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## FALSE PRESUMPTIONS COUNTER TO THE PRESUMPTIONS OF INNOCENCE

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American criminal procedure is condemned as ineffective, because delay and technicality intervene on behalf of the accused. The sanction of the law is neither swift nor inexorable. Not only do "the wicked flee where no man pursueth," but the prisoner enmeshed is preserved from punishment by over-sedulous respect for his rights. Mr. Justice Holmes, in his lectures on the common law, says that the law must express the prevailing sentiment of the community. Our criminal law is commonly supposed to do so, and in consequence, critics and censors vent upon the community their japes and quirks at the present state of our criminal justice. Yet, in fact, our administration of the criminal law does not reflect or mirror the public mind upon the matter.

Much of the practice, many of the forms, most of the rules and principles that are operative in the criminal courts to-day are the heritage of olden days. No adventitious condition of society, no ephemeral fashion of manners finds immediate place in jurisprudence. On the other hand, be any condition of society but general and persistent enough, it will make the impress of itself upon the body of the law. Very many states of society, and innumerable aspects of each state have appeared, transpired and vanished, so that "the place thereof knew them no more," during the course of development of our system of jurisprudence. Yet the traces of their life are visible in the structure of our legonomy, as the tracteries of ancient flora and fauna are found imprinted in the deposits of phosphate that we are mining to-day. The courts are slow to assimilate the "spirit of the times." To commend itself to them, a custom or a usage, must be encrusted with the hoar of age. Though we have modified the requirement that a practice must have existed since, "the memory of man runneth not to be contrary," we are still dubious to experiment with any course which is not sponsored by tradition.

Watch, therefore, the effects. Within two hundred and fifty years we have emerged from a barbarous code of punishment. Not murder and not rape alone, nor even other crimes of violence; but theft, trespass and many similar minor infractions of the law were

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denounced by the penalty of death. The branding iron, the pillory, the ducking pond, and the whipping block, were the "terror of evil-doers," aforesaid. Convicts were burned. Convicts were attainted to the disherison of their family. Wager of battle flourished and wager of law was in vogue. We subdued the transgressor with torture.

The forces and influences that direct public opinion move, as some one has said, by oscillation. Put into action by some impulsion, they tend to continue in motion even after the cause thereof has disappeared, and they are followed by a reaction, very nearly as violent as the original impact. Spencer has followed the law through all the phases of finite actions and reaction and deduces therefrom the datum that all motion is rythmetic.

Two hundred and fifty years ago England was not in a wholly ungovernable state of anarchy. While the social status of the people was crude beyond the present-day conception, and the theory of government was arbitrary beyond present-day tolerance, yet the relationship of the parts of society to each other, and the functions and authority of the nation toward the individual were clearly, if roughly, marked out. The England of that day, however, was the product of a turbulent past. In the past, official tenure had been uncertain, official control had been imperfect. Respect had been induced by fear, and fear by savage visitation. Kings had sat enthroned upon the battle shields of the barons, the barons had entrenched themselves in power by oppression, and the commons had been as the beasts of the field, the allotted prey of church and state and nobility. The laws, framed to procure some manner of harsh justice upon offenders in this uncouth age, descended to and were administered by the courts of the more settled times of the eighteenth century. It followed that these laws were inappropriate and obsolete. They were merely the over-swing of the pendulum set in motion by the effort of rude masters to command respect. A milder judiciary were reluctant to enforce the excessive punishment imposed.

Out of this condition arose the tendency of the courts to safeguard the rights and welfare of the defendants. To-day this attitude, which has persisted, under obviously changed conditions, is condemned as over-zealous sentimentality. Formerly, however, when, once a man was found guilty, he became subject to infamous and inhuman penalties, it was commendable. The prisoner could not speak for himself. Often he could not have counsel. Yet conviction of a crime so trivial that to-day it would be disposed of in Mayor's court meant possible

death or transportation. The end of the criminal sanction was still mainly retribution. The principle of prevention was not emphasized, and the aim of reformation was without recognition.

Americans now feel that the accused is a pampered being. They are positive that "the toils of the law" are ineffective. They look upon the careful scrupulousness of the prosecutor as a laxity. They flout at the presumption of innocence. They urge that, by the time that the charge has been tested in preliminary hearing and grand jury room, the probabilities of innocence are not rife. They cavil at the unanimous verdict. They protest against the indefinite power of appeal. They perceive in these implements of defense an unfair discrimination against the safety and well-being of the state. They consider them inept. And, in many respects, their strictures are sound. Technicalities are over-used. The unanimous verdict, at least in commonwealths, where a jury of twelve must sit, is unnecessary and expensive. Appeals perhaps should be restricted. "There must be an end to litigation," even where personal liberty is affected. In one regard, however, the people as represented by the legislatures, in their haste to modernize the criminal law, are over-stepping their prerogative. When they make naught of the presumption of innocence, when they endeavor to destroy it, when they pass statutes that nullify it, they are trespassing upon forbidden ground. In all reverence, we may give them the admonition of old, "Take thy shoes from off thy feet, for that whereon thou standest is holy ground."

We live by virtue of presumptions. They are the short-cuts to accomplishment. Without them we would become so entangled in the minute difficulties of our daily round, that existence would be intolerable and attainment impossible. And, ordinarily speaking, action based upon presumptions is justifiable. We cannot check up as we go. We must take for granted, infer, presume. So long as opportunity for verification exists, ellipsis of thought and elimination of intermediate steps is commendable. So long—and no longer! As Herbert Spencer has pointed out, the ability to verify is the extenuation for the failure to verify, and, when thought or action is founded upon data that cannot be proved the result is illusion.

Presumptions, in and of themselves, contain no virtue and no vice. Justly drawn, they are advantageous, useful and inevitable. Wrongly drawn, they are mere insubstantial illusions.

What the shadow is to the material object, so is the outward act to the motive of the mind or to a state of facts, namely, an index and

manifestation thereof. Many legal presumptions arise from this source. They are presumptions drawn from the evidence of an outward act, as to the motive, or the state of facts actuating that outward act. If it is the common experience of humanity, that an act of a certain sort is accompanied by a definite state of mind or a definite state of facts, it becomes a process of deduction, that, the act appearing, the state of mind or the state of facts exists. Men constantly act upon such inferences. The law takes cognizance thereof, and observing the act, raises a rebuttable presumption of fact as to the state of mind of the actor, or the state of facts impelling the act. Following a regular form of development, as this rebuttable presumption receives more and more invariable recognition in the courts, it becomes hardened into a rigid rule, and finally takes its place in the permanent body of the law as a conclusive presumption of law.

If a presumption finds its way into the law through the regular route outlined, there is little possibility that it will be vicious. Presumptions are only vicious when they are illusory, that is to say when they are framed upon a false premise. Their justification lies only in the probability of the actual concurrence of the state of mind or state of facts, with the act in question. If this substance does not more often than not appear in conjunction with the shadow, all rules, based upon their probable conjunction, are vain. So far as such illegitimate presumptions are adopted as rules controlling the sanctions of the law, and operating to confine the liberty of citizens they are not only illusory, but vicious. The viciousness lies in their unjustifiable restraint of freedom of action.

The presumption of innocence is an authorized and valid presumption. It has not only the endorsement of a venerable life, but it is the ordinary guide of our daily lives. We all act upon it from moment to moment. If we should abandon the principle that men prefer rectitude to wrong-doing, and that men do right rather than wrong, and that crime is the exception instead of the rule, civilization would forthwith abandon us, and we should revert to savagery. All our institutions are built upon it. We know its truth, by constant verification.

Being a thing wholly true in itself, and the expression of an inference from a state of facts that shadows an actual state of mind, the presumption of innocence is essential to our law. It is neither out-worn nor out-grown, and consequently, it belongs to us as a bulwark of our liberty and should be preserved. Granting that the sanction of

the criminal law, as it has come to us from our fathers, is imperfect and must be refashioned, if it is to be suited to our present sense of justice, and to modern public policy, yet in our haste we should not tear from our jurisprudence a tried and valued principle which embodies the most just conceptions of the present day. Correction of the old is not mere wanton destruction of all things resident therein. Distinctions yet remain between the weed and the flower, the tares and the wheat.

Ill-advised legislators, however, have not thought of these things. They hear the cry for retribution to the wrong-doer, and they heed it by seizing at random any weapon at hand. Because all evil-doers do not suffer punishment, they conceive, in their haste, that the presumption of innocence is detrimental to justice. And they ride forth to do battle with that presumption.

The weapons that they wield against it are counter-presumptions. It may be doubted whether these are proper weapons under any circumstances. Especially is this so when the counter-presumptions employed are of the illegitimate variety, to-wit: when they are founded on inferences of fact, that cannot be verified, and connections of acts with states of mind, which do not in reality concur with each other. If the act does not really mirror the motive, intent or state of mind presumed, the presumption is an offense to common sense and a danger to the public welfare.

Yet presumptions of this character are being more and more employed to contradict and neutralize the presumption of innocence. For instance, there is a law in Florida declaring, in effect, that the delivery of liquor and receipt of money therefor shall create a prima facie presumption of the guilt of an unlawful sale of whiskey. Test this arbitrary rule by the dictates of common sense. As a matter of fact and in actual cases, do the delivery of liquor and the receipt of money therefor indicate a sale? The man delivering the liquor and receiving the money may be either the agent of the buyer or the agent of the seller. The Florida court has decided that the agent of the seller may be guilty of unlawful sale of whiskey, but not the agent of the buyer. If he is the agent of the one he is innocent, if he is the agent of the other, he is guilty. Whose agent he is, as a matter of fact, depends wholly upon the details of the particular transaction. Consequently he is as likely to be innocent, as to be guilty. The outsider, seeing only the delivery of the liquor and the receipt of the money, and unacquainted with the facts of the agency involved in the transfer

observed, is wholly unable to determine the guilt or innocence of the parties. The act is entirely equivocal. But the presumption is determinative. Its effect, moreover, is to shift the burden of proof, and strip the accused of the mantel of innocence. Under such circumstances, what becomes of the presumption of innocence? By the expedient of an illusory counter-presumption, it would appear to have been wholly devitalized and nullified.

We have given one example. All lawyers can multiply others. We need not culminate authority. The condition exists. Its results, upon presumption of innocence, are obvious.

We hold a brief on behalf of the presumption of innocence. It is one of those "red threads of abstract theory, stained by the blood of centuries of human sacrifice, that runs through the warp and woof of civilization," beautifying and illuminating the whole fabric thereof. It has been written into the corpus of the law, at the behest of immemorial experience. It carries with it the intrinsic worth of self-evident verity. All attacks upon it proceed from ignorance or vandalism. We resent and deplore them. Especially, however, do we raise a cry of warning, when we see pointed toward it the artillery of error and darkness. In such artillery, one very effective battery has been found to be that of illusory counter-presumptions. This battery must be silenced.

We repeat as we began. No doubt the sanction of the criminal law in the United States is imperfect. By all means let it be made effective. Do not let us, however, seek any panacea which costs us our established safeguards of liberty. Else will "the last error be worse than the first."