COUNSEL FOR PRISONERS (E. Review, 1826)

Stockton on the Practice of not allowing Counsel for Prisoners accused of Felony. 8vo. London, 1826

ON the sixth of April, 1824, Mr. George Lamb (a gentleman who is always the advocate of whatever is honest and liberal) presented the following petition from several jurymen in the habit of serving on juries at the Old Bailey:—

> "That your petitioners, fully sensible of the invaluable privilege of Jury trials, and desirous of seeing them as complete as human institutions will admit, feel it their duty to draw the attention of the House to the restrictions imposed on the prisoner's counsel, which, they humbly conceive, have strong claims to a legislative remedy. With every disposition to decide justly, the petitioners have found, by experience, in the course of their attendances as jurymen in the Old Bailey, that the opening statements for the prosecution too frequently leave an impression more unfavourable to the prisoner at the bar, than the evidence of itself could have produced; and it has always sounded harsh to the petitioners to hear it announced from the bench, that the counsel, to whom the prisoner has committed his defence, cannot be permitted to address the jury in his behalf, nor reply to the charges which have, or have not, been substantiated by the witnesses. The petitioners have felt their situation peculiarly painful and embarrassing when the prisoner's faculties, perhaps surprised by such an intimation, are too much absorbed in the difficulties of his unhappy circumstances to admit of an effort towards his own justification, against the statements of the prosecutor's counsel, often unintentionally aggravated through zeal or misconception; and it is purely with a view to the attainment of impartial justice, that the petitioners humbly submit to the serious consideration of the House the expediency of allowing every accused person the full benefit of counsel, as in cases of misdemeanour, and according to the practice of the civil courts."

With the opinions so sensibly and properly expressed by these jurymen, we most cordially agree. We have before touched incidentally on this subject; but shall now give to it a more direct and fuller examination[1]. We look upon it as a very great blot in our over-praised criminal code; and no effort of ours shall be wanting, from time to time, for its removal.

We have now the benefit of discussing these subjects under the government of a Home Secretary of State, whom we may (we believe) fairly call a wise, honest, and high-principled man—as he appears to us, with out wishing for innovation, or having any itch for it, not to be afraid of innovation*, when it is gradual and well considered. He is, indeed, almost the only person we remember in his station, who has not considered sound sense to consist in the rejection of every improvement, and loyalty to be proved by the defence of every accidental, imperfect, or superannuated institution.

If this petition of jurymen be a real *bonâ fide* petition, not the result of solicitation—and we have no reason to doubt it—it is a warning which the Legislature cannot neglect, if it mean to avoid the disgrace of seeing the lower and middle orders of mankind making laws for themselves, which the Government is at length compelled to adopt as measures of their own. The Judges and the Parliament would have gone on to this day, hanging, by wholesale, for the forgeries of bank notes, if juries had not become weary of the continual butchery, and resolved to acquit. The proper execution of laws must always depend, in great measure, upon public opinion; and it is undoubtedly most discreditable to any men intrusted with power when the governed turn round upon their governors, and say, "Your laws are so cruel, or so foolish, we can not, und *will not,* act upon them."

The particular improvement, of allowing counsel to those who are accused of felony, is so far from being unnecessary, from any extraordinary indulgence shown to English prisoners, that we really cannot help suspecting, that not a year elapses in which many innocent persons are not found guilty How is it possible, indeed, that it can be otherwise? There are seventy or eighty persons to be tried for various offences at the Assizes, who have lain in prison for some months; and fifty of whom, perhaps, are of the lowest order of the people, without friends in any better condition than themselves, and without one single penny to employ in their defence. How are they to obtain witnesses? No attorney can be employed—no subpoena can be taken out; the witnesses are fifty miles off, perhaps—totally uninstructed—living from hand to mouth—utterly unable to give up their daily occupation, to pay for their journey, or for their support when arrived at the town of trial—and, if they could get there, not knowing where to go, or what to do. It is impossible but that a human being, in such a helpless situation, must be found guilty; for as he cannot give evidence for himself, and has not a penny to fetch those who can give it for him, any story told against him must be taken for true (however false); since it is impossible for the poor wretch to contradict it. A brother or a sister may come—and support every suffering and privation themselves in coming; but the prisoner cannot often have such claims upon the persons who have witnessed the transaction, nor any other claims but those which an unjustly accused person has upon those whose testimony can exculpate him—and who probably must starve themselves and their families to do it. It is true, a case of life and death will rouse the poorest persons, every now and then, to extraordinary exertions, and they may tramp through mud and dirt to the Assize town to save a life—though even this effort is precarious enough: but imprisonment, hard labour, or transportation, appeal less forcibly than death—and would often appeal for evidence in vain, to the feeble and limited resources of extreme poverty. It is not that a great proportion of those accused are not guilty—but that some are not—and are utterly without means of establishing their innocence. We do not believe they are often accused from wilful and corrupt perjury; but the prosecutor is himself mistaken—the crime has been committed; and in his thirst for vengeance, he has got hold of the wrong man. The wheat was stolen out of the barn; and, amidst many other collateral circumstances, the witnesses (paid and brought up by a wealthy prosecutor, who is repaid by the county) swear that they saw a man, very like the prisoner, with a sack of corn upon his shoulder, at an early hour of the morning, going from the barn in the direction of the prisoner's cottage! Here is one link, and a very material link of a long chain of circumstantial evidence. Judge and jury must give it weight, till it is contradicted. In fact, the prisoner did not steal the corn; he was, to he sure out of his cottage at the same hour—and that also is proved—but travelling in a totally different direction—and was seen to be so travelling by a stage coachman passing by, and by a market gardener. An attorney with money in his pocket, whom every movement of such employ made richer by six-and-eight pence, would have had the two witnesses ready, and at rack and manger, from the first day of the assize; and the innocence of the prisoner would have been established; but by what possible means is the destitute ignorant wretch himself to find or to produce such witnesses? or how can the most humane jury, and the most acute judge, refuse to consider him as guilty, till his witnesses are produced? We have not the slightest disposition to exaggerate, and on the contrary, should be extremely pleased to be convinced that our apprehensions were unfounded: but we have often felt extreme pain at the hopeless and unprotected state of prisoners and we cannot find any answer to our suspicions, or discover any means by which this perversion of justice, under the present state of the law, can be prevented from taking place. Against the prisoner are arrayed all the resources of an angry prosecutor, who has certainly (let who will he the culprit) suffered a serious injury. He has his hand, too, in the public purse: for he prosecutes at the expense of the county. He cannot even relent; for the magistrate has bound him over to indict. His witnesses cannot fail him; for they are all bound over by the same magistrate to give evidence. He is out of prison, too, and can exert himself.

The prisoner, on the other hand, comes into Court, squalid and depressed from long confinement—utterly unable to tell his own story for want of words and want of confidence, and as unable to produce evidence for want of money. His fate accordingly is obvious;—and that there are many innocent men punished every year, for crimes they have not committed, appears to us to be extremely probable. It is indeed, scarcely possible it should be otherwise; and, as if to prove the fact, every now and then a case of this kind is detected. Some circumstances come to light between sentence and execution; immense exertions are made by humane men; time is gained, and the innocence of the condemned person completely established. In Elizabeth Caning's case, two women were capitally convicted, ordered for execution—and at last found innocent, and respited. Such, too was the case of the men who were sentenced, ten sears ago, for the robbery of Lord Cowper's steward. "I have myself (says Mr. Scarlett) *often* seen persons I thought innocent convicted, and the guilty escape, for want of some acute and intelligent counsel to show the hearings of the different circumstances on the conduct and situation of the prisoner."*—(House of Commons Debates, April* 25*th*, 1826.) We are delighted to see, in this last debate, both Mr. Brougham and Mr. Scarlett profess themselves friendly to Mr. Lamb's motion.

But in how many cases has the injustice proceeded without any suspicion being excited? and even if we could reckon upon men being watchful in capital cases, where life is concerned, we are afraid it is in such cases alone that they ever besiege the Secretary of State, and compel his attention. We never remember any such interference to save a man unjustly condemned to the hulks or the tread-mill; and yet there are certainly more condemnations of these minor punishments than to the gallows: but then it is all one—who knows or cares about it? If Harrison or Johnson has been condemned, after regular trial by jury, to six months' tread-mill, because Harrison and Johnson were without a penny to procure evidence—who knows or cares about Harrison or Johnson? how can they make themselves heard? or in what way can they obtain redress? It worries rich and comfortable people to hear the humanity of our penal laws called in question. There is a talk of a society for employing discharged prisoners: might not something be effected by a society instituted for the purpose of providing to poor prisoners a proper defence, and a due attendance of witnesses? But we must hasten on from this disgraceful neglect of poor prisoners, to the particular subject of complaint we have proposed to ourselves.

The proposition is, *That the prisoner accused of felony ought to have the same power of selecting counsel to speak for him as he has cases of treason and misdemeanour, and as defendants have in all civil actions*

Nothing can be done in any discussion upon any point of law in England, without quoting Mr. Justice Blackstone. Mr. Justice Blackstone, we believe, generally wrote his Commentaries late in the evening, with a bottle of wine before him; and little did he think, as each sentence fell from the glass and pen, of the immense influence it might hereafter exercise upon the laws and usages of his country. "It is,'' says this favourite writer, 'not at all of a piece with the rest of the humane treatment of prisoners by the English law: for upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?'' Nor, indeed, strictly speaking, is it a part of our ancient law; for the Mirror, having observed the necessity of counsel in civil suits, who know how to forward and defend the Cause by the rules of law and customs of the realm, immediately subjoins, "and more necessary are they for defence upon indictment and appeals of felony, than upon any other venial crimes." To the authority of Blackstone may be added that of Sir John Hall, in Hollis's case; of Sir Robert Atkyns, in Lord Russell's case; and of Sir Bartholomew Shower, in the arguments for a New Bill of Rights, in 1682. "In the name of God," says this judge, "what harm can accrue to the public in general, or to any man in particular, that, in cases of State-treason, counsel should not be allowed to the accused?

What rule of justice is there to warrant its denial, when, in a civil case of a half-penny cake, he may plead either by himself or by his advocate? That the Court is counsel for the prisoner can be no effectual reason; for so they are for each party, that right may be done"—(*Somers' Tracts,* vol. ii. p. 568.) In the trial of Thomas Rosewell, a dissenting clergyman, for high treason, in 1684, *Judge Jeffries,* in summing up, confessed to the jury, "that he thought it a hard case, that a man should have counsel to defend himself for a two-penny trespass, and his witnesses be examined upon oath; but if he stole, committed murder or felony, nay, high treason, where life, estate, honour, and all were concerned, that he should neither have counsel, nor have his witnesses examined upon *oath."—(Howell's State Trials,* vol. x. p. 207.)

There have been two capital errors in the criminal codes of feudal Europe, from which a great variety of mistake and injustice have proceeded: the one, a disposition to confound accusation with guilt; the other, to mistake a defence of prisoners accused by the Crown, for disloyalty and disaffection to the Crown; and from these errors our own code has been slowly and gradually recovering, by all those struggles and exertions which it always costs to remove *folly sanctioned by antiquity.* In the early periods of our history, the accused person could call no evidence:—then for a long time, his evidence against the King could not be examined upon oath; consequently, he might as well have produced none, as all the evidence against him was upon oath. Till the reign of Anne, no one accused of felony could produce witnesses upon oath and the old practice was vindicated, in opposition to the new one, introduced under the statute of that day, on the grounds of humanity and tenderness to the prisoner! because, as his witnesses were not restricted by an oath, they were at liberty to indulge in simple falsehood as much as they pleased;—so argued the blessed defenders of nonsense in those days. Then it was ruled to be indecent and improper that counsel should be employed against the Crown; and, therefore, the prisoner accused of treason could have no counsel. In like manner, a party accused of felony could have no counsel to assist him in the trial. Counsel might indeed stay in the court, but apart from the prisoner, with whom they could have no communication. They were not allowed to put any question, or to suggest any doubtful point of law; but if the prisoner (likely to be a weak unlettered man) could himself suggest any doubt in matter of law, the Court determined first if the question of law should be entertained, and then assigned counsel to argue it. In those times, too, the jury were punishable if they gave a false verdict against the King, but were *not* punishable if they gave a false verdict against the prisoner. The preamble of the Act of 1696 runs thus:—"Whereas it is expedient that persons charged with high treason should make a full and sufficient defence." Might it not be altered to *persons charged with any species or degree of crime?* All these errors have given way to the force of truth, and to the power of common sense and common humanity—the Attorney and Solicitor General, for the time being, always protesting against each alteration, and regularly and officially prophesying the utter destruction of the whole jurisprudence of Great Britain. There is no man now alive perhaps, so utterly foolish, as to propose, that prisoners should be prevented from producing evidence upon oath, and being heard by their counsel in cases of high treason; and yet it cost a struggle for *seven* sessions to get this measure through the two houses of Parliament. But mankind are much like the children they beget— they always make wry faces at what is to do them good; and it is necessary sometimes to hold the nose, and force the medicine down the throat. They enjoy the health and vigour consequent upon the medicine; but cuff the doctor, and sputter at his stuff!

A most absurd argument was advanced in the honourable House, that the practice of employing counsel would be such an expense to the prisoner!—just as if anything was so expensive as being hanged! What a fine topic for the ordinary! "You are going" (says that exquisite divine) "to be hanged to-morrow, it is true, but consider what a sum you have

saved! Mr. Scarlett or Mr. Brougham might certainly have presented arguments to the jury, which would have insured your acquittal; but do you forget that gentlemen of their eminence must be recompensed by large fees, and that, if your life had been saved, you would actually have been out of pocket above 20*l*.? You will now die with the consciousness of having obeyed the dictates of a wise economy; and with a grateful reverence for the laws of your country, which prevents you from running into such unbounded expense—so let us now go to prayers."

It is ludicrous enough to recollect, when the employment of counsel is objected to on account of the expense to the prisoner, that the same merciful law, which, to save the prisoner's money, has *denied* him counsel, and produced his conviction, seizes upon all his savings the moment he is convicted.

Of all false and foolish *dicta,* the most trite and the most absurd is that which asserts that the Judge is counsel for the prisoner. We do not hesitate to say that this is merely an unmeaning phrase, invented to defend a pernicious abuse. The Judge *cannot* be counsel for the prisoner, *ought not* to be counsel for the prisoner, never *is* counsel for the prisoner. To force an ignorant man into a court of justice, and to tell him that the Judge is his counsel, appears to us quite as foolish as to set a hungry man down to his meals, and to tell him that the table was his dinner. In the first place, a counsel should always have private and previous communication with the prisoner, which the Judge, of course, cannot have. The prisoner reveals to his counsel how far he is guilty, or he is not; states to him all the circumstances of his case—and might often enable his advocate, if his advocate were allowed to speak, to explain a long string of circumstantial evidence in a manner favourable to the innocence of his client. Of all these advantages, the Judge, if he had every disposition to befriend the prisoner, is of course deprived. Something occurs to a prisoner in the course of the cause; he suggests it in a whisper to his counsel, doubtful if it is a wise point to urge or not. His counsel thinks it of importance, and would urge it, if his mouth were not shut. Can a prisoner have this secret communication with a Judge, and take his advice, whether or not he, the Judge, shall mention it to the jury? The counsel has (after all the evidence has been given) a bad opinion of his client's case; but he suppresses that opinion; and it is his duty to do so. He is not to decide; that is the province of the jury; and in spite of his own opinion, his client may be innocent. He is brought there (or would be brought there if the privilege of speech were allowed) for the express purpose of saying all that could be said on one side of the question. He is a weight in *one* scale, and some one else holds the balance. This is the way in which truth is elicited in civil, and would be in criminal cases. But does *the Judge* ever assume the appearance of believing a prisoner to be innocent whom he thinks to be guilty? If the prisoner advances inconclusive or weak arguments, does not the Judge say they are weak and inconclusive, and does he not often sum up against his own client? How then is he counsel for the prisoner? If the counsel for the prisoner were to see a strong point, which the counsel for the prosecution had missed, would he supply the deficiency of his antagonist, and urge what had been neglected to be urged? But is it not the imperious duty of the Judge to do so? How then can these two functionaries stand in the same relation to the prisoner? In fact, the only meaning of the phrase is this, that the Judge will not suffer any undue advantage to be taken of the ignorance and helplessness of the prisoner—that he will point out any evidence or circumstance in his favour—and see that equal justice is done to both parties. But in this sense he is as much the counsel of the prosecutor as of the prisoner. This is all the Judge can do, or even pretends to do; but he can have no previous communication with the prisoner—he can have no confidential communication in court with the prisoner before he sums up; he cannot fling the whole weight of his understanding into the opposite scale against the counsel for the prosecution, and produce that collision of faculties, which, in all other cases but those of felony, is supposed to be the happiest method of arriving at truth.

Baron Garrow, in his charge to the grand jury at Exeter, on the 16th of August, 1824, thus expressed his opinion of a Judge being counsel for the prisoner:— "It has been said, and truly said, that in criminal courts, Judges were counsel for the prisoners. So undoubtedly they were, as far as they could to prevent undue prejudice, to guard against improper influence being excited against prisoners; but it was impossible for them to go further than this; for they could not suggest the course of defence prisoners ought to pursue; for Judges only saw the depositions so short a time before the accused appeared at the bar of their country, that it was quite impossible for them to act fully in that capacity." The learned Baron might have added, that it would be more correct to call the Judge counsel for the prosecution; for his only previous instructions were the depositions for the prosecution, from which, in the absence of counsel, he examined the evidence against the prisoner. On the prisoner's behalf he had no instructions at all.

Can anything, then, be more flagrantly and scandalously unjust, than, in a long case of circumstantial evidence, to refuse to a prisoner the benefit of counsel? A foot-mark, a word, a sound, a tool dropped, all gave birth to the most ingenious inferences; and the counsel for the prosecution is so far from being blamable for entering into all these things, that they are all essential to the detection of guilt, and they are all links of a long and intricate chain: but if a close examination into, and a logical statement of, all these circumstances be necessary for the establishment of guilt, is not the same closeness of reasoning, and the same logical statement necessary for the establishment of innocence? If justice cannot be done to society without the intervention of a practised and ingenious mind, who may connect all these links together, and make them clear to the apprehension of a jury, *can* justice be done to the prisoner, unless similar practice and similar ingenuity are employed to detect the flaws of the chain, and to point out the disconnection of the circumstances?

Is there any one gentleman in the House of Commons, who, in yielding his vote to this paltry and perilous fallacy of the Judge being counsel for the prisoner, does not feel, that, were he himself a criminal, he would prefer almost any counsel at the bar, to the tender mercies of the Judge? How strange that any man who could make his election would eagerly and diligently surrender this exquisite privilege, and addict himself to the perilous practice of giving fees to counsel! Nor let us forget, in considering Judges as counsel for the prisoner, that there have been such men as Chief Justice Jeffries, Mr. Justice Page, and Mr. Justice Alybone, and that, in bad times, such men may reappear. "If you do not allow me counsel, my Lords (says Lord Lovat), it is impossible for me to make any defence, by reason of my infirmity. I do not see, I do not hear. I come up to the bar at the hazard of my life. I have fainted several times; I have been up so early, ever since four o'clock this morning. I therefore ask for assistance; and if you do not allow me counsel, or such aid as is necessary, it will be impossible for me to make any defence at all." Though Lord Lovat's guilt was evident, yet the managers of the impeachment felt so strongly the injustice which was done, that, by the hands of Sir W. Young, the chief manager, a bill was brought into Parliament to allow counseling to persons impeached by that House, which was not previously the case; so that the evil is already done away with, in a great measure, to persons of rank: it so happens in legislation, when a gentleman suffers, public attention is awakened to the evil of laws. Every man who makes laws says, "This may be my case:" but it requires the repeated efforts of humane men, or, as Mr. North calls them, dilettanti philosophers, to awaken the attention of law-makers to evils from which they are themselves exempt. We do not say this to make the leaders of mankind unpopular, but to rouse their earnest attention in cases where the poor only are concerned, and where neither good nor evil can happen to themselves.

A great stress is laid upon the moderation of the opening counsel; that is, he does not conjure the farmers in the jury-box, by the love which they bear to their children—he does not declaim upon blood-guiltiness—he does not describe the death of Abel by Cain, the first

murderer—he does not describe scattered brains, ghastly wounds, pale features, and hair clotted with gore—he does not do a thousand things, which are not in English taste, and which it would be very foolish and very vulgar to do. We readily allow all this. But yet, if it be a cause of importance, it is essentially necessary to our counsellor's reputation that this man should be hung! And accordingly, with a very calm voice, and composed manner, and with many expressions of candour, he sets himself to comment astutely upon the circumstances. Distant events are immediately connected; meaning is given to insignificant facts; new motives are ascribed to innocent actions; farmer gives way after farmer in the jury-box; and a rope of eloquence is woven round the prisoner's neck! Every one is delighted with the talents of the advocate; and, because there has been no noise, no violent action, and no consequent perspiration, he is praised for his candour and forbearance, and the lenity of our laws is the theme of universal approbation. In the meantime, the speech-maker and the prisoner know better.

We should be glad to know of any one nation in the world, taxed by kings, or even imagined by poets (except the English), who have refused to prisoners the benefit of counsel. Why is the voice of humanity heard everywhere else, and disregarded here? In Scotland, the accused have not only counsel to speak for them, but a copy of the indictment, and a list of the witnesses. In France, in the Netherlands, in the whole of Europe, counsel are allotted as a matter of course. Everywhere else but here, accusation is considered as unfavourable to the exercise of human faculties. It is admitted to be that crisis in which, above all others, an unhappy man wants the aid of eloquence, wisdom, and coolness. In France, the Napoleon Code has provided not only that counsel should be allowed to the prisoner, but that, as with us in Scotland, his counsel should have the last word.

It is a most affecting moment in a court of justice when the evidence has all been heard, and the Judge asks the prisoner what he has to say in his defence. The prisoner, who has (by great exertions, perhaps of his friends) saved up money enough to procure counsel, says to the Judge, "that he leaves his defense to his counsel." We have often blushed for English humanity to hear the reply. "Your counsel cannot speak for you, you must speak for yourself;" and this is the reply given to a poor girl of eighteen—to a foreigner—to a deaf man—to a stammerer—to the sick—to the feeble—to the old—to the most abject and ignorant of human beings! It is a reply, we must say, at which common sense and common feeling revolt:—for it is full of brutal cruelty, and of base inattention of those who make laws, to the happiness of those for whom laws were made. We wonder that any juryman can convict under such a shocking violation of all natural justice. The iron age of Clovis and Clottaire can produce no more atrocious violation of every good feeling, and every good principle. Can a sick man find strength and nerves to speak before a large assembly?—can an ignorant man find words?—can a low man find confidence? Is not he afraid of becoming an object of ridicule?—can he believe that his expressions will be understood? How often have we seen a poor wretch, struggling against the agonies of his spirit, and the rudeness of his conceptions, and his awe of better-dressed men and better-taught men, and the shame which the accusation has brought upon his head, and the sight of his parents and children gazing at him in the Court, for the last time, perhaps, and after a long absence! The mariner sinking in the wave does not want a helping hand more than does this poor wretch. But help is denied to all! Age cannot have it, nor ignorance, nor the modesty of women! One hard uncharitable rule silences the defenders of the wretched, in the worst of human evils; and at the bitterest of human moments, mercy is blotted out from the ways of men!

Suppose a crime to have been committed under the influence of insanity; is the insane man, now convalescent, to plead his own insanity?—to offer arguments to show that he must have been mad?—and, by the glimmerings of his returning reason, to prove that at a former period that same reason was utterly extinct? These are the cruel situations into which Judges

and Courts of Justice are thrown by the present state of the law.

There is a Judge now upon the Bench, who never took away the life of a fellow-creature without shutting himself up alone, and giving the most profound attention to every circumstance of the case! and this solemn act he always premises with his own beautiful prayer to God, that he will enlighten him with his Divine Spirit in the exercise of this terrible privilege! Now, would it not be an immense satisfaction to this feeling and honourable magistrate, to be sure that every witness on the side of the prisoner had been heard, and that every argument which could be urged in his favour had been brought forward, by a man whose duty it was to see only on one side of the question, and whose interest and reputation were thoroughly embarked in this partial exertion? If a Judge fail to get at the truth, after these instruments of investigation are used, his failure must be attributed to the limited powers of man—not to the want of good inclination, or wise institutions. We are surprised that such a measure does not come into Parliament, with the strong recommendation of the Judges. It is surely better to be a day longer on the circuit, than to murder rapidly in ermine.

It is argued, that, among the various pleas for mercy that are offered, no prisoner has ever urged to the Secretary of State the disadvantage of having no counsel to plead for him; but a prisoner who dislikes to undergo his sentence naturally addresses to those who can reverse it such arguments only as will produce, in the opinion of the referee, a pleasing effect. He does not therefore find fault with the established system of jurisprudence, but brings forward facts and arguments to prove his own innocence. Besides, how few people there are who can elevate themselves from the acquiescence in what *is,* to the consideration of what *ought to be;* and if they could do so, the way to get rid of a punishment is not (as we have just observed) to say, "You have no right to punish me in this manner," but to say, "I am innocent of the offence." The fraudulent baker at Constantinople, who is about to be baked to death in his own oven, does not complain of the severity of baking bakers, but promises to use more flour and less fraud.

Whence comes it (we should like to ask Sir John Singleton Copley, who seems to dread so much the conflicts of talent in criminal cases) that a method of getting at truth which is found so serviceable in civil cases should be so much objected to in criminal cases? Would you have all this wrangling and bickering, it is asked, and contentious eloquence, when the life of a man is concerned? Why not, as well as when his property is concerned? It is either a good means of doing justice, or it is not, that two understandings should be put in opposition to each other, and that a third should decide between them. Does this open every view which can bear upon the question? Does it in the most effectual manner watch the Judge, detect perjury, and sift evidence? If not, why is it suffered to disgrace our civil institutions? If it effect all these objects, why is it not incorporated into our criminal law? Of what importance is a little disgust at professional tricks, if the solid advantage gained be a nearer approximation to truth? Can anything be more preposterous than this preference of taste to justice, and of solemnity to truth? What an eulogium of a trial to say, "I am by no means satisfied that the Jury were right in finding the prisoner guilty; but everything was carried on with the utmost decorum! The verdict was wrong; but there was the most perfect propriety and order in the proceedings. The man will be unfairly hanged; but all was genteel!" If solemnity is what is principally wanted in a court of justice, we had better study the manners of the old Spanish Inquisition; but if battles with the Judge, and battles among the counsel, are the best method, as they certainly are, of getting at the truth, better tolerate this philosophical Billingsgate, than persevere, *because* the life of a man is at stake, in solemn and polished injustice.

Why should it not be just as wise and equitable to leave the defendant without counsel in civil cases—and to tell him that the Judge was his counsel? And if the reply is to produce

such injurious effects as are anticipated upon the minds of the Jury in criminal cases, why not in civil cases also? In twenty-eight cases out of thirty, the verdict in civil cases is correct; in the two remaining cases, the error may proceed from other causes than the right of reply; and yet the right of reply has existed in all. In a vast majority of cases, the verdict is for the plaintiff, not because there is a right of reply, but because he who has it in his power to decide whether he will go to law or not, and resolves to expose himself to the expense and trouble of a lawsuit, has probably a good foundation for his claim. Nobody, of course, can intend to say that the majority of verdicts in favour of plaintiffs are against justice, and merely attributable to the advantage of a last speech. If this were the case, the sooner advocates are turned out of court the better—and then the improvement of both civil and criminal law would be an abolition of all speeches; for those who dread the effect of the last word upon the fate of the prisoner must remember that there is at present always a last speech against the prisoner; for, as the counsel for the prosecution cannot be replied to, *his* is the last speech.

There is certainly this difference between a civil and a criminal case—that in one a new trial can be granted, in the other not. But you must first make up your mind whether this system of contentious investigation by opposite advocates is or is not the best method of getting at truth: if it be, the more irremediable the decision, the more powerful and perfect should be the means of deciding; and then it would be a less oppression if the civil defendant were deprived of counsel than the criminal prisoner. When an error has been committed, the advantage is greater to the latter of these persons than to the former;—the criminal is not tried again, but pardoned; while the civil defendant must run the chance of another Jury.

If the effect of reply, and the contention of counsel, have all these baneful consequences in felony, why not also in misdemeanour and high treason? Half the cases at Sessions are cases of misdemeanour, where counsel are employed and half-informed Justices preside instead of learned Judges. There are no complaints of the unfairness of verdicts, though there are every now and then of the severity of punishments. Now, if the reasoning of Mr. Lamb's opponents were true, the disturbing force of the prisoner's counsel must fling everything into confusion. The Court for misdemeanours must be a scene of riot and perplexity; and the detection and punishment of crime must be utterly impossible: and yet in the very teeth of these objections, such courts of justice are just as orderly in one set of offences as the other; and the conviction of a guilty person just as certain and as easy.

The prosecutor (if this system were altered) would have the choice of counsel; so he has now—with this difference, that, at present, his counsel cannot be answered nor opposed. It would be better in all cases, if two men of exactly equal talent could be opposed to each other; but as this is impossible, the system must be taken with its inconvenience; but there can be no inequality between counsel so great as that between any counsel and the prisoner pleading for himself. "It has been lately my lot," says Mr. Denman, "to try two prisoners who were deaf and dumb, and who could only be made to understand what was passing by the signs of their friends. The cases were clear and simple; but if they had been circumstantial cases, in what a situation would the Judge and Jury be placed, when the prisoner could have no counsel to plead for him!"—*(Debates of the House of Commons, April 25,* 1826.)

The folly of being counsel for yourself is so notorious in civil cases, that it has grown into a proverb. But the cruelty of the law compels a man, in criminal cases, to be guilty of a much greater act of folly, and to trust his life to an advocate, who, by the common sense of mankind, is pronounced to be inadequate to defend the possession of an acre of land.

In all cases it must be supposed, that reasonably convenient instruments are selected to

effect the purpose in view. A Judge may be commonly presumed to understand his profession, and a Jury to have a fair allowance of common sense; but the objectors to the improvement we recommend appear to make no such suppositions. Counsel are always to make flashy addresses to the passions. Juries are to be so much struck with them, that they are always to acquit or to condemn, contrary to justice; and Judges are always to be so biassed, that they are to fling themselves rashly into the opposite scale against the prisoner. Many cases of misdemeanour consign a man to infamy, and cast a blot upon his posterity. Judges and Juries must feel these cases as strongly as any cases of felony; and yet, in spite of this, and in spite of the free permission of counsel to speak, they preserve their judgment, and command their feelings surprisingly. Generally speaking, we believe none of these evils would take place. Trumpery declamation would be considered as discreditable to the counsel, and would be disregarded by the Jury. The Judge and Jury (as in civil cases) would gain the habit of looking to the facts, selecting the arguments, and coming to reasonable conclusions. It is so in all other countries—and it would be so in this. But the vigilance of the Judge is to relax, if there is counsel for the prisoner. Is, then, the relaxed vigilance of the Judges complained of, in high treason, in misdemeanour, or in civil cases? This appears to us really to shut up the debate, and to preclude reply. *Why* is the practice so good in all other cases, and so pernicious in felony alone? This question has never received even the shadow of an answer. There is no one objection against the allowance of counsel to prisoners in felony, which does not apply to them in all cases. If the vigilance of Judges depend upon this injustice to the prisoner, then, the greater injustice to the prisoner, the more vigilance; and so the true method of perfecting the Bench would be, to deny the prisoner the power of calling witnesses, and to increase as much as possible the disparity between the accuser and the accused. We hope men are selected for *the Judges of Israel* whose vigilance depends upon better and higher principles.

There are three methods of arranging a trial, as to the mode of employing counsel—that both parties should have counsel, or neither—or only one. The first method is the best; the second is preferable to the last; and the last, which is our present system, is the worst possible. If counsel were denied to either of the parties, if it be necessary that any system of jurisprudence should be disgraced by such an act of injustice, they should rather be denied to the prosecutor than to the prisoner.

But the most singular caprice of the law is, that counsel are permitted in very high crimes, and in very small crimes, and denied in crimes of a sort of medium description. In high treason, where you mean to murder Lord Liverpool, and to levy war against the people, and to blow up the two Houses of Parliament, all the lawyers of Westminster Hall may talk themselves dry, and the Jury deaf. Lord Eldon, when at the bar, has been heard for nine hours on such subjects. If, instead of producing the destruction of five thousand people, you are indicted for the murder of one person, here human faculties, from the diminution of guilt, are supposed to be so clear and so unclouded, that the prisoner is quite adequate to make his own defence, and no counsel are allowed. Take it then upon that principle, and let the rule, and the reason of it, pass as sufficient. But if, instead of murdering the man, you have only libelled him, then, for some reason or another, though utterly unknown to us, the original imbecility of faculties in accused persons is respected, and counsel *are* allowed. Was ever such nonsense defended by public men in grave assemblies? The prosecutor, too, (as Mr. Horace Twiss justly observes), can either allow or disallow counsel, by selecting his form of prosecution;—as where a mob had assembled to repeal, by riot and force, some unpopular statute, and certain persons had continued in that assembly for more than an hour after proclamation to disperse. That might be treated as levying war against the King, and then the prisoner would be entitled to receive (as Lord George Gordon did receive) the benefit of counsel. It might also be treated as a seditious rite; then it would be a misdemeanour, and

counsel would still be allowed. But if government had a mind to destroy the prisoner effectually, they have only to abstain from the charge of treason, and to introduce into the indictment the aggravation, that the prisoner had continued with the mob for an hour after proclamation to disperse; this is a felony, the prisoner's life is in jeopardy, and counsel are effectually excluded. It produces, in many other cases disconnected with treason, the most scandalous injustice. A receiver of stolen goods, who employs a young girl to rob her master, may be tried for the misdemeanour; the young girl taken afterwards would be tried for the felony. The receiver would be punishable only with fine, imprisonment, or whipping, and he could have counsel to defend him. The girl indicted for felony, and liable to death, would enjoy no such advantage.

In the comparison between felony and treason there are certainly some arguments why counsel should be allowed in felony rather than in treason. Persons accused of treason are generally persons of education and rank, accustomed to assemblies, and to public speaking, while men accused of felony are commonly of the lowest of the people. If it be true, that Judges in cases of high treason are more liable to be influenced by the Crown, and to lean against the prisoner, this cannot apply to cases of misdemeanour, or to the defendants in civil cases; but if it be necessary, that Judges should be watched in political cases, how often are cases of felony connected with political disaffection! Every Judge, too, has his idiosyncrasies, which require to be watched. Some hate Dissenters—some mobs; some have one weakness, some another; and the ultimate truth is, that no court of justice is safe, unless there is some one present whose occupation and interest it is to watch the safety of the prisoner. Till then, no man of right feeling can be easy at the administration of justice, and the punishment of death.

Two men are accused of one offence; the one dexterous, bold, subtle, gifted with speech, and remarkable for presence of mind; the other timid, hesitating, and confused—is there any reason why the chances of these two men for acquittal should be, as they are, so very different? Inequalities there will be in the means of defence under the best system, but there is no occasion the law should make these greater than they are left by chance or nature.

But (it is asked) what practical injustice is done—what practical evil is there in the present system? The great object of all law is, that the guilty should be punished, and that the innocent should be acquitted. A very great majority of prisoners, we admit, are guilty—and so clearly guilty, that we believe they would be found guilty under any system; but among the number of those who are tried, *some* are innocent, and the chance of establishing their innocence is very much diminished by the privation of counsel. In the course of twenty or thirty years, among the whole mass of English prisoners, we believe *many* are found guilty who are innocent, and who would not have been found guilty, if an able and intelligent man had watched over their interest, and represented their case. If this happen only to two or three every year, it is quite a sufficient reason why the law should be altered. That such cases exist we firmly believe; and this is the practical evil— perceptible to men of sense and reflection; but not likely to become the subject of general petition. To ask why there are not petitions—why the evil is not more noticed, is mere parliamentary froth and ministerial juggling. Gentlemen are rarely hung. If they were so, there would be petitions without end for counsel. The creatures exposed to the cruelties and injustice of the law are dumb creatures, who feel the evil without being able to express their feeling. Besides, the question is not, whether the evil is found out, but whether the evil exist. Whoever thinks it is an evil, should vote against it, whether the sufferer from the injustice discover it to be an injustice, or whether he suffer in ignorant silence. When the bill was enacted, which allowed counsel for treason, there was not a petition from one end of England to the other. Can there be a more shocking answer from the Ministerial Bench, than to say, For real evil we care nothing—only for detected evil? We will set about curing any wrong which affects our popularity and power: but as to

any other evil, we wait till the people find it out; and, in the meantime, commit such evils to the care of Mr. George Lamb, and of Sir James Mackintosh. We are sure so good a man as Mr. Peel can never feel in this manner.

Howard devoted himself to his country. It was a noble example. Let two gentlemen on the Ministerial side of the House (we only ask for two) commit some crimes, which will render their execution a matter of painful necessity. Let them feel, and report to the House, all the injustice and inconvenience of having neither a copy of the indictment, nor a list of witnesses, nor counsel to defend them. We will venture to say, that the evidence of two such persons would do more for the improvement of the criminal law, than all the orations of Mr. Lamb, or the lucubrations of Beccaria. Such evidence would save time, and bring the question to an issue. It is a great duty, and ought to be fulfilled—and in ancient Rome, would have been fulfilled.

The opponents always forget that Mr. Lamb's plan is not to *compel* prisoners to have counsel, but to *allow* them to have counsel, if they choose to do so. Depend upon it, as Dr. Johnson says, when a man is going to be hanged, his faculties are wonderfully concentrated. If it be really true, as the defenders of *Mumpsimus* observe, that the Judge is the best counsel for the prisoner, the prisoner will soon learn to employ him, especially as his Lordship works without fees. All that we want is an option given to the prisoner—that a man, left to adopt his own means of defence in every trifling civil right, may have the same power of selecting his own auxiliaries for higher interests.

But nothing can be more unjust than to speak of Judges, as if they were of one standard, and one heart and head pattern. The great majority of Judges, we have no doubt, are upright and pure; but some have been selected for flexible politics—some are passionate—some are in a hurry—some are violent churchmen— some resemble ancient females—some have the gout—some are eighty years old—some are blind, deaf, and have lost the power of smelling. All one to the unhappy prisoner—he has no choice.

It is impossible to put so gross an insult upon Judges, Jurymen, Grand Jurymen, or any person connected with the administration of justice, as to suppose that the longer time to be taken up by the speeches of counsel constitutes the grand bar to the proposed alteration. If three hours would acquit a man, and he is hanged because he is only allowed two hours for his defence, the poor man is as much murdered as if his throat had been cut before he came into Court. If twelve Judges cannot do the most perfect justice, other twelve must be appointed. Strange administration of criminal law, to adhere obstinately to an inadequate number of Judges, and to refuse any improvement which is incompatible with this arbitrary and capricious enactment. Neither is it quite certain that the proposed alteration would create a greater demand upon the time of the Court. At present the counsel makes a defence by long cross-examinations, and examinations in chief of the witnesses, and the Judge allows a greater latitude than he would do, if the counsel of the prisoner were permitted to speak. The counsel by these oblique methods, and by stating false points of law for the express purpose of introducing facts, endeavours to obviate the injustice of the law, and takes up more time by this oblique, than he would do by a direct defence. But the best answer to this objection of time (which, if true, is no objection at all) is, that as many misdemeanours as felonies are tried in a given time, though counsel are allowed in the former, and not in the latter case.

One excuse for the absence of counsel is, that the evidence upon which the prisoner is convicted is always so clear, that the counsel cannot gainsay it. This is mere absurdity. There is not, and cannot be, any such rule. Many a man has been hung upon a string of circumstantial evidence, which not only very ingenious men, but very candid and judicious men, might criticise and call in question. If no one were found guilty but upon such evidence

as would not admit of a doubt, half the crimes in the world would be unpunished. This dictum, by which the present practice has often been defended, was adopted by Lord Chancellor Nottingham. To the lot of this Chancellor, however, it fell to pass sentence of death upon Lord Stafford, whom (as Mr. Denman justly observes) no court of justice, not even the House of Lords (constituted as it was in those days), could have put to death, if he had had counsel to defend him.

To improve the criminal law of England, and to make it really deserving of the incessant eulogium which is lavished upon it, we would assimilate trials for felony to trials for high treason. The prisoner should not only have counsel, but a copy of the indictment and a list of the witnesses, many days antecedent to the trial. It is in the highest degree unjust that I should not see and study the description of the crime with which I am charged, if the most scrupulous exactness be required in that instrument which charges me with crime. If the place *where,* the time *when,* and the manner *how,* and the persons by whom, must all be specified with the most perfect accuracy, if any deviation from this accuracy is fatal, the prisoner or his legal advisers, should have a full opportunity of judging whether the scruples of the law have been attended to in the formation of the indictment; and they ought not to be confined to the hasty and imperfect consideration which can be given to an indictment exhibited for the first time in Court. Neither is it possible for the prisoner to repel accusation till he knows who is to be brought against him. He may see suddenly, stuck up in the witness's box, a man who has been writing him letters, to extort money from the threat of evidence he could produce. The character of such a witness would be destroyed in a moment, if the letters were produced; and the letters would have been produced, of course, if the prisoner had imagined such a person would have been brought forward by the prosecutor. It is utterly impossible for a prisoner to know in what way he may be assailed, and against what species of attacks he is to guard. Conversations may be brought against him which he has forgotten, and to which he could (upon notice) have given another colour and complexion. Actions are made to bear upon his case, which (if he had known they would have been referred to) might have been explained in the most satisfactory manner. All these modes of attack are pointed out by the list of witnesses transmitted to the prisoner, and he has time to prepare his answer, as it is perfectly just he should have. This is justice, when a prisoner has ample means of compelling the attendance of his witnesses; when his written accusation is put into his hand, and he has time to study it—when he knows in what manner his guilt is to be proved, and when he has a man of practised understanding to state his facts, and prefer his arguments. Then criminal justice may march on boldly. The Judge has no stain of blood on his ermine; and the phrases which English people are so fond of lavishing upon the humanity of their laws will have a real foundation. At present this part of the law is a mere relic of the barbarous injustice by which accusation in the early part of our jurisprudence was always confounded with guilt. The greater part of these abuses have been brushed away, as this cannot fail soon to be. In the meantime it is defended (as every other abuse has been defended) by men who think it their duty to defend everything which *is,* and to dread everything which *is not.* We are told that the Judge does what he does not do, and ought not to do. The most pernicious effects are anticipated in trials of felony, from that which is found to produce the most perfect justice in civil causes, and in cases of treason and misdemeanour: we are called upon to continue a practice without example in any other country, and are required by lawyers to consider that custom as humane, which every one who is not a lawyer pronounces to be most cruel and unjust—and which has not been brought forward to general notice, only because its bad effects are confined to the last and lowest of mankind.**

*We must always except the Catholic question. Mr. Peel's opinions on this subject (giving him credit for sincerity) have always, been a subject of real surprise to us. It must surely be some mistake between the Right Honourable Gentleman and his chaplain! They have been travelling together, and some of the person's notions have been put up into Mr. Peel's head by mistake. We yet hope he will return them to their rightful owner.

**All this nonsense is now put an end to. Counsel is allowed to the prisoner, and they are permitted to speak in his defence.