THE SPIRIT OF OUR LAWS

BRITISH JUSTICE AT WORK

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"A HISTORY OF THE ENGLISH BAR AND THE ATTORNATUS TO 1450"

REVISED EDITION

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TO

THE MEMORY OF

SIR EDWARD CLARKE, K.C.

PREFACE TO THIRD EDITION

THE preparation of this new and largely rewritten edition of *The Spirit of our Laws* was undertaken and almost completed by the author, but his sudden death deprived it of the benefit of his final revision. The present editor has interfered as little as possible with either the form or contents of the book as it was left by Mr. Cohen; he has confined himself in the main to the excision of some inessential material and the clarification of an occasional obscurity of phrase.

The author had intended to complete his study of the working of the English legal system with a chapter on 'Luxuries and Abuses,' but owing to the somewhat fragmentary condition of the manuscript it has been decided to omit this section. This is the less regrettable as a stimulating criticism of our existing legal fabric, with many interesting if controversial suggestions for reform, can be found in Mr. Claud Mullin's recent book *In Quest of Justice*. The most serious 'abuse' from the point of view of the ordinary citizen, and the one with which the omitted section was chiefly concerned, is the extreme costliness of litigation in England. Mr. Cohen feared that increased economy in the working of the legal machine could only be achieved at the expense of its efficiency, but appeared to think that there was a case for relieving the individual litigant at the cost of the State. In the first place, he felt strongly that all Court Fees should be abolished, as free access to judicial process should be an

unquestioned right arising from membership of any civilized State. Secondly, he thought it unfair that the litigant should pay for the failure of the machinery provided by the State; for successive appeals with their heavy costs are often caused either by an uncertainty in the law itself or by an error in its application by the judiciary.

Two interesting steps that have lately been taken towards the ideal of a rapid and cheap settlement of legal disputes may perhaps usefully be mentioned here. As the result of representations by various Chambers of Commerce and other bodies, new 'Rules of Procedure'[1] have been formulated which are to apply to any King's Bench action considered suitable for the abridged and simplified procedure thereby introduced, certain important actions, including any which involve an accusation of fraud, being definitely excluded. In an action set down in the 'New Procedure' list the preliminary processes are accelerated, and at the hearing of the summons for directions, which 'so far as possible' will be dealt with by the judge who is to try the case, the judge is given a number of important discretionary powers. He may, for example, fix the day and place of trial, may limit the number of expert witnesses and may order evidence to be given by affidavit. More important still, perhaps, he may direct that the issues be tried with or without a jury, and may record an agreement of the parties limiting or excluding the right of appeal. A few cases under the new system have already been heard, but it is impossible as yet to say to what extent the experiment will succeed in shortening, and therefore cheapening, judicial proceedings.

The expense of professional advice and advocacy looms large in the imagination of the public, but it is unlikely that much effective control can be imposed from above.

[1] See Appendix.

Apart from the legendary income of the 'fashionable silk,' which it is entirely within the power of the public to limit, the earnings of the average barrister are not excessive. The scale of fees, regulated by tradition, bears but little relation to expenditure of effort; for a comparatively high brief fee is the recognized compensation for underpayment for preliminary advice. One clearly indefensible tradition has, however, just been relaxed by the Bar Council, which has decided that the 'two-thirds rule,' a convention entitling a junior to demand a brief fee of two-thirds of that of his leader, is no longer to apply where the leader's fee exceeds a hundred and fifty guineas.

This concession, and also a proposed reduction in the scale of solicitors' fees, is chiefly valuable as an indication of the desire of both branches of the profession to co-operate in what is clearly the most pressing task of the legal reformer. English justice is remarkable for its adaptability to a changing social environment, its administration is pure and marked by intellectual distinction. But the pace at which it moves, though no longer funereal, is still excessively stately, and its cost presses harshly on those that invoke its assistance, and renders it inaccessible to many in need of its aid.

A. P. G. RANSOME

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PREFACE TO SECOND EDITION

THIS book is intended primarily ' for the ease of the lay people,' otherwise known as ' general ' readers. Even the most precocious specialists come from that large class, and it is for the benefit of those intelligent persons (only) who desire or hope to desire a further acquaintance with ' Law ' that the references to reports of cases mentioned have been added. I believe that this is the only technicality for which I have to apologize ; otherwise, except in quotations, there is, I hope, none. Consequently, law students—or any students—may, perhaps, find here a very first primer or friendly introduction to studies which they can easily make severer. Meanwhile, the writer has called in Literature's ' artful aid ' when he could.

He believes (as he did in the former edition, with the exception of one word, which he now adopts from a benevolent *Law Quarterly Reviewer*) that ' this is the only book in English which endeavours to describe in popular language for laymen the whole fabric of our legal practice.'

H. C.

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EQUITY AND THE COURTS OF CHANCERY

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ABBREVIATIONS

(NOT INCLUDING LAW REPORTS)

A.-G. . . . Attorney-General.
Ch. . . . Chancery.
C.A. . . . Court of Appeal.
C.C.A. . . Court of Criminal Appeal.
C.C.C. . . Central Criminal Court.
C.J. . . . Chief Justice.
Cty. Ct. . . County Court.
D.N.B. . . *Dictionary of National Biography.*
Encycl. . . *Encyclopædia of the Laws of England.*
J. . . . Justice.
K. . . . Kenny's Outlines of Criminal Law.
K.B.D. . . King's Bench Division.
K.C. . . . King's Counsel.
L.C. . . . Lord Chancellor.
L.Jo. . . *Law Journal.*
L.J. . . . Lord Justice.
L.Q.R. . . *Law Quarterly Review.*
L.T. . . . *Law Times.*
M.C. . . . Magna Carta.
M.R. . . . Master of the Rolls.
P. & M. . . Pollock and Maitland.
Q.B. . . . Queen's Bench.
Q.C. . . . Queen's Counsel.
Q.S. . . . Quarter Sessions.
R.S.C. . . Rules of the Supreme Court.
S.-G. . . . Solicitor-General.
St. Tr. . . *State Trials.*

THE SPIRIT OF OUR LAWS

THE FRAMEWORK OF THE LAW

INTRODUCTION

THERE is a story told that in the early days of arbitration, when its object was little understood, 'Call that arbitration?' said a workman; 'why, they give it agin me!' There seems to be very much the same sort of ignorance about the law among even 'well-educated' people, and these pages are undertaken in the hope of dispelling a little of it.

A great many people take an interest in the law without being lawyers or litigants or specialists of any sort. They like to understand something of what is going on around them, and for their law they have to trust to snatches from the newspapers. Though, possibly, both writer and reader are 'well-educated' persons, the exact point on which the report turns is almost certain to be missed, for neither has any training to catch it. Hence the frequent exclamation, 'I can't understand this case; however could they have arrived at such a decision?' And, of course, the bewilderment is greater where there is any desire to scratch beneath the surface. Yet between the formal study of the law and the perusal of the daily newspaper there is no satisfaction for the amateur reader, better, perhaps, known as 'the general' reader. A professed lawyer, of course, would not dream of trusting an ordinary newspaper report (with a few exceptions) for practical purposes, for he requires at least a certain degree of accuracy, and may require the highest. But looking only to the purposes of amusement, the fact is that too little

is known of the principles of the law by journalists and their ' clients ' alike, to make what is written about it in the press—which, in the aggregate, is an immense mass—either really intelligible or enjoyable, to say nothing of its not being intellectually profitable.

It is easy to see the reason. It is because the law has no place in any of our systems of education. There is nothing to quarrel with in this. No one would suggest that in the ordinary sequence of our career in learning—dame's school or kindergarten, preparatory school, public school, university—the law should be a compulsory subject.[1] The broad, sound theory on which all these institutions are conducted is that the growing mind shall be equipped with an outfit which will best enable it to interpret the world before it to its own contentment, through the materials it collects for the needs and the graces of life. The learner, long before he is old enough to appreciate it, ought to be led on to enjoy truth and beauty as the most likely sources of contentment. First the alphabet, then reading and writing, next arithmetic, are the media for supplying knowledge practically useful in itself, and at the same time a discipline for certain mental faculties. At a later age geography, history, grammar, geometry, repeat the process on another plane, and awaken or furbish other faculties as they ripen. As the time approaches when, in common belief, the character is formed, the schooling is deliberately given a special bent, and the last years of tutelage—generally the final stage before earning a living—are devoted to an opportunity for the study of some one whole world of thought; for centuries it was either classics or mathematics, now it is these and whatever else the universities propose. But throughout all these efforts there runs one increasing purpose—contentment. If the boy at school, or the undergraduate at college, is in due course taught anything utilitarian, anything which he can later convert into cash by (for example) teaching others, this is an additional advantage, but not the chief purpose of the system. To

[1] There is, however, another view. In 1920 there appeared ' An Elementary Commentary on the Laws of England,' by Judge Ruegg, K.C., *designed* for the use of schools (2nd ed. 1930).

read, to write, to cipher, to know a certain number of facts are among the primary needs of bare existence, just as there must be a minimum of physical comfort to keep body and soul together, however noble that soul may be. Man, said Victor Hugo, is an ellipse with two foci, facts and ideas.

Where, then, in this scheme, is the place of the law? The answer is—nowhere, except exceptionally at the far end of it. The reason for this is simple. The early years of laying foundations must be devoted to the accumulation of elementary facts and powers, what might be called generically the acquisition of *technique*. Even the elements of music and fine art, which do not fare pedagogically much better than the law, cannot be wholly neglected, not because any one supposes that feeling and taste can be drilled into a learner, but because if those blessings are ever to be secured at all, there is an absolute necessity for some mechanical habit to be formed. But there is no such absolute necessity for imparting the rudiments of the law thus early, for it is based on the sense of right and wrong, and this, it is assumed, is wafted, like a sunny breeze, to use Plato's phrase, into the child from all sides, at all times. No child will ever learn to read or to play the piano unless he is taught the letters or the notes, but no child can grow up in any surroundings without a sense of right and wrong. In short, children can and do grow up without the slightest appreciation of fine art, but they will inevitably, if of sound mind, know the object of the law.

It is only when we come to the university link in the educational chain that we find the law as part, so to say, of the stock-in-trade. And this is quite a modern innovation. For centuries only the classics and the mathematics were allowed to possess the essential qualification of a 'liberal education.' It may be that that view was not wholly wrong; it has at any rate been superseded. But the old pre-eminence survives at least to this extent, that the best intellects are attracted by the service of the 'humanities,' which, in their turn, fashion the best intellects. Probably not one student in a hundred studies the law at the universities who does not destine himself to

a legal career. In any case it cannot honestly be said that the law has a distinct place in our national system of education. It does, as a severe study, contain every advantage of discipline and every seed of fertility, but, as a matter of fact, it stands as a thing apart, special and not much appreciated.

The law, as here used, cannot be defined. It can, however, be exactly illustrated by a phrase of Thackeray's. He once said to a man, 'Do you like the play?' to which the man replied, 'I like to go to the theatre sometimes.' 'Bah!' said the other, 'you don't even understand what I mean.' What he meant is what is commonly called 'The thing generally.' It is not the history nor the philosophy of the law, nor its form, nor its contents, still less the reform of it, nor is it the law as a profession, with which it is proposed to deal here, though each conception may furnish topics here and there. It is rather as a great idea, as a system or institution which the modern mind cannot conceive as eliminated from modern civilization—if one word must be used, it is the spirit of our law, which it is hoped in some measure to convey.

And first, where does our law come from?

1. THE COMMON LAW

The actual beginnings of a people are never seen. Their own records naturally date from a period when the civilization of the nation has reached a certain stage, when there are floating traditions or memories of the past which can be written down. But it does happen sometimes that skilled observers of another race or country record the appearance of the early state of tribes or people which afterwards showed, or perhaps are showing, great developments. A familiar instance is Julius Cæsar's account of the Gauls or the Britons; in the 19th century Europe saw the Japanese stride forward. But here, too, when the recorder comes upon the scene, there is already a definitely formed character to record; it is not so definite as we know it in later historic times, but it is represented as uniform and symmetrical. We are as certain as we are that there

was a battle of Waterloo, that there was a time when the Ionians and the Dorians were pouring or filtering into ancient Greece from Asia, though no contemporary witness has told us of the process ; if we knew more of them at this stage, we should have an invaluable key to much subsequent history. It is seldom that the origin of a nation is traced step by step to one person ; but we have this in the Old Testament. This would seem to be a peculiarly good opportunity to catch the manners living as they rise, but, in the first place, the most delicate stage, so to say, the growth from a family to a people, is missing—it drops out between Genesis and Exodus ; and, in the second, we are not minutely instructed under what influences Father Abraham's character was formed. In any case, in the individual race and in the individual child, there is an undifferentiated background from which no stray memory survives. It is in this area of time that the germs of character are deposited, and it is to this period that we must look for the meaning of the Common Law.

The primitive stock of a race never seems quite to wear out, however widely the modern product may differ from its 'rude forefathers.' The Hebrew, the Hellene, the Roman, all clearly retain in their historical characteristics something from what by comparison may be called their savage state. The Spaniard's ancestors, the Iberians, were remarkable for their cruelty ; the Germans are the descendants of stolid tribes ; the Gauls were brave, impetuous, pleasure-loving ; the Saxons loved liberty. Wherever the initial impulse or tendency came from, however the breed became a fixed species, bodies of men, very much like one another in many ways, do appear on the face of the earth, while the men of one body differ very much from the men of another. In the dark ages of growth, the future of the race is determined by its habits and customs. These, of course, depend on its necessities. To take a simple instance, those who live by the sea notoriously differ from those who live by the land. And the primeval daily struggles and toils for self-preservation are peculiarly apt to leave their traces in the mature temperament or disposition. The books of the anthropologists are full of

illustrations of such facts. The most famous expression of the theory is that universally known as Evolution, the continuous progress in activities which preserve or improve life. It is obvious that, with time, habits and customs of all sorts must spring up. It is commonly supposed that one of the most certain habits of primitive man was that the physically weaker should be subject to the physically stronger ; it is merely a guess from the analogy of the other animals, though it is likely enough. But it is worth noting that the will of the stronger could not be imposed in defiance of prevailing customs, for all members of the community alike would be subject—and servilely subject—to their domination ; the reformer running deliberately counter to popular prejudice or superstition is a distinctly later phenomenon. Primitive man would be unable even to conceive his world except as he knew it, so that even if the reformer is regarded as a fully fledged lawgiver—a long step forward—the only law he could give would be nothing but the echo of the usages to which he was accustomed. So it is a commonplace observation that autocrats like Tsars or Sultans cannot abruptly change the national habits, even if they would ; it is only within that circle that they are all-powerful : their ignorant subjects would not be able to understand great artificial changes, and the decrees would be dead letters.

No doubt the inveterate habits of peoples are abruptly changed, as by the wholesale conversions of a conquering Mahomet, or the suppression of the Juggernaut by the British ; but these are cases of sheer compulsion by external force. Gradual change of character from within is very, very slow, and perhaps the old stock of primeval dispositions is never exhausted.

This hypothesis really comes to this. When first nations come upon the scene there is something which they obey, whether it be the raw will of some one person—however indicated, whether as a leader in past emergencies or one who had imposed himself as a superior on unwilling inferiors—or a made-up law in the modern sense, rudimentary indeed, but still a distinct piece of manufacture. At any rate, there is some permanent institution implying a sense

of what is permitted and what is not permitted, or of what is commanded to be done, something like a public conscience. At a very early stage the Greeks recognized the proverb that Custom is king of everything, and, as a matter of fact, in their language the word for law originally meant custom.

The common law, then, is all—up to a certain time—that a race thinks people ought or ought not to do. What that time is it is impossible to define accurately, because it is impossible to say at what precise moment a nation emerges from barbarism into civilization, or becomes so comparatively civilized that it can be said to have any law at all. However, the question of time is only of consequence because it is usual to think, if not to speak, of the Common Law as a body of principles and rules from 'time immemorial,' complete and not to be added to. Roughly, the truth is that after laws begin to be written down regularly—that is, when a distinct measure of civilization has been attained—the Unwritten Law or Common Law is conceived of as dating from before the first formal legislation. But the contents of the Common Law need not be published or expressed for many centuries, until, in fact, something occurs that necessitates the application of some rule which has existed, unexpressed, from time immemorial. For practical purposes, however, we may consider the Common Law to date from the infancy and the youth of the nation.

Let us apply all this to our own country. Very early the rule got itself established that, normally, human life must not be taken. Yet you will nowhere find distinctly enunciated in law, 'Thou shalt not kill'; nor till 1827 was it written that the murderer should be put to death, nor enacted in so many words till 1861 (s. 1 of 24–25 Vict. c. 100)—'Whosoever shall be convicted of murder, shall suffer death as a felon'; though this is obviously only a convenient way of stating the common law of centuries. So with the prohibition, 'Thou shalt not steal'; there is no statute which makes this simple statement, and for centuries there was none which regulated the punishment. At the Conquest, we are told, the custom

which survived in Kent till 1922 and 1925—that all the sons of an intestate inherit land alike—was universal throughout the country. The Normans introduced primogeniture, a feudal custom, but left the old system in Kent (as a special favour, the story goes, the men of that county having done William a great service). At any rate, the common law of both the larger and the smaller area existed side by side. Or again, take the relation of husband and wife. In the first place, at all times, so far as we know, monogamy was the rule; polygamy is not expressly prohibited in a statute till 1603. In course of time, too, the rights of a husband over a wife became more or less defined. It is, perhaps, not too much to say that for centuries it was generally believed that the man was so far the master of the woman that he had the right to chastise her moderately by way of correction, and, *prima facie*, there was nothing unreasonable in such belief. For in an early and incomplete state of civilization such a custom was quite likely to establish itself. But in a notorious case [1] in 1891, a judge declared that the common law had never conferred any such power on the man, and that such was not the law of this country. His lordship was, no doubt, right; but the instance illustrates how the common law was supposed to be old custom of the masses solidified. Again, concurrently with progress, locomotion, of course, develops, and necessary customs inevitably spring up. When railways revolutionized the people's going to and fro, there was a large and well-settled body of common laws regulating the duties of authorities, carriers, and others having to do with the roads. When these were superseded by the iron tracks, the common law of highways applied to the latter so far as possible, the fresh conditions arising from the new inventions being met by special new laws, where the common law did not speak. Finally, there might exist a common law among a group, as, for instance, among merchants, whose business and habits produced customs special to themselves. When, in course of time, some of these were adopted in everyday life, and became sufficiently prominent to make it worth

[1] 1891, 1 Q.B. 682 : in C.A.

while determining by what authority they were valid, the law merchant, as it was called, was held to be part of the common law. Thus the extremely common practice of passing away the right to a sum of money by writing one's name on the back of a bit of paper was originally part of the common law of merchants. Perhaps the best example of the common law is the power of Parliament—King, Lords, and Commons—to make the laws; there is no documentary authority for this power.

It is, therefore, easy to see at a glance the meaning of the great—constitutional, as it is called—principle which has been of such immense practical importance in the United States and other colonies: that colonists from this country who settle a new land within the dominions of the Crown take the common law with them. It only means that those of the people who emigrate in that way take with them the character of that people; and that, in the absence of anything binding them to the contrary, they are taken to agree to the traditional habits and observances to which they have been accustomed, as naturally expressing their own characteristics. They are as free to alter such rules in their altered circumstances, or, generally, to deal with an unforeseen situation by drawing anew on the common law, as are the bulk of the people whom they have left at home.

How the common law is invoked to meet fresh emergencies we shall understand when we see how it is expressed.

2. THE DEPOSITORIES OF THE COMMON LAW

These are the judges. The origin of the office is lost in antiquity, like other origins. But it may be assumed that the primitive judge would be a fair representative in intelligence and character generally of his people. When something like a system was evolved, the 'elders,' with whom we are familiar in Scripture, naturally were frequently called to the office. Men of experience—that is, age—would be enough for the work so long as no definite professional knowledge was needed and no professional

organization existed. The important point to notice is, that whoever acted as 'a judge' must be of the people, must always have lived among them, and must reproduce in himself their ways of thinking. When the only question was, What is the right thing to do in the given circumstances? he could answer it as well as any one else; if he had authority of any sort, his view of what ought to be done at any time might set the standard for those under his influence. With the express power of deciding disputes or of awarding retribution—the latter, no doubt, his common function—his duty would be hourly to apply those principles which he had learned like his neighbours, and which he no more questioned than they did. We know that among some ancient tribes there was a regular tariff for, say, murder: so many oxen or sheep for a father, so many for a husband, so many for a brother, and so on. All this would be common knowledge, and the primitive judge would only declare what every bystander would have said as a matter of course. More difficult cases would soon multiply if the society made any progress, but this must have been the prototype of the judicial office. The judges were the men who enjoyed the reputation of knowing what their people thought right and wrong, and they have never lost it. When James I asked Edward Coke a question of law, he desired to know whether it was one of common law or statute law—because, he said, if it were one of common law he could answer it in bed; but if it were one of statute law he must get up and examine the statutes.[1]

To this day, when codes and statutes do not provide for a case, those who have to decide it must fall back on the sense of right and wrong which they share with the rest of the people—on what we now call general principles of morality. In other words, the judges declare the common law.

[1] 'It is impossible to know all the statutory law, and not very possible to know all the common law.'—Scrutton L.J., 1 *Cambridge Law Journal*, 19: 1921.

3. LAWS WRITTEN AND PUBLISHED

When was this country sufficiently advanced to have written laws? Taking the accepted chronology, we find in a book of authority, 'c. 600 (A.D.), Ethelbert issues the first English laws[1] that have come down to us'[2] under the influence of his conversion to Christianity and in the lifetime of St. Augustine (*d.* 604), who had effected it. The historians lay stress on the *written* form[3] (not so much on the contents). Scholars, then, have settled it that practically the first legislation in our modern sense took place about thirteen hundred years ago. The code in question, we may be sure, *chiefly* declared the existing law, as we should now say, and did not mean to make new law, and it is put forth by the sovereign's authority.

But it is a law of nature, that as a people makes progress in civilization it becomes more and more susceptible to the influence of other races with which it comes into contact, and in the time of Alfred that influence is manifest.

'Alfred,' says Freeman, 'speaks of himself as simply choosing the best among the laws of earlier kings. . . . What is specially characteristic of Alfred's laws is their intensely religious character. The body of them, like other Christian Teutonic codes, is simply the old Teutonic law, with such changes . . . as the introduction of Christianity made needful. What is peculiar to Alfred's code is the long scriptural introduction beginning with the Ten Commandments. The Hebrew Law is here treated very much as an earlier Teutonic code might have been. . . . Alfred commonly shows a thorough knowledge of the institutions and traditions of his own people.' Note this last sentence. It is a reminder that when the day of written codes arrives, the bulk of them consists of the laws actually in force and generally popular at the moment. The early legislator

[1] P. 3, vol. i. (with German translation) in *Die Gesetze der Angelsachsen*, Halle, 1903–16, by Dr. Liebermann, who, on this subject, has superseded all previous authorities, who had nothing like his material in amount.

[2] *English Political History*, Acland and Ransome.

[3] *Dic. Natl. Biog.* (1889), *Ethelbert*, following Thorpe, *Anc. Laws* (1840), and confirmed by Liebermann, iii. 1 (1916).

neither has the power nor the desire to change the laws, *i.e.* to make violent or serious changes in the habits of the people. And note, too, that the written law of another and a foreign people may have the deepest influence on the common law, almost without those subject to it knowing it. For the Romans when they ruled in this island had long had a huge system of written laws, and the Christian missionaries had the Bible, in which there are many codes of laws—to say nothing of the other races; and it is certain that the life of the tribes, if it is too early to speak of the national life, must have been profoundly modified by these visitors or settlers with these famous codes. In other words, the Roman occupation and the Christian propaganda insensibly educated the natives in civilization. After the laws of Alfred, these Anglo-Saxon 'dooms,' as they are called, continue throughout the tenth and part of the eleventh century. They end with the laws of Canute, no legislation of Edward the Confessor having survived. In Maitland's opinion, these laws were mostly new, and are not mere statements of existing law. The importance of the Norman Conquest lies largely in the bringing of uniformity to the diversity of the Anglo-Saxon tribal customs. The Normans did not suppress the Anglo-Saxon law—rather were they concerned with its preservation and re-statement, as is shown by the grant of the several Charters of Liberties by the early Norman Kings, confirming the laws existing in the good old times of Edward the Confessor. But fresh legislation is scanty until the reign of Henry II, and the history of the statute law thenceforward becomes inextricably interwoven with the history of the growth of Parliament, the machinery by which it is produced.

Just a word about this, though, strictly, it is beyond our scope. 'The first representative assembly on record' (in England), according to Stubbs (1 *Hist.* c. 12, § 154), met at St. Albans on August 4, 1213, and consisted of the bishops, the barons, and the reeves and four 'legal'[1] men from each 'township on the royal demesne': they came to relieve certain ecclesiastics, but they remained to vindicate national

[1] 'Legalis'=under no disability.

liberty.[1] An assembly in 1244 seems to mark an epoch. '*The earls, barons, and bishops* [2] . . . *meet in Parliament and demand control over the appointment of ministers.* Similar demands and complaints are made by Parliaments in following years' (*Acland and R.*). In 1254 occurs (*ib.*) 'First summons to Parliament by royal writ of two knights of the shire.' In 1265 'a Parliament meets, to which are summoned two knights from each county, and *for the first time representatives from cities and boroughs.*' Finally, in 1295 (*ib.*), 'is the First Complete and Model Parliament of The Three Estates,' [3] which becomes the precedent for future development.

Practically, then, Parliament dates from Edward I's reign, but we are still a long way off Parliament as we know it—not only in function, but in form. In 1893 Maitland, the modern Selden, edited for the Rolls Series (98) the Records of the Parliament of 1305 (Feb. 28): his Introduction is thorough and fascinating even among his own works, a *locus classicus* in British origins. 'It was a full parliament in our sense of that term. The three estates of the realm met the King and his council. The great precedent of 1295 had been followed.' But at this time 'a Parliament is rather an act than a body of persons. . . . It is but slowly that this word is appropriated to colloquies of a particular kind, namely, those which the king has with the estates of his realm, and still more slowly that it is transferred from the colloquy to the body of men whom the king has summoned. As yet, any meeting of

[1] 'John seems to have been the first English statesman who proposed to give some place, however subordinate in the great Council of the realm, to laymen who were neither barons nor knights but simple freemen.'—Kate Norgate, *John Lackland*, c. 5 (1902).

[2] The 'three deliberated apart': 2 Stubbs, § 175.

[3] The Lords Spiritual, the Lords Temporal, and the Commons, or, more accurately, the clergy, the nobility, and the commons. 'The estate of the clergy is still in theory represented in both Houses, but, as regards the Lower House, this representation has been a mere fiction for centuries' (*Ency. of Laws of Eng.*). The date, &c., of the division into two Houses is still obscure. Edward I 'created the house of lords as much as he created the house of commons'; 'the ancient court and council of the king was as certainly the parent of the house of lords as the shire system was of the house of commons.'—2 Stubbs, §§ 201, 228, 229.

the king's council that has been solemnly summoned for general business seems to be a Parliament.'

Bearing in mind, then, the totally different aspect of a law-giver, maker, or promoter, and (it must be added) a court of law, in the infancy of Parliament and now, we may still say that there has been an uninterrupted stream of statutes from 1235 to the present day.

4. STATUTE LAW

Delolme says, 'It is a fundamental principle with the English lawyers that Parliament can do everything, except make a woman [1] a man or a man a woman' (*The Constitution of England*, Book I., ch. x. 1771), *i.e.* it can 'do everything that is not naturally impossible' (Blackstone, i. 161). For instance, it (*i.e.* the King and the two Houses together) could turn the government into a republic or anything else. In the oft-quoted words of Coke (4 Inst. 36), its power 'is so transcendent and absolute as it cannot be confined either for causes or persons within any bounds.' The empire, of course, is the limit of its jurisdiction. The authority of Imperial Parliament over the empire cannot be summarily defined, but a popular work puts the present position correctly. 'There is no fundamental law upon which the Constitution of the British Empire rests, but there are three main principles underlying its administration, viz. self-government, self-support, and self-defence [the 3 s's]. The first of these principles has been applied for many years and is fully developed in the case of Canada, Newfoundland, Australia, New Zealand, the Union of South Africa, and the Irish Free State. The second principle is equally developed, almost every unit being financially self-supporting and few requiring aid from the central Government. The third principle is of modern growth and may be said to be the outcome of the Imperial Conference. . . . All British Dominions are subject (except as regards taxation) to the legislation

[1] It was said jestingly even to have done this, when, in 1850, it enacted 'words importing the masculine gender shall be deemed and taken to include females' (an Act for shortening the Language used in Acts of Parliament, c. 21, s. 4).

of the British Parliament, but no Act of Parliament affects a Dominion unless that Dominion is specially mentioned.[1] If the legislature of a Dominion enacts a law which is repugnant to our Imperial law affecting the Dominion, it is to the extent to which it is repugnant absolutely void.'[2] In practice the lesson of 1776 is well remembered.

In regard to certain grave crimes (*e.g.* treason, murder, bigamy), the empire means British subjects anywhere. Parliament does not assume to legislate for foreigners in foreign countries (including foreign ships on the high seas), and need not for piracy, for any court *anywhere* can try a pirate. Nevertheless, it may be that here and there, in semi-civilized countries, or in protectorates where there is not a settled government, and where the Crown has obtained a certain jurisdiction, Parliament, by regulating that jurisdiction, has legislated for foreigners in a foreign land. Still, this is exceptional; in the ordinary way, the remedy for wrongs done to the King's subjects in foreign countries is through the regular means those countries provide by their laws or, failing those, extraordinarily, through our Secretary of State for Foreign Affairs, who will act according to Treaties or the Law of Nations.[3] The persons or property of foreigners within the King's dominions are, of course, subject to British law.[4] In the case of British

[1] *E.g.* s. 712 of the Merchant Shipping Act, 1894, is, 'This Part [xiii.] of this Act shall' with a few exceptions 'apply to the whole of Her Majesty's dominions'; and in s. 735, though 'the legislature of any British possession' may, with the sanction of an Order in Council, repeal or alter any of the Act's provisions about their own registered ships respectively, they may not do so to those about emigrant ships.

[2] Whitaker's *Almanac*, 1931, p. 536. For fuller study of this voluminous subject see Tarring's *Law of the Colonies* (1913); Halsbury's *Laws of England*; Keith's *Responsible Government in the Dominions* (1928) and *Sovereignty of the British Empire* (1929).

[3] The literature on this subject since the Great War is enormous. Hall (8th ed. Pierce Higgins, 1924) and Oppenheim (ed. McNair, v. 1 and v. 2) are the chief English authorities.

[4] Laws specially applicable to foreigners are inconsiderable—deportation for offences (under Alien Acts, 1905, &c.) is the chief discrimination; in some colonies those relating to foreign labourers are important. The exemption of foreign sovereigns and ambassadors is no exception, for it is our law which exempts them. In wartime restrictions on alien 'enemies' are imposed.

subjects doing wrong abroad, the value of the power to try them on British soil obviously depends on the probability of finding them there.

How Parliament gradually got these ample powers is part of the history of the country, and not our theme here. Now that it can make any law [1] it must do it in the form of a statute, and it has chosen to make three classes of statutes—public, local and personal, and private Acts. Every word of every one of these has equally to be passed by the King, Lords and Commons.

A public bill is, or ought to be, concerned with matter

[1] A resolution of either House, not being illegal, about the internal affairs or conduct of that House is a law, binding on its members, though it is not generally so called. The expulsion or imprisonment of a member of the House of Commons is an extreme instance of the regulation of its internal affairs by the House; the legality of expulsion has never been expressly tested in a court of law. Sir William Anson says that such a resolution 'amounts to no more than an expression of opinion that the person expelled is unfit to be a member of the House.' (*The Constitution*, vol. i. c. iv. s. 4, § 3.) It is admitted that the expelled person may be re-elected. The last imprisonment by the H. of C. was in 1880 of Mr. Bradlaugh, M.P. (for refusing to withdraw), in the Clock Tower for 24 hours. 'It is certainly true that a resolution of the H. of C. cannot alter the law. . . . The statement that the resolution . . . was illegal, must, I think, be assumed to be true *for the purposes of this case*. . . . I do not say that the resolution of the House is the judgment of a Court not subject to our revision; but it has much in common with such a judgment. The H. of C. is not a court of justice; but the effect of its privilege to regulate its own internal concerns practically invests it with a judicial character when it has to apply to particular cases the provisions of Acts. . . . If its determination is not in accordance with law, this resembles the case of an error by a judge whose decision is not subject to appeal. There is nothing startling in the recognition of the fact that such an error is possible. If, for instance, a jury in a criminal case give a perverse verdict, the law has provided no remedy. [Not since Criminal Appeal A.] The maxim that there is no wrong without a remedy does not mean, as it is sometimes supposed, that there is a legal remedy for every moral or political wrong. If this were its meaning, it would be manifestly untrue. There is no legal remedy for the breach of a solemn promise not under seal and made without consideration; nor for many kinds of verbal slander, though each may involve utter ruin; nor for oppressive legislation, though it may reduce men practically to slavery; nor for the worst damage to person and property inflicted by the most unjust and cruel war. The maxim means only that legal wrong and legal remedy are correlative terms; and it would be more intelligibly and correctly stated, if it were reversed, so as to stand "where there is no legal remedy, there is no legal wrong"' (Stephen J. in *Bradlaugh's* case, 12 Q.B.D. 284: 1884).

of national interest—reform, education, taxation, &c.: Parliament in discussing it must inform itself from whatever source it can, by debate or through a committee —the stages are very rigid. Every view, at any rate of the principles (if not of the details) in question, has a good chance, for all practical purposes the certainty, of being considered. This is mere newspaper knowledge. Such 'public general' bills—their technical name—are printed at every stage of progress.

Of course the Houses can and do adapt their procedures to urgent needs: thus on April 8, 1690, a bill recognizing King William and Queen Mary, and 'for avoiding all questions touching the Acts made in the Parliament . . . 13th Feb. 1688,' a matter of supreme national interest, passed through all its stages in the Lords, went through the Commons on the 9th with the same run, and was passed on the 10th. In 1883, under the terror of outrages, both Houses passed the Explosives Act in one night (Ap. 9), and it became law on the 10th. In 1929 it was discovered [1] that there was one Under-Secretary too many sitting in the Commons, and as no one could tell which it was, all were liable to fine, &c.; an Indemnity Act (20 Geo. V. c. 9) was got through in a few days. The Houses naturally regard the rights of their respective members vigilantly; hence, when on March 25, 1931, it suddenly appeared possible, but not certain, that some M.P.s had inadvertently infringed an Act of 1781–2 by having contracts with the Government, an Act to excuse them from penalties was passed through both Houses the same night: Royal Assent, March 27. On September 21, 1931, the Gold Standard (Amendment) Act went through every stage in a few hours.

Local and personal Acts deal with matters of special interest to certain persons or places, and confer powers or authority which either require the consent of Parliament or can be much more effectually obtained with that consent. Railways Acts are of this class, and so are many others,

[1] 'By one of those delightful people, parish clergymen, who spend their lives in acquiring interesting and out-of-the-way knowledge.'—The Prime Minister, Dec. 3, 1929: Hansard, 2207.

creating or facilitating great industrial or municipal undertakings and other enterprises. Some of these, though of immense importance, only concern particular places or groups of persons. For instance, the great London Building Act of 1894 (57–8 Vict. c. ccxiii., amended 61–2 Vict. c. cxxxvii.) is a local statute; it extends 'to London and no further' (s. 4). Personal bills are estate, divorce, naturalization, name, and 'other bills not specified as Local' (Erskine May); thus some are naturally called private. For all these purposes there is an elaborate machinery of committees of either House or of joint committees of both Houses to consider the proposed measures. All interested parties can be heard before these committees, and there is a Parliamentary Bar devoted to practising before them, and a staff of officials to attend them. It is obvious that in estate bills for settling the complicated affairs of great estates, or in divorce bills, which dissolve marriages (now only in Northern Ireland, where the courts of law never had power to do so in deference to the Catholic religion), these committees act as judges, and consequently their procedure is regulated by rules as rigid as those the judges enforce. These tribunals are better fitted to deal with these questions of detail than either House itself, and the bill, which is ultimately presented as the result of their deliberations (if it *is* presented), is in effect their report to the House on the matter referred to them—a report which, of course, the House may deal with as with any other bill, but which it almost invariably accepts. Nearly all local Acts are printed, including Inclosure and Drainage Acts, of which there are a good many. Some strictly private Acts are printed (*e.g.* the Tichborne, &c., Act, 1874), and some are not; it is a question of convenience. There is a set of rules for distributing the committee work of this sort between the two Houses, with a view of saving time; but the principle is preserved that nothing becomes an Act of Parliament until the three constituents have concurred in it in a formal way. It is perhaps needless to say that every Act passed is carefully recorded by the proper officers.

The actual composition or drafting of a bill brought into

either House is a matter of much importance, and even the verbal changes which it undergoes in its passage must be vigilantly watched. In 1812 it was enacted that penalties under an Act were to go half to the informer and half to the poor of the parish, but the only penalty under the Act is fourteen years' transportation.[1] There is a story that in a bill for the improvement of the metropolitan watch in the time of George III, there was a clause that the watchmen should 'be compelled to sleep' during the day. An M.P. who suffered from gout, proposed that it should be extended to the House of Commons.

However simple or short an enactment may purport to be, the authors will almost certainly require trained assistance, for only a professional lawyer can suggest the points where it may modify or conflict with the existing law, and if the measure is long, and at all complicated, it is certain to come into contact with existing statutes somewhere. The Government, of course, has a staff of professional draftsmen at its disposal, but it does not, nevertheless, always make its meaning clear, or avoid conflict with other laws.[2] Hence the frequent comments we read in

[1] An incorrect version is that the words ultimately ran—'fourteen years' transportation, and that upon conviction, one-half thereof should go to the King and one-half to the informer.'

[2] Perhaps the most extraordinary instance of a draftsman's blunder is the statement in the Extradition Act (1870) Amendment Act, 1873, s. 3: 'Whereas a person who is accessory before or after the fact . . . is by English law liable to be tried and punished as if he were the principal offender.' An accessory after the fact is, of course, nothing of the sort, or every one who screened a murderer would be liable to be hanged. On ss. 30 and 31 of the Wills Act, 1837, Messrs. Underhill and Strahan say, 'Strange and almost incredible as it may appear, it is believed that the real history of the two sections is that they were drafted as alternative sections, but by some carelessness were both allowed to remain in the Act when passed' (*Wills and Settlements*, 1927, p. 192). Owing to a misprint 'prisoner,' in the Criminal Lunatics Act, 1884, became 'person,' and was copied into the (Irish) Lunacy Act, 1901: *Law Times*, July 29, 1916, p. 237. 'No one has yet solved the mystery' of 'the meaning of' s. 8 (1) *a* of the Trustee Act, 1888. 'The conundrum proved too tough for Sir Edward Fry . . .' (Underhill, *Trusts* (1926), 494). By the Criminal Evidence Act, 1898, s. 4 (1) certain persons 'may be called as a witness either for the prosecution or defence and without the consent of the persons charged,' *i.e.* a witness may be called for the defendant, without his consent—which is absurd. This blunder has often been exposed, yet the formula has been repeated in later Acts.

the newspapers. As Ld. Thring, who had very great experience in drafting Government bills, puts it " when the bill has become law, it will have to run the gauntlet of the judicial bench, whose ermined dignitaries delight in pointing out the shortcomings of the legislature in approving such an imperfect performance ' (*Practical Legislation* (1902), p. 9).[1] For instance, the Workmen's Compensation Act of 1897 was notoriously and continuously the subject of such criticism and was with that of 1900 repealed (*sic*) in 1906. The fact is that no foresight can foresee everything: cases occur in which the facts will not square wholly with one statutory principle or provision, but partly with one, partly with another ; or are of a kind which no one had thought of when the bill was designed, drafted, debated, or passed. Hence has arisen the science of the interpretation of statutes. Of this something must be said to illustrate the practical difficulties of understanding the words as they leave the draftsman, or, it may be, some individual member of either House. But before quitting the former, two implements of his stock-in-trade may be explained.

' Codification,' says Ld. Thring, ' is the reduction into a systematic form of the whole of the law relating to a given subject, that is to say, of the common law, the case law, and the statute law ; while consolidation differs from codification [2] in this alone, that it omits the common law, and comprises only the statue law relating to

[1] The Introduction throws interesting light on the methods of work of various statesmen, especially the contrast between Gladstone and Disraeli. The latter on the evening of March [not ' November '] 14, 1867, instructed Thring to redraft ' entirely ' the (second) Reform Bill by Saturday the 16th. When printed, it was laid before the Cabinet, considered by Disraeli, &c., on Monday, and circulated to the H. of C. on Tuesday—' a feat which has probably never been accomplished by any other draftsman.'—Spencer Walpole, *Hist. of 25 Years* (1904), ii. p. 186, who gives the *correct* dates from Thring's contemporary MS.

[2] ' Mr. Prin [Prynne] . . . did discourse with me . . . about the laws of England telling me the many faults in them ; and among others, their obscurity through multitude of long statutes, which he is about to abstract out of all of a sort; and as he lives, and Parliaments come, get them put into laws, and the other statutes repealed, and then it will be a short work to know the law, which appears a very noble good thing.'—Pepys, Ap. 23, 1666.

a subject, as illustrated or explained by judicial decisions.'

Instances of consolidation [1] are the Customs Laws Consolidation Act of 1876, the County Courts Act, 1888, the Stamp Act of 1891, the Sheriffs Act of 1887, the huge Merchant Shipping Act of 1894 (748 sections *plus* 22 schedules, 292 pages, royal octavo, till then the longest Act ever passed), the Bankruptcy Act, 1914, the Companies Acts, 1929, Law of Property, Supreme Court of Judicature, Workmen's Compensation Acts, 1925, and Poor Law and Land Drainage Acts, 1930. Some of these statutes are said to be strictly consolidating, 'purely literary' (Hardcastle), *i.e.* they collect in one pigeon hole, so to say, exact copies of all the scattered enactments on one subject, destroying the originals by repeal. Such a proceeding is, of course, a great saving of time and convenience both in domestic and legislative affairs. Theoretically, there is nothing but a removal: instead of looking for a thing in one place, you look in another. But practically this process always means rearrangement to some extent, and thus consolidation lets in a small new element. This is so, even if there are no judicial decisions on the separate Acts, or if they have already had their effect in the tributary streams merging and mingling in the main Act. But where judges have decided cases on sections and words of the constituent Acts, *i.e.* have interpreted or construed them judicially, it would be waste of time to ignore those decisions, so they are either distinctly incorporated in or distinctly excluded from the consolidating statute. Still, it does not purport to enact anything new, and seldom does so; but from time to time it becomes important, in order to do justice, to know whether such an Act intended to alter the law, however slightly, or merely intended to declare what it was.

Of codification, Ld. Thring says, 'It may be stated at once that nothing has been done, or perhaps can be done, towards any systematic codification of English law'; but this is hardly accurate. It is, perhaps, a question of words, but it is generally understood that there are a few codifying

[1] The Municipal Corporations Act, 1882, is our 'best specimen.'—Dicey, *Law and Opinion in England*, Lect. II., 1905.

Acts, viz. Bills of Exchange (1882), Partnership (1890), and Sale of Goods (1893), Insurance (1906). Perjury, Forgery, and Larceny were similarly treated in 1911, 1913, and 1916 respectively. Now, in the first (and earliest) of these we can see the word getting on, as it were, under a microscope supplied by the workman, and a glimpse brings home the situation in a most interesting way. 'Bills, notes, and cheques,' said Mr. Chalmers, in the Introduction to the third edition (ninth edition, 1927) of his *Digest* (Bills of Exchange), 'seemed to form a well-isolated subject, and I therefore set to work to prepare a digest of the law relating to them. I found that the law was contained in some 2500 cases, and 17 statutory enactments. I read through the whole of the decisions, beginning with the first reported case in 1603. But the cases on the subject were comparatively few and unimportant until the time of Lord Mansfield [about 1760]. The general principles of the law were then settled, and subsequent decisions, though very numerous, have been for the most part illustrations of, or deductions from, the general propositions then laid down. On some points there was a curious dearth of authority. As regard such points I had recourse to American decisions, and to inquiry about the usages among bankers and merchants. As the result, a good many propositions in the *Digest* (1878), even on points of frequent occurrence, had to be stated with a (probably) or a (perhaps).' Then the Institute of Bankers and the Associated Chambers of Commerce gave their assistance, and ultimately Scots law was conciliated, and the bill extended to Scotland. A strong committee of merchants, bankers, and lawyers of the House of Commons 'heckled' it, and it presently became the Bills of Exchange Act, 1882. No other such account by a draftsman of how legislatively the trick is done, if that expression may be pardoned, seems to be known. It is worth while to add a few more of his remarks. 'The Act has now (1891) been in operation for more than eight years. . . . Merchants and bankers say that it is a great convenience to them to have the whole of the general principles of the law of bills, notes, and cheques contained in a single Act of 100 sections.

As regards particular cases which arise, it is seldom necessary to go beyond the Act itself. It must also be an advantage to foreigners who have English bill transactions to have an authoritative statement of the English law on the subject in an accessible form . . . the Act, as yet, has given rise to very little litigation. I am sure that further codifying measures can be got through Parliament, if those in charge of them will not attempt too much. . . . Let a codifying bill, in the first instance, simply reproduce the existing law, however defective.[1] If the defects are patent and glaring, it will be easy to get them amended. If an amendment be opposed, it can be dropped without sacrificing the bill. The form of the law, at any rate, is improved, and its substance can always be amended by subsequent legislation. If a Bill, when introduced, proposes to effect changes in the law, every clause is looked at askance, and it is sure to encounter opposition.'

Now, here, incidentally, we get a glimpse for the first time of the importance of case law. The fundamental fact to remember is that the circumstances in each case differ; they may be very close in any two cases, but there must be some difference, and that difference may affect the law very much. It will not do to say common sense will show you whether the difference in the facts will make any difference in the law. It will not, just because you may not know whether or not there is any law affecting the difference; lawyers themselves are often puzzled to tell. For instance, one case may decide a point between a man and his 'servant,' and in the next the only difference may be that it is a case between a man and his clerk. The same words may or may not be actionable, according as they are written or spoken; whether a man is a partner or not may depend on very small things. A seller may or may not be able to recover the price from a buyer in exactly the same state of the facts, according as the price is below or above a certain amount. Therefore, when at any given moment it is proposed to collect all the law on

[1] As we are told, Ld. Herschell insisted on his doing, but he adds, 'Of course codification pure and simple is an impossibility' (*ib.* xli.).

a subject into a code, it is not possible to do so with absolute completeness, for all possible cases have not arisen ; those actually adjudicated may absolutely conflict or seem to conflict, cases suggested by way of *illustration* in the course of a judgment may or may not be decided (*i.e.* the judge may or may not give his opinion how he should decide if the case he suggests came before him), or there may be doubt what principle of law the court laid down in a recorded case, though there be none about the decision on the facts. Hence Sir Courtenay Ilbert, another great authority on the matter, says, 'We know that the chief practical difficulty of the lawyer and the judge is not the apprehension of principles, but the application of principles to facts, and that the best constructed code cannot remove this difficulty' (*Encyclopædia of Laws : Codification*). And thus it is that, though he may not intend it, the draftsman cannot but make new law here and there, if only because he cannot insert his 'probably' and his 'perhaps' in the text of the bill. Where there is a doubt or a conflict in his authorities, he must perforce choose, and so later the question may arise whether the Act altered the existing law on a given point or not.

Nevertheless, a code may be of great practical value. Sir Frederick Pollock, who drafted the Partnership Code, says, 'Codes are . . . for the ease of the lay people,' and his Act 'ought at any rate to make the substance and reasons of the law more comprehensible to men of business who are not lawyers . . . since difficult cases are, after all, the minority, perhaps it is of some importance for men of business to be enabled to see for themselves the principles applicable to easy ones' (12th ed. 1930). This is an approach to Bentham's ideal: 'The object of a code is that every one may consult the law of which he stands in need in the least possible time' (cited by Sir C. Ilbert). It is not to be supposed that an intelligent man could not understand an ordinary Act of Parliament, but he could hardly *guess* what other Acts—to say nothing of the cases—had a bearing on the one he was reading ; but of this danger there is much less risk in a code, for it purports to have assimilated and digested all relevant matter.

It may be added here that since 1868 there has been a Statute Law Committee [1] which deals with the form of the Statute Book. Its great achievement is the publication of the *Statutes Revised*, containing, so far, in twenty-four volumes all the statute law from 1235 to the end of 1920 *still in force*; Vol. 24 appeared in 1929. The minutest change in a statute is recorded yearly in the *Chronological Table of all the Statutes*, Vol. 1—which, of course, affects those twenty-four volumes, the earliest of which—even the 2nd edition—is now forty-three years old. This useful body has also swept away a great number of legal cobwebs lurking in the dark corners of obsolete statutes, using as brooms, 'Statute Law Revision Acts,' which, as it were, post the Statute Book up to date.

5. THE INTERPRETATION OF THE LAW

There is a story that some Western State of America passed a law, in the interest of temperance, that no drinking-saloon should exist within a mile of any schoolhouse. Under this a court decided that certain existing schoolhouses must be pulled down. The interpretation of the letter of the law may clearly be a matter of paramount importance.

In this country the official interpreters of the laws are the bench, and there never has been any doubt about it. A country J.P. sitting in a court must, if necessary, decide the meaning of words in an Act of Parliament. The earliest type of judge was, or was supposed to be, lawgiver and judge in one. Moses sat 'alone' (Ex. xviii. 14), and it was too much for him; his court was popular, and he had to appoint subordinates, reserving his strength as a court of appeal for 'the hard causes' (ver. 26). In our own country it was 'by slow degrees the work of hearing and deciding causes' was 'disengaged from governmental business' (P. and M., *History of English Law*, I. vi. p. 182). Now the separation is complete.

Why, then, is the phrase 'judge-made' law never used except in condemnation? Because those who use it think

[1] See *Parliamentary Paper*, 1877 (288), vol. 69, p. 373.

either that the judges in question have interpreted the law wrongly, or have added to a statute something which Parliament did not intend to be there, 'invented' it, as Pitt said; and that, in either case, they have 'made' law. It is obviously important to see whether, as a fact, there is any person or body but Parliament which does make new law.

A good instance [1] was supplied in 1849. Mr. Thorogood was a passenger in an omnibus, and, wishing to alight, did not wait for the omnibus to draw up at the kerb but got out whilst it was in motion and far enough from the path to allow another carriage to pass on the near side. An omnibus belonging to Mrs. Bryan came up at the moment, Mr. Thorogood was unable to get out of the way, was knocked down, and died in a few days. Mrs. Thorogood brought an action against Mrs. Bryan, but she was unsuccessful, and four judges held that Mr. Thorogood was so much 'identified' with the driver of his omnibus, that the latter's negligence—his own seems to have been dropped—was his own negligence as against a third party. They seem to have thought that Mrs. Thorogood had a remedy against the proprietor of her husband's omnibus. The point is that this decision (not on a statute, but at common law) became law, and it remained law till 1888, when the House of Lords expressly overruled this case, and exploded the doctrine of 'identification.' Meanwhile, no doubt, many cases had been decided as if the doctrine was right. It is worth quoting a few lines from a well-known text-book: 'You are driving your motor-car, we will say, at your usual furious and improper speed through the streets of a town, and I am going out to dinner in a taxi-cab. My driver, as it turns out—though, of course, I did not know it when I employed him—is drunk, and, through the joint negligence of him and you, a collision occurs, and I am badly hurt. According to the formerly accepted view, I am so far identified with my drunken driver that *his contributory negligence is mine*, and I shall fail in my claim against you. This theory of *identification* was . . . finally destroyed' by a case [2] 'where a collision having occurred

[1] 8 C.B. 114. [2] 13 App. Cases, 1 : 1888 ; H. of L.

between the steamships *Bushire* and *Bernina* through the fault of the masters of both, a passenger on board the *Bushire* was drowned. The representatives of the deceased brought an action . . . against the owners of the *Bernina* for negligence '—as Mrs. Thorogood had done—' and it was held that the deceased was not identified in respect of the negligence with those navigating the *Bushire*, and so the action was maintainable ' (Shirley's *Leading Cases*, 9th ed. p. 481). It is clear, therefore, that judges may make law, and that their law may be wrong, *i.e.* other lawyers of equal or greater authority do not agree with them.[1] On the other hand, the law they make is often right. Thus, according to Sir J. Fitzjames Stephen (*Digest of Criminal Law*, 1st ed. 1877, p. 345 : 3 *Hist. Cr. L.* 245), the law that perjury in a witness is punishable by the common law, is judge-made, an ' usurpation ' of the Star Chamber in 1613. ' The erection of the crime into an offence at common law is, no doubt, [one] of the boldest, and, it must be added, one of the most reasonable acts of judicial legislation on record.' The point for the moment is that the judges' power of making law is derived from the right of interpreting the existing law—in this instance, the common law.

Let us take another case, where the question was whether there was a conflict between the common law and the statute law. In 1872 there was a great strike of gas-stokers in London, under the auspices of a trade union. Parliament, in 1871, had carefully regulated the rights of unions by one Act, and expressly provided for the ordinary offences of workmen on strike by another (Criminal Law Amendment Act, 1871). Before that time strikes were ' hit ' as illegal conspiracies, and it was intended and generally understood that in future a mere strike by a combination was not to be criminal. Nevertheless, Bunn and his comrades were tried

[1] Hence a witty Appeal Judge could, without offence, say, ' X. was everything a judge of first instance should be—he was courteous, he was rapid and always wrong.' Blackstone's commentator (1 *Comm.* 70) refers to L. Mansfield's saying [2 *Doug.* 722 in 1781], ' The absurdity of *Ld. Lincoln's* case [v. *Roll*, &c. : Shower, *Parly. Cases*, 154, &c. : 1695] is shocking. However, it is now law ' : and to ' the notorious [*R.* v.] *Bewdly* [Corporation] case, in 1712 (P. Williams, 207), where the practice of a court for several years though directly contrary to the words of an Act of Parliament was held obligatory.'

at the Old Bailey, though they were not charged with any offence under that (second) Act. The judge held that, notwithstanding the statutes, they might be guilty of conspiracy at common law. They were convicted and sentenced to twelve months' hard labour (but only served four). It is not surprising that, as Sir J. F. Stephen puts it, 'this decision caused great dissatisfaction amongst those who were principally affected by it.' As a result, the (second) Act was repealed in 1875, and replaced by one still existing (Conspiracy and Protection of Property, since amended) which puts the matter on a clear basis. Yet it does not expressly overrule the bad law. This, however, was emphatically done by five judges in 1891, who took the opportunity of saying (about this case, and another in 1867), 'to hold that the very same acts which are expressly legalized by statute, remain, nevertheless, crimes punishable by the common law is contrary to good sense and elementary principle.' (1891, 2 Q.B. 560.) Sir J. F. Stephen mentions the offence of conspiracy as one which, in a sense, the judges created, and he may well say that the 'history of the matter is by no means favourable to the declaration by the bench of new offences,' and that this instance is probably the last occasion. Coke expressly held that a statute could not prevail against the principles of common law, but this has never been the accepted view.

In 1902 Parliament resolved to protect music publishers against the piracies of their songs by street hawkers who sold them for a few pence (the printers, of course, not having any copyright in them). It was enacted that these copies might be seized by a constable without warranty; they were then to be taken before a court of summary jurisdiction, to be, 'on proof that they are infringements of the copyright, . . . forfeited or destroyed, or otherwise dealt with, as the court may think fit.' The judges, when appealed to, said that this did not mean that the order for forfeiture or destruction could be made without summoning the hawker; he must be summoned before this could be done.[1] In 1915

[1] For an instance of 'an equity judge literally making the law,' see L.Jo., May 7, 1904, p. 236 (3 *Russ.* 1, 55: 1823-8). 'It would be difficult to find a better instance of judge-made law than the rule laid

the Court of Appeal thought that 'the decision of *D.* v. *D.* [1913, *P.* 198] did alter the law, and therefore cannot be upheld.' Of course, no judge *consciously* rules because he thinks Parliament ought to have enacted according to his ruling; this would, as Lord Chancellor Halsbury once [1] put it, 'look like a reflection on the Legislature,' but when the point is doubtful, a judge is naturally biased to what he thinks ought morally to be done.

All these instances have been given because it is important to remember that the power to interpret the law is practically power to make the law within certain limits.

It is perhaps worth adding, that if any judicial decision is supposed to work injustice, Parliament can legislate so that the grievance is redressed; and it often does so, in fact. For instance, when, in 1858, it was decided that the fraudulent obliteration of the crossing on a cheque was not a forgery, an Act was passed in that year to make it a crime. The writing 'not negotiable' on a cheque was authorized in an Act of 1876, introduced to prevent such a hard case [2]

down by the House of Lords itself that the House is bound by its own decisions.'—Dicey, *Law and Opinion in England* (1905), p. 484; see all Note IV. And cf. his *Law of the Constitution* (1915), 217: 'The Habeas Corpus Acts have achieved this end [enforcing personal liberty] and have therefore done for the liberty of Englishmen more than could have been achieved by any declaration of rights,' they are really 'of more importance . . . even than such very lawyer-like documents as the Petition of Right [1628] or the Bill of Rights [1689], though these . . . show almost equally with the H.C. Act [1679] that the law of the English constitution is at bottom judge-made law.'

It is sometimes said that the H.C. was invented to get people into prison, but used to get them out of it; before 1679 the old writ of H.C. was dodged by transferring prisoners from gaol to gaol so that their friends did not know to whom to address process. McKechnie, *Magna Carta*, 421, shows that the 'original object' of H.C. was 'the safe keeping of the prisoner's body in gaol, not his liberation therefrom.'

[1] 19 T.L.R. 213: 1903. On another occasion he said, 'I think a court of law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes,' 1891, A.C. 549. In 1701 Holt C.J. said (12 Mod. 687–8), 'An act of parliament can do no wrong, though it may do several things that look pretty odd,' which would be a good motto for Lord Chief Justice Hewart's *The New Despotism* (1929), *i.e.* 'the pretensions and encroachments of bureaucracy' instigated by Parliament—apparently an unique instance of attack on adopted *policy* of the legislature by a judge.

[2] 1 Q.B.D. 31.

as occurred in 1875, when the payee of a cheque lost his money through its being stolen because, though he had crossed it to his bank, he had not thereby destroyed its negotiability. In 1875 a German steamer ran into an English ship off Dover, whereby several persons on the latter lost their lives. The German captain was tried at the Central Criminal Court for manslaughter and found guilty, but after much argument [1] the conviction was quashed on the ground that the court had no jurisdiction to try a foreigner for an offence on a foreign ship which was passing through British waters to a foreign port. In 1878 the Territorial Waters Act was passed to give such a jurisdiction. In March 1884 four judges decided [2] that the Married Women's Property Act, 1882, did not permit a husband to give evidence against his wife for stealing his property (though it gave her the right against him in those circumstances—'odd,' as Stephen J. said): by June 23 this absurd omission was filled by the M.W.P.A., 1884, which expressly recites—'a doubt has arisen,' &c. The Trade Disputes Act, 1906, was passed to get rid, so to say, of the 'Taff Vale' Judgment (1901), as the Trade Union Act, 1913, was to counteract 'the Osborne' decision in 1910.

6. MORALITY AND THE LAW

Before embarking on procedure for any end, it is essential to know whether the law can assist to that end. The law by no means takes cognizance of all grievances which an individual may suffer, immoral though the deeds may be. In what spirit, then, does the law recognize wrongs? The morality of the law is low, and there are many morally wrong and even wicked acts which it will not punish. A lie, for instance, may cause loss and damage to any one believing it to be true, but a lie, as such, is no offence against the law. It only becomes one in certain circumstances, *e.g.* in the mouth of a vendor whose misrepresentations induce a purchaser to enter into a bad bargain, and even then the technical penalty may only be rescission of the contract, though, no doubt, the costs of an

[1] 2 Ex. D. 63. [2] 12 Q.B.D. 266.

action may be a substantial fine. Drunkenness in itself is not an offence. Unchastity is only visited by the law quite exceptionally. No action lies for libels on the dead. It is not a slander to say of a man that he is suspected of having committed a murder (unless there is 'special' damage), and all sorts of foul abuse enjoy immunity if the words used do not directly cause damage. If the sparks from a railway engine set fire to anything, the owner (except of agricultural crops) cannot recover compensation from the company, provided there is nothing amiss with the locomotive's conditions or management. What a judge once said is very much to the point. 'A great part of the atrocious things which have been done . . . are not punishable by English law. It does seem an extraordinary thing that a man, being entrusted with money by other people for investment, should be able to put it into his own pocket fraudulently and dishonestly, and yet commit no crime punishable by English law. I am reminded of a circumstance that was mentioned to me some time ago by a friend very greatly versed in the English criminal law. In the course of his studies he made out a list of the iniquitous things which could be done by the English law without bringing the man under any provision of the common or statute law, and he had had it in his mind at one time to publish it, to show how defective the law was, but he forbore on grounds of public policy to call attention to what people might do without rendering themselves liable to punishment.'[1] Now, in all these instances—except that of the railway—the wrong done is, no one can deny, a moral wrong. On what principle, then, does the law refuse to take notice of them?

The answer, broadly, is that it cannot take notice of all moral failings, and, therefore, it must pick and choose. It cannot, because it would be physically impossible. To be the guardian of all morality it would have to contemplate every fault of temper, every act of discourtesy, every deviation from the truth, including every misstatement of fact, every act of disobedience, every broken word, every

[1] 1891, 2 Q.B. 141. But the Larceny Acts of 1901 and 1916 removed the difficulty here: *post* and *propter hoc.*

infirmity of disposition, every spiteful or unkind action—in short, everything that could be described as immoral in the sense of flowing from a bad motive or a bad habit. Even if there was a limit of age beneath which there was no subjection to the law, there would be a large period in which the faults now within the jurisdiction of the father or the schoolmaster would be investigated by a public tribunal. Life under such a system would be intolerable. This is so obvious that there can be no need to follow it out; but it is, perhaps, worth adding that one certain effect of such a state of things would be that men would avoid the society of other men. Our law is practical, and selects only what it considers most important to put under its ban, leaving other wrongdoings to the social sanction, *i.e.* to the discretion of the individuals in contact with wrongdoers. It may be questioned, in any given case, whether this policy is right. For instance, it is maintained that to be drunk should be a legal offence. But in this, as in every other instance, it will be found—though the reason may not satisfy every reformer—that there are grounds for legislative inactivity. In this case it may fairly be held that to attempt to prosecute every one, say, who took 'too much' to drink in a private house, would encourage such an amount of spying and domestic treachery, and would lead to such endless diversity of opinions whether the extreme limit of sobriety had been reached or not, that such a moral law, pure and simple, could not be administered fairly and equally, and would probably fall into contempt. In other words, such a prosecution would do more moral harm than moral good. A principle of our law that we shall hear more about is that where the administration of a law is very difficult, or likely to be inequitable—which happens especially when it is hard to 'draw the line' between those who are to be included and those who are not—then that is a reason against instituting the law. So with much immorality—in the narrow sense. Rightly or wrongly, it is believed that a legal sanction is not the surest way—not so sure as the social sanction—to prevent it; and, in any case, that a legal punishment is too great an invasion of individual

freedom of action, though that freedom be shamefully abused. (Some countries are severer in this respect than ours.) In this instance, in the conflict with individual liberty, the law gives way.

The moral law, then, and the legal law are not co-extensive. The law picks what it chooses out of the moral law. Consequently it never purports to enjoin anything but what is moral.[1]

7. NON-MORAL, BUT ILLEGAL

It is convenient to point out here the principle on which the law enforces a multitude of things which have no direct or obvious connexion with morals. If the maximum legal rate at which a motor may be driven is twelve miles an hour, it could hardly be called an immoral act to drive at thirteen. But it is immoral to disobey a law, not repugnant to the conscience, and, the rate being once fixed by authority, the law as properly regards a transgression of it as a violation of the moral law as a breach of faith or a burglary. Rules, regulations, by-laws, &c., in fact often supply illustrations of the recognition of the duty of obedience to the law because it is the law.

THE MECHANISM OF THE LAW: THE CONDUCT AND CONSEQUENCES OF A CIVIL ACTION

8. GOING TO LAW

So far we have been dealing with preliminary considerations concerning the system or framework of the law under which we live. We may now turn more particularly to its mechanism, that is, the practice and procedure of the law (the effects of which often puzzle laymen, while the substance of the law is intelligible to them).

[1] The frequent dictum that 'Christianity is part' of our law must now be interpreted, that the law will enjoin nothing against Christian *morality*; it cannot refer to Christian dogma, as Ld. Coleridge pointed out; 15 Cox C.C. 235: 1883.

In a word, the sole object of practice and procedure (for here the two words means the same thing) is to secure justice. The object of the substantive law is to enforce or apply great moral principles, the object of procedure (the adjective law, as it is sometimes called) is (or ought to be) to give litigants the benefit of that law with the smallest possible delay, and at the smallest possible expense.

Here we plunge at once into the vast theme of 'going to law.' In course of time, the law of 'going to law' has itself become huge. Many books, not to say a whole literature, are devoted to the subject, and lawyers have been famous as counsel or judges for their knowledge and experience of that law. By comparison with the cardinal principles which it applies and safeguards, procedure is justly depreciated as a web of formalities and technicalities, but its sole aim is justice in its very best form, and without it (in some shape or another) justice is nowadays impossible. Some people may conceive that if two persons have a dispute, ideal justice requires that they should be able to go off there and then (as the two mothers with the baby did to Solomon) to an officer of justice,[1] who will tell them whether either has a grievance which the law will recognize or redress, and, if either has, will decree a remedy or a punishment. But such a type of case is to-day almost impossible, if only because the parties do not usually desire so speedy a settlement. But even to this primitive unceremoniousness the law of to-day can approximate, especially in County Courts [2] and those of justices or stipendiaries, and even in favourable circumstances in the High Court.[3] In a police court, for instance, it is by no means inconceivable that a quarrel or a difference should be adjudicated upon within an hour or so of its occurrence, and,

[1] This was possible and actually done in the case of a dispute between a cabdriver and his fare in London between 1853 and 1896.

[2] Unless it is otherwise stated, we refer throughout to the High Court.

[3] *e.g.* where there was a dispute on a bill of lading, and it was desired that the ship should sail on June 19, an action was begun on June 17, and, by consent, ordered to be tried, and was tried, on the 18th, in the 'Commercial' Court (1 Comm. Cas. 85: 1895). See 1 *Cambridge Law Journal*, 16: 1921.

If the magistrate's order can be satisfied on the spot, that there should be no formality (such as summons or notice) between the parties from beginning to end. Indeed, theoretically, the law has preserved—and the persistence is very noteworthy—both the immediacy of time in hearing and the personal pleading of the parties of the 'Pie-powder' courts, where the dust of the journey was still on the parties' feet. However, primitive simplicity in our practice is unattainable. Much of that practice is simple, but much at any given moment can only be understood by one trained in its *technique*, that is, a lawyer. This accounts for the fact that a large part of the criticism of the law, which is a constant feature of the newspaper, is aimed not at the principle of a statute, but at some incident of practice; the writer, probably, does not understand it. If he did, he would realize that the rule was originally designed solely in the interest of justice.

Historically, the relation between procedure and law proper (*i.e.* the ethics of conduct) has been intimate; here its nature can only be indicated—most conveniently in the language of Professor Holland: 'Rules of procedure occupy so prominent a place in early society, and furnish so much curious illustration of the history of civilization, that they have attracted a share of attention perhaps in excess of their real importance. One might almost suppose from the language of some writers that an elaborately organized procedure may precede a clear recognition of the rights which it is intended to protect. It has been said that law is concerned more with remedies than with rights. It would be as reasonable to say that a field consists in its hedge and ditch rather than in the space of land which these enclose. In point of fact, a right must be recognized at least as soon as, if not before, the moment when it is fenced round by remedies. The true interest of the topic of Procedure is derived, first, from the close connection which may be traced between its earliest forms and the anarchy which precede them;[1] and, secondly, from the manner in which the tribunals have contrived from time to time to effect

[1] Note *ib.*: '"Trial by battle" was a late survival in England of regulated self-help.'

changes in the substance of the law itself, under cover of merely modifying the methods by which it is enforced' (*Jurisprudence*, 359 : 1924).

For every purpose, including procedure, we must distinguish sharply between civil and criminal matters. Broadly, the distinction is popularly appreciated. When people talk of going to law, they do not mean setting the *criminal* law in motion. We will therefore deal first with a civil action ; with the necessary preliminary processes, with the courts before which the action must be brought, with the conduct of the action itself and the rules by which that conduct is guided, and with the results of such an action in the form of damages and costs. The criminal law and its enforcement will be treated later.

9. LITIGATION

Once at law, technicalities begin. Foremost among these, in time and importance, is giving clear notice to the other side what the alleged grievance against him (or her, or them) is. It is by no means intended to describe here the stages or incidents of an action ; general principles adopted by the law only are dealt with. The one applicable most closely to the beginning of all legal proceedings is that each party should have ample opportunity to state its case, which implies that the party attacked shall have ample opportunity to defend itself. One great step toward this end is to make sure that the issue between the parties is clearly defined ; and as soon as notice is formally given that the law has been set in motion, authority steps in to decide the next moves on both sides. Its object is, that when the actual day of judgment, the trial, comes, the judge and each side may know exactly what has to be proved or what to be met. It is obvious that if the matter at issue is simple, the first notice may tell the defendant all he can expect to know ; and for this case, too, provision is made. But, generally speaking, at this point the question of ' pleadings ' arises.

If this were a history, a volume of it might be devoted to the extraordinary part that ' pleading ' for centuries—

indeed, till late in the nineteenth century—played in our procedure. A few instances will bring this home. Some are taken from criminal trials, in which a man's life was in peril, but the principle was the same throughout the law. Crone, in 1690, was found guilty of high treason. 'A motion in arrest of judgment was instantly made on the ground that a Latin word, endorsed on the back of the indictment, was incorrectly spelt. The objection was, undoubtedly, frivolous. . . . But Holt and his brethren remembered that they were now, for the first time since the Revolution, trying a culprit on a charge of high treason. . . . The passing of the sentence was therefore deferred, a day was appointed for considering the point raised by Crone, and counsel were assigned to argue on his behalf. "This would not have been done, Mr. Crone," said the Lord Chief Justice significantly, "in either of the last two reigns." After a full hearing, the bench unanimously pronounced the error to be immaterial, and the prisoner was condemned to death' (Macaulay, *History*, chap. xv.).[1] In 1727 a man charged with challenging to a duel and described as 'a gentleman,' himself objected that he was not, but 'a surgeon'; upon debate his accuser was allowed to 'amend' on paying the costs.

'Chelmsford. John Taylor had been arraigned and tried on the charge of uttering a forged note in the name of Bartholomew Browne, for £820, 10*s*. 0*d*., with intent to defraud the bank of Cricket & Co., at Colchester, of which the jury found him guilty; but just as Baron Hotham was about to put on his black cap, and to pass the sentence of death on the prisoner, one of the barristers, not retained on the trial, happening to turn over the forged note, saw it signed Bartw. Browne; throwing his eyes immediately on the indictment, perceived it written therein Bartholomew Browne. He immediatly pointed out the circumstance to Mr. Garrow, counsellor for the prisoner, who rose up and stated the variance as fatal to the indictment, in which the judge concurred, and discharged the prisoner' (Annual Register, 1800, March 30).

[1] For a similar ludicrous wrangle (just before sentence of death) see 12 St. Tr. 815–16: 1691.

In both these instances an infinitesimal technicality made for leniency (though none the less one defeated justice as it was understood at the time). It was in civil matters that pleading flourished most rankly,[1] and was most intimately associated with injustice.

What the state of things was a century ago, let a most competent witness, John Campbell, afterwards Lord Chancellor of Ireland and then of England, when a law student and pupil of Tidd, the great special pleader, attest. In his Autiobiography (i. 147) is the following letter written by him :

'*May* 17, 1804.

'There is the most scrupulous nicety required in these proceedings. For instance, there are different kinds of actions, as assumpsit, detinue, trespass, case, etc. The difficulty is to know which of these to bring, for it seldom happens that more than one of them will lie. There is still more difficulty in the defence to know what is a good justification, and how it ought to be pleaded, to be sure that you always suit the nature of the defence to the nature of the action, and to take advantage of any defect on the opposite side. . . . By continuing in this low, illiberal drudgery so long their [special pleaders'[2]] minds are contracted, and they are mere quibblers all their lives after.'

[1] See, for instance, pp. 46–9 of the first edition (1906) of this book; at this distance of time it is not worth while reproducing them. The curious should look at *Criticisms on the Bar* by 'Amicus Curiae' [J. P. Collier], 1819, pp. 5–6. In 1815 (G. Cooper's Cases, 304) 'defendant swore that his reason for not setting out the account was that it was so voluminous that the stamps to the schedule would alone cost £29,000.' The suit had been going on 'on the accounts' in the Master's office for nearly 25 years : Bennet, *Note-book of a Law Reporter*, p. 113 : 1867.

[2] 'The whole system of pleading and the old state of things . . . was at once absurd and iniquitous' (L.C.J. Coleridge in 1876 ; 2 *Life*, p. 259). Cf. : 'Some pleading was delivered, and one of the statements in it was that on March 29 plaintiff called on defendant with tears in her eyes.' The clerk put this into the form of an interrogatory : 'Is it not a fact that on March 29 plaintiff called on defendant, and whether or not with tears in her eyes or in one, and which of them ?' (L.Jo., Dec. 9, 1905).

This state of things lasted a good while longer [1]—in less exuberant shapes down to our time. The overwhelming importance which pleadings for centuries had in the practice of the law, is now of historical interest only. The science was a study by itself, and had a band of professors solely devoted to it. But most of the forms and almost all the spirit of this institution are gone, and to-day we claim to take a common-sense practical view of everything, and the tendency is altogether away from technicality. 'It may be asserted, without fear of contradiction, that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation. The expenses of the law are still too heavy,[2] and have not diminished *pari passu* with other abuses. But law has ceased to be a scientific game that may be won or lost by playing some particular move' (Ld. Bowen in Ward's *Reign of Queen Victoria*, i. 310).

If any one date can be assigned for the change, perhaps it is that of the great Judicature Act of 1873. 'The system of pleading,' says a master of the art, 'introduced by the Judicature Acts is in theory the best and wisest, and, indeed, the only sensible system of

[1] 'The 31st day of December 1834 was perhaps the last day of the old Common Law learning, but much of that old learning was already obsolete. . . .'—Augustine Birrell, *A Century of Law Reform* (1901), 178.

[2] This idea persists in our literature. In Massinger's *New Way to pay Old Debts* (1626), Sir Giles Overreach has a scheme for ruining an enemy by law costs. 'When I have harried him thus two or three years, though he sue *in forma pauperis*, in spite of all his thrift and care he'll grow behindhand.' 'You'll go to law, will ye?' says Alderman Smuggler in Farquhar's *Constant Couple* (II. 4), 1700. 'I can maintain a suit of law be it right or wrong these 40 years, thanks to the honest practice of the courts.' Burnet, *History*, 658 (about 1730), says: 'The law of England is the greatest grievance of the nation, very expensive and dilatory, there is no end of suits, especially when they are brought into chancery. It is a matter of deep study to be exact in the law. Great advantages are taken upon inconsiderable errors.' 'The true wonder was how a cause ever ended at all. One law suit in those days almost entitled a counsel to marry' (Ld. Cockburn, *Journal*, Nov. 8, 1848, of Scotland). A City magnate once said of the hierarchy of our courts: 'Yes, and there is another behind the House of Lords—the Bankruptcy Court.' (See also Scrutton L.J., in 1920; 1 *Cambridge Law Journal*, 9–10, and the legal journals, *passim*.)

pleading in civil actions. Each party in turn is required to state the material facts on which he relies ; he must also deal specifically with the facts alleged by his opponent, admitting or denying each of them in detail ; and thus the matters really in dispute are speedily ascertained and defined. Some such preliminary process is essential before the trial' (Blake Odgers on Procedure, Pleading, &c., Preface, 1891 : 1930).

10. PRELIMINARY PROCESSES

The simplest of such preliminary processes is what we have already called the formal notice of the action. To this, of course, there may be no response ; in that case it is only fair that the sued shall be taken to admit the claim—judgment goes by default, as it is called.[1] Where the claim is for a specific sum or thing, judgment can be at once given ; but if the demand is for damages, *i.e.* for a sum to be found or assessed by a jury or a judge, there must be a further proceeding on this point only. So at any stage of the pleadings the sued or the suer may make default in the next formal step. But for the moment we deal with the normal course of litigation ; but even here we must distinguish between litigation of two kinds. It will be easily understood that most disputes at law are *bona fide* disputes, but there may be disputes which are not *bona fide*. For instance, I may lend a man money, and have to sue him for repayment. He has no answer, he cannot deny that he owes the money. It would be absurd to bandy pleadings to and fro, and to go through the trouble of a trial. There is a simple process by which the debtor is prevented from defending such an action, and judgment is at once summarily given for the suer. It is clear that in such a case any resistance to the demand can only be for the purpose

[1] In 1911 in the King's Bench Division 'there were in round numbers 11,000 actions in which judgment *in default of appearance* was entered . . . a considerable proportion of King's Bench actions begin and end with the issue of the writ—probably from 15,000 to 20,000 in a year. These are mere debt actions in which the defendant pays the debt and costs directly he is served with the writ.' Sir John Macdonell, *Civil Judicial Statistics* for 1911, p. 14.

of delay, for the debtor to gain time, and justice requires that such a purpose should be defeated, and all the more so because a dishonest or disingenuous litigant, when sued, can always get some delay by making a formal answer to the formal notice that the action has been begun, though he cannot do this without some cost. Still, it is obvious that the power of giving summary judgment may be easily abused : people are not to be lightly shut out from making their defences. Consequently, great caution is exercised in granting this privilege to suitors ; the mere suspicion that delay only is sought, or that the defence is not honest, is not enough. It must be manifest on the face of it, that in law there is no answer. For instance, A. has given B. a cheque in payment, say, of a debt, and then stops the cheque, or it is dishonoured. B. sues A. A. swears that the debt was for a bet. If this is true, he is not liable to pay. This may be utterly untrue, and B. may swear that he actually lent A. the cash, and the official, a Master, who has to decide may believe him. But he cannot give judgment summarily in his favour ; there is an issue between the parties, and it must be tried. Or suppose B. has supplied A. with goods, and has not been paid for them. When he sues, A. says, ' True, I bought the goods of you, but they are not up to sample, or not in proper condition ' ; or, ' I ordered one thing, you sent another ' ; or, ' You are asking more than the agreed price.' The same official can see at a glance what amount A. disputes and what he admits to be due to B.—*e.g.* the value he puts upon the goods he has in fact kept, or the price which *he* asserts was agreed—and he may order this sum to be paid into court as a condition of going to trial. ' If you don't,' he says in effect, ' I give judgment against you.' This, at any rate, deprives A. of the advantage of delay. (The official may, in his discretion, order the admitted sum to be paid to B. as a condition of allowing a trial about the rest ; but, generally, when there are outstanding questions between the parties, it is fairer to have the money brought into court.) Or he may say, ' How can I decide whether the goods were in proper condition, or up to sample, &c. ? A. denies all liability, as he is entitled to do if he is right. You must

fight it out in court'; and so, in this and in other cases, he gives unconditional leave to defend. The obligation to pay into court is found, in practice, to lead to a speedy satisfaction of *just* debts, for the dilatory debtor has nothing more to gain, and may lose much in costs by going on. If the party ordered to bring a sum into court as a condition of defending an action feels himself aggrieved, he may appeal against the order; and in a well-known case [1] in 1901, though such an appeal, first from the Master to a judge, then from him to the Court of Appeal, was unsuccessful, it was finally allowed by the House of Lords.

Such preliminary processes as we have mentioned are not pleadings, and are not connected with pleadings, but have been touched on as sharing with pleadings the character of preliminaries to trial. The great bulk of cases are *bona fide* disputes, *i.e.* on the face of them there is a genuine difference between the parties on questions of fact or law (whether the motive of each in going to law is honest or not), and it is in such cases that there are pleadings almost without exception. There is, however, an exception even here. In 1893, 'for the first time in the history of our law,' a plaintiff could dispense with pleadings, if he thought fit; since 1897, after some vicissitudes, he cannot do so without a Master's order.[2] It is only practical where the issue is extremely simple and sufficiently appears in the first formal notice to the other side, and is barely possible without the consent of the other side. In County Courts the pleadings, if they may be so called at all, are of the simplest—a state of things which some reformers would introduce 'above.'

[1] 85 L.T. 262. In 1926–7 a dispute on taxation of costs by a Master was decided by the judge in favour of the defendants; the C.A. reversed this judgment; but in the H. of L. five lords unanimously reversed them: 1929, A.C. The dispute before the Master itself arose out of an action between the parties, in which the same judge was reversed by the C.A. and restored by the H. of L.: 1928, 1 K.B. 241.

[2] Blake Odgers above, at p. 80. Cf. Sir John Simon, K.C. (Address to the American Bar Association at Cincinnati, Aug. 31, 1921): 'The old system of pleading has been abolished, with the result that more simplicity has been introduced into the preliminaries of trial, though *with a sacrifice of precision* which many of the best English lawyers realize to be a misfortune.'

In a very large proportion of cases, then, the proper authority, among other directions which he gives on the conduct of the action launched, orders pleadings to be delivered. The only technical quotation here shall be Order 19, rule 4, of the Rules of the Supreme Court: 'Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.'

It is not worth while to give a specimen of a set of pleadings. They vary, of course, with the circumstances of each case, and the possibilities, therefore, are infinite, and one example is not a precedent for another. The contents may, perhaps, be brought home to a layman thus. Imagine two persons having a difference and endeavouring to settle it by correspondence, *without argument*. A. states his grievance in a letter to B., confining himself absolutely to what he believes to be the facts relevant, and demanding specific satisfaction. B. replies, giving his version of the facts, either denying, or admitting expressly or impliedly, the facts alleged in A.'s letter, but always taking care not to 'show his hand,' any more than A. did, *i.e.* saying nothing about the evidence he can bring, who is to prove this or that of his facts, &c. A. will probably write back and gladly acknowledge the admissions of B., if any, and point out that now the only questions between them are so and so; or, on B.'s answer he may formally withdraw some of his statements, and adhere to the rest; or, if there are no admissions on either side, A. may coldly reply that it is now plain what the dispute or disputes is or are between them, and here very frequently, in law and out of it, the correspondence may cease. But it may go on a little further if A. introduces new matter—always of alleged fact—in his reply, whether as a result of what B. has said or not, and B. may think it worth while to rejoin. At any rate, when the exchange of letters ceases, it is obvious, if the writers have not satisfied each other, the dispute must be settled otherwise than by the pen, and probably the ast word in the epistolary war will say so. Now, suppose

the chosen arbitrament is the law; then a correspondence of this sort, put into the hands of the judge at the first moment of the trial, will be the pleadings, and ought to enable him to see at a glance what 'it's all about.' In other words, he knows the four corners within which the contention must be carried on, and beyond which it is his duty not to let it range without good reason.

The pleaders, of course, in the interchange sketched, always have their eyes on the positive law pertinent to their facts, *i.e.* they know that sooner or later the correspondence will be submitted to other lawyers, and the suer, therefore, has to fix on the form of his action—a purely technical matter, and generally, but not always, very simple, for he only has to decide whether he will frame it as for libel or trespass or debt, or breach of contract or detention, &c., or for several of these together—grievances which cannot be confused—though in a state of complicated facts it may be a very difficult matter to know on what ground to sue. And as he must sue on some definite legal ground,[1] he must be careful that his opponent does not find

[1] Or several legal grounds arising out of the same facts. For instance, suppose a shopkeeper who deals in furniture dismisses his manager, who takes away with him a favourite desk he has been in the habit of using during his service, and to which he lays claim, and of which he obtains possession by reason of his facilities for going all over his master's premises. The shopkeeper could sue him for detinue, or trover, or trespass to goods—there is now no practical difference between these—*i.e.* for return of the desk and for damages for its detention, or for the value of the thing. Or, he could elect to treat the ex-manager's act as a purchase of the desk, and sue for the price. And at the same time he could sue for damage for the trespass to the shop and warehouse if, after his authority as manager had ceased, he presumed to enter. Further, suppose that in taking the chattel away it had been injured, or that the taker had sold it for cash after he got it. The true owner might, in addition to its return, ask for damages for the negligent treatment of his property in the former case, and in the latter sue for money had and received to his use. The pleader, not knowing exactly what evidence he would be able to produce at the trial, would be justified in framing his claim on all these grounds simultaneously (even 'in the alternative,' where they were inconsistent), as his client would be content, of course, to win upon one. The judge (and jury, if there is one) will see that substantial justice is done. Thus, if the shopkeeper makes out his title to the desk, they will either award him the fair price of it, or, if he prefers to have it back, they will see that he is compensated for any deterioration to its selling value by giving him adequate damages, whether they call them damages for negligence, or trespass, or con-

reason to say that, admitting every fact alleged by the suer, his action must still fail, for all these facts combined do not in law give a cause of action, *i.e.* they disclose nothing of which the law will take cognizance. If this be so, it is obviously just that the action should not be allowed to go farther, causing unnecessary waste of time and money, and so there is a procedure by which, if such an objection is taken, it may be decided whether, on their pleadings, the parties had anything to go to law about. In this extreme form this power is not commonly exercised. One case may be mentioned,[1] where, undoubtedly through the 'rigging' of the market for certain shares, a man had lost nearly eight thousand pounds. His action was stopped before trial because it was held in law, if all his allegations were proved, they would not give him the ground of action he had set up. In other words, for the moral fraud of which he alleged he had been the victim, the law gave no relief. But the power of striking allegations out of all pleadings on the ground that they have nothing to do with the questions at issue, and therefore ought to be eliminated before these issues are determined, is hourly exercised. The attempt to introduce irrelevant considerations with a view to prejudice opponents is the echo of a

version. If the facts proved ground one form of action alleged and not another, the judge may, and often does, there and then allow the pleading to be amended—provided, of course, that no injustice is done to the other side by taking them by surprise—so that a mere technicality shall not defeat the object of the trial. The large powers of amendment judges now possess are an essential feature of the present system of pleading. Nevertheless, it is by no means a matter of course that leave to amend is given. For instance, where a certain agreement was set up, it was alleged in answer that it was not valid because one party, whose agent had signed it for him, was of unsound mind, and therefore the agent was not lawfully authorized to sign. But the judge found that the principal was not of unsound mind, and refused to allow the agent's want of proper authority to be set up as a separate and independent defence, because, on the pleadings, the other side could not be prepared to meet such a case. All they could be expected to do was to show that there was nothing wrong with the agreement on the ground of the principal's insanity; nothing else affecting the agent's appointment had been alleged against them. Consequently the impeacher of the agreement lost his case, though if his pleader had set up the agent's defect substantively, he might have won. 1877, 7 Ch.D. 284.

[1] 64 L.T. 598, in 1891.

private quarrel, and cannot be permitted in a scientific inquiry.

A comparison has already been made between an interchange of pleadings and the course of a correspondence on some disputed matter. Certain questions would probably be asked by one side or the other, with a view of clearing up doubts about the meaning of the other side's statements on certain points, or, possibly, on the main point in issue. So it is at law. A man cannot sue me for a sum of money without giving particulars. He must, at least, say whether he lent me cash, or sold me goods, or paid a debt or subscription for me at my request. In a good many cases this will be enough ; I shall know to what he refers. But he may send in a bill for a period of twelve months, merely demanding a certain total sum. I am clearly entitled to know the amount of each item, when and for what it was incurred, and if he sues me for the lump sum, there is a short way of making him state these specific facts at his expense, even though it ultimately turns out that he was right on every one, and I owe him every penny he claims. And so, generally in every case, one side or the other may ask for particulars of some statement which the opponent has made, and if the proper tribunal decides that there cannot be a full or fair trial of the dispute without them, it will order them to be given, and if this order is disobeyed, the defaulter will not be allowed to get any advantage from—possibly not to prove—his incomplete statements, and may be adjudged to lose the cause for his default. Take another instance. ' In an action for conspiring to induce certain persons by threats to break their contracts with the plaintiffs the defendant is entitled to particulars stating the name of each such person,' ' the kind of threat used in each case, and when, and by which defendant each such threat was made, and whether verbally [orally ?], or in writing, if in writing, identifying the document ' (Odgers, 1926).

These are simple cases, and it may seem strange that any one should want to withhold these details ; but clearly it would be detrimental to one party to an action to be kept in ignorance of the facts collected by the other,

as these facts would have to be met—and it is often difficult for the tribunal to decide what particulars should be given. For example, to take Dr. Odgers's next instance, 'where directors plead under the Companies Acts, that they *bona fide* believed their statements to be true, and that they had reasonable grounds for their belief, they' were 'ordered to deliver particulars of the grounds of their belief,' it is easy to see how conveniently, if they had done anything wrong, they could shelter themselves under an honest belief which was impervious to scrutiny, and how readily, upon a compulsory disclosure, their whole case might collapse. Nevertheless, assuming that they had acted with absolute probity, it is quite conceivable that it might be fatal to the interest of their company to divulge what was asked, for they may have had private and confidential information, which, of course, would not be again forthcoming if the name of the informant had to be revealed. This illustrates the difficulty the tribunal often feels in adjudicating on particulars. Still, the tendency now is to grant rather than to deny them. 'Now we play with the cards on the table' (Odgers).

Yet other precautions may be taken to secure a thorough threshing out. It may be possible or likely that if a party sees a document, whether he has forgotten or never knew of its existence, or being well aware of its existence, does not remember its contents, that the litigation may come to an end: he may be satisfied. Or it may be only fair in the circumstances that both parties should inspect the document itself or have a copy of its contents. There is a procedure known as 'discovery of documents' by which these rights may be secured. Dr. Odgers puts a common case, where (material) letters have passed between the parties before the dispute arose; 'the plaintiff has the defendant's letters, and the defendant has the plaintiff's, and neither set is properly intelligible without the other. It is most desirable that any one who intends to give evidence should, if possible, read over his own letters before he enters the witness box. For his recollection of an interview which took place many months ago is probably somewhat hazy now, and far less reliable than his

letter written at the time, which remains in black and white as clear and intelligible now as it ever was.' And a party may be ordered to swear what material documents he has. Here, too, care is taken that neither party is called upon to yield anything which is not relevant to the case, and which can fairly be considered to violate the privacy or the confidence of the other. While there are all sorts of safeguards to prevent this kind of intrusion, any attempt to keep back a document in order merely to embarrass an opponent would certainly be punished at the trial, whether it was then produced or not. Many, of course, are not wanted till then, and a mere notice to produce them then is sufficient; for instance, original letters or papers of which you have copies, or which you do not care to inspect till the last moment, but *may* want then.

The resources for saving time, trouble, and expense at the trial are not even yet exhausted. 'Besides discovery of documents,' says our authority, 'the parties may also require discovery of facts. Indeed, they will especially require this in those cases where there are no material documents to be disclosed. For it is in those very cases that there is almost sure to be a conflict of evidence, and that makes it all the more desirable for the parties to ascertain before the hearing what are the exact points on which there will be this conflict. Take, for instance, an action for personal injuries caused by a collision on a railway. There are often no documents existing which throw any light on such a matter. Yet it is most important for the plaintiff to know, before he comes into court, whether at the trial the defendants will seriously contend that no such collision ever took place, or that the plaintiff was not a passenger in either train on the day of the collision, or that he was not injured thereby. Hence in a proper case the court allows one party to administer a string of questions to the other, and compels that other to answer them,' on oath, subject to certain restrictions. This procedure would obviously be liable to great abuse, were not a check provided by the authority of a judicial official, who may refuse to allow certain questions to be put. The following instances of interrogatories are given by Dr. Odgers :

'The publisher of a newspaper must answer the interrogatory [in a libel action], "Was not the passage set out intended to apply to the plaintiff?" But he need not answer the further question, "If not, say to whom?" as, if the passage did not apply to the plaintiff, it is immaterial to whom it referred, so far as the present action is concerned.'

'If the proprietor of a newspaper accepts liability for a libel' published 'in his paper, he cannot be interrogated' on 'the name of the writer of the libel,' or on the sources of his information.

'Interrogatories asking plaintiff whether similar charges had not been made against him previously in a newspaper, and whether he had contradicted them or taken any notice of them on that occasion, are clearly irrelevant,' and cannot be put.

In all these preliminary processes there is a simple and summary means of resisting any of the orders sought, and appeals from decisions on these points are common.

11. JURY OR NO JURY?

There is yet one very important preliminary question before trial—jury or no jury?[1] There is generally an option in the K.B. and its smaller edition, the County Court. In criminal *trials* (and therefore not in police courts) there must be one though never in a chancery court. There is no absolute right to one in divorce.[2] In Admiralty a jury is very rare: when nautical knowledge is required two Trinity Masters assist the judge. When the House of Lords sits as a Court of Law, it is itself the jury and therefore one which is apt to change from sitting to sitting. Of the very ancient[3] and ubiquitous coroner's

[1] In July 1918 during the War the right was temporarily suspended in some *civil* matters. In the High Court the right is regulated by Rules (by s. 99 of Judicature Consolidation Act, 1925), and see Preface for the judge's discretion under the New Procedure Rules.

[2] *The Times*, March 26, 1931.

[3] In other old courts scattered through the kingdom, *e.g.* the Mayor's in the City of London, the judge always has a jury to try actions. Of these local courts, antique and traditional, there is an extraordinary

courts, later. In cases of very great importance, civil and criminal, in the K.B., three judges sit with a jury, *e.g.* the Tichborne trial, 1873; the Attorney-General against Mr. Bradlaugh, M.P., 1884; the Jameson 'Raid,' 1896; Lynch, 1902; Casement, 1916.

In each court an official decides whether there shall be a jury or not. This he does broadly on the ground that the issue to be tried is, or is not, one of law or one of fact, but in many actions, notably slander, libel, false imprisonment, malicious prosecutions, seduction, breach of promise of marriage—where reputation is peculiarly at stake—either party can claim a jury as of right.

It is not clear *now* why a jury should especially be the arbiter of facts; *historically*, no doubt, the original juries were the witnesses themselves. But to-day, single judges frequently (invariably in the Chancery Division) come to conclusions of fact. Where life or liberty is at stake, as usually in criminal trials, naturally no judge would willingly take upon himself the responsibility of a decision, and, though in a less degree, the judges have no doubt been glad to escape from this burden in civil matters; hence, perhaps, the persistence of juries. Moreover, Lord Chancellor Halsbury said, 'As a rule, juries are, in my opinion, more generally right than judges' (L.Jo., Sept. 26, 1903). Their great panegyrist is Blackstone in the following classical passage: 'Trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases!" . . . Montesquieu, "who concludes that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have

wealth (see 9 *Halsbury*, §§ 290–480); many are in desuetude, but some are of extreme historic interest, *e.g.* Prize Courts, Admiralty Ct. of Cinque Ports, Duchy Ct. of Lancaster, University Vice-Chancellors' Courts.

Recent tribunals are the Industrial Ct., the Railway and Canal Commissioners; the Commercial Ct.; in some of these High Ct. judges preside over inferior members.

Official referees are adjuncts of the High Ct., to whom judges refer lengthy investigations (details, figures, &c.) to save time.

recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.' 'And it will hold much stronger in criminal cases, since, in the times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the King and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has, therefore, wisely placed this strong and twofold barrier of a presentment and a trial by jury between the liberties of the people and the prerogative of the crown. . . . So that the liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate, not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations, which may sap and undermine it by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters, that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution, and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern' (*Commentaries*, vols. iii. 379; iv. 349). The tide seems to be setting against the jury—in the New Procedure Rules power is given to the judges in some cases to dispense with this historic survival.[1]

12. LAW AND FACT

Broadly, the distinction is clear. For instance, in actions for breaches of contract the dispute often is as to what the parties meant at the time in using or omitting a certain phrase or sentence. This is purely a question of

[1] See Preface.

fact, and when that is decided, there can be no possible doubt about the law. Or the question may be through whose fault or negligence an accident was caused. Granted that it was some one's, that person may be clearly liable in law to pay damages. Again, whether or not there was a promise to marry is always a question of fact. But, on the other hand, suppose the only material question is the meaning to be put upon a word, or phrase, or clause, in a statute or a document, say a lease or a will. Or there may be no dispute whatever about the facts, the only question may be whether a certain contract to be valid must be in writing or not. Clearly these matters are matters of law, to be decided by lawyers, who know the cases on the statute or common law. Now for centuries the principle has been that a judge determines the law, and a jury the fact, and on this broad principle each case is sent to the appropriate tribunal. Where the parties agree to leave all issues in the hands of a judge sitting alone, effect is generally given to their wishes.

The instances here given of the distinction between law and fact are simple, but the distinction itself is one of the most difficult [1] met with in the practice of the law. For it is easy to see that many questions are at once questions of law and fact, for the reason that ordinary words used in expressing a law get into a legal atmosphere and contract, as it were, a special legal odour. For instance, one would imagine that it was a 'fact' that a hairdresser was a tradesman, and exercised a business, and so a magistrate thought who fined one for breaking the Sunday Observance Act, 1677, which says that 'no tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business or work at their ordinary callings upon the Lord's Day'; but two judges said this was a wrong interpretation of the clause, and remitted the penalty (1900, 1 Q.B.). Again, laymen might think that whether a given structure was a scaffolding or not was a matter of fact; but under the Workmen's Compensation Act, 1897, this was not so. Whether a

[1] 'It is not, however, in many cases practicable completely to sever the law from the facts.'—Lord Blackburn, 3 App. Cases, 207: 1877.

temporary staging is a scaffolding within the meaning of the Act was not a mere question of fact; "it is a mixed question of fact and law" (1901, A.C.). So in a well-known case in 1897, it was held that a ring on a racecourse was not 'a place' within a Betting Act (1897, 2 Q.B.). In none of these cases cited, however, had the facts been found by a jury. In 1894 a jury found that a certain course of conduct on the part of a wife constituted cruelty, but the House of Lords held that in law the facts did not establish cruelty (1897, A.C.). Again, where it is a question on the facts of each case what is 'reasonable,' *e.g.* what is a reasonable time, it would seem to be peculiarly the province of the jury to decide this point; and so it is where there are no fixed rules of law, as, for instance, whether goods bought by sample have been rejected within a reasonable time, or whether shares to be transferred within a reasonable time have been so transferred. But where, in process of time and by dint of threshing a matter out in commerce and the courts, a rule has been bodied forth, then, apart from exceptional circumstances, the jury ought to adopt as a fact the established quasi-legal view of what is 'reasonable,' as, for instance, that the holder of a cheque or instrument payable on demand, in order to present it within a reasonable time, should do so on the day he receives it, or the next.

This difficult analysis cannot be pursued further here. Perhaps (it is humbly suggested) it would simplify discussion to say that the province of the jury is not so much fact as *conduct*; they ask themselves what some one did, or intended (if anything), or whether that was reasonable, and then the law pronounces on their finding.

On the whole matter may be cited a passage from a judgment [1] of Lord Mansfield's in 1783. 'Where a question can be severed by the form of pleading, the distinction is preserved upon the face of the record, and the jury cannot encroach upon the jurisdiction of the court; where, by the form of pleading, the two questions are blended together,

[1] 21 St. Tr. 1039. Cf. Ld. Blackburn (3 App. C. 1205: 1878): 'A jury, no doubt, has the physical power to find a verdict contrary to the direction of the judge, but if that is done it is wrong.'

and cannot be separated upon the face of the record, the distinction is preserved by the honesty of the jury. The constitution trusts that, under the direction of a judge, they *will not usurp* a jurisdiction which is not in their province. They do not know, and are not presumed to know, the law; they are not sworn to decide the law, they are not required to decide the law. . . . It is the duty of the judge in all cases of general justice to tell the jury how to do right, though they have it *in their power* to do wrong, which is a matter entirely between God and their own consciences.'

13. THE JURY, COMMON OR SPECIAL?

For the agreement and number of jurors, viz. twelve, a learned commentator on Blackstone, iii. 376, remarks: 'The unanimity of twelve men, so repugnant to all experience of human conduct, passions, and undertakings, could hardly in any age have been introduced into practice by a deliberate act of the legislature,' and goes on to point out that it is reasonable that life, liberty, and property ought not to be at the mercy of any small majority of voters; there ought to be a fixed minimum for condemnation, and twelve was the number chosen, and he conjectures that, 'as less than twelve, if twelve or more were present, could pronounce no effective verdict, when twelve only were sworn, their unanimity became indispensable.' Sir Frederick Pollock puts it down to 'the inherent sanctity of the number twelve'[1] (*Expansion of the Common Law*, 95: 1904).

When once it is decided that there is to be a jury, either side may demand that it be special, in the High Court.

[1] Forsyth (p. 64 n.[1]) can only suggest that it was a 'favourite' number for a court among Scandinavians, and quotes a writer in 1682: 'In analogy of late [n.b.] the jury is reduced to the number of 12, like as the prophets were 12 to foretell the truth; the apostles 12 to preach the truth; the discoverers 12, sent into Canaan, to report the truth; and the stones 12, that the heavenly Hierusalem is built on; and as the judges were 12 anciently to try . . . matters of law; . . . and also as for matters of state there were formerly 12 councillors . . .' a characteristic specimen of pre-scientific scholarship. McKechnie, *Magna Carta* (1905), p. 161, goes thoroughly into origins.

'Special juries,' says Blackstone, 'were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him.' There was certainly a special jury in 1624 : *Cro. fac.* 672 (and perhaps in 1604 : *ib.* 22).

Now special juries are generally claimed by litigants who prefer that their cases should be heard by persons of their own social standing,[1] or of one nearer to it than those of whom the bulk of common jurors consists, either because they believe that the class from whom the special jurymen are drawn, viz. 'esquires, or persons of higher degree, or bankers, or merchants,' are men of greater intelligence, or that they are free from the prejudices which they fear in a distinctly lower grade of society. Practically, any one who is a householder may be on the common jury list. It is popularly but erroneously believed that persons on the special jury list are not liable to serve on common juries. Remuneration[2] is a modern concession. The great Sir Thomas Smith says (about 1560) : 'The party with whom they have given their sentence, giveth the enquest their dinner that day most commonly, and this is all they have for their labour, notwithstanding that they come some twentie, some thirtie, or fortie miles or more . . . all the rest is of their owne charge' (*Commonwealth of England*, B. 2, c. 18).

Enough, perhaps, has been said about the preliminaries to a trial. We have not to do here with the work of 'getting up a case,' which each side has to consider ; it chiefly consists in determining what evidence will be necessary to prove or rebut a given case, in discovering what witnesses can be brought forward, and exactly what they know relevant to the inquiry, and in procuring or looking out the necessary documents. If, for any reason, the parties come to terms before the trial, it is part of the

[1] 'We sympathize only with those who dress like ourselves, whether the habit be of ideas or broadcloth.'—Mr. Justice (Lord) Darling, in *Scintillæ Juris* : 'Of Examining in Chief.'

[2] The latest authority (1911) is Halsbury's *Laws of Eng.*, v. 18, 264.

agreement whether these terms shall be formally adopted in the judgment of the court, or whether the whole matter shall be withdrawn from the jurisdiction of the court. In any case, the court will never, in a civil cause, oppose a settlement; indeed, it will encourage it. But a criminal prosecution cannot be withdrawn without the consent of the court.

14. OPEN COURT OR 'IN CAMERA'

All trials (almost without exception) must be in open court, and all judicial proceedings may be public. Originally this practice was a safeguard—and perhaps the only one—against royal oppression or official corruption working with such instruments as *lettres de cachet*;[1] now perhaps its chief value is as an additional deterrent to wrongdoers.[2] Against this, however, must be set the reluctance which many people feel to have their private affairs discussed in public, so that even innocent persons are deterred from coming into court; but probably this centrifugal force is not for frequency comparable with the former. Judicial debate, too, has an educational value for all auditors, lay and legal. It is obvious that it is only exceptionally that publicity will do more harm than good—for instance, the disclosure of details of obscenity or immorality, such as certain newspapers were in the habit of printing *ad nauseam*, until an Act of 1926 minutely regulated reports.

Chief among the exceptions is naturally the case where publicity is what one of the parties seeks to avoid, *e.g.* when

[1] Compare the old stories about the German Fehm-Gericht, or the modern ones about Italian secret societies, or some Tsarist and other Russian tribunals. Secrecy must sooner or later lead to injustice. With us, the jury which theoretically represents the country in criminal trials is practically a public.

[2] Lord Morley mentions in his *Life of Gladstone* that the latter was in favour of prohibiting publicity in the proceedings of the divorce court 'until he learned the strong view of the President of the Court, that the hideous glare of this publicity acts probably as no inconsiderable deterrent.'—Bk. IV. ch. viii. note. 'It was not at all a disadvantage,' said the President of that court—'quite the contrary—that publicity should be given to this class of case, for it brought the matter home to every one' (*The Times*, July 26, 1905, *A.* v. *A. and N.*). An Act of 1926 now carefully limits these accounts.

in 1883 ' a secret trade process ' was in dispute, and in 1885 a solicitor threatened to disclose the affairs of a client, the hearings were with closed doors. ' Cases,' said a judge,[1] in 1894, ' relating to lunatics are constantly heard in private, and cases about wards . . . in order that the lunatic or ward may not be prejudiced,' and apparently family disputes in Chancery, by consent, may be added. But this rare privacy rests rather on practice than on law, even in ' cases in which,' as the judge put it, ' public decency and morality require it.' [2] After some doubt an exceptionally strong House of Lords (overruling the Court of Appeal and the judge) distinctly decided [3] that not even ' in the interest of public decency ' may the golden rule be suspended (except when it ' must yield to the paramount duty of the court to secure that justice is done,' *i.e.* in such rare cases as those just mentioned and a few others, and, of course, where Parliament has distinctly decreed privacy, as of certain hearings under the Children Act, 1908, and the Official Secrets Act, 1920. But public trials of an offence made a crime for the first time by an Act in 1908 and held in private, were restored in 1922 on the ground [4] that it was necessary to advertise that this offence was now punishable by the ordinary law, and that the tribunal was otherwise deprived of the comments of the lawyers and the Press, &c. —the incident is a valuable testimonial to the value of publicity. But in cases of shocking incidents, generally, judges practically achieve the same end by a simple request to all (sometimes only to women and children) who are not compelled to remain, to depart.

[1] 3 Ch. 200. See ' In Camera ' in Index, Halsbury's *Laws of England.*

[2] In Warren's *Ten Thousand a Year* (1841), B. 3, c. 4, Snap sends Titmouse orders for Old Bailey trials : ' for so it happens that in this country the more hideous the crime the more intense the curiosity of the upper classes of both sexes to witness the miscreant perpetrator, the more disgusting the details the greater the avidity with which they are listened to by the distinguished auditors,' &c.

[3] 1913, A.C. 417.

[4] L.Jo., May 13, 1922, p. 161 ; 16 Criminal Appeal Reports, 144.

15. THE JUDGE NOT IN COURT

But the duties of a judge are by no means limited to trying actions. There are innumerable orders he can and does make, and powers he can and does exercise, when he is not sitting in court, and even without hearing the other side ; for instance, when there is great urgency. And in emergencies, and when few judges are available, the privacy of a judge's home or holiday [1] must perforce be invaded. Shakespeare makes the Lord Chief Justice, in a public street, first threaten to, and then actually, commit Sir John Falstaff to prison.[2] The judges, in fact, are always clothed with their authority, and some of it may be exercised privately, as, for instance, is all their jurisdiction—and that of their deputies and subordinates ' in chambers '—preliminary to trial or after it. As a matter of fact, the general public never does attend such hearings, but any curious person, with no improper or dishonest intention, would have practically no difficulty in obtaining admission. Of course, in preliminary manœuvres much is discussed which need not, and would not, be made public, unless and until there is an open trial ; and if either party is anxious to secure himself from premature divulgation to unprivileged ears, he will not have the smallest difficulty in securing the absence of everybody but his opponent. But, in the great majority of such cases, probably no one concerned would make the smallest objection to the presence of spectators, if any wished to attend. There seems, however, to be no doubt that the presiding official has an absolute right to exclude any one but the parties.

[1] On one occasion, in a long vacation, counsel, who wanted a judge's order, at the earliest possible moment, for some vital purpose, pursued Shadwell, ' the last Vice-Chancellor of England,' to a creek near Barn Elms, where he was bathing, stated his case, and got his order (D.N.B. 1830–40 ?). Lyndhurst L.C. (1827) granted an injunction in a box at the Opera (Bennet, *Sketches* (1867), 215). After a late sitting in a County Court, judge and counsel adjourned to the train which they all wanted to catch : it was a case of *solvitur ambulando* ; judgment was reserved (L.Jo., April 30, 1904, 232).

[2] *2 Henry IV*, act i. sc. 2, and act v. sc. 5.

16. PLACE OF TRIAL

In other than County Court actions, the suer may select the place, his choice being limited in practice to the nearest assize town or London ; but his option is exercised subject to the control of an official, who will see that the sued is not put at an unfair advantage, and will, if necessary, fix the place himself. Thus a man in Cornwall, suing one in Devonshire, would not be allowed to ' try ' in Northumberland ; he would probably be restricted to the assizes of either Devon or Cornwall. And if his opponent was in Northumberland, it might be fair, having regard to cost and the balance of convenience, to try in London. And trials are frequently ordered in London if the delay till assizes would be too great, or there are other special reasons for dispatch, or the expense and inconvenience would be sensibly lessened by doing so.

In the County Court (speaking quite generally) the action must be brought in the district where the sued dwells or carries on business ; but for this purpose practically all London is one, and a suer (who lives or carries on business in any part) may, if he chooses, proceed in his district and not in his opponent's. The rule is designed to save trouble and expense to any one wrongly sued ; if he is rightly sued, on the other hand, he must pay the travelling costs of the winner. Of course, the rule contemplates permanent residence ; a temporary sojourn in gaol, for instance, will not do, though it was set up in one case.[1]

In criminal matters the place of trial is nearly always in the county in which the crime is alleged to have been committed ; but since 1926 convenience, especially of the accused, may suggest some other. If offences are alleged in more than one county, each may have to be tried in its proper place, but dealing with all charges at once and by one sentence is, where possible, encouraged—' winding up the moral bankruptcy,' it has been called. If justice requires it, *e.g.* when local feeling is inflamed, a prisoner may be tried out of the county ; thus Palmer, the Rugeley

[1] 5 C.B.N.S. 267 : 1858.

murderer, was tried in 1856 at the Central Criminal Court, where most of *such* cases go.

17. THE TRIAL

A few points [1] may be noticed, on the form or order of proceedings.

Counsel or the party [2] makes an opening speech, explaining what his case is, and indicating what evidence he proposes to call. It must be remembered that this is the first time the other side hears officially exactly the case proposed to be made out against them; and though very often they can guess what this will be, yet sometimes the information they thus acquire is important and valuable; for instance, they hear the names of the witnesses against them, and may prepare accordingly. The statement of counsel is, of course, unsworn, and if he has reason to suppose that he will not be able to call a certain witness, or put in certain evidence, he must not allude to that testimony, for his only right at the moment is to indicate what he will prove, and he has no right to influence the minds of his hearers by anything that he cannot prove. And thus another and a logical purpose is served by this speech; for the judge and the jury get a picture or bird's-eye view of what they are to inspect more closely, and understand better the idea they are invited to form from all the parts put together than they could from a consideration of those parts individually without this interpretation. Indeed, in a long and complicated case some such presentation is necessary to enable the jury [3] to take

[1] Nothing is said about 'challenging' jurors in *civil* cases, as it is of no practical importance in England, Scotland, or Wales.

[2] And so throughout—one or the other, but not both.

[3] And, though in a much less degree, the judge. It must always be remembered when the tribunal is a judge the *whole* proceedings are conducted by trained lawyers, accustomed to the same habits of thought, speaking the same scientific language, knowing the rules and assumptions by which they are bound. Thus much time, explanation, and formality are often saved which must be expended on a jury.

Some 'openings' are famous for their art. Maule J. (about 1840) once said to counsel: 'I should like to stipulate for some sort of order. . . . There is the chronological, the botanical, the metaphysical, the geo-

any connected view at all, and in a short and simple case it can do no harm. Whenever the great Faraday was to be shown an experiment, he used to say, 'Now tell me what I am going to see,' *i.e.* what do you propose to establish? If he did not know this he might not carry along with him the exact materials relevant to the conclusion, or, when that end was reached or suggested, might not remember whether the essential steps had been taken.

In the same speech, if there be any question on the law applicable to his facts, counsel will tell the court his view of the law, and submit that, if he proves the facts he has sketched, the law entitles him to a verdict. The judge may take the contrary view, and in a clear case may declare that, even if the facts opened were fully proved, he should have to direct the jury that the law prevented them giving the suggested verdict.[1] After such an opinion it would be useless to continue the case, and thus time and, probably, expense are saved. Appeals from such and other decisions will be dealt with separately.

After the opening speech, the witnesses on the same side are called. They, if they are compellable by law, may be summoned by an easy process, if they are well enough, to come, when, as is only just, their reasonable expenses are paid, *i.e.* they will be punished if they disobey. In a civil case, one of the parties pays; in a criminal case, almost always, some public fund; but in the latter, owing to its greater gravity, attendance as a witness is 'in the nature of a public duty' (Short and Mellor, *Crown Practice*, 407: 1908), and expenses need not be paid before the trial unless the witness is too poor to travel without them. Every human being (except, perhaps, the sovereign) [2] is, in

graphical—even the alphabetical order would be better than no order at all.'—Sergt. Robinson, *Bench and Bar*, 128.

[1] But he cannot prevent witnesses being called; when a great judge did so, he was at once reversed. 1892, 2 Q.B. 122.

[2] Taylor on Evidence, 11th ed. (1920) s. 1381. It is also obviously inconvenient that any one taking part in the conduct of a case in court—judge, counsel, juror, or officer of the court—should also appear therein as a witness, and such a thing is practically unknown; but it is not expressly and theoretically forbidden. At the trial of the Earl of Essex in 1600, a peer who was a member of, and a judge advising, the Court (the Lords), gave evidence. 1 St. Tr. 1340, 1342.

a civil case, a *competent* witness (not quite always the same as *compellable*), if he or she is not a person devoid of sufficient understanding to know what he or she is about. Either party may call the other.[1]

It is the business of the judge to satisfy himself that a person called has sufficient understanding to know what he is about,[2] and there is no practical difficulty in ascertaining this in the case of persons mentally affected or drunk at the moment. His duty is the same in the case of children of tender years, but it is more difficult to perform. He generally puts a few questions to the child directed to test its intelligence and sense of duty to speak truth,[3] *e.g.* the following dialogues have led to the infant's admission as a witness: 'What becomes of a liar?' 'He goes to hell.' 'Is it a good or a bad thing to tell lies?' 'A bad thing.'

The *general* principle of the competency of every human being to testify in our courts is founded on a colossal philosophic induction that by far the greatest part of what falls from human lips is true,[4] and by a narrower one that there are two great safeguards for the truth, the oath and cross-examination. It by no means follows that every one who may be competent to depose can be compelled by law to do so. The sovereign (even if competent) certainly cannot, nor can an ambassador or diplomatic agent who represents a foreign sovereign (for *he* could not were he in this country), nor any of such representative's suite (for they are identified with him). Nor, of course, can persons outside the jurisdiction of the courts of England, Scotland, or N. Ireland be so compelled; nor will any person not physically fit to attend be compelled to do so.

[1] *e.g.* 8 Q.B.D. 492, 497 (1882), a 'very unusual course'; heavy damages against the caller (dft.).

[2] Taylor, *ib.* ss. 1375–6.

[3] 'In practice it is not unusual to receive the testimony of children of eight or nine years of age when they appear to possess sufficient understanding' (*ib.* s. 1377). A county court judge once adjourned a case so that a child might be taught the sanctity of an oath (*Evening Standard*, Nov. 8, 1918).

[4] 'This principle has a powerful operation even in the greatest liars, for where they lie once they speak truth a hundred times' (Reid cited by Taylor, *ib.* s. 50).

Still, speaking generally, there is a process to enforce [1] (after payment of reasonable travelling expenses) the presence of any one in these islands, or of documents in his or her possession, unless the court has reason to believe that an abuse of this facility is being attempted, and proper arrangements can be made to take the evidence [2] of persons unable to attend the hearing through illness or absence in another country, wherever they are, and to use it as their substitute, so to say, at the hearing. But such substitutes are not encouraged, for a judge or a jury may fairly draw conclusions about the veracity of a witness from his demeanour in their presence, and though, perhaps, such scanty observation may be a fallible guide, still, there are many occasions when persons may obviously be seen to be speaking falsehood by merely looking at them.

But even when the witness is in the box, it is by no means always just that he should be compelled to answer every relevant question—to say nothing of the irrelevant—of which 'more anon.'

18. WITNESSES' OATH, &c.

This institution certainly came into this country through the Bible in the train of Christianity. The experience of many centuries has shown that some form of adjuration does, as a matter of fact, secure greater truthfulness in some classes of people and less in none, and as it is the special

[1] By punishing disobedience; no tribunal can make a man speak. Best, *Evidence*, 113, cites: 'Were the Prince of Wales,' said Bentham (1790), 'the Archbishop of Canterbury, and the Lord High Chancellor to be passing . . . while a chimney-sweeper and a barrow-woman were in dispute about a ha'porth of apples' and called them as witnesses, they must go. In a blasphemy prosecution defendant *subpœnaed* all the religious *chiefs* he could hear of—to show the divergence of theological opinion—and on the day 'these found themselves all shuffled up together in the waiting-room—the Archbishop of Canterbury and the High Priest of the Jews' included. *Law. Mag.* 1st ser. (1841), 364. There was power to set aside the *subpœna*, as was actually done when some 'suffragettes,' whose policy was to annoy ministers, summoned the Prime Minister and the Home Secretary to Leeds. 1909, 1 K.B. 258.

[2] On oath, and subject to cross-examination, so that the only element missing in court is demeanour.

business of the law to discover the truth, in view of its effects on life, honour, liberty, and property, no one with trifling exceptions who is a witness is exempt from some such solemnity,[1]—including simple affirmation—though its form is almost, in respect of the religious element in it, a matter of individual taste. Everybody agrees that deliberate untruthfulness in a witness designed to defeat the ends of justice should be punished by law; and while it is true that such a sanction can exist equally well without, as it has been put by objectors to any formal exhortation, setting up 'two standards of truth,' still, if people have two, the law prefers the higher.[2] One of the exceptions is equally made in order to do justice, for, in the case of certain personal offences (only) against children of tender years, if the offenders could not be convicted because their victims did not understand the nature of an oath, in many cases they could not be convicted at all. Such children, therefore, are heard unsworn, provided, as in other cases, the court is satisfied of their intelligence and veracity. 'Of all witnesses in an honest cause, an intelligent child is the best.'[3] But no one can be convicted without material corroboration of such evidence, and such witness, if perjured, is liable to punishment.

[1] The Sovereign, it is said, is exempt. Judges and counsel, deposing only about their parts in previous trials, need not (but may) be sworn. The accused on criminal charges may make unsworn statements. 'The defendant, being in contempt for not answering, was brought by several orders to the bar; and being indeed a Quaker, refused to answer on oath, but prays to answer without oath. Lord Chancellor did admonish him of the peril, viz. that the bill must be taken for true entirely as it is laid if he answered not,' and it was: 2 *Cases in Chancery*, 237: 1677.

In 1823 a prisoner was acquitted because the only person who could prove the uttering of the forged cheque alleged was a clerk, and he being a Quaker declined to swear: 1 C. & P. 99.

[2] In early law witnesses supposed to be more likely to perjure themselves were discouraged; thus Jeffreys L.C.J., in his better days, refers to: 'I think it is a hard case, that a man should have counsel to defend himself for a twopenny trespass and his witnesses examined upon oath; but if he steal, commit murder or felony, nay, high treason, where life, estate, honour, and all are concerned, he shall neither have counsel nor his witnesses examined upon oath': 10 St. Tr. 267: 1684. It was not till 1695 that an accused was allowed *sworn* witnesses in treason, nor till 1701 in felony.

[3] *Attorney in Search of a Practice* (1839), c. 17.

19. EXAMINATION AND CROSS-EXAMINATION

It is obvious that the witness must tell his own story; but in order to prevent his wandering from the point, or being too discursive (as an untrained narrator is very apt to do or be), and, moreover, in order to direct his attention to points which he might forget, or of which he might not see the bearing on the case, his evidence is generally called forth by the questions of counsel who called him, and who almost invariably has before him a written statement of what the witness has previously said on the matter. The essential requirement that he should tell his own story is largely secured by the fundamental rule, that the questioner shall not put leading questions; that is, shall not put words into the witness's mouth on any material point, for the latter can easily tell from the form of the question what answer is *desired*, and with this he ought to have no concern. For instance, the interrogator ought not to ask, 'Did you hear A. promise to pay B. £10 for a watch?' for that plainly invites the answer 'Yes' (supposing the point to be a material one in dispute); but, 'Did you on one occasion hear A. and B. speaking together?' 'If so, what did A. say?' Then, 'What did B. say in reply?' 'Did you hear a price mentioned?' 'If so, by whom?' and so on. But, of course, not every trivial point is to be approached thus guardedly, as, for instance, 'What is your name?' 'Where do you live?' 'Did you, then, write to A.B.?' where it may be safely assumed (but not otherwise) that the answer to any of these questions cannot affect the issue. If, for instance, it is important to establish that the witness did then write to A.B., the question should be, 'What did you do next?' or, 'What step did you then take in reference to this matter (or to A.B.)?'

And, in any case, either side can at any time object to any proposed question.

It is true that, as has been said, the examiner knows from the papers in his hand what answer the witness will *probably* [1] make to his question, and cannot, therefore, expect

[1] Mr. Justice Bailhache, when at the bar, used to say: 'I don't care a straw about the witnesses against me; it's my own I'm afraid of.'

to get any unfair advantage by the form of his question; but there is at least a possibility (and often experience shows that it is the fact) that the lawyer or other person who took down that statement misunderstood some matter or unconsciously read in his own suggestions or, generally, gently assisted the deponent. Or, in the interval between making the statement and going into the box, the latter's recollection may have improved. In any case, herein is one of the advantages of the public punctiliousness of a trial, and, no doubt, of the intervention of the oath; the whole scheme warns the witness to be careful, and gives him abundant opportunity to revise any former inaccuracy in respect of the matter. On the other hand, the novelty of the scene in court tends to perturb a nervous witness; but this state of mind a prudent counsel can do something to allay. An inevitable disadvantage of a party 'in person' is that he is not a trained questioner, but the judge will duly help this defect (sometimes permitting a latitude denied to the professional).

After examination comes—

20. CROSS-EXAMINATION

'The adverse party,' said Sir T. Smith, 'or his . . . Counselleurs and Sergeants interrogateth sometime the witnesses and driveth them out of countenance,' *i.e.* if it chooses, it takes the witness in hand with a view to showing either that he is untruthful or mistaken, or that a different colour may be put on his facts from that which is sought to be put. It is hardly possible to over-rate the importance of this searchlight. 'It is not easy for a witness subjected to this test to impose on a court or jury,[1]

[1] It is, of course, much easier to deceive when evidence is given merely by affidavit (*i.e.* on written oath, so to say), as is the rule in most preliminary processes out of court (and as happens exceptionally in court). This is, perhaps, the amount of truth in the famous epigram of a cynical judge: 'The truth will occasionally leak out, even in an affidavit,' *i.e.* where there is no cross-examination. So Lord Bowen says of the old Court of Chancery, 'It tossed about as hopelessly,' in cases of conflicting testimony, 'as a ship in the trough of the sea for want of oral testimony—a simple and elementary method of arriving at the truth, which no acuteness can replace' (Ward's *Reign of Queen Victoria*, vol. i. p. 290).

for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended' (Taylor, *Evidence*, s. 1428). He cites Bacon's *Essay on Cunning*: 'A sudden bold and unexpected question doth many times surprise a man and lay him open. Like to him that, having changed his name, and walking in Paul's, another suddenly came behind him and called him by his true name, whereat straightways he looked back.' So a deserter denied that he had been in the army: suddenly counsel said, 'Attention!' and the man instinctively obeyed the word of command.

'The object of cross-examination,' says Phipson, 'is twofold—to weaken, qualify, or destroy the case of the opponent;[1] and to establish the party's own case by means of his opponent's witnesses' (*Evidence*, 11th ed. 1930, ch. xl.).

The situation is the converse of that in examination, for, presumably, the witness, so far from wishing to help his questioner, wishes to hinder him. Consequently, almost all the restrictions on interrogation there in force here disappear, and it may be broadly stated that, subject only to the general control of the judge, any question may be asked by one side of a witness (not defendant in a criminal case) called by the other, including those which though otherwise irrelevant tend 'to impeach his credit' by attacking 'his antecedents, associations, character,' or to show 'that he has been convicted of any criminal offence.' Evidence may be called to establish such a conviction, though, on these other points, his answers may not be contradicted, for that would lead too far afield—unless, indeed, the particular subject is immediately relevant to the issue, for then the attack on credibility is something more than collateral to the issue. For instance, evidence may be always given to show that a witness's

[1] If Anthony Trollope had been aware of this he would not have blundered (as so many novelists do when they use *legal* machinery) in a dialogue between a judge and a young barrister. The former says: 'Mr. Chaffanbrass . . . is perhaps unequalled in his power of cross-examining a witness.' 'Does his power consist in making a witness speak the truth or in making him conceal it?' 'Perhaps in both' (*Orley Farm*, vol. ii. c. 8).

general reputation is such that he ought not to be believed on oath, for that goes to everything he has sworn.

The principles underlying these regulations are admirably put by the authority so often cited. 'The rule [of not contradicting] is founded on two reasons, first, that a witness cannot be expected to come prepared to defend, by independent proof, all the actions of his life; and next, that to admit contradictory evidence on such points would of necessity lead to inextricable confusion by raising an almost endless series of collateral issues. The rejection of the contradictory testimony may, indeed, sometimes exclude the truth; *but this evil, acknowledged though it be, is as nothing compared with the inconveniences that must arise were a contrary rule to prevail*' (Taylor, s. 1439)—another instance of the law recognizing a balance of advantages. Again, 'no doubt, cases may arise where the judge, in the exercise of his discretion, would properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date might, in general, be rightly suppressed, for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked.

'But . . . if the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness and his present character for veracity,' there is no reason 'why he should be privileged from answering, notwithstanding the answer may disgrace him. It has indeed been termed a harsh alternative to compel a witness either to commit perjury or to destroy his own reputation; but, on the other hand, it is obviously most important that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profli-

gate witness in competition with the substantial interests of the parties in the cause' (§ 1460–1). A witness in Ireland professed to be unable to speak English, and gave his evidence in Irish through an interpreter—'no slight advantage to a dishonest witness,' in cross-examination; he was pressed about his knowledge of English, and finally asked whether he had not just before spoken English to persons then in court. He denied this, and seven judges held that these two persons ought not to have been called to confute him, while three thought they ought (§ 1444).

But there are some questions which may be properly asked, but yet need not be answered. The excuse, 'I am not bound to incriminate myself,' for declining to answer a question is well known, and is allowed by the law 'on the policy of encouraging persons to come forward with evidence in courts of justice by protecting them as far as possible from injury or needless annoyance in consequence of so doing' (Phipson,[1] *Evidence*, ch. xvi.). That is, the witness need not expose himself, or herself, or his wife, or her husband to 'any criminal charge, penalty, or forfeiture' of property by his or her answer, however material to the case it may be. But the exemption is confined to the apprehension—of the validity of which the court must judge—of these special consequences, and not of others, *e.g.* the admission of a debt. And answers even incriminating are now sometimes compellable, notably concerning offences in bankruptcy, some forms of larceny and fraud and libel, subject to 'the sensible compromise'; and concerning the criminal charge being tried, when the accused gives evidence.

Public policy also exempts at their option, on obvious grounds, such witnesses as the following from answering questions relating to their official duties: ministers and other officers of State, heads of Government departments, prosecutors for the inland revenue (about their informants), judges, jurors, counsel, and solicitors (about confidential communications with a lawful object from clients), husband

[1] Who adds, 'A sensible compromise has, however, been adopted in several modern statutes by compelling the disclosure, but indemnifying the witness in various respects from its results.'

and wife (about communications *inter se* during marriage), and in some other cases. It is easy to see that, in some of these cases, answers might be prejudicial to the public service, and in some to domestic peace. The individual party who seeks the aid of the answer which is not forthcoming, no doubt may suffer; but here again, on a balance of the general disadvantages against the particular advantage, the law decides on suppression. Practically, in all these cases, the persons called decide for themselves (unless the interest of some third person, such as a client is involved, in which case his consent must be obtained), and if they waive their privilege no one will assert it. In effect, all the matters suppressed are, and ought to be, secrets, and only the owners of them have any right to say whether or when they shall be divulged. It is perhaps worth mentioning that a cross-examiner ought to put to the witness any matter (such as a letter, an interview, or what not) of which he has cognizance, and of which he (the cross-examiner) proposes to call evidence later; for it is only fair that the witness should have an opportunity of explaining or contradicting, and normally he is only in the box once. In short, one party has no right suddenly to 'spring' something on the other when he has had and omitted the opportunity of getting an explanation.

The elaborate rules (to which there can only be a brief reference) for cross-examination show that it has always been considered of momentous importance in British lands. As an art, it depends entirely on the supply of materials. In the absence of information about a witness, it may be absolutely impossible to shake him in the slightest degree; with plenty, it may be quite easy. Still, when there is nothing conspicuous to seize on, art will be displayed in watching the witness alertly, in fastening on the smallest discrepancy,[1] and in developing the dialogue [2] in a direction

[1] Serjeant Ballantine once 'smashed' a will, of the signature of which there was great suspicion, but absolutely no evidence to justify it. The cross-examiner had the second attesting witness out of court while he examined the first, and, by eliciting a large number of discrepancies in small details between the two versions, discredited both of them.

[2] As good an instance as any of 'leading on' is supplied by a cross-

where and towards topics on which, it is hoped, he may throw light. The last few sentences are illustrated by the following story from Mrs. Henderson's *Recollections of John Adolphus*, her father, an eminent barrister (p. 156). 'Two Lascars were on their trial for the murder of the captain of a ship, the evidence of the mate seemed quite conclusive. In the course of it he said, however, that at the time of the murder there was great confusion, as the ship was in much peril, and requiring all the attention of the sailors to prevent her striking on a rock. My father, who defended the prisoners, asked so many questions about the exact number of the crew, and where each man was, and what he was engaged in during the perilous time, that at last the judge whispered, "I suppose, Mr. Adolphus, the questions are to the purpose? I own I do not see it," thinking, doubtless, the time of the court was being wasted. After a few more questions on the special duty each man was performing, the witness had accounted for every man on board, the captain being below, and the two prisoners murdering him. My father fixed his eye steadily on the witness, and said in a searching and loud tone, "Then, who was at the helm?" The wretched mate dropped down in a fit, and soon after confessed he was himself the murderer. In his false evidence he had given to each his position, and forgotten the most material, or rather left none to fill it. Nothing but a perfect knowledge of the requirements of a vessel in this dangerous position could have saved these unfortunate men.' A vivid imagination may suggest questions which would not occur to every

examination of Lord Chancellor Halsbury's when at the bar (the Shrewsbury Election Petition, 1870). A. swore positively that a well-known person, X., had sought to bribe him during an election to vote for a candidate. Counsel ascertained that X. would deny this on oath. He then asked A. a series of questions to show that he had not mistaken the man, thus: 'Perhaps you only saw him side face?' 'No, I saw him full face.' 'Was it similarity in his clothes, or something of that sort, made you think it was Mr. X.?' 'Not at all.' 'You are sure it was Mr. X.?' 'Quite.' In due course Mr. X. showed conclusively that he was miles away from the place at the alleged time. If counsel had not first pinned him to a particular man beyond chance of revocation, he would probably have said, when Mr. X. appeared, 'This is not the man; I have mistaken his name,' and his life, as it undoubtedly was, would not have been detected.

mind. In a case in which it was essential to fix the precise day on which a man and a woman had met, 'the time sworn to was the middle of May . . . the place a garden; for an hour [she] endured the strictest cross-examination . . . she was not to be shaken in any material part of the story . . . the examination proceeded thus: "You walked in the garden with Mr. M.? Yes; several times. . . . Never once" after the *essential* date. "Is there fruit in the garden? Yes. Were you allowed to pick it? Yes; he used to give me some. What fruit? Currants and raspberries. Ripe? Yes." This was enough. She was detected at once. . . . Currants and raspberries are not ripe till June. . . . The woman's whole story was untrue. . . . She did not perceive the drift of the questions, and consequently had not sufficient self-command to reflect that the fruit named was not ripe in May!'

One of the best illustrations of cross-examination in the English language is in fiction, viz. in the *Tale of Two Cities*, ch. iii.; the slight touch of parody serves as a hint that cross-examination may be carried to excess. The informer, Barsad, is witness against a prisoner charged with treason. 'Had he ever been a spy himself? No; he scorned the base insinuation. What did he live upon? His property. Where was his property? He didn't precisely remember where it was. What was it? No business of anybody's. Had he inherited it? Yes, he had. From whom? Distant relation. Very distant? Rather. Ever been in prison? Certainly not. Never in a debtor's prison? Come, once again. Never? Yes. How many times? Two or three times. Not five or six? Perhaps. Of what profession? Gentleman. Ever been kicked? Might have been. Frequently? No. Ever kicked downstairs? Decidedly not; once received a kick on the top of a staircase, and fell downstairs of his own accord. Kicked, on that occasion, for cheating at dice? Something to that effect was said by the intoxicated liar who committed the assault, but it was not true. Swear it was not true? Positively. Ever live by cheating at play? Never. Ever live by play? No more than other gentlemen do. Ever borrow money of the prisoner? Yes. Ever pay

him? No. Was not this intimacy with the prisoner in reality a very slight one, forced upon the prisoner in coaches, inns, and packets? No. Sure he saw the prisoner with these lists? Certain. Knew no more about the lists? No. Hadn't procured them himself, for instance? No. Expect to get anything by this evidence? No. Not in regular Government pay, and employed to lay traps?' Oh dear, no. Or to do anything? Oh dear, no. Swear that? Over and over again. No motives but motives of sheer patriotism? None whatever.' Sometimes the cross-examiner is 'scored off.' Sir Walter Scott (*Quentin Durward*, Standard ed. p. 429) relates how, the sanity of X. being the issue, a doctor witness having admitted that X. was a splendid whist player, was pressed how a deranged man could excel at a game, requiring pre-eminently 'memory, judgment, and combination.' 'I am not a card-player,' was the reply, 'but I have read that cards were invented for the amusement of an insane king.' The result was decisive.

Perhaps a word may be devoted to the abuse of cross-examination. If the preceding pages are clear, it will readily be believed that there is no more difficult duty than that of cross-examining, chiefly by reason of the judgment required in knowing what *not* to ask.[1] It must be admitted that the practice is abused, but the wonder is that the abuse is so infrequent. In the first place, there is a natural anxiety on the part of the advocate [2] to do his

[1] 'It is obvious that if an advocate severely cross-examine a witness and totally fail, the jury to a certain extent must feel disgusted and the cause will probably suffer in proportion. . . . Everybody knows that there is no interrogatory so effectual in detecting guilt as that which is put by a steady and searching eye. A man who is skilful in this respect will keep up a sort of silent cross-examination of a person all the time he is giving evidence for the opposite party.'—*Amicus Curiæ* (above) on Mr. Topping, K.C.

[2] See an amusing article on 'Cross-examination,' by Lord Bramwell, in *Nineteenth Century Magazine* for February 1892, and Wellman, 'Art of Cross-examination.' Taylor (on Evidence, § 52 n.) says that 'the best modern example of forensic ability' of this sort is Hawkins's cross-examination of one Baigent in 'the Tichborne trial of 1871.' As bad cross-examination, Mr. Harris, Q.C., cites from the *Heart of Midlothian* [c. xvi.] Sharpitlaw's questioning. *Hints on Advocacy*, Introductory (1897): 'A knowledge of human character is the key to success,' *ib.*

very best for his client, and if he has no reason to doubt the accuracy of the information supplied to him, he tends to get all the advantage he can from it, to discredit the witness. That information is often full of mere suspicions and hearsay (collected by the zeal of the compiler, in his turn, for the client); but in using such hints the cross-examiner may fairly assume that the character opposed to him, if the expression may be used, is not perfect, and, if he thinks it worth while, he is entitled to use all his material. Indeed, sometimes he is bound to do so, as in the case of previous misconduct, or convictions bearing directly upon the issue—occasions among the most painful he has to face. Another source of anxiety to the cross-examiner is the disparagement of a third person, who cannot be represented in court. Such a course may be absolutely imperative, owing to the witness's connexion with a notorious wrongdoer. The temptation to create prejudice against the witness by the introduction of such topics as his religious and political opinions, or his 'patriotism' in a time of popular fervour, when they are irrelevant as they generally are, ought to be sternly resisted, and anything tending to such impertinence ought to be vigilantly suppressed by the judge. And, indeed, that intervention is, as we have seen, one of the checks on our system of confutation; the other, and perhaps the more potent, is the certainty that any abuse of the right, causing unnecessary pain, will recoil on the trespassing party—if there is a jury, probably with decisive force. And herein in practice lies the great safeguard of cross-examination. At any rate, we avoid the absolute licence [1] which, it seems, is legally admissible in a French trial, owing to the absence of a distinct law of evidence.[2] The underlying theory

[1] *i.e. of the judge*, who alone may question witnesses; counsel do it through him. Civil 'witnesses . . . give their testimony in chambers . . . before a judge specially appointed.' It 'comes before the court in written form only. Such witnesses are expected . . . to narrate uninterruptedly the circumstances relevant. In this narrative personal knowledge is intermingled with hearsay and opinion; judge and counsel intervene only' to elicit information on particular points. Finally the bench of judges *sift* the oral and written evidence. See O. Bodington, p. 2.

[2] At the opening of the trial of Landru for murders 'the president

there may be more logical, but it is certainly less practical. It is that the tribunal should know whatever facts exist—the more truth they have, the more they are likely to find. If there is anything anywhere in any one's life that he or she is ashamed of, that is his or her affair, for which justice cannot be stinted. Let wrongdoers beware—there is an extra chance that the wrong may come out; if appearances only are against them, let them have full opportunity of explanation. Such a train of reasoning would be sound, if any man were all mind, but tribunals composed of human beings have prejudices, traditions, emotions, and creeds which are irrational, and it is right that these should not be wantonly stirred. Perhaps the truth is that our limitations on the interrogations of witnesses are too many and the French too few. In both systems, probably, the humaneness of the triers reacts against any gross misapplication of the process, in favour of the victim;[1] as Baron Alderson wittily put it, the art of cross-examination is not to examine 'crossly.'

21. RE-EXAMINATION

The witness now reverts to his own side, and it is only fair that he should have an opportunity of putting in the most favourable light for the side which called him (or for himself) matters which are thought to have told against it or him. The object of re-examination is to set up what has been knocked down, and it is therefore confined to what tends thereto. No new subject may be introduced. Occasionally this examination is as effective as that to which it is the foil, as when the cross-examiner, acting on wrong or insufficient information, elicited that the witness had been in the company of a lady (in circumstances from

. . . very pointedly informed counsel [for the defence] that it was his duty to enlighten the jury about the antecedents of the accused—a duty which, he conceived, was in accordance with justice' (*Daily Telegraph*, Nov. 9, 1921). *We* conceive just the reverse.

[1] 'I heard but hardly believe . . . that a juror had said he would never find against the Claimant because Bovill [the judge] and I [the cross-examiner] had been very hard on him. I doubt this, but it is awkward.'—Sir J. D. Coleridge (afterwards L.C.J.), 2 *Life*, 417 (*Journal*, June 16, 1871).

which possibly a jury might draw unfavourable inferences), but carried the inquiry no further, the re-examiner simply asked who the lady was, and the answer being 'my wife,' the opponent's case was considerably damaged by what may have been an innocent mistake. On the other hand, a Chancery leader once elicited in cross-examination that the witness had been convicted of perjury: Re-examination began, 'Have you not often been acquitted of perjury?' 'The way how not to do it.'

Witnesses are called in succession for the same side.

A French practice, that of confronting witnesses who give a different version of the same event, is occasionally seen in the County Courts,[1] when, the issue being simple and the stake comparatively small, it is sometimes rapidly efficacious but naturally leads to undignified retorts and outbursts of temper.[2] It is of little use in a case where the least unravelling is necessary, though in rare circumstances, under the spell of a dramatic moment which it might create, it might extort an admission or a confession.

22. 'NO CASE'

The one side having produced its evidence, oral or documentary, has stated its grievance, and its case is closed. The other party may then submit that there is nothing to go to the jury, *i.e.* that there is absolutely no evidence[3] on which the jury could find for the view just presented to them; if there be any at all—'a *scintilla*,'[4] a

[1] Taylor mentions (and in an earlier edition laments) its disappearance from the High Court (s. 1478). He mentions an Irish case in 1743, where the court ordered the confrontation of two witnesses who were examined alternately, and where at one moment four witnesses were in the box together (17 St. Tr. 1351 and 1350).

[2] The Paris *Figaro* of August 24, 1904, contains an account of a 'tumultueuse confrontation,' which ultimately had to be stopped, owing to the extreme violence of one of the parties.

[3] *e.g.* if the action be for the price of goods, and the vendor fails to prove delivery.

[4] Erskine J. (1841, 2 M. & G. 727): but now this is too little; unless there is enough on which 'they *might* reasonably and properly' so find, the judge ought to withdraw it (1908, A.C. 352). In 1891, when the judge 'struck too soon,' *i.e.* after hearing only Counsel's speech, the C.A. insisted that the *sworn* evidence must be heard, for the speech might inadvertently contain mistakes (1 Q.B. 122).

judge once said—it must be left to them, at any rate nominally. Or if the question emerging is purely one of law, and the court has a distinct opinion against the contention made, in both these events it officially declares that there is no case, without calling on the other side, in whose favour the cause thus ends.

23. THE DEFENCE

But judge or jury may, and commonly do, wish to hear the evidence and arguments for the other side. Accordingly, that side begins by a speech, the object of which is not only to pick holes in the case as now put forward by the opponents, but also to show the strength of its own case based on the facts it proposes to establish. The procedure is then exactly the same as before, till after evidence (if any is called), another speech is permitted to the side now 'in' on the whole case. Finally, the beginning side is now allowed a second speech, to reply on the defence which has been made to its attack. 'The last word' is, perhaps, a tactical advantage.[1] It is necessarily given to that side, because, till the opponent is finished, it cannot know the fullness of his reply. And so, when no evidence of any kind is called for the defence, the beginner must make his second speech at the close of his own case (if at all). Here the defender relies entirely on the weakness of the case he has to meet, and, accordingly, it is to that case only its advocate need address himself.

24. THE SUMMING-UP OR DIRECTION TO THE JURY

The judge then sums up. His address, which is actually the last word before the jury deliberates, often (it is generally believed) turns the scale. Is it, then, fair that it should affect the result?

Theoretically, nothing could be more scientific than that the trained thinker, the champion of impartiality, who has

[1] It is said that Benjamin Q.C., a great advocate, once contented himself by saying to a city jury at the Guildhall, 'Give us our money and be quick about it'; and they did.

a general control over the proceedings of the court, should, in an equally general way, guide and direct the counsels of one constituent of it. No one will suggest that he should compel them. In many cases a reasonable person who has heard the whole of the case can come to but one conclusion, and in those, whether the judge sums up or not, the jury would come to that conclusion. But in many others, the proceedings leave a genuine doubt about what actually took place. It is the special business of the jury to solve that doubt; it is not the function of the judge. Yet suppose that he has no doubt, or, at any rate, has formed a strong impression on which side the truth lies, is he to sit by, and possibly to see injustice done (as he believes), for want of a word from him? And if he cannot be certain in his own mind that the jury will find the facts correctly, he must be still less certain that they will apply the law as he has explained it to them, correctly to the facts they do find, where their verdict must include determinations both of law and fact,[1] though in its form it is simply a declaration 'for' one side or the other. And yet the mere existence of a doubt on their part shows that doubt is possible, and that for that very reason their especial function begins. The dilemma seems to be—if it is a clear case, free from doubt, the jury will agree with the judge and a summing-up is useless; if they disagree with him, it is clear they doubted where he did not, and therefore a summing-up invades their province.

The view of the law itself on this subject has not always been the same; the doctrine that a judge should sum up the whole case generally seems to be comparatively modern. In 1745 a great judge, L.C.J. Willes, distinctly said, 'In answer to the objection that' a certain plea 'is leaving the law to the jury, it must be left to them in a variety of

[1] *e.g.* according to the variations of a number of facts the law of 'contributory negligence' (*i.e.* who of two contributories is liable for the result) varies extremely. Yet the jury may simply find for one side or the other; they need not declare that there was or was not contributory negligence or from what facts they draw their conclusion. A judge might think their inference from the facts right, and their application of the law wrong; or he might disagree with their view of the facts and yet admit that on that view they had applied the law correctly.

instances where the issue is complicated, as "burglariously," "feloniously," "treasonably." "Was it a devise or not?" "Was it a demise or not?" But the judge presides at the trial for the very purpose of explaining the law to the jury, and *not to sum up the evidence to them.*'[1]

Compare that with another case in 1841. Bosanquet J.[2] said, 'Is a judge merely to read over his notes without saying in what manner the case strikes him?' To which counsel replied, 'It is not the duty of a judge to state what is the balance of evidence.' And the judgments show what the court thought in this matter. Tindal C.J. says, 'The whole objection amounts to this, that the opinion of the judge was delivered in favour of the defendant. I think it is no objection that a judge lets the jury know the impression which the evidence has made on his own mind. At all events, the party objecting to such a course should show that the impression entertained by the judge was not justified by the evidence.' 'A judge,' said Bosanquet J., 'has a right to state what impression the evidence has produced on his mind.' 'The learned judge,' says Coltman J., 'seems to have made strong observations, but not stronger than he was justified in making. A large mass of evidence had been given, which, though of little weight in itself, was of such a nature as might mislead a jury'—a hint about one specific duty of a judge to a jury.

The danger, of course, is that a jury should become a mere instrument to register the decrees of the judge. And this danger arises from the position of the judge. His opinion would naturally and rightly prevail, endorsed after discussion by the jurors, even if it only came before them like any other view presented to them, but it does not. It comes before them with peculiar force. However intelligent a man is, if he is not disciplined in the work, his mind must fluctuate hither and thither as he hears details and arguments (to say nothing of appeals to his sympathies), first on one side and then on the other. It is inevitable in such a state of doubt that he should repose in the one person who speaks with authority, whom he knows to be absolutely

[1] Willes, 583. [2] 2 M. & G. 727.

disinterested, and whom it has been (happily) his lifelong habit to regard with respect, and perhaps a touch of awe, and that he should thus adopt his opinion bodily. And the stronger the judge's view, the more outspoken the bias,[1] the more will the irresolute juryman be prone to take refuge in the judge's certainty. In such a case there is no trial by jury. Such considerations have been felt so strongly in France, and in some of the United States, that the summing-up has been abolished in criminal courts.

'In France,' says the Comte de Franqueville (*Le Système Judiciaire de la Grande Bretagne*, c. 27. 7 : 1893), 'where the summing-up of the presiding judge at Assizes was often only another speech for the prosecution,[2] hardly less violent than that of the public prosecutor, it was determined to get rid of the abuse at its root and not to stop short of abolishing this formality : thus they fell from Charybdis into Scylla, and the remedy is perhaps more troublesome than the

[1] Erle C.J. told the following story in 1851. 'I was counsel in a case of assault. My client had had three ribs broken by a drunken bargeman. The opposite counsel cross-examined whether, since the accident, he had not been a field preacher, whether he had not actually preached from a tub. He admitted that he had. I did not see the drift of this ; for, though a man could not easily preach after his ribs had been broken, he might when they had re-united. The judge summed up strongly against me, and my client got nothing. I afterwards found that the judge had an almost insane hatred of field preachers. It is true that each juryman may have prejudices equally absurd, but they are neutralized by his fellows, and, above all, they are not known' (1 Senior's *Conversations*, p. 315). In the Whitaker Wright case, 'Mr. Justice Bigham, in his summing-up, did not hesitate to indicate the inferences which he would be disposed to draw from the evidence, while assuring the jury of their right to draw their own inferences. This mode of summing-up, though forbidden in some of the United States, is well established in England, and is recognized by the practice of asking a judge whether he is satisfied with the verdict against which any appeal is made. While at times abused by judges of imperfect discretion, it has its advantages, especially in a long case, in assisting the jury to a conclusion, or making them more careful in examining the evidence, if they are inclined to differ from the inferences of the judge' (L.Jo., Jan. 30, 1904).

[2] 'It often seemed to me that justice herself, if she had a voice, would speak like this. I know no spectacle that can impress so solemnly on the hearts of men veneration of the law.' But he adds that he had heard that under our system the individual is more protected than society, 'and that many guilty escape.'—*Notes sur l'Angleterre* (1872), c. 6.

disease.' It must be remembered, this is said of criminal procedure.

The principal value of the summing-up, to which, indeed, it owes its existence in its modern form, and which makes it absolutely necessary at hearings of any length, is the exposition in orderly sequence by a master mind of the involved relations between the different actors, the pursuit of the many threads of their activities, and the co-ordination of the whole mass of deeds and words to one picture or a series of pictures. It is thus a counterpart of the opening speeches, and should be, and sometimes is, a work of art.

The functions of the judge generally are *historically* considered in the following passage (P. & M., *History of English Law*, vol. ii. bk. 2, ch. ix. s. 4, p. 667): The behaviour which is expected of a judge in different systems of law seems to fluctuate between two poles. At one of these the model is the conduct of the man of science who is making researches, and will use all appropriate methods for the solution of problems and the discovery of truth. At the other stands the umpire of our English games, who is there, not in order that he may invent tests for the powers of the two sides, but merely to see that the rules of the game are observed.[1] It is towards the second of these ideals that our English medieval procedure is strongly inclined; we are often reminded of the cricket match. The judges sit in court, not in order that they may discover the truth, but in order that they may answer the question, "How's that?" This passive habit seems to grow upon them as time goes on, and the rules of pleading are developed.' Since the decay of these latter, the judicial mind, it is hoped, is monopolized by the first ideal. The medieval view has not survived.

'Conflicting fallacies,' says Macaulay (on *History*, 1828), 'like those of advocates, correct each other. It has always been held . . . that a tribunal will decide a judicial question most fairly when it has heard two able men argue, as unfairly as possible, on the two opposite sides of it. . . . Sometimes, it is true, superior eloquence and dexterity will make the worse appear the better reason; but it is at least

[1] 'The sporting theory of criminal justice.'—Fitzjames Stephen, *Jurid. Soc. Papers*, 468 (1857).

certain that the judge will be compelled to contemplate the case under two different aspects. It is certain that no important consideration will altogether escape notice.'

25. THE VERDICT

The jurors must be unanimous,[1] unless (in civil cases in the High Court *only*) the parties agree to accept the finding of a majority, when it has been announced that they cannot agree; or possibly by reason of the absence of one of them.

As has been already mentioned, the jury may have the duty to return a verdict simply for one litigant or the other, and to assess damages (if any), and they have the *right* to do no more. This undoubted right [2] of saying simply 'for A.' or 'for B.' is sometimes valuable, and has occasionally (in criminal, though but very seldom in civil cases) caused friction between the judge and the jury. For the judge may think it convenient to put certain questions to them about the facts, upon their answers to which the law will depend, and this he will apply. Such a course often defeats the intention of the jury, for they may conscientiously be able to answer the questions in only one way, and thereby may supply reasons for a decision, the contrary of which they could and would have secured had they not had need to give reasons. The whole situation is well illustrated by what happened in the famous Transvaal Raid Case in 1896.[3] Russell L.C.J. said towards the end of his summing-up, 'Finally, I have to ask you to answer certain definite questions . . . the principal reason is to show the dividing line between . . . questions of fact as we [three judges] conceive and . . . of law. . . . I am now about to direct the jury as on former occasions, and to tell them that if they desire they may decline to answer and may return a general verdict. . . . We think that this is peculiarly a case upon which it would be almost grotesque to ask you, without

[1] The rule was not fixed before the fourteenth century and never laid down in print.

[2] 3 Ad. & E. 506 (1835).

[3] A criminal case, but the law is the same for the present purpose.

any guidance from the court, to pronounce an opinion about what was the effect of hundreds of documents. . . . Also . . . if you choose, in opposition to the request which I and my brethren make to you, to refuse to answer these questions, nobody can make you answer them. The Court asks you to answer them because they think it is right in the interests of justice . . . that they should be answered. . . .'

The Foreman: 'I should like to ask one question: suppose we prefer not to answer them in this way, is the alternative "guilty" or "not guilty"?'

The L.C.J.: 'That would be the alternative undoubtedly. But you ought to consider—I say it without any feeling at all, except the desire to see the law carried out reverently and decently—you will be incurring some responsibility if, without adequate reason, you refuse to answer these questions.'

The jury answered each question, whereupon Lord Russell said: . . . 'That amounts, gentlemen, to a verdict of guilty, which you now find against all the defendants.'

The Foreman said that there was a 'Rider' about the great provocation in the state of affairs at Johannesburg, and added: 'My lord, we have answered your questions categorically.'

The L.C.J.: 'Then I direct you that in accordance with those answers you ought to find a verdict of guilty against the defendants. . . . Gentlemen, I direct you that in point of law that amounts to a verdict of guilty . . . and it is your duty to say so.'

The Foreman: 'My lord, there is one objecting to that. We answered your questions categorically as an alternative; we do not agree on a verdict of guilty or not guilty.'

The L.C.J.: 'That is a most unhappy state of things, and if there is one juror objecting to it, he ought to reconsider it. These questions, answered as they are, amount to a verdict of guilty, and to nothing else. They are capable of no other construction, and therefore I direct you—and I direct my observations particularly to the gentleman to whom you refer as differing from the rest—that you ought all to find, in accordance with the terms of these findings, a verdict of guilty.'

After a short consultation, the Foreman: 'My lord, we are unanimous in returning a verdict of guilty.'— (*Official.*)

. . . . . .

Here it is obvious that one at least of the jurymen wished to declare 'not guilty,' and if they had all done so, the court would confessedly have been powerless. Thus this case shows the value of the special verdict, *i.e.* the findings of certain facts, for, in effect, it compels the jury, so to say, to show their hand and leave the final adjudication in the hands of the court, which will put the proper legal interpretation on those facts.[1] For it has long been observed as the chief flaw in the system of trial by jury, that juries have the power, though not the right, to find the law—a power which can be defeated by the device of inducing them to answer specific queries, for it is much more difficult for bodies of men or for individuals to answer plain questions perversely than to stretch an opinion, especially one not strongly entertained one way or the other—and, after all, finding for one litigant or the other is expressing an opinion. For instance, in the case last mentioned, the jury, if left to themselves, probably would have found a verdict of 'not guilty'; confronted with definite questions, they could not have achieved that end without an obviously perverse distortion of the facts. To such perverse findings we shall see the counter-stroke of the law presently. Further, a jury often does not know the legal effect of a special verdict or it would not give it. Might it, therefore, not be suggested that, in the interest of legal justice, the true type of a verdict in civil cases is the special verdict?

26. DISAGREEMENT OF (CIVIL) JURY *INTER SE*

If the jury fail to agree,[2] the judge usually makes one or two attempts to get unanimity; if he fails, he must

[1] So in the *Mignonette* case, the jury were asked to find the facts—not to say 'guilty' or 'not guilty.'

[2] 'It has been often suggested that after a certain time the verdict of a majority [*misprinted* minority] should be taken, as, for instance, that the verdict of eleven should be taken after one hour, and that of nine after three hours. Such proposals appear to me to be open to the

perforce release them from further consideration of the case. Things are then as they were before the trial, and the suer still has, generally, the right to begin again. Occasionally both sides agree to a majority verdict, but naturally a defendant tends to refuse, although in the end he may have to pay costs of two trials.

27. DISAGREEMENT OF JUDGE WITH JURY

Even when the jury agree upon a verdict it may have no effect, even for a moment, for it still has to run the gauntlet of the judge, who may, and occasionally does, disapprove of it and set it aside. In 1862 Chief Baron Pollock and four other judges said 'a judge has a right, and in some cases it is his bounden duty, whether in a civil or a criminal case, to tell the jury to reconsider their verdict. He may send them back any number of times to reconsider. He is not bound to record the first verdict, *unless they insist upon his doing so*; if they find another verdict, that is the true verdict.' [1] In a civil case there is no necessity for a judge to ask a jury to reconsider a verdict of which he disapproves, for it is expressly provided [2] that he shall direct judgement to be entered 'as he shall think right.' Accordingly, to take a concrete instance, where the question for the (special) jury was whether a husband had an English or an Austrian domicile at a given

objection that they diminish the security provided by trial by jury in direct proportion to the occasion which exists for requiring it. If a case is easy, you require unanimity. If it is difficult, you accept a small majority. If very difficult, a still smaller one. . . . Trial by jury has both merits and defects, but the unanimity required . . . is essential to it. If that is given up, the institution itself should be abolished.'—Sir J. F. Stephen (a judge), 1 *Hist. Crim. Law*, 305, c. 9 (1883). Cf. 2 P. & M. B. 2, c. 9, s. 4. In Scotland a majority in a civil case is not accepted, except by consent, until three hours after it has been 'enclosed'; but it is at any time in a criminal case: if it is six against six for twelve hours it can, but need not, claim discharge.—*Encycl. Laws of Scot.*, v. 5, 255; v. 8, 547 (1929).

[1] L. & C. 213; 9 Cox, 231—a criminal case; the words in italics only refer to criminal cases. Pollock Q.B. said that in the case of 'the Hammersmith ghost' [*F. Smith*, 1804; Russell on *Crimes* (1928), 726], on a verdict of manslaughter, four judges told the jury that it was either murder or an acquittal, and they found murder.

[2] Order 36, Rule 39.

moment (on which depended the question whether a divorce granted in Austria was valid or not), and though the judge directed them that the facts were really all one way, *i.e.* showed that the man's domicile was Austrian, they found (apparently from sympathy with the guiltless wife) that it was English, and persisted in that finding, the judge ordered judgment to be entered for the husband, who asserted the Austrian domicile.[1] After expressing his extreme astonishment at the verdict ('I was never more astonished in my life, and I thought that a jury might be fairly trusted . . . I have heard some astounding verdicts in my life, but I confess I was never before so taken by surprise') he went on, 'I never wish to appear to set aside a verdict of a jury, and I say it with the greatest regret, . . . but had I known what course things were going to take, I should have considered one, two, or three times before deciding that it should be left to a jury. The *onus* does lie on the wife to show a change of domicile, and no real evidence has been offered on this point on which a jury of reasonable men could find that there had been a change of domicile, and I am prepared to direct judgment to be entered for the husband. I do desire to add that I have no hesitation in saying that the Austrian decree is valid, and that this English marriage has been dissolved.'

If it is just that a judge should have this power [2] where the jurors are unanimous, *a fortiori* is it right where they disagree, for then some of them agree with him. Accordingly, it occasionally happens that when the jury disagrees, the judge decides for one party.[3]

But cases of judges thus formally overriding or superseding juries are naturally rare. They may all, perhaps, be classed as cases in which the judge might, had he chosen, have stopped the trial when the one side had finished, on the ground that there was no evidence 'to go to the jury' against the other, and he does not lose this right because, contrary to his expectation, the verdict is for the former.

[1] *The Times*, July 15, 1903.

[2] A County Court judge has it not, but he may grant a new trial.

[3] *e.g.* 10 T.L.R. 366, 1894, where both the motives mentioned in the next paragraph seem to have weighed with the judge.

He may think that by not withdrawing the case from the jury, he may give the suer another chance, for the witnesses for the sued may strengthen the case of the suer —a thing that often happens—or that in the event of an appeal it may be convenient and save time and expense that the evidence of both sides should be before the court. In criminal cases he may, if he is dissatisfied with the verdict of guilty, at once give leave to appeal.

In any case, exceptions of this sort do not really impair the fundamental rule that where there is a doubt about the facts, it is for a jury to decide upon them. Moreover, such judges' verdicts are like their other decisions, and like all verdicts, subject to appeal. Still, this ultimate control of a judge of first instance gives great colour to Bentham's view : ' A conception nearer to the truth will be formed by considering the main or principal power as in the hands of the judge, that of the jury serving as a check to his power, than by considering the principal power in the hands of the jury, that of the judge serving as a check to theirs.' [1]

28. JUDGMENT : EXECUTION

In the great bulk of cases the judge gives effect to the verdict of the jury, and if they award damages, pronounces for the amount they find. Of course, if there is no jury, he has the powers of one. Unless he otherwise orders, his judgement takes effect at once, and if it includes, as it commonly does, a direction that one party is to pay the other a sum of money, that sum becomes a debt, and the creditor has all the ordinary rights of a creditor in respect of it (*e.g.* he can sell it, or take bankruptcy proceedings in respect of it), *plus* the right to ' issue execution,' *i.e.* to have the debtor's property—in whatever form almost it may be found—seized and sold to defray the debt, on going through the simple formalities necessary ; execution may take place on the very day of the judgement. It is this stage which a litigant should keep in view before taking action, for, if the party he sues is not worth ' powder and shot,' *i.e.* has no property or not enough, a victory may be barren,

[1] *Works*, vol. v. p. 67 ; *Juries*, Part I. ch. ii.

or nearly so, for there is nothing or extremely little on which to levy execution, and the creditor may be saddled with the cost of issuing it, besides his previous expenses. However, there is a process by which the debtor may be examined—publicly, sometimes—about his means and independent evidence thereof given; and power is given to the judge to commit him to prison if, having means to satisfy the judgement, he fails to do so.

If the judgement should be that a specific thing is to be delivered over, it could be enforced in much the same way. Moreover, the judge can commit to prison for disobedience to his order; and this is generally the remedy of the court where it has adjudged something to be done (*e.g.* an obstruction to be removed) or not to be done (*e.g.* certain persons not to trespass on land)—in contradistinction to something to be paid—and it has been disobeyed. It follows that where an appeal is contemplated by the sued, frequently their first object is to get a stay of execution from the judge pending appeal, for in any case it may be extremely inconvenient to pay over a sum of money—to take the commonest instance—for a time, even though it is ultimately returned on the success of the appeal, and in many cases the party to whom the money is due would certainly not be able to refund it in the event of the appeal going against him. On the other hand, it is not fair that the winner should be deprived for an indefinite time of the fruits which finally may appear to have been his from the date of the judgement, or before; accordingly, he is entitled to four per cent. interest on the sum awarded all the time he is 'kept out' of it. Further, his opponent, too, may be of such sort that unless the judgement can be satisfied at once, it may never be satisfied, for he may dispose of his property, or otherwise lose it, before the appeal is decided. In all these circumstances the judge must make up his mind. Where the losing party is thoroughly substantial and certain to be 'good' for the money, he will more readily grant a stay of execution without any conditions; if he is not so confident of the future solvency of the loser, he may order the money to be paid into court as a condition of granting a stay, there

to abide the appeal, and he may take exactly the same course if he wishes the money not to get into the hands of a winner who probably would not refund it, if the appeal was successful. Or he may disapprove so entirely of the proposed appeal that he may refuse to help the appellant in any way, in which case execution may issue at once, unless a higher court can be persuaded to grant a stay. And there may be an appeal against any of the other decisions for a stay just suggested.

29. COSTS

The judge has a further duty to perform at the time of judgement. In 1870 there was a forty-year-old joke that there were matters of three degrees of importance in an action : first, there were the legal technicalities ; second, the costs ; and finally, the merits (23 L.T.N.S. 794–5). In any case, the subject of costs is of sufficient importance to be treated separately.

30. APPEALS (CIVIL)

The broad principle on which it is permitted to challenge the conclusion of a court is, of course, that it is fallible, it may make a mistake either in finding facts, *i.e.* it asserts or assumes something to have happened which, in fact, did not happen, or in administering the law, *i.e.* in the opinion of other lawyers, it applies the wrong law to the facts before it, or it may combine both sorts of error. On the other hand, it is obvious that resort cannot be had to this principle indefinitely, else litigation might go on for a very long time ; indeed, it might never definitely and formally cease. Clearly, in a *bona fide* dispute, injustice is done to some one by unnecessary delay in finally settling it—to the State, says an old maxim, by reason of its citizens who are at law not minding their own business —and very gross injustice by very long delays. The law, therefore, had to take up a position intermediate between these two possibilities of grievance. It will review a decision alleged to be unjust, but it will not review such

review *ad infinitum*. Roughly speaking, it thinks two 'shots' enough, but sometimes it will not permit even one.

We cannot go into the history of the subject, but may cite the following sentences: 'Nothing that . . . could properly be called an appeal from court to court was known to our common law. This was so until the "fusion" of common law with equity in the year 1875. . . . In the twelfth century, under the influence of the canon law, Englishmen became familiar with appeals (*appellationes*) of a quite other kind [ecclesiastical]. . . . The graduated hierarchy of ecclesiastical courts became an attractive model. The king's court profited by this new idea; the king's court ought to stand to the local courts in somewhat the same relation as that in which the Roman *curia* stands to the courts of the bishops. It is long indeed before this new idea bears all its fruit, long before there is, in England, any appeal from court to court . . .' (P. & M., *History of English Law*, v. ii. b. 2, c. ix. s. 4).

Now, at any rate, there has been a great growth of the idea, though the curtailment of its luxuriance has been a constant achievement of modern reforms. As the science of law has grown, naturally a point of law has become more important to the lawyer; hence professional bias has favoured such appeals to those on the facts. Roughly speaking, the upward steps of the hierarchy now are (1) police court or petty sessions, or other local courts, or chief clerks, masters,[1] registrars, referees, arbitrators, commissioners; (2) a single judge of the High or the County Court; (3) the King's Bench Division or the Probate, Admiralty, and Divorce Division; (4) the Court of Appeal; (5) the House of Lords [2] (*i.e.* the peers who

[1] Officials largely concerned with the administrative details or 'the practice' of an action, both before (as illustrated frequently above) and after. Out of London, many of their duties are performed by district registrars.

[2] The Judicial Committee of the Privy Council is the body which hears appeals to the 'King in Council,' *i.e.* almost, but not quite, entirely appeals from our colonies, dependencies, India, &c., and some ecclesiastical. It is therefore composed of judges past and present, British, and from the various dominions according as cases come from

are or have been judges [1]). The word 'roughly' is used because no appellant needs to go through the whole gamut of tribunals, but must pick his halting-places according to his point of departure. The combinations are many, and even practitioners are sometimes in doubt whither their first step must be, but the Divisions, the C.A., and the H.L., are occupied almost entirely with appeals, including requests for new trials. With a few exceptions, there is no application in the C.A. which may not be carried to the H.L. With the exception of the two extremes, there is no court which may not be appealed to as well as from, and it will be generally noticed that by a sort of courtesy, appeal is generally to a larger number of judges. No co-ordinate court, *i.e.* one on the same plane, can bind or control any other. The C.A. will always, if it can do so with justice, avoid ordering a new trial by disposing finally of the matter before it, with a view to saving time, trouble, and expense. Where the question is purely one of law, it can always do so by giving judgement for the party it thinks is in the right; but where

their respective lands, and of prelates in church matters. Its extraordinarily geographical jurisdiction is illustrated by a hearing (*Times*, May 15, 1931) whether a 'Chief . . . who rules over 40,000 sq. miles of the Bechuanaland Protectorate' was entitled 'to burn the houses as a punishment' of two of his tribe.

[1] *i.e.* the Lord Chancellor, the Lords of Appeal in Ordinary (six at most; they are peers for life, and paid), and peers who hold, or have held, 'any of the . . . high judicial offices' (ss. 5, 25, Appellate Jurisdiction A., 1876). Theoretically, these appeals are heard at a sitting of the House, and any noble (though not 'learned') lord may take part. And they frequently did: in the colossal *Douglas* Legitimacy Case, 1761–9, which 'nearly caused a civil war in the north,' 'there had been much canvassing' by both sides (Campbell, 5 *Chanc.* 288, c. 144). In 1883 a lay peer took part in *Bradlaugh* v. *Clarke*, and voted with the minority (*Annual Practice*, 1921, vol. ii. p. 2132). But in modern times such a thing is otherwise unheard of, though there is nothing but 'the conventions of the House' to prevent it (Anson, *Constitution*, v. 1, 239 (1922)). The House can always and sometimes does in cases of difficulty (as *e.g.* in *Daniel O'Connell's* case in 1844: *Allen* v. *Flood*, 1898, A.C. pp. 4, 11–67) consult the judges. This practice has survived from very early days when they, like other eminent officials, were members of a great conclave, of which the House of Lords is the largest surviving fragment. The judges still get a writ to 'advise' each Parliament. For a *criminal* trial (not an 'impeachment') by the House of Lords, see p. 213 *n.*[3].

the decision of a jury is impugned, or there is a conflict of evidence, it is naturally reluctant to forgo the aid of findings of fact, and only interferes in a very clear case.

A County Court judge has more power in the matter of appeals than a High Court judge, for the latter cannot grant or refuse a new trial in a case he has tried, while the former can, whether he tried the case alone or with a jury. In 1860 there were four jury trials of the same plaint, at the last of which the suer clearly won, but the judge, dissatisfied with the verdict, refused to record judgment —but he was overruled! The reason is that the County Court takes cognizance of litigation about smaller sums[1] than the High Court, and is consequently the tribunal to which the poorest class of suitors generally must resort, and it minimizes the expense and trouble of appeal if application is made to one who already knows all about the case. From his decision about a new trial there is an appeal to the K.B.D. only on points of law: on a question of fact he is final; *e.g.* that A. paid B. £10. But if he thinks a jury have made a mistake, *e.g.* have given excessive damages, or their verdict is against the weight of evidence, he can grant a new trial.

An appeal from a High Court judge sitting alone is a

[1] Roughly speaking, the County Court limit is £100 debt or damage. But this does not apply to actions remitted, *with* or *without* consent of the parties, from the High Court. But there is no jurisdiction, as a rule, in the County Court to try actions for breach of promise of marriage, libel, slander, seduction, or those 'in which the title to any . . . hereditaments, toll, fair market, or franchise' (including a patent) is disputed. Where there is a yearly rent or value in dispute it must not be over £100 if the County Court is to have jurisdiction. In certain cases there is power to remove a cause from the County to the High Court, security being taken that the party so increasing the costs shall, if necessary, pay them.

Speaking broadly, the County Court is a miniature K.B.; in bankruptcy it actually has the status of the High Court, with jurisdiction throughout England (except London); and as, since 1865, it has had 'a limited jurisdiction in equity,' it might almost be called a miniature High Court, especially as, since 1868, there is a limited Admiralty jurisdiction in such of these courts as are held in the neighbourhood of the sea. Moreover, it has many other miscellaneous duties, as fresh Acts constantly widen its jurisdiction. The value generally of the property in litigation over which the County Court has Equity jurisdiction is £500 or under; parties who take their actions to the High Court that could be tried below may be mulcted in costs. Solicitors appear in these Courts. No reference is here made to emergency (war) jurisdiction.

rehearing of the whole cause—law and facts—by the C.A. In some cases leave to appeal must be obtained from judges, for example, in the County Court when the amount at stake is £20 or less, and sometimes leave has to be obtained from the C.A. to go to the H.L. The object of these restrictions is to discourage unnecessary appeals.

All these instances presume appeals by parties interested, but very often those parties are not sufficiently interested or wealthy 'to go further'; in such cases the science of law may suffer. 'The public, it may be suggested,' says Dicey, 'would gain a good deal if a power were conferred upon the House of Lords of calling up for the House's decision (say on the motion of the Attorney-General and of course at the public expense), cases determined by the Court of Appeal and involving the determination of an important principle of law which had never come before the House of Lords.' This has now actually been effected from the *criminal* C.A., even at the instance *of a party*, if the Attorney-General approves. The only *non-litigious* facility of this sort is under the Judicial Committee of the Privy Council Act, 1833, whereby the Crown may consult them in the abstract, so to say: this was done in 1913, when there was a doubt whether a member of the Commons had vacated his seat or not: 1913, A.C. 514: they decided that he had.

31. GROUNDS OF APPEAL—FRAUD, PERJURY, &c.

Where there has been actual fraud, through which a judgment has been obtained, or that result has been brought about by untrue statements, that were not discovered to be false until it was too late, there is an appeal by means of a fresh action (besides other redress). Thus, in 1896, Littlejohn brought an action against Sturrock for moneys paid on his behalf. The former made out his case on affidavit so strongly, the essence of it being that he had paid the money for Sturrock to a third person (to whom Sturrock owed it, and of whom, apparently, he was not able to make any inquiry), that the latter believed him, and (under the summary procedure described above)

agreed to pay the sum claimed without further proceedings. When he discovered that the whole story was a fraud, Sturrock successfully brought an action to recover all he had been made wrongfully to pay, including Littlejohn's and his own costs in that suit, and his costs in the second, or 'review' action.[1]

It must be remembered that all appeals of this kind are to lawyers—never to juries. This is reasonable when pure points of law are to be discussed, and when a jury's findings of facts or of damages are impugned : two or three trained judges are quite competent to decide whether a verdict was *manifestly* perverse in any particular, for otherwise it will not be set aside. Moreover, witnesses are not, as a rule, heard after the trial of an action—their proper place—and very seldom in the preliminary stage before it, where affidavits are the only evidence. For the proceedings at the trial of an action the C.A. must rely on the judge's notes—except in the Probate, Admiralty, and Divorce Division, where there is an official shorthand writer—unless the parties have agreed to use and pay for a shorthand transcript.[2] In a sense, counsel who has appeared 'below' is a witness, but an advocate is not a desirable witness. The C.A. ought to have a full and faithful account of the matters on which it is to pass judgement, and should not need to resort to any extraneous inquiry.

32. VERDICTS APPEALED AGAINST

The commonest grounds of appeal are that the verdict of a jury is against the weight of the evidence, that the damages a jury has given are too much or too little (§ 33), that the judge has made a mistake in the law—for example, has admitted or rejected evidence wrongly, or has misled

[1] 68 L.J.Q.B. 165.

[2] It would, perhaps, generally add to the dignity of the appeal, and sometimes to the chances of justice, if there was an official shorthand record of every action, at any rate, in the High Court (as there is now of every trial on indictment). The judge's notes are, like his summing-up, necessarily coloured by his view ; he need only put down the bare minimum of what he considers relevant, and that limitation may be the very ground of appeal.

the jury (or himself)—that the jury have been influenced by improper motives or means, that fresh and material evidence has come to light since the trial, or that there was perjury thereat, that the judge found the facts wrongly, &c. &c., all on the allegation that some substantial injustice has been done; a mere technical irregularity, not alleged to impede the course of justice, is not enough to upset a judgement.

And first, for appeals from verdicts of (civil) juries.

Since 1886, the principle of control has been clearly stated by the H.L.[1] A passenger was hurt, when getting out of a carriage, by being thrown on to a platform by the motion of the train; she brought an action against the railway company, alleging negligence; they said it was her own fault. The evidence was conflicting, but a special jury gave her three hundred pounds. On appeal, the K.B.D. (*i.e.* two judges) took the view that the verdict was against the weight of evidence, and ordered a new trial. The C.A. restored the verdict, Selborne L.C. saying, 'As the verdict was not perverse or unreasonable, looking to the evidence given, it does not seem to us to be a case in which the decision of the jury, who are the proper judges of such questions, should be interfered with. The damages are, I think, plainly not excessive, if the verdict is right or if the verdict was one which the jury, in the exercise of their proper judgment, were entitled to give. . . . I have always understood that it is not enough that the judge, who tried the case, might have come to a different conclusion on the evidence than the jury, or that the judges in the court where the new trial is moved for, might have come to a different conclusion, but there must be such a preponderance of evidence as to make it unreasonable and almost perverse that the jury, when instructed properly by the judge, should return such a verdict.' 'The question which we have to determine,' said Herschell L.C. in the appeal to the H.L., 'is not what verdict we should have found, but whether the Court of Appeal were wrong in holding, as they have done, that the verdict was not against the weight of evidence. . . . I am not prepared

[1] 11 A.C. 152.

to say that a jury might not reasonably find that the accident was due to the negligence of the defendants' servants.' Ld. Fitzgerald added, 'If my recollection does not mislead me, we have departed, in this House in several instances, from the old rule which introduced the element of "perversity," and have substituted for it that the verdict should not be disturbed, unless it appears to be not only unsatisfactory, but unreasonable and unjust.'

Ld. Halsbury said: 'If reasonable men *might* find (not "ought to," as was said in another case) the verdict which has been found, I think no court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges." The verdict was unanimously upheld.

But this does not mean that, 'if there is evidence to go to the jury, it is almost impossible, except in extreme cases, to set aside a verdict as being against the weight of the evidence.' In 1896 a horse-dealer bought from a farmer for £70 a horse with a warranty that it was sound and a good worker. Upon its arrival it was found that this warranty was not fulfilled. Several veterinary surgeons said it was a very bad 'shiverer,' and suffering from a disease which must have been in existence at the time of the sale. This the seller vehemently denied. A jury awarded the buyer his money back, and two out of the three members of the C.A.[1] upheld this verdict, being well aware of the case last cited, but not thinking that the jury had taken an unreasonable view. But the third judge did think so, saying, 'Can a verdict which, ignoring a large body of evidence given by witnesses of unimpeached veracity, with every opportunity of knowing the true state of facts about which they speak, and some of them absolutely independent witnesses, facts, too, about which they could not be by any possibility mistaken, and which verdict adopts the mere speculative opinions of scientific witnesses unsupported by, and in opposition to, every antecedent fact proved in the case, and in the face of scientific evidence on the other side reconciling the evidence given on both sides, and affording a reasonable solution of the matter in

[1] 13 T.L.R. 174; 14 T.L.R. 41; 77 L.T. 536.

controversy, be said to be just or reasonable ? I answer that question in the negative. . . . If there ever was a verdict against the weight of evidence, I think this is one.' And so thought the H.L., which ordered a new trial. Herschell insisted that 'the question which had to be determined should have been so left to the jury, that one is satisfied that it was before their minds, that their minds were applied to it, and that they did really on the determination of that question give their verdict.'

It comes then to this, that the verdict of any High Court jury may be annulled by a majority in a smaller body on a review of exactly the same evidence *minus* the living witnesses.[1] It must be remembered, however, that the appeal from the larger to these smaller juries is from the untrained to the highly trained in gauging and analysing evidence. The (comparative) fewness of the verdicts thus set aside is a tribute to the common sense and application of the jurors. We have seen the course open to a judge dissatisfied with a verdict. No official notice—at any rate systematically [2]—is taken of his satisfaction or dissatisfaction ; the mere fact that the jury would not adopt the judge's view of the evidence,[3] will not weigh with the reviewing court.

33. DAMAGES

The policy in respect of the award of damages is much the same. The general rule is that the amount is a matter peculiarly within the province of the jury, so much so that, except by consent, a judge never fixes the figure unless it is fixed by law ; but if it can be shown that the sum is either so

[1] This element has been increasingly insisted on of late years, especially in the C. Crim. A.

[2] In Ireland, apparently, a judge who was dissatisfied with a verdict formally certified the C.A. to that effect ; 18 C.L.R.Ir. 53 : 1885, where a jury gave sixpence for a bad assault in 'a public-house row.' On a second trial, substantial damages were given. Cf. in C.A., *Times*, June 28, 1905 ; and cf. L.Jo., Jan. 27, 1906, p. 48. The C.C.A. has the statutory right of calling for a report from the trial judge.

[3] 12 T.L.R. 285. The C.A. has often said that it is 'almost impossible' to get a new trial because 'the verdict is against the weight of evidence.'

little or so much that there must presumably be something wrong in the way it was arrived at, a court will interfere and either rectify the figure or send the case to be tried by another jury.

First, a few words on damages generally. In 1877 a London doctor, earning, it was said, between £6000 and £7000 a year, was injured and incapacitated for life by a railway accident. He brought an action, and the judge, in addressing the jury, said:[1] 'As a matter of law, the principle of damages is not very well defined, and I am inclined to think purposely so, because in this country, be it right or wrong, the public are to be judged by their fellow public, and not always to have the minds of lawyers to judge between two men of ordinary life and habits. In a question of damages like this, it seems to me that the law means to bring in the habits, thoughts, feelings, and general knowledge of things, which are brought to bear, by taking twelve honest, independent men, chosen indifferently, and putting them into the box to consider what sum one man ought to pay another for an injury. With regard to contracts there is no difficulty. If I contract with you to sell you so much sugar at such a price, and I do not do it, and you are obliged to spend double the money in getting the sugar, you put down the figures and say the damage you have sustained is so much, and that is what I must pay. If I contract with you on a bill of exchange, I must pay the amount and the interest upon it, because I have contracted to pay that. In those cases there is no difficulty whatever in the principle of damages. But when you come to damages like the present, which involve personal injury, the measure becomes more difficult. The only principle, if I may use the word, which applies to contracts is this, that you must, as a rule, give a man compensation by way of damage for the loss he has, in the ordinary and natural course of things, suffered from the breach of contract. But it has been pointed out for centuries, and it is the principle of foreign jurisprudence as well as ours, that in actions for personal injuries of this kind, as well as in many others, it is wrong to attempt to give an equivalent for the injury

[1] 5 Q.B.D. 78.

sustained. I do not mean to say that you must not do it, because you are the masters, and are to decide ; but I mean that it would operate unjustly. . . . Perfect compensation is hardly possible, and would be unjust. You cannot put the injured man back again into his original position. . . . You will have to consider under the head of damages, first of all, the pain and suffering to him. An active, energetic, healthy man is not to be struck down almost in the prime of life, and reduced to a powerless helplessness, with every enjoyment of life destroyed, and with the prospect of a speedy death, without the jury being entitled to take that into account, not excessively, not immoderately, not vindictively, but with the view of giving him a fair compensation for the pain, inconvenience, and loss of employment which he has sustained. . . . The next head which you have to consider is the amount of expense which he actually incurred.' The judge also told the jury that they were not to give the value of an annuity of the same amount as the sufferer's average income for the rest of his life. If they gave that they would be disregarding some of the contingencies ; they must give ' on the fairest estimate ' they could make of what the probable continuance of his professional income would have been (and, it may be added, he told them that he could not see that the fact that the doctor enjoyed a considerable income ' from other sources ' ought to alter the amount they should give him). The jury gave £7000. Two courts approved a new trial, on the ground that this amount was so small that the jury must have left out of account some of the circumstances which should have been taken into it. At the second trial the jury gave £16,000, assumed by the court [1] to be made up of £1000 for the pain and suffering, and £15,000 for three years' average income at £5000 a year. This sum was now attacked as excessive, but unsuccessfully. This case shows that there are some legal rights that it is impossible to reduce to a money standard ; only a guess is practicable. Such cases, by the way, are frequently compromised when there is a prospect of a re-hearing, one side or the other fearing to come off still worse ; as in 1896, where a jury

[1] *The Times*, Dec. 18, 1879.

had awarded a lady twelve thousand pounds (though she had only claimed five) against a physician for libel and slander,[1] the parties came to terms before the question of excessiveness went further.

Finally, *Kelly* v. *Sherlock*[2] (1866) is most instructive. This was an action by a clergyman against a newspaper proprietor-editor for libel. The facts perhaps sufficiently appear from the following passages in the judge's summing-up, after he had expressed 'his unqualified opinion that the alleged libels were quite unworthy of an educated gentleman.' 'I would ask you whether it is possible to say otherwise than that they are publications calculated to defame' Mr. Kelly, 'and to expose him to contempt and aversion. Is it possible to say they are fair and reasonable comments upon public matters? I do not see it for my part, but it is a matter for your opinion.

'Then comes the question of damages. It certainly is a most unfortunate thing that a gentleman who tells you that he is a minister of religion, and of love and charity, should have managed to embroil himself with so many different people, and about such trash, that he should have been the plaintiff at these assizes in four actions . . . he has brought an action against the churchwardens of his church; he has managed to quarrel with the corporation and with the organist; and has had a scuffle with somebody else, according to the conviction for assault against him.' The jury gave a farthing damages. On appeal on the ground of inadequacy, Shee J. was in favour of a new trial on this ground, saying that they were all agreed, that 'regard being had to the number and characters of the libels . . . and to the lateness and meagreness of' Sherlock's 'apology for them, a verdict for substantial damages would have been much more satisfactory, and more in accordance with the truth and justice of the case. . . . The judge would have done better to advise the jury that, regard being had to the character, the falseness, and the long continuance of the libels and the inadequacy of the . . . apology in respect of time, and substance . . . the case was not one for nominal damages. . . . Upon the whole, the result

[1] *The Times*, May 1, 1896. [2] L.R. 1 Q.B. 686.

of' Kelly's 'appeal to the law of his country, adding as it does, insult to injury, and giving a victory over him to his reviler is, in my opinion, much to be regretted and one which . . . we might well have interfered to prevent.'

But the other two judges declined to break the general rule, though one said he would have been better satisfied with higher damages, 'as I think that the persistence of' Sherlock 'in the reiteration of defamatory statements concerning Kelly, either wholly untrue or grossly exaggerated, was neither sufficiently met by his tardy and meagre apology nor palliated by any actual provocation, which he had individually received.' Still, 'it is not enough to justify us in setting aside the verdict, that we believe that the jury did not form the same estimate that we might have done of the fact that the libels extended over a long period of time, and reiterated imputations which had been satisfactorily explained. It may suffice to say that, on the amount of damages, it was in the province of the jury to weigh both the matters of aggravation and mitigation, and to determine the result.' And the third added, 'There could be no doubt that the publications were libels, and libels of a gross and offensive character, and if the question had been one of punishing' Sherlock 'none could have doubted that the verdict ought to have been heavy. But the question was not what fine ought to be imposed on' Sherlock, 'but what compensation ought' Kelly 'to have for his injured feelings; for it is to be observed that there was no pecuniary damage, and that no one who in these unhappy controversies was not already prejudiced against' him, 'would think worse of him in consequence of the vulgar abuse of' Sherlock. And after reviewing Kelly's conduct, he continued, 'I cannot say that I think the jury were bound to give him substantial damages, though I heartily wish that their verdict had not been such as to give an appearance of triumph to' Sherlock.

These cases are enough to illustrate the general rule that the courts are very reluctant to set aside a jury's estimate because it is too low, but perhaps to-day that reluctance is smaller than it used to be.

At any rate, this jurisdiction is much more frequently

exercised where the contrary fault—one to which juries are certainly more prone—viz. excessiveness, is alleged. The general rule is much the same as in the opposite case, viz. the court will only interfere 'if the damages are so large that no reasonable men ought to have given them,' *e.g.* £500 against a person who had written to a wife a statement, which, even if true, did not necessarily (though it did possibly) impute to the husband immorality, but, at the least, unconventionality; two courts refused to interfere.[1]

In one of the famous cases of arrest under general warrants, in 1763, arising out of the publication by Wilkes of No. 45 of the *North Briton*, a journeyman printer had been taken into custody by a King's messenger, who had detained him for about six hours, 'but used him very civilly by treating him with beef steaks and beer, so that he suffered very little or no damages,' a jury awarded £300, which the lucky printer kept.[2]

Merest, Esq. v. *Harvey*,[3] in 1814 was an extraordinary case. Mr. Merest, 'a gentleman of fortune,' was shooting on his own grounds when Harvey, 'a banker, a magistrate, and a Member of Parliament, who had dined and drank freely after taking the same diversion of shooting, passed along the road in his carriage, and quitting it, went up to' Merest 'and told him he would join his party, which' Merest 'positively declined. . . . But' Harvey 'declared with an oath that he would shoot, and accordingly fired several times upon' Merest's 'land and at birds which the latter found, . . . and used very intemperate language, threatening in his capacity of a magistrate to commit' Merest. 'The witnesses described' Harvey's 'conduct as being that of a drunken or insane person.' A special jury gave £500, and Merest kept it. 'I wish to know,' said a judge, 'in a case where a man disregards every principle which actuates the conduct of gentlemen, what

[1] 24 Q.B.D. 53.

[2] 2 Wils. 205. Wilkes himself got £4000 against the Earl of Halifax, the Secretary of State, for about six days' detention (D.N.B.), and Mr. Beardmore, 'an eminent attorney,' £1500 against the same nobleman (Annual Register, Dec. 11, 1764, and Feb. 7, 1765).

[3] 5 Taunt. 442.

is to restrain him except large damages ? . . . What would be said to a person in a low situation of life who should behave himself in this manner ? I do not know upon what principle we can ' interfere ' in this case unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage. . . . Suppose a gentleman has a paved walk in his paddock before his window, and that a man intrudes and walks up and down, . . . and looks in while the owner is at dinner ; is the trespasser to be permitted to say, " Here is a halfpenny for you, which is the full extent of all the mischief I have done " ? ' ' I remember,' said another judge, ' a case where a jury gave £500 damages for merely knocking a man's hat off, and the court refused a new trial. . . . It goes to prevent the practice of duelling,[1] if juries are permitted to punish insult by exemplary damages.'

A promising engineer, earning £3 a week, twenty-eight years old, who had been injured in a railway accident, was awarded £3000 damages. Though the individual members of the C.A. would not have given so much, they declined to interfere because it did not appear that the jury had been influenced by *extraneous* considerations.[2]

In such cases it is inevitable that the natural indignation of the unsophisticated citizen should express itself, and the law cannot prevent ' vindictive ' damages, *i.e.* more than mere compensation.[3] Thus in actions for seductions

[1] Anticipated in 1764 : a special London jury gave Mr. Grey £200 for a black eye, caused by the violence of Sir A. Grant, M.P., who had been provoked by the former's calling him a scoundrel during a quarrel. The court refused to interfere, saying, ' when a blow is given by one gentleman to another, a challenge and death may ensue, and therefore the jury have done right in giving exemplary damages.' Grey ' has been used unlike a gentleman by ' Grant ' in striking him, withholding his property, and insisting upon his privilege (of Parliament), all of them tending to provoke him to seek his revenge in another way than by law, and therefore we think the damages are not excessive ' (2 Wils. 252).

[2] 1904, 2 K.B. 250.

[3] Because, the loss having no definite pecuniary value, it is natural that juries should visit aggravated moral wrong by a high fictitious assessment and that judges should not discourage it. But even here, the law will exercise control. Where a man's paramour wrote to him a libel ' of a very aggravated character ' on his wife—with whom he was living, though she afterwards divorced him—' for

—in *form* claims for a pecuniary equivalent for the loss of services of the wronged female, and not to be entertained unless there be such loss, and not to be brought by her but by her master or relative who suffers such inconvenience—the law never scrutinizes nicely the amount in which the wrongdoer is mulcted. So in actions for breach of promise of marriage, *nominally* the inquiry is (when the breach is established) into the material loss of the suer; thus in 1835, when a jury gave a jilted lady £3500, in the belief that the offender was a very rich man, the court [1] agreed to *review* the verdict on some evidence that his wealth had been exaggerated, but ultimately sanctioned that figure. But in another such action,[2] in 1890, where the sued had behaved with great baseness, a jury, by awarding £10,000 (reduced to £6500), exemplified the easiness of defeating their own object, for the person in question became bankrupt, a result which often follows 'crushing' damages.

Another case in 1884 [3] well illustrates the law on this subject. After a trial of very great length, £5000 damages were awarded a sculptor for libel. On appeal, both on the ground that the verdict was against the weight of evidence, and that the damages were excessive—one judge thought that the verdict was wrong, one that it was right, and the third, with whom the first agreed, that the damages should be reduced to £500. To this the sculptor agreed, and accordingly a new trial was refused. But his opponent was not satisfied, and went to the C.A. But as this was to re-open the whole matter on its merits, this court had

the purpose of undermining any goodwill that might continue to exist' between them, and at the trial the wife was cross-examined with the view of showing that her relations with her husband were such that his loss could not be reasonably deemed to be a matter for heavy damages, and the jury awarded the lady £5000 against the libeller, this sum was held to be excessive, and reduced to £1500. The court quite recognized that it was a case for 'vindictive or punitive' damages, and that the jury were entitled to enhance them on account of the nature of the cross-examination referred to. 'But allowing for that,' said the judge, '£5000 was altogether outside reason, and was a sum which no jury could reasonably have arrived at . . . except by taking into consideration matters they had no business to' (*Times*, June 18, 1903).

[1] 2 Bing. N.C. 166. [2] *Times*, Aug. 13, 1890.

[3] 12 Q.B.D. 356; *Times*, March 18, 1884.

to review the evidence, and coming to the conclusion that the verdict was not against the weight of evidence, resolved that the original verdict (for £5000) should stand.[1] Its incidental decision that the C.A. can revise damages without the consent of both parties was overruled in 1905 (*W.* v. *W.*, A.C., 115); both parties must consent.

When a jury gave a libelled golfer £1000 the C.A. not only thought that sum excessive, but entered judgment against him; but the H.L., accepting the excessiveness, ordered a new trial on *that point* only (*Times*, March 24, 1931).

Perhaps the present state of the law is to be found in a recent (January 1931) article in the *Fortnightly Review*. 'Lord Sumner explained the mental processes by which he corrected the exuberance of a jury. . . "In my opinion by no formula can £1000 be got at. For any damage really done £100 was quite enough: double it for sympathy, double it again for the jury's sense of the defendant's conduct, and again for their sense of Mr. F. E. Smith's [afterwards Lord Birkenhead]. The product is only £800 . . . in libel the assessment . . . does not depend on any definite legal rule, but there must be some reasonable relation between the wrong done and the solatium applied."'

34. OTHER GROUNDS OF APPEAL

Actual misconduct, in the ordinary sense, of juries is rare; but there was a case in 1840. 'The trial took place in a large room, without anything to separate the jury from the other persons present. It was sworn that in the course of the trial the jury, without the authority of the under-sheriff or stopping of the proceedings, went out and returned smoking cigars. On one occasion some were seen talking to the plaintiff's attorney in an adjoining public-house.'[2] The verdict was for the plaintiff, and a new trial was ordered. In 1915 a member of a borough

[1] But this supplied another instance of the above-mentioned effect of 'crushing' damages, *i.e.* that they are not paid.
[2] 8 Dowl. 315.

council served on a jury in an action in which his council was sued but won. It was agreed that the verdict was a proper one, but a new trial was ordered.[1] Even when the usher of the court was present during a jury's deliberation without saying a syllable a new trial was ordered.[2] When a juror was heard criticizing a witness to some one, the trial was stopped for a new jury.[3]

If a clear, or even a probable, case can be made out that the verdict was obtained by perjury, *e.g.* if a material witness is actually convicted thereof,[4] there will be a new trial. About 1765 there was an extraordinary case.[5] Fabrilius ' was a Dane, and the case he made out at the trial was that he had escaped from a Danish settlement in the East Indies with 6000 pagodas (£2400) quilted about his body. (He was present in court, walked to and fro with great agility, and then showed he had 6000 pieces of lead of the size of pagodas concealed and fastened about his body.) That he came aboard one of our East India ships, of which the defendant was mate, and he had deposited these pagodas with him. Some Danish sailors who were aboard swore to circumstances which proved his having the pagodas and putting them into the defendant's hands. Great stress was laid upon the confusion the defendant appeared to be in when the money was demanded of him. A witness, who called himself a Danish consul, swore to circumstances in support of the plaintiff's case. . . . So the jury, to the satisfaction of Lord Mansfield, found a verdict for £2400. (The Danish ambassador sat by Lord Mansfield and interested himself for the plaintiff. Marginal note.) The defendant moved for a new trial upon the ground that the whole was a fiction supported by perjury, which he could not be prepared to answer. That, since the trial, many circumstances had been discovered to detect the iniquity and to show the subornation of the witnesses. The Court, after a very strict scrutiny, granted a new trial on payment of costs. The justice and propriety of the determination appeared in a very strong light to many persons, who thought the whole

[1] 31 T.L.R. 564. [2] 1915, 2 K.B. 674. [3] *Times*, Ap. 24, 1931.
[4] 3 Doug. 24 : 1781. [5] 3 Burr. 1771.

story to be manifestly a scheme of villainy, supported by perjury. And the plaintiff never dared to try it again'; he ran away.[1]

Honest mistakes may clearly have the same effect as wilful perjury, and, accordingly, there was a new trial in such a case [2] in 1823.

Akin to these cases are those where the facts are not even known to the losing side at the trial. In 1774, where a receipt for a sum for which there had been a verdict and judgment was discovered after the trial, a new trial was allowed.[3] So in 1823, on the oath of Thurtell (afterwards a murderer, executed in 1824), a jury awarded nearly two thousand pounds against an insurance company in respect of goods burned in a warehouse. It was strongly suspected that the fire was due to arson, but the judge rightly told the jury that suspicion was not enough; unless they were satisfied that the owner had been guilty of the capital offence, as arson then was, they could not find against him. Nor was a new trial ordered till proof was adduced of the actual conspiracy to defraud the company—showing that the claim 'had been supported by a tissue of unparallelled and audacious fraud'—including a sworn confession by an accomplice of Thurtell's in the murder for which, by this time, both were in prison.[4] But, as in these instances, the 'new fact' must be practically conclusive; *i.e.* it must be tolerably certain that, had it been known, the verdict would have been the other way, 'unless,' as a judge put it,[5] 'it can be shown that the verdict was based on mistake, surprise, or fraud,' there will not be a new trial. The same authority, while setting up the same test in a case [6] in 1902, observed that though there ought to be such new evidence as would probably upset a judgment—in this case there was no jury—that before the C.A. need not necessarily be such as could be produced at the trial; it must, apparently, be enough to

[1] 3 Doug. 28.
[2] 1 Bing. 145. But the mistake must be serious and absolutely clear 3 T.L.R. 71: 1886).
[3] 2 W. Bl. 956. [4] 1 Bing. 339. [5] 81 L.T. 531 (1899).
[6] 71 L.J.P.D.A. 58; see also, in 1904, 1 K.B. 12, Cozens-Hardy L.J.

convince that court. Fraud generally, as the means of getting a judgment, is a ground for a new trial.[1]

A very rare—but not unique—ground [2] for setting aside a verdict was that accepted (amongst others) by the C.A. when counsel had, in effect, in opening, charged the lady defendant with blackmail, without any substantiating evidence.[3] The court could not 'appraise how far' these observations had affected the verdict of the jury, who had given £500 damages for libel. It thought that, though the judge at the trial dealt with this element, 'and no doubt modified it, and the damages might in consequence have been reduced,' he had not realized sufficiently how much this departure from the ordinary practice of counsel might have influenced the jury. This is a somewhat *naïve* suggestion that juries cannot distinguish between evidence to facts, and unsupported statements by an advocate, and it implies that they are susceptible to rhetorical denunciation. In 1904, however, the Court of Tennessee decided that an advocate has a perfect right to make a jury weep.[4]

The C.A. may not only order a new trial,[5] which is to

[1] 20 Ch. D. 672 : 1882, where a solicitor, himself a party sued, put in a fraudulent defence, making admissions ; his client got the action reheard and won.

[2] In 1844 a judge said, 'I remember a new trial once granted' because 'an unfair speech had been made by the advocate' opposed, 'but the precedent was never followed' (6 M. & G. 692).

[3] *The Times*, June 15, 1903.

[4] *Daily Express*, Oct. Quintilian had read of the harm done by orators by 'perniciosa eloquentia' and hence 'et Lacedaemoniorum civitate expulsam et Athenis quoque ubi actor movere affectus vetabatur, velut recisam orandi potestatem' (*Inst. Or.* ii. 16 ; cf. xii. 10). In 1916 the C.C.A., though it commented on the 'bad taste of prosecuting counsel in addressing the jury, "I appeal to you gentlemen to protect young girls from such men as these"—and condemned language likely "to inflame or prejudice the jurors' mind," did not disturb the verdict' (12 Cr. Ap. R. 74).

[5] On very various grounds, some, merely personal, *e.g. The Times*, Jan. 22, 1828 (or Jan. 21, 1928) : 'Will it be believed possible that a man beyond eighty can sit from day to day in a hot crowded court for eighteen hours often—never less than eight or nine—obliged during the whole time to attend, to write down the whole evidence, and to comment on this to a jury ? Instances of the judge falling asleep from mere exhaustion have not seldom happened. We remember the present C.J. of the Common Pleas [Sir R. Gifford] moving for a new trial on the very ground that the judge was asleep during the most important

restore the *status quo ante*, but may reverse the decision of the court below by giving judgment for the appellant; *e.g.* where a jury had given damages for breach of contract, though an appeal failed on one ground, judgment was reversed on the evidence generally, though this had not been asked (1925: 69 Sol. Jo. 380). This naturally occurs much more frequently where the appeal is on a point of law than where there has been a conflict of evidence and findings of fact are impugned, for the judges are the sole authorities on the law, and can therefore rectify an error in law at once, whereas their control over facts they share with the jury.

35. COSTS

In the rare cases where neither side has an advocate—chiefly county and police courts—litigants' expenses are small.

'Costs,' said Baron Bramwell in 1860, 'as between

parts of the trial'; his 'nap was during his own [Sir R. G.'s] speech.'

In 1847, after a lady had got £300 for breach of promise of marriage, a new trial was granted, on the ground of 'surprise' and fresh evidence. The day before the trial Cockburn, for the gentleman, made an application about it to Chief Baron Pollock, who remarked that 'in his opinion it would be insanity in the defendant to call witnesses'; thereupon a 'scene' followed, Cockburn strongly protesting, because the jurors in waiting must have heard these words, and when next day the case was duly called, he applied for a postponement and a new jury. The judge refused, and there was another 'scene' in which Cockburn withdrew from the case; a juror vehemently protested that nothing the judge could say before trial would affect the jury, the trial proceeded, and the lady got £400—no one appearing for the man. Despite many sworn protests from juror and an explanation by Pollock, a new trial was granted and the word objected to condemned (11 Jurist, Pt. I. 544). The importance of this decision is even greater to-day when newspapers are rife; it is almost certain that jurors know beforehand of sensational cases (*Rouse's* case, Jan. 1931).

In 1866, when he was a judge, Cockburn said Pollock had said more than was reported, and himself refused a new trial because the judge suggested before the hearing that the case should be settled (7 B. & S. 475).

A new trial was granted when a judge refused to allow counsel not instructed by an attorney to cross-examine (15 Q.B. 171: 1850).

party and party, are given by the law as an indemnity to the person entitled to them. They are not imposed as a punishment [1] on the party who pays them, nor given as a *bonus* to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained. Of course, I do not say there are not exceptional cases, in which certain arbitrary rules of taxation have been laid down; but, as a general rule, costs are an indemnity, and the principle is this—find out the damnification, and then you find out the costs which should be allowed.' [2]

This may be taken to represent the theory of the law. In practice, the theory cannot usually be perfectly realized, because it assumes the existence of other theories, from the application of which, as a matter of fact, one side or the other departs. The law assumes that the losing side has necessitated the litigation, and should therefore pay for it; [3] but as a matter of fact, this is not always so: there are infinite varieties in the distribution of the responsibility between the parties, of whom there may be, and frequently are, more than two. For theory and practice to coincide, we must suppose a suer clearly in the right, a sued clearly in the wrong, and the course of the action so smooth that the former did not indulge in a single penny of expense beyond the strict legal allowance, with the result that when he gets a 'clean win,' and judgment with costs, he is awarded not only his substantive claim, but all that it has cost him to vindicate it. But this state of things occurs seldom, if ever; one of the commonest reasons being, that even where a demand is thoroughly justified, the maker in prosecuting it incurs

[1] But in 1740 Hardwicke L.C., where a man had been 'guilty of the grossest fraud that ever appeared before a court,' said, 'If I could make him pay exemplary costs, I would do it; but though it was the ancient course of the court in notorious frauds, yet it has been disused for some time from the difficulty of carrying it into execution' (2 Atkyns, 43). For general principles see a H.L. case (1927, A.C. 732).

[2] 5 H. & N. 385.

[3] The general rule applies to appeals, the winner of the final fight getting the costs of *all*.

expenses beyond those the law will refund him. Even in the imaginary case supposed, where he does recover every farthing 'out of pocket,' he still loses his time in 'getting up' his case, and in attending at court, though, as a witness, if he was one, he may be allowed certain expenses: ideal justice would compensate him for this loss, to say nothing of his anxiety. And it is obvious that the law must set some limit to the expense to which a winner has the *right* to put a loser. To take a familiar example, it would be grossly unjust for any one who had a clear case, free of all legal difficulty, to employ three or four counsel at the trial and saddle his opponent with their fees as 'costs.' Accordingly 'costs' are strictly regulated by law.

In the long course of practice the details of this subject have been pretty thoroughly worked out, and a staff of officials,[1] as part of an elaborate machinery, has come into existence to do justice in each case in this respect. Nothing can here be attempted except an outline of the general principles relevant.

In all cases, the proper authority on costs is the authority who decides at the hearing—the judge at the trial,[2] a court or judge of appeal, when the appeal is determined, or the official who decides preliminary points before a trial, at the time he so decides. From that discretion there is sometimes no appeal,[3] unless a question of law arises, *i.e.* it is contended that some order for costs is bad in law. In all cases where costs must be asked for, they must be asked for at the conclusion of the hearing to which they relate, for then the merits are fresh in the mind of the judicial authority; though of course he may, if it is convenient, reserve his decision on the point, or have the question argued at some future time.

The general rule is that costs follow the event, *i.e.* the successful party is awarded some costs from the unsuccess-

[1] Called taxing masters (*taxare*=to criticize or challenge).

[2] At one time the jury had a voice in this matter. 'The jury, by the judge's favour, did give us but £10 damages and the charges of the suit.'—Pepys, June 3, 1663.

[3] And 'the House of Lords will not entertain an appeal against costs only' (1903, A.C. 126).

ful. What are these? It is impossible to enumerate them, because in each case they depend on the particular circumstances. Nevertheless, certain principles have been fixed in the course of centuries, and these are administered by experienced officials.

As an illustration (merely) of a common type of the costs allowed between party and party, a successful plaintiff's costs, 'independent of the result of particular issues,' *i.e.* subsidiary points on which he may have failed and got no costs, or even been ordered to pay the costs, include charges for—'letter before action: instructions to sue: writ: service of writ: search for appearance if no notice of appearance having been entered is given: claim, or notice in lieu of claim: instructions for claim: reply: attendance to deliver claim: and subsequent pleadings, if delivered: instructions for same: all necessary and proper perusals: notice of trial: setting down cause: attendance at the trial: instructions for brief: drawing brief and copy for counsel: copies of necessary documents: counsel's fees,' &c.

'A successful defendant's costs of the cause include—instructions to defend: undertaking to appear: entering appearance: notice of appearance: perusing statement of claim: instructions for defence: drawing same, delivery of pleadings: instructions for rejoinder and drawing of any rejoinder, attendance at trial: brief for counsel, &c., as in the case of plaintiff.'[1] The generality of the rule (above) may be illustrated by the following case[2] in 1880: An English firm, agents of publishers in New York, received a consignment of copies which infringed an English copyright. They were innocent in the matter, and upon receiving a warning from the copyrighter they determined not to sell the copies, and were willing to give a promise to this effect; but before they could do this, an injunction was sought against them, 'importing for sale' being a clear offence under a Copyright Act, and they had to pay the costs of the action. 'As I understand the law,' said Jessel M.R., 'of costs it is this, that where a plaintiff comes

[1] *Costs*, by W. E. Gordon, p. 152; 1884, but still *substantially* valid.
[2] 15 Ch. D. 501.

to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the court to deprive him of his costs—the court has no discretion, and cannot take away his right to costs. There may be misconduct of many sorts : for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the court to refuse costs ; but where there is nothing of the kind, the rule is plain and well settled. . . . It is, for instance, no answer where a plaintiff asserts a legal right for a defendant to allege his ignorance of such right, and to say, " If I had known of your right I should not have infringed it." . . . I have often remarked that there is an idea prevalent that a defendant can escape paying costs by saying, " I never intended to do wrong." That is no answer, for as I have often said, some one must pay the costs, and I do not see who else but the defendants who do wrong are to pay them.' [1] So much for the general rule. Costs follow the event, and are taxed on the ' party and party ' scale.

Now for the first important exception. Till January 1, 1930, if there was a jury, the judge(s) might, 'for good cause,'[2] deprive the successful party of his costs ; since then in '*all proceedings*' they are ' in the discretion ' of the court. Naturally there has been much discussion about the meaning of ' good cause.' The law was laid down in the following case.[3] One of Bostock's servants occupied an open space in Ramsey with his menagerie for fifteen hours, despite the prohibition of the local authority. Some months after, criminal proceedings, characterized by a judge as perfectly ' puerile ' and involving Bostock, who lived at Glasgow, in great inconvenience and some expense, were taken at Huntingdon for an unlawful obstruction. The judge there ' made some strong comments ' on the case, and soon directed the jury to acquit. Thereupon Bostock brought his action for malicious prosecution ;

[1] But the strictness of this rule has, perhaps, been since modified.
[2] R.S.C. (made by authority of an Act), Order 65, rule 1.
[3] 1900, 1 Q.B. 357 ; 2 Q.B. 616.

but the judge, holding that the council had reasonable and probable cause for their action, and had not acted maliciously, decided in their favour and withdrew the case from the jury, but at the same time deprived the winners of their costs in view of their conduct; saying, 'I am of opinion that the judge is not confined to the consideration of the defendant's conduct in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation. In the present case I think I am entitled to look at the antecedent conduct of the council, which led to the apparent necessity of Bostock to vindicate himself against the charge which had been brought against him.' And the C.A. thought so too.

Here, then, the sued, though successful, was deprived of costs, and this case merely followed the principle of another,[1] in 1880, where the successful suer was deprived of his. A doctor brought an action for libel against a lady who, in a letter to a rich old woman whose affairs he had formerly managed, and who was just coming out of an asylum, wrote, 'Mind you keep away from that doctor; you know what he brought you to before,' and a jury gave him £10 damages, but the judge deprived him of the costs, saying, 'The libel was of a very mild character, but the reason I deprived' him 'of costs was this, that I thought he had brought the whole thing on himself. The old woman was evidently of weak intellect, and he had got hold of the whole of her property so as to excite very just suspicion on the part of the neighbours. . . . Then' the doctor 'was induced to give up the money he had got, and this was a kind letter . . . to the old woman who was coming out of the asylum. The verdict, to my mind, was inexplicable . . . and I came to the conclusion that it was just the case in which the court is to interfere.' Another judge thought that the jury might have been perfectly justified in their verdict, and the judge equally so in holding that if the suer 'had been a person with proper feeling he would not have brought the action,' and that the proper course had been taken, and this view prevailed in the C.A., where

[1] 5 Ex. Div. 307.

it was said, 'The jury are not judges of the costs of the action,[1] and on the other hand, the judge, in exercising this jurisdiction . . . must not take upon himself to overrule the verdict of the jury, and has no right to say that the particular thing complained of was not a libel. . . . But [N.B.] the amount of damages given by the jury is not to be considered as conclusively' settling the question of costs. 'Every judge would take it as a material element in considering whether this jurisdiction . . . is to be exercised or not. But it is the duty of the judge who tried the case, and the duty of the C.A. also, to consider the whole circumstances of the case, everything which led to the action, everything which led to the libel, everything in the conduct of the parties which may show that the action was not properly brought in respect of the libel. . . . I am satisfied that this letter never did, or could have done, the slightest harm to' the doctor, 'and further, that it was not the true cause of the litigation. . . . I cannot but think that the sum of £10 was not awarded as the measure of any damage due to the letter, or as the measure of injury to' his 'wounded feelings,' 'but was obtained through the eloquence and skill of his counsel, who managed to impress upon the jury that a less sum would not be sufficient to send him home with his character cleared. In fact it was given as a response to the appeal to their feelings. . . . I think that the judge was justified in holding that the £10 . . . was not substantially different from 20*s*. . . . It would be doing injustice to the ' sued ' if we were to make her and her husband pay costs on account of this incautious letter.'

But even where there is no misconduct, a successful suer may be deprived of some of his costs. Forster took a house on lease from Farquhar and others on their agreeing

[1] But they often try to be. In *Kelly's* case, above, the jury could not agree, and came into court and asked, 'What verdict would carry costs?' The judge told them it was no business of theirs, 'otherwise they might defeat the law,' because, 'it says, in certain cases, for the prevention of frivolous actions, if the plaintiff does not recover a certain amount, he shall try his action at his own expense. . . . You ought to say, "We will give a certain amount," but the amount ought not to be regulated by its effect upon the costs.' There can be no doubt that the jury sometimes intend to give costs, and no more.

to make the drainage good, and occupied it with his family. Soon after, his children and some of his servants were attacked by scarlet fever, which the doctor put down to the defective drainage, which was then examined and found to be amiss. Thereupon he brought an action [1] against Farquhar, &c., claiming for medical attendance, &c., £217, 19*s.*; cost of disinfection, &c., £10º; costs of removal, &c., £40; fees, &c., of sanitary engineer, £26, 18*s.* 6*d.* But doctors testified that the scarlet fever was not due to the defective drainage, and so the jury found, though they gave him £12, 12*s.* for engineers' fees. Thereupon the judge ordered him to pay his opponents' costs in respect of the other three items, and this order was strongly confirmed in the C.A. 'As a matter of reason,' said one judge, 'it is clear that a successful litigant need not have been guilty of injustice or oppression to make it unfair that he should cast on his opponent all the costs of litigation. The measure of what is fair in costs is not to be found in a mere consideration of his conduct towards the opposite side. It may have been reasonable, from his point of view, to do that which it would be unreasonable to make the opposite litigant pay for.' And he recited a remark of Ld. Halsbury's, viz. 'I cannot entertain a doubt that everything which increases the litigation and the costs and which places on the defendant a burden which he ought not to bear in the course of that litigation, is perfectly good cause for depriving the plaintiff of costs.'

Or again, when the misconduct is rather general than relevant to the particular case, a successful suer may lose his costs. In 1889 a jockey brought an action [2] against a newspaper for a libel alleging that he had 'pulled' his horse in two races. The jury gave him a farthing, and the judge took away his costs. The higher court refused to interfere, for, as one judge said, 'as a matter of business no jury would give a plaintiff merely a farthing damages if they believed that his evil reputation was not founded upon truth. . . . The jury meant that this jockey had this evil reputation,' and that, though he had not pulled this horse, he had been in the habit of pulling before. 'If that

[1] 1893, 1 Q.B. 564. [2] 5 T.L.R. 272.

were so, a man with such a character had no right to bring the action, and he acted oppressively in doing so.' Clearly, then, the smallness of the damages is an element the judge must *take into consideration* in deciding on costs.

There is even a further step possible in the disciplinary use of costs, and that is by actually making a successful suer pay the costs of the sued. In 1888 an action [1] for libel was brought against a newspaper and its editor-manager, and at the same time the latter sued his opponent (M.) for slander. After four and a half hours' deliberation, the jury found for M. on both claims, with a farthing damages for the former; on the slander, they found that M. had not intentionally slandered the editor. The judge ordered M. to pay the costs of the other side on the claim for which he had got a farthing, and deprived him of his costs (and no doubt, if he had had the power, would have made him pay the opponents') on the claim on which they had failed. The judge expressed dissatisfaction with the verdict, especially with 'unintentional slander'; he thought, having regard to the time taken to find it, it was in the nature of a compromise, and it appears from his remarks that M.'s charges were untrue and unwarranted against persons who had completely exculpated themselves, and that it was these charges which had led to the retaliatory paragraph. In 1910 a judge said that M.'s was an exceptional case, but, *as a rule*, a farthing ought not to carry costs from the other side.

The sued, too, though successful, may be deprived of his costs. The following is a strong case,[2] because one appeal judge thought that 'the charge totally broke down' against such a person. Smith, a brother-in-law of a bankrupt, asserted that two valuable policies of insurance on the latter's life were his, as security for a debt; the trustee in bankruptcy alleged that this was 'a concoction and a fraud,' and claimed the policies for the creditors.

[1] 5 T.L.R. 42. Cf. 1906, 2 Irish Reports, 357; 26 T.L.R. 394, 1910: libel.

[2] 2 T.L.R. 881, 1886. It must be a very strong case indeed. See 74 L.J. Ch. 421: 1905.

At the trial certain discrepancies came out between Smith's evidence then and previous evidence in the bankruptcy about the debt and entries relating thereto, but the jury found in his favour. The judge deprived him of costs on the ground that his accounts were of a suspicious nature, and that, by his evidence in the Bankruptcy Court, he had brought the litigation on himself, as the trustee was justified in further inquiry, and by two to one, the judges above thought that the judge had 'good cause.' 'Whenever,' said one of them, 'a defendant had, by his misstatements, made in circumstances which imposed an obligation upon him to be truthful and careful in what he said, brought litigation on himself and rendered the action reasonable, there would be "good cause" to deprive him of costs. For some reason or other,' Smith 'told a falsehood in the bankruptcy proceedings, and, having done so, his creditors might well believe his whole story was false.'

But though a successful suer may (in extreme cases) be made to pay the costs of the sued, the converse is not true—though there is power to deprive the sued, who is successful, of his costs, there is none to make him pay all the costs of his opponent. The most he can be mulcted in is, said Jessel M.R., 'perhaps the greater part of the costs, by [the court] giving against him the costs of issues on which he fails, or costs in respect of misconduct by him in the course of the action. But a judgment ordering the defendant to pay the whole costs of the action cannot, in my opinion, be supported unless the plaintiff' wins.[1] 'There is,' said another judge, 'an essential difference between a plaintiff and a defendant. A plaintiff may succeed in getting a decree, and still have to pay the costs of the action, but the defendant is dragged into court and cannot be made liable to pay the whole costs of the action if the plaintiff had no title to bring him there.' This case is illustrated by one in 1853—a miserable squabble between an attorney and his clerk about the premium for the latter's articles, and was remarkable for the following exordium[2] by Knight Bruce L.J.: 'This is a conflict

[1] 18 C.D. 76: 1881. [2] 4 De G. M. & G. 520.

of demerits, the question being whether the very bad case of the defendant is not equalled or exceeded by the badness of that of the plaintiff. A series of Vice-Chancellors have refused to have anything to do with these parties, and they have accordingly now bestowed themselves here [in the C.A.]. The suit . . . is one for which the defence must be the apology, and the badness of which almost apologizes for the defence. The money sought by the claim . . . is, in a sense, due from the defendant to the plaintiff, and perhaps it is as clear that the defendant ought to pay it as that the plaintiff ought not to receive it. . . . There is much to regret on both sides. I think the plaintiff was ill-advised in bringing this claim forward at all; but when brought forward, it certainly should have been met in a different manner ['immorality, profligacy' were only items in the counter-charge]. It has been met in a manner neither justifiable nor excusable. . . . I think' making the sued, though successful, pay costs, 'a jurisdiction of considerable delicacy and difficulty. . . . There are here . . . passages . . . filed by the defendant which go beyond the ordinary and proper licence—which go into the private life, truly or untruly, of the plaintiff, and into his general habits in a manner which cannot be requisite.' In the result, the attorney lost his action, but his clerk had to pay him £20 'for the impertinent [irrelevant] matter contained in the affidavits,' and, of course, got no costs.

The possibilities of the distribution of costs are, perhaps, enumerated by Jessel M.R.[1] 'The judge has a large discretion about costs; he may make the defendant pay the costs of some of the issues in which he failed, although he may have succeeded in the whole action. Or he may say that both parties are wrong, but that he could not apportion the blame in a definite proportion, therefore would dismiss the claim without costs. Or he might say that the plaintiff should have half the costs of the action, or some other aliquot part.[2] Or he may follow the course

[1] 17 Ch. D. 774: 1881.

[2] So in 1902 a judge remarked that the 'form of dividing the costs according to the issues . . . though logical and strictly right, gives rise to a great deal of trouble. The costs of an issue, or costs increased

which I sometimes adopt, and I generally find that the parties are grateful to me for doing so, namely, fix a definite sum [1] for one party to pay to the other so as to avoid the expense of taxation, taking care in doing so to fix a smaller sum than the party would have to pay if the costs were taxed . . . there is no appeal from the discretion of the judge.'

Thus, the arbiter of costs was 'the discretion of the judge.' This discretion, as we have seen, now exists in 'all proceedings.' But it has been laid down, 'wide though the discretion is, it is a judicial discretion, and must be exercised on fixed principles, not according to private opinion, or even benevolence or sympathy,' [2] and where, as in one of the last cases cited, the wrong principle has been applied to costs, the reviewing court will interfere. But where that discretion has been exercised it will not interfere. Thus, where a man, by erecting some buildings, and especially a wall, obstructed his next-door neighbour's light for a time, but on the latter's remonstrance, offered

by a particular claim, do not connote by themselves any of the general costs of the action; and, therefore, when the matter comes before the taxing master, great difficulty occurs in distributing the general costs of the action, and notwithstanding the great knowledge and experience of the taxing masters, the difficulty is often not satisfactorily solved. Sometimes it is possible with some care at once to say that the party who is to pay costs shall pay a certain proportion of the whole costs, and, if that can be done, time and expense are saved. Of course, such a method is necessarily rough, and in the nature of an estimate; but still, I cannot help thinking that such a rough estimate is just as likely to do what is right as the more logical and precise method' (*Weekly Notes*, 1902, 49). This method, it seems, is reserved for cases of much or intricate detail, complete investigation into which would be protracted or impossible. Thus, in 1902, where an infringement of trade marks was alleged, and the chief evidence went back to 1892, and some evidence even to 1876, and there were two hearings, and each party was partially successful (and it probably would have been impossible to fix each party exactly with the costs for which he was liable), the judge lumped the two sets of costs together, and bade one party pay the other two-fifths of the aggregate, believing that thus he did 'substantial justice,' and that such an order was 'in mercy to the parties and to the taxing master' (1903, 1 Ch. 230). Perhaps in Chancery the tradition has been generally in favour of a more liberal scale.

[1] This is now constantly done, especially where the fund to be dealt with is small.

[2] For the various instances, almost innumerable, see the very learned comments on Order 65, v. 1 of the *Annual Practice*.

to give him full satisfaction without litigation, and soon after when the latter took an action against him, renewed his offer in effect, and on this, too, being refused, pulled down the wall but went on with the rest of the building, and when the action against him was heard, the judge, evidently thinking that the action might have been dispensed with, awarded £2 against him, *without* costs, for the obstruction to the light while the wall was up, but on the claim for injury to his neighbour's premises, through his building work, found in his favour, *with* costs, the court above held [1] that there was no appeal from the decision on costs. So where small retail dealers had innocently bought five hundred cigarettes, valued at 17*s.* 6*d.*, which, in fact, infringed a trade mark, and returned the great bulk of them when they found out the fraud, the judge, while he held that he must prohibit them from selling the spurious goods, declined to give costs against them, as he did not think such actions should be encouraged.[2] This case was followed, as modifying the strictness of the general rule laid down in 1880, when [3] *The Times* sued the *St. James's Gazette* for infringement of copyright in an article by Rudyard Kipling, and in certain paragraphs. The case was abundantly clear about all the 'copy,' but, for the article, the latter journal, on a given date, was willing to give the required undertaking not to publish it further. It was not shown that the former journal had suffered any damage, and the judge, while commenting very strongly on piracy of this sort, yet, in view of the 'notorious practice' for twelve years of the latter of making extracts from the former 'without any objection or complaint,' and of their being then summarily 'pulled up' all at once without notice, made no order on the paragraphs and (practically) gave no costs, and for the substantial grievance of the article, he only allowed costs —or, at any rate, very little more—down to the date in question, that is, on the basis of the undertaking having been accepted.

It is clear that it is sometimes morally right to communicate with the other side before going to law, and the

[1] 65 L.T. 354: 1891. [2] 1892, 1 Ch. 630. [3] 1892, 3 Ch. 500.

omission may affect the costs, but 'it never has been the law . . . that a defendant should always have notice of the intention to bring an action before it is brought'—often 'there is no time for such notice, as promptitude is essential' (last case). Thus, in a clear case, where the sued offers *everything* (including costs) the suer could at the moment obtain, the latter ought not to go to law merely to heap up costs; if he does, he may lose [1] his case and have to pay the former's costs. Moreover, if, of two or more technical ways of proceeding, the dearer is chosen, there is provision for cutting down the costs to the cheaper scale.[2] Again, where the original claim is admitted and satisfied, but not the proper costs incurred so far, *e.g.* where a man pays the debt, &c., sued for, but not the subsidiary legal expenses claimed therewith, there is a simple process to enforce the incidental demand.[3]

A.—Scales of Costs

In the High Court there is power to allow some costs, published in a list, on a higher scale, 'if on special grounds arising out of the nature and importance or the difficulty or urgency of the case,' the judge thinks fit to do so.[4] The condition is strictly construed, and 'consequently' it is stated, 'neither the mere bulk of the case, whether in subject-matter or in time occupied [5] . . . nor the fact that charges of fraud or negligence are made, nor all these incidents together constitute "special grounds."' Nor, it seems, does 'extraordinary ability and diligence on the part of the solicitor.' The higher scale, however, is usually allowed in election petitions, patent actions in which scientific evidence is given, where there is much scientific evidence of a technical character, or the point at issue is more suitable for an electrical expert than for a judge, or numerous foreign documents are involved, and it has been

[1] 1894, *Weekly News*, 95.
[2] 1893, 3 Ch. 151.
[3] *Ann. Prac.* 1931, O. 65, r. 1, p. 1350.
[4] O. 65, r. 9.
[5] Allowed but *not necessarily* on this ground: 1916, W.N. 414; 116 L.T. 111, lasted 145 days (of which the evidence took 80), and there were 50,000 questions and answers.

allowed in a trade-name case of great importance. It may be taken that it is rarely allowed.

In the County Court, costs are normally awarded definitely on one of three possible scales (in addition to that where the amount at stake is not more than £10, in which case the scale of costs is very low indeed; beneath £2 no costs at all are allowed), viz. where the subject-matter or the sum recovered is (*a*) between £10 and £20, (*b*) between £20 and £50, (*c*) over £50. But the judge has a very large discretion, larger than that of the High Court judge, both about the scale to be applied in any particular case, and about any particular item of costs, provided (when it is a question of scale only) that he 'certifies in writing that the action involved some novel or difficult point of law, or that the question litigated was of importance to some class or body of persons, or of general or public interest' (s. 119 of the County Courts Act, 1888). For the principles on which he may deviate from the general rules for distributing costs, they are much the same as those holding in the High Court (above). Perhaps there is a greater facility of appeal on costs to a County Court judge (*i.e.* from his chief officer, the registrar, who usually settles the details in the first instance) than there is from the corresponding decision of a High Court judge. And, generally, his decision on costs is final; it can only be reviewed on the suggestion that he has made a mistake in law.

Care is taken, when the result of an action in the High Court shows that it might have been brought in the County Court, *i.e.* where not more than £100, the usual limit of the lower jurisdiction, is recovered, that the costs are settled, as a rule, according to the scale of that court, which is designed to be less burdensome than that of the High Court.

So much for the general principles on which costs are allowed or withheld. There still remains for litigants the vital question, how the order for costs is interpreted, *i.e.* what items are to be paid. In the rare case where a lump sum is awarded or agreed upon, there is an end of this matter. In almost every other there is an official taxation with the object of preventing (1) an opponent, (2) any

client being saddled with unnecessary or unfair expenses, and the sum to be paid in the result depends on the mode, and on that the details, of taxation ordered.

The varieties are, of course, infinite; and as they have always been so, the officials—and only they [1]—have the accumulated experience that can analyse complicated or colossal claims, but the principles they lay down may be reviewed by the judges. It is only—and barely—those principles which can be touched here.

'On every taxation the taxing-master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses.' [2]

Subject to this rule, the following main distinction is observed: (i) the loser may have to pay the winner all that the latter would be bound to pay his own solicitor for the litigation. The amount thus due from client to solicitor may be, and generally is, fixed by taxation at the instance of the loser; (ii) the loser may be ordered to pay not all of the winner's costs, but only such as are usual between party and party. These, too, are settled by taxation.

The second—'party and party' costs—is by far the commoner case. The general principle is that the winner shall only get from the loser the expenses necessary to gain his cause; everything beyond that is a luxury which he must pay for himself. For instance, in his anxiety, he may bring up an unnecessary number of witnesses, or may institute too many or too lengthy inquiries, or authorize needless journeys, or insist on employing a third or fourth counsel, or on paying a very high fee to retain a

[1] Like the *civile jus repositum in penetralibus pontificum* (Livy, ix. 46); Cn. Flavius's 'White Book' anticipated ours: *fastos* sic *circa forum* in albo *proposuit*.

[2] *Ann. Pr.* 1931, O. 65, r. 27 (29).

particular one. Except in very special circumstances he will never recover money thus spent. Obviously, what is necessary in each case depends on its peculiar facts, but practice has established a more or less rigid—though a discretionary—use.

But under this system, it can hardly ever happen that the winner can recover *all* he has to pay his own solicitor, and therefore, so far as costs are concerned, he will be out of pocket through vindicating his right. To mitigate (though not entirely to satisfy) this loss, the bill is sometimes calculated by the former mode, as between solicitor and client.

Obviously, a solicitor conferring with his own client, as to how their case shall be conducted, is in a very different position from that of a loser ordered to pay his opponent's costs. The solicitor may very well point out the most that can be done to ensure success, and must point out the least that ought to be done. The client knows his own means, and if he says, 'Leave no stone unturned,' the solicitor is bound to obey. But he is bound to 'protect his client, even against himself, if necessary,' and, therefore, if any unusual or heavy outlay is contemplated, he must warn him that he cannot rely on recovering it from the other side, but must be prepared to bear it himself. Clearly, then, if the solicitor does his duty in this respect, he will be allowed to incur expenses much more liberally than when he looks for remuneration from the other side; and if he does not do his duty, he may find himself liable to pay any improper expenditure out of his own pocket. Thus, while taxation between solicitor and his client in litigation protects the latter from overcharge [1]—and any client, winner or loser, may demand it—it also protects the loser on those exceptional occasions when he is ordered to pay the winner's costs, 'as between solicitor and client,' for though these, as we have seen, are more liberally allowed

[1] Smollett (about 1753) satirized the 'piling up' of costs against a client. 'He found he had incurred the penalty of three shillings and fourpence for every time he chanced to meet the conscientious attorney, either in the park, the coffee-house, or the street, provided they had exchanged the common salutations; and he had great reason to believe the solicitor had often thrown himself in his way, with a view to swell this item of his account" (*Count Fathom*, ch. xxxvii.).

than 'party and party' costs, yet they do not include more than the solicitor could claim, as a matter of course, from his own client, though, as a fact, more are sometimes incurred. But when this order is made, it is expressly meant to give more costs than are usually allowed between party and party—in fact, to be as nearly as possible an indemnity; for instance, it allows the costs of taking counsel's opinion before litigation. But it 'is seldom made between hostile litigants,'[1] being usually reserved for trustees, executors, administrators, &c., who do not profess to act in their own individual interest, and whose costs come out of an estate or fund rather than an individual pocket.

Even on this system a winner may not recover absolutely all his costs from the loser. If any clearly unnecessary expense is to be incurred, his solicitor must expressly stipulate with him that he shall, in any event, pay it, in which case it would obviously be improper to expect to recover it from the other side. 'Fair justice to the other party' is the criterion.[2]

An instance[3] will illustrate these regulations. In 1882 there was litigation between solicitors and a Mr. Wells about the costs of a previous successful suit in which they had acted for him. On taxation *between party and party* the costs of certain shorthand notes ordered by the solicitors were disallowed, and the question was who was to pay for them. On taxation *between solicitor and client* these costs were disallowed, and so were a part of those of certain expert scientific witnesses, whom the solicitors stated it was absolutely necessary to call; another sum paid to an expert witness, at the express request of Mr. Wells, was also disallowed them. There was a conflict of evidence how far Mr. Wells had authorised some of these expenses. On one appeal the disallowances were confirmed, but on a further appeal the sums paid to all the witnesses were allowed, while the shorthand costs were refused the solicitors, who thus became liable to pay them out of their own pocket. 'It was the duty of the solicitors,'

[1] *Encycl. of Laws*: 'Costs.'
[2] Daniell's *Chancery Practice*, ch. xviii. s. 4, p. 1078 (1914).
[3] 52 L.J.Q.B. 186: 1882.

said a judge, 'to give Wells advice, and to protect him against unnecessary expenses, and to point out to him that if he employed shorthand writers their expenses would not be allowed on taxation as between party and party. . . . In my opinion it is impossible to allow these costs, although Wells authorised the notes to be taken, for it has not been proved that the appellants pointed out to him that if he succeeded in the action those costs would not be allowed to him on taxation between party and party.

'As regards . . . the expert witnesses, the evidence . . . shows that Wells thoroughly understood the nature of the transaction. The solicitors, therefore, have discharged their duty. . . .

'It seems to me that although the master has a discretion on taxation as between party and party, and the same discretion as between solicitor and client, it by no means follows that what is reasonable as between party and party is reasonable as between solicitor and client . . . The solicitor must advise and protect his client even against himself, if necessary; but it is a mistake to say that only what is necessary and reasonable to be allowed as between party and party is also reasonable between solicitor and client. It might be reasonable to allow in the latter case what it is reasonable to allow in the former, but the converse is not true,' and the judge cited from an authority three modifications of solicitor and client taxation, viz. (1) where the costs are payable personally by a third party or out of his fund; (2) where they are payable out of a fund in which the client has only a partial interest; (3) where the costs are payable by the client himself or out of his own fund. In the third case, 'the solicitor is not only entitled to be paid for such proceedings as he took necessarily . . . but also for proceedings not in themselves necessary, but which the client directed to be taken, if a full explanation had been given to him of the true state of the case,' *i.e.* that he could not get the cost from the other side.

Of course, a client need not check his solicitor's bill, and may authorise any expense he likes. The solicitor may agree to take a lump sum.

It may be convenient to add here that even when there is no litigation the client can have the solicitor's bill taxed by an easy procedure, and if he succeeds in reducing it by one-sixth, the latter must pay the cost of the taxations.

B.—Trustees, Executors, etc.

These may even get more than 'solicitor and client' costs; they may get every penny of expense properly incurred. The chief occasions are: 'when personal representatives,' *i.e.* executors or administrators, 'and trustees are entitled to costs out of the fund.' . . . But, in general, these costs will only be allowed 'in cases in which there is a fund under the control of the court; where there is no such fund or an action against the trustees is dismissed, the costs awarded to the trustee will be only the ordinary costs. In special circumstances, however, costs as between solicitor and client have been given where there was no fund under the control of the court.'[1] Another instance is in administration actions,[2] and there are others.[3]

Now, trustees, executors, &c., and solicitors are looked on in a special light by the courts (and especially by the Chancery Courts), the former with favour and the latter with scrutiny in the article of costs, because while both classes must necessarily have much confidence placed in them in discharging their responsible duties, the latter are paid, while the former, as a rule, are not; while in the event of any failing in the performance of their peculiarly fiduciary obligations, both are equally severely visited. So the same authority says, 'Trustees, agents, and receivers, accounting fairly, are entitled to their costs out of the

[1] Daniell's *Chancery Practice*, c. xviii. s. 4: 1914.

[2] 'Administration is where the rights of one or more persons in relation to an estate, property, or collection of assets are adjusted and protected. The term is applied to the duties of executors, administrators, trustees, liquidators, &c., in managing the property committed to their charge, paying debts, dividing the surplus assets, &c. (Sweet, *Law Dictionary*).

[3] Some are enumerated in a judgment: 1888, 39 C.D. 140; 'in some cases to vindicate the honour and justice of the court.'

estate, as a matter of course ; and the same rule extends to personal representatives, to whom, as they can only obtain complete exoneration by having their accounts passed in the court, the court will give every opportunity of exonerating themselves by passing their accounts at the expense of the estate.' (c. xviii. s. 3). But not only so : 'It frequently happens that in actions to which the trustees or personal representatives are parties, . . . and which do not involve any account, they have incurred expenses which it is very right [that] they should be reimbursed, but which do not fall under the denomination of costs of the action, even when directed to be taxed as between solicitor and client. Of this nature are many charges to which, where there is a judgment directing an account, a trustee would be considered entitled under the head of just allowances, but which, where there is no judgment for an account, and consequently no opportunity of claiming just allowances, a trustee would be in danger of losing, especially in cases where the action does not involve property out of which they can be retained, or disposes of the whole of the trust fund. The court will, therefore, in such cases, upon the statement that such charges have been incurred, extend the order for the taxation of costs as between solicitor and client to the costs, charges, and expenses properly incurred by the trustee. Under such a direction as this, the trustee may obtain all such expenses as he has properly incurred relating to the trust property in or in connexion with the action, although they are not properly costs in the cause ; and under it he may be allowed the costs of litigation conducted by him strictly as trustee, whether successfully or unsuccessfully, and although he may not have been allowed such costs in the actions in which they have been incurred ; and costs properly incurred by trustees, and paid or payable to their solicitors, will be allowed though statute-barred' [1] (*ib.* p. 1085).

A few applications of these principles may be given. In 1888 a vicar and churchwarden brought an action

[1] *i.e.* could not be recovered *as a debt* owing to the lapse of time since they were incurred.

against the trustees of a small charity fund raised to provide a church-room for the parish, on the ground that the latter held the fund on a condition which could not then be fulfilled. The judge thought the action was an idle proceeding, and ordered the vicar, &c., to pay the trustees' costs, as between solicitor and client, saying, 'I think that it is the duty of the court to protect this fund, and, so far as I can, it shall not be burdened with one farthing of this most unjustifiable litigation. . . . I can hardly conceive a more proper case' for such costs, 'where the plaintiffs have made an improper attempt to get this trust fund out of the hands of . . . the rightful trustees. If party and party costs only were given, the defendants, as trustees, would be entitled to be paid their extra costs out of this small fund, which I deem it to be my duty to protect to the utmost.'

A trustee who was guilty of no misconduct was allowed his costs as between solicitor and client, though the result was that two sets of such costs were allowed. Where an estate was insufficient, the executor was held in an administration action entitled to his costs, charges, and expenses in priority to everybody else. Where a settlement was set aside, the trustees were allowed their costs out of a fund, though some of the beneficiaries (*i.e.* those who were to get something out of it) were not. Where trustees (acting under advice of counsel) made a *bona fide* mistake which rendered an action necessary, they were not ordered to pay the costs of it; and where a trustee denied that he was indebted to an estate, but on taking an account it appeared that he was, he was still allowed his costs. In that case,[1] in 1882, a judge said, 'It is not the course of the court in modern times to discourage persons from becoming trustees, by inflicting costs upon them if they have done their duty, or even if they have committed an innocent breach of trust. The earlier cases had the effect of frightening wise and honest people from undertaking trusts, and there was a danger of trusts falling into the hands of unscrupulous persons,

[1] 20 C.D. 305: 1882. Ld. Selborne, as there cited, had extended this reasoning to mortgagees.

who might undertake them for the sake of getting something by them.'

On the other hand, where a trustee by his own conduct occasioned an action, he was ordered to pay the costs of it, and though he then refunded all the trust money in question, he was not allowed his costs in the proceedings after his refunding.

An honest trustee of a very small estate had to pay costs out of his own pocket when he took legal action in a much more costly method than was necessary.[1] When a trustee took it into his head, quite wrongly, that a person to whom he had had to pay an income for years was dead, and that an impostor [2] was drawing the money, he had to pay for his incredulity.

All the above illustrations of a system of more liberal allowance of costs (including the solicitor and client scale) have been taken from Chancery cases, where, generally, there is a fund under the control of the court, or an estate in question, and the tendency to award costs more generously than in other courts, perhaps, arises from the fact that, before the fund or the estate is distributed, it belongs to no particular person, and the burden, therefore, does not weigh on any individual. Moreover, if, as commonly happens, the property 'in Chancery' is ultimately to be shared by a number of persons, the incidence of costs 'out of the estate' is felt lightly by each. At any rate, such a device as 'solicitor and client' costs is much rarer in common law courts, though not unknown there, than in those on 'the other side.' In this respect the practices of the two great divisions have been gradually assimilated, for 'one of the objects' of certain new rules of January 1902 was 'to meet the complaint of want of uniformity in taxation, and for this purpose it was determined to establish an amalgamated taxing department . . . which should perform all the duties hitherto performed by 112 different kinds of masters.[3] Another judge put it more explicitly. 'It was said that the costs allowed in the K.B.D. were allowed on a less liberal scale than in the Chancery Division, and it was desirable that both should

[1] 46 L.T. 848. [2] 72 L.T. 66. [3] The L.C.J. 1903, 1 K.B. 236.

be assimilated so that the suitors should not have any reason for preferring one division to the other.' [1]

C.—Solicitors

This profession, practically indispensable in all litigation and much other business of importance, is regulated perhaps more than any other: since 1873 solicitors are officially 'officers of the Supreme Court' and subject to almost military discipline. The essential point here is that in the matter of legal costs, a great, indeed, the chief, responsibility rests on them, and that the courts by no means tend to minimise it. When they think it just, they order the solicitor in a case to pay some or all the costs of it out of his own pocket.

The general rule [2] runs thus: 'If in any case it shall appear to the court or a judge that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the court or judge may call on the solicitor of the person by whom such costs have been so incurred, to show cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case shall require) why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person, and thereupon' may order accordingly. This is pretty drastic. In 1895 a court came to the conclusion that an appeal had been brought entirely at the instigation of the solicitor, and solely to benefit himself (by 'putting the screw on' the opposite side to get certain costs), and that it was 'very nearly, if not quite, justifiable to say that it was a blackmailing appeal,' and they ordered him to pay the costs of appeal to which his client was liable, and prohibited him from getting any from her.[3] Where one party had to produce documents, and put in *inter alia* 4216 letters, and charged the other party £19 odd for a copy,

[1] 1903, 2 Ch. 162. [2] R.S.C. Order 65, r. 11. [3] 1896, 1 Ch. 366.

the court thought this was an oppressive expense, and ordered that the former should pay all costs occasioned by this proceeding, and repay the £19 (less £2, the proper sum for a copy), hinting [1] plainly that the penalty ought to fall on the solicitor whose business, of course, it was to attend to the matter.

In 1894, a judge thought that solicitors had shown discourtesy by not giving notice that their client, a material witness, was too ill to attend, with the result that the case when called on had to be adjourned, and they were ordered to pay such extra costs as were thus occasioned.[2]

In 1895, a solicitor who showed unreasonable haste in commencing litigation (of an unimportant kind) on behalf of his client, though he won his point, was disallowed his costs against the client.[3]

It occasionally happens, generally through honest mistake, that solicitors begin litigation without the authority or consent of the party whom they purport to represent: in such cases they themselves have been made to pay the costs of both sides. Finally, it may be added for the sake of completeness, that the universal remedy by action is open to a client against a solicitor. The solicitor, said a judge in 1830, 'is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession, whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law.' [4] Thus when an attorney after taking counsel's opinion on procedure made a mistake in the law, about which there was at the time a reasonable doubt, was sued for negligence by his client, the latter failed.[5] So when in a complicated business transaction a lady sued her solicitor for negligence (to register)—an

[1] 26 C.D. 473, 1884. [2] 1894, W.N. 21. [3] 1895, 1 Ch. 474.
[4] 6 Bing. 468. [5] 1 N. & M. 262: 1833.

omission charitably regarded as an error of judgment—and for 'bad advice,' she failed in every one of three courts, the Court of Appeal finally holding, 'It is not sufficient for a client to prove that' his solicitor 'gave him wrong advice on a doubtful point: something more than an error of judgment is necessary to constitute actionable negligence'; 'crass' negligence and damage must be proved. On the other hand, when an attorney deliberately proceeded under a wrong section of an Act and his clients were badly 'hit,' the H.C. made him pay them damages.[2]

As counsel[3] are immune from clients' attacks—at any rate by litigation—their only loophole to 'get at' the legal profession seems to be through solicitors' negligence.

The anxiety of the law that suitors should not be burdened with unnecessary costs has also led to the doctrine of

D.—Security for Costs

It constantly happens that persons who sue and lose fail to pay the costs incurred by and due to their opponents. No expedient has been devised to get rid of this injustice, and to this extent, any one of any substance is at the mercy of any man of straw. In a very few cases[4] there is power to prevent actions proceeding—even then, not without

[1] 103 L.T. 56: 1910.

[2] 6 Cl. & F. 193: 1838.

[3] Of course, only if fraud or dishonesty is not charged; if they are, there is no sort of immunity nor for any 'foul practice' any more than 'other ministers of justice' for these 'bring a disgrace on the law itself' (Hawkins, *Pleas for the Crown* (1716), B. 2, c. 22, s. 30). In 1791 counsel had filed a bill so 'scandalous and impertinent' that it cost his client some money; the client sued him—the first action of its kind (and nearly the last)—but no action lay in law; the court might make him pay the costs thrown away (*Fell* v. *Brown*, 1 Peake N.P. 131). The leading case on this immunity is *Swinfen* v. *Ld. Chelmsford*, 1859-60, 1 F. & F. 619; 29 L.J.Exch. 382. There is in existence an indictment (after 1668) against Mr. John Walker, 'a councellour for betraying his client's cause and taking Fees of the other side' (Tremaine, 261); but the result is not known.

[4] 'Obviously frivolous or vexatious, or obviously unsustainable,' it was laid down in 1892 (3 Ch. 277). The Vexatious Actions Act, 1896, which provides that persons who have persistently brought unreasonable actions may be restrained from doing so, except by permission of a judge, was passed in view of notorious proceedings by a Mr. Chaffers.

expense to the sued ; but, generally, it would be manifestly unjust to stop the hearing of grievances, merely because the suer is, or is supposed to be, without means to defray costs if he is unsuccessful. But the law does what it can to minimize this injustice, by ordering the suer, in certain classes of cases, to give security for or to deposit a sum to cover costs ; if he does not he cannot go on. The chief of these classes are : Where he resides abroad, where he has no permanent address, or there is any difficulty in finding him, where he is only nominally the suer, and where limited companies sue and there is reason to believe [1] that they cannot pay if they lose. Moreover, married women without separate estate, insolvents, and persons without visible means are under certain disabilities.

Where the suer lives abroad, it is clear that there might be much additional difficulty and expense in getting costs from him ; against that additional difficulty his opponent has a right to be protected. Where that especial danger disappears, the rule disappears, viz. where the suer has substantial property in Great Britain and N. Ireland.

If there is any difficulty in finding a suer, or his movements give rise to the suspicion that, having launched his action, he is evading his liabilities to his opponent, it is only fair that he should be called on to show his *bona fides*.

Persons who sue nominally are often bankrupts, whose interest has really passed to some one else, say, the creditors, but who can still much more conveniently and cheaply sue in their own name on the other's behalf. As it is certain that they could not pay costs if they lost, it would be unreasonable that they or those behind them should not give security.

There is, of course, strong 'reason to believe' that limited companies in liquidation will not have sufficient assets to pay their costs if they lose, and accordingly they *may* be ordered to give security therefor. Nevertheless, there is a general rule [2] that 'the plaintiff will not be com-

[1] Companies (Consolidation) Act, 1929, s. 371.

[2] See 1890, 24 Q.B.D. 663. The reason for this difference between a company and an individual is probably historical, the former being

pelled to give security for costs merely because he is a pauper or bankrupt or insolvent.' Still, there are cases where, for various reasons, insolvents have been made to give such security. And there is a great exception to the general rule in the case of appeals, for ' there the appellant has had the benefit of a decision by one of Her Majesty's courts, and so an insolvent party is not excluded from the courts, but only prevented if he cannot find security from dragging his opponent from one court to another.' [1] And there are many other grounds on which an *appellant* will be ordered to give security for costs, for the dispute has been threshed out once.

It is, however, the law that any one who sues in the High Court for a ' tort,' *i.e.* broadly some grievance other than a breach of contract, *e.g.* for libel, personal injuries, &c., and cannot satisfy a judge that he has [2] ' visible means ' of paying the costs if he loses, may be ordered to give security, in default of which, the proceedings may be stopped—a jurisdiction which seems to be seldom exercised—or the judge may send the case to be tried in a County Court. Here ' visible means ' signifies ' such means as could be fairly ascertained by a reasonable person in the position of defendant. It does not mean merely " tangible means " ; the judge must satisfy himself whether the plaintiff has any means.' [3]

A married woman without separate estate or other property is in the same position, if she sues, as any other suer similarly situated, *i.e.* she cannot be compelled to give security merely because she is or appears to be poor. ' It is no doubt rather a startling result,' said (Lord) Lindley J.—' a married woman who has no separate estate may be engaged in extensive litigation, and involve a

the creature of modern statutes. ' Security for costs,' said a judge, ' was required in the days when the person of the debtor could be seized, and if the court thought that he was going abroad, so that the defendant could not arrest him, then security was required. When the person of the debtor ceased to be liable to arrest, the incidental remedy ceased also ' (1885, 30 C.D. 420).

[1] 1885, 31 C.D. 38.

[2] County Courts Act, 1919, s. 2.

[3] *Ann. Pract.* 1931, p. 1411, O. 65, r. 6 ; 13 Q.B.D. 835 : 1884.

defendant in a large amount of costs which the defendant may never be able to recover against her. But, strange though the result may be, the (Married Women's Property) Act (1882) is imperative.' [1] But it is otherwise if she sue 'by an impecunious next friend.'

In the County Court security for costs is ordered practically on the same principles as in the High Court, but if the suer does not reside in England or Wales, he must give such security; and if his opponent's residence or place of business is more than twenty miles from the court, and the latter can show on oath 'a good defence upon the merits,' [2] the former must give some security. The amount fixed as security naturally depends on the amount of costs reasonably likely to be incurred, and it is generally a substantial part of such amount.

E.—Poor Persons [3]

After being under the Supreme Court for some years the machinery for the gratuitous advocacy of poor litigants

[1] 30 C.D. 420: 1885.

[2] C.C.R.O. 12, r. 9.

[3] For the obsolete (but not abolished) *jus forma pauperis* system, see 1st ed. of this book, p. 172.

'For many years,' said Mr. Hassard-Short, who has been officially connected with this innovation from its origin (*Practice in Poor Person Cases* (1916) ix.), 'England was behind the great civilized States of the world' in giving legal facilities to 'the poor.'

Scotland has had a system since 1424. Ld. Campbell's kindly marginal note on Brougham, c. 1 (1868), is '1800. He resolves to make his fortune by defending pauper prisoners at the Assizes.' Rush, the U.S.A. ambassador, notes (*Court of London*, Oct. 3, 1820) that during the adjournment of the Queen's trial Brougham went to the Yorkshire Assizes and appeared 'for a poor old woman upon whose pig-cot a trespass had been committed'; he got her 40*s.* damages—'illustrative of the English Bar and . . . of Mr. Brougham.' Walter Scott, too, appeared similarly.

'An attorney was provided at the public expense under the title of "advocate of the poor"' (1480, Prescott, *Ferdinand and Isabella*, pt. 1, c. 6).

The Protector Somerset 'set up in his own house' a court of requests 'to deal with the claims of poor suitors, about 1540, and made the great Sir Thos. Smith Master (D.N.B.). Blackstone (iii. 81) says that these were called 'Courts of Conscience,' *i.e.* of 'summary,' supposed to be 'natural,' justice; abolished 1640.

was transferred in 1925 to the Law Society and its cognate provincial bodies: the volunteer counsel and solicitors get no remuneration whatever except that certain 'out o' pocket expenses' may be allowed to the solicitor from the client and, in the event of any sum being recovered from the other side, scanty costs also.

The 'poor' would-be litigant must satisfy a Committee that he has reasonable grounds for appearing and is not worth more than £50, excluding wearing apparel, tools of trade, and the subject-matter of 'his case,' or in special circumstances £100. The 'poor person' must not have more than £2 a week 'from all sources' or 'in special circumstances £4.' In matrimonial causes where the wife is the 'poor person' the *Court worth* must be within the £50 (or £100) limit and the joint income within the £2 (or £4). A 'poor' frivolous appellant may be mulcted in costs. Even foreigners living abroad are admissible.[1]

There is not the same power in the County Court—the refuge *par excellence* of poor persons; still, its scales render it less necessary: a poor case sent down from the High Court does not lose its privilege.[2]

According to the last Report (March 1931), on January 1, 1930, there were in London 116 applications pending; 1974 new were received in 1930: 889 were granted, 714 refused, 341 'otherwise disposed of,' and 146 went over to 1931. Nearly 70 per cent. of these were matrimonial: in 1929, of the total *proceedings* 94 per cent. were matrimonial, and of these 97 per cent. were successful.

Such are some of the chief provisions which the law makes with the view of controlling and keeping down legal expenses.

Too much space has perhaps been given to this subject, but of all aspects of our justice this is possibly the one that most arrests the popular attention. We have seen that in 1887 a great judge thought that one of the worst flaws in our system was its costliness, and that remains much the same as it was in his day. 'Your decisions,' said L.J. Scrutton in 1920, 'should be given quickly and

[1] 44 T.L.R. 14: 1927.
[2] County Court Ord. 33 and 20.

they should be given cheaply.[1] If you make justice expensive you deny it to the poor man ;, and the justice of the English Courts should be such that rich or poor should be able to obtain it from the courts without being ruined. . . . Now it is one of the present dangers of English justice that the ability and energy of counsel and the fertility in suggestion of expert witnesses are making justice too expensive for the poor. There is a case at present going on in the House of Lords . . . where a colliery tip on a hillside slid down and two or three thousand pounds worth of damage was done to the houses below,

[1] A most interesting commentary on this ideal is supplied by Sir Dudley North (brother of Lord Keeper Guilford and of Roger, a barrister in large practice, who wrote his *Life* (p. 53) and tells the story), who was a merchant in Constantinople, 1662–80 : he suggests that in some respects Turkish justice compared favourably with English. 'One thing' is 'in Favour of the Turkish Law which is of admirable Use, and that is their Dispatch. . . . Justice is a rare Thing if it may be had ; but if it is to be gained by sailing through a Sea of Delays, Repetitions and Charges, really it may be as good a Bargain to stay at home a Loser. A wrong Determination, expedite, is better than a right one after ten years Vexation, Charge, and Delay. A good Cause immediately lost is, in some Respects, gained ; for the Party hath his Time and Tranquillity of Mind reserved to himself to use as he pleaseth ; which is a rare Thing in the Opinion of those who have felt the Want of both, and of their Money to boot . . . consequently, wrong Judgments soon and final have the Virtue of Justice, because Peace and Quietness is thereby preserved. But Delays have an Effect directly to the contrary ; for those maintain Feuds and hatred as well as Loss of Time and Money ; so that if it be said that, in the End, Justice is secured thereby (which I do not grant), I answer, It is done by unjust Means and comes to the same.' 'It is a Question whether, in Experience, the ordinary Checks by the European Laws set up to control this arbitrary Power of judging, by numerous Forms, Dilatories, Processes, Offices, Allegations, and Probations without End, to say nothing of Errors and Appeals . . . are found to have much mended the Matter.' 'But in the Main, Corruption enough, no doubt ; and where is it not so ? If it is found there that Men truckle under the Tyranny of the Greater, and bear Oppression rather than offend them, *here Men truckle for Fear of the Law itself, and let their just Right and Property go rather than launch into a Deluge of Officers, Counsellors, and Forms*' (p. 55). The Judge 'accounts something is due to him for doing Justice, *not much unlike what is termed Fees*, only without State or Rule as the European Way is' (p. 45). The writer certainly knew of the *cause célèbre* (*Ld. Bath.* v. *Ld. Montagu*) for an estate of £1000 *per ann.* 'wherein on severall trialls had been spent £20,000 between them'—'worth £10,000 to the lawyers' (Evelyn, June 18, 1696 ; Sept. 2, 1701). What sums do these figures represent to-day ?

and another two thousand or so was spent in stopping the colliery refuse from slipping farther. . . . At the present moment . . . the costs on both sides are over £150,000. Now if it had been a poor man's house, what justice could he have had with expenses like that? And this is one of the dangers which needs meeting at present in English procedure. It is partly owing to the industry of counsel and partly owing to that particular class of relatives of Ananias to whom I have already referred. It is most extraordinarily expensive to fight any case involving scientific investigation' (1 *Cambridge Law Journal*, 9). A K.C. records that in one of his cases 'the cost of printing and binding the records on the first appeal to the Lords was £1995, 9*s.* 8*d.*'[1] Court fees provide another and inescapable element in costs. Proposals for the abolition of these taxes on justice will be dealt with later.[2]

36. COSTS OF LITIGATION

Theoretically, the costs of successful appeals are in the same position as court fees, *i.e.* they are imposed by the State without the consent of the payer, in the sense that they are caused by some mistake of judge[3] or jury, who are the officers and representatives of the State, and it has therefore been suggested that where an appeal corrects a judge's law or a jury's facts, the (appeal) costs of both parties should be borne by the State, for neither litigant has been unduly pugnacious in coming again. This view is reasonable, provided that there is power to punish a rash or spiteful unsuccessful appellant, besides making

[1] E. F. Spence, *Bar and Buskin* (1930), p. 362. His successful client claimed as costs (*before* H.L.) £15,000 (p. 364).

[2] *See* Preface.

[3] A judge once cynically said: 'The principle upon which costs are not awarded is that a suitor ought not to pay for the errors of a judge' (40 L.J.Ch. 194, in 1870). 'I have heard,' wrote the great Joshua Williams in 1857, 'that in Norway . . . the law is that when the decision of an inferior judge is reversed by a superior court, the judge has to pay out of his own pocket the costs thereby occasioned. Few men, I fear, would be found among us to accept a seat on the Bench on these terms' (*Letters to John Bull, Esq.*, in *Lawyers and Law Reform*, x.).

him pay the ordinary costs (as he generally has to at present), for he has already had the view of the law on his case ; and if he disputes it, he should do so at his risk.

Our law of costs is as insular as our

37. LAWS OF EVIDENCE

The ideal of the law is that testimony should fulfil three conditions, viz. :

i. It must be relevant to some definite question in issue.
ii. It must not be of a worse *kind* if a better is available.
iii. It must be produced in such a form that it can be cross-examined to.

Upon this standard it insists whenever it is practicable, *i.e.* compatibly with doing justice, and accordingly in the great bulk of cases these three conditions are fulfilled. They are waived only where the stamp of truth is deemed to be conspicuously impressed on the evidence without them.[1] Perhaps the first is never waived. What is or is not relevant to a story is not a matter of law but of common sense, which sometimes, as we know from daily life, guides different people to different conclusions about the same thing. So, what is relevant in a given case is by no means always easy to determine. What is not relevant may not be given at all, as it wastes time ; thus Mrs. Cluppins's [2] observations on a memorable occasion anent her family, existent and prospective, were cut short.

Condition ii. does not imply that the law will interfere with or discriminate among the materials at a party's disposal, that, *e.g.* where a number of witnesses saw an act done, it will dictate that one of these shall be called in preference to another ; or where expert opinion is wanted—say, a doctor's—it will say, 'You

[1] *e.g.* where the other side accepts evidence or does not demand or employ cross-examination. In urgent cases one side is necessarily heard (on oath) before the other and a *temporary* decision given.

[2] *Pickwick*, ch. 34.

may call Mr. A. but not Mr. B., because the former is more eminent in his profession'—but only that if a party wants to establish that somebody saw something he must (if reasonably possible) produce that person in court to say so; no amount of writing by that person, even under oath, will do, as a rule; or if it is to a litigant's interest to show what is the true scientific view of his conduct or of anything else, he must produce the appropriate trained expert, and equally must call him. If it is desired to use a letter, it must be produced, and the writer may have to be there to swear that he wrote it. This is the principle of the 'best evidence.'

It is obvious that if this principle did not prevail, much said and done behind a man's back would be evidence against him, when he was a party, and much would be purposely said and done behind his back—*i.e.* manufactured—if it was not to be tested in his presence. Hence condition iii. follows necessarily from ii.; cross-examination is such a test. It is only dispensed with where no test is supposed to be required.

But 'where you cannot get the best possible evidence, you must take the next best,' said Lord Abinger [1] in 1840, when the books of the Bank of England, not being allowed, on the ground of the public convenience, to be removed to the court, the next best thing practicable was to prove that an entry in them was in the handwriting of a certain person. The judge remembered a case where a man had written a libel on a wall—of course, a copy was allowed, the wall was not bodily produced; so if a letter is proved to be destroyed or lost, its contents may be given from a copy or from memory, if the original could have been given. These instances illustrate what is 'reasonably possible.'

38. HEARSAY

The most important exclusion under these general rules is that of 'hearsay'; it supplies, too, the most important exception to those rules.

[1] 6 M. & W. 69.

The golden rule here is, 'Hearsay is not evidence.' Perhaps its most classical expression in English is, 'You must not tell us what the soldier . . . said.' Put less epigrammatically, the rule is that a witness may only depose what is within his own knowledge; the psychological difficulties which might arise—what knowledge is—cannot be touched here. By far the commonest application of the rule is the prohibition of a witness's telling what somebody had told him or her about a material point when the person against whom that statement is offered was not present.

If he was present, the case will be altered. A. (in the box) may not say what B. told him about C. (a party), for the truth of what B. told him is not within his personal knowledge. It *is* within it that B. made a statement to him, and this he may say. The rule is obviously artificial, for in daily life[1] we constantly rely upon hearsay—very frequently, though not always, with profit. Thus, if we are seeking certain information, we are constantly told, 'Personally, I don't know, but So-and-so told me,' the very point we are asking about it; and we often act on such evidence with perfect safety. But, on the other hand, we are sometimes misled by such talk; our narrator has not heard, or has forgotten some qualifying word or phrase, or has put a sentence into the mouth of one person which was said by another—which might make all the difference to us—or even has invented the whole incident. Now, the law is much more afraid of the evils which might, and certainly would, result from such liberty of speech than of those which may and do from its restriction. Take a simple case. It is constantly of vital importance to an individual to prove that he was not at a certain place at

[1] 'It seems a pity that what is called "hearsay evidence" is not allowed to be given in our courts for what it is worth; for though it may be freely admitted that what a man hears said of him, without denying it, may be assumed to be true, it is none the less likely that a good deal more truth will be spoken of him when he is away than when he is present to be offended at the candour of his friends, and, possibly, to vigorously resent it. And though I am not prepared to say with "the Jacobin," "Whatever is, in France is right," yet there is much more to be said for gossip than that the French courts attend to it' (Ld. Darling J., *Scintillæ Juris*: 'Of Evidence').

a certain time. It is known that a perfectly reputable person, who cannot for some reason be produced in court —perhaps he is dead—said, in the hearing of other respectable persons, who can be produced—in connexion with some matter totally different to that under investigation—that he had seen and talked with that individual at that time in that place. Everybody knows that such evidence is conclusive on the particular point. Yet the law must assume that, in every case it has to deal with, the matter is so serious that only the highest possible standard of truth—that is, a scientific standard, by which the utmost certainty attainable is reached—should be applied, and as this standard in some matters, if justice is to be done, would exclude hearsay, it must exclude it in all. The reason why, at any rate, it would *sometimes* not be safe to admit it is thus explained by an eminent authority.[1] 'The term "hearsay" is used with reference to what is *done* or *written*, as well as to what is spoken, and in its legal sense it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person. That this species of evidence is not given upon oath, that it cannot be tested by cross-examination, and that in many cases it supposes some better testimony, which might be adduced in the particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness, its incompetency to satisfy the mind about the existence of the fact, and the frauds which may be practised with impunity under its cover combine to support its exclusion.'

The absence of the person [2] against whom the statement is offered, was mentioned above as a condition necessary to exclude hearsay. If made in his presence it *may*, if not denied, amount to an admission, and be reported; and

[1] Taylor, *Evidence*, s. 570, 11th ed.: 1920.

[2] Perhaps the true phrase is, 'Not in the hearing of the person,' for a statement may be heard and the maker not seen, as happened in 1849: 2 C. & K. 709. Cf. *Gray's* case, *Irish Circuit Reports*, 76 (1841), where the accused took no part in a conversation, though he might have heard it: evidence rejected.

although this combination does not often occur, viz. that a statement adverse to somebody is made in his presence, and that of another, and that the maker does not appear at the trial—for such a person can generally be produced—yet when it does occur it may be, especially in criminal proceedings, where the law of evidence is very nearly the same, so momentous to the person against whom the statement is offered, *i.e.* the accused, that this particular exception to the rule against hearsay may be illustrated.

In 1897 X. was charged with an offence for which, if convicted, he would be liable to penal servitude for life. A girl who alone (beside X.) knew whether he was guilty or not, was very ill in bed. In the presence of her mother and sister, an inspector of police took a statement from her about 4 p.m., and afterwards put it into writing. At 11 p.m. the same day he returned with X., and in his presence put certain questions to her, and then and there wrote down her answers, on hearing which X. said, 'That is not true.' The girl died an hour or so afterwards. At the trial it was proposed to put in those questions and answers—the first statement, of course, was out of the question—but the late Ld. Brampton would not allow this. He denied that—as was then argued—*any* statement made in the presence of an accused is evidence against him. 'The statement,' he went on, 'if made in his absence would clearly not be evidence against him of the facts contained in it. It makes no difference that it was made in his presence, unless evidence could be adduced which would justify the jury in finding that the prisoner, having heard the statement and *having the opportunity of explaining or denying it, and the occasion being one on which he might reasonably be expected to make some observation, explanation, or denial, by his silence, his conduct or demeanour or by the character of any observations or explanations he thought fit to make, substantially admitted the truth of the whole or some portion of it.*' He did not agree that such a statement was admissible if the accused clearly dissented from it. 'How can a simple emphatic and distinct denial be turned into an admission of the truth of the contents of

a statement not otherwise admissible? To allow such a statement to be put in evidence, even though accompanied by evidence of the prisoner's denial of it, could not fail to be most unfairly prejudicial to him; for when once read as evidence, it would be extremely difficult, if not impossible, to prevent it *from making an impression hostile* [1] to the prisoner upon the minds of an ordinary jury. The death of the girl makes not the slightest difference.' And in directing an acquittal, he said, 'The objection to the evidence is not a mere technical one, and the view I have taken must, I think, commend itself to you and to all fair-minded persons. I will illustrate it very simply: if a man went into another's presence, and addressing him, said, "On such and such a day you robbed me of my purse and money." And the person so accused said, "Pray do not remind me of it any more. Forgive me, I am sorry," that would be clear evidence of guilt. On the other hand, if the accused replied, "This is an outrageously false and wicked accusation," no man in his senses could honestly construe that into an admission that he had committed the crime imputed to him.' [2] Observe the rule against which the proposed evidence would have offended, is that evidence should be subject to cross-examination. It was not a 'dying declaration,' as will be seen. Of course, if the girl had lived she could have sworn in court all she said in answer to the questions. (But it is now settled that though such a statement is no evidence of the facts stated against the accused (as the jury must be impressively told), yet it is *not* inadmissible merely because he denies it at the moment.) [3]

[1] A truth not always *sufficiently* appreciated in practice; however a jury may be exhorted to do so, they *cannot* forget or ignore certain statements, especially sensational ones.

[2] 18 Cox C.C. 470. On a trial for murder a deathbed confession of the murder was held inadmissible. See *Gray's* case, above.

[3] The point is too technical to pursue here; the student of *Evidence* will do well to read *Christie's* case in the H.L.: 10 *Crim. Ap. R.* 141, 1914. *Smith's* case (above) represented an extreme view from which there has been a recoil.

39. ADMISSIONS AND CONFESSIONS

Exceptions [1] from the general rule against Hearsay are in three main classes; viz. (1) Admissions: statements made in the presence of a third party, and confessions; (2) statements made by persons since deceased; and (3) statements contained in public documents. All alike are justified by common sense, though, perhaps, not equally.

An admission and a confession have this in common —they are against some interest, from a material (though not, perhaps, from a moral) point of view, of the utterer, and they may, therefore, be safely let in against him,[2] though, of course, neither is conclusive, and it is quite open to him to prove that he lied or was drunk or misunderstood the facts when he made them. If these be cases of hearsay, it is, at any rate, one of the parties himself who has been heard to say whatever it is, and he has himself to blame if he suffers through it. 'Admission' is used much more often in civil than in criminal [3] cases, to which the ordinary word 'confession' is confined.

A simple example of the rule on admission is if A. sues B. for the price of goods sold, A.'s books debiting B. therewith alone prove nothing—for such evidence is easily manufactured; but if, when the books are produced, A. is seen to have debited C., it is strong evidence that B. is not liable, or if it appears from B.'s books that he admitted the debt, the reverse.

[1] Phipson, *Evidence*, ch. xviii. (1930).

[2] A good illustration of this is a wife's admission of misconduct, which may be conclusive against her, but is not against any man she may thereby incriminate. The practical effect, however, is that the jury, if there is one, hears the charge against the other party, and may be influenced by it. In one extraordinary case they convicted and gave £50 damages against a co-respondent (who denied guilt), on the confession of the wife, who did not appear in the suit. But the judge ultimately refused to give the husband a divorce, after hearing the wife, believing that she was the victim of force (15 P.D. 218 : 1890).

[3] Here no admission is allowed, *i.e.* no statement can be agreed upon by the two sides without strict proof, however trivial the matter; the greatest admission of all, viz. a plea of guilty, must perforce be accepted. But there is ample safeguard that such a plea, if falsely made, as sometimes happens, is not accepted.

Confessions, too, only operate against the maker—not against any one whom he may implicate.[1] A confession may or may not be in law sufficient to convict the maker; in effect, it never does so without corroboration. False confessions are, of course, rare, but they form a curious revelation of the human mind. 'The prisoner,' says Taylor,[2] 'oppressed by the calamity of his situation, may have been induced by motives of hope or fear to make an untrue confession, and the same result may have arisen from a morbid ambition to obtain an infamous notoriety (Note.—One or other of these motives probably induced Hubert falsely to confess that he set fire to London in 1666), from an insane or criminal desire to be rid of life, from a reasonable wish to break off old connexions and to commence a new career, from an almost pardonable anxiety to screen a relative or a comrade, or even from the delusion of an overwrought [3] or fantastic imagination. (Note.—This is prob-

[1] Accordingly, when a fellow-accused is implicated, when the confession is repeated in open court, the name of that person is suppressed (and sometimes that of any other person implicated). That, however, was not allowed in a very remarkable trial, in 1830, of one Clewes, for the murder of one Hemmings in 1806. Hemmings had undoubtedly murdered the Rev. Mr. Parker in 1806, and it was suggested that Clewes and two others accused with him had employed him to do so, and had then murdered him to prevent his giving them up. His remains were not found till 1829. Clewes made a certain confession in prison. The judge at the trial admitted this, but when the clerk, in reading it, suppressed the names of the other two not then on trial, the judge insisted that they should be read out, but told the jury to disregard anything said about them. The confession merely stated that Clewes was present at the murder of Hemmings, but took no part in it, and knew nothing of the design, and he was acquitted, whereupon the charge against the other two was withdrawn. A commentator says that the practice had been to omit such names, 'and some judges have even directed witnesses who came to prove verbal declarations to omit' such names (4 C. & P. 225). The latter is surely the better practice. Even arguments on *facts* which are objected to as evidence are sometimes kept from juries (8 Cox C.C. 398 : 1860)—now more frequently.

[2] *Evidence*, 11th ed. s. 863.

[3] To this head, probably, may be put an extraordinary case in 1858, where, throughout her diaries, a wife suggested improprieties with one person, and, perhaps, with two persons; on the strength of which her husband got a decree of divorce (*a mensa et thoro*, from an ecclesiastical court), but failed to get a dissolution of the marriage from the divorce court, as both these persons satisfied the court that the implicating entries were the result of a delusion (1 Sw. & Tr. 362).

ably the true key to the frequent confessions of the poor wretches who in old times were wont to be tried for witchcraft.)' Sensational utterances such as those alluded to in this passage have long been the themes of romance, but, perhaps, even fiction has not produced a more extraordinary case than that cited by Taylor (*ib.*).

In 1819 the Supreme Court of Vermont convicted and sentenced to death two brothers named Boorn for the murder of their brother-in-law in 1812. They were suspected at the time, but they were not tried till one of the neighbours 'repeatedly dreamed of the murder with great minuteness of circumstance.' They 'deliberately' confessed the murder, and admitted that they had concealed the body where certain articles belonging to their brother-in-law and some bones had been found, and they petitioned the Legislature to commute their sentence to imprisonment for life, and this was granted for one. 'The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home in time to prevent the execution. He had fled for fear that they would kill him. The bones were those of some animal. They had been advised by some misjudging friends that as they would certainly be convicted upon the circumstances proved, *their only chance of life*, by commutation of punishment, *depended upon their making a penitential confession, and thereupon obtaining a recommendation to mercy.*'

Here, then, is a clear instance where the inducement to confess was the hope [1] of coming off better than if a denial

[1] This state of things is by no means unknown in minor matters. People sometimes submit to fines, and even imprisonment, rather than run the risk of a severe sentence after defending. It is essentially the same feeling which sometimes prompts people to satisfy a claim they think unjust, rather than be at the trouble and expense of resisting it. It 'pays' better. It must be remembered that it is morally wrong to set up an untrue defence; and, therefore, such a course sometimes aggravates the offence—'sometimes,' because it is not always possible to say beforehand whether a moral offence is a legal one too. It may be doubtful whether the facts come within an Act of Parliament, as, for instance, in the many cases where embezzlers have been held to be not clerks or servants, and so not within the statute under which alone they could be convicted. Such a state of things, by the way, shows

were persisted in. Accordingly, the first general rule is that confessions must be voluntary before they can be used ; the second is that they are not held to be voluntary if any inducement to self-accusation has been held out by any one in authority.

These principles have been well worked out, and in course of time have become technical and even artificial.

A writer,[1] already cited, has collected the following instances of persons in such authority : ' A constable or other officer having the accused in custody or in cases of felony, perhaps a private person arresting ; the prosecutor or his wife ; or partner's wife, if the offence concerns a partnership ; or his attorney ; the master or mistress of the prisoner, if the offence has been committed against the person or property of either, but otherwise not ; a magistrate, whether acting in the case or not ; the magistrate's clerk ; a coroner.' How technical this doctrine has become may be seen in two cases contrasted by the same writer.[2]

' A maidservant being charged with concealing the birth of her child, makes a confession in consequence of an inducement held out by her mistress ; the confession is admissible, for the mistress is not a person in authority, the offence having no connection with the management of the house (1852).'

' A maidservant being charged with setting fire to her master's house, makes a confession in consequence of an inducement held out by her mistress ; the confession is inadmissible, for the mistress is a person in authority, the offence relating to her husband's property (1836).'

In the former case, the mistress said, ' You had better speak the truth,' and in the latter, ' Mary, my girl, if you are guilty, do confess ; it will perhaps save your neck. You will have to go to prison if W. H.' (whom Mary had charged with the crime) ' is found clear—the guilt will fall on you. . . . Pray tell me if you did it.' The test being

the absurdity of condemning counsel for defending accused persons whom (as it is put) ' they know to be guilty.' Accused persons, no doubt, who know they have done wrong, often admit their guilt, but they mean moral guilt. If they are not legally guilty as well, it is not only not dishonourable, it is a positive duty to advise them to plead not guilty.

[1] Phipson, ch. xxi. (1930). [2] *Ib.*

whether the inducement is likely to influence the accused (to make a false confession), it is difficult for an unlearned person to see the difference between these two cases. As if a servant girl was more likely to tell her mistress the truth because neither she nor her husband was prosecuting her, and was not likely to, though some one else was; or, as if the confessor generally could weigh the amount of authority at the moment of confession!

Next, on the nature of the promise or threat inducing the confession, the same writer has collected the following instances where confessions were not excluded: those 'obtained by inducement relating to some collateral matter unconnected with the charge; or by moral or religious exhortation (whether by a chaplain or others); or by a promise of secrecy; or even by false representations made to, or deception practised upon' the accused; '... or by his having been made drunk[1] for the purpose; or by questions, which he need not have answered, having been put to him by a private person, or by the police before arrest ... even though put to enable them to determine whether or not to arrest; and the better opinion is that confessions made in answer to questions by the police put to the accused even when in custody, are in strict law admissible, provided there was no promise or threat used. Such questions, however, as well as statements by fellow-prisoners read over to the accused to induce him to confess are to be condemned, and judges, it seems, have a discretion to exclude evidence so obtained.'

The importance of this last point, and the true philosophy of the whole subject, are appreciated in the following paragraphs.[2] 'As the authority possessed by the persons who make or sanction the inducement is calculated both to animate the prisoner's hopes of favour, on the one hand, and, on the other, to inspire him with awe, ... the law assumes the possibility, if not the probability, of his making an untrue admission, and, consequently, withdraws from the consideration of the jury any declaration of guilt which

[1] But, in 1839, a confession made by a man while talking in his sleep was rejected. Taylor, s. 881 n.

[2] Taylor, ss. 874, 876.

the prisoner, in these circumstances, may be induced to make. Moreover—and this is a more sensible reason for the rule—the admission of such evidence would naturally lead the inferior agents of the police, while seeking to obtain a character for activity and zeal, to harass and oppress unfortunate prisoners, in the hope of wringing from them a reluctant confession. . . . It by no means follows that the same rule,' about inducements offered by persons in authority,[1] ' will equally apply to all promises and threats held out by private persons. These last inducements may vary in their effect to almost any conceivable extent. They will often be obviously insufficient to produce the slightest influence on even the feeblest mind ; and in such cases the confession which follows, but which, in fact, is not *consequent* on them, should be admitted in evidence. On the other hand, an inducement held out by a private individual may be, and, indeed, frequently is, quite as much calculated to cause the prisoner to utter an untrue statement, as any promise made to him by a person in authority ; in these cases it is difficult to see why the confession made to such private person should not be excluded.' It has therefore been suggested that, without laying down any positive rule, whether of admission or rejection, the judge should determine each case on its merits, bearing in mind that his duty is to reject such confessions only as would seem to have been wrung from the accused under the supposition that it would be *best* for him to admit guilt. Perhaps the true test is, Was the confession *really* voluntary ?

A few instances[2] may be given of inducements to confessions. Evidence held admissible : A promise to give the accused a glass of spirits ; to strike off his handcuffs ; to let him see his wife. The following words as being merely admonitions : ' Be sure to tell the truth ' ; ' I should advise you to answer truthfully, so that if you have committed a

[1] In *Clewes'* case, a magistrate and clergyman had promised the accused that if he confessed he would use his influence with the Home Secretary to procure a pardon ; but he told Clewes that that pardon had definitely been refused. The confession made after this refusal was therefore admitted.

[2] Phipson, ch. xxi. (1930).

fault you may not add to it by saying what is untrue'; 'You had better, as good boys, tell the truth'; [1] 'I hope you will tell, because Mrs. G. can ill afford to lose the money'; 'Don't run your soul into more sin, but tell the truth.' The following as neither threats nor promises, only cautions: 'I must know more about it'; 'Now is the time to take it,' *i.e.* what was stolen, 'back to her'; 'You would not have told so many lies if you had not done it.' 'What you say will be used as evidence against you'; 'You are in the presence of two police officers; I should advise that to any questions put to you, you will answer truthfully. . . . Take care, we know more than you think we know'; 'Why have you done such a senseless act?'

Evidence held inadmissible: 'It is no use to deny it, for there are the man and boy who will swear they saw you do it.' 'I dare say you had a hand in it; you may as well tell me all about it.' 'It will be a right thing for him (accused) to make a clean breast of it.' 'The inspector tells me you are making housebreaking implements. If that is so, you had better tell the truth.' 'It would have been better if you had told at first.' 'You had better tell me about the corn that is gone.' 'If you tell me where my goods are, I will be favourable to you.' A servant in custody said, 'If you will forgive me, I will tell the truth'; Mistress replies, 'Anne, did you do it? If you don't tell me you may get yourself into trouble, and it will be the worse for you.' 'I only want my money, if you give me that you may go to the devil.' 'If I tell the truth, shall I be hung?' 'No, nonsense; you will not be hung.' 'If you don't tell me I will send for a constable.' 'I shall be obliged if you would tell me what you know about it; if you will not, of course we can do nothing for you.' 'This is a serious charge—take care that you do not say anything to injure yourself; but if you say anything in your defence, we are willing to hear it, and to send to any person to assist you.'

[1] So, 'Now, Ellen, have you seen my rings? Be a good girl and tell the truth,' did not vitiate her confession; but had the speaker said *before* as she did *after* confession, 'If you will give me back my rings, I will forgive you,' it would probably have been excluded (6 Cr. A.R. 198: 1911).

It must be remembered that the party hit by an admission or confession, is there to explain the circumstances, and to cross-examine or to contradict the reporters.

40. STATEMENTS BY DECEASED PERSONS

The next class of admissible hearsay consists of the statements of deceased persons—such, that is, as are made [1] in such circumstances that they are extremely unlikely to be false (and, therefore, not needing the test of cross-examination). Foremost among these is a declaration made against the maker's own (pecuniary) interest, on the same grounds as those on which we saw that a man's admissions were accepted against himself (though note that here the dead person's utterance may be used against some one else). Thus, where [2] a solicitor entered in his books that he was paid so much for drawing a will and seeing it executed, it was pretty conclusive after his death that such a document had existed, for there is a high probability that a man does not put down as paid to him a debt which is not paid. Of course, if fraud could be proved, such a presumption is got rid of.[3] In this instance, it having been thus shown that a will had existed, what purported to be a draft of it was, in its absence, accepted.

So strong is the presumption that declarations against pecuniary (or proprietary) interest are true, that they draw with them, so to say, all the rest of their contents. Thus in a famous case [4] in 1808, where the title to great estates depended on what day in April 1768 a certain person had been born, 'an entry' (to quote, for brevity, Phipson's summary [5] of the facts) 'by a deceased accoucheur of the payment of his charges for attending a confinement is evidence of the fact and date of the child's birth, . . . of the name of its parents, though only stated on hearsay, and of the payment of the declarant's charges, though the

[1] Taylor, s. 668.

[2] 41 L.J.P. & M. 32 : 1871.

[3] 'Cases have been known where a declaration against pecuniary interest has been made with a sinister purpose,' said a judge (53 L.T. 706 : 1886).

[4] 10 East, 109.

[5] Ch. xxiii. (1930).

payer was alive and might have been called.' That this rule, too, has become technical, may be gathered, *ibidem*:

'To prove that certain shares belonged to A., an entry in the day-book of a deceased stockbroker—"Bought for A. 200 L. C. Co.'s shares, £1400"—held not admissible as a declaration against the broker's interest: for if the price fell, and he was not bound to deliver any specific shares, the transaction might be for his advantage. (A corresponding entry in the broker's ledger in which the latter, in addition, debited himself with the purchase-money received from A. was admitted.)'

Another class of receivable statements by deceased persons consists of those made as a matter of duty in the ordinary course of business, that is, generally at or near the time of the fact they state, *e.g.* where a deceased drayman had delivered some beer and the same night made, as was his duty, an entry of the fact in the proper book, this entry was admitted as evidence in an action for the price of the beer.[1] There is a 'presumption of truth which arises from the mechanical and generally disinterested nature of entries made in the ordinary *course of duty*, and from their constant liability, if false, to be detected by the declarant's superiors.'[2] But note that it is only the exact facts which it is the duty to declare are proved, and these must be within the maker's personal knowledge. Thus, in a coal mine, it was the regular course for Harvey to give notice to Yem, the foreman, of the coal which was sold. Yem was not present when the coal was delivered to the customers, and could not write, but got Baldwin every night to make the entries from what he told him, and to read them over to him. When both Harvey and Yem were dead, some one was sued for coal, and it was proposed to produce Yem's book to show there was no entry of payment. But this was not allowed, for Yem had no personal knowledge whether the coal was delivered or not, and the claim[3] was defeated. So in 1889 when it was sought[4] to prove a marriage, because in a registry of baptisms kept by a curate since dead he had stated that

[1] 1 Salk. 285 : 1703.
[2] Phipson, ch. xxiv. : 1930.
[3] 11 M. & W. 773 : 1843.
[4] 25 L.R.Ir. 184.

he had baptized a child in 1804, the daughter of 'J. H. and H. F., his wife,' and it was his duty to mention whether the child was legitimate or not, the entry was rejected because it was not made at or about the time of the alleged marriage, and because there was nothing to show that the curate knew of his own knowledge there had been a marriage.[1] (Of course, the entry was good to prove the baptism.) It is, perhaps, needless to add that there must have been no motive to misrepresent on the part of the dead declarant, *e.g.* the drayman and the coal foreman (above) were not alleged to have appropriated the goods, and to have then made the false entries ; if they had, such entries would have been mere forgeries.

We may pass rapidly over similar declarations relating to public or general rights. These generally affect titles to rights in land, and notably boundaries. Such evidence is admitted partly from[2] 'necessity, ancient facts being generally incapable of direct proof,' and partly from 'the guarantee of truth afforded by the *public nature of the rights* which tends to preclude individual bias, and lessen the danger of misstatements by exposing them to constant contradiction.' But it is an essential condition of such admission that the declaration must be made before the

[1] In view of this strictness—limiting the evidence *exactly* to the facts which it was the duty to state, and admitting nothing more—the greater favour shown to statements against interest seems anomalous. It is, no doubt, reasonable to believe that the accoucheur in 1768 got his fee, but he had no interest, and certainly no duty, in giving the correct dates. But it was the duty of the coal foreman and the curate to make correct entries respectively of the payments for the coals and of the fact of marriage (and in their cases their actual knowledge was probably as good as that of the man-midwife in his). The extent to which this rule has been carried may be seen from the following case : In 1831 it became important to decide whether a man had committed an act of bankruptcy under the then law, and this depended on whether he had been arrested in 1825 at his place in Paddington or in South Molton Street. He produced the official return of the officer (now dead) who arrested him, to the sheriff, and this stated distinctly that he had been taken at South Molton Street. But it was not allowed to be evidence, because it was no part of the officer's duty in his return to state the place of arrest, though he was bound to make the return : 1 C. M. & R. 347. It is not surprising that *this* 'stringent application' of the rule 'has been frequently criticized' (Phipson, ch. xxiv.).

[2] *Ib.* ch. xxv.