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CONVICTION UPON CIRCUMSTANTIAL EVIDENCE.

THE injustice of convicting persons of capital offences upon circumstantial evidence has been a fruitful theme of discussion time out of mind. We believe it is now generally conceded that crimes diminish in a country in proportion to the mildness of its laws. Evils certainly arise in having laws on the statute-book which are at variance with the universal instincts of mankind, and which are therefore continually evaded. The abolition of a bad law is attended with less injury to a community than its constant evasion. Heinous crimes are usually committed in secret, and the proof, therefore, is necessarily circumstantial. Evidence so precarious in its nature should indeed be closely scrutinized. In Scotland, long ago, they refused to convict of capital offences upon such evidence; and in England, since the conviction and execution of Eugene Aram—upon whose character and the circumstances of whose death, the versatile Bulwer founded a readable novel, and the gifted Hood wrote a touching poem—the courts have been prone to analyze carefully a case resting entirely upon such evidence. Aram, it will be remembered, was indicted for killing one Daniel Clarke, and was convicted of his murder by a chain of circumstantial evidence, fourteen years after Clark was missed. The *corpus delicti* was not proved. The concatenation of circumstances which led to his conviction is among the most peculiar and remarkable on record.

In the trial of capital cases there are two time-honored maxims which have always obtained. (1.) That *circumstantial evidence falls short of positive proof:* (2.) That *it is better that ten guilty persons should escape than one innocent person should suffer.* The first qualified by no restriction or limitation is not altogether true. For the conclusion that results from a concurrence of well authenticated circumstances, is always more to be depended upon than what is called positive proof in criminal matters, if unconfirmed by circumstances, *i. e.*, the oath of a single witness, who, after all, may be influenced by prejudice, or mistaken; and if by the word "better," in the second maxim, is meant more conducive to general utility, it would also seem to be unsound. And here we may endeavor to ascertain clearly what is understood in legal parlance by "circumstantial evidence." It may be observed that, every conclusion of the judgment, whatever may be its subject, is the result of evidence, a word which (derived from words in the dead languages signifying "to see," "to know,") by a natural sequence is applied to denote the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved; circumstantial evidence is of a nature identical with direct evidence, the distinction being, that by direct evidence is intended evidence which applies directly to the fact which forms the subject of inquiry, the *factum probandum:* circumstantial evidence is equally direct in its nature, but, as its name imports, it is direct evidence of a minor fact or facts, incidental to or usually connected with some other fact as its accident, and from which such other fact is inferred. Upon this general definition jurists substantially agree. For an illustration, then, of direct and indirect evidence, let us take a simple example. A witness deposes that he saw A. inflict a wound on B., from which cause B. instantly died; this is a case of direct evidence. C. dies of poison, D. is proved to have had malice against him, and to have purchased poison wrapped in a particular paper, which paper is found in a secret drawer of D., but the poison gone. The evidence of these facts is direct, the facts themselves are indirect and circumstantial, as applicable to the inquiry whether a murder has been committed and whether it was committed by D. The judgment in such a case is essentially deductive and inferential. A distinguished statesman and orator (Burke's Works, vol. II., p. 624), has advanced the unqualified

proposition that when circumstantial proof is in its greatest perfection, that is, when it is most abundant in circumstances, it is much superior to positive proof. At one time great injustice was done by condemning persons for murder when it had not been proved that a murder was perpetrated. The now well-recognised principle in jurisprudence that no murder can be held as having been committed till the body of the deceased has been found, has terminated this form of legal oppression. A common cause of injustice in trials for murder is the prevarication of the party charged. Finding himself, though innocent, placed in a very suspicious predicament, he invents a story in his defence, and the deceit being discovered, he is at once presumed guilty. Sir Edward Coke mentions a melancholy case of a gentleman charged with having made away with his niece. Though he was innocent, in a state of trepidation he put forward another child as the one said to have been destroyed. The trick being discovered, the poor man was executed, a victim of his own disingenuousness.[1]

[1] The following case occurred in Edinburgh (*vide* 2 Chambers' Miscellany).

Catherine Shaw encouraged the addresses of John Lawson, which were insuperably objected to by her father, who urged her to receive the addresses of one Robertson. One evening being very urgent with her thereon she peremptorily refused, declaring she preferred death to being Robertson's wife. The father became enraged, the daughter more positive, so that the words "barbarity, cruelty, and death," were frequently pronounced by the daughter. He locked her in the room and passed out. Many buildings in Edinburgh are divided into flats or floors, and Shaw resided in one of these flats, a partition only dividing his dwelling from that of one Morrison. Morrison had overheard the quarrel, and was impressed with the repetition of the above words, Catherine having pronounced them emphatically. For some little time after Shaw had gone out all was quiet: presently Morrison heard groans from Catherine. Alarmed, he ran to his neighbor, who entered Morrison's room with him and listened, when they not only heard groans, but distinctly heard Catherine murmur, "Cruel father, thou art the cause of my death." They at once hurried to Shaw's apartment, knocked but received no answer, and repeated the knocks, but no response came. A constable was procured, and an entrance forced, when Catherine was found weltering in her blood, a knife by her side. She was alive, but unable to speak, and on being questioned as to owing her death to her father, was only able to make a motion with her head, apparently in the affirmative, and expired. At this critical moment Shaw entered the room; seeing his neighbors and a constable in his room he appeared much disordered, but at the sight of his daughter, turned pale, trembled, and was ready to sink. The first surprise and succeeding horror left little doubt of his guilt in the breasts of the beholders; and even that little was removed when the constable discovered blood upon the shirt of Shaw. Upon a preliminary hearing he was committed. On his trial he acknowledged having confined his daughter to prevent her

The rules of evidence and the practical principles of jurisprudence have been methodized by a succession of wise men, as the

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intercourse with Lawson; that he had frequently insisted on her marrying Robertson; and that he had quarrelled with her on the subject the evening she was found murdered, as the witness Morrison had deposed; but averred he left her unharmed, and that the blood found on his shirt was there in consequence of his having bled himself some days before, and the bandage becoming untied. These assertions did not weigh a feather with the jury in opposition to the strong circumstantial evidence of the daughter's expressions of "barbarity, cruelty, death," together with that apparently affirmative motion with her head, and of the blood so seemingly providentially discovered on Shaw's shirt. On these concurring circumstances Shaw was found guilty, and executed at Leith Walk. Was there a person in Edinburgh who believed the father guiltless? No, not one, notwithstanding his latest words, at the gallows, "I am innocent of my daughter's murder." A few months afterwards, as a man, who had become the possessor of the late Shaw's apartments, was rummaging, by chance, in the chamber where Catherine died, he accidentally perceived a paper which had fallen into a cavity on one side of the chimney. It was folded as a letter, which on opening contained the following:—

"Barbarous father, your cruelty in having put it out of my power ever to join my fate to that of the only man I could love, and tyrannically insisting upon my marrying one whom I always hated, has made me form a resolution to put an end to an existence which is become a burden to me. I doubt not I shall find mercy in another world, for sure no benevolent Being can require that I should any longer live in torment to myself in this. My death I lay to your charge; when you read this, consider yourself as the inhuman wretch that plunged the murderous knife into the bosom of the unhappy . CATHERINE SHAW."

A few years ago a poor German came to New York, and took lodgings, where he was allowed to do his cooking in the same room with the family. The husband and wife lived in a perpetual quarrel. One day the German came into the kitchen with a clasp-knife and a pan of potatoes, and began to pare them for his dinner. The quarrelsome couple were in a more violent altercation than usual; but he sat with his back towards them, and being ignorant of their language, felt in no danger of being involved in their disputes. But the woman, with a sudden and unexpected movement, snatched the knife from his hand and plunged it in her husband's heart. She had sufficient presence of mind to rush into the street and scream "murder." The poor foreigner in the meanwhile, seeing the wounded man reel, sprang forward to catch him in his arms, and drew out the knife. People from the street crowded in, and found him with the dying man in his arms, the knife in his hand, and blood upon his clothes. The wicked woman swore in the most positive terms that he had been fighting with her husband, and had stabbed him with that knife. The unfortunate German knew too little English to understand her accusation, or to tell his own story. He was dragged off to prison, and the true state of the case was made known through an interpreter; but it was not believed. Circumstantial evidence was exceedingly strong against the accused, and the real criminal swore unhesitatingly that she saw him commit the murder. He was executed, notwithstanding the most persevering efforts of his counsel, John Anthon, Esq., whose convictions of the man's innocence were so painfully strong, that from that day he refused to have any connection with a capital case. Some

best means of discriminating between truth and error. Having their origin in man's nature, as an intellectual and moral being;

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years after this tragic event the woman died, and on her death-bed confessed her agency in the diabolical transaction.

One of the most remarkable cases of conviction upon circumstantial evidence that has occurred in this country, is that of one Ratzky, who was tried and convicted in 1863, at the Oyer and Terminer in Brooklyn, N. Y. The case is known as the "Diamond Murder," and the circumstances of the case were in brief as follows:—

Ratzky boarded at a house in Carrol street in said city, where one Fellner also boarded, who had a short time before come from Mentz, Germany. Fellner was about fifty years of age, had been a large dealer in diamonds in his native place, but, as shown, he had for certain causes absconded and fled to this country. On his passage over he became enamored of one Miss Pflum, who was in company with her sister, a Mrs. Marks. On his trip over his gallantry and attentions gained for him, from the passengers, the appellation of "Don Juan," and Miss Pflum that of "Zerlina." Arriving at New York the two ladies engaged rooms at a house in East Broadway, and it was shown on the trial that their characters were not the most exemplary.

On Friday morning, a few days after Fellner had commenced to board in Carrol street, Ratzky and he went to New York together. Fellner never returned to the house. His body was found washed ashore at Applegate Landing, near Middletown, N. J., four days after. On examination of the body it was found that the deceased had been murdered, there being twenty-one wounds on his breast. The body was identified by one Mrs. Schwenzer, who boarded in the same house where Ratzky and Fellner had boarded. Ratzky fled under an assumed name, but was arrested in St. Louis, and finally brought to trial. His story of the affair is, in short, that, on the evening of the morning when he went to New York with Fellner, they called at the house where Mrs. Marks and Miss Pflum were. That Fellner and Miss Pflum were engaged in conversation for an hour, and that during the evening Fellner gave him a gold watch which Miss Pflum handed him from a jewel case belonging to Fellner. It was a little after 8 o'clock that evening when Ratzky informed Fellner that it was about time for them to go home. That he urged Fellner several times to go, but he and Miss Pflum were engaged in a lively conversation, and that at last upon further urging Fellner rose to go, kissed Miss Pflum with great *nonchalance* before those present, telling her that to-morrow he should leave for Chicago, and desiring her to answer his first letter from there. He embraced Miss Pflum, at the same time whispering something in her ear. They then left—arriving at the ferry, no boat was in, and they sat down on the cross-beam of the ferry dock; that Fellner took off his hat and wiped the perspiration from his forehead, at the same time handing his cane to Ratzky. When the boat came they went on board, he, Ratzky, still retaining the cane. In a moment or two Fellner rose from his seat and walked up and down the cabin once or twice, then went on the deck, as Ratzky supposed, for the sake of breathing the cool air; that the boat shortly after started, and if Ratzky's story be true, he never after saw Fellner alive. That he waited for him to come off the boat when it reached Brooklyn side, but not seeing him asked the ferry-master if he had seen a man pass answering the description given. That he called out the name of Fellner at the top of his voice in order to find him, but concluded that he had gone home.

and founded (as an eloquent advocate has said) in the charities of religion, in the philosophy of nature, in the rules of history, and in the experience of common life: 29 St. Tr. 966.

If this story had been confirmed Ratzky would doubtless have been acquitted. It appeared on the trial that when the body was found Mrs. Schwenzer proposed to go and see it, when Ratzky endeavored to dissuade her from doing so. She visited Mrs. Marks, at Ratzky's request, who begged her not to say anything about the matter, giving her at the same time a sum of money to secure her silence. Ratzky soon after left the city. Fellner's body being identified, Mrs. Marks and Miss Pflum were arrested on suspicion as being *particeps criminis*. Miss Pflum committed suicide by hanging herself in the cell of a New York station-house a few days after her arrest.

(Webster, in his elaborate argument in the Knapp Case, declared that "suicide is confession.")

On the trial the prosecution argued upon the theory that Fellner and Ratzky crossed on the Hamilton Avenue ferry-boat to Brooklyn; that Ratzky induced Fellner to go to the club-house, which stands near the water at the foot of Court street, in order to get drinks; that they had been there before, and that Ratzky having got him there he inflicted the stabs and dragged the body to the water's edge or into the water, and from that point Fellner's body floated into the bay and finally was thrown ashore four days after on the Jersey side. It was shown that Ratzky reached home the night in question at 10 o'clock, that he was heated when he got home, and had Fellner's cane and a parcel belonging to him in his possession; that he inquired if Fellner had come, and on being answered in the negative, he told the story as above. To some in the house he said that Fellner had gone to Chicago. The prosecution argued that Ratzky was the last person with Fellner; that he knew he had wealth—a motive for murder; that Fellner's disappearance on the ferry-boat was wholly irreconcilable with Ratzky's subsequent conduct. If he had mentioned the fact to the ferryman that he had missed Fellner on the boat, why is not the ferryman produced? If Ratzky did not know that Fellner had been made away with, would he have had his trunk broken open next morning and taken his clothes, while making no effort to avoid the risk he ran in case of Fellner's return? Do honest men break into trunks, tell conflicting stories, try to keep dead bodies from being identified, run away, assume disguises, and change their name?

The prosecution examined witnesses on the stand who swore that under a conjunction of favorable circumstances a body thrown into the water on Brooklyn side might float to Jersey shore. But four days had elapsed from the night on which the murder was committed, according to the prosecution, until the body was found. It was not decomposed when found; on the contrary, the blood came from the wounds when probed. It is generally known that a dead body will sink when thrown into the water, and will not rise until decomposition sets in and gases are generated to float it to the surface. The theory is, that it could not have floated, and if not, it was impossible that it could have been carried by the tide from Brooklyn to the Jersey shore. No witnesses were called in behalf of Ratzky, and the jury, after a consultation of fifteen minutes, returned a verdict of guilty. By the law of 1860, a person convicted of murder in the first degree must be confined in the state prison one year, and at the expiration of that time, the governor might

The rules as laid down by Wills on Cir. Ev., other writers on the subject have repeated, and are as follows:—

(1.) The circumstances alleged as the basis of any legal inference must be strictly and indubitably connected with the *factum probandum*.

(2.) *The onus probandi* is on the party who asserts the existence of any fact which infers legal accountability: 1 Starkie's L. of Ev. 162; 1 Greenl. L. of Ev. c. 3.

(3.) In all cases, whether by direct or circumstantial evidence, the best evidence must be adduced which the nature of the case admits.

(4.) In order to justify the inference of legal guilt from circumstantial evidence, the discovery of the body necessarily affords the best evidence of the fact of death, of the identity of the individual, and most frequently also of the cause of the death. A conviction for murder, therefore, is never permitted in our day unless the body has been found, or there is equivalent proof of death by evidence leading directly to that result. The evidence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. This is a fundamental rule, the *experimentum crucis* by which the relevancy and effect of circumstantial evidence must be estimated.

(5.) If there be any reasonable doubt as to the certainty of the connection of the circumstances with the *factum probandum;* as to the completeness of the proof of the *corpus delicti;* or as to the proper conclusion to be drawn from the evidence, it is safer to err in acquitting than in convicting. This rule follows irresistibly as a deduction from the consideration of the numerous fallacies necessarily incidental to the formation of the judgment on indirect evidence and contingent probabilities, and from the

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order the death penalty to be enforced. By throwing the *onus* of enforcing the penalty on the governor, it was anticipated that the death penalty would be virtually abolished in the state. This law was in force when the murder was committed, but was repealed in 1862; Ratzky was convicted in 1863, and Judge Brown sentenced him to be hanged under the law then in force. On appeal, a new trial was denied, and it was further held, that the court erred in sentencing Ratzky under a law not on the statute-book when the murder was committed. Ratzky was, therefore, sent back for a re-sentence, and under the law of 1860, he is now in prison at the pleasure of the governor of the state, who may execute the sentence at any time, though an effort is being made to have him reprieved.

impossibility in all cases of drawing the line between moral certainty and doubt. It has been truly said (Burnett on the C. L. of Scotland, p. 524) that, though in most cases of circumstantial evidence there is a possibility that the prisoner may be innocent, the same often holds in cases of direct evidence, where witnesses may err as to the identity of a person, or corruptly falsify, for reasons that are at the time unknown. As we have seen, the testimony of the senses cannot be implicitly depended upon, even where the veracity of the witness is unquestionable. As, where Sir Thomas Davenport, an eminent barrister, a gentleman of acute mind and strong understanding, swore positively to the persons of two men, whom he charged with robbing him in the open daylight. But they positively proved *an alibi*, and the men were acquitted: *Rex* v. *Wood and Brown*, 28 State Trials, p. 819; Annual Register 1784. Many of the cases where conviction was had upon evidence which was indirect or circumstantial, illustrate the assertion of Burke, that circumstantial evidence is often more reliable and positive than direct proof. Capital crimes are so rarely committed under circumstances which lead to positive unequivocal evidence of them, that presumptions are necessarily founded upon the connection with certain facts. So when the one is proved to have occurred the others are presumed to accompany them. Some presumptions of nature are so cogent and irresistible, that the law adopts them as *presumptiones juris et de jure*. The question whether parties in criminal prosecutions ought to be allowed to testify in their own behalf has elicited much discussion during the past five years, and some states, Massachusetts and Maine among the number, have passed enactments allowing parties arraigned for capital offences to testify. Few know how numerous are the cases where it has subsequently been discovered that the innocent suffered instead of the guilty. One such case in an age is enough to make legislators pause before giving a vote against the abolition of capital punishment. But some may say the Old Testament requires blood for blood. So it requires that women should be put to death for adultery, and men for doing work on the Sabbath, and children for cursing their parents; and "If an ox were to push with his horn, in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman, the ox shall be stoned, and his owner also shall be put to death." The commands