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TESTIMONY OF PARTIES IN CRIMINAL PROSECUTIONS.

SOME eight years have elapsed since the writer published in these pages some reasons, which presented themselves to his mind, in favor of repealing the rule of evidence which prohibited parties to lawsuits from testifying in their own behalf. This was a subject then strongly agitating the mind of the legal profession in the state of New York, and in the spring of 1857, the contemplated change was effected, and ever since, parties to civil suits have stood on the footing of other witnesses in the courts of our state. It is confidently claimed that the change worked a great reform. Occasionally an ex-judge or lawyer of a very old school may be met, who, although he sees the manifest convenience and justice of the new enactment in every suit that he tries, yet is so wedded by habit and association to the old rule, that he experiences a pang at parting with it. He feels, at best, like an invalid who has obtained a release from a chronic tumor or wen—a strange sense of freedom, a constrained sort of relief. He misses the accustomed exercise of his ingenuity in the picking up of shreds of fact from those but remotely connected with the subject of the litigation, and having but an imperfect knowledge of it, and the dexterous weaving of a thousand threads together into a web, (how often "of the whole cloth,") while in the bosom of his client all the time rested the complete and perfect knowledge, which he was not permitted to disclose. He is terribly tried about "total de-

pravity," and man's natural bent towards falsehood. And therefore he gravely shakes his head (not that there is anything in *that*, as an eminent British advocate once said of an antagonist who indulged in the like dumb show), and sighs—*acti temporis laudator*—for the good old times of chancery, common law pleading, and pay by the folio, and everybody as witnesses except those who knew something about the subject-matter;—the days when law was an expensive and narrow monopoly, rather than the great conservator of order and the champion of truth. He will not give you any reason for his faith: he has none. He simply runs into the formal rut of cant, and rehearses phrases to you such as the judges use when they decide without a reason: "the exercise of a sound discretion," "the danger of innovation," or, "man is at best but a fallen and unreliable creature." There is not a great deal of this idolatry of the dead rule, for the public opinion is overwhelmingly in favor of the present practice. It is seldom that an acting judicial officer can be found who does not heartily approve the reform, and unhesitatingly avow that it has saved the time of the court and of parties, has simplified the trial of causes, has discouraged dishonest litigation, and has promoted the elucidation of truth. And if a vote could be taken to-day upon the subject, among our profession, at least nine out of ten would hold up their hands for a continuance of the rule as now administered. Indeed, we doubt whether any sane man can be found in our state who would be willing to return to the old system.

But reform is progressive, and the active mind of the nineteenth century is already agitating the inquiry: "If we make parties to civil suits witnesses for themselves, why not permit the defendant in criminal proceedings to testify on his own behalf?"

There was some show of reason in a rule which enacted that *both* parties are disqualified from testifying on their own behalf; there was some faint sense of justice in it; it seemed at least impartial. But it must be remembered that in criminal actions only *one* of the parties is disqualified. The people may always be heard; *vox Populi vox Dei* in courts of justice; but the defendant is infamous—let his mouth be closed. And so we see presented the extraordinary spectacle of an interested man testifying against his neighbor who cannot open his mouth in exculpation. Who can tell how often revenge or avarice may impel to perjury or prevarication, and the consequent punishment of inno-

cent men? In every criminal proceeding the prisoner is set up as a mark for the arrows of the public prosecutor, with all his crowd of clients behind him, while the accused is compelled to be dumb.[1]

Now is there not a manifest discrepancy between the theory and the practice of the law? The theory is, that every person accused of crime is to be presumed innocent until convicted. But the practice too often is to consider him as both guilty and infamous until he shall satisfactorily establish his innocence. In pursuance

[1] A recent case in England having attracted much attention, we give a statement of it, condensed from the London Law Times of September 30th 1865, and subsequent numbers, as a strong illustration of the remarks in our text.

A Madame Valentin had lived for thirty years with a merchant of Bordeaux, who, on his death, gave her, as she alleged, certain railway shares of considerable value. His heir, one Madame Bouillon, disputed the validity of this death-bed gift, charged Madame Valentin with obtaining the shares surreptitiously, prosecuted her before one of the tribunals at Paris, obtained a conviction and a sentence of six months imprisonment. The railway stock having been brought to England, the question was again raised there in the form of an action in the Court of Exchequer. The trial lasted five days, and Madame Valentin succeeded in practically reversing the decision of the Paris court and establishing the validity of the gift to herself. While these proceedings were pending Madame Valentin went to England for the purpose of selling a portion of the stock, accompanied by a man called Lafourcade. After a while she quarrelled with him, and he then allied himself with the other party. He made an affidavit alleging that Madame Valentin intended to leave England. She was arrested under the Absconding Debtors Act, and not being able to find bail, was committed to prison, where she lay for five months, until the trial by the Court of Exchequer and the verdict in her favor discharged her. She then prosecuted Lafourcade for perjury in the affidavit that had obtained her arrest. He was convicted and sentenced to eighteen months imprisonment. Upon this the other party took the like proceeding against her, and prosecuted her for perjury for having, in her evidence at the trial, sworn that she had never threatened to leave England, as Lafourcade had alleged. She was in turn convicted, and thus was exhibited the extraordinary spectacle of two persons convicted and punished for perjury in a transaction in which it is quite certain that both could not be guilty. In the one case, the prosecutor being heard and the prisoner's lips sealed, the story of the former is believed. In the other they have changed places; the prosecutor is now the prisoner, and the prisoner is prosecutor; the story of the latter is heard but not that of the former, and again there is a conviction, although utterly inconsistent with the former conviction, when the position was reversed.

There being no court of appeal or other legal mode of righting such a case in England, resort was had to the clemency of the Crown, and Madame Valentin received not an acquittal, to which she was of natural right entitled, but a *pardon* for a crime of which nobody believed her guilty, and of which she, in all probability, would never have been convicted had she been allowed to be heard in her own defence.

of this corruption of the theory in many of our states (but not in our state, thank Heaven!), if one is accused of selling liquor without a license, or smuggling a few pounds of tobacco across the frontier, he is put in a pen surrounded by a spiked railing, and a sulky individual is stationed at its door, with a long pole, to frown upon his counsel when the accused whispers suggestions in his ear, and to say, in effect, to the public: "Look upon this malefactor." And yet, Law, in the person of the grave and learned judge upon the bench, will say, upon request of the prisoner's counsel: "Oh yes, to be sure; gentlemen of the jury, the burden is on the district attorney to prove the prisoner's guilt; the law presumes his innocence; you must have no reasonable doubt that he committed the crime;" and then the jury turn their eyes from his honor to the prisoner, and in his humiliating position they see a practical contradiction of the law's benignant theory. The writer never enters a country court-house and sees one of these detestable pens, without a strong desire to huddle our legislators into it, and try them for inconsistency, inhumanity, and indecency, without a presumption in their favor! And is not the rule we are considering just as effectual a contradiction of the theory of the law? They have come down to us together from darker ages, and they both deserve the name of barbarisms.

It must be remembered that the writer is appealing only to those communities which have abrogated the common law rule in regard to parties in civil suits, for his remarks can have no application to those localities where the rule is unchanged. But in the former, is it not the topmost height of inconsistency to let John Doe testify in his own behalf, when sued by Richard Roe to recover the value of a pair of chickens sold and delivered, and yet prohibit him from testifying, when Richard Roe complains that he stole the aforesaid chickens? John may say anything he chooses to avoid paying a few paltry shillings, but when the charge is of larceny, and disgrace and dishonor are threatening himself and his family, and the penitentiary stares him in the face, the tender and benignant law says:—"Oh no, John, that would never do. We cannot allow you to say that you were not there, or that you had bought the chickens, and merely went to fetch them away, or anything else tending to clear yourself; for you see, John, it would be against public policy and the old and well-established rule of evidence, and would work great injustice, and tend to promote perjury;

for you, being complained of for stealing a pair of chickens, cannot be expected to speak the truth under oath, so great is the depravity of human nature. We are sorry for you; you are unfortunate; but the law is inexorable; and as for your family, if they shall become needy, we have in our tenderness provided an asylum for them in the almshouse." And so it goes—John to the jail, and his family to the poor-house;—and the judge pulls down his spectacles and calls the next case, with a severe dignity and an unimpassioned voice, apparently and really unconscious that he has been assisting in the perpetuation of a great error and accessory to a monstrous injustice. A judge of New York—no less an historical personage than he whom Irving has immortalized as the "great congressman"—was once called on, in the discharge of his official duties, to sentence a negro slave, owned by one of his neighbors and whom his honor had known from boyhood, for some trifling offence. "Stand up, Zingo," said his honor; "what have you to say why the sentence of the law should not be pronounced upon you?" The criminal, frightened out of what little wit nature had given him, commenced stammering in a painfully confused manner, "Why—massa—massa—Knickerbocker—" "Not a word, Zingo!" interrupted his honor, "not a word!" and sentence was pronounced. And so it is every day. The law demands of us to prove our innocence, but shuts our mouths when we essay to speak it.

That which we here complain of is, that the law has not upon this point the merit of consistency. We are not now considering the question in the aspect of policy. The only theory upon which the testimony of a party to a civil action was excluded, was, that it was taken for granted that if he stated anything favorable to himself, it must necessarily be perjury; and that can be the only theory upon which to base the exclusion of his testimony in a criminal proceeding. There is no hesitation in courts in receiving admissions or confessions of persons charged with crime; we are always ready to accept a plea of guilty; we are never skeptical about a man's story when it bears against him; it is only when he tells us something which makes for him that we hesitate, and the reason can be no other than that which we have intimated. But having discarded the theory in the one case, we must also do it in the other, if we are to be called consistent. The reason of the exclusion having ceased any longer to commend itself to our

minds in the former instance, we ought no longer to allow it to prevail in the latter.

But we assert that the law has never been consistent in its *administration* of the rule as to criminals, even if it be admitted that the rule is just and expedient. There *is* one instance in which the criminal is permitted to tell his own story, and that is before the examining and committing magistrate. "Zingo" may here say why sentence should not be pronounced upon him; but he must be careful, for the privilege is two-edged and cuts both ways, and oftener, in the hands of officials, is turned against him than against his accusers. Here, then, he may *state*—not *testify*, for his testimony, of course, would be a lie—but *state* whatever he has to say in exculpation. And what he says is gravely written down, and this statement may be read in evidence, upon the trial, *against him*, if the district attorney pleases; and as it contains all that he stated, some things favorable to himself, or intended by him to be so, must necessarily come out before the jury who sit to try him, and that without the sanction of an oath. So that after all, the law does permit the prisoner, in this second-hand manner, to present his exculpatory statements to the jury upon his trial, and these exculpatory statements are received without possessing, even in form, the sacred character of statements made under oath. Now, if the prisoner may be heard, unsworn, before the examining magistrate, why not before the jury, after having taken the oath? If he is to be in the least credited before one judge, will the presence of twelve additional judges corrupt him? Or is it the oath itself that inspires him with deceit and falsehood? If he is to be heard at all, why not at all times and places? If his statements are receivable to influence the magistrate in holding or releasing him, why should they not be received in the form of legal testimony to influence the jury in convicting or acquitting him? Is there any objection to the jury's judging for themselves from the bearing and demeanor of the accused, under oath, of the probable credit due to his statements before the magistrate? Can it be true that the real object of the law in permitting prisoners to make their statements before the magistrate, is to set a trap to catch unwary, unadvised, ignorant, or confused defendants, by giving the district attorney the right to use the statement on the trial, and not giving the same privilege to the accused? In any view, we urge that here is a great absurdity. The law sees the

injustice of striking the accused utterly dumb, and therefore tolerates an exception to its rule. Precisely so did the law make many exceptions to the rule in civil suits from the necessity of things. And a rule to which so many and such important exceptions are necessary or expedient must itself be unnecessary and inexpedient.

But this is not the only practical inconsistency of which we have to complain in this regard. Let us remember that the object of the law is to develop truth, and that the reason assigned for the exclusion of the accused is, that the accusation itself renders the accused unworthy of credit. Now there happen to be two indicted for the commission of a joint offence. The public prosecutor finds it impossible to convict either of them by extraneous evidence, and therefore offers one, that if he will confess the crime and inculpate his accomplice, he shall go free and his accomplice alone shall pay the penalty. Here is a very strong temptation for an honest man, wrongfully accused, and what rogue could withstand it? Legal grace does its work, and the scoundrel of the spiked pen is translated to the witness-box, and we send his accomplice to prison on his testimony. Here the testimony of a man is received, not only when charged with crime, but when confessedly guilty. True, here and there the books say he must be corroborated, but in practice this is more matter of form than substance, and a jury seldom fails to convict on such evidence. Is the law quite as punctilious here as in the case under consideration? The object ought to be to ascertain the truth. But suppose the prisoner appealed to for "state's evidence" should offer to give a narrative consistent only with the innocence of both himself and his fellow-prisoner; would the district attorney produce him, think you? Oh, no; the depravity of human nature then suggests itself to Mr. Attorney's mind, and he declines ministering to it. It will be noticed that the witness is depraved if he claims to be innocent, but pure if he confesses his guilt. The law will not listen to either of the accused as prisoners, because they are not to be believed; but it will select one of them and offer him a premium, if he is really innocent, to become a perjurer at the expense of his companion. In the one case, it perchance refuses to hear the truth; in the other it offers inducements to men, possibly honest, to degrade themselves.

The rule of which we are speaking sometimes produces in prac-

tice very ridiculous and amusing results. Noakes and Stiles have a quarrel in the street; they come to blows; each supposes his antagonist in fault; each starts instantly for the police justice, to prefer a complaint for assault and disorderly conduct; Noakes, having longer legs or better wind, arrives first and procures a warrant against his adversary, who comes panting into court, shortly after, just in season to find himself in the custody of the constable, an infamous man, and not allowed to raise his voice in his own behalf; and so he is fined. Next day the parties meet again, and have a repetition of the quarrel, and each supposes the other to blame as before; again they start for the temple of justice, but this time Stiles, having improved by his training, or discovered some short cut, turns the tables on the agile Noakes, and renders *him* infamous and unworthy of credit; and therefore this time the fine is imposed on Noakes. Thus a man's credibility may sometimes depend upon the length of his legs or the soundness of his lungs. But let us suppose that in the case we have mentioned, Noakes now brings a civil action against Stiles for the same cause, even after his conviction; then both Noakes and Stiles are competent witnesses on their own behalf, and it is entirely competent for the civil tribunal to render a decision entirely at variance from that of the criminal tribunal. So, in the first instance, the law, refusing to hear Noakes on account of his infamy, punishes him on the testimony of Stiles; in the other, having heard both the parties, it refuses to punish him at all, but subjects Stiles to damages and costs for the very same transaction, and that after Noakes has been rendered "infamous and unworthy of belief," on account of the criminal proceedings, charge, and conviction.

But to take a more serious, but not more possible view, the practical working of this rule will be found equally objectionable, in a variety of instances, in regard to which there is hardly room for controversy. A case of very frequent occurrence in our courts is the accusation of rape. In many, and perhaps a majority of instances, the allegation is made by ignorant or obscure women against men of fair reputation, who, up to the hour of accusation, have stood as persons of probity and respectability. In this kind of proceedings there can generally be but one witness, and that the complainant, and as a general rule it may be said that there can ordinarily be but one question, and that of consent, for the accuser usually has the first necessary element to the offence sub-

stantially undisputed and acknowledged. But the question of consent is a close one, depending upon nice shades of action and meaning, and it behooves the law, where there is such an ample field for the operation of fraud and conspiracy, to exercise extraordinary caution. Here, then, it would seem, there is an example of great hardship in the enforcement of the exclusion. Can there be any doubt that in at least half these cases the statement of the accused would materially modify the narration of the prosecutrix and reasonably shake her credit in the minds of the jury? But it is not permitted, and the life or the liberty of the unfortunate accused is at the mercy of a designing, a revengeful, or a corrupt woman.

There is yet another class of cases in which it would seem eminently proper to admit the testimony of the accused, and that is when the *corpus delicti* depends upon the *animus* of the defendant, or rather upon his knowledge of extrinsic circumstances and the reasons that operated on his mind at the time of the transaction. Perjury sometimes presents an example of this description. Here the jury are often expected to peer into the mind of the accused, and form an opinion as to whether or not he knew the falsity of that which he averred under oath. What objection can be raised against allowing him to testify concerning his knowledge and his belief at the time of his original testimony, and subjecting him to a critical cross-examination upon the subject?

Again, in cases where the accusatory evidence is strictly circumstantial. It is an old dogma that "circumstances cannot lie," but experience has shown that they sometimes do "lie" as grossly as "figures." Although not an every-day occurrence, yet once in a while, an innocent and reputable man has been environed by a network of circumstances, apparently damning, and yet time has developed a theory entirely consistent with his innocence. We care not how seldom it occurs; it is sufficient if it can ever occur. The law ought to guard as far as practicable against the possibility of injustice. It is better that a thousand guilty should go unpunished than that one innocent man should suffer. If the testimony of such a man, under such circumstances, can throw any light upon the transaction, surely the jury ought to hear it and judge of it.

We can imagine—many of us have seen—frequent instances in which court, jury, witnesses, officers, and spectators would unite

in saying that the prisoner ought to be allowed to testify. If there is or can be one such instance, the exclusion should be done away in all. The law draws no distinctions as to circumstances in this respect. The law "is no respecter of persons." Its rules are for all men, in all places, and at all times, or ought so to be. The test should therefore be *credibility*. And the question of credibility should always be submitted to the jury. If the accused is unworthy of credit, they will not believe him; but if his testimony and bearing commend themselves to their belief and respect, they ought to and will believe him. And here let us add, that in our opinion, the cross-examination of an accused person would greatly tend to the development of the truth. If innocent, he will not be shaken or confused. If guilty, to use the expressive words of Chief Justice APPLETON in speaking of this subject: "His truths and his falsehoods are alike perilous. He is pressed by question upon question. He evades or is silent. Evasion is suspicious. Silence is tantamount to confession." And thus, instead of promoting error, we enlist a new agent in the service of truth.

We are aware of the great prejudice in the minds of men on this subject. So great is this prejudice that they are not disposed to give fair scope for the experiment. Thus in Connecticut, where the legislature, in enacting a law authorizing parties in civil actions to testify on their own behalf, inadvertently made the provision so broad as to cover criminal proceedings, the legislature repealed the obnoxious portion of the enactment the very next year. And yet the member for Fairfield, while on his way to the station to take the cars for the capital, where he should in his seat vote for this repeal, might have seen the well-preserved whipping-post on Fairfield Common, directly in front of the ancient and honored temple of justice, and drawn from the sight a useful lesson on reform. Then in our state, where the legislature last winter modified the pre-existing law on this subject, which allowed parties to civil actions to be sworn, so that to-day it clearly embraces criminal proceedings as well as civil suits, yet judges are found so timid as to reject the proffered testimony of the accused in criminal cases, and for no better reason than that the legislature "could not have intended to do such a dreadful thing."

In the state of Maine, where the sun rises, the law-makers, in 1859, passed an act enabling the respondent in any criminal prosecution for libel, nuisance, simple assault, or assault and battery,

by offering himself as a witness, to testify; and in 1863, the provision was extended to all criminal proceedings whatsoever. This extension of the rule is a strong argument in its favor, derived from practical experience. And Chief Justice APPLETON, in his admirable letter on this subject (published in these pages in August last), which deserves to be written in letters of gold, says of these changes: "So far as I can judge, they are favorable to the ascertainment of truth—the great end for which judicial proceedings are instituted." "I anticipate from the change proposed a greater certainty of correct decisions in criminal proceedings. The guilty will be less likely to escape. The danger of the unjust conviction of the innocent will be diminished."

A great many other reasons might be advanced to show the expediency of establishing a new practice on this subject. But perhaps to adduce them would answer no useful purpose. And after all, we are advocating no new thing. It is a remarkable fact that argument on this topic is needed in no language save the English. In no civilized countries on the face of the globe save those where the English language is spoken, is a person accused of crime prohibited from testifying in his own behalf. In all countries, except those which boast the superior civilization and culture which have given the Anglo-Saxon his merited supremacy in the affairs of the world, the accused is allowed, and even required, to submit to the tribunal before which he stands for trial, his own version, explanation, or denial, and these are received and considered, and are awarded such credit as they are worth. How is this? Is the English tongue peculiarly "to falsehood framed?" Or is it because our law-reform has not kept pace with that of other countries? Have we not confined ourselves too closely to narrow reasonings upon human depravity, and the unreliability of human testimony, and lost sight of the fact that we have provided a competent tribunal to judge of its reliability? But it is not too late to reform our practice. Error is not any more respectable because it is hoary. "The eternal years of *God*" belong to truth alone. It will not do to say that the men of the nineteenth century have no conscience. It now lies with the lawyers of our country to agitate and consummate this needed amelioration. They have always been the recognized champions of men's rights, and the redressers of their wrongs, and to them the world looks, and on them it calls, to establish just, consistent, and equal