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SOLON

OR

THE PRICE OF JUSTICE

TO-DAY AND TO-MORROW

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BY

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against the apparent ignorance of judges, and almost all against the expense involved in the enforcement of legal rights. With these memories in mind, the lawyer would like to call attention to some striking and important benefit which his profession has conferred upon his countrymen. Oddly enough, no such benefit occurs immediately to his mind. Perhaps after profound cogitation he could point to one, but too often his reflections result only in the sentiment: "Ah well, they cannot get on without us."

This entirely colourless commendation of his functions is hardly inspiring even to the lawyer. To the lay mind it is definitely irritating, and has evoked the most forcible aspersions from writers such as Mr William Durran. This author contends[1] that the lawyer is nothing but an incubus, an Old Man of the Sea who has squatted for generations on the shoulders of society. Such social progress as we can see around us has resulted not because of, but in spite of, the efforts of the legal profession, whose interest has always been to render the law incomprehensible to all but its members. Our legal history, says Mr Durran, is deplorable.

This is true, but little of our history is in a better case. Our religious, industrial,

[1] *The Lawyer*, by William Durran, 1913 (Kegan Paul).

military, diplomatic and mercantile records have all many pages which we should like to tear out if we could, and which we regularly cover over in the presence of the young. Indeed our modern civilisation itself has been evolved through a welter of blood. It is not therefore to be wondered at that the evolution of our law is somewhat unlovely. Moreover, the history of other systems of law is not less murky than that of our own. Ever since the investigations of Sir Henry Maine it has been admitted that legal systems have definite stages of growth; that the recognition of rights which are nowadays considered elementary (such as the right to make a contract or a will) is a comparatively late development; and that primitive codes always err on the side of excessive formalism. The Roman legal system (the only one that has rivalled our own in scope or stamina) presents the closest analogies to the Common Law at almost every important point. The grotesque ceremonial involved in a conveyance of land, the multiplicity of legal fictions, the disabilities imposed upon women, are all common to both systems. Particularly striking too was the indifference to fraud exhibited by the early lawyers. Not until the time of Cicero was the allegation of fraud admitted in Roman law as a defence to a claim on a formal contract; while in

England the remedy for deceit as an independent wrong was firmly established only in 1789.

It is permissible therefore for the English lawyer, when twitted about the history of the system which he serves, to answer, "Well, show me a better if you can." This is a legitimate defence, but it has generally been weakened by over-statement. The best-known legal exponents have persistently over-called their hands, and so offered a safe "double" to their opponents. Writing at a time when the subtlety, prolixity, and incoherence of English Law were at their apex, Blackstone still conceived the system to be the "perfection of reason". A generation later it was torn to tatters by Jeremy Bentham; and Blackstone is honoured now mainly by Americans. One might have expected the jurists of our day to be deterred by this awful example. Unfortunately they are not. Our foremost modern experts are not content to play the part of apologists. It is their fashion to extol the ingenuity of lawyers and the supposed legal genius of the nation in terms of the most fulsome extravagance. Thus Professor Jenks in his preface to *The Book of English Law* takes "the opportunity of exalting, however feebly, the fame of one of the Englishman's greatest achievements, viz., the creation of the one great system of

indigenous national law which the modern world has produced". While Lord Bryce observes[1] that "the utterly unsystematic character from which Case law necessarily suffers, and which it imparts to the whole law of the country . . . is the capital defect, *one might say almost the only defect*, of the law of England."

Much of this admiration is misdirected. An impartial historian must certainly give the legal profession full marks for industry. At all periods lawyers have worked harder than most men; first, in the acquisition of vast stores of technical knowledge, and secondly, in the application of their technique to ever-changing circumstances. But they have not succeeded in producing anything impressive to the eye of the layman. They have worked in the dark like moles, constructing an underground labyrinth of rules and forms whose by-ways and corners could only become familiar to the student after long years of exploration, while the general public moving heedlessly above the ground was scarcely aware of its existence. The genius of the profession reveals itself as an inexhaustible aptitude for following the longest and most tortuous paths from point to point, for tunnelling under obstacles instead of knocking them down, for descend-

[1] *Studies in History and Jurisprudence*, vol. II, p. 291.

ing into ravines and climbing up the other side rather than building bridges.

A few instances may be given which are typical of the general method. It is often desirable where family property is to be re-settled to extinguish the entailed interests which encumber it. This is now done by the simple execution of a deed; but for hundreds of years the operation necessitated the institution of fictitious legal proceedings between the interested parties, in the course of which a complete stranger (usually the crier of the Court) was brought in as a third party. This gentleman always left the Court at a certain point and failed to re-appear when wanted; he was accordingly deemed to be in contempt, and judgment was given against him and the party who pretended to be relying on him.

Again, few questions admit of simpler statement than the question whether A or B is the true owner of certain land. For a period, however, of about three hundred years this plain issue could only be satisfactorily brought before a Court by means of the following procedure: A commenced an action in the name of an imaginary gentleman called John Doe to whom he pretended to have made a lease of the land in question. He further pretended that Doe had been wrongfully turned off the land by another imaginary gentleman

named William Stiles, who was alleged to be an acquaintance of B. In form therefore the proceedings were by Doe against Stiles. The real Defendant, B, was brought in by means of a letter, in fact sent by A, but signed " Your loving friend William Stiles ", informing B that a writ had been issued and advising him to intervene in the action for the protection of the land. Which B duly did. This genteel buffoonery, which was known as the action of Ejectment, was allowed to persist as a regular process of the law until 1852.

Let us draw out at random a volume of law reports of the period and see how the legal system was working in the middle of the last century. Opening Volume 3 of Messrs. Welsby Hurlstone & Gordon's Exchequer Reports at page 14, we find that in the year 1848 the acceptor of a bill of exchange resisted an action for the money on the ground that the Plaintiff in his formal statement of claim had described him as " W. D. Hay " instead of giving his full names. This was held to be a good defence.

It should not be supposed that these curious results were easily attained. On the contrary, painful years of research and experiment were devoted to the evolution of the appropriate remedy for every legal ill, and until the process was complete the

would-be litigant was compelled to submit either to the indignity of pocketing his grievance or else to the risks of trial by battle, teams of oath-swearers, or some other form of lottery. Not until the year 1602 was any reliable method established whereby a purchaser of goods could be forced to pay the money. Nor until the year 1846 could a man whose wife had been killed by the act of another recover damages from the delinquent. It was still doubtful until 1789 whether any remedy was available to a man who had been swindled out of his fortune by deliberate lies. Many similar instances could be mentioned where lawyers have only supplied the public need after generations of demand.

But the matter does not rest here. For even when they have elaborated new remedies they have often omitted to extinguish the older forms, which survive only to waste public time and to entrap the unwary. In November 1818 a defendant threw down his glove in the Court of King's Bench and demanded trial by battle in accordance with the law which prevailed in the eleventh century. The propriety of this challenge was debated before five judges for nine days and was finally affirmed in April 1819. Whereupon the plaintiff announced that he would not fight; so the proceedings died a natural death. More than a hundred years

later the Court of Appeal decided that the expression "three months' notice" contained in a lease meant three lunar months' notice; an interpretation which had not occurred to the mind of either of the parties themselves. Lastly, we may mention the wholly unfair responsibility which still attaches to a husband for the conduct of his wife. In the days when a man's wife was regarded merely as one of his earthly possessions, in the same manner as his horse, and when her fortune was automatically transferred to his pocket by marriage, it was not unreasonable to make him pay if she libelled, assaulted or swindled other people. The law, characteristically, continued to entertain this primitive view of the married state until about fifty years ago. Since then, however, the emancipation of woman has been complete. Married or single, she now victoriously wields the full disadvantages of citizenship. Yet the wretched husband is still haltered with his medieval responsibility, and must pay damages out of his own pocket-money, if his wife makes defamatory allusions to her rivals in business.

Not less striking than these relics of antiquity are the gaps which still remain at the present day in our catalogue of rights and remedies. In many cases it is still impossible to obtain any redress for the most conspicuous wrongs. If my secretary

is knocked down by a drunken motorist and breaks a leg I can recover damages for the loss of his services during convalescence. But if he is knocked down and killed I have no remedy at all, although I may feel morally bound to pension his family, and may be unable to find an adequate substitute. If my daughter is seduced by a millionaire before she has left school I have no claim for compensation; but it is otherwise if she lives at home and helps her mother in the house. Again, in a number of cases, which present no satisfactory basis for classification, the enforcement of important rights may be defeated by the death of the delinquent. If I am grossly libelled or shot in the leg by a man who dies before I have sued him to judgment, I have no remedy against his executors; whereas if he breaks my wheelbarrow or infringes my copyright they will have to pay compensation.

2. THE PRESENT

Contemplating these phenomena, one may feel a legitimate surprise at the civic dignities which have regularly been heaped upon leading lawyers throughout history. For many years they have played a larger part than any other class of men in the government of the country, yet to such

a pitch have they brought their own profession that going to law is in the majority of cases too expensive to be worth while. This solemn truth is often not realised by the layman until after he has spent the money; but the litigating public is steadily increasing in wisdom and migrating from Courts of Law to arbitral tribunals of its own creation.

This is a lamentable and ludicrous state of affairs. So firmly entrenched is the legal profession that our judges receive knighthoods from the King, substantial salaries from the Treasury and the utmost reverence and esteem from the general public. It is widely and rightly believed that civil actions in this country are conducted with an impartiality and a decorum unknown to other nations; and periodically the subject is treated to a display of wigs, robes and processions which inflate him with pride at the achievements of our island race. With all this, the law remains for him a dangerous and inscrutable mystery. He admires his judges for their learning and integrity but he has no desire to have anything to do with them. He was repeatedly warned in his youth to avoid recourse to the Courts at all costs, and his later experience in business confirms the value of this advice. Litigation is a luxury within the reach only of millionaires and paupers. For the man of moderate

means it is far cheaper to settle disputes out of Court or simply to leave them unsettled. We thus have the spectacle of an elaborate and dignified Government department paid for by the public and organised by the State for the very purpose of resolving disputes between subject and subject, which is yet practically unused by the vast majority of taxpayers. It is as if every house and cottage in the kingdom were wired for electric light at the public expense, but as if the electric current were supplied at the rate of 10/- per unit so that all the householders preferred to use oil lamps.

It is not remarkable that this attitude towards the law prevails so widely. There is a decision of the House of Lords which is well known to all commercial lawyers. It lays down that a customer owes a duty to his banker in drawing a cheque not to leave room for any fraudulent person to alter the amount of its value. If this case were equally well known to laymen, no one would ever go to law again. What happened was this: A merchant had a clerk whom he trusted. One day the clerk said he wanted petty cash and asked the merchant to sign a cheque for £2. The merchant did so rather carelessly, and the clerk subsequently altered the amount to £120, and received payment of this sum at the merchant's bank. The merchant claimed that the

bank had no right to debit him with £120, and brought an action to enforce his claim. The judge (who subsequently became Lord Chancellor) thought that he was right and gave judgment in his favour. So did the three judges of the Court of Appeal. But the bank took the matter to the House of Lords, where it was considered by four Law Lords. They disagreed with the four judges and decided in favour of the bank, ordering the merchant to pay the whole costs of the three hearings. Accordingly this dispute about £120 cost the merchant several thousands of pounds. And the immediate cause of the catastrophe was the fact that so many judges thought that he was right. But the over-riding cause was the ramifications of the legal system. Even if he had won the case in the House of Lords he would still have been considerably out of pocket.

In a recent case a well-known figure in the sporting world brought an action against a firm of confectioners who, without asking his permission, had made use of his name in an advertisement of their wares. He claimed damages for libel since he said that anyone seeing the advertisement would think that he was in the habit of raising money by selling the use of his name. The justice of the case would probably have been met by a payment of fifty or a hundred pounds.

But the jury awarded £1,000 damages, and the judge held that the advertisement was libellous. This was more than the confectioners could stomach; so they appealed. The Court of Appeal, by a majority of two judges to one, held that the publication (though in deplorable taste) was not in law a libel, and that in any case the damages awarded were excessive. The judgment was accordingly reversed and the plaintiff ordered to pay all the costs.

The House of Lords however disagreed with this view and, holding that the publication was in law a libel, ordered the question of damages to be retried. They also ordered the confectioners to pay the costs of the original hearing and of the final appeal to the House of Lords, but left the costs incurred in the Court of Appeal to be divided between the parties. In the end the action was settled; but both parties must have begun to wonder whether the game was worth the candle.

It would not be difficult to multiply instances where the expenses of actions in the High Court have proved entirely disproportionate to the value of the matter at stake. A party who goes to law can never know what the case may cost him in the end, or whether his opponent will run him through the whole gamut of appeal tribunals. If he does, the plaintiff may be out of pocket

even though he ultimately wins his case. If he loses it he may be ruined.

It is the same story in the inferior Courts. The County Court whose jurisdiction is limited to claims within £100 is the regular "poor man's court". It is certainly possible to litigate cheaply in this forum. Where both parties reside in the neighbourhood of the court-house and where the point at issue is a fairly simple one they may obtain justice quite cheaply by appearing in person. Unfortunately these conditions are rare. More usually one of the parties has to come from a considerable distance to the Court. Questions which cannot be settled by agreement are apt to be complex or technical, and in most cases representation by counsel or solicitors is desirable in the interests of the parties. In such cases it is only too often that the expense of the proceedings outweighs the value of their subject. In suburban or country districts the Court sits perhaps only on one day in every month. A long list of cases awaits the judge. Some of them are often not reached in the course of the day and have to stand over till the next Court. In a case where the attendance of counsel, solicitors and half a dozen witnesses is required, some of whom may have had to travel long distances to the Court and all of whom have wasted a complete day in waiting for the case to be heard,

it is obvious that the expense thus thrown away is quite disproportionate to the matter; and unless the amount claimed is substantial the costs of the suit will inevitably absorb nearly all of it. It is a common experience for a successful plaintiff who has recovered judgment for about £25 to find himself only a few pounds in pocket as the result, while his adversary's expenses will amount to £50 or more.

This pathetic state of affairs is largely unappreciated by the lay public, and is bound to remain so. People who have ever been engaged in lawsuits are greatly in the minority. Most people care nothing for law or for suits. The lawyer on the other hand is so familiar with the system that he is no longer impressed by its extravagance. The feasibility of any fundamental reforms hardly ever occurs to his mind. The conscientious practitioner finds that the best service he can do for his clients is to steer them clear of litigation whenever possible. The problem of legal costs thus sinks unsolved between the indifference of the layman and the familiarity of the lawyer. It persistently escapes the focus of any strong body of opinion. Such a body of opinion could in the past have been brought together by the lawyers themselves. They have failed to do so. What then are the prospects and possibilities of the future?

3. THE PROBLEM

The foregoing remarks are not intended as an indictment of the legal profession. It is true that after centuries of practice our lawyers have not succeeded in popularising the legal system. But this is not to say that they have not tried to serve their clients. The fact is that the legal system was imposed upon the profession in the first place by laymen whose power could not be resisted, and the lawyers have ever since then devoted themselves to assisting their clients to evade the imposition. Just as legal development in Rome was hampered at every stage by the patriarchal order of society which prevailed there for so long, so in England for some centuries any direct approach to common sense in legal matters was obstructed by feudalism and the power of monarchs. The social structure imposed upon the nation by the Angevins was founded upon the tenure of land. Land and the folk who lived upon it were parcelled out by the Norman kings among their dependents and ecclesiastical advisers; the greatest care being taken to prevent too much of it from falling into any one hand, and to ensure that no transfer should be made without the supervision of the monarch. Any land granted by the king must be kept in the family where the king could

keep an eye upon it, and when that family became extinct the land would revert to the king again to be disposed of as he desired. When we recall that in medieval times whole families might be readily extinguished by summary decapitation, it will be perceived how admirably this scheme of property holding suited the government. And the better it was for the government the worse it was for the baronial landowner.

Obviously the most lucrative opportunities or lawyers were offered by this situation. The whole learning of the profession was naturally directed to inventing, testing and perfecting ways and means of evading the property law prescribed by the sovereign. Of course the king had his lawyers too. The best legal advice was just as necessary to kings in those days as it is to money-lenders in these. But the king's lawyers must always have been secretly (if only subconsciously) in the other camp. The genteel fiction (which still persists) that lawyers do their work for nothing had probably as much relation to the facts then as it has now; and since land was the only considerable form of property it followed that the most successful lawyers were also landowners. Hence, no doubt, the judicial favour which was bestowed on the shallowest devices for circumventing the land law so long as they were circuitous enough to be incompre-

hensible to the layman. While the king decreed the law to suit himself, the lawyers invented law to suit their clients, and defended their inventions either by a barricade of technicality or by the solemn assertion that they had been instituted by Alfred the Great. The result was that at the end of the nineteenth century our real property law had become a welter of forms, fictions, secrets, and devices which (according to rumour) irritated Lord Birkenhead, when a law student, so much that he resolved to make a clean sweep of the whole department if ever the opportunity offered. This, with the assistance of learned conveyancers, he recently attempted and great improvements have been made. But immediate results cannot be expected since the effort was somewhat belated. The feudal lawyers had got too long a start. Like the simple-minded Irish peasants they knew that the land "would not run away", and they took advantage of the fact during twenty generations to erect on it an edifice of trusts, entails, reversions, remainders and legal what-not which could not suddenly be rased to the ground without great injustice to the various interests concerned. Happily, however, under the influence of democratic legislation, the land is now beginning to show definite symptoms of wanting to run away; the interests

aforesaid are selling out; and it is possible to hope that by the end of the present century most of the medieval paraphernalia will have been transferred from our law libraries to our museums.

If the above remarks give a fair summary of the history of our real property law it seems hard to throw much of the blame for that history upon the lawyers. To save their clients' property from the rapacity of the government was (as it still is) a most meritorious occupation for them, and no doubt the success of their method depended largely upon its technicality. So far, they were clearly doing good service to the public. Where they went wrong was in assuming that the rites and mysteries of their own invention constituted as a whole an ideal system of law. To take an example: Various forms of procedure for trying the title to land in cases of disputed ownership were established during the reign of Henry II. These "real actions", as they were called, had certain primitive disadvantages. In some cases the defendant could put off the trial for a year and a day by pretending to be ill and going to bed; and when sufficiently rejuvenated by these tactics he could claim trial by battle. In other cases the whole issue of ownership had to be submitted to a local jury; but it was always easy for the defendant to raise a number of technical

pleas which the jury could not understand, and which therefore had to be disposed of by a judge before the case continued. In this way the trial could be held up for long periods. Within a few generations the imperfection of these methods began to be felt and the lawyers set to work to devise some more convenient form of process. The result was the celebrated action of Ejectment with its fictitious plaintiff and imaginary lease and disturbance which has already been described. The evolution of this form of action occupied about 300 years. In its perfected state it produced exactly the results intended by the most devious of means. The ingenuity of its invention cannot be doubted. But here the credit given to the lawyers must cease. It was introduced only as an expedient to circumvent a legal process which could not readily be abolished so long as the power of parliament was uncertain and difficult to exercise. Its perpetuation for more than a century after the firm establishment of parliamentary legislation can hardly be excused. As soon as it became practicable to abolish Henry II's real actions and to substitute for them a cheap and intelligible method of trial, this should have been done and the action of Ejectment discarded. Yet not until the middle of the last century was any step taken in this direction. The old real actions

lingered on until 1833, and the action of Ejectment survived them for nineteen years longer. The lawyers, in love with the machinery invented by their predecessors, never thought of discarding it, even when encrusted with the rust of centuries, so long as their clients had the money to keep it working. Lost in admiration for the multiplicity of cogs, levers and spindles, they gave no heed to the question of running expenses.

Nor have they yet awakened fully to the gravity of this question. The lawyer of to-day still lives largely in the past. If in actual practice, he spends much of his time in consulting ancient precedents and tracing the historical development of those rules of law which he desires to invoke at the moment. If he is cast in an academic mould, he explores even more assiduously the causes which actuated his medieval predecessors, and compiles instructive treatises full of extravagant praise for their legal genius. Some go so far as to attribute to the nation itself a legal genius analogous to the artistic genius of the ancient Athenians. But this is only a somewhat florid way of saying that our lawyers have suffered very little interference from the lay public, and have thus been enabled to legislate darkly and circuitously without much opposition. The legal genius of the nation amounts to nothing

more than an apathy in regard to technical subjects and the desire for a quiet life.

If this apathy on the part of the layman gives us the clue to the lawyers' past success, it also helps us to account for their present failure. When one recalls that every subject of the State is (theoretically) regulated in his intercourse with others by an elaborate system of legal rules providing for every imaginable contingency, it seems odd at first sight that he should take no interest in it. It is not so really, however, for in fact the system takes very little interest in him. It assumes always that he has plenty of money to spare, and since this assumption is only correct about once in a hundred times we find that 99 per cent. of the population is outside the pale of the civil law. For instance: A, a wealthy man, buys a diamond necklace for his wife from a jeweller. The jeweller's messenger mistakenly delivers the necklace to B instead of to A. B pawns it with C. By appropriate proceedings A can recover the necklace from C. It will cost him something to do so; but the necklace is worth a lot, and in any event A can afford the expense. In fact, the legal system comes to the aid of A. But if A is a jobbing gardener and the subject is not a necklace but a spade worth a guinea, the law is of no assistance whatever. To take proceedings in the County Court with

any hope of proving his case will probably cost A more than 10/-, and he will almost certainly lose a complete day's work (possibly two) in waiting for the case to be tried. Yet the spade is of much more moment to the jobbing gardener than the necklace to the millionaire; and the law would do better service to the public by restoring the former than the latter to its true owner. Nor is this an extreme instance. Let us take another illustration. A lets out a motor-car to B on the hire-purchase system on terms that B shall insure the car forthwith. B makes a proposal to an insurance company and pays a premium, but the issue of the policy is held up for a few days owing to the discovery that B's record as a driver is somewhat unfortunate. In the meantime B takes delivery of the car, and while he is filling the radiator a drunken motorist runs into it and breaks the back axle. B takes the car to a garage for repairs. A claims to retake possession of the car on account of B's breach of the hire agreement. B disputes his right to do so, and the garage proprietor refuses to deliver the car to either of them until he is paid for the repairs. To sort out this tangle will usually cost as least as much as the car is worth. Moreover, the case is one which will probably go to the Court of Appeal; in which event all parties will be financial losers, whatever

the result. Yet cases of this sort are quite frequent, as every hire-purchase dealer knows.

The bound volumes of our law reports are replete with learned and instructive decisions on facts more or less complicated than those above mentioned. But what the reports so seldom disclose is the total cost of the litigation to the parties. If they did they would be sorry reading indeed, and if they were widely read no one would ever worry to sue in the High Court for less than £500.

If public interest in this topic were thoroughly awakened and a disinterested body of opinion were brought to bear upon it we might see sweeping reforms. The enforcement of legal rights could no doubt be made available for all on an economic basis, just as medical service is now available under the National Health Insurance scheme. Disputes of one sort and another arise every day in all classes of society —not merely acrimonious quarrels, but genuine differences of view as to the position of the parties—and the settlement of these differences by the intervention of some impartial agency is a necessary and benevolent public service. Our civil courts of justice are designed to supply this very need. An ideal system would provide the services of these courts for nothing; and indeed this fact is recognised in the provision made for

paupers, who may obtain free conduct of legal actions just as they obtain free medical attendance. On the other hand justice, like medicine, cannot ultimately be dispensed without money, and those who can afford to pay something for it should be made to do so. This principle is recognised in our medical administration; but here no hard-and-fast line is drawn above the pauper class. It is realised that a large class of people can afford to pay something towards medical service, but often not enough to purchase the service, which may be needed in a particular case. Hence the scheme whereby each member of the class subscribes an insignificant sum at regular intervals, thus forming a fund sufficient to keep the service running. And on the whole this scheme commends itself to the public. Everyone knows the value of medical attendance and is prepared to pay a modest contribution against the day when he may need it himself. Justice however has no such machinery. In the eye of the law every man is either a pauper or a millionaire; either he can afford to pay for the enforcement of his rights or he cannot—a transparently false hypothesis since legal wrongs, like physical infirmities, vary as to their complexity and the treatment necessary to right them. There seems no reason in logic against spreading the cost of litigation

over the public at large. The Army and the Civil Service are maintained in this way. So are the Police. It would seem odd to argue that a man who has been saved from a felonious assault by a constable should be made to pay a fee of fifty guineas for the service and for the costs of the subsequent prosecution, and that the Police Force should rely for its funds upon these opportune contributions. Yet the argument is accepted in the sphere of civil justice. A man who has been swindled out of £1,000 must pay all the expenses of setting the Courts in motion in the first place, and is only allowed to recover a portion of this (if he can) from the delinquent after judgment. For the law, alas, is distrusted. The man in the street, while prepared to pay for the good health of his fellow subjects, would never stomach a tax to pay for their litigation. What does he care for their rights and wrongs? The law is of no interest to him. Time enough to worry about it when he needs its help himself.

Whether our legal system could possibly have developed in such a manner as to arouse and hold the interest of the public is hard to say. It is not easy to be thrilled by jurisprudence. But certainly the lawyers did nothing to help in this respect. Ever since the Norman Conquest they were working for the rich rather than the poor.

The focussing of their interest in the first place upon the land law made this almost inevitable. The only laymen worth interesting were the landowners. The people who lived upon the land were serfs having no constitutional rights—mere chattels chained to the land and requiring no distinct consideration. All the most interesting disputes were waged between prosperous parties. Subtlety, technicality, and subterfuge were the stock-in-trade of a real property lawyer, and his clients always had money to buy them. True, the great mass of the people did not appreciate these talents; but then the great mass of the people were of no account, either socially or financially. There was no market for the pedestrian virtues of clearness, directness, and common sense.

When wealth became more widely distributed and literacy more common the legal profession had unfortunately become set in its habits. Law was a science, a secret, almost a religion. Legal remedies were not ready to hand to be applied like poultices to civil wrongs. Each wrong must be classified, analysed, and proved to have been recognised as wrong by Alfred the Great; the remedy must be carved out of the materials of antiquity, supported by precedent and shown to be no upstart innovation. The conservatism of the lawyer which deterred him from devising anything

simple or new was further embellished by his reluctance to unlearn any of the ancient technique which he had so painfully acquired. This is well illustrated by the history of the action of *Assumpsit*. Commerce, even in its earliest infancy, must have demanded the establishment of a simple procedure for the collection of debts. The action of Debt however as understood by lawyers was too cumbrous and uncertain to be of any practical use. The defendant could always muster a number of friends to swear in solemn form to his general integrity and to the non-existence of the debt claimed (whether they knew anything about it or not); and this put a stop to the plaintiff's action unless he had the hardihood to prosecute them all for perjury. If the action could have been shorn of this disadvantage, and thus adapted to try the issue expeditiously, no doubt the commercial public would have been well satisfied. But this obvious reform (which could easily have been introduced by any strong-minded Chancellor) was never attempted. Selecting the most inappropriate form of procedure which could be imagined—namely, the action of trespass—the Tudor lawyers experimented, elaborated, and contrived until they had evolved from it the famous action of *Assumpsit* and had persuaded themselves that such an action had always existed. They thus

kept the public waiting until 1602 before supplying its simple need.

Estranged, therefore, as the legal system is from the affections of the public, it is idle to contemplate any direct proposals for spreading the cost of litigation over the general body of taxpayers. But it is not necessary to abandon this ideal altogether; for the public already contributes considerably to the upkeep of justice. About two-thirds of the money needed for the salaries of judges and lower officials, the maintenance of buildings, the printing of official documents, and so on is derived from Court fees received from litigants. But the remaining third is borne by the public at large. Incidentally, they might be harmlessly compelled to contribute a little more. It is impossible to contemplate the rush for admission to any court where a cause célèbre is being tried without realising that a valuable source of revenue is being simply ignored. There is no valid argument against making some modest charge for public admission to the courts. But this is not to say that a proposal to make such a charge could easily be carried. On the contrary, it would probably open the floodgates of sentimental rhetoric. It would be stigmatised as a denial to the man in the street of his right—nay, of his constitutional duty—to see that justice is

fairly meted to his fellows. The words of Jeremy Bentham would be freely quoted: "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." And so on. But these glorious sentiments have no relation to real life. It is true that every citizen has a perfect right to go and see justice administered. It is one of those rights which he can freely exercise when he does not want to, and can hardly exercise at all when he does. When the courts are engaged with cases devoid of interest to a layman he can go and listen all day long from the deserted benches of the public gallery. But when a sensational breach of promise suit or murder trial is in progress he will find that there is no room for him unless he goes without his breakfast. Any member of the public is entitled, in theory, to be present at the hearing of appeals in the House of Lords. But accommodation is only available for about six; and even when there is room for him, it is a brave man who will force his way by devious passages through a cordon of robust constabulary to the threshold of the chamber. Moreover it is a mistake to suppose that one in a hundred spectators at our legal proceedings goes there in order to see that the judge behaves

himself. He goes there either (a) out of mere curiosity, or (b) because he has nothing better to do. An admission fee of one shilling, so far from polluting the fount of justice, would possibly deter just enough of the idle onlookers to enable those who had any real interest in the proceedings to attend them in comfort. And as a tax in aid of litigation it would have the signal merit of being entirely voluntary.

But whether or not there is any hope of making this further painless extraction from the public pocket, it is worth enquiring whether their existing contribution (about £300,000 per annum) is being used to the best advantage, or whether it could be diverted into some more profitable channel. That is one possible line for the reformer. Another is to explore the possibility of reducing the expenses which fall on the individual litigant. In other words, can we make justice more accessible either by saving some of the money at present subscribed by the taxpayer and applying it to the relief of litigants, or by diminishing the immediate expenses which fall upon the litigants themselves?

Under the latter head come such familiar proposals as the fusion of the barristers' and solicitors' professions, the abolition of juries and the curtailment of oral evidence. Under the former comes the question of

appellate tribunals. Suppose we abolished one of our courts of appeal and thereby saved the salaries of half a dozen judges—say £30,000—could we spend this money in some way which would cheapen and popularise justice?

Let us examine the expediency of some of these proposals; bearing in mind the current state of public opinion. It is here that the lawyers must pay the price of the antipathy which their doings have evoked from the layman. There is no chance of landing large reforms on a wave of sympathetic interest. The best that can be hoped is to drag them unobtrusively ashore without disturbing the sluggish waters of popular indifference.

4. FUSION

First in importance of the reforms to be discussed is the proposed fusion of the barristers' and solicitors' functions. This reform, if carried through, would be a serious mistake; yet, paradoxically enough, it is the one which seems most likely of accomplishment in our time, since it makes an egregious appeal to the lay mind. Reporting in 1930 on the "Expense of Litigation", a distinguished and painstaking sub-committee of the London Chamber of Commerce made

the following pronouncement: "We think the present separation of the two sides of the legal profession should be ended, as this would undoubtedly considerably lessen the expenses caused by the present double representation of litigants with a consequent saving both in Counsels' fees and copying of documents and would enable lawyers to deal more flexibly with costs. But we recognise that fusion is not yet practical politics and would arouse great opposition and whatever developments as regards fusion may arise in the future we have to deal with present conditions and what is immediately practicable." Accordingly this proposal is not formally included in the recommendations made.

But this passage is provocative to a lawyer since it suggests that only the obstructive prejudice of the legal profession itself lies in the way of what is obviously a sound reform. The task of the reformer is always hard, and it is regrettably true that the antique entrenchments of the Inns of Court are peculiarly proof against the assaults of common sense. The lawyer is a slow-moving and crustacean creature, several centuries behind the times, and too thick-skinned to be ashamed of the fact. Besides, nobody likes being reformed.

These are facile arguments which tend, however, only to strengthen the case for

fusion without explaining why that process is so desirable. The advocates of this reform (particularly when they are laymen), are apt to assume its desirability as obvious. Oddly enough, it is not " obvious " that all doctors should also be ear specialists, or that all plumbers should also be electricians. It is a fact that most tobacconists also deal in walking sticks, but it is not obvious why they should do so. It is, however, said to be obvious that all solicitors ought also to be barristers.

This feeling among laymen is to a large extent engendered by the network of medieval etiquette in which they find themselves enmeshed as soon as they contemplate litigation. The barrister sits in his chambers in pontifical seclusion. No direct approach by the client is possible. He must be inducted into the presence by his solicitor before an audience can be obtained, and must withdraw under the same protection at the end of the sitting. Both counsel and solicitor conscientiously conspire to prevent any communication from passing between the client and the former save in the sunshine of the latter's presence or through the conduit of his office. It sometimes happens that after a conference with counsel the client suddenly remembers that he forgot to ask an all-important question. His first instinct is to ring up counsel as soon as he

gets home. "I say, I find I forgot to ask you this afternoon, etc.", but he will only be told that any further communication with learned counsel must be made through his solicitor; and so, after a lapse of days, the solemn machinery is put into motion once more. To a certain type of mind this peculiar form of mumbo-jumbo is undoubtedly uncongenial. In point of fact there is much to justify it. There is at any rate a candid assertion by counsel that they will only give interviews under certain perfectly clear conditions; whereas other professional men, when pestered by their clients, resort to such devices as pretending to be out when they are in fact in, or suggesting that the subscriber has been connected with the wrong number.

But whatever grievance can be made of this matter of routine is entirely beside the point when the larger question is considered whether the barrister's part in litigation ought to be played instead by the solicitor. In considering this point it is of some importance to bear in mind what that part consists of. It is the duty of the barrister in chambers to investigate the legal effect of every fact alleged by his client, to consider what additional facts are or may be pertinent to the case, to estimate the value of every point which is or may be taken by the opposing party, and to suggest the most

effective and economic methods of proof. These proceedings, besides necessitating a good deal of merely clerical work, commonly involve much research in the consideration of complicated points of law. It is not unusual for a barrister to spend two or three days in settling a Statement of Claim consisting of a dozen short paragraphs. The solicitor who is engaged in the more practical and humdrum business of issuing writs and executions, making wills, drafting leases, winding up companies, and celebrating the last legal obsequies over the remains of his favourite clients, rightfully complains that he has no time to look up hypothetical points, and gladly refers them when they arise to the barrister whose aloofness from everyday affairs peculiarly fits him to fumble about in the labyrinth of the law library. The situation is more or less parallel to the case in medicine of the busy general practitioner and the specialist who gives much of his time to research.

Nevertheless, the academic detachment of the barrister seems to infuriate certain laymen. The law, they say, should be so simple, compendious, and easily understood that the necessity for a second opinion ought never to arise. This is another of those " obvious " propositions which are so seldom fully argued. Architecture is not simple, neither is stockbroking. The structure of

the motor-car and of the human interior, the processes of mining and of agriculture, the three-party system and contract bridge —all these, like life itself, are fraught with complexity. How, then, can the law, which has a finger in every pie, remain simple and easy to follow?

Then there is the court work of the barrister. One has heard it suggested that advocates should be dispensed with altogether; and that the judges (being men of acknowledged learning, experience, and impartiality) should be competent to determine any case on hearing the parties themselves and any witnesses whom they may choose to call. This system works moderately well in the County and Police Courts, where disputes are often of a simple but intensely personal nature, and where the opportunity of unburdening his mind in public is sometimes of much more importance to the plaintiff than his chances of victory or defeat. It is not uncommon to see two opposing litigants, after twenty minutes of exuberant invective and retort across the judge's desk, retreating arm-in-arm to the nearest licensed premises when the decision has been given. On the whole, however, it cannot be said that litigants "in person" are more than moderately well served in County Courts. In the High Court the service is slightly better; there

is less of it, and the appearance of a litigant in person may be a welcome diversion to a High Court Judge, while it is nothing but a perennial ordeal for his County Court brother. No one who has listened to a layman conducting his case in person in the High Court can doubt that but for the usual practice of employing advocates the delays of the law would be double or treble what they are at present. Nor is there anything surprising in this. The average motor owner needs more time to clean out and readjust a carburettor than the expert mechanic. In the same way it takes him longer to tell a detailed narrative of facts and express the conclusions he wishes to be drawn therefrom than it takes an expert who has been trained in the use of concise exposition and argument. English people perhaps need advocates more than many foreigners, since they have little aptitude for expressing themselves clearly. This ineptitude generally reaches its highest point in important commercial transactions. Thus, it is not uncommon for a policy insuring against the theft of a pearl necklace from a shop to contain printed reference to piracy, jettisons and barratry of mariners "of and in the good ship or vessel called ..... 144, Hatton Gardens ..... whereof is master, under God, for this present voyage ..... Messrs. A. B. C. & Co., Ltd."

Once it is conceded that the employment of advocates is desirable, most people will admit that it is also desirable that they should be well trained in their business. The art of advocacy cannot be picked up in a day. It requires assiduous practice and attention; and its object is not (as some laymen contemptuously hold) to mislead the tribunal, but to place before it in the completest and most emphatic manner the contentions, whether of fact or of law, of one's client. When this is ably done on both sides the assistance which the judge derives from the process is enormous, and the time spent in argument is amply repaid by the narrow scrutiny and fair consideration which are thereby focussed on the matter in hand.

It would be difficult to combine these functions with the practical executive work of a solicitor's office. The man who finds mortgages for impecunious clients, puts bailiffs into other people's houses, and writes non-committal letters for six and eightpence can hardly spare the time to prepare lengthy speeches and cross-examinations or to master the darker aspects of the law relating to quasi-easements. There must be a division of labour in the solicitors' offices even if one does not have to go outside them to find advocates. Indeed, this is what happens in countries where the two professions are

nominally combined. It is common practice in the U.S.A. for certain members of the "law firms" to devote themselves largely to court work, leaving to their partners the business which is habitually done by solicitors over here.

Let us imagine the results of "fusion" if it were introduced to-day. There would at once be a dignified movement by the leading barristers and an unseemly scramble among the junior fry to secure partnerships in respectable firms of solicitors, while the solicitors themselves would perceptibly unbend in their efforts to obtain the most brilliant advocates for their own firms. And a firm which succeeded in doing so might well be proud of itself. No longer would the matchless eloquence of Sir Wilberforce Whatnot be accessible to any litigant whose solicitor approached him with an adequate fee. The layman who wished Sir W. to appear for him in court would have to desert his former solicitors and instruct Sir W.'s new firm. It is easy to see that all the large scale litigation would soon be concentrated in the hands of a few pre-eminent firms.

Whether a number of honest but uninfluential solicitors would thereby be driven out of business is hard to say, and is probably of little concern to the layman who urges this reform. What should concern him more is that the delays of the law which he already

finds so exasperating would be doubled or trebled by the new arrangement. One feature of the present system is that there are many barristers of first-rate ability, and a solicitor who is disappointed in his desire to retain one of them in a particular case can easily satisfy himself with another. This is fully recognised by the judges, who see to it that the convenience of counsel shall yield to the precedence of litigants. It is only fair that the necessary delays of the law should be the same for all, and that parties who have got their tackle ready for the trial should be able to set their cases down in order and know when their turn for hearing is due. Any sudden re-arrangement which alters the position of one case in the list may cause great inconvenience. Parties in another case who have mustered all their witnesses in preparation for trial on Tuesday may find that the case cannot be reached till Thursday or, conversely, may be taken unawares by the case appearing in the list on Monday. It is not the practice therefore to permit a case to be postponed merely because one of the counsel engaged may find that he will be busy in another court when the case is called on. If he cannot appear himself he must return the brief and let it be given to someone else.

But how could this practice be maintained if the professions were fused? It is the

battle cry of the fusionists that the lawyer first consulted should be able to handle the case from beginning to end, so that the client may be assured that at every stage he is represented by one who has a complete knowledge of his troubles. If this principle is not upheld the case for fusion disappears altogether. If it is upheld it must be upheld by the judges. They cannot possibly command a man to change his solicitor on the eve of the trial. In every instance a day must be fixed when the advocates on either side are free to conduct the case. In such circumstances the skilful use of an engagement book will postpone the hearing of a case for months, the lists will be in confusion, and the only cases tried will be those handled by the less eminent firms whose pleading partners are not embarrassed by over-patronage.

That this is no fanciful foreboding is shown by American experience. In order to allow the litigant to be represented at every stage by the lawyer of his original choice the Courts of the U.S.A. are not unwilling to grant adjournments for the convenience of counsel. A friend of the writer who is in good legal practice in Philadelphia instanced a case which was first called on for trial in 1926. As he was engaged in another court on this particular day he obtained an adjournment of the case. By

a skilful or fortunate disposition of his other work he managed to find the same pretext for a further adjournment every time the case appeared in the list; and in 1928 when he paid a visit to England it had still not come to trial. Since lawyers in America are paid by results, and since this case was a "dead loser" for his client, he expressed the conscientious hope that he would be able to defer its trial indefinitely by these tactics.

Another American lawyer belonging to one of the biggest New York firms informed the writer that his firm had a staff of no less than eighty members devoted to court work. Here we have fusion de luxe. Yet even so the English system was not unknown; since no member of the firm was an expert in patent law, and when they received a case of this nature, they farmed it out to one of their rivals.

If these considerations expose the unreality of the ideal of single and unbroken representation, the only remaining argument for fusion is that it would save some of the expenses necessarily incurred in the communications which at present take place between solicitors and counsel. The preparation and copying of certain documents would no doubt be eliminated. The solicitor would not need to write formal instructions for his own perusal (though it is not to be

supposed that he would charge less for his technical opinions than counsel do at present). But the gain under this head would really be very small. In a case of any magnitude the most expensive of the documents laid before counsel is generally the bundle of correspondence. It is also the duty of the plaintiff at the trial to provide a similar bundle for the judge. Could either of these copies be saved if the solicitor himself argued the case? Everyone who has ever addressed a court knows how necessary it is to "dog-ear" one letter in the bundle, mark the next with a blue pencil, make marginal notes on a third, and so on. Is it contended that the advocate-solicitor would inflict these aids to memory upon the originals in order to save the cost of a copy? If he did he would probably be attached for contempt of court when the judge asked to see one of the original letters. A little reflection on these lines goes a long way to mitigate the claim that fusion would wreak important economies in the copying of documents.

Undoubtedly there is room for some relaxation of our present rules of etiquette. There may well be cases in which the layman should be permitted to cross the threshold of counsel's chambers without the safe conduct of a solicitor. It may be that a solicitor should not be entitled to charge a fee for

carrying a set of papers to a barrister who lives in the same building. But these problems could be explored and solved without the momentous changes involved in fusion.

Let us hope that this much-advertised reform will be avoided. At best, it would leave the litigant about as well off as he is now. And this would be disastrous; for no doubt he would have been promised great things, and his disappointment at the result would only exacerbate still further his inherited distrust of the law.

5. JURIES

A more interesting proposal and one much canvassed at the present time is the abolition of the jury in civil trials. It is not likely that any important change in this connexion will be seen in the near future, for opinions are too evenly divided among those who consider themselves to be authorities on the subject; while such of the general public as feel any interest in the matter will equally be divided according as their fortunes have prospered or foundered before juries. Certainly this method of trial is attended sometimes with great advantages and sometimes with grave defects. No doubt the continuance of the civil jury owes much to the popular success of the criminal jury. This

latter has been and is immense. Rightly belauded as the Palladium of English freedom, the jury system has stood firm time and again against the oppression of autocrats and the injustice of positive laws. Service on juries must have an ennobling effect on the character, if one is to judge from the resolute manner in which down to quite recent times jurors have consistently withstood confinement for long hours without food or fire, judicial ferocities of varying degree, and the savage punishments of disappointed authority. Equally one must admire their firmness in refusing to convict even on the clearest evidence when the result would have been to hang a man for stealing a purse or forging a cheque. Their function has been to pour a clear stream of common humanity down the muddy channel of the criminal law; and so obvious has been their success that during the last century one after another of the great nations of Europe has adopted the same method as a cure for its constitutional ills.

While the system of juries is thus invested with an historical glamour, it is worth remarking that the civil jury has little claim to it. In criminal trials the jury stands between the prisoner and the rigours of the law; but in civil causes it does no such thing; its function is merely to decide which of two disputants is in the right. Occasion-

ally one of the parties may be a Government Department, but juries are rarely used in such cases. As between subject and subject there seems to be little constitutional value in having disputes determined by a jury rather than by a judge, and experience certainly does not show that juries are less liable to error or susceptible to prejudice than judges. Nevertheless, trial by jury in civil cases has held tremendous favour, both in this country and in America. It has been regarded, as Mr. Justice Story remarks, as an "inestimable privilege"—"a privilege scarcely inferior to that in criminal cases which is conceded by all to be essential to political and civil liberty". He adds that "trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial, is, it is believed, incorporated into and secured in every state constitution in the Union".

Oddly enough this appreciation of the civil jury awakes no answering echo in other countries. In spite of their adoption of trial by jury in criminal cases no single Continental nation has introduced it in civil matters, and even in Scotland where it was introduced in 1815 it has never thriven. These facts suggest that the arguments in its favour

cannot really be very strong. About a hundred years ago de Tocqueville (that admiring observer of English institutions) expressed them to be: First, that jury service is good for the juror himself since it forces him to exercise his mind in a judicial manner. Secondly, that by attending in the Courts he acquires a wholesome respect for the law. Thirdly, that he also acquires an uplifting sense of his own importance and responsibility. Fourthly, that he is more likely than a professional lawyer to judge the parties fairly, since he realises that they are ordinary laymen like himself who might one day be judging him. Fifthly, that service on the jury has a high educational value. Not only is the juror brought into touch with persons of learning and culture; not only does he learn something of the legal rights of the subject; but he also finds in all probability that the subject matter of the action is something entirely outside the range of his own experience (as, for instance, a dispute between two members of a travelling circus), which must perforce have a broadening effect upon his outlook on life in general.

Even in de Tocqueville's day these arguments can hardly have been very strong, since they seem to presuppose (if the juror is to gain the full benefit of the treatment) such large and frequent doses of jury service

as would probably have brought about a revolution if they had been administered. The advance of national education has nowadays weakened them still further, and the conception of a jury summons as a ray of daylight to a benighted ignoramus is hardly tenable. Indeed, it is more frequently regarded as an infernal nuisance. It is noteworthy also that those people who do regularly attend the law courts (namely, the lawyers themselves), so far from being broadened or uplifted by their experiences become, at any rate in the public estimation, too narrow and technically minded to be able to take a common sense view of ordinary business transactions.

But the fourth of de Tocqueville's points remains. It cannot be doubted that juries are in some cases better fitted to try contested issues of fact than judges. The professional lawyer with his long experience of conflicting statements and of the technique of cross-examination is apt to be over-fastidious in sifting oral evidence. In particular he attaches great weight to written statements made on previous occasions by the witness. The presumed conduct of a reasonable man in any given circumstances is a conspicuous feature of our civil law; and it is too often assumed by lawyers that a reasonable man must be one who answers every business letter by return of post,

and in doing so makes every point which may be thought to tell in his favour if the matter should come to litigation. But juries behave differently. They pay little attention to the bundle of correspondence with which counsel seek to regale them, and they seldom ask to see any of the letters when they retire to consider their verdict. They form their conclusions rather upon the appearance and demeanour of the witnesses, which they are better able to observe than the judge who is occupied in taking a note of the evidence. On the other hand they are at a proportionate disadvantage where the matter depends largely on documentary evidence or involves a mass of technical detail, and the lugubrious torpor which usually descends on them in such cases must be disheartening to the litigants whose advocates are trying to hold their attention.

Then again it may be said against juries that they are too sensitive to the arts of advocacy, and thus concede an unfair advantage to the party who commands the greater wealth of professional eloquence. There is much truth in this. As a nation we are comparatively taciturn and make very good listeners; so much so that if a man can really talk it matters little that he has nothing to talk about; his audience enjoys the speech simply for its own sake. This fact is exemplified not only at elections

but also in the law courts, where the master of a rich vocabulary can often make bricks without straw. But the extent to which juries are regularly overpowered by sheer rhetoric is apt to be exaggerated by the layman. Although certain outstanding figures like Carson and Marshall-Hall may seem to possess the power of making juries "go mad", such men are few, and in the vast majority of cases the jury pay far more serious attention to the judge than they do to counsel. The judge is an old hand at the advocate's tricks, and is well able in his summing up to discount any meretricious effect which they have produced. At any rate, it is not often that the jury differs in opinion from the judge, and in some cases it must seem to the spectator that the judge himself is not utterly proof against a personal predilection for a particular barrister. Here again we come upon an unhappy truth. The infirmities of human nature obstruct the path of justice at every turn. It is not possible that a judge who is constantly listening to advocates should not find some of them more attractive (or less tedious) than others, or that even the same argument in the very same words will not be better received when presented by A than when presented by B. "It is easy", said Sir William Erle, "for a judge to be impartial between plaintiff and defendant; indeed he

is almost always so; it is difficult to be impartial between counsel and counsel."

It cannot therefore be predicated in every case that a judge is more likely to arrive at a truer conclusion on the facts than a jury. Mr Heber Hart, K.C., has suggested the substitution of trial by three judges for trial by judge and jury; but apart from the obvious objection that the taxpayer would have to shoulder a number of additional salaries, it is not clear that three judges would decide better than one. Of a bench of three judges there is always one member who by virtue of seniority or otherwise takes precedence of the other two, and directs the course of the proceedings; and there is a tendency for the others if in doubt to follow his lead where he holds a strong opinion. Even a unanimous decision may therefore be in substance only the strongly held opinion of one judge; while a majority decision rests often on the hesitant choice of one member between the robuster, but conflicting, views of his brethren.

All things considered, no strong case is made out either for the wholesale retention or for the abolition of trial by jury. It is better to select the *via media*, at present taken, of discreetly allotting to juries those cases which are most suitable for them, such as libel, motor accidents, breach of promise, fraud, and so on. Moreover, a decisive con-

sideration for those who are interested in the problem should be that jury trial seems popular in this country. Some attribute this popularity to the sporting instinct of the Englishman, who would rather gamble on the secret vacillations of twelve amateurs than have his case decided by a trained arbiter. More probably, however, it rests less upon the sporting instinct than on the public distrust of officials. In no sphere (as has been noticed already) does this distrust attain a robuster maturity than in that of the law. The two parties to a civil action feel themselves at once to be beleaguered by insatiable lawyers, and hail a jury with as much relief as they would hail a boat in a shark-ridden bathing pool. It will be a happy day for the legal profession when it commands such esteem that juries are no longer demanded. But whatever the explanation, trial by jury is undoubtedly popular, and in supplying the machinery to work it the legal profession gives a certain satisfaction to the public. Since this is almost the only respect in which it does give satisfaction to the public, the abolition of trial by jury would seem to be a mistake from everybody's point of view.

This is not to suggest that there is no need for any reform in the present procedure. It will have been noticed that the foregoing arguments on either side of the matter have

nothing to say to the question of expense. Yet it is on this score that the present system is most open to attack. One advantage of trial by judge alone is that a decision of some sort must be reached. The judge cannot disagree with himself and refuse to make up his mind. But juries can and do; and the more conscientious they are in scrutinising the case, the more likely does a disagreement become. Judges are sometimes heard imploring juries to agree if it is humanly possible, and pointing out the disastrous consequences of their failing to do so. Disastrous they are indeed, since the whole expense of the trial has been thrown away, and must all be incurred again if the parties wish to proceed. In a case of any magnitude this total loss may easily amount to £500 and may be quite sufficient to deter the parties from any further attempt to settle their dispute. Probably disagreements only occur in a small percentage of cases, yet they are regrettably frequent, and bring with them a weird sense of futility. Two instances may be taken from actual experience. In the first case an enterprising man obtained the grant to himself of the sole English rights of an expensive film play. Not having the means to produce it himself, he sold his rights to a Company for a small sum, and the Company's promise that he should be named on all advertisements of

the film as one of the persons responsible for its presentation. The Company then circulated some thousands of large posters bearing their own name but not his. He accordingly claimed damages. The trial lasted for two days, during which numerous witnesses were called, and the Company made a half-hearted attempt to prove that they had not broken their contract at all. The judge summed up strongly in favour of the plaintiff, but the jury, while having no doubt that the contract had been broken, differed as to the proper amount of damages. Eleven of them wished to award the plaintiff £500, while the twelfth would not move above one shilling. In the second case a lady brought an action against a doctor for damages for negligent treatment. This case was tried three times. On the first occasion the jury announced that they had decided in favour of the plaintiff before they had heard any of the defendant's evidence, and were accordingly discharged for misconduct. On the second occasion they disagreed; and on the third occasion they found for the defendant. These proceedings must have been ruinous for both parties.

It is of course practicable for the parties to agree to abide by the verdict of a majority of the jury; but a defendant will rarely consent to this since there is always the chance that the plaintiff lacks the means or

the inclination to set the case down for trial again, in which case the defendant is fairly well out of his trouble as matters stand.

The remedy for this evil springs instantly to the mind. Why not receive majority verdicts whether the parties consent or not, as is done in Scotland? The only serious objection to this course is that juries might be tempted to decide the case without sufficient consideration. On retiring to their room they would put the matter to the vote and return at once to the court with their verdict. On the other hand, the requirement of unanimity leads to the fullest discussion between the dissentient sections of the jury; and this, it is urged, is often a valuable aid in getting at the truth. So it sometimes may be; but experience shows that it often only paves the way for a compromise which is neither consonant to reason nor satisfactory to the parties. Suppose that a young man has been run down by a motor-car and crippled for life. It is obvious that no award of less than four figures can adequately compensate him, and the only practicable line of defence will be to show that it was his own fault, and not the driver's which brought about the accident. In other words, the main question for the jury will be not so much the amount of the damages as the issue of liability. When the jury retire it is found that they

are divided on this issue. Ten of them hold the defendant to blame, and wish to award the plaintiff £2,000. Two of them hold the plaintiff to blame and wish to award him nothing. The usual result is that after long debate they return a verdict for the plaintiff of £250, which is barely enough to pay his medical expenses.

Nevertheless, there is substance in the contention that the jury should be made to discuss the question submitted to them; but this could be achieved without insisting on unanimity. Let it be provided that if the jury are unable to agree after, say, three hours from their retirement, they may then, but not till then, take a decision by vote, and if as many as, say, ten of them are then in agreement their decision shall be taken as a binding verdict. Such a procedure would, it is believed, diminish the numbers of abortive trials by at least fifty per cent., while if a majority of ten against two were required, the weight of the verdict given would be but little less than that of an unanimous jury.

One should not leave this subject without remarking on the very unsatisfactory relation which exists between the jury and the Court of Appeal. It is of course desirable as a safeguard against prejudice and perversity that the findings of the jury should be susceptible of review by a higher auth-

ority. It is equally desirable on the other hand that where the parties have elected to have their case determined by a jury the jury's opinion shall not lightly be set aside or be replaced by that of a judge. The Appeal Court accordingly is very loth to interfere with the verdict of a jury so long as they have been properly directed by the summing up of the judge. If there is any evidence in support of the jury's finding the judges will not interfere merely because they think that the evidence to the contrary was more impressive and that they would not have decided in the same way themselves. The verdict will only be upset if it appears to be so utterly at variance with the evidence given that it cannot be the honest conclusion of any twelve reasonable men. This rule is evidently designed to meet an extreme case—the case of twelve good men and true taking sudden leave of their reason or conscience; and the layman may pardonably suppose that such a case is very exceptional. Curiously enough, it is constantly occurring. Juries will often unhesitatingly find that certain facts have been proved when no evidence of them has been given at all; and this in matters of the gravest importance. Our law reports are replete with cases where juries have made findings of fraud or malice against individuals, and the Court of Appeal has

held that there was not a jot of evidence which entitled them to do so. The remarkable frequency of such cases suggests that either there must be some inherent imbecility in the average citizen which reaches its full perfection as soon as he is confined in a jury box, or else that the judicial conception of what is meant by "evidence" must be strangely at variance with the layman's notions.

Painful as the suggestion must be to lawyers, it seems that the second alternative is the nearer to the truth. The reported cases show clearly that the legal mind is far too fastidious in regard to evidence. In the recent case of *Jones v. Great Western Railway* (47 T. L. R. 39) the jury found that the death of a workman had been caused by the negligence of the Railway Company's servants. The three Lords Justices of the Court of Appeal held that there was no evidence that the death was due to such negligence, and set aside the jury's finding. In the House of Lords this decision was reversed. Four of the Law Lords held that there was evidence available to support the finding of the jury, but one dissented and adopted the view of the Court of Appeal. We find, therefore, that while twelve jurymen were convinced that a particular fact was proved, eight judges of appeal were equally divided in opinion. Moreover, their point

of disagreement was not as to whether the fact was satisfactorily proved, but as to whether there was any evidence of it at all. Many similar cases are to be found in the reports; and they certainly lend colour to the complaint that the truth is obvious to anyone but a lawyer.

This unsatisfactory state of affairs may be partly due to the fact that the appeal judges do not as a rule see the witnesses. Nor do they necessarily have before them a verbatim report of what the witnesses have said, but only the written notes of the evidence which have been taken by the judge at the trial. In important cases however, stenographers are often engaged at the expense of the parties, and their reports are available for the Court of Appeal. But even so it is extremely difficult for the judges to form any idea of the impression made by the evidence. Anyone who has had practical experience must admit that the most accurate written reports of oral evidence are sometimes entirely misleading. The written page gives no indication of the demeanour of the witness in the box. It does not show which questions he answered readily and which with hesitation. It makes no allowance for irony and sarcasm. Yet all these factors may be parts, and most important parts, of the evidence given. The witness may answer "Yes, I suppose

so," in a tone which fully justifies a jury in concluding that what he means is "No, I believe not." He may have perjury and fraud written all over him, and yet give answers which, on paper, would do credit to an archbishop. The jury who have seen him may be morally entitled to regard his answers as positive evidence of the exact contrary of what he says. But the Court of Appeal will be able to see no evidence to justify the jury's finding and will have to order a new trial or enter judgment for the defeated party. Occasionally, the Court of Appeal finds itself in the embarrassing position of being bound to act upon the opinion of a jury which they have already pronounced incompetent to form any opinions at all. Cases can be found in the reports where the Court has given judgment to the following effect: "The jury in this case has found that the defendant was fraudulent in his conduct of the plaintiff's business. Having carefully scrutinised the shorthand note we are unable to see any evidence at all upon which twelve reasonable men could have so found, and we consequently disregard this finding altogether. It is not necessary, however, in order to entitle him to the relief for which he asks that the plaintiff should go so far as to prove fraud. It is sufficient for his case to prove that the defendant was merely negligent in his conduct

of the business; and the jury have made a separate finding of negligence against the defendant in addition to their finding of fraud. It was urged upon us that there was no evidence of negligence for the jury's consideration; but we cannot say that there was not some slight evidence which entitled them to find as they did. We might not ourselves have attached any weight to that evidence. But since there was some evidence of negligence which the jury evidently believed we cannot interfere with their verdict on this point, and the judgment given for the plaintiff must accordingly stand."

Such unhappy logic as this is surely damaging to our legal reputation. If the jury have shown themselves to be imbeciles in dealing with one aspect of the case, what can be the value of their opinion on another? The rule defining the powers of the Appeal Court clearly needs amendment. Either the judges should have greater liberty to upset the jury's findings or they should have less. For the reasons given it is submitted that they should have less.

6. EVIDENCE

Distinctive as the jury system is of English law, our methods of taking evidence are almost equally peculiar. Witnesses with

us are examined viva voce and in open court. Each witness is seen and heard by the judge, jury and parties, and where his cross-examination is competently conducted the risk of his telling lies which are believed is very small. The merits of this method are often apparent in the Divorce Court. The majority of divorce cases are undefended. Evidence is given on one side only, and if the judge believes the witnesses a decree is granted. And the judge nearly always does believe the witnesses. But sometimes the sensitive nose of the King's Proctor disentangles the scent of a red herring from the general aroma of the proceedings; and a motion is subsequently made to set aside the decree on the ground that a false case has been presented to the Court. On this occasion the petitioner is cross-examined for the first time, and it normally results that the story previously told to the court is now shown to be a tissue of lies. There is unhappily a good deal of perjury in our courts, and cross-examination does not stop it, but it does very generally lead to its detection and unveil the truth.

If there is a contrast between oral evidence which is subject to cross-examination and that which is not, there is an even sharper one between oral and written evidence. The latter is of practically no value at all on any contested issue. One of the most

amusing (and at the same time nefarious) occupations of junior counsel is the drafting of affidavits under Order 14. This is part of the rules of practice of the Supreme Court which provides that in certain simple classes of case the plaintiff may obtain judgment without any trial unless the defendant swears an affidavit disclosing some sort of defence. Where there is in fact no defence (as is usually the case where an action is brought, for instance, on a dishonoured cheque) one might fancy that the defendant is faced with the alternative of either having judgment signed against him immediately or else running the risk of a charge of perjury in trying to stave it off by affidavit. But this is far from being the fact. Any respectable lawyer will have no difficulty in drafting an affidavit, which, without transgressing the bounds of strict truth, clothes the nakedness of the defence with such a closely woven fabric of apparently palliating circumstances, that the bewildered court has no option but to give leave to defend the action. When the case is ultimately tried on oral evidence the facts stated in the affidavit are found to be quite irrelevant or unsubstantial. But the defendant has gained several weeks' delay —which he has probably occupied in placing his assets beyond the reach of his creditors. The practical working of this procedure is

indeed one of the most unsatisfactory features of our present system; and it entirely depends on the misleading character of affidavit evidence. "I once made an affidavit", said Mad Margaret, "but it died." They generally do, but not until they have served their turn.

On the other hand the grand defect of oral evidence is of course its expense. Witnesses have to be brought together, often from remote parts of the country, on a given day when it is expected that the case will be heard. As often as not, however, the case is not reached until the following day owing to the unexpected duration of the previous case in the judge's list. When the trial does begin it may be that the whole of the first day is occupied with the evidence of the plaintiff's witnesses and the defendant's witnesses are not required. None the less, they have to be in attendance since no one can say how long the plaintiff's evidence will last. Busy men are thus kept waiting about sometimes for several days, idly spending money in one place instead of earning it in another. And all this expense falls upon the parties to the suit. Something could be done to minimise this waste by a more scientific arrangement of the cause lists which would enable the parties to know with certainty on what day their case would be tried. But obviously no

striking economy can be effected so long as the general system of taking evidence orally in court remains.

In continental countries far less importance is attached to oral evidence. Written statements are freely used and where oral evidence is taken it is often not subject to cross-examination. Instead of making the witness travel to the court the judge may visit the witness and take his statement without assistance from either of the parties. Hearsay evidence is not so rigorously excluded as with us. The judge may use his own knowledge of the subject matter of the dispute and may resort to any materials which come to hand. The actual contest in open court will perhaps not take place until all the material evidence has been gathered and filed, and will thus be reduced merely to a matter of a few hours of legal argument. (This system of procedure will be found described in some detail in Mr Claud Mullins' admirable book, *In Quest of Justice*, to which the writer is indebted for much information.)

The advantage gained in the matter of economy from the continental method is prodigious. Some well-authenticated statistics which are appended to the Report of the London Chamber of Commerce already referred to show that in Germany the cost of a civil action will regularly be anything

from one-fifth to one-tenth of what it would amount to in this country. But even the summary description of the procedure which is given above, makes it plain that the safeguards against the court being misled by false evidence are very slender. Either we must conclude that the German nation is so advanced in morality that the risk of perjury is negligible, or else (and more probably) that they prefer a swift and cheap decision to a careful investigation of the facts. At any rate it is apparent that truth and economy cannot go hand in hand; we must choose which of the two is to be pursued; and it is hard to believe that the English law having long ago made up its mind on this question is likely to change it now. Unbiassed observers admire the continental method of dispensing justice for its cheapness, but for little else.

It seems therefore most unlikely that we shall see any departure from the main principle of taking evidence orally in court; but there is much reason to suppose that we shall see it relaxed a good deal in cases where the truth is in no great danger of violation. For although this method is well suited to the elucidation of complicated or disputed matters, the law with a grotesque sort of logic insists that it shall also be applied to prove even the most elementary and incontestible facts. Thus, to prove the

width of a road a witness must be produced who has measured it, while a photograph of the road itself can only be put in evidence by the man who took it. On the trial of a motor accident case both these gentlemen will probably be required to attend the court in order that the plaintiff may make sure of being able to prove his case; but when it comes to the point, the defendant's counsel may be prepared to admit the measurements, and the photographs so that the witnesses' evidence is taken as given without their going into the box. We in England are so used to this sort of nonsense that we hardly realise what nonsense it is. But it strikes the foreigner at once. In a letter produced by the London Chamber of Commerce a learned French lawyer observes, "It is also very strange where for instance a meteorological report is produced to be obliged to produce a witness who comes to say that it is actually the meteorological report of such and such an observatory."

There is scope for large economies in this field. Matters which nobody doubts should not be formally proved. Documents should be presumed to be genuine until they are proved to be false (as is already the practice in the County Courts). And definite steps should be taken to fix dates for the hearing of cases as far as possible. Beyond being able to find out that his own case is number

so and so in the list, and that it will be tried next after the case of Blank *v.* Blank, the litigant has no means of knowing when it will actually be heard. In special circumstances he can sometimes obtain a promise from the Court that it will not be heard before a particular day, but this is no guarantee that it will be reached when that day arrives. The time-honoured objection to fixing dates for cases is that no one can tell how long any particular case will last, and that if it does not last for the time which has been allotted to it, the judge will be out of work until the next case is due for trial, thus wasting much time and public money. But why the picture of a judge twiddling his thumbs should be painted in such doleful colours is hard to understand. Time is of no value to him, for he receives his salary whether he sits or not; so different from the litigant, who receives nothing for kicking his heels in the Courts' Corridor while waiting for the end of the case in front of his own. Moreover, it is not wholly true to say that a jobless judge is a drain on public money, for about two-thirds of every judge's salary is subscribed not by the public, but by litigants themselves in the shape of court fees. These then are surely the persons deserving consideration; and the loss of one working day to a judge is easily overbalanced by the gain of one working

day to a couple of litigants, and their witnesses. Moreover, we could probably make good the loss of judicial time by curtailing the present aching length of the long vacation.

7. PLEADINGS

Another very practical field for economy is offered by our present system of pleading. This requires a word of explanation. A layman on hearing Mr So-and-So described as a "good pleader", might take this to mean that he is an effective advocate in court. But this is wrong. "Pleadings", in the language of the profession, means the written statements prepared by either party to a suit in which he sets out the precise facts which he proposes to prove in support of his case. Since the question of what facts are relevant to any particular claim or defence must depend upon the law which governs the matter, the task of sifting out the facts which are strictly material to his client's case is commonly entrusted to counsel, and constitutes one of the most tedious and worst-paid branches of his regular work. Having done this he draws up a written statement of the facts in language of unequivocal lucidity and precision. A "good pleader" is thus one who is a tried master of this exceptionally repellent form of English prose, which knows

no punctuation but the full stop and rejoices in such expressions as "aforesaid" and "by reason of the premises". So exuberant is its exactitude and simplicity that it is often almost unintelligible to anyone but another pleader. A layman who was forced to read pleadings for two or three hours continuously would undoubtedly go mad. By way of illustration let us recall the familiar exploit of Jack and Jill, which an experienced pleader might deal with somewhat as follows:

(1) On a date and at a time which are at present unknown to the plaintiff one Jack and one Jill (spinster) were together lawfully walking upon a certain highway known as —— Hill in the County of ——, and were carrying (or one or other of them was carrying) an empty bucket with the object of filling the same with water at some place at or near the summit of the said hill which the plaintiff cannot more precisely specify.

(2) While so walking as aforesaid the said Jack fell violently to the ground thereby sustaining serious personal injury.

Particulars

Simple fracture of the base of the skull.

(3) At or shortly after the time of the said injury being sustained by the said Jack

as aforesaid the said Jill also fell to the ground, but so far as the plaintiff is at present aware she did not thereby sustain any (or any substantial) injuries.

Some cases are tried without pleadings, but in the large majority elaborate statements drawn up on these lines are delivered by each of the parties. Excerpts from them are sometimes read aloud in court, generally to the stupefaction of the jury; but they are often not referred to at all, and have only the effect of extracting from the pocket of the clients a starvation wage for the counsel who so carefully drafted them. The main object of a pleading is to inform the party to whom it is delivered of the precise facts which are alleged against him in order that he may know what he himself will require to prove at the trial and may not be taken by surprise by the evidence called against him. This is obviously a sound idea and is a great improvement on the old practice which sometimes permitted a defendant to put in a vague general plea giving the plaintiff no indication as to which of several imaginable defences would be raised and thus forcing him to arm himself against them all. In complicated cases our system is definitely of value, and generally saves both time and money in the end. Moreover, where fraud or serious misconduct

is alleged it is manifestly just to force the party complaining to state definitely at an early stage exactly what the charge is. But in many cases pleadings are quite useless. It often happens that when the evidence is given the plaintiff fails altogether to prove the facts which he set out to prove, but succeeds in proving some other facts which suit him equally well. The defendant complains that the case now presented is not the case pleaded, whereupon the judge gives the plaintiff leave to amend his pleadings. Obviously pleadings which are amended and redelivered when the trial is practically over might just as well have never been delivered at all. In such cases the judge usually penalises the successful plaintiff to some extent in the matter of costs. But the problem of costs is not solved by deciding which party is to pay them. What we want to do is to prevent them from being incurred at all.

But apart from these instances of amendment, there are large numbers of cases where pleadings serve no purpose at all. In many cases the issue of the writ has been preceded by a correspondence between the parties or their solicitors, and by the time the action is started each side knows exactly what the other is going to say. In other cases it is quite obvious, even without such a correspondence, what the parties' con-

tentions are. A fair example is the ordinary "running down" action which results from the collision of two motor-cars. A will say that it was entirely the fault of B, and B that it was entirely the fault of A; and the result will depend on the evidence of the people who witnessed the accident. Why, when the issue is so clear, should counsel be engaged to draft Statements of Claim, Defences, Counterclaims and Replies? They will never be read in Court, or, if they are the jury will not pay any attention to them. Yet pleadings are invariably ordered in such cases.

The expense of pleadings does not always stop at the preparation of the documents themselves. The delivery of pleadings is often only the prelude to a series of minor skirmishings of considerable expense and little importance. The defendant to whom a Statement of Claim is delivered need not necessarily be content with it. He is often entitled to ask for more precise particulars, verified by dates and documents, of the plaintiff's case, or for answers on oath by the plaintiff to questions arising out of the facts pleaded. If his right to these is disputed, a summons is taken out, and the parties repair by devious staircases to a chamber in the Royal Courts of Justice which is well named the "Bear Garden". From there they proceed to a smaller room,

where they are confronted by an officer known as a Master of the Supreme Court, who hears what they have to say and decides the point. If counsel are employed, each proceeding of this sort costs about £14. It is a sign, however, either of the general tightness of money or of the dawn of intelligence among solicitors' clerks, that counsel are now taken in on these summonses far more seldom than a few years ago. From the Master there is an appeal to the Judge and from the Judge to the Court of Appeal. The amount of money spent on these interlocutory proceedings is quite astonishing. And it is seldom well spent. A defendant who asks his opponent to supply further particulars of his Statement of Claim often does so, not because he does not know the answer to his question, but simply in order to waste time, to tie the plaintiff down to some particular answer, or to jockey for position in some similar way. An eminent King's Counsel once said to the writer, "If I were a Master I should never take more than four minutes to decide anything. Either the point is important, in which case there is bound to be an appeal to the judge in any event; or it is not important, in which case why worry?"

Where all parties are reasonable and reputable the interlocutory business of an action is reduced to a minimum. But the

system lends itself to abuse by unscrupulous litigants. An action is commenced for £250 on a dishonoured cheque. The defendant takes the writ to his solicitor and says, "I have no defence, but I need time to pay. If you can prevent the action from being tried until July it will be all right, but if judgment is signed at once I shall be ruined." The solicitor sympathetically embarks on interlocutory manoeuvres. They are all unsuccessful, but with the courteous co-operation of the Masters of the Supreme Court he is enabled to waste two or three months. The case then comes on for trial, when it is discovered that the defendant has removed with his family, bank balance, and other assets to the U.S.A.

Luckily we do not need an Act of Parliament to clean up the Bear Garden. The legal profession can, if it will, introduce most of the necessary reform. Considerable facilities already exist for trying cases without pleadings and avoiding interlocutory applications. But they are little used at present. The modern lawyer still tends to be plagued by the expensive habits of his predecessors, just as he tends to be plagued by their gout. But if he weathers it at all, the present economic depression will teach him a good deal, and the price of justice may fall when other prices begin to rise again.

8. APPEALS

But to urge all practicable economy on the parties to a suit and their advisers is merely to nibble at our problem. All earnest reformers like to find something which they can destroy utterly; to undermine foundations rather than to shy at chimney-pots; and it is much more profitable to approach the legal edifice in this state of mind, for it is definitely over-weighted in the top storey. The ultimate and infallible oracle of our law is the House of Lords. Its decisions are given only after the utmost deliberation by a staff of highly paid and hugely experienced judges. Unfortunately, the cost of obtaining their opinion is grotesque. As a preliminary to having his appeal entertained at all, the appellant has to put down security or actual cash to the amount of £700. He then has to prepare his Case and the Appendix. The Case is very similar to the pleadings which he has already delivered in the early stages of the action. It is slightly more racy in style and sets out the history of the case in greater detail, but its purpose is much the same. It is, of course, settled by counsel at much expense. No one ever reads it. The Appendix is more important. All the cor-

respondence, plans, insurance policies, bills of lading, or what not, which are or may be material for their Lordships to peruse in forming their judgment are here collected together and printed in book form on numbered pages. The Appellant's Case, the Respondent's Case, and the Appendix are then bound together in a volume which is called the Record. Each of the Law Lords has a copy of this Record before him, and is thus enabled to find somewhere between its covers a copy of every document which may be referred to at the hearing of the appeal. This method no doubt prevents time being wasted in hunting for documents. But its cost is staggering. No less than forty printed copies of the Record have to be lodged at the House of Lords. Mr E. F. Spence, K.C., in his charming memoirs[1] tells us that in one of the appeals to the House of Lords which arose out of the well-known *Pollak v. Campbell* litigation the preparation of the Record cost £1,995 9s. 8d. Such are the mere preliminary expenses of an appeal.

It can thus be understood that almost every decision of the House of Lords involves one party or the other in expenses of more than £1,000. This in itself is sufficiently disturbing: but it is even more

[1] *Bar and Buskin*, by Edward F. Spence, *K.C.*, 1930 (Elkin Mathews & Marrot Ltd.).

deplorable in a case like that of the £120 cheque (see p. 16 ante) where the party who ultimately has to pay the whole of the costs has been consistently successful before the lower courts.

Moreover, doubts and disagreements are not unknown even in the House of Lords. It is not extravagant to suppose the case of a litigant who, after obtaining the unanimous opinion in his favour of the trial judge and three judges of the Court of Appeal, is defeated by a majority of three judges against two in the House of Lords. He gets no value at all for the six judges who were for him, but has to pay by the thousand for the three who were against him. Only the dogged indifference of the legal profession to these prodigal results can account for the continuance of the system.

The evil is steadily becoming worse, owing to the ever-increasing prominence of large corporations in every-day affairs. Commercial interests are continually shifting out of the hands of small owners into the hands of large and wealthy companies; and the disparity of means between opposing litigants tends to be much greater than it was half a century ago. The private individual whose rights are infringed will often find that the proposed defendant to his action enjoys a subscribed capital of a quarter of a million pounds, and is only too

willing to ventilate the dispute in the House of Lords. But the law is quite out of touch with this position. In no practical feature do I resemble the Gas Light & Coke Company or the Halifax Corporation. Nevertheless, we are humorously deemed to be equal before the law. The House of Lords opens its doors to all at the same fee, and in so doing places a bludgeon in the hand of the wealthy and unscrupulous litigant. Suppose a small man owns a useful patent, which stands in the way of a large corporation formed for the purpose of exploiting some commercial process. What is simpler than for the corporation to infringe the patent and announce in answer to his remonstrances that they are advised that there is some doubt as to its validity and are prepared to contest the point, if necessary, up to the House of Lords? In this way the complaint as to infringement is easily silenced—a convenient and unobtrusive method of robbery.

The abolition of the judicial functions of the House of Lords would obviously go a long way towards reinstating the law in the affections of the lay public. As long ago as 1873 this was seen to be a desirable reform. The Act of that year which constituted the Supreme Court of Judicature intended that this court should be what its name expresses, and accordingly abolished the right of appeal to the House of Lords; but the opera-

tion of this provision was suspended for some time, and it was ultimately repealed by the Appellate Jurisdiction Act of 1876.

The causes of this reversal of policy are worth recording. Although in 1873 the abolition of appeals to the House of Lords was emphatically demanded by public opinion in this country, there appeared to be no desire for any change in Scotland or Ireland. Appeals from the Scottish or Irish Courts were therefore not dealt with by the Bill. Provision was made, however, for strengthening the proposed Court of Appeal by the addition of Scottish and Irish judges, in the hope that at some future time the Scottish and Irish lawyers might desire to participate in the scheme. The second reading was debated in both Houses of Parliament by all the ablest lawyers of the day, and was carried without a division in either. It was subsequently felt, however, to be somewhat unsatisfactory that the final Court of Appeal should not be the same for all parts of the United Kingdom, and efforts were made to bring the Scotchmen and Irishmen into line with the scheme. Unfortunately, the latter stood on their dignity, and refused to have their own decisions reviewed by a mere Court of Appeal in England. This difficulty could probably have been surmounted had not advantage been taken of it by a clique of die-hards, headed by Lords

Redesdale and Penzance, who took the opportunity to foster a new opposition to the reform in this country where none had existed before. The result was a compromise which ended in the creation of the Lords of Appeal in Ordinary, and the retention of the House of Lords in a reconstituted form. The situation is well described in a leading article published in the *Times* of the 13th June, 1876: "It must be admitted that the enemies whose consent to a substantial change has been secured by an apparent maintenance of old forms did not belong exclusively to either political party. Thus, they were found in Scotland and Ireland in quarters supposed to be freed from political passion, though apparently not emancipated from personal jealousies. The people of Scotland were quite content with a Final Court of Appeal extra-Parliamentary in form and substance, but the honour of some of the occupants of the Scotch Bench was touched by the proposal. A similar feeling was easily excited in Ireland. In England the Committee formed to defend the Appellate Jurisdiction of the House of Lords was reinforced by men whose presence upon it astonished all but those who have studied the power of lingering superstitions."

Let us now look at the modern arguments in favour of the retention of this appellate

jurisdiction. The first argument would not deserve serious consideration at all if it were not that it springs spontaneously to the lips of lawyers whenever the subject is mentioned. "But," they say, "if you abolish the House of Lords, what are you going to do when the Court of Appeal goes wrong?" In one sense this remark is almost meaningless; for if there were no higher tribunal, the Court of Appeal never could go wrong. The House of Lords is at present always right, simply because there is no higher Court to reverse its decisions; and what it pronounces to be the law accordingly is the law.

What is perhaps intended by this line of reasoning is that two appeals are better than one. This was apparently the objection of Lord Penzance, who said in 1875 that "the Act of 1873 . . . contained one provision which he had always held to be most detrimental—namely, that one Court in England hearing between 400 and 500 appeals a year, should pronounce judgments that were absolutely irreversible for all time, except through an Act of Parliament. A Court possessed of that power would have been capable of doing an inconceivable amount of harm to the judicature of this country". This is, of course, precisely the power which is possessed by the judicial side of the House of Lords to-day, although it only deals with

50 or 60 appeals in the course of the year. If the argument is that a court which sits continuously and hears a large number of cases is likely to make more mistakes (in proportion) than one which sits intermittently and hears a smaller number, the answer must be that this is merely a matter of opinion which can neither be proved nor disproved. Certain it is, however, that the best-informed opinion of 1873 thought nothing of this objection and saw, on the contrary, overwhelming reasons for leaving the final decision with the Court of Appeal.

In moving the second reading of the Bill in 1873, in the House of Lords, Lord Selborne said: "There is generally a system of double appeal for the suitor. I never concealed my opinion that this is not a good system. Where you have got a good Court with sufficient judicial power to command the confidence of the country, it is better that there should be no double appeal. . . . My opinion is that if you establish an adequate Court, it is desirable for the parties and for the general interest of the country that the decision of that Court should be final, and that you should not multiply appeals. You can never escape by going through any number of Courts of Appeal from the risk of differences of opinion in each and every one of them, and from doubts arising as to whether the last Court

decided better than the one before it. What you want is to make as good a Court as possible, and to give it all the power and authority you can, and that, in my humble judgment, is best accomplished by making it final." Lord Hatherley expressed "his entire concurrence with the essential principles of the Bill from beginning to end"; while Lord Chelmsford "had long been of opinion that it was quite impossible for their Lordships, with the feeling which existed on the subject in the public mind, to retain the appellate jurisdiction of their Lordships' House". As mentioned above, the motion was carried *nem. con.*

In the Commons, opinion was equally emphatic. Lord Coleridge (then Attorney-General) only expressed the general feeling when he said: "No man, whatever might be his view of the constitutional position of the House of Lords, who had any knowledge of its practical working, could deny that a more indefensible institution as a judicial institution it was hardly possible to conceive. Although lawyers had been able to maintain a poor sort of a living, still everyone knew that the people who went into a Court of Law were greatly the exception. Very few persons, comparatively speaking, ever went to law, and very few who had ever gone would go again; and those people who had enjoyed the luxury of an appeal to

the House of Lords must be very few indeed. When they had got a great appeal decided by that august tribunal, and when they had the satisfaction of paying the highly deserving recipients whom they must pay for that luxury, both sides probably went away with a thankful feeling of relief, and with a hope that they would never hear of the House of Lords again in its judicial capacity. . . . For his part, he would say that if this Bill did nothing else but get rid of the House of Lords as a judicial tribunal it would be worth while to pass it."

It is true that one of the main objections to the House of Lords at that time was its personnel, which has admittedly been much strengthened by the creation of the Lords of Appeal in Ordinary. But even so, it is difficult in face of the opinions above quoted to make out any case for the double right of appeal.

But then it is said that there are reasons why the House of Lords, as a judicial body, is more likely to decide rightly than the Court of Appeal. Anyone who has seen both bodies at work may be excused for doubting this proposition. The suggestion is, however, that several of the Law Lords also play an active part in the legislative deliberations of the House, and that they are thereby brought into touch with current social problems and tendencies. They are thus

supposed to be able to take a broader and more perspicuous view of important legal problems than is open to the judges, whose "judicial ignorance" of many subjects is assumed to be emphasised by the cloistral conditions of their daily work. It is certainly true that the Law Lords see more of public affairs than the judges, but whether their decisions are thereby rendered more helpful or consistent is open to doubt. At any rate a lawyer can quickly pick out a good many which cannot be so described. It is worth mentioning some of them.

Sorrell v. Smith, 1925 A.C. 700, was carried to the House of Lords for the very purpose of elucidating a most important branch of the law (namely, commercial boycotting and conspiracy) which had been enveloped in obscurity by the previous decisions of the House. It was the confident hope of the profession that the law would at last be stated clearly and authoritatively. But there was no unanimity on general principles among their lordships, and the judgments in this case have only emphasised the doubts which they were invited to dispel.

In *Neville v. London Express Newspaper Ltd.*, 1919 A.C. 368, which dealt with the action of maintenance, a curious department of the law was rendered more curious by a twofold decision, the second branch of which deprives the first of any importance. The

division of opinion in this case was such that the result arrived at accorded with the views of one only of the five members who sat on the appeal.

Williams Bros v. Agius, 1914 A.C. 510, decided that in estimating the damages to be awarded for non-delivery of goods, the existence of sub-contracts made by the buyer cannot be taken into account. *Hall v. Pim (Junior) & Co.*, 33 Com. Cas. 324, decided the contrary. "I hope," said a learned Lord Justice quite recently, "that the House of Lords may soon have an opportunity of explaining how their decision in *Hall v. Pim (Junior) & Co.* is to be reconciled with their decision in *Williams Bros v. Agius*". (See 1929, 1 K.B. at p. 410).

Another pair of cases which will perplex many lawyers and all laymen is *Addie & Sons v. Dumbreck*, 1929, A.C. 358, and *Excelsior Wire, Rope & Co. v. Callan*, 1930, A.C. 404; and yet another is *Colls v. Home & Colonial Stores*, 1904, A.C. 179, and *Jolly v. Kine*, 1907 A.C. 1. We may add to these the cases (admittedly not very numerous) in which the House of Lords has surprised the profession and the public by declaring the law to be such that the legislature has immediately altered it. A fair example of this process is *Taff Vale Railway v. Amalgamated Society of Railway Servants*, 1901,

A.C. 426, which resulted in Section 4 of the Trade Disputes Act, 1906. In such a case the general understanding of the law on a particular point is suddenly upset by one body and restored by another at great expense, which is concentrated on the pockets of a few individuals.

Let us now glance at the proportions in which appeals to the House of Lords are successful. The six years from 1922 to 1927 (inclusive) yielded 264 English appeals which were finally adjudicated by the House. Of these 187 were dismissed and 77 were allowed (entirely or in part), giving a proportion of 2.4 to 1. This, however, probably exaggerates the number of successful appeals, since the year 1924 appears to have been quite unusual in this respect. If this year is omitted from the series, we have 223 appeals of which 167 were dismissed and 56 were allowed. This gives an almost exact proportion of 3 to 1, which is probably about right. The matter may be further tested by examining the particular cases in which the orders of the Court of Appeal have been upset. The bound volumes of appeal cases for the years 1927 and 1928 contain reports of 20 of such cases; and it will be found that in no less than eleven of these there were divisions of opinion in the House of Lords, and in nine only were the appeals unanimously allowed. If these

figures prove anything, they prove the truth of Lord Selborne's remark which has already been quoted: "You can never escape by going through any number of Courts of Appeal from the risk of differences of opinion in each and every one of them, and from doubts arising as to whether the last Court decided better than the one before it."

On the other hand, we must admit that certain decisions of the House of Lords are monuments of learning and good sense, and have helped from time to time to rationalise the law. The cases above mentioned are only cited to show that those who oppose the House of Lords on purely juristic grounds have a good deal to say for themselves. Let us, however, assume that the argument under discussion is entirely sound; and let us admit that the conclusions of the Law Lords sometimes ascend to heights of theoretical rightness which cannot be scaled by the Lords Justices of Appeal. Even on this assumption the question presents itself whether the results obtained are so numerous or striking as to give a return for the huge expense which falls on the particular litigants, or for the annual bill of £50,000 which is paid by the public for the salaries and pensions of the Law Lords.

But at this point another and far more fundamental consideration intervenes. The

triumphs of pure logic which are won by the highest tribunal are no doubt gratifying to lawyers. To the lay public they are of very little significance. The civil law is administered by lawyers for the benefit of lawyers; and the feast of reason which is occasionally dished up by the House of Lords is served and relished exclusively in the Temple. The long delays and fascinating interlocutory contests of a leading case are of no interest to the public at all. The average litigant does not delight in spending two or three years and two or three thousand pounds in procuring a final decision, however harmonious the result may be with the obscurer doctrines of the Common Law. He is much more concerned to have his case decided quickly and cheaply than to have it decided so very rightly. Law, like medicine, is a service which should be placed within easy reach of all who need it. And a good and rapid service at popular prices is much more to be desired than a slightly better service at prohibitive prices and involving long delays. The wilful blindness of the legal profession to this transparent truth results in the moribund condition in which we find it to-day. The goose which laid the golden egg has discovered at last what an utter goose it was to do so. The layman who desires a decision on his rights to-day prefers to take it quickly

and cheaply from an arbitrator, who may be devoid of judicial experience and prejudiced by his own commercial interests, rather than to go before the judges whose learning and impartiality he so much admires, and who are provided by the State for the very purpose of resolving his difficulties.

Then again, it has been argued that the deliberations of the House of Lords invest the substantive law with a dignity and importance which have much to do with the respect in which it is generally held. This may be true; but the argument must go further than this, and must suggest that there would be an insufficient respect for the law if the final decision in civil cases rested with the Court of Appeal. This view will not commend itself to anyone who takes the trouble to gauge the respect in which the Court of Appeal is held already by the general public. This respect is found to be quite surprising in its intensity. It may indeed be less marked than the respect accorded to the House of Lords (by those who have never had to pay for an appeal to that body), but even so it is enough to prevent the substantive law from falling into disrepute. The analogy provided by the criminal law supports this view. It is probably in the sphere of criminal justice that the pre-eminence of our courts over those of other countries is most marked

and most appreciated. It is true that there is a method by which a criminal case can be carried to the House of Lords, but this is so seldom used that it need not be taken into consideration, and in fact the final decision on all points of law and practice rests with the judges of the Court of Criminal Appeal. This Court is not in theory so strong a judicial body as the Civil Court of Appeal, yet its prestige is amply sufficient to satisfy the public.

Lastly, we have the old story of the Scotchmen and the Irishmen. Conditions have changed a good deal since 1875, and it may be that the link which connects the jurisprudence of the three countries is not now cherished as much as it then was. Certainly, we find no desire in Southern Ireland for any kind of final appeal outside that country. The Northern Irish only send two or three appeals each year to the House of Lords and since they have not the contempt for English institutions which is evinced by their neighbours, they might perhaps be found willing to submit these cases to the English Court of Appeal, reinforced, if necessary, by the presence of an Irish expert. Scotland contributes fifteen to twenty appeals in the course of the year. It is possible that the submission of these cases to the House of Lords is regarded as a valuable privilege. But even if it is, there is no reason in logic

why the same House should remain the final Court of Appeal for England. The law of Scotland differs already in numerous respects from our own, and to insist upon the same ultimate court of appeal for the two systems is only to disguise the divergence which is already admitted. To the English layman this artificial symmetry of institutions is surely dear at any price.

If the foregoing remarks give a fair statement of the case for retaining the appellate functions of the House of Lords, it is evident that the reform which was unfortunately sidetracked in 1876 is now long overdue. But the abolition of appeals to the House of Lords is only a first step towards the reform that is needed. The curtailment of the number of possible appeals undoubtedly lifts a burden off the litigant of modest means; but it does not go far enough. Let us suppose a dispute between A and B relating to the construction of a contract and involving a sum of £200 or £300. A brings an action to recover this amount, and the trial judge decides in his favour and gives judgment against B with costs. B appeals, and the Court of Appeal decide that the trial judge was wrong in the view he took. Judgment is accordingly entered for B, and A is ordered to pay the costs both of the appeal and of the original hearing. From B's point of view, this is as it should

be. Having been in the right, he obviously ought to have his costs paid. At the same time it is hard on A. It was not his fault that the trial judge went wrong ; but he has to pay twice over because one judge decided in his favour. And this expense is probably out of all proportion to the value of his original claim. Complete justice could only be done if the Court of Appeal could order that B's costs of the original hearing should be paid by A, and that both parties' costs of the appeal should be borne by the State. In this way the result is made to be precisely what it would have been if the trial judge had decided rightly, and the liability for costs of the unsuccessful litigant remains the same whether he is defeated in the first instance or only on appeal. This, of course, although the most typical case, is not the only case calling for insurance against costs thrown away. Sometimes a new trial has to be ordered, and in this event the insurance fund will have to provide both the costs of the appeal and the costs of the original trial. There may be, moreover, certain intermediate cases where the order of the trial judge is varied or reversed owing to fresh evidence discovered since the hearing, or where for some other reason it appears that the imperfection of the original decision is due rather to the conduct of one of the parties than to the error of the judge. In

such cases the Court of Appeal should have a discretion to decide whether any, or what proportion, of the costs should be paid out of the fund.

The broad effect of such an insurance plan is that either a plaintiff or a defendant will be able to make a fair estimate at the time when proceedings are commenced of the maximum that they can cost him if he loses. This is the very thing that the layman wants most to know when he contemplates enforcing his rights. But under the present system he can only be told what is the least he may possibly have to pay and what is the most ; and the disparity between the two figures is often enough to make him pocket his grievance and withdraw instructions from his lawyers.

This scheme no doubt requires money ; but not so much as one might think. It is to be remembered that it only applies to appeals which are successful. If A loses in the first place, he will not be encouraged to appeal any more than he is at present. If he does so, and loses again, there is no hardship involved in his having to pay the costs twice over. The State will only pay when its officers are shown to have made mistakes. Available statistics show that about one appeal in three is successful, giving an average yearly total of about 110. Of these about 30 to 35 will be interlocutory

appeals; that is to say, appeals upon small points of practice which are quickly disposed of. The taxed costs of both parties to such appeals would hardly in any case exceed £50, and would generally be much less. The costs of the final appeals are extremely difficult to estimate, but if we allow an average cost of £250 we must be somewhere near the mark. It will thus be seen that an annual sum of about £20,000 might be sufficient to finance the scheme.

In these days when Governments think in millions and the taxpayer does not dare to think at all, such a sum could no doubt be unobtrusively raised by general taxation; but the abolition of appeals to the House of Lords will render even this expedient unnecessary. Even if the present system is left untouched so far as Scottish and Irish appeals are concerned, it is possible that enough money will be saved in the long run. For the withdrawal of English appeals will reduce the judicial business of the House of Lords to little more than one-third of its present volume, and it may then be found that the number of Lords of Appeal in Ordinary can be reduced from six to three. It is true that much of the work of the Law Lords lies in the Judicial Committee of the Privy Council, so that the proposed reduction would have an effect upon that body as well as upon the House of Lords.

But the Judicial Committee receives a great deal of help from other quarters, and could probably carry on its work satisfactorily with the diminished staff of Law Lords which is suggested. The proposed reduction would involve a saving of £18,000 per year in salaries, and a further saving of a substantial amount in that it would cut down the number of possible recipients of pensions. This saving, if not wholly sufficient, would go a very long way to finance the State insurance against successful appeals which has been outlined above.

The adoption of this system of reform is surely worth a trial, if only for the substantial reduction effected in the price of justice. The Law has been deemed an ass for so long that perhaps the name will stick for ever; but even an ass is not without attraction if one can ride on him for a penny.

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