**Trollope’s Jury Trials**

*CLEMENT FRANKLIN ROBINSON[[1]](#footnote-1)*

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URING his active life, Anthony Trollope was a post-office inspector, a bureaucrat. His father was an unsuccessful chancery barrister, and although Anthony spent one summer’s holiday in his father’s chambers, he could have gained little knowledge of civil procedure and none of criminal procedure from this brief experience. I find no record of his having been personally connected with any litigation. As a post-office inspector, he ran up against postal frauds, but he was not a lawyer like Galsworthy, or a reporter like Dickens. Lawyers, however, figure in many of his novels; and legal problems, both in and out of court, certainly challenged his interest.[[2]](#footnote-2) The interpretation of an ancient charitable bequest is the basis of The Warden. Roger Scatcherd’s bequest of a fortune to a legatee who was unidentified in the will, but known to the leading character, is the theme of Doctor Thorne, one of Trollope’s greatest novels.[[3]](#footnote-3) We have a reminder of the Tichborne claimant in *Is He Popenioy?*; and in and in *Mr. Scarborough’s Family* appear the technicalities of the English law of entail, reversions, evidence of marriage, and compounding of creditors’ claims.[[4]](#footnote-4)

His handling of these various legal matters has been both censured and commended, but I am concerned at present only with the novelist’s jury trials. We should expect to find mistakes. Trollope himself recognized this likelihood: “And then those terrible meshes of the law! How is a fictionist, in these excited days, to create the needed biting interest without legal difficulties....”[[5]](#footnote-5)

This disarming remark does pose the question whether it is seemly to examine Trollope’s jury trials from a lawyer’s point of view. The literary craftsman should be judged by the finished product, and perhaps specialists who may see technical flaws un-perceived by the general public should keep quiet about them. Writing for nonlegal readers, I should make plain at the outset that I am a devoted Trollopian, and although interested objectively in testing his jury trials by the light of American experience, subjectively I have no criticism. I do not purport to be a literary critic; I am merely a legal analyst.

In 1923 Sir Francis Newbolt made a slashing legal criticism of Trollope’s *Orley Farm*.[[6]](#footnote-6) In this essay I propose to examine his strictures and widen the inquiry to consider certain other court trials. Of the eleven courtroom scenes listed by the Geroulds[[7]](#footnote-7): I will comment briefly on the three described in *The Vicar of Bullhampton*[[8]](#footnote-8); *The Eustace Diamonds*,[[9]](#footnote-9) and *John Caldigate*,[[10]](#footnote-10) and more particularly on the three which we find in *The Three Clerks*,[[11]](#footnote-11) *Orley Farm*,[[12]](#footnote-12) and *Phineas Redux[[13]](#footnote-13)* where one lawyer stands out—Mr. Chaffanbrass.

Every lover of Trollope knows this Old Bailey practitioner. In 1858 Mr. Chaffanbrass (we never learn his first name) unsuccessfully defended a guilty embezzler in *The Three Clerks*. Four years later he successfully defended a guilty perjurer and forger (*Orley Farm*, 1862). Twelve years later, chiefly by a masterly cross-examination, he cleared an innocent man from the charge of murder (*Phineas Redux*, 1874).

Of Mr. Chaffanbrass Trollope said in his autobiography: “I don’t think I have cause to be ashamed of him.”[[14]](#footnote-14) Again in speaking of two of his novels he said: “There is no personage in either of them comparable to Chaffanbrass.”[[15]](#footnote-15)

In all three cases our sympathy is with Chaffanbrass’s client, but only in the third do we come to think well of the “very dirty, little man” with “all manner of nasty tricks.” But our concern must not be with Mr. Chaffanbrass so much as with the way in which Trollope handled the court scenes in which Mr. Chaffanbrass appeared.

*The Vicar of Bullhampton*

In this novel we have the trial of a robber and murderer and his accomplice. Trollope describes the cross-examination by “a big, burly barrister with a broad forehead and gray eyes,” of the wit-ness who had identified the accused in the vicinity of the crime. The barrister attitudinized at every answer, turning to the jury” as though he would say ‘There, then, what do you think of the case now, when such a man as that is brought before you to give evidence?’”

The barrister also tried to break down an identification by showing that the witness was now recognizing, after a year’s lapse of time, a man whom he then saw for the first time. In discussing the witness, he gave the “impression to those who looked on, but did not understand, that the case was over as far as it depended on that man’s evidence.” But the barrister himself knew very well that the judge in summing up would “refer to the presence of the two prisoners in the cart as a thing fairly supported by evidence.”

Trollope here pictured an everyday scene in English and American courts, but in few, if any, state courts in this country can the judge give an opinion that facts were supported by evidence.

In cross-questioning another eyewitness, the barrister made him “own that he had been five times in prison,” causing the barrister to shake his head as though in sorrow that such a man should be before them as a witness.

In most American courts a criminal record may be shown—theoretically to impeach the credibility of the witness, but actually, of course, to prejudice the jury against him. Direct questioning to bring out a prison sojourn as distinguished from showing a criminal record would not generally be allowable in this country.

The cross-examination of the gentle, weak Carry aimed to educe the fact that she had “gone wrong.” “I believe you have been indiscreet,” were the words the questioner asked in a loud voice, “almost a jeer.” Her emotion prevented her answering. He insisted. When courtroom opinion turned against him, he put his duty to his client as an apology for insisting on the question, and again asked her if she was “one of the unfortunates.” Still she did not answer, and he dismissed her from the stand.

I am inclined to think that this whole scene was literary rather than legal, either by English or American practice. Cross-examination may go a long way, but I doubt if sexual immorality unconnected with the crime and not resulting in a criminal conviction could be used to discredit a witness.

*The Eustace Diamonds*

In *The Eustace Diamonds*, at the trial of Benjamin and Smiler for stealing the diamonds, the ineffable Lizzie Eustace was a much-needed witness.[[16]](#footnote-16) Her connection with the diamonds was none too savory, and she did not want to appear in court. Not being under bail as a material witness, she went to Scotland, after testifying at the preliminary hearing in the police court. Sent for when the case came up for trial at London, she smoothly declined, giving illness and all the other excuses that a woman like Lizzie would give now in the United States as then in the British Isles. She could not be forced to come: not only was she in Scotland, but she had a medical certificate. The attorneys in London knew that the medical statements were “false as hell,” but must be treated as though they were as “true as gospel.” Her evidence given to the police court was, however, offered, and although the attorney for the accused dwelt extensively on her absence, a conviction followed.

It is true here, as in England, that although in general an accused is entitled to be confronted with a witness, testimony given at the preliminary hearing may under some circumstances be offered before the jury; and it used to be true here that the attendance of a witness from another jurisdiction could not be forced.

In many states in this country a uniform act has been adopted which permits the summoning of witnesses in criminal cases from one state to another. The only inaccuracy which catches one’s eye in Trollope’s account of the incident is the statement of the defendant’s counsel that the prosecution “didn’t believe a word of her sickness.” To mention the personal beliefs of opposing counsel, and to imply insincerity, would certainly be objectionable if the point were taken; but sometimes it is wiser not to pick up such a point and object to it, because one may get worse than he gives.

*John Caldigate*

In John Caldigate we have the trial of the hero for bigamy, following upon unsuccessful attempts to blackmail him. The prosecution was based on perjured testimony relating to Caldigate’s early life in Australia. Caldigate insisted on talking with his barrister before the trial, although advised to the contrary by his solicitor. This English protocol, of course, is wholly foreign to American practice. Caldigate assured the barrister that he was innocent. The barrister replied that no statement made by Caldigate would affect him. He said that it was not for him to believe or disbelieve anything. “If carried away by my feelings I were to appeal to the jury for their sympathy because of my belief, I should not better your case. Secondhand protestations from an advocate are never of much avail and in many cases often prejudicial.”

Here the barrister took a position commendable here as in England. Counsel who in arguing a case to the jury state their own belief about it can be brought up short by objection, and undoubtedly many lawyers representing criminals wisely prefer not to let their personal beliefs enter into the case. There are some lawyers, however, who go so far as to let it be known generally that they never take a criminal case unless they are convinced of their client’s innocence, and there are others whose standing is so high that such a belief is inferred from their appearing for an accused person. But the deduction is unsound. Lawyers of the highest probity may take an unsavory defense to assure a fair trial for the accused. A skillful attorney can, of course, throw his emotions into the case by intonations and intimations, and many criminal practitioners are adept at doing this.

A larger question is involved: what is a defending attorney’s duty when he believes that his client is guilty? Ethical practice requires that the lawyer should go through with the case after he has begun it. He should at least try to mitigate the sentence if the client pleads guilty or is convicted, and should play every legal card if the client insists on trying the case.

In a famous English case a defendant confessed to his counsel in the course of the trial. The counsel consulted the judge. The judge told him that it was his duty to go through with the case.

The trial as pictured by Trollope is chiefly concerned with the cross-examination by Sir John Joram who as “Jacky Joram” had been a jolly young man before settling down to becoming a successful barrister, successively solicitor general and attorney general. He won his verdicts by his unfailing complaisance and courtesy, not by bullying.

Sir John’s cross-examination of the prosecution’s witnesses is masterly and correct when tested either by English or American procedure. There is little of the byplay between counsel and wit-ness which Trollope uses in other trials, wherein the counsel ex-presses his own views.

As all Trollopians know, Caldigate was convicted, but subsequently freed on the evidence of the falsified postmark which a post-office employee detected.

*The Three Clerks*

In *The Three Clerks* Trollope took quick advantage of the new Larceny Act of 1857 (20-21 Vict. chap. 54, sec. r) which for the first time made it possible to prosecute a trustee for the fraudulent conversion of trust funds.

The crime being a misdemeanor a grand jury indictment would not generally be a necessary prerequisite to trial in the United States today but was the customary procedure in England at the time. Trollope took proper literary license in saying nothing about it.

Alaric Tudor had lost his ward’s funds in a speculative stock venture. Mr. Chaffanbrass’s characterization of the crown’s witnesses was better literary than legal practice. One accountant, having conceded that he might two or three times a year make an error, was induced to admit that every entry he made during the course of a year might be incorrect. Good so far, but Chaffanbrass continued, “ ‘Go down, Sir, and hide your ignominy.’ And the wretch slunk out of court.”[[17]](#footnote-17) Much is permitted in cross-examination of a witness, but castigating him after his testimony was over would hardly get by today in the United States, and I doubt if it would in England.

On the second day of the trial the jury “were ready with pen and paper to give their brightest attention.”

I understand that the taking of notes by jurors is permitted in England, but this is not generally true in the United States. I have seen a trial interrupted while the judge had a court officer sequester a juryman’s memorandum. The legal theory, absurd under modern conditions, is that notes made by inexperienced jurymen may emphasize the wrong points, may be inaccurate, may sharpen conflicts of opinion, and may distract the juryman’s attention from the witnesses.

When the prosecution concluded, Mr. Chaffanbrass not only outlined but argued his case, saying that he would not have another chance to talk to the jury. In the United States if the defense is going to offer testimony the accused’s counsel states the facts before producing the witnesses and reserves his arguments until the evidence is closed. In England I understand that custom rather than rule usually confines the opening statement to facts rather than argument.

The order of procedure for the final arguments after the close of evidence in criminal cases differs in various states. Sometimes the prosecution argues first and has a brief rebuttal after the defense argument. In other jurisdictions the defense argues first, and, as in Alaric Tudor’s case, the defendant who offers no testimony starts at once on his argument.

The first of Mr. Chaffanbrass’s witnesses testified that relatives of the ward had refused to accept a settlement. In the United States these facts might help to mitigate sentence, but would hardly be evidence of innocence. In England, apparently, the evidence can be shown “for whatever it is worth,” but the prosecution can point out that it is irrelevant on the question of guilt.

The other witness necessarily called by the defense was known to the reader to be hostile. Trollope gives no indication that this hostility was established in court as a basis for cross-examination by defense counsel. Neither in England nor in this country can counsel ride his own witness, unless he first establishes the hostility or adverse interest of the witness. Trollope may well have been taking justifiable literary license in omitting to dwell on this legal detail.

Chaffanbrass’s questions are rife with running comments on the evidence: “You ought to be a proud and happy man.”[[18]](#footnote-18) “Yes, sir, you must answer [such questions] and many more like them.”[[19]](#footnote-19) “You believe you are not a stock jobber.... You are as much a stock jobber, Sir, as that man is a policeman, or his lordship is a judge.”[[20]](#footnote-20)

American counsel would be quick to invoke the judge’s ruling against such comments when a pattern rather than inadvertence became apparent. I understand that in England counsel can make “a mild suggestion” that a certain answer may bear certain consequences; and in England, as in the United States, a witness can be reminded that he is under oath, and that giving false testimony is perjury. But in neither jurisdiction can he be threatened with prosecution.

I notice that the judge in The Three Clerks did find that Chaffanbrass had gone a little too far and told him not to threaten the witness, but nevertheless told the witness to answer.

It is interesting to notice that the case lasted until eight o’clock in the evening because Mr. Chaffanbrass “insisted on going on” after the testimony was completed at seven. Certainly English courts kept long hours in those days. Evening sessions are exceptional in the United States, but in England 1 understand that they are still frequent in the provinces, and in Trollope’s time this was true also in London.

Alaric did not take the stand though Chaffanbrass said he could have put him on if he had deemed it necessary. Chaffanbrass must have meant that Tudor could have made an unsworn statement. English law at this time did not permit sworn testimony by the Accused.

Trollope says that in his charge the judge went “through all the evidence and told them what was admissible and what was not.”‘ Trollope was either careless or misinformed. The admissibility of testimony is determined at the time when it is offered. It goes in or stays out according to the judge’s ruling which, of course, is subject to exceptions. There is, however, this difference between most state courts on the one hand and federal and English courts on the other: in the latter group but not in the former, the judge in his charge may comment on the weight of the testimony and draw conclusions of fact.

The jury were out so long (seven hours) that the judge decided to starve them into a verdict, although one of the jurymen was said to be ill. In all jurisdictions juries have to be kept together and apart from observation after the case has been submitted to them, until they have reached a result; although up to the time when they “get the case,” except in capital cases, they may separate when not on duty. It is not unknown in the United States for a jury to hang out until after it has had “supper on the county,” and sometimes juries have to be brought back and labored with by the judge in the hope of producing a verdict. The judge will sometimes quote to the jury from reported cases which have pointed out the conscientious duty of a juryman to examine his reasoning if he finds himself definitely in disagreement with his fellows. Sometimes this has a surprising effect. I had a case once where the one juror who had held out for eight hours for the defense swung the eleven to agree with him after the judge had talked to them at midnight.

The jury recommended mercy on the one count on which they found Tudor guilty. Under the old common law practice a jury may be instructed to bring in its verdict as “guilty or not guilty and nothing else,” but by statute in many states a recommendation as to the punishment may now be included, and in England this is a matter of custom.

There is nothing to indicate that there was any conference regarding the sentence, as is usual in this country but infrequent in England; but the judge gave the shortest possible sentence. Evidently the system of probation, special docket, and suspended sentence had not then become effective. If Alaric had been convicted in the United States, which certainly would have been doubtful if he had Chaffanbrass for a lawyer, few judges would have imposed imprisonment.

Take it all in all, I think Chaffanbrass did a good job in this case, although Sadleir does not seem to think so.[[21]](#footnote-21)

*Orley Farm*

Every Trollopian knows that Orley Farm centers on the prosecution of Lady Mason twenty years after she had forged a codicil to her husband’s will. She was tried for the perjury contained in the testimony that she gave when the documents were offered for probate—somewhat as Alger Hiss was recently tried for perjury instead of espionage. Our old friend Chaffanbrass was chief trial counsel. He eventually got her off by tactics that tempt one to comment, commend, and condemn; but I will try to confine myself to the legal machinery inspected objectively from the viewpoint of an American lawyer.

About twenty-five years ago in discussing *Orley Farm* Sir Francis Newbolt, an English barrister, slashed Trollope not only for legal ignorance, but for tactical incompetence.[[22]](#footnote-22) I should certainly hesitate to chase after Sir Francis when he goes out of the legal field into literary territory. What if Trollope was inaccurate in his nomenclature of will and codicil, improbable in conceiving that Lady Mason had the skill to forge the document, and ingenuous in describing a trial that might have been headed off by the lawyer? He had a story to tell, and every Trollopian is glad he told it.

After the prosecution became inevitable, and counsel were chosen, pretrial conferences took place between counsel for complainant and accused. Acquainted with the personal negotiations “off the record” which form so large a part of the practice of a lawyer, at least in nonmetropolitan areas, I am intrigued with Trollope’s perception of a similar procedure in England. If English lawyers keep at arm’s length, I should expect that Newbolt would have criticized the fact of the negotiations instead of merely the result.

The lawyers for Lady Mason and her stepson went further than they could in this country in agreeing on the form of the court proceeding. In this country such an agreement would have to be made between official prosecutors and defendant’s counsel, although the private counsel for the complainant might be consulted. Prosecuting attorneys in the United States are very touchy about having their conduct controlled by the attorney for private parties, once official cognizance has been taken of a case.

In England I understand the department of justice does not take jurisdiction as a matter of course of all criminal cases, but the public’s interest in a criminal complaint may cause the department to come into the case officially, supplying prosecution counsel either from its own staff or from barristers whom it selects. The prosecution of Lady Mason in Orley Farm remained a private affair, although the solicitor general was employed in his private capacity by the complainants.

The fundamental difference between England and the United States in the personnel in a court action is further illustrated by the presence in the case of solicitors and barristers. In this country all practitioners are “lawyers” and can practice in office or in court as desired. Separation of functions between “office man” and “court man” is merely a matter of convenience. In England, of course, only barristers can appear in jury trials.

The first step in the *Orley Farm* proceeding in England, as it would have been in the United States, was to bring the accused before a local magistrate to have her “bound over” to the grand jury. In such case the magistrate’s finding is that there is probable cause to believe that a crime has been committed of which the accused may be guilty. The accused is therefore held in jail to await grand jury action unless he can furnish bail to secure his appearance in case the grand jury indicts him. I judge that Trollope took some literary license with English procedure in these preliminary proceedings.

According to Trollope, brief testimony was produced; no defense was offered; bail was given and the matter was thus quickly settled. Trollope says: “A single question was put to her by the presiding magistrate ... and ... some answer was made. . ..”[[23]](#footnote-23) and the matter was over.

Newbolt criticizes the proceeding because the matter had been so arranged as to avoid publicity; bail was accepted from an absent bondsman; there was no formal appearance in her behalf in court; material witnesses were not produced; the witnesses for the prosecution were not cross-examined; her testimony given at the previous trial was not produced, and consequently no evidence of its falsity appeared; and he says the magistrate should not have questioned the accused. This is a formidable catalogue of complaints and amounts to saying that the magistrates had no basis for committing her.

Newbolt may be substantially right as far as English procedure goes. I suppose he is. I am told that preliminary criminal proceedings in England are carried on with formality, but that the magistrate may ask formal questions of the accused. But the procedure which Trollope describes is frequent in this country; indeed testimony may be entirely waived and the respondent bound over without a hearing. Often the accused demands production of state’s witnesses so that he may have a line on their testimony; but he may waive cross-examination and offer no testimony in defense. It certainly is not unusual for the state to offer just enough testimony to make out a bare prima facie case without disclosing corroborating details. Time and energy are saved to the prosecution if the prosecutor is acquainted beforehand with the willingness of the accused to waive hearing, and the prosecuting attorney is quite willing to cooperate in minimizing publicity if the defendant’s attorney will help shorten the preliminary hearing.

I should say that in Lady Mason’s case her counsel knew only too well the testimony which the prosecution was going to offer at the trial, and was glad to help in reducing publicity to the lowest terms. The whole incident sounds perfectly natural to an American lawyer.

It may be that Trollope slipped a cog with reference to bail, but in a case of this sort in this country bail would be a formality of no practical use. The mere personal recognizance of the accused might be taken.

We learn nothing of the grand jury session which, of course, was secret. Newbolt seems to think that we should have been told about it, and that the grand jury may not have had enough to go on in indicting her. Trollope was writing a story and not a court report.

Although its function in Lady Mason’s case was little more than routine, as is often the case, the grand jury is occasionally a valuable cog in the judicial wheel. Some criminal situations can be better sifted in secret session. The grand jury may save expense and painful publicity by returning “no bill”; and happenings in the grand jury room may short-cut the road to justice. I can think of cases where suspicion pointed to two women as killers of husband and child, respectively. In both cases public sympathy was with the accused, and the grand jury sensibly found that the evidence against them was intangible. Another time the husband of a murdered girl was so frightened by seeing the line of witnesses going one by one into the grand jury room behind closed doors that when he came in to the grand jury room himself as a routine witness, he broke down and confessed to the murder, although up to that time there had been no evidence against him.

The settlement offer made off the record subsequent to the in-document by the aged admirer of Lady Mason to the solicitor for the complainant was humanly probable. Newbolt criticizes the lawyer for not telling the story to his client so that the case could be ended then and there. On this question of legal ethics I am in-cloned to disagree with Newbolt. Experienced lawyers know that the real interest of a client may be aided by not telling the client everything the lawyer knows. And of course as a practical matter, as Mr. Round knew in this case, no possible property settlement will stop some embittered persons from pressing a criminal charge. The significant person to be told in this country is the official prosecutor. If he is advised of the situation, a foundation is laid for disposing of the criminal case; but an acceptance of old Sir Peregrine’s offer would have shot Trollope’s story to pieces.

The trial began, Lady Mason sitting with counsel, as she would in the United States. Our theory of the innocence of the untried accused carries to the point that at least if he is on bail be does not need to sit in the dock. English courts apparently hold the accused in custody while the jury is functioning.

In empaneling the jury, jurors from the vicinity were excluded. This is a frequent American practice either by agreement of counsel or by ruling of the court, but Newbolt criticizes it as contrary to English procedure.

Two problems of legal etiquette are raised by Newbolt. He says that junior counsel should not have opened the case for the crown, and that Trollope was wrong in believing that counsel for the defines must necessarily divide between them the cross-examining of the principal witnesses for the prosecution.

It is the general practice in this country for junior counsel to open the case, and there is no rule of professional etiquette with regard to the part to be taken by associate counsel. If there are two lawyers on the same side, the junior usually opens the case and puts in the direct testimony; the senior cross-examines, puts in the defense, and makes the final argument. But the lawyers can vary this as they please.

In the opening speech the counsel for the prosecution “dropped a tear,” and certainly argued his case as he never could have in the United States. Newbolt does not criticize this point, but I am told that even in England the judge might have called him to book. Newbolt contents himself with criticizing the solicitor general’s reference to a perjury for which Newbolt says there was neither proof nor count in the indictment.

I must say I cannot understand this criticism. I have no doubt that the prosecutor of Hiss had a great deal to say as to the treasonable conduct of Hiss if his testimony in the previous case was perjury; and it is evident from the newspaper account of the trial that plenty of evidence of the true situation developed as the case went in *Orley Farm*. I think it is safe to say that the prosecution established the forgery sufficiently to prove the perjury if the jury had wished to find Lady Mason guilty.

Newbolt waxes sarcastic because of the discussion between all five lawyers and the quoting of “precedents without number” on a point of law which Newbolt says is so plain that there are no authorities to it; viz., the admissibility of the evidence of the previous trial. But Newbolt must have been. in court when clouds of dust were raised from legal carpet scuffing. Counsel are sometimes myopic about the plain nose on somebody’s face.

The prosecution did have a plausible point in suggesting that evidence of the previous trial should not be introduced piecemeal in connection with cross-examining a witness for the prosecution. Obviously, before the case could go to the jury, the perjury would have to be based on a production at least of all the perjured testimony, and probably of the entire record of the previous case. Conventionally this evidence would come in from the prosecution, but it is not unusual for substantive evidence to be pulled in by the ears out of the natural order. In a state like Maine where a witness is open to cross-examination on all aspects of the case and not merely as to the point for which he is produced, I have known cases where the defendant’s substantive defense of settlement and release was produced at the start of the case in the cross-examination of a plaintiff’s witness called to testify on a minor point.

Were there handwriting experts ? Trollope does not say so, and Newbolt therefore concludes there were none, but I should say this is a *non sequitur*.

Chaffanbrass’s cross-examination of the two principal witnesses for the prosecution would certainly be objectionable by American standards. Here, as in the earlier case in which Chaffanbrass had figured, he held the witness up to ridicule by such comments as: “The heart of any man placed in such a position as that you now hold must, I think, fail him.”[[24]](#footnote-24) To these asides Newbolt does not object, but he properly comments on the way Chaffanbrass threatened the witness: “As sure as you’re a living woman, you shall be placed there and tried for the same offense,—for perjury,—if you tell me a falsehood respecting this matter.”[[25]](#footnote-25) English or American judges would have called him to time for such threats.

As a matter of fact, the particular threat was unsuccessful. All Chaffanbrass got was an acknowledgment that the witness was being kept in free quarters, and was living on the fat of the land at the expense of the complainant. I am surprised that Chaffanbrass did not try the time-worn device of asking her to name the persons with whom she had talked the case over. Witnesses uncoached to meet that question sometimes give cross-examining counsel a chance to put them on the spot by their answer. Chaffanbrass probably suspected that Bridget was loaded with a satisfactory reply.

Lady Mason’s lawyer offered no testimony in defense—a frequent practice in all common law jurisdictions. Her defense, as in many criminal cases, was twofold—the weakness of the prosecu-tion’s case and the improbability that a person of her good character would forge a will and perjure herself. Both these defenses were presented in the final argument of her counsel—the first quite properly, the second quite unethically.

The favorable impression that a personable defendant may make on a jury merely by sitting in the courtroom and looking the part of innocence, added to testimony of good character and reputation, has freed many a criminal—notably Lizzie Borden. It was quite proper for Lady Mason’s lawyer to comment on her appearance. But he went further: he guaranteed her character and reputation without any evidence on the point. Such evidence, if offered, could of course have been contradicted by evidence to the contrary for the prosecution. Evil reputation and bad character do not count against an accused unless the defense opens the door to the issue. I should not suppose Lady Mason’s lawyer would have been afraid of the issue, and I agree with Newbolt that he took a dangerous chance in resting his case without character testimony.

Covering the point by statements in the argument was a gross impropriety. But he went further. He told the jury why he had not proved the point by witnesses. Newbolt’s criticism of these tactics is justified. It was not until 1877 that the English practice which did not permit Alaric Tudor to testify in The Three Clerks was changed. So Lady Mason was unable to testify, even if her counsel had wanted her to. The right of an accused to testify had been well established in the United States long before this time, and is now of course universal.

This right puts counsel into a quandary. Apparently in England failure of the accused to testify can be commented on by prosecution and the judge. This is not so in the United States, and the jury is instructed that the fact that the accused does not testify should not be considered by the jury as any indication of guilt. Nevertheless there is no doubt that juries are influenced by it. If the accused is a poor witness, or his counsel suspects his guilt, it is better to keep him off the stand. Some lawyers never put on a client whom they believe to be guilty.

There was another impropriety in the final argument by Lady Mason’s counsel, which Newbolt does not notice. He stated his own belief in her innocence. Respondent’s counsel in this country would know that it is wise, as well as seemly, not to make a personal matter of it. Her lawyer even went to the point of asking the jury to express their disapproval of “the wickedness displayed in the accusation.” I am sure that any judge either in England or the United States would have called him to task. “Guilty or not guilty and nothing else” is all the jury can say except where statutes permit recommendations regarding the sentence.

Looking at the report of Lady Mason’s case as a whole, I should say that it is more accurate than the usual newspaper account of a trial, where the sensational features are played up and legal procedure misapprehended. I am impressed with the few errors that Trollope seems to have made in English procedure, and am inclined to believe that the trial might have taken place in the United States just as Trollope reports it, except in a few minor respects.

Certainly Trollope made a good story of it, and our estimation of Chaffanbrass is increased by the way he handled his case. We begin to see that he had a definite philosophy of life and a consistency in his principles, such as they were.

*Phineas Redux*

I have an idea that Trollope meant to say goodbye to Mr. Chaffanbrass in the Allston courtroom when the jury brought in its verdict freeing Lady Mason, but twelve years later the old lawyer successfully defended an innocent man accused of murder. This time Trollope may well have consulted with lawyers as to legal procedure with telling effect.’

Phineas Finn, a distinguished member of Parliament, was put on trial for the murder of one Bonteen, found dead in an alley near a club shortly after Finn had made threats and left the club flourishing a bludgeon. The crucial evidence of the prosecution was the testimony of weak but honest Lord Fawn, who had seen a man in a light overcoat fleeing from the alleyway. We know that Phineas did not do it, but he did have a gray coat that night. Certainly he was in a bad spot. The murderer was undoubtedly Emilius, a Bohemian Jew of unsavory reputation who like Finn was an enemy of Bonteen. Emilius had no light coat, and his landlady said he could not have left his lodging that night because the door was locked and she had the key.

The pretrial conference in this case was at the chambers of Finn’s solicitor. Lord Fawn conceded some doubt when confronted by an entirely different coat which was in the hall of the lodging house on the night of the murder. The prosecution was not invited to this conference with Lord Fawn, but no rule of law or legal etiquette so requires. There is nothing sacred about a witness, although lawyers sometimes seem to think so. Lord Fawn might have refused to come in and talk, but he did not.

Counsel for the prosecution at the outset of the trial vigorously accused Chaffanbrass of “tampering” with the witness, but Chaffanbrass made him soften the charge.

The high light of the trial is the cross-examination of Lord Fawn, eliciting successfully the indefiniteness of his observations. I wish the case could have stopped at that point. It would have been better law, but perhaps poorer literature. Chaffanbrass could have rested after demolishing Lord Fawn.

In Chaffanbrass’s opening to the jury he combined facts and arguments again in a way less objectionable in England than in the United States. He then produced his evidence, and a second time the case was ripe for being closed, but there came a series of incidents which Trollope accurately calls “confusion in court.” A bludgeon of foreign make was found near the alleyway, and a duplicate key belonging to Emilius was discovered in Prague. Chaffanbrass asked for a long continuance to get this evidence. According to Trollope, the foreman of the jury objected, saying they were ready to render their verdict and did not want to be sequestered for several days longer. Such participation by a member of the jury would be rare in the United States, but in Trollope’s time had already begun to be common, and I understand is a growing practice. I think Chaffanbrass would have guessed that he was safe, and in real life would have waived the point. But that would have spoiled Trollope’s story.

The testimony when produced was conclusive, and the prosecution joined with the defense in agreeing on a directed verdict. Nevertheless Chaffanbrass argued for an hour, and the judge talked for four hours instead of directing a verdict in a few words, as a judge here would have done.

In England the crown now has a right of appeal on questions of law, so that nowadays it is not unusual for a judge to direct a verdict *in extenso*, but there would be no reason for this where counsel on both sides had joined in the recommendation, so that the case would close with the verdict.

When the jury reported the verdict as directed, it said that Finn should not have been put on trial anyway. No harm was done, but this certainly was not judicial procedure.

And so Phineas was discharged, and presumably Mr. Chaffanbrass was paid off, unless, in accordance with the old English practice he had been “refreshed” daily with a fee. He disappeared from sight, collecting his papers, and disregarding other counsel who were congratulating themselves on the successful termination of a very disagreeable piece of business. I think it was rather hard-hearted of Trollope to let the old lawyer fade out with no word of farewell after he had become rehabilitated in our opinion by the way he conducted the case for Finn. What became of Chaffanbrass? We will never know. First to last he is the same bleary-eyed old man with his soiled clothes and unkempt wig. In his last literary appearance justice has triumphed, but I suppose he may have gone into court a week later to defend someone whose guilt was beyond question. Scorning and despising him when we first meet him, we come to understand that the talents of a criminal practitioner may be exercised for good as well as for bad. It’s all a game to him, and he works for the side that hires him.

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 Once I went into the Old Bailey during a trial for blackmail. The arrangement of the room was strange and the bewigged counsel looked queer. It was novel to my American ears to hear the victim mentioned as “Mr. X,” and to realize that no evidence of his identity was put into the record. But as I sat through the trial these extraneous aspects began to fade out, and before long I felt perfectly at home.

And another time I heard the present lord chancellor of England and his predecessor, Sir John Simon, arguing conversationally in a chancery court the question whether a certain joint enterprise amounted to a partnership. I could have taken part as a junior to either of them with no legal embarrassment except the natural diffidence of being associated with such distinguished barristers.

And so in reading Trollope’s trials after discounting the literary features I have come to feel the accuracy of his presentation. It seems that he did not depart from English procedure as much as Newbolt claims; and the points of divergence from his own experience which on first reading prick the attention of an American lawyer prove on examination to be unimportant incidents, inherent in superficial differences between English and American procedure.

1. Clement Franklin Robinson is a lawyer of Portland, Maine, who has long interested himself in the legal aspects of Trollope’s novels. [↑](#footnote-ref-1)
2. On the English procedure discussed in this essay, I have had the courteous assistance of Mr. E. A. Godson, secretary of the General Council of the Bar, London. Discussion of American procedure is based upon my experience as a lawyer in the state of Maine. [↑](#footnote-ref-2)
3. Trollope’s law in *Doctor Thorne* was the subject of a depreciatory address by Mr. Justice Dixon of the High Court of Australia, October 30, um. The speaker incidentally characterized Chaffanbrass’s cross-examination in Orley Farm as “revolting.” Australian Law Journal, IX, Supp., p, 72. [↑](#footnote-ref-3)
4. “*Mr. Scarborough’s. Family* is not the best known of Trollope’s works, but it seems to me that it is not open to the legal criticism which has been levelled against Orley Farm and the efforts of other novelists.” “Amicus Curiae” in Law journal, LVIII (February 24, 1923) 71- [↑](#footnote-ref-4)
5. *Phineas Finn*, II, chap. 4. Citations of Trollope’s novels in this essay are from the Dodd, Mead edition (New York, 1912), except *The Three Clerks*, one-vol. ed. (London and New York, 1914). [↑](#footnote-ref-5)
6. F. Newbolt, *Out of Court* (London, 1925), based on a lecture by him reported in *Law Journal*, LVIII (February 10, 1923), 5. [↑](#footnote-ref-6)
7. W. G. and J. T. Gerould, *A Guide to Trollope* (Princeton, 1948), p. 54. In addition to the six jury trials which form the basis of my essay, the Geroulds list the trial of Pat Carroll in *The Landleaguers*; the trial of Countess Lovell in Lady Anna; the trial of Lady Macdermot in *The Macdermots of Ballycloran*; the trial of Daniel O’Connell in *The Kellys and the O’Kellys*; and the trial of Mr. Bowborough in *Phineas Redux*. [↑](#footnote-ref-7)
8. The trial of the Grinder and Sam Prattle: II, chap. 32. [↑](#footnote-ref-8)
9. The trial of Benjamin and Smiler: H, chaps. 74, 78. [↑](#footnote-ref-9)
10. The trial of John Caldigate: II, chaps. 9–11. [↑](#footnote-ref-10)
11. The trial of Alaric Tudor: chaps. 40–41. [↑](#footnote-ref-11)
12. The trial of Lady Mason: II, chap. 26; III, chaps. 14, 15, 17, 18, 21. [↑](#footnote-ref-12)
13. The trial of Phineas Finn: III, chaps. 8–14. [↑](#footnote-ref-13)
14. P. 96. [↑](#footnote-ref-14)
15. P. 110. [↑](#footnote-ref-15)
16. Sadleir says (in *Anthony Trollope: A Commentary* [Boston and Cambridge, 1927], p. 387) that Trollope when he here “tackled a further problem involving such technicalities … went to the trouble of getting written expert opinion on the point at issue.... The precaution served its purpose; the law in *The Eustace Diamonds* (and for that matter in *Phineas Redux* also), has remained uncriticized.” [↑](#footnote-ref-16)
17. P. 668. [↑](#footnote-ref-17)
18. P. 676. [↑](#footnote-ref-18)
19. P. 677. [↑](#footnote-ref-19)
20. P. 679. [↑](#footnote-ref-20)
21. “*A Guide to Anthony Trollope*,” Nineteenth Century, IX (April, t922), 655, Sadleir says, however, that it is an open question in his mind which is best of the three trials that are reported in *The Three Clerks*, *Orley Farm*, and *Phineas Redux*. [↑](#footnote-ref-21)
22. *Out of Court* (London, 1925). [↑](#footnote-ref-22)
23. II, 338. [↑](#footnote-ref-23)
24. III, 179. [↑](#footnote-ref-24)
25. III, 223. [↑](#footnote-ref-25)