litigation began; otherwise, obviously, such evidence could be manufactured.

We have already had an instance of the importance of admitting statements of deceased relatives in what may be called 'family matters,' or, generally, 'pedigree.' As our authority [1] points out, the grounds for this are '*necessity*, such inquiries generally involving remote facts of family history known to but few, and incapable of direct proof: and the *peculiar means of knowledge, and absence of interest to misrepresent* of the declarants—members of the family having the greatest interest in seeking, the best opportunities of obtaining, and the least motives for falsifying information on such subjects.' The point comes up almost invariably on a question of succession to property or a title, where the relationship or legitimacy [2] of given individuals is of cardinal importance. A good instance, and one illustrating the fineness of some of the distinctions made on this subject, is supplied by the Sussex Peerage Case.[3] The Duke of Sussex, sixth son of George III, had purported to marry Lady Augusta Murray at Rome in 1793. A clergyman of the Church of England had officiated 'in a form as nearly as could be according to the rites of the Church of England, an English Prayer Book being used.' Their son after their death unsuccessfully claimed the peerage; the question was whether the marriage was valid by English law. An entry in a Prayer Book, proved to be in his mother's writing, was admitted; it ran: 'The Prayer Book by which I was married at Rome to Prince Augustus Frederick,' &c. Lyndhurst L.C. said: 'It is admissible as a declaration by one of the parties that there was a marriage, though not admissible to prove the marriage.' The nature of the volume had nothing to do with the matter.

Here, too, the statement must be made before controversy has begun for the same reason as before.

[1] Phipson, ch. xxvi.

[2] Note that in law an illegitimate child could have no family (except one he founds), but under an Act of 1926 there may be legitimation in certain circumstances.

[3] 11 C. & F. 85: 1844.

It is obvious that there are many family matters of which one cannot have personal knowledge, but yet about which one cannot be mistaken, *e.g.* one's own age or the maiden name of one's mother or grandmother. When it becomes important to establish such a point it often could not be done without trusting to a family tradition, 'since most family information is obtained at second-hand,' and it would 'frustrate'[1] 'the main object of relaxing the hearsay rule' to insist on first-hand knowledge. 'It is sufficient, consequently, if' the 'information purported to have been derived from other relatives, or from general family repute, or even simply from what' a declarant 'has heard,' provided such 'hearsay upon hearsay' does not directly 'appear to have been derived from strangers. . . . Statements about matters occurring six generations before have been received.' Thus 'to prove which was the eldest of three sons born at one birth, a declaration by their deceased father that he had for the purposes of distinction christened them Stephanas, Fortunatus, and Achaicus, according to the order of names in St. Paul's first Epistle to the Corinthians; and a declaration by their deceased aunt that she had for the same purpose tied strings round the arms of the second and third children at their birth are admissible': 1731. With regard to the extent of distance back, a suit in 1835–43 is interesting.[2] The title to large estates under a will in 1768 was at stake, and it was sought to put in evidence a Welsh pedigree tracing the genealogy of the family from the Lord of Rhŷs, Prince of South Wales, who died in 1233, to a William Lloyd living in 1733. At its foot was the memorandum: 'Collected from parish registers, wills, monumental inscriptions, family records, and history: this account is now presented as correct, and as confirming the tradition handed down from one generation to another to Thomas Lloyd . . . of Cwm Gloyne . . . 1733 by . . . William Lloyd.' This was indorsed 'true account of my family and origin. Thomas Lloyd, Cwm Gloyne.' A witness proved that this was in the handwriting of Thomas and that he had himself found the document fifty years ago among

[1] Phipson, ch. xxvi. [2] 7 Scott N.R. 711.

the papers of the Cwm Gloyne family at that place. It was held that the document was, at all events, admissible to show the relationship of those persons who were described by the maker of it as living, and who might be presumed to be personally known to him.

It is in this connexion that family Bibles, 'inscriptions on tombstones,[1] coffin-plates, mural tablets, hatchments, family portraits, rings, and pedigrees,' play a part. The first 'stand upon a somewhat different footing, not because of the sacred nature of the volumes, but from the custom of using them as family registers.[2] Entries therein are receivable on the grounds of publicity and family acknowledgement without proof of identity, relationship, or (presumably) death. The mere fact that the book is a Bible, however, is not sufficient: it should be shown to be a family Bible, in the sense of having been handed down and preserved as such in the family, and should come from the custody of a member thereof.'[3] If the other things in the list 'have been publicly exhibited they will be admitted on the presumption of family acknowledgement, though their authors be alive.' Finally, under this head we may notice that 'in the case of *marriage*, the repute and conduct need not be confined to the family, reputation among and treatment by friends and neighbours being receivable'; but such reputation must be general, *i.e.* not repose on what some particular person said.

[1] Epitaphs are proverbially untruthful, but not wilfully, perhaps, on names, dates, &c. Yet, 'there are several well-known instances of such mistakes. In the epitaph upon Spenser's monument in Westminster Abbey there is a misstatement of the time of his birth of no less than forty years, and of that of his death of three years. The time of death is erroneously stated on the monument of Sterne . . . and the time and place of birth on that of Goldsmith' (Phillips on *Evidence*, vol. i. p. 213, 10th ed.: 1852). Taylor (s. 652) says that the presumption that relatives would not permit an erroneous inscription to remain 'is doubtless often contrary to the fact.' He adds that he has 'found on a monument in a London cemetery this startling announcement: "The victim of a mother's temper."'

[2] 'In America,' said Ld. Redesdale, 'where there is no register of births or baptism, hardly any other is known' (4 Camp. 421: 1811).

[3] Phipson, *ib.*

41. DYING DECLARATIONS

By far the most important of statements of dead persons admissible in evidence is the 'dying declaration' of some one who has been killed [1]—at the trial of some one for his or her death. The charge must be one of murder or manslaughter, and the declaration must be shown to have been made under a sense of impending death. The obvious reason for admitting such a statement is that it proceeds from the victim himself, who presumably knew what was going on, and that often, where there are no other witnesses, criminals would escape altogether if it was not admitted. The truth of it is guaranteed with a very high degree of probability,—that people at the point of death do not lie.

The importance of this rule may be seen in a case [2] which excited much controversy. A man was hanged for the murder of a woman at Ipswich. At the trial it appeared (among much other evidence) that she came suddenly out of the house where the man was 'with her throat cut, and on meeting' a woman 'said something, pointing backwards to the house. In a few minutes she

[1] This must not be confused with the occasion when a *magistrate* attends at the bedside of any one dangerously ill, and takes down his or her sworn statement relating to any indictable offence, to perpetuate testimony, *and* the person against whom the statement is made (almost invariably the accused) has an opportunity of being present and cross-examining on such statement. If the maker of the statement dies, or is likely to die, the statement may be read at the trial; of course, with the cross-examination. If the suspected person cannot be found, the statement is not evidence, but it may contain 'dying declarations.'

It may be mentioned here, that what witnesses swear or affirm at a police court (and, probably, the coroner's, if there is an opportunity of cross-examining) may, if they die or become insane, or too ill to travel before the trial, or (since 1925) if they are certified as 'unnecessary,' be read thereat. But the mere fact that the witness cannot be found does not let in such reading, unless the accused has got the witness away. In 1851 three men were tried for robbery with violence. It was proved at the trial that one of the three had 'got away' an adverse witness. Accordingly her evidence was read against all three, but as two were not implicated in getting her away, this was unfair, and the trial was set aside. The jury had acquitted the actual getter away; the other two were ultimately transported for ten years (17 Q. B. 238; see p. 300, n. 1).

[2] *Bedingfield*, 1879, 14 Cox, Criminal Cases, 343.

was dead.' The judge refused to allow what she said to be repeated on the ground that there was no evidence that she knew she was dying. As a matter of fact, she had said, 'See what Harry has done,' which alone would probably have been fatal to the accused. But 'there was a strong movement in favour of the prisoner on the ground that the woman's statement had been rejected, and that it might have been in his favour . . . and if the circumstances had been less conclusive it is possible the movement might have been successful. Suppose' the words 'had been, "See what he has driven me to!" they would have been sufficient probably to secure an acquittal. And it was impossible to say what, on cross-examination, the words might have appeared to be.' Surely, if impending death be a guarantee of a speaker's truth, this woman's words might have been believed. The exclusion of them reduced the rule to a mere technicality. Suppose her last words had exonerated the accused, would it not have been monstrously unfair to exclude them?

The same incident illustrates another rule, viz. that of relevance. This is thus stated by Mr. Phipson:[1] 'Acts, declarations, and incidents which *constitute* or *accompany and explain* the fact or transaction in issue are admissible for or against either party,' and explained by Taylor[2]—'The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and each in turn becomes the prolific parent of others, and each during its existence has its inseparable attributes, and its kindred facts materially affecting its character and essential to be known, in order to a right understanding of its nature.' In other words, where does an act[3] or fact begin or leave off?—a difficulty, indeed, which is constantly arising in human affairs—always when we seek to put what we call consequences down to certain causes. Such a speculation is like the inquiry where the ever-widening circles generated by a stone dropped into

[1] Ch. vi. (1930). [2] s. 583.

[3] Hence the common phrase, 'an act or a fact *per se*' is meaningless.

water stop, to which, by the way, Carlyle likened conduct. But in practice a limit must be found, and it is supplied by the discretion of the individual judge, for there are no fixed principles for dealing with this question. Thus in the case above the judge refused to let in the woman's last words on (what may be called) 'the whole story,' theory saying that that statement was not part of anything done or something said while something was doing, but something said *after* something done. It was not as if, while being in the room, and while the act was doing, she had said something which was heard; it was something stated by her after 'it was all over, whatever it was, and after the act was completed.' The distinction here between *something doing* and *after something done* is indeed fine, but it serves the better to show that the meaning of this rule is to exclude anything which cannot fairly be said to be part of the whole story under discussion. Everybody will agree that a statement by an interested party, or, indeed, any one a long time after an event, should be excluded—unless, of course, the stater is there to answer for it—for it may be partly the result of reflection or imagination.[1]

In a manslaughter case 'a statement made by the deceased *immediately* after he was knocked down how the accident happened has been held admissible.' The parts of the whole story, then, must hang closely together in time. But that is not enough. In 1913 the mother of a little boy gave evidence that 'within a few minutes of the offence being committed' the child said to her, in presence of the accused, 'That is the man': both the C.C.A. and the H.L. ruled that this evidence was not admissible as 'part of the whole story.'[2]

[1] The reader must remember that we are glancing at the chief exceptions to the grand rule that only such evidence may be given as the givers can be *cross-examined* on.

Where there can be no cross-examination, there must be very strong presumptions, indeed, of the truth of (especially) unsworn statements.

[2] *Christie's* case, 10 Cr. Ap. R. 141.

42. 'PUBLIC' DOCUMENTS

The third class of exceptions to the rule against 'hearsay' consists of statements contained in public documents. The principal[1] of these are: (1) Statutes, State Papers and Gazettes; (2) Public Registers; (3) Public Inquisitions, Surveys, Assessments and Reports; (4) Official Certificates; (5) Corporation, Company, and Bankers' Books; (6) Published Histories, Maps, Tables, &c.—the last as dealing with matters of *public* notoriety.

It is plain that all these writings attain a high standard of truth, and that there is little fear of doing injustice by letting them in without insisting on the presence of the authors, if alive, for cross-examination; indeed, generally there would be injustice in excluding them. Nevertheless, in each kind there are 'qualifications' of the admissibility of the documents, (though they cannot be treated here), tending to exclude those where there is any reasonable chance of error.

Perhaps the most liberal concession in the list is that of commercial companies' books; but it only extends to certain points about which, in the absence of fraud, there can hardly be any mistake. And here, *as in all cases* where the authors of statements are not present to be cross-examined, it is open to the litigant affected to show that there has been mistake or fraud. Even judgements, when put in evidence, may be impeached on a proper ground.

The *principles* which it has been attempted to illustrate apply to all our courts, but much less frequently in those of

EQUITY AND THE COURTS OF CHANCERY

43. EQUITY AND CHANCERY

It is impossible to explain the present function of the Equity or Chancery Courts without a reference to their

[1] Phipson, ch. xxix.

origin and history. There is nothing more interesting in legal annals than that history which shows that this institution is a peculiarly English home growth, and practically unique. 'This distinction between law and equity, as *administered in different courts*,[1] is not at present known, nor seems to have ever been known in any other country at any time' (Blackstone, B. iii., c. iv., 50).

Two things strike people as civilization progresses and society grows in knowledge, wealth, and physical improvements, viz. the hardships and injustice sometimes inflicted by adhering to a fixed system of law, *i.e.* through its technicalities, and the want, becoming conspicuous from time to time, of laws to meet wrongdoing not till then conceived. In both cases justice requires that the existing law should be supplemented. But early legislation, as we have seen, by no means implied Acts of Parliament; lawyers and other officials, including the sovereign, often made the laws. Instances of one class of occasional hardships would be a debtor or a tenant compelled to pay a debt or rent twice over (say, through neglect of some legal precaution), or a legatee or other beneficiary under a will losing what the testator clearly intended to leave to him or her through the donor's non-compliance with a technical legal rule (*e.g.* that there must be two attesting witnesses). We are too familiar in daily life with the spectacle of the surety ruined through a too confiding friendship; of the goodly estate eaten up by the exactions of the usurer; of the too complacent trustee, who ultimately has to pay for his easiness out of his own pocket; and, generally, of those who are 'let in' by the misdeeds or misfortunes of others. No one to-day would propose to relieve such sufferers from their legal losses out of unorganized pity; whatever relief there is is regulated by law. But it by no means follows that in the early development of our law its authors deliberately set to work *only* to remedy actual failures of the law to do justice where it had been invoked (by being misapplied or not applied to a sufficient extent);

[1] The Romans and the *aula regia* here administered it in *the same* court (*ib.*).

they may very well have aimed generally at the 'correction of the law where it fails through its too great generality' (in statement)—Aristotle's famous definition of equity [1]—and while not differentiating between one individual hard case and another, they have been by no means averse from admitting even compassion into their judgements. In short, in the great movement of our law after the Norman Conquest, there came a moment when it was seen that alongside the other tribunals was wanted a jurisdiction something like that of the old Eastern *cadi*, who sat under a palm tree and decided each case as it came along, regardless of everything except 'natural justice.' Professor Ashburner puts it thus: 'Cases arose for which the common law gave either an inadequate remedy or no remedy at all. Moreover, even where the common law offered a remedy, yet if the parties were unequally matched in wealth and in influence, the weaker party often had little chance of obtaining a judgment in his favour, or, if he obtained it, of enforcing it.

'To meet these difficulties, it became necessary for the sovereign to exert that judicial authority which he had not yet parted with, and he exerted it by delegation sometimes to his Council and sometimes to his Chancellor. . . . It is clear that the council was mainly concerned with cases in which the complainant had a remedy at common law, but that remedy was rendered unavailing by the influence of his adversary over the jury, the sheriff,[2] or the judge; while matters in which the complainant had no remedy at law came more frequently before the chancellor, at first, apparently, by delegation in particular instances, and then by a general delegation. . . . The origin of the independent jurisdiction of the Chancellor is generally sought in a pro-

[1] *Ethics*, v. 10 (or 14), 6.

[2] Literature abounds in instances and general complaints of the amazing power of officials; the early common lawyers enlarge on the crime of 'Oppression.' Cf. Evelyn (*Diary*, Ap. 8, 1685): 'This day my brother of Wotton and Mr. Onslow were candidates for Surrey . . . and were circumvented in their election by a trick of the Sheriff's taking advantage of my brother's party going out of . . . Leatherhead to seek shelter and lodging . . . proceeding to the election when they were gone. . . . The Duke of Norfolk led "the opponents'" party.' Evelyn says his brother had a huge majority.

clamation of Edward III in 1349, to the Sheriffs of London.' [1]

It is clear that in the development of this 'plant of marvellous growth' the Chancellor [2] played a great part, and his office gave its name to the concrete institution, viz. Chancery. Now, 'he was, if one may say so, secretary and managing director all in one, and being invariably in early times an ecclesiastic, he was always at the king's ear, he kept the king's soul, and the king's seal.' [3] The organization for achieving the ethical virtue of equity was appropriately dominated by 'the keeper of the conscience [4] of the king,' the supreme judge [5] in the State, *i.e.* his confessor,[6] and soon the distinguishing mark of the Chancery was that it 'acted on the conscience.' And this characteristic tendency it has never lost.

[1] *Principles of Equity*, ch. ii. p. 26 : 1902, at which date (the late) Mr. Bolland (*Year Book*, p. 55 : 1921) had not made his great discovery that the Justices in Eyre on their rounds (before the dates above) could not fulfil their mission without creating 'Bills in Eyre,' *i.e.* rough-and-ready complaints, dealt with there and then ; this 're-discovery' is 'perhaps the most important addition to our . . . legal history . . . of late years' due 'entirely to recent study of the manuscript Year Books.' All knowledge of it had been lost for over 600 years,' *i.e.* till the Selden Society began (and continues) the magnificent work of editing them.

[2] 'Chancellor,' from *cancellarius*, originally officials who put petitioners' documents through openings (*cancelli*) to the judges in Church Courts. This official was by no means always the great dignitary he is at present. 'As compared with the justiciar, the chancellor was at first a humble personage. He was the chief domestic chaplain of the king, and did the secretarial work, presumably because he possessed the rare gifts of being able to read and write. He apparently resided in the palace, and we know that he had a daily allowance of five shillings, a simnel [a cake], two seasoned simnels, one sextary of clear wine, one sextary of household wine, one large wax candle, and forty pieces of candle. In the time of Henry II this allowance was made only' if he dined out ; 'if he dined at home, he only got three and sixpence, with a slight variation in the other commodities' (Carter, *English Legal Institutions*, ch. xv. : 1906).

To this day one of the Chancery Courts is called the 'Lord Chancellor's,' though he seldom sits there. See an instance in *The Times*, Aug. 7, 1906.

[3] *Carter*, ch. xv.

[4] Apparently invented by Sir Christopher Hatton (1587) : 1 Spence, 414 : 'the holy conscience of the Queen' (Eliz.).

[5] 'The early Norman sovereigns were almost absolute' (*Carter*, ch. xiii.).

[6] Campbell's *Chancellors*, i. 4.

'It was,' says Mr. Ashburner,[1] 'a court of conscience in two senses. In one sense the jurisdiction was exercisable according to the conscience of the Chancellor, although his conscience . . . was fettered more and more by authority; in the other sense the jurisdiction was exercised on the conscience of the defendants. The objects of a court of civil judicature, as now understood, are to determine proprietary rights, enforce obligations, and redress wrongs by granting damages. The earliest descriptions of the equitable jurisdiction lay stress upon a different principle. The object of the Court of Chancery was, in the first instance, the purification of the defendant's conscience. It was a cathartic jurisdiction.' [Remember that the judges were prelates or priests of the Church which highly esteems confession, penance, and absolution.]

'If a person is allowed to remain in possession of property which it is against conscience for him to retain, his conscience will be oppressed, and the court, out of tenderness for his conscience, will deprive him, notwithstanding his resistance, of what is so heavy a burden upon it. This principle is at the bottom of the leading doctrines of the court. If property is given to me in confidence to deal with it for the benefit of another, or if I declare that I will deal with the property for the benefit of another, my conscience would be polluted if I denied the existence of an obligation, and attempted to retain the property for myself. If I lend money on the security of property it would be against conscience for me to rely on the form of the conveyance as giving me any larger interest in the property than is adequate to compensate me my debt with interest thereon, and my costs, charges, and expenses. If I have undertaken to perform a duty, my conscience might be affected if I acquired an interest inconsistent with that

[1] Pt. 1, ch. 2, p. 51. These courts were said to 'scrape the conscience.' In 1826 a solicitor told the Chancery Commission that he had so scraped 'one of the first merchants in London three times in one of the plainest cases that ever was. At last he could not evade the questions . . . and paid my client the £1000. . . .' Mr. Birrell adds, 'I wonder whether he paid the costs of the scraping as well' (*A Century of Law Reform* (1901), p. 186, in a most valuable and amusing *résumé* of the history of Chancery).

performance ; and a court of equity, to prevent the slightest stain from attaching to my conscience, disables me from retaining such an interest if I have acquired it. If I obtain a benefit by fraud, actual or presumed, or by undue influence, actual or presumed, it would be against conscience that I should retain it. Moreover, it may be against conscience for me to retain property, although I did nothing against conscience in acquiring it. Thus property which I have obtained by an innocent misrepresentation must be restored to the original owner.'

And it seems [1] that ' the common people ' actually called Chancery the Court of Conscience ; our authority for this adding, ' yet herein conscience is so regarded that Lawes be not neglected, for they must joyn hands in the moderation of extremity.' West also says, speaking of *Summum jus*,[2] ' which oftentimes precisely regardeth the very letter and words of the Common Lawes : For remedy whereof, parties grieved pray aide . . . of Chancery to bridle extremity and reduce such rigour to Equity and Conscience.' So, in 1726, King L.C., said, ' We do not always here consider what the strict intent of the party was, but consider what is equitable and just : and then suppose the party meant that, and so decree it ; else I am sure nine in ten of our decrees could not be supported.'

A tribunal which adopts a tone of the sort heard in these extracts is obviously in a very different position from

[1] 2 W. West, *Symboleographie*, 176*b*, 173*b*: 1641; and so Cardinal Wolsey said (*Life*, by G. Cavendish, his ' gentleman usher ' (1557), p. 217). The phrase was easily misunderstood : ' This Court is not a Court of Conscience but a Court of Law,' said Jessel M.R. ' I will not dive into the recesses of a man's mind to say whether he believed when he was doing a dishonest act that he was doing an honest one ' (10 Ch.D. 128 : 1878).

[2] *Jus summum saepe summa est malitia*, says Syrus, Ter. Heaut. 796. *Summum jus summa injuria*, Cicero, *De Officiis*, I. 10, which may perhaps be translated, ' Extreme law is extreme injustice.' An anonymous writer in 1751 paraphrases it. ' Laws are compared to grapes, which, being too much pressed, yield an hard and unwholesome wine ' (*Grounds and Rudiments*). Burke referred to it as ' that over-perfect kind of justice which has obtained by its merits the title of the opposite vice ' (*Economical Reform*, 1780). So Herrick—of different anomalies :

' Do more bewitch me than when art
Is too precise in every part.'

that of one which must allow Shylock's claim when he sues upon the bond. A natural jealousy sprang up in the *regular* judges—as they may be called as against the irregular—partly, perhaps, from professional bias, and partly from the conviction that the common law and statute law were the only sure guarantees of liberty. This dislike was inflamed when the new court actually came into collision with the old, and though the Chancellors often framed a 'harmony' between their Equity and the Law, for centuries there was a certain hostility between the two 'sides' of Westminster Hall. Mr. Ashburner makes these points clear:

'In most systems of judicial organization, the distribution of contentious matters between the different courts is, as a rule, determined either by the importance of the controversy from a pecuniary or other standard, or by the nature or locality of the subject-matter in dispute, or by the domicile or status of one or both of the parties. In England the distribution before the Judicature Act [1873] was based upon a different principle. The Court of Chancery and the courts of common law dealt with precisely the same controversies; but they decided them in many cases on contradictory principles. The courts of law, in the exercise of their jurisdiction, ignored, not only the doctrines, but also the existence of the Court of Chancery. At law, a trustee or mortgagee under a forfeited mortgage was treated as the absolute owner, and money given to the separate use of a married woman belonged at law to her husband; . . . and it was no justification in law of an act, that it had been done under the authority of a court of equity. Thus, if an executor made payments under a decree, the decree could not be pleaded or given in evidence in an action brought at law by a creditor of the testator. Collisions between the two jurisdictions were obviated—to a certain extent—by the equitable doctrine that equity acts on the person. The Court of Chancery disclaimed all authority to sit as a court of appeal from the courts of common law, or to exercise a dispensing power over their judgments.' 'Decrees upon suits brought after judgment,' according to an order of Lord Bacon

[Chancellor, 1618–21], 'shall contain no words to make void or weaken the judgment, but shall only correct the corrupt conscience of the party and rule him to make restitution or to perform other acts according to the equity of the cause.' 'Though this court,' said Hardwicke L.C. [in 1749], 'cannot set aside a judgment of a common law court obtained against conscience, yet will it decree the party to acknowledge satisfaction on that judgment, though he has received nothing, because obtained where nothing was due. So it cannot set aside a fine [a mode of conveying land, now obsolete] for being obtained by fraud and imposition, . . . yet, on a conveyance so obtained, this court never sent the plaintiff to the Common Bench to set it aside, but considers the person obtaining the estate, even by fine, as a trustee, and decrees him to reconvey on the general ground of laying hold of the ill-conscience of the party to make him do what is necessary to restore matters as before.' [1]

Upon which passage (Hardwicke), Mr. Ashburner says: 'The old relation between equity and common law is illustrated by the following fact. A court of equity could not release from prison a debtor who had been taken in execution at law, although the court was satisfied that he was entitled on equitable grounds to be relieved from liability. Their only weapon was to imprison the creditor till he released his debtor, and it sometimes happened, if the creditor was obstinate, while the debtor was in prison on a' writ 'issued by the creditor, the creditor was himself in the Fleet for contempt of a decree in equity.' Again, 'In the reign of Elizabeth, continual skirmishes took place between the two jurisdictions. . . . In 1587, Taylor was ordered by a decree in equity to pay money to More, and was imprisoned in the Fleet for non-compliance with the decree. The Court of Queen's Bench, which had given a judgment in Taylor's favour,' ordered the warden of the Fleet to bring up Taylor and discharged him. At the same time, More's counsel was indicted. . . . Taylor was soon re-arrested under an order of Sir Christopher Hatton

[1] Of Hatton it was explicitly said that though he was a poor *lawyer* he made up for it by his equity (*æquitas*).

[L.C.], and Taylor's counsel, who confessed in open court that he had penned the indictment, was also committed to the Fleet. In 1589, Taylor, who had been a close prisoner in the Fleet for more than a year, made an abject submission to the Chancellor. In 1616, James I gave a decision in favour of the equitable jurisdiction,[1] and from the Restoration it was exercised without opposition, although not without occasional murmurs.'

Finally, the great Selden, who died in 1654, and whose *Table Talk*, compiled by his secretary, illustrates the persistence of the idea that equity means what one mind, viz. the Chancellor's, thinks equitable: 'Equity is a roguish thing. For law we have a measure, know what to trust to: Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make the standard for the measure we call a foot to be the Chancellor's foot. What an uncertain measure would this be; one Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in the Chancellor's Conscience.'[2]

44. THE SUBJECT-MATTER OF EQUITY SUITS

What sort of cases, then, are heard in the Chancery Courts? Learned writers have traced in interesting volumes the growth of the ideas, the germs of which have just been described, into the actual practice at the present

[1] This refers to the great pitched battle between the Chancellor, Ld. Ellesmere, and Coke C.J. In a case tried before Coke, a verdict had been obtained by the following gross fraud, 'by decoying away a necessary witness of the defendant and making the judge believe he was dying. The witness was taken to a tavern and a bottle of sack ordered for him; as soon as he put it to his mouth, the emissary went back to court, and when the witness was called, the emissary swore that he had just left witness in such a state that if he were to continue in it a quarter of an hour longer he would be a dead man' (*Carter*, ch. xv.). The Chancellor granted a perpetual injunction against the execution of the judgement.

[2] From Sir Frederick Pollock's ed. 1927, p. 43. The preceding 'Talk' is: 'Equity in Law is the same that the spirit is in Religion what every one pleases to make it. Sometimes they goe according to conscience sometime according to Law sometime according to the Rule of the Court.'

day. We can here only touch on the two extremes of the history.

'Two lines are attributed to Sir Thomas More [Chancellor about 1530]: "Three things are to be helpt in conscience —fraud, accident, and things of confidence." "It was the province of equity," said Sir Julius Cæsar, M.R. [about 1615], "to remedy frauds, breach of trust, extremity of common law or undue practices." "Touching the affirmative part, what matters are relievable in the Chancery?" said Norburie in the reign of James I. "I have heard they must be one of these kinds, viz. matters of fraud, trust, extremity, or casualty; or else not lightly to be dealt in here."'[1]

What does this jurisdiction include at the present day? The great Judicature Act[2] of 1925 (like that of 1873) assigns to the Chancery Division—

'All causes and matters for any of the following purposes:

The administration of the estates of deceased persons;
The dissolution of partnerships or the taking of partnership or other accounts;
The redemption or foreclosure of mortgages;
The raising of portions, or other charges on land;
The sale and distribution of the proceeds of property subject to any lien or charge;
The execution of trusts, charitable or private;
The rectification or setting aside or cancellation of deeds or other written instruments;
The specific performance[3] of contracts between

[1] Ashburner, ch. iv.

[2] S. 56. The reform made by the great 1873 Act had been suggested in substance more than two centuries earlier: Ashb. p. 18, citing Sheppard's *England's Balme* (1657), p. 64. Roger North (*Life of Dudley North*) wrote before 1700: 'And even here very good patriots have declared it fit that the court having jurisdiction of the cause in point of law should also judge of the equity emergent thereupon; but the present constitution doth not allow it.' The writer as a practising Chancery barrister is a very good contemporary authority. Burnet also (*History*, 659) advocated this reform about 1720.

[3] Where damages for breach of a contract (*e.g.* to sell land) would be inadequate compensation, the court may order the contract itself to be fulfilled.

vendor and purchasers of real estates, including contracts for leases ;

The partition or sale of real estates ;

The wardship of infants, and the care of infants' estates.'

Acts of Parliament have from time to time assigned other matters to the Chancery Courts. 'The statutory jurisdiction of the Court of Chancery related principally to Charities, Companies, Trusts, Infants, and Married Women.' [1]

The common attribute of all the causes here enumerated is that they relate to property, and for a very long time the Court of Chancery has only concerned itself with the interests of its litigants in property: there would be no point in making a penniless child [2] a ward of court. At first sight there would seem to be no connexion between the name of a street and the rights of property, but when in 1885 the Corporation of Dublin resolved to change the name of Sackville Street to O'Donnell Street, a Chancery Court restrained them by an injunction in an action by some householders in the street, who objected on the ground of 'inconvenience and of detriment to their trades and businesses.' [3]

Perhaps equity as a vindication of morality was never more completely identified with equity as the defence of property than in a case [4] where one partner sought to turn another out of a drapery business under a deed which provided that this might be done for 'scandalous conduct detrimental to the partnership business . . . or any flagrant breach of any of the duties of a partner,' and the latter had been convicted of travelling without a railway ticket and fined forty shillings. The judge thought that such a fraud was a breach of the duty of one partner towards another, and permitted the expulsion until an action could be tried.

[1] *Ann. Pract.* 1931, p. 2168.

[2] 'In one sense,' said a judge in 1883, 'all British subjects who are infants are wards of court because they are subject to that sort of parental jurisdiction' of the Court of Chancery (25 Ch. D. 60).

[3] 15 L.R.Ir. 410.

[4] 1904, 1 Ch. 486.

45. THE REFORMS OF 1873

It is clear, even from the references here, where the subject has barely been skimmed, that for centuries, if there was not open hostility, there was a want of harmony, of ' solidarity ' as the French say, between the two great coexisting systems of law ; each refused to recognize the other.[1]

The troubles of the suitor (before 1873) were, says Mr. Ashburner, ' increased by the equitable rule which refused to admit one trial at law as decisive upon the legal right, except in cases where the Court of Chancery had itself directed an issue. Moreover, a court of equity was confined to its own peculiar remedies ; it could not give damages for a breach of contract or for a tort. If a plaintiff sought to restrain a threatened invasion of his proprietary right, and the court held that no invasion was threatened in the future, but was satisfied that the right had been invaded in the past, the court could not give damages for the wrong already done. If a plaintiff sought specific performance, the court could not give him damages as an alternative remedy. In both cases the plaintiff was

[1] Even since the Judicature Act, the old dislike occasionally crops up. Ld. Bowen once said, ' I often hear eminent counsel talk of " an equity " in the case. It always reminds me of the story that Confucius once called his followers together and asked them what was the greatest impossibility conceivable ? None could answer. Then he said that it was when a blind man is searching in a dark room for a black hat which is not there ' (*A Chance Medley*, 279 : 1911). Ld. Bramwell, speaking of an equity of redemption, said, ' It is a right not given by the terms of the agreement between the parties to it, but contrary to them, to have back securities by a borrower to a lender—I suppose one may say by a debtor to a creditor—on payment of principal and interest at a day after that appointed for payment, when, by the terms of the agreement between the parties, the securities were to be the absolute property of the creditor. This is now a legal right in the debtor. Whether it would not have been better to hold people to their bargains and teach them by experience not to make unwise ones rather than relieve them when they had done so, may be doubtful. We should have been spared the double conditions of things, legal rights and equitable rights, and of system of documents which do not mean what they say. But the piety or love of fees of those who administered equity has thought otherwise. And probably to undo this would be more costly and troublesome than to continue it ' (1892, App. C. 18).

obliged after his suit in equity to go to a court of law.'[1] Thus, a Chancery court could not give damages, the chief weapon of the courts of law, which, in their turn, were not armed with the injunction,—an order, generally, not to do something, but it might be, positively, to do something —the peculiar truncheon of equity, disobedience to whose decree was, and is, punished by imprisonment.

Gradually some of the powers of the common-law courts were conferred on the Chancery Courts, and at last, in 1873, the Judicature Act abolished all differences between the powers of one set of judges and those of another over the remedies of suitors, and Chancery judges now award damages and common-law judges grant injunctions. 'The main object of the' Act, said Ld. Watson,[2] 'was to enable the parties to a suit to obtain in that suit, and without the necessity of resorting to another court, all remedies to which they are entitled in respect of any legal or equitable claim or defence properly advanced by them, so as to avoid a multiplicity of legal proceedings. . . . The Act of 1873 deals with the remedies, and not with the rights, of parties litigant. It was not intended to affect, and does not affect, the quality of the rights and claims which they bring into court . . . whether as plaintiffs or as defendants.' 'The Judicature Act has conferred upon one and the same tribunal the jurisdiction which before that Act was exercised separately by the courts of equity and the courts of common law;—and its provisions prevent any collision between the principles by which these courts before the Act were respectively guided. A claim which before the Act could only have been adjudicated upon in the Court of Chancery, because the courts of common law did not recognize its existence, can now be lawfully adjudicated upon by any division of the High Court of Justice or any judge of any division; and the apportionment of suits is based upon considerations of convenience, and not upon differences of jurisdiction. Where a man before the Judicature Act became entitled by the same cause of action to two distinct remedies, one of which he could only pursue in a court of common law, and the other

[1] *Principles*, ch. i. p. 17. [2] Cited Ashburner, p. 22.

only in the Court of Chancery, he can and must, since the Act, pursue both his remedies in one proceeding; and if the remedies are cumulative, the same court in one proceeding will give him both, while, if they are alternative, the court will give him that remedy which is adapted to the circumstances of his case. *But the two streams of jurisdiction, though they run in the same channel, run side by side, and do not mingle their waters.*'[1] Possibly it might have been added that some craft may be launched and may float on either.

The present state of things is that there are (besides the Lord Chancellor, who very seldom has time to sit in the Supreme Court) six equity judges of the High Court each sitting separately and without a jury. One division of the Court of Appeal (the Master of the Rolls and five Lord Justices *plus* (rarely) *ex officio* the Lord Chancellor and the other two Presidents of the Divisions[2]) deals with appeals from these judges, and another with those from other courts. Both divisions consist of three judges. The general rules of procedure, evidence, costs, &c., are those already described. Witnesses figure orally in litigation here much less than in the other courts—and their appearance at all is a modern concession[3]—these courts have long been famous for their legal learning and the chief home of legal lore. Hence the atmosphere of Chancery has not been very favourable to emotional interest or to anything sensational,[4] and hence, perhaps, its most

[1] Ashburner, p. 22. See, for instance, Ld. Bramwell's remark, above: the *distribution* of litigation between the two 'sides' seems to go on much the same as before the Act.

[2] The C.A. once sat in its full normal strength, *plus* the L.C.J. presiding, to deal with the then urgent question of the rights of alien enemies: 1915, 1 K.B. 866.

[3] There is a story that before this innovation it was suggested to an eminent practitioner that he should see a person whose evidence (by affidavit) he would have to rely on, and that his answer was, 'I will have no flesh and blood in these chambers.' One consequence of there being no witnesses or jurors was that cross-examination as an art did not flourish.

[4] Mr. A. Birrell, K.C., speaks of 'the flutter of excitement' when at one time 'two or three married ladies' would be interrogated by the judge. 'To introduce these ladies to the judge, to tell him their names, and the precise amount of their respective shares, was a piece of business

distinctive peculiarity—a jury is unknown in its courts. Generally such facts as are in dispute are left to the judge to decide, but if the court is in doubt or unwilling to decide the issue (where, for example, crime or some sorts of fraud are alleged), it has power to send the whole case, or any one issue of fact out of several, to be tried by a judge and jury on the common-law side in the ordinary way, or at the assizes, or anywhere else. Under the present practice, says an authority,[1] the Chancery division will refuse to order an action to be tried before a jury unless there is a simple question of fact the verdict upon which would decide the issue in the action ; and even then it is a matter of discretion. Practically the whole of the work of Chancery is done in London, with the very important exception of that which is within the jurisdiction of the Court of the County Palatine of Lancaster, which sits at Manchester and Liverpool. There is a similar survival from ancient times at Durham. The County Courts can deal with equity cases where (speaking roughly) the value of the property in dispute does not exceed five hundred pounds, but they have little to do on this ' side.'

The present reputation of the Chancery Courts is in vivid contrast with their long evil notoriety. Taken up from an early time, as we have seen, with the rights of property or controlling funds in court, they could only be resorted to—as they still are largely, though by no means exclusively—by the rich, or those charged with great pecuniary interests, such as those of railway companies, banks, &c. And they administered a system of law peculiar to themselves, and understood even among lawyers by one group only. Except through papers,[2] they hardly came into

generally supposed to put a heavy tax upon the readiness and resource of a Chancery junior, and it was, at all events, his nearest approach to the flutter of *nisi prius*, or the excitement of cross-examination ' (*On Trustees* (1896), Lect. I.).

[1] Daniell, 1 *Chancery Practice* (1914, p. 666), ch. xiv. s. 3. A right-of-way can now be tried on either ' side,' but when such a case was begun in Chancery, the C.A. refused to let the suer transfer it to the other, with a jury : 38 W.R. 194 : 1890.

[2] ' Chancery suits, above all things, required an unruffled atmosphere, and from year's end to year's end the real live suitor, whose pocket kept the whole thing going, gave no hint of his actual existence. If he

contact with an outside world, for whose benefit, after all, the tribunals existed. No surroundings could be more conducive to an excess of professional bias—a form, perhaps, of Herbert Spencer's 'class bias,' an interest in and a love of their particular branch of the law for its own sake, overflowing into the nooks and crevices of the most minute points. The process of *dehumanization* was no doubt aided by a strong sense that as they were not under the strict letter of the law (as other lawyers were), they were morally bound to avoid arbitrariness and conflicting decisions by a scrupulous respect for the precedents[1] created by their predecessors (generally the Chancellors). Hence the special learning and research—required in any case by the knottiness of the questions raised—but hence, too, the slowness, cumbrousness, and delay (the latter largely due to the fact that the Chancellor was generally wanted somewhere else, especially in the House of Lords), leading in their turn to monstrous expense, which became the tradition of the Court of Chancery. The ready instruments of torture were appeals. 'It is recorded that a case was heard in February 1830, in which there had been seven trials—three before judges of the King's Bench, and four before the Lord Chancellor—at the close of which the suit floated serenely upwards to the House

were ruined, as he too often was, it was done out of sight of judge and counsel' (A. Birrell, as above; *e.g.* in *Jarndyce* v. *Jarndyce*); but 'Dickens in *Bleak House* wholly failed to state in the preface . . . that most of the defects, which he had so graphically illustrated, had been abolished by Act of Parliament before' it 'was printed' [1853]. J. M. Beck, *May it please the Court* (1930), 100.

[1] 'Both Lord Eldon [1818] and Lord Redesdale [1802] insisted that courts of equity were governed in their decision by principles as fixed as those of the common law' (Ashburner, p. 46, who, however, observes, 'The principles of equity did not really become rigid until the Judicature Act,' p. 51), perhaps the most striking illustration of the tendency of all codes to become inflexible, the system of equity having been expressly designed to mitigate the rigour of another system. But the reputation of being more 'learned' than other lawyers was slowly acquired, 'the Chancery,' says Evelyn, 'requiring so little skill in deep law-learning if the practiser can talk eloquently in that Court, so that few care to study the law to any purpose' (*Diary*, Dec. 8, 1700). The position is now reversed between (what was once irreverently styled) law and jaw.

of Lords.'[1] The rehearings were often due to the fact that the Chancery judges were never sure what view the common-law judges would take of the facts. The comparative wealth of the suitors, perhaps, helped to encourage the waste of money.

Thus an institution which had started on its career as the home of 'conscience' became a heap of abuses. Every period of English literature, till recent times, bears witness to this, and to the present day to have one's head in chancery is a colloquial expression for something very unpleasant.

No writer on this subject is so well known, or made so great an impression, as Dickens. But he had great forerunners,[2] of one of whom a few words may be quoted. Brougham, himself destined to preside over the court, endorsed[3] in the House of Commons, in 1823, the opinion 'that that court was a great public grievance, and the severest calamity to which the people of England was exposed.' Finally we may refer—not to the great novelist—but to a learned lawyer, commenting on him by the way

[1] Dr. Blake Odgers, in *A Century of Law Reform* (1901), p. 225. He goes on, 'No doubt, when a suit reached its final stage—when all inquiries had been made, all parties represented, all accounts taken, all issues tried—justice was ultimately done with vigour and exactitude. Few frauds ever in the end successfully ran the gauntlet of the Court of Chancery.' 'But granting full relief may be had, what doth it cost to come at it?' asked Roger.

[2] See Pepys, April 25, 1666; Roger North, *Lives and Autobiography*, almost *passim* (about 1700); Burnet, *History of his own Time*, 378 and 659, about 1704; Sydney Smith, *Peter Plymley's Letters*, x. 1807; John Stuart Mill, *Political Economy*, v. 893, about 1848; Herbert Spencer, *The Study of Sociology*, ch. xi. 1873; Spencer Walpole, *History*, vol. iii. ch. xii. 1880. The latter says, 'Every one has heard the good story of the old peeress who had insisted on remaining a few minutes in court to see how they set to work to settle her suit, which had been eighty-two years in Chancery.' Compare what Dr. Odgers (above) says, 'No man in those days could embark on a Chancery suit with any reasonable hope of being alive at its termination if he had a determined adversary.' Mr. Cooper, Q.C., published in 1827, *Lettres sur la cour de la Chancellerie*, containing a fierce attack on the court under Ld. Eldon, when things were at their worst. He says, 'The curse of war has certainly not caused as much ruin and calamity in England as the Court of Chancery under this judge' (Letter 3). It might have been said that there was only an iota's difference between chancery and chicanery.

[3] Hansard, 781, June 5.

of calm annotation of a leading case [1]—one arising out of a will made in and speaking from 1818, in which litigation began in 1821 and ended in 1833, and 'identified in the tradition of the Chancery Bar with the suit of *Jarndyce* v. *Jarndyce*. . . . The only odd thing about that description is that the absurdity of the procedure is in no way exaggerated. Exaggeration would be impossible. In the old procedure, when an estate was thrown into Chancery, . . . every act of administration was carried out in detail by a professional army [2] under the direction of the Chancellor or Vice-Chancellor. . . . Similar proceedings in the same suit have gone on from time to time from the earliest memory of the oldest judge in the memory of the existing bar, and perhaps—in some sequestered chambers sadly shorn of their former dignity—are going on still.' This is an interesting speculation; if there is such a survival it is almost entirely of antiquarian interest. For so far to-day are the Chancery Courts from being a 'national grievance,' [3] that all complaints of their want of dispatch and economy have disappeared, and, indeed, they are held up in respect of the former as examples to other tribunals. If an apology is needed for this digression into history it may, perhaps, be found in the pointing of the moral that legal reforms, which it took generations of struggle to accomplish, might, considering their success, well have been accelerated, and

[1] *Cadell* v. *Palmer*, *21 Ruling Cases*, notes, p. 129 (1900). Nottingham L.C. (1675) disposed of a bill filed before 1642 heard before every Chancery judge since then. J. Jekyll was briefed soon after 1778 in a cause begun by his great-grand-uncle (M.R.) under Queen Anne (*d.* 1714): Campbell, *3 Chancellors*, 395. In *The Times* of March 26, 1919, there is a report of *Lintott* v. *Footmer*: the testator died in 1816; it was adjourned by the Master of the Rolls in 1834. Sargant J. settled minutes of judgement and ordered inquiries who were entitled.

[2] The late Sir Edward Fry, L.J., who was 'called' in 1854, says that 'to throw an estate into Chancery' 'meant sometimes that the whole estate would be devoured by the costs of the solicitors who gathered round the corpse' (*Memoir*, 1921, p. 73). The writer of that *Memoir* records that one Chancery Court had got into such a bad state 'that on one occasion the following advice is said to have been given: "The plaintiff has no case in Law or Equity, but I advise him to file a bill in Vice-Chancellor ——'s Court and to instruct Mr. —— [counsel]. He will then probably obtain a decree"' (*ib.* p. 72).

[3] Mr. Tierney in the House of Commons; March 1, 1824, Hansard, 604.

that others are still overdue. For the Court of Chancery, to sum up in the words of a very critical periodical,[1] 'had —and no doubt still has—its imperfections; it has been derided for its dilatoriness, its propensity for hair-splitting, its "piety and love of fees," but who can say how much the country owes to the standard of strict integrity which that court has consistently upheld for centuries?'[2]

Thus these tribunals are model courts, but their purposes are limited. Their studies are, so to say, mathematical as compared with their 'opposite numbers,' which are consecrated to the 'humanities,' and the two disciplines imply different tastes.[3]

THE CRIMINAL LAW AND ITS ENFORCEMENT

46. CRIMINAL LAW

'Almost all men,' said the late Dr. Kenny,[4] by far the greatest English exponent of this topic since Blackstone, 'whether thoughtful or thoughtless, are fascinated by its dramatic character—there is no other which stirs men's imaginations and sympathies so readily and so deeply.'

[1] 76 L.Q.R. Oct. 1903, p. 358.

[2] Cf. Eve J.: 'This action began just before I came on the bench [1907], and it has been in my chambers ever since. As a result, from a hopelessly insolvent company, it has been so managed by my officers that every creditor has been paid in full and also all the debenture holders, and large sums raised by prior lien have been paid off. Now we are paying to the shareholders more than 20*s.* in the pound. It is a testimonial to the Court of Chancery. . . . It only shows what beer can do' (*Times*, May 13, 1931).

[3] The contrast between these two 'apices juris' is brought out by the stories (probably untrue) that when (for a short time) the Equity judges tried criminal cases at Assizes, one of the most eminent told a jury that the prisoner must have known there had been some violence, because he said, 'Where is my bloody shirt?' and that he remarked of a witness who had denied all previous knowledge of a constable that nevertheless he had addressed him familiarly as 'Bobby.' Similarly it is *said* that a very refined judge once asked a bargee deposing to a collision with another's craft, 'When you saw what was imminent, why didn't you call out, "You goose, where are you going?"'

[4] *Outlines of Criminal Law*, ch. i. 13th ed. 1929.

In ordinary parlance the common word 'crime' requires no explanation, but a legal definition taxes the skill of the greatest jurists. One of the latest of these concludes that 'a crime is a wrong whose sanction is remissible by the Crown, *if remissible at all.*' In other words, only the Crown can let the offender off the punishment; the aggrieved person cannot. In a civil action, of course, he can. He is not, for example, bound to take the damages he has been awarded. But the offence may not be pardonable 'at all.'[1] With this exception the Crown's power of pardon is universal, and so a crime is a wrong which can be pardoned by the Crown. We might add, 'and the only wrong,' were it not, according to our authority, that there is one[2] class of civil action in which the Crown may remit any penalty awarded. But at any rate 'no private person can ever grant a valid remission of any criminal sanction. Herein lies the only ultimate and unvarying distinction between the two kinds of procedure.'

Obviously this definition is not of much value to a layman who wants to know whether a given act is a crime or not, nor, indeed, to a lawyer on the same quest without further inquiry. It seems quite easy to say that a crime is a wrong, *morally* worse than a wrong to right which a civil action must be brought. But this is by no means so, for a slander may be diabolically wicked and manslaughter merely the result of trival carelessness. 'Indeed, a person's conduct may amount to a crime even though instead of being an evil to the community it is, on the whole,

[1] Kenny (*ib.* p. 503) gives two instances, viz. a public nuisance, while still unabated, and under the Habeas Corpus Act, 1679, sending a man to prison outside the realm, 'lest politicians obnoxious to the Crown should be kidnapped by Crown servants with impunity.'

[2] Viz. penal actions, *e.g.* those brought by 'common' informers (*i.e.* persons not more aggrieved than any one else) for breaches of the Sunday Act of 1780–1. Under the Remission of Penalties Act, 1875, the Crown may (unless an Act *expressly* gives it to him) disappoint the informer if it chooses of his expected gain, and this, it is pointed out, is the only instance of the right of the Crown to 'interfere with a civil remedy; it cannot, *e.g.*, take away a man's damages or dissolve his injunction' (though it can forgo its own). 'These proceedings were permitted by statute at a date when the position of misdemeanours in law was not fully established, when Justices had no summary jurisdiction and the police was inadequate to detect offences' (Encycl. 'Pen. Actions').

a benefit, as where a defendant was held guilty of the offence of a common nuisance because he had erected in Cowes Harbour a sloping causeway which, to some extent, hindered navigation, though by facilitating the landing of passengers and goods it produced advantages which were considered by the jury to more than counterbalance that hindrance.' So 'treason is legally the gravest of all crimes; yet often, as Sir Walter Scott says, remembering Flora Macdonald and George Washington, "it arises from mistaken virtue; and therefore, however highly criminal, cannot be considered to be disgraceful," a view which has received even legislative approval in the exclusion of treason and other political offences from international arrangements for extradition . . . the mere omission to keep a highway in repair shocks nobody, but is a crime; whilst many grossly cruel and fraudulent breaches of trust are mere civil wrongs.' Again, 'it is a "crime" not to send your child to school, though it cannot be prosecuted in any higher tribunal than a police magistrate's, and the utmost possible punishment for it is a fine of a sovereign.[1] Similarly, . . . a matter may be criminal without involving any moral turpitude, as where a limited company omits to send to the Registrar . . . the annual list of its members.'

Whatever the legal definition may be, successful criminal proceedings nearly always permit some infliction of punishment as such by the State, and not merely incidentally (as by the payment of costs in an action, exposure, &c.). Civil proceedings are supposed to aim at giving a man or getting him back his due (including the prevention of a threatened wrong). An ideal system would, if necessary, combine both, which ours seldom does.

The test of 'punishment as such by the State'[2] would be theoretically exact were it not for the exception already mentioned, viz. penal actions. The popular phrase 'imprisonment for debt,' is very misleading. People are never sent to prison because they are in debt and cannot pay; but because they won't pay when a judge, after full

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[2] 'Punitive' damages (pp. 135–6) are not 'by the State' (the judge) but the jury.

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[1] Till 1914 five shillings, a measure of the advance of public opinion.

[2] 'Punitive' damages (pp. 135–6) are not 'by the State' (the judge) but the jury.

inquiry into their means, is satisfied that they have or have had the means to satisfy his order. The imprisonment, which does not extinguish the debt, cannot, as a rule, last more than six weeks, but comes to an end as soon as the sum is paid. Historically, this power as exercised by the County Court, where almost exclusively it is invoked, has nothing to do with the punishment for contempt of court, but is a relic of the barbarous right of taking a debtor's body in execution ; still there is nothing externally to distinguish punishment for such disobedience from that for contempt of court, of which, however, there is declared to be a civil and a criminal form—the latter being the open *expression* of what the name implies, because it tends to the former, viz. denial of the sacrosanctity of justice.[1] It may console sufferers for these two offences to feel that the proceedings against them are civil and not criminal ; but as there seems to be little *practical* distinction between these forms of incarceration, the relief, perhaps, is not very real. Judged by the test proposed above, these offences are crimes, as only the Crown can release from the consequences (which for a contempt may be a fine). Perhaps it is simplest to say that contempt of court is at once a civil and a criminal offence, this anomaly arising from the fact that in truth it is not really the subject of litigation at all, for the court is the judge in its own cause, punishing for offences against its own dignity or for interference with its own special business, viz. the administration of justice in given cases. Even when there is an appeal from the sentence (which is rare, and limited, perhaps, to the question whether there was legal authority to sentence), still one of the parties before the court is, so to say, another court, and there is a natural tendency to uphold the power of the judiciary.

Incidentally it will have been noticed that while all civil proceedings are undertaken with a view to get some material advantage for the individual suer, the *immediate*

[1] The distinction seems academic (see Oswald on *Contempt*, &c., 2nd ed. ch. v. and ch. xiv.). It seems, however, that there are slight differences in the prison regulations between these three classes.

result of criminal proceedings is never to give anything to the specific victim of the crime (if there is one),[1] with a few exceptions when the criminal has property.

It is true that fines are frequently inflicted on criminals as their sole punishment, and that the State which prosecutes them is enriched by the amount, but (to say nothing of the fact that this sum does not go into the sovereign's *private* pocket), the State whose law has been defied is in a very different position from, say, a person libelled or a woman maltreated. Whatever benefit accrues to the Treasury from such exactions goes to the relief of the whole body of taxpayers; the hope of getting any part of them cannot be a motive to any person to charge another with a crime.

But though the *immediate* or first result of criminal proceedings is a conviction or an acquittal, incidentally they may secure the victim compensation. It commonly happens, for instance, in cases of assault or injury to property, that a sentence is mitigated if the offender makes reparation for the unnecessary expense he has caused; and it is, of course, impossible to say how often the prospect of such a result induces a victim to denounce the assailant to the police. In these particular cases of larceny or injury to property, magistrates *may* impose no other punishment on first offenders than payment of damages and costs. The courts, of course, will not be bound by any 'bargain' between criminal and victim about such payment.

But there is, further, a direct means of obtaining restitution of stolen property through the conviction of the thief in respect of the particular property. It was always open (with certain exceptions) to bring an action to recover

[1] For there need not be one, as there are 'instances of crimes which do not violate any one's right,' *e.g.* 'engraving upon any metal plate (even when it is your own) the words of a banknote without lawful excuse for doing so; or being found in the possession of housebreaking tools at night; or keeping a live Colorado beetle' (Kenny, ch. i.). Here the only 'victim' is the State, which has chosen to consider itself aggrieved by these acts, and to make disobedience to its law a crime, but the State can hardly be considered a 'specific' victim. And we recognize—more and more—certain rights of dumb animals.

stolen property from any one with whom it might be found, who, of course, might be, and often was, an innocent purchaser for full value. But since 1861, the court in which the thief is convicted may, and generally does, make an order that the property proved to be stolen shall be summarily restored to the owner from whoever may have possession of it, no matter nŏw innocently it may have been acquired, and even the proceeds of stolen money still in the thief's hands may be thus followed, though the money itself, if *legally* spent (but only so), cannot. Thus, in the case of the Bank of Liverpool frauds, the judge not only ordered the money standing in the names of the guilty persons at their respective banks, and proved to be the fruits of the crime, to be restored to the bank, but also other sums standing in the name of unconvicted persons (who could not be found) shown to come from the same source (*The Times*, February 24, 1902). The *innocent* buyer thus dispossessed may, occasionally, get the price he had paid back out of the money found upon the convict. (Where the thief is not caught, or there is an acquittal, the true owner *may* be, and frequently is, able to sue any one who has his property, and when, in the former case, it has got into the possession of the police, there is an easy process for claiming it.) But the court is not bound to make such an order, and often, where stolen goods have been pledged, if the conduct of the pawnbroker has been irreproachable it only orders restitution by him on his receiving some compensation. Or the court may refuse the order if, for instance, it is not sure to whom the property belongs, and leave the claimants to their civil remedy.

It is clear, then, that proceedings against some crimes do end in the victims of them getting some material advantage (though seldom more than they actually have lost), but, at any rate, the indispensable preliminary to any such advantage is a conviction followed by punishment, however slight. The court or the jury must say in every case—not whether they find for A. or B., suer or sued, or partly for one and partly for the other, as in civil proceedings—but guilty or not guilty; they can find for or against the accused, but this does not mean finding

against or for *some one* else—as in civil proceedings, for in every criminal case the State is the accuser, and comes forward *solely* in the interest of justice, and asks *only* for punishment. And if there is a conviction, some mark of State disapprobation—for the judge, too, represents the State [1]—there must be, however trivial, *e.g.* the accused may be fined a penny,[2] or bound over in his own recognisance [3] to come up for judgment if called upon, or be sentenced to a day's imprisonment, which implies his immediate release, but there cannot be an absolute discharge.[4] With costs as punishment we deal below.

In the overwhelming bulk of criminal cases, then, we may say that the punishment of the offender is always the first, and nearly always the only consideration. But its mainspring must not be lost sight of: 'When a court of justice . . . awards punishment . . . the object is not vengeance. The purpose is to deter': Ex-Lord Chancellor Herschell.[5] So Pepys tells us (February 3, 1661) that he heard a sermon by Mr. Thomas Fuller 'at the Savoy, upon our forgiving of other men's trespasses, showing among

[1] The apparent anomaly of the State appearing before itself constantly recurs, but does not cause the slightest practical difficulty. The 'Crown,' in *any* legal proceeding, invariably means a Government office—which acts quite independently of the sovereign—and on the very rare occasions when the Crown has a private interest in litigation, it is in exactly the same position as any other litigant before the judges, who are even more independent of the Crown than a Government department. The Crown as a person, the Crown in its capacity as a suitor, and the Crown in its capacity as a judge, are really three distinct things.

[2] The greatest fine probably ever inflicted was that of £30,000 on the Earl (afterwards first Duke) of Devonshire in 1687 for striking a man in the king's palace. He was imprisoned in default of payment, but escaped, and gave his bond for payment. But he did not pay, and after the Revolution the proceedings were set aside as illegal, and the fine as excessive (D.N.B.; 11 St. Tr. 135).

[3] A promise to forfeit a certain sum on failure to come and receive punishment for *this* offence, which is only to be exacted in case of future misconduct. Generally, the expedient is a mere formality, and the sum is often beyond the means of the promiser, but occasionally delinquents are thus brought up and imprisoned for the old offence. An instance is mentioned in the L.Jo., May 12, 1894, when the judge said that in ten years he had only called upon three such persons.

[4] Except in the very pettiest matters before magistrates, *e.g.* offences by children.

[5] 1898, A.C. 131.

other things that we are to go to law never to revenge but only to repayre, which I think a good distinction.'

It has been seen that some wrongs may be righted, so to say, either civilly or criminally. Libel and assault are the commonest instances—the former more often figuring civilly, and the latter criminally—'since they are the crimes least unlikely to be committed by rich people' (though 'they are very far from being . . . the only crimes where it is possible' to proceed civilly), because 'most crimes are committed by persons so poor'—a generalization of paramount importance—'that no compensation could be obtained from them.'[1] These two examples are from the least serious category of crime; but suppose a case from the most serious. If the crime is charged,[2] the sufferer takes his chance of compensation or restitution (if that be possible), and the State is satisfied by the vindication of the law. But the position is very different if the victim says, 'What I want is redress; the State must look to its own revenge. I shall bring my action and get back what I can'—not ideally public-spirited, perhaps, but very natural. What is the State to do then?

About 1872, 'Mr. W. instructed his wife to take a quantity of jewellery, including a brooch, to the shop of Mr. A., and get a substantial loan on the security. The negotiations came to nothing, and A. returned a packet purporting to contain the jewellery. When the packet came to be opened there was no brooch inside, and Mrs. W. charged A. with having stolen it. Instead, however, of a prosecution for felony, this action was brought against

[1] Kenny, p. 20, who suggests that 'the circumstances which give rise to a prosecution for bigamy would often support civil proceedings' for deceit.

[2] When a man was simultaneously charged and sued for assault, the judge said, 'It is a rule that the court cannot pass sentence for an assault while an action is depending' (4 A. & E. 575, 1836), and declined to do so, though the suer offered to give up his action. It is easy to see how each judgment for the *same* offence might be affected by the other. When a civil claim is founded on a felony, it is practically impossible to proceed with an action until the graver question of crime is tried: 1914, 3 K.B. 98.

him, and a verdict was found for W. for £150.'[1] After the trial, W. took criminal proceedings against A., who asked (in vain) for a new trial on the ground that when the evidence tended to prove a felony as here, the criminal charge must be investigated before a civil action will lie; and though the judges said that the rule[2] was that the civil remedy is suspended till the punishment of the guilty has been sought, still they did not see how that could be enforced, for the judge could not stop the action, he was bound to try it. And in this position the law has been ever since. In 1889 a woman brought an action[3] 'for assault and battery' against a man, alleging a shocking offence against her (which he denied); but the judges, far from declining to let the action go on till the charge was tried, refused to adjourn it because a material witness was said to be ill. As the commentator on W.'s case says, 'What *is* the proper course no one knows.'

It was observed that an ideal system would combine (when necessary) both civil and criminal proceedings—as is commonly the case in France—and it ought not to be beyond the resources of our jurisprudence to accomplish this. A huge analogous reform was effected when the remedies of equity and of the common law were united in one court, and here and there, as we have seen, it has similarly combined the civil and the criminal. An approximation to this type of thorough legislation is to be found in Acts protecting the funds or other property of Friendly Societies and Trade Unions (the members of which are always poor persons) from misappropriation, for a magistrate may at once order the offender to restore the money or property, and sentence him to pay a penalty (up to

[1] Shirley's *Leading Cases*, p. 572, 9th ed.; L.R. 7 Q.B. 554.

[2] It is very doubtful: Pollock on *Torts*, 13th ed. p. 205 (1929). He cites (from 7 Scott N.R. 499) a characteristic passage from Maule J., 'whose criticism of both law and procedure could be outspoken': 'I do not know why it is the duty of the party who suffers by the felony to prosecute the felon, rather than that of any other person; on the contrary, it is a Christian duty to forgive one's enemies, and I think he does a very humane and charitable and Christian-like thing in abstaining from prosecuting.' But, then, why not from suing, too?

[3] *S.* v. *S.*, 16 Cox C.C. 566, 1889: Ireland. The suppression of names in court is not so recent as is sometimes supposed.

£20) and costs, and in default of obedience to any part of such judgment he may send him to prison. Unfortunately, if the defaulter does not obey, and does go to prison, he cannot be sued civilly for the same property.[1] No doubt there must be some limit to unification of this sort. For instance, it would shock good feeling if a man who had murdered the breadwinner of a family, were sentenced in the same breath to die, and to pay damages to his victim's widow and children. But it would be nothing but abstract justice that his estate should contribute to their support, as it would do if the death had been the result of his negligence instead of his crime; indeed, an employer would be so liable, even though he and all his employees were absolutely free from blame (provided there was no wilful misconduct on the part of the workman killed). However, it may be noted that the law is tending more and more in the direction of an 'all round' jurisdiction—for the present confided mostly to police-magistrates and justices. When restitution of property dishonestly gotten *plus* payment of the costs of prosecution is ordered we get something like a system of combined criminal and civil remedies, but the combination is rare. And there are one or two cases where the court can order compensation for injury or loss or an official may pay it out of a convict's property.

It has, perhaps, been brought out that the distinction between civil and criminal proceedings is purely artificial, and does not correspond to any opposition in human nature or facts. There are some moral wrongs which the law will revenge or redress with the one kind of procedure, some with the other kind, some with both, while there are some which it will not recognize at all,[2] though it will com-

[1] 1891, 2 Q.B. 288.

[2] And that not only for the reason mentioned above. There are genuine moral wrongs which the law will not recognize, because they arise entirely from acts which the law either forbids or discourages (on moral grounds), *e.g.* it ignores dishonourable conduct in betting or gambling. A man who pleads the Gaming Act as his only answer to a claim for a bet or money lost at cards is often flagrantly dishonest. Perhaps the most famous authentic—as is now established—case of this sort occurred about 1725. Everet alleged that he 'was skilled in dealing in several commodities such as plate, rings, watches, &c.,' that

pensate for accidents to workmen, which are not wrongs at all. Any one, then, who thinks himself aggrieved must first find out whether the law can give him either reparation or revenge, and next, how to set the law (if any) in motion.

47. WHO CAN BE A 'CRIMINAL'?

No one under seven years of age. From seven to fourteen there must be clear proof that the accused 'knew that he was doing wrong'—a very difficult phrase, nowadays always interpreted charitably and, if guilty, he cannot be 'imprisoned.' At fourteen boys and girls may be criminals *optimo jure*, but under sixteen cannot be sentenced to death or penal servitude nor as a rule to imprisonment, the complement of 'detention' in varying forms being paid till majority is reached: [1] a female cannot be whipped.[2]

The civil law, too, liberally protects 'infants' on the ground of their 'immature intellect'—hence, sometimes, a

he entered into (oral) partnership with Williams, 'and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads and at inns, fairs, &c.; that they (both) proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch; . . . that they went to Finchley . . . and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, &c., that there was a gentleman at Blackheath who had several things of this sort to dispose of, which might be had for little or no money, 'in case they could prevail on the said gentleman to part with the said things,' and after some small discourse they dealt for the said things,' and much else of the same sort. Williams declined to account for £2000 thus made by 'joint dealings at Bagshot, Salisbury, Hampstead, &c.,' and Everet claimed a partnership account in the usual form, because W. would 'not come to a fair' one. It turned out that both were highwaymen; the suer was hanged in 1729, and his partner in 1735. The costs of the case had, it is said, to be paid by the counsel who signed it, and Everet's solicitors were fined £50 each. One of them was transported for robbery in 1735. Nevertheless, if Everet's story was true, he had a genuine grievance against his partner: 35 L.Q.R. 197: 1893; from original records: *European Mag.*, May 1787.

[1] Kenny, p. 50.

[2] As Queen Victoria thought the lady who introduced abnormal bicycling costume ought to be—the most typical Victorian sentiment ever expressed.

generous fiction—' and imperfect discretion.' [1] But as this attribute of infancy may be indefinitely prolonged, provision has to be made for ' all sorts and conditions.' No one can define a ' normal ' person, but every one recognizes an extremely abnormal one, but few—especially doctors—agree about the intermediate variety.

In 1884 the crew of the shipwrecked yacht *Mignonette* after great privations were dying of hunger and thirst, and ' the boy ' was on the point of death : the crew accelerated his end and by acts of cannibalism survived till ' they were rescued.' The lawyers were puzzled what to do, because the great Hale (about 1670) had laid it down that to kill an innocent person in order to escape death was murder, and it was felony for a starving person to steal a loaf.[2]

Bacon had explicitly opined—very appositely to this case—that ' if two shipwrecked men were clinging to a plank which was only sufficient to support one and one of them pushed the other off, he would be exempt from any criminal liability because his conduct was necessary to save his life ' (Kenny, p. 76). The jury stated that they did not know whether ' the whole matter ' amounted to murder. However, the two survivors were sentenced to death—and released after six months imprisonment. Was any good purpose whatever served by this sentence, except to ventilate the *theory* of the criminal law ? Is not ' the truth perhaps that law is not applicable to extreme abnormal circumstances when reason is paralysed ' ? [3]

When, then, does a state of mind excuse ?

In the case of persons legally certified as ' insane,' popularly called mad, there is no juridical difficulty : they would not be charged with crime but would be dealt with medically ; or, if formally brought before a bench, they would, in their own interest, be put into benevolent custody, unless the offence were indictable, when the jury

[1] 17 Halsbury, 43.

[2] He did not act on this view as a judge when, with great diffieulty, he persuaded a Cornish jury to acquit a starving, shipwrecked lad who had ' burgled ' to steal a loaf : Foss, 7 *Judges*, 112. Such a man who abstains (and survives) ought to be charged with attempted suicide.

[3] The present writer, Roscoe's *Criminal Evidence*, 14th ed. (1921), p. 1120 ; 15th ed. p. 1154.

may try the question on evidence, like any other, whether they are sufficiently sane to plead.

The difficulty mostly arises—almost exclusively in trials for homicide—less accutely for kleptomania—when the defence is that the accused was 'insane' when and if he committed the alleged act, though he had not been so legally registered. An epoch in the problem of responsibility was marked on March 13, 1843, when, after a sensational murder by one M'Naghten, who was found 'not guilty,' on the ground of insanity, at the Old Bailey and sent to Bedlam by the Home Secretary, the House of Lords decided to ask the judges to define the law.

Their collective 'deliverance' is still authoritative. The gist of it is: to excuse, the prisoner must be 'clearly shewn' at the time of the act to be 'labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act; or (if he did know this) not to know that what he was doing was wrong morally.' [1] From this position the judges have declined to budge, despite attempts, in many cases, to argue that the respective circumstances brought the client within the protection of the rules of 1843. Now, the analysis of 'Knowledge' is very subtle, and there have been perpetual discussions [2] on the words above. They have worked out in the case of crimes committed by intoxicated persons—that one who is so drunk as not to be able to form an intent, *i.e.* as not to know what he is doing, is in law insane: short of that extreme condition he has not the same 'protection.' [3]

It has been said that the controversy is a struggle between the doctors and the lawyers: the latter will certainly not allow the former to direct the jury on their verdict though they pay the greatest attention to expert alienist opinion: *suum cuique.* Matters came to a (temporary) head in 1923 when Lord Birkenhead appointed a powerful Committee of a Judge and practising lawyers, including two

[1] Kenny's *Summary*, p. 54.

[2] See Dr. Mercier's works, especially *Crimes and Criminals* (1918).

[3] The House of Lords, 1920, A.C. 479; 14 Cr. A.R. 159, a rare instance of being severer than the C.C.A., which had reduced murder to manslaughter.

Home Office specialists, to report [1] on the whole subject. They concluded in favour of the M'Naghten rules, except that

> 'it should be recognized that a person charged criminally with an offence is irresponsible for his act when the act is committed under an impulse which the prisoner was by mental disease incapable of any power to resist.'

In other words, 'Uncontrollable Impulse,' as it is popularly called, which the Committee accepted 'in substance' from the British Medical Association, deliberating *ad hoc*, ought to save a man from the gallows, if not from Broadmoor. This was undoubtedly 'one up' to the doctors. The Committee rightly thought that to this end legislation would be required, but when Lord Darling on May 15, 1924, brought in such a bill in the House of Lords, nearly every judge concerned was against it and it was rejected without a division, and in 1925 the Court of Criminal Appeal declared *ex cathedra* that such a defence was unknown to English law [2]—as it did in 1908 of 'temporary insanity' the humane compromise of many a Coroner's jury. In 1922 the Infanticide Act took away the stigma of murder by recognizing in the case of women recently confined that 'the balance of her mind' may be 'then disturbed' (in most of the instances, by shame). Thus, at any rate, more attention is being paid to mental science, and some day 'these gathering indications will . . .' through 'scientific doctors and lawyers (be) incorporated in a statute.' [3] Presumably it would recognize 'as well as "intellectual," "cinative" (of the will) and "affective" (of the emotions) insanity.' [4] 'It is quite certain,' said Lord Dunedin in a great charge to a Scots jury in 1907, where the Crown successfully set up the insanity of the accused (of murder), 'that . . . scientific opinion on insanity has greatly altered in recent years and Courts of Law, *which are bound to follow so far as they can* the discoveries of science and the results of

[1] *And.* 2005 : 1923. [2] 19 Cr. A.K. 50 : 142 ; 1 Cr. A.R. 223.
[3] L.J. June 1923, apropos of Darling J.'s remark that the law did not recognize 'subconsciousness' (writing a letter without knowing it).
[4] Kenny, p. 57.

experience, have altered their definitions and rules along with the experts . . . it is left to *Juries* to come to a commonsense determination . . .' on the evidence and direction.[1] And that is where we are at present.

48. CLASSES OF CRIME

(1) Treason; (2) felony; (3) misdemeanours; (4) police [2] or petty offences.

This is not a scientific,[3] but a practical division, according to seriousness.

(1) The popular idea about treason is substantially correct, viz. that it is a crime against the State or against the individual sovereign who personifies the State, though it is not so generally known that it includes wrong against certain members of his or her family, and even some of their high officers. Little need be said about it, as, happily, it is phenomenally rare in this country—though there was a trial, conviction, and therefore necessarily sentence to death [4] for it as late as 1916—the best-known variety of it, real political perfidy, having been long extinct—since the last agitations of the Jacobites—as is natural in a realm with a good and long-settled government. Nowadays violence to royal personages would be dealt with and punished in the same way as if they were ordinary people. One can hardly imagine Parliament creating a new treason, but other crimes have been created, and those fixed by common law freely dealt with by Parliament. Most of the law still unrepealed against treason dates from the

[1] 1907, S.C.(J.), 77.

[2] 'Police' is here used in the general sense of local or municipal as opposed to State initiative, *e.g.* keeping a child from school or having a smoking chimney, though no 'policeman' may intervene. Class 4 may be called 'offences' simply. 'Petty offences, *i.e.* only "triable" by justices of the peace without a jury. Sometimes absurdly though officially styled "summary offences"' (Kenny, p. 90).

[3] It seems to be agreed on all hands that the distinction between classes 2 and 3 should be abolished or revised at the earliest opportunity.

[4] In Colonel Lynch's case in 1903 the commutation to two years' imprisonment, and the pardon at the end of one, marked official contempt for this class of treason. Since 1820 of the nineteen persons thus sentenced to death only one (Casement, in 1916) was executed. Kenny (1929), C. 31.

time when the central authority in the State thought it essential to arm itself with terrible powers against attacks on the royal dignity [1] which was identified with the commonwealth. Hence the least penalty for treason was death ; but, as political and other education grew, acquittals became so common lest execution should follow—exactly as they did when less notorious crimes were capital—that at last, in 1848, was invented a species of

(2) Felony, namely, treason felony. Certain notorious Fenians and dynamiters were tried for it. Parliament is slow to create felonies, but it did so in 1929, viz. ' child destruction ' not caused ' in good faith ' obstetrically : the maximum punishment for these is penal servitude for life.

Familiar instances of felonies are murder, manslaughter, burglary, housebreaking, larceny, bigamy, rape. Whilst the most conspicuous instances of

' (3) Misdemeanours are less heinous crimes, like perjury, conspiracy, fraud, false pretences, libel, riot, assault.' [2] Murder is the only capital [3] crime in this list ; the rest

[1] But as early as 1628–9 it was held no treason ' to charge the king with a personal vice,' *e.g.* unchastity or drunkenness, but a misdemeanour (*Pine's* case, Croke Car., 117, 126). Pine had said that Charles I was ' as unwise a king as ever was and so governed as never king was ; for he is carried as a man would carry a child with an apple ; therefore I and divers more did refuse to do our duties to him ' : and again, ' Before God, he is no more fit to be king than Hickwright,' ' an old, simple fellow—Mr. P.'s shepherd.' The judges and A.-G. were bidden to advise on these words, and after debating a great many precedents, in which an extraordinary number of persons were executed for merely disparaging the king and government, the last being a mad barrister—J. Williams, in 1620, who wrote a treasonable book called *Balaam's Ass*—they resolved that though Pine's words ' were as wicked as might be ' and showed ' a corrupt heart,' they did not amount to treason. A personal libel on His Majesty was punished in 1911.

[2] Kenny, ch. vii.

[3] But not the only one left, as is generally supposed. (1) Burning or destroying ships of war in dockyards, &c., or military or naval stores, &c., there or in arsenals, &c. (extended in 1918 to Air Force property), or any ship, &c., in the port of London ; and (2) piracy (though not amounting to murder, if it endangers life), are still punishable by death under Acts of 1772, 1799, and 1837 respectively. The latter ' is now almost unknown in our courts ' ; the last instance ' unimportant ' in 1894.

The Army Act, 1928, abolished capital punishment for several military offences ' on active service.' ' No one under 18 is ever actually executed, but a youth of 18 was executed in 1925 ' (Kenny), and no one under 16 may be ; but ' a youth of 18 ' (*Times*, July 17, 1925) was hanged.

are commonly punished by imprisonment, though the lesser misdemeanours are sometimes met with fine. Broadly, the rules of procedure are the same in all these cases.

(4) Offences. As these are all wrongdoings, not included in the three previous categories, obviously no sort of list can be attempted, and the number of cases is naturally huge (in comparison with those in the other three).

The fundamental characteristic here is, that they are adjudged by the magistrates,[1] 'justices' (without a jury), who now derive their powers entirely from statutes. Thus in 1929 the last year for which the judicial statistics are published, *in addition* to civil proceedings before magistrates, of which there were an enormous number, there were 588,811 charges in England and Wales (or rather, persons charged)—in 1928, 651,786—of whom 23,839 (22,749 in 1928) were tried in the 'juvenile courts,'[2] set up by the great Children Act of 1908 and physically apart from 'ordinary' prisoners. As practically[3] all criminal

[1] Those paid, who are trained lawyers, sit alone; so do the aldermen of the City of London, who are assisted by expert clerks. Otherwise, of the 'great unpaid,' two or a majority of more must decide.' One alone can only hear trivial cases, and cannot impose more than fourteen days' imprisonment or twenty shillings *including* costs, but he can commit for trial.

[2] Only 96 of these were not dealt with summarily: 15,575 were 'proved guilty but not convicted'—N.B., 6738 were discharged, but some had to pay costs or damages: 1684 had to enter into recognizances: 6610 were placed under probation officers, *officially* created in 1907: he can bring the disobedient back to court: 484 were sent to Industrial Schools: 8 were placed in 'homes' (relatives', for choice). Punished were 553 sent to Reformatory Schools: 175 males were sentenced to a whipping: of 4815 fined in 1928 the guardians had to pay costs or damages in 2646 cases.

[3] Impeachments, and informations in the K.B., are not, but they are so rare that they may be neglected. The last impeachment was in 1806, when Ld. Melville was acquitted of malversation as treasurer of the Navy.

The right of a Secretary of State, or any other privy councillor—always a magistrate for every county—to arrest *for treason* and to commit for trial, is of extreme historical interest, but now of no practical consequence.

In one—and probably only one—instance has Parliament stopped penal proceedings on the findings of a Coroner's jury. On March 8, 1710, de Guiscard, charged with treason, was examined by the Privy Council and suddenly stabbed Harley, the Chancellor of the Exchequer

cases are begun before magistrates, these figures [1] show that a large number of their tribunals are required to cope with the work; and, accordingly, their courts are by far more numerous than courts of any other rank in the kingdom and more busy than many.[2] The daily applications to them for advice, especially by humble folk, gives the magistrate the air, as a French observer put it, of 'the father of a family' who through his subordinates removes many grievances and saves much formal process. In town or country, a police-magistrate or a J.P.—a uniquely British product—is never far off. They are the bedrock of our criminal system.

(as Swift recounted to Stella an hour or two later): the culprit was so 'necessarily and unavoidably bruised and wounded' (preamble of Act 9 Ann. c. 16 or 21) by one Wilcocks, a messenger, and the other attendants that he soon died in Newgate. The (London) inquest could not but find W. guilty of homicide, and he would have been duly indicted had not the above Act legalized all the acts of W. and the others on March 8. Swift complains to Stella (March 25) that the law would not allow de G.'s body to hang in chains, as he was untried. (It was actually pickled and shown at 2d. a head till Anne stopped it.) It would have been more to the point if Swift had insisted on the necessity of legislation, as showing our law-abidingness.

Coroners may be removed by the L.C. for misconduct, for varieties of which see Danford Thomas, p. 74, and add from 1873 *Whitcombe's* case (1 C. & P. 124), where a jury found that a coroner had corruptly shielded a (convicted) murderer.

Coroners' juries shared with other juries the (partial) abeyance due to the war. The Coroners Act of 1926 gives them a discretion to dispense with a jury when there is nothing suspicious about the death.

[1] Even in 1666, when Charles II personally pressed Evelyn 'to take on this job,' he excused himself—'the office in the world I had most industriously avoided in reguard of the perpetuall trouble thereoff in these numerous parishes.' A little later (May 1), Pepys had the same difficulty with his cousin (1) because he would not punish 'Quakers'; (2) because he did not know Latin, 'now all warrants do run in Latin.' On Dec. 8, 1879, John Bright 'declined' the office for Warwickshire, 'not liking some of the duties of the magistracy and doubting if it was a system which should be maintained' (*Diary*).

[2] In 1929 there were about 25,000 J.P.s in England and Wales (K. 432 n.): in Apr. 1925, 669 women magistrates in the counties and 405 in the boroughs.

There are (1931) twenty-seven stipendiary magistrates for London and seventeen in other populous places.

49. *A.*—OFFENCES, CIVIL (OR 'QUASI-CRIMINAL'[1])

These are generally miniature actions[2] brought by the party aggrieved—often a local authority—and except that the procedure is 'summary,' *i.e.* quick, they are in all respects (including costs and appeals) like other civil proceedings; and, therefore, it need only be mentioned here that they can only end in (1) dismissal, or (2) an order to do something—*e.g.* to close an overcrowded house, to destroy unsound meat, or to pay a sum of money with or without costs, never in a fine or imprisonment.[3] Parliament is always extending this jurisdiction.

50. *B.*—OFFENCES, CRIMINAL

Properly so called. We have already had a division of crimes according to gravity; we now meet one according as I. the charge is, and must be, dealt with by the magistrates; II. may, but need not necessarily, be so dealt with; or III. cannot be finally determined by them. Naturally, the two divisions will roughly correspond.

I. Not Indictable

The first of these categories is by far the most comprehensive, for it 'covers some hundreds of offences, *e.g.* many petty forms of dishonesty or of malicious damage, acts of cruelty to animals, transgressions against the by-laws that secure order in streets and highways, and violations of the laws relating to game, intoxicating liquors, adulteration of food, revenue, public health, and education.'[3]

[1] A convenient phrase in *Judicial Statistics* (Blue Book) for 1919, p. 39; but not in that for 1928.

[2] *e.g.* 'bastardy proceedings; disputes between employers and workmen; matrimonial separations; claims for District rates or for contributions due under the Public Health Acts from the owners of house property, for the making of streets or repairing sewers' (K. p. 436).

[3] Except for non-payment when means are proved, *e.g.* in affiliation (K. ch. xxix.).

The magistrates in almost every case (in II. as well as I.) may be as lenient as they like about punishments, but their *severity* is limited. If they find an offence is proved, they may consider it too trivial for punishment, or they may bind the offender over to keep the peace—a mere mark of disapprobation—with or without sureties, or they may fine him (and in some cases in a large sum) with or without costs; but they may, if the statute infringed permits, send him to prison with or without hard labour, though never for more than six months (except [1] he be on 'ticket-of-leave,' when for certain breaches he may be sent for twelve); and if a fine is not paid, they may commit to prison for a definite time, or they may order the money to be raised by distress on his goods; and if that does not produce enough, they may send to prison for three months, or less.[2] A few words in an Act of 1914 are (probably) the first official recognition that a conviction may be disastrous for an offender's dependants: money found on him normally goes to pay his fine or debt or to the rightful owner, unless (except, apparently, in the last case) the court thinks 'that the loss of the money will be more injurious to his family than his imprisonment'—a humane provision, confirmed in 1923—both recognizing the humble class concerned.

Here, then, we meet with the liberty of an accused being at stake—certainly the most prominent feature of criminal law in the popular mind. The first legal physical restraint of that liberty is Arrest: [3] surrender comes to the same thing. Bail implies a promise to return on a future day into the *custody of the law*, which means, with hardly an exception, that of the police.

[1] And except when they inflict *consecutive* sentences (with the maximum of twelve months) for more than one offence, but this is very rare.

[2] Criminal Justice Administration, s. 4 (1); Industrial Assurance Act, s. 39 (6): 1923.

[3] Kenny once thought that 'all arrest before trial seems inconsistent with Magna Carta' (*e.g.* 6th ed. p. 441). Perhaps he was convinced by McKechnie, *Magna Carta* (1905), pp. 156, 457, who, on the *defects* of that instrument, points out that arbitrary arrest was not even challenged till the time of Charles I.

51. ARREST

Who, then, may arrest? Practically no one but the police may, and no one ever does.[1] But there is one momentous exception. Not only any one may, but any one *over age* must 'do his best to arrest . . . any person who *in his presence* commits a treason or felony or dangerous wounding,' on pain of fine or imprisonment. It seems, too, on ancient authority, that when one of these crimes has been actually committed, a private person *may* arrest any one whom he reasonably suspects of having committed it (and even, perhaps, may arrest any one *about* to commit a crime, till the danger is over).[2] In all cases but the last the captive must be handed over to the police. It may be added that every one is bound[3] to assist the police in arresting, if called upon, and people are occasionally punished for not doing so.

Constables naturally have much wider powers[4] than private persons, especially in the latitude of 'reasonable suspicion.' It is clear that there must be such a privileged class, not only to avenge crime, but to prevent it. But, on the other hand, such powers are jealously watched, and in many cases not even the police may act without a magistrate's authorization. For it would be ridiculous to arrest when there is no reason to suppose that the accused, when summoned, will not answer the charge—indeed, when it is trivial, the magistrates may, and often do,

[1] But see 'Prisoner' in Index. The High Court of Justice occasionally has a prisoner in its custody.

[2] K. ch. xxx. If it was clear that a crime *there and then* was actually contemplated, it is difficult to see what tort the private person commits.

[3] As one Brown found in 1841, when a constable called on him to assist in stopping a prize-fight; though his excuse was that he could not leave the four horses of the carriage from which he was looking on and that his help against the assembled mob would have been utterly useless, he was found guilty by a Bedford jury, and fined forty shillings, and ordered to find sureties for good behaviour (C. & M. 314).

[4] It was laid down by Coke in 1616 that a 'constable hath as good authority in his place as the Chief Justice of England in his' (1 Rolle's Rep. 238). Henry Fielding, the greatest English J.P. (Westminster and Middlesex), has described 'Mr. Gotobed,' 'the watch' of his day (which he reformed), in *Amelia*, B. 1, c. 2 (1751).

dispense with his presence at the hearing. But when it is deemed necessary that he should be there, and, therefore, in all serious criminal charges (and in *any* where, in fact, he has taken no notice of the summons), his attendance may be compelled by a magistrate's warrant, granted on sworn evidence *only*, to arrest him, which, practically, is valid throughout the whole kingdom (and, in effect, the British Empire). Indeed, when any one is 'wanted' for a serious crime, a warrant is issued as a matter of course. But it is a rule that [1] 'if a summons will be likely to prove effectual, a warrant should not be granted, unless the charge is of a very serious nature.' The oath,[2] of course, imposes a greater responsibility on the taker.

It is clear, then, that when arrest is necessary or is desired by an aggrieved person—generally the prosecutor [3] —recourse must be had to the police. But innumerable criminal charges are begun by summons. The summons may be obtained from a magistrate, by application made personally or through a representative; or the wrong alleged may be reported to the police, who may decline to interfere on the ground that the matter is too trivial, or that nothing illegal has been shown, and leave the complainer to act for himself, in which case he is quite free to make his application to the magistrate; or they may consider the allegation so grave that they will themselves make application to the magistrate to issue a warrant according to the exigencies of the moment, or they will at once proceed to arrest [4] the accused. But if they do 'take

[1] Atkinson's *Magistrate's Annual Practice* (1914, but still authoritative), p. 46.

[2] In the City of London even a (criminal) summons is only granted on oath. Thus a false charge may at the outset involve perjury.

[3] A word, with its cognates, almost exclusively—here absolutely—confined to a criminal meaning.

[4] Arrest may be mitigated by bail (from *bailler*=to hand over=*mainprise*), *i.e.* release on condition of appearing in court: it is said that old records say when a surety could not be found, 'Let the prison be his bail.' Since 1914 it must be granted by the officer in charge of the station, for offences not 'of a serious nature' (even for 'light felonies,' said the *Police Code*, 1912, p. 18), where there is no warrant, and the case cannot come before the magistrate within twenty-four hours; young persons under 16 *must* be bailed with only grave exceptions. If the accused has to find sureties in this *or any other instance*,

a case up ' in any of these ways, or, indeed, in any, they make the charge either on the distinct responsibility of the complainer or of their own ; the latter in cases of crimes committed, as we have seen, under their own eyes, or in which they have good reason to suspect the culprit ; the former when, having no official knowledge through their officers, one person definitely charges another with a crime, *e.g.* when any one is given into custody in the street.

The following general rules are laid down in the *Police Code* of 1924 by eminent police authorities :

A constable ' is justified in arresting on reasonable suspicion that a felony has been committed.' A constable cannot legally arrest without warrant [1] for a misdemeanour unless ' an Act *expressly* gives him power (*e.g.* since 1926 a " bookmaker " betting illegally), or a breach of the peace is taking place or is about to take place and the arrest is necessary to prevent it.' Otherwise application for a warrant is generally advisable, and specially in cases of doubt, ' or if there is any suspicion that the object of the person aggrieved is rather to recover the stolen property than to enforce the law,' embezzlement being often within this category. Thus, the limit of arrests ' on sight ' by the police is not and cannot be rigidly fixed : they use their common sense in each case. There must, on the whole, be a good many illegal arrests.

Arrests cannot be made without something being said, and for a long time the admissions and confessions made to or skilfully extracted or extorted by over-zealous or unscrupulous or perfectly impartial officers have been minutely criti-

the police must be satisfied that the persons ' going bail ' are ' good ' for the amount, which must be reasonable. The ' surety ' has been compared to a gaoler and described as the Duke's ' living prison ' (*L'Ancienne Coutume de Normandie*, ch. lxviii. and ch. lxxv(i).).

[1] Search warrants (also sworn) have for centuries been granted to look for stolen goods and are now issued for a very large number of purposes. It is said that if it be just to take a man's body it cannot be unreasonable to rummage his property. In the famous case, in 1765, of the General Warrants, issued by the Secretary of State to arrest Wilkes's printers, &c., and to seize their papers, &c., the Crown claimed that the right went back at least to the Restoration, but the judges would not hear of it ; one said, ' no degree of antiquity can give sanction to an usage bad in itself ' (19 St. Tr. 1027).

cized. At last, in 1912, the judges formulated four rules (13 Cr. Ap. R. 90), and later eight more (all in L.T. Sept. 28, 1918, and elsewhere), to regulate what a policeman on apprehending may ask the accused (actual or potential): they come to this, that the suspect must not be 'led on'; he must be cautioned at the first possible moment that anything he may say may be given in evidence—whether in his favour or not—and he must not be cross-examined by the police: co-suspects must not be confronted to get recriminations *à la française*, but the police are not called on to silence a talking *étenu*.

Inspector Wensley, after forty-two years of Scotland Yard, was aware of hundreds of cases where interrogation of a suspected person has prevented arrest by proving his innocence—especially where three or four persons are under suspicion.[1]

But the question, who charges, is of supreme importance, in view of the prevalence of actions for malicious prosecution and for false imprisonment, where an accusation has been heard and dismissed; and it is common in such cases to hear the blame bandied about between the police and some party concerned. But whether it be policeman or civilian, he is liable civilly, unless he had 'reasonable and probable cause' for making a criminal charge against the given individual. Thus, in 1870, where one Austin [2] had been locked up all night but discharged by the magistrates in the morning, the judge said, 'Mrs. Dowling took it into her head that she had a right to give Mr. Austin into custody, because he broke into a room in the house in order to repossess himself of his own property. In this she was mistaken, for he was guilty of nothing felonious or malicious. . . . He having been so wrongfully given into the custody of a police constable was taken to the police station. But for the subsequent act of Dowling he would not have been detained there. If Dowling had merely signed the charge-sheet, that would not have amounted to more than making a charge against one already in custody. . . . But . . . though Dowling gave no express direction for Austin's detention, he was expressly

[1] *Detective Days* (1931). p. 282.

[2] L.R. 5. C.P. 534.

told by the inspector on duty that he disclaimed all responsibility in respect of the charge, and that he would have nothing to do with the detention of Austin, except on the responsibility of Dowling; the inspector would not have kept Austin in custody unless the charge of felony was distinctly made by Dowling. How long did that false state of imprisonment last? So long of course as Austin remained in the custody of a ministerial officer of the law, whose duty it was to detain him until he could be brought before a judicial officer. Until he was so brought, there was no malicious prosecution. The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment,' and this was held to be a clear case of false imprisonment at least.

What is 'reasonable' or 'probable' depends on the circumstances of each case, but the anomaly of allowing the initiation of criminal proceedings at the instance of any accuser, without the slightest guarantee of his good faith, or of his ability to satisfy a claim for damages, is inherent in every civilized system of jurisprudence, for otherwise the complaints or denunciations of poor persons or those of low station would not be attended to, and many criminals would escape. Our law does, indeed, show a peculiar abhorrence of any abuse of the powers to arrest by allowing process (civil) against even the bench of inferior courts,[1]

[1] A successful action of this sort is very rare, but there was one in 1848. Mr. Smith, who was county court judge in Lincolnshire, allowed Mr. Holden, who resided and carried on business in Cambridgeshire, and who was therefore out of his jurisdiction, as he knew, to be sued in his court, and, when he did not appear, made an order against him for the payment of a certain sum. Mr. Holden took no notice of this order, and was summoned to the Lincolnshire court. He again made default, whereupon Mr. Smith, '*bona fide* believing he had power to

especially magistrates', which it seldom does for any other judicial mistake they may make—and by recognizing false imprisonment as a crime, viz. a misdemeanour (generally an assault),[1] but except in circumstances of aggravation, punishment in the latter way is not much in vogue. Perhaps *any* reckless or malicious initiation of criminal proceedings should itself be made criminal, and the immunity which—short, at any rate, of perjury—an unprincipled 'man of straw' now practically enjoys be taken away.

52. PROSECUTIONS

It is clear that the overwhelming bulk of prosecutions are undertaken by the police at the instance of some sufferer. A private prosecutor who, for his own convenience, prefers to control the conduct of his case in *any* court, pays all expenses, *e.g.* for solicitor and counsel (if any), *over and above* those which, as we shall see, the local authority—county or borough—would pay in the ordinary way (out of the rates); but, otherwise, there is not the slightest

do so,' committed him for 'contempt' to Cambridge jail for fourteen days. He was released by a judge of the High Court (on a *habeas corpus*) and brought an action and recovered £60 damages from the judge, and, though there was an appeal, kept them (19 L.J.Q.B. 170). The judges said that the judge's mistake was one of law, and not of fact, and 'we have found no authority for saying that' a judge 'is not answerable in an action for an act done by his command and authority, *when he has no jurisdiction.*'

In 1875 a girl, who was ultimately convicted, was, while in charge, examined twice by a doctor. She brought an action for assault, and recovered damages against the doctor and the magistrate and police inspector who authorized the examination, though it was admitted that all three had acted in good faith, but had mistaken the law (13 Cox C.C. 625).

In 1904 a London police magistrate fined a man for not having had two of his children vaccinated; owing to the age of the children the magistrate had no jurisdiction. The fine was not paid, and a distress was levied. The father thereupon brought an action against the magistrate for illegal distress, and recovered (and on appeal retained) £10 damages in a county court (20 T.L.R. 435, 639).

In 1920 a conviction for perjury was quashed because a court at Peterborough included justices who had no right to sit (15 Crim. Ap. R. 122).

[1] But not necessarily; relatives who locked an *accoucheur* in the patient's room to ensure his presence were convicted (69 J.P. 107, 1905).

difference in the procedure or incidents. For it is a fundamental constitutional rule that *all* prosecutions take place in the name of the Crown, on the theory that it is the peculiar duty of the State and not of the citizen to exact punishment. But, again, this makes no material difference in the actual conduct of the case *at any stage*. In general, the State is sufficiently well represented by the local authority; but in grave cases—*e.g.* where the penalty is death, or when the matter seems to be of special public interest—the intervention of the Crown is more than nominal; for, acting through its ministers—here the law officers, the Attorney-General, and the Solicitor-General at the instance of 'the Treasury' (which, in such a case,[1] pays out of the taxes),—the Crown, represented by the Director of Public Prosecutions, may prosecute by the mouth of these two officers themselves,[2] or by that of any counsel whom the former of them or the Director may appoint. Roger North in a noble passage insists on the official impartiality of Crown lawyers, of whom he was one.[3] But even the personal presence of the law officers gives the Crown no privilege (except an unimportant technical one).

And as the State can alone prosecute, so there must be the sanction of the State in some form to abandon a prosecution; the 'prosecutor' cannot stop it. 'Such a person may be the sole victim of the crime; he may even have taken the trouble to commence a prosecution for it; yet these facts will not give him any power of final control over the proceedings, and no settlement which he may make with the accused offenders will afford the latter any legal immunity. The prosecution which has been thus settled and abandoned by him may at any subsequent time, however remote, be taken up again by the Attorney-General, or even by any private person. Thus . . . a

[1] Or it may do so after a private prosecution, as in Whitaker Wright's case, 1904, in recognition of public service rendered.

[2] In the proceedings against Dr. Jameson and others for the 'Raid' in 1896, the law officers appeared at the Bow Street Police Court.

[3] *Autobiography*, 129: they never took a fee in capital cases, which was unknown 'before nor since'; he had only done so once, as a young man, in a private prosecution and had regretted it ever since.

man had begun a prosecution against the keeper of a gaming-house, and employed a particular solicitor to conduct the proceedings. He afterwards changed his lawyer, and subsequently arranged matters with the defendant and dropped the prosecution [without obtaining the leave of the court]. Thereupon the original solicitor took it up and brought it to trial. The former prosecutor protested against this activity, but in vain. The Court of King's Bench insisted that the case must proceed.' [1] But there is not the same objection to the *State's* representative stopping criminal proceedings, and the Attorney-General may stop any,[2] or allow or compel a private prosecutor to do so. The latter, of course, may be allowed to do so by the court—*any*—if it does not suspect collusion,[3] or if there is not some public reason (if the expression may be used) against such a course.

53. THE HEARING BEFORE MAGISTRATES

Procedure—Evidence

The actual hearing in all criminal courts is conducted on the same principles and in much the same order as those

[1] K. ch. i., cites here 3 B. & Ad. 657 (1832), which followed a precedent of 1826.

[2] As he did after the second abortive trial in the Peasenhall murder case in 1903. It is not clear whether a defendant can insist on being tried (on the ground, *e.g.* that he desires a *verdict* of not guilty).

[3] In the Divorce Court, where such corrupt bargains are most likely, the court constantly interferes. All contracts to stifle prosecutions, at any rate for felonies and misdemeanours, are illegal and unenforceable, even if made with the sanction of the judge (*i.e.* 'such an agreement can give rise to no civil right, and no action can be brought upon it': 9 Halsbury's *Laws of Eng.*, 504; 45 Ch.D. 351, 1890, C.A.); and 'compounding' a crime is punishable, *e.g.* advertising a reward for stolen property with the promise that 'no questions will be asked.' Magistrates often exercise their power of refusing the withdrawal of a prosecution (especially if they suspect compromise). Thus, in 1863, after a summons for assault, the parties made it up, and one assailant paid the assaulted £1; neither appeared on the day fixed, and, though the justices knew what had passed, they issued a warrant to arrest the accused: one was arrested, and bail refused. Ultimately both were fined £1, though the prosecutor desired to withdraw from the case. The judges held that the magistrates were within their rights (27 J.P. 277, 289). Superior courts, of course, have the same right.

described under civil proceedings—with a few technical differences in the order and number of speeches of parties (or their advocates). Solicitors appear in police courts. The rules of evidence, too, are the same ; indeed, many of the examples given have been taken from criminal procedure. As the gravity of a crime may often depend on the character of the person committing it, magistrates are always informed of any previous convictions against the accused, though in view of the procedure with a jury it is anomalous that they should get this information before they have made up their minds whether to convict or not on the particular charge before them. When they send the case to another court, their knowledge of the accused's antecedents cannot affect this trial, and it is in such cases mostly that previous convictions tell.

54. THE DECISION

Once before the court, the accused may be charged with any crime, whether greater or smaller than that already preferred, if the evidence discloses good grounds. In any case, the first thing the magistrate has to do is to determine into which of the classes mentioned in sec 50 (above) the charge falls.

Indictable Offences

Now it is essential to note that these are all *indictable*, *i.e.* they may all be, and some must be, tried by a jury. Lawyers themselves are not always sure whether a given wrongdoing (especially if it be modern) is indictable [1] or not, but, generally, the matter is quite clear, and magistrates know what crimes they *may* deal with and what they must not.

[1] *e.g.* falsifying the list of voters by an overseer was held not to be (1891, 1 Q.B. 747). When an alien was indicted under the Aliens Act, 1914 and 1919, the C.C.A. held that those Acts did not justify it and quashed a conviction : 17 Cr. A.R. 149 ; 1923.

55. DISMISSAL

They may, of course, dismiss *any* charge, and in Class I., their special domain, their decision is final (and, indeed, it is very seldom that an accused dismissed thus on *any* charge is again brought up on the same charge, though in Classes I, II, III, this may be *possible*). For it is a fundamental rule (with a very few definite exceptions) that if a charge has been investigated and dismissed *on its merits*,[1] no one can be imperilled a second time *in any court* in respect thereof. Thus, when a bench fined a driver on one day for ' wilful misbehaviour ' in striking a horse on which a lady was riding, whereby she was badly hurt, and on another under another statute, for assaulting her on the same occasion, fined him again, the second conviction was quashed.[2] And so, had the first charge been dismissed on its merits, the second would have been invalid.

56. INDICTABLE OFFENCES TRIED BY MAGISTRATES

Class II.

Originally magistrates could only deal with non-indictable offences. Gradually, since 1847, apparently,[3] their jurisdiction has been extended till ' six-sevenths of all the trials for indictable offences ' (including even some felonies) ' take place thus.' [4] Since 1879 on specified charges [5] the court may, if it thinks fit, ' having regard to the character and antecedents of the ' adult ' accused, the nature of the

[1] Which is not the case if the court is so doubtful of its own *law* that it ' states a case ' for the judges to decide—which either side may ask it to do—nor if the dismissal takes place owing to a technicality, as where a man was summoned for drunkenness, and it appeared that the summons had been obtained by one who had no authority to obtain it, the justices dismissed the charge, but allowed the proper person to bring it again (33 J.P. 629, 1869). Nor when a jury disagrees is a case determined.

[2] L.R. 10 Q.B. 378, in 1875.

[3] Stephen, *History of the Criminal Law*, ch. iv. p. 124.

[4] K. ch. xxix. (1929), p. 439.

[5] All, practically, crimes against property which is not of the value of more than forty shillings. Morally, no doubt, that ' it was such a little one ' is no defence ; but, practically, magistrates can do ample justice in such small cases.

offence, and the absence of circumstances which would render the offence one of a grave or serious character and all the other circumstances of the case (including the adequacy of the punishment), and if the accused when informed by the court of his right to be tried by a jury, consents to be dealt with summarily,' [1] deal with the case itself. The immemorial respect of the Common Law for trial by jury as the ' palladium ' of personal liberty is here conspicuous, for there are careful provisions before the accused surrenders his right and consents to be tried by a few justices or even one magistrate, that he shall understand what he is doing, for a magistrate must explain that he need not answer or plead guilty or not guilty if he does not like, that if he does not he will either be discharged [2] or committed for trial, that if he pleads guilty, he will be sentenced there and then, or very soon, &c. The necessary [3] consent ' is usually given readily in order to avoid the risk of imprisonment whilst awaiting trial, and of receiving a severer sentence than it is possible for the Petty Sessions to inflict.' [4] Hence the popularity of this procedure. In the case of children,[5] for whom the proper guardian must give the necessary consent, the magistrates' powers of trial are still wider, and that of punishment, though otherwise beneath their normal limit, includes, in the case of a boy, whipping.

But so enamoured is our law of trial by jury that even the charge of an offence—not being an assault (which is usually not a very serious matter)—which may entail more than three months' imprisonment,[6] entitles the accused, if he likes, to be tried by jury.

[1] S. 24 (1) of Crim. Just. A. 1925.

[2] In which case the rule about Class I. applies; he is (as good as) acquitted.

[3] K. ch. xxix. (1929), p. 434 : ' about four times as many such crimes are ' thus ' tried as are tried by actual indictment.'

[4] *i.e.* a maximum of six months' imprisonment or a fine of £100 or both, plus costs of prosecution ; for twelve months consecutive indictable offences (six for non-indictable).

[5] The Children's Act, 1908, is a code for offences by and against children.

[6] Of which there is a huge number : there is a very valuable alphabetical list with, *inter alia*, ' the application ' of any penalty, in the Appendix to Stone's *Justices' Manual* (1930-6, 2nd ed. p. 1782).

57. INDICTABLE OFFENCES NOT TRIABLE BY MAGISTRATES

Class III.

The gravest crimes are not, of course, punishable by magistrates; no one would propose that death or penal servitude should be inflicted without the option of the concurrence of a jury. Here the function of the magistrates is to inquire whether there is a *prima facie* case against the accused; and they may come to the conclusion that there is not, and then they must discharge. But as they have here no power to determine the case on its merits, an accused may, if fresh evidence comes to light, be brought before them again [1] on a preliminary inquiry into the *same* charge.

But even though the magistrate dismisses the (indictable) charge, the prosecutor may still go on and occasionally does with success, for it is to the public interest that such

[1] As, for instance, in the Road murder, June 1860, the criminal was discharged by the magistrate, and in 1865 was again charged and ultimately convicted.

This case is a reminder that there is no prescription for crime (at common law: by statute there is for some serious offences, six months for very many 'summary' ones). But in practice the theory is only acted on in grave instances. Thus Charles Ratcliffe, brother of the Earl of Derwentwater, convicted of high treason in 'the '15,' escaped and was not caught till 1745; he was executed in 1746: his plea that he was not the convicted man was tried: 1 Wilson, 150. Ex-Governor Wall was tried at the Old Bailey in 1802 for the murder of a man at Goree (by flogging as a punishment for mutiny) in 1782; soon after he was charged in England, but the proceedings were dropped: in 1784, on fresh evidence, they were revived, and he fled, but in 1801 he surrendered and was convicted and executed. In 1830 one Clewes was indicted at Worcester for a murder in 1806 of one Hemmings, who, it was suggested, had helped Clewes to murder another man in 1806, and whom, therefore, Clewes wanted 'to put away'; Hemmings's body was not discovered till 1829: not guilty (4 C. & P. 221). 'At the Derby Winter Assizes in 1863,' says Stephen (2 *Hist. Cr. L.* 2), 'I held a brief for the Crown in a case in which a man was charged with having stolen a leaf from a parish register in 1803'; bill thrown out. Some psychologists think that after these lapses of time a man is *not* the same man (though not quite in Charles Ratcliffe's sense). A charge of stealing twenty-nine years before was made in a Manchester police court: *Times*, Apr. 9, 1924.

serious charges should be probed to the bottom, *i.e.* be determined by a jury; but in those 'which experience shewed to be most frequently made the subject of false accusations,'[1] viz. perjury, conspiracy, obtaining by false pretences, indecent assault, keeping a gambling or disorderly house (and some others), the prosecutor may, in effect, insist before the magistrate that the case shall be sent for trial with the usual incidents of such a committal, and if he does not so insist, he cannot go on. But if the accused is acquitted, his accuser—as is only fair—may have to pay all his costs.

58. COMMITTAL FOR TRIAL

The magistrate who does not dismiss or determine a charge must send it for trial; in effect, he orders an indictment to be prepared. And he does it by 'binding over' the prosecutor[2] and all the witnesses to the facts on *both* sides in penalties to attend at the trial and give their evidence. But persons accused of indictable crimes comparatively rarely call witnesses before the magistrates. Perhaps the Poor Prisoners' Defence Act of 1930 will lead to a change. The trial must take place either at assizes[3]

[1] K. ch. xxxi. (1929), p. 471: '. . . in several cases at the Central Criminal Court juries . . . have convicted where a justice had . . . refused to commit.'

[2] Occasionally there is an amusing struggle to prosecute. In 1888 a woman charged her husband with assault, and the magistrates on committing him for trial 'bound over' a constable to prosecute—a common practice. On his behalf counsel was retained at the trial, but the wife, too, had retained solicitor and counsel. The judge ordered the prosecution to be conducted by the wife's representative, as those of 'the person interested,' so that she would receive the costs allowed (16 Cox C.C. 367). It is generally advisable to bind over 'the person interested.'

[3] Peers are tried for treason or felony by the House of Lords (which forms the jury), because (the old view was) every man is entitled by Magna Carta to be tried by his 'peers' in rank, for 'the great are always obnoxious to popular envy' (1 Blackstone, 401). But, historically, it seems this has nothing to do with trial by jury, which came in later, by which time, apparently, the barons had (tried and) failed to get the same right in civil causes and misdemeanours (1 P. & M. pp. 152, 392; ii. 622–3; McKechnie, *M.C.* 456). Originally, probably there was no need to concern themselves about any charges but treasons (and certain felonies). But even in these cases, till indictment presented

or quarter sessions. For some crimes, the magistrate has an option where they shall be tried; but some must go to assizes, where *all* crimes are triable. Quarter sessions may try many more crimes than they may not, viz. 'all indictable offences except: (1) Such felonies, other than burglary,[1] as are punishable on even a first conviction by penal servitude for life or by death; (2) certain specified crimes which, though less grave than those already enumerated, are likely to involve difficult questions of law, *e.g.* . . . forgery, bigamy, . . . perjury, libel, &c.,' and 'child destruction' (1929). Hence it is not surprising that 'Quarter Sessions of counties and boroughs try more prisoners than the Assizes and the Central Criminal Court together' (*ib.*).

Whither, then, do magistrates send a case for trial, if they have a choice? As a general rule, to the court locally proper, which will try the case earliest, and since 1925 (Cr. J. Act, s. 14) they have a large discretion 'with a view either to expediting trial or the saving of expense': conveniences being nearly equal, they naturally tend to relieve the judge who is always wanted in London, by remitting to quarter sessions. The mere fact that assizes sit first is not enough. But this general tendency is often modified by the gravity or heinousness of the crime, by the bad antecedents of the accused, or even by the magistrates' knowledge of the local chairman of the quarter sessions (who naturally, if a layman, does not, as presiding judge, inspire such confidence as a lawyer) in the direction of preferring assizes. There is, perhaps, some justice in the theory that the worse the criminal, the higher should be the tribunal condemning, as there is some natural jealousy of any one but a High Court judge wielding the dreadest dooms of the law. It must, however, happen occasionally that the nearest assize (to

the procedure is identical. But as such trials are naturally very rare, the last was in 1901 (E. Russell, *Bigamy*), the subject is not worth pursuing. In 1692 Knollys, 'commonly called the Earl of Banbury,' was charged with murder (in a duel); as the Lords and the K.B. could not agree whether he was a peer, he was not tried at all.

[1] But 'grave or difficult' burglaries must go to assizes; still less than a third now go there: K. ch. xxviii. p. 430. Q.S. for Peterborough claims a much wider jurisdiction than other Q.S.: see 15 Cr. Ap. R. 122, 1920, for the interesting antiquarian and archæological grounds.

which only the gravest cases can go) is three, four, or five months off,[1] and the nearest quarter sessions three, and the accused persons waiting trial may therefore be in prison all that time. This is a great blot on the present system, despite the provision that any one committed to quarter sessions, and for any reason not tried thereat, must be tried at the next assizes—and many suggestions of reform have been made. The only substantial mitigation of such a hardship is an indulgent allowance of

59. BAIL

The magistrate naturally has greater power in this matter than the police, and may, if the hearing before him is prolonged from day to day, grant the accused bail on each occasion; on a committal for trial, he always *may* till the trial (except for treason [2]), and, in some cases, must. His discretion will, of course, be exercised according to the gravity of the case—thus bail is very rarely granted on a charge of murder [3]—and largely according to the likelihood of the accused surrendering to take his trial. And if he

[1] In some countries detention before conviction automatically counts n sentence. Perhaps the State ought to compensate an acquitted person for *undue* delay in trial as the State is to blame. Moreover, long detention unnerves a prisoner, and thus and in other ways impedes the defence. Occasionally, however, great dispatch is possible. Thus, a woman was injured on Oct. 14, 1903, and died on Nov. 16, on which day took place the coroner's inquest and the magistrates' hearing. On the 17th, the grand jury at Hertford Assizes returned a true bill for manslaughter, and her assailant was convicted and sentenced on the 19th (*Pall Mall Gazette*, Dec. 3, 1903, which also cites a case where a woman arrested at Bristol was sentenced at Exeter Assizes within twenty-four hours of her arrest, all the ordinary stages having been completed). Bellingham, who shot Mr. Spencer Perceval on May 11, 1812, was hanged on the 18th—all in indecent haste. In 1863 a man committed a murder on Sunday, Dec. 13. He was taken before the magistrate on the Monday, confessed his guilt, and was sent for trial on the 15th. A true bill was found against him, and he was sentenced to death on his own confession on the 16th (*Ann. Reg.*, 1863).

[2] Which is only bailable by a Secretary of State or a judge.

[3] But in the old cases of duels it often was, when the crime was regarded as more or less technical (22 L.J.M.C. 25 : 1852). Till 1743, at least, till put 'in charge of' the jury, the accused could not be relieved of their 'irons' : 1 *Leach*, 36.

grants bail, he may, if he likes, dispense with sureties.[1] The cases in which bail is compulsory are the less serious misdemeanours, and in these, and generally, if the accused cannot find surety at the moment, he is allowed to do so at any time before trial. The amount fixed must be 'reasonable'; [2] to demand excessive or to refuse proper bail with a corrupt (*e.g.* a political) motive, is an indictable offence on the part of the magistrate.[3] At any rate, judges have spoken—and are continually speaking—very strongly on the apparent reluctance—chiefly in country places—to grant bail, and to grant it sufficiently low. Yet 'experience shews that . . . only about one in every thousand' admitted to bail fails to appear: in 1928 only thirty persons indicted, and 885 of the huge number summarily tried, absconded.[4] However, there is an appeal to a judge of the High Court, and since 1914 the police have an extended power of bail in minor cases.

A case in 1876 (*The Times*, Nov. 20) illustrates some of these points. S., charged with obtaining credit by false

[1] 'In suspicious cases the names of persons tendered as sureties may be required to be furnished in advance, in order that the prosecutor or the police may make inquiry about their character and means. Twenty-four hours', and even forty-eight hours' notice of bail is frequently required. The sureties are bound to answer on oath about their position and liabilities and the sufficiency of their property to meet their recognizances. It is not usual to accept as bail persons who are not householders; and the practice of accepting the defendant's own solicitor as surety has been condemned as highly inexpedient, if not improper. Proposed sureties should not be rejected if the money qualification is satisfactorily established' (Atkinson, *Mag. Ann. Prac.*). Sureties must not be indemnified against loss; any such bargain is illegal. Apparently, there is no objection to an accused depositing the amount he is bound in, and this was done in a case (*The Times*, Apr. 25, 1895) where the sum—£1000—was forfeited: in 1927 of 7242 committed, 3158 were bailed, only 29 absconded(K. p. 456). Sureties who fear their man will abscond can release themselves by giving information.

[2] In 1925 three London bankers had each to give bail in £10,000 (fraudulent conversion) (K. p. 456).

[3] Thus, when in 1843, the magistrates of Staffordshire showed great energy in putting down riots and disturbances about Dudley, but two of them refused to take two substantial town councillors of Birmingham as bail (£100 each) for an accused, on the ground that the two sympathized with Chartism, they were sternly reproved by the Q.B., and ordered to pay the costs of proceedings (4 Q.B. 468).

[4] *Blue Book*, 1928, pp. 93, 97 n.

pretences, was admitted to bail in £750 by the magistrate, and his solicitor was accepted in that behalf. He attended at his trial till the last day, when he went abroad. The jury disagreed, but the judge issued a warrant for him, and on his return he was arrested. Application was then made to the Q.B. for bail. 'As it is a misdemeanour,' said the L.C.J., 'I am afraid he is legally entitled to it. If we had an option, we certainly should not exercise it in his favour.' On learning that the recognizances had not been estreated,[1] because no blame attached to the bail for his flight, the judge went on, 'What does that matter? One of the great reasons for taking bail is that there is a belief that, whatever may have been the delinquencies of the accused, he will not be such a scoundrel as to leave his bail in the lurch; and unless the recognizances are estreated, it will be easy enough for any one to get bail, for it will be understood that they will not have to pay. In my opinion the recognizances ought to be estreated. What is the use of bail unless the bail are to be held responsible?' And the court fixed the bail in two sureties of £750 each, and the accused himself in £1500, and protested against the solicitor being accepted.

60. COSTS

The general rule that the loser may have to pay the costs of the winner is the same in criminal cases in Class I. as in civil suits; if the fine is small, the costs may easily exceed it. Of persons sent to prison few are condemned or able to pay costs as well. Otherwise the prosecutor recovers them; the condemned may be imprisoned for not paying costs, if distress does not produce enough. If the prosecutor has to pay costs—which is rare—though there may be a distress, the procedure generally is civil.

In Classes II. and III. the principle is that after a trial of an *indictable* offence, whether by magistrates or by a jury, in a *proper* case, as the court shall determine, either 'side' shall pay the costs of the other (as well as its own),

[1] *i.e.* the stipulated amount had not been demanded. It is exacted by distress on goods and chattels if necessary.

or such part of them as is not paid out of a public—county or borough—fund (*e.g.* those of the witnesses, counsel's fees, &c., in the great majority of cases).[1] Of course in the great bulk of convictions it is not worth while to order the defendant to pay the costs of the prosecutions, but the power is freely used against defendants who can afford to pay.[2] There are, comparatively, so few private prosecutors that the converse order is seldom made. But it may be made, especially if 'the charge was not made in good faith.' Costs allowed by magistrates are generally a lump sum, calculated according to the circumstances and exigencies of the case, 'there is no general statutory limit'; [3] but when witnesses are bound over in indictable charges, their expenses (at *both* hearings) are paid, according to a fixed scale, in the court of trial, where, indeed, there are seldom any other witnesses for the prosecution,[4] though there are, quite often, for the defence. The fixed scales of remuneration [5] aim at a reasonable repayment of prosecutor and witnesses (on *both* sides) 'for the expense, trouble or loss of time properly incurred' in attending; thus a dock-labourer would not get as much for the loss of a day's work as a doctor. But in a proper case costs may be disallowed.[6] And there is power to reward any

[1] The Costs in Criminal Cases Act, 1908.

[2] *e.g.* a misdemeanant in 1909 was sentenced not only to imprisonment with hard labour but to pay between £2000 and £3000 costs (K. p. 95), but the conviction was quashed (2 Cr. A.R. 228); in *Morriss's* case, Dec. 1925 (sexual offences), costs were not to exceed £1000 (*ib.* p. 495).

[3] Encycl. 2nd ed. 'Costs,' p. 98.

[4] Which usually calls all its witnesses before the magistrate, and must give notice of any *fresh* evidence to the accused before the trial.

[5] In 1904 the *ordinary* maximum was fixed at seven shillings per day and five per night. Expert and professional witnesses might get much more; working people, &c., got less. *All* got reasonable travelling allowances. (*Statutory Rules and Orders*, 1904, p. 117.) The Home Office explained that the scale was expressly fixed in view of there being no title to 'any remuneration in the strict sense,' for 'it is a primary duty incumbent on every citizen to assist the course of criminal justice.' In 1920, in view presumably of the rise in prices, the *ordinary* scale was raised by 100, and the other scales by 50 per cent. (*Statutory Rules and Orders*, 1920, p. 446).

[6] As they were in 1823, when an accused was acquitted at Worcester Assizes of stealing two eggs. The judge was informed that the 'magistrate (the Rev. Ld. Aston) had felt it his duty to bind over' some one 'to prosecute.' 'If,' replied the judge, 'the magistrate felt it his duty

one for energy in arresting criminals (not beyond £5 at Q.S., but a judge of assize may award more [1]), and there may be an allowance to the widows and families of persons killed in endeavouring to make such arrests.[2]

61. APPEAL FROM MAGISTRATES

With very few exceptions, there is no appeal from dismissal by a magistrate. But there is from a conviction—since 1914—in every case where the accused 'did not plead guilty or admit the truth of the information,' and since 1925, even then, from the sentence.

The appeal is to quarter sessions,[3] where all the justices of the county are the jury, and when the necessary formalities are completed, order or sentence is suspended till the appeal is decided. But, owing to the cost, this relief is in effect denied to the poor persons who form the bulk of such defendants. On the debate in the Commons on the bill to put an end to this grievance, which was read a second time without a dissentient on April 24, 1931, the speakers, who all spoke with authority, gave instances where the cost was £45, £30, £50, £55, and the deposit demanded £10 and £70. It was agreed that frivolous appeals must be penalized.

This is practically the only way an accused or sued party

to bind you over to prosecute, I feel it mine not to charge the county with the expenses of such a prosecution' (1 C. & P. 96). The costs of an *unnecessary* witness or of one manifestly untruthful may be disallowed, *i.e.* the public fund does not pay them.

[1] Thus a man in 1851, who was murderously assaulted while in bed by two armed burglars in his sister-in-law's house, but nevertheless fastened them in from the outside until they could be secured, was awarded ten pounds (5 Cox C.C. 142).

[2] *e.g.* £233. 15*s.* 0*d.* was awarded by the judge at the Central Criminal Court to the widow and children of a man so killed by one *Platel*, who was found guilty of murder, but insane (L.Jo., May 30, 1903).

[3] But matrimonial *litigation* under an Act which makes the magistrate a sort of inferior judge of divorce goes to the Divorce Division. 'Though the yearly total of summary convictions approaches 500,000' there are only 'since the Act of 1914 about 300' appeals to Q.S. 'There is barely one appeal to Q.S. for every 1000 convictions' (and though the expense must be partly the cause of this) as 'less than half (in 1923 less than a third) . . . are entirely successful,' this is a very strong testimonial to these courts (K. 1929).

can review a magistrate's decision as *of right*. But the court may, and commonly does, if it has any doubt on the law applicable, at the instance of *either* party, 'state the case' with its own view for the opinion of the High Court,[1] which will then direct the magistrate on the law; or if he refuses 'to state the case,' may compel him to do so, if it thinks that the point of law is arguable. Thus, when a board-school master was summoned for an assault in detaining a child half an hour to learn a lesson, and for touching its head with his hand, though no pain was alleged, justices dismissed the charge as frivolous, and declined to state a case, but they were ordered to do so (and to pay costs) on the ground that there was a genuine point of law to be argued, viz. the legality of the assault or detention.[2] An appeal of this sort is naturally almost always on a point of law; it does not touch the question of severity of sentence, which is not a matter of law and cannot be raised at all by appeal, though, of course, if Q.S. allow the appeal, the sentence goes too, or they may mitigate it if they affirm conviction. But if a sentence was absolutely illegal, as, for instance, if a magistrate ordered eighteen months' imprisonment or a term of penal servitude, or even inflicted hard labour in default of payment of a fine, when the Act[3] only authorized imprisonment, or did anything equally patently wrong in law on the face of it, *e.g.* convicted for certain offences not prosecuted within six months of the occurrence, the K.B. would 'pull them up' promptly by divers means. And there is ample

[1] The average is 90 a year sent there by the justices, and a dozen ordered thither by the judges; about half succeed. The magistrates, who have no personal interest, do not generally appear to support their opinion; if they do, they may have to pay costs, as when they failed to convict a vendor of adulterated milk at the instance of the police, and were held to be wrong (76 L.T. 781: 1897). When Q.S. justices refused an hotel licence but did not appear in K.B.D., which reversed them, it ordered them personally to pay the costs, which, however, it held, they could get back from the county treasurer (1912, 2 K.B. 567).

[2] 48 J.P. 149: 1884.

[3] In 1895, a clerk, by an oversight, had left in the words 'there to be kept to hard labour,' and the magistrate had signed the document. Though the accused had paid the fine, so that no question of imprisonment could arise, the judges quashed the conviction on the ground that he might have paid from fear of hard labour (64 L.J.M.C. 273).

machinery whereby that court is moved to stir them to do any of their duties, when omission is rightly alleged against them, as, for instance, when they have wrongly declined to hear a case, believing they had no jurisdiction. Nevertheless, the high reputation of these tribunals cannot be gainsaid. No other nation[1] possesses this invaluable institution. Their services are much more conspicuous in the counties than in the great towns, but English public life is inconceivable without them.

62. ASSIZES AND QUARTER SESSIONS

An assize[2] court is almost invariably presided over by a judge of the High Court, the 'red' judge, as he is popularly called, from his robe (or, if there is a pressure of work, by a commissioner, who is generally an eminent King's Counsel), held at a fixed, usually the county, town in each county, or an important centre in it, two or three or even four times a year, according to the populousness of the county, when the criminal business (and almost always the civil[3]) ready for trial in that county (or, exceptionally, in a neighbouring one, to save delay) is taken; two such courts may, if there is enough business, be sitting at the same time.

[1] But in 1819 (May 28) Rush, the U.S.A. Minister here, writes, 'The same kind of magistracy prevails in the State of Virginia, where respectable and independent citizens discharge the duties of justices of the peace without pay or reward' (*A Residence at the Court of London*, 1845) —*apropos* of some remarks at a dinner-party by William Wilberforce, who 'believed the good which as a body they did . . . incalculably predominated over any occasional mischief.' This is even more true to-day: the race of Shallows and Squire Westerns is extinct, though perhaps their spirits flutter about poaching misdemeanours. On May 24, 1600, Pepys wrote: 'We [apparently he and Sir W. Batten] were sworn justices of peace for Middlesex, Essex, Kent, and Southampton; with which honour I did find myself mightily pleased, though I am wholly ignorant in the duty of a justice of the peace.'

[2] Literally, an assembly. The scandals due to the astronomical periodicity of these legal constellations where they were not wanted (for instances see last ed. p. 277) have disappeared, and many an old town misses its trumpeters and javelin men. Parliament is thus moving in the direction of a scheme (known as Sir Harry Poland's), giving County Court judges, recorders, Q.S. chairmen, commissioners, &c., sitting once a month, the less serious criminal work of assizes.

[3] *i.e.* High Court, practically K.B.D. work. Since 1920 divorce causes are heard at assizes.

In London the Central Criminal Court, in the Old Bailey, is at once the assize court and criminal court of quarter sessions for the City of London, and the assize court for Greater London—in its widest geographical sense ; it has twelve sessions a year, and four judges constantly sit simultaneously, *i.e.* a High Court Judge, or occasionally two, and some or all of the City [1] judges, viz. the Recorder, the Common Serjeant, and the judge of the City of London Court. The jurisdiction of the court always embraces Middlesex, the suburbs of London in Essex, Kent, and Surrey, and may reach to parts of all the home counties at certain times of the year. As it normally draws upon a population of about seven millions, it is naturally the most important and probably the busiest criminal court in the world. Its business is purely criminal.

Quarter sessions were originally, and are still in nearly all cases, quarterly meetings of the justices of a county or of a borough to transact the business, criminal and other (but very little civil litigation), of the county or the borough respectively. In the county of London (which does not include the City), owing to its populousness, the work is divided between two courts,[2] both presided over by two (paid) lawyer judges, who sit simultaneously every fortnight. Its area is that of the county of London, *i.e.* that administered by the London County Council. In other towns (*i.e.* boroughs which have quarter sessions) a recorder, a (paid) lawyer, is judge, but in the counties an unpaid and, generally, a lay chairman [3] merely presides.

[1] Who sit in the court of justice, which the City is privileged to possess —viz. the Lord Mayor's Court, now amalgamated with the City (County) Court.

[2] Where ' one-fifth of all the persons indicted in England and Wales ' are tried : K. p. 429 (1929).

[3] Except where two or three populous counties have salaried chairmen ; K., *ib.*, who proceeds, ' It is a singular paradox that our constitution should permit trials, not merely for petty matters of police, but for charges that seriously affect men's character and liberty, to be conducted by persons who, however honourable and eminent, are legally untrained, whilst it requires a civil suit for the smallest ordinary debt to be heard before a professional lawyer.' Campbell, afterwards L.C., wrote in 1810 of a chairman of Q.S., ' He knows just enough of law to pervert his understanding ' (*Life of Ld. C.*, ch. ix.). But these country gentlemen — naturally — vary very much in attainments

Both these tribunals have these same features, viz. (1) the grand jury (for crime), (2) the petty jury, (3) advocates, if any, must be barristers. And *civil* appeals are, broadly, like other civil appeals. The rules of procedure and evidence are those already outlined.

Since 1908 these jury courts do not sit unless there is any business for them to do,—a belated expedient for a 'practical' country.

63. GRAND JURIES[1]

The history of juries in this country is extremely interesting. In remote times they were, perhaps, the actual witnesses automatically[2] constituted into a body; later they gave 'voice to the common repute'[3] of the neighbourhood. They must still come together at assizes, though of recent years they need not at Q.S. if there are no 'bills' for them, and at both they are no longer troubled with cases where accused have pleaded guilty. They were

Literature used to abound with satires on local justices, and the difference of tone to-day about 'the great unpaid' measures very great progress. Thus, in 1751, Fielding says of 'Jonathan Thrasher, Esq.,' a magistrate for Westminster, 'I have been sometimes inclined to think that this office of a justice of the peace requires some knowledge of the law . . . as these laws are contained in a great variety of books, the statutes which relate to the office of a justice of peace, making of themselves at least two large volumes in folio, and that part of his jurisdiction which is founded on the common law being dispersed in about a hundred volumes, I cannot conceive how this knowledge should be acquired without reading, and yet certain it is Mr. Thrasher never read one syllable of the matter. . . . To speak the truth plainly, the justice was never indifferent in a cause but when he could get nothing on either side' (*Amelia*, B. 1, c. ii.). All High Court judges are J.P.s of all counties, and some sit regularly in their local Q.S., more rarely in petty sessions; as Ld. Campbell says (*Life of Coke*), 'in former times, the C.J. and the puisne judges [*i.e.* not chiefs] of K.B. often acted as police magistrates,' as Coke did. The experience as a common law barrister—inevitable—in these courts must be invaluable to the judge.

[1] Suspended during the war; revived Jan. 1922.

[2] Hence their power of *initiating* process, see Stephen, 1 *Hist. Cr. L.* p. 253. The original rough-and-readiness of jury trial survives in the inconspicuous Court of the Savoy in London—an 'instance actually existing amongst us,' said Stephen in 1883 (*ib.* i. p. 271). Originally, 'It is an institution fit for a small precinct, where every one knows every one, and can watch and form an opinion upon what goes on.'

[3] 2 P. & M. p. 639.

always local folk, and now they are regulated by a rigid system. But what has never ceased is the existence of a local body of notables, to whom [1] anybody could denounce anybody else for serious crime, and who would then take the necessary steps. Any one can still do so, and to-day this body is called the grand jury,[2] and private persons do still go to them. But the number of these prosecutors is not worth speaking of in comparison with the number of charges sent by the magistrates, when they commit for trial, to the grand jury, practically the whole of whose work is the consideration of those charges. For, the offence being indictable, it is *their* duty to say whether or not they will indict. In order to do this duty, they rehear in private, no judge being present, the evidence on oath given before the magistrate *against* the accused, fresh witnesses being rare, until they are satisfied that there is a case for him to answer, whereupon they publicly present the indictment in court, where it is at once announced that they have found a 'true bill'; or, having heard the whole evidence *against* him, they may throw out [3] the bill, which is equally announced at once in public, so that the accused may be discharged,[4] whereas in the former alternative, he must be put upon his trial.

[1] A judge said in 1872, they 'were not bound by any rules of evidence. They were a secret tribunal, and might lay by the heels in jail the most powerful man in the country, and for that purpose might even read a paragraph from a newspaper' (12 Cox C.C. 353). 'The[ir] sole function . . . is to repeat badly what has already been done well: to hear in secret, imperfectly and in the absence of the accused one side of the case after both sides of it have already been heard fully in open court and with full opportunity of legal aid. A bad tribunal is laboriously brought together in order to revise the work of a better one.' K. p. 463, who adds that a Royal Commission (1913) reported in favour of abolition and 'their suspension during the war produced no complaint and saved . . . in the metropolitan police district alone more than £10,000,' but those discharged under that régime would not admit this (nor would some of the convicted).

[2] In contradistinction to the (now) 'petty,' commonly, from familiarity, called 'the jury.' An early notice of this difference is by an Italian, probably the secretary of Francesco Capello, the Venetian ambassador here about 1500 (Camden Socy., No. xxxvii.: 1847, p. 33).

[3] The old Latin formula for this, 'ignoramus' (we don't know), has given a forcible expression to the language.

[4] But this is not an acquittal; and though it is very rarely done, another bill on the same allegations may be brought before the grand

It is obvious that an accused, thus liberated from a trial by the action of the grand jury, is saved time, trouble, and perhaps anxiety and expense.[1] But, as nowadays this is the most this body can effect, the question is sometimes raised whether it should not be abolished. Now, it seems clear that (speaking quite generally) when a grand jury releases, which they only do in from 2 to 3 per cent. of the cases,[2] no petty jury would convict ;[3] the accused, therefore, would only be worse off, if this institution ceased to exist, by the suspense, inconvenience, or even pain and exposure of a public trial (though, of course, there must have been some preliminary public hearing). Opinions will differ whether it is worth while for the sake of so few persons,[4] who undoubtedly may gain a good deal through it, to keep up all over the country so troublesome and costly a system. Perhaps when that system is very briefly described, a distinction may appear.

The grand jury generally consists of twenty-three men or women (the maximum), summoned nominally by the

jury. This was actually done where a bill had been thrown out at Q.S. ; the magistrates, presumably for good reason, ordered an indictment to be again preferred at Hereford Assizes, where the bill was found, and the accused was ultimately convicted of assault and sentenced (*The Times*, March 1, 1901). *Local* prejudice or favouritism must be watched.

[1] Judges sometimes take the opportunity of addressing the grand jury, to make public allocutions on important matters of law, as, for instance, the L.C.J.'s ' charge ' in 1867 (which lasted six hours), and Blackburn J.'s in 1868, both in effect on Governor Eyre's case, but both these addresses on martial law would have been equally in place to any jury. And for such speeches, generally, another occasion could easily be found.

[2] According to K. ch. xxxi. (1929) ; it is said that at some places it is a tradition for the grand jury to ignore at least one bill, to keep alive their right, so to say.

[3] An authenticated story, however, has come down from a certain Q.S. that a man against whom a bill had been *ignored*, was by mistake put on his trial, convicted, and sentenced. The mistake was discovered after the court rose and the prisoner—escaped !

[4] Of whom even some, perhaps, *ought* to be tried, for Chelmsford L.C. came to the conclusion, in 1859, ' that even at the Central Criminal Court more than half [of 22] bills ignored [within six months in 1852] ought to have been tried *and convicted* ' (K. *ib.*, where, too, see the *pros* and *cons*). Ld. Chelmsford had heard the grand jury there called ' the hope of the London thief ' (Hansard, March 10, 1859, 1612).

Sheriff,[1] and as twelve at least must find a bill, it can never consist of less than twelve; it is not, of course, a fixed body, but it is differently composed each time it meets. There is no longer any property qualification for its members at assizes, but in the language of Blackstone (IV., 302), 'they are usually gentlemen of the best figure in the county.' Noblemen frequently serve, and Sir J. F. Stephen says (1 *History*, ch. viii.), 'In practice,' they are 'county magistrates,' all, in fact, competent to be special jurors. In London grand jurors are (broadly) the 'larger' tradesmen with a sprinkling of other classes, all generally qualified to be 'specials,' with a somewhat lower scale at Q.S. But at Q.S. of counties grand jurors, who are generally middling farmers or tradesmen, must be qualified like the petty jurors, while in the boroughs, where there is no qualification at all, they are generally tradesmen of good or middling position or men of business. Thus, each grand jury is relatively to its petty jury, of a better worldly standing. (The latter,[2] it may be added, *everywhere* consists, like a common (civil) jury, of men or women (married or single) who are householders and *generally* not (though they may be) qualified to be 'specials.')

The meeting, then, of an assize grand jury is necessarily more or less of a social gathering, for the members are all more or less known to one another in other capacities, and are persons of leisure, and county business is inevitably discussed and promoted. But there is nothing like this common bond in other grand juries where the members are frequently unknown to one another, and being, as a rule,

[1] So that in 1825 the High Sheriff having died suddenly abroad, the judge dismissed the assembled jurors at Appleby (1 Lewin, 304). The Sheriff's great antiquity is attested by his Anglo-Saxon title. He is not, however, now the first royal officer of the county; the (Lord) Lieutenant is that, though much younger (Henry VIII). The sheriff is responsible for the execution of all judgments in his county, including the severest. In 1914 the C.C.A. held that he must whip a boy so sentenced if he could not find a substitute (10 Cr. A.R. 62).

[2] Whose members must be over 21 and own a freehold of £10 a year, or be a leaseholder for a term of at least twenty-one years of lands of the value of £20 a year, or occupy a house rated at not less than £20 (or in Middlesex £30) (K. p. 479 (1929)). Since 1919 the bench may have a jury of men only or women only, and may, if a woman applies, release her in a repugnant case.

private citizens, have less opportunity of forwarding public affairs, and more need to attend to their own. Thus, perhaps, it might be suggested that (apart from ignoring a few bills) a grand jury at an assize still serves a practical purpose, while elsewhere it serves none.

64. INDICTMENTS

The form of indictment, almost the only surviving criminal 'pleading,' shares the indifference which has overtaken pleadings generally. Striking instances of the old pedantry have already been given. 'It is scarcely a parody to say that from the earliest times to our own days [1883], the law relating to indictments was much as if some small proportion of the prisoners convicted had been allowed to toss up for their liberty' (Stephen, 1 *History*, ch. ix.). The need of any commentary on this passage is dispensed by the Indictments Act of 1915, which has almost swept away technicality and made it easy for the accused to understand and to plead at once to all or any of the possible charges against him arising out of the same circumstances and for the jury to select the appropriate conviction (if any) while it protects him against *unconnected* charges being heaped up against him in one trial. Thus the points of law that used to be frequently taken on this topic are now rare. Hence the science of indictments is dead and the—once copious—learning on this subject is dying out. The most recent innovation is the indictment that has not come from a grand jury.

65. THE PETTY JURY

Of the right of either party to object (for good reason or none) to any given juryman serving, 'This,' said a judge [1] in 1883, 'speaking practically, is a matter of hardly any importance in quiet times in England. In the course of my experience, I do not remember more than two occasions on

[1] Sir F. J. Stephen, 1 *History*, ch. ix.

which there were any considerable number of challenges.'[1] It was very different in Ireland in the old days of political discontent and is very different in the United States, where the system adopted from this country works in different social conditions. There was a case at Tewkesbury in 1865 where the accused (of embezzlement) challenged so many that a jury could not be got together at Q.S., and it had to go to assizes: apparently it strongly excited local feeling, which is generally in inverse proportion to the size of the place. Attempts to corrupt jurors or juries are nowadays even rarer than objections to them.

Unanimity[2] is absolutely required:[3] there cannot be a bargain between the parties to accept the verdict of a majority; in Scotland, where there are fifteen jurors, a majority decides, and may find 'not proven.'[4] But, as in a civil case, a disagreement leaves the case exactly where it was before it began; it is not an acquittal—the accused may be, and often is, tried again. Thus, in 1842,

[1] 12 L.T.N.S. 580. That the power ought to be used sometimes may be seen from the following instances. Montagu Williams, a famous advocate and magistrate, tells how (about 1870?) a man suborned by the accused or his friends, got on to a jury at the Old Bailey by a trick, and by mere persistence held out till a verdict of 'not guilty' was returned, though all his colleagues were justly for convicting (*Leaves of a Life*, vol. i. ch. xvii.). At Lewes Assizes in July 1904, during a trial for an offence against a woman, it was discovered that the latter's husband was on the jury. In France, according to K. p. 480, it has given rise to an epigram by Maître Lachaud, 'that most eloquent defender of prisoners, "I challenge every man who looks intelligent."'

[2] But not of twelve, since 1925: if one or two are incapacitated the case may still go on.

[3] 'Always requiring unanimity is nonsense,' *per* Ld. Cockburn, a Scots judge: *Memorials*, ch. v. p. 301 (1856). In the *Rouse* case, where the jury had been out 75 minutes, an ex-A.-G. said that he had never been able to determine whether long deliberation showed a leaning to the prosecution or the prisoner: 'they may have spent a considerable time in discussing prisoner's private character' (*The Times*, Feb. 24, 1931).

[4] 'Feb. 20, 1827—the . . . woman . . . is clearly guilty but . . . the jury gave that bastard verdict, *Not proven*. I hate that Caledonian *medium quid*. One who is not *proven guilty* is innocent in the eye of the law' (Walter Scott, Journal I. 361: 1890). Ld. Cockburn heard Scott say in court, 'Well, sir, all I can say is, if that woman was my wife I should take care to be my own cook' (*ib.*). The formula only occurs in an *English* Act in 1861 (24 & 25 Vict. c. 100, s. 44) and only=not guilty found by justices in assault.

one Gray was indicted at Monaghan Assizes for shooting with intent to murder; one of the jurors was taken ill, and the jury was therefore discharged without a verdict. He was tried again in 1842 and 1843; both times the jury disagreed. The Crown then got the case taken into the Q.B. at Dublin, and the case was again sent to Monaghan. This time he was found guilty, and sentenced to transportation for life; but as he had challenged two of the jury without giving any reason, but the court had disallowed his objection, he appealed unsuccessfully to the Irish Q.B., but successfully to the House of Lords,[1] which ordered a fifth trial. In 1873 a man was tried three times for murder, and finally convicted and executed; and in 1902 a man was three times indicted (for rape) at the Central Criminal Court, and finally acquitted.[2] In the Tallow Case, of conspiracy and 'exclusive dealing' in Ireland, there were two criminal and two civil trials, in all of which the jury disagreed; in the fifth,[3] a civil action, heavy damages were awarded. But, generally, in practice it is considered unseemly to put an accused person on his trial for very grave charges (and not worth while for light ones) more than once or twice, as the disagreement of juries, presumably, implies considerable doubt, and hence, after two abortive trials of a man for the Peasenhall murder in[4] 1902 and 1903, the Attorney-General exercised his power of stopping further proceedings, in effect ordering the release of the prisoner. The old story that a judge might take an assize jury, who could not agree, round the circuit with him 'in a cart,' as a mark of indignity, till he came to the border of the county (where, of course, their jurisdiction ended), when they were shot into a ditch, is a myth,[5] but, till recently, the law did

[1] 11 Cl. & F. 437. [2] *Pall Mall Gazette*, Jan. 29, 1903.
[3] *The Times*, Nov. 13, 1902; 1903, 2 Ir. Rep. 681.
[4] *Pall Mall Gazette*, Jan. 29, 1903.
[5] 1 B. & S. 449 note: 1861. Ld. Lyndhurst (ex-L.C.) is quoted as saying that there never was any such jury-carrying in this country—apparently, not even that permitted, viz. in a decent carriage—but in an Irish case in 1845 it was positively asserted that it had been done twice within living memory, once within the ten years (7 Irish L.R. 156). It will not have escaped notice that many of the extreme cases of jury practice happened in N. Ireland, perhaps because political feeling moved all classes there.

take rather strong measures to procure unanimity and independence.

The old rule was, that while they were considering their verdict in any case, civil [1] or criminal,[2] they must not separate nor have food, drink, or fire till they were discharged, as readers of Macaulay's account of the trial of the Seven Bishops, a criminal information in the K.B. for seditious libel, may remember. It happened sometimes that the prisoner went out, but the jury were locked up. But in misdemeanours and civil cases, though not in felonies,[3] they were allowed (almost without exception) to separate during any adjournment [4] (including that overnight), though not during their final deliberations, the rigours of which, however, in *all* cases have been abated.[5]

[1] 'There was a civil cause in which the jury would not agree on their verdict. They retired on the evening of one day, and remained till one o'clock the next afternoon, when they were discharged. There was only one juror who held out against the rest—Mr. Berkeley (member for Bristol). The case was tried over again and the jury were unanimously of Mr. Berkeley's opinion, which was in fact right . . .' (Greville's *Memoirs*, Jan. 19, 1831).

[2] In 1821, after the jury had retired in a case of stealing at Q.S., one of them separated from the rest and conversed respecting his verdict with a stranger. The jury found 'guilty,' but the justices set the verdict aside as bad, and indicted again at the next sessions, when there was also a verdict of guilty. It was held that they were right in this course (4 B. & Ald. 273). So strict is the rule that when a judge sent the Clerk of Assize to ask if there was any chance of the jury agreeing and he answered a question they put him and gave them advice, the conviction they found was quashed (10 Crim. Ap. R. 173 : 1914).

[3] So that, when it was found that during a murder trial at Northampton in 1892, a juror had separated from his colleagues during the interval for lunch, the judge discharged the jury and postponed the trial to the next assizes. The usual course, in case of any accident or fatality, was to discharge the jury and at once to swear the eleven remaining and a new juryman, and to begin again. Now, *by consent*, ten will do.

[4] Formerly much rarer, as the court hours were more. In *W. Stone*, 1796 (treason), the K.B. sat the first day from 9 a.m. to 10 p.m. 'without any interruption or refreshment ; the A.G. noted that some of the jury were 'very much exhausted and incapable . . . of keeping up their attention much longer' ; the next day they sat from 9 a.m. to 11 p.m., the jury being 'out' nearly three hours. Ld. Kenyon C.J. said that they were not used to such 'modern' extraordinarily lengthy trials, and was in some doubt whether a jury could adjourn overnight : 25 St. Tr. 1295 ; 6 T.R. 530.

[5] There is a dramatic account of an Old Bailey jury in a murder case locked up for ten days and nights in Dickens's 'Trial for Murder,' the first of 'Two Ghost Stories,' 1865.

Since 1897 the court may, and commonly does, permit the jury to separate before they retire to consider their verdict in *any* case except treason, murder, or treason-felony.

The inconvenience of the old system was so great that in long cases only misdemeanours could be preferred, though felony was alleged, for fear of the expense and trouble of keeping the jury isolated for a long time (or even one of them becoming ill or dying), as, for instance, in the case of 'The Claimant,' whose trial for perjury lasted 188 days in 1873–4, and who otherwise would have been indicted for forgery (of 'Tichborne' bonds).

66. PLEA OF GUILTY

A plea of guilty, of course, relieves the jury (since 1920 both juries) from hearing the case. But in very grave charges the judge advises the accused not to plead guilty,[1] at any rate without the advice of counsel; but sometimes even on a capital charge the accused insists on so pleading. On the other hand, occasionally an accused pleads guilty without meaning to confess a *technical* crime, or even falsely; this can be set right on appeal. Whether to advise a client to plead guilty is often one of the most anxious considerations of counsel.

67. EVIDENCE

The general rules already mentioned apply with full strictness where life or liberty is at stake. Some check on the witnesses is afforded by the fact that what they said before the magistrates or coroner—where they have nearly always been called for the Crown—is carefully transmitted (signed by themselves) to the Court, and one side or the other is sure to seize on any discrepancy between their former and present testimony. A great advantage of this transmission is that in the event of a witness dying before the trial, or being too ill to attend it, the official report of what he said may be used before both juries. Hence it is always advisable to cross-examine a witness

[1] As he does in 'nearly half' the trials at Assizes and Q.S. (K. p. 472).

at the earliest opportunity, if at all, for if he does not appear at the trial, this advantage (when it is one) is lost; no evidence can (with one exception) be *read* unless the accused had an opportunity of cross-examining it when delivered. For the same reason (to say nothing of others), each side does well to call all its witnesses at the preliminary hearing. But written evidence is by no means lightly received instead of the living witness.

Since an Act of 1898 swept away the last relic of the old [1] theory of evidence, practically everybody, notably the accused, may be a witness, and (almost) everybody but the accused may be compelled to be a witness—with a proper saving that a husband or wife shall not be called *against* each other (except where the charge is a *family* crime, *i.e.* against spouse or children, when he or she must almost necessarily be called), and, if called, shall not be compelled to disclose any communication made by the other since marriage. Moreover, no one but the judge may comment on the accused not going into the box and testifying on oath like any one else. It must be obvious that there are some cases in which his not doing so is a plain indication of guilt, and a judge is bound to point this out to the jury.[2]

One sort of evidence, viz. that about character, calls for a separate word. Obviously, if the facts are plain no amount of good or bad character can save a guilty man or condemn an innocent one on a specific charge; an act

[1] Fielding in 1757 says of a man acquitted of (capital) forgery it was 'because the person whose name was forged was not admitted' to avoid his own deed by his evidence—'a law very excellently calculated for the preservation of the lives of His Majesty's roguish subjects, and suitably used for that purpose' (*Amelia*, B. 11, c. 3). The impediments to justice seem to culminate in a trial for uttering forged cheques in 1823. The partners whose name was forged could not be called to prove this because they were interested (as, if the paper was genuine, they must pay the defrauded bank), so one partner was 'released' by the bankers, and proved the forgery. But this was not enough. The bankers' clerk who was to prove the uttering was a Quaker, and could not be sworn, so the prisoner was acquitted (1 C. & P. 98).

[2] As in 1899, 1 Q.B. 77, and in a case (*The Times*, Feb. 24, 1904) where the accused was charged with (and convicted of) bribing voters if there was any innocent explanation of the money passing, he must assuredly have come forward to give it.

or omission is then in issue, and not previous character (except, indeed, when the very question for the jury is about character, as in some libel trials). Consequently, an accused is not expected to produce evidence of his general good character, but he may do so if he likes, and obviously where *the facts* are doubtful, such evidence may be of great weight. For instance, in *Our Village* (1819), Miss Mitford says of the trial of 'the Incendiary': 'One poor man alone had retained no counsel, offered no defence, called no witness, though the evidence against him was by no means so strong as that against his fellow-prisoners, and it was clear that his was exactly the case in which testimony to character would be of much avail. . . .' A day labourer 'drest in a smock frock . . . clean and respectable in appearance, but evidently poor,' appears unsummoned for the prisoner. 'I heard that he was to be tried to-day,' he said, 'and have walked 20 miles to speak the truth of him as one poor man may do of another.' He had known prisoner 'as long as I have known anything. We were playmates together, went to the same school, have lived in the same parish; I have known him all my life.' 'And what character has he borne?' 'As good a character, my lord, as a man need work under . . .' 'principally from this direct and simple tribute to his character the prisoner in question was acquitted.'

68. PREVIOUS CONVICTIONS

Evidence of previous convictions is strictly regulated. It is scrupulously withheld from the jury before verdict—unless the law exceptionally permits—for the obvious reason that if their minds were balancing on the particular charge,[1] it might turn the scale against the accused. Kenny puts the rule neatly: '. . . good character, "how-

[1] 'I remember,' said an Irish judge in 1866, 'a case . . . where the jury were a long time finding a verdict upon a "felony," and when on convicting they heard of the previous one, the foreman said if they had heard of that before it would have saved a world of trouble'—15 W.R. 108—a case in which the convicted man was released because a previous conviction was mentioned to the jury.

ever got in," can be rebutted by evidence of a bad reputation (. . . so rare that neither Cockburn L.C.J. nor Coleridge L.C.J. had ever seen it given) but not by evidence of bad disposition, still less of particular bad acts.' . . . The chief exceptions are: (1) On charges of knowingly receiving stolen property, when any conviction within the previous five years for 'any offence involving fraud or dishonesty' may be proved against the accused, a natural stringency in view of the peculiar insidiousness of this crime; (2) when an accused expressly sets up his own good character [1] as an argument of his innocence—in which case it is only fair that the jury should know his record—or, by way of clearing himself, makes imputations on the character either of the prosecutor or of any of his witnesses, or himself gives evidence against any one charged with him, *i.e.* puts the blame or hints at it on another. The previous conviction must not be too remote or irrelevant; if it is 'raked up' spitefully it would excite sympathy with, not feeling against, the accused.

69. DEFENCE

On all grave charges, and in many where the judge thinks that there may be a good legal defence, he will see that the accused is defended by counsel. For a long time [2] (and it occasionally happens still) the judge would request

[1] It has been held that an accused testifying that he lives at a certain place and works at a certain place is thereby claiming a good character, on the ground that he is suggesting that he is leading a respectable life. But surely this is too harsh a construction, for such a suggestion may be perfectly true, without being a claim to good character. However, it is only pressed when such a claim is the manifest object.

Nor should this procedure ever be unduly pressed. Thus, when of two defendants jointly charged, one said in evidence that the prosecutor's statement was a lie, 'and he is a liar,' whereupon the chairman allowed evidence of his previous convictions to be given, and they were both found guilty, the conviction of both was quashed (though the chairman thought the previous convictions had not affected the verdict), because the words in question were merely an emphatic denial of guilt (89 L.T. 677 : 1904).

[2] Perhaps ever since there was a bar (*Hist. of Eng. Bar, &c.*, 175). In 1850 Campbell L.C.J. (15 Q.B. 988, where liberty was at stake) said: 'We know that on such an occasion any barrister would come forward without an *honorarium*.'

some barrister present to defend a person in the dock when the case was called on (and sometimes has paid him a fee out of his own pocket), and the bar made it a point of honour to comply. In 1904 the system began to be formulated of giving legal aid in certain conditions to a 'poor prisoner' on his *trial by a jury*, viz. either the services of counsel alone or those of a solicitor as well, at the public expense, the money allowance, however, being small. The chief condition was that the *kind of* defence should be stated. But defendants before magistrates very often 'reserve their defence' (wisely sometimes, especially in cases of complication, for they have not the information which they may get in the interval before trial, and may not wish till then to show their hand to the other side). Where the answer is a total denial, *e.g.* 'I was not there' (*alibi*), or 'the whole charge is a concoction' (though this is rare), no honest person would hesitate to say so at the earliest possible moment. But since January 1, 1931, that condition is removed, and *any* criminal court *may*, if defendant's means are insufficient, grant him a solicitor, and, if the case goes higher, counsel: in murder he may have that advantage below. Even when it is sought to restrain a 'poor' person from bringing 'vexatious' actions the Court may give them counsel. It is significant of the temper [1] of a British criminal court that counsel never exercises the right of 'summing up' against an undefended person.

A 'dock' defence also illustrates the tradition of the bar that it is not free to refuse its services. An accused actually in the dock can claim to be defended then and there by any counsel present [2] (except one engaged in the case) on handing him one guinea [3] (*plus* half a crown for

[1] It has even been said that the judge and counsel on both sides are in a conspiracy to get the defendant off.

[2] He must pick 'on sight' on what principle is only known to the criminal classes. One judge, to facilitate his 'view,' used to let him inspect the robed ranks from the front, whence he could 'throw the handkerchief'—a practice, exactly as in that game, very pleasant to youthful juniors, but distasteful to seniors.

[3] This sort of client, aware of the obligation but not of its exact terms, sometimes offers a fee *in kind*, as an accused poacher did—the subjects of the charge.

his clerk), and this is frequently done, busy men being sometimes 'captured'; there are cases of counsel kept twenty-three days in July 1921 (at C.C.C. Conspiracy, K. p. 504), and sixteen in September 1921 in such cases. The custom arose as the criminal classes learned that theoretically counsel's services were honorary, and that the lowest legal fee recognized is a guinea. The new Act will diminish this resource of an impoverished industry.

The drawback of the abnormal forms of advocacy, *i.e.* without a solicitor, is that there is no time to 'get up' the case and make inquiries—as there would be in the case of a richer client. It is clear, however, that the experiments of 1903 and 1931 will lead to a complete system of defence of poor persons, such as has existed in Scotland for centuries. Of the judge's summing up much has been said above and a little will be added below.

70. SENTENCE

The law had for centuries no definite theory of punishment except that of the Greek maxim, that the wrongdoer should suffer, fortified by many a text from the Bible. It certainly did not concern itself with the reformation of the transgressor; it left that to the Church. It would be a valuable key if we could discover from what materials the first tariff of penalties was drawn up—who, to put it crudely, fixed the price of being drunk and disorderly at forty shillings or that of petty larceny at three months? Vengeance—*vendetta*—may be an instinct of primitive man, but the *lex talionis* obviously can only be applied in a few cases, for the simple reason that it is generally impossible to retort the peccant evil on the offenders. The much misunderstood passage of 'an eye for an eye' was an *amendment* of a savage common law, otherwise private war or *vendetta*, and prohibited taking more than *one* eye for one eye, and, by the time it got into the code, taking more than its money value. There is no known instance in the Bible [1] of 'the lore of nicely calculated less

[1] The case of Adonibezek (Judges i. 6–7) is in war not law, and points distinctly to the primitive pagan custom of Canaan.

r more,' burning for burning (except, of course, in capital punishment for homicide). That arithmetical equality could not possibly be meant is clear from the same school's jurisprudence of the 'false witness' (Deut. xix. 19): 'then shall ye do unto him as he had thought to have done unto his brother,' for the great majority of perjurers it would be absolutely impracticable. This very point was argued [1] at great length in 1756 at the Old Bailey when some 'miscreants' were tried for wilful murder for having, for the sake of the reward, falsely charged three persons with robbery (of one of their own gang) for which one accused at least was hanged: the judges decided that this was not murder but conspiracy. Obviously retaliation is not co-extensive with moral guilt. The only *logical* theory of punishment fitting the crime is that attributed to Draco Cabine (100 B.C.), about whom very little certain is known: that even the smallest offences deserved death, which in view of his known *mitigation* of the penal code, despite the tradition which this proposition has fixed on him, can only mean that disobedience to the law is disloyalty to the State—*i.e.* treason—and that the State has therefore the right (which primitively it exercised) of inflicting any sentence it liked. He certainly did not ordain generally or adjudge specifically that one who took life should be mulcted exactly as one who took a coat, but if he had, he would have been very much in the position of our jurists a little over a hundred years ago.

No panacea for crime has yet been discovered. Mere severity [2] does not absolutely deter, or murder would have

[1] 1 Leach, 44; Foster, *Crown Cases*, 130–1: one of the prisoners 'lost his life in the pillory through the resentment of the populace.'

[2] Though some races prefer death to certain evils. In 1824 one Angelini twice publicly besought the Lord Mayor of London to let him be hanged in place of Fauntleroy, the forger, sentenced to death, in consideration of a large sum of money with which he wanted to provide for his family.

Punishment for attempted suicide, so far from deterring, increases the tendency, but here 'punishment' is always some form of benevolent treatment. *Pace* Blackstone (iv. 189), some thinkers do not regard suicide as a crime; he approved of the (then) sanction—penalizing deceased's family in feeling and purse: if there was no family, he would rely on the religious wrong, but he points out the much greater mildness of the McMay law.

been stamped out; and if every culpable motoring Jehu were sent to penal servitude, there might be fewer accidents. But public opinion never tolerates extreme harshness. What would be perhaps the greatest deterrent, if it were attainable, is certainly of retribution; but hope springs eternal in the criminal breast. The only sure induction is that the better the discipline of the young, the less unemployment and poverty, the less wrongdoing there will be.

To-day, at any rate, the law avowedly has three converging purposes in sentence: (1) The correction, *i.e.* setting right, of the offender; (2) the deterring him from future breaches of the law; (3) the deterring others therefrom. That is to say, the law is trying to do consciously what vengeance tried to do without thinking about it. Incidentally, perhaps, this is an instance of the receptivity by the common law, by the judges—more markedly in more modern times—of new scientific ideas and hypotheses.

Concretely these principles are applied thus:

I. Death

Capital punishment is still a burning question. On December 5, 1928, a bill for abolition was introduced into the House of Commons by 119 to 118, but it went no further. Exactly a year later, however, a Select Committee was appointed which sat thirty-one times and heard many witnesses (December 12, 1929–December 9, 1930). Their Report (1931) is extremely valuable though impaired by the withdrawal of six of the fifteen members (p. cix); it is, on the whole, abolitionist and *inter alia*, definitely recommended abolition 'for an experimental period of five years in . . . Civil Courts in time of peace.' Reformers very properly insist on the number of civilized states which do not decree death (though some have reverted to that sanction), but ignore the fact that the social conditions of those countries are different from ours and that we do not share and often do not understand their mentality. The crux is—Does capital punishment deter? When Rousseau (*Contrat Social*, B. 2, c. 5) said, 'No one has the right to put to

death, even as an example, any one whom we can keep alive without danger,' he begged the whole question.

Fitzjames Stephen, a judge, actually thought that other classes, too, of extremely wicked people should be 'destroyed' (*Hist.*, v. 1, 478; v. 2, 91: 1883). Perhaps we are 'just right'—in tempering our lethal theory with much mercy. Perhaps we have reached the limit of abolition—since 1824 when a judge said, 'It is well known that there is no felony at the common law, except petty larceny, upon which judgment of death may not be given' (3 C. & B. 514).

II. Penal Servitude

Since 1853 transportation (new under Charles II) has been gradually, not immediately, abolished. The minimum term of penal servitude is three years, for cases that may carry out the design of the system, viz. a moral 'cure' through discipline and a healthy life—'diet' in its original sense, secured by work in one of the three classes to which the doctor may assign the patient, each of which will help him later to earn a living by labour. As in all forms of incarceration, there is a remission term of a quarter of the term for good conduct. Smoking is permitted as a prize at a late stage. Solitary confinement as punishment has been abolished. In all forms of captivity a large majority leave prison much healthier than they enter it. The prison has long ceased to be the home of dirt, disease, and idleness, or the abode of gloom and misery. It is not an inferno or a paradise; it is more or less a purgatorio.[1]

[1] In 1861 Erle J. said: 'Great importance is attached to keeping up their (prisoners') weight. As their work does not promote the development of muscle, their weight is retained by fattening them. I saw a set of convicts at Dartmoor. Every one of them had thrown out a bow window. Nothing could look more absurd than a line of 60 or 70 men each adorned by this prominence. Its reformatory effects, however, will be great. They will be guilty of none of the thefts which require agility. . . .' Falstaff 'admitted that he could not rob afoot' (1 N. Senior, 319). But in 1861, as Erle says, the inmates only learnt trades.

III. Imprisonment

Imprisonment has three divisions :

1. The first is practically reserved for political offences—which some schools decline to regard as criminal—and is really only detention. The prisoner wears his own clothes, may order any food, &c., he likes (within the limits of temperance) ; he may not smoke but may have newspapers and one visitor a week, and the (paid) services of another prisoner.

2. The second is hard labour : for first offenders only, who are carefully segregated from and have more visits and letters than prisoners in division 3, who are the rank and file of the hard labour prisoners.

The theory is that ' the cure ' being much shorter, the patients being (comparatively) of better moral antecedents than those in penal servitude, the treatment is ' intensive.' [1]

The ' star ' class are the first offenders, so adjudged by the Governor and assigned to class 2.

The ' labour ' in question is in essence the same as that in penal servitude, and varies according to the local facilities of the prison (fields, quarries, buildings, &c.).

IV. Remanded Persons

A remanded person may have food sent in with a limited amount of drink ; two friends may visit him daily, his solicitor as often as he likes ; he may write a letter every day. All conditions may be mitigated by the Governor, for good cause. The remanded person may not, however, smoke—a needless cruelty ; and he is segregated as much as possible from other ' remands ' who have been there

[1] Erle J. said of one in 1861 : ' His present sentence of one year's hard labour is severer [than p.s.] while it lasts.' Hence two years of it is assumed to be the limit of normal human endurance and even that *extreme* is seldom inflicted. But three years h.l. is legally possible (14 & 15 Vict. c. 19, s. 12 : 1851 : assault on authorized person arresting), though unknown. So the pillory (though abolished in 1837) is still to be read in 18 Eliz. c. 5, s. 5(4) (common informer compounding with offender).

before. It will be generally agreed that unconvicted persons whom it is necessary to detain should not suffer more restrictions than are essential for their safe custody. No doubt it would cost more to enlarge their liberties, but this cannot be an excuse for inflicting privations which often turn out to be merited. Reform in this direction is certain to come.

V. Fines

Fines have already been mentioned. Of the various legal *minima* and *maxima* of terms it can only be said that no one knows how they came into existence. No doubt, if a man multiplies convictions, the terms must increase until he is condemned as 'incurable'—and even then he cannot be locked up indefinitely; but there are a very large number accused, if not guilty, for the first time, and no amount of 'experience' has yet been able to find an equation between their offence and their punishment. Hence it is inevitable that the well-worn clichés passed on from bench to bench should be resorted to. If the State could afford to do so, it ought to deal differently with each individual case, as it does with those in its hospitals, but it is impossible to get a diagnosis of character in each of the multitudinous cases that come before our courts: when occasionally it does happen, the physician on the bench often gets a clue for his treatment. It is to this enormous difference in *antecedents* that the harshest inequalities of sentence are due. Mr. Justice Erle, apropos of his visit to Dartmoor (above), said of the recent case of a French baron sentenced in England to twelve months' hard labour for a crime of violence, 'he will be mixed with common felons . . . he will have to work with them and live with them. To a man of any refinement, and he must have some, it is a horrible sentence. And think what will be his position when he is released. *I had much rather be hanged.*' This aspect perhaps our system neglects. When the youthful barrister remarked to a magistrate in defence of a hawker whose barrow had been obstructive, 'The reputation of a London coster is like the bloom on the peach—touch it and it disappears for ever,'

he was, perhaps, exaggerating, but there is a rough justice in his view: a good name is as dear to one class as to another. But there are people to whom exposure and imprisonment does not mean ruin—material and social: they can go back to their former work and environment at once. Whereas this resource is not open to the culprit described popularly as a 'gentleman': behind the official doom on him sits ruin and the impossibility of earning a living in the old way, or perhaps at all. Equality, 'standardization' of sentence, a flat rate for every offence of a given class that does not take this element into account, may be grossly unfair. No doubt there are men who deliberately count the cost of amassing money and hoarding it as a 'nest-egg'—perhaps through friends—to be enjoyed when they have paid the penalty of their frauds; if so, mercy would be wasted on them. But if a judge can be satisfied that the accused is really ruined by his conviction (to say nothing of his dependants) the sanction of incarceration might weigh less heavy.

Any legal sentence may be pronounced at assizes.

At Q.S. penal servitude for life may be inflicted (for burglary, and for a second or subsequent conviction for felony), but such a case seems to be unknown, fourteen years being generally the limit of that tribunal's severity, that term, too, being very rare there or anywhere. Detention before trial is often taken into account, and for some offences that detention is even considered sufficient punishment; indeed, some cases are met by mere detention till the next court so as to avoid a *sentence* of imprisonment.[1]

The science of penology is no longer in its infancy, and we have begun to learn its lessons. Plato finely suggested that the physician ought to know what pain is. Judges are naturally ignorant, except in the most general way, of prison life, and no one would propose that they should

[1] Even in 1781 credit was given to detention, for a man being sentenced to death in September for forgery, and the doubt on a legal point not being settled (against him) till January, he was pardoned 'in consideration of the long confinement he had suffered,' and only sentenced 'to raise gravel for three years on the Thames': 1 Leach, 227.

undergo a term of imprisonment, but the 'savage' sentences of the past were undoubtedly due partly to that ignorance. The school that holds crime to be a form of disease has won, at any rate to the extent that each case is to be considered on its merits, so to say, and that the professional criminal is recognized as the chronic sufferer (and one to be isolated). Kenny[1] quotes the epigram of an experienced prison governor—'one half of the people in our prisons ought never to have been sent there, and the other half ought never to come out.' But a capable writer,[2] who professed to be an ex-convict, disbelieved the second half of this proposition, and advocated a reform of the internal tone of the prisons.

At any rate, the 'habitual criminal' was created by an Act of 1908.[3] That statute is an attempt to solve the problem: What are we to do with people who are not in fact deterred by their previous punishments? It is very easy to say—send them to prison for life, but this is not merciful, and abandons all effort to restore them to normal society. The new experiment consists of treating habitual criminals as patients and first applying to them the old cure—determinate sentence of *penal servitude* (not 'imprisonment') for the new offence, and then, after its expiration, indeterminate sentence for not less than five nor more than ten years—known as 'preventive detention'[4]—which may come to an end when the prisoner's reformation is guaranteed, as far as it can be, *i.e.* with reasonable probability—by the expert authorities who control him. There were 29 such sentences in 1929. It is needless to say that the 'habitual' is encouraged as much as possible to start afresh morally. The Home Secretary's report to Parliament for 1928 (*Crim. Stat. Und.* 3581) is not altogether discouraging (p. lvii). In December 1929 the actual number of these persons was

[1] K. p. 525 (1929) (where, and in ch. xxxi. *ib.*, from 'Judgment,' is by far the best account in English of the present state of thought on this subject). Would not 'a third' be truer above, the other third getting just the right treatment for their malady?

[2] In the *Nineteenth Century*, Feb. 1904.

[3] The *name* first appears in an Act of 1869: 32 & 33 Vict. c. 99.

[4] The *phrase* is French, in which it only means 'no bail.'

only 113 (all men and all aged above 30, *i.e.* 17 aged 30 to 40, 76 aged 40 to 60, 20 aged over 60). The system is moribund for women. It seems unlikely that any proposal to extend it for men (*e.g.* so as to allow it to follow certain sentences of imprisonment as well as penal servitude) would command general acceptance, because its results since 1908 make it impossible to say that in any large proportion of cases it sets up a reasonable probability that the offender if licensed will abstain from crime and lead a useful and industrious life. . . . A separate Preventive Detention prison, under separate rules, has to be retained for only just over 100 men who ' otherwise would be housed in convict prisons, together with the small male convict population [1] of about 1450, which is falling at about the rate of 100 a year.' The first question that report asks is, Is crime increasing ? The answer is, Yes, ' on a short view,' for more *indictable* crimes were known to the police in 1928 than 1927, but ' on a very long view,' No, for the per millionage (of population) in 1857 was very much higher : and in 1928 the average number of convicts was less than half that in 1911–12 (p. lvi). Without any bias to feminism, it may be added that the report (p. xxxiii) treats the number of females convicted annually of *indictable* offences as negligible : the largest age-group in 1928 being 860 between 30 and 40, and (p. xxxiv) ' as a whole the figures go to show that the increasing activities of women have not resulted in any serious crime among women [confirmed by 1929 Report, p. vii], but, on the other hand, have been accompanied by a great fall in less serious or petty offences.'

There are other modes of imprisonment gradually less severe down to mere incarceration (as of ' civil ' prisoners [2]). Among these the Borstal system (taking its name from a place near Rochester, Kent, where it was first practised), for youths between 16 and 21, has been, it is claimed, most successful. Borstal is a sort of public school among

[1] But the essence of the system is segregation, which can necessarily only be partial in most prisons.

[2] *e.g.* debtors and some minor criminals, so to say, attended with other penalties.

prisoners, where games are encouraged as among youths of that age outside, with, no doubt, the same good effect on character.

The details of all these courses [1] are still being carefully worked out, and have long included a determined policy of reforming and even of refining the convict and of speeding him well on his new and better way after release, which is often accelerated by way of encouragement systematically by the network of Discharged Prisoners' Aid Societies—all this with the best and ever better results. For instance, 'Police Supervision' is falling into desuetude,[2] only, of course, over ex-delinquents. There are consequential penalties for some convictions, *e.g.* disqualification for office, forfeiture of pension, &c.

Since 1905 the Home Secretary may expel any *alien* recommended by a court as criminal or 'undesirable' without or after any punishment inflicted; since 1920 he may do so 'on his own authority.' As it is rather startling to find a *lettre de cachet* in this country to-day, chapter and verse are the Order in Council of March 25, 1920, purporting to be under the Acts of 1905 and 1919 (in 1 Stat. Rules & Orders, 1920, p. 148, Art. 16 (6) (c)): 'If the Secretary of State deems it to be conducive to the public good to make a deportation order against the alien,' he may do so.

It is to be hoped and believed that this power is sparingly used. Page 155 *ib.* thoughtfully provides that after sentence served or when there is none, the Home Secretary may 'detain' the alien in prison until the Secretary's order for removal is received—for which no limit is fixed. No doubt it is not always easy, especially with Orientals, to decide whether a man is a British subject or an alien, but it is a 'big order' to give a minister power to lock up,

[1] See the admirable *English Prison System*, 1921, by Sir E. Ruggles-Brise, then chairman of the Prison Commission.

[2] An attainder may still be produced by a judgement of outlawry, though such judgements are in practice obsolete. The last was in 1859 (K. p. 495, *praemunire*, a legal 'museum piece'; cf. 2 M.).

Other possible sentences are abating a nuisance, pulling down a wall, destroying forgeries, obscene libels, loss of custody of children, &c. A list is attempted in Roscoe's *Crim. Evid.*, 14th ed. 1921, p. 333, &c.

indefinitely, *untried* foreigners who are frequently poor and friendless. The check on this arbitrariness is that the Home Office is glad to get rid of them as soon as possible —' for our country's good.'

71. PARTICULAR WORK OF QUARTER SESSIONS

So far we have dealt with this court and assizes jointly, in respect of crimes tried by jury. We now touch on *other* powers of the justices *without* juries—though the Bench itself may, and often does, consist of more members than a jury. In such cases, in boroughs the recorder sits with other justices but as sole judge. But in certain civil highway cases, owing to the great public interest at stake, juries—of twelve ' disinterested ' men, says the Act of 1864 naïvely—are interposed. In London, too, under a special Act, there are occasionally juries in such non-criminal cases.

The only criminal business without juries [1] is appeals from magistrates, on convictions for affiliation—since 1914 by right, without exception, if guilt is not admitted. The justices (or the recorder) hear the whole of the case, as if it had never been heard before, and may reverse or modify or confirm the sentence of the inferior court, but they cannot increase it. A majority decides ; the chairman has no casting vote.[2] If the Bench is equally divided, nothing is done,[3] *i.e.* the appeal fails. There is no further appeal (except on a point of law).

But a large number of civil appeals (from magistrates, committees, &c.) have been placed within their jurisdiction by Parliament ; of these, the most important are in cases of affiliation, rating (county, poor, &c.), settlement of lunatic and other paupers, drink licences, diversion or

[1] Except the punishment of ' incorrigible rogues ' and of youthful offenders fit for Borstal, convicted by magistrates, and sent to Q.S., the sole instances of one court condemning and another punishing. Both classes may appeal to the C.C.A.

[2] 10 Ad. & E. 706 : 1841.

[3] This is the famous principle—*semper presumitur pro negante*, viz. any one who wants anything must prove his point—else the *status quo*.

stopping of highways and inclosures of greens.[1] This legal business is peculiarly *county* work. Their remaining functions, peculiarly county but not legal work, have been 'almost entirely transferred to the County Council,' but they still retain certain direct or indirect powers over highways, licensing, compensation, lunatics, police, and prisons,[2] generally by the appointment of some of their members on the controlling authorities, *e.g.* they elect five triennially, any of whom may sit as assessors to try certain offences against clergymen of the Church of England under the Clergy Discipline Act, 1892.

72. APPEAL (CRIMINAL)

An era was marked in English criminal law when a Court of Criminal Appeal was established in 1907,[3] and began to sit in 1908. Till then criminal appeal was confused and unscientific. There is not, and there never has been, an appeal from an acquittal by a jury.[4] Even where an accused (of assault) obtained an acquittal by a trick—he

[1] Encycl. : 'Quarter Sessions.'

[2] The Court may be compelled to do certain things or may take the opinion of a superior court in certain matters exactly like a court of summary jurisdiction, and in this way appeals from the latter to the former may be again reviewed.

[3] Undoubtedly public opinion had been stirred by the discovery in 1904 that a Mr. Beck, who had been sentenced to seven years' penal servitude in 1896 for frauds and convicted again for the same offences (but not sentenced) in 1904 without any right of appeal, had been the victim of a 'double'—prosecutions in respect of which he received £5000 as compensation: but there was already a long history of the attempts to secure such a right by law, for the details of which see (Introduction to) The Criminal Appeal Act (Jordan & Sons, 1908) by Sir H. Poland, K.C.

[4] There were a few cases of acquittal where a new trial was granted, but these were cases of non-repair or obstruction of highways, originally owing to their enormous public importance, criminal *in form* and now seldom even in form (appeals being only to the civil C.A.), and such new trials have been abolished. And even previously if there was danger of imprisonment, an acquitted person could not be tried again, as in one such case (7 Q.B.D. 198: 1881) Lord Coleridge pointed out, adding that the one solitary historic case in which there had been a new trial and a conviction after an acquittal for felony had been overruled as a 'revolution in criminal law,' and never followed.

got his case at Q.S. taken at a time when he knew the prosecutor was not there, though he was bound to give him ten days' notice, and had not done so—a superior court refused to interfere.[1] Nor was there till 1908 an appeal *on the facts* from conviction [2] by a jury. But in 1848 a great step forward was taken by the creation of the Court for Crown Cases Reserved—a great historic link between the present Court of Criminal Appeal and the only similar institution for centuries before, viz. an informal assembly of the judges of the K.B. This was a mere voluntary gathering which met when one of their number was in doubt about a *point of law* at a trial where he had presided, and there had been a conviction. If the judges or a majority of them thought that a mistake in law had been made (if only in procedure) they had no power to rectify it, but they could and often did recommend the Crown to pardon the convicted person absolutely or to commute his sentence and, as there was no other form of redress, their view was always adopted. But only the judge at the trial could resort to this expedient. In 1848 the innovation was made of giving a jury court the right, on the invitation of the 'guilty' person, of formally stating the *legal* point for (at least) five judges to decide—and so to quash or confirm the conviction. But still there was no tribunal for the accused to go and say: 'The jury have made a mistake in fact: I am not guilty.' And the judge could not be compelled to 'state a case'; if he had no doubt about the law as he laid it down nothing could be done. Thus a 'Crown Case Reserved' frequently had to decide whether there was 'misdirection,' *i.e.* a mistake in law, especially where the jury, through (correctly) applying the wrong law to the facts, might have been

[1] 7 Dowl. 578: 1839.

[2] Occasionally misdemeanours tried in the K.B. got the advantage of the procedure of that court, which, being normally civil, allowed appeals, *e.g. Whitehouse's* case in 1852 (1 D. & P. 1). A new trial and acquittal followed a trial and conviction which was obtained because the Crown did not produce a material witness; this was hardly an appeal *on the facts*. In 1825 it was discovered at the Cornwall Assizes that a man had by mistake sat on a jury *for his father*, and convicted a prisoner for perjury; the latter obtained a new trial (5 B. & C. 254).

misled. In 1907 this court was merged [1] in the new Court of Criminal Appeal, *i.e.* all the judges of the K.B. Division, three being a *quorum* and the number usually sitting.[2]

The capital fact about this tribunal is that it can act if 'on any ground there was a miscarriage of justice,' below: it can reverse the verdict *on the facts*, or it can substitute its own for it; it can quash a sentence or a conviction, or increase or decrease the term of a sentence—in short, it can correct wrong legal arithmetic to a decimal point, so to say.

The quoted words are a welcome tribute to the ideal of generations of reformers—the identification of law with justice. The long and steady recoil from technicality which we have noted elsewhere can hardly go further than the words in the 'charter' of the Court; but, *per contra*, it keeps touch with reality by stipulating that the members of the Court 'may, *notwithstanding* that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal, if they consider that no substantial miscarriage of justice has actually occurred.' A man is no longer to escape the penalty of his misdeeds because his name has been misspelt in an indictment, but, at the same time, even a malefactor is to be protected from the prejudice of an unfair cross-examination too well instructed about his past. Thus the Court, which constantly acts on this proviso, frequently has to balance the question whether some irregularity at the trial, technical or practical, did or did not weigh the scale unfairly against the convicted person.

That some suppliants 'for wool' should 'go away

[1] One result of this survival is that the power of declaring a trial a nullity or 'mis-trial' *e.g. Tremearne's* case above, and *ordering a proper trial*, which the C. for C.C.R. undoubtedly exercised, passed in 1908 to the C.C.A.—as the H.L. decided in *Crane's* case in 1921 (15 Cr. A.R. 183). (The lay mind or even other minds may not appreciate the difference between this power and that of ordering 'a new trial,' which was expressly denied to the C.C.A.) Here two men *separately* indicted for the same theft were tried together and convicted, and the C.C.A. had ordered the case to be tried again.

[2] On special points five sit, and, if necessary, the whole (seventeen or eighteen) K.B. judges would sit. In the great *Franconia* case (L.R. 2 Ex. Div. 63) fourteen judges sat (1876).

shorn' may seem harsh but is a necessary expedient to keep down 'frivolous' appeals. The Court has not been swamped, as in 1907 was widely anticipated, by convicts trying their luck, but nevertheless Avory J. said in 1921, 'ninety per cent. of the applications . . . are frivolous' (15 Cr. A.R. 142), and the Court did in that instance what it can always do in an unreasonable 'try-on,' make sentence run from that date, thus, as it said, a few days later—in another such case—(*ib.* 147) adding a month to the incarceration; in 1923 (17 Cr. A.R. 175), in an impudent case, thirteen weeks (to a term of sixteen months). And there are other devices to prevent extravagant appeals being heard.

The right to appeal on a point of *law* is unlimited; otherwise the certificate of the trial judge—often offered—is requisite, or the consent of a judge must be obtained, but there is an appeal for this consent from one judge to three judges. An authorized appellant may be allowed counsel and solicitor at no expense to himself. Space can only be found for a few examples. A day or two before and after the war broke out the German Consul at Sunderland, a German by birth, but naturalized in 1905, was active, as his official duty required, in sending Germans from this country to their own to serve in the German army. Now, of course, he was quite entitled to do this up to 11 p.m. on August 4, 1914, when we declared war against Germany. But he was tried for high treason for what he did on the 5th, and was sentenced to death. Nothing could have been said against the verdict—even if he had not known that this country was at war with Germany—if the jury had found that his intention and purpose was to assist the King's enemies against the King (within the Treason Act of 1351); in that case, the fact that at the same time he was doing the work for which he was paid would not have availed him. But, in fact, the judge omitted to direct the jury that they must consider the accused's *intention* before they could find him guilty, and, though, had he done so, they might well have found that his purpose was hostile to this country, yet as this vital legal point had been overlooked, five judges quashed the conviction and released

the prisoner—a strong instance of the reversal of a verdict on a point of law.[1]

In September 1911, about 2 a.m., a woman was murdered in Clerkenwell. If the story of F., a disreputable person who possibly helped the criminal beforehand, and certainly assisted him to get away, and of two disreputable women was to be believed, E., the accused, confessed to them within half an hour of the murder that he had done it. Later on the same day the three made statements—at a police-station—implicating E., and in due course they gave evidence, that of F. being by far the most damning, though it was corroborated in some points by that of the two women. Now the statements of the women had been duly made evidence by the prosecution so that when they were in the box the accused's counsel could and did confront them with any inconsistency between those statements and their oral testimony. But F.'s far more deadly statement had *not* been made legal evidence; the accused's counsel had never seen it. Yet the judge, in summing up, constantly quoted from it, evidently under the impression that it had become evidence, and pointed out how F.'s oral evidence that day tallied with what he had said at the first moment. Naturally E. was convicted and sentenced to death, but the Appeal Court felt bound, whatever the true facts were, to set aside the conviction [2] obtained—or even influenced—by so grave a misstatement as that of the judge. They took the opportunity, by no means the first, of regretting that they had not the power of ordering a new trial (such as the civil Appeal Court has); they would certainly have ordered it here. For twenty years no other person condemned capitally was thus liberated until in a case from Liverpool in May 1931 the Court interpreted the facts differently from the jury.[3]

Another source of irregularity is the jury itself. Misconduct by individual jurors is very rare, but sometimes it is clear that the whole body has made an honest mistake.

[1] 11 Cr. Ap. R. 63. [2] 7 Cr. Ap. R. 4.

[3] *The Times*, May 21, 1931, stated that the defence cost about £1000 and the appeal £300. If this latter sum could not have been raised, would the accused have been hanged?

During the course of a trial [1] for theft, in 1912, a juryman said to the accused's counsel, 'Your client has not called any evidence of his good character'—a matter very carefully regulated by law. The judge at once intervened and pointed out that there was no obligation on the accused to call any such witness. When the man was found guilty the jury asked the judge to deal with him under 'the First Offenders Act'—but, unfortunately, he had been convicted eighteen times and had often 'had' penal servitude. 'Ah!' said the juror, 'I thought as much; I only asked about the man's character so as to get the jury to agree.' The conviction was quashed, for, the direct evidence being slight, the Court was certain that the jury had speculated on the accused's bad character, and this had turned the scale. They were correct in their guess, but they had no right to guess. This instance suggests that when there is no evidence of good character juries often conclude that there is no good character.

Mere difference of opinion from that of the jury on the *facts* of a case, no flaw in procedure being alleged, is naturally a much rarer ground for the courts giving relief, for it is very slow to differ from the body which till 1908 was in law the absolutely final arbiter on disputed facts.[2] But sometimes it is driven to do so—by those facts. In 1914 a lady was bicycling on a lonely country road about 4.30 p.m. on February 17, when she was attacked by a soldier, probably with a sinister purpose; she was certainly hurt. The accused was quartered at barracks three miles from the scene; she gave a description of her assailant to the police; he had, she said, 'a fierce-looking ginger moustache,' and she, in fact, picked the accused out of

[1] 7 Cr. Ap. R. 214.

[2] It was feared that the existence of a reviewing authority would weaken the jury's time-honoured sense of responsibility; whether this is so it is impossible to say. Juries naturally hesitate to condemn on grave charges, but there is no longer the same motive for their trying to find a loophole—or less—for acquitting, as when 'for years . . . juries went on finding on their oath that goods of the value of £50 were under the value of five shillings' (Campbell's *Life of Eldon*, c. 200: 1810), lest the prisoner should be hanged (Blackstone's 'pious perjury, iv. 239)—a good illustration of Aristotle's dictum that the law is powerless against public opinion.

hundred men. Another witness who saw the culprit's moustache as he was running away after his crime picked the same man out of twelve, and so did another witness. But the accused had not, and never had had, a moustache; during his seven weeks' detention no moustache grew, and there were other discrepancies between the described and the actual man. Nevertheless, the jury found the accused, who set up an *alibi*, guilty not of the graver charges, but of common assault. But this the superior Court [1] set aside, believing that there must have been some resemblance between the criminal and the man before them, and that the jury, loath to let so dastardly a crime go unpunished, but yet not being quite sure of their man, had compromised on the lesser offence. 'The jury must have really doubted,' said a judge, 'whether the case was made out.' The courts naturally abhor a 'compromise verdict' in criminal cases. Defendant's counsel thought that the gentlemen in the box were, perhaps, in a hurry, as at four p.m. they had had no food since breakfast:

'Wretches hang that jurymen may dine.'

In 1915 H. and G. were convicted of receiving stolen property, knowing that it was stolen.[2] It was stolen on January 25, and on February 1 the police found it in a room let to G. in H.'s house. When H. was taxed with the stuff he said, 'I wish I had never seen the man; I bought them *from* [or *for*, which was hotly contested] G.; he rents the room from me.' G. explained that he had bought the things very cheap at a popular market and called a witness to corroborate that fact; this, whether true or false, was uncontradicted. Nevertheless they were both convicted—because, perhaps, the gentleman summing up showed clearly that they were *possibly* guilty. They were, however, released by the Court. This, perhaps, is not a perfect example of pure reversal of findings of fact, owing to the contribution of the bench mentioned, but it is a good instance of the grand principle which the Court laid down in so many words in 1917, viz. if the facts are equally consistent with innocence as guilt, it leans to relief.[3] There

[1] 10 Cr. Ap. R. 227. [2] 11 Cr. Ap. R. 130. [3] 12 Cr. Ap. R. 231.

a doctor was with others found guilty, after a seven days' trial, of (in substance) corruptly certifying recruits as unfit for military service or only fit for home work. The evidence was complicated, but three judges came to the conclusion that there was no direct evidence against the accused of any of the offences alleged against him (*e.g.* there was no evidence that he had received one farthing corruptly); the facts proved were quite consistent with his innocence, and they reversed the jury.

Another paramount duty of the Court is to reconsider sentences, when it is asked to do so. In a few cases the judge has no discretion what sentence he shall inflict, *e.g.* in capital crimes, but in all other cases obviously there may be differences of opinion whether he has been too severe or too lenient. The Appeal Court is often confronted with the suggestion that, in the given circumstances, the sentence is too severe. Those circumstances, of course, vary infinitely, and are never the same, though they may be more or less similar. Hence the Court has never swerved from its view that it is impossible to 'standardize' sentences;[1] it deals with each case on its demerits. One very valuable result of this commanding attitude has been that inferior tribunals have been very much more sparing in the infliction of punishment, for no tribunal likes being overruled. And generally it has 'keyed up' those courts to the proper pitch, especially of the tune which calls for an artist—the 'charge' to the jury. 'Acting in harmony with the spirit of the hour they have sensibly lowered the standard of severity; the savage sentence is a thing of the past. Thus they have insisted that the maximum legal penalty should be reserved for the worst cases of the crime, and that detention before trial should be allowed for in the term; they have strongly discouraged the imposition of penal servitude after imprisonment with hard labour or of hard labour after penal servitude and of penal servitude for a first offence, or, if such a penalty is inevitable, they have preferred the minimum term of three years; while they have repeatedly favoured the merciful policy of "winding up a delinquent's moral bankruptcy" by indicating

[1] *e.g.* 15 Cr. Ap. R. 77 : 1920.

how, when a defendant is riddled with charges from several quarters, he should be punished once for all and start again "with a clean slate." . . . In short, even their failings have leaned to leniency's side.' [1]

The jurisdiction of the Court is so comprehensive that it has quashed a conviction following even a plea of guilty when that confession was made under a mistake (of law,[2] or untruthfully,[3] &c.). Another striking instance is that where a conviction is quashed after the sentence has been served [4]—the public recognition of a mistake of justice being more honourable to the victim than a royal pardon, which *may* only imply a remission of penalty. Thus the judgements of the Court range from the supremest human interests to technical *minutiae* and 'illuminate every nook and cranny of doctrine, practice, and procedure,' [5] of our criminal law of which, in short, it is the oracle and 'the Clearing House.'

First Scotland and then Northern Ireland have set up such a Court—whence its success may be inferred. There is one serious flaw in the procedure. From the moment any one in prison applies to the Court for relief, his sentence ceases to run—he cannot, if he wants to, do 'time.' Hence persons under short sentences—especially if a vacation intervenes and delays the hearing—often decline to appeal, and every one must lose at least two or three weeks (unless the Court allows the interval to count—which, as a rule, it does only when it does not wholly reject the appeal). Clearly it would do no harm if applicants were not suspended from 'work.'

There is an appeal from this Court to the House of Lords. If either 'side' can obtain the certificate of the Attorney-

[1] *The Quarterly Review*, Oct. 1918, p. 352.

[2] 7 Cr. Ap. R. 110: conviction in Feb. 1910; bound over; brought up for judgement in Dec. 1911; sentenced to two years' imprisonment with hard labour; time for appeal extended for the plea in 1910; conviction quashed Jan. 1912.

[3] 2 Cr. Ap. R. 107: 1909.

[4] 8 Cr. Ap. R. 71, 84; six months' imprisonment with hard labour on Oct. 30, 1911, for housebreaking; fresh evidence implicating another person; appeal successful on Nov. 18, 1912.

[5] Preface to Roscoe's *Criminal Evidence*, 14th ed. 1921; 65 L.J. (1928), 397.

General that 'the decision' on appeal 'involves a point of law of exceptional public importance, and that it is desirable that a further appeal should be brought' it 'may appeal from that decision to the House of Lords.' [1]

Accordingly there have been such appeals on both 'sides'; the Crown has occasionally revindicated its right to a prisoner whom the Appeal Court had released, and has occasionally failed to keep a conviction which that Court had upheld.

73. MERCY

Mercy is to the criminal law what equity was to the common. When all legal resources have been exhausted, there still remains the privilege of the Crown—a happy survival from primitive times when the criminal was forfeited, like a prisoner of war, to the prince, whose power of life and death implied the lesser right of pardon. To-day 'the most amiable prerogative of the Crown' (Blackstone) is almost as highly organized as the machinery of punishment, and is supervised by the same department, viz. the Home Office, which naturally consults the sentencing judge, or, since 1908, refers to the Court of Criminal Appeal when

[1] This is of extreme historic interest, as it is the sole relic of the writ of error (formally abolished by the Acts in 1907 and 1930)—probably the most cumbrous and costly form of criminal appeal ever known. It was very ancient, perhaps reaching back to Edward I, and it was the only way of taking a (criminal) point of law to the Lords; it was nearly always brought by an aggrieved defendant (cf. Short & Mellor, *Crown Office Practice*, 1st ed. 1890, p. 313) with the consent of the Attorney-General. It only applied to some error 'apparent upon *the record* of the proceedings' (Stephen, 1 *Hist. Cr. L.* 308); in early times, when there were few who could read, and fewer still who could read Latin, that document was the object of an almost religious reverence, and hence by degrees was decorated by its worshippers with a bulk of superfluous ornament; in 'the Claimant's' case in 1881 (*Castro's* or *Orton's* or *Tichborne's*, 6 Ap. C. 229) 'the record was a parchment roll of monstrous size,' most of the contents of which were 'wholly unimportant': appeal rejected by C.A. and H.L. In 1844 Daniel O'Connell, convicted in the Q.B., Ireland, of a seditious conspiracy, was liberated by the House of Lords on account of clear technical errors in the form of the indictment (11 Cl. & F. 157). On the same ground Mr. Bradlaugh and Mrs. Besant were successful in the C.A. in 1878; they had been sentenced for the publication of a onee notorious book (3 Q.B.D. 607).

a case for review is suggested on behalf of the condemned.[1] But the royal right to pardon at discretion has not been in the least diminished by the creation of that tribunal, and it has often been exercised when those judges have rejected a petition. Moreover, the power of the minister may often be conveniently used, when, *e.g.* it is too late to apply to that Court,[1] or a convict is discharged before his time on account of permanent ill-health. The Crown is then 'a magistrate . . . holding a court of equity in his own breast to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment' (4 Blackstone, 396).

That this power is not the *personal* privilege of the sovereign may be seen from an incident in the reign of George IV: 1830. A gentleman of County Clare was sentenced to death for burning his house. The king, petitioned by 'respectable inhabitants of the county,' and 'there being some favourable circumstances in his case,' wrote directly to the Lord-Lieutenant of Ireland without taking the advice of any minister. The Lord-Lieutenant respited the man, but he, the Duke of Wellington, and Sir Robert Peel, Home Secretary, protested against the king's action, and the latter finally allowed the law to take its course.[2]

The effect of a pardon is, so far as possible, to put the recipient in exactly the same position as if he had not been convicted; all disabilities disappear. Thus, when a man was convicted of felony in May 1883, and sentenced to

[1] Absolute mistakes are very rare, but see above. K. (*Outlines*, p. 505) cites J. D. Lewis (*Causes célèbres de l'Angleterre*, p. 10: 1883): after a wide study of English criminal trials from the times of James II, he had not found more than three cases in which any quite innocent person had been (not merely sentenced, but) actually executed; viz. the clear cases of Shaw (at Edinburgh in 1721 for the supposed murder of a daughter, who had in reality committed suicide), of Jennings (at Hull in 1762 for theft by a mistake of identity), and the much more doubtful case of Eliza Fenning (in London in 1815 for a supposed attempt at poisoning). That of the innkeeper, Jonathan Bradford (in 1736 for the murder of a traveller), though a case of legal innocence, was one of moral guilt, as he had entered the traveller's room to kill him, but found him slain already by his own valet.

[2] *Sir Robert Peel*, by C. S. Parker, vol. ii. ch. vi. p. 146; for other instances of the king, who seems to have been very tender on this subject, being overruled, see vol. i. ch. ix.

seven years' penal servitude, but in November got a 'ticket of leave,' and in 1885 'a free pardon,' it was held in 1890 [1] that he could hold a spirit licence despite the enactment 'that every one convicted of felony shall *for ever* be disqualified from selling spirits by retail.'

'Law . . . cannot be framed on principles of compassion to guilt: yet justice, by the constitution of England, is bound to be administered in mercy; this is promised by the King in his coronation oath' (Blackstone).

ARBITRATION. THE LEGAL PROFESSION

74. ARBITRATION

'Our arbitration law dates back to the days when judges were paid by fees and were in consequence the natural enemies of private tribunals,' says a learned writer in the L.Jo., April 18, 1931. Apparently the first known reference to this 'allotropic modification' of 'the real thing' is in 1606, but our quotation gives point to another. 'Having,' says Evelyn, May 26, 1671, 'brought an action against one Cocke for money which he had receiv'd for me, it had been referred to an arbitration by the recommendation of that excellent good man the Chief Justice Hales; but this not succeeding, I went to advise with that famous lawyer, Mr. Jones of Gray's Inn [afterwards S.-G. and A.-G.] and 27 May had a trial before Ld. Ch. Justice Hales, and after the lawyers had wrangled sufficiently it was referred to a new arbitration. This was the very first suit at law that ever I had with any creature and ô that it might be the last.'

Parties in civil actions may still, if they choose, submit their differences to an arbitrator [2] or arbitrators, or to the

[1] 24 Q.B.D. 561.

[2] The history of this word is interesting, meaning originally 'one who goes to see'; it is used in early Latin = a witness; later a judge: *arbitrari* = to think, is common.

latter and an umpire in case the arbitrators cannot agree,[1] undertaking to be bound by the decision or 'award' he or they may make. Or they may be compulsorily referred by the court, before which they are, to an officer of the court—the official referee, or a registrar, or a referee—upon whom the court allows them to agree, or, in default of such agreement, appoints, and courts generally take one of these courses in cases where the parties themselves usually resort to arbitration, *i.e.* where there is a mass of details or items or long accounts to be investigated, or the 'ins and outs' of certain special businesses which only the initiated can be expected to know, figure prominently in the dispute. In the last case, many interests have organized their own local arbitration boards, *e.g.* in the City of London, which are easily set in motion, and decide speedily, and all are cases in which a jury could hardly be expected to follow all the details with any certainty, or a judge to give up an unfair amount of his time, though, of course, if there is any point of law he usually has to decide it, though even that may be left to the arbitrator. Many mercantile contracts provide that in case of dispute resort should be had to arbitration. The motive usually impelling parties to submit to arbitration is either to secure judges conversant by their calling with the kind of matter in controversy, or to get a *cheaper* and *speedier* decision than they expect in due course of law, and to avoid

[1] 'Mackinnon J. (the Chairman of a Committee on this subject, which reported in 1927) has recently underlined a criticism which has often been made on the working of "this practice." He could not understand why, year after year, the clause providing for the appointment of two arbitrators and an umpire continued in use. In practice the arbitrators never agreed, and in the end the dispute always had to go to the umpire. So thousands of pounds were wasted. The arbitrators regarded themselves as advocates, each for the party who had nominated him, and generally they were very indifferent advocates: in "his" opinion, the proper course would be to appoint in the first place some competent person, or get him appointed by some competent body, to act as a single arbitrator and dispose of the matter once and for all. Sir Francis Newbolt [Official Referee] has . . . called attention to the three competent persons, known as Official Referees, who are ready and willing without charge to decide matters in dispute once and for all' (L.Jo., March 14, 1931). A judge, in sending back an award to be recast recently complained that it was a constantly recurring difficulty that arbitrators did not find the facts that the court wanted (*The Times*, May 7, 1931).

publicity. On the other hand, they must provide for the remuneration of their chosen judges,[1] which, of course, they have not to do in the case of a judge or an officer of the court. 'The technical trade arbitrations on the . . . quality of goods, conducted by experts without the help . . . of an advocate, work, I believe, very well. The ordinary arbitrations, particularly before lay arbitrators, with or without an umpire, are a snare. On the whole, they cost more than litigation.'[2]

A short Act of 1889, supplemented by part (ss. 88–97, &c.) of another in 1925 (Judicature, &c.), is practically a code on this subject. The hearing before the arbitrators is practically a miniature trial, with a little less formality.[3] There is ample provision for enforcing the judgment, or, in a proper case, for setting it aside, on appeal, as, for instance, in the rare cases where partiality on the part of the arbitrator is alleged. It will not be set aside merely on the findings of fact, unless they are so perverse as to imply misconduct; in this respect the arbitrator is in the position of a jury. Amendments of these statutes are recommended by authority (L.Jo., April 18, 1931), where it is stated that foreigners of different nationalities often agree to submit their commercial contracts to arbitration in England.

The law itself, so to say, submits itself to arbitration in the great field of Workmen's Compensation, *i.e.* that which is awarded to a disabled workman, or, in the case of his death, to his dependants from the employer, when an accident happens during and arising from the employment. It is obvious that relief in such cases should be speedy and the procedure cheap, and to achieve that end the local County Court judge sits as an arbitrator between

[1] 'The present practice is to leave both the costs of the cause and the costs of the reference to the discretion of the arbitrator.' His charges are not always liable to taxation (Johnson, *Bills of Costs*, p. 467 (1897)).

[2] Spence K.C., *Bar* v. *Buskin* (1930), 156: 'the hearing always lasts longer . . . the applications to set aside awards are countless' and very often successful, and with 'lay arbitrators the miscarriages of justice are numerous.'

[3] L.Jo., March 21, 1931, cites from *Essays*, by Mr. A. H. Chaytor, K.C., suggestions for reform, including actions to be 'carried on in a new spirit more like that of arbitrations,' in many of which—and important ones—he has acted as arbitrator.

the parties and makes a money award and controls the distribution of it. These tribunals are very busy and have given almost universal satisfaction to both parties. On any point of *law*, however, arising there is an appeal to the law court.

It is practically impossible to refer purely criminal matters to arbitration, and it is rare in matters which may be the subject of either criminal or civil proceedings. Occasionally, by leave of the court, a not serious misdemeanour such as obstruction to a highway or nuisance is so referred, *e.g.* in 1832 (3 B. & Ad. 237).

75. THE LEARNED PROFESSION

enjoys this name because when it was first so called it knew Latin—in unbroken succession from the courts which Hortensius, Cicero, and Pliny frequented, and which in time were copied, and even improved, by the Church, whose mother tongue that language was, and is, as such tribunals are, still hers. For centuries the Church provided in this country the only complete profession ; for that of arms can hardly be said to be a ' whole-time job ' till the Normans came.

The origins of the third profession in England are tolerably marked. It disengages itself in the century of settlement after 1066, partly impelled by the clash of interests between the alien and the native races, especially in agrarian contentions, wherein the Church was often a party and readily supplied *advocati*, though there is good evidence that even the Anglo-Saxon monasteries sheltered secular common lawyers. But undoubtedly for some time ' clerics ' constituted what legal profession there was on bench (whence the old ' sheriff ' was not at first displaced) and at bar, and it is not easy to find a clear instance of any one not in orders practising or of any non-clerical tribunal.

I. The Judges

All the judges have always been appointed by the Crown, normally after consultation with an adviser ; sometimes

in early days the sovereign unblushingly promoted a favourite or a friend. Sj. Vaughan, the brother of the King's doctor, in 1827, was said to have got his place 'by prescription.' As the House of Commons grew more powerful, many places, including judgeships, were given for political services, but M.P.s are no longer appointed merely for political services: the efficient gentlemen now promoted therefrom to the bench are the more efficient for their membership with its knowledge of affairs, especially of the springs of legislation. The ecclesiastics (and noblemen) gradually disappear from the bench, notably under Henry III and his son (the 'Justinian'), and the tonsured bar go after them from lay courts.

The relations between the Crown and the judiciary are an integral part of English history, and cannot be dealt with here.

The famous clause in the Act of Settlement of 1701, finally securing the judge's independence of the Crown, was not (it is sometimes overlooked) to come into force until Sophia's descendant was king, which happened in 1714.[1] That clause provided that judges should be appointed for life subject to good behaviour—(exactly, by the way, anticipated by the Persians [2])—*i.e.* till a request from both Houses to the Crown for removal. This safeguard has only been put into force once, viz. when Sir Jonah Barrington was so dismissed in 1830 for having appropriated some of the money paid in to his Court.[3]

The Lord Chancellor nominates the judges,[4] Commissioners of Assize, *i.e.* temporary judges, Masters and Clerks,

[1] Nor did it, as may be gathered from Luttrell (*Diary*, June 6, 1702: v. 5, p. 181): 'On Thursday night the Lord Keeper sent to judge Furten and baron Hatsel that they might forbear sitting in their courts the next morning in Westminster hall being the 1st day of term, her majestie [Q. Anne] designing them their quietus'—a purely political move. Neither of these gentlemen returned to the bar as Pemberton, twice dismissed under Charles II, had done.

[2] Herodotus, iii. 31.

[3] D.N.B.: not mentioned in Dr. Ball's *Judges in Ireland* (1926). For Johnson, see v. 2, p. 33, and 29 St. Tr. 81–502.

[4] 'Though technically not those of the C.A.,' *i.e.* the Prime Minister consults the L.C. P. 60 of Ld. Haldane's (very strong) committee: Dec. 14, 1918. *Cd.* 9230, 1918, v. xii. p. 1.

indeed makes all promotions in the Courts (except K.B. Masters and a few men in modern posts),[1] also appoints—and removes (if necessary, which it never has been)—(1) the bench of the County Court created in 1846; (2) all the J.P.s (except in the Duchy of Lancaster, which has its own Chancellor).

Stipendiary magistrates and recorders are recommended to the Crown by the Home Secretary. The 1918 Committee formally repeated (pp. 64, 74) the frequent suggestion that a minister of justice—for whom there is 'a strong case'—should be created: this would erect a central Clearing House of Justice.

The Law Lords, who only date from 1876,[2] are naturally nominated by the Prime Minister (unlike Chatham, who dared not 'ask even for a tide waiter's place'[3]), who makes all promotions to the Upper House and can, of course, consult the Lord Chancellor.

One County Court judge has been promoted to the superior bench—a natural step in the hierarchy, some lawyers think, on the ground that office shows the man—and one Official Referee as regards remuneration. One authority[4] writes: 'In my view the salary of the County Court judges before the war [still the same] was insufficient, having regard to the nature of their work, which very often is, in a sense, more important than that of the judges of the High Court. For the sum at stake in a County Court action is generally far larger in relation to the fortunes of the liti-

[1] As Eldon found to his discomfort when a Chancery Mastership fell vacant in 1815. According to his own account (Campbell, *Lives of Chanc.* 679), the Prince Regent had often asked him to appoint Joseph Jekyll, K.C., M.P., his (George) S.G., 'wit and politician' (D.N.B.) but a common lawyer, and he had always refused; George presented himself at his house when Eldon was ill in bed, and forced his way through objecting servants to his bedroom; the invalid still refused. Then said His Royal Highness: 'How I do pity Lady Eldon!' "'Good God!" I said. "What is the matter?" "She will never see you again, for here I remain till I have your promise. . . ." Well, I was obliged at length to give in. . . . However, Jekyll got in capitally.' But he declined to give way to the Prime Minister, who, without his authority, had nominated a judge (*ib.*).

[2] But till then the Lords often did (as they still do occasionally) actually ask the common law judges to advise them.

[3] Macaulay, *Essay* (1844).

[4] Mr. E. F. Spence, K.C., *Bar and Buskin* (1930), p. 166.

gants than is the case in the High Court, and the right of appeal is severely limited. In the case of the judges of the Supreme Court the position is absurd. As a result of the fact that the rate of their remuneration has not been raised since the war, they now, in consequence of income tax, surtax, and increased cost of living, work for a sum ridiculously less than that contemplated when the judicial salaries were fixed, and this at a time when, roughly speaking, everybody else is being far more highly paid than before the war. . . . What fun it would be if they were to strike!'

An exaggerated, but nevertheless interesting, criticism of the Bench may perhaps be quoted:

According to Nassau Senior, a Master in Chancery (1 *Conversations*, 1860–1, p. 314), Sir W. Erle, a thoroughly good judge (1844–66), said (and passed for print):

'With respect to intelligence, a judge is certainly superior to an ordinary juryman. . . . As to education, the jury have decidedly the advantage. The education of a judge, as far as relates to deciding fact, is the education of a practising barrister who is immersed in the world of words and removed from acting in the commercial, agricultural, and manufacturing facts which form the staple of contest. He is so accustomed to deny what he believes to be true, to defend what he feels to be wrong, to look for premisses, not for conclusions, that he loses the sense of true and false—*i.e.* real and unreal. Then he is essentially a London gentleman, he knows nothing of the habits of thought, or of feeling, or of action in the middle and lower classes who supply our litigants, witnesses, and prisoners. And it is from barristers thus educated that judges are taken. . . . Experience the judge certainly has. As counsel or as judge he has taken part in many hundreds of trials. . . . But this long experience often gives the judge prejudices which warp his judgment. The counsel who are accustomed to plead before him find them out and practise on them. I have seen dreadful carelessness [1] in judges. Again, a judge

[1] 'Scandalous tradition has it that a Chief Justice at an assize town, instead of taking the usual route to the assize court, which passed the hotel at which the Bar put up, deliberately took another route in order that the Bar might not be aware of his coming, and then had the cause

is often under the influence of particular counsel; some he hates, some he likes, some he relies on, and some he fears. It is easy for a judge to be impartial between plaintiff and defendant . . . it is difficult to be impartial between counsel and counsel.[1] . . . Even in civil causes I prefer juries to judges. The indifference to real and unreal, and so to right or wrong, which besets a barrister bred in the world of words rather than of facts, often follows him to the bench. Besides this, I have known judges bred in the world of legal studies, who delighted in nothing so much as in a strong decision. Now a strong decision is a decision opposed to common sense and to common convenience. . . . A great part of the law made by judges consists of strong decisions, and as one strong decision is a precedent for another a little stronger, the law at last on some matters becomes such a nuisance that equity intervenes or an Act must be passed to sweep the whole away. . . .' 'I do not regret having changed the bar for the bench. Both are laborious and both are anxious; but the labour of the bar to a man in great practice is overwhelming.'

II. The Bar

For centuries the Supreme Court judges and since their creation those of the County Court have been taken from the bar.[2] Hence here (and in all English-speaking countries) the relations between bench and advocates are smoother than in most other countries.

On this subject an amusing and lengthy collection of anecdotes could be made. The early bar is 'very courteous to the bench. But . . . they can "stand up to it," too, polite but firm.'[3] In course of time forensic

list called over in the empty court and nonsuited every plaintiff and enjoyed a pleasant holiday for the rest of the time allotted to the assize.' —R. Sutton, *Personal Actions* (1929), p. 24.

[1] A witty judge is credited with saying: 'First I look who are the solicitors in a case, then who are the counsel, and I know what to do in 80 per cent.; in the other 20 I attend to the facts.'

[2] Perhaps Laurence de Brok (1253), who had appeared for the King, is the first: Foss, 2 *Lives*, 200, 267.

[3] *Hist. of Bar to 1450*, p. 222.

manners naturally became stereotyped, and in troublous times affected by politics. In 1684 there was a scene in Court when Jeffreys—mildly, for him—browbeat Ward, counsel: 'Let us have none of your fragrancies and fine rhetorical flowers to take the people with'; the latter hissed vigorously his rudeness to Ward. Whereupon he said, 'What in the name of God! I hope we are now past that time . . . that humming and hissing shall be used in Courts of Justice.[1] . . . I knew the time when causes were to be carried according as the *mobile* hissed or hummed, and I do not question that they have as good a will to it now.' [2]

The 'intemperate deportment' of Leach M.R. (about 1840) towards the counsel of his court led to a unique incident—he had to 'receive a deputation of the leaders of his court who waited upon him to offer their remonstrances against his discourteous treatment of the bar.' [3] Bethell was the hero of 'a scene' in 1859 [4] when he said to the judge: 'Your lordship will hear the case first, and if your lordship thinks it right you can express surprise afterwards,' &c., his conduct was approved by *The Times*, and rewarded by 'the thanks of the inner bar' in that court. The 'tiffs' between Cockburn C.J. and Jessel S.-G. are historic.[5]

From 1100 to 1200 we may say that the legal profession was slowly forming. As the clerical element receded from the bench their brethren at the bar naturally did the same, and it is generally said that in Edward I's time there was a lay bar. His father had certainly dealt with a law school of some sort—it is by no means clear why—in the city about 1230–40, and at the same time was piously endowing a chapel in 'Chancler's Lane,' so called because the chapel was that of his Chancellor, who had a house there. It has been supposed that the Inns of Court in and about Holborn originally accommodated

[1] R. North, *Autobiography*, 168, mentions a judge who 'made open war against the bar . . . until at last' through his ignorance 'they brought him to truckle and then no man ever courted the bar as he did.'

[2] 10 St. Tr. 337.

[3] Nash, 1 *Life of Ld. Westbury*, 58, 291.

[4] March 19, L.T.

[5] *The Times*, March 22, 1883.

students frequenting both these institutions. The Templars had a house in Holborn and no doubt a church in 1119; in 1185 both are in the 'Temple,' where, as in other sacred buildings, we know that legal records were stored in 1200. But the lawyers as a body did not establish a centre there till about 1300. The inevitable crystallization of societies in those days was in the shape of Colleges—witness Oxford and Cambridge; and the four Inns, now—but only since the end of the last century—almost the only survivors of the rudimentary system, still suggest their domestic origin by making their junior members *assist at* a number of dinners.

The modern bar is divided into two clearly defined classes, that of the King's Counsel or leaders and that of the juniors. The development of this distinction may perhaps be briefly touched on. The Norman Kings had enormous pecuniary interests, and soon became litigants, very often, no doubt, before their own judges. The first counsel, perhaps, to appear for the King before a tribunal, an ecclesiastical synod, was Aubrey de Vere in 1139 in *Rex* v. *Bishops of Salisbury, &c.*, 'a good lawyer,' who was sent by Stephen as an ordinary servant of the Crown, *serviens*, and thus founded the order of the 'serjeants,' now extinct in England,[1] since the great growth of the parallel order of King's Counsel as the senior bar. As the royal business—and the people's—increased, more *servientes regis* were wanted, and the most successful naturally specialized in the courts and were known as *servientes regis ad legem* to distinguish them from his other *servientes*. Suitors naturally ran after them, as they did till recent times after the Law Officers, and so there gradually sprang up a body of 'Serjeants at Law' independent of the Crown, though appointed by it. They tended to dwell, of course, near Westminster, and many lived in the City, where there was most business, and are soon found in other large towns. Our 'Law land' with its

[1] The late Lord Lindley being the last survivor. In Ireland, where there were only two at a time, both officials of the Crown—which their many English brethren were not. Serjt. Sullivan, K.C. in England, is the last.

'Inns' is convenient to both those cities, and many of the pupils they took, soon known as their 'apprentices'—the 'junior bar' of to-day—came from London and the country and filled those Inns often to overflowing. It is generally accepted that the first 'Q.C.' was Francis Bacon—perhaps the most intellectual Englishman who ever lived—appointed about 1587–8 as Elizabeth's 'Counsel extraordinary,' which may mean 'without either patent or fee'; [1] but this was regularized by James I, who made him a K.C. *sans phrase* in 1604 with the (henceforward) traditional salary of forty pounds a year.' [2] For a long time the title was sparingly granted. Roger North tells [3] us that his brother, the Lord Chancellor, was the first to get it, being 'under the coif' (a piece of black cloth, the *insigne* then of a Serjeant, though originally worn commonly)—now represented by the black cap [4]—'since the Restoration' (1668), he himself 'being of the King's Council' in 1682. Gradually the title became an asset for the Crown to play with, and was granted more frequently, and naturally became part of the Chancellor's patronage, who knows what the needs of the courts are. Thus George IV, despite his Chancellor, for long refused it to Brougham, afterwards L.C., and to Denman, afterwards L.C.F., on account of their successful defence of Queen Caroline, whose A.-G. and S.-G. they had respectively been, and finally only gave Denman a 'patent of precedence.'

Nowadays any junior of good character and ten to fifteen years' standing (as a rule) can obtain the honour, provided that the volume of work will 'stand' the number.

The healthy, slow growth of the bar to adolescence, 1200–1300, was attested in and encouraged by a work [5] of William of Drogheda, written at Oxford, where his house is still shown, about 1239. He was in orders and practised

[1] 3 Blackstone, 27; Campbell, 2 Chanc. 276, 322.
[2] *Plus stationery*, both abolished by Will. IV: *Ib.* p. 322.
[3] *Autobiography*, 14th ed. Jess. App. 1887, and *Examen*, 572.
[4] The white border (originally of a white *cap*) made Webster (about 1619) frequently use 'night-cap' as a 'contemptuous nickname' for barristers (*Notes and Queries*, p. 68: Jan. 25, 1913).
[5] *Summa Aurea de Ordine Judiciorum* (Prague, 1914 ed. Wahrmund).

in the ecclesiastical courts and almost certainly in the secular, to which he has abundant references. His book might be called the Whole Duty of the *Advocatus*, for incidentally it contains a minute code of the conduct of counsel, down to hints—and very acute ones too—how he is to get his fees ; for at that time the relations of advocate and client were frankly contractual. He never had official authority, but from his day the public recognition that there is a legal profession steadily grows and his standard of duties and rights of every branch of it is more or less accepted.

In 1275 Parliament[1] regulates the profession—whence we see that, as always happens in unorganized vocations, some practitioners had been 'hoodwinking a judge who's not over-wise' or taking advantage of a party (of which early there are a good many complaints, some due to ignorance of the advocate's work) : practitioners convicted are to be disbarred. In the City by 1280 the bar is a strong 'going concern,' and a very valuable ordinance,[2] where it is first mentioned as a *chattel*, speaks of each branch of the profession (*mestier*) as distinct—but they are not *incompatible*[3] till about 1557—though it is not surprising that in early days the same man is sometimes called by the title of each and sometimes acted as such, as 'Attorney-General' shows. It is equally easy to understand how in those days of nascence the lawyer was popularly misunderstood as a meddler, a 'maintainer,' a fomenter of suits. Another rife complaint was that of betrayal of the client, sometimes because he did not understand that his representative might appear for him in one cause and against him in another, but sometimes for downright treachery.

The ethics of advocacy, however, is a wide subject. It is discussed under that title by the late Dr. S. Lowell Rogers in L.Q.R., July 1899, and Lord Macmillan, K.C. (Oxford : 1927), and by Lecky in the *Map of Life* (1899), pp. 101–12 *contra*. Incidentally the first disposes of the

[1] 1st St. of Westminster, c. 29.
[2] *Munimenta Gildhall L.*, v. 2, Pt. I. text ; Pt. II. 595 transln. (Rolls).
[3] Authorities, *Hist. of the Bar*, &c., p. 326.

nonsense about the immorality of counsel defending persons whom they 'know' to be guilty: they never do know; accused persons very rarely confess to counsel, and what he 'believes' has nothing to do with the matter (except that disbelief in his client's honesty must weaken his efforts): still less can he 'know' whether a witness whom he seeks to discredit is 'honest,' and he is not only entitled, but bound—if he is to earn his fee—to take every advantage of procedure open to him. It is for Parliament to settle the rules and for the judge to see that they are put in force. The advocate's standard of honour is that of all honourable men, and in practice these literary dilemmas seldom occur. Dr. Johnson (always cited by these critics) put the point exactly. Nevertheless it was decided in 1808 by 'the British Forum' that 'It is impossible for a Lawyer to be an Honest man' (5 Farington, March 14). 'The leading case is that of Charles Phillips, who defended Courvoisier in 1840 for murder, for which he was executed. During the trial he admitted to Phillips that he was guilty; "Then," said counsel, "of course you will plead guilty." "No, sir, I expect you to defend me to the uttermost." Thereupon Phillips consulted one of the judges on the bench (a sort of assessor: though he was not the one trying the case), who knew nothing of the confession—still it was perhaps not fair to him; he "unhesitatingly advised Phillips that he was" bound to go on with the defence "*and to use all fair arguments arising on the evidence.*" Note: "Whether Phillips exceeded these limits has been the subject of keen controversy." Trollope was probably thinking of this case when he makes the young counsel say to the old judge (in *Orley Farm*, vol. ii. ch. viii. 1862), "Would you [take the case] in my place?" "Yes, if I were fully convinced of the innocence of my client at the beginning." "But what if I were driven to change my opinion as the thing progressed?" "You must go on in such a case as a matter of course. . . ." Phillips's colleague was in the same dilemma; if both had withdrawn the defendant must be convicted. It is true that in his speech he never expressed his belief in his client's innocence, but his references to God read oddly, considering what he

knew (1 Townsend's *Modern State Trials*, 252). Such rhetorical passages are now out of date and such expressions of belief condemned (though there are famous precedents).'

In 1921 Birkenhead L.C. strongly insisted on the duty of every lawyer to cite to the court all relevant cases whether for or against him, and visited a party offending in this respect with loss of costs (1921, S.C. (H.L.) 74).[1] But on a point of law it is reasonable to argue at one time *pro* and another *con*,[2] as Eldon tried to do in 1780 when the judge declined to hear him as he defied him to answer his own argument on the point in a case—which made him—where he had contended, successfully, against his instructions to consent (Campb. *Seven Lives*, ch. c. 193).

An anthology of (dis)appreciations of the bar would be bulky but valuable: a few may represent the irregular curve of the ages. Passing Hoccleeve, Gower, Lydgate, &c., we see about 1400 the profession consolidated in Chaucer's Serjeant of the Law—the most finished picture of an advocate in English literature. He would see the Inns of Court waxing and multiplying under his eyes, and probably was an inmate of one of them and waited on by its Maunciple. In the poet's younger days the microscopic Treasury had noted a taxable order emerging, and in 1379 charged each judge 100 shillings, each serjeant and *great* apprentice of the law, 40*s*.; *other* apprentices 'who follow the law,' 20*s*.; all other apprentices *of less estate* and *attornies*, the traditional 6*s*. 8*d*.: the same of the corresponding ecclesiastical lawyers.[3] This is a fair measure

[1] Anticipated by ex-Judge Sir E. A. Parry in *Seven Lamps of Advocacy*, p. 19: he tells how Lincoln won his first case in a court by announcing that he had found no case in his favour but many against him, but that he would proceed to argue his point. It is said (*ib.*) that the late Joshua Williams thought that in principle it was no part of an advocate's duty to reveal the case against him, but this, says the judge, was at a time when pure technicalities used to win.

[2] When counsel inadvertently argued against his own 'side' and the mistake was discovered, the judge allowed him to answer himself, 'as there was none better qualified to do so' (Croake James, 192). When Sugden discovered that he had taken a brief on both sides 'without knowing it,' he adroitly said, 'for no client would he ever argue against what he knew to be a clear rule of law' (Greville, Feb. 11, 1829).

[3] 3 Rot. Parl. 58.

of their respective social positions, for we know that the government were only taxing 'the rich.' Owen Glendower began life as such an 'apprentice' at Westminster (1400). Fortescue (about 1450–60), born into Chaucer's world, shows us the Templars' colleges as a nursery of culture: much later Evelyn's brother enters one without any design of following the law. Shakespeare never speaks disrespectfully of the bar,[1] but Restoration plays do very often. Evelyn, after a scathing denunciation of the 'polite' education of his day, in the very spirit of Mr. Pleydell, hopes that with a better, 'At least there will not likely appear such swarms and legions of obstreperous lawyers as yearly emerge out of our London seminarys, *omnium doctorum in doctissimum genus* (for the most part) as Erasmus truly styles them.'[2] In Roger North's books about (1700–30) we see the development of the circuit system—he himself went three—and the bar divided by politics, as it has been ever since—ferocious in his day.[3] About 1740 Richardson makes Pamela,[4] who meets the species for the first time, say of two barristers: 'I think that they have neither of them any diffidence. But their profession, perhaps, may set them above that. . . . They would make great figures at the bar, I fancy.' Her doting husband asks her Why? 'Only because they seem prepared to think well of what they shall say *themselves*,[5] and lightly of what *other people* say or may think of *them*.' 'That, indeed, my dear,' he is pleased to say, 'is the

[1] 'Only once does he refer disparagingly to the attorney's profession when he makes E. IV's Queen (*Rich. III*, iv. 4) describe a flood of idle words as "windy attornies to their client woes"'—Sir D. P. Barton, *Links between Shakespeare and the Law* (1929), p. 83.

[2] Nov. 10, 1099, v. 4, p. 25 (ed. Wheatley).

[3] *e.g.* 'I heard it creditably reported of Serjeant Maynard that being the leading counsel in a small-fee'd cause, would give it up to the judge's mistake and not contend to set him right, that he might gain credit to mislead him in some other cause in which he was well fee'd' (*Life of Ld. Guildford* (1742), p. 45).

[4] V. iv. Let. 2 (p. 7: 1811).

[5] Cf. what Mme. Roland's father said to her (about 1770) when she said, 'My husband must be my superior.' 'What you want is an *avocat*: women are not too happy with these *gens de cabinet*: they have pride (*morgue*) and very little money.'—*Mémoires particuliers* (1929), p. 123.

necessary qualification of a public speaker, be he lawyer or what he will. . . .' So far we meet almost exclusively the well-to-do classes in litigation: indeed, it is not till the great popular movement, 1830–60, that the *bourgeois*, so to say, employ the bar very much [1] or go to it. But by 1750 it is an 'institution' and has 'evolved' two great distinguishing marks from its inchoate form: (*a*) the fee system, and (*b*) the dual system.

About 1389 a nobleman having a lawsuit invited his counsel, a judge,[2] and three others[3] to his house in Paternoster Row, London, 'and after Dinner . . . in an angry mood, threw to each of them a Piece of Gold and said: "Sirs, I want to know,"' &c. 'Whereupon Pinchbeck stood up, the rest being silent, fearing that he suspected them,' and answered. Obviously the manner—and the rate—of remuneration has changed. The arguments for and against paid advocacy were debated in the Roman Senate in A.D. 47 till a *maximum* fee was fixed, but the totally different circumstances are no guide for us.[4] The theory that the client gives his counsel a gift and does not pay him a price,[5] though a fiction, has done invaluable service to the reputation of the profession and to the profession itself.[6] Mr. Bernard Shaw's waiter makes great play of his tips and his K.C.'s takings being equally *sub rosa*, but has forgot that the latter has a vigilant middleman interposed between him and the customer. The practice,

[1] Which perhaps accounts for Pepys's remark, 'The term ended yesterday, and it seems the courts rose sooner for want of causes than it remembered to have done in the memory of man' (June 2, 1663).

[2] Dugdale, 1 *Baronage*, 578 (1675). 'The modern etiquette by which a judge, who has been counsel in a cause abstains, if possible, from taking any part in the judgment on it, seems not then [1700] to have been thought of. . . .'—Blackburn J., L.R. 10 Q.B. 40 (1874).

[3] One, Pinchbeck, perhaps the original of Chaucer's Man of Law.

[4] Except, perhaps, the remark that the bar is a fine opportunity for the *plebs*—a development very much like ours: Tac. Ann., xi. 7; cf. xiii. 5; 54 A.D.

[5] 'A compliment,' said an eminent serjeant in 1792 with the assent of Ld. Kenyon, who called barristers' and physicians' fees 'presents' (1 Peake N.S. 166), when it appeared that the barrister had not been negligent, as alleged, but had been paid for work at an earlier stage and not at the trial.

[6] So Coleridge, *Table Talk*, Jan. 2, 1833.

indeed, has always been commercial,[1] but the practitioners in every age and climate have anticipated and obeyed Isaiah's bidding, 'plead for the widow.' By 1615 counsel was the only person in this country who could not sue for a debt, and the countervailing theory that he cannot be sued for doing his work badly was naturally invented (probably by him).

The present rule is that the junior is entitled to two-thirds of his leader's *brief* fee;[2] if there is no leader the only trade union rule is a guinea minimum. It is by no means the case that more than one counsel is a modern luxury; when Evelyn's 'great cause' was heard by Guildford L.C. (February 12, 1685–86) he had 'six eminent lawyers and my antagonist three, whereof one was the smooth-tongue solicitor [Finch],' and at the rehearing (March 25, 1687) he had 'seven of the most learned Council' and his adversary five, among whom were the A.-G. and the late S.-G. As it is seldom possible to know when a case will begin, no counsel with any practice can be certain that he will not be engaged elsewhere at the moment; hence the advantage of more than one or of an overriding contract with one.

In the prevailing epidemic of unemployment no vocation can claim pride of place, but the bar perhaps has enjoyed it longer than any other. In 1810 Campbell wrote: 'My marrying days will be over before I am in a position to marry with advantage and propriety.'[3] In 1852 we have the view[4] of a youth of twenty-two, who matured into the great Lord Salisbury, Prime Minister: 'The bar . . . is more destructive of health than any other profession, and among the hundreds who yearly flock into it, I am about as likely to attain eminence in it as I am to get into Parliament. Moreover, it requires no prophetic eye to see that even now it is passing away. People have tasted the sweets of cheap law in the County

[1] A lady complained in 1331 that she had paid her attorney not only money but butter and cheese: Bolland, 30 Seld. Soc. xlvi., who mentions an old riddle, 'Why is a serjeant like Balaam's ass? Because he won't speak till he has seen an angel' (a coin): *Manual*, 15.

[2] The two-thirds rule has now been relaxed. See Preface.

[3] 1 *Life*, 255, p. 327. [4] *Life*, by Lady G. Cecil (1921), v. 1, c. 1.

Courts [1846], and they will not long spare Chancery or Westminster Hall. Before I left [England] I used to hear at the Temple nothing but instances of decline of practice : how it was now hopeless to those who had it not and was daily gliding away from those who had it. It was common enough to hear of men of the first eminence barely paying their expenses. Further, a clergyman or a statesman or a doctor are, as such, useful men. Their professions do good. But the barrister is at best a tolerated evil. He derives his living from the fact that the law is unintelligible, and, in proportion as modern legislation succeeds in making it acceptable and simple, he will disappear. Whatever good arises from the administration of the law is, *pro tanto*, hindered by the necessary intervention of paid counsel between the suitor and his remedy.

'The bar, therefore, not only does no good, but it is a public nuisance—though, perhaps, for the present, inevitable. I conclude, therefore, that for me at the present day legal eminence is not attainable, and, if it were, would scarcely be worth having. I am speaking solely in reference to usefulness. It may, perhaps will, end in my doing nothing in particular and trying to eke out my means by writing for newspapers. But even that seems to me preferable to the bar.' Lord Robert Cecil does not seem to have known that the normal lawyer prevents as much litigation as he promotes : the art of surgery is saving not severing limbs.

The latest and most competent observer is not more encouraging to the present man who is bearing the blue bag of a briefless life. Mr. Spence (p. 155) exclaims: 'And the barrister ! heaven help him if he has not a private income or some collateral paid work. I do not believe that the average barrister, who is trying hard to get work and has ordinary competence, earns as much at the age of thirty as the wages of a bricklayer.'

Verily, it has been well said, a successful barrister must be good at something. At any rate the training for that grade, owing to its versatility of interests, fits the initiated for most modern occupations—for being a sort of panathlete of the working world.

The Sex Disqualification (Removal) Act of 1919 was an epoch in many spheres of work. A woman at the bar, though an innovation in this country, is by no means new in history. Valerius Maximus (viii. 3), about A.D. 50, praises two out of three in the Roman courts, but highly disapproved of the behaviour of another, Carfania, and says her name became proverbial (like Jezebel's). Thus she achieved the honour of immortality in the Digest[1] —for through her, her sex lost audience (except when party to the same). In 1664 when the daughter of a prisoner intervened, Jeffreys said : ' We do not use to have women plead in Court of King's Bench. Pray be at quiet, mistress.' When later on she cursed him publicly, he had her removed, but soon released her ' without fees.' [2] In 1737 Lee C.J. was the chief forensic feminist, but the modern movement began in 1900 in Scotland. In 1850 Campbell [3] refused to let a wife appear for her husband in custody *in an action*, mentioning that Hale had heard Bunyan's wife because his liberty was at stake.

The experiment is too recent for comment, but—*Si femme le veut, Dieu le veut.*

III. Attornies

The attorney [4] has a different origin : he was at first a deputy, almost a mere messenger, any one could be an attorney, women often were.[5] Hence he always was and is in direct contact with the client—now the great differentiation from counsel : and has for centuries been specially concerned with getting the writ, ' the first shot.' As has been pointed out, when the profession was emerging people

[1] III. i. 5 : ' Carfania improbissima . . . inverecunde postulans et magistratum inquietans '—The great Spanish Code *reproduces* the story, disqualifying ' because it is not decent for females to do men's work in court.'

[2] 10 St. Tr. 110–4.

[3] 15 Q.B. 988 ; 1 *Lives of C.JJ.* 559.

[4] The word comes through Fr. *atorner* from *adornare*=to ' equip,' ' instruct ' ; the English word first appears in 1330 ; ' solicitor ' in 1412–20 (N.E.D.).

[5] As the first known was : 1162. They may be solicitors.

did not discriminate between its different activities, which were, in fact, often combined in the same man, but confounded them all in the universal dislike of the meddler and breedbate: to 'solicit' had its original Latin suggestion of perturbance.[1] The great City Ordinance of 1280 clearly distinguishes between the two branches and, if not then, soon after, each is generally regarded as a separate 'whole-time job.' In 1455 a famous petition—granted by an Act—went up from East Anglia, that the attornies in that area (uncertain) should be limited in number: there were 80 (or 24 ?—20 × 4 or 20 + 4 ?) already, 'the most parte of theym not havyng any oyer lyving': [2] it does not mince its words about the failings of these gentlemen. W. Hudson, called in 1605, wrote [3] before 1635: 'In our age there are stepped up a new sort of people called solicitors [4] unknown to the records of the law, who, like the grasshoppers of Egypt, devour the whole land . . . express maintainers—common solicitors of causes and set up a new profession, not being allowed . . . at least in this court [St. Ch.] . . . devourers of men's estates by contentions,' &c. In 1649 Lilburne, accused [5] and acquitted (by the 'Gentlemen of the Grand Inquest') of treason against the Commonwealth, says, 'If you will not let me have counsel, let my solicitor speak matter of law for me.' Evelyn says (Feb. 4, 1699–1700), 'Parliament voted that the exorbitant number of attornies be lessen'd (now indeede swarming and evidently causing law-suits and disturbance, eating out the estates of people, provoking them to go to law).'

Though no precise date can be given for the now all but universal rule that counsel must be 'instructed,' it would certainly appear [6] that it was unknown before 1700

[1] About 1820 some one said to Ld. Tenterden C.J., 'I am the plaintiff's solicitor.' 'Sir,' he replied, 'we know nothing of solicitors here; we know the respectable rank of attorney.'

[2] 5 Rot. Parl. 326.

[3] *Star Chamber*, 2 *Collectanea Jurid.* (1792), 94.

[4] The title used first in a statute in 1605 (which reveals a bad state of things.

[5] 4 St. Tr. 1404: *ib.* 1379 for the most extraordinary scene in an English court.

[6] *Hist. of the Bar, &c.* (1929), 326.

and by no means rigid in 1730. Thus Roger North [1] writes:

'I had at the beginning of my practice some offers or approaches of this kind. I have had it said to me by a client, alone by himself, that he wanted some one counsel that would take the conduct of his whole cause. He was weary of the solicitor, and so many as he had, who were so full that they could not undertake the direction of his and in order to it possess themselves with his entire matter and then what would I advise? Such beginnings as these I have always scented and rejected. So that in a short time my practice grew clear from all such smut, and if less profitable yet more easy and to my content.'

By 1850 the practice of counsel acting on the instructions of a solicitor (and not of the lay client) was so inveterate (and almost so in 'crime') that though the Queen's Bench (15 Q.B. 171) was bound to hold that there was no such *rule*, yet the uniform usage of more than a century was so paramountly convenient that they hoped that it would always prevail—and it has prevailed.

The quotations, above and below, are miniature epitomes of their periods: the following, for the nineteenth century, is by Sir George Stephen, a solicitor about 1820 and a barrister in 1849—ten years after he had published anonymously *An Attorney in Search of a Practice*—and a good scholar. 'It is,' he says (p. 148), 'rightly assumed that' the solicitor 'must possess a certain share of legal knowledge; though even here . . . less will serve his turn than is commonly supposed; a liberal education *ultra* the law is mostly, but very erroneously, regarded as a mere accomplishment. I am ashamed to say of my brethren that I know too many among them the style of whose composition would disgrace a chambermaid and the tone of whose manner would exclude them from the butler's pantry. . . . Your "sharp, clever fellows" make your worst attornies' and 'rarely gain admission to the higher classes of respectable clients. . . .' If 'in an affair of delicacy and importance . . . entangled perhaps, with much of personal and private feeling' he wanted a solicitor, he would select 'a man distinguished by calm energy, a

[1] Roger North's *Autobiog.*, c. xi. pp. 140–1: 1691: ed. 1887.

clear head, and sound common sense; if he were' also 'gifted with a cheerful disposition and marked, not by fastidious delicacy of mind, but by that enlarged honesty which is usually intended by "honourable principle"' then he thought 'he possessed the finest qualities for a useful attorney'—and he knew the whole gamut of Dickens's lawyers, and his fascinating ch. xiv. about them is a good picture of the times: 'till within the last 40 or 50 years an attorney's title to be ranked even among the middle classes of society was very equivocal. Mr. Latitat was the rogue of every farce[1]—the knave of every novel. . . . Legal business itself was at this period of a very inferior stamp,' as a rule. '. . . Law, too, like everything else, was comparatively cheap, and even the bar, though always to a certain extent the resource of pauper-aristocracy,[2] was scarcely regarded in any other light than a refuge for the destitute, suited to the youngest sons of younger brothers, who had no turn for the army and no character for the Church.' But he explains, of late 'patrician families' have sent scions into business which, with other contributories, has elevated the profession socially, and 'now' there are 'hundreds . . . who are not less gentlemen by birth, by feeling, and by manners than we are by Act of Parliament.'

On solicitors' costs, Mr. Spence says: 'The whole system ought to be overhauled . . . it is ridiculously illogical; they are permitted to charge for things not done by them

[1] Cf. Gilbert's 'All Baronets are Wicked.' In 1819 *Amicus Curiae* (132) John Payne Collier wrote, 'I once saw Sir V. Gibbs [A.-G. and C.J.] inflict upon an Attorney a very sound box on the ear in open Court: the man shewed however that it was in some degree merited by his patient submission under it.' Cf. 'I have sometimes witnessed a great deal of overbearing insolence from barristers of every standing but never except from men naturally coarse and . . . mere adventurers, though often successful ones, in their profession . . . [they] are exceptions': Sir G. Stephen, c. xv.

The Times of July 14, 1931, in a notice of the late Mr. Chaytor, K.C., says that he was put forward to protest to a certain judge who was 'overbearing' in his treatment of solicitors and their clerks and that he performed this task successfully and without prejudice to his relations with the judge.

[2] An anticipation of John Bright's 'the foreign policy of this country for the last 170 years has been a system of gigantic outdoor relief for the English aristocracy' (Jan. 18, 1865).

as a compensation for insufficient remuneration for work that they do.' His panacea for the crying evil is to cut down the amount of work to be done 'without reducing the charges for the work actually done': *e.g.* 'masses of useless costly particulars and interrogatories,' 'needless' summonses could be prohibited; and often in huge bundles of correspondence, only 'a few passages' are wanted.

Since the great regulative Act of 1843 (c. 73) 'attornies' and 'solicitors' are synonymous. In course of time they have obtained audience in a great number of courts. Their admission and their discipline is controlled by the very powerful Law Society, which ultimately derives from a Society of 'Gentlemen Practisers in the Courts of Law and Equity,' known in 1739. Since 1919 a Committee of that Society has had the right of striking off the rolls, 'judicially,' any member on them. There is a movement towards making membership of that Society compulsory on solicitors, *i.e.* on the third or so who are not at present members.

From time to time the fusion of the two branches is proposed, generally on the ground of cheapness. It is certainly true that in small litigation, *i.e.* where there is very little for any one to do except at the hearing, it is cheaper to employ one advocate than two, and in the great majority of the solicitors' courts only one solicitor is employed. In English-speaking 'fusion' countries there is very often a partnership between lawyers who, between them, possess (at least) the four great requisites of court practice—ability to speak in public, business capacity for organization, general knowledge of legal principles, and special knowledge of (1) the law of the case; (2) the procedure. These will seldom be found in one man: hence, if the case is 'heavy' enough there will be the same distributions of parts as at present and little economy, except that the two or more specialists may be interviewed under the same roof. Of course, any individual lawyer may have a genius for law—practitioners in 'small' cases at county courts often have—but 'fusion' would not make it easier for the client to find them. In litigation involving grave pecuniary interests the dual system is inevitable.

IV. Learning

Though there is not a cut-and-dried scheme for 'call' or 'admission' till modern times, it is a mistake to suppose that there was no system of examination in the Middle Ages. Advocates in the ecclesiastical courts were certainly not admitted without examination.[1] In 1292 there is a royal rescript[2] bidding the judges select 'apprentices' by counties, from the best *scholars*: there is then no distinction between candidates, and we have no details of the 'subjects' nor any instance of such an examination.[3] In practice, no doubt, the serjeants, as a small, wieldy body, originally 'locals' at Westminster, would certify the judges of some or of all of the pupils who centred round each—and this for a long time was the essence of the system. They attended him in court, took notes of his and his opponent's arguments, and occasionally got in a word or two 'on their own': when the Inns began to take them in, there would be a good deal of 'shop' out of court and they would be still more familiar with the writ from the Chancery, just round the corner. It would seem that they were gradually introduced into practice by their 'masters'; they certainly remained 'apprentices' till they became serjeants—up to which grade there was no formality: the judges might recognize them as 'utter,' not inner, barristers. Yet in 1627 it was held that a 'Barrister' may 'not give advice, albeit he had Letters Patent to enable him as fully as if he had been called to the Bar.' Yet in 1594 a 'puny utter barrister' argued a case in court. Thus the mere grade of 'barrister' did not give audience: as Waterhous, about 1663, says: 'When they were called to the Bar (which they never or rarely importun'd) they did forbear practice till they had ruminated well,' &c. We cannot get anything so definite

[1] William of Drogheda, *Summa*, c. 46 (about 1240).

[2] 1 *Rot. Parl.* 84.

[3] When Nicholas Breakspear wanted admission to the Abbey of St. Albans, 1130–40, the Abbot examined him and found him 'insufficiens,' and told him to go back to school: he did, and became Adrian IV. Cf. Eldon at Oxford in 1770: *Life*, Camp. c. 191.

as 'call.' But we do know that as early as Edward I's or Edward II's reign there was a box or corner [1] in the 'Common Bench' set apart for learners—whom, by the way, the early judges often edify *en passant*—and in 1758 Ld. Mansfield desired counsel 'to state the case for the sake of the students.' [2] It was no doubt from the same coign of vantage that the immortal case [3] of *Bardwell* v. *Pickwick* was heard and seen by the defendant's friends. Thus 'there was really no legal education at the Inns of Court in 1800': [4] becoming a barrister was joining a club by almost informal election, where everybody knew everybody else. On November 7, 1809, Mary Lamb writes to Sarah Hazlitt: [5] 'Yesterday Martin Burney was to be examined by Lord Eldon, previous to his being admitted as an Attorney,' but Charles in a letter of May 24, 1830 (*ib.* v. 7, p. 855), knew that he was a barrister—as indeed the Law Lists of 1829, &c., show.

By 1852 the need for a practical system was manifest and the four Inns appointed an extraordinarily strong Committee,[6] of which Bethell S.-G., was chairman. It founded the Council of Legal Education, and appointed Readers and Lecturers: no student was to be called unless, *either* he had attended the lectures of two Readers for a year, *or* passed an examination. The Press openly ridiculed voluntary examination, and it was soon made compulsory. It does not appear that the products of this regimen are more efficient than their uncertified predecessors.

The solicitors seem to have had much the same easy-going haphazard method of admission as their brethren-in-law, until about 1833, when the Law Society instituted courses of lectures, which were inevitably followed by examinations in 1837. Both systems have developed greatly in the last century and probably the tests of this

[1] 22 Seld. Soc. xli.

[2] 1 Burr. 571.

[3] There actually was a suit against P. about his Bath coach in 1827; one of the judges was Gaselee (=Stareleigh): 4 Bingham, 218.

[4] Blake Odgers, *A Century of Reform*, 32.

[5] Lucas's *Lamb*, v. 6, p. 406.

[6] *Law Times*, May 22, 1852. A copy of the historic *Report* of the Committee is in the Middle Temple Library.

Society are now severer than those of the other 'branch.' Both Faculties, wisely, indeed of necessity, insist on some proof of culture as well as of knowledge, before stamping their hall-mark.

76. THE FUTURE

Reformers have been quoted, but there are prophets too. The late Lord Birkenhead puts into the pen of an essayist[1] writing a hundred years hence—about the twenty-second century: 'Forensic eloquence will cease in courts of law. Prevarication, whether by prisoner, witness or advocate will be instantly detected. . . . What will it avail a murderer, if a Demosthenes demand his acquittal from a Jury which has been scientifically convinced of his guilt on psychological grounds? Personally, therefore . . . [says an imaginary undergraduate], I have abandoned an ambition to enter politics by way of the Bar.' It is a confirmation of the advance of subtlety that many detective stories to-day find the best clues to crimes not in physical objects but in painstaking analysis of the characters of the suspected.

Dean Inge, too, indulged in a Utopia of 'England in 2931' (*Daily Telegraph*, May 30, 1931). It sheltered 'no lawyers. . . . Crime is very rare and never punished by imprisonment. There are reformatories for first offenders, and if a delinquent is pronounced incorrigibly anti-social he is privately and painlessly extinguished in a lethal chamber without any publicity or humiliation to his family.'

But what about the immediate future? Perhaps a few little repairs will be made to the huge machine, but to simplify it is a sociological problem. Honest disputes arise from misunderstandings; difficulties must occur, too, so long as one set of men compose the laws and others interpret them. Uncertainty about past facts is inevitable. Ugly contentions are due directly to greed, and much vice or crime to passion as well. There is no hope for the complete simplification of English law.

[1] *The World in 2030 A.D.*, p. 196.

APPENDIX

MEMORANDUM AS TO THE NEW RULES OF PROCEDURE [1]

FOR some years past, protests have been raised against the present procedure for bringing litigation before the High Court of Justice, both in the matter of the preparation of the case for trial and in the mode of trial when the issues have been determined. Those protests have urged that the stages before trial are burdensome upon the suitor, and that the cost of these preliminaries as well as of the actual trial in Court are so high that many persons are compelled to forgo their right to have their cases tried in the Law Courts. They have perforce to adopt some method of deciding them by another more summary and speedy tribunal.

They have confidence in the Courts and the Judges, and they are anxious to bring their suits before them; but they complain that the approach to them is too prolonged and expensive.

These protests have in the last two years been translated into definite suggestions by Chambers of Commerce and other bodies, with an urgent request to the Lord Chancellor that he would take steps to overcome the difficulties which attend a decision in a Court of Law.

Exception is taken to the present system as set out in the following items:

(1) The present procedure requires too meticulous precision in 'Particulars,' discovery and interchange of documents.

(2) Prolonged delay while the above preliminaries are being arranged.

(3) The uncertainty of trials by Jury, involving not rarely a new trial because the Jury have failed to comply

[1] Official memorandum accompanying the issue of the Rules of the Supreme Court (New Procedure), 1932. S.R. & O. 1932. No. 252.

with the Judges direction in Law, or it is found afterwards that a misdirection has been given to them.

(4) Multiplicity of appeals.

(5) Delay and uncertainty in reaching the day for trial.

(6) Excessive costs involved in the above.

The Lord Chancellor has given full weight and consideration to these views and called upon the Rule Committee to assist him in finding a solution to meet them.

It may be prefaced that from time to time changes of procedure in the Courts are necessitated by changes in the practice of business men.

Thus the Common Law Procedure Acts of 1852, 1854, 1860 were passed in response to cogent assertions that the proceedings in the Courts at those dates were unnecessarily tedious and costly.

Twenty years later the Judicature Acts recast the personnel and procedure of the Courts ; and in 1883 new Rules were framed from which the Annual Practice and the Yearly Practice with their pages, careful and accurate but innumerable, have been brought into being.

It must be agreed that in recent years the easy production of letters and memoranda, due to the mechanical processes now available, has multiplied the documents involved in a comparatively simple business transaction ; and to prepare all these for the Judge and Counsel and to produce them in Court involves an expenditure of time and money which hampers the easy progress of a suit.

It is not surprising, therefore, that at the present day criticisms and demands have arisen which are akin to those above referred to.

With the purpose of overcoming these difficulties, the Rule Committee, after deliberations extending over several months, have formulated rules, framed on the analogy of the Commercial Court, under the heading—New Procedure Rules.

The first step is to determine what case is suitable for the new and abridged procedure. This will be secured under Rule 3, by the Solicitor acting for the Plaintiff who issues the writ, indorsing on the writ a certificate in the simple words : ' Fit for the New Procedure '—with his signature. It is not easy to make an exhaustive definition of such cases ; but those who know what the issues will be can decide whether the litigation is likely to prove complex or simple and are

entrusted with this responsibility. Solicitors, who are officers of the Court, and upon whom the Court relies as intermediaries between their clients and the Judicial authorities, have proved their capacity of judgment for such a task in their handling of the Poor Persons Rules, and their assistance in this initial step will be welcomed to ensure that the new list is not filled with cases which prove unwieldy for direct and speedy methods. Should a mistake be made on this point at the outset, the Judge can correct it and transfer the case back to the ordinary list under Rule 8 (2) (*d*).

Certain cases are definitely excluded from the New Procedure—actions for libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage and actions where fraud is alleged by the Plaintiff.

With his writ or within seven days of the Defendant's entry of appearance, the Plaintiff is to deliver a Statement of Claim 'with all proper particulars,' and within seven days of the delivery of this Statement of Claim, the Defendant, without asking for further particulars, is to deliver his Defence with all proper particulars.

In a suitable case, the above steps can be complied with without much difficulty, and the parties will have indicated the issues, and the points on which they rely.

Then comes the important step in the procedure. The Plaintiff is to take out a summons for directions within seven days of the delivery of the Defence or of the Reply—if any; and that summons is as far as possible to be dealt with by the Judge who will try the case. Provision is made for the Judge to delegate to a master these summonses, if for any reason he himself finds it impossible to hear them. But it will be seen that Rule 13 provides that the Master acts in effect for the Judge, and if there is an appeal, that appeal is to the Judge who is in charge of the list, and final without his specia leave.

Upon the hearing of the summons, directions may be given by the Judge as to any further particulars required owing to a default to give them in the first instance, and as to discovery and inspection of documents, with a control in his hand as to the costs involved on this first head, and as to discovery and inspection of documents the test is 'as he may think necessary or desirable having regard to the issues raised.'

As he will try the case—Rule 9 (2)—the parties may rely upon his decision not causing prejudice to either side, and

upon his discretion to remedy any unforeseen omission that is revealed at the trial.

Power is given to set down the case for trial at assizes ; to transfer to a County Court ; to limit the number of expert witnesses ; and providing for proof by an affidavit within the limits that such a course can be adopted with safety ; and to refer a question involving expert knowledge to a special referee for inquiry and report.

Then follow two important provisions :

The first is that the Judge may ' order the action or any issue therein to be tried with or without a jury as in his discretion he may think fit.' This restores a discretion which was in operation during the war and no doubt will be carefully exercised. Not infrequently a jury is asked for by one of the parties ; and when the case is actually opened in Court, it is found quite unsuited to their consideration and they are discharged.

Trial before a jury requires longer time than before a Judge alone. Speeches of Counsel, the evidence, the summing-up, must be elaborated to make plain what can be expressed in shorter terms to a Judge equipped by his experience to appreciate the salient points of a case, and there are the uncertainties and mischances possible as stated above from the intervention of a jury.

If trials are to be less costly they must be shorter.

The second is that he may record ' the consent of the parties either wholly excluding their right of appeal, or limiting it to the Court of Appeal, or limiting it to questions of law only.' It will be observed that such a limitation depends entirely upon the consent of the Parties, as indeed it must, unless legislation were passed for the purpose. Yet this power will enable the Judge to present the possibility of reaching finality to the parties, and if they do not reach an agreement on the point, at least they will have no justification for expressing surprise or discontent if their case passes upwards from Court to Court.

By Rule 9 the Judge may fix a day for the trial of the action, and ' the action shall as far as possible be tried on that day,' and ' by the Judge who heard the summons for directions.'

These two desiderata are not easy of attainment. Some cases are unexpectedly long and the Judge is detained. Some cases prove shorter than was anticipated, and the Judge is without work till the date for the trial of the next case arrives.

There are the changes and chances of this world. Illness may overtake Judge, Counsel, the Parties or their Witnesses.

An effort is to be made to meet these uncertainties by detailing two Judges, who will sit in London continuously for a substantial span, to take charge of the new list. If one is detained, the other may be free, and thus it may be possible to adhere to the dates fixed for the suitors. Even if it is not possible that the same Judge who heard the summons for directions shall try the case, it will probably be tried by his colleague in charge of the list.

A special Rule—2—provides means for a Defendant in an ordinary action to claim that it shall be transferred to the new procedure list, and Rule 1 (11) fits his application into the system already described.

Provision is made for the New Procedure Rules to apply to actions commenced in the District Registries of Liverpool and Manchester, and the District Registrar in such cases is substituted for the Judge. With the Registrar's leave there can be an appeal to the Judge in charge of the new list, but decision of the latter is final without his leave to go further.

These new rules are not to shorten the powers that a Judge at present holds under the existing rules—they are in addition —not a subtraction—and provision is made to fit them into the existing system where it is necessary to do so. For instance, by Rule 10, where an action is commenced as a new procedure action and subsequently fraud is alleged, the party against whom the charge is made, if he so desires, can require the action to be transferred to the ordinary list; and by Rule 12 the new procedure is brought into alignment with Order XIV.

Above all, the powers of the Judge taking the list are made discretionary, and there is not to be an appeal from his decision without his leave. This provision will make him master of the procedure, and it is hoped preserve the Court of Appeal from constant applications and appeals on matters which are not vital to the issues that the parties desire to have determined.

It will prevent the unhappy result that followed from the Rules of 1883, when a Divisional Court was constantly engaged in resolving problems that those rules presented without any corresponding advantages to the suitors.

When those Rules of 1883 were framed, Mr. Justice Field—afterwards Lord Field—sat in Judges Chambers at the request

of Lord Selborne to initiate the new procedure, and it was the impotence to prevent appeals that destroyed the value of that Judge's great experience, and led to the passing of (Lord) Finlay's Act in 1894.

That Statute begins with the significant words, 'No appeal shall lie,' and the cases to which that prohibition applies, and the exceptions from it, follow. The opening words are in themselves a commentary upon the conditions existing at the time, and reveal an aspiration for the attainment of finality.

The present attempt is one that offers great possibilities to suitors where there exists an effort to reach a conclusion of disputes at a reasonable expenditure of time and money. No system can appeal successfully to those who are hostile to it.

Where, however, there is a desire, such as the Chambers of Commerce assert does exist, to approach the Courts at less cost than is involved in many complex actions of to-day and with well-founded hope for an early and final decision, the New Procedure Rules may be offered with some confidence to men of goodwill.

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