be settled and permanent; but as time will be required to develop any innate fault in the Code, so likewise must time be allowed to demonstrate its perfection. Like the XII Tables of Rome, and the Institutes of Justinian,

* The Commissioners were, the Hon. Charles Jackson, Hon. Asahel Stearns, and Hon. John Pickering. The latter gentleman was appointed to supply the place of the lamented John Hooker Ashmun, Royal Professor of Law in Harvard University, who died on the 1st of April, 1833, aged 33 years.

may it be immortal, and deservedly enjoy the admiration and reverence of the people of this Commonwealth in all future time.