THE HAMLYN LECTURES

Seventh Series

THE PROOF OF GUILT

A Study of the English Criminal Trial

Third Edition

Glanville Williams

STEVENS

THE PROOF OF GUILT

A Study of the English Criminal Trial

By

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Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:

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The seventh series of four lectures was delivered by Dr. Glanville Williams, at Birmingham University in October 1955.

JOHN MURRAY,
Chairman of the Trustees.

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Introduction

We have all found that when acting as host or guide to a visitor from abroad we have learned many things about our own country and its institutions from the stranger's surprise. His questions and astonishment throw a new light on what we have taken for granted. Some of us have had this experience when trying to explain the English criminal trial to foreign lawyers. Six features of our practice stand out to them as matter for inquiry and comment. They are: the position of the judge as umpire; the defendant's freedom from being questioned; the mode of examining witnesses by question and answer; certain rules of the law of evidence; trial by jury, and for lesser offences trial by lay magistrates. It is true to say that in all these respects the law of England, and the systems derived from it, possess a certain singularity. In this book I shall say something of the history and evolution of each point, canvass opinion upon the way they operate today, and try to decide whether they promote the conviction of the guilty and the acquittal of the innocent, and so justify the esteem in which the British system of trial is quite generally held.

On the last matter, one general observation may fittingly be made at the outset. It is true that the

administration of criminal justice in England stands high in the opinion not only of Englishmen but of foreign observers. We in England go so far as to think, with a natural pride, that it is the best in the world, and there are certainly some good grounds for this complacency, even though our studies of foreign systems have not gone far beyond the United States, France, and some of the countries that owe the basis of their code of criminal procedure to the French one. Having breathed this proper reverence for our system, I may perhaps be allowed to add that it is not perfect, and that we can profitably copy from other countries on a few points, or even invent improvements of our own. In the following pages I shall be much concerned to enquire whether the particular rule or institution is the best conceivable.

It is also worth pointing out that when countries outside the common-law world have failed to adopt our own practice, this is sometimes the result of conscious rejection and not of ignorance or misunderstanding. English criminal procedure has been anxiously and for the most part admiringly studied by Continental observers for upwards of two hundred years, to see if it could yield any suggestions capable of being adopted in their own countries. Our requirement of oral hearing in open court, and our rule that an accused person cannot be punished for not answering questions, were taken over by the French *Code d'Instruction Criminelle* in 1808 and have in this way passed into the jurisprudence of the Continent as a whole. Another of our institutions, the jury system, was widely copied at first but has been generally abandoned. On the other hand, Continental lawyers have steadfastly refused to adopt our

rules of evidence and the mode of examining witnesses that goes with them, and they have also, for the most part, rejected our conception of the proper duties of the judge, and the principle that no questions can be directed at the accused without his consent. Are these matters mere dross, or is there some value in them that our foreign friends have missed?

For reasons of space the discussion is confined to the stated aspects of the criminal trial itself. I hardly deal at all (except once on an historical point) with pre-trial process. There are, in fact, many admirable rules of criminal procedure upon which I shall have nothing to say, but which would have to be emphasised if my object were to give a proper picture of the way a man is tried: an example is the rule requiring the prosecution to disclose the whole of their evidence to the accused before he is tried on indictment, which gives him complete protection against being taken by surprise. (There is no such protection in summary trial.) Also, it must be remembered that rules and institutions are of far less importance than the mode and spirit in which they are administered. Scots criminal procedure is very different from English, yet there is as much satisfaction in Scotland with the conduct of prosecutions as there is in England. This is because both countries observe the basic decencies. Conversely, the United States has inherited the broad principles of common-law procedure, but in that country there is the sharpest criticism of its working, which is not entirely to be explained by differences of legal detail. Professor Pendleton Howard, an American visitor to this country, who wrote the most

penetrating and most adulatory study of our criminal justice, found that its success was largely due to what may be shortly described as good administration—not only the aloofness, impartiality and efficiency of the judge, but the detachment and fairness of prosecuting counsel, the restraint of defending counsel, and the care taken by the police to preserve good public relations, which itself involves respect for the rights of suspected persons. To give a single illustration of this point of view, Professor Howard, writing for an American public, described "the tactful and persuasive manner in which the English judge assists the jury in arriving at a proper verdict," and added:

> "If English juries were forced to listen to some of the judicial scolds, blatant bullies and third-rate politicians who preside over criminal trials in many jurisdictions in the United States (especially in the larger centres of population where judicial nominations are frequently controlled by corrupt political machines) it is altogether possible that they would behave very much as do many of their contemporaries on this side of the water." [1]

Jury Trial before the Nineteenth Century

Until one dips into legal history it is hard to realise how recent is our present notion of justice to the accused person and a fair trial. The trial jury in criminal cases dates from the thirteenth century, and it was at first biased against the defendant by the very way in which

[1] Pendleton Howard, *Criminal Justice in England* (New York 1931) 380.

the proceedings started: the accusation had been made by the grand jury, or jury of presentment, and these same jurors formed the jury of trial. During the fourteenth century the practice grew up of adding other jurors in order to bring some fresh opinions into the jury of trial, and in 1352 a statute allowed the accused to challenge any of the indicting jury who were put on the jury of deliverance. This severed the two juries, and removed from the trial jury the members who might be obviously prejudiced; but it took another five centuries to remedy other defects in the system of trial, all of which operated heavily against the accused.

At first the jury were judges and witnesses together, since they acted on their own supposed knowledge, fortified by village gossip.[2] It soon came to be found that this knowledge was often defective, and, to make sure that the jury realised the weight of the evidence, witnesses were allowed to be called for the Crown; but no witnesses were allowed for the defence in charges of felony until the seventeenth century. The report of *Throckmorton's* case in 1554 gives us the shockingly unjudicial remark of Southwell, one of the commissioners appointed to try Throckmorton for treason, when the defendant asked a friend whom he perceived present in court to contradict the evidence for the Crown: "Go your ways, Fitzwilliams, the court hath nothing to do with you. Peradventure you would not be so ready in a good cause."[3] Even if the defendant had been

[2] It was recognised from earliest times that the jury might go for information to "sources entitled to credit." See Glanvil c. 17, speaking of the Grand Assize.

[3] 1 St.Tr. 869 at 885. This is the first full report of a criminal trial that has come down to us, and deserves to be read at large.

allowed to gather witnesses he would hardly have had an opportunity to do so, because in a case of any importance he was kept in close confinement until his trial. After 1640 persons charged with felony, that is to say the graver class of crimes, were in practice allowed to call witnesses; but the admission was so grudging that until the close of the century the defence witnesses were not generally permitted to give their evidence the added credibility of the oath, seemingly on the theory that such witnesses, if they contradicted the witnesses for the prosecution, were probably lying. There were no rules of evidence, and the early State Trials show men being condemned on the written accusations of witnesses with whom they were not confronted.

Not only hearsay evidence but evidence of the accused's bad character was freely admitted to prove his guilt, and the witnesses against him were frequently perjured—as was sometimes shown by later official investigations, which however came too late to save the wretched defendant from his fate. The evidence of accomplices, taken after they had been tortured in prison, or while they were under postponed sentence of death, and so subject to the greatest temptation to say whatever might be required of them, whether true or not, was admitted without reservation or caution of any kind.

In charges of felony the defendant was not allowed to have counsel to cross-examine witnesses—at first not even for the purpose of arguing points of law. Many defendants had no legal advice, even when problems of great difficulty and importance were in issue. A defendant might be expected to cope unaided with no

fewer than four eminent counsel for the Crown, and this without law-books or notes, and without advance notice of the evidence against him. The scandalous proceedings in *Throckmorton's* case, which were certainly not unique, may again be taken as an illustration. Throckmorton, defending himself with great ability although he was not a lawyer, raised a question of law, and asked the judges to refer to certain statutes, which he named. He was told that there should be no books brought at his desire; the judges knew the law sufficiently without books. Not to be rebuffed, Throckmorton recited the statutes from memory, as well as several precedents that he had heard mentioned in the course of parliamentary debate. Counsel for the Crown replied with the grumble: "If I had thought you had been so well furnished with Book Cases, I would have been better provided for you." Throckmorton, with his retentive memory and quick wit, was one of the few defendants of this period to turn the issue of a charge of treason in his own favour; and his jury were made to suffer heavily for acquitting him. The intemperate conduct of counsel for the Crown, which runs through the early State Trials, reached its height in the appalling vituperation poured out by Coke in his prosecution of Sir Walter Raleigh.[4]

Shortly after 1760 the courts began to allow defending counsel to cross-examine witnesses even in capital cases (he had already been allowed to argue points of law); but even then he could not address the jury. A full right to have counsel was eventually given to

[4] (1603) 2 St.Tr. 7.

accused persons by statute in 1836. This overdue measure was strongly opposed at the time by no fewer than twelve out of the fifteen judges, one of them (Mr. Justice Park) threatening resignation if it were passed into law; the threat, however, was not carried out.[5] At the present day we take the right to have counsel for granted. Yet if we try to look at legal procedure with a perfectly fresh mind, it may appear a rather wonderful thing, that a person charged with an offence against the State, perhaps one of the utmost gravity and danger, may be defended by a member of an honoured profession, whose duty is conceived as being almost solely to his client, and who is allowed to urge every point of fact and law, however technical, that may secure his acquittal. The wonder disappears when we realise that trial without defenders has been tried and found intolerable.

The crying abuses of the old common law, as we now regard them, were actively defended by apologists. Chief Justice Coke said that "the Jesuits have much slandered our common law in the case of trials of offenders for their lives," picking particularly on the denial of witnesses and counsel; Coke did not contradict the facts of the charge, but said merely that the practice did not prejudice the accused, because "first, the testimonies and proofs of the offence ought to be so clear and manifest, as there can be no defence of it; secondly, the court ought to be instead of counsel for the prisoner."[6] It is perhaps needless to remark that these arguments were pure humbug. The reader, with

[5] *A Century of Law Reform* (London 1901) 50.
[6] *Thomas* (1613) 2 Bulstrode 147, 80 E.R. 1022; Co. *Inst.* iii 29, 137.