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EDITORIAL

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THE evidence is unmistakable that public opinion throughout the country looks upon the infliction of the death penalty with growing disfavor. This may be seen from legislation both federal and state. Early in 1897 an act of Congress was passed to reduce the number of cases in the Federal courts in which the death penalty may be inflicted. It provides that in all cases where the accused is found guilty of murder under the Revised Statutes of the United States the jury so finding may qualify their verdict by incorporating in it the words, "without capital punishment." The effect of these words is to reduce the sentence from death to imprisonment at hard labor for life. By virtue of the above act Thomas Bram, who has been again convicted of the murder of the captain of the barkentine *Herbert Fuller*, and his wife, will escape with his life.

A striking example of the tendency above noted is found in the action of the Ohio legislature, recently, in the passage of an act which provides that in capital cases the jury may recommend mercy in their verdict, whereupon the judge shall sentence the prisoner to imprisonment for life.

It will be seen that the effect of the above statutes and others of similar tenor is to leave the question of life or death wholly to the jury. That body not only finds the facts but virtually passes sentence in accordance therewith. The matter is removed entirely from the discretion of the court. It cannot be said that the discretion of the court is lessened—judges never have had any in this matter—but certainly the discretion of the jury is vastly increased.

Such legislation is fairly indicative of the growing prejudice in all sections to the infliction of the extreme penalty. The feeling that the state has no right to take a human life as a forfeit for crime seems to be gaining ground. At least the popular impression is that, granted so great a right to the state, it should be most sparingly exercised. Recent legislation has reflected this sentiment and the tendency seems to be to confine the right within narrow limits, making death the penalty only under circumstances which justify so harsh and rigorous a punishment.

The wisdom of the policy is an open question for the future to decide. It is midway between the extremes of the total abolition of the death penalty and its unrestricted infliction in capital cases, and may therefore appeal to advocates of both. It seems to combine many of their advantages.

* * *

A RECENT decision of the highest court in the land is important in that it will do much toward settling a mooted question. The Supreme Court of the United States has declared the Illinois Inheritance Tax Act, constitutional and valid, thus placing itself in line with what appears to be the current of modern adjudication. The court finds the Illinois act not peculiar to itself, and determines its validity upon the general principles applicable to such statutes.

The court holds that an inheritance tax is not one on property, but on the succession to property, that the right to inherit property is a creature of law, not a natural right, and therefore that the state, the authority granting the right, may limit it with conditions, as it sees fit.

* * *

BEQUESTS FOR THE SAYING OF MASSES.

THE courts of some of our States have been slow to get away from the rule of the English cases in which, under the amalgamated condition of church and state, bequests and devises for the saying of masses have been held void, as superstitious uses or creating perpetuities. But of four recent cases three decisions sustain, and only one denies, the validity of bequests for masses. The affirmative cases are Moran *v.* Moran, 73 N. W. 617; Hoeffer *v.* Clogan, 49 N. E. 527, and Harrison *v.* Brophy, 51 Pac. 883. These decisions are directly opposed to the English cases, although they are in harmony with the majority of the American decisions. In Festoraggi *v.* St. Joseph's Catholic Church, 25 L. R. A. 360, it is said: "Under

our political institutions, which maintained and enforced absolute separation of church and state, and the utmost freedom of religious thought and action there is no place for the English doctrine of superstitious uses." And the note to that case makes it very plain that no such rule or principle now obtains here. But opposed to the above decisions are those of the courts of New York, Alabama and Wisconsin. The grounds of these decisions vary. In New York charitable uses were abolished by legislation and in all valid trusts there must be a definite and certain beneficiary to take the equitable title. The Alabama court held that a bequest to be used in solemn mass for the repose of the testator's soul could not be supported as a charitable bequest. And the recent decision in McHugh *v.* McCole, 72 N. W. 631, was upon the ground that a trust to be sustained must be of a clear and definite nature and the beneficiary interest to every person therein must be fully expressed and clearly defined upon the face of the instrument.

So the decisions on this subject are not yet in accord. But the tendency of the American courts is all in the direction of sustaining the validity of these bequests. In the Wisconsin case the judge expressed regret that the intention of the testator could not be given effect because he had put it in the form of a trust provision. And in the Iowa case the court said: "It is not wise in such cases for courts to quibble about the technical trusts or beneficiaries. Results are of greater importance than technical names, and a bequest for a known lawful purpose, where the power of execution is prescribed and available, should never fail for want of a name or a legal classification, unless it is in obedience to a positive rule of law."