

John Beattie, 'Scales of Justice'

By the 1780s at least, defense counsel had come to have a different view of the evidence presented against their clients, a different view of the prosecution witnesses, and certainly a different view of their own role in the trial from that of the judge. They had come by then to see themselves as the defendant's advocate. Even if the scope for that advocacy was limited, their cross-examination of the prosecution witnesses could make a significant difference for the accused they defended. Cross-examination was undoubtedly developed as a fine art and as a way of commenting on the evidence because of the restrictions that continued to be imposed on defense lawyers' work until the 1836 act. It was in this area that the criminal trial changed most manifestly in the eighteenth century, in practice and in intention

John Langbein, *Origins of Adversary Criminal Trial*, pp 293-95

In the 1780s Garrow was particularly vigorous in cross-examining in reward cases. Representing an 11-year-old defendant accused of participation in a simple theft, which was not a rewardable offense, Garrow intimidated by his questioning that reward-seeking drove the prosecution. He asked a prosecution witness: "Did you never hear there was a reward of forty pounds upon the conviction of that child?"²⁰⁰ "[U]pon your oath did you never hear that you should be entitled to forty pounds as the price of that poor infant's blood?"²⁰¹ Defending in a case of alleged highway robbery that resulted from an incident of pickpocketing, Garrow used cross-examination to elicit that a thieftaker had counseled the prosecutor to testify that the accused had shoved the prosecutor, for the purpose of making the offense violent and hence rewardable as highway robbery.²⁰² Defending in another prosecution for highway robbery, he asked the thieftaker how many persons would divide the reward, and he asked another witness: "How much of the reward are you to have?"²⁰³ On behalf of a defendant charged with a highway robbery, Garrow asked a prosecution witness whether "the thieftakers have thrown some gold dust in your eyes?"²⁰⁴ Defending in a burglary case, Garrow used his cross-examination to raise the possibility that the witness had been seeking either a reward or a grant of nonprosecution under the crown witness system.²⁰⁵ From the prosecutor in a highway robbery case, one Sheppard, Garrow elicited that Sheppard had twice before prosecuted for robberies to his person, convicting once. Sheppard denied having shared reward money in that case. Garrow then asked Sheppard: "Then you will not get above forty [pounds] if you convict now, my old friend, you will not get eighty this time?"²⁰⁶

The themes of cross-examination that we see in the reward cases—impugning the prosecutor's motives and probing for contradictions or other shortcomings in the prosecution evidence—were not, of course, confined to reward and crown witness cases.²⁰⁷ We see defense counsel cross-examine to develop discrepancies between the pretrial statement and the trial testimony,²⁰⁸ to shake the identification of persons²⁰⁹ or property,²¹⁰ to question criminal intent,²¹¹ and to explore base motivations for bringing prosecutions²¹²—for example, that the crown was paying the witness in a smuggling case ("How should I live else?" the witness said sheepishly).²¹³



1. *The Full Flowering of the Art of Cross-Examination*

William Phillis²⁶⁹ was accused of having used one of the oldest confidence schemes in the world to steal Thomas Clarke's money. The victim claimed that Phillis had tricked him into paying a large sum as security on a "diamond" ring the two had "found" while walking in the street. After Clarke paid the money the defendant allegedly absconded, leaving the victim with a worthless glass ring. When Clarke had finished telling the court his story, Phillis asked: "Is counsellor Fielding in court, I was told that the bill was thrown out."²⁷⁰ Fielding was not available but, on the spur of the moment, another barrister, Mr. Sylvester, volunteered to handle the case. His cross-examination of Thomas Clarke went as follows:

[Sylvester.] You thought this purse was a good thing, did you not?

[Clarke.] I could not tell what it was.

[Sylvester.] You cried halves at first?²⁷¹

[Clarke.] Yes.

[Sylvester.] You know you had no right to it?

[Clarke.] Certainly.

[Sylvester.] Then you knew somebody else had had a right to it, you thought it was lost by somebody?

[Clarke.] I knew it was not the man's property.

[Sylvester.] It was a third person's?

[Clarke.] Yes.

[Sylvester.] With what conscience would you think of defrauding the man of it?

[Clarke.] I did not know who it did belong to.

[Sylvester.] But you might have advertised it?

[Clarke.] Yes.

[Sylvester.] Then you were both rogues alike, you both agreed to cheat a third person?

[Clarke.] Begging your pardon I had no such meaning.

This unrehearsed and unbriefed interrogation is a model of adversarial efficacy. It denigrated the victim in the eyes of the jury, emphasized his complicity in a shady scheme, subtly argued that the victim was responsible for his own predicament, and invited the jury to conclude that the incident did not warrant a criminal penalty. Sylvester was able to do all this at a moment's notice. What is more, the jury was persuaded by his effort and acquitted Phillis.

Cross-examination skills of this sort were much in evidence during the last twenty years of the 1700s.

William Paley, *The Principles of Moral and Political Philosophy*, 1785, 551-2:

A concurrence of well-authenticated circumstances composes a stronger ground of assurance than positive testimony, unconfirmed by circumstances, usually affords. Circumstances cannot lie. The conclusion also which results from them, though deduced by only probable inference, is commonly more to be relied upon than the veracity of an unsupported solitary witness. The danger of being deceived is less, the actual instances of deception are fewer, in the one case than the other. What is called positive proof in criminal matters, as where a man swears to the person of the prisoner, and that he actually saw him commit the crime with which he is charged, may be founded in the mistake or perjury of a single witness. Such mistakes, and such perjuries, are not without many examples. **Whereas to impose upon a court of justice a chain of circumstantial evidence in support of a fabricated accusation, requires such a number of false witnesses as seldom meet together; a union also of skill and wickedness which is still more rare; and, after all, this**

species of proof lies much more open to discussion, and is more likely, if false, to be contradicted, or to betray itself by some unforeseen inconsistency, than that direct proof, which, being confined within the knowledge of a single person, which, appealing to, or standing connected with, no external or collateral circumstances, is incapable, by its very simplicity, of being confronted with opposite probabilities.

“Hortensius,” Deinology, Or, the Union of Reason and Elegance: Being Instructions to a Young Barrister. with a Postscript, Suggesting Some Considerations on the Viva Voce Examination of Witnesses at the English Bar, 1789

I maintain that it is the right and the duty of an English advocate to doubt of every thing which is said by a witness, and to try every thing by every possible test, and, barring all familiarities, personalities, and a something, which I can only describe by the vulgar term *brow-beating*, to sift every witness to the bottom, and to put his testimony to the severest torture.

My complaint is, that this is not done; that nobody seems to know how to set about it; that the examination of witnesses is not cultivated as a matter of science; that there are no instructions upon the subject; no models to be found by which a young advocate may form himself.

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I confess this is quite a new idea: hitherto this subject seems to have been attended to by nobody; young men rush into this branch of business, flounder on, and manifest their zeal by hazarding all sorts of questions to witnesses, as they happen to come uppermost, lose a hundred causes by bad management, and so purchase a degree of caution, and a sort of clumsy facility of getting on; and this has been suffered to pass.

it never can be the interest of advocates to treat witnesses ill. If ever they seem to do it, perhaps it is because they do not know how to come at their point in any other way. The advocate who feels that a witness has kept back the truth, or spoken a falsehood, and does not know how to detect the one, or extract the other, by a series of questions logically and geometrically deduced, feels very angry, and justly, but is unfortunate in having no vent for his anger but by raising his voice, and talking of perjury and the pillory.

Colin gave a little sigh and the smile dawned on his face. He wrote in a "three," making the date of March 1 into March 31, and then once again he paused, watching with eager eyes for the ink to dry on the page. Then, taking up a penknife which lay on the table beside him, he erased, but not quite erased, the "three" he had just written there. He left unerased, as if a hurried hand had been employed on the erasure, the cusp of the figure, and a minute segment of a curve both above and below it.

Looking at the entry as he looked at it now, when his work was done, with but casual carefulness, any inspector of it would say that it recorded the marriage of Philip Lord Stanier to Rosina Viagi on the first of March. But had the inspector's attention been brought to bear more minutely on it, he must, if directed to hold the page sideways to the light, have agreed that there had been some erasure made in front of the figure denoting the day of the month; for there was visible the scratching of a pen-knife or some similar instrument. Then, examining it more closely, he would certainly see the cusp of a "three," the segment of the upper curve, and a dot of ink in the place where the lower segment would have been.

These remnants would scarcely have struck his eye at all, had not he noticed that there were the signs of an erasure there. With them, it was impossible for the veriest tyro in conjecture not to guess what the erasure had been.