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THE RIGHT TO COUNSEL IN A CRIMINAL CASE.

THE sixth amendment to the Constitution of the United States provides, among other things, that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, * * * and to have the assistance of counsel for his defence."

The ninth section of the first article of the Constitution of Pennsylvania declares that "in all criminal prosecutions the accused hath a right to be heard by himself and his counsel." Provisions identical in language or in substance with one or the other of these quotations are to be found in the Constitution of every state in the Union, with the exception of Virginia.

It is our purpose to examine this right, to trace the history of its establishment, and define its boundaries. The subject is one of unusual interest, and appeals not only to the professional man but to every intelligent layman who values his rights as a citizen and seeks to fully understand them. The claim of Guiteau, recently on trial for the murder of President Garfield, though represented by counsel, to act as his own counsel, and his extraordinary behavior in the assertion and exercise of his right, awakened a wide spread public interest in the topic and led to many inquiries concerning it. It is not too late to discuss it.

The rule, briefly stated, is as follows: At common law, in all cases, whether of treason, felony or misdemeanor, and at all times, the prisoner has had and still has the right to address the jury in person in his own defence. In misdemeanors he always was and still is allowed to do this by counsel; but it is universally agreed that at common law a prisoner, whether peer or commoner, was not entitled to defend by counsel, upon the general issue "not guilty" on any indictment for treason or felony: 1 Archbold's *Crim. Prac. and Pl.*, Pomeroy's ed., 551; Weeks on Attorneys at Law, sect. 184; 1 Chitty's *Crim. Law* *407; Hawkins's P. C., b. 2, c. 39, sect. 1; Foster's *Crown Law* 231; Hale's P. C. 236.

There were certain well-established exceptions. In appeals, which were private rather than public prosecutions, being the accusation of a murderer by one who had an interest in the person killed, or of a felon by one of his accomplices, full counsel were always allowed to the appellee, because although the object sought was the death of the defendant, yet the form was that of a civil proceeding, and all appeals were presumed to be carried on with greater spleen and vindictiveness than indictments: 2 Hawkins, c. 39, sect. 3; 1 Chitty *Crim. Law* *410; 17 *State Trials* (Howell's ed.) 430; 8 *Id.* 726.

The prohibition of the assistance of counsel applied only to *matters of fact*, as the court assigned counsel to argue a doubtful point of law arising at or after trial (Hale's P. C. *236); and upon the trial of issues which did not turn on the question of "guilty" or "not guilty," but upon collateral facts, as a plea of sanctuary or a pardon, or upon the assignment of error to reverse a sentence of outlawry, prisoners under capital charges, whether of treason or felony, were entitled to the assistance of counsel: Foster's *Crown Law*, pp. 42, 46, 56, 232; *Ratcliff's Case*, 4 *State Trials* 47.

But these exceptions were of little practical benefit to those ignorant of law, for it was held in all cases that the prisoner must propose the point, and if the court think it will bear a debate they will assign counsel to argue it: 2 Hawkins, c. 39, sect. 4; 7 *State Tr.* 1523; 8 *Id.* 570; 11 *Id.* 525. At the trial of Lord Preston in 1691, Chief Baron ATKYNS said: "It is not the doubt of the prisoner but the doubt of the court that will occasion the assignment of counsel." 12 *State Trials* 659, 660.

Upon the trial of Thomas Howard, Duke of Norfolk, in 1571, for treason in supporting the right of Mary Queen of Scots to the

British throne, he made a vain appeal to the court for counsel even upon questions of law: 1 State Trials 965. "I have," he said, "had very short warning to provide answer to so great a matter. I have not had fourteen hours in all both day and night; and now I neither hear the same statute alleged, and yet I am put at once to the whole herd of laws, not knowing which particularly to answer unto. The indictment containeth sundry points and matters to touch me by circumstance, and so to draw me into the matter of treason which are not treasons themselves; therefore with reverence and humble submission I am led to think I may have counsel, and this I show, that you may think I move not this suit without any ground. I am hardly handled. I have had short warning and no books." Chief Justice DYER refused the request by answering that counsel could not be allowed in point of treason.

Sir Henry Vane, on his trial for high treason, raised most important questions of law, and prayed to have counsel assigned to speak to them. The application was refused on the ground that the same points had been decided on the trials of the regicides: 6 State Trials 183, A. D. 1662.

During the trial of Sidney application was made by him for counsel when he contended that conspiracy to levy war was not treason, and when he objected that some of the jury were not freeholders of the county in which the venue of the indictment was laid, and he was answered by Chief Justice JEFFREYS "If you assign us any particular point of law, if the court *think it such a point as may be worth the debating*, you shall have counsel:" 9 State Trials 834. When Bamfield rose as *amicus curiæ* and suggested in arrest of judgment that there was a material defect in the indictment, JEFFREYS coolly observed, "We have heard of it already, we thank you for your friendship and are satisfied." He then sentenced the illustrious prisoner to death. On the trial of Colledge, Lord Chief Justice NORTH declared, "I must tell you a defence in case of high treason ought not to be made by artificial cavils but by plain fact:" 8 State Trials 570.

The judges in the time of the Commonwealth were no less arbitrary. Their behavior towards John Lilburne on his trial as a traitor for publishing criticisms upon the government of Cromwell, was more decorous in tone but none the less severe than that of Foster or Scroggs. Time and again he besought the appointment

of counsel, and was always refused. Then bursting out with long suppressed passion he cried: "Pray let me have fair play, and not be wound and screwed up into hazards and snares." With a courage unequalled by his bravest deeds in battle, he declared: "In so extraordinary a case for me to be denied to consult with counsel, I tell you, sir, it is most unjust and the most unrighteous thing in my apprehension that I ever heard or saw in all my life. O Lord! was there ever such a pack of unjust and unrighteous judges in the world. * * * I would rather have died in this very court before I would have pleaded one word unto you, for now you go about by my own ignorance and folly to make myself guilty of taking away my own life, and therefore unless you will permit me counsel, upon this lock I am resolved to die:" 4 State Trials 1299. His appeal was fruitless.

An apology for this harsh feature of the rule was offered in the maxim that the judge was counsel for the prisoner; that it was his duty to see that the proceedings were regular, to examine witnesses for the defendant, to advise him for his benefit, to hear his defence with patience, and in general to take care that he was neither irregularly nor unjustly convicted. In prosecutions where counsel were allowed, the court did not advise the prisoner. The maxim was benevolent, but few judges ever gave the slightest heed to it in practice.

One or two instances must suffice for illustration. Upon the trial of Penn and Mead at the Old Bailey, for preaching to a seditious and tumultuous assembly, the recorder put the following question:

"What say you, Mr. Mead—were you there?"

MEAD: "It is a maxim of law that no one is bound to accuse himself, and why dost thou offer to insnare me with such a question? Doth not this show thy malice? Is this like unto a judge that ought to be counsel for the prisoner at the bar?"

REC.: "Sir, hold your tongue, I did not go about to insnare you?" 6 State Trials 958.

Upon the trial of John Crook, and other Quakers, for refusing to take the oaths of allegiance, the following spirited dialogue is reported:

FOSTER, C. J.: "John Crook, when did you take the oath of allegiance?"

CROOK: "Answering this question in the negative is to accuse

myself, which you ought not to put me upon.' '*Nemo debet seipsum prodere.*' I am an Englishman and I ought not to be taken, nor imprisoned, nor called in question, nor put to answer but according to the law of the land."

FOSTER, C. J.: "You are here required to take the oath of allegiance, and when you have done that, you shall be heard."

CROOK: "You, that are judges on the bench, ought to be my counsel, not my accusers."

FOSTER, C. J.: "We are here to do justice, and we are upon our oaths to tell you what is law, not you us. Therefore, sirrah, you are too bold."

CROOK: "Sirrah is not a word becoming a judge. If I speak loud, it is my zeal for the truth, and for the name of the Lord. Mine innocency makes me bold."

FOSTER, C. J.: "It is an evil zeal."

The chief justice then ordered the mouth of the prisoner to be gagged with a "dirty cloth:" 6 State Trials 119.

The grossest violation of the maxim was the behavior of JEFFREYS upon the trial of Lady Alice Lisle. She was more than seventy years of age and a widow, and had given food and shelter to a dissenting clergyman named Hicks, who had been with the army of Monmouth. The indictment charged her with treason. There was no proof whatever that she knew that the man she harbored had ever been with the rebel army; and the jury declared that they were not satisfied upon this point, which was the only important one in the case. The judge usurped the functions of the counsel for the Crown and pressed a reluctant and conscientious witness so hard as to "clutter him out of his senses." Blasphemy, ribaldry and the most horrid jests and imprecations were showered upon him in the effort to induce him to say something that would convict the prisoner. Finally, JEFFREYS extorted a verdict by arbitrarily declaring "there is as full proof as proof can be:" 11 State Trials 322. He then sentenced the unhappy lady to be burned to death, but she escaped the terrible fate of Elizabeth Gaunt, by a commutation of the sentence into death by hanging. Upon the scaffold she spoke these words: "I have been told the court ought to be counsel for the prisoner; instead of which there was evidence given from thence which, though it were but hearsay, might possibly affect my jury. My defence was such as might be expected from a weak woman; but such as it was I did not hear it

repeated to the jury: But I forgive all persons that have done me wrong, and I desire that God will do so likewise."

The rule and the practice under it had their admirers. *Ld. COKE* declared that the reason of its adoption was because the evidence by which the prisoner was to be condemned ought to be so very evident, and so plain, that all the counsel in the world should not be able to answer it: 3 *Inst.* 137. *Sir John Davys* declared that our law doth abhor the defence and maintenance of bad causes more than any other law in the world: *Preface to Davy's Rep.* *Sergeant Hawkins* asserted "if it be considered that generally every one of common understanding may as properly speak to a matter of fact as if he were the best lawyer, and that it requires no manner of skill to make a plain and honest defence, which in cases of this kind is always the best, the simplicity and innocence, artless and ingenuous behavior of one whose conscience acquits him, having something in it more moving and convincing than the highest eloquence of persons speaking in a cause not their own." 2 *Hawkins*, c. 39, sect. 2.

The rule did not pass unchallenged. The seeds of its dissolution, though slow in development, had been early sown. As far back as the reign of *Edward II.*, the author of the *Mirror of Justices* had declared that counsel learned in the law "were more necessary for the defence of indictments and appeals of felony than upon other venial causes." The venerable *Whitelocke* assailed it in debate; *Sir ROBERT ATKYNS* declared it a severity, and significantly said that he knew from experience what the maxim meant that the judge was counsel for the prisoner. Even *JEFFREYS* declared that it was an injustice that a man should have counsel to defend a two-penny trespass, but that in defence of life he should have none. (See the very learned note to 5 *State Trials* 469.) The *Bloody Assizes* aroused the sleeping sense of justice of the nation, and in ten years after, the Bill for regulating Trials in Cases of High Treason was brought forward in the House of Commons early in February of 1695. After much opposition it became a law, known as the 7th *Wm. III.*, c. 3. The act, among other things, gave to a prisoner charged with high treason "the assistance of counsel, not exceeding two, throughout his trial, to examine his witnesses and to conduct his whole defence as well in point of fact as upon questions of law."

Many wiseacres predicted the ruin of the state. *Bishop Burnet*,

after stating that the bill had passed contrary to the hopes of those then at the head of affairs, said, "the design of it seemed to be to make men as safe in all treasonable practices as possible." The judges too were the avowed enemies of the change.

The act was to go into effect on the 25th of March 1696. On the 24th of March, Sir William Parkyns, a wealthy knight, bred to the law, was put upon his trial for having been concerned with Charnock, Porter, Goodman and Fenwick in a Jacobite plot to assassinate the king. He prayed that counsel might be allowed him, and cited the preamble of the statute as declaring that such a demand was reasonable and just. Lord HOLT replied: "God forbid that we should anticipate the operation of an Act of Parliament even by a single day:" 13 State Trials 72. Parkyns then asked that the trial be postponed; but his application was refused and the unlucky man was actually convicted and executed six hours before the bill went into effect.

It was a long time, however, before counsel were bold enough to defend their clients with spirit, and it remained for Dunning and the never to be daunted Erskine to establish the rights of the bar.

The first instance on record of the assignment of counsel under the act is on the trial of Rookwood and others for having been concerned in the same conspiracy as Parkyns. Sir Bartholomew Shower was assigned as counsel. "My Lord," said he, addressing Chief Justice HOLT, "we are assigned of counsel in pursuance of an act of Parliament, and we hope that nothing which we shall say in defence of our clients shall be imputed to ourselves. * * * We come not here to countenance the practices for which the prisoners stand accused, nor the principles upon which such practices may be presumed to be founded; for we know of none, either religious or civil, that can warrant or excuse them." Lord HOLT administered a very proper rebuke. 13 State Trials 154.

In strong contrast with this abject apology is the splendid bearing of Erskine on the trial of Paine: "I will for ever—at all hazards—assert the dignity, independence and integrity of the English bar, without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say that he *will* or will *not* stand between the crown and the subject arraigned in the court where he daily sits to practice, from that moment, the liberties of England are at an end."

Impeachments had been expressly excepted from the Statute of William, and, therefore, counsel were denied to Lords Winton and Lovat, the latter of whom, broken by the weight of eighty years, was too feeble to struggle even for his life. It is significant that Sir William Yonge, who was the leading manager of their impeachment, introduced into the House of Commons the bill that in 1747 became known as 20th Geo. II., correcting this abuse. It was not until 1836 that the last remnants of this barbarism were swept away. The 6 & 7 Wm. IV., c. 114, enacted that all persons tried for felony should be admitted to make their defence by counsel or attorney.

As the law now stands, the prisoner, for whatever crime indicted, is entitled to the full assistance of counsel upon every question of fact and law, to visit him in prison, to advise him in court, to cross-examine the opposing witnesses, to examine in chief those produced for the defence, and to address the jury. The only remaining question is, how far does the representation by counsel supplant the prisoner's ancient right to act in person?

It was early held in England that a man could be heard by himself or his counsel, but not by both. The point was raised upon the trial of Mr. Redhead Yorke, in 1795, for a misdemeanor: 25 State Trials 1021. At the close of the opening by the counsel for the prosecution, Mr. Yorke applied to Justice ROOKE to learn whether both himself and his counsel might address the jury. He was informed that both could not, and that he must make his election. Mr. Yorke then applied to be permitted, when his counsel examined the witnesses, to examine them himself also. This was refused. Mr. Yorke and his counsel then alternately cross-examined. Then at the close of the prosecution the court asked the prisoner whether he had elected to address the jury or to leave it to his counsel. He elected to do it in person, and his counsel and himself alternately examined the witnesses for the defence.

In 1811, Lord ELLENBOROUGH, in the case of *Rex v. White*,³ Camp. N. P. 98, still further restricted the practice. His language is so clear and sensible as to deserve quotation: "I am afraid of the confusion and perplexity that would arise if a cause were to be conducted at the same time both by counsel and the party himself. I am extremely anxious that a person accused should have every assistance in making his defence, but I must likewise look to the decent and orderly administration of justice.

I therefore cannot allow counsel to examine witnesses for the defendant if he is likewise to put questions to them himself and afterwards to address the jury. If, in the course of the trial, any point of law arises which he declares himself incompetent to discuss, I will be very ready to hear it argued by his counsel, although he conducts the defence himself. I will do in this respect as was formerly done in capital cases when the assistance of counsel was not permitted to prisoners upon matters of fact. I think I cannot consistently with my duty go further; and surely there is no hardship in the rule I lay down. If the defendant has counsel to conduct his cause, he may suggest any question to them which he considers fit to be put, or if he takes the conduct of it upon himself he may have the benefit of their private suggestions upon matters of fact; and as soon as any point of law arises they shall be readily heard upon it."

Both of these cases were cited in argument before Lord Chief Justice ABBOTT on the trial of one Parkins for a misdemeanor; he held that a prisoner cannot have counsel to examine and cross-examine witnesses and reserve to himself the right to address the jury: *Rex v. Parkins*, Ryan & Moody N. P. C. 168.

An examination of the later decisions shows an occasional departure, under very special circumstances, from the rulings just quoted, but the undoubted weight of authority is in favor of the rule, which very eminent judges have repeatedly enforced, that a prisoner is in the hands of his counsel for every purpose, if he see fit to employ counsel; but so tender is the law about infringements of ancient rights that on a murder trial of a foreigner who had obstinately remained mute from malice for more than a year, the court refused to allow counsel to appear for the prisoner without his express consent: *Regina v. Yscuado*, 6 Cox C. C. 386.

In the following cases the rule was enforced: *Reg. v. Manzano*, 2 Foster & F. 64; s. c. 6 Jur. N. S. 406; *Reg. v. Taylor*, 1 Foster & F. 535; *Reg. v. Boucher*, 8 C. & P. 141; *Reg. v. Burrows*, 2 M. & Rob. 124; *Reg. v. Walkling*, 8 C. & P. 243; *Reg. v. Rider*, 8 Id. 539; *Reg. v. Teste*, 4 Jur. N. S. 244.

In the following cases the rule was relaxed: *Reg. v. Stephens*, 11 Cox C. C. 669; *Reg. v. Dyer*, 1 Id. 113; *Reg. v. Malings*, 8 C. & P. 242; *Queen v. Williams*, 1 Cox C. C. 363.

We now turn to the United States, and must go back in point of time. The materials to furnish an accurate judgment of the

practice in the colonies prior to the Revolution are few and unsatisfactory. The colonial charters and patents are silent as to any change, real or proposed, of the law of the mother country, but among the laws agreed upon in England between William Penn and "divers free men of the Province" of Pennsylvania, the sixth article provided that "in all courts all persons of all persuasions may freely appear in their own way and according to their own manner, and there personally plead their own cause themselves, or, if unable, by their friend." Admonished, no doubt, by his own sufferings, the liberal and benevolent Proprietary, in the Charter of Privileges granted by him in 1701, with the approbation of the General Assembly, declared, "that all criminals shall have the same privileges of witnesses and counsel as their prosecutors." The records of the Provincial Council show that those accused of crime both defended themselves and were defended by counsel; but we can only conjecture how the practice changed in the other colonies.

In 1718, at Charleston, in South Carolina, Major Stede Bonnet and thirty-three others were tried in the Vice Admiralty Court for piracy: 15 State Trials 1231. The prisoners had no counsel, and the behavior of Chief Justice TROTT is a sad instance of judicial barbarity. The statements of the prisoners in one case, to which no credit was given for their exculpation, were used as hearsay evidence in another case to convict the prisoner.

In 1732 John Peter Zenger was tried in New York for libel, and was defended with great boldness by Andrew Hamilton of Philadelphia, the most eloquent and renowned lawyer of his day. The case is no guide for us, however, as libel is graded as a misdemeanor.

In 1770, Josiah Quincy, Jr., and John Adams defended, for the murder of Attucks, Gray and others, the soldiers who had fired upon the mob in the streets of Boston on the evening of the 5th of March. These and the cases of the Salem witches are the only trials of note that our meagre colonial records afford.

The example set by Penn and the sufferings of the English at home, full of instructive warning to those who sought to guard against governmental tyranny by constitutional provisions, are sufficient to account for the presence in the earliest state Constitutions of a clause extending to one accused of crime the protection of a defence by counsel.

Pennsylvania and Maryland so provided in 1776; New York in the following year; Massachusetts in 1780, and Delaware in 1792. In September 1787, the convention called to frame the Constitution of the United States completed their work, and submitted it to the people for adoption. The original instrument contained no Bill of Rights and no reference to our subject. At the end of July 1788, eleven states had unconditionally adopted the Constitution, but five of them proposed amendments for the consideration of the first Congress that would assemble under it, and one of the five called for a second general convention to act upon the amendments desired. North Carolina and Rhode Island did not adopt the Constitution until the administration of Washington had fairly begun, and by the 15th of December 1791, amendments were duly proposed by Congress and ratified by the legislatures of the several states. The sixth amendment, to which alone we need refer, has been partly quoted at the head of this article. To carry it into effect Congress provided "that in all courts of the United States the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein:" and further, at a later date, "every person * * * indicted for treason or other capital offence shall be allowed to make his full defence by counsel learned in the law:" Rev. Stat. U. S. sects. 747, 1034. This language and that of the amendment to the Constitution have never received judicial construction. The practice, we believe, has been in conformity with the English rule, until the recent trial of Guiteau. It is a singular fact that the question has never been raised in any of the states, except in a late case in Tennessee, which we shall presently notice.

In Mississippi, South Carolina and Texas, the language of the constitutional clauses is too explicit to admit of doubt; it gives the right "to be heard by himself or counsel, or both, as he may elect." In Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Kentucky, Missouri, New Hampshire, Ohio, Oregon, Pennsylvania, Tennessee, Vermont and Wisconsin, the language is "by himself *and* his counsel." In Kansas, Louisiana and Nebraska, it is "in person *or* by counsel." In Alabama and Maine, it is "by himself *and* his counsel or either at his election." In Massachusetts he "shall be fully heard by himself *or* counsel, at his election." In California, Florida, Nevada and New York, he is "to appear and defend in per-

son *and* with counsel as in civil actions." In Georgia he "shall have the privilege and benefit of counsel." In Iowa, Michigan, Minnesota, New Jersey, North Carolina, Rhode Island and West Virginia, "he shall have the assistance of counsel in his defence." In Maryland it is declared that "he ought to be allowed counsel." In Virginia there is no constitutional provision, but a statute of 1786 and well-settled practice establish the right.

Upon most of these clauses there is room for ingenuity of argument, but the almost total absence of judicial decisions is strong evidence of the sensible determination of criminals to commit their defences exclusively to professional hands. The only case revealed by a diligent search is that of *Wilson v. The State*, in Tennessee, 3 Heisk. 232. Counsel had fully agreed upon the evidence, and then the prisoner himself claimed the right to make a statement. This was denied. The Court of Errors and Appeals held that the right given by the Constitution, though in the words "to be heard by himself *and* his counsel," simply meant the right to argue the case upon the facts in evidence, and did not include a sworn or unsworn statement of facts not otherwise proved. Judge NELSON dissented on the ground that this was a denial of right. It may, therefore, be fairly said that the question is still open to debate.

The limitations put upon the rights of advocates, and, by parity of reasoning, upon those who claim to act as their own advocates, are such as grow out of the powers of a court to so superintend the proceedings as to prevent a waste of time or breach of decorum. But while insisting upon the existence of these powers, judges have universally displayed the utmost reluctance to exercise them. The right to "try men by the hour-glass" is declared dangerous in the extreme: *Hunt v. The State of Georgia*, 49 Geo. 255; *People v. Keenan*, 13 Cal. 581; Cooley's Const. Lim. 336; *State v. Collins*, 70 N. C. 241; *Word's Case*, 3 Leigh (Va.) 743; *Commonwealth v. Porter*, 10 Met. 263; *Lynch v. State*, 9 Ind. 541.

Other difficulties may arise, as recent experience has shown, from the rule that in cases of felony the record must show that the prisoner was personally present during every stage of the trial: *Prine v. The Commonwealth*, 6 Harris 103. This rule is not enforced in cases of misdemeanor: *United States v. Davis*, 6 Blatch. C. C. R. 464.

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