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THE POWER OF COURTS TO LET TO BAIL.

THE power to admit to bail, persons accused of offences against the criminal laws, is one of the most important of the powers belonging to the courts. The power to bail is largely discretionary; and it is the purpose of this article to mark the limits which have been set to this discretion, and to present the practice of the courts, and the principles by which they have been guided in solving some of the most important questions connected with the exercise of this power.

By the early English common law, all offences, including treason, murder, and other capital felonies, were bailable at the discretion of the court: 4 Bl. 298, 299; 2 Hale P. C. 120; *Barney's Case*, 5 Mod. 323.

By the Statute of Westminster 1, chap. 13, the power to bail, as to inferior courts and magistrates, was regulated and restricted. This statute did not, however, affect the Court of King's Bench. This court and its judges were left with full common-law jurisdiction upon the subject of bail: COLERIDGE, J., in *Ex parte Baronnet et al.*, 1 Ell. & Bl. 1.

By the common law, both before and after the Statute of Westminster, the power of the King's Bench and its judges to bail, was unquestioned in all cases. There was no limitation upon the exercise of this power, except that found in the practice and principles upon which the courts and judges proceeded, and by which they

were guided. The power belonging to the English Court of King's Bench to bail in all cases, belongs equally to the courts of general jurisdiction in the states of this country, deriving their systems of jurisprudence from the common law of England, except as the same may be controlled or limited by constitutional or statutory provisions. This power is necessarily incident to the power to try, acquit, and finally discharge a prisoner.

In the exercise of this power, the English judges have been guided by a discretion "regulated according to the usage of law." The discretion was not exercised according to the caprice or individual judgment of each judge; it was a legal discretion, regulated by the rules and practice of the court, as contained and expounded in the adjudged cases: 1 Chitty's Crim. Law 128. The American courts have not departed from the principles of the English cases, and it will therefore be found that the practice upon this subject is as consistent and harmonious as upon any other subject of which the courts have cognisance.

The rules and practice of the courts upon this subject have been regarded by the English judges as of equal force with positive enactment; and it was because of an alleged abuse of discretion, and violation of the practice of the courts, in letting to bail John Eyre, that Junius, in his celebrated letter to Lord MANSFIELD, declared that the Lord Chief Justice was "degraded from the respect and authority of his office, and was no longer *de jure* Lord Chief Justice of England."

In all cases where applications are made to the courts for bail, the seriousness of the charge, the nature of the evidence in support of it, and the severity of the punishment awarded by law for the offence, are the chief considerations which influence the determination of the question. It was the constant practice of the English courts to refuse bail where the evidence created a strong presumption of guilt.

In *Baronnet's Case*, ERLE, J., said: "The principle has been fully laid down already that where a crime is of the highest magnitude, and the evidence in support of the charge strong, and the punishment the highest known to the law, the court will not interfere to admit to bail. Where either of these ingredients is wanting, the court has a discretion which it will exercise."

In capital cases, where the presumption of guilt is strong, bail should rarely, if ever, be allowed; because no pecuniary consideration would induce a party, charged with a capital crime, who felt

that there was a strong probability of conviction, to appear for trial.

"All that a man hath will he give for his life;" and recognising this truth, the courts have seldom relaxed the rule that, in capital cases, it is safest to deny bail where there is a strong probability of the prisoner's guilt.

"Bail is only proper where it stands indifferent whether the party is guilty or innocent of the accusation against him, as it often does before the trial; but where that indifference is removed it would be absurd to bail:" Hawkins, book 2, chap. 15, sect. 20. This rule is approved in *Taylor's Case*, 5 Cowen 39, and in *The People* v. *Goodwin*, 1 Wheeler's Cr. Cases 153. In the latter case, SUTHERLAND, J., says: "I have found no case at war with Hawkins."

In the case of *Commonwealth* v. *Keeper of Prison*, 2 Ash. 234, a practical and safe rule is given. "It is difficult," says the court, "to lay down any precise rule for judicial government in such a case; but it would seem to be a safer one to refuse bail in a case of malicious homicide, where the judge would sustain a capital conviction pronounced by a jury, on evidence of guilt such as that produced on the application for bail, and to allow bail where the prosecutor's evidence was of less efficiency." The court ought not to look further than to the nature of the offence and the strength of the evidence in support of it. Neither the character of the prisoner, nor his relations or situation in life, can be looked to in determining the probability of his appearing for trial: *In re Robinson*, 23 L. J., Q. B. 286.

Upon the question, whether the court can go behind the indictment, on an application for a *habeas corpus* to secure bail, the practice in the American courts is not uniform.

The practice in the English courts is to refuse to hear proof to rebut the presumption of guilt created by an indictment. And this practice is followed in many of the American courts. Upon the application of Aaron Burr for bail, after indictment, Chief Justice MARSHALL refused bail, and thought proof to rebut the presumption raised against the defendant by the finding of the grand jury inadmissible, although before indictment he had admitted the prisoner to bail. The same rule was followed in the case of *The United States* v. *Jones*, 3 Wash. C. C. 224.

In the case of *Hight* v. *The United States*, 1 Morris 407, MASON, Ch. J., says: "The humanity of our law requires that be-

fore a person shall be punished as criminal, he must be found guilty by two independent juries. The verdict of the first raises a full presumption of guilt up to the time of his trial before the second."

The same practice was followed in *The State* v. *Mills*, 2 Dev. 421, and in *Benoit's Case*, 1 Martin (La.) 142. In the case of *Hight* v. *The United States*, it was said that the provision of the ordinance of 1787, which declares that "All persons shall be bailable, unless for capital offences, where the proof shall be evident or the presumption great," is merely declaratory of the common law of the United States; and that the indictment of a grand jury furnished the proof and created the presumption which authorized the refusal of bail.

In Indiana, since the decision in the case of *Lumm* v. *The State*, 3 Ind. 293, the practice has been to hear the evidence, after indictment, and to let to bail upon proof that the prisoner was guilty of a bailable offence, or upon his showing that the "proof was not evident, or the presumption strong" that he was guilty of a non-bailable offence. This practice has been adopted in many of the other states: *Ex parte Wray*, 30 Miss. 673; *State* v. *Simmons*, 19 Ohio 139. Under this practice the court will hear the evidence and from it determine whether the presumption created by the indictment is overcome by the facts presented; if so, bail will be allowed; but if not, the presumption remains and bail must be refused. The indictment is not left out of view in this investigation, but furnishes in the first instance the full presumption of guilt. If a person is indicted for a non-bailable offence, and applies for bail, but refuses to offer any evidence, the result must be precisely what it would be in those courts where evidence will not be heard after the accused is indicted; bail must be denied, and upon the ground that the indictment furnishes a strong presumption of guilt. The burden is upon the prisoner to show that he is entitled to bail: *Heffrin's Case*, 27 Ind. 88.

If the evidence adduced neither strengthens or impairs the presumption created by the indictment, there can be no doubt as to the course to be pursued; the presumption would remain; it would be strong and bail ought to be refused. After indictment it is not a question of guilt or innocence absolutely, and the same certainty of guilt is not required before refusing bail, that would be required to convict: *Street* v. *The State of Mississippi*, 9 Am. Law Reg. N. S. 749. It has been thought that the disagreement of a jury is an element in the determination of the ques-

tion whether the "proof is evident or the presumption strong." In *Goodwin's Case, supra*, this was considered as supporting an inference in favor of the prisoner's innocence. In *Summon's Case*, 19 Ohio 139, the application for bail was upon this ground alone; and it was denied that it was an independent ground for bail.

It is evident that the effect of the disagreement of a jury upon the question of letting to bail, must depend materially upon the grounds of disagreement. The disagreement may have been caused by the captiousness or obstinacy of one juror. The Spanish have a proverb, that a man had "better be a fool than be obstinate;" and a disagreement caused by obstinacy, would be of no value whatever in determining the question of bail. The disagreement may have been as to some matter of law. And although the jury may determine the law, it could not be seriously contended that a difference of opinion among the jurors as to the law, would be entitled to any consideration by the court in trying the question of bail. If the court was informed that the disagreement grew out of an intelligent and conscientious difference of opinion in relation to matters of fact proper to be considered by the jury, then such disagreement might properly be considered as creating an inference in favor of the prisoner, but otherwise the disagreement of a jury is certainly a fact of no value upon the question of bail. In some exceptional cases bail has been allowed, for special reasons, unconnected with the question of probable guilt or innocence, before and after conviction: *Rex* v. *Bishop*, 1 Strange 9; *Commonwealth* v. *Semmes*, 11 Leigh 665; *Commonwealth* v. *Archer*, 6 Grattan 705; *Ex parte Dyson*, 25 Miss. 359.

Under provisions similar to that contained in the ordinance of 1787, some courts have thought the power to bail was taken away, if the crime was capital, and the proof evident or presumption great. (See 2 Ash. 227.) On the contrary it has been distinctly held that the discretionary power, otherwise possessed by the courts, remains, even if the crime and its punishment are the highest known to the law, and the proof evident: 30 Miss. 673. This is certainly the better opinion, as the provision referred to is but declaratory of the common law, and at common law the power was admitted and sometimes exercised; 12 Mod. 66; 5 Id. 323. In Indiana this discretion is taken away by the following provision of the Constitution of 1852: "Murder or treason *shall not be bailable*, when the proof is evident or the presumption strong."