

III.—*On the Exclusion of the Evidence of Accused Persons.*

By John O'Hagan, Q.C.

[Read, 18th May, 1875.]

SOME apology is, I feel, due to the Society for the selection of a subject so often discussed here and elsewhere ; yet when the topic is a proposed reform, it can hardly be said to be exhausted until either it has been carried, or else plainly rejected by public opinion. So far has the latter been from the truth as regards the measure here dealt with, that for many sessions past its proposal and adoption would have seemed no more than the natural completion of the progress already made in the amendment of the law of evidence. For my own part, my views have arisen much more from observation and experience, than from any theoretical considerations. I may, however, be permitted to recall to the minds of my hearers the changes in this branch of the law which have been effected within a single generation—effected gradually and tentatively as the English method is. A little more than thirty years ago, in civil actions, the parties, their wives and husbands—and not they alone, but every person having the slightest pecuniary interest in the result were absolutely excluded from giving evidence. There was a mass of authorities, now happily obsolete, with which a *nisi prius* lawyer of those days had to make himself familiar, all turning on the nature of the interest which did or did not render a witness disqualified. In the decisions upon this point there was almost irreconcilable conflict, and in the principle itself neither reason nor consistency. For while, as I said, the most trifling interest of a direct and immediate kind in the result of the action was sufficient to seal the lips of a person whose evidence might have been vital to a just decision of the cause, no amount of interest in the question at issue, as distinguished from the actual verdict in the case, would have that effect. Nor, again, would any interest arising from the passions or affections, though calculated to create a far more preponderating bias than some slight consideration of money, have the effect of working an exclusion. All a man's kith and kin, his nearest and dearest (his wife only excepted), might have been examined on his behalf. In addition to the incapacities arising from interest, there was an incapacity arising from crime. No one who had been convicted of treason or felony was admissible as a witness, unless his competency were restored by a pardon under the Great Seal. It is well to remember these things ; if only that we may bear in mind what absurdities men, even men of high capacity and trained intelligence, devoted to the administering of justice, will be content to submit to and even to defend, for no better reason than that they find them existing.

But from the moment that the eyes of philosophic jurisprudence were directed towards an examination of the laws of England, it was impossible that a system so irrational could last. The judges began to lay down the sensible canon, that whenever it was possible, consistently with previous decisions, so to hold, the objection

should be held to apply to the credit and not the competency of the witness. Writers such as Mr. Phillips put the objection to the law as it then stood, very pithily, when they observed that juries were deprived of the means of going right because they might possibly go wrong.

Yet there was no legislative change down to the year 1843. In that year the incapacities arising from crime or interest were abolished (6 and 7 Vic, c. 85); but the parties themselves, their wives and husbands, still remained excluded. In 1851, the parties, and in 1853, the wives and husband of the parties, were admitted to be witnesses; but from this admission two classes of cases were excepted—cases of breach of promise of marriage, and such cases as form the staple of those tried in the London Divorce Court. With respect to the former, the apprehension, no doubt, was, that if the young lady were permitted to tell her own story to a sympathizing judge and jury—giving her own version of the defendant's conduct and expressions—cases of breach of promise of marriage might be woven out of very slender materials. And, as to the latter, it might be said that if the law, in any case, were to fetter the free utterance of testimony from any quarter soever, it should be in the case of those with whom a perverted opinion has made it a kind of vicious point of honour to cover crime with falsehood. Yet so powerful has been the current of modern opinion in favour of giving to the tribunal which has to judge, all possible means of judging, that even these last exceptions have been swept away, and there is now no one disqualified, in respect of any character which he fills, from giving evidence in a British civil court. There is still, it is true, an incapacity of another kind—an incapacity arising from the religious opinions of the proposed witness, with which I do not purpose to deal.

My subject is the retention in the criminal code of that principle of exclusion which has been obliterated from the civil code. I have to observe, however, that even in the criminal law an inroad has been already made upon the system, and, if any real principle be involved, the integrity of that principle has been abandoned. By Mr. Plimsoll's Act of 1871 (34 and 35 Vic., c. 110, s. 3), it is made a misdemeanor to send to sea an unseaworthy ship, so as to endanger the lives of those on board; and in any indictment under that act, the accused is permitted, for the purpose of proving circumstances of excuse, to give evidence like any other witness. Why should there not be a similar enactment with respect to all offences? Consider it first in the aspect of simple justice. Let us suppose an innocent man, of hitherto unblemished character, accused of a crime. He desires to give evidence on his own behalf—to oppose his own oath to that of his prosecutor—to explain the circumstances of suspicion which may tell against him—offering, of course, to let his statement undergo the test of cross-examination. He offers, say, in addition to his own testimony, that of his wife, who possibly may alone be cognizant of the most vital facts. Neither is permitted to be sworn. It is left to the prisoner's counsel to suggest possibilities of explanation, possibilities of innocence—to create darkness instead

of dispelling it—to harp upon the great principle of the benefit of doubt, and (if he succeeds in obtaining an acquittal) to set his client free, rather as a man not clearly proved to be guilty, than as a man shown to be innocent. But he may not succeed, and the innocent may suffer. Do not say that this is an imaginary case. Two or three instances occur to my recollection, which I have not had time to verify by names and dates, but which possibly are as present to the minds of some of my hearers as to my own.

One was the case, about a dozen years ago, of a clergyman in England, whose wife kept a boarding school, and who was made the subject of a most shocking accusation by two little girls at the school. They gave their evidence against him with an artless simplicity of manner, which experience unhappily shows to be sometimes compatible with the most depraved falsehood. He was convicted and sentenced to penal servitude. As he still loudly protested his entire innocence, and was vehemently joined in this by his wife, an opportunity was given to him of trying the case anew in the form of an indictment of the girls for perjury. They were indicted and tried accordingly. Upon the evidence, chiefly of the clergyman's wife, they were convicted of perjury, and sent to a reformatory. The man of course was pardoned and set free. According to my recollection of the second trial, there could be no rational doubt of his innocence, revolting as it may be to think that creatures so young should have been guilty of such monstrous wickedness. But if we could admit the possibility that it was otherwise, and that it was in the second trial that injustice was done, the case tells, even more powerfully, against the existing law; for here are two juries coming to directly opposite conclusions, neither of whom heard the evidence upon which the other decided. It is the case of the knights and the gold and silver shield, forming a feature of the jurisprudence of the nineteenth century. Upon any supposition that can be made, a frightful injustice was committed—an injustice which would almost certainly have been avoided if the first jury had been permitted to hear the whole of the evidence.

Another instance is of a somewhat earlier date. It was the case of a London solicitor who was tried for a conspiracy to defraud. Certain parties had formed a plan to represent themselves as the next of kin of a deceased person, and by that means to obtain administration in the name of one of them, and thus to possess themselves of a considerable amount of Government stock standing in his name. They employed the solicitor in question, to whom they were previously unknown, to act for them in the matter. No doubt he was guilty of great want of caution in trusting too credulously the statements made to him by his clients; but he was in reality guilty of nothing beyond this. However, the fraud having been discovered, he was tried along with the really guilty parties—was convicted and sentenced to a long period of transportation. After he had undergone six months or so of his punishment, the public journals and the Home Secretary became convinced of his innocence, and he obtained what is called a pardon, as amends for the misery, degradation, and ruin which had been brought upon him.

Now I will assume that this gentleman's counsel did his duty and pressed home to the uttermost the "benefit of the doubt;" but the prisoner's plain right was to tell his own story on his oath to the jury—to let them judge of its consistency and probability, and of his demeanour under examination and cross-examination. Is it too much to say that if in that case the accused had been a competent witness, the frightful blunder which was made would almost certainly have been avoided?

These are cases which attracted public attention. How many are there which pass unknown and undiscovered? I was told by one of the ablest and most experienced of Crown prosecutors, now on the bench, that in his opinion it is a great mistake to suppose that wrongful convictions do not from time to time take place—convictions, he added, which in all probability would not have taken place if the prisoner had been examined as a witness. Cases peculiarly liable to an error of this kind are those where there is no direct evidence against the prisoner, but a presumptive or *prima facie* case is made, upon which, if unexplained, the jury are at liberty to act. For example, cases of alleged larceny. The prosecutor proves the loss of his goods. The constable proves the finding of them with the prisoner a day or two afterwards, and the judge has to tell the jury that that is evidence upon which they may convict, if the prisoner does not account for the possession. The prisoner has, perhaps, tried to explain, but at the wrong time, and was bewildered, and could say little when the right time came. How different would it be in the supposed case of the prisoner's innocence, if he (or she) were allowed to give evidence, and in that evidence detailed the real circumstances. But nowhere has what I cannot help terming the unreason of the present law come home to me so forcibly, as in a class of trials with which every one conversant with our quarter sessions courts must be familiar.

An affray takes place between two factions or family parties coming home from a fair or market, and two or three on each side are badly beaten. Informations are sworn on one side, and cross informations on the other; and as they are all perfectly well aware that the effect of putting a man upon his trial is to prevent him from being a witness either for himself or for those tried along with him, they take very good care to include amongst the accused any single individual who might give evidence for the defence. The cases come on at petty sessions before the magistrates; who, after a full hearing, return all the parties for trial at the quarter sessions. The Grand Jury, who by law can only hear the evidence for the Crown, have little difficulty in finding the bills in both cases, and then in due course ensue the trials before petty juries. Now let me for distinction sake give names to the respective parties—let me call them, say, the Ryans and the Carrols. The Ryans are first tried, and step into the dock, young and old, to the number of half a dozen or more. Then the Carrols come on the table, witness after witness, and tell one side of the story—how entirely the blame of the encounter lay with the prisoners; how quiet and peaceable they, the Carrols, were, till they were wantonly attacked; and if they then had to strike, it was

purely in self defence. When their evidence closes the case closes. The jury retire to consider their verdict, and then what occurs? The Carrols all walk into the dock to take their trial before a new jury, and the Ryans walk out of it for a time, in order to discharge their function as witnesses. The new jury hear a new case. The Ryans have now their innings. According to their side of the story, the Carrols were the aggressors, and they relate, in proof of this, a number of circumstances, not one of which had been before the previous jury. Thus each jury is forced to decide upon one-sided evidence in cases in which the accused belong precisely to the same class and position in life as the accusers, and it could not be said that the one were in any degree more credible than the others. If instead of being tried by separate juries the parties were successively tried by the same jury, the judge would be bound to tell them that they must discard from their minds everything but the evidence in the actual case before them, and not pay the slightest attention to what was sworn in their hearing half an hour before, though it might appear to them to contain the very truth of the case. Is not this something like a *reductio ad absurdum* of the law?

There is another kind of case which might easily occur, and which did in fact almost occur in connexion with the fatal railway accident at Thorpe, in the east of England, last September. One of two parties may be criminally responsible; each may lay the blame on the other, and there may practically be no further evidence. The law in such a case is at a dead lock. In the instance to which I refer, one of the parties was in fact convicted, because, in any view of the case, he had been guilty of a departure from the letter of his duty. But how easily might it have been otherwise—how easily might it have happened, that according to the story of each the other alone was guilty? And yet by the law as it stands, no one jury would be in possession of both the conflicting versions so as to compare and contrast them.

If, then, there be arguments so powerful, based upon reason, justice, the safety of the innocent, the precedent of the course of legislation as regards civil proceedings, and the commencement of precedent even in criminal causes, made by Mr. Plimsoll's Act, upon what grounds is the change resisted? I can remember but three. It is said that to permit the accused to be examined as witnesses, would be to afford opportunities for perjury, would diminish seriously the chances of acquittal, and would be contrary to the spirit of the British constitution. Now, first, as to perjury. I may premise that it would be a grave error to suppose that the law, in its exclusion of interested witnesses, was governed by what may be termed a moral motive—that is, the fear lest the consciences of the witnesses should become burdened with the guilt of being forsworn. If it were so, the law was extremely inconsistent, for at no time was there such a multiplication of needless and trivial oaths for every purpose, and in every department of the state, with not only the risk, but the almost certainty of perjury being committed on every hand, as during the period when the exclusion of witnesses by reason of interest was in the fullest force. No, the law was actuated by an idea ranging more legitimately within its own department. It was the notion that

justice would suffer prejudice if any witness were even listened to who was not entirely farthworthy. The modern rationale of judicial evidence was slow in gaining an entrance into men's minds or swaying their method of procedure. Our conception of a fair trial is to hear everybody who has anything relevant to say—to let the evidence be sifted, probed, tested to the full—to let the interest of the witnesses, as well as their passions, prepossessions, and antipathies, be taken into account—and a conclusion arrived at with at least all possible means for forming it. Such was not the elder conception. The tribunals were not fully trusted with the discrimination between truth and falsehood, and the only plan thought of to prevent their being misled by evidence which might be false, because the witnesses were interested, was to shut out the evidence altogether. If such was, as I say, the underlying motive of the exclusion, how can we possibly recur to it as forming an argument for preserving the exclusion in one department alone, when the idea which prompted it has wholly disappeared. How can we, in common consistency, refuse to hear the evidence of him who is only accused of injuring his neighbour by a blow, or of stealing from him some trifling property, when we have gone the length of admitting the evidence of him who is accused of an uncomparably worse crime—the destruction of his neighbour's home and haappiness. This has been done for the most unanswerable of reasons, namely, that the innocent are not to be debarred from deposing to their innocence, because the guilty standing in the same place might be tempted to incur the additional guilt of falsehood. But again: it may be urged that even, it be true that the moral apprehension of the encouragement of perjury was not the idea by which, in fact, the ancient law was governed, yet still that it is a matter for very grave consideration, and that if it were clear that the proposed change in the law would, in the natural course of things, induce a very large amount of moral evil in the form of false swearing, that alone ought to be a reason why the state should shrink from the change. Now, I think that is an argument fairly deserving of an answer.

I am by no means of the school of those who hold that the state has nothing to do with moral considerations. My views are widely different. It is too large a question now to enter upon; but this much may at least be said—that those who take the most exalted views of the functions of the state in relation to the encouragement of good and the discouragement of evil, would add that all this should be subordinate to the performance of its primary duties and functions. For example, if either by statute or by custom a system had grown up of exacting or permitting a mass of unnecessary oaths, such as custom-house oaths, voluntary oaths before magistrates, and the like, in which truth was daily violated, and the name of the Deity profaned, the legislator that would prescribe, or would refuse to abolish oaths of that character, might incur a serious moral responsibility. But the case is entirely different when the state looks to nothing but the discharge of its own essential functions, and the evil that arises comes, not by way of direct consequence from its action but, from an abuse by individuals of the opportunity afforded them.

The end of a trial, civil or criminal, is the attainment of truth. If the legislature come to the conclusion that truth would be best elicited by hearing everyone—parties, and all; and if, in the course of the inquiry, anyone should be tempted by personal interest to swear falsely, the guilt will be neither upon the legislator who makes the law, nor upon the judge who administers it, but solely upon him who thus abuses it. The true moral philosophy in this matter is admirably put by Shakspeare in a passage which you may all remember. It is the night scene in *King Henry the Fifth*; when the king, going round the camp in disguise, enters into conversation with the common soldiers to test their feelings. One of them says to him that he fears few die well that die in battle, and if they did not die well it would be a black matter for the king that led them to it. King Henry answers: "So, if a son, that is by his father sent about merchandise, do sinfully miscarry upon the sea, the imputation of his wickedness, by your rule, should be imposed upon his father that sent him: or if a servant, under his master's command, transporting a sum of money, be assailed by robbers, and die in many irreconciled iniquities, you may call the business of the master the author of the servant's damnation: but this is not so—the king is not bound to answer the particular endings of his soldiers, the father of his son, nor the master of his servant; for they purpose not their death when they purpose their services." So, in the present case, the law purposes not the perjury of the witness when it purposes his evidence.

If then, as I think I have shown, the former ground must be abandoned—if the reception of evidence from every side be now regarded as a help and not a hindrance to a just decision, I add that justice should not be deprived of that help because it may be abused to purposes of evil by human perversity.

Secondly, it is said that the proposed change would be fatal to any chance of a prisoner's escape, because if he tendered himself for examination he would be certain to be broken down, and his case destroyed upon cross-examination. This is an objection I have found chiefly to have weight with lawyers, and it manifests, I think, a curious state of mind which is not unlikely to grow up with those practising in, or conversant with, our criminal courts. There is, first, the assumption that anyone put upon his trial is, with hardly an exception, guilty, and, secondly, the opinion that, though guilty, it is a good thing that the law should have a supply of nooks and crannies, and dark passages, through which, with clever assistance, the guilty may contrive to escape. Certain it is that, apart from such cases of revolting crime as set all mankind in arms against the perpetrator, there is a secret professional pleasure, not only on the part of the advocate—which is natural enough—but in the breasts of his sympathizing brethren, when a culprit gets off by some ingenious point or dexterous sleight, or by working powerfully the benefit of the doubt, or by reminding the jury, over and over again, that the prisoner's mouth is closed, and that if he were permitted to give evidence he could explain everything. And the more plainly guilty he is, the greater is the professional pleasure in the art which saved him. But does anyone seriously think that an innocent person would be

more likely to be found guilty if he were examined? I can hardly follow the course of thought which arrives at that conclusion. It may, perhaps, be suggested as possible, that a rude, uneducated mind, not believing in mere innocence as a safeguard, may, though innocent, find a defence upon some fabricated story, the detection and overthrow of which would almost certainly insure a conviction. Such a case is, no doubt, possible, for conjecture itself can hardly outrun the strange things which any lawyer of experience has witnessed in fact, but it would be rare in the extreme, for even with the most ignorant, the natural instinct of innocence is to rely upon the truth, and in any case I hold that it is better to let the sagacity of the tribunal deal even with such anomalous examples. I remember citing elsewhere a saying of Mr. Crabbe Robinson, the English lawyer and man of letters, who had gone to France during the peace of Amiens, and attentively studied the procedure there. He said that he had come to the conclusion that if he were a guilty man he would rather be tried in England, and if he were an innocent man, he would rather be tried in France. This is, no doubt, a very high testimony to the French criminal procedure; but no one has ever dreamed of introducing that procedure in its integrity into this country. It is totally foreign to our traditions and mode of thought. It may be true, as Mr. Crabbe Robinson says, that the severe cross-examination of the prisoner by the judge has the effect of eliciting the truth on whatsoever side the truth may be; but that very process must, as it seems to us, divest the judge's mind of that balanced impartiality which should be its prevailing quality, and enlist his vanity and love of victory in the conviction of the accused. However, nothing of that kind has been proposed for these countries. All that is sought could be effected by three lines of an act of Parliament, declaring that a person accused of an offence may give evidence like any other witness. That the result would be to increase the number of the convictions of the guilty is extremely likely; and in that respect also it would be a great gain to the public, all jurists being agreed that the certainty of punishment is more efficacious than its severity, as a deterrent from crime.

There remains then to consider the last objection—namely, that the proposed change is contrary to the spirit of the British constitution. I candidly say I do not think much stress need be laid upon that objection before an audience like the present. If by the British constitution is meant the criminal code and the criminal procedure of England, I appeal to any one familiar with the *State Trials* whether, until reformed in modern times, it did not present a mass of iniquitous absurdity, which might seek its fellow in any state, Christian or pagan. Let me give an instance or two of what that constitution was two hundred years ago, in the reign of Charles the Second. It seems hardly credible that when a person was on trial for his life, no witness whatever could be sworn on his behalf. On the trial of Whitehead and others, in the seventh volume of the *State Trials*, Lord Chief Justice North thus speaks of the proposal to summon witnesses on behalf of the unfortunate prisoners, who were afterwards convicted and executed: "There never was any person in a capital



cause sworn against the king. The common law is the custom of the kingdom, and we are bound to know it, and must be all governed by it" And yet the same Chief Justice, when he came to charge the jury, told them that what had been said by the witnesses for the prisoners, was "talking and not swearing." And it was not unusual for the counsel for the prosecution to point out to the jury that greater credit was due to the witnesses for the Crown than to the witnesses for the prisoner, because the former were on their oaths, and the latter were not. This scandalous injustice, I am happy to say, has not existed since the Revolution of 1688. In like manner, the prisoner, as is well known, was not entitled to the assistance of counsel unless by leave of the court, and for the single purpose of arguing any point of law which the prisoner had succeeded in raising.

After the Revolution, persons accused of high treason were granted by statute the free benefit of counsel; but in felony cases, though by a permitted innovation, they were allowed to act so far as to examine and cross examine the witnesses, yet the full benefit of counsel was not allowed to anyone on trial for felony down to the close of the reign of King William the Fourth (6 & 7 Wm. IV., c. 114); and it is instructive to read in Sir Samuel Romilly's memoirs, how bent and bigoted he found the judges of that day—eminent men of a time little removed from our own—against a concession which to us seems commanded by the most elementary ideas of justice. And yet with the scale so heavily weighted against the prisoner, that Sir John Hawles declared the trial by ordeal advantageous for him in comparison, there was this compensating absurdity, that the slightest variance between the names of persons, places, or things, stated in the indictment, and the proof of them on the trial, though utterly insignificant to the real merits of the case, was fatal to the prosecution, and the prisoner was entitled to be acquitted. This existed as late as the year 1841, when Lord Cardigan was tried before his peers and acquitted, because of a mistake in the statement of the christian name of his antagonist. It was through fear of some such error being discovered, that the courts laid down the inflexible rule, that they would never permit a man indicted for felony to get a copy of the document under which his life or liberty was menaced. This rule, by the way, through some oversight in legislation, exists still in cases of felony, though the ample powers of amendment given to the judges have long since done away with any pretence for retaining it. These features of the ancient law are humorously brought out by the learned and lamented John William Smith, in his *Lay of Chief Justice Gascoigne*.—

"For justice in the olden time sped onward at a rate,  
Which in these days of law's delays we cannot emulate;  
For lest the prisoner at the bar false evidence should bring,  
His witnesses were not allowed to swear to anything.  
And lest his wily advocate the court should overreach,  
His advocate was not allowed the privilege of speech;  
Yet such was the humanity and wisdom of the law,  
That if in the indictment there chanced to be a flaw,  
They then allowed him counsel to argue on the doubt,  
Provided he himself had first contrived to find it out;

But lest this worthy privilege should be by him abused,  
 To show him the indictment they most steadily refused  
 'Twas thus the law kept knaves in awe, gave honest men protection,  
 And widely famed, was justly named, of wisdom the perfection."

I may seem to have entered into a digression upon the whole history of our criminal law, instead of confining myself within the limits of the subject I have chosen. I did not mean so do so. I only proposed to show how little weight should be given to the argument that the proposed change is contrary to usage. For the rest; no one concedes more freely than I that all the alterations in the criminal law effected in modern times, have been in the direction of humanity and common sense; that it is administered in a spirit which leaves nothing to be desired, and that if the even balance is ever departed from, it is certainly not against the prisoner that the scale is depressed. I own, also, that it is right to proceed in these reforms with cautious and hesitating steps; but surely no one can complain that in this matter the pace has been too fast. Before the reforms in the law of evidence, to which I referred in the beginning of this paper, just the same arguments, drawn from liability to perjury and the like, which are now urged against the admission of prisoners to give evidence, were pressed against the examination of the parties.

I contend that there is no reason why the law should not, in this respect, be made what every law, springing from sound conclusions of jurisprudence, should be, as far as possible—symmetrical and coherent.

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VI.—*On the Temporary and the Permanent Business of Friendly Societies, with some Suggestions for making the latter secure through the agency of the Post Office Insurance and Savings Bank Departments.*—By William John Hancock, F.I.A.

[Read, 22nd June, 1875]

FRIENDLY Societies are formed to enable labourers by co-operation to guard against the vicissitudes of life—such as temporary want of employment, temporary sickness, old age, and death.

Provision for temporary want of employment, and temporary sickness may be considered as somewhat analogous to Fire Insurance, that is to say, in individual cases the contract ends and the claim on the funds of the society ceases with the close of the year or shorter term for which contribution is paid. Each payment of contribution may be considered as a new contract for another term; and so far as sickness is concerned, the rates of contribution are either the same for all ages within the ordinary working period of life, or increase but little, as it is found that the average amount of sickness suffered at each age is nearly uniform from age 16 to about 40; then there is some increase