

THE LAW OF ADULTERY AND IGNOMINIOUS PUNISHMENTS—WITH ESPECIAL REFERENCE TO THE PENALTY OF WEARING A LETTER AFFIXED TO THE CLOTHING.

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AT the October meeting of the Society, I stated that I had recently seen certain papers connected with a criminal case in which the culprit was, in 1743, sentenced to wear a letter sewed upon his outer garment; and I asked if any of my fellow-members could tell me, either how early in the history of the Colony, or how late in the days of the Province, sentences of this character were imposed. Some interest naturally attaches to the question from the great popularity of Hawthorne's *Scarlet Letter*, the scene of which is laid in Boston, about 1650. At that time the crime of Adultery was included upon the Statute Books of the Colony of the Massachusetts Bay in the list of capital offences; nor was there any modification of this law, until the re-organization of the General Court under the William and Mary Charter. Of this fact, Hawthorne evidently became aware during the progress of his work, and to preserve the story from criticism, to which it would otherwise have been subject, he put the following words into the mouth of a townsman, speaking in the market-place concerning the law and the magistrates: "The penalty thereof is death. But in their great mercy and tenderness of heart, they have doomed Mistress Prynne to stand only a space of three hours on the platform of the pillory, and then and thereafter, for the remainder of her natural life to wear a mark of shame upon her bosom."

At the time when I propounded the foregoing question, I thought it quite possible that among my hearers there might be more than one, who could, on the spur of the moment, furnish such information as there was of interest in the matter, and I did not intend to bring the subject again before the Society. Although no answers to my query were made at the meeting, I subsequently received aid in the way of direct information and suggestions,¹ which led me to make a more extended examination of the subject than I originally contemplated. What I have found, I propose now to tell you, and, in addition thereto, I shall add a few words descriptive of a fruitless attempt which I have made to determine the origin of this peculiar method of punishment.

Hawthorne, in his *Scarlet Letter*, associates the imposition of the penalty of wearing a letter conspicuously super-imposed upon the outer garment, with the crime of Adultery. It is my purpose to trace the legislation in the Colony of the Massachusetts Bay relative to Adultery; to show in what instances punishments, either similar or analogous to the penalty described in the *Scarlet Letter*, were imposed in that Colony; to point out certain statutes in Plymouth and in the Connecticut Colonies having penalties of a similar character; and to discuss the question whether punishments of this nature originated in this country, or formed a part of the penal discipline in force in the seventeenth century in England.

The verisimilitude of Hawthorne's account, in the Introduction to the *Scarlet Letter*, of his discovery of the cloth letter and the manuscript containing the record of the doings and sufferings of Hester Prynne, has doubtless deceived many people. The realism of this account may

¹I am under obligations to our associates, Franklin B. Dexter, Justin Winsor, John McK. Merriam, Charles J. Hoadly and Dr. Samuel A. Green. I wish also to acknowledge the courteous assistance which I have received at the Social Law Library, the Harvard College and the Harvard Law School Libraries.

have been strengthened by the attempt, in the story itself, to show, through the medium of a speaker, why the penalty therein described differs from the law of the land. In all probability, however, the average reader would overlook this passage, and rise from the perusal of the book under the impression that the narrative was founded upon fact.

It may be as well, therefore, to state at the outset, that Mr. Lathrop, in his "Study of Hawthorne," evidently considers the Introduction as a part of the fiction. "A friend," he says, "asked Hawthorne if he had documentary evidence for the particular punishment, and he replied that he had actually seen it mentioned in the town records of Boston, though with no attendant details."¹ Mr. Lathrop, in a note, points out that Hawthorne may have seen the statutory provision for the punishment of Adultery, which was passed in Plymouth Colony, in 1658. The inherent impossibility of anything of the kind being found in the town records of Boston, might, perhaps, pardon the neglect to test the accuracy of the statement attributed to Hawthorne, but I concluded that the examination of the Indexes of the published volumes was such an easy matter that I could hardly afford to omit it. Finding nothing there, I asked Mr. William H. Whitmore, the editor of the series, if he had ever heard of anything of the sort. Mr. Whitmore, while disclaiming the positive knowledge which would permit him to speak authoritatively, was strongly of opinion that no such punishments were inflicted by the town or the selectmen.

Mr. Lathrop calls attention to the fact that Hawthorne had in "Endicott and the Red Cross," one of the Twice-told Tales, already introduced "a young woman, with no mean share of beauty, whose doom it was to wear the letter A on the breast of her gown, in the eyes of all the world and her own children." Among the various forms of

¹"A Study of Hawthorne," by George Parsons Lathrop, Boston, 1876.

ignominious punishment enumerated in this story, one, the exhibition of the label A WANTON GOSPELLER, upon the breast of a culprit, makes it certain that Hawthorne in addition to his knowledge of the law which has already been suggested, also possessed some information as to the contents of the Records of the Colony of the Massachusetts Bay, and this carries with it a presumption of knowledge of the Plymouth Records. If the statement attributed to him, in which he gives the Boston Town Records as his authority for the form of punishment, is well founded, it would indicate that he obtained his information through some friend,¹ and was careless in his description, perhaps ignorant of the exact authority. In the story itself the exigencies of the novelist may have compelled him to adopt Boston in preference to Plymouth for the scene of action.

The evolution of a code of laws in this Colony is an interesting bit of study and has a bearing on this question. The first step taken to formulate a method of procedure is to be found in the record of the first Court of Assistants held at Charlestown, August 23, 1630. Provision was made at this session for the appointment of Justices of the Peace, whose jurisdiction for the reformation of abuses and the punishment of offenders was co-ordinate with that of Justices of the Peace in England.

Mr. Whitmore in his bibliographical introduction to the Colonial Laws of Massachusetts,² has set forth with great clearness, the pressure on the part of the people for a more distinct assertion of their obligations and their rights, than was to be found in the vague generalities of English custom. He has also shown the resistance which this pressure met with on the part of the magistrates; the

¹ He refers to some of the publications of Joseph B. Felt. The substance of the special information essential for his purpose, could have been culled from Felt's books. In addition to this, however, the two men must have met in Salem, and talked about this topic.

² "The Colonial Laws of Massachusetts," re-print, Edition 1672. Boston, 1890, pp. 4, et seq.

postponement of reports; the appointment of new committees, and the various other devices to which resort was made under semblance of great activity in carrying out the will of the people, for the purpose of preventing the premature adoption of a code of laws. The quotation which he gives from Winthrop¹ furnishes the key to the cause of this delay. The Charter restrained the Company from passing laws repugnant to the laws of England. English laws were, however, based upon custom. Opportunity must therefore be afforded for certain customs to ripen, which, if boldly proclaimed in the form of laws, might be said to be repugnant to English laws.

While the elaboration of a Civil and Criminal code was thus held in abeyance, the Court of Assistants was brought face to face with various offences. Some of these, being recognized violations of English as well as of moral law, were easy to deal with, while others, infractions of the Mosaic code, but not rated as rank penal offences in English practice, were in their very nature troublesome. Among the latter was Adultery, the estimate of which, as a crime in English eyes, may be inferred from the language of Blackstone, who, after alluding to the fact that Parliament, in 1650, classed Adultery and Incest among Felonies, goes on to say:² "At the restoration, when men from an abhorrence of the hypocrisy of the late times fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigor."³ And

¹ Winthrop, I., pp. 322, 323.

² "Commentaries on the Laws of England," by Sir William Blackstone, Knt. Philadelphia, MDCCLXXII., IV., p. 64.

³ The struggle to determine the position of Adultery among criminal or social offences is indicated, but not fully set forth, in the Journals of the House of Lords and Commons. Notwithstanding the flippant manner in which Blackstone speaks of the "unfashionable rigor" of the Act of 1650, it is evident that during the entire century which preceded the passage of that Act, there had been persistent remonstrance against the silence of the criminal code on this subject. The first movement was in the House of Lords in the time of Henry VIII. and was directed against "women proved of adultery." In the time of Edward VI. a "Bill for Adultery" was introduced in the Commons.

these offences have been ever since left to the feeble coercion of the Spiritual Court, according to the rules of the Canon law; a law which has treated the offence of Incontinence with a degree of tenderness and lenity." Although coercion was left to the Spiritual Courts, yet the Temporal Courts had jurisdiction of the civil injury, and the husband had an action of trespass *vi et armis* against the adulterer.¹

Pike, in his *History of Crime*,² speaks of the Act of 1650 as a "very famous and much ridiculed Act for the punishment of Incontinence." . . . "The Judges on circuit and the Justices of the Peace now dealt with the offences which had previously been under the ecclesiastical jurisdiction."

The same spirit which led the English Parliament in 1650³ to class Incest and Adultery among felonies found expression among the law makers of the Colony of the Massachusetts Bay at a much earlier date. At a Court of Assistants held at Boston, September 6th, 1631,⁴ the question was propounded, "Whether adultery either with English or Indian, shall not be punished with death?" The matter was referred to the next Court. On the 18th

In the days of Elizabeth one was read for the first time in the House of Lords. In the early part of the reign of James I. a bill for the better repressing "the detestable crime of Adultery" was read twice in the House of Lords, and referred to a committee on which there were five Bishops. The committee referred the bill back to their Lordships, being of opinion that it concerned particular persons, more than the public good. The subject came up in the reign of Charles I., in 1625, in the House of Commons; re-appeared in 1626; again showed itself in 1628; and again in the Long Parliament, 1644. This time the committee were instructed to provide that the bill be put in due and lively execution, but, although the House had the subject up at some time during each year for six consecutive years, the bill did not get through until 1650.

¹ "Commentaries on the Laws of England," by Sir William Blackstone, Knt. Philadelphia, MDCCLXXII., I., p. 139.

² "A History of Crime in England," by Luke Owen Pike, M.A., London, 1876, II., p. 182.

³ "A Collection of Acts and Ordinances of general use made in the Parliament, begun and held at Westminster, the 3d day of November, Anno 1640, and since, unto the adjournment of the Parliament begun and holden the 17th of September, Anno 1650," etc., etc. By Henry Scobell, etc., etc., London, 1658. Chapter 10.

⁴ Massachusetts Colony Records, I., p. 91.

of October¹ of the same year, at a Court at which were present the Governor, the Deputy Governor, and five Deputies, it was ordered "that if any man shall have carnal copulation with another man's wife, they both shall be punished by death."

The question whether the penalty of this Act should be enforced was fairly presented at a Quarter Court, held at Boston, June 6, 1637.² Three criminals, two men and one woman, were arraigned for Adultery. No action was taken upon these cases at this term of the Court, but, as we may infer from Winthrop,³ the prisoners were remanded to gaol. August 1st, there was a session of the General Court.⁴ September 5th the Quarter Court⁵ assembled, but in consequence of the session of the synod at Newtown, adjourned without transacting any business. September 7th the General Court met and adjourned to September 26th. The case was finally taken up at a session of the Quarter Court at Boston, Sept. 19, 1637,⁶ at which time the culprits were convicted. Notwithstanding the rapidity with which prosecutions were carried through and sentences executed in those days, the prisoners were not sentenced at this term of Court. At a general term of the Court⁷ held at Newtown, March 12, 1637/8, the issue was finally faced and sentence was imposed upon "the three adulterers" that they be "severely whipped and banished, never to return again upon pain of death."

The next paragraph in the Record, to that containing the sentence, reads as follows: "The law against adultery made by the Particular Court in October, 1631, is confirmed, that whosoever lieth with another man's wife, both shall be punished by death; and this is to be promulgated." Thus the law stood until October 7th, 1640,⁸ when at a

¹ Massachusetts Colony Records, I., p. 92.

² *Ibid.*, I., p. 197.

³ Winthrop, I., p. 257.

⁴ Massachusetts Colony Records, I., p. 200.

⁵ *Ibid.*, I., p. 202.

⁶ *Ibid.*, I., pp. 202, 203.

⁷ *Ibid.*, I., p. 225.

⁸ *Ibid.*, I., p. 301.

General Court, the question was again introduced and an Act passed in the following language: "The first law against adultery, made by the Court of Assistants, Anno 1631, is declared to be abrogated; but the other, made March, 1637/8, by the General Court, to stand in force."

It is obvious from this review of the legislation upon the subject, all of which took place prior to the adoption of the Body of Liberties, that the Court of Assistants, which took the matter into consideration at one term of Court, but hesitated to act, had, in the interim between the two sessions, secured the necessary votes for the passage of the Act which bears date October 18, 1631. This Act was presumably the law of the Colony until the occasion came for its enforcement, when the General Court postponed action from session to session, and finally imposed sentences which were certainly not in accord with the penalty prescribed by the Act.

The long detention in prison of the three criminals whose case had occupied so much of the time of the Court, and the perplexing nature of the questions raised as to the legality of the Act, attracted sufficient attention to these cases for Winthrop to record in his journal¹ the exact nature of the law points raised at the trial. Apparently there were two objections to the legality of the Act;—First, that which was suggested in the Act of 1640, viz., that it was passed at a Court of Assistants and not at a General Court. Second, that there was some defect in the publication of the law. The Elders, "who had been requested to deliver their judgments," were of opinion that if the law had been sufficiently published, the death penalty ought to be enforced. The Elders had no scruples on account of the character of the Court at which the Act was passed, but the General Court itself, in view of the fact that there had been some defect in the matter of the publication, and further, that not only some of the Deputies, but others also doubted the

¹ Winthrop, I., p. 257.

power of the Court of Assistants to pass the Act, thought it was "safest that these persons should be whipped and banished." If our examination of this preliminary stage of criminal practice in Massachusetts has failed to reveal much of value in connection with the subject under investigation, it will at least be conceded that it has brought us in contact with a remarkable instance of the regard of the Courts for the technical rights of the accused.

Between the session of the Court of October 7, 1640, and that held December 10th, 1641, there is no record of any change in the penalty for Adultery. At this last session the Body of Liberties was adopted. The ninety-fourth section of this code is devoted to the enumeration of twelve Capital Offences, of which the ninth reads as follows: "If any person committeth adultery with a married or espoused wife, the adulterer and adulteress shall surely be put to death." It is repeated in the same language in the laws of 1660, and again in the laws of 1672, and there is no record of any act repealing or amending it, so far as I know. It may therefore be assumed to have been the law of the land so long as the colonial criminal code remained in force.

At the session of the General Court, begun and held at Boston, May 30, 1694, an Act was passed against Adultery and Polygamy, which was published on the 20th of June. The second section in this Act is as follows:—

"And if any man shall commit adultery, the man and woman that shall be convicted of such crime before their Majesties' justices of assize and general gaol delivery, shall be set upon the gallows by the space of an hour, with a rope about their neck, and the other end cast over the gallows; and in the way from thence to the common gaol shall be severely whipped, not exceeding forty stripes each. Also every person and persons so offending shall forever after wear a capital A, of two inches long, and proportionate bigness, cut out in cloth of a contrary color to

their clothes, and sewed upon their upper garments, on the outside of their arm, or on their back, in open view. And if any person or persons, having been convicted and sentenced for such offence, shall at any time be found without their letter so worn, during their abode in this province, they shall, by warrant from a justice of the peace, be forthwith apprehended, and ordered to be publicly whipped, not exceeding fifteen stripes, and so from time to time, *toties quoties.*"

This law remained unaltered upon the Statute Books during the days of the Province.

I have no positive information of any conviction under this Act, but I have seen in the Court files in 1743,¹ a sentence imposed upon a person convicted of Incest, in which the penalty was in substance the same, the only change being that the letter which the convict was ordered to wear upon his upper garment was I instead of A.

Incest, if of the particular instances made capital by the Law of God, was included in the Act for punishing capital offenders, which was passed October 29, 1692.² The crimes and offences included in this Act were declared to be felony and all persons legally convicted of having committed any of them were to be adjudged to suffer the pain of death. A reference in the margin of the printed law indicates that an enumeration of the particular instances of Incest which were thus made subject to the death penalty might be found in Leviticus, Chapter XX., beginning at the eleventh verse. This Act was disallowed by the Privy Council, August 22, 1695, because some of the Capital Offences, and among these Incest,³ "were conceived in very uncertain and doubtful terms," and for the further reason that the death penalty was not conformable to English law; but, even before the Privy Council had refused

¹ Suffolk Files, 360—56, 557.

² Massachusetts Province Laws, I., Ch. 19, pp. 55, 56.

³ Letter from Privy Council quoted, *Ibid.*, I., p. 56.

its approval of the Act, the General Court would seem to have concluded that the law, so far as it applied to Incest, needed revision. On the 19th of June of the year 1695,¹ an Act was passed to prevent incestuous marriages, and three days thereafter was published. The Preamble opens: "Although this Court doth not take in hand to determine what is the whole breadth of the divine commandment respecting unlawful marriages, yet for preventing that abominable dishonesty and confusion which might otherwise happen," Be it enacted, etc., etc.

The first section of the Act specifies the degrees of kindred between which marriage is forbidden, following in this regard the English Ecclesiastical Law. The second section prescribes the penalty for the violation of the Act, the details in which are identical with those fixed for the punishment of adulterers, except that the cloth letter is to be an I instead of an A. The remainder of the Act has no bearing upon the question under consideration. It was under this Act that, in 1743, the trial, conviction and punishment took place, to which I have alluded. The substantial portions of the sentence in this case were in the following words:²

PROVINCE OF THE MASSACHUSETTS BAY } G E O R G E the SECOND by the
MIDDLESEX S S. } Grace of God King * * * * *

To Richard Foster, Jun'r, Esq'r, Sheriff * * * * *
WHEREAS ANDREW FLEMING of GROTON * * *
has been convicted by verdict of * * * * * and by the
consideration of said justices has been adjudged to suffer
as follows, viz.; That the said Andrew Fleming be set
upon the gallows in our said County by the space of an
hour with a rope about his neck, and the other end cast
over the gallows and in the way from thence to the common
gaol be severely whipt forty stripes and that he forever

¹ Letter from Privy Council quoted, Massachusetts Province Laws, I., p. 208.

² Suffolk Files, 360—56, 557.

after wear a capital I, two inches long and of a proper proportionate bigness, cut out in cloth of a contrary color to his coat, and sewed upon his upper garment on the outside of his arm, or upon his back in open view * *.

Then follows the return of the sheriff, setting forth the execution of the sentence, so far as he was responsible for the same.

Our Associate, Dr. Samuel A. Green, has been kind enough to point out to me that an account of the proceedings under this sentence was printed in the *Boston Weekly News-Letter* of Thursday, February 10, 1743, as follows :

“Last Friday, one Andrew Flemming, of Groton, was convicted at the Assizes held at Charlestown, of Incest with his own daughter, for which he was sentenced to sit upon the gallows at Cambridge with a rope about his neck, and then to be whip'd forty stripes in the way from the gallows to the prison. And yesterday he received his punishment. The daughter has absconded.”

The review of the law of Adultery which has been presented shows that under the Colonial code, death was the only prescribed penalty. The various forms of ignominious punishment provided in the Province law for the crime of Incest were enforced in one instance, to our positive knowledge. Perhaps an extended search of the Court files would reveal other convictions and sentences of this nature.

The question naturally arises, was the death penalty ever enforced for the crime of adultery? There was a case presented by the Grand Jury for the consideration of a Quarter Court,¹ held at Boston, March 7, 1636/7, in which the offence of the defendant, although not described as adultery, must, if the adjectives used in the record were correctly applied, have closely resembled that crime. The defendant was evidently found guilty of something, for she was “seriously admonished to repent and walk humbly,

¹ Massachusetts Colony Records, I., p. 193.

chastely and holily." At a Quarter Court, Sept. 7, 1641,¹ a man, for his adulterous practices, was censured to be sent to the gallows with a rope about his neck, and to sit upon the lather² an hour, the rope's end thrown over the gallows, so to return to prison.

At a General Court held at Boston, September 8th, 1642,³ a message was sent to Meantonomo, "to acquaint him that one Michewese, an Indian about Providence, did lately attempt to ravish the wife of one Nich's Woode, of Dorchester, and to desire that he may be sent to us to be punished, not with death, but with some other punishment."

In 1648,⁴ a woman was acquitted, on two several charges of adultery, but was sentenced to be severely whipped for "her evil and adulterous behavior and swearing."

In 1654,⁵ a woman accused of adultery, though not found guilty of the fact according to law, was found guilty of shameful and unchaste behavior.

I should be inclined to infer from the foregoing and from the character of some ignominious sentences imposed in certain aggravated cases of rape and seduction, that the Court was reluctant to enforce the death penalty, and allowed the issue in some of the cases to be so framed as to prevent the disclosure of the real charge, were it not for the Record of the Court of Assistants printed by Mr. Whitmore in the preface to the reprint of the Colonial Laws from the Edition of 1672.⁶ We have there the proceedings at a Court held in Boston, March 5, 1643/4, where a man and a woman, each being found guilty of adultery, were condemned to death.

Cotton Mather furnishes in his *Magnalia* testimony on this point, which goes one step beyond the record of the

¹ Massachusetts Colony Records, I., p. 335.

² Ladder.

³ Massachusetts Colony Records, II., p. 23.

⁴ *Ibid.*, II., p. 243.

⁵ *Ibid.*, IV., pt. I., p. 193.

⁶ "The Colonial Laws of Massachusetts," re-print, Edition 1672, p. xlii.

Court. The Sixth Book has an Appendix which contains the history of certain criminals who were executed. The second of Mather's criminals was an adulterer from Weymouth. "By the law of this Country," says Mather, "Adultery was then a capital transgression, as it hath been in many countries. And this poor adulterer could not escape the punishment which the law provided." Among the various instances cited by the author of *Magnalia* of crimes for which offenders forfeited their lives, there are several in which Adultery formed a part of the offence, but in the case cited above, the statement is direct that the man was executed for Adultery.

If we turn now to the law of Plymouth Colony upon this subject, an examination of the record will show that some doubt existed, when the list of capital offences was made out, whether Adultery should be included in this list, or classed with Fornication, which was to be punished at the discretion of the Magistrates. Adultery was written in the Records in the same paragraph with, and preceding Fornication.¹ Then the word Adultery was crossed out, and after the words "Treason," "Murder," "Witchcraft," "Arson," "Rape," etc., offences grouped under the heading "Liable to death," the words "Adultery to be punished," were written in. Precisely what was intended by this it is difficult to say, but we can ascertain from the records how offenders of this class were punished.

In 1639,² a woman, who was found guilty of Adultery, of a somewhat aggravated character, was sentenced to be whipped at a cart-tail through the streets, and to wear a badge upon her left sleeve during her abode within the government; if found at any time abroad without the badge she was to be burned in the face with a hot iron.

In 1641,³ a man and a woman convicted of this offence

¹ Plymouth Colony Records, Laws, 1623-1682, p. 12.

² *Ibid.*, I., p. 132.

³ *Ibid.*, II., p. 28.

were sentenced both to be severely whipped immediately, at the public post, and that they should wear (while they remained in the Government) two letters, viz., an "A D," for Adulterers, daily, upon the outside of their uppermost garment, in a most eminent place thereof.

In 1658,¹ it was enacted by the Court and the authority thereof that whosoever should commit Adultery, should be severely punished by whipping two several times, viz.: once while the Court was in being at which they were convicted of the fact, and the second time as the Court should order, and likewise to wear two capital letters, viz.: "A D" cut out in cloth and sewed in their uppermost garments on their arm or back; and if at any time they should be taken without the said letters, while they were in the Government so worn, to be forthwith taken and publicly whipped.

Our associate, Charles J. Hoadly, in response to the question which I put at the last meeting, communicated to our President, on the 7th of November last, certain information relative to punishments of this class in Connecticut, which, by permission, I quote:

"In Massachusetts an Act for punishing Incest was passed in 1695 (Acts & Records of the Province, I., 209). This law was introduced into our Connecticut Laws in the revision of 1702 (p. 73). It is found in the edition of 1715 (p. 74); in the revision of 1750, or edition of 1769 (p. 145); in the revision of 1784 (p. 136); in the revision of 1796 (p. 287); and in the edition of 1808 (p. 479). It is referred to in Swift's System, Vol. II., p. 329. I do not find any formal repeal of this law, but it was dropped (at least that part of it requiring the convict to wear a capital I two inches long on the outside of his upper garment) at the revision of 1821."

The review which we have taken of the statutory law in the Colonies of Massachusetts Bay, Plymouth, and Connecticut bearing upon the subject, and of sentences

¹ Plymouth Colony Records, Laws, 1623-1682, p. 95.

imposed in Massachusetts Bay and Plymouth, has prepared us for an examination of ignominious punishments similar in character to the letter penalty, which were inflicted during Colonial times, for offences other than Adultery. I call attention to the limitation of the proposed examination, since it does not include mutilations nor brandings, both of which were common methods of punishment. At the very outset of such an examination we encounter the fact that the temporary exposure of a criminal with a label around his neck indicating the character of the offence for which he was thus exposed, was not only common, but was adopted by the General Court as a suitable penalty for certain offences, and was incorporated in several of the penal statutes. In presenting the examples which I have selected from the records of punishments of this sort, I shall not endeavor to classify them in any way, but shall simply preserve the chronological order in which they are recorded.

September 3, 1633,¹ a man was sentenced to pay a fine and stand with a white sheet of paper on his back, whereon "Drunkard" is written in great letters, and to stand there-with so long as the Court shall think meet, for abusing himself shamefully with drink, and enticing his neighbor's wife to incontinency and other misdemeanors.

March 4, 1633/4,² at a Court of Assistants, one Robert Coles, for drunkenness, was sentenced to be disfranchised, and to wear about his neck, and to hang about his outer garment a D made of red cloth, set upon white, to continue for a year and not to leave it off at any time when he should come among company. Certain penalties were prescribed for failure to observe the conditions of the sentence, and he was also ordered to wear the D outwards and was enjoined to appear at the next General Court, and to continue there till the Court should be ended.

¹ Massachusetts Colony Records, I., p. 107.

² *Ibid.*, I., p. 112.

We have in this case a cloth letter, the color to be red, to be made conspicuous by being set upon white ground. It is not, however, to be sewed upon the outer garment, but is to be suspended about the neck. It is always to be worn when the offender is in the presence of other people, and he is always to keep the red letter on the white ground exposed to public view.

April 5, 1636,¹ William Perkins, for drunkenness, and other misdemeanors, was sentenced, to stand at the next General Court, one hour in public view, with a white sheet of paper on his breast, having a great D made upon it. It was further provided that he should attend the pleasure of the Court till he should be dismissed. In view of the fact that Perkins had committed other misdemeanors in addition to his offence of drunkenness, the paper label and the brief public exposure are in striking contrast to the continuous character of the punishment imposed upon Coles.

March 5th, 1638/9,² a man, for attempting lewdness with divers women, was censured to be severely whipped at Boston and at Ipswich and to wear the letter V upon his uppermost garment until the Court do discharge him. The capital letter which was ordered to be worn by the culprit was probably initial, and in this case may perhaps have indicated that the offence was uncleanness.

September 3d, 1639,³ a man for stealing, was censured to be put forth to service for three or four years, except he could procure £10; also he was to have a T set upon his uppermost garment. This sentence is defective, in that it neither specifies what the letter is to be made of, nor how it is to be attached to, or exposed upon the person, nor how long the convict was to wear it. At this term of Court, the man sentenced in March to wear a letter V was, upon his good carriage, discharged from the penalty which had formerly been enjoined upon him.

¹Massachusetts Colony Records, I., p. 172. ²*Ibid.*, I., p. 248. ³*Ibid.*, I., p. 268.

December 3, 1639,¹ two women were each sentenced to wear a paper in consequence of light behavior.

June 4, 1642,² a man and his wife were enjoined to stand an hour on the 16th of June, in the market place, with each of them a paper with great letters on their hats. Presumably these great letters were in some way to convey information to beholders of the character of the offence of the convicts.

March 29, 1681,³ two females for incest were sentenced to be imprisoned a night, to be whipped or pay £5, and to stand or sit during the services of the next lecture day, on a high stool, in the middle alley of the Salem Meeting House, having a paper on their heads, with their crime written in large letters.

Josselyn, in his *Two Voyages*,⁴ says: "An English woman suffering an Indian to have carnal knowledge of her had an Indian cut out in red cloth sewed upon her right arm, and was enjoined to wear it twelve moneths." Josselyn left New England on his return from his second visit in 1671. His work was published in 1674. This punishment may have occurred at any time prior to 1671. The details of this sentence are specific. The Indian was to be cut out of cloth; the color was to be red; the badge to be worn upon the right arm. The period of the punishment was twelve months. It may have been inflicted in either Plymouth Colony or Massachusetts Bay.

March 5, 1656/7,⁵ a woman was sentenced in Plymouth Colony for her unclean and lascivious behavior and blasphemous words to be publicly whipped at Plymouth, and afterwards at Taunton, on a public training-day, and to

¹ Massachusetts Colony Records, I., p. 284.

² "The Colonial Laws of Massachusetts," reprint, Edition 1672, xxxiii.

³ "The Annals of Salem from its first Settlement," by Joseph B. Felt. Salem, 1827, p. 270.

⁴ Josselyn's "Account of Two Voyages to New England." Veazie's reprint, Boston, 1865, pp. 178, 179.

⁵ Plymouth Colony Records, III., pp. 111, 112.

wear a Roman B cut out of red cloth, and sewed to her upper garment on her right arm. Here we have the red letter attached to the outer garment.

The analysis of the Massachusetts Records in connection with this subject could not be considered complete if it failed to reveal certain penal statutes, in which the punishment proposed for offenders, in some respects resembled that which was laid down in the Plymouth statute against adultery. November 4, 1646,¹ it was ordained that a Christian who disturbed congregational services should be fined £5 or "stand two hours openly upon a block 4 foot high, on a lecture day, with a paper fixed on his breast with this—A WANTON GOSPELLER—written in capital letters, that others may fear and be ashamed of breaking out into the like wickedness." Apparently interruptions by those who were not Christians were not conceived to be of sufficient importance to be included within the scope of this Act.

May 27th, 1652, an Act was passed which was directed against those who should wittingly or willingly deface or rend any record or writing in any public office. The penalty was that the offender should pay treble the damages that might arise, and a fine of equal amount to the State or that he should suffer two months' imprisonment without bail or mainprize, or "stand in the pillory two hours in the Boston market, with a paper marked over his head in capital letters A DEFACER OF RECORDS."

There is no need that I should recapitulate what has been presented concerning these punishments in order that we may analyze them. It will be plain even to a hasty reader that the purpose of the badges, letters or labels which the convicts were compelled to wear was to convey information to the beholder of the exact offence committed by the wearer. However ignominious it may have been to sit in the market place for an hour with a paper label upon

¹ Massachusetts Colony Records, II., p. 179.

the person signifying that the bearer had violated some colonial ordinance, it is clear that such punishment as this was insignificant when compared with the requirement that the token of crime should be made of more lasting material, and should be conspicuously worn for a continuous period, of such length that the wearer would necessarily become associated, in the minds of the whole community, with a badge of ignominy. It is also evident that in the attempt to utilize this form of punishment, it was spread over so much territory in its application that in some cases offenders were to be punished by wearing placards which it would have been their pride and their pleasure, instead of their shame, to parade in public places under any and all circumstances. It is quite conceivable that the religious enthusiast who felt it to be his duty to interrupt devotional exercises, either for the purpose of expressing his dissent from the dogmas promulgated from the pulpit, or with intent to protest against the ecclesiastical tyranny of the synod, would glory in the opportunity to pose as a martyr under the title of a wanton gospeller. That which was intended to be a source of mortification would be a crown of glory. A form of punishment, which, within certain limits, would act as a deterrent for crime, might be, and probably was in this colony, extended in its application beyond the limits of its efficacy.

It would be natural to suppose that the form in which we find this punishment laid down in the Act of 1694 against Adultery, a form apparently in use, in Plymouth Colony, as early as 1639, must have been of transatlantic origin. I certainly was of that opinion and thought that I could easily quote from English authority some instance which should correspond in substance with the details of the penalty imposed in that Act. Failure on my part to accomplish this result may raise in the mind of some person, who shared my expectation, a question as to the character of my investigation. The answer to this would

be that the search, though not exhaustive, was broad enough to have disclosed some instance of the letter penalty if such punishments were ever common in England.¹

It certainly was not a statutory penalty. No suggestion of anything of the kind is to be traced through any of the abridgments of the Statutes. Nor is there record of any punishment of this sort, in the form books prepared for the use of Justices of the Peace.²

Branding or stigmatizing is referred to, and the stocks, the pillory, and the ducking-stool find mention, but no word of temporary exposure with a label affixed to the person, a form of punishment quite common at that time in England.

If the penalty was not statutory it might perhaps be found laid down as a penance in the canons of the Ecclesiastical Courts. Pike, as we have already seen, says that before the statute of 1650, cases of Adultery came under ecclesiastical jurisdiction. A writer about the beginning of the last century treating of the laws against immorality and profaneness says:³ "But the canon has bound you to inform of all manner of vice, profaneness and debauchery, requiring you faithfully to present all and every the offenders in adultery, whoredom, incest, drunkenness, profane swearing, or any other uncleanness and

¹ A natural suggestion is that it might have come from Holland. I have not as yet found any person who could authoritatively say whether any such custom existed in that country. Inasmuch as many of the early Colonial Laws were based upon the Mosaic Code, there was a possibility that there might have been some Jewish method of punishment upon which it was founded, but an examination of a Biblical Concordance failed to reveal anything of the sort.

² Among the law books ordered by the General Court, November 11, 1647 (Massachusetts Colony Records, II., p. 212), was Dalton's "Justice of the Peace." Dalton frequently cites Lambard, who compiled an older book of the same sort. I have examined both of these books, as well as others of the same character.

³ "A second Essay upon the Execution of the Laws against Immorality and Profaneness," etc., etc., by John Disney, Esq., London, 1710, preface, p. xxvii.

wickedness." These were the offences which would naturally have been punished in this ignominious manner; but in the *Codex Juris Ecclesiastici*¹ it was laid down that "sometimes corporal penance and sometimes pecuniary is enjoined" for the punishment of offenders of this class, while Burn,² in his *Ecclesiastical Law* says that penances may be either corporal or pecuniary and the former may be thrusting the convicts into a monastery, branding, stigmatizing, or imprisonment. In no work of this class have I found mention of the letter penalty.

In such books as Hone's *Year Book*, Brand's *Popular Antiquities*, and Chambers' *Day Book*, we should expect to find mention of punishments of this sort. The pillory and the ducking-stool are described, but the nearest approach to the punishment under discussion is to be found in the illustration of the pillory in Chambers, where the name of the culprit is placarded above his head as he stands in the machine.

There are certain books devoted to the topic of curious punishments.³ None of these help us in our search for an instance of the punishment under special consideration.

One book which I have examined⁴ seems to me to be in its omissions almost as much of an authority as to what

¹ "*Codex Juris Ecclesiastici*," etc., by Edmund Gibson, D.D., London, 1741, p. 1085.

² "*The Ecclesiastical Law*," by Robt. Burn, LL.D. The Ninth Ed., corrected by Robt. Phillimore, III., p. 103.

³ In the preface of one of these, "*Punishments of the Olden Times, etc., etc.*," by Wm. Andrews, F. R. H. S., etc., etc.," I find the following: "For a considerable period we have devoted much time in collecting from the bye-ways of literature all the information we could find relating to the punishment of the people, and the result of our labors has been to bring together many important facts of historical interest and value not generally known. In this book we do not propose to furnish an account of all the modes of punishment of the days of yore, but to direct attention to the most important."

Another book of this class has the special title "*Some strange and Curious punishments*," being No. 5 of "*The Olden Time Series*," "*Gleanings*," etc., selected and arranged by Henry M. Brooks.

⁴ "*Quarter Sessions from Queen Elizabeth to Queen Anne*," etc., etc., by A. H. A. Hamilton, London, 1878.

punishments were not inflicted in England during the period which it covers, as it undoubtedly is authority for the facts of that description which it records. The author availed himself of an opportunity to examine the records of the Devonshire Quarter Sessions from the time of Queen Elizabeth to the days of Queen Anne. From these records he has culled all that seemed to him worthy of mention. He gives instances of exposure of criminals with labels upon their persons, and records many facts concerning the branding of rogues and thieves, but he has not preserved for us an instance of a punishment which consisted in the continuous wearing of a badge or label. If we accept the failure to find in this book what we are after, as evidence of the non-existence of the practice in England we are forced to the conclusion that our search in English authorities can only give us light upon two points, viz. : Ignominious punishments of a temporary character by means of labels, and those of a continuous character through branding or through mutilation of the person. Temporary exposures with labels affixed were not uncommon in the days of Charles the First,¹ and often the offence was fully set forth in the descriptive phrase of which use

¹ "Collectanea Juridica:—Consisting of Tracts relative to the Law and Constitution of England." Dublin, 1741.

Part II. "A Treatise of the Court of Star Chamber." [By William Hudson.] [Written prior to 1635.]

P. 53. In S. H. S. One Compter being examined for breach of the privilege of the Court in procuring one to be arrested during his attendance, and denying it upon proof made thereof, he was sentenced to wear papers.

P. 169. Loss of ears is the punishment inflicted upon perjured persons, infamous libellers, scandalors of the State, and such like.

Branding in the face and slitting of the nose is a punishment inflicted upon forgers of false deeds, conspirators to take away the life of innocents, false scandal upon the judges and first personages of the realm.

Whipping hath been used as a punishment in great deceits. . . .

Wearing of papers hath been used in all ages, and before the Statute of 5 Eliz. was the usual punishment of perjury, but since hath been used as a punishment for oppressors and great deceits.

I quote somewhat at length from this tract, because the contribution by the Star Chamber of information on this subject is unexpected.

was made. Thus Hamilton gives an instance in which the words "This is the fellow that beat his Master" were written on a paper which was placed in the hat of the convict, and he states that "Cozening the people by telling fortunes" was a phrase which was often used in a similar way, the prisoner being compelled to stand in the pillory with a paper in his hat stating his offence. The practice continued in force during the Commonwealth and is described in *Hudibras* as follows:¹

"With papers in their hats that showed
As if they to the pillory rode."

A part of the sentence of Titus Oates was that he should walk round all the lands of Westminster Hall with a placard showing the nature of his offence.

The analogous method of punishment termed stigmatizing or branding was a recognized penalty in English practice.² The initial Roman letter with which the prisoner was branded was as a rule a ready key to unlock the secret of his crime.³ Originally it was used to mark in the hand persons who had taken the benefit of clergy. In 1698, it was enacted that thieves should thereafter be burnt with

¹"*Hudibras*," edited by Henry G. Bohn. London, 1859, I., p. 67.

²At the Lent Assizes, Devonshire, 1598, eleven, and at the Midsummer Sessions, seven prisoners were branded.—Hamilton's Quarter Sessions, etc., pp. 30, 33.

³SS signified a Stirrer up of Sedition, Pike's "History of Crime," II., p. 163; M indicated a murderer, 4 Henry VII., Ch. 13, Statutes of the Realm, II., p. 538; R a rogue, Hamilton's Quarter Sessions, &c., p. 86; B a blasphemer, Burn's "Justice of the Peace," 10th edition, p. 212; V a vagabond, I. Ed. VI., Ch. III., Statutes of the Realm, IV., pt. I., p. 5; S a slave, I. Ed. VI., Ch. III., Statutes of the Realm, IV., pt. I., p. 5; F a fraymaker, or fighter, 5 and 6 Ed. VI., Ch. IV., Statutes of the Realm, IV., pt. I., p. 133; and T generally indicated a thief, 21 James I., Ch. VI., Statutes of the Realm, IV., pt. II., p. 1216. See also 4 Henry VII., Ch. XIII. I think there can be no doubt that the letter used for branding was initial and indicated the crime. Yet, Judge Lynde records in his diary, that in 1732 a man convicted of manslaughter was branded with the letter T. This could not have indicated the offence. They must have used a brand which happened to be convenient. The diaries of Benjamin Lynde, etc., p. 29. The letter might be burned into the flesh on the brawn of the thumb, 4 Henry VII., Ch. XIII; on the forehead, I. Ed. VI., Ch. III., Statutes of the Realm, IV., pt. I., p. 5; on the cheek, *Ibid.*: or on the shoulder, Hamilton's Quarter Sessions, etc., p. 86.

the usual mark in the most visible part of the left cheek near the nose, in open Court, in the presence of the Judge. This worked so badly that the statute only remained on the Statute Book eight years.¹

Branding was not necessarily continuous in its effects nor was it of necessity, a constant reminder to the public that the person who had suffered the sentence was to be regarded as a warning. The iron might be inadequately heated. Branding on the shoulder was of course under cover. Branding on the brawn of the thumb could easily be kept out of sight; not so, however, with some of the mutilations which were provided as penalties in many of the early statutes.

One who slandered Philip and Mary paid for the act with his ears, while if he ventured to libel them the hand that penned the libel was chopped off. A perjurer in the days of Elizabeth² if he could not pay his fine was pilloried in some market place and had both his ears nailed.³ A forger of evidences and writings⁴ was pilloried, had both his ears cut off, and also had his nostrils slit and cut, and seared with a hot iron, so as to "remain a perpetual note or mark of his falsehood." Perpetual marks were sometimes left upon pilloried criminals, if we may believe the author of "*Hudibras*," which constituted no part of the legal punishment.⁵

¹ Pike's "History of Crime," II., p. 280.

² 5 Eliz., Ch. IX., 1562-3, Stat. of the Realm, p. 437.

³ "Each window like a pill'ry appears
With heads thrust thro' nailed by the ears."

—"*Hudibras*," Bohn's Edition, London, 1859, II., p. 228.

I have not seen the statute under which the penalty described in the following couplet was imposed:

"Dragg'd out thro' straiter holes by the ears,
Erased or Coup'd for Perjurers."

—*Ibid.*, p. 402.

⁴ 5 Eliz., Ch. XIV., 1562-3, Stat. of the Realm, p. 443.

⁵ "Or witches and on gibbets
Cutting from malefactors snippets,
Or from the pill'ry tips of ears
Of rebel saints and perjurers."

—*Ibid.*, II., p. 246.

Having noted these facts we are prepared to draw our conclusions from what has heretofore been recited as to punishments of the class under consideration, in the Colony and in the Mother Country. If we group under one class temporary punishments where a label was suspended upon the person of the offender, and in another continuous punishments where a letter or badge was affixed to his clothes, we shall find upon examination of the cases cited from the Records of the Massachusetts Bay and Plymouth Colonies that the first recorded instance of the infliction of an ignominious punishment of either class occurred in 1633, and consisted simply of the temporary exposure of the convict with the word "Drunkard" on his back. This was in Massachusetts Bay, and was followed the next year by a case which does not come under either group in our classification, but serves as a connecting link between the two. In this case the offender was sentenced to wear for a prolonged period a cloth letter suspended from his neck. In 1639, in Massachusetts Bay, there were two cases in which continuous sentences of this character were imposed, one also in Plymouth. In 1641 another continuous sentence was imposed in Plymouth. In neither of these cases is the method of attachment of the letter to the person indicated. All other sentences cited from the Massachusetts records and all penalties of this kind imposed by the statutes of Massachusetts Bay prior to 1694, were temporary in their character. In 1656 the first case is recorded in which a convict was sentenced to wear a letter upon the outer garment. This occurred at Plymouth and was followed two years thereafter by the statute against Adultery, which has already been quoted.

It is obvious that the suspension of a label about the

Bohn's reference to Macbeth suggests the probability that they were to be used for purposes similar to the "grease, that's sweaten from the murderer's gibbet" which was thrown into the witches' cauldron.

neck of a person exposed in a public place would serve its purpose. There was no need of inserting in the sentence a provision that the label should not be reversed. The offender, if not under surveillance of the officers of the Court, would at all times be under inspection of those who would see to it that the sentence was carried out according to its intent. The label could not be reversed by himself without attracting attention, nor would it be permitted to remain so if when flapped about by the wind the wrong side chanced to be turned to the public gaze. When a case arose in 1634 in which it was deemed desirable to prolong the punishment no change was made in the method of attaching the label to the person, but the caution to the offender to wear it outward was a recognition of the fact that this method would permit a technical compliance with the sentence, which would nevertheless avoid most of its terrors.

In the interview between Arthur Dimsdale and Hester Prynne which took place in the forest, Hester "undid the clasp that fastened the scarlet letter, and taking it from her bosom threw it to a distance among the withered leaves." It did not need the novelist to show that other methods might be used to exhibit the letter than by suspending it from the neck or sewing it on the garment. The loose flapping label was destined to be superseded if the punishment was to be changed from temporary exposure in a public place to the constant wearing when in the presence of another.

The real step in the evolution of this punishment was that which converted a temporary humiliation into a permanent shame. The mortification experienced by the drunkard exposed in the stocks might lead to his reform, but to keep him constantly before the community as an example was a cruel and ineffectual punishment. The same disregard of the criminal in the attempt to make out of his case a warning which should impress the public

is to be found in a sentence imposed in 1642, in which the offender was first to be severely whipped in Boston, and then to have one of his nostrils slit as high as well may be, after which it was to be seared. He was then to be remanded to prison till he should be fit to send to Salem, where he was to be again whipped, and the other nostril was to be slit and seared. After that he was not to be allowed to go outside of Boston, and he was to wear a hempen rope about his neck, the end of it hanging out two feet at least. If found at any time without the rope in sight he was to be whipped.¹ It would seem as though the mutilation of this poor criminal would have rendered him sufficiently conspicuous without the added infamy of the rope perpetually about his neck.

This method of indicating a convict served the purpose in a general way, as well as the letter on the garment, and was occasionally made use of. Thus, in November, 1654, a man was sentenced to be whipped at Boston and at Watertown, and thereafter to "wear a rope about his neck hanging down two foot long."

If the failure of Hamilton to discover in the Devonshire Sessions any continuous sentences of this character be accepted as indicative that such sentences were not imposed elsewhere in England during the same period, it would point to the prevalence of a different tendency in the Mother Country from that which prevailed in the colonies on the subject of penal discipline. The Criminal Laws of England were severe, but banishment led the way to transportation as an alternative for the preposterous list of capital offences. Harsh penalties of maiming, like those of cutting off ears for slander or striking off the hand for libel, are to be found upon the statute books,² but the alternative of the fine and imprisonment was generally

¹ Massachusetts Colony Records, IV., pt. I., p. 212.

² Stat. at Large, II., 465, 1 and 2, Philip and Mary, Ch. III.

offered, and such acts if not extended, frequently expired with the demise of the Crown.

The branding on the brawn of the thumb provided for in the days of Henry VII.,¹ although it remained on the statute books until the reign of George III.,² was often administered in such a way that the law came to be regarded as an absurdity. Technically the penalty was enforced, but the branding irons were simply warmed, and in that condition pressed upon the thumb. Pike speaks of it as "a piece of absurd pageantry, tending neither to reformation of the offender nor for example to others." "By the time of Queen Anne," says Hamilton, "the multitudinous hangings, branding, and floggings which characterized the reign of Elizabeth had given way to a more settled and temperate system."

If the failure on the part of the English to develop the temporary labels into a continuous punishment means anything, it would seem as though it were in a line with the substitution of banishment for execution, and of the tendency towards a more settled and temperate criminal system.³

¹ Burn's "Justice of the Peace," I., 319.

² Pike says in his "History of Crime," II., p. 282, "Branding was not discontinued until the reign of George III.," but in the Appendix to the same volume, p. 645, he says, "By the Transportation Act of 1718, 4 Geo. I., c. 11, persons within benefit of clergy might be transported for seven years, instead of being burnt in the hand or whipped."

³ I am forced to draw my conclusions from a negative premise, *i. e.*, from failure to find instances of the punishment in question. This is of course unsatisfactory, as the thoroughness of my search may always be questioned. To reinforce my work, I sent a query to "Notes & Queries," and in response thereto received from Mr. Robert Blair, F. S. A., Secretary of the Society of Antiquaries of Newcastle-upon-Tyne, the following reply: "*Letter brands on Criminals* (Notes & Queries, 8 Ser., vii., p. 7.) At a meeting of the above-named Society [Society of Antiquaries of Newcastle-upon-Tyne] held in October, 1892 (Proc., Vol. V., p. 228) there were exhibited specimens of the letters A P for "Allendale Parish," cut out of red cloth which about a century and a half ago were worn on the left sleeves of paupers in Allendale, County Northumberland." My first impression on reading this was that it militated against the conclusions which I draw in the text, but on second thought I saw, that however cruel the Overseers of the Poor may have been in thus thoughtlessly marking the paupers under their charge, the affixing the cloth letter

In this onward march toward an amelioration of penal administration, the people of the Colony and their descendants have pursued parallel lines with the inhabitants of Great Britain.¹ As a rule I think it may be said that we have generally been in advance, but it seems to me that the evolution here of the letter penalty under the same circumstances which failed to develop it in England is a sign of an earlier awakening there to the fact that it is not necessary that all punishments should be humiliating in their character.

could not have been intended as a punishment. Mr. Blair adds to what I have quoted above: "This is the nearest answer I can give to your query, so far as the North of England is concerned."

¹It must be remembered, however, that two of the soldiers concerned in the Boston Massacre in 1770, were convicted of manslaughter and were branded. Judge Lynde describing this says it took place in the Court. His language is "being admitted to the benefit of Clergy, were burnt in the hand in the Court."



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