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TESTIMONY OF DEFENDANTS IN CRIMINAL PROSECUTIONS.

BANGOR, Me., February 24th 1866.

My Dear Sir,—I received a few days ago a note from my friend Governor Cony, advising me that you were desirous of ascertaining the practical working of the change in the law of evidence, recently adopted in this state, by which the accused in criminal trials are, at their own instance, made witnesses.

The opinions of individuals on this subject will be more or less influenced by their preconceived views as to the wisdom and expediency of the proposed change. I had no doubt that the interests of justice required that it should be made, and, so far as I had any influence, freely used it in favor of its adoption. Nothing has since occurred to change or even weaken my previous opinions. I have tried criminal cases in which the accused being innocent, owed his honorable acquittal in no slight degree to his own testimony, and the clear and frank manner in which it was delivered. In one case, notwithstanding the innocence of the prisoner, as was subsequently most abundantly established, and notwithstanding his own testimony, the jury found him guilty. So being guilty, and yet testifying to his own innocence, the jury in some cases have justly convicted, and in others have erroneously acquitted the prisoner.

But erroneous verdicts will occasionally be rendered, whether

the accused are admitted to testify or not, as long as juries shall be composed of fallible men. No rules of admission or exclusion of evidence can be established which will prevent misdecision. The results may not vary in many cases, whether the prisoner is received or rejected as a witness, but in all trials there will be a greater assurance of correct decision, and a greater confidence that justice has been done, than where evidence, and that perhaps of the greatest importance, has been withheld.

But the expediency of the law in question cannot be determined by the results of particular cases. It cannot depend on the opinions of individuals. It must rest upon the general reasoning applicable to the subject. All judicial decisions should be based upon evidence. All the evidence attainable and needed for a full understanding of the case should be forthcoming, unless the evils of delay, vexation, and expense, consequent upon its procurement, should exceed those arising from possible misdecision.

The exclusion of evidence is the exclusion of the means of correct decision. The greater the mass of evidence excluded, the less the chances of such decision, until, if all evidence be excluded, resort must be had only to lot.

It is but a few years since the most strenuous opposition was made to those changes in the law of evidence by which, in civil cases, parties and those interested in the result have become admissible witnesses. Those changes when proposed, struck with horror that class of minds whose conservatism consists in the love of abuses, and in the hatred of their reformation; a love and a hatred the more intense in proportion to the atrocity of the abuses existing of which the reform was attempted.

These changes have been made, and being made have received the general approbation of the entire judicial body in England; in this country with hardly an exception. Indeed, the wonder now is how any one ever could expect justice would be done when the very material—*pabulum justitiæ*—as Lord Bacon terms it, was withheld from those whose duty it was to decide.

The propriety of admitting parties being conceded, the question naturally occurs, Why should they not be received in criminal as in civil cases? The object in all trials is the same—the ascertainment of the truth. The greater the evils of misdecision in criminal than in civil cases, the greater the necessity of resorting to all

available sources of information for the purpose of averting those evils.

The truth is wanted from any and every source. The prisoner knows it. The law presumes him innocent. If regard be had to the legal presumption applicable to each and every prisoner, he should, being presumed innocent, be received to testify. Being innocent, he would not resort to falsehood to establish such innocence. Being innocent, and no other evidence of such innocence being attainable from any source, his exclusion is the exclusion of all possible means on his part of making out his defence. Being innocent, and other proof of the fact attainable, who does not perceive the importance of his evidence to explain all doubtful circumstances, so that he may not only be acquitted, but that the acquittal shall leave no stain behind.

Of all exclusions, that of a man presumed innocent would seem to be the most monstrous. Is he innocent, and shall he not be heard to establish his own innocence? Every motive, if innocent, is adverse to falsehood.

Is he guilty? His guilt is not proved. It may be that he is, but it is not to be assumed in advance, and the assumption made the ground of exclusion—an assumption at variance with legal presumptions.

If guilty, and he is a witness at his own instance, the objection will be made that receiving his testimony may lead to perjury. But the essential sin of perjury is the falsehood uttered, aggravated more or less by the occasion of its utterance.

The prisoner being guilty pleads not guilty. In so doing he utters a lie, just as much as when he makes a false answer as to any other fact about which he is interrogated. The prisoner being a witness denies in detail what before he had denied in the gross. In the one case, it is a lie without, in the other it is a lie with circumstances. It is idle to say that the falsehood in its generality is not equally a lie as when it is compounded of many particulars.

True, in the one case the prisoner is under oath, in the other he is not. But the falsehood is the essential sin, and it exists as much in the one case as in the other. The superadded ceremony may affect the legal but it cannot the moral character of the falsehood.

The obligation to utter the truth is of universal application.

Undoubtedly, the prisoner being guilty cannot defend without the utterance of a lie; but if he cannot it may be a very good reason why he should not make the attempt, but a very poor one why he should lie. No one who would not deprive a prisoner of the right of self-defence, even by uttering a falsehood by way of plea, can consistently object to giving him the right of denying, explaining, or qualifying the charge as a witness.

The prisoner guilty, upon examination and cross-examination, may utter the truth. If so, justice is done. The great object of judicial proceedings is accomplished.

Suppose the prisoner answers falsely, it by no means follows that his false answers will be credited. But the possibility of false testimony is no reason for exclusion. To exclude a witness because he may lie, is to exclude all witnesses, because there is no one of whom the truth can be predicated with assured certainty against the pressure of all conceivable motives acting in a sinister direction. The exclusion presupposes guilt which the law does not presume,—and probable perjury to sustain such guilt—two crimes: one committed; the other to be committed by the very person whom the same law presumes guilty of no crime whatever.

To exclude for presumed guilt is to determine in advance and before hearing, and adversely to the prisoner, the question in issue. It is, when the question of guilt or innocence is on trial, to exclude for guilt before guilt is or can be ascertained. The presumption of innocence logically requires the admission of the innocent.

But guilt is no ground of exclusion. The law admits the avowed accomplice, expecting a pardon, his pardon dependent upon the delivery of inculpatory evidence against the prisoner, whose innocence is a presumption of law. Admitted guilt received and heard; presumed innocence refused a hearing. Crime then constitutes no reason for the exclusion of a witness. The real ground of exclusion is that he is a party to the record. So that the participant in crime is heard, while the presumedly innocent party to the record is rejected, and for that reason alone. But the mere fact that a man's name is on the docket of a court, is no very good reason why his testimony, when required for the purposes of justice, should for such cause be rejected. In civil cases it has been deemed insufficient; much more should it be in criminal cases.

So, too, the law looks with great suspicion upon hearsay evidence. In the case of hearsay, whether confessional or other, there are at least two, and there may be more, witnesses whose conjoint testimony, original or reported, serves as the foundation of judicial decision. When the percipient and narrating witness are united in one and the same person, if he speak the truth and be believed, he determines the cause. In hearsay the narrating witness is not the percipient or effective witness: he speaks or purports to speak from the narration of others, and those others are the efficient witnesses. When the alleged confessions of a prisoner are received, *the efficient testimony consists in the statements thus reported.* But these confessions may have been misunderstood in whole or in part from inattention, misrecollected from forgetfulness, or misreported from design. They may be indistinct and incomplete, embracing but a portion of the truth; and the omissions which interrogation would have supplied, may produce the sinister effect of falsehood. The sanction of an oath and the securities to trustworthiness, afforded by examination and cross-examination, are wanting. Yet this very evidence thus seen to be inferior in trustworthiness is received, while the party present in court is not permitted to correct the errors of the narrating witness, whether arising from inattention, misrecollection, or design, nor if the confessions were indistinct or incomplete to supply the deficiencies arising from such indistinctness or incompleteness, and that too when under oath and subject to examination and cross-examination.

The securities against testimonial falsehood are the sanctions of religion, examination and cross-examination, and the fear of temporal punishment. These are all wanting in confessions, *as against the person whose confessions are offered to his prejudice.* They are attainable, and attained in all their strength, if the prisoner is examined.

The result is, that the *prisoner would be a witness in both cases.* In the one case without any of the securities for testimonial trustworthiness, *he testifies through the lips of the narrating witness by whom his confessional utterances are reported.* In the other case, when his testimony would be delivered under all the recognised safeguards against falsehood, it is rejected. Without any securities against falsehood, incompleteness, or indistinctness, the party is a witness; with every one attainable in their

utmost efficiency he is excluded. Testimony recognised as inferior in every essential of trustworthiness is received, while the best evidence—the direct statements of the party under oath and subject to examination and cross-examination, are rejected.

The accused may lie, and the jury may be deceived thereby. While there is no witness whose statements may not be false, so there is no witness to whose statements, true or false, it can be made certain in advance that the just degree of credence will be given by the jury.

But what is the danger of deception? The prisoner is a witness at his own instance. Does he answer evasively, or, being cross-examined, does he refuse to answer? Silence may be equivalent to confession; evasion indicates that a true answer would endanger the person interrogated. Is the witness false in all his statements? Each particular falsehood endangers; the more numerous the falsehoods the greater the chance of detection and disproof. The answer partly true and partly false? Each truth is in eternal warfare with the accompanying lie. Truth and falsehood have no greater fellowship than has new wine with old bottles. The truth uttered by the witness imperils the lie. Every truth he utters endangers himself. Every truth uttered by another, every true witness, increases his peril. The refusal to answer, the evasive, the false answer, the not less significant and expressive silence, are each and all circumstances of no slight force in leading the minds of those who are called upon to decide to a right conclusion.

The jury may, undoubtedly, place too great reliance upon the testimony of the prisoner, as they may upon that of any other witness. They are deemed competent to weigh and compare the various witnesses for and against the prisoner. Are they any the less competent to weigh his? Does his position add to his credibility? Are the circumstances which surround him such as to induce undue credence? Competent to weigh the testimony of parties in all civil cases, does that competency vanish when the prisoner on trial is called from the criminal bar to the witness-stand? The appearance and manner of the prisoner, the probability of his statements, whether contradictory or contradicted, are all open to the consideration of the jury, and they are as competent to form a correct estimate of his testimony as of any other witness.

Hearing cases by the halves is but a bad way of getting at the truth. To receive the prosecutor and reject the prosecuted, to hear the accuser and refuse to hear the accused, would undoubtedly tend much to facilitate decision and relieve the judge of fact, of the difficulty of weighing and comparing conflicting testimony. Still greater would be the relief from labor and responsibility if no evidence was heard, and resort was had to the aleatory chances of the dice. This aleatory mode of deciding cases seems to have tickled the fancy of Rabelais, according to whom Mr. Justice BRIDLEGOOSE resorted to chance, "giving out sentence in favor of him unto whom hath befallen the best chance of the dice." But it is hardly worth the while accurately to adjust and carefully to determine the relative merits of trying cases by halves, and of deciding them by the throwing of dice.

In my judgment, the interests of justice require the admission of the party alike in criminal as in civil cases. The acquittal of innocence is thereby more probable; the conviction of guilt more assured. The prisoner, if innocent, will regard the privilege of testifying as a boon justly conceded. If guilty, it is optional with the accused to testify or not, and he cannot complain of the election he may make. If he does not avail himself of the privilege of explanation, it is his fault, if by his own act he has placed himself in such a situation that he prefers any inferences which *may* be drawn from his refusal to testify, to those which *must* be drawn from his testimony, if delivered. If he testifies, and truly, justice is done. If falsely, and justice is done, however much he may complain, the public will little heed his regrets.

I have hastily called your attention to some of the considerations bearing on this question. They will be found most elaborately examined in the masterly work of Bentham on the "Law of Evidence," where the reasons for the proposed change are stated with a cogency of argumentation unanswered and unanswerable.

I am, with great consideration, yours most truly,

JOHN APPLETON.

JOHN Q. ADAMS, Esq.,
House of Representatives, Boston,
Chairman of the Committee on the Judiciary.

We have received the foregoing copy of Chief Justice APPLETON'S letter, upon the propriety of admitting defendants in criminal cases to give testimony, on their own behalf, if they so elect.

The letter was addressed to the Committee on the Judiciary, at their request, and its suggestions adopted by them, and reported to the House of Representatives, in the form of a bill, which is expected to become a law of the Commonwealth of Massachusetts.

The suggestions of the learned Chief Justice are received by the profession with great interest and respect, upon all subjects, but especially in regard to evidence, which he has made a specialty for many years. The author is an acknowledged advocate of Law Reform in the department of procedure and practice, and his thorough and conservative manner of handling these important questions, has attracted deserved attention and regard, upon both sides of the Atlantic. His able letter to Mr. Sumner, in regard to the Right of Equality before the Law, for all races and classes of men, was republished in the London Review of Jurisprudence, the leading law periodical in the British Empire; and many of his other articles have attracted more attention in Europe than those of almost any other American law writer. We have thought, therefore, that we could not do the profession a more essential service, than by reproducing this letter in our own pages.

The views of the author upon this and kindred subjects have one very important merit, in our estimation, which we are not often able to perceive, in the same prominence, in the suggestions of most other advocates of legal reform. For the most part, and especially in this country, legal reform, although professedly carried forward under the attractive sobriquet of abrogating time-honored abuses, and restoring simplicity and truth, has, fortunately or otherwise, fallen into the hands, for the most part, of a class of persons, who seem to be oppressively pervaded with a sense of false sympathy, for every one who comes in any way under the restraints or censures of the law. With that class of men the grand aim seems to be, to devise some scheme whereby every man will be able to set the law at defiance, and successfully to resist its ministers. This may seem an overstatement of this view of the question, but we sincerely believe it is not.

Law reformers of this class assume in the outset, that almost every man who comes under the censure of the law is really innocent, and being so, the desideratum is, to bring such appliances to bear upon his case as will insure an acquittal. It is with this view, that the admission of defendants in criminal cases to testify

in their own behalf has been advocated; chiefly, as we believe, because it is expected that in this mode, every innocent man will be enabled to escape conviction. And as the law presumes every man innocent until convicted, many have so roused their humanitarian sympathies in behalf of the unfortunate class accused of crime, as almost to desire their universal acquittal. It is this class of law reformers that has rendered the whole subject, so far as it applies to criminal procedure, distasteful and almost disgusting to men of conservative sympathies, and who have had much experience in the administration of criminal justice.

With this class of law reformers Chief Justice APPLETON can have no sympathy. He believes that most men accused of crime are veritably guilty, and that they should be legally convicted and punished; and like a sensible man, he advocates the admission of defendants in criminal cases to testify in their own behalf, if they so elect, because he expects, that under the operation of such a law, the guilty will be more sure of conviction and punishment, and that the innocent will be more sure of escape; a result which every good man ought to desire. And we believe he is entirely right in his estimate of the effect of such a statute, and especially in regard to the guilty. For, whether they accept the proffered privilege or not, the effect will be almost sure to quicken the tendency toward, and to increase the certainty of their conviction. And it is in this view only that we should feel prepared to give our adhesion to the proposed change; and it has also been from our thorough conviction that it must and will have the effect to secure the conviction of many, who would otherwise have escaped, that we have hesitated in regard to so radical a change. We have all along had doubt, whether this is not virtually compelling a guilty man to give evidence, upon his final trial, against himself. For although the act in terms leaves the matter to his own election, no one can be so simple and unsophisticated, as not to comprehend, that if the respondent has the right to give testimony in his own behalf, and declines to avail himself of the privilege, it cannot fail to have almost the same effect as if he had given testimony against himself. The effect of the act therefore is, practically, to require defendants to testify in criminal cases of every grade, which is so essential a departure from the spirit and principles of the English law, that we should hesitate about adopting it. It is tendering the accused an alternative which, if he is guilty, he

can neither accept or decline, without detriment, of a fatal character, to his cause. But we feel no disposition to discuss the matter further. The surest test will be to try the thing, and we apprehend that is the only test which will satisfy the public mind in America upon the point.

If the statute should operate severely upon criminals, we should expect a great public clamor against it, and its consequent repeal. Those classes in our American society which hold the balance of power in the country, are not always overscrupulous in regard to the measures which they support, or the interests which they serve. The better-disposed portion of law-loving and law-abiding citizens may now feel that such a law will be convenient, in order to suppress vicious practices, in regard to drinking-saloons and gaming-houses. But when these same moral and pious people come to see that they are thereby in danger of losing so many voters, that they will soon be in danger of losing power themselves, the edge of their zeal will become very essentially blunted.

We have within the last few days received an intimation from a source entitled to the highest regard, that what one of our contributors said in the January 1866 number of the Register, p. 138, as to the reason for repealing this law in Connecticut, that it was done on account of the general prejudice against the law in that state, is altogether a misapprehension. Our present correspondent says: "So far as I ever knew, prejudice had nothing to do with the repeal. That law had one year's trial. The impression with the profession and the judges was, that mercy to the accused demanded its repeal. And I think I may safely say, that those usually denominated criminal lawyers * *, were loudest in calling for a repeal of that act. If the accused testified, the jury were told that a man who would commit a crime would lie to get himself clear; and the jury would think so and disregard his testimony. On the other hand, if for any reason the accused did not avail himself of the privilege of testifying in his own favor, the jury were told he might have done so, and would were he not conscious of guilt; and the jury would say so too." * * * "The repeal [right or wrong] was, therefore, the result of the one year's *experiment*, and not of mere prejudice,"—as asserted by our former contributor. We confess to a strong inclination in favor of the soundness of the view of our present correspondent.

We regret that our present correspondent should have felt any annoyance at what he calls "a fling at the whipping-posts on Fairfield Common," contained in the article of our former contributor, as if it might be regarded as a reproach to the noblest of the Old Thirteen—Old Connecticut—that she had not dug up her whipping-posts sooner, when they all stood for the double office of "town-posts" as well. We assure that gentleman that the last thing we should ever think of countenancing, would be an intentional insult to the state of Connecticut—the bluest and the best of all the Old Thirteen, in our humble estimation. We honor and love her most sincerely, with all her faults, and not the less for her repeal of this statute, and for the reason assigned as well as the fact. Justice to the accused, and reasonable forbearance in the expedients resorted to for convicting, will always enable a state the more rigorously and unflinchingly to enforce the punishment of offenders, after they are convicted.

Our own experience has long ago convinced us, that it is better to give the accused every reasonable ground to secure a fair and thorough defence, and then the public will acquiesce more readily in the infliction of punishment, to the full extent of the law. Facilities for convictions will prove of little avail, if the hand of the executioner and of the executive officer, in every department, is to be paralysed by a maudlin sympathy with the *offender* the moment he becomes a *convict*. I. F. R.

RECENT AMERICAN DECISIONS.

Supreme Court of Missouri.

HANNIBAL AND ST. JOSEPH RAILROAD CO. *v.* HATTIE HIGGINS BY ELIZA HIGGINS, HER GUARDIAN.

Primâ Facie Presumption of Cause of Injury to Passengers.—The Statute of Missouri giving a remedy to the representatives of a passenger killed upon a railway train, goes upon the same principle which before obtained in regard to injuries to passengers, that such injury or death *primâ facie* results from want of due care in the company.

Proof of the Cause of the Injury admissible.—This presumption is not conclusive under the statute, but may be rebutted by evidence of the cause of the injury.

Distinction between Employees of the Company and Passengers.—One who had been in the employment of the company as an engineer and brakesman, until his