The Legal Legacy of the Queen's Trial: The Rise and Fall of Caroline's Rule

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In some ways it is strange to speak about the legal legacy of the Queen Caroline affair. Her trial was, after all, not technically a legalistic endeavor, but a legislative one. Barred from the common law courts by the fact that they could claim no jurisdiction over a Queen, and unable to make use of the ecclesiastical courts for fear that Caroline would countersue with her own (rather well-founded) accusations of his infidelity, the new King was left no other option but to turn to Parliament.

And this was the context for one of the stranger "trials" in British history. One in which the judges were law lords who functioned not as judges per se, but only as advisors on questions of the law.[1] The jury was comprised of the whole House of Lords (bringing new meaning to the phrase "jury of one's Peers"), and whose charge was not to vote on the Queen's guilt or innocence, but on the propriety of passing a bill – a fundamentality legislative endeavor.[2] Importantly for our purposes, though, the trial was to take place using the procedure and rules of evidence from the common law courts, and it is this decision that allowed rulings made in this otherwise unorthodox trial to have a left a mark on the law that extends into the present day.[3]

While the trial is famous for a great many moments, its longest lasting, if least well known legal legacy is a rule of evidence which came to be known by the rather clunky, if direct moniker "the Rule in Queen Caroline's Case" or Caroline's Rule for short.

A central factor at issue in the trial was the character of the Queen herself. Rules of procedure at the time forbade the Queen from speaking at the trial, so instead of questioning her

[1] Leonard J. Stern & Daniel F. Grosh, "A Visit with Queen Caroline: Her Trial and Its Rule," *Capital University Law Review* 6:2 (1976), 187.
[2] Ibid.
[3] Ibid.

directly, the prosecution relied on a series of witness, most of whom had previously been in the Queen's employ, to testify about the Queen's alleged misconduct.[4] The second such witness was one Louisa Demonte, a Swiss national who entered into the Queen's service as her first *femme de chambre*. Her testimony was extensive. The transcript extends some 130 pages, in much of which Louisa, like the prosecution's previous witness, spent spilling lurid details about the conduct of the Queen and Bergami.[5]

It was a moment several hours into Louisa's cross-examination that led to the creation of Caroline's Rule. Central to the defense's strategy was the idea of *impeachment.* Impeachment, in this sense, is to call into question the credibility of a witness, usually by introducing evidence of "prior inconsistent statements," i.e. evidence that what the witness is saying on the stand does not match what they said in some earlier instance. Impeachment does not necessarily involve accusations that the witness is lying, but whether the witness is wrong because they are lying or because they simply cannot remember. Either way, they are proven to be unreliable.

The defense's strategy for impeachment was thus: to allow Louisa to speak ill of the Queen's character on direct examination without interjection, and then to confirm Louisa's negative assessment of the Queen on cross-examination, knowing all the while they that they had in their possession two letters, in Louisa's hand, both of which actually *praised* the Queen's good character, and one of which implied that she had been offered a bribe to testify against the Queen. Eventually, the defense would confront her with the contents of the letters, showing her

[4] Ibid.
[5] *Trial of Queen Caroline* (3 vols; New York: James Cockroft & Co., 1874). Demont's testimony extends from pages 277 to 407 in vol. 1.

to be, at the very least, an inconsistent and therefore unreliable witness as to the Queen's character.[6]

At the time this was a well-worn litigation strategy.. Although Henry Brougham, the Queen's chief counsel, did not cross-examine Louisa in this case, he later recalled employing the strategy in an earlier case: one in which, while cross-examining a rather arrogant gentleman, Brougham got him to repeatedly deny that he had ever said certain things material to the case. After the witness's repeated and staunch denials, Brougham, in a trademark bust of drama, swept away a cover on his desk, revealing a trove of some fifty letters, containing every phrase the man had so vehemently denied using just a moment earlier. The witness's credibility was destroyed in an instant, and Brougham's client carried the day.[7]

Almost two hours into the defense's questioning of Louisa about the contents of the contradictory letters, the prosecution objected.[8] There were a number of minor technical objections, but the main one for our purposes was not about the general propriety of the letters' use as evidence, but on *when* such evidence could be introduced.[9] After a mere ten-minute deliberation, and citing neither reason nor precedent, the judges returned with what would later come to be known as Caroline's Rule: the letters, as evidence of a prior inconsistent statements, could be read into evidence either immediately after the defense's opening statements *or* at the beginning of the defense's cross-examination, but in either case, and this is essential, the existence and contents of the letters had to be revealed *before* the defense could question the witness as to the letters' contents.[10]

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[6] Katharine T. Schaffzin, "Sweet Caroline: The Backslide from Federal Rule of Evidence 613(b) to the Rule in Queen Caroline's Case," *University of Michigan Journal of Law Reform* 47 (2014), 283-287.
[7] John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (10 vols.; 3rd ed.; Boston: Little, Brown & Co., 1940), §1259-1260.
[8] Schaffzin, 288.
[9] Ibid.
[10] Ibid.

This new rule, had it been posited earlier, would have effectively prevented the strategy used here in the examination of Louisa, and so dramatically illustrated by Brougham in the earlier case. By requiring the defense to show their hand *before* allowing them to question the witness, you prevent the defense from using the element of surprise in order to catch the witness in being inconsistent. If Louisa had known that the defense had written evidence contrary to what she was then saying on the stand, she would surely have been much more guarded about what she chose to admit and deny.

Nobody on the defense objected to this new rule, likely because, due to the prosecution's belated objection, they had effectively carried out their plan and sufficiently undermined Louisa's credibility in the two hours before the prosecution objected and the judges announced this new rule.[11] Their trap had already sprung, and so there was no point objecting now - they read the full letters into evidence according to the new rule, and simply proceeded with the case.

And thus, in a brief ten-minute interlude, because of the belated objection of a weary attorney general, during a trial that wasn't really a trial, we were saddled with a new rule of evidence. One that, had I been speaking across the pond in England where the rule was first adopted, likely would have remained only a footnote in the history of this whole affair, as after appearing in just a handful of cases, the rule was abolished there by statute, a mere thirty-odd years after its introduction. But its hold in the United States has proven to be stronger, and its legacy in this country would extend more than 150 years.

The rule's first foray into the American courts was not a successful one. The first case to take it up, just a year after it had been laid down in England, rejected it as an unwise rule, and anyways, contrary to American practice.[12] A decade later, another case, this one in Maine, also

[11] Ibid.
[12] *Tucker v. Welsh*, 17 Massachusetts Reports 160 (Supreme Judicial Court 1821).

rejected the rule.[13] It was not until 1832, in a New York case, where Caroline's Rule had its first favorable treatment in American courts.[14] As the rule crossed the Atlantic, it was given a standard formulation: the rule required the proponent of the evidence to read or show a prior inconsistent statement (in our case, the letters) to the witness before cross examining them about the inconsistency, and this was the formula upheld in the New York case.[15]

It was not until a decade later, however, that the rule gained a broader acceptance in this country. Simon Greenleaf, a professor at Harvard, wrote his seminal treatise on evidence in 1842, which included, seemingly uncritically, the formulation of the rule upheld in the New York case, citing only British examples, and the single favorable American case.[16] Greenleaf's treatise was considered so authoritative, that the inclusion of Caroline's Rule in his work effectively cemented its place in American jurisprudence.

Yet why did the rule persist so long in America after it had been abolished in England? Mainly, it appears, because Greenleaf had the bad fortune of dying just a year before the English rule was abolished, and subsequent editors of his treatise failed to take proper notice of its repeal.[17] This leaves us with rather ironic statements, like one made by a Michigan Judge in 1868, which mentions that when it comes to Caroline's Rule "our entire practice is based upon the English rule, and upon that there is no possible room for dispute" apparently unaware that the rule had been repealed in England some 14 years earlier.[18]

But its legacy is not entirely due to Greenleaf's text. Proponents of the rule gave one of three main arguments in its defense. First, it prevents unfair surprise and embarrassment to the

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[13] *Ware v. Ware*, 8 Maine Reports 42 (Supreme Judicial Court1831).
[14] *Bellinger v. People*, 8 Wendell's Reports 595 (New York Supreme Court 1832).
[15] Ibid.
[16] Simon Greenleaf, *A Treatise on the Law of Evidence* (6th ed.; 3 vols.; Boston: Little, Brown & Co., 1852-1860), 595-596.
[17] Wigmore, §1263.
[18] *Lightfoot v. People*, 16 Michigan Reports 507, 515 (Michigan Supreme Court 1868).

witness, by allowing them the opportunity to deny or explain having made the seemingly inconsistent statement.[19] The second argument was that Caroline's Rule required the entire evidence to be introduced, preventing it from only being used selectively.[20] And third was an argument for efficiency, that it saves time, by preventing the witness from later having to be recalled in order to explain any inconsistencies.[21]

These arguments were balanced against the fact that forcing the defense to show its hand ahead of time removed one of the most effective tools in a cross-examiner's kit – the element of surprise.[22] Once the witness is put on notice as to the kind of evidence the defense has, they will have their guard up, and know about which things they can effectively lie, and which they cannot. But while the arguments against the rule were strong, it had by this point taken firm root in the American courts and was not to be easily dislodged.

It wasn't until over 150 years after its first arrival on American shores, and more than a century since its abolition in England, that Caroline's Rule was finally retracted in America. The Federal Rules of Evidence, first adopted in 1975, having weighed its costs and benefits, came to the conclusion that Caroline's Rule was no longer tenable, and superseded it with rule 613 which requires that, as long as the witness is given the chance to explain the inconsistency, the evidence may be introduced before or *after* the witness is questioned about the inconsistencies – effectively restoring the ability of the modern lawyer to employ Brougham's flourish.[23] That rule 613 supersedes Caroline's Rule is no coincidence: in the notes which accompany the rules,

[19] Schaffzin, 290. It may, perhaps, seem strange, that "preventing embarrassment" would be a cogent argument in favor of a legal rule, but protecting the witness from undue embarrassment is something taken rather seriously, and is a codified rule of modern evidence law, enshrined in section 611 of the current Federal Rules of Evidence.
[20] Schaffzin, note 59.
[21] Schaffzin, 290.
[22] Schaffzin, 290-291.
[23] *Federal Rules of Evidence,* section 613.

provided by the drafters, they explicitly called out Caroline's Rule, by name, as a "useless impediment to cross-examination," and stated their intention to finally be rid of it.[24]

And thus ends the rather long legacy of a rather short rule, first proposed nearly 200 years ago today – or does it?

While almost every court has taken up the rather direct comments of the drafters of the Federal Rules of Evidence to be rid of Caroline's Rule and replace it with rule 613, there are holdouts, none more frequent than the 8th Circuit Court of Appeals, which covers Arkansas, Iowa, Minnesota, Missouri, Nebraska, and the Dakotas.[25] Despite the plain intention of the drafters of the federal rules, the 8th Circuit continues, in cases as recently as the early 2000s, to insist on using Caroline's Rule in defiance of rule 613.[26]

It appears then, that Caroline's legacy, as least as far as the law is concerned, may yet live on.

[24] Ibid., advisory committee's note.
[25] Schaffzin, 307, note 158.
[26] See e.g., United States v. Schnapp, 322 F.3d 564, 571–72 (8th Cir. 2003); United States v. Dierling, 131 F.3d 722, 733 (8th Cir. 1997); United States v. Sutton, 41 F.3d 1257, 1260 (8th Cir. 1994).