confirmed rather than impaired by the fact that it comes to no definite conclusion. "We are relapsing into the old arguments," are Augustine's last words. "God be with you, and lead your wandering steps to steadfast ground."

"Amen," answers the poet; "and let me not, in following the voice which calls me, fill my own eyes with dust; but may the tumult of my soul subside, and the noise of the world be still, and ambition beset me no more."

They are the words of a man who has passed through a great spiritual crisis, but has come out of it so weak that he hardly realizes his own deliverance, or knows whether he have vitality enough left to rally.

There are two among Petrarch's later sonnets, usually numbered 313 and 314, in which he gives lyrical expression to his own last word upon the intimate theme of the Secret. The thought in the second of these sonnets is plainly, to the poet's mind, a necessary complement of that in the first; and if the accent of the penitent seems slightly conventional in the former, in the other it is entirely human and spontaneous; while the *amende* it contains is as naive and touching as its picture of the great lady and the great beauty "unspotted from the world" is full of dignity and refinement. They may be rendered thus: —

Truly I mourn for all the vanished days
That erst I lavished on a mortal love,
Suffering not my soul to soar above,
Though wings were mine, and win men's nobler praise.
But thou, acquaint with all my evil ways,
Immortal and invisible King of Heaven,
Succor a feeble creature, passion-driven,
And fill my lack with largess of thy grace!
That I, who lived at sea, and lived in strife,
May haply die in port, and die at peace,
Making a brave end of a wasted life;
And for my few remaining days, in these,
And in the last, let thy strong hand upbear.
I have no hope or resource otherwhere!

And O serene and sweet serenities,
All full of ruth and spotless tenderness!
And apt my fiery pleadings to repress
(I know it now!) in all compassionate, wise,
Mild speech, instinct with gentle courtesies,
Yet clear and radiant with honor's light!
Blossom of goodness! Fount of beauty bright,
Cleansing the soul of every low surmise!
The heaven we crave still hovered in that glance,
Now strong to hold all frowardness in check,
Now comfort giving and sweet countenance
To one who all his ill desert doth reck.
Ay, blessed be that noble variance!
It saved a soul, which else had gone to wreck!

Harriet Waters Preston.
Louise Dodge.

PROBLEMS OF PRESUMPTIVE PROOF.

A POPULAR crusade is in progress against the conviction of persons accused of capital crimes on what is loosely termed "merely circumstantial evidence." Several such convictions in cases that have attracted world-wide attention have lately occurred. Mrs. Maybrick's case has risen almost to the dignity of an international controversy. The case of Carlyle W. Harris, in New York, evoked a similar though a more local manifestation of dissent from verdicts involving capital punishment based on presumptive proof. In both cases the crime charged was murder of the most heinous character: the killing of a husband by his wife in the first, and of a wife by her husband in the second; and in each the killing was done by the agency of poison. Of concurrent interest with these was the case of Dr. Graves, tried in Colorado for the murder of Mrs. Barnaby, — also, as was alleged, by means of poison, sent to the victim through the mails in a form that counterfeited whiskey. The evidence on this trial, again, was what, in a

common but indefinite phrase, is called "purely circumstantial," and the failure of the jury to agree was widely hailed with approval, grounded in large measure upon the repugnance already noted to capital convictions on evidence that is not positive, clear, and direct, — evidence, in fine, that is not free from all doubt. Finally, there is at this writing a case in which the public has taken an extraordinary interest, that of the trial of Miss Borden, charged with the murder of her father and stepmother.

Without discussing the merits of these cases, — all of them, in a sense, still on trial in the irregular court of public opinion, — we may well take some pains to consider how far it is safe to follow the new doctrine, loudly proclaimed by not a few of our leading newspapers, and earnestly advocated by many reputable citizens, that convictions in capital cases should never proceed upon "merely circumstantial evidence." There is good ground for the belief that much of the objection to capital convictions on evidence that is not direct has its root wholly in a repugnance to the death penalty; that is to say, it is not convictions for murder on indirect evidence that are objected to, but the infliction of capital punishment as a consequence of such convictions. This is manifestly true, because we hear no outcry whatever against "merely circumstantial evidence," no popular protest against convictions obtained and sentences passed on "presumptive proof," in cases of forgery, burglary, or arson, for which the punishment falls short of death. Nevertheless, we must consider the argument as it is presented, apart from the penalty, and as one that touches the intrinsic value of evidence that is variously called "circumstantial," "inferential," and "presumptive." There is indeed no other way of logically considering it; for if we once admit that the murderer ought not to forfeit his life on "purely presumptive proof," we must admit also the injustice of forfeiting the liberty of the forger, the burglar, or the incendiary on the same species of proof.

The question raised is fundamental. It goes to the very foundations of the complex structure which we call "society," and challenges the first securities of civilization. No lawyer of any eminence will be found to doubt this proposition, and that so large a number of laymen are evidently unconscious of its truth is a fact of ominous import. For it is a demonstrable truth that a law prohibiting convictions on criminal charges upon "purely presumptive proof" would, in practice, be a law to exempt the great majority of criminals of every class from punishment, and hand the community over, bound hand and foot, to the unbridled dominion of its most depraved members.

Observe, first, that in every case of murder by poisoning, a form of murder which there is much reason to believe is increasingly prevalent in these days, when the knowledge of deadly drugs is widely diffused and their procurement extremely easy, conviction must be secured by "circumstantial evidence," or not at all. There is not a single case recorded in the law books in which the proof that one person was willfully and maliciously poisoned by another was direct. At some point or other, in every trial for poisoning, the facts cease to connect by the direct testimony of eye-witnesses, and the jury must be left to inference and presumption. For reasons that lie upon the very surface of all human experience, this must always be true, not only of trials for poisoning, but of the great majority of all criminal trials. An eminent English judge (Bayley) has recorded his opinion that "more than one half of the persons convicted of crimes are convicted on presumptive evidence." Hume, the famous Scotch writer, declares that conviction on circumstances "is grounded on reason and necessity." The Chief

Justice of England, in the case of Rex *v.* Burdett (4 B. & Ald. 95), very clearly brought out this point in his charge to the jury. "If no fact," he said, "could be ascertained by inference in a court of law, very few offenders could be brought to punishment. In a great number of trials as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given: the man who is charged with theft is rarely seen to break into the house or take the goods; and, in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck or the poisonous ingredients poured into the cup." Our own great American justice, Story, laid down the same principle in very forcible terms in the case of United States *v.* Gibert (2 Sumner, 19, 27, and 28).

It needs no brilliant jurist, however, to teach us the plain and simple truth that men do not commit crimes openly and in the light of day, but stealthily and in the darkness of concealment. The very root of the word "murder," taken from the old common law (*murdrum*), conveys the idea of concealment. A man about to forge a note does not call his neighbor and bid him watch the forgery. Neither does a man about to commit a murder announce his intention either to the proposed victim or any of his friends. Burglars are not accustomed to ring the front door bell before picking the lock of the back door, nor do they, as a rule, leave their photographs on the entered premises to assist in their pursuit and identification. So that, until human nature is essentially changed, we may conclude with certainty that the overwhelming majority of criminals must either be punished upon indirect evidence, or not at all; and the more enormous the crime and the more severe its punishment, the more certain it will always be that proof of guilt, nine times out of ten, cannot be direct, and must be presumptive.

While the popular notion is that wrongful convictions on circumstantial evidence have been numerous, the records of the courts and the data afforded by history point to the converse conclusion, and suggest more strongly the perils of what is called direct evidence. The most memorable miscarriages of justice on record are not those in which circumstantial evidence and mere presumptions made thereon led to unjust verdicts, but those in which either direct evidence, or evidence which, though not absolutely direct, was apparently open to no sort of reasonable doubt, led to the conviction and execution of men and women who were afterwards shown to have been entirely innocent of the crimes which were so conclusively brought home to them. A few of them may be here briefly cited by way of illustration.

As fine an example as the annals of the law afford of the fallibility of what is regarded as the best and most conclusive proof is the celebrated Danish case of Soren Qvist. This man was the pastor of a little village in Jutland, where he lived, a widower, with a daughter who kept house for him. A wealthy farmer, named Marten Burns, who lived in a neighboring village, had sued for the hand of the pastor's daughter, and had been repulsed in such a way as to fill him with hatred for both the girl and her father. Soren Qvist was, later on, induced to hire a poor brother of the rejected suitor, one Neil Burns, as a farm hand. This man proved to be lazy, impudent, and quarrelsome, and the pastor, who was noted as a man of quick and violent temper, though otherwise of an excellent character, had many angry altercations with him. In one of them, losing his self-control, he seized a spade in the garden where they stood and dealt Neil Burns several blows with it. The farm hand was felled to the earth, but when the pastor, alarmed and instantly sorry for what he had done, raised him up, the fellow (so the pastor

said) broke away, leaped over the garden hedge, and made off into the adjacent woods. After that he was mysteriously missing. Strange rumors began to circulate, and by and by Marten Burns, the rich brother and rejected suitor, came upon the scene. He went before a magistrate and charged the pastor with the murder of his missing brother. He produced two witnesses who swore that they heard Soren Qvist in angry altercation with Neil Burns, heard him say that he would beat him to death, saw the spade swing twice in the air above the hedge-top, and that after that all was quiet. They were near neighbors of the pastor. Another witness testified that on the evening of the day on which Neil Burns disappeared he was coming home very late, and passed the pastor's garden; that he heard a sound as of digging in the earth, and, looking over the hedge, saw the pastor, in his familiar green dressing-gown and with a white nightcap on, busily leveling the earth with a spade. The pastor turned around, and, afraid of discovery, the witness ran away.

At Marten Burns's instigation the pastor was now arrested, and his garden was searched for the body of the missing man. At the very spot pointed out by the witness who had seen the pastor digging at midnight a body was found. It was dressed in the clothes worn by Neil Burns when he was last seen alive; a leaden ring was in the left ear, the same that Neil had worn for many years; the face of the dead man was disfigured by blows, such as might have been dealt with a spade, and the features could not be recognized. Every one except the pastor accepted the body as that of the murdered Neil Burns. The pastor vehemently protested his innocence, but acted as one dazed by the discovery of the body and the other apparently direct evidences of his guilt. A dairy maid in his own employ now came forward, and testified that she, looking from her bedroom window, saw him, in his green gown and white nightcap, going out into the garden late on the same night that the passing peasant had sworn to seeing him out there in the act of digging. So the unfortunate clergyman was tried, and on what seemed to be direct evidence of the best kind he was convicted and sentenced to death. At the trial two more corroborative witnesses appeared, who swore that, on the same night when the digging in the garden occurred, they were passed by a man, dressed in a green gown and white nightcap, going towards the garden, and carrying a sack on his back, which seemed to contain something heavy. This cumulative testimony not only convinced the court and all who heard it, but convinced even the accused pastor himself. He confessed the crime, saying that he had on several occasions walked in his sleep, and done things of which he was not conscious; and he was now satisfied that, in his sleep, he had arisen and gone out into the woods, had there found the corpse of Neil Burns, who had died of the wounds received at his hands, and had buried it at midnight as described by the witnesses. He duly suffered death by decapitation.

Twenty-one years afterwards, the man Neil Burns reappeared in the village and told the true story. All the apparently conclusive proof was manufactured by the revengeful Marten Burns. The quarrel of Neil with the pastor, his flight after being felled with the spade, his immediate disappearance, and the burial of the counterfeit corpse in the pastor's garden were all deliberately planned. The man seen digging the grave in the garden was Marten Burns, who had entered the parsonage and stolen the pastor's green gown and white nightcap for the purpose. The corpse was that of a suicide, stolen from its grave at the cross-roads, dressed in Neil's clothes, and its face battered by Marten with a spade. Then Neil was sent out of the country with a sum of money and ordered never to return, which he never did until he

heard of his rich brother's death, by which event he hoped to profit.

Here, then, was seemingly conclusive evidence on all vital points: the fatal blows were seen by eye-witnesses; the corpse was fully identified; its burial by the pastor at midnight was also sworn to by eye-witnesses; finally, the pastor himself acknowledged his guilt, and died deeply penitent of his supposed crime. And yet no murder was committed. It is certain that no greater miscarriage of justice than this was ever brought about by "merely circumstantial evidence" or "pure presumptions" grounded thereon.

The English case of James Harris is another illustration of how, by the most direct proof, guilt may be fastened upon an innocent person. Harris kept an inn about eighteen miles from York. A blacksmith named Grey supped and slept at his house, and died there. A man in the employ of Harris, named Morgan, testified that he actually saw his master murder Grey by strangling him, and tried in vain to prevent it; that, after the deed, he looked through the keyhole of the room in which it was done, and saw his master rifle the dead man's pockets. A maid servant, also in Harris's employ, swore that, after the murder, from the wash-house window she saw her master take money from his pocket, wrap it up carefully, and bury it under a tree in the garden. Her evidence led to a search, and in the spot she had described thirty pounds in gold were found to have been buried. Harris was convicted and executed, protesting his innocence to the last. There had been no murder committed in that case. Grey had died in a fit of apoplexy, and never was possessed of the money alleged to have been taken from his dead body. Morgan and the maid servant were lovers. Morgan had resolved to revenge himself on his master for a blow the latter had given him. He accordingly perjured himself by testifying as he did, and his sweetheart corroborated him by testifying falsely as to the buried money, which they both knew was Harris's own money, and which they had planned to steal when the hoard amounted to enough to set them up in business. After Harris's execution this precious pair quarreled, and the truth then came out. They both died of jail fever on the day before that on which they were to have been tried.

Perhaps the strangest instance of the fallibility of direct proof is found in the weird story of Jonathan Bradford, who kept an inn on the road between London and Oxford. He was charged with the murder of a gentleman of fortune, named Hayes, who put up at his house, and the evidence against him was of the kind which judges and juries have alike agreed to consider conclusive. Bradford was found standing over the body of his murdered guest, whose life was all but gone, holding a dark lantern in one hand and a blood-stained knife in the other. Guests who had heard the dying man's groans rushed into the room, and, discovering Bradford there as described, seized him on the instant, disarmed him of his knife, and charged him with the murder. Bradford stoutly asserted that he was innocent, and claimed that he had come to the scene of the murder, like the gentlemen who found him there, because he too heard the victim's groans, and intended to give him assistance. No one believed this story. His conviction and execution quickly followed. Before his death, Bradford confessed to the clergyman who attended him after his condemnation that, having heard Hayes say that he had a sum of money with him, he (Bradford) had gone to his room prepared and intending to kill and rob him; but that when he got there he was horrified to find that his purpose had been anticipated, and that Hayes was already in the agony of death from stabbing, done, as he declared to the last, by he knew not whom. In his excitement over the discovery his knife dropped from his hand on the floor, and, in picking it up,

both the knife and his hands became bloody. His story was, eighteen months later, proved to be true. Hayes had, in fact, been murdered by his own footman, who made a detailed confession of the crime on his deathbed. He had stabbed his master, rifled his pockets, and fled back to his own room in Bradford's inn, only a few seconds before Bradford himself, with the same intent, entered the victim's bedchamber.

Scarcely less conclusive was the evidence in the case of the old Frenchwoman who, about one hundred and twenty years ago, kept a shop in Paris, near the Place St. Michel. She was believed to be rich, and to keep her money in her house. She was found murdered in her bed one morning, having been stabbed to death with a knife. Her only servant was a boy, who had been in her employ several years. He alone, so far as any one knew, had a key to the front door, which was found open. A blood-stained knife lay on the bedroom floor. In one of her hands the dead woman still grasped a thick lock of hair, and in the other was a neckerchief. All these articles were proved to be the property of the boy. He was tried for the crime and convicted, having first, under torture, made a full confession of it. He was executed; but it was conclusively shown, soon after, that he had been wholly innocent in the matter. Another boy had done the deed. He had obtained possession of the accused boy's knife, neckerchief, and hair, and placed them as they were found in order to fix suspicion upon the latter. He had been in the habit of dressing the shopboy's hair, and had saved enough of it from time to time to make the lock found in the dead woman's hand. He had procured a key to the front door by means of a wax impression taken from the one in the shopboy's possession.

In every one of the four cases above summarized, the evidence was not what is popularly called "merely circumstantial." In two of them the convicted persons confessed; and confession is properly held to be the best kind of direct evidence. In all four cases, and particularly in one of the two where there was no confession (Bradford's), the proof seemed to be clear and positive, and, though not absolutely direct, was far from being "purely presumptive." It has been judicially decided that evidence such as that given in Bradford's case is equivalent to direct evidence. Bracton, writing on crown law in the thirteenth century, says there are some presumptions which admit of no proof or defense to the contrary. He classifies them as "violent presumptions," and among them he puts the case of a man found over a dead body, with a bloody knife. Such a man, he says, cannot deny the killing, and no other proof is necessary, — which was exactly Bradford's case. In the other case (Harris's) in which confession was absent, the proof was the direct evidence of an eye-witness. The proof was bad in fact, though good in law, because the witness lied, — an occurrence that has no doubt vitiated the supposed superior value of direct evidence in countless instances. It is a probable opinion that more men have been wrongfully convicted of crimes by the direct eye-witness proof of perjured witnesses than by the indirect proof of inferences drawn from circumstances.

The theory, the philosophy, and the practice of evidence are all alike greatly obscured by the careless use of terms which are of confusing if not conflicting significance. We speak of direct and indirect evidence, of positive and circumstantial or presumptive proof, and there is no doubt considerable haziness as to the precise meanings attached to these different phrases by different persons employing them. It is instructive, therefore, to consult the standard definitions. First, "proof" and "evidence" are not synonymous words. Evidence

is only a means to an end; proof is the end. There can be no proof without evidence, but there may be a great deal of evidence without proof. The object of evidence of any and all kinds is to prove, and, in the words of Mr. Best, "proof is the perfection of evidence." The distinction between direct and indirect evidence is artificial. All evidence is direct so far as it goes; otherwise it is not evidence at all. It must go directly to the proving of some fact. The act of inferring or presuming one fact from another is a separate matter; there must be direct evidence of some fact, however, before any other fact can be inferred or presumed therefrom. The terms "circumstantial" and "presumptive" tend also to fog. They are often used as if interchangeable, but in strictness there is an important difference in their meaning. Circumstantial evidence is that which is made up of circumstances or relative facts; presumptive evidence is that which, as a matter of law, raises a certain presumption or inference. All presumptive evidence, says a standard authority (Wills), is circumstantial; but all circumstantial evidence is not presumptive. There is equally high authority for saying that in strictness all evidence is presumptive; that is, it compels and requires a presumption of some sort. Direct evidence, to be of any value, must be presumed to be true, and the law so presumes it until it is shown to be untrue, or the veracity of the witness is impeached. All trials of accused persons begin with one presumption, namely, that of the prisoner's innocence, and end with another presumption, that the verdict of the jury is in accordance with the evidence. The first presumption must be overthrown by proof before a verdict of "guilty" can be given, and the last presumption must be overthrown by argument or proof before the verdict can be set aside.

What, then, is meant by the phrase "presumptive proof"? Many authorities of great weight have held that the phrase is a contradiction in terms, that presumption is not proof, that where proof exists presumption has no place, and that a presumption can be possible only in the absence of proof. Sir W. D. Evans holds that "the distinction between presumption and proof is that the one may be false, but until shown to be so must be regarded as true; but the other (the facts upon which it is founded being admitted) cannot be otherwise than true." Lord Erskine, however, holds that "proof is nothing more than a presumption of the highest order." As a practical matter of every-day life, outside of courts as well as inside, all rational men have agreed to this working rule of conduct and procedure: that when we are fully satisfied and convinced that anything is true we hold it to be proved. No merchant could carry on business for a day on any other rule than this; he must and he does, every day and hour, act on the presumption that certain things of which he is fully convinced are true. No case could be tried in any court, or decided by any jury, if nothing were ever to be presumed or taken for granted. Witnesses are presumed to be telling at any rate what they believe to be the truth, even if it is not; accused men are presumed to be innocent, and all men are presumed to be sane, until they are shown to be otherwise. So, then, it comes to this at last, that to prove a man guilty or innocent is simply to convince the jury that he is so: and this may be done by the direct evidence of eye and ear witnesses; by an array of proven circumstances which, taken in their natural relations one to another and as a whole together, amount to proof, because they cannot be explained away on any other hypothesis; or by presumptions of fact and of law drawn from direct or circumstantial evidence, or from a combination of both.

The more the subject is studied, the

more absurd will appear the contention, just now enjoying a run of newspaper popularity, that there should be no convictions on "purely presumptive proof" or "merely circumstantial evidence." Circumstances and presumptions are the raw materials out of which all proof is made, and without which none is possible. We have already seen that so-called direct evidence itself, and the strongest chains of circumstantial evidence conceivable, supported even by the confessions of the accused persons, cannot be depended upon to prevent erroneous convictions and unjust punishments. Full confessions of guilt have ever been held to be direct evidence of the highest and most satisfactory kind that can be offered to a court. Yet Mr. Starkie lays it down, in his authoritative work on Evidence, that a full confession, though one of the surest proofs of guilt, is only presumptive evidence of that fact; resting upon the presumption that no innocent man would sacrifice his life, liberty, or reputation by a voluntary declaration of that which is untrue. Here again the records show beyond any doubt that this presumption, strong as it is, and firmly grounded in human reason, has frequently been wrong. Confessions were undoubtedly made by the hundreds and thousands in mediæval times, simply in order to escape torture. But the literature of confession is rich, even in modern times, in examples of persons self-convicted by admission of crimes of which they were innocent.

There is a celebrated American case which illustrates this point touching confessions, which may here be briefly recalled. In 1812, a man named Barney Boorn lived in Manchester, Vt., with his two sons, Stephen and Jesse, and a son-in-law, one Russel Colvin. Colvin was generally looked upon as a harmless, half-insane man. His habits were eccentric, and he had been known on several occasions to disappear for days at a time. At last he was missing so long from the town that it began to be whispered that he had been put out of the way. The gossips of the neighborhood remembered that the two Boorn brothers had not been on good terms with Colvin. Shortly after Colvin was missed, one of the Boorn brothers was reported to have said that they had "put him where potatoes won't freeze." Other circumstances were looked up and verified to their disadvantage. Some bones were discovered, and suspected to be those of the murdered Colvin; the hat he wore when last seen was found in a battered state by some children. Finally, suspicion and gossip culminated in the arrest of Jesse Boorn. Seven years had elapsed since Colvin's disappearance, and Stephen Boorn, the other brother, had left the town. There was absolutely no evidence against either of the brothers, but Jesse admitted that his brother Stephen had confessed to him the murder of Colvin; that Stephen said he had quarreled with Colvin, and had killed him by a blow on the head. Stephen Boorn was then brought home under arrest, and, apparently believing that defense was hopeless after his brother's confession, he too confessed. Both brothers, on their own confessions, were tried, convicted, and condemned to death. Jesse, having been the first to confess, was reprieved. Stephen's day of execution was fixed. In an interview with his counsel, the doomed man begged him to advertise for the missing Colvin in the newspapers. His counsel perceived at once that the man must either be innocent or else insane, to make such a suggestion. It was acted upon, and in the Rutland (Vt.) Herald this notice appeared: —

MURDER.

Printers of newspapers throughout the United States are desired to publish that Stephen Boorn, of Manchester, in Vermont, is sentenced to be executed for the murder of Russel Colvin, who has been absent about seven years. Any person

who can give information of said Colvin may save the life of the innocent by making immediate communication. Colvin is about five feet five inches high, light complexion, light-colored hair, blue eyes, about forty years of age.

MANCHESTER, VT., *November* 26, 1819.

Three days afterwards the New York Evening Post copied this notice, and the next day it was read aloud in a New York hotel. A man named Whelpley stood by and heard it read. He had formerly lived in Manchester and had known Colvin, and he told many stories of his eccentric doings. A Mr. Tabor Chadwick, of Shrewsbury, N. J., listened to this talk, and, as he thought it over going home, it occurred to him that a man then living with his brother-in-law, Mr. William Polhemus, of Dover, N. J., answered closely to the description given of Colvin by Whelpley. He wrote a letter to the New York Evening Post stating his impressions. Whelpley saw this letter, went to Dover, N. J., found Colvin, and, after great effort, induced him to go to Manchester and prevent Stephen Boorn's execution. There was great rejoicing in Manchester, Vt., when Stephen was released from prison, and his escape was celebrated by the firing of cannon. Yet both he and his brother had confessed the crime for which he so narrowly escaped the scaffold.

Many such astounding cases of false confessions, made from motives never satisfactorily ascertained, are embalmed in the chronicles of crime: they belong to the mysteries of human experience; they are puzzles in psychological phenomena, which defy solution and mock all our reasoning. Are we, therefore, to conclude that confessions are not the best of direct evidence? We have already seen that the direct evidence of eye-witnesses often results in the gravest judicial errors, because eye-witnesses sometimes swear to what they never saw, and sometimes are themselves the victims of optical illusion or of a deceit practiced upon them by others. For all that, direct evidence is very valuable; strong circumstantial evidence is valuable, also, and the voluntary confessions of accused persons are the highest kind of evidence, amounting to proof positive. All these rules are, of course, subject to the law of exceptions, by which, however, the rule is not set aside, but confirmed.

The current clamor against the conviction of persons charged with murder by means of poison on purely presumptive proof is no new thing. The crime of poisoning has in all times been difficult of discovery. Excluding proof by presumption, not one poisoner in one hundred would ever be brought within the scope of human law and justice. The most memorable poisoning trial of modern times was that of William Palmer, of Rugeley, in Staffordshire, England. He was tried and convicted in 1856 for the murder of one Cook; but he was believed to have poisoned two other persons, also, his wife and a brother. The motive in each case was the same, — the collection of large sums of money from insurance companies which had issued policies on the lives of the poisoned persons. There never was the slightest particle of direct evidence against Palmer. No trace of the poison which he was believed to have used, strychnia, could be found in the body of Cook. Relying on this serious absence of direct proof on a vital point, Palmer freely boasted his confidence in acquittal by the jury up to the last moment; and even after the verdict of "guilty" was rendered, he persisted in believing he would be pardoned. In the condemned cell he repeatedly said that he was going to his grave a murdered man. Public opinion outside of Rugeley, where his guilt was never questioned, was much agitated as to the possibility of his innocence. On the scaffold, however, he broke down; and while he made no formal and explicit confession,

he used expressions to the chaplain which tacitly admitted his guilt, not only in the case of Cook, but in the other cases for which he had not been tried. The verdict, therefore, though based on pure presumption, was undoubtedly just. One of the presumptive proofs which most strongly swayed the jury was the great fear shown by Palmer at every stage of the investigation, and his efforts to suppress and destroy evidence that told against him. He had, for example, offered the driver of the vehicle in which a jar containing the contents of Cook's stomach was to be taken to the Rugeley railway station *en route* to London ten pounds if he would upset the carriage and break the jar.

The same presumption of guilt from evidence of the prisoner's fear and his efforts to destroy the proofs of his crime was drawn in the celebrated case of Captain Donnellan, convicted in 1781 of the murder by poison of his brother-in-law, Sir Theodosius Boughton. In spite of the protests of the mother of the poisoned man, he had insisted, before any one else could arrive on the scene, on rinsing out the glass from which the fatal draught had been drunk. He had also interfered, with success, to prevent any medical examination of the body before it was too late to yield clear and positive proof of the cause of death. The weight of the medical testimony on the trial was rather in the prisoner's favor. The most eminent physician of the time, Sir John Hunter, testified positively that there was nothing in the circumstances of the death, nor in the evidence afforded by the autopsy, to justify the "least suspicion" of poison. Four medical witnesses of much less eminence, however, testified to the exactly contrary effect. The extreme fear shown by the accused man, his persistent efforts to suppress and destroy the evidence against him, and the fact that by the death of his brother-in-law he succeeded to a valuable estate, all raised presumptions against him. On these he was convicted and executed. He most solemnly protested his innocence just before going to the scaffold, and the case is still a favorite theme of disputation in the legal textbooks. The weight of opinion appears to be that the theory of presumptive proof was pressed too far, in this instance; that not only was guilt inferred from indirect evidence, but that a vital fact from which inference was made was itself first inferred, namely, the fact that death was the result of poison. Nevertheless, no one can read all the evidence in the case without feeling that, whatever stretching of the law there may have been to convict Donnellan, it is not likely that any such moral wrong was thereby done to an entirely innocent man as was done in the case of Soren Qvist, already related, where the proof was not "purely presumptive," but almost absolutely direct and positive, and where it was finally clinched by confession.

Mr. Justice Bullen, in his charge in the Donnellan case, laid down this rule: "A presumption which necessarily arises from circumstances is very often more convincing and more satisfactory than any other kind of evidence. It is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof of guilt, without affording opportunities to contradict a great part, if not all, of these circumstances." Ordinarily, this is no doubt true; and cases like that of Soren Qvist do not invalidate the rule.

As a typical case illustrating the trustworthiness, in most cases, of entirely circumstantial evidence, and the safety and justice of convictions on presumptive proof deduced therefrom, the famous trial and conviction of Franz Muller for the murder of Thomas Briggs, a London bank clerk, in July, 1864, under very singular circumstances, may be adduced. Briggs took the train from the Fenchurch Street station on the North

London railway to go to his home at Hackney. When the train arrived at Hackney, the compartment in which he had left Fenchurch Street was found empty of passengers; the cushions were soaked with blood, and all the signs of a terrible struggle for life were visible. Scattered about the carriage were found a hat, a walking-stick, and a small black leather bag. Briggs's mangled body was discovered some distance back on the line of the road, and he lived for several hours after being so found, in an unconscious state. He had evidently been clubbed into insensibility by a fellow-passenger soon after the train started from Fenchurch Street station, robbed, and then thrown out of the carriage window, from which, also, his murderer must have immediately jumped. The one clue which the police had to work upon was the hat left in the railway carriage, which was not that of Briggs. Here was the narrow pathway of a first presumption, which led on to a succession of other presumptions; and finally, without a jot or tittle of direct evidence by eye-witnesses, Franz Muller was landed on the scaffold. The first presumption was that the hat found in the carriage, not being that of Briggs, was that of his assailant. A label inside the crown showed that it was bought at a certain hat store in Marylebone, London. A few days later, Briggs's gold chain, stolen by his murderer, was traced to a jeweler in Cheapside, who had given another in exchange for it to a foreign-looking man whom he described. The second presumption was now made, — that this foreign-looking man was the murderer. This last presumption was widely made known in the papers, and soon a cabman came forward and told of a lodger who had recently left his house, and who, before leaving, had given to his (the cabman's) little daughter a cardboard box bearing the name of the Cheapside jeweler upon it. This cabman found a photograph of his departed lodger, and it was shown to the jeweler, who at once positively identified it as that of the foreign-looking man who had brought Briggs's gold chain to him and exchanged it for another. The lodger's name was Franz Muller. The final presumption of the police was then made, — Muller was the murderer. The cabman examined the hat left in the railway carriage, and identified it as one he had bought for Muller at the Marylebone hat store whose label it bore. Then the London shipping offices were visited, and a clerk was found who, being shown Muller's photograph, remembered that a man whose face it closely resembled had sailed on the Victoria for Canada, via New York. Extradition papers were prepared, and detectives and witnesses started in pursuit on a much faster steam vessel than the Victoria. Muller was arrested in New York harbor, searched, taken ashore, extradited, and carried back at once to England for trial. On his head Briggs's hat was found, and among his effects the gold watch of the murdered man. The defense was able and stubborn. Stress was laid on the fact that nothing but circumstances and presumptions were offered against the accused, and the counsel for the crown admitted this to be so. A strong attempt was made to prove an alibi; and if all that was sworn to had been true, Muller could not have been on the scene of the murder at the time it was committed. But the jury proceeded to accept presumptions as equivalent to proof positive. They believed that the hat left in the carriage was Muller's hat, and presumed that he must have been there, or he could not have left his hat behind; they presumed that his possession of Briggs's hat and gold watch at the time of his arrest in New York harbor was the direct result of his crime in the railway carriage; they presumed on the whole evidence, purely circumstantial as it was, that he did assault and kill Briggs, rob his body, and fly to America

with the fruits of the robbery. They found him guilty with scarcely any hesitation. But the efforts made to save him were desperate, and, as in similar recent cases in this country, a large number of persons, swayed by the strong sentiment evoked out of their own imagination of perfect innocence where guilt had been proved beyond all reasonable doubt, cried "Shame!" Muller was a German, and powerful German influences were invoked to save him. The traditional stubbornness of the English official mind, backed as it always is by a wholesome majority opinion in favor of letting the law take its course, and making murder both an odious and a perilous crime, was adequate to the emergency. Muller, who had protested his innocence until the day of his death, broke down at the final moment, and whispered to the German chaplain who shrived him, "I did it."

Whatever may have been the case in former times, there is no reason to fear, in this age of the world, in English-speaking countries at least, that justice will often miscarry in capital cases, except to the detriment of the state. Sir Matthew Hale's dictum, "It is better five guilty persons should escape unpunished than one innocent person should die," is nowadays more than literally fulfilled. It is a maxim of increasing popularity, not only with all accused persons, but with that considerable class of people who find in criminals an irresistible impulse to sympathetic excitement. Blackstone improved on Hale, making it better to have ten assassins escape than to have one innocent man suffer by an error in the jury-room. Starkie improved on Blackstone, and made it "better that ninety-nine offenders should escape than that one innocent man should be condemned." It is a probable opinion that even Mr. Starkie is behind the times in which we live. There is now a constant clamor which seeks to pass itself off as public opinion, and which practically asserts that it is better all crimes should go unpunished than that any person should by any possibility suffer unjustly.

A glance at our American statistics of homicide for the year 1892 may appropriately conclude this article and point its moral. No fewer than 6796 persons were murdered in the United States last year, as against 5906 persons in 1891, 4290 in 1890, and 3567 in 1889. Innocent persons are evidently not escaping, however the guilty ones are faring. The American victims of homicide have almost doubled in three years. In the same year (1892) that 6796 persons were murdered, only 107 were executed by process of law, — one execution to every 63.5 murders.

The outcry against convictions on "purely presumptive proof" is at once senseless and insincere. If it should ever prevail, an era of free murder would be the inevitable result. It is really a protest against capital punishment, thinly disguised as an objection to the only kind of proof possible in the majority of criminal trials. Wholesome public opinion needs to be rallied in the other direction. It ought never to be forgotten that murder is capital punishment; every person who kills another shows himself a believer in capital punishment — for his victim; and the moment these friends of capital punishment can be converted to more humane views, capital punishment by the state will be abolished; the votaries of the death penalty have only to abolish it themselves, and the state cannot continue it. But the aim of the emotional agitators of the day is to abolish the death penalty first as a public protection, and leave its abolition as a private pastime to await the discretion of the nearly 7000 executioners who are now annually practicing capital punishment in this country.

James W. Clarke.