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TESTIMONY OF PARTIES IN CRIMINAL PROSECUTIONS.

Mr. Chief Justice Appleton, of Maine, under date of February 22d 1865, wrote a letter to the Hon. D. E. Ware, of Boston, which appeared in the Register of August following, wherein he states that the legislature of Maine in 1859 passed an act by which any respondent in any criminal prosecution for "libel, nuisance, simple assault, assault and battery," might, by offering himself as a witness, be admitted to testify. And that, in 1863, the law as to admission of testimony was further extended, and it was enacted, that, "in the trial of any indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall at his own request, and not otherwise, be deemed a competent witness: the credit to be given to his testimony being left solely to the jury, under the instructions of the court."

Chief Justice Appleton also wrote a second letter, bearing date the 24th of February 1866, to John Q. Adams, Esq., Chairman of the Committee on the Judiciary of Massachusetts (*vide* Law Register for October last), wherein he gives his views at length upon the change in criminal evidence, and argues with much legal acumen and plausibility, the justice of the new law in his state. The opinion emanating from a gentleman who has made the subject of evidence a specialty for many years, demands

at least a candid consideration by the profession, and all who desire the administration of equity and justice.

As the suggestion of the Chief Justice was adopted by the Judiciary Committee and reported to the House of Representatives, in the form of a bill, and which may, from present appearances, become a law of the Commonwealth of Massachusetts, it is desirable that the question be fully discussed and digested, and we therefore deem it not ill-timed to offer a few reasons why, in our opinion, the establishment of such rule would not only fail to prove practicable, but be far from subserving the public good. The proposed rule as yet being almost wholly untried, can be argued only upon general principles of propriety.

The honorable advocate of the change concedes the principle of evidence, that the accused is deemed innocent, and all trials for crime proceed with that presumption. "Yet during the trial," he observes, in speaking of the established rule, "when the question of guilt or innocence is to be determined, the party injured or alleging he is injured, is admitted to testify, while the respondent, presumed innocent, is denied a hearing. *Audi alteram partem.* Hearing both sides of a controversy is so obvious a dictate of impartial justice, that one may well marvel that its wisdom and propriety should ever have been called in question, much more that it should have been denied."

It may be observed here, that one of the principles upon which the rule of law disallowing a party in criminal proceedings to testify, is, it redounds to the benefit of the accused and thus carries out the fundamental legal presumption of innocence. The guiltless is thus protected. Taking into consideration the overwhelming shock, which a man of nervous and delicate sensibilities must realize upon being arraigned for some heinous crime, before a judge, perhaps, who has the reputation of being not only severe in his manner of trying a case, but unmerciful in convicting and passing sentence; and considering, also, the liability of such person being not only overcome, and therefore incoherent in his testimony, but of actually criminating himself, the rule can but work great hurt and injustice. The human mind, under the pressure of calamity, is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitation may prevail. Taking advantage of his confusion, in the cross-examination, subtle or designing

counsel might make out a much stronger case than if the party had not testified; as was found to be the injurious result of the rule in Connecticut. And the honorable gentleman admits that he has known cases where, notwithstanding the innocence of the prisoner, "as was abundantly proved," and *notwithstanding his own testimony, the jury found him guilty.* Our time-honored and time-tried rule, therefore, upon this showing and aspect of the case, may be said to be wiser and safer for the accused (and that is the aim of the law), in the majority of cases, than by the rule adopted in Maine.

Although in France, and some other countries, the accused is allowed to testify, yet in England for centuries, going back before William of Normandy conquered that island, the rule of the common law has been adhered to and been found to subserve justice. The rule has obtained time out of mind.

The Chief Justice admits, that when the accused is permitted to testify he will be pressed with question upon question, and that evasion would be suspicious, and silence be tantamount to confession. "All this," he remarks, "may be disastrous to the criminal, but justice is done." We would ask wherein? If disastrous to the party arraigned, how is justice done? It would assuredly be disastrous to the accused, and justice would not certainly be done if the party being allowed to testify should tell such a confused, incoherent story (as is usual with an ignorant person in such cases), through embarrassment and fright (as it is with those who, circulating in good society, are arraigned for crime), that the minds of the jury would take his incomprehensible answers as evasions, and his testimony, in the main, as implicating and condemning himself. Nothing could be said of avail in palliation of his conduct. And how often do we see instances, even in civil matters, where men cannot make a statement on the stand, with clearness enough to be understood by a lawyer, much less by those who comprise an average panel of jurymen; and how much more is this confusion and incoherency aggravated naturally, in criminal cases, thus militating in an incalculable degree against the prisoner. And it is fair to presume, a man having the right to be heard, whether innocent or guilty, if he remains silent the suspicions of the jury would at once be keenly aroused.

These we deem cogent reasons why it is safer, and wherein

justice will be administered and subserved better, by not allowing parties to be heard in their own defence. The same objections cannot, of course, be equally pertinent in civil cases. We do not, therefore, agree with our advocate, in thinking that the guilty would be "less likely to escape," or the danger of unjust conviction of the innocent "diminished." For the history of criminal law proves, the *guilty* person, having committed a crime, steels his mind and heart to the "sticking-point," and never fails to tell a plausible story; while the innocent usually breaks down under the rigid, perhaps confounding examination.

The time-honored maxim, *Stare decisis et non quieta movere*, has been revered in all ages as the bulwark of safety in jurisprudence. And while we are not among those who cry out *Stare decisis!* (with as much emphasis as the elder Cato ejaculated *Delenda est Carthago*, on all occasions) whenever a reform in law is proposed, and not unmindful that society is constantly being educated, growing in truth—yet, we hold the reform, or rather change in the Code of Maine, to be too radical, untimely, and we can but predict a speedy repeal of the law, as was done in Connecticut. And thus we essay to take issue with the Chief Justice, and against any state adopting said rule for these obvious reasons.

To wisely prune and graft the law has in every age been considered beneficial; but true reform, since the Spartan lawgiver's time, has never been accomplished by ploughing too deeply or planting too abundantly. For as the prince of reformers, Bacon, somewhere remarks, "The work which I propound, tendeth to pruning and grafting the law, and not to ploughing up and planting it again: for such a remove I should hold indeed for *a perilous innovation*."

And thus to plough up the prime root and element in criminal jurisprudence, which is made the more worthy of veneration from its duration and time-tried wisdom, would indeed be perilous. And Lord Erskine thus eloquently and eulogistically says of evidence: "The principles of the Law of Evidence are founded in the charities of religion—in the philosophy of nature—in the truths of history, and in the experience of common life:" 24 Howell's State Trials 966. And likewise observes Chief Justice STORY, in the case of *Nichols* v. *Webb*, 8 Wheat. 326–332: "The rules of evidence are of great importance, *and cannot be*

departed from without endangering private as well as public rights."

It is peculiarly fitting to consider and ponder these wise opinions, when a proposition is made to undermine and overthrow a charitable rule of law, whereof the mind of man runneth not to the contrary.

Some jurists have held, that confession alone is a sufficient ground for conviction, even in the absence of independent evidence: Best on Pres. p. 330, and cases there cited.

But by the established law of England, a voluntary and unsuspected confession is not sufficient to warrant conviction, unless there is independent proof of the *corpus delicti*. This rule is certainly more in accordance with the principles of reason and justice. Those who would hold a confession competent for conviction, would doubtless advocate the rule which is adopted in Maine. The voice, whether bold or timid, of the accused, would doubtless turn the scale for conviction or acquittal, in the minds of disciples of that school.

By an ordinance of France passed in 1667, the testimony of relatives and allies of parties, even down to the children of second cousins inclusively, is rejected in civil matters whether it be for or against them. This institution has in modern times, also, been considered sound and reasonable: 1 Seld. 1497, Wilk. ed. For it becomes not the law to administer any temptation to perjury. By the civil law relatives could not be compelled to attest against those to whom they were allied. Thus showing that fundamentally the law has not favored the testimony of prisoners, or of their friends and relatives.

The able and pointed contributor "B." in the Register of January 1866, avers that it is owing to prejudice in the minds of men, which prevents their acquiescence to give fair scope for the experiment,—of allowing parties in criminal prosecutions to testify;—and states, that Connecticut having passed an act, wherein the legislature inadvertently made the provision so broad as to cover criminal proceedings, it was repealed from "prejudice." It is true, mankind are naturally opposed to innovation, but especially so when it is aimed to root up a fundamental principle; and, too, when the injustice and inequity of such innovation is palpable, and been so proved to the satisfaction of a state or people. In the state of Connecticut, where the "new rule" had

a fair trial, it was found to work incalculable hurt to innocent persons, for adroit and cunning lawyers were prone either to hold up to the minds of the jury the fact—the astounding fact!—that the prisoner at the bar had not testified as was his privilege, or had evaded questions, and therefore suspicion should attach. So that, whichever position the accused might assume, he placed himself in a critical and unfavorable aspect. Like the very ancient custom among the Romans, to prove a man's guilt, or indebtedness, by the "water-test"—if he floated he was guilty, if he sunk he was innocent, so that he lost his life, or case, in either event.

The contribution referred to by "I. F. R." in his editorial remarks upon C. J. APPLETON'S Judiciary letter, aforementioned, which was apparently written by an able member of the bar of Connecticut, says, in so many words, that "prejudice had nothing to do with the repeal of the act (in that state), but that after one year's trial, the impression with the profession and the judges was, that *mercy to the accused demanded its repeal.*" And then proceeds to say, he thinks "those usually denominated criminal lawyers * * * were loudest in calling for a repeal of the act." The repeal was therefore the result of one year's experiment, and not from mere "prejudice," as charged in the January article referred to.

It was in the early part of the session of the Connecticut Legislature of 1848, that a bill, which was substantially drawn by Judge MCCURDY and introduced by the Hon. Charles Chapman, was passed in these words: "No person shall be disqualified as a witness in any suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credit."

The introducer of that bill informs the writer that it was not intended to make a man indicted for crime a competent witness in his own case, and that he presumes Judge MCCURDY had no such purpose. At the first term of the Supreme Court after the passage of the act, it may be seen, the presiding judge *held* that, by said law, the accused was made a competent witness, and the decision was concurred in by all the judges.

At the following session of the legislature it was that an

act was passed to the effect that, "so much of the 141st section of said act (it being the feature in question) as authorizes a party to testify, regarding the same, be and is hereby repealed."

The presumption of law that an accused person is innocent until proved guilty, becomes a mere mockery when such traps are set for guilty men as the one in Connecticut in 1848, and the one now being used in the state of Maine.

It is a shameful fact that, practically, in Massachusetts and Maine, every person arraigned for a criminal offence is presumed to be guilty until he is proven innocent, in contradistinction to the theory of the common law. If the rule advocated by Chief Justice APPLETON were to become the law in Massachusetts, "it would be the last turn in the screw," says our informant, "and few men would ever after be successfully defended there." A cross-examination of a person arraigned for crime is indeed a terrible test, and the skilful trier who conducts it might well say with Hamlet:—

> "If circumstances lead me I will find
> Where truth is hid, though it were hid indeed
> Within the centre."

We think it is abundantly shown, the trial of the rule in Connecticut proved—as doubtless will be proved in Maine—that innocent persons were more likely to be convicted thereby than under the old common-law rule of England. For it works in contravention of the wise maxim in criminal law, that "it is better that ten guilty persons should escape than that one innocent man should suffer." A citation or two may not be ill-timed in this connection.

The notorious trial of Eugene Aram, which took place at the York Assizes in 1759, is a strong case illustrative of our theory—that more certainty of conviction follows when the prisoner is allowed to speak or testify. Readers of criminal law and history will agree, that the testimony adduced in Aram's Case was entirely inadequate and insufficient to convict him.

The body of Daniel Clarke, the murdered man, was found in a cave, fourteen years after the deed was committed. Richard Houseman, who was indicted, turned "king's evidence," and Aram was named as the principal perpetrator of the crime. The skull of the murdered man was produced in court, but the only medical testimony was that of Mr. Locock, who deposed, that "no such breach as that pointed out in the skull could have pro-

ceeded from natural decay; that it was not a recent fracture by the instrument with which it had been dug up, but seemed to be of many years' standing." The prosecution proved in fact nothing; and Aram called no witness in his defence. The sage principle in English law, that no man can be condemned for murder unless the body of the person supposed to have been murdered be found and identified, was entirely ignored in this case; the *corpus delicti* was not proved; no satisfactory proof that the skeleton was that of Clarke. Neither the age, the sex, nor any of the many points of identity which at the present day would be required, were proved.

Trusting to his genius, eloquence, and ingenuity for defence, Aram delivered a written speech of great power, denying any knowledge of the bones exhibited, and presented weighty argument to prove they belonged to some hermit who had in former times dwelt in the cave, "as the holy Saint Robert was known to have done." Although Aram's argument was most powerful, the jury failed to be convinced of his innocence. It is confidently believed that the astonishing abilities he exhibited on his trial contributed only to the clearer establishment of his guilt. The celebrated Dr. Paley, who was present at the trial, was afterward heard to say, that Eugene Aram had "got himself hanged by his own ingenuity." If he had remained silent the jury could not have convicted him upon the evidence presented.

There is little doubt, from different authorities on the subject, that he unwittingly pleaded for his own conviction. He doubtless did more to throw light (or what was considered light) upon the gossamer-threaded evidence, and prove "unknown facts of guilty acts," than a dozen witnesses. And it is conceded that the jury not only indulged in conjectures, and magnified suspicions into proofs, but weighed probabilities in *gold scales*.

We have cited this case as tending to show that, when a prisoner undertakes to exculpate himself, the nature of man is such that it begins to distrust and finally rebel against his words of exculpation—even if the accused does not entangle himself in some link or chain of the evidence, as is most likely to be the case.

Other and parallel cases might be cited to show that, when a party in criminal prosecution speaks in his own behalf, he usually

has "a fool for his client;" and that it invariably fails, at least, to improve his position before the court.

We conceive that, for any state to adopt the act or rule, which Connecticut found unwise and impracticable and repealed—as working great injustice to the innocent—which Maine has adopted, and which is urged upon Massachusetts, would not only be a "perilous innovation," but be instrumental in furthering the acquittal of bold and desperately bad men, and convicting those who are timid and wholly innocent.

Our time-revered rule not only obviates the possibility of the accused criminating himself, but prevents perjury. And who can doubt, if we were to adopt the proposed rule—this unhingement of the law—in the state of New York, that persons guilty of the crime with which they are arraigned, would on every occasion commit perjury; and whether they did or not, the jury would believe they did, and so be *loth to accredit the testimony of any one.* Thus, the rule would inevitably become an engine of self-conviction. The act of administering the oath to a prisoner, and likewise his testimony, would be deemed futile, idle words. At the present time the accused is at liberty to say whatever he pleases after the case is submitted, and his statements are taken for what they are worth.

So that, under the old-established law, there is as much efficacy in hearing the prisoner as there could possibly be were the proposed rule adopted. And, finally, in all candor to Mr. Chief Justice APPLETON and those who adhere to his school, we can only account for their earnest advocacy, and the people's opposition (where it has been tried) to the new rule, upon the principle of the old proverb, that *a looker-on seeth more than a gamester.*

J. F. B.

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