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HISTORICAL STUDIES IN ENGLISH JURISPRU-  
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I.

PROCEDURE IN EARLY CRIMINAL TRIALS.

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In the study of history, everything that has influenced or preserved the manifestations of human thought is worthy of attention, and among many objects of special interest the laws of a people are of primary importance, as exhibiting traits of character nowhere else to be found. It is a saying of Lord Bacon, "that as streams do take tinctures and tastes from the soils through which they flow, so do the laws partake of the flavor and character of the people who enforce them." The truth of this remark has been amply vindicated. Statements, customs, law reports, records and the State trials can be studied like fossil shells, as faithful memorials of the past, as petrified samples of the passions and principles of dead centuries, as well as of their prejudices and inconsistencies.

In considering the laws of England, we are first attracted to a standpoint which enables us to realize the ex-

tent and value of the principles of freedom which are imbedded in the English Constitution. The chief characteristic of Englishmen, and that which is the secret of their present moral, political and intellectual independence, is their appreciation of the dignity of human nature, and of the rights which belonged to freemen. They believed in these from the earliest times, and these they inherited from their German ancestors. The Teutons were a hardy, energetic, fearless people, warlike, and addicted to strong drink, but of noble dispositions; earnest and faithful, holding their women in high esteem, electing their chief on account of his valor, and determining matters of public importance by the suffrages of all.<sup>1</sup> In their own huts, or on their own lands, they were their own masters, and were strongly attached to the idea of home. These principles of Teutonic government, spreading along the shores of the German Ocean, were transplanted into England, and there took deepest root and soonest attained maturity. Even beneath the weight of Norman tyranny and repression they forced their way, and expanded into the noble maxims "that every man's house is his castle," and that "no freeman can be deprived of life, liberty or property, save by the judgment of his peers and the law of the land;" maxims which have been termed "the elixir and storehouse of English freedom."

In frank-pledges and trial by jury, in Magna Charta, the Petitions of Right, the Bill of Rights, the Habeas Corpus Act, and the Privileges of Parliament, we note the sturdy growth of liberty into fit relations to law. The conflicts of the kings with their nobles, the growing interests of trade and commerce, the civil wars and the decisions of Westminster Hall, had alike contributed to build up a body of jurisprudence as splendid as it has proved to be imperishable. The maxims of the law even in very ancient times breathed defiance to tyranny, and, when enforced, securely guarded life and limb; but it is singular to mark how few were the actual safeguards thrown about a criminal on trial, and how slight was the value set by our ancestors upon

<sup>1</sup> Tacitus, De Germania.

human life. In fact, the contrast between the theory and the practice of the law is one of the most unexpected of phenomena in English history.

In every criminal trial, the evidence for the crown, as the prosecution was called, was given under the solemnity of an oath, which in superstitious days was doubly impressive, but a barbarous rule prevented the prisoner from calling any witness in his behalf. Strange as it may seem, it was the cruel-hearted Mary Tudor who changed this practice, and directed her Chief Justice to listen to whatever could be said in favor of the subject. Not until the reign of Anne, however, could the witnesses summoned for defence be sworn. In felonies, which embraced all the crimes of darkest dye, the law denied to a prisoner a copy of the indictment upon which he was arraigned as well as a copy of the panel of jurors. Thus he had little knowledge of the charge against him, and none whatever of the men by whom he was to be tried. The names of the witnesses against him were also withheld. He was refused the assistance of counsel to advise him in prison, except by special leave of court, and was deprived of the use of any papers drawn up by counsel to prepare him for trial. He was tried at the same assizes, generally on the same day when the indictment was found, and therefore had no time to prepare his challenges to the jury, except in cases of high treason, where, it is said, on somewhat doubtful authority, that fifteen days must elapse between arraignment and trial.<sup>1</sup> These hardships, or, to speak plainly, these denials of justice, were subsequently corrected in the reigns of William III and Anne. At common law, however, the guilt of the accused was measured apparently by the gravity of the charge, for the graver the charge the fewer were the privileges accorded to him, and the more hopeless was the task of defence. It was little less than a mocking insult to a man thus environed by difficulties created solely

<sup>1</sup> See Archbold's *Criminal Practice* and Pl., Pomeroy's edition, 551; 1 Chitty's *Crim. Law*, 407—410; Hawkins' *Pleas of the Crown*, b. 2, c. 28, § 1; Foster's *Crown Law*, 231; Hale's *Pleas of the Crown*, 256; Weeks on *Attorneys-at-law*, sec. 184.

by the law, to be told that the benign presumption of that law was in favor of his innocence. How significant was the exclamation of the Duke of Norfolk upon his trial: "I know that one suspected is more than half condemned."<sup>1</sup>

Without entering into more detail, the statements just given are sufficiently precise to enable us to realize the terrible danger in which a prisoner stood when charged with crime. In almost every case death stared him in the face, and upon trials for high treason the axe of the executioner was laid beside him—a dreadful reminder of his well-nigh inevitable fate. The prosecutions were conducted by able, experienced and sometimes blood-thirsty attorneys-general, who were eager to command the applause of the king, who had elevated them to office, by the wholesale extinction of those who by legal fiction were deemed to be his enemies. The judges, dependent for their places upon the caprice of an arbitrary monarch, and unwilling to forfeit his favor, too often threw the weight of their position into the scale against the accused. Juries were bullied and browbeaten into verdicts of guilty, or, upon their refusal to convict, were imprisoned, starved, fined or attainted for their contumacy. In order to secure a fair trial the necessity for a spirited defence by eloquent and fearless advocates seems to us indispensable; but the common law, which has been so highly praised for its humanity and its wisdom, denied the right to counsel in the very cases where they were most needed, and permitted prisoners—ignorant of law, poor and friendless, feeble in body and mind, unaccustomed to public assemblies, dragged to trial almost immediately after their arrest and arraignment, without copies of the indictment, without knowing by whom they were to be confronted or by whom they were to be tried, without a right to have their witnesses sworn—to struggle single-handed against the overwhelming influence and tyranny of the crown.

Thus were the fountains of justice crimsoned by State prosecutions; the walls of prisons were pierced by the shrieks of despairing men and women, hopelessly doomed.

<sup>1</sup> 1 State Trials, Howell's edition, 965.

Accusation was tantamount to conviction; conviction meant speedy death.

Upon the trial of Thomas Howard, Duke of Norfolk, in 1571, for high treason in supporting the right of Mary, Queen of Scots, to the throne of England, the prisoner made a vain appeal to the court for counsel even upon questions of law. "I have," he said, "had very short warning to provide answer to so great a matter; I have not had fourteen hours in all, both day and night, and now I neither have the same statute alleged, and yet I am put at once to the whole herd of laws, not knowing which particularly to answer unto; . . . therefore, with reverence and humble submission, I am led to think I may have counsel. . . . I am hardly handled. I have had short warning and no books." Chief-Justice Dyer refused the request by answering that counsel could not be allowed in point of treason.<sup>1</sup>

During the trial of that pure patriot, Algernon Sidney, whose philosophical speculations anticipated the doctrines of Locke and Jefferson, application was made by him for counsel, and he contended that conspiring to levy war was not treason; when he objected that some of the jury were not freeholders of the county in which the venue of the indictment was laid, he was answered by Chief-Justice Jeffreys: "If you assign us any particular point of law, if the *Court think it such a point as may be worth debating*, you shall have counsel." When Sergeant Barnfield arose as *Amicus Curie*, and suggested in arrest of judgment that there was a material defect in the indictment, Jeffreys coolly observed, "We have heard of it already; we thank you for your friendship and are satisfied." He then sentenced the illustrious prisoner to death.<sup>2</sup>

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

<sup>1</sup> 1 State Trials, 965.

<sup>2</sup> 9 State Trials, 834.

counsel, and was always refused. Then, bursting out with long-suppressed passion, he cried: "Pray let me have fair play, and not be wound and screwed up into hazards and snares. . . . In so extraordinary a case for me to be denied to consult with the counsel, I tell you, Sir, it is most unjust and the most unrighteous thing in my apprehension that I ever heard or saw in all my life. O Lord! was there ever such a pack of unjust and unrighteous judges in the world? . . . I would rather have died in this very court before I would have pleaded one word unto you, for now you go about by my own ignorance and folly to make myself guilty of taking away my own life, and therefore, unless you will permit me counsel upon this lack, I am resolved to die." He was acquitted, however, by the jury, and lived to be tried again for new boldness of speech and action—characteristics which had won for him the honorable title of Free-born John."<sup>1</sup>

An apology for this harsh rule was offered in the maxim that the judge was counsel for the prisoner; that it was his duty to see that the proceedings were regular, to examine witnesses for the defendant, to advise him for his benefit, to hear his defence with patience, and in general to take care that he was neither irregularly nor unjustly convicted. The maxim was benevolent, but few judges ever gave the slightest heed to it in practice.

When Penn and Mead were tried at the old Bailey for preaching to a seditious and tumultuous assembly, the Recorder put the following questions:

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

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

*Recorder*: "Sir, hold your tongue; I did not go about to ensnare you."<sup>2</sup>

In some instances the prisoners were quite equal to the task of self-defence, and were more than a match in wit

<sup>1</sup> 4 State Trials, 1299.

<sup>2</sup> 6 State Trials, 958.

and readiness for the judges. William Penn, then a youth of twenty-five years of age, desired to know by what law it was they prosecuted him, and upon what law it was that they founded the indictment. The Recorder replied, the common law. William Penn asked where that law was. The Recorder did not think it worth while to run over all those adjudged cases for so many years, which they called common law, to satisfy his curiosity. Penn replied, if the law were common it ought not to be so hard to produce.

*Recorder:* "The question is, whether you are guilty of this indictment."

*Penn:* "The question is not, whether I am guilty of this indictment, but whether this indictment be legal. It is too general and imperfect an answer to say it is the common law, unless we know where and what it is; for where there is no law, there is no transgression; and that law which is not in being is so far from being common that it is no law at all."

*Recorder:* "Sir, you are a troublesome fellow, and it is not to the honor of the Court to suffer you to go on."

*Penn:* "I have asked but one question, and you have not answered me, though the rights and privileges of every Englishman are concerned in it."

*Recorder:* "If I should suffer you to ask questions till to-morrow morning, you would be never the wiser."

*Penn:* "That is according as the answers are."<sup>1</sup>

The grossest violation of the maxim that the judge was counsel for the prisoner, and the darkest spot upon the blood-stained ermine of an English judge, was the behavior of Jeffreys upon the trial of Lady Alice Lisle. She was the widow of one of the regicides, of more than seventy years of age, and, prompted by the same spirit of benevolence that filled the hearts of those in our own day who sheltered the fugitive slave as he groped for freedom by the light of the North star, had given food and lodging to a dissenting clergyman named Hicks, who had been with the army of Monmouth. The indictment charged her with high treason and as "moved and seduced by the instigation

<sup>1</sup> *Supra.*

of the devil" to entertain wicked and treasonable designs. There was no proof whatever that she knew that the man she had harbored had ever been with the rebel army, and the jury declared that they were not satisfied upon this point, which was the only important one in the case. The judge usurped the functions of the counsel for the crown, and, like a wolf ravening for prey, pressed a reluctant and conscientious witness so hard as to "clatter him out of his senses." Blasphemy, ribaldry and the most horrid jests and imprecations were showered upon him in the effort to induce him to say something that would convict the prisoner, and while the judge thus dragooned the witness, the gentle prisoner, with a conscience void of offence and with unflinching trust in God, bowed her gray head upon the dock and slept like a tired child. Three times did the jury refuse to convict, and as often did Jeffreys remand them, arbitrarily declaring, "there is as full proof as proof can be," and finally extorted a verdict of guilty by the threat of an attainder. He then sentenced the unhappy lady to be burned to death, but she escaped this terrible fate by a commutation of the sentence into death by hanging.<sup>1</sup>

Not so fortunate in the manner of her death was Elizabeth Grant, a sister of charity, who, ministering to the wants of the sick and poor, had, like Alice Lisle, unwittingly entertained a hunted fugitive who was base enough to turn informer and witness. As she drew the fagots and blazing straw about her to hasten her death, the spectators burst into tears, and among them stood the great-souled William Penn. The scene was not without its lessons for him and its results for us. Well may we exclaim with one of that day: "This was not justice, it was courage!"

The rule that prisoners tried for felony should not have counsel, and the practice under it, had their admirers. Lord Coke, the great oracle of English law, declared that the reason of its adoption was because the evidence by which the prisoner was to be condemned ought to be so very evident and so plain that all the counsel in the world

<sup>1</sup> 11 State Trials, 322.

should not be able to answer it.<sup>1</sup> Sir John Davys, in the preface to his reports, declared, with strange perversity of logic, that "our law doth abhor the defence and maintenance of bad causes more than any other law in the world." Sergeant Hawkins, who wrote at a time when more liberal views ought to have prevailed, asserted that the rule was reasonable, "as every one of common understanding may as properly speak to a matter of fact as if he were the best lawyer."<sup>2</sup> Of a truth said my Lord Coke: "The reason of the common law is not man's natural reason."

The rule did not pass unchallenged. The seeds of its dissolution, though slow in development, had been early sown. As far back as the reign of Edward II, the author of the *Mirror of Justice* had declared that counsel learned in the law "were more necessary for the defence of indictments and appeals of felony than upon other venial cases." The venerable Whitelock assailed it in debate; Sir Robert Atkins, the Attorney-General of Charles I, declared it "a severity," and significantly said that he knew from "experience what the maxim meant that the judge was counsel for the prisoner." Even Jeffreys declared that it was "an injustice that a man should have counsel to defend a two-penny trespass, but that in defence of life he should have none."<sup>3</sup>

The Bloody Assizes had aroused the sleeping justice of the nation, and in 1695 a bill was passed allowing the prisoners in cases of high treason the assistance of counsel not exceeding two. Many wiseacres predicted the ruin of the State. Bishop Barret, after stating that the bill had passed contrary to the hopes of those then at the head of affairs, said: "The design of it seems to be to make men as safe in all treasonable practices as possible." The judges were the avowed enemies of the change. The act was to go into effect on the 25th of March, 1696. On the 24th of March, Sir William Parkyns, a wealthy knight, bred to the law, was put upon his trial for having been concerned in a Jacobite plot to assassinate the King. He prayed that

<sup>1</sup> Inst., 137.

<sup>2</sup> 2 Hawkins' Pleas of C. C., 39.

<sup>3</sup> See the learned note, 5 State Trials, 467.