*REG. v. MASON*

Anthony Trollope was born a few weeks before Mrs. Rawdon Crawley went to her vulgar triumph at the Duchess of Richmond’s ball; and he ended his industrious and successful career forty years ago. He was, as a story-teller, a master of humour and pathos, and he interested and delighted many thousands of eager readers. Dr. Garnett, who placed many of his novels on a level with Middlemarch, wrote of him in the Dictionary of National Biography, while critically admitting some defects, ‘. . . but no one has exhibited the outward aspects of the England of his day —saints and sages excluded on the one hand, and abject vagabonds on the other—as Anthony Trollope has done.’ He referred also to his ‘ realistic power in depicting the tender mysteries of damsels’ hearts and the ways and works of the rougher sex.’ All this is well known to the great public who still read the novels, and will continue to read them for what they are, in spite of technical inaccuracies, but it is perhaps not unfair, without raising a dissentient voice on the main issue, to hope that a careful examination, even in a satirical vein, of some important legal errors, may prove useful, at least to the profession of the law. We can only deal with the crime and prosecution of Lady Mason.

The report of this case in *Orley Farm* is intended to be a scathing criticism of the conduct of the Bar of England, especially in criminal trials. The recent republication of the famous novel draws our attention to the fact that no reasoned reply to this attack has yet appeared in print, and we now propose to examine the grounds upon which it is made, and the legal knowledge of the writer, as shown by internal evidence. If the grounds prove unsubstantial, and the ignorance of the author more than venial, enough will have been done.

For the sake of brevity, the modern law reporter often writes: ‘ The facts will be found fully stated in the judgment ‘; and we also must refer the reader to the summing up of the learned Baron at the trial for the skeleton of the story.

In his autobiography, Mr. Trollope prides himself on the character of Mr. Chaffanbrass, and ‘the talks between lawyers,’ but he regrets that Lady Mason, the heroine, confessed her crime too soon.

The crime, he says, was the forgery of her husband’s will, but in the novel it was a codicil only which was fabricated. A codicil is a supplement to a will, added by the testator for the purpose of explanation, alteration, or revocation of the original contents, but Mr. Trollope did not know this, nor, of course, did his legal puppets who had such capital talks: Sir Richard Leatheram, S.-G., who thought that a person accused of forgery could not be bailed, and ‘ examined a few unimportant witnesses on legal points ‘; Mr. Furnival, M.P., who tried to buy off the prosecution secretly; Mr. Chaffanbrass, who thought that, according to professional etiquette, no counsel might cross-examine more than one witness, and had chambers in Ely Place; Mr. Steelyard, who ‘ opened the pleadings ‘ in- the Crown Court; and Mr. Felix Graham, who ‘ went special ‘ with his first brief on his own circuit, and required to be solemnly assured by his leader that Lady Mason was absolutely innocent before his conscience would permit him to read the brief. These typical banisters perpetually confused the will, which was never challenged, or produced, or, in fact, executed, with the codicil, which, following ‘ the will,’ the first will,’ and the body of the will,’ turned out not to be a codicil at all.

Both these impracticable instruments were formally proved and accepted in the Ecclesiastical Court in or about 1830 on the evidence of the surviving witnesses and of Lady Mason, who swore that she was present and saw the transaction, and in 1852, when Sir Fitzroy Kelly was Solicitor-General in real life, she was prosecuted for perjury. The novel was published in 1862. In the civil proceedings Mr. Furnival, who had carelessly borrowed his chambers direct from Serjeant Snubbin, himself ‘gave evidence’; and when the lady was committed by the magistrates to the assizes in the criminal proceedings without a word of protest, and practically upon no evidence at all, he took no part, but sat on a chair close to the elder magistrate, and ‘whispered a word to him now and then.’ He was probably, we think, tickling him with the story of the attempt by Crabnitz (his clerk) to bribe Dockwrath, the revengeful attorney. It was, of course, a typical, if comic, incident in the life of a defending counsel and M.P. Two vital witnesses were absent, those called were not cross-examined, the codicil was not produced, the solicitors were in collusion, and no counsel appeared.

There was still a slight obstacle to the full-dress drama of the trial: the grand jury had, somehow, to return a true bill. Mr. Trollope took this in his stride without even a suggestion of Baron Maltby’s charge. He seems never to have beard of depositions, of names of witnesses on the indictment, and the freedom of the grand jury room. In his desire to set the stage for the exhibition of the chicanery of lawyers, ‘the propagation of untruth for gain,’ and the scandalous brutality of cross-examination, he did not pause to consider that neither the servant, Bridget Bolster, nor the custodian of the partnership deed, Torrington, the only witnesses whom the law allowed to go before the grand jury, could give a single scrap of evidence upon which they could send the lady for trial. They, however, without even seeing the codicil, promptly returned a true bill, and the curtain rose upon the final act, a trial before judge and jury which lasted for three mortal days of passionate emotion. In point of date we are prepared to say that Baron Martin must be selected as the most likely judge in real life. Before him’ a trial would have been impossible, or in the alternative, if possible, which is not admitted, it would not have taken half an hour. However, we have thrown into the following form our own idea of what the expression would have been of the thoughts passing through the mind of that acute and experienced judge if he had been called upon to sum up on the third day. If it has a faint echo of J. C. M. or A. L. S. about it .we offer our apologies to those majestic shades. For private reasons we were unable to attend the Queen’s courts in 1852. Amid a silence which could be felt, the learned Baron would have spoken somewhat as follows:

‘Gentlemen of the jury, this long and interesting case—in many ways novel and dramatic—is now drawing to a close. After I have directed your attention to the facts proved, and explained the law applicable to the charge made, you may, if so disposed, give your verdict. You are at present, no doubt, slightly, if not completely, confused, but the law is clear and simple. If Lady Mason committed perjury twenty-two years ago, and you find the case proved, you should naturally return a verdict of guilty; but you should make sure of the identity of the lady. I rather think it is the one in black sitting next but one to Mr. Chaffanbrass, in the row usually, .reserved for counsel. Someone there, I fancy, pleaded “ not guilty.” It is, in general, a convenient plan at assizes to place and keep the prisoner in the dock, so that regrettable mistakes may be avoided, but this trial has not been conducted altogether on the old lines. When I first dozed I thought I was sitting at Nisi Prius, as the dock was empty, and a junior counsel was palpably opening the pleadings. Later, I found out my mistake, and wished that I had never woken up.

‘As I have said, the law is clear, but I cannot venture to say the same of anything else which has taken place. Speaking entirely for myself, I have not often been so bewildered, though I have done my best to keep awake, and to focus my attention for three days on the various phases of what I may term the phantasmagoria. I have listened to evidence on points of law, and to arguments which were not only in themselves highly improper, but which were put forward as evidence. I have listened with what I hope you thought was patience, but which was really laziness, to an argument conducted by all five counsel directed to an objection which, if it had not been raised by the Solicitor-General and argued by all, I should have called incredibly trifling, and unspeakably ignorant.

 Anyone who has read the story of Susannah and the Elders knows more about cross-examination than counsel representing the Crown.

‘Indeed, the general exhibition of legal learning has been most remarkable.

‘I have heard wills and codicils called deeds, devises called bequests, deeds called absolute deeds, slanders called libels, a partnership deed called a separation deed, and executed like a will; and I have seen jurors excluded from your body upon the objection, made in open court by the attorney for the defence, that they came from Hamworth, because one of the minor witnesses for the prosecution practises there in the law and gossips with his acquaintance. I should have remonstrated at the time, but I thought I must be asleep. This impression was by no means removed by the opening speech for the Crown.

‘Enough of this, however, for the present.

‘Sir Joseph Mason died many years ago, and left a will, which was duly proved. A codicil was put forward by Lady Mason in the interest of her infant son and one Miriam Usbech; and this was contested by Mr. Mason, of Groby, the elder son. You have seen the codicil. A trial took place. Lady Mason swore that she was present at the execution, and saw all the four signatories sign. She won, the will and codicil were confirmed, there was no appeal, and the controversy slept for over twenty years, during which Mr. Dockwrath married Miriam Usbech, spent her 2o:id. legacy, and became the father of sixteen children. He then lost the tenancy of two fields at Orley Farm owing to young Mason coming of age, and be determined to ruin both him and Lady Mason. I do not pause, gentlemen, to analyse motives, or to speculate on the mental and moral effect of suffering twins twice. That belongs to the domain of forensic medicine. Mr. Dockwrath found a copy of the only deed which has been shown you, and eventually the original, produced here by Mr. Torrington, and these proceedings were the result.

‘The case for the prosecution is that Lady Mason swore falsely, but neither before you, nor before the grand jury, nor before the magistrates, did they offer any evidence that she swore at all. A trifle like that is, of course, often overlooked by law officers, who have so much to think of; and the defence, with the tact and courtesy which always distinguish defending counsel, amiably supplied the deficiency, instead of submitting that there was no case. You may well ask why I did not stop the trial at some time or other. Why, indeed? The air is full of such mute interrogatories!

‘I know by the customary channel—my excellent clerk—that Lady Mason consented under the advice of her chief champion, Mr. Furnival, to be committed for trial from the loftiest motives of personal delicacy and the natural desire for privacy, and that the grand jury found a true bill because they wanted to hear Mr. Chaffanbrass cross-examine the Bolster woman, but I have always understood that, at some time or other, evidence of the offence charged must be given, if there is any. If none, then evidence of some other offence is picturesque, if not, strictly speaking, useful.

‘The law is clear, but the practice varies with every novelist —I mean every law officer.

‘The best evidence, gentlemen, I am sure we are all agreed, was that given by the Solicitor-General and Mr. Furnival, the two leading counsel. Sir Richard Leatheram’s minute description of the actual forgery of the codicil, a felony which, as you know, was not, and is not, charged against the lady, was, without flattery, better than a circus, and his elaborate, if hazy, forecast of the convincing testimony of the handwriting experts whom he knew he could not call, was, if a little unusual, a masterpiece of forensic art, and eluded even the vigilance of Mr. Furnival, who seemed to me almost too obliging. No doubt he had his reasons he meant to give evidence himself which was quite as irregular. His personal tribute to the character of the prisoner in the dock—I mean the lady in black, not in the dock—unless she is merely a friend of Mr. Chaffanbrass, in which case I apologise. And what eloquent and convincing testimony it was

‘How clever, too, was that roguish reason for not calling sworn evidence to character! There were plenty of the best people in the county, Mr. Furnival said, ready to swear to the spotless reputation of Lady Mason, and to convince those of you foolish enough to imagine, after seeing the codicil, that forgery was even possible, that she spoke the truth at the former trial, but these highly respectable but shy witnesses, so convincing on the horizon, gentlemen, were not called into the box. Why not? Because Mr. Furnival, as he says, did not wish their innocence and modesty to be sullied by cross-examination! Behind the forensic fencing, gentlemen, what is really conveyed to you by that strange innuendo? Why, that these people might be asked, perhaps, whether the boldest and cleverest woman of her generation had confessed, or possibly boasted of, her heroic sacrifice. One or more of them might have heard from her those details of the midnight scene which are so well known apparently to the Solicitor-General. A woman might boast of it, even if no one could believe her.

‘Mr. Furnival’s own evidence is fortunately not open to cross-examination, that frightful system of torture, oppression, and injustice. Can you conceive anything more cruel and barbarous, and likely to propagate untruth, than such questions as might have been put to the eminent counsel if he *had* gone into the box?

‘I can imagine your horror if he had been asked, for instance, whether he had himself tried to buy off the prosecution, whether he had sent his own clerk under an assumed name to offer Dock-wrath—that evil genius of futile discoveries—one thousand pounds to block Mr. Mason’s attack on his stepmother. What ‘imputations and suppose he had had no answer ready? Such a crime on his part would have been, you say, too ridiculous for suggestion, but at least it would have been physically possible, which Lady Mason’s forgeries were not.

‘If these counsel were not so eminent, it would be my duty to tell you that their speeches were both of them grossly unprofessional, but what was still more staggering to one versed in the old ways was the Solicitor-General’s objection to the introduction of matters upon which the prosecution was itself founded. He is, indeed, no ordinary advocate. I speak from a long experience, and I say so. No ordinary advocate would have called Mr. Dockwrath as a witness at all. He had no necessary evidence to give, and was bottled full and to bursting with matter very damaging to the prosecution—a champertous agreement, revenge, malice, hatred, I know not what—but counsel knew that where all your relevant evidence put together does not make out a case it is a sign of weakness not to call a few make-weights; and he was naturally acute enough to appreciate, having himself advised on the case, that the total sum of Torrington and Bolster along with the egregious Kenneby, who was not called before the magistrates, was, in the scales of justice or the eyes of a jury, about one penny-weight, or rather less. Torrington produced a deed, which you saw and yourselves compared with the codicil, but nothing was proved about it. It is the sole excuse for reopening the attack on the lady after twenty-two years. Although none of the learned counsel were alive to the fact, it proves nothing by itself: neither Kenneby nor Bolster proved its execution, or their own signatures, or anything else, and I am not surprised. Nothing could surprise me now, but I must observe that the plausibility (if any) of the suggestion that Bolster wrote her name on the deed twenty-two years ago, and not the codicil, fades away when it is realised that whatever she did was done in the presence of four, if not five, people met together for some solemn purpose. She was never even asked whether Lady Mason was present. Kenneby was not asked. Another trifling oversight. A signature to a deed, legally unnecessary, is by custom an important matter, and in practice requires a witness. If the two partners did not sign together, two witnesses would be required. Usbech for Sir Joseph, I suppose, and someone else later for Mr. Martock. Here we have two strange and quite unnecessary witnesses brought into Sir Joseph’s room together, and all the formalities of a will. To attest what? Counsel all call a codicil a deed, so I suppose they think every deed a testament.

‘About the formalities of the will itself, its date, and the names of the witnesses, we know nothing, except that Bridget Bolster had nothing to do with it. I have been puzzled about it because Lady Mason admittedly copied out both the will and the codicil, and when she forged the four names on the codicil, where did she get them from? What evidence is there that she ever had in her possession, or saw, or heard of, the deed which was handed over by Usbech to Martock and remained in his possession and that of Torrington, his executor?

‘She chose the witnesses absolutely at random, and very carelessly, and took the date at haphazard. So far as she knew, Bolster had never witnessed a signature in her life, or signed her name to a legal document, so her feigned signature could not possibly stand, and the lady had every reason to suppose that Kenneby; as a professional man in the employment of Usbech, and in love with his daughter, the legatee, Miriam, would, as an honest man, utterly deny a solemn testamentary transaction which in fact never took place, and did not benefit him in any way. He could not have forgotten it, No one will deny that he was the worst witness who ever was called upon to give a simple piece of evidence, but he is alive and sane.

‘You remember, gentlemen, the striking picture of the midnight crime drawn by the Solicitor-General: the young mother, scarcely more than twenty years of age, forging the codicil or the will—there is no clear distinction made between them by the prosecution or the defence; over and over again the question of her forging the will has been discussed, though we know that the will has never been impugned before; it is not even produced—the good mother sacrificing herself from the highest and purest motive, a passionate desire for justice even at the price of crime, with the very real risk of a felon’s death; but the learned, and indeed eminent, counsel gave her credit for too little. What she did, the audacious robbery of her stepson, was not only heroic, but quite impossible; it was beyond the power of mortal woman. My brother Arabin, who used to try prisoners in the City of London, once said to a woman who was convicted of a smaller robbery: “ You have disgraced even your sex; you must go abroad.” I wonder what his trenchant wit would have made of this case. Let each one of you imagine himself in Lady Mason’s exact position, at her tender age, in her social, and protected, and ignorant position, and, as I have just said, alone and at night, under the shadow of that death which was surely coming to her generous and helpless husband. What did she actually and physically do, if her accusers are right? She first composed and wrote the legal phraseology of the codicil, words which she knew would be most carefully compared with those of the will, if anyone questioned their being the words of the old solicitor, and such a doubt would be raised by the first glance. The phrasing of the legacy to Miriam Usbech alone, with its words of art and its references to the widow’s portion already bequeathed, out of which it was to be paid, was an impassable barrier, and its introduction was, you remember, entirely gratuitous. Read it. Is that the composition of an agonised young woman who knew less about legal writing than you do?

‘But suppose that barrier passed. She then signed her dying husband’s name, but with what shuddering agitation! As with trembling hands she formed the different letters she knew not only that she was committing an odious crime, but that it was actually a capital offence. Fauntleroy, the banker, had been publicly hanged for it only half a dozen years before, and everyone in Kent knew that within no more than two years Captain Montgomery had only escaped the same fate by taking prussic acid in the condemned cell. I see some of you remember that. You may also remember that in the very year of this codicil the death penalty for many forgeries was abolished, but not for this particular kind of forgery. That change was made seven years later, though no one was, in fact, executed during the intervening period.

‘What thoughts for a young woman feloniously writing another’s name, a model wife with a young baby! And, above all, how did she hope to escape detection?

‘She may have been mentally capable of any crime—some women are—but surely not of a crime so clumsy and so obvious that it positively invited instant exposure, That is not cleverness, but mental disease.

‘I have, however, only dealt with the least part of her sup-posed folly.

‘All this is of minor importance. As regards her husband’s name, we may assume that she had something to copy, if, with her genius, that was necessary: we might even go so far as to suppose that she had also obtained a specimen of Usbech’s signature, shaky with gout; but having copied that with a feeling of satisfaction that he, at any rate, was safely dead, she was met by the real crux of the situation. No other possible witnesses were dead, so she had to choose two living ones, and she chase Kenneby and Bolster to complete her task. Why, Heaven knows. She signed their names so cleverly that they clearly recognised the writings as their own, and no handwriting expert could be called to say they were not.

‘A date was added entirely at random: one day was as good as another so long as she chose one when Usbech was doing business; and she rose triumphant from her delicate and un-usual task, but as certain of instant detection and exposure as a fox in a noisy hen-roost.

‘Gentlemen, she was not indicted for forgery. Why not? A story is going about, and has reached me through the ordinary channel, my excellent clerk—it may also have reached you through the amiable Dockwrath outside the court—that Mr. Mason, of Groby, refrained from making the charge of felony out of mercy, forgery not being a bailable offence, like perjury, or out of prudence, because such a terrible accusation would create a feeling in the lady’s favour, and might even influence you and me, and pervert the course of justice.

‘All nonsense, gentlemen, of course. No one could connect the word “ prudence “ with this prosecution, and even the learned gentlemen responsible for it can hardly have advised Mr. Mason that the one crime is more bailable than the other. It is not. Even Law Officers know that. No. The real reason is that just as this complicated and extravagant suggested forgery would have been greeted with ridicule by the first person to whom Lady Mason dared to show it, so a false charge of felony on such flimsy grounds would expose Mr. Mason to an action which would cost him thousands. Even be, blinded by malice, avarice, and the hope of revenge, could not believe that his stepmother forged the codicil herself.

‘Now to conclude. The lady is charged with perjury, but as no single positive fact has been proved before you, not one, large or small, which is inconsistent with the genuineness of the codicil, with her entire innocence, and with the decision of the Ecclesiastical Court, which was not appealed against, I think that, even without identifying the accused person, you might now safely say that whoever here is charged with whatever it is did not do it.

‘This ill-starred indictment, solemnly prepared even before the information was sworn, “ pressed for “ before the magistrates, who had no more to do with the indictment than I had, and finally handed to the grand jury with only the names of Bolster and Torrington upon it—this sorry parchment must pass away into limbo without even the merit of being historically possible.

‘If ever there was a prosecution founded entirely on a revengeful desire to defame and persecute the innocent, and carried on by brazen effrontery and misconduct alone, this is that case. Hence the natural reluctance of a high-minded young counsel to soil his dainty hands with the defence.’

‘Gentlemen, consider your verdict.

‘You find the prisoner not guilty. I respectfully concur. Now I must protect you and the community at large from the effect of this trial on your minds. I release you all from jury service for twenty-two years.

‘If the prisoner is in court, she may go; if not, she should be informed of the result.’

Our friend Sir William Anson, who did not deal in romance, wrote that a patent physical or legal impossibility avoids a contract; so it does a felony or a fishing story—one of the most difficult things to avoid.

A confession of an impossibility is as sterile as a building scheme. It is not even a ground for prosecuting a prisoner upon a different charge. The great legal and only woman writer says (see *Malaprop on Female Crimes*): ‘*Confessio unius non debet bis vexari*.’

There was only one execution; what Mr. Trollope called a codicil was a clause, repugnant in character, fatuous in imagination and febrile in art, which followed the will, the body of the will, the first and preceded the one attestation clause. He did not know what a codicil was.

Still less did he contemplate the clear legal position that if Kenneby and Bolster did not effectively and properly sign there would be an intestacy, and Mr. Mason would be an actual loser, for though, as heir-at-law, he would take Orley Farm along with Groby Park, he would have to share the ex-Lord Mayor’s amassed wealth or personalty not only with his half-brother and with the widow, but also with those shadowy sisters who are only faintly heard, off the stage.

F. Newbolt

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