

THE HAMLYN LECTURES

SEVENTH SERIES

THE PROOF OF GUILT

A Study of the English Criminal Trial

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THE PROOF OF GUILT

A Study of the English Criminal Trial

BY

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CHAPTER I

THE EVOLUTION OF THE ENGLISH TRIAL

INTRODUCTION

WE have all found that when acting as host or guide to a visitor from abroad we have learned many things about our own country and its institutions from the stranger's surprise. His questions and astonishment throw a new light on what we have taken for granted. Some of us have had this experience when trying to explain the English criminal trial to foreign lawyers. Six features of our practice stand out to them as matter for inquiry and comment. They are: the position of the judge as umpire; the defendant's freedom from being questioned; the mode of examining witnesses by question and answer; certain rules of the law of evidence; trial by jury, and for lesser offences trial by lay magistrates. It is true to say that in all these respects the law of England, and the systems derived from it, possess a certain singularity. In this book I shall say something of the history and evolution of each point, canvass opinion upon the way they operate today, and try to decide whether they promote the conviction of the guilty and the acquittal of the innocent, and so justify the esteem in which the British system of trial is quite generally held.

On the last matter, one general observation may fittingly be made at the outset. It is true that the

administration of criminal justice in England stands high in the opinion not only of Englishmen but of foreign observers. We in England go so far as to think, with a natural pride, that it is the best in the world, and there are certainly some good grounds for this complacency, even though our studies of foreign systems have not gone far beyond the United States, France, and some of the countries that owe their code of criminal procedure to the French one. Having breathed this proper reverence for our system, I may perhaps be allowed to add that it is not perfect, and that we can profitably copy from other countries on a few points, or even invent improvements of our own. In the following pages I shall be much concerned to inquire whether the particular rule or institution is the best conceivable.

It is also worth pointing out that when countries outside the common law world have failed to adopt our own practice, this is sometimes the result of conscious rejection and not of ignorance or misunderstanding. English criminal procedure has been anxiously and for the most part admiringly studied by Continental observers for upwards of two hundred years, to see if it could yield any suggestions capable of being adopted in their own countries. Our requirement of oral hearing in open court, and our rule that an accused person cannot be punished for not answering questions, were taken over by the French *Code d'Instruction Criminelle* in 1808 and have in this way passed into the jurisprudence of the Continent as a whole. Another of our institutions, the jury system, was widely copied at first but has been generally

abandoned. On the other hand Continental lawyers have steadfastly refused to adopt our rules of evidence and the mode of examining witnesses that goes with them, and they have also rejected our conception of the proper duties of the judge, and the principle that no questions can be directed at the accused without his consent. Are these matters mere dross, or is there some value in them that our foreign friends have missed?

For reasons of space the discussion is confined to the stated aspects of the criminal trial itself. I do not deal at all (except once on a historical point) with pre-trial process. There are, in fact, many admirable rules of criminal procedure upon which I shall have nothing to say, but which would have to be emphasised if my object were to give a proper picture of the way a man is tried: an example is the rule requiring the prosecution to disclose the whole of their evidence to the accused before he is tried on indictment, which gives him complete protection against being taken by surprise. (There is no such protection in summary trial.) Also, it must be remembered that rules and institutions are of far less importance than the mode and spirit in which they are administered. Scots criminal procedure is very different from English, yet there is as much satisfaction in Scotland with the conduct of prosecutions as there is in England. This is because both countries observe the basic decencies. Conversely the United States has inherited the broad principles of common law procedure, but in that country there is the sharpest criticism of its working, which is not entirely to be explained by differences of

legal detail. Professor Pendleton Howard, an American visitor to this country, who wrote the most penetrating and most adulatory study of our criminal justice, found that its success was largely due to what may be shortly described as good administration—not only the aloofness, impartiality and efficiency of the judge, but the detachment and fairness of prosecuting counsel, the restraint of defending counsel, and the care taken by the police to preserve good public relations, which itself involves respect for the rights of suspected persons. To give a single illustration of this point of view, Professor Howard, writing for an American public, described “the tactful and persuasive manner in which the English judge assists the jury in arriving at a proper verdict,” and added:

“If English juries were forced to listen to some of the judicial scolds, blatant bullies and third-rate politicians who preside over criminal trials in many jurisdictions in the United States (especially in the larger centres of population where judicial nominations are frequently controlled by corrupt political machines) it is altogether possible that they would behave very much as do many of their contemporaries on this side of the water.”¹

JURY TRIAL BEFORE THE NINETEENTH CENTURY

Until one dips into legal history it is hard to realise how recent is our present notion of justice to the accused person and a fair trial. The trial jury in

¹ Pendleton Howard, *Criminal Justice in England* (New York 1931) 380.

criminal cases dates from the thirteenth century, and it was at first biased against the defendant by the very way in which the proceedings started: the accusation had been made by the grand jury, or jury of presentment, and these same jurors formed the jury of trial. During the fourteenth century the practice grew up of adding other jurors to bring some fresh opinions into the jury of trial, and in 1352 a statute allowed the accused to challenge any of the indicting jury who were put on the jury of deliverance. This severed the two juries, and removed from the trial jury the members who might be obviously prejudiced; but it took another five centuries to remedy other defects in the system of trial, all of which operated heavily against the accused.

At first the jury were judges and witnesses together, since they acted on their own supposed knowledge, fortified by village gossip.² It soon came to be found that this knowledge was often defective, and to make sure that the jury realised the weight of the evidence witnesses were allowed to be called for the Crown; but no witnesses were allowed for the defence in charges of felony until the seventeenth century. The report of Throckmorton's case in 1554 gives us the shockingly unjudicial remark of Southwell, one of the commissioners appointed to try Throckmorton for treason, when the defendant asked a friend whom he perceived present in court to contradict the evidence for the Crown: "Go your ways,

² It was recognised from earliest times that the jury might go for information to "sources entitled to credit." See Glanvil c. 17, speaking of the Grand Assize.

Fitzwilliams, the court hath nothing to do with you. Peradventure you would not be so ready in a good cause."³ Even if the defendant had been allowed to gather witnesses he would hardly have had an opportunity to do so, because in a case of any importance he was kept in close confinement until his trial. After 1640 persons charged with felony, that is to say the graver class of crimes, were in practice allowed to call witnesses; but the admission was so grudging that until the close of the century the defence witnesses were not generally permitted to give their evidence the added credibility of the oath, seemingly on the theory that such witnesses, if they contradicted the witnesses for the prosecution, were probably lying. There were no rules of evidence, and the early State Trials show men being condemned on the written accusations of witnesses with whom they were not confronted.

Not only hearsay evidence but evidence of the accused's bad character was freely admitted to prove his guilt, and the witnesses against him were frequently perjured—as was sometimes shown by later official investigations, which however came too late to save the wretched defendant from his fate. The evidence of accomplices, taken after they had been tortured in prison, or while they were under postponed sentence of death, and so subject to the greatest temptation to say whatever might be required of them, whether true

³ 1 St. Tr. 869 at 885. This is the first full report of a criminal trial that has come down to us, and deserves to be read at large.

or not, was admitted without reservation or caution of any kind.

In charges of felony the defendant was not allowed to have counsel to cross-examine witnesses—at first not even for the purpose of arguing points of law. Many defendants had no legal advice, even when problems of great difficulty and importance were in issue. A defendant might be expected to cope unaided with no fewer than four eminent counsel for the Crown, and this without law-books or notes, and without advance notice of the evidence against him. The scandalous proceedings in Throckmorton's case, which were certainly not unique, may again be taken as an illustration. Throckmorton, defending himself with great ability although he was not a lawyer, raised a question of law, and asked the judges to refer to certain statutes, which he named. He was told that there should be no books brought at his desire; the judges knew the law sufficiently without books. Not to be rebuffed, Throckmorton recited the statutes from memory, as well as several precedents that he had heard mentioned in the course of parliamentary debate. Counsel for the Crown replied with the grumble: "If I had thought you had been so well furnished with Book Cases, I would have been better provided for you." Throckmorton, with his retentive memory and quick wit, was one of the few defendants of this period to turn the issue of a charge of treason in his own favour; and his jury were made to suffer heavily for acquitting him. The intemperate conduct of counsel for the Crown, which runs through the early State Trials, reached its height in the

appalling vituperation poured out by Coke in his prosecution of Sir Walter Raleigh.⁴

Shortly after 1760 the courts began to allow defending counsel to cross-examine witnesses even in capital cases (he had already been allowed to argue points of law); even then he could not address the jury. A full right to have counsel was eventually given to accused persons by statute in 1836. This overdue measure was strongly opposed at the time by no fewer than twelve out of the fifteen judges, one of them (Mr. Justice Park) threatening resignation if it were passed into law; the threat, however, was not carried out.⁵ At the present day we take the right to have counsel for granted. Yet if we try to look at legal procedure with a perfectly fresh mind, it may appear a rather wonderful thing, that a person charged with an offence against the State, perhaps one of the utmost gravity and danger, may be defended by a member of an honoured profession, whose duty is conceived as being almost solely to his client, and who is allowed to urge every point of fact and law, however technical, that may secure his acquittal. The wonder disappears when we realise that trial without defenders has been tried and found intolerable.

The crying abuses of the old common law, as we now regard them, were actively defended by apologists. Chief Justice Coke said that "the Jesuits have much slandered our common law in the case of trials of offenders for their lives," picking particularly on the denial of witnesses and counsel; Coke did not

⁴ (1603) 2 St.Tr. 7.

⁵ *A Century of Law Reform* (London 1901) 50.

contradict the facts of the charge, but said merely that the practice did not prejudice the accused, because "first, the testimonies and proofs of the offence ought to be so clear and manifest, as there can be no defence of it; secondly, the court ought to be instead of counsel for the prisoner."⁶ It is perhaps needless to remark that these arguments are pure humbug. The reader, with Throckmorton's struggle for life fresh in his mind, will need no further comment on the second of Coke's points: so far from the Tudor and Stuart judges volunteering advice to the accused, they frequently refused to give him legal assistance upon his direct appeal. Even in later years the argument was sometimes heard that a person charged with felony did not need counsel because the case against him must be proved so plainly that no counsel could contend against it. Stephen's comment upon it was:

"In the very commonest and simplest cases there is some truth in this, if it is assumed that the witnesses speak the truth; but if the smallest complication is introduced, if the facts are at all numerous, if the witnesses either lie or conceal the truth, an ordinary man, deeply ignorant of law, and intensely interested in the result of the trial, and excited by it, is in practice utterly helpless if he has no one to advise him."

It is unnecessary to go through other defects in the old system, such as the ridiculous rules with regard to the indictment, which have been fully described

⁶ *Thomas* (1613) 2 Bulstrode 147, 80 E.R. 1022; *Co. Inst.* iii 29, 187.

by the author just quoted, in his monumental *History of the Criminal Law*, and which are accurately epitomised in the following lines.

“ For lest the sturdy criminal false witnesses
should bring
His witnesses were not allowed to swear to
anything,
And lest his wily advocate the Court should
overreach
His advocate was not allowed the privilege of
speech.
Yet, such was the humanity and wisdom of the
law
That if in the indictment there appeared to be
a flaw,
The Court assigned him Counsellors to argue on
the doubt,
Provided he himself had first contrived to point
it out.
Yet lest their mildness should by some be craftily
abused,
To show him the indictment they most stead-
fastly refused,
But still that he might understand the nature
of the charge,
The same was, in the Latin tongue, read out to
him at large!⁷

⁷ The above account is based upon Thayer, *Preliminary Treatise on Evidence* (London 1898), Chaps. 2-5; Stephen, *History of the Criminal Law* i 221, 225-8, 254 *et seq.*, 284, 326, 331-7, 358, 382; Holdsworth, *History of English Law* ix 216-7, 232 *et seq.*

CHANGES IN THE NINETEENTH CENTURY

It sufficiently appears that until the eighteenth century the English criminal trial, particularly for felony, appears by modern standards to have been altogether un-English, and in fact to have subjected defendants to a so-called "proof" that was equally irresistible by guilt and innocence. With the entry of the 1700s and the Chief Justiceship of Lord Holt there came about a vast improvement, so that foreign observers—like Voltaire, Montesquieu and Beccaria—acclaimed English procedure as superior to their own. The French trial of his own day seemed to Voltaire to point only to the destruction of the accused, whereas the English trial gave substantial guarantees. In 1791 the Revolutionary Assembly authorised a large importation of English methods, though not all the innovations of that time proved permanent.⁸

In some respects, however, the old blemishes on English procedure persisted till well into the nineteenth century. We are still too impetuous in our manner of condemning criminals to punishment, but at least the finding of guilt proceeds at a proper pace, and is not pushed forward by the animal cravings referred to by Pope.

The hungry judges soon the sentence sign,
And wretches hang, that jury-men may dine.

In those days trials were disposed of at a single sitting, which might last for as long as forty-three hours; it stands to reason that no judge, juror, advocate, witness or party could have been fit for his work

⁸ See Ploscowe in (1935) 45 *Harvard Law Review* 453, 460.

for anything like this period. The power of the court to adjourn in cases of felony was established in 1794, but even then reluctantly exercised. In the trial of Lord Cochrane in 1814, which is generally thought to have resulted in a miscarriage of justice, the defence had to be opened after midnight, when the case had already been running for some fifteen hours; the court adjourned at 3 a.m. until 10 a.m., when the prosecution were able to reply to the whole case with the advantage that they and the jury had enjoyed the refreshment of sleep.⁹ Till 1870 the jury were put under pressure to reach speedy agreement by being confined without meat, drink or fire. It is related that on one occasion one of the jury during a long retirement asked the bailiff for a glass of water. The bailiff came into court and asked Mr. Justice Maule if he might give the jurymen water. "Well," said the judge, "it is not meat, and *I* should not call it drink; yes, you may."

Perhaps the most glaring of all defects was the rule excluding the defendant from giving evidence—a rule made the more unjust because the prosecutor was allowed to testify. At one time the defendant's version of what happened might not be heard at all; later he was allowed by some judges to make an unsworn statement; it was only in 1898, after much debate,

⁹ Stephen, *H.C.L.* i 403, 422; Travers Humphreys, *A Book of Trials* (London 1953) 27-8; *A Century of Law Reform* (London 1901) 63. Edward Abinger, who was called to the Bar in 1887, relates that he was concerned in a great murder case before Grantham J., in which sentence was passed on the accused after twelve and a half hours' continuous sitting, at nearly one o'clock in the morning (*Forty Years at the Bar* (London n.d.) 19).

that the Criminal Evidence Act allowed him to testify under oath.

PEINE FORTE ET DURE

In theory, trial by jury was originally optional in charges of felony; but since the older methods of trial (by ordeal) had disappeared, there was no alternative to it, and so the stubborn defendant who refused to plead was coerced. At first he was merely put on a diet of bad bread and stagnant water; but it was found that the judge of assize could not wait till an obstinate prisoner gave in under this treatment, so the pressure of weights was added to speed matters up.¹⁰ Some defendants chose to be pressed to death in order to avoid the forfeiture of property that would result from a conviction. The practice of torturing in this way lasted for four and a half centuries, from the end of the thirteenth to the middle of the eighteenth centuries. It could have been avoided merely by providing—as was eventually done—that refusal to plead should be taken as a plea of not guilty. One hardly knows whether to marvel more at the appalling cruelty of our ancestors or at their baffling lethargy, in failing for so long a time to avoid horrible cruelty by a simple legislative change. As Palgrave remarked, “It is a singular proof of the want of attention to any general principles of legislation that a custom equally foolish and barbarous should have continued so long unaltered. And the subject is one, among others, which shows that the English law must

¹⁰ Stephen, *H.C.L.* i 300.

forfeit many of the encomiums which have so long passed current amongst us.”

SUMMARY JURISDICTION

Early magistrates' courts were also open to abuse. Jurisdiction could be exercised by a single justice of the peace, unlearned in the law and without professional advice, in his own house and with no member of the public having the right to be present.¹¹ The defendant could not insist upon having counsel, and appeals were restricted. These defects were largely removed by the Summary Jurisdiction Act, 1848, which required that summary jurisdiction should be exercised in open court, and gave a right of professional representation. Other statutes had been extending the right of appeal to quarter sessions, though a general right of appeal was not given till 1879, and even today there are cases where no appeal is given from an order of magistrates. Subject to this criticism, it may be said that so-called “summary” trial is now as regular as any other; the distinguishing feature is that the decision is arrived at by magistrates instead of by a jury.

It has seemed necessary to paint this sombre picture of former English criminal justice in order to prevent false projections into the past, and to correct any impression that the solid merit of our present institutions is due to the immemorial wisdom of our ancestors. On the contrary, the virtues of our present

¹¹ *Whistler* (1699) Holt K.B. 215, 90 E.R. 1018.

system are of comparatively recent introduction, after many centuries of what must appear, to the free Englishman of today, almost inconceivable legal oppression. If we realise this we shall, I think, be more ready to look with critical and unforgiving eye upon any deformities that may still be found in our system of criminal procedure. Fortunately they are of minor proportions, and if there is serious criticism of the present system it is not so much because it leads to the conviction of the innocent as because it too readily assists the acquittal of the guilty.

CHAPTER 2

THE POSITION OF THE JUDGE

WE may now return to our foreign visitor and see what strikes him most forcibly about the modern English trial. If he comes from one of the Continental countries, or any other outside the range of the common law, he is likely to be impressed by the attitude of reserve maintained by the judge during the trial. But before coming to this, something may be said about the distinctive common law method of selecting judges.

THE APPOINTMENT AND TRAINING OF JUDGES

The difference of background between English and Continental judges is well known. On the Continent the judiciary is a branch of the civil service; it recruits young men, who make it their career to work their way up to the highest appointments. In England, judges are chosen from amongst practising barristers—usually leaders of great experience, though it must be confessed that now and again appointments are made to the Bench which are unexpected in the profession. Under our system, the judge comes to office at a mature age, with a knowledge of the world and experience of advocacy, and with a measure of ability and attainment proved by success in the most highly competitive of all professions. It is natural that such a man should be well able to maintain order and

dignity in the proceedings before him, in contrast to the youthful judge found in some Continental courts who may find himself at a disadvantage when dealing with experienced advocates.

Comparisons are proverbially odious when they lead to the conclusion of our own superiority, and, not to sound too complacent, it may be well to record certain ways in which the English system has been subjected to criticism. A risk inherent in our method of appointment which has to be accepted is that the judge may lack the quality distinctively necessary for a judge—that of a judicial mind. The great forensic fighter does not necessarily possess this quality; it may even be a disablement for success. The task of an advocate is not to judge but to contend. The only safeguard here lies in the knowledge and judgment of the Lord Chancellor, in whose gift the judgeships lie. He has, if he chooses to use it, a way of making what may be called a probationary appointment, as Commissioner of Assize, which is purely a temporary job; a future High Court judge may also gain experience as recorder of a borough. But there is no regular system of probation. That misfits in judicial office sometimes occur is acknowledged by all lawyers when they foregather in private: and a cantankerous judge may be a heavy incubus upon the administration of justice for many years. He cannot, as in some Continental countries, be promoted off the Bench. The English habit of relying upon single judges aggravates this evil.

The training of a judge before appointment does not include the all-important question of sentencing

policy, and there is no preparatory period during which the new recruit to the Bench is required to learn the actual working of the penal and remedial methods now established for the reclamation of wrongdoers. If his practice was at the Commercial Bar, he may even be largely ignorant of criminal law and procedure.

To say that a judge is "mature" upon appointment is sometimes an understatement; he may be an old man; and there is no retiring age for judges. Mr. Justice Avory died in harness at 83; Mr. Justice Humphreys was appointed to the Bench at the age of 60, and retired of his own volition at 84. Of the present High Court, the Lord Chief Justice is, at the time of writing, 78 years of age, while Cassels, Oliver and Hilbery, Justices, are 78, 73 and 72 respectively. Often there may be nothing wrong in this, and judges certainly retain a remarkable acuity of mind and perception to advanced ages. On the other hand the system has its danger, because there is no one who can effectively tell a judge that he is failing and must retire. Although the psychological study of problems of ageing has hardly started, there is sufficient to show, what indeed needs no demonstration, that intelligence and receptiveness diminish with advancing years, and that towards the end of the normal span there is generally a marked decline. A. T. Welford, for example, in his report of team experiments entitled *Skill and Age* (1951), concludes as follows.

"If it is legitimate to generalise from our findings, it would appear that, as a person gets

older, he finds it increasingly difficult to comprehend verbal or visual data, especially when these are in any way new or unfamiliar.”

This has its effect on the ability of an aged judge to follow evidence. Also, an old man tends to be the less capable of learning and of apprehending new ideas. English judges have been notorious for their extreme traditionalism in legal matters and their resistance to penal reform.¹

There are cases where it has been alleged that the age of the judge has been a contributory factor to a miscarriage of justice. In 1889, when he presided at the trial of Mrs. Maybrick, the great Mr. Justice Stephen was a man of sixty. Four years before he had had a stroke, and two years after the trial he retired from the Bench on the advice of his physician. It has been thought that, in the interval, his mind, though he did not realise it, was somewhat affected, and that this explains the unsatisfactory nature of his charge to the jury.² Whether the explanation is true or not, the conviction of the unhappy woman that followed was not only regarded by the public at the time, but has frequently been characterised since, as one of the major miscarriages of English justice. It is against the public interest that there should be even

¹ A striking study by Gardiner and Curtis-Raleigh is published in (1949) 65 *Law Quarterly Review* 196.

² H. B. Irving, in his introduction to the trial in the Notable English Trials Series, contents himself with remarking that “the judge’s grasp of the case is by no means sure, and there are errors of dates and facts and in the recapitulation of the evidence that would hardly have been expected in a judge of Sir James Stephen’s experience.” For Stephen’s illness see the *Life* by Leslie Stephen (London 1895) 435, 464.

a semblance of doubt about the intellectual capacity of a judge to try a criminal case. In the particular example given, no retiring age that is at all within the range of practical politics would have met the situation, but a retiring age would at least reduce the chance of its occurrence.

To accumulate this list of criticisms is liable to give a false impression, and I have mentioned them chiefly to avoid any assumption of absolute superiority in our method of judicial appointment as compared with that across the Channel. Notwithstanding its faults, which are for the most part remediable, the English system has on the whole given great satisfaction. We think that it has produced judges of intelligence, alertness, patience, toleration, and firmness, at least equal to any that could be obtained by civil service methods of selection and promotion. A very large number have been men of outstanding ability and attainments, who have throughout their judgeships been held in the very highest esteem. As will be shown, the confidence generally reposed in the judge is one reason for the comparative success in England of the system of trial by jury.

The position of the English judge, appointed for life, may next be contrasted with that of his counterpart in America, where in thirty-five of the States the judicial office is elective for a term of years, and so is drawn into party politics. One result is that American judges do not always feel sufficiently strong to repress newspaper contempt of court by the publication of matter prejudicing the trial of a pending case; hence

the abuse of "trial by newspaper" which is almost unknown in England.

The High Court judge is not, of course, the only kind of judge known to English law. Trials on indictment are conducted not only by High Court judges at Assizes, but by recorders at borough quarter sessions and by Benches of magistrates, with a chairman, at county quarter sessions, in all cases sitting with a jury. Most recorderships are part time, and these generally carry no more than an honorarium, which means a derisory payment (say £50 a year) for the work done, the holder relying upon practice at the Bar for his real livelihood. Chairmen of magistrates at quarter sessions now have a legal qualification, a reform, obtained after much argument, which is now acknowledged to be a great improvement on the position prevailing earlier in the century; but the legal qualification may have been acquired in the realm of probate and conveyancing, and once again requires no knowledge of the immense advances that have been made in recent years in the wise treatment of offenders. Thus the legally qualified chairman of the court of quarter sessions, with its very wide powers, may in fact be less well fitted for his job than many petty sessional magistrates. It may be noted that the legal qualification does not necessarily imply that there is payment, or adequate payment, for the work done. Recorders and chairmen are not required to undergo a period of probation as lay magistrates during which their judicial temperament may be tested.

It has been suggested with great force that the existing system of assizes, borough quarter sessions and county quarter sessions should be replaced by a redesigned system of regional criminal courts. This would have several advantages: the unified court, having more business, would meet more frequently than most existing courts, and so would reduce the time for which offenders have to await trial; it would be more convenient than it is now to remand offenders for inquiries after conviction and before sentence; and, since fewer judges would be required, they would have the opportunity of acquiring greater specialised experience. Although all argument is for a change of this kind, all tradition is against it. Men like the holding of Assizes, with their touch of ceremony; boroughs are jealous of their ancient Recorderships, and there is official satisfaction with the way in which lay magistrates participate in the administration of justice. Not much can be done in the face of this sentiment, but opinion has moved sufficiently to permit of a "Northern Old Bailey" being established for the criminal work of Liverpool and Manchester.

QUESTIONING BY THE JUDGE

There is a marked contrast between the functions of the judge in England and in other European countries. On the Continent it is the judge's duty to arrive at the truth by his own exertions in conjunction with those of the official prosecutor. In France, for example, there is the *interrogatoire* of the accused by the presiding judge, who also takes the leading part

in examining witnesses.³ In England, on the other hand, and in other countries following the common law tradition, the examination of all witnesses (including the accused, if he offers himself as a witness) is conducted principally by the advocates for the parties. The judge does not himself examine witnesses, except that he may put supplementary questions.

This relative inactivity of the judge is a feature of English procedure going back to the middle ages. Speaking of the medieval trial, Pollock and Maitland said that it often reminds one of a cricket match; "the judges sit in court, not in order that they may discover the truth, but in order that they may answer the question, 'How's that?'" This passive habit seems to grow upon them as time goes on.⁴ It was, indeed, the original method of criminal trial in all European countries, being the regularisation of the primitive combat; but only in England has it survived essentially in its original form. On the Continent it was abandoned from the twelfth century in favour of the "inquisitorial" system, which was then regarded as an advance. Even England adopted the new fashion,

³ The following is a list of English literature on French criminal procedure. Garner, (1916) 25 Yale L.J. 255; Wright, (1928) 44 *Law Quarterly Review* 334, (1929) 45 *ibid.* 96; Ploscowe, (1932) 23 *Journal of Criminal Law and Criminology* 372; same (1933) 24 *ibid.* 712; same, (1935) 48 *Harvard Law Review* 433; Tyndale, (1935) 13 *Canadian Bar Review* 659; Keedy, (1940) 88 *University of Pennsylvania Law Review* 385, 692, 915; Hogg, (1945) 23 *Canadian Bar Review* 846; Hamson, [1955] *Criminal Law Review* 272; R. C. K. Ensor, *Courts and Judges* (Oxford 1933). The leading French work is Garraud's *Traité d'Instruction Criminelle*. For the history see A. Esmein, *A History of Continental Criminal Procedure* (London 1914); Auld in (1935) 1 *University of Toronto Law Journal* 82.

⁴ *History of English Law*, 2nd ed. ii 671.

along with the use of torture, in the ecclesiastical courts and Star Chamber during the sixteenth and seventeenth centuries. In the latter part of this period the practice of judicial interrogation spread to the common law courts, the State Trials recording many lengthy and bullying examinations of witnesses by the judges, the best known being that of James Dunne by Chief Justice Jeffreys in the trial of Lady Lisle in 1685.⁵

At the present day the tradition of judicial self-restraint is regarded as a fundamental part of criminal procedure. Bacon expressed it pithily when he declared that "an over-speaking judge is no well tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the Bar." The classic advice to a newly appointed judge is that he should take a sup of holy water in his mouth at the beginning of a case, and not swallow it until the evidence on both sides has been heard. Lord Hewart said in the same vein that "the business of a judge is to hold his tongue until the last possible moment, and to try to be as wise as he is paid to look."

Two passages may be quoted to show the reasons for the English practice. The first is taken from a chapter of Sir James Fitzjames Stephen's *History of the Criminal Law*, where the author examines and criticises the French system. This, he thinks, places the judge

"in a position essentially undignified and inconsistent with his other functions. . . . The

⁵ 11 St.Tr. at 325 *et seq.*

duty most appropriate to the office and character of a judge is that of an attentive listener to all that is to be said on both sides, not that of an investigator. After performing that duty patiently and fully, he is in a position to give a jury the full benefit of his thoughts on the subject, but if he takes the leading and principal part in the conflict—and every criminal trial is as essentially a conflict and struggle for life, liberty from imprisonment, or character, as the ancient trials by combat were—he cannot possibly perform his own special duty. He is, and of necessity must be, powerfully biased against the prisoner.”⁶

The other explanation was given by Lord Justice Birkett, when he said:

“ People unaccustomed to the procedure of the courts are likely to be overawed or frightened, or confused, or distressed when under the ordeal of prolonged questioning from the presiding judge. Moreover, when the questioning takes on a sarcastic or ironic tone, as it is apt to do, or when it takes on a hostile note, as is sometimes almost inevitable, the danger is not only that witnesses will be unable to present the evidence as they may wish, but the parties may begin to think, quite wrongly it may be, that the judge is not holding the scales of justice quite evenly.”⁷

⁶ *H.C.L.* i 544; *cf. ibid.* 565. To much the same effect, see the remark of Lord Greene M.R. in *Yuill v. Yuill* [1945] P. 15 at 20, cited with approval in later cases.

⁷ *Anon.*, *The Times*, April 9, 1952.

This does not mean that all questioning by the judge is improper. When judicial interruptions have been frowned upon on appeal, it has generally been because they were so numerous as to make it impossible for the defence to be fairly presented,⁸ or because an apparently honest witness has been badgered and bullied into committing himself beyond his professed recollection,⁹ or because the judge's questioning is conducted in such a way as to give the impression that he is satisfied that the accused is guilty. Provided that he acts judicially and with due regard for the rights of the defence, a judge is permitted to question a witness at some length, preferably after both sides have finished their examinations. Lord Goddard said: "If a judge thinks that the case has not been thoroughly explored he is entitled to put as many questions as he likes."¹⁰ The classic example occurred at the trial of Armstrong, who was detained in the box by Mr. Justice Darling to answer a series of quiet but shrewd and deadly questions which not only showed that Armstrong had concealed his possession of arsenic from the police, but also demonstrated the absurdity of Armstrong's explanation that this arsenic had been made up into no fewer than twenty small packets (each containing enough to kill a man) merely for the purpose of administering a

⁸ *Clewer* (1953) 37 C.A.R. 37: cf. *Gilson* (1944) 29 C.A.R. 174; *Ingram*, *The Times*, October 12, 1954.

⁹ *Bateman* (1946) 174 L.T. 336; 110 J.P. 133; 31 C.A.R. 106.

¹⁰ *Per* Lord Goddard C.J. in *Williams*, *The Times*, April 26, 1955. But he added that it was a pity that the trial judge had asked as many questions as he had done. Cf. *Merrifield*, *The Times*, September 4, 1953.

separate packet to each individual dandelion on his lawn.

ACCUSATORIAL AND INQUISITORIAL

It is sometimes said that England retains the "accusatorial" system of criminal procedure, in contrast to the "inquisitorial" system adopted on the Continent. These terms are used with some variety of meaning by different writers, and this has the effect of creating verbal differences between the theories presented. Some writers draw a single, sharp distinction between accusatorial and inquisitorial systems; others, by ascribing a number of different characteristics to each (publicity or secrecy of hearing, oral or written evidence, mode of initiation of proceedings, mode of examining witnesses), enable themselves to say that both the Anglo-American and the Continental systems are mixed, being semi-accusatorial and semi-inquisitorial in different degrees. There seems to be no point in becoming embroiled in these merely verbal issues. If the terms "accusatorial" and "inquisitorial" must be used, it seems clearest to say that they refer only to the mode in which evidence is elicited, and that the single characteristic of an inquisitorial system is the activity of the judge in questioning the defendant and witnesses. On this definition, the French system is inquisitorial. But the French trial, like the English, involves an oral hearing, with prosecution and accused separately represented, and with no compulsion upon the accused to answer questions.

Another way in which language tends to run away

with one is when the English trial is described as not merely accusatorial but combative or gladiatorial, on the ground that it reduces the criminal trial to a sporting contest, or trial of strength between the Crown and the accused, with the judge as an impartial arbiter. The judge is an impartial arbiter, and there is in a sense a contest; but the analogy with a duel or game cannot be pressed too far, because the two sides are not governed by the same rules. It is not regarded as the object of counsel for the prosecution to obtain a conviction; his duty is to bring the facts before the court; on the other hand it is the duty of counsel for the defence to use all legitimate means to obtain an acquittal.

THE CONTINENTAL AND ENGLISH SYSTEMS COMPARED

The suspicion of bias attaching to the judge in Continental countries is recognised, even by domestic observers, to be one of the weakest elements in their procedure. Partly this has been due to the frequent practice of appointing presidents of the assizes from former public prosecutors. As Dr. Mannheim has remarked, "the whole mentality of a public prosecutor is necessarily different from that of a judge, and a man who has, for decades, exclusively performed the task of prosecuting can hardly be expected to become an absolutely impartial judge."¹¹ In England, judges have never been exclusive public prosecutors, for the simple reason that no such branch of the legal profession is known here. But the chief reason for the

¹¹ (1937) 53 *Law Quarterly Review* 112.

unhappy position in which the Continental judge finds himself lies in the inquisitorial process, which turns the presiding judge, whatever his intentions, into a second and more august prosecutor. It has, indeed, been observed that the roles of the judge and the prosecutor, as they are conceived in England, are almost precisely reversed in France. There, the prosecutor does not examine the witnesses for the State, nor cross-examine the accused and the witnesses for the defence, or at any rate he does not bear the main burden of these tasks, and he never objects to the admission or exclusion of testimony. French commentators say that he refrains from taking too active a part from the fear of provoking the hostility of the jury and arousing their sympathy for the defendant. But the result of his inactivity at the trial is to throw much of his work upon the judge, who thus comes to seem, in the mind of the public and the jury, to be more prejudiced than counsel for the prosecution. One consequence of this is that acquittals are sometimes a form of protest against the way in which the case has been tried. Great dissatisfaction is expressed from time to time by the French with their own system, but it is always hard to change a settled tradition.

A by-product of the Continental practice is that the president cannot come into court with a perfectly open mind. Since the task of interrogation devolves upon him, he must spend as much time studying the bulky *dossier* as an English prosecuting counsel in getting up his instructions and proofs of evidence. Interrogation cannot be effectively conducted unless the case has been thoroughly mastered beforehand. It

is even required in France that the president of the *cour d'assises* shall have interviewed and interrogated the accused before the trial, notwithstanding that there has already been extensive interrogation by the examining magistrate (*juge d'instruction*). The procedure is intended partly to be for the protection of the accused, it being thought that the judge can satisfy himself that there has been no suppression of evidence telling in the accused's favour. However this may be, our reaction to the French system is that it creates a danger that the point of view of the prosecution will communicate itself to the judge before the case has been heard.

An English judge, on the other hand, comes fresh to the case. His aloof and unbiased position is responsible in part for the esteem in which he is held. It is true that the judge is furnished, before the trial, with a copy of the depositions; and since these depositions will generally contain only the evidence for the prosecution, there may seem at first sight to be some danger that he will have formed an opinion of the case before the hearing. In practice this does not happen, because the judge is not compelled to study the papers intimately in order to play his part at the trial. Some judges do not even read them, and the most he is likely to do is to race through the file in order to see if there is any preliminary point likely to arise. This is not a highly important reason for furnishing the judge with the papers before the hearing, and in ordinary contested cases little would be lost, while something in apparent impartiality would be gained, if the judge did not read them at all—as Scottish

judges do not. On the other hand, there are some cases in which a judge who carefully avoided looking at the depositions before trial would avail himself nothing, because on an application for separate trials of persons jointly indicted, or on an objection to evidence, he would be obliged to read them.

In the past the judge's reading of the depositions has been useful because it has enabled the judge to see whether there appears to be a good defence, so as to obtain impromptu legal aid for the defendant by asking a barrister present to "assist the court" by looking after the defendant's interests. This is no longer regarded as an adequate substitute for proper legal aid in advance of the trial. Another occasion on which the judge's reading of the depositions may prove to be a safeguard is on a plea of guilty, when the English practice is not to hear evidence. Sir Ellis Hume-Williams relates how, when he was Recorder of Norwich, he once astonished a hardened offender.

" [The man was] charged with stealing a rabbit, and from the private list of his previous convictions (which is supplied to the judge alone) I saw that the old rascal specialised in that particular occupation, for there were eight or ten previous convictions against him for the same thing. But this time he was in luck, for, from the depositions, I saw that the only evidence against him was that he was found with the rabbit in a sack, and that some farmer in the neighbourhood had lost a rabbit. No one had seen the prisoner take it or even seen him near the place

from which it had disappeared, and there was no identification of the animal. Of course, on such evidence he could not possibly be convicted. So when he was brought up into the dock I persuaded him with some difficulty to plead "not guilty." The case was tried, and when the evidence, or rather want of evidence, had been given for the prosecution, I directed the jury that there was no evidence on which the prisoner could properly be convicted, and they must return a verdict of not guilty. Thereupon the foreman stood up and said, 'We find the prisoner not guilty.' Never have I seen greater amazement on the human countenance. 'What,' said the old man in the dock, 'not guilty? Well I'm ——'—and then taking his cap said to me, 'God bless you, sir. A merry Christmas.' And he marched out of the dock."¹²

Apart from helping to decide these preliminary questions, it is useful for the judge to have the depositions in front of him because then he can see what the witnesses for the Crown are expected to say next. Following the depositions in this way, the judge will stop a police witness, when he states what the accused said on arrest, from including an admission by the accused of previous convictions, because it is not proper for the jury to come to know of these previous convictions before they give their verdict.¹³

¹² Hume-Williams, *The World, the House and the Bar* (London 1930) 43.

¹³ *Turner v. Underwood* [1948] 2 K.B. 284.

OTHER FUNCTIONS OF THE ENGLISH JUDGE

In addition to putting supplementary questions to witnesses, the judge is permitted to allow the recall of witnesses, and even to call a witness not called by either prosecution or defence if he regards that course as necessary in the interests of justice; but such a new witness called to testify against the accused should be called before the case for the defence has been closed, unless the matter could not have been foreseen.¹⁴

The judge must rule upon the admissibility of evidence and other points of law arising during the trial. It is his duty to object to inadmissible evidence for the prosecution even though counsel for the defence makes no objection,¹⁵ for the reason that it is damaging to the defendant's case for his counsel to have to get up and argue that a question is inadmissible.

When all the evidence is in and counsel's speeches have been made, the judge must, on a trial on indictment, charge the jury on the facts of the case and the law applicable to them. Oddly enough, though this is regarded as the most important function of the English judge, it is not performed at all by the judge in France, at any rate in open court (see p. 241). Here, again, the English trial is not regarded as a mere game between two sides, because the judge must put such questions to the jury as appear to him properly to arise upon the evidence even though

¹⁴ Archbold, 33rd ed., s. 898.

¹⁵ *Stirland* [1944] A.C. at 327; (1942) 58 *Law Quarterly Review* 383.

counsel for the defence may not himself have raised the point.¹⁶

The final function of the judge, on a plea or verdict of guilty, is to pronounce sentence. Fortunately for the length of this book, the whole question of sentencing policy can be regarded as outside its scope.

¹⁶ *Hopper* [1915] 2 K.B. 431 (C.C.A.: provocation); *Kwaku Mensah* [1946] A.C. 83 (P.C.). There is a somewhat anomalous exception for the defence of insanity.

CHAPTER 3

THE RIGHT NOT TO BE QUESTIONED

“THE methods of the criminal courts are hundreds of years old,” wrote Clarence Darrow, “and their conceptions a thousand years older than that. The whole material world has been made over, but the law and its administration have stood defying time and all the intellectual changes of our day and age.”

This remark, typical of the criticism sometimes directed against present criminal procedure, is a trifle superficial. The principles of criminal procedure are not the product of scientific observation, but embody a system of values. These values do not necessarily have to be changed with the march of knowledge of the material world. A good illustration is the rule conferring upon an accused person the right not to be questioned, which may be a good or a bad rule but has certainly not been made better or worse by the invention of printing or the aeroplane.

According to the rule, neither the judge nor the prosecution is entitled at any stage to question the accused unless he chooses to give evidence. “At the common law,” says Blackstone, “*nemo tenebatur prodere seipsum*: and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men.”¹ This rule may be called the accused’s right not to be questioned; in America it

¹ Bl. *Comm.* iv 296.

is termed the privilege against self-incrimination. The latter expression is more apt as the name for another rule, the privilege of any witness to refuse to answer an incriminating question; this is different from the rule under discussion, which, applying only to persons accused of crime, prevents the question from being asked. The person charged with crime has not merely the liberty to refuse to answer a question incriminating himself: he is freed even from the embarrassment of being asked the question. The privilege against self-incrimination, as applied to witnesses generally, must be expressly claimed by the witness when the question is put to him in the box²; whereas the accused's freedom from being questioned prevents the prosecution from asking (much less compelling) him to enter the box, and from addressing questions to him in the dock.

In endeavouring to form an opinion about the value of the freedom recognised under the common law, it is necessary both to consider the history of this freedom and to compare it with the position on the Continent.

THE FORMER PRACTICE OF INTERROGATION

In the bad old days, the system of interrogation was practised in England. The old ecclesiastical courts and the Star Chamber claimed the power to summon a defendant with no warning of the charge

² The judge will not generally take the objection for the witness: *Att.-Gen. v. Radloff* (1854) 10 Ex. at 107, 156 E.R. 375, *per Parke B.*; but he ought to inform the witness of his rights. Cf. [1954] *Criminal Law Review* 916.

to be made against him, and to examine him on oath. Hudson, who was no enemy of the Star Chamber, explains how these powers came to be abused.

“But afterwards this advantage of examination was used like a Spanish Inquisition to rack men’s consciences, nay, to perplex them with intricate questions, thereby to make contrarities, which may easily happen to simple men; and men were examined upon one hundred interrogatories, nay, and examined of the whole course of their lives.”³

Since the law was that an oath could be compulsorily administered to the defendant, he could be punished for refusing to take the oath. Lilburn, who was charged in 1637 with sending seditious libels out of Holland into England, refused to take the oath, and was punished by being whipped from the Fleet to the pillory, receiving upwards of 500 lashes, then being made to stand in the pillory for two hours, and fined £500.⁴

If the defendant confessed, the Star Chamber could examine him in private and not on oath. Of this Hudson says:

“Therein, sometimes, there is a dangerous excess. For, whereas the delinquent confesseth the offence *sub modo*, the same is strained against him to his great disadvantage. Sometimes many circumstances are pressed and urged to aggravate the matters which are not confessed by the delinquent; which surely ought not to be urged,

³ *Collect. Jurid.* ii 169.

⁴ 3 St.Tr. 1315.

but what he did freely confess in the same manner. And happy were it if these might be restrained within their limits, for this course of proceeding is an exuberance of prerogative.”⁵

What was much worse, the Council and Star Chamber used (they did not invent) the rack and other diabolical instruments for the purpose of obtaining confessions, and there are two instances of a barbarous punishment being inflicted without even the forms of trial.⁶ Torture might also be employed, with or without authority, by justices of the peace acting as agents of the Council in the country.⁷ Even at this distance of time it is impossible to read accounts of these things, which I shall not repeat in detail, without the stomach sickening and the blood boiling. Selden’s protest is worth recalling. “The rack,” he said “is used nowhere as in England. In other countries ’tis used in judicature, when there is a *semi-plena probatio*, a half-proof against a man, then to see if they can make it full, they rack him to try if he will confess. But here in England they take a man and rack him, I do not know why, nor when, not in time of judicature, but when somebody bids.”⁸ One can well understand how these inhumanities, laconically

⁵ *Op. cit.* 127–8. See, on the whole subject, Wigmore in (1902) 15 *Harvard Law Review* 610; Holdsworth, *H.E.L.*, ix 199 *et seq.*

⁶ Nicolas, *Proceedings and Ordinances of the Privy Council* (1837) vii p. xlvi; *cf.* Pike, *History of Crime in England* ii 86; L.A. Parry, *The History of Torture in England* (London 1933); Holdsworth, *H.E.L.*, v 186.

⁷ Stephen, *H.C.L.*, i 222; C.A. Beard, *The Office of Justice of the Peace* (New York 1904) 117–8.

⁸ *Table Talk* (ed. Pollock 1927) 133.

though Selden stated them, occasioned a fierce dislike for the procedure by interrogation and for the court that administered it.

The use of torture to extract confessions is a stain on the legal history of all European countries, not to say the contemporaneous history of some of them; Englishmen can at least say that it was abandoned here sooner than anywhere else.⁹ And the revulsion from torture has, perhaps, left a deeper mark upon our legal system than on any other. The strong insistence, after the abolition of the Star Chamber, that the administration of an oath to a defendant was contrary to the law of God and the law of nature, was a race-memory from those evil days.

It took some time before the opposition to the practice of examining persons charged with crime became effective. While the Star Chamber was in being, the judges of the common law courts frequently assisted in its business, and so became familiar with its procedure.¹⁰ Perhaps for this reason, instances of examination can be found even in these courts, though the accused was not put on oath. In particular, it was the practice under the Tudors and Stuarts to examine the accused before his trial, if the case was important.¹¹ The examination was a kind of preliminary

⁹ Not to let England off to lightly, it should be pointed out that the statement about torture in the text refers only to this practice before the finding of guilt. England retained the flogging of offenders till 1948, long after it had been abandoned in other civilised countries; and we still retain this form of torture as a punishment in prisons, when other countries have renounced it there too.

¹⁰ Fox, *Contempt of Court* (Oxford 1927) 73, 83 n. 2.

¹¹ A well-known example is *Udall* (1590) 1 St.Tr. 1271; cf. *Co. Inst.* ii 51.

trial, conducted before the Privy Council or the judge; sometimes torture was used; and even witnesses to the occurrence might be treated in the same way. The practice died out after 1688, though even in the early years of Victoria's reign it was still regarded as proper for the Privy Council to make a preliminary examination of prisoners charged with State offences.¹²

Down to the Revolution, the interrogation of the accused was repeated at the trial itself, the questioning at this stage being done principally by counsel for the Crown. The practice seems to have arisen because on a charge of felony (including treason) the accused was not allowed counsel, so that he engaged in argument with the prosecution in order to defend himself. At the trial of Throckmorton, for instance, the proceedings consisted almost entirely of a verbal duel between Throckmorton and the counsel for the Crown.¹³ Between the fifteenth and the early seventeenth centuries many statutes were passed empowering the judges to examine defendants where the charges were quite minor, such as not being properly armed with a bow in accordance with the statute. All these Acts have long since expired or been repealed.¹⁴

Even at this period the common-law courts insisted that an accused person could not be punished for not answering. When, in 1568, a defendant before the Court of High Commission was charged with taking mass at the Spanish Ambassador's house, he was committed to prison for refusing to make reply to the

¹² Fox, *op. cit.* 72-6; Stephen, *H.C.L.* i 183, 325.

¹³ Stephen, *op. cit.* 325 ff., 440; Holdsworth ix 227.

¹⁴ Fox, *op. cit.* 76-81.

judges' questions; but the Court of Common Pleas released him, affirming the principle that no one is compelled to give himself away (*nemo tenetur seipsum prodere*).¹⁵

In the early 1700s the habit of overtly questioning the defendant ceased, though whenever the defendant conducted his own defence there was in practice a strong compulsion upon him to answer the case against him, for otherwise his failure to make an effective defence would naturally be taken as an inability to do so. If the charge were felony the accused had at first no right to have counsel, and so he had to take an active part in his own defence. The statutes conferring the right to employ counsel upon defendants to charges of felony were in themselves measures of elementary justice, but they had the indirect effect of enabling guilty persons to shelter behind their counsel, as had always been possible on charges of misdemeanour. When he had counsel, the defendant was exempted and prevented from saying anything at his trial; since he was not allowed to be sworn as a witness, his silence could not be taken against him, because it was imposed upon him by the law. Thus counsel were able to make an impassioned speech to the jury pointing out that the law had sealed the lips of the defendant, and asserting that he would be able

¹⁵ Leigh's case, quoted by Coke C.J. in *Burrowes v. Court of High Commission* (1605) 3 Bulst. at 50, 81 E.R. at 43. Wigmore, 15 *Harvard Law Review* 630, and *Evidence*, 3rd ed., viii § 2251, seems to attend insufficiently to the distinction between questioning an accused person and punishing him for refusing to answer. There is no evidence that the latter was possible under the common law except for *peine forte et dure* and charges of contempt of court.

to clear himself if he were only allowed to go into the box.

The later history of questioning in court will be taken up in the next section. At this point we may notice that the Star Chamber procedure by examination has left one enduring mark upon the law, in respect of contempt of court. Here the administration of an *ex officio* oath to answer interrogations is still theoretically possible, though it seems unlikely that at this date it would be revived.

We must now go back in the chronology to consider the work of justices of the peace. It was they who conducted the pre-trial interrogations in charges without political importance. The justice of the peace was half magistrate, half police officer, and in the latter capacity acted very much like a police detective at the present time, except that he was not so scrupulous. The interrogation was put on a statutory footing by two Acts of Philip and Mary, requiring the justices of the peace before whom a person accused of felony was brought to examine the prisoner, and those that brought him, concerning the fact and circumstances thereof.¹⁶ When these statutes were passed the purpose evidently was to obtain if possible a confession from the defendant. Sir Thomas Smith makes this clear, for in his account of the criminal procedure of the sixteenth century he says that "as soon as any is brought to the justice of peace, he doth examine the malefactors, and writeth the examination and his

¹⁶ 1 & 2 Phil. & M. c. 13 (1554); 2 & 3 Phil. & M. c. 10 (1555). For the history see Stephen, *H.C.L.* i 216 *et seq.*, 441; Holdsworth, *H.E.L.* iv 529; Plucknett, *Concise History of the Common Law*, 4th ed. 407.

confession.”¹⁷ The written record of the examination was read over to the jury at the trial.¹⁸

Gradually the practice changed. The exclusion of interrogation at the trial naturally had its effect on the preliminary enquiry, and by Bentham’s day some magistrates were making a habit of nullifying the enquiry, so far as the accused himself was concerned, by telling him that he was not bound to answer.¹⁹ This was given statutory compulsion in 1848, when it was enacted in effect that the primary function of the justices was to hear the witnesses against the accused, and that having done so they should warn the accused that he was not bound to say anything in answer to the charge, though he was invited to do so. The warning is still part of our legal procedure.

THE CRIMINAL EVIDENCE ACT, 1898

We left the history of the accused’s right to silence at the trial at the point where this right was procuring unmerited acquittals. That undesirable state of things was partially remedied by the permission given by some judges to defendants to make unsworn statements. Stephen, writing in 1883, recorded this as the practice of one or two judges, including himself, as though it were a recent invention.²⁰ Instances can,

¹⁷ *Commonwealth of England* (1583) (ed. L. Alston, Cambridge 1906, p. 90.)

¹⁸ *Ibid.* 99.

¹⁹ Bentham, *A Treatise on Judicial Evidence* (tr. M. Dumont, London 1825) 242; Bentham, *Rationale of Judicial Evidence*, Bk. 9, Pt. 4, Chap. 3, Sect. 4 (ed. London 1827, vol. 5, p. 256; *Works* vii 460). See however Stephen, *H.C.L.* i 227.

²⁰ Stephen, *H.C.L.* i 440; Allen in 69 *Law Quarterly Review* 22.

however, be found much before that date.¹ The practice was not only a boon to innocent defendants, who were thus helped to clear themselves, but a weapon against the guilty, who could no longer claim that their mouths were closed by the law. However, it was by no means universally adopted by the judges, and it was not well designed in the public interest, because the defendant who elected to make an unsworn statement could not be cross-examined upon it, so that the prosecution might have little opportunity to test the accuracy of what was said.

For some years the British legal genius met the problem in a hesitating and piecemeal fashion, inserting into Acts creating new offences a proviso that the accused in any charge under the Act should be a competent witness, but studiously avoiding any general reform. This approach created numberless anomalies. The Draft Code of 1879 proposed to supersede all the special statutes by a general rule allowing a defendant to be sworn at his own option, and allowing him to be compulsorily cross-examined upon his statement so made. To the lasting detriment of English law the Draft Code itself was thrown to the wolves, but rescuers were found for this particular provision. Foremost among them was Lord Alverstone, who was greatly impressed by a civil action in which he had, when at the Bar, appeared for a defendant. His client had been successfully prosecuted for fraud and sent to prison. He was then sued for damages in respect of the same fraud, before Lord Coleridge sitting

¹ See the case of 1804 mentioned in 65 *Law Quarterly Review* 501.

with a jury, and in the civil action, unlike the prosecution, the defendant was able to go into the witness-box to defend himself. The result was that he satisfied the court of his innocence of any fraudulent intent, the jury interposing in the course of his examination in chief and stopping the action. Lord Coleridge often referred to the case, expressing the view that if the defendant's evidence could have been given at the criminal trial, he could not possibly have been convicted. Lord Alverstone was so convinced of the necessity for an amendment of the law that he introduced a Bill for several sessions in the House of Commons. At first it met with the usual apathy and the usual efforts to find wisdom in the established rule. It was contended that the proposed change would be against the spirit of the law, since a guilty person would be unfairly compelled to testify to his own disadvantage, and even an innocent person would injure more than assist his cause. One lawyer prophesied, from his great practical experience, that when defendants were allowed to testify on their own behalf there would be thirty innocent persons convicted on one circuit alone. Sir Herbert Stephen sought to explain this paradox when, in a letter to *The Times*, he wrote: "Many people cannot, in answer to questions, give a plausible, coherent, and honest-sounding account of any matter in which they have a strong personal interest, while they may, in spite of that constitutional defect, be innocent of the specific crime alleged against them."² But perhaps

² See Sir Herbert Stephen's argument at large in his *Prisoners on Oath* (London 1898).

the principal argument was that trump card of all traditionalists—the simple fact that there had been little practical experience of the new system, whereas the old had been in operation for many centuries.

Gradually, however, the Bill gained support; after five or six years Lord Halsbury took it up, and it became the Act of 1898.³ The new law is universally pronounced to have worked well, Sir Harry Poland saying, after twelve years' experience, that all the predictions of its opponents had been falsified.⁴ That may have been true at the time, but, as will be shown, later events have largely fulfilled one of those predictions, namely that the Act would force defendants into the box whether they liked it or not. The clerk to Mr. Justice Avory, in his informative autobiography *My Sixty Years in the Law*, remarks that he has no hesitation in saying that for one prisoner it has helped to an acquittal a score have been convicted by it.⁵

It remains to be said that the English reform lagged behind that in other common-law countries, because legislation allowing an accused person to testify had already been passed in India, the United States, Australia and Canada.

CRITICISM OF THE RIGHT NOT TO BE QUESTIONED

Even under the Act of 1898 the accused has the right not to enter the witness box if he wishes to avoid being questioned. The Act did not follow the

³ See Lord Alverstone, *Recollections of Bar and Bench* (London 1915) 176; (1895) 30 L.J.Newsp. 218, 377-8.

⁴ *A Century of Law Reform* (London 1901) 54.

⁵ F. W. Ashley, *My Sixty Years in the Law* (London 1936) 300.

precedent of the Indian Code of Criminal Procedure, which, in section 342, allows an accused person to be questioned by the judge, while at the same time exempting him from punishment for refusing to answer, or even for giving false answers.⁶ In England there is no power to interrogate accused persons, whether before the trial or at the trial itself, unless they volunteer to speak. The following discussion of the rule will be confined to procedure at the trial, the question of pre-trial interrogation being outside my present scope.

The first great opponent of the rule was Bentham, and his criticism of it is still the fullest and best in our literature. Bentham did not hesitate to adopt a strong attitude, calling the rule "one of the most pernicious and most irrational notions that ever found its way into the human mind." This attack took considerable courage, for then, as indeed to a lesser degree now, the rule was firmly entrenched in public favour, as one of the most important safeguards of the English legal system.

Bentham recognised that the rule derived part of its attraction from the fact that it stood at the opposite pole from the tyranny practised on the Continent, and in England under the Star Chamber, which "presented the hateful spectacle of torture, and of judges eager to seize, and turn against the accused, every word which might escape him in the agony of pain." This reaction

⁶ See the comment by Stephen, *H.C.L.* iii 335. H. A. D. Phillips, *Comparative Criminal Procedure* (Calcutta 1889) ii 176 complains that Indian magistrates neglect their duty to put questions under the power given by the section.

has lost none of its psychological force at the present day. It is a natural, if irrational, response to barbarity of this kind to refuse to permit any questioning of a defendant at all. Dispassionately regarded, however, the rule cannot be supported by an argument referring to torture, for no one supposes that in present-day England a permission to question an accused person, if accompanied, as it would be, by safeguards, would result in any ill-treatment of him. The risk, if there is one, is just the opposite: that if dangerous criminals cannot be questioned before a magistrate or judge, the frustrated police may resort to illegal questioning and brutal "third degree" methods in order to obtain convictions. This has happened in the United States of America; and even if we have sufficient confidence in our own police to discount the possibility of rubber-hose beatings here, we must recognise that the restraint on their part exists in spite of the defendant's freedom from examination in court and not because of it.

Bentham had no difficulty in disposing of the other argument for the rule, that it prevented the enforcement of bad laws, and above all restricted the operation of the too numerous laws carrying capital punishment. The simple answer was that the rule tended to prevent the enforcement of good law equally with bad, and thus operated as a debilitating upon the whole body of the penal law. As Stephen afterwards remarked, "people always protest with passionate eagerness against being deprived of technical defences against what they regard as bad laws, and such complaints often give a spurious value to technicalities when the

cruelty of the laws against which they have offered protection has come to be commonly admitted.”⁷

The old laws of capital punishment were examples of such bad laws: and one of their evil effects was that they reduced the administration of justice to a gamble. Although almost all felonies were punishable with death, it was not in fact practicable to carry out executions on the scale that legal theory required, and public justice was regarded as satisfied if a comparatively small number of felons was executed each year. The rest might be allowed benefit of clergy, pardoned, or acquitted on technicalities or by the “pious perjury” of the jury. Historically regarded, the rule against questioning the defendant is one example of the indifference of society to the need for securing the conviction of the guilty. Bentham set his face against this system of haphazard punishment, arguing that “the more certain punishment is, the less severe it need be.”⁸ Consequently he was against all rules making for the acquittal of offenders.

The third argument in favour of the law was again mere sentiment: that to try to get an accused person to give evidence against himself was not playing the game; it was hitting below the belt, or hitting a man when he was down. Bentham was scornful of the analogy between a criminal trial and a private combat. He pointed to the evil results of the rule: in so far as it hindered the conviction of the guilty, it might operate to prevent the conviction of the apprentice in crime while he was yet open to redemption, besides

⁷ *H.C.L.* i 342.

⁸ *Theory of Legislation* (tr. R. Hildreth, London 1887) 326.

neglecting the immediate interest of society that dangerous criminals should not be left free. "When the guilty is acquitted, society is punished." Moreover the supposed rule of fair play was not logically applied, because no objection was seen to giving evidence against the accused of documents written by him, or even of conversations ascribed to him by other witnesses. "Thus," said Bentham, "what the technical procedure rejects is his own evidence in the purest and most authentic form; what it admits is the same testimony, provided that it be indirect, that it have passed through channels which may have altered it, and that it be reduced to the inferior and degraded state of hearsay." In fact, of course, the conventional notion of fairness could not be consistently applied in these other respects without destroying the law altogether. But, said Bentham, "if it is wished to protect the accused against punishment, it can be done at once, and with perfect efficacy, by not allowing any investigation."

With his clarity of mind Bentham perceived that the common use of the maxim *Nemo tenetur seipsum accusare* (or, *prodere*) was tendentious. Read as a proposition that no one was bound to start a prosecution against himself, the thing was so obvious that its mere statement was puerile. Read as an assertion that no one should be punished for refusing to make a confession of guilt, the maxim was again not in question. In this sense the maxim applies to all witnesses in all legal proceedings, not merely to the defendant to a criminal charge; no witness is punishable for refusing to answer a question which he claims

may incriminate him. This rule has not been doubted for four centuries, because it is regarded as inhumane to place a person in a legal dilemma which must result in punishment one way or the other.⁹ Those who seek to alter the accused's freedom from interrogation ask only that the prosecution should be permitted, in court, to put questions to the accused person, whether (since 1898) he elects to give evidence or not. There would be no direct compulsion on the accused to answer the questions if he preferred to maintain a stolid silence; though of course this silence would almost certainly have a most serious effect upon his defence.

The crux of the matter is that immunity from being questioned is a rule which from its nature can protect the guilty only. It is not a rule that may operate to acquit some guilty for fear of convicting some innocent. To quote Bentham's words, "If all the criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it; innocence

⁹ But Canada has resolved this problem in a different way, by providing that the witness who takes objection is compellable to answer but is protected from having his statement given in evidence against him in any subsequent criminal prosecution (Canada Evidence Act, 1952, s. 5, replacing earlier legislation). The same rule holds in England under specific statutes (e.g. Larceny Act, 1861, s. 85; Bankruptcy Act, 1914, s. 166; Larceny Act, 1916, s. 43 (3)), and in all cases where a witness is improperly compelled to answer an incriminating question against his objection (*Garbett* (1847) 1 Den. 236, 169 E.R. 227; *Coote* (1873) L.R. 4 P.C. 599).

claims the right of speaking, as guilt invokes the privilege of silence.”¹⁰

The next important treatment of the rule comes from the pen of Sir James Stephen. He perceived the objection to the rule, that it was highly advantageous to the guilty; and at one place he seemed disposed to characterise it as pedantry. On the other hand he saw the merit that it “contributes greatly to the dignity and apparent humanity of a criminal trial.” Stephen added: “It effectually avoids the appearance of harshness, not to say cruelty, which often shocks an English spectator in a French court of justice, and I think that the fact that the prisoner cannot be questioned stimulates the search for independent evidence.”¹¹ On the first of these observations, it may perhaps be questioned whether the rule is a necessary one for avoiding the appearance of harshness. The trial in France differs from the English trial not only in that the examination of the accused is a central feature of every French trial, but, much more importantly, in that this examination is carried out in the first instance by the presiding judge. Interrogation by the judge has caused dissatisfaction even in France, because it seems to turn the judge into a prosecutor; and the English practice whereby the examination of witnesses is conducted by advocates seems greatly

¹⁰ Bentham's discussion will be found in his *Treatise on Judicial Evidence* (tr. M. Dumont, London 1825) 240 *et seq.*, and his *Rationale of Judicial Evidence*, Bk. 5, Chap. 7, and Bk. 9, Pt. 4, Chaps. 2, 3 (ed. London 1827 vol. 3 pp. 131 *et seq.*, vol. 5, pp. 203 *et seq.*; *Works* vii 39 *et seq.*, 444 *et seq.*). Bentham's views were approved by Salmond (*Jurisprudence*, 10th ed. 487).

¹¹ *H.C.L.* i 325, 441.

preferable. If, therefore, the accused in an English trial were compellable to enter the witness box, it is to be assumed that he would be questioned by counsel for the prosecution, precisely as he is now questioned when he elects to give evidence and so exposes himself to cross-examination. It is not the English experience that the cross-examination of the defendant when he elects to give evidence under the Act of 1898 gives the appearance of harshness or cruelty, except of course in so far as it subserves the purpose of the whole inquiry, which is to ascertain whether the accused committed the offence or not.

There is, indeed, one situation where the common-law practice may cause injustice to be done. This is where the accused is not represented by an advocate. It must have happened times without number that a poor person, without legal advice, and left severely alone by the judge or magistrate, has been unjustly convicted by reason of his inability to appreciate the legal points in issue and to make his defence. Stephen was much struck by this, and gave instances where innocent persons had been convicted because the judge had refrained from questioning them so as to bring out their real defence.¹² There is no doubt that in this situation it would be far better to allow judicial questioning, as is done in India. An even better solution would be to provide legal advice and assistance for all persons accused of serious crime. England has lagged behind in this respect. In Continental countries like France, Italy and Germany, and also in Scotland, it has long been the rule that a person

¹² *H.E.L.* i 442 *et seq.*

accused of one of the graver class of crimes must be defended; if he has no defender the court appoints one for him. In England there was no regular practice of this kind until the present century, except in the custom of the "dock brief"¹³ or some voluntary arrangement with a barrister through the intervention of the judge. Since 1903 there has been provision for State legal aid, until 1930 confined to jury trials; and the Act of 1949 which is at present in force is still confined to cases where by reason of the gravity of the charge or exceptional circumstances it is desirable for legal aid to be granted. Thus legal aid is not available for ordinary cases before magistrates. There is a strong argument for saying that where the defendant is unrepresented the court should be allowed to question him.

It may also be observed that the preference felt by the common lawyer for the system under which the judge refrains from questioning the accused presupposes that the principal object of the penal system is punishment with a view to deterrence—an assumption that for adult offenders is still largely true, notwithstanding the development of probation and discharge without punishment. If the criminal process were ever to be conceived as genuinely directed to the well-being of the offender, a change would probably take place in our attitude towards judicial questioning.

¹³ A defendant to a criminal charge has by custom the right to the services of any barrister in court who is not otherwise engaged upon payment of a fee of £1 3s. 6d; no solicitor is employed, and the barrister is permitted to use the court copy of the depositions. This is the "dock brief." It is now unusual except for pleas in mitigation, State legal aid being unavailable for the latter purpose.

In the juvenile court, where rehabilitation dominates, and where, moreover, the youngster is not likely to be legally represented, it is much better for the adversary system to be abandoned, and for the chairman of the magistrates to behave like a parent, first asking the child what he did, and then cross-examining him.

Stephen's second point, that the fact that the accused cannot be questioned stimulates the search for independent evidence, has a measure of truth as applied to pre-trial questioning, though whether this advantage is enough to balance the disadvantages is a matter of opinion. It does not, however, apply to questioning at the trial itself, for it is not to be believed that any precaution would be neglected in getting up a case simply because of a reliance on the cross-examination of the accused at the trial.¹⁴

That Stephen was not wedded to the accused's privilege of silence is shown by the fact that he was the principal author of the Draft Code of 1879, which proposed to allow the accused to give evidence and made him subject to compulsory cross-examination if he elected to do so. This measure, as we have seen, was put into law by the Criminal Evidence Act of 1898, which did much to reduce the importance of the whole question. The matter is now for agitation only

¹⁴ The same reply may be made to Professor Hamson, who, decrying the "modern realists" who would alter the classical principle of the unexaminable prisoner, says that "the alteration means more than the upsetting of an arbitrary rule of evidence; it involves the turning loose upon the prisoner of the prosecution, its agents, and its engines" (article in *The Times*, March 15, 1950). He was, perhaps, not considering a proposal to allow questioning at the trial only. The criticism, if applied to this proposal, would seem to me to be an exaggeration.

in those cases where the accused person chooses not to give evidence.

In the United States there has been a marked swing of opinion against the common-law rule. Although the Fifth Amendment provides that "no person shall be compelled in any criminal case to be a witness against himself," it has been held that this constitutional birthright, valid against the federation, does not avail against the states, which may end it. "The immunity from compulsory self-incrimination," said Cardozo J., "might be lost, and justice still be done."¹⁵ The American National Commission on Law Observance thought that the privilege "has come to be of little advantage to the innocent and a mere piece in the game of criminal justice."¹⁶ Quite a number of American legal writers take the same position.

JUDICIAL COMMENT UPON THE DEFENDANT'S FAILURE TO TESTIFY

As has already been mentioned, the passage of the Criminal Evidence Act was resisted in certain quarters in the interests of guilty defendants. It was argued that if the accused gave evidence he could be made to convict himself, while his failure to testify would be a circumstance of suspicion against him. A similar debate took place in the United States, and when the federal statute of 1878 allowed an accused person to give evidence on his own behalf, it was provided that

¹⁵ *Palko v. Connecticut* (1937) 302 U.S. 319.

¹⁶ Report of 1931, reprinted in Hall and Glueck, *Cases on Criminal Law and its Enforcement* (St. Paul, Minn. 1951) 513.

his failure to do so should not create a presumption against him. This has been taken to require the judge to instruct the jury that they should not draw unfavourable inferences against the defendant because he does not enter the witness-box. Only in a very few States with special legislation is unfavourable comment possible, though the number is gradually being enlarged.¹⁷ In Canada, too, the judge is debarred from commenting on the accused's failure to testify.¹⁸

In England, those who wished to show this extreme solicitude for the acquittal of the guilty did not wholly get their way. The Act of 1898 was a compromise; it forbade counsel for the prosecution to make the damning comment upon the accused's failure to testify, but permitted the judge to do so; under this compromise we live today. The Court of Criminal Appeal allows the judge to exercise the discretion given him by the Act,¹⁹ and the result is often to force the accused to give evidence in order to prevent the unfavourable comment from being made. Although

¹⁷ J. C. Knox in (1925) 74 *University of Pennsylvania Law Review* 139; 50 *Yale Law Journal* 114 n. 45; Wigmore, *Evidence*, 3rd ed., viii §§ 2272, 2272a. The American Law Institute's *Model Code of Evidence* (1942), Rule 201 (3), would allow the judge to comment upon the accused's failure to testify.

¹⁸ Canada Evidence Act, 1952, s. 4 (5). But see *May* (1915) 21 D.L.R. 728.

¹⁹ *Rhodes* [1899] 1 Q.B. 77. The restrictive attitude of the Privy Council in *Waugh* [1950] A.C. 203 is open to question: see (1950) 13 *Modern Law Review* 378; and cf. *Jackson* [1953] 1 W.L.R. at 594. In Scotland some judges have gone so far as to express the opinion that the judge should refrain from exercising his statutory privilege: for the different opinions see *Brown v. Macpherson*, 1918 J.C. 3; *Scott v. H.M. Advocate*, 1946 S.L.T. 140 (noted 10 J.Cr.L. 282).

at first judges were chary of commenting, they have come more and more to do so. A good illustration is the trial of Nodder in 1987 for abducting a girl of ten, Mona Tinsley, who had not afterwards been found. The accused did not give evidence, and his counsel contented himself with a speech to the jury, in which he pointed out gaps in the evidence for the prosecution. Mr. Justice Swift, in his charge to the jury, made the following remarks, which must have contributed materially to the conviction that followed.

“Members of the jury, there is one person in this court who could tell you a great deal about the disappearance of this little child. A great deal! For it is admitted that he was with her on the evening and during the afternoon of the day on which she was last seen.

He could tell you much, and, members of the jury, he sits before you in the dock. But he has never been *there* [pointing to the witness-box]. Would you not think that he would be willing—nay, eager to go into the box, and on his oath tell you all he knows? But he stays where he is.

Nobody has ever seen that little girl since twelve o'clock on January 6th. Nobody knows what has become of her. . .

There is one person in this court who knows, and he is silent. He says nothing to you at all.

The witness-box is there open and free. Why did he not come and tell you something of that strange journey beginning in the Guildhall Street, Newark, when she inquired: ‘How is Auntie? I should like to see Peter’?

There is one person in this world who could have made it all plain to you. There is one man in the world who knows the whole story, and when you are trying to elicit that which is true he sits there and never tells you a word.

When [counsel for the defendant] says there is no evidence of what happened on January 5th and 6th I venture to ask: 'Whose fault is that?'

You are not to speculate, but you are entitled to ask yourselves: 'Why does he give us no information? Why is he silent when we are wondering and considering what has happened to that little girl?' " 20

The position is, therefore, that the accused will normally give evidence; or if he does not, the judge will comment on the fact and the jury will probably convict. But sometimes a defendant who is in a tight corner and who is an old enough hand to know the perils of cross-examination may remain in the shelter of the dock; the judge may omit to comment on the fact, and the jury may be so puzzled and unhappy that they bring in an acquittal. Lord Porter told

²⁰ A. E. Bowker, *Behind the Bar* (London 1947) 224. (The version in the *Notable British Trials Series*, which was revised by the judge, appears in slightly less dramatic form.) Cf. *The Trial of Rattenbury and Stoner*, ed. F. Tennyson Jesse (London 1935) 269-70. See also Sir Travers Humphreys' opinion: "I do not myself think that a jury is likely to be in the least prejudiced against a defendant by his failure to give evidence unless there is some matter of importance upon which he and he alone can contradict or explain evidence called for the Crown which is, on the face of it, adverse to him. In that event it is surely right that his failure to give evidence should tell against him": *Criminal Days* (London 1946) 45.

of an indecent case that he tried at the Old Bailey, where the jury refused to convict an obviously guilty man who had not gone into the box, because "We don't like convicting a man for this class of offence unless we have heard what he has to say."¹ In this case Lord Porter had actually explained to the jury that he had no power to compel the defendant to testify, so that their attitude was wholly unreasonable. Occasionally a defending counsel may hit upon some plausible excuse for keeping his client out of the box, as when, at the trial of Merrett for murdering his mother, counsel for the defence explained the accused's silence by thanking God that "there are people who would rather go to their death with their lips sealed than that they should speak a single word that would reflect on the name of a mother." The Scottish jury, deprived of the opportunity of hearing Merrett and not liking to condemn the reason for it, brought in a verdict of "not proven." The sequel was unfortunate, for Merrett later murdered both his wife and his mother-in-law.² These instances are perhaps enough to show how the present rule introduces an element of chance into the administration of justice.

The sensible solution would be to require an accused person to listen to questions put to him by counsel for the prosecution, though with no penalty for refusal to answer. This is the French practice, with the difference that the questions are asked by the judge. In neither England nor France can the defendant be forced to confess his own guilt, though the two

¹ (1949) 2 *Current Legal Problems* 21-2.

² See T. B. Smith in [1954] *Criminal Law Review* 500.

systems differ on whether questions can be addressed in his direction. In France, as elsewhere on the Continent, an unfavourable inference may be drawn from the accused's silence under questioning; in England, an unfavourable inference may be drawn from the accused's failure to volunteer for questioning. This is not such a great cleavage, but in the occasional cases where the point is important the balance of advantage seems to lie with the Continental practice.³

If the Continental solution be too thorough for the English taste, it would at any rate be an improvement if we allowed prosecuting counsel to make the appropriate comment where the defendant gives no evidence, in order to make sure that the point is brought to the attention of the jury.

THE CROSS-EXAMINATION OF THE DEFENDANT

Once a defendant elects to give evidence on his own behalf he becomes subject to cross-examination like any other witness; but unlike other witnesses he has not the full privilege against self-incrimination. This is because, under the Act of 1898, s. 1 (e), he may be compelled to answer a question incriminating him as to the offence charged, though (with some exceptions to be studied later) he may not be asked a question incriminating him as to any other offence (*ibid.* para. (f)). The legal compulsion to answer questions incriminating him as to the offence charged is, however, only theoretical, because it is not the practice to

³ For a discussion of the French practice see Hammelmann in (1949) 27 *Canadian Bar Review* 653.

commit a defendant to prison for contempt of court in refusing to answer such a question. The real inducement to answer lies in the unfavourable inference that will be drawn from silence. The French rule is more practical in not imposing upon the defendant any obligation to speak. Laying down rules that he has not the heart to enforce is a well attested, if seldom acknowledged, feature of the Englishman's character.

On cross-examination counsel for the Crown is generally armed not only with other witnesses' statements or circumstantial evidence telling against the accused's version, but also, in many cases, with a statement made by the accused himself before or at the time of his arrest, which is inconsistent with the story that he now wishes upon reflection to put forward in the witness-box. The result is that the cross-examination of a guilty defendant quite frequently makes out the case for the Crown. In the words of Sir Patrick Hastings:

“Weaknesses in the defence are torn to shreds, improbabilities become glaring in their nakedness, and above all any lying statements that the defendant may have made become accentuated a thousand-fold. The law which permits a prisoner to give evidence on his behalf is supposed to confer upon him an inestimable benefit, and indeed it is only just and proper that an innocent person should have the right to proclaim his innocence on oath, but to a guilty person, or indeed to one who has something vital to conceal, the privilege is of

more than doubtful benefit, and indeed one which many accused persons would infinitely prefer to be without.”⁴

A celebrated example is that of Seddon, who might not have been convicted unless, sure of his ability to score off Sir Rufus Isaacs, he had insisted upon going into the box, and so exposed himself to a devastating cross-examination which has since become a classical example of the art. The evidence given for the prosecution had been entirely circumstantial, and without the evidence of Seddon there was a chance that the jury might acquit. In the cross-examination Seddon was taken through the history of the case and invited to give his own explanation of every material matter. The result, as Sir Travers Humphreys has pointed out, was to turn a fairly strong case into a conclusive one.⁵ Rouse again, might not have been convicted if he had not gone into the box, for the most telling evidence against him turned out to be his own admissions made under the shattering cross-examination by Mr. Norman Birkett.

On the other hand innocent persons have found the opportunity of giving their story and facing cross-examination to be their salvation. It is safe to say that Mrs. Rattenbury was acquitted almost solely because of the favourable impression she made in the witness-box, which undid the damage done by her own false confessions before the trial.

⁴ *Cases in Court* (London 1949) 273-4.

⁵ Foreword to E. W. Fordham's *Notable Cross-Examinations* (London 1951) xxii

THE PRACTICE OF PUTTING A DEFENDANT ON OATH

In England the oath is treated with a levity that appears both remarkable and distasteful to the foreign observer. Routine papers in legal proceedings, like the affidavit of documents or the proof of a debt in liquidation, are invested with all the dignity of an oath, involving the use of the Bible and the invocation of the Deity; and all evidence except that of very young children is taken on oath, unless the witness declares that he has no religious belief or that his religious belief prevents him from taking an oath, in which case he is allowed to affirm.

On the Continent they are more discriminating. An accused person is not put on oath, because of the stark conflict between his self-interest and his sense of duty to speak the truth. Consequently, he is not subject to prosecution for perjury, or for any other offence, if he tells a lie. In Germany the practice is to swear a witness (other than the accused) after he has made his spontaneous statement, the oath consisting of the simple affirmation that what he has said is true; and the judge may refrain from causing the oath to be administered to a witness if he thinks that the circumstances create a strong probability that he has been tempted to lie. By not taking the oath the witness is saved from the risk of prosecution for perjury. Even in India, which has generally adopted the basic principles of English penal law, the accused gives evidence without an oath, and is not punishable for falsehood.⁶

⁶ *Code of Indian Criminal Procedure*, s. 342.

In England, where an accused person gives evidence on oath, the legal consequence is that he is subject to a prosecution for perjury in respect of any untrue statement, including an untrue denial of guilt. This, however, is mere theory: there was an isolated prosecution in 1899,⁷ but the practice during the present century has been not to proceed against persons for committing perjury when on their trial. The reason is not only the difficulty of proving the guilty mind (which affects all prosecutions for perjury), but, more specifically, the feeling that it goes against the grain to prosecute for a lie told under such duress of circumstances. Whatever the practical justification of this policy, it is open to the criticism of reducing the oath to a piece of hypocrisy to which no attention is paid even by the law itself. Sir Travers Humphreys' comment is worth repeating.

“Juries are quite capable of appreciating the temptation to lie, which is put before an accused person in allowing him to give evidence, and are not, I believe, unduly impressed by the fact that his evidence is given under the sanction of an oath. If there is a criticism to be applied to the modern practice it is, I suggest, that it has tended to encourage perjury, since the defendant is almost expected to deny his guilt and is probably aware that there is not the least probability, even if his evidence is disbelieved, of his being prosecuted

⁷ *Wookey*, 63 J.P. 409. In *Wheeler* [1917] 1 K.B. 283 a defendant was prosecuted for perjury in respect of a statement made by him after he had been convicted, with a view to mitigation.

for perjury. To that extent it may be said the alteration in the law has had the effect of cheapening the value of an oath.”⁸

In considering a possible change in the law, it is necessary to bear in mind that the present Continental practice was found also in England in the early days of jury trial. English law at that period refused the oath not only to the defendant himself but to his witnesses. There was logic in this. Under the old procedure a man was not put on trial until he had been indicted by a grand jury who were supposed to represent the opinion of neighbours, and he would probably have been interrogated into the bargain. The fact that an accused person was put on trial indicated some kind of opinion that he was probably guilty. Now the witnesses for the defence would probably be friends of the accused and would, as such, be tempted to lie on his behalf. It was not thought right to administer a religious oath to those who were likely to be tempted to break it. The same reason that denied the oath to the accused person denied it to his witnesses.⁹

The lack of the oath was not at first felt as a great injustice because there was no principle that evidence had to be on oath to be accorded weight. The practice

⁸ Sir Travers Humphreys, *Criminal Days* (London 1946) 46.

⁹ Probably the solicitude was rather for the sanctity of the oath itself than for the souls of those who were likely to forswear themselves. Sir C. K. Allen, *Legal Duties* 270 refers to other and less creditable reasons for the rule. Wigmore in (1902) 15 *Harvard Law Review* 628 expresses the opinion that the oath was not at first administered to witnesses before the jury because in those days such an oath would have been regarded as a decisive thing.

of swearing witnesses in legal trials was sporadic; Bentham showed convincingly that in 1554 it was still not the invariable practice to swear the witnesses for the prosecution.¹⁰ But in the later 1600s, just before the Revolution, the judges seemed to take the view that unsworn testimony of the accused was no evidence,¹¹ and when this happened it became obvious that the practice had to be changed, at any rate for the accused's witnesses. When once the oath was conceded to the witnesses for the defence, it was only a matter of time before it was allowed to the defendant himself.

If the problem is to be freshly examined, a distinction may well be drawn between the administration of an oath and the scope of the law of perjury or false statement. As to the first, it is doubtful whether there is now anything substantial to be gained by requiring a form of oath or affirmation in any legal proceedings. The only way of withdrawing the oath from the defendant and his witnesses, if manifest unfairness is to be avoided, is by withdrawing it from the prosecution as well. The question what deliberate falsity in evidence shall be punished is a different one, but it seems undesirable to have too great a gap between the formal law and its enforcement. Wilfully false statements tending to incriminate the accused must clearly continue to be punishable. It seems doubtful whether any very useful purpose is served by regarding as theoretically punishable false statements

¹⁰ *Rationale of Judicial Evidence*, Bk. 9, Chap. 3 (London 1827, vol. 5, pp. 262-3).

¹¹ Wigmore, *Evidence*, 3rd ed., ii, § 575, n. 42.

made for the purpose of getting a man off, where there is no fabrication of evidence or subornation of others to give false evidence; but on the whole it would seem undesirable to remove the theoretical prohibition of such false witness, even though prosecutions may rarely be decided upon. In the case of the accused himself the present law seems quite pointless, and it is suggested that the Continental rule might well be adopted whereby an accused person is not punishable for untruths told in his own defence.

THE SURVIVAL OF THE UNSWORN STATEMENT

It will be recollected that before the passage of the Act of 1898 some judges had mitigated the severity of the common law by allowing a defendant to make an unsworn statement, on which, however, he could not be cross-examined. The Act of 1898 somewhat anomalously preserved this compromise arrangement, so that at the present day an accused person may elect to make an unsworn statement from where he stands, instead of entering the witness-box in which he exposes himself to the perils of cross-examination.¹² The right is not often exercised in trials on indictment where the accused is represented by counsel, because the unsworn statement made without the possibility

¹² He may, indeed, make both a sworn and an unsworn statement—unless he is a juvenile, in which case the rights are made alternative by the Summary Jurisdiction (Children and Young Persons) Rules, 1933, r. 10. For discussions of the unsworn statement, see Cowen in (1952) 68 *Law Quarterly Review* 463; Allen in (1953) 69 *ibid.* 23; Barry and Paton, *Introduction to the Criminal Law in Australia* (London 1948) 82.

of the defendant's statement being tested by cross-examination will be given little credit, and it is generally thought to be better to say nothing than to exercise a right that is itself almost a confession of vulnerability. In summary jurisdiction, however, unsworn statements are common, because when the magistrate explains the choice open to an unrepresented defendant, the latter will tend to choose what may seem to him to be the safe course and make a statement from where he stands. A most unsatisfactory situation is then capable of arising, because the defendant cannot (in strict law) be asked questions to elucidate the essential points in his defence that he may have omitted. In practice the summary court is likely to throw the rule to the winds and ask the questions. Parliament may one day recognise that the retention of a choice between the sworn and unsworn statement is unnecessary for justice. If a previous argument be accepted, it would be possible to abolish the sworn statement and to combine the unsworn statement with a liability to cross-examination.

THE EVIDENCE OF A SPOUSE

There is one curious survival in English law of the ancient disability to testify on the ground of self-interest. This is in respect of spouses. At common law the husband or wife of an accused person was no more competent to give evidence than was the accused person himself, theoretically on the fiction that husband and wife were one person in law. This rule has never been completely abolished, as, of course, it

should have been to accord with modern ideas. Some exceptions were admitted at common law, and others have been created by statute, chiefly in relation to offences against children, sexual offences, and offences against the property of the other partner.¹³ There have been some highly technical decisions on these exceptions which have emphasised the arbitrary nature of the law.¹⁴

Even where the wife (or husband) is a competent witness, she is not generally compellable to come forward; there are relatively few exceptions to this rule. It may be doubted whether, at the present day, the restriction on compellability is any more justifiable than the restriction on competence. The prosecution would not normally call the accused's spouse as an unwilling witness, even if they had power to do so, except for that spouse's own protection. In the admirable *Model Code of Evidence* prepared by the American Law Institute the spouse is placed on the same footing as any other witness, subject only to the privilege not to disclose marital communications.

¹³ Archbold, 33rd ed., ss. 841-2.

¹⁴ See, e.g., note in (1951) 14 *Modern Law Review* 341; *Alger* [1954] 1 Q.B. 279; 8 *Journal of Criminal Law* 81; 9 *ibid.* 11; 13 *ibid.* 5.

CHAPTER 4

THE EXAMINATION OF WITNESSES

THE QUESTION AND ANSWER METHOD

THE Anglo-American practice whereby witnesses are in turn examined, cross-examined and re-examined by the advocates for the two sides, being tightly controlled by the questions asked, stands in contrast to that prevailing on the Continent. In France, for example, the witness is allowed to recite or ramble without interruption, though he may be interrogated afterwards by the president of the court and by counsel for both sides. The French think that for a witness the principal quality is spontaneity. Whether they get spontaneity is another matter; it is said that what actually happens, too often, is that the witness makes a prepared speech. Mr. A. C. Wright, in his study of French criminal procedure, declares that "in all sensational trials anyone is cited who may be counted upon to make a really good speech to stir the jury's feelings, journalists, politicians and professors of philosophy being in particular demand."¹ We in England are prevented from adopting spontaneous witnesses, even if we wished to have them, because of our exclusionary rules of evidence, which would cease to operate if the witness were allowed to say anything that came into his head. The utility of some of these rules of evidence will be considered in a later chapter.

¹ (1929) 45 *Law Quarterly Review* 98.

An incidental result of the system of questioning, in examination-in-chief, is that if it is sympathetically done it helps the witness to tell his story. It may also save time by keeping him to the point. His evidence is brought out in a coherent and orderly way, and the confusion which observers so often find in a French trial is avoided. The danger of the English method is that the evidence may be subtly falsified because the witness is not allowed to have his full say. Counsel, by the way in which he frames his questions, is often enabled to edit the evidence.² One may hope, however, that it would be regarded as a gross breach of professional ethics for counsel intentionally to mislead the court in the evidence he elicits from his own witnesses. The importance of these customary standards of professional conduct cannot be stressed too strongly in a system which leaves so much to the discretion of advocates retained by the parties.

The ethics of cross-examination are regarded as quite different from those of examination-in-chief, for when dealing with a witness called by the other side it is regarded as not only proper but laudable for counsel to know what not to ask and when to stop asking. The great object is so to cut off the witness

² Lord Alverstone made an unconscious admission on this in his *Recollections of Bar and Bench* (London 1915) 284: "Cross-examination is far easier than examination in chief. In cross-examination one cannot avoid getting answers which are not desired as one has to put leading questions and points of contradiction to hostile witnesses; but in chief a great deal depends upon the way in which witnesses are examined. This is a confession of the practice of editing the evidence. In *Frampton*, *The Times*, April 13, 1954, the police, by omitting a vital part of a witness's typed statement, so that he was not questioned upon it in court, brought about a wrongful conviction.

that he makes admissions damaging to his own side while being given no opportunity to introduce the qualifications he is anxious to state. This kind of professional cleverness, and the occasions when by mistake the cross-examiner ruins his effect by asking one question too many, are the subject of many stories hugely enjoyed by lawyers. From the social point of view there is almost nothing to be said for it, but perhaps little harm is caused in practice. This is because after cross-examination comes re-examination by the side calling the witness, who will almost certainly be given every opportunity by his own counsel to expand and explain any misleading statement he has made.

CROSS-EXAMINATION

The English view is that cross-examination is the best method of ascertaining forensic truth, while English lawyers are the most perfect exponents of this difficult art. The Americans think the same, with the comparatively modest substitution of "Anglo-American" for "English." Hear the opinion of Wigmore, greatest of the exponents of the law of evidence in the English-speaking countries:

"Not even the abuses, the mishandlings, and the puerilities which are so often associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the medieval system of the civilians. Nevertheless, it is beyond any doubt the greatest

legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience He may, it is true, do more than he ought to do; he may 'make the worse appear the better reason to perplex and dash maturest counsels'—may make the truth appear like falsehood. But this abuse of its power is able to be remedied by proper control. The fact of this unique and irresistible power remains, and is the reason for our faith in its merits. If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure."³

At the Nuremburg war-guilt trials, where the procedure was a compromise between different systems, our method of cross-examination is said to have evoked the admiration of Continental lawyers. Whether or not the English on this occasion mistook courtesy for conviction, the opinion of those English observers who have studied French practice is that our neighbours across the Channel have no proper

³ Wigmore, *Evidence*, 3rd ed., v. § 1367. For the abuses of cross-examination, see Frank, *Courts on Trial* (Princeton, New Jersey, 1949) 82-4. The reader who wishes to have a very brief account of some of the methods of cross-examination may consult the article by W. J. C. Meredith in (1945) 23 *Canadian Bar Review* 625.

conception of the art of cross-examination, the main function of counsel for the defence there being to watch over and object to questions put by the court. "No one," says Mr. Wright again, "seems to know how to dissect a statement into its component parts, find out hidden contradictions, and cut through equivocation, generalisations or hearsay to the essence of facts within the witness's own knowledge. Nor does the national temperament seem to envisage counsel quietly pressing a point, asking for precise answers, demanding explanations or particulars—in short, testing the witness's evidence." The practice of cross-examination is hindered by the Code itself, Article 319 of which provides that after the witness has given his spontaneous statement, the accused or his counsel can question him *par l'organe du président*. This phrase is not interpreted strictly to mean that the president must repeat every question after counsel; ordinarily, he contents himself with bidding the witness to reply to the question that has been put to him, and he may even allow counsel to address questions without his interposition.⁴ However, it is evident that the French witness does not expect to be questioned on behalf of the parties, unless the questions have the continuous support and authority of the judge. In our eyes such a principle must seem to involve grave peril of miscarriages of justice, for, as Stephen says, the judge "has not those strong motives for doubting the witness's truthfulness which alone make cross-examination really

⁴ Garraud, *Traité d'Instruction Criminelle* (1982) ii 133.

effective.”⁵ We are not entirely without experience in this matter, because on the rare occasions when a Home Office inquiry is held into an alleged miscarriage of justice, it is the practice not to allow representatives of private parties to cross-examine witnesses as a matter of right, though they may sometimes be allowed to put specific questions to the witnesses. This restriction, which was recently imposed by Mr. Scott Henderson in his inquiry into the Evans and Christie cases, invariably causes the most profound dissatisfaction, and is perhaps one reason why these reports, which usually find that no mistake has occurred, fail to allay public disquiet.

⁵ *H.C.L.* i 547.

CHAPTER 5

MISTAKEN EVIDENCE

THE ACCURACY OF RECALL

WHILE I think that the current assessment in England of the value of cross-examination (assuming it to be performed by a competent advocate) is well founded for the unwilling or dishonest witness, it perhaps needs qualification for the much more common forgetful witness. Cross-examination—that is to say, intensive questioning, sometimes with suggestions of the answer expected—may fail to make a witness remember what he has forgotten, and may, indeed, make him assert a falsity. Notable experiments have been made upon this subject by psychologists. Sir Cyril Burt staged a kidnapping scene in the middle of one of his lectures. When quiet was restored and the members of the audience had recovered from their amazement, they were asked to write out an account of the raid. On an average one statement out of four was found to be quite untrue. Cross-examination or the lapse of time resulted in errors being doubled or trebled.¹ In other words, pressing a witness with questions days or weeks after the event may cause him to believe that he observed or remembered something that he did not. This is not an objection to the practice of cross-examination, which is far too valuable for other

¹ See *The Listener*, December 7, 1950.

purposes to be abandoned merely because of its effect in aggravating errors of recollection. It is, however, a factor that must always be borne in mind in assessing the value of evidence.

Professor Bartlett, in his important work *Remembering*, describes experiments that show how temperament, interests and attitudes determine the content of perceiving and recalling. One element that is often of great importance in legal trials is the order in which events took place. Professor Bartlett reports that even in short tests, with only brief intervals elapsing, the order of sequence was a factor extremely liable to disturbance. Of twenty subjects who took part, seven were wrong as to the order of sequence in the first experiment.

The extent of human fallibility in this matter is disturbing when one considers that the result of a trial may depend upon who, in a struggle, is held to have drawn his weapon first. An experiment similar to the one by Sir Cyril Burt already referred to was performed during a law lecture by Professor Gower at the London School of Economics. There was an altercation between an Englishman and a Welshman; each drew weapons and the Englishman "shot" the Welshman. When members of the audience were examined as to what had happened, they said that the Welshman had brandished his weapon first, whereas in actual fact both drew weapons at the same time. The reason for the mistake was that at the dramatic moment the situation was such that all eyes were on the Welshman. The mistake might be disastrous in

a legal case if the question of self-defence were in issue.²

Sometimes the literal accuracy of words reported is a vital issue in a trial. Professor Bartlett's experiments give small cause for comfort in this matter. When subjects were invited to remember a story, their reproduction consisted almost entirely of paraphrase. "Accuracy of reproduction, in a literal sense, is the rare exception and not the rule."³ This conclusion is supported by the experiment at the London School of Economics, where no witness gave a wholly accurate account of the dialogue that had preceded the show of violence.

It will be remembered that Bentley was hanged because, on the evidence, he said to Craig: "Let him have it, Chris!", when Craig thereupon shot a policeman. Bentley's words were as well proved as was humanly possible, because they were deposed to with precision by three policemen. The only permissible comment is that the fallibility of testimony must always be borne in mind, and that error is particularly likely to appear in the reporting of dialogue. In this connection it is worth recalling the words of Stephen, who, remarking on the excessive weight that juries tend to attach to a sworn statement, said:

"A consideration of the degree to which circumstances corroborate each other, and of the intrinsic probability of the matter sworn to, is a

² For the experiment see (1952-3) *Obiter* (published by the Law Society, London School of Economics), No. 2, p. 26. See also (1951) 29 *Canadian Bar Review* 372.

³ *Remembering* (Cambridge 1932) 98.

far better test of truth than any oath can possibly be, and I should always feel great reluctance to convict a prisoner on the uncorroborated testimony of a single witness to words spoken, or to any other isolated fact which, having occurred, leaves behind it no definite trace of its occurrence.”⁴

That a witness forgets facts is not a great danger to an accused person, for it will generally be in his favour. The danger arises when the witness, through a trick of memory, believes that he saw or heard what he did not. The intensity of a false belief of this kind is sometimes surprising: George IV remembered vividly being at the battle of Waterloo.

In legal judgments, great stress is laid on the advantage enjoyed by the judge and jury who are able to study the witness while he is being examined. This is one reason for the orality of the legal proceeding, the theory being that the detection of falsehood or uncertainty is facilitated by seeing and hearing the witness give evidence. It is also one reason why the Court of Criminal Appeal is reluctant to interfere with the verdict of the jury which has heard the witnesses. However, it is an exaggeration to suppose that a lie can be detected merely by observing the way in which the witness utters it, for some liars are bold and some honest witnesses are hesitating and nervous. All who have experience of the criminal courts can testify to this, though the jury who have to try the case may

⁴ *H.C.L.* i 401.

unfortunately be quite unaware of it.⁵ Moreover, we have Professor Bartlett's authority for saying that the confidence with which a witness recalls an event is no guide to the accuracy of his recollection. Writing of the two methods of recall, visualisation and vocalisation, he says that when visualisation is the primary method employed, it favours the introduction of material from an extraneous source, and has the general effect of setting up an attitude of confidence which has nothing to do with objective accuracy. When vocalisation is the primary method employed, it tends to set up an attitude of uncertainty which again has nothing to do with objective accuracy.

The law draws a sharp distinction between fact and opinion. The ordinary witness (as distinct from the expert) is supposed to speak only to what he actually knows, as opposed to deduction or inference which is a matter of opinion to be decided by the jury. It appears from Bartlett's experiments, however, that

⁵ " Experience teaches those who are always in the courts that it is by no means always the shrewd and fully confident witness who is speaking the truth. On the contrary, those who have reluctantly come to court, and who are very nervous of being there at all, are apt to give their evidence in a hesitating manner, and, indeed, often to contradict themselves and forget things which they perfectly remember before they get into the box. A judge, with his great experience, knows how much value to attach to manner and demeanour, but a jury have not the same advantage ": Ellis-Hume Williams, *The World, the House and the Bar* (London 1930) 162.

The clerk to Mr. Justice Avory wrote: " The worst woman I ever knew—and I have known some bad ones!—had a face which for purity and innocence I can compare only with Raphael's 'Madonna,' and some of the best men and women who have crossed my path would have been convicted instanter under any laws founded on Cesare Lombroso's theories ": F. W. Ashley, *My Sixty Years in the Law* (London 1936) 163.

no firm line can be drawn in recollection between observation and inference. Where a story to be remembered contained some puzzling elements, the subjects showed a strong tendency to rationalise, which means that they retold the story as they thought it ought to have been rather than as it was. "Whenever anything appeared incomprehensible, or 'queer,' it was either omitted or explained."⁶ In short, the supposed facts that the witness retails in court are made up in large part of his guesswork.

A vocalising subject at a second sitting said: "Remembering what I said before played a considerable part in what I said this time. I sometimes remembered the judgments I made before."⁷ This is an interesting commentary on the legal rule whereby the witness's statement, given in court perhaps months after the event, is the real evidence, while his original proof of evidence, given perhaps within hours of the event, is not referred to at all, and his deposition at the preliminary hearing is referred to only for the purpose of contradicting him and not as independent evidence.⁸ The legal insistence upon the necessity for an oath and upon oral statement in court in order to give credibility to evidence appears in this light to be irrational. It really needs no psychologist to show

⁶ *Op. cit.* 68, 84, 83.

⁷ *Ibid.* 60.

⁸ The latest reported case is *Birch* (1924) 93 L.J.K.B. 385; 18 C.A.R. 26, where, however, no injustice was done by the rule, because the prosecutrix at the trial retracted her evidence against the accused, and this evidently cast strong doubt upon the prosecution's case. The rule would work badly if used where a witness has genuinely forgotten some detail between the preliminary hearing and the trial. It could also cause injustice if used against the accused and not for him. See more below, p. 146.

that, although instances occur of delayed reproduction, memory generally fades with the passage of time, and that, when a witness is required more than once to recall an event, his act of recall on a subsequent occasion may be merely an imperfect memory of what he said on an earlier.⁹

Realisation of the fragility of memory also underlines the need for really speedy trial of criminal cases. In England the trial is already commendably prompt, but delay could still further be eliminated if all criminal courts were in practically continuous session.

IDENTIFICATION EVIDENCE

With all the forms of possible error just described, it is inevitable that some miscarriages of justice should take place under any system of law, and the best that can be hoped and worked for is that these mishaps should be kept to a minimum. In England and America

⁹ An acute observer, the late Albert Lieck, Chief Clerk of the Bow Street Magistrates' Court, pronounced a similar opinion. "Very few of us are careful and accurate observers. Those of us who are, are at our best when we can check our observations by repetition, which is exactly what is impossible in most matters where human testimony is required in court The tricks played by our senses are terrifying to the seekers of truth. . . . The evidence which is given is often not even a recollection of the events, but only a recollection of what the witness said about it soon after. You can easily see this is so. A policeman will quite often be able to relate only what appears in his note, not by any means the least satisfactory kind of evidence. Seek to take him out of his framework, and to resee the events in his mind's eye, so some detail, not regarded at the moment but turning out to be important, can be recovered. In nine cases out of ten he cannot do it, though he honestly tries. His memory is of his note, not of an observed happening" (Lieck, *Bow Street World*, 238, 243).

most of the spectacular miscarriages have been due to wrong identification of the defendant as the culprit. Professor Borchard's book *Convicting the Innocent* records sixty-five criminal convictions (including three in England) in which the accused was subsequently proved innocent, *e.g.*, by the alleged "murdered" person turning up alive, by subsequent conviction of the real culprit, or by the discovery of new evidence leading to a pardon. The major source of error was found to be the identification of the accused by the victim of a crime of violence. This mistake was practically alone responsible for twenty-nine of the convictions, and in eight of them the wrongfully accused person and the guilty criminal bore not the slightest resemblance to each other.

In this connection, Professor Bartlett's words on the subject of remembering faces are of importance.

"Faces seem peculiarly liable to set up attitudes and consequent reactions which are largely coloured by feeling. They are very rarely, by the ordinary person, discriminated or analysed in much detail. We rely rather upon a general impression, obtained at the first glance, and issuing in immediate attitudes of like or dislike, of confidence or suspicion, of amusement or gravity."

Experiments were performed by asking subjects to describe faces that they had previously been shown on picture post-cards. Bartlett's report is as follows.

"A particular face often at once aroused a more or less conventional attitude appropriate to the given type. Thereupon, the attitude actively

affected the detail of representation. . . . A subject gave the Captain [one of the postcards] 'a grave appearance': 'He was a very serious looking young man.' The face was [wrongly] turned into complete profile and assigned a prominent and heavy chin. After a lapse of three weeks the seriousness appeared to have become intensified, and the Captain was now referred to as 'The young man in profile, to the right. He had a square face, and is very serious and determined looking.' Seriousness and decision were emphasised again and again, and a fortnight later seemed more striking than ever. This subject had to terminate her experiment at this stage, and so I showed her the card once more. She was amazed, and thought at first that I had substituted a new card. Her Captain, she said, was very much more serious; his mouth was firmer, his chin more prominent, his face more square It looks very much as if, under the influence of the affective attitude involved, some of the detail given in recall is genuinely being constructed Accurate recall is the exception and not the rule."¹⁰

In the experiment at the London School of Economics, nine members of the audience were asked to try to identify the two actors at an identification parade held a week after the event. The parade consisted of thirteen persons. Only two students out of the nine were able to identify the Englishman, and

¹⁰ *Op. cit.* 53-5, 61.

only four were able to identify the Welshman. The rest with varying degrees of assurance identified completely innocent men. Two innocent men were identified twice.

It is possible to show how this kind of error has vitiated actual legal cases. The most notorious and instructive is the trial of Adolf Beck. Beck was something of a rolling stone who between 1868 and 1885 was in various States of South America. During this period, in 1876-77, one John Smith committed a number of petty frauds upon women in London. He would pose as a gentleman of means, make an acquaintance with a woman whom he would visit in her home, and persuade her to come to live with him as his mistress. He would then obtain possession of a ring or watch from the woman on one fraudulent pretence or another, and would borrow some small change. For these offences of obtaining property, which he repeated a number of times with different women, Smith received a sentence of imprisonment.

Fourteen years after Smith's release, in the year 1895, when Beck was back in London, the frauds on women began again. The method adopted was almost exactly the same as in the first series. One of the defrauded women thought she recognised Beck as the man who had imposed upon her, and upon his arrest he was also identified by other women who had actually been the victims of John Smith. In all, Beck was wrongly picked out in identification parades by no fewer than twelve women who had been defrauded by Smith. Only one of the women who were defrauded

at this period by Smith was certain that Beck was not the man who had defrauded her.

The identification evidence was allowed to result in Beck's conviction although there were some circumstances contradicting it. The cheat was said to be very well dressed whereas Beck's clothes were shabby. The women who gave evidence for the prosecution said that the man who had visited them spoke with a foreign or German accent, whereas Beck did not. The man who cheated them wrote fluently, whereas the evidence of a chambermaid who had seen Beck writing was that he wrote very badly and slowly. On the other hand Beck failed to prove an alibi for any of the meetings with the women with which he was charged. Also, by an unhappy coincidence, he was found in possession of pawn tickets relating to female jewellery, though none of these related to the missing property. The result of the trial was a conviction, and Beck remained in prison for seven years.

The subsequent history is quite as extraordinary. While Beck was in prison his solicitor attempted to prove his innocence by pointing out physical differences between Beck and Smith; but he met with obstruction and stolid indifference on the part of the prison authorities and the Home Office. It is an astonishing fact that the prison records regarded Beck and Smith as the same person, notwithstanding that it was impossible for Beck to have committed Smith's crimes, as Beck's solicitor many times pointed out.

About two years after Beck's release from prison the frauds began again, and Beck was convicted of them in 1904 on the identification evidence of four

women, who picked Beck out on the street or in identification parades, and on the evidence of a handwriting expert, who, as is too often the habit of handwriting experts, found no difficulty in declaring that Beck's handwriting in his private pocket-book was the same as that used by the cheat in letters that the latter had written to his victims. After this second conviction Beck's luck turned. While he was in custody awaiting sentence the frauds recommenced, and Smith was arrested. It could no longer be denied that a ghastly blunder had been made. Beck was given a free pardon and a grant of £5,000 as compensation.¹¹

The Government set up a legal committee to inquire into the case. In its report, the committee stated the important conclusion that "evidence as to identity based on personal impressions is perhaps of all classes of evidence the least to be relied upon, and, therefore, unless supported by other facts, an unsafe basis for the verdict of a jury."¹² These other facts required by the committee must, of course, be facts implicating the accused. It requires some intelligence and care to distinguish between facts that merely corroborate that a crime has been committed, which are useless to support identification evidence, and facts that connect the accused with the crime, and this distinction obviously needs to be explained to the jury. Common sense suggests that it is also necessary to distinguish between the witness who has merely made

¹¹ See generally *The Trial of Adolf Beck*, ed. E. R. Watson (Edinburgh 1924); G. de C. Parmiter, *Reasonable Doubt* (London 1938), Chap. 3.

¹² Reprinted in *The Trial of Adolf Beck* 250.

a brief acquaintance with the criminal and the witness who knows him well. There is all the difference between saying: "I saw the defendant, whom I have known all my life," and "I saw a man I recognised as the defendant, whom I had met once before." The former statement, in ninety-nine cases out of a hundred, is satisfactory identification; the latter, in the absence of corroborative evidence, never is.

One other observation is suggested by Beck's case. Identification seems to be a matter on which personal pride has a strong effect: a witness often resents it when his ability to recognise someone is questioned. The women who wrongly identified Beck became more sure of their identification under cross-examination. At the trial of Steinie Morrison, a cab driver who said that he drove Morrison and the deceased on the night of the murder was reluctant to admit, though he eventually did admit, that before picking out Morrison at an identification parade he had seen some photographs of Morrison in connection with the case in the newspapers.¹³ Professor Bartlett's conclusion is again relevant that the visual memorisers have an attitude of confidence that has nothing to do with objective accuracy.

A parallel to Beck's case occurred in Scotland in the case of Oscar Slater. Again there was wrong evidence of identification, but this time it was hardly surprising because the police deliberately allowed the witnesses to see Slater in custody before they were

¹³ Parmiter, *op. cit.* 131. See the caustic remarks on this case by Edward Abinger, *Forty Years at the Bar* (London n.d.) 51 *et seq.*

asked to identify him. The general attitude of the authorities was quite as disgraceful as in Beck's case. Slater spent eighteen years in prison on a conviction for murder before it was officially admitted, after prolonged agitation, that his conviction was a mistake.¹⁴

It may be mentioned that Slater, like Beck, was "compensated" in money terms for the ruin of his life; he was given an *ex gratia* payment of £6,000, which obviously bore, and could bear, no relation to what he had suffered. Although the fact that compensation was paid is satisfactory, it is a strange defect in English law that no proceedings were open to the victim of the injustice to test the propriety of the sum offered. Bentham and Romilly long ago campaigned against the absence of legal redress for wrongful punishment—an injustice that was remedied by most European countries in the nineteenth century, and by a federal statute in the United States in 1938.¹⁵ Some Continental countries even allow compensation for a wrongful conviction that is promptly reversed on appeal. In France, for example, an appeal court that quashes a conviction may award the victim of the error an amount to be paid by the State, subject to right of recovery from the *partie civile*, the informer, or the false witness on whose testimony the conviction was founded. In England, on the other hand, not even an *ex gratia* payment is made where a

¹⁴ The trial is reported in the *Notable British Trials* series; see also the striking analysis by Edgar Lustgarten, *The Woman in the Case* (London 1955) 71 *et seq.*

¹⁵ Borchard, *Convicting the Innocent* (New Haven 1932) 380; Harry Street, *Governmental Liability* (Cambridge 1953) 44; (1944) 22 *Canadian Bar Review* 764 (Switzerland).

miscarriage of justice has been corrected by the ordinary process of law and where there has been no failure or misconduct on the part of the authorities concerned.¹⁶

In a more recent case of alleged mistaken identity no mistake has been admitted. This is *Rowland* (1946), where a man was convicted of killing a woman by hitting her on the head with a hammer. The evidence of his connection with the crime was principally the identification by three witnesses who claimed to recognise him after short meetings. One of these witnesses, a second-hand dealer, said he recognised Rowland as a chance customer who had bought the hammer from him with which the murder was committed. When he saw a photograph of the hammer in the newspaper, he recognised it, and later picked out Rowland at an identification parade. Before the examining magistrate, and also before the court at the trial, this witness said that the man to whom he sold the hammer was "on the dark side." When he was invited to look at Rowland and invited to agree that Rowland was not on the dark side he did agree, but added: "But he had his hair plastered down with grease that night. That is probably what made him look dark." No reference to this greased hair appeared in the description of his customer which he had previously given the police. It may have been an instance of delayed memory, but it may have been unconscious transference from some other customer.

The second witness was a waitress who deposed

¹⁶ Reply of the Home Secretary in the House of Commons, March 25, 1954 (525 *Parl. Deb.* col. 138).

to seeing the deceased woman with a man at the café where she worked, and picked out Rowland, with some hesitation at first, at an identification parade as being the man. At the trial she said that the reason for her hesitation was that Rowland's hair had fallen over his face, and there was no grease on it, and he did not look as smart as the man she remembered having seen in the café. She had seen this man about twice before the occasion in question. This witness said that the hair of the man in the café was dark or black, but again explained the discrepancy by saying that the hair was greased and that "grease makes your hair look black." Whereas the dealer's customer had a thin face, was very pale and looked ill, the waitress's customer had "a fresh complexion."

One fact in particular casts some suspicion on the correctness of the waitress's evidence. Rowland had in fact been in that café on a few occasions, and it is therefore quite possible that when the waitress saw him on the identification parade she unconsciously effected a transference. It was only after the identification parade that the waitress said she had seen the man before; when she saw him in the café on the occasion in question she did not recognise him. Does it not appear as if the man she saw was a stranger, and not Rowland whom she had seen before?

The third witness said he had seen a man with the deceased woman on the street at midnight shortly before the murder. He had not seen the man before. He gave a description of the man to the police, and picked out Rowland at an identification parade a fortnight later. There was again the discrepancy over the

hair, and this witness again explained it by reference to the grease. Whereas the dealer's customer had a thin face, this witness saw a man with "a full round face."

There is much else in the case that cannot be gone into here, and it has been fully and admirably studied by Mr. Silverman.¹⁷ The remarkable feature is still to come. After Rowland's conviction, and while he was under sentence of death, a man called Ware purported to confess to the murder for which Rowland had been convicted, and gave a detailed statement to the police which fitted all the known facts. He confessed because he heard of Rowland's conviction, and it worried him a great deal. After making his statement to the police he gave an interview to Rowland's advisers in which he amplified his statement still further. The statement is too long to reproduce here; suffice it to say that it is highly circumstantial and seems to bear the evident stamp of truth.

One might have thought that this statement would have ended the proceedings against Rowland, subject only to the formality of getting his conviction set aside. I agree with Mr. Silverman in thinking that Ware's confession was true; but whether it was true or not, one cannot believe for a moment that the jury would have convicted Rowland on the evidence given in the case if Ware's confession had also been before them.

What followed can only be described as a stain upon English justice. An appeal was taken by

¹⁷ Paget and Silverman, *Hanged—and Innocent?* (London 1953), 1 *et seq.*

Rowland, but the Court of Criminal Appeal refused to listen to any evidence of the confession by Ware. Undoubtedly it had power to admit the new evidence, but it refused to do so for a series of remarkable reasons, one of which was that there were no exceptional circumstances in the case.¹⁸ The best that can be said of this sorry judgment is that it indicated, and therefore invited, the possibility of Home Office intervention.

The Home Secretary did intervene. He appointed Mr. J. C. Jolly, K.C., to inquire into the whole matter. Mr. Jolly heard Ware, who by this time had decided to withdraw his confession. In his report Mr. Jolly expressed the opinion that there had been no miscarriage of justice. Rowland was accordingly hanged.

It will be seen that according to this way of managing things the full case with all the evidence available was considered only by a single person, acting as a one-man jury, and from his decision there could be no further appeal. No opportunity was given to defending counsel to cross-examine the new witnesses who were heard. I do not propose to go through Mr. Jolly's report, because that has already been done by Mr. Silverman in the book referred to, and he has some hard things to say about it. But one point deserves mention, because it is connected with what has gone before: one of the matters that Mr. Jolly thought conclusive against Rowland was that at identification parades arranged by Mr. Jolly, in which Ware consented to take part, the three witnesses who had previously given evidence identifying Rowland failed

¹⁸ [1947] K.B. 460.

to identify Ware. To anyone slightly acquainted with the mechanisms of the human mind it will not seem at all surprising that witnesses who have once made what they think is the right identification, telling and retelling their story in private and in public, should refuse to be shaken on it afterwards.

Four years after Rowland's execution, namely, in 1951, Ware was found guilty but insane of the attempted murder of a woman by raining blows upon her head with a hammer. He had given himself up to the police, telling them: "I don't know what is the matter with me. I keep on having an urge to hit women on the head."

The decision of the Court of Criminal Appeal in Rowland's case not to receive the fresh evidence was against common sense and precedent, and the court changed its mind on a later occasion. In 1945 a man had been convicted on the identification of a young woman; while he was serving his sentence another confessed to the crime. This time the Court of Criminal Appeal made no difficulty about admitting the new evidence, and the conviction was quashed.¹⁹

It would be pleasant, but unduly optimistic, to think that the danger inherent in identification evidence by comparative strangers to the accused is now generally recognised. The fact is that juries do not recognise its unreliable nature, and there is still no practice of cautioning juries upon it. Nor are juries given any adequate instruction on the limitations of the identity parade. It is the experience of the

¹⁹ *Ashman, The Times*, March 23, 1954; [1954] Crim.L.R. 382.

police that at the majority of such parades the witness picks out nobody, or the "wrong" man.²⁰ If a witness fails in this way, he may not be called at the trial, his evidence being useless, or, if no other identification evidence is available either, the prosecution may be dropped. It will be obvious that this fact seriously discounts the probative value of a positive identification. Quite apart from this, and even granting a reasonably good memory on the part of the witness, the danger of the identity parade is that the witness expects to find the guilty person present, and therefore points out the man who he thinks is most like the one he remembers. Thus all that an identification parade can really be said to establish is that the accused resembled the criminal more closely than any other members of the parade did, which is not saying very much. In its evidence to the Royal Commission on Police Powers in 1929 the Howard League for Penal Reform made a valuable suggestion which, if generally adopted, would go some way towards improving the procedure. They urged that the officer in charge of the case should not be present at the parade, and further that the witness should be shown "blank parades" as well as a parade containing the suspect, the blank parade sometimes preceding, sometimes following, the other. Even at present the officer in charge of the case does not conduct the parade.

It is the practice of the police when tracking a professional criminal whose identity is unknown to

²⁰ R. M. Howe, *The Work of the Criminal Investigation Department* (Law Society, London 1952) 20.

use the *modus operandi* index at Scotland Yard, and to show a witness a number of photographs (including photographs of non-criminals) in order to enable him if possible to identify the person whom he observed with a view to an arrest. This practice is regarded as a proper one, and does not render inadmissible evidence of a subsequent identification by the witness at an identification parade.¹ In such circumstances the prosecution should not give evidence that the accused was first picked out from police photographs, because this will lead the jury to infer that the accused has a police record,² but the defence may of course elicit this fact if it wishes.³

If the witness was only shown one photograph before the arrest was made, and identifies the suspect from it, his subsequent identification of the same person at a parade is inadmissible.⁴ Also, once a

¹ In *Melany* (1924) 18 C.A.R. 2 it appears to have been held that a judge need not caution the jury on the danger of such an identification. In *Dwyer* [1925] 2 K.B. at 803, the court appeared to go back on this, saying that "afterwards the witness who has so acted in relation to a photograph is not a useful witness for the purpose of identification, or at any rate the evidence of that witness for the purpose of identification is to be taken subject to this, that he has previously seen a photograph." This appears to mean that the trial judge should exclude the evidence or at least caution the jury; but in *Hinds* [1932] 2 K.B. 644 the court rejected this view and in effect went back to *Melany*. Cf. *Chaloner* [1955] Crim. L.R. 110.

² *Wainwright* (1925) 19 C.A.R. 52 (even though the defendant is unrepresented); cf. *Dwyer* [1925] 2 K.B. 799. It seems that *Varley* (1914) 10 C.A.R. 125 would not now be followed. However, where by accident a witness for the prosecution refers to the fact that he saw a photograph of the accused in the "rogues' gallery" at Scotland Yard, this will not necessarily invalidate a conviction: *Wright* (1934) 25 C.A.R. 35.

³ *Palmer* (1914) 10 C.A.R. 77; *Kingsland* (1919) 14 C.A.R. 8.

⁴ *Dwyer* [1925] 2 K.B. 799.

suspect has been arrested, it is most improper for the police to show his photograph to a witness before the identification parade, and if they do so a conviction may be quashed.⁵

EXPERT EVIDENCE

The decision by courts of law of technical and scientific questions on which the experts are disagreed obviously presents great difficulty. In Borchard's book *Convicting the Innocent*, to which reference has already been made, one of the unreliable features found in criminal procedure was the system of expert evidence, and the author suggests that there should be publicly-employed impartial experts. This belief in the scientific value of public employment is, perhaps, unfounded. It is a commonplace that the expert privately retained for the defence is probably biased, because he knows that he is employed to destroy the case for the prosecution⁶; this does not, of course, mean that his evidence is necessarily wrong. What is not so generally recognised is that the prosecution expert is also biased. In a murder case, for example, the report of the pathologist who performs the autopsy is sent to the Director of Public Prosecutions, who instructs counsel on the basis of it; the pathologist must then back up his report in the witness-box after the body has been buried and the direct evidence put

⁵ *Haslam* (1925) 19 C.A.R. 59.

⁶ A striking illustration of the way in which even the most upright and conscientious expert may try to assist the defence by giving evidence which he is led in cross-examination to admit is absolutely unfounded is supplied by the trial of Crippen. See Travers Humphreys, *Criminal Days* (London 1946), 110-13.

beyond reach. It requires great personal integrity for the pathologist to refrain, when his opinion is publicly attacked in cross-examination, from adding details in self-justification. Dr. F. E. Camps, drawing attention to this danger, has suggested that two pathologists should be present at every autopsy. Autopsies generally take place when the suspect has not yet been found; if he has been found, he has a right to be represented.

Much trouble has been caused in some trials through the poor quality of the expert evidence. It is difficult to get the best men to give opinions for forensic work. The reason for this is partly the fear of being made to look ridiculous in cross-examination, partly the low fees paid (they are now somewhat better), and partly the loss of time brought about through failure to give proper consideration to the expert witness in fixing a time for trial. Psychiatric evidence has frequently been defective because of the difficulties of the subject and the failure to promote and develop its study to the fullest extent. On the other hand, a great advance was made in securing reliable chemical analyses, medical tests, firearms examinations, and the like, by the establishment of the Forensic Science Laboratories, which operate primarily for the prosecution but are also fully available to the defence.

When all improvements have been made in the quality and status of the expert witness, certain problems remain inherent in the system of having technical questions determined by an inexpert body. The first is the difficulty of the jury in understanding the

evidence, a difficulty that increases as science grows in complexity. It is somewhat farcical when the most elementary scientific concepts have to be explained to a jury in order to prepare them for pronouncing upon an abstruse problem. Dr. Dennis Hill, in evidence before the Royal Commission on Capital Punishment, said that he had failed to explain to the jury the significance of certain EEG (electroencephalogram) traces after an hour and a quarter in the box.

The second problem facing a lay tribunal is how to decide between conflicting expert evidence. Certainly no system is tolerable in which an expert witness cannot be cross-examined and contradicted. In the past, miscarriages of justice have sometimes been prevented by clever and effective cross-examination of experts. On the other hand, a disagreement between experts may present an insoluble problem for the inexpert. It would be preposterous for the jury to attempt to decide between the conflicting opinions of its own knowledge and ability. In the Crippen case the jury were allowed to peer into microscopes to determine, in the light of the conflicting medical evidence, whether or not a piece of flesh bore the scar of an old operation. Something of the same kind took place in the trial of the Seddons, where evidence was given that the electrolytic Marsh Berzelius test had been used for determining the amount of arsenic in the organs of the deceased Miss Barrow. The test involved the comparison of a series of mirrors, and these mirrors were handed to the jury as exhibits. One of the counsel for the Crown, Sir Travers Humphreys,

relates, with apparent approval, how the jury displayed an "eager interest" in these exhibits. "They were enabled to form their own opinions as to the matching of the mirrors which were handed to them for the purpose, they were supplied with copies of the tables prepared by Dr. Willcox showing the result of the various tests made by him of the organs and parts of the body, and some of them even tasted the contents of a bottle containing a solution of arsenical fly-papers, which, according to the witness, would be found to have a slightly bitter taste."⁷ Since it was the province of the jury to decide the issue, they certainly deserve commendation for bringing their best judgment to bear upon the evidence put before them. At the same time it seems obvious that an amateur opinion given in confirmation of the opinion of the expert upon materials supplied by the expert adds precisely nothing to the weight of the scientific opinion; and for a jury to attempt to decide between conflicting opinions on an abstruse question by any independent investigation of its own is the height of absurdity. What the jury generally does in the latter circumstances is to disregard the evidence of the opposing experts and to decide the case on the other evidence. This may sometimes be the only available way out, yet one of the so-called experts may in reality be presenting a mere speculation, or a theory that does not command informed agreement. Obviously it calls for an expert to choose between experts. Sometimes the jury may believe an expert merely because

⁷ *Criminal Days* (London 1946) 117.

he gives his evidence in a confident way, or on the other hand may reject sound expert evidence because the witness has rashly trodden outside his competence in immaterial details and been exposed for it.

No general solution of this problem has been found. A sensible recourse in some cases might be to adjourn the proceedings for the conflicting evidence to be considered by an expert or experts appointed by the court, in order for them to report, in the light of the judge's instruction as to the burden of proof, whether the case of one side or the other has sufficient probability in its favour to be safely acted on; but no provision exists for this in criminal proceedings,⁸ and our system of trial by jury, and trial by itinerant judges, makes adjournment for any length of time impracticable in the most serious cases. Another possibility would be to have experts sitting as assessors whenever a scientific question is likely to arise. In the event of a conflict of opinion they would be qualified to make an informed choice, and since the expert evidence would be addressed to them we should avoid the absurdity of expecting a jury to comprehend technical questions. Such expert assessors are already used in maritime matters in the Probate, Divorce and Admiralty Division.⁹ Unfortunately they are

⁸ See the problem discussed by the Royal Commission on Capital Punishment, Cmd. 8932 of 1953, p. 151. In civil actions without a jury the court is given the power by R.S.C., Ord. 37A.

⁹ There is also a general power given in civil cases by R.S.C., Ord. 36, r. 2, but this, like the one last noted, is little used.

Formerly there was one curious instance of a jury of experts. If a woman were condemned to death, and pleaded pregnancy as a ground for respite and eventual commutation of punishment, the matrons present in court—or if necessary any

unknown in criminal proceedings, chiefly perhaps because of the reverence felt for jury trial. Stephen, for example, argued against having medical experts to decide medical issues on the question-begging ground that they would usurp the function of the jury.¹⁰ This turns the jury into a kind of sacred cow of the legal system, and precludes any inquiry into which is the best tribunal to determine a given question.

The defects in the present procedure are aggravated by the failure of the Court of Criminal Appeal to use its powers to review conflicts of expert evidence. A well-known instance is Thorne's case,¹¹ where the interpretation placed upon a microscope slide by the expert for the prosecution was contradicted by three highly qualified experts for the defence; where, moreover, the defence interpretation, if accepted, would have disposed of the case; and where the jury nevertheless rejected it. Under the Criminal Appeal Act, the Court of Criminal Appeal has power to refer such scientific questions to a Special Commissioner for inquiry and report; yet in this case, where everything turned on the question, the court refused to exercise its power, on the ground that the jury were to be trusted.

In insanity cases, common sense has triumphed

found on the pavement outside—would be compulsorily empanelled into a jury to examine the woman and decide the issue. It was eventually discovered that the jury of matrons was not infallible, and as the result of an agitation an Act was passed in 1931 to alter the procedure. The law now is that the same jury that tries the woman on the capital charge (which may be all male) decides on medical evidence whether her claim to pregnancy is valid. If the woman is found to be pregnant, no death sentence is pronounced.

¹⁰ *H.C.L.* i 575.

¹¹ (1925) 18 C.A.R. 186.

and the jury has not been allowed to be the final arbiter. Even if, on a charge of murder, the jury convict of the murder and refuse to find insanity, the Secretary of State will, if there is any doubt, take the advice of medical experts, and if they report that the prisoner is insane, the death sentence will not be carried out and he will be transferred to a Broadmoor institution. This enlightened practice has survived strong opposition. The real objection to it is not, as is sometimes urged, that the issue comes to be tried by experts who override the verdict of the jury, but that it is tried by experts after the court hearing, without any of the customary safeguards, and without even a proper public statement being made of the result of the expert inquiry. What is needed is for the experts to be brought into the court hearing as assessors to try the medical issue.¹² This, of course, involves superseding the jury on this issue, and there will always be objection from some quarters to having the jury superseded. One day we may officially recognise that the jury has already been displaced on the issue of sanity, and that all that remains is to regularise the position.

HANDWRITING EVIDENCE

Juries tend to regard handwriting evidence and fingerprint evidence with equal distrust, but the two stand in very different categories. Fingerprint evidence,

¹² I have argued this in (1954) 7 *Current Legal Problems* 16. Cf. the suggestion in *The Criminal Law and Sexual Offenders* (B.M.A. 1949) 20.

provided that a good impression has been obtained, is the best there is: it has been calculated that the chances of two fingerprints being alike are one in a septillion.¹³ But every practising lawyer who has dealt with handwriting evidence knows that it is a fertile source of error because the comparison of handwriting is so much a matter of opinion. It would be incorrect and unfair to stigmatise all handwriting experts as charlatans, but their profession has to bear part of the responsibility for some grievous errors of justice. This is particularly so in "poison pen" and forgery cases, when one of the specimens of handwriting that the expert is asked to compare is admitted to be written in a disguised hand. The general practice is the extremely objectionable one of giving the expert only two specimens of handwriting to pronounce upon: one admittedly written by the accused, and one the authorship of which is in dispute. Now if an expert is asked to find similarities between two pieces of handwriting, you may be sure that he will find similarities. The proper thing to do is to treat him like a witness at an identification parade: give him twenty or fifty specimens of handwriting by as many different people (including the accused) and ask him whose writing most nearly resembles the disputed one. If he picks on the accused, that will be solid evidence; whereas if he is given only the accused's handwriting, it is no test at all.

This chapter has been largely concerned with the

¹³ Palm print evidence is similar: *Robinson, The Times*, May 10, 1955.

miscarriages of justice that either are an inevitable risk in the penal system or result from defects in our present rules of evidence or arrangements for trial. The next three chapters will discuss some of the main rules of the law of evidence in criminal cases.

CHAPTER 6

INVENTED EVIDENCE

SOME types of evidence have been found by experience to be so liable to false invention that, though they remain admissible, special safeguards have been devised for them.

ADMISSIBILITY OF THE EVIDENCE OF ACCOMPLICES

Sometimes the prosecution may have secured a confession from one of a gang, who is ready to turn Queen's evidence against his companions. But such evidence needs to be scrutinised with care, because the informant is anxious to stand well with the police in order to protect himself from prosecution or to reduce his own sentence. With the object of removing so far as possible this conflict between his own interest, which may lead him to wish to blacken his companions as much as possible, and his duty to speak the truth, the law provides that one of several accused persons cannot be called to testify for the prosecution unless the proceedings have been terminated against him by plea of guilty, entry of *nolle prosequi*, or verdict. In practice, where one of a band of criminals agrees to turn Queen's evidence against the others, it is usual for him to plead guilty and receive his sentence, or else for the Crown to offer no evidence against him and thus secure his acquittal, before the case against the

other defendants is opened.¹ This means that when the accomplice comes to give evidence he has nothing to gain from dishonesty.²

As already said, where it is wished to have the accomplice convicted before he gives his evidence, the usual and (wherever possible) the desirable practice is for him to be sentenced also, because otherwise the accomplice may think that he will be able to purchase a reduction in his sentence by giving the evidence that

¹ For the second course see *Rowland* (1826) Ry. & M. 401, 171 E.R. 1063.

² For a full study of the law relating to the evidence of accomplices see R. N. Gooderson in (1952) 11 *Cambridge Law Journal* 208, and, for the earlier history of the "approver," now only of antiquarian interest, see Pike, *History of Crime in England* i 287; Allen, *The Queen's Peace* (London 1953) 89; 7 *Canadian Bar Review* 520.

Mr. Gooderson adds another case where the accomplice can testify for the prosecution, namely where the trials are not joint. This was decided by a total of no fewer than twenty-six judges, in the various stages of appeal, in *Winsor* (1866), L.R. 1 Q.B. 289 (Q.B.), 10 Cox 276, 326 (C.C.R.), 14 L.T. 567 (Ex.Ch.). It is difficult to perceive any principle behind this exception. In all the other cases where the accomplice is received as a witness for the prosecution, the proceedings have been terminated against him, and it seems anomalous that the Crown should be able to evade this restriction merely by going for separate trials. Moreover, the exception in question is hardly reconcilable with *Grant* [1944] 2 All E.R. 311, 30 C.A.R. 99, and *Sharrock* [1948] 1 All E.R. 145, where it was held that the disability applies to preliminary proceedings before examining magistrates even where there is no joint charge; when the case is before the magistrates it is not known whether the trial will ultimately be joint or not. Cf. *Fletcher* [1952] C.L.Y. 2122. These last three cases are admittedly much inferior in point of legal authority to *Winsor*, and *Winsor* was not cited or discussed. On the question whether the disability applies where the different defendants were not implicated in the same crime see (1949) 13 *Journal of Criminal Law* 207.

A committal for trial is bad if one of the accused is called by the prosecution, even though he is warned that he need not incriminate himself: *Sharrock*, above.

the police expect of him. However, there is no inflexible rule on this point.³ Occasionally it is necessary for one reason or another to postpone sentencing an offender, *e.g.*, pending medical examination, or in the case of juveniles pending the preparation of a "background report," and where good reason exists there is no legal objection to taking the evidence of the accomplice, for what it is worth, before he has been sentenced.

There is another way in which the Crown may make use of the evidence of an accomplice. The several accused persons may be charged jointly, and when one of them gives evidence on his own behalf, he may be cross-examined with a view to implicating his companion. This course may be taken even though the only evidence given in chief by the accused is that he is guilty.⁴ Any admissions made by him in examination in chief or in cross-examination become evidence in the case as a whole, and are therefore evidence against the co-defendant.⁵ The co-defendant is entitled to cross-examine the defendant giving the evidence.⁶

The course just indicated is advantageous to the Crown, not only because it enables the accomplice to be asked leading questions, which would not be possible if he had been called as a witness for the Crown, but because the accomplice cannot object to

³ *Cf.* (1947) 11 *Journal of Criminal Law* 415.

⁴ *Paul* [1920] 2 K.B. 183.

⁵ This is the rule supported by the strong weight of authority: see Mr. Gooderson's article. To his cases may be added the dictum of Humphreys J. in *The Trial of Rattenbury and Stoner*, ed. F. Tennyson Jesse (London 1935) 267.

⁶ *Hadwen* [1902] 1 K.B. 882.

answer on the ground that it may incriminate himself.⁷ It is correspondingly disadvantageous to the defendant against whom the evidence is given. Such a defendant, foreseeing the way things are likely to go, may wish to apply at the outset for separate trials. At one time judges seemed sympathetic to the application,⁸ but lately have made a general practice of refusing it. The reason was stated by Mr. Justice Devlin as follows.

“Take the case of two prisoners, A and B, who are said to have been engaged in a common illegal enterprise, and one desires to say that he was made use of by the other, that he was innocent and was misled. If a separate trial be granted, the result would be that in the first case the prisoner A might go into the witness-box and give evidence of all sorts of things said by B and of the conduct of B as being a man of obvious criminality, and the result would be that the jury, hearing only A’s side and not B’s, might think it proper to acquit A. Then the trial of B takes place before another jury and the same procedure happens in reverse, and the jury in that case might think it proper to acquit B. The result of granting a separate trial might, therefore, be that there was a miscarriage of justice. And the same result would, I think, apply if one assumes, contrary to the assumption that I have made, that one of the

⁷ Criminal Evidence Act, 1898, s. 1 (e).

⁸ “Where the defence of one accused is to incriminate another that is good reason for not trying them together”: *Bywaters* (1922) 17 C.A.R. at 68; cf. *Barnes* (1940) 27 C.A.R. 154.

accused is innocent. The result might be that the jury [on a charge against the innocent accused only], hearing only the innocent accused and not having had the advantage of seeing the other accused, not being able to form any opinion about his character, not hearing him cross-examined, might come to the conclusion that there was not enough in the story that they had heard [*i.e.*, the defence of the innocent accused], in the absence of hearing the other side of it being tested, to justify an acquittal.”⁹

It may be noticed that the learned judge’s comments on the second situation, namely where one defendant is innocent, are relevant only if this defendant opposes his co-defendant’s application for separate trials. If both defendants ask for separate trials and are refused, the refusal cannot be justified by any fatherly regard for their interests. Almost always it must involve them in a greatly increased risk of conviction, innocent or not. The solution of the problem is not easy to see, but it may be suggested that in all cases where there are joint trials each defendant should be entitled as of right upon conviction to a review of the evidence by an appellate court.¹⁰

THE RULE FOR CORROBORATION OF ACCOMPLICES

Even where, under the rules just stated, the evidence of an accomplice becomes admissible against his

⁹ *Miller* [1952] 2 All E.R. 667.

¹⁰ For a recent illustration of a jury convicting one of joint defendants although there was no evidence against him, where the Court of Criminal Appeal was fortunately able to intervene, see *Abbott*, *The Times*, July 13, 1955.

fellows, it remains suspect evidence, because of the tainted source from which it comes. The accomplice may no longer have anything to fear or hope from the way in which he gives his evidence; yet he may mistakenly entertain such a fear or hope, or he may wish by his evidence against others to gratify some spite against them. And the circumstances make it peculiarly easy for him to do this, because as a confederate he knows the inner story of what has happened, and it is easy for him to tell this story with a large amount of truth while implicating in it one who is perhaps quite innocent.

In view of this danger the rule of prudence suggested by the experience of centuries of criminal administration is that it is unsafe to convict a man on the uncorroborated evidence of an accomplice. The notorious failures of justice that occurred in the trials for the Popish Plot were in part due to the credence given to persons who on their own evidence took part in the supposed plot. It has long been the practice for judges to warn juries of the need for corroboration, and in the absence of such warning a conviction on the uncorroborated evidence of an accomplice will be quashed. The only rule of law, however, is one requiring the jury to be warned. Even today the jury are allowed to convict on uncorroborated evidence if they please, provided only that they have received the warning. It is, perhaps, impossible to have an absolute rule; but at least a conviction that ignores the warning should be severely scrutinised by the Court of Criminal Appeal.

The difficulty of reconciling a strict rule of evidence

with the public interest that criminals should be convicted is well illustrated by the Clapham Common stabbing case (*Davies*), which was recently before the House of Lords.¹¹ The Lord Chancellor, Lord Simonds, who in effect delivered the judgment of the House, examined two divergent lines of authority in the Court of Criminal Appeal on the corroboration of accomplices. According to some cases, the rule that a judge should warn the jury of the danger of convicting on the uncorroborated evidence of an accomplice is merely a rule of practice, and the absence of warning will not be fatal to the conviction if there is in fact corroborative evidence. According to other decisions of the Court of Criminal Appeal, the rule is one of law, and absence of warning will be fatal even though there is corroborative evidence, unless the court can act under the proviso to section 4 (1) of the Criminal Appeal Act, 1907—that is to say, unless the court is of opinion that a reasonable jury would inevitably have arrived at the same conclusion if an express warning had been given. None of these cases was binding upon the House of Lords; but instead of examining which of them laid down the preferable rule, Lord Simonds merely announced that the second and stricter rule had the preponderant weight of authority on its side, and should be adopted.

The effect of the stricter rule in practice depends on how it is interpreted. In the case before him, Lord Simonds reviewed the evidence which showed that the accused youth, *Davies*, was the only member of the gang who possessed and produced a knife;

¹¹ *Davies* [1954] A.C. 378.

independent witnesses spoke to this, and there was also evidence of blood-stains in Davies's pocket. This was a considerable body of evidence against Davies, yet Lord Simonds did not say that it would have been enough to justify an appellate court in acting under the proviso, and dismissing the appeal against conviction, if that question had been in issue. His silence on this may, however, be attributed to the fact that the House discovered another way of dismissing the appeal.

This was by adopting a narrow definition of the term "accomplice." The evidence which came under fire on the appeal had been given against Davies by another youth, Lawson, who was a member of the same gang and who had been convicted of common assault for his part in the affair. Lawson had been acquitted of participation in murder, because there was no evidence that he knew that Davies carried a knife. On the trial of Davies for murder, at which Lawson gave evidence for the Crown, the judge did not warn the jury of the danger of convicting on the uncorroborated evidence of an accomplice. The House of Lords nevertheless upheld a conviction, on the ground that no warning was necessary, because Lawson was not an accomplice to the crime charged against Davies, namely murder. He was an accomplice only to the lesser crime of assault.

This decision gives an anomalous result. If Davies had been charged with assault, Lawson would have been an accomplice and a warning would have been necessary. Actually Davies was charged with murder; but this murder was one that contained an assault to

which Lawson was a party. It is surprising that, in these circumstances, the corroboration rule should not apply. The reason underlying the corroboration rule is the danger of false evidence from one who is himself implicated in the crime. This danger is present, though perhaps to a smaller extent, even where the accomplice is party only to a lesser degree of crime. In the instant case, the evidence of Lawson was, to say the least of it, tainted. He was in a much better position to falsify and colour his evidence against the accused, if he had been so minded, than an accessory after the fact is in respect of the principal felon, or than a receiver of stolen goods in respect of the thief, for neither of these persons is generally present at the time of the crime, whereas Lawson was present and knew most of what was going on. Lord Simonds recognised that the accessory after the fact and the receiver come within the corroboration rule; yet he could "see no reason" why the rule should include Lawson. Perhaps there was no reason if one thought only in terms of a technical rule and a technical definition of terms; but it is regrettable if the supreme tribunal should so restrict its horizon.

It was pointed out previously that where two persons are jointly indicted, the admissions of one made in the witness-box are evidence against the other (p. 109). It is submitted that in such circumstances the accomplice warning should always be given,¹² and the failure to give it should not necessarily be condoned by the jury's subsequent acquittal of the

¹² This is emphasised by Mr. Gooderson in the article previously cited.

defendant who has given the damaging evidence. This proposition may seem illogical at first sight, for why should the accomplice warning be required if the jury in the result fails to find that the witness was an accomplice? The answer is that an acquittal does not mean that the witness was not an accomplice, it only means that there is no sufficient evidence that he was an accomplice. The jury may have given him the benefit of the doubt, but still it may be unsafe to convict on his evidence alone.

Sometimes a case may develop in such a way that as between two defendants it may become obvious that one is guilty and the other innocent, the task of the jury being to determine which is the guilty and which the innocent. This type of case does not technically need the accomplice warning, because even though each defendant gives evidence against the other, the conviction of one will automatically amount to a finding that the other was innocent and was not an accomplice. At the same time, the situation is one where a miscarriage of justice is unusually likely to take place unless great care is taken. Each defendant has a strong incentive to throw the blame on the other; the guilty defendant whichever he is, is probably in a good position to invent a plausible tale casting the responsibility on his co-defendant; and the jury may be prone to suppose that they have to make a choice between the defendants by convicting one, without realising that, in case of doubt which is guilty, both may have to be acquitted.

One other remark may be made upon the accomplice warning. Under the present law, the warning

must be given even where the accused does not enter the witness-box to deny the charge.¹³ This rule is unnecessarily tender to the accused, and it might well be reconsidered by Parliament. It would be more in accordance with the public interest to rule that where corroboration of the evidence for the prosecution would otherwise be required, it shall be dispensed with if the accused does not give evidence in his own defence.

THE RULE FOR CORROBORATION IN SEXUAL CASES

On a charge of rape and similar offences it is the practice to instruct the jury on the necessity for corroboration of the evidence of the alleged victim. The rule applies to a charge of indecent assault, or any sexual offence, including apparently an unnatural offence between males. There is a sound reason for the rule, because the sexual factor introduces a disturbing and unpredictable element into the evidence. So great is the danger of relying on such evidence if it is not corroborated that a jury that convicts in face of the warning may have its verdict upset by the Court of Criminal Appeal.¹⁴

Indeed, the danger of false evidence is present in all cases where a prosecutrix may be actuated by sexual motives, and also particularly in charges of writing anonymous letters. This is forcibly shown

¹³ *Jackson* [1953] 1 W.L.R. 591.

¹⁴ Archbold, 33rd ed., sects. 1104, 1949; *Freebody* (1935) 25 C.A.R. 69; *Att.-Gen. v. Williams* [1940] Ir.R. 195, 4 J.Crim. Law 320; *Dent* [1943] 2 All E.R. 596; 29 C.A.R. 120; *Asplin* [1955] Crim.L.R. 433. On the wording of the warning see *People (Att.-Gen.) v. Moore* [1950] Ir.Jur.Rep. 45.

by two cases, strikingly similar to each other, of which full accounts have recently been given in books of reminiscence by judges.

The first, related by Sir Alfred Bucknill, is a case that occurred before the First World War, when a woman, Mrs. Johnson, was three times convicted and served two sentences of imprisonment on charges of which she was not guilty.¹⁵ The charges were of writing letters threatening to kill a neighbour, Mrs. Woodman. In fact, as afterwards appeared, the letters had been written by Mrs. Woodman herself, and she had such quiet and persistent malice that she not only fabricated the business to get Mrs. Johnson sent to prison on the first occasion, but repeated it all in order to send her back again the moment she came out.

The case is a discomfiting one because of the slender nature of the evidence thought necessary for Mrs. Johnson's conviction, though it is perhaps better known now than it was in 1912 that neurotic people do occasionally write anonymous letters to themselves, sometimes without even being aware of it. Apart from the evidence of Mrs. Woodman, two pieces of circumstantial evidence were thought to be decisive against Mrs. Johnson. The first was the fact that the anonymous letters disclosed certain information which it was too readily supposed was possessed only by the defendant. The apparently purposeless way in which this information was brought into the letters might have suggested the truth to a sharp-witted inquirer,

¹⁵ Bucknill, *The Nature of Evidence* (London 1953), Chap. 2.

namely that it was put there for the deliberate purpose of incriminating Mrs. Johnson, who would hardly have been likely to give herself away so clumsily as was alleged. Secondly, there was rather vague evidence of things being thrown into Mrs. Woodman's garden from Mrs. Johnson's premises, it being alleged that the letters came in this way. As Sir Alfred Bucknill points out, this evidence had little, if any, value, but was given undue importance. He quotes a remark of Baron Alderson: "The mind is apt to take pleasure in adapting circumstances to one another, and even straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual the more likely is it in considering such matters to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete." The word "ingenious" in this passage must be taken in a pejorative sense, for it cannot be the mark of a really able and subtle mind to make this mistake.

The case presents other disquieting features. Mrs. Johnson was denied proper legal aid in her second and third trials. It is true that in the second trial a barrister who was sitting in court was asked to undertake her defence, but, as events proved, this makeshift form of legal aid was no substitute for a defence thoroughly prepared beforehand. Next, Mrs. Johnson was sentenced to imprisonment for six and twelve months respectively for a motiveless crime without

any inquiry into her state of mind; one hopes, without much assurance, that this would not now happen, even if guilt were plainly proved. Mrs. Johnson was refused leave to appeal after the first conviction, notwithstanding the flimsy nature of the evidence against her. Finally, it is worth noting the way in which Mrs. Johnson's first false conviction in effect prevented her from receiving an impartial trial on the second occasion, the jurors coming from the same locality and knowing of the earlier trial. The only way of meeting this prejudice would be by counsel for the defence reopening the issue of the previous trial, and showing how the weakness in the evidence on the earlier charge was repeated on the second charge. But Mrs. Johnson's counsel, engaged without warning in the court itself, had no opportunity of doing anything so elaborate.

It perhaps does a little to restore one's faith in English criminal justice to know that when her innocence was established by the confession and conviction of Mrs. Woodman, Mrs. Johnson received not only a free pardon but the sum of £500 as compensation for her time in prison.

Sir Travers Humphreys, in his autobiography, instances three persecutions similar to that of poor Mrs. Johnson. In the third, which commenced in 1920, the prosecutrix was Miss Swan, a woman of thirty who had never been known to use bad language or make an indecent remark, and was in fact a noticeably modest and decent type of woman. She complained of obscene letters being sent to her by her neighbour, Mrs. Gooding, who was convicted almost exclusively

on the evidence of Miss Swan, and sentenced to fourteen days' imprisonment. Mrs. Gooding was released from prison on the expiry of her sentence, and almost at once the libels recommenced. She was again prosecuted by Miss Swan and was sentenced to twelve months' imprisonment. Mrs. Gooding applied for leave to appeal to the Court of Criminal Appeal, but, says Sir Travers, "her application was, as it was bound to be, refused, she having been convicted on evidence properly left to the jury." Mrs. Gooding, however, petitioned the Home Secretary, who instituted an inquiry which suggested strongly that Miss Swan had herself concocted the letters. The Home Secretary therefore brought the case before the Court of Criminal Appeal, which quashed Mrs. Gooding's conviction, and Mrs. Gooding was awarded £250 compensation by the Treasury. Soon afterwards the libels commenced once more, and this time the police were able to pin them on Miss Swan, who had been the culprit the whole time. Even so, the first prosecution of Miss Swan failed, the judge thinking the evidence insufficient. When the libels started a fourth time, another prosecution was brought and was successful. The judge, in sending Miss Swan to prison for twelve months, said that it was difficult to believe that she was in her right mind. Whether she served her time in prison, or whether she was removed to a mental hospital as she obviously should have been, I know not.

Sir Travers Humphreys, who appeared for the Crown in the two prosecutions of Miss Swan, reveals his impression of her in the box, which underlines the

danger of going by appearances. Miss Swan was, he tells us, the perfect witness. "Neat and tidy in appearance, polite and respectful in her answers, with just that twinge of feeling to be expected in a person who knows herself to be the victim of circumstances, she would have deceived, nay she did deceive, the very elect."¹⁶

Commenting upon the case, Sir Travers makes two observations that are of lasting value. In the first place, Miss Swan's two prosecutions of Mrs. Gooding were brought by her as private prosecutions, and therefore were not subject to the scrutiny of the police before they were started. In his criticism of the English system of private prosecution with which he follows this remark he implies the view that cases of this sort should be left to the police, though he adds, somewhat surprisingly, that he is not suggesting any alteration in the law. In the second place the learned author puts forward the principle that "it is too dangerous to accept as satisfactory evidence upon which to convict in any sexual case the statement of the woman concerned unless there is other evidence tending in the same direction. Further, that this rule should never be relaxed merely because the prosecutrix in the witness-box behaves like an angel and looks like a Madonna." He points out that there is already a rule somewhat to the same effect in regard to charges of indecent assault and the like made by a woman against a man, and that it needs to be extended to any case in which the question of sex may possibly

¹⁶ *Criminal Days* (London 1946) 129.

account for the evidence of the principal witness. Charges of obscene libel are evidently in this category.

THE RULE FOR CORROBORATION OF CHILDREN

Since children are suggestible and sometimes given to living in a world of make-believe, their evidence must be considered with care. Instances are reported of little girls who not only become willing partners in vice but are quite ready for spite or blackmail to get innocent men into trouble. It is also said that the women examiners who take statements from child complainants are prone to use leading questions and so put the story into the child's mouth, the child afterwards quite honestly confusing the suggestion with the fact.¹⁷ These dangers justify the legal counsel of prudence which requires corroboration of a child's evidence. The rule is that the jury must be directed to receive the evidence of witnesses of tender years with caution, and that it is dangerous to act upon such evidence unless it is corroborated in a material particular implicating the accused.¹⁸ If the child is too young to understand the nature of an oath, his

¹⁷ Albert Lieck, *Bow Street World* (London 1938) 141-2. Cf. "Solicitor" in (1938) 5 *Howard Journal* 125: "I have known several different and entirely inconsistent stories told to a policewoman who endeavoured to take a note of the evidence to be given by a small girl. What the child said in court was unlike anything she had said before. This particular child had the face of an angel, and a shy hesitating manner of speech which would have convinced an Aberdonian. She was in fact, according to ordinary standards, a very depraved young person."

¹⁸ *Dossi* (1918) 13 C.A.R. 158; *Marshall* (1924) 18 C.A.R. 164; (1941) 8 *Journal of Criminal Law* 306; Archbold, 33rd. ed., ss. 1957, 1984, 1985.

evidence may still be received in proceedings for an offence against him, provided that he understands the duty of speaking the truth; but here corroboration is required by law, so that it is not sufficient to support a conviction that the corroboration warning is given if there is in fact no corroboration.¹⁹

Although the rule requiring the corroboration of children is a sound and necessary one, it presents a formidable obstacle to the conviction of men who have been guilty of disgusting practices in private with such children. For this reason the rule should not be extended farther than is required by the necessity of the case. In this connection a valuable suggestion for a change in the present law was made by the Departmental Committee on Sexual Offences against Young Persons in 1925.²⁰ The Committee pointed out that at present the evidence of a young child is not corroboration of the evidence of another child,¹ and that this rule is the right one where the children all testify to the same incident. Where, however, the children testify to different incidents, the probability that they are speaking the truth becomes incomparably greater. "A little boy goes to his mother crying in distress and complains to her that he has been indecently assaulted by a man whom he names as A living in the same large tenement dwelling. A fortnight afterwards another boy, no relation of the first, makes a similar

¹⁹ Children and Young Persons Act, 1933, s. 38; Archbold, s. 806. In deciding whether the child may take the oath, the judge may hear a witness on the child's mental capacity: see note, (1950) 13 *Modern Law Review* 235.

²⁰ Cmd. 2561 of 1925, pp. 51-3.

¹ See, e.g., *Manser* (1934) 25 C.A.R. 18.

complaint to his mother. Three weeks after another boy, no relation of the other two, makes a similar complaint to his mother. In all three cases the same man is implicated and identified, but there is no corroboration of any one of the three children's evidence in their respective cases. The police reluctantly decline to prosecute." To deal with this situation the Committee recommended that Parliament should amend the law, as, perhaps, by extending the law of evidence concerning design and system, so as to include this class of case. The importance of tightening the law in accordance with the recommendation is shown by the following case, cited by the Committee, in which a man was six times before the courts for indecent assaults on little children.

March 27, 1922.	Indecent assault on a girl of 5 years.	<i>Withdrawn.</i>
March 27, 1922.	Indecent assault on a girl of 7 years.	<i>Acquitted.</i>
June 27, 1923.	Indecent assault on a girl of 3 years.	<i>Acquitted.</i>
July 9, 1923.	Indecent assault on a girl of 6 years	<i>Dismissed.</i>
November 19, 1923.	Indecent assault on a girl of 3½ years.	<i>Acquitted.</i>
June 24, 1924.	Indecent assault on a girl of 4 years.	<i>12 months' imprisonment.</i>

It is probable that the failure of all the charges before the last was due to lack of corroboration. Had the rule suggested by the Committee been in force,

prosecutions might have been withheld until the incident of June 27, 1923, when evidence of the previous occasions might have been given. There should obviously be power to give such evidence even if the defendant has been charged on the earlier occasions and acquitted under the corroboration rule. It may also be suggested that, because children have short memories, the evidence given in the earlier cases should, where it does not lead to a conviction, be recorded and preserved, and should be admissible against the defendant on the later occasion without the necessity for fresh evidence being given by the young witness. These changes in the law would, however, require legislation. It is perhaps hardly necessary to say that Parliament has not yet had time to attend to the Report of 1925.

CHAPTER 7

THE BURDEN OF PROOF

THE PRESUMPTION OF INNOCENCE

IN England every man is presumed to be innocent until he is proved guilty. This proposition, dear to the hearts of Englishmen, is popularly supposed to epitomise the difference between English and French criminal law. Of course it is not true. The French have become a trifle sensitive about the matter, and emphasise on all possible occasions that they too have the presumption of innocence. However, there is a sense in which it would be correct to say that the presumption does not hold in either country. When a man has been sent for trial by examining magistrates in England, and even more when he has been sent for trial by the *Chambre des Mises en Accusation* in France, it has already been officially determined that there is a *prima facie* case against him. He may be kept in custody before trial, under conditions differing little from those of an ordinary prisoner. Obviously such a man is not, in any intelligible sense outside the rules of the law of evidence, presumed to be innocent, though neither is he presumed to be guilty. The fact simply is that the finger of suspicion is pointing against him. We should, however, do everything possible to treat such a man as if he were innocent, consistently with the demands of the public safety and the due trial of the charge. If we were

serious in this endeavour we would do much to ameliorate the position of defendants, by improving the conditions of those in prison on remand, improving the cells of the court in which accused persons may be detained overnight (at present they are often confined in a dark room without reasonable comfort and lacking even a table on which to make notes), and, except for violent prisoners, no longer requiring them to occupy the dock, which is a cage in which they stand separated from their advisers and friends. Our present treatment of defendants in these three respects is a repudiation of the philosophy behind the supposed presumption of innocence.

THE BURDEN OF PROOF

When it is said that a defendant to a criminal charge is presumed to be innocent, what is really meant is that the burden of proving his guilt is upon the prosecution. This golden thread, as Lord Sankey expressed it, runs through the web of the English criminal law. Unhappily Parliament regards the principle with indifference—one might almost say with contempt. The statute book contains many offences in which the burden of proving his innocence is cast on the accused. In addition, the courts have enunciated principles that have the effect of shifting the burden in particular classes of case.

The sad thing is that there has never been any reason of expediency for these departures from the cherished principle; it has been done through carelessness and lack of subtlety. What lies at the bottom of the various rules shifting the burden of proof is

the idea that it is impossible for the prosecution to give wholly convincing evidence on certain issues from its own hand, and it is therefore for the accused to give evidence on them if he wishes to escape. This idea is perfectly defensible and needs to be expressed in legal rules, but it is not the same as the burden of proof. There is a clear if subtle difference between shifting the burden of proof, or risk of non-persuasion of the jury, and shifting the evidential burden, or burden of introducing evidence in proof of one's case. It is not a grave departure from traditional principles to shift the evidential burden, though such a shifting does take away from the accused the right to make a submission that there is no case to go to the jury on the issue in question, and it may in effect force him to go into the witness-box. Where the law shifts the evidential burden to the accused, the prosecution need not give any evidence, or need give only slight evidence, on that issue, and are then not liable on that issue to be met with a submission of "no case." This means that the accused must, for his own safety, make some answer. But the shifting of the evidential burden does not necessarily mean that the persuasive burden or burden of proof passes to the defendant. When all the evidence is in, the jury will be directed that the burden of proving all the issues remains with the Crown, so that if they are not satisfied on any of the issues they must find for the defendant. All that the shifting of the evidential burden does at the final stage of the case is to allow the jury to take into account the silence of the accused or the absence of satisfactory explanation appearing from his evidence.

Hence if the accused gives some evidence consistent with his innocence which may reasonably be true, even though the jury are not satisfied that it is true, the accused is entitled to be acquitted, for the burden of proof proper remains on the prosecution. A clearer recognition of this difference between the evidential burden and the persuasive burden, on the part both of Parliament and of the courts, would enable the rule resting the persuasive burden on the Crown to be restored to its full vigour.

THE QUANTUM OF PROOF

To say that the burden of proving a crime is generally on the prosecution does not conclude all questions. What degree or quantum of proof is needed: is it mere likelihood, or certainty, or something in between these two extremes? This question in turn raises a fundamental issue of penal policy: how far is it permissible, for the purpose of securing the conviction of the guilty, to run the risk of innocent persons being convicted?

The Romans had the maxim that it is better for a guilty person to go unpunished than for an innocent one to be condemned; and Fortescue turned it into the sentiment that twenty guilty men should escape death through mercy rather than one just man be unjustly condemned. The next recorded instance of this is in the mouth of Sir Edward Seymour, who, speaking for Fenwick upon a Bill of Attainder in 1696, said: "I am of the same opinion with the Roman, who, in the case of Catiline, declared, he had rather ten guilty persons should escape, than one

innocent should suffer." Hale took the ratio as five to one; Blackstone reverted to ten to one, and in that form it became established.¹

The maxim did not go altogether without challenge. Its most celebrated opponent was Paley, who, in his *Principles of Moral and Political Philosophy*,² took issue with it because of the paramount social importance of convicting the guilty. "When certain rules of adjudication must be pursued, when certain degrees of credibility must be accepted, in order to reach the crimes with which the public are infested, courts of justice should not be deterred from the application of these rules by *every* suspicion of danger, or by the mere possibility of confounding the innocent with the guilty. They ought rather to reflect, that he who falls by a mistaken sentence may be considered as falling for his country."

These sentiments were repudiated by Romilly.³ Bentham, however, felt inclined to add his own criticism of the maxim, which he took as referring to a ratio of a hundred guilty to one innocent. He thought that it "supposes a dilemma which does not exist: the security of the innocent may be complete, without favouring the impunity of crime."⁴ Bentham was thinking chiefly of those technical rules which favour the escape of proved criminals. As applied to the quantum of the burden of proof his criticism is misconceived: we do very often find ourselves in

¹ References are: Dig. 48.19.5; Fortescue, *De Laudibus* c. 27; 13 St.Tr. 565 n.; Hale, *P.C.* ii 289; *Bl.Comm.* iv 358.

² Vol. 6 Chap. 9 (ed. of 1817, p. 428).

³ *Observations on the Criminal Law*, Note D.

⁴ *Works* i 558.

the dilemma of either acquitting one who is probably guilty or convicting one who may possibly be innocent.

Two more writers deserve to be noted in this survey. Stephen thought the maxim by no means true under all circumstances: "Everything depends on what the guilty men have been doing, and something depends on the way in which the innocent man came to be suspected."⁵ The first branch of this remark would seem to suggest that the graver the crime charged, the more ready we should be to accept proofs that involve danger to the innocent. This would be a reversal of the generally accepted principle. As to the latter part of the remark, it is not generally thought to be right to strain the law against a man, or to be careless about the proof against him, merely because of some wrongdoing other than that with which he is charged. Stephen would have hit the target more accurately if he had said that the maxim is true to a certain extent but involves the necessity of drawing a line beyond which risk to the innocent is justifiable in the public interest.

It has been said that every legal maxim is either a platitude or a half-truth, and Sir Carleton Allen ably demonstrates the way in which the present one may lead to error. He points out that the number used in stating the ratio is not without importance. "I dare say," he says, "some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept

⁵ *H.C.L.* i 438.

such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos.”⁶

The evil of acquitting a guilty person goes much beyond the simple fact that one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a disregard of the law, and this in turn leads to a public demand for more severe punishment of those who are found guilty. Thus the acquittal of the guilty leads to a ferocious penal law. An acquittal is, of course, particularly serious when it is of a dangerous criminal who is likely to find a new victim. For all these reasons it is true to say, with Viscount Simon, that “a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent.”⁷

A rule giving excessive protection to an accused person becomes even less defensible as the criminal law turns to remedial treatment instead of punishment. It is certainly very regrettable if the wrong person is directed to take medical treatment for some neurotic disorder of which he has not in fact shown any symptoms; but at least the evil to him of such an order is considerably less than that of a sentence of imprisonment under the traditional penal system. This argument is not a very strong one as applied to the present law, because so much of the criminal law and its administration is still punitive.

It is, then, a question of degree: some risk of

⁶ *Legal Duties* (1931) 286.

⁷ *Stirland* [1944] A.C. 315 at 324.

convicting the innocent must be run. What this means in terms of burden of proof is that a case need not be proved beyond all doubt. The evidence of crime against a person may be overwhelming, and yet it may be possible to conjecture a series of extraordinary circumstances that would be consistent with his innocence—as by supposing that some stranger, of whose existence there is no evidence, interposed at the crucial moment and actually committed the crime, when all the evidence points to the fact that the accused was alone on the spot, or by supposing, on a charge of murder, that the deceased died of heart failure the moment before the bullet entered his body. The fact that these unlikely contingencies do sometimes occur, so that by neglecting them there is on rare occasions a miscarriage of justice, cannot be held against the administration of the law, which is compelled to run this risk.

THE DIRECTION TO THE JURY ON THE QUANTUM OF PROOF

Until recently it was the habit of judges to direct juries that a crime had to be proved beyond reasonable doubt. It was explained that this required a clear conviction of guilt and not merely a suspicion, even a strong suspicion, though on the other hand a mere fanciful doubt where it was not in the least likely to be true would not prevent conviction. The direction in terms of proof beyond reasonable doubt received the approbation of the House of Lords in the important cases of *Woolmington* (1935) and *Mancini* (1942). Shortly after that, however, the opinion of the Court

of Criminal Appeal turned suddenly against it, and in *Summers* (1952)⁸ this court ruled that the expression "reasonable doubt" ought to be abandoned because it could not be satisfactorily defined. Instead, the jury should be directed that they must be "satisfied" of guilt, or "satisfied so that they can feel sure" of it. In the months following this pronouncement judges obediently gave up referring to "reasonable doubt," generally contenting themselves with directing the jury that they must be "satisfied" of guilt. The change has, however, caused some misgiving among lawyers, because it is generally thought to be an inadequate way of informing the jury that a person charged with crime is entitled to the benefit of a doubt if there is one. There is, moreover, some reason to suppose that miscarriages of justice are capable of resulting from the new form of words.

An illustration is a case that recently attracted some attention as the case of alleged "murder by motor-car," namely, *Murtagh and Kennedy* (1955).⁹ The first defendant had killed a man when he drove on to the pavement with his motor-car, and the contention of the prosecution was that the killing was intentional, and was done to satisfy a grudge because of a fight that had occurred earlier. The contention of the defendant was that he had seen the deceased take up a coal-cellar lid for the purpose of throwing it at the defendant's car, as he had done before, that

⁸ The cases referred to are: *Woolmington* [1935] A.C. at 481; *Mancini* [1942] A.C. at 11-13; *Summers* (1952) 36 C.A.R. 14.

⁹ 39 C.A.R. 72. See further the article in [1955] *Criminal Law Review* 464.

the defendant had ducked, and that the resulting swerve of the car on to the pavement was purely accidental. The trial judge told the jury that the burden of proof from beginning to end rested on the prosecution, but all that he told them on the question of quantum of proof was the formula that had then become current to the effect that the jury had to be "satisfied" that guilt had been proved. The judge later added: "If you find on a full and fair consideration that it is not safe to reject the account of these two men that this was a pure accident, . . . acquit them both."

The jury convicted the driver of murder, and his passenger, the second defendant, of manslaughter. Owing to the restrictions imposed upon appeal from a verdict of a jury, it was not considered possible to challenge the conviction on the facts, and, instead, an appeal was argued on the question of law whether the direction of the judge was adequate. This appeal fortunately succeeded, on the ground that since the two accused had put forward an explanation of their conduct consistent with their innocence, the judge should have directed the jury that if they accepted this explanation they must acquit, but also if they were left in doubt about the explanation they must acquit. The judge's reference to the possibility of its not being safe to reject the defence was not considered an adequate substitute for the instruction in terms of doubt as to the defence. Thus the effect of the decision seems to be to reintroduce the necessity for referring to the possibility of doubt, though the exact scope of the decision remains obscure. It may be

that the old reference to "doubt" will now come back into directions without the qualifying adjective "reasonable"; if so, the direction will be more favourable to the defendant than it was before the Court of Criminal Appeal commenced to work its upheaval in the law.

The danger of leaving the jury without a direction on the possibility of doubt may be illustrated by the facts of the actual case. The defence was not merely a plausible hypothesis produced by defending counsel, although of course even a hypothesis would need careful attention. In actuality, as was pointed out by the Court of Criminal Appeal, the evidence established that before the tragedy the defendants had twice been to the police station to invoke the help of the police against the deceased, and must have known when they drove for the last time to the spot where the killing was shortly destined to take place that the police would be there either by the time when they arrived or within a very short time. This made it seem unlikely that the driver would have decided upon an intentional murder. In addition, witnesses for the prosecution corroborated the defendant's evidence that the deceased, at the time when he was struck, either was lifting the coal-cellar lid with the intention of throwing it or had already lifted it and was holding it up in a throwing attitude. Taking the evidence as a whole, with the improbability of murder in the circumstances and the proof of facts bearing out the defence of accident, it should have told strongly in favour of the defence. If there is any meaning in giving a defendant the benefit of the doubt, especially

on a capital charge, Murtagh should have been given it. Yet the jury convicted him of murder, and part of the responsibility for what must be taken to have been an incipient miscarriage of justice may perhaps be attributed to the form of the summing-up, which avoided reference to the possibility of doubt. Even so, it may fairly be said that the jury did not come very creditably out of the case; and the defendants had cause to bless the minor blemish in the summing-up, which gave them an effective right of appeal.

CHAPTER 8

THE EXCLUSIONARY RULES OF THE LAW OF EVIDENCE

THE common law of evidence is distinctive chiefly in the determined way in which it excludes certain evidence which, although logically relevant, is regarded as unfair, or as dangerously misleading. The two chief examples of this exclusion are hearsay evidence and evidence of the accused's bad character or conduct similar to that charged. It was pointed out in the first chapter that in the earlier State Trials these restrictions were not recognised. However, having once perceived the need for rules of evidence, the judges proceeded with zest to develop a corpus of rules which must rank as one of the most involved and subtle of all branches of the law.

THE HEARSAY RULE

That "what the soldier said is not evidence" is one of the best-known rules of law, as well as one of its most intricate professional mysteries. This "hearsay" rule is quite strictly preserved in criminal cases, and the reason, or a partial reason, is apparent. When the life, liberty or at least reputation of a man is at stake, it is not right to be content with second-best evidence. Even if the witness is a great scientific expert whose time is valuable, he must come into court himself to state the result of his investigations,

not send an assistant to report it at second-hand. In this way he may be subjected to cross-examination, which may show that his experiments were misconceived; an assistant who merely reported what the great man said could not be effectively cross-examined. Again, the prohibition of hearsay evidence eliminates one very important source of possible error; the more a story is retailed from one person to another, the more likely it is to become garbled.

This last risk is well shown by Professor Bartlett's experiments in what he calls "serial reproduction." Each experiment proceeds as follows: a story is shown to *A*, who afterwards writes down what he remembers of it; his remembered version is shown to *B*; *B*'s remembered version is shown to *C*, and so on. Examples are given of the startling and radical alterations that occur in the story as it is passed on. "Epithets are changed into their opposites; incidents and events are transposed; names and numbers rarely survive intact for more than a few reproductions; opinions and conclusions are reversed—nearly every possible variation seems as if it can take place, even in a relatively short series."¹

These, then, are the two principal justifications for the hearsay rule: the desirability of having the witness personally present in court, where his demeanour can be observed and his story can be tested by cross-examination by the other party or by a trained counsel of that party's choice, and the risk that a story when passed on may become garbled.

¹ *Remembering* (Cambridge 1932) 175.

Of these two explanations the second has only a limited validity, because the risk of error in hearsay evidence can be exaggerated. Bartlett's experiments, referred to above, related to multiple hearsay. First-hand hearsay is more reliable, and in ordinary life we often act upon it. Thus if a man tells us his age we normally believe him, unless of course we suspect him of wishing to deceive us. Yet his statement of his own age must be hearsay. Similarly, if a servant states that his master is away and will not be back for a week, we do not think of disbelieving the latter part of his statement merely because it is hearsay.

An even more serious objection to the view that hearsay is excluded because the evidence may have become garbled in transit is that the exclusionary rule applies not only to oral statements but to written documents, which are not subject to this possibility. It is evident that the exclusion of written documents rests entirely upon the other consideration, namely the desirability of having evidence given orally. Part of the difficulty of explaining the present law of hearsay is due to a confusion between these two different desiderata—first-hand evidence and oral evidence.

In order to show the difference, let us suppose that a witness, X, writes a letter to the judge giving the substance of his evidence and asking to be excused from attendance. The letter cannot be read out in court as a means of conveying the witness's evidence, but it is not hearsay. It is a direct statement by the witness. The reason why it is excluded is partly because it is not on oath (though that point could be met by making it an affidavit), and more substantially

because the law requires evidence to be given orally in court, where the witness may be cross-examined.

Now let us suppose, to carry the argument further, that instead of writing to the judge, *X* writes to a friend *Y*, and *Y* goes into the box to prove *X*'s letter. This evidence will generally be regarded as inadmissible, and the reason given by the judges is that the facts stated in *X*'s letter as proved by *Y* are hearsay. The evidence is not, however, hearsay in quite the same sense as a statement by *Y* that he has heard *X* say something is hearsay. In the latter case there is some risk that *Y* misheard *X*, but in the former case we know that we have *X*'s very words, which come to us from *X*'s pen. The true reason why the letter is excluded is the same as when the letter is written to the judge, namely that evidence is required to be given orally in court.²

The foregoing argument concerns written evidence, but the same principle—that evidence must be given orally in court and be subject to cross-examination—can also explain the exclusion of hearsay oral statements. *Y* in the witness-box may recite something that *X* has said to him, and we may be quite sure that *Y* is a good witness and that *X* did say what he is alleged to have said. Even so, the evidence is excluded

² In the case put, *Y* is merely giving evidence of the identity of *X* as the writer of the letter. This should not logically be regarded as turning *X*'s statement into indirect evidence. Suppose that *X* comes into court and gives evidence on oath that he is John Smith and saw an event which is in issue; if it is admitted that John Smith saw the event, but disputed whether the witness is truly John Smith, *Y* may enter the box and confirm that *X* is Smith. This proof by *Y* of the genuineness of *X*'s evidence does not make *X*'s evidence indirect.

as hearsay, and the reason surely is that this way of giving the evidence prevents effective cross-examination. It is no use cross-examining *Y* as to the truth of the facts stated by *X*, because *Y* can only go on repeating that *X* said so. If you really want to satisfy yourself as to the facts, you must question *X*.

This line of reasoning makes it look as though the true basis of the hearsay rule is the importance attached to having the witness present in court, rather than the frailty of the spoken word when passed from lip to lip. It is all very well to say that the witness must come to court, but what if he is dead or otherwise unavailable? Here the law is presented with the choice of either accepting second-hand evidence of what the absent witness said, or doing without his evidence altogether. The way in which the choice is made must depend upon the importance attached to the possibility of cross-examination. Is cross-examination merely a desirable check which one would like to apply if possible, or is it so vital that evidence in respect of which no cross-examination is possible must be rejected as worthless?

The answer given to this question by the present law is an uneasy compromise. Various exceptions and quasi-exceptions are made to the hearsay rule, enabling this kind of evidence to be admitted (admissions, declarations in the course of duty, declarations against interest, dying declarations, etc.), but they are arbitrary in many of their details, and there is no general rule admitting hearsay evidence when no better is available. No one can read the disquisition upon the law by Professor Edmund M. Morgan in his Foreword

to the American Law Institute's *Model Code of Evidence* without perceiving that the present network of rules is an affront to the intelligence of those who have to apply it. The complication of the law is the more inconvenient because it has to be applied to questions that may arise unexpectedly in the course of trial; the application of the rules cannot always be considered at leisure. To take one example—and a comparatively simple one—there is an exception to the hearsay rule for “dying declarations.” A dying declaration, made with the knowledge of the imminence of death and with all hope of recovery abandoned, is admitted to prove the circumstances in which the death was occasioned. However, this is so only on a charge of murder or manslaughter: if, for instance, the charge is of robbery or dangerous driving, the evidence is inadmissible. The restriction is indefensible.

Again, the dying declaration is admissible only if the deceased knew he was dying and thought he had no hope of recovery. This is a serious limitation, which has been criticised by Lord Maugham. He gives the following example.

“If a man who subsequently dies of poison tells someone that he became ill shortly after visiting a named acquaintance who gave him a cup of coffee, I cannot see any sensible reason for excluding this evidence for what it is worth. If the friend has recently purchased poison, poison of the same kind as that which caused the death, and the statement of the dead man is admitted,

there is some chance of convicting a horrible murderer." ³

Lord Maugham went on to meet the objection that a person might, under the proposed rule of admissibility, manufacture evidence against another and then commit suicide for the purpose of getting his enemy convicted of murder. He rightly thought that this possibility belonged more to the realm of detective fiction than to real life; and in any case the very thing could now be done under the law of dying declarations.

The law of dying declarations is out of accord with present thought because it is based on a theory that now appears old-fashioned. The theory is that the imminence of death acts as a substitute for the oath, the oath being in this context supposed to be the factor responsible for the general hearsay rule. We no longer think that the swearing of a statement is much of an additional guarantee of its truth, so that neither the hearsay rule itself nor any exception to it is adequately justified by a reference to the oath.

Another part of the rule that can only be explained by reference to the requirement of an oath is the rule excluding prior statements of a witness. Let us suppose that X makes a statement shortly after an accident describing what he has seen. At a trial arising out of the accident, X gives evidence and admits that he made the previous statement but denies that it was an accurate account of what he saw. He is cross-examined upon his denial, and the cross-examiner

³ (1939) 17 *Canadian Bar Review* 483.

refers him to the previous statement. The rule is that although the previous statement is admissible to contradict *X*'s new version by shaking his credibility, it is not admissible to prove the truth of the facts stated in it, so that if there is no other proof of these facts there will be no legal evidence of them.⁴ The outcome is entirely negative. Yet *X* has given evidence and been cross-examined, and the jury may be convinced that his first statement was true. The only explanation of the rule of exclusion—and it is an unsatisfactory one—is that the earlier statement cannot be credited because it was not made on oath. It is of course absurd to say, in this twentieth century, that the mere fact that a statement is not made on oath is enough justification for ruling it out in legal proceedings. In practice the rule is sometimes disregarded, the earlier statement being accepted as evidence in itself.⁵

The only satisfactory ground for excluding first-hand hearsay (as opposed to hearsay upon hearsay, which becomes altogether too remote and unsafe) is to compel the party wishing to tender the evidence to produce the actual declarant in court for cross-examination. This reason for the hearsay rule ceases to operate if the witness is dead: here, faced with the choice of admitting or suppressing the evidence, the better policy is surely to admit it for what it is worth. If the exception for dying declarations is rested on this ground, it needs great extension, for there is then no need to

⁴ Above p. 82 n. 8.

⁵ It was so disregarded in *Power* (1911), a case that Sir Patrick Hastings relates with disapproval: *Cases in Court* (London 1949) 292.

confine it to declarations made while dying: it ought to be extended to the declarations of all persons who are since deceased,⁶ or who, indeed, are unable for any other reason to give evidence. Certainly, written statements ought generally to be admitted in evidence, where the maker cannot be called as a witness; for the possibility of error with such documents is minimal; if they were made before the prosecution was thought of, they are less likely to be biased than evidence given in court; and if they were made close to the events recorded, of which the maker had personal knowledge, they may be much more reliable than evidence that he gives later in the witness-box, when his recollection is dimmed. Provision for the admission of such documents in evidence has already been made by Lord Maugham's Act for civil cases, and it was an excess of caution, for which Lord Maugham was not responsible, to exclude criminal cases from the scope of the Act. Even oral statements might be admitted more generously than they are now if the witness is dead or cannot be found or is otherwise not available. In other words, the present rigid law should be confined to cases where the witness is available to be called; where he is not available his evidence should be available at second hand, subject to a judicial discretion to exclude it if its probative value is outweighed by the risks of undue prejudice, undue surprise or confusion of issues which its reception would carry. This simple rule, which has the great authority of the American Law Institute, would

⁶ Several judges have spoken in support of this rule. See (1939) 17 *Canadian Bar Review* 304-5.

preserve all that is valuable in the existing law, while getting rid of its complexity.⁷ It would, of course, need legislation to give it effect. Even under the existing law, with all its detailed rules, there is a general principle requiring scrupulous fairness to the accused, which means that although evidence may be technically admissible against a defendant, as being logically relevant and falling outside the rules of exclusion, still if it is not sufficiently substantial to justify the grave prejudice it may cause the defendant, the judge may intimate to the prosecution that it should not be pressed.⁸

THE HEARSAY RULE AND THE JURY SYSTEM

Proposals to amend the hearsay rule in criminal cases require some consideration of the extent to which the rule is bound up with the institution of the jury. The earlier legal historians, such as Maine and Thayer, thought that all the exclusionary rules of evidence, of which the hearsay rule is one, owe their origin to the presence of the jury; and the judges of the nineteenth century certainly put the hearsay rule upon this ground.⁹ The law, on this view, is designed to protect

⁷ See the A.L.I.'s *Model Code of Evidence* (1942) Rules 303, 503; also the study by R. W. Baker, *The Hearsay Rule* (London 1950); Wigmore, *Evidence*, 3rd ed., v §§ 1360 *et seq.* The Model Code would also admit as evidence all previous declarations by one who testifies as a witness.

⁸ *Christie* [1914] A.C. 545; *Harris* [1952] A.C. at 707. The judge may similarly disallow questions put to the accused in cross-examination on the ground that they are unfair, having regard to the risk of misleading the jury as to the issues to be tried, and if he fails to disallow them an appeal may be brought: *Stirland* [1944] A.C. at 324, 327.

⁹ Thayer, *Preliminary Treatise* 508. But Thayer adds, at p. 535, that "juries are much less helped and sustained by

the jury from hearing bits of information that may help but in the long run are more likely to mislead them. Two reasons may be found for saying that hearsay evidence is capable of misleading: the jury may not realise that evidence may become altered in being repeated, and they may not realise that evidence is unreliable when it has not been cross-examined upon. A trained judge, on the other hand, may be trusted to consider evidence for what it is worth.

Regarded as a proposition of legal history, this theory of a specific connection between the hearsay rule and the jury cannot be substantiated. When the hearsay rule was invented, during the few decades before and after 1700, there appears to have been no idea that the jury as a lay tribunal needed specially filtered evidence. It is true that hearsay evidence was regarded as untrustworthy, partly because of lack of the oath and partly because of the lack of opportunity of cross-examination, and this was the reason why the evidence was excluded; but, for all that appears, it would have been excluded even if the issues of fact had had to be decided by the judges. Indeed, there have always been forms of trial without juries—as, by magistrates, or latterly by High Court judges sitting without juries—and the hearsay rule is applied with the same rigour as if a jury were present.¹⁰

rules of evidence than is sometimes thought." An example of a judicial utterance is Sir James Mansfield C.J. in the *Berkeley Peerage Case* (1811) 4 Camb. at 415, 171 E.R. at 135: "In England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds." See also, on the history, Holdsworth, *H.E.L.* ix 127.

¹⁰ For the rejection of the theory coupling hearsay with the jury see Wigmore, *Evidence*, 3rd ed., v § 1364; Edmund

The notion that the hearsay rule is specially designed to blinker the jury owes much of its plausibility to the special precautions taken when a jury is to decide the case. The jury are excluded from the court while contested evidence is being debated; and if something improper slips out which is seriously prejudicial to the accused, his counsel may apply for the trial to be begun again before another jury, and the court ought to accede to the application.¹¹ On the other hand, the jury are credited in some respects with an almost inhuman ability to regulate their minds according to the direction of the judge. For example, when there are several defendants, and evidence is given that in law is admissible against one of the defendants only, the jury are supposed to be able to think of the piece of evidence against that defendant but to dismiss it from their minds when considering the others. When a witness who gives evidence is challenged with his own contradictory statement made in his deposition before the magistrates, the jury are supposed to be able to regard the deposition as destroying the credit of the witness and nullifying

M. Morgan, Preface to the American Law Institute's *Model Code of Evidence* (1942) 36; also *ibid.* 217 *et seq.* According to these writers, the hearsay rule was a product of the adversary system, *i.e.*, the system of cross-examination, the idea apparently being that it was unfair to the other party to admit evidence without the possibility of cross-examination. While agreeing that the hearsay rule was principally the result of the requirement of cross-examination, I prefer to say that the latter requirement was itself regarded as a means of establishing the truth of the evidence. In this indirect way it remains true to say that hearsay was excluded because it might be misleading.

¹¹ *Firth* (1938) 26 C.A.R. 148; Halsbury, *Laws of England* 2nd ed. ix 173.

his evidence in court, without taking the deposition as positive evidence for the facts stated in it. Thus the jury are credited with the ability to follow the most technical and subtle directions in dismissing evidence from consideration, while at the same time they are of such low-grade intelligence that they cannot, even with the assistance of the judge's observations, attach the proper degree of importance to hearsay.

It must be realised that no rules, however subtle they may be, can wholly prevent misleading evidence going in. One of the large exceptions to the present hearsay rule is in respect of confessions and admissions made by the accused. Although this is a necessary exception, it frequently lets in evidence of the most untrustworthy character. For example, evidence of admissions alleged to have been made by the accused may be given by prostitutes and thieves whose testimony is highly suspect. They may have been questioned by the police, and may have made the statement that they thought was expected of them because it did not pay them to offend the police; or such admissions may be deposed to by persons who wish to gain notoriety in a case that is attracting public attention. Again, admissions made under police questioning may be misleading if the note of the accused's words made by the police omits the questions to which they were replies; and the admission may be wholly false. No law can entirely save the jury or magistrates from the agony and responsibility of deciding the weight to be attached to evidence.

The strict rules of the English law of evidence are

not only rejected by Continental lawyers but regarded by them with dislike amounting to abhorrence. In France, for example, the president has a discretion to exclude hearsay evidence; but despite the presence of jurors in the *cour d'assises*, there is no detailed set of directions on this subject, as in common-law countries. Documents may be read in court if they emanate from persons who are unable to appear. Strict rules of exclusion are regarded as so many hindrances to the ascertainment of truth. At the Nuremberg Trials, which were of an international character, although it was agreed that the common-law methods of trial should generally be used, the Anglo-American law of evidence was rejected, and in its place there was the single rule that the tribunal "shall admit any evidence which it deems to have probative value." The rule worked even to the satisfaction of the Anglo-American lawyers, and Justice Robert H. Jackson expressed the opinion afterwards that "less time was devoted to disputes over procedure and the admissibility of evidence than would be so consumed in a criminal trial of any comparable magnitude in the United States."¹²

A discretion to exclude remote and insubstantial evidence is necessary for any tribunal. But opinion is hardening that the technical English rules of hearsay, which may have the effect of excluding evidence of the greatest persuasiveness, are neither necessary nor easily workable.

¹² "Nuremberg in Retrospect," (1949) 35 *American Bar Association Journal* 813. For Continental law see Hammelmann in (1951) 67 *Law Quarterly Review* 67.

HEARSAY AS EVIDENCE FOR THE DEFENCE

The books on evidence do not distinguish between the rules of hearsay as applied to the evidence for the Crown and as applied to the evidence for the defence. Most people would say that there should be a great difference, and that a miscarriage of justice should not be risked by shutting out any evidence for the defence, even though it may be hearsay. Accordingly, Crown counsel frequently take no objection to defence evidence even when they might technically be able to do so. As Sir Herbert Stephen wrote:

“The counsel for the prosecution ought to make it obvious, and in England he almost always does so, that his object is not to get a conviction, without qualification, but to get a conviction only if justice requires it. He therefore seldom if ever raises any objection to questions proposed to be asked in the course of the defence upon any ground except that they are a waste of time, or likely to distract the attention of the jury from the substantial issues of the case.”¹³

As an illustration of this practice, where one of joint defendants has made a statement confessing guilt and exculpating the other, his statement is not strictly evidence for the other, but no objection is ever taken to it.¹⁴

On the other hand an objection was taken by the Crown to hearsay evidence in the trial of Mrs. Barney

¹³ *The Conduct of an English Criminal Trial* (London 1926) 11.

¹⁴ *Cf. The Trial of Rattenbury and Stoner*, ed. F. Tennyson Jesse (London 1935) 267, *per* Humphreys J.

for the murder of her lover in 1932. The hearsay evidence that the defence wished to bring out was a statement by the deceased to the effect that Mrs. Barney wanted to kill herself; this evidence was vital for the defence, whose case was that Mrs. Barney, threatening to commit suicide, had had to struggle for the pistol with her lover, in which struggle the pistol accidentally went off. Sir Percival Clarke, for the Crown, objected to the evidence, on the ground that since a hearsay statement could not be evidence for the Crown, it could not be evidence for the defence. Whether he was technically right in taking the objection has since been the subject of debate among lawyers, but certainly if he had succeeded the consequence for Mrs. Barney might have been disastrous. Fortunately the judge ruled that the evidence should be admitted, and Mrs. Barney was acquitted.¹⁵

CONFESSIONS

The most important exception to the hearsay rule is in respect of confessions (or other admissions) made by the accused. Evidence may be given of such confessions, on the ground that they are very likely to be true, being made by the accused against his own interest, even though he now denies them.

Experience shows the danger of supposing that a

¹⁵ *The Times*, July 7, 1932. Mrs. Barney's counsel, Sir Patrick Hastings, afterwards wrote that Sir Percival was probably right, and that the judge strained the laws of evidence in favour of the defence (*Cases in Court* (London 1949) 272). It did not seem to occur to him as a possible argument that the hearsay rule ought not to be applied against the defendant to a criminal charge.

confession, even if satisfactorily proved, is *necessarily* true. Not only may it be made to shield another, as in the case of Mrs. Rattenbury, but it may even, it seems, be made for no better reason than to put an end to police questioning. No one can now say for certain whether Evans's confession was false, but the other circumstances point to the probability that the murder to which he confessed was in fact committed by Christie, and, if so, there can be no more startling illustration of the fact that some people who find themselves in the hands of the police, though without receiving any ill-treatment, will "confess" to anything.¹⁶

The only case where a confession is automatically excluded from evidence by law is where it has been obtained by a promise or threat relating to the charge and made by a person in authority. Here the likelihood of truth generally disappears. An example would be where a policeman has told the defendant that he will get off more lightly if he confesses. The principle excluding such induced confessions is right and proper, even though some of its details, and indeed its fundamental philosophy which governs these details, may be the subject of differences of opinion.¹⁷

It has, however, been suggested with much force that a defendant ought not to be given the benefit of the rule excluding induced confessions if he does not

¹⁶ The case of Mrs. Rattenbury is referred to in note 14 above; for the case of Evans, see Paget and Silverman, *Hanged—and Innocent?* (London 1953); Michael Eddowes, *The Man on Your Conscience* (London 1955).

¹⁷ For a full study see Macdonald and Hart in (1947) 25 *Canadian Bar Review* 823. See also [1955] *Criminal Law Review* 339.

enter the witness-box to deny the truth of his confession.¹⁸ A person who has made a confession and who now wishes to assert that it was false should be allowed to do so only on condition of submitting to cross-examination. The Court of Criminal Appeal has supported this suggestion to the extent of saying that defending counsel ought not to make allegations that the police were guilty of beating the defendant unless the defendant is prepared to give evidence to that effect.¹⁹

THE EXCLUSION OF CHARACTER AND CONVICTIONS

The feature of the English system that most puzzles and intrigues foreign lawyers is that the prosecution are generally not allowed to give evidence of the accused's bad character or previous convictions in order to help establish that he committed the crime in question. Such evidence can in general be given only after conviction in order to determine punishment. In many other countries, on the other hand, this evidence is the very first to be adduced at the trial. On the face of it the English system might seem to be over-lenient to the accused, because we do in everyday life attach importance to the question whether the person whose worth we are assessing has a criminal record or not. One reason for the English rule is that evidence of general evil propensity widens the issues of the trial so immensely as to be unfair to the accused. Even the notorious Judge Jeffreys

¹⁸ Morrison in (1948) 1 *Journal of Criminal Science* 150.

¹⁹ O'Neill (1950) 34 C.A.R. 108.

may be found to say, in Hampden's case, that "to rake into the whole course of a man's life is very hard"; and Mr. Justice Withins said on the same occasion: "We would not suffer any raking into men's course of life, to pick up evidence that they cannot be prepared to answer to."²⁰ Another, and stronger, justification is the exaggerated importance that a jury, consisting of persons without legal experience, may attach to this kind of evidence; for they may argue: "This man is charged with crime, and the police think he did it, and he is clearly of criminal habits; therefore he must be guilty." Mr. Justice Willes put the point in the following words.

"[Evidence of character] is strictly relevant to the issue; but it is not admissible upon the part of the prosecution, because as my Brother Martin says, if the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon the trial for murder you might begin by showing that when a boy at school the prisoner had robbed an orchard, and so on through the whole of his life; and the result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted by that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity; because although by admitting it you might arrive at justice in one

²⁰ (1684) 9 St.Tr. 1103.

case out of a hundred, you would probably do injustice in the other ninety-nine."¹

The continuing need for the rule when there is a jury is stressed by experience of what happens when it is not applied. The conviction of Steinie Morrison, insufficiently supported as it was by the evidence, was probably due more than anything else to the fact that Morrison's bad character had been let in evidence, under a rule shortly to be discussed, after his counsel had attacked the character of the prosecution witnesses. Knowing Morrison's past, the jury could no longer bring themselves to put a favourable construction upon disputed evidence. Another object-lesson in the wisdom of the law is the trial of Oscar Slater: that unhappy man would not have been convicted had it not been for the inexplicable and indefensible disclosure of his mode of living.

Parliament has shown little perception of the importance of the rule preventing the prosecution from damaging the accused by disclosure of his record. The various offences under the Prevention of Crimes Act, 1871, such as that of awaiting an opportunity to commit an offence, require the prosecution to prove that the accused has previously been convicted of one of the specified crimes; and this evidence must be led before the accused can be convicted. Judges have realised the danger in this legislation, and have said that charges should not be brought under it if some other charge is possible; consequently, the Act has largely fallen into disuse.

¹ *Rowton* (1865), L. & C. 520 at 540-1, 169 E.R. at 1506. See generally Wigmore, *Evidence*, 3rd ed. i § 57.

On the other hand, much use is made of the Vagrancy Act, which creates a somewhat similar offence triable before magistrates. It is altogether anomalous that whereas previous convictions cannot generally be given in evidence on a precise and concrete charge like larceny, they can, under this legislation, be used to help prove guilt of an offence of such general character as awaiting an opportunity to commit an offence, or loitering with intent to commit a felony, where there is no mischievous act at all.²

CROSS-EXAMINATION UNDER THE CRIMINAL EVIDENCE ACT

Although the prosecution are not allowed to prove the accused's bad character in the first instance, the way in which he conducts his defence may enable them to do so.

When the Act of 1898 was being drafted there was much controversy on this question. Some judges, such as Lords Bramwell and Brampton, wanted to allow the accused who gave evidence to be cross-examined like any other witness, and therefore to be cross-examined as to character. They thought it wrong that a defendant of good character should be able to bring it forward, while a defendant of bad character should be allowed to enter the witness-box and set his evidence against other witnesses, without being open to the same modes of attack as other witnesses.³ Had their proposal been accepted the

² For the Prevention of Crimes Act and the Vagrancy Act, see Williams, *Criminal Law: The General Part* § § 153-4.

³ See A. C. L. Morrison in (1948) 1 *Journal of Criminal Science* 142.

result would have been either to deter most defendants from entering the witness-box, or to have created an enormous breach in the time-honoured principle excluding evidence of the accused's antecedents. The analogy between a defendant who gives evidence and other witnesses is plausible but unrealistic, because whereas an attack upon the character of an ordinary witness can at most result in his evidence being rejected, an attack on the character of an accused person who gives evidence may in the minds of the jury be regarded as supplementing deficiencies in the evidence for the prosecution.

Fortunately the proposal was not adopted, and the Act as we have it represents something of a compromise. It has always been the rule of the common law that if the accused calls witnesses to his good character the evidence may be countered by evidence of his bad character. The accused cannot be allowed to claim a good character that he does not possess; by calling evidence of character, he puts it in issue. Under the Act, this rule is applied to allow the prosecution to cross-examine the accused as to his character wherever he has given or elicited evidence as to his good character.⁴ It is enough, to give the prosecution this

⁴ See s. 1, proviso (f). But it is part of the complexity of this part of the law that the meaning of the word "character" in the rule at common law differs from that in the statute. Where the accused calls witnesses to his good character but does not himself enter the box, the prosecution can only counter the evidence of character by evidence of general reputation: see the criticism of this rule by Stephen, *H.C.L.* i 450, and the wider rule in the American Law Institute's *Model Code of Evidence*, Rule 306. Where the accused enters the box and gives evidence of his good character (which

right, that the accused or his advocate has asked questions of the witnesses for the prosecution with a view to establish his own good character. Also, an accused who puts his character in issue in any respect puts his whole past record in issue, so that he cannot restrict evidence of his character to certain aspects of it only. In order to prove bad character counsel for the Crown may prove previous convictions of the accused, but he is not allowed to ask the accused whether he was *acquitted* of a specified crime in the past, for the acquittal must be taken as conclusive proof of his innocence of it; and for a similar reason it is improper to ask the accused whether he was suspected or accused of another crime.⁵

Had the Act stopped at this point it would have given general satisfaction and the law would have been simple and intelligible. Unfortunately it went further and provided two more cases in which the Crown is entitled to cross-examine a defendant-witness to character. The first is where the nature

term here seemingly includes actual moral disposition and not only general reputation: *cf. Stirland* [1944] A.C. at 323), the prosecution can question him not only upon this character but upon specific offences as examples of bad character: see the language of proviso (f). The reason for the rule in proviso (f) is that when the accused gives evidence and puts his character in issue, it is in issue not merely as tending to prove or disprove that he committed the crime in question, but, at one remove from this, as tending to prove or disprove that he is a credible witness to the facts; and character evidence has a wider meaning for the latter purpose than for the former purpose. English law clings rather pathetically to the illusion that a person charged with crime can be treated as an ordinary witness of fact; the more realistic Continental view was mentioned on p. 64.

⁵ Criminal Evidence Act, 1898, s. 1 (f), as interpreted in *Stirland* [1944] A.C. 315.

and conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; the second, where the defendant has given evidence against any other person charged with the same offence.

In these two rules, and particularly in the first, English law shows less than its usual fairness to the accused, and the first rule has caused grave embarrassment to defending counsel on numerous occasions. There is hardly any rule of the law of evidence that is more in need of change. The unhappy dilemma in which it places counsel was made the subject of a strong protest by Edward Abinger,⁶ who was put in this position when defending Steinie Morrison on the charge of murder. On his client's instructions, and as a necessary part of his case, Abinger attacked the character of an important witness for the prosecution, showing her to be a brothel-keeper; the penalty for this was that Morrison's previous convictions were brought out, which was no doubt a potent factor in securing his conviction. Criticising the existing law, Abinger put the case of a witness for the prosecution who has been convicted of perjury. He asked: "Is counsel defending the man in the dock to allow such a witness to leave the box uncross-examined as to his convictions for perjury, and thus delude the jury into believing he is a reliable witness?"

To put another extreme case, the principal or only witness for the prosecution may have been heard to utter a threat against the defendant to "fix" him

⁶ *Forty Years at the Bar* (London n.d.) 48 *et seq.*, 70 *et seq.*

if he ever got the chance, and this threat may give rise to a strong suspicion that the witness's evidence is fabricated; yet counsel for the defence cannot tax the witness upon this threat without putting his client's character in issue, which if the character is a bad one may be sufficient to damn him in the eyes of the jury. Again, a defendant who has made what purports to be a confession may allege that this confession was extorted from him by threats on the part of the police; but if he gives evidence to this effect he runs the risk of having his criminal record brought to the notice of the jury.⁷

It would seem to be simple logic that the question whether the defendant's character should be regarded as being in issue is totally distinct from the question whether the defence should be allowed to make imputations upon the character of a witness. The main reason why evidence of the defendant's character is generally excluded is that the jury are likely to be unduly influenced by knowledge of his bad character. This reason of policy exists whether or not the counsel for the defence finds it necessary to question the character of the witnesses for the prosecution. It must further be noted that the rule operates unevenly, because whereas it places counsel for the defence under restraint, the prosecuting counsel is under no such restraint. Imputations may freely be cast upon the characters of all the defence witnesses except the defendant himself, while counsel for the defence,

⁷ *Clark* [1955] 3 W.L.R. 313; *Curwood* [1945] Argus L.R. 25, 69 C.L.R. 561, discussed by Barry and Paton, *Introduction to the Criminal Law in Australia* (London 1948), 78.

knowing that his client has a bad character, is inhibited from replying in kind. The effect may be, as one writer expresses it, that "the witnesses for the prosecution will appear as paragons of virtue, while the witnesses for the defence may be entirely discredited."⁸ This cannot be regarded as even justice, nor as a sure method of arriving at the truth.

Although Parliament has never seen fit to reconsider the question, the judges have done their utmost to modify the rule, and the result is a case-law of some complexity. The usual way in which the words of the Criminal Evidence Act are modified is by saying that an accused person cannot be cross-examined to credit merely because the proper conduct of the defence necessitates the making of injurious reflections on the prosecutor or his witnesses.⁹ An

⁸ Geoffrey de C. Parmiter, *Reasonable Doubt* (London 1936), 180; cf. *ibid.* pp. 126, 163.

⁹ In *Stirland* [1944] A.C. 315, Viscount Simon L.C. laid down this rule and seemed to regard it as an exhaustive statement of the way in which this particular part of the statute is to be modified by interpretation. His reference to the very restricted decision in *Turner*, next note, seems to indicate that the modification is a comparatively slight one, and would not cover an attack upon the prosecution's witness like that made by Abinger, even though it is regarded by counsel, and is in fact, the best way of defending his client. Viscount Simon said that "it is most undesirable that the rules which should govern cross-examination to credit of an accused person in the witness-box should be complicated by refined distinctions involving a close study and comparison of decided cases, when in fact these rules are few and can be simply stated"; he then went on to state the law in six propositions, of which the one reproduced in the text above is the only one relevant to the present point. However, it may be doubted whether Viscount Simon's summary does enable one to dispense with the previous case-law, which will be found discussed by Julius Stone in (1942) 58 L.Q.R. 369.

obvious example is where a man is charged with rape and alleges that the prosecutrix consented to the act; such an allegation involves an attack on her character, but, being directed solely to the negation of the charge, does not let in questions as to his character.¹⁰ What protection a defendant would have beyond a simple situation of this kind is still doubtful, except so far as is covered by the decided cases, not all of which are in agreement with each other. It is, however, settled that if the accused is only led to attack the prosecution by the way in which he is asked questions in cross-examination, the attack does not let in a reply to his own character.¹¹ Moreover it has been held that the court has a discretion to exclude particular questions even when the statutory situation has arisen, and that the Crown should ask the court whether a statutory situation has arisen before cross-examining as to character.¹²

THE EXCLUSION OF CHARACTER EVIDENCE AND THE JURY SYSTEM

There is no rule that a judge trying a case with a jury must not know of the accused's previous convictions. On the contrary, a list of such previous convictions lies before the judge on his desk. This is not regarded as an embarrassment, because, by deeply ingrained tradition, the judge in charging the jury dismisses the

¹⁰ *Turner* [1944] K.B. 463. The decision is restrictively interpreted: see *Jenkins* (1945) 173 L.T. 311; 31 C.A.R. 1.

¹¹ *Baldwin* (1925) 18 C.A.R. 175.

¹² *Stone, op. cit.* at pp. 382-3. The rule stated by the author on p. 381, para. (a), is too wide a deduction from the authorities.

convictions from his mind; and of course the judge does not himself have to adjudicate on the facts. There is one occasion, however, when a different administrative arrangement might be preferable. This is when an appeal is taken to a recorder from a magistrates' court. The recorder, in deciding the facts, is supposed to try to forget the sheet in front of him which lists the defendant's convictions. On an appeal to county quarter sessions, the list of convictions is given only to the chairman, who does not show it to his colleagues until after the finding of guilt.

In magistrates' courts the law of evidence is supposed to be the same as in trials on indictment, but it is impossible for a small local court to avoid knowing the past history of a number of the offenders who come regularly before it. Moreover, magistrates may come to know of the accused's criminal record at some previous stage of the case against him, for example on an application for release on bail. Some magistrates escape this particular difficulty by refusing bail whenever the police make objection to it, without inquiring into the reason for the objection, because to inquire into the reasons would usually invite a disclosure of the accused's previous convictions. This is not a very satisfactory solution, because a person who has been arrested on a charge of crime is entitled to ask the magistrates to exercise a judicial discretion upon his application for bail, which they can only do if they know the full circumstances. Thus the better view is that magistrates should, where the police make objection to bail, hear what they have to say

about the accused's record, even though they may themselves have to try the case. Another situation where the magistrates, and indeed a jury, may come to know of a previous conviction is where the information charges the crime as committed after a previous conviction, under some special statute which increases the punishment on second conviction.¹³

Except in these cases of necessity, however, the rule is that it is irregular for evidence of previous convictions to be given in a magistrates' court before the finding of guilt, just as it is when the trial is by jury. If such evidence is given, the magistrates must adjourn the case for hearing before a new Bench, unless the defendant, after being informed of his right, waives it.¹⁴ It will be seen that the law is something of a compromise between the necessities of magisterial jurisdiction and the tradition of English criminal justice.

CIRCUMSTANTIAL EVIDENCE REQUIRING PROOF OF A CRIME

Circumstantial evidence is not excluded merely because it involves proving some other crime against the accused. For instance, to prove his connection with a burglary, it may be shown that the burglar left an article on the premises which had previously

¹³ *Per* Jelf J. in *Beesby* [1909] 1 K.B. at 858.

¹⁴ *Hastings v. Ostle* (1930) 94 J.P. 209; *Elkington v. Kesley* [1948] 2 K.B. at 263; contrast *Turner v. Underwood* [1948] 2 K.B. 284. *Cf.* Magistrates' Courts Act, 1952, s. 29, which is designed to assist magistrates in avoiding inquiry into previous convictions before deciding whether to try a case summarily.

been stolen by the accused.¹⁵ Thus the law is that evidence of other crime is generally admissible against the accused provided that it has some relevance other than the mere relevance of showing his propensity to commit crime. A special application of this rule is in relation to evidence of similar facts.

EVIDENCE OF SIMILAR FACTS

Henry Cecil's novel *According to the Evidence* is built around the difficulty of proving a case against a man when he makes a practice of attacking girls but each separate charge has to be based on somewhat flimsy evidence. In judging and assessing people in ordinary life we are accustomed to "build up" a case by putting together separate pieces of evidence, each one of which taken alone may be doubtful but which taken together are convincing. How far is this possible in law, when each piece of the evidence relates to a separate offence?

The answer is that although it is not usually permissible to prove against an accused person that he is given to crime generally, the courts have on a number of occasions admitted evidence of other crimes where they are sufficiently similar to the crime charged to be strongly probative of it.¹⁶

¹⁵ For an interesting illustration of one of joint defendants invoking this rule to throw the blame on to his co-defendant see *Miller* [1952] 2 All E.R. 667.

¹⁶ The evidence may either be through ordinary witnesses or by the cross-examination of a defendant-witness: Criminal Evidence Act, 1898, s. 1, proviso (f) (i). The evidence of an accomplice to the previous crime needs the corroboration warning (*Davies* [1954] A.C. 378), and if there is no corroboration the prosecution should carefully consider whether to call the evidence at all (*Farid* (1945) 30 C.A.R. at 181).

An excellent illustration is the well-known "brides in the bath" case.¹⁷ A man called Smith was charged with drowning in her bath a woman with whom he had gone through a ceremony of marriage. Although there was no direct evidence that he had caused her to drown, nor any circumstantial evidence of sufficient cogency pointing to his guilt of that drowning if it were regarded in isolation, Smith was convicted; and this was because evidence was admitted that two other women with whom he had been connected had met their deaths in precisely the same way. The similarities between the three deaths were very striking. As Lord Maugham has put it, "No reasonable man could believe it possible that Smith had successively married three women, persuaded them to make wills in his favour, bought three suitable baths, placed them in rooms which could not be locked, taken each wife to a doctor and suggested to him that she suffered from epileptic fits, and had then been so unlucky that each of the three had had some kind of fit in the bath and been drowned."

A less obvious similarity than this is sufficient, particularly if the number of deaths is such as to exclude any reasonable possibility of accident. In the "baby-farmer" case, *Makin v. Attorney-General for New South Wales*,¹⁸ a man and his wife made a practice of receiving children for small payments, representing that they were willing to adopt them; the bodies of thirteen children were afterwards found

¹⁷ *Smith* (1915) 31 T.L.R. 617.

¹⁸ [1894] A.C. 57.

buried in their garden. On an indictment for murdering one of the children, it was held that evidence could be given of the finding of all the bodies, and this although no act of killing could be proved in any one instance.

Again, evidence of similar acts may be submitted to show marked mental peculiarities which made it more likely that the accused did the act and had the intent with which he is charged. Thus in *Thompson* (1918)¹⁹ Lord Sumner said that persons given to unnatural crimes were stamped "with the hallmark of a specialised and extraordinary class as much as if they carried on their body some physical peculiarity."

Evidence of only one other similar fact may be sufficient to show "system and method." Thus the conviction of an abortionist may be assisted by showing that he committed an abortion on a previous occasion.²⁰ It is obvious that we are here rather near the line, for it would not generally be admissible evidence against a person charged with burglary to prove that he has committed some other burglary with which he is not charged. Such evidence would be excluded on the general principle on which evidence of bad character is excluded, namely that it widens the issue unfairly against the accused and goes too largely to prejudice.

The legal distinction may appear a difficult one until it is realised that the way in which it is drawn is largely a matter of common sense. If, for instance, a man is convicted of arson of a hayrick, he had

¹⁹ [1918] A.C. 221 at 235. Cf. *Hall* [1952] 1 K.B. 302.

²⁰ *Dale* (1889) 16 Cox 703; *Bond* [1906] 2 K.B. 389; *Starkie* [1922] 2 K.B. 275.

better for his own safety avoid hayricks in future, for if he alone is near one when a mysterious fire breaks out, he has only himself to thank if he is charged with arson and if his previous conviction is given in evidence against him—as could probably be done, although the point has not been precisely determined.¹ The probability that in such circumstances it was the convicted arsonist who started the fire is obviously very high. On the other hand, a convicted burglar is not expected to avoid passing near houses, for it is impossible for him to avoid them; and if he is caught in the neighbourhood of a house in which a burglary has just been committed, his previous conviction is not generally evidence against him.² It would be evidence, however, if there were marked similarities between his previous burglary and the one for which he is now charged.³ And even without these marked similarities, the previous conviction would be evidence against him if he were actually found inside the house, and set up an excuse that he got there by mistake.⁴

¹ *Cf. Dossett* (1846) 2 C. & K. 306, 175 E.R. 126, where the facts were somewhat different from those imagined in the text.

² Even a convicted rapist is safe from having his conviction given in evidence if a woman with whom he has had intercourse alleges that she did not consent: *cf. Turner* [1944] K.B. 463, where, however, the argument proceeded on the terms of the Criminal Evidence Act.

³ *Cf. Robinson* (1953) 37 C.A.R. 95. So also on a charge of obtaining by false pretences, a previous obtaining can be given in evidence if, but only if, there is a similarity between the pretences.

⁴ *Harrison-Owen* [1951] 2 All E.R. 726 is not against the above contention, because it proceeded on the special nature of the defence (automatism) and on a highly technical view

A previous similar crime is not evidence against the accused unless he is shown to have been connected with it. This condition was held not to have been satisfied in *Harris* (1952),⁵ a case that went to the House of Lords and is now the authoritative pronouncement upon the whole subject. The accused person, Harris, was a policeman of Bradford who was tried on an indictment containing eight counts charging him with office-breaking on a series of dates in a period of three months, by breaking into and entering the premises of a company of fruit merchants situated in an enclosed and extensive Bradford market and stealing therefrom various sums of money. There were several similarities in the various offences charged. In every case the money stolen was only a part of the amount that the thief, whoever he was, might have taken. In every case the same means of access were used, and in every case the theft occurred in a period during part of which the accused was on duty in uniform in the course of patrolling the market, and, apparently, at an hour when most of the gates of the market were closed to the general public. But, on the first seven of these occasions, there was no further evidence to associate the accused specifically with the thefts. On the eighth occasion, however, which was between 6 and 7 o'clock on a Sunday morning, the accused, who was on solitary duty in the market as before, was found to be just outside the premises by two detective officers who had rushed

of the nature of an "act." It is, in any case, an ill-considered decision.

⁵ [1952] A.C. 694.

to the spot on hearing, in the quarters where they were secretly waiting, the ringing of a burglar alarm, the existence of which was unknown to the accused. On this occasion, marked money which had been placed in the till had been abstracted, and was found concealed in a coal-bin, not far away from where the accused was first seen. The two detectives were well known to the accused and might have been expected to be at once recognised by him, but when they entered the market, one by climbing over a gate and the other by opening it with some difficulty, though they were in the accused's view at no great distance, he contended that he had not recognised them at first as members of the police force and so had not moved to join them. Instead he disappeared from view and a little later came running up to join them. The time that elapsed between their first sight of him and his return was just sufficient to enable him to have reached the coal-bin and come back.

The accused was tried on all the counts together, and the jury acquitted him on the first seven, relating to the earlier occasions, but convicted him on the last. An appeal was taken on the ground that the jury should have been directed that the evidence relating to the earlier occasions was inadmissible to prove an offence by the accused on the last. This contention succeeded in the House of Lords for the reason, stated by Viscount Simon, that the fact that someone perpetrated the earlier thefts when the accused may have been somewhere in the market did not provide sufficient material confirmation of his identity as the thief on the last occasion. Lord

Morton pointed out that the accused was not proved to have been near the shop or even in the market at the time when the earlier thefts occurred.

It may be thought from this decision that the law relating to similar acts is not in complete conformity with what the plain man would regard as common sense. The circumstances proved against the accused in respect of the last occasion involved him in very grave suspicion, for the theft obviously occurred at the time of the ringing of the alarm, and the accused was the only person who appeared to be on the spot at that time. If the evidence of the previous thefts were admitted, it might be thought to remove any remaining doubt. For the thefts in the series were so markedly similar that they were almost certainly committed by the same person; and it would be attributing an almost inconceivable ill-luck to the accused to suppose it mere coincidence that they all occurred when he was on duty at the market and none occurred when he was off duty. This argument, however, overlooks the crucial factor in the case, according to the House of Lords, which was that the accused was not proved to have been near the shop at the very time when the earlier thefts took place.

The decision of the House of Lords was later considered in another case by the Court of Criminal Appeal,⁶ which took the view that the decision in *Harris* depended on the fact that the jury had acquitted on the first seven counts. This acquittal had to be taken to mean that the jury were not satisfied that the accused had been guilty of the first seven thefts,

⁶ *Robinson* (1953) 37 C.A.R. 95, especially at p. 106.

and this in turn destroyed any relevance of the first seven thefts to the eighth count. According to the suggestion of the Court of Criminal Appeal, the trial judge in *Harris* might have provided for this possibility by directing the jury that if, and only if, they found the accused guilty on the first seven charges could they be assisted by that view in determining the eighth charge. The difficulty with this theory is that the evidence relating to the first seven charges was insufficient, by itself, to convict the defendant on those charges; it could become sufficient only by adding the evidence on the eighth charge, which seemed more decisively to identify the accused as the culprit. Thus in effect the jury could not convict on the first seven charges without first making up their mind that the accused was guilty on the eighth charge. But if the jury were able to make up their mind on the eighth charge without the aid of the earlier charges, there would be no need for the trial judge to refer to any assistance to be derived from the earlier charges. In short, these earlier charges could give assistance only on the assumption that no assistance was needed. On the whole the suggestion made by the Court of Criminal Appeal does not seem to represent the real decision of the House of Lords, because I do not think that that decision would have been any different if the jury had convicted on all eight counts.

Where, however, the earlier offences are brought home to the accused by proper evidence, there is no doubt that they can be given in evidence against him on a charge of a later offence, within the rules

already stated. This is shown by *Straffen* (1952),⁷ where evidence that the accused had killed young girls previously was admitted to show that he killed the girl with whose death he was charged, the circumstances being quite similar. There are cases where it is possible to add together the evidence on different charges, even though the defendant cannot be proved to have been implicated in any of them if the evidence is taken separately on each charge. The baby-farmer case was of this kind; so too was an Australian case where a woman had lost two husbands through the same kind of poison: evidence of the first death was admissible against her on her trial for murder in respect of the second, to rebut her defence that her husband took the poison himself in order to get her into trouble.⁸ Thus the law is not altogether helpless against the chain murderer who covers his or her tracks pretty well but is left implicated by the similarity of his misdeeds.

The rule allowing the admission of similar facts is subject to the overriding discretion of the judge to exclude evidence, even if it is strictly admissible under the rule, if it is only of trifling weight, and if its probable effect upon the jury would be out of proportion to its true evidential value.⁹ In accepting this qualification upon an otherwise broad rule,

⁷ [1952] 2 Q.B. 911; cf. note in (1953) 16 M.L.R. 74.

⁸ *Fletcher* (1953) 53 State Reports (N.S.W.) 70, noted in [1954] Crim. L.R. 274. The previous death was held inadmissible by the Privy Council in the somewhat similar case of *Noor Mohamed* [1949] A.C. 182; but see the criticism in (1949) 12 M.L.R. 232.

⁹ *Per* Viscount Simon in *Harris* [1952] A.C. at 707, following earlier authority.

English law seems happily to have reached the plain and simple position stated in the American Law Institute's Draft Code of the Law of Evidence (Rules 303, 311), whereby similar fact evidence is admissible unless it is relevant solely as tending to prove the accused's disposition to commit such a crime, while this admissibility is subject to the discretion of the judge to exclude evidence if its probative value is outweighed by the risk that its admission will necessitate undue consumption of time, or create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered. The decision in *Harris* is perhaps most satisfactorily put upon this discretionary exclusion, though the only law lord to attribute it to the rule was Lord Oaksey in a dissenting judgment.

The perceptive reader will have realised that the effect of this part of the law of evidence is to enable the judge to control in large measure the verdict of the jury. The judge's decision to admit the damning evidence of similar facts means almost inevitably a verdict of guilty, while his exclusion of it will often give a good chance of acquittal. In deciding whether to admit or reject, the judge must be largely governed by his opinion whether the evidence is substantially probative, which means taking his own opinion of whether on this evidence it would be right to convict. In *Harris*, for example, the House of Lords must have thought that the evidence as a whole was not quite strong enough for conviction. Thus the law

of similar-fact evidence is a disguised way of removing a large part of the responsibility of the decision to the judge.¹⁰

CHARACTER AND CONVICTIONS AS EVIDENCE FOR THE DEFENCE

As has already been pointed out, it is always open to a defendant to put his character in issue. The same is true of previous convictions, where they are relevant to the defence. This principle has been accepted ever since its denial in the tragic and momentous case of Adolf Beck. The police, it will be remembered, were convinced that Beck was the same person as the John Smith who had been convicted in 1877 (see p. 86), and the handwriting expert who advised the prosecution pointed out, as was the fact, that the letters written by the culprit on the present occasion in the course of his frauds were identical in handwriting with those written by Smith in 1877.¹¹ Had this allegation been made in court the prosecution of Beck would have failed, because the defence could have conclusively shown that Beck could not have been the offender in 1877,

¹⁰ It has not been possible to survey all the authorities on the subject of similar-fact evidence. A good short account of the cases to 1949 will be found in an article by Mr. H. A. Hammelmann in 12 M.L.R. 1, 232. See also Stone in (1933) 46 *Harvard Law Review* 954 (a study that has had a considerable effect on later thought); P. B. Carter in (1953) 69 L.Q.R. 80; (1954) 70 *ibid.* 214; Wigmore, *Evidence*, 3rd ed., i § 194; Allen, *Legal Duties* (1931), 289 *et seq.*; Archbold, 33rd ed., ss. 608 *et seq.*

¹¹ Unfortunately the expert also expressed the opinion that the handwriting of these letters was a disguised form of the handwriting of documents admitted to be by Beck; and he testified to this belief at the trial.

when he was in Peru. If Beck was not the offender in 1877, and if the frauds of 1877 and 1895 were committed by the same person, as the police recognised, it followed that Beck was innocent of the frauds of 1895 with which he was charged. However, owing to the way in which the case was conducted on behalf of the Crown this defence was prevented from being effectively raised. There were four indictments against Beck charging him with larceny from the women after a previous conviction, to wit the conviction of Smith in 1877, and this clearly showed that it was the view of the prosecution that Beck was the person who had been convicted in 1877. If these indictments had been tried the whole issue would have been before the jury. However, Mr. Horace Avory, who appeared for the prosecution, chose to allow these indictments to lie on the file, for the perfectly proper reason that there was a doubt whether the facts amounted to larceny; instead he proceeded on an indictment for the misdemeanour of obtaining property by false pretences, which did not charge a previous conviction. This in itself did not prejudice the defence, but Avory's serious error occurred when the defence attempted to show, by cross-examining the Crown's handwriting expert, that the documents in the present trial and in the trial of 1877 were all in the same handwriting. Avory objected that this was a collateral issue, and that evidence of previous conviction should not be brought out before the jury, lest it should afterwards be said that the accused had been improperly convicted. This extraordinary argument was upheld by the

Common Serjeant, and the direct result was that an innocent man was convicted and suffered long imprisonment.

In retrospect it is clear that Avory's objection was wrong even in strict law, for the question was directly relevant to the issue of identity, which was indeed the only issue in the case. But even if the objection had been technically valid, it was a grave mistake for prosecuting counsel to press an objection that, as he must have known, deprived the accused of his line of defence. Nor was it an excuse for him to say that he was not conscious of doing injustice because he himself was fully convinced of Beck's guilt.

As if this was not bad enough, the Common Serjeant declined to reserve a case on the point of law whether he was right in stopping the cross-examination of the handwriting expert. At that date an appeal could be taken to the Court for Crown Cases Reserved on points of law only with the consent of the judge trying the case. It is hard to understand how the Common Serjeant could have thought that his decision, which obviously had the effect of shutting out the defence that he and every one else knew that the defendant wished to raise, was so clearly right in law that it was not a fit subject for consideration by the appeal court.

Beck's case will long be remembered as the monumental example of how the solicitor and counsel for the Crown, the judge, the prison authorities and the Home Office ought not to behave. Avory was afterwards exonerated from blame by a Committee of Inquiry set up to consider the case, and there is no

doubt that he was guilty of nothing worse than a serious error of judgment, for which he paid dearly in the comments made when Beck's innocence was established. The Committee expressed the opinion that the Common Serjeant's ruling excluding Beck's evidence had been wrong. The only happy outcome of the whole affair was that it clinched the case for the establishment of a Court of Criminal Appeal, which was accordingly set up in the year 1907. Had this court existed when Beck was tried, it would probably have reversed his conviction on the ground of misrejection of evidence. As will be shown later, there is reason to fear that the Court of Criminal Appeal is still not an adequate revising body on pure questions of fact.

CHAPTER 9

THE TRIAL OF SEVERAL CHARGES AT ONE TIME

THE problem of reconciling the notion of a fair trial with considerations of convenience becomes acute when several charges arise out of the same facts. We shall consider separately the cases where there is only one defendant, and where there are different defendants.

TRIAL TOGETHER OF DIFFERENT CHARGES AGAINST THE SAME DEFENDANT

Where several different offences are charged in different counts of the same indictment, the court has power to order separate trials of the different counts if this is necessary to prevent the accused being prejudiced or embarrassed. The mere fact that evidence is admissible on one count and inadmissible on another is not by itself a ground for separate trials, because the view taken by the courts is that the matter can often be made clear in the summing-up without prejudice to the accused. Where, however, the evidence on one count is inadmissible on another and would create very good prejudice, the trial judge should order a severance.¹

¹ *Sims* [1946] K.B. 531. There is a somewhat unfortunate passage in *Harris* [1952] A.C. at 704, which may be thought to be against this, but it was not necessary for the decision. It is submitted that in view of the decision of the House of Lords that the evidence under the first seven counts was inadmissible under the eighth count (above, p. 173), the trial

TRIAL TOGETHER OF DIFFERENT DEFENDANTS

Where two persons are charged with conspiracy, or with committing a crime together, they may be charged and tried jointly.

A defendant who is thus tried jointly with another or others is placed at several disadvantages. In the first place, the increase in the complexity of the case through having several defendants creates a risk that the jury may muddle one with another. To obviate this risk the recognised practice in a case of any complexity is now for the judge to sum up separately for one defendant, and take a verdict in respect of him, before passing on to the next defendant.² Secondly, the jury may be prejudiced against a defendant because of his association with others whom they are convicting. They may think that "birds of a feather flock together." There is no complete safeguard against this so long as joint trial is allowed, though it may be some assistance for each defendant to be separately represented. Thirdly, the result of a joint trial before a single jury is that evidence which may in law only be admissible against one defendant (*e.g.*, a confession by him) is heard by the jury which is also trying the other defendant. Theoretically, the position of a defendant should not be prejudiced merely because someone else is charged with him; so that the evidence against each defendant should be considered separately, just as it is where the trials

judge was wrong in allowing them to be tried together. Had they been tried separately, the first seven charges would have collapsed on a submission of "no case."

² This was upheld in *Newland* [1954] 1 Q.B. 158.

are separate.³ However, where the trial is a joint one this is difficult to secure. The jury may be instructed to ignore certain evidence against D when considering the case against E, but it is easier to instruct the jury to forget evidence than to cause them to do so.

For these reasons it is frequently in the interest of persons charged jointly to have separate trials. On the other hand, separate trials add greatly to the length and cost of proceedings and therefore tend to be resisted by the Crown. Moreover, the joint trial makes convictions easier for the same reasons as separate trials make them more difficult—but this should be regarded as an altogether improper argument for joint trials. One additional point may be mentioned here, though it has been dealt with before. When two persons are tried jointly, and one gives evidence in his own defence, he may be cross-examined by the Crown to incriminate his co-defendant (p. 109). If the trials were separate, the Crown could not get this evidence except by calling the one defendant to give evidence in chief against his companion; leading questions could not then be asked, and the witness might object to answer questions having a tendency to incriminate himself.

The foregoing considerations are enough to show that whether trials are joint or separate may make all the difference between conviction and acquittal. Now the law is that where two persons are jointly

³ If the charges are heard separately, each defendant is affected only by the evidence against himself; hence magistrates are not allowed to hear the evidence in the second case before announcing their decision in the first: *Hamilton v. Walker* [1892] 2 Q.B. 25.

prosecuted it is in the discretion of the court whether to allow separate trials or not.⁴ On occasion a separate trial has been refused even though the defence of one of the accused involved an attack on the other,⁵ or even though evidence admissible against one was inadmissible against the other. However, it is always open to the court to allow separate trials on these grounds if it wishes.⁶

The law is curiously different where there are separate indictments or informations against two or more defendants; here the separate charges, provided that they arise out of the same facts, may be heard together if the defendants consent; but the rule is that any objection is decisive.⁷ Thus the rights of the defendants will depend on whether the prosecution has chosen to make a joint charge or a number of separate charges.

There are many cases in which, unless the trials are separate, the rules of evidence become psychologically almost impossible to apply. For example: D and E are charged; D makes a statement saying he is innocent and E did it, while E states he is innocent

⁴ *Ex p. Brown* (1852) 16 J.P. 69; *Littlechild* (1871) L.R. 6 Q.B. 293; *Gibbins* (1918) 82 J.P. 287, qualifying the expression of opinion in *Lee* (1917) 13 C.A.R. 39; but see *Grondkowski* [1946] K.B. 369.

⁵ See p. 110, above.

⁶ *Cf. Rowan* (1910) 5 C.A.R. 282.

⁷ *Edwards v. Jones* [1947] K.B. at 662. In some cases magistrates were upheld in hearing cases together where there had been merely an absence of protest by the defendants: *R. v. Staffs. JJ.* (1858) 23 J.P. 486; *Ex p. Biggins* (1862) 26 J.P. 244; *R. v. Ashbourne JJ.*, *ex p. Naden* [1950] W.N. 51. But in the last case Lord Goddard C.J. said that it was desirable that the question "Do you consent to the two summonses being heard together?" should be put specifically to the defendant.

and D did it. D's statement made out of court is not evidence against E, or E's against D; but if the two are tried together, it will be almost impossible for the jury to avoid comparing the two statements and considering which is the more credible in the light of the proved facts. If separate trials were ordered, E's statement made out of court could not be given in evidence against D, or vice versa. Thus a joint trial in these circumstances tends to operate to the disadvantage of the accused. Nevertheless, judges are unsympathetic to an application for severance made on this ground, for reasons that have already been given (p. 110).

The theory of the joint trial is that even though evidence may be given in the course of the trial that is in law admissible against one defendant only, justice is done by the judge directing the jury to erase this evidence from their minds in considering the other defendants. The simple faith that the jury are able to follow this direction, compartmentalising their minds in respect of each of the accused, is curiously inconsistent with the effort made by other rules of law to prevent the jury coming to know of evidence that may be misleading. If the justification of part of the law of evidence is that the jury cannot be trusted to hear certain types of evidence, they do not become trustworthy merely because there is also another defendant in the dock.

Sometimes one wonders whether judges do not welcome the fact that the joint trial offers an escape from the rigid rules of evidence. In one case Mr.

Justice Darling, supporting a refusal to allow separate trials, said:

“It is not enough to say that counsel could have defended the two appellants more easily if they had been tried separately. There may be many things made clear to the jury which would not have been made clear if the prosecution had been embarrassed by having to deal with the two cases separately. The whole story was before the jury of what went on in the house where the two appellants lived together.”⁸

This talk of “embarrassment to the prosecution” through the application of the ordinary rules of evidence is strange doctrine. Either the rules of evidence are justifiable or they are not; if they are, there can be no excuse for encouraging their evasion by the practice of joint trials.

Except where the defendants are seeking to throw the blame on each other, there is really only one tenable argument for the joint trial, and that is the economic one of cheapness and the convenience of witnesses. This argument is by no means lightly to be dismissed. When a trial against a number of defendants lasts for as long as forty-four days, which does sometimes happen, it would be a serious and frequently an unjustifiable drain on the public purse and the time of witnesses (and jurors) for the trial to have to be repeated as many times as there are defendants. Thus an application for a separate trial need not be allowed if the evidence that the defendant

⁸ *Gibbins* (1918) 82 J.P. 287.

desires to exclude is comparatively unimportant having regard to the weight of other evidence against him. On the other hand, where there is a great deal of evidence on the joint charge that is inadmissible against him, the judge ought to grant the application. Mere saving of time is no reason for running the risk of substantial injustice according to law; and injustice must be avoided even though it means having several sets of depositions, several trials, and the witnesses giving their evidence a number of times over.

One other advantage to the defendant of separate trials may now be mentioned. It relates to the evidence of the co-defendant. Just as a defendant may give evidence for himself, so he may give evidence for a co-defendant. In other words, one defendant is always a competent witness on behalf of a co-defendant. He is not, however, compellable,⁹ because if he could be forced into the witness-box, he would be subject to cross-examination upon his own guilt by the Crown under the Act of 1898, whereas the principle is that a defendant cannot be put into this position without his consent. The rule is unavoidable on the law as it now stands, but it may have the unhappy consequences in some circumstances of depriving a defendant of his principal witness. The only practical solution of the difficulty is for the trials to be severed, the defendant who is desired as a witness by his co-defendant being tried first.

For the sake of completeness, though it bears rather upon an earlier discussion than upon the present one, it may be mentioned that if two persons are

⁹ *Macdonnell* (1909) 2 C.A.R. 322.

charged jointly, counsel for one of them is entitled to comment on the fact that the other has not gone into the witness-box.¹⁰

¹⁰ *Kennedy, The Times, May 23, 1928 (C.C.A.).*

CHAPTER 10

THE JURY

THE modes of proof and the rules of evidence are only half the story of how guilt is brought home. The other, and very important, half relates to the men who have to decide the issue. In the more serious cases this is the jury: in less serious, magistrates.

England is the foster-mother of the jury, which, although copied or inherited by other countries, is still regarded as a distinctively British contribution to political institutions. It has also, in the past, been looked upon as part of the secret of British liberty. "Trial by jury," said Blackstone, "ever has been, and I trust ever will be, looked upon as the glory of the English law. . . . The liberties of England cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations, which may sap and undermine it by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience."¹ Praise of the jury is regularly accompanied by denunciation of the judges—indeed, the only occasion on which English judges are sweepingly and unsparingly condemned by the lawyer is when he wishes to throw into relief the advantages of the jury. To quote

¹ *Commentaries*, iii 379, iv 350.

Blackstone again: "In times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the Crown, in suits between the king and the subject, than in disputes between one individual and another."² Lord Brougham said: "If it be alleged that an obstinate juror may, in defiance of the truth, and in disregard of his oath, suffer the guilty to escape, from party or from personal bias, it must, on the other hand, be borne in mind, that this is a small price to pay for the perfect security which a jury affords to all men, even the humblest, against the ruin that power and its minions might bring upon them."³ Although no student of the constitution would now go quite so far as to regard the judges, even in times of emergency, as mere minions of power, there are many who still look upon the jury as an essential part of the criminal process, at any rate for serious crimes. No doubt a good part of the reason for this attitude is the fear of giving power to a single identifiable person. Jurors are unknown men, constantly changing, and so their power is apparently not feared.

THE JURY IN OTHER COUNTRIES

So great was the prestige of the British jury that it was transplanted to one Continental country after another as a symbol of new-found political freedom. Juries arose in France during the Revolution, and performed their first functions by sending aristocrats to the guillotine. The jury was introduced into Germany

² *Commentaries*, iv 349.

³ Henry Lord Brougham, *Works*, 1873 ed., xi 127.

after the Revolution of 1848, and later into Italy, Austria, and most other Continental countries, as well as Japan. The link with democracy was emphasised by the disappearance of the jury in countries coming to fall under modern dictatorships: Italy, Yugoslavia, Russia and her satellites. On the other hand Italy has not re-established jury trial since the last war, and it was abolished in Germany even before Hitler, as well as in a number of European countries that have never lost their democratic institutions. On the whole, the efforts to acclimatise jury trial have met with indifferent success, partly because of a failure to settle satisfactorily the relative provinces of judge and jury. Perhaps another contributing factor was the failure to apply the restrictive rules of the law of evidence (particularly in respect of the character of the accused) which English experience had shown to be necessary—notwithstanding the translation of Best on *Evidence* into German in 1851, and the eulogy of the English rules by Feuerbach, Mittermaier, and their successors.⁴ The strong tendency on the Continent of late years has been to replace the jury by lay justices or assessors, sitting with the judges and sharing with them the responsibility of deciding both fact and law and determining sentence. These lay justices may, as in France since 1941, bear the name of a jury and be very close to the English jury in being chosen *ad hoc* and at random from the community, differing, however, in that they sit on the Bench and constitute a joint

⁴ For a fascinating account see Hermann Mannheim, "Trial by Jury in Modern Continental Criminal Law," (1937) 53 L.Q.R. 99, 388; also Gorphe in (1936) 27 *Journal of Criminal Law and Criminology* 17, 155.

tribunal with the professional judges; or they may, as in Sweden and in the Soviet "people's courts," be somewhat similar to the English justices of the peace, being lay magistrates specially chosen to serve for a period of office and not merely for a particular case or short series of cases; in the countries named the choice of the magistrates is made by election.

The English jury has not received anything like the volume of criticism of its Continental counterparts; the fundamental principles governing it have remained unchanged for two centuries; and there has been nothing like an official move to exclude jury trial in the most serious criminal cases. At the same time, a number of observers even in this country have expressed dissatisfaction with the jury, and their criticisms will be stated in the course of the discussion.

In the United States jury trial is admitted to have worked badly, partly because of vigorous use of the right of challenge, which spins out the selection of the jury, partly because of intimidation and racial problems, and partly because of lack of tactful control by presiding judges; also, exemptions from jury service leave unskilled workers chiefly to qualify.⁵ Although the Constitution gives a right to jury trial, it is in practice waivable in most states (at any rate for crimes short of the most serious), and usually is waived except for some crimes such as those of passion.⁶ When jury trial is thus waived, the case is heard by a bench of three judges. In Maryland, which

⁵ See Albert Morris, *Criminology* (New York, 1934) 258, for a graphic report of weary, heated and ill-informed arguments in the jury room.

⁶ See Oppenheim in (1927) 25 *Michigan Law Review* 695.

has always permitted the waiver of jury trial in criminal cases, more than 90 per cent. are tried without juries.

In Canada, Australia and New Zealand experience has been more favourable, though of course some criticisms are heard. In South Africa, only male persons who are registered parliamentary voters can serve as jurors, which means that there is racial discrimination. A person indicted before a Provincial or Local Division of the South African Supreme Court may elect to be tried by judge without jury, and there are other cases where trial may be without jury even without the accused's consent. Generally a judge sitting without jury may summon assessors to sit with him as members of the court.⁷ The South African Penal Reform Commission has proposed that non-jury trial should be the rule, though trial by jury may be asked for.

THE JURY AS A CHECK ON UNPOPULAR LAWS

It may seem something of a mystery that, with such a tyrannous origin as was observed in the first chapter, the jury should have become a popular institution. Grave as were the defects of jury trial, it was preferable to the sixteenth-century alternative of trial in the Star Chamber. Another point in favour of the jury was that it came to be regarded as a check upon the judges, who were suspected—often rightly—of being hand in fist with the government, and of stretching the law against the subject, especially for political crimes. At first the position of the jury was

⁷ Gardiner and Lansdown, *South African Criminal Law and Procedure*, 5th ed. i 274-5.

an unenviable one, because they could be heavily fined or imprisoned for acquitting against what the judge took to be the evidence or against the judge's direction. There is no record of a jury being punished for convicting a man; only for acquitting. In Sir Nicholas Throckmorton's case, to which reference was made on p. 5, the jury acquitted the accused notwithstanding that they had not been allowed to hear the witnesses in his favour; for this they were imprisoned and ruinously fined, the foreman forfeiting the enormous sum of £2,000. "This rigour," says the reporter, "was fatal to Sir John Throckmorton, who was found guilty upon the same evidence on which his brother had been acquitted." The practice of punishing the jury, followed both by the common law judges and by the Star Chamber, was all the more surprising because it contradicted the theory that the jury were entitled to decide a case of their own knowledge, irrespective of the evidence tendered in court. It was ended by the famous opinion of Chief Justice Vaughan in *Bushel's case* (1670).⁸ While the practice continued, there was a strong inducement for the jury to consult their own safety and convict rather than acquit in case of doubt. When the practice ended, it became possible for the jury to prevent the enforcement of unpopular laws, and to thwart efforts to use the law in order to suppress political freedom.

But to say that the jury had this power does not mean that it exercised it. Although, as has already been said, the older writers on the constitution regard the jury as the palladium of liberty, objective research

⁸ 6 St.Tr. 999, Vaughan 135, 124 E.R. 1006.

does not show that juries were ever remarkable for acquitting in political cases against the direction of the judge and the weight of evidence. It is true that some instances can be found, particularly under the Commonwealth, when political prosecutions failed because of the refusal of the jury to convict a popular figure; and some of the acquittals for libel in the eighteenth century can be put down to resistance to government intolerance. Yet it would be going too far to infer from this rather small number of cases that the jury has played an important part in the struggle against authoritarian rule or economic oppression. Jury trial did not avail the Chartists, for example. This was because charges of sedition and unlawful assembly were usually tried by special juries, who belonged to the propertied classes and were unlikely to look with favour upon subversive movements.⁹ Indeed, if contemporary allegations are to be believed, even the natural bias of the special jury was not considered sufficient assurance of a conviction, for, in addition, the jurors were specially picked for their "reliable" opinions, the Crown retaining special panels of jurors for the trial of charges of sedition¹⁰—a practice against which the law certainly afforded

⁹ Stephen, after an examination of the State Trials, expressed the opinion that "as a matter of history trial by jury has been less of a bulwark against oppressive punishments than many of the popular commonplaces about it imply" (*H.C.L.* i 571). See also, on the importance of the special jury, R. M. Jackson. "Jury Trial Today," in *The Modern Approach to Criminal Law* (London 1945) 92 *et seq.* Since Dr. Jackson wrote, special juries have been abolished by law in all criminal cases (*Juries Act, 1949, s. 18 (1)*), having previously been obsolete for thirty years.

¹⁰ Bentham, *Works*, v 65 (Elements of Packing as Applied to Juries); Cockburn, *Memorials of His Time*, 1909 ed., 81.

(as it still affords) no safeguard. This kind of packed jury clearly gave little protection to the individual. But, on the other hand, constitutional changes meant that the jury's intervention ceased to be necessary for this protection. Judges of the tribe of Jeffreys and Scroggs disappeared with the Revolution, and the advent of democracy in the nineteenth century meant that authoritarian methods had no longer to be used to repress sedition. Most of the great pronouncements on constitutional liberty, from the eighteenth century onwards, have been the work of judges, either sitting in appellate courts or giving directions to juries. The assumption that political liberty at the present day depends upon the institution of the jury, though still repeated by English lawyers in addresses to foreign visitors, is in truth merely folk-lore—of a piece with the theory that English liberty depends on the separation of powers, or (as opinion at one time had it) upon the absence of an organised police force.

The notion that an English jury will, as anything like a regular matter, take the law into its own hands and acquit in defiance of the judge's direction upon the law rests on a misapprehension of its function. The English jury is a trier of fact only, and this limitation of its province is recognised by all parties concerned. In particular, counsel address their arguments on points of law to the judge, and make no attempt to persuade the jury to disregard his direction.¹¹

¹¹ In the United States the philosophy of democratic government was so strong that the theory long prevailed that the jury were entitled to interpret the law as well as find the facts in

It is true that in some exceptional cases, of a non-political character, the jury, acting very often with the approval of the judge, has tempered the strict law to the particular defendant where strong sympathy is aroused. Thus the jury has been some safety-valve against the working of unpopular law, in a country where the legislature does not pay the attention to the legal system that it should. In the days of extensive capital punishment, for instance, the jury committed "pious perjury" in order to reduce a conviction to one for a non-capital offence, and it may still, on occasion, show more mercy than the law in insanity cases and "mercy-killing." When it is known that a conviction will be hard to obtain, as on a charge of sedition, or a charge of abortion against the mother herself (as distinct from the back-street abortionist), an official practice tends to establish itself of not prosecuting for these offences, thus effecting for most practical purposes a virtual repeal of the law.¹² Here the existence of the jury may be thought to have a salutary effect, though it would be far preferable to change the law to make it accord with current opinion.

Where, however, there is a strong public need for enforcing the law, the difficulty of overcoming the resistance of the jury has to be faced. This is so in driving offences. The juror's sympathetic reluctance to convict motorists of driving "under the influence," of dangerous driving, and of "motor manslaughter,"

criminal cases; it has, however, been generally rejected since the later years of the last century. See Mark deWolfe Howe in 52 *Harvard Law Review* 582.

¹² There is an additional reason for not prosecuting the woman for abortion; it is more useful to have her as a witness against the professional abortionist.

is well known; Lord Goddard, commenting upon the problem, wryly observed that "no one has yet been able to find a way of depriving a British jury of its privilege of returning a perverse verdict."¹³ Yet the public need to take dangerous drivers off the road is so great that prosecutions must continue to be brought, even though the scales are absurdly weighted against them.

A lawyer, if he is true to his calling, must have some reservations about any instance whereby juries gain applause by disregarding their oath to give a true verdict according to the evidence. If we really wish juries to give untrue verdicts, why do we require them to be sworn? Except in capital cases, merciful considerations need no longer enter into the discussion, because judges now have an almost unlimited power to discharge without punishment.

There is one type of society in which a jury system may bring the administration of justice to a standstill, namely one in which juries are drawn from a population deeply estranged from its government, as in Ireland during the troubles. A system in which criminal cases are tried by juries drawn at random from the population at large, though not necessary for democracy, is certainly incompatible with autocracy. Even in the colonial Commonwealth, where government generally works peacefully enough, it has not been thought wise to introduce a fully democratised jury system. In Nyasaland, for instance, it rests in the discretion of the Government to decide whether the particular offence requires a jury. In other

¹³ 191 H.L. Deb. 85.

colonies where jury trial is the rule, the qualification for serving on a jury is restricted. Because of racial difficulties, there are provisions enabling European or English-speaking defendants to be tried by a jury with a majority of their own people. England has been fortunate to be without serious racial divisions, which create severe problems in the working of the jury.

JUDICIAL CONTROL OF THE JURY AT THE PRESENT TIME

According to the older practice a judge might direct the jury to reconsider their verdict even though it was a clear one. The power was sometimes used to apply such moral coercion to the jury as to cause them to bring in a more severe verdict than they at first wished.¹⁴ This would no longer be done: for example, a verdict of manslaughter on facts requiring a verdict of murder would now be immediately accepted. The jury will be directed to reconsider their verdict only if it is ambiguous.¹⁵

Even with this restriction, the influence of the judge may sometimes be used to cause the jury to change their minds. For example, on one occasion when the charge was of attempted suicide, the accused being drunk at the time, the jury returned a verdict

¹⁴ As in the "Hammersmith Ghost" case, *Smith* (1804), reported in Medland and Weobly, *A Collection of Remarkable and Interesting Criminal Trials*, ii 206; cf. 65 *Law Quarterly Review* 502. Pollock C.B. approved the practice in *Meany* (1872) L. & C. 213, 169 E.R. 1368, and the report of the same case in 9 Cox 231 makes him say: "He [the judge] may send them back any number of times to reconsider their finding. The judge is not bound to record the first verdict unless the jury insist on it being recorded."

¹⁵ *Crisp* (1912) 28 T.L.R. 296; 76 J.P. 304; 7 C.A.R. 173; cf. *Larkin* [1943] K.B. 174.

of "guilty, but of unconscious mind." This verdict was defective, because the concluding words seemed to contradict the verdict; and in fact the jury from their accompanying explanation evidently intended it as an acquittal, the word "guilty" meaning only that the accused had done the act charged against him, and the rest of the verdict showing that in the opinion of the jury the essential *mens rea* was absent. However, the judge went through the evidence again to show that the accused knew what he was doing, and the jury then, being directed to reconsider their defective verdict, returned a verdict of guilty; and the accused was sentenced to six months' imprisonment, reduced to six weeks on appeal.¹⁶ What plainly happened was that the jury changed their mind in view of the judge's later remarks. If they had expressed their first opinion in the correct legal form of "not guilty," this could not have happened.

TAKING A SPECIAL VERDICT

The judge has another weapon to prevent a jury giving a sentimental acquittal and disregarding his direction in point of law, but the weapon is a rusty one and may perhaps never be used again. It consists of the power to ask for a special verdict, that is to say an answer by the jury to specific questions, the judge reserving the right to require the jury subsequently to give the general verdict that appears to follow in law from their answers on the questions of fact. The use by the judges of something like this

¹⁶ *Crisp*, last note.

power in connection with proceedings for seditious libel in the eighteenth century¹⁷ occasioned great popular indignation, and Fox's Libel Act, 1792, conferred upon the jury the right to give a general verdict in all cases of libel. Elsewhere the power to ask for a special verdict still exists. Its last important use was the Transvaal Raid case in 1896. The circumstances there were unusual, because Jameson and the others who took part in the raid were handed over by the Boers to be dealt with according to English law, but in England they were regarded as heroes, and it was evident that a jury would be most reluctant to convict. Lord Chief Justice Russell, who presided at the trial, thought that the honour of England was at stake, and in order to secure a conviction he asked the jury to return a special verdict finding the facts only. The questions were so worded that they could only be answered in one way, unless the jury were prepared for a flagrant disregard of their oaths. The jury answered the questions, and the judge then directed the jury that on their answers the proper verdict was one of guilty, but one juror stood out. After further persuasion from the Chief Justice, given against the strong protest of Sir Edward Clarke for the defence, the judge got his way and a verdict of guilty was returned.¹⁸ Even in this case, which

¹⁷ What happened was that the judge would direct the jury that the publication was seditious in law, and that they were to convict if they found that the defendant had published it. Thus a general verdict was formally taken, but in substance it was a special one.

¹⁸ Jameson, *The Times*, July 29, 1896; see also the graphic account by F. W. Ashley, *My Sixty Years in the Law* (London 1936), 152 *et seq.*

is the last instance of a conviction secured by high-handed methods, the judge made it clear in his direction to the jury that they were entitled to refuse to comply with his wishes, and to return a general verdict.¹⁹ Since then it has been recognised to be the better practice to leave criminal guilt to the jury in general terms.²⁰

THE ABSENCE OF INFORMATION ON THE WORKING OF THE JURY

In Raymond Postgate's imaginative reconstruction of a jury trial, *Verdict of Twelve*, the jurors are made to reach their verdict for reasons that have little relation to the evidence given. Claud Mullins expresses the opinion that "if jurors were compelled to give reasons for their answers, like schoolboys, the weakness of the system would quickly become apparent, for I am convinced that often the reasons behind a jury's verdict are fantastic."¹ Whether this opinion is well founded cannot be certainly known. Not only does the verdict express no reasons, but the deliberations of the jury take place in the strictest privacy. No lawyer, psychologist, sociologist or other investigator is allowed to be present; if by some means a stranger got into the jury room it would vitiate a conviction.² Thus the facts necessary for an objective appraisal of the actual working of the system are concealed.

¹⁹ Cf. Stephen, *H.C.L.*, ii 325.

²⁰ *Davies* [1897] 2 Q.B. 197 at 202; cf. *Hendrick* (1921) 37 T.L.R. 447; 15 C.A.R. 149. In *Bourne* (1952) 36 C.A.R. 125, it was said that "special verdicts ought to be found only in the most exceptional cases."

¹ *Fifteen Years' Hard Labour* (London 1948), 51-2.

² *Goby v. Wetherill* [1915] 2 K.B. 674; 7 *Canadian Bar Review* 161.

Nor has anyone in England attempted to discover what happened in the jury room by exhaustive interrogation of the jurors afterwards. This would be an inferior type of inquiry to direct observation, but in any case it is not certain that it would be allowable. The only authority in point, if it can be called that, is an *obiter dictum* of Lord Hewart C.J. in the case of *Armstrong* (1922).³ A juror had given an interview to some newspapers after the trial, and they had published his account of what had happened in the jury room. Lord Hewart declared his opinion that this was "most improper, deplorable and dangerous." "Every jurymen," he said, "ought to observe the obligation of secrecy which is comprised in and imposed by the oath of the grand juror." In his indignation, Lord Hewart seems here to have been led into an irrelevant argument, for the petty jury, unlike the former grand jury, does not take an oath of secrecy. The substantial reason behind his attitude was that he feared that such disclosures might undermine public confidence in the jury. "If one jurymen might communicate with the public upon the evidence and the verdict, so might his colleagues also; if they all took up this dangerous course, differences of individual opinion might be made manifest, which, at the least, could not fail to diminish the confidence that the public rightly has in the general propriety of criminal verdicts." It may be observed on this that where there has been a conviction, revelations by jurors could hardly show differences of opinion on the

³ 16 C.A.R. at 159.

guilt of the accused, for the conviction must have been unanimous—unless such revelations show that there was no real unanimity, which might be a legitimate ground for public disquiet. It is not against the public interest that people's confidence in juries' verdicts should be shaken, if the present confidence is ill reposed.

Lord Hewart's judgment does, however, show the real reason for keeping the jury's deliberations secret, namely, the desire to preserve public confidence in a system which more intimate knowledge might destroy. The same reason dictates the exclusion of strangers from the jury room. It would, of course, be quite wrong to allow a stranger to be present if there were a risk of his intervening in the discussion. However, this risk could be eliminated if a research worker were admitted to the jury room only in the company of the usher. Or it would be possible to make a recording of what passes, without any third person being present in the room. So far as I know, no request to conduct an inquiry of this sort has been made, and if made it would almost certainly be met with a refusal. In the United States, when two enterprising law students sought permission to interrogate jurors after the trial, their proposal was made without success to nine judges of several different jurisdictions.⁴

One does not wish to make any observations on this subject that might encourage newspapers to prolong the somewhat morbid public interest in criminal trials by publishing interviews with jurors after the verdict has been given. It would be unseemly for

⁴ Frank, *Courts on Trial* (Princeton, New Jersey, 1949) 116.

jurors to compete with each other to sell to newspapers the story of what passed in private between them. Fortunately, since the Armstrong case, nothing of the kind has happened, either because of a greater sense of responsibility on the part of newspapers, or because of a fear of the law of contempt of court or criminal conspiracy.

I should say that the fear is unfounded and that disclosure by a juror is not an offence under the existing law. If such disclosures become a public evil they must be dealt with by Parliament, not by the judges inventing a new offence. And if legislation is passed, exemption should be given for disclosure made on public grounds,⁵ or for the purpose of genuine inquiry into the jury system. The matter raises important problems of policy which cannot be settled by a simple prohibition of disclosure.

In the absence of exact knowledge an observer can form an opinion of the jury in one of a number of ways. He may consider the qualifications necessary for service on the jury and decide whether, on general grounds, persons so qualified are likely to make good judges of fact. This *a priori* type of reasoning, in my submission, will lead to an opinion adverse to the jury. Alternatively our observer may spend his life in different courts hearing cases and considering the verdicts that are returned. This kind of impressionistic study is continually being made by advocates

⁵ As when a juror asserts, in stay of execution, that he concurred in the verdict under a mistake, and refers to what passed in the jury room in order to explain the cause of his misapprehension. For examples of disclosure by jurors see Geoffrey de C. Parmiter, *Reasonable Doubt* (London 1938) 222n.

and judges, and generally leads to an opinion highly favourable to the jury. On the other hand chief officers of police, who spend less time in court but more time considering the effect of what the courts do, declare that juries are mischievous because they capriciously acquit dangerous criminals whom the police have been at much trouble to apprehend. Some investigation of these divergent opinions will be found in the following pages.

GENERAL ARGUMENTS AGAINST THE JURY SYSTEM

If one proceeds by the light of reason, there seems to be a formidable weight of argument against the jury system. To begin with, the twelve men and women are chosen haphazard.⁶ There is a slight property qualification—too slight to be used as an index of ability, if indeed the mere possession of property can ever be so used; on the other hand, exemption is given to some professional people who would seem to be among the best qualified to serve—clergymen, ministers of religion, lawyers, doctors, dentists, justices of the peace (as well as all ranks of the armed forces). The subtraction of relatively intelligent classes means that it is an understatement to describe a jury, with Herbert Spencer, as a group of twelve people of average ignorance. There is no guarantee that members of a particular jury may not be quite unusually

⁶ Not necessarily by lot: the precise mode is left to the individual sheriff or his officer. Some work through the alphabet; others go by streets; others use a pin. It is said that the number of women jurors is sometimes deliberately kept down on the ground that criminal cases are not nice for women to try.

ignorant, credulous, slow-witted, narrow-minded, biased or temperamental. The danger of this happening is not one that can be removed by an alteration in our arrangements; it is inherent in the notion of a jury as a body chosen from the general population at random.

Anyone is in a position to assess the quality of the average jurymen by looking around him. Jurymen are to be found driving buses, selling vegetables, and at repetitive work in factories. They are very often good, kindly souls, skilled at their own jobs, competent and reliable in the affairs to which they are accustomed; but persons whose ordinary occupations are of a humble character rarely qualified to be regarded as first-rate intellectual machines. They are not accustomed to giving sustained attention to the spoken word. Some jurors may themselves be professional criminals; others may have their judgment affected by a moral objection to imprisonment or the death penalty. The one thing certain is that as a body jurors have no experience in sifting evidence in a court of law—it is a mere coincidence if any member has been on a jury before. There is no other comparable activity in life in which experience is not regarded as an asset, no other social institution with such haphazard and fleeting membership.

The juror's lack of experience in the task he is required to perform is aggravated by the confusion caused by the strange surroundings of the court and the unfamiliar language employed. Jurors are not required to sit in court for a few cases before their own turn comes, in order to make some acquaintance

with the procedure. And it is a bold jurymen who asks questions during the trial to clear his mind on points that are puzzling him.

Unfamiliarity with the work he is called upon to do tends to affect a juror's judgment in a number of ways. He may be prejudiced against the accused merely because the accused is in the dock, or looks a "poor type"; or he may be prejudiced in the accused's favour because he seems oppressed or looks respectable. Unable to control his emotions, the juror may transfer to the accused some irritation or approval which he has conceived for the defending counsel; or some real or supposed unfairness on the part of the prosecution may bring him violently to the side of the defence, though nothing that has happened has any logical bearing on the issue of fact to be tried.

Owing to the requirement of unanimity, the aberration of a single juror will not matter if he can be induced to follow a strong majority lead. For this reason one need not be alarmed at the possibility of a moron being included in a jury; he will probably not realise his right to dissent, nor have the strength of mind to do so, and the effect of his presence will merely be to reduce the operative number of the jury by one. But if the dissentient juror is not so much stupid as prejudiced, he may hold out against the rest and even make converts. Particularly if he happens to be the foreman, having as such a certain authority in the group, the result may be disastrous.

The only way in which a jury acquires experience is by beginning to try the cases in its list, assuming that it is given more than one to try. It is a matter

of observation by those who work in the criminal courts that when the same jury is used to try a succession of similar cases, its members become more ready to convict because they learn to see through the tricks of the defence. Mr. Cecil Whiteley records that the number of acquittals on charges of driving under the influence of drink was so great at the London Sessions that the experiment was tried of putting all the cases in one list and trying them with the same jury. The verdict in the first two cases was not guilty, but in all the others there were convictions, and when counsel cross-examined the police surgeon the jury could not restrain themselves from laughing.⁷ Again, when the jury bring in their first conviction for larceny, after anxious deliberation, against the respectable-looking man in the dock, they will probably hear his previous convictions read out, which will be something of a shock to them. After one or two experiences like this they will be less reluctant to convict, and may even become cynical and assume that all the succession of persons who appear in the dock are hardened offenders. Thus the "toughening" process, though it may increase the jury's conviction rate, has potential dangers.⁸

⁷ *Brief Life* (London 1942) 101.

⁸ Sir Travers Humphreys, an ardent supporter of the jury, vouches for the fact that, in his youthful experience at the Bar at the London Sessions, "the man whose case was tried by a jury early on the first day had a better chance of acquittal than his fellows." Purcell, for the defence, would harp in his address to the jury upon the possibility of doubt, "and the jury not infrequently fell—that is, in their first case. When once a jury had made up their minds to convict though with great hesitation, and there had then stepped from the dock into the witness box Warder Humphreys (yes, that really

Some jurors, who can spare the time for the trial and who are accustomed to follow sensational cases in the papers, are pleased to serve; others are reluctant, having perhaps been taken from a one-man business, or having had important private arrangements upset by the summons to jury service. Unlike the lay magistrate, the juror is not a volunteer, and receives no public dignity from his office; in his eyes, the jury summons is often a calamity comparable only to a nasty illness. Even if a juror is so mindful of his public duty as to be willing to serve, the dates on which he is to serve are imposed upon him, and may be seriously inconvenient. The remuneration of jurors is deliberately made on a scale that is adequate only for the lowest paid workers. The juror's irritation in these respects is not likely to be lessened if, as frequently happens, he has to wait in court for a day or more for his turn to go into the box. A man in this frame of mind tends to listen to the evidence under protest, is readily bored, and easily conceives an animosity against the succession of defendants who are the apparent cause of all the trouble; thus he tends in the jury room to convict out of prejudice, to acquit out of ignorance, or to concur in any verdict that seems to offer the chance of speediest agreement. The longer the case lasts, the greater is the risk of this impatience developing.

was his name) who proceeded to prove a long list of convictions for similar offences, winding up with 'Then follows the five years' penal servitude, my Lord,' the jury for the rest of the Session was apt to regard Purcell as a deceiver and Edlin [the Chairman of the Court], who invariably summed up for a conviction, as the man to rely upon" (*Criminal Days*, (London 1946) 49).

I am satisfied that these dangers are not merely fanciful. In such poor researches as I have been able to make, by conversing with intelligent people who have served as jurors, I have been given concrete instances of such things happening. If my informants are to be trusted, the last thing many jurors think of doing is to give a "true verdict according to the evidence."

The length of a trial bears a close relation to the complexity of the issues. Worst of all is a conspiracy trial with a multiplicity of defendants. The longest trial known at the Old Bailey was the Francasal betting case in 1954, which took fifty days of court time spread over more than five months. Before that, the record was held by a conspiracy charge in 1953 against six defendants which occupied forty-four days. The Tarran Industries case before a Special Commission of Assize at Hull in 1947 took thirty-two days, a woman juror being excused after the first ten days because of ill-health. If one goes back to the nineteenth century, the trial of the Tichborne claimant for perjury lasted nearly a year.

The outstanding feature of such complicated charges is the strain they impose upon jury trial. The jury have a very uncomfortable seat. They rarely take notes, and are given small facility to do so. It is humanly impossible to remember in full detail the evidence given over a period of days without a note, and it follows that the jury are largely dependent on the summing-up for a review of the evidence. Even this may attain prodigious length. Chief Justice Cockburn's summing-up in the prosecution of the

Tichborne claimant lasted for twenty days; it was afterwards printed in two large volumes each containing 821 pages.

Since a juror comes to his task without legal training, he is not well equipped to pick out what is relevant as the evidence is being given. The judge's direction which is supposed to inform him as to the law comes only when all the evidence is in.

The inability of the jury to follow complicated charges is recognised in the advice given to prosecutors. "Complication," said Mr. Justice Byrne, "is a weapon for the defence. The fewer and simpler the issues left to the jury, the less chance there is of a miscarriage of justice."⁹ Some criminal charges cannot be kept simple because the facts involved are not simple. Complicated commercial frauds are least suitable for juries. Indeed, even the simplest questions of proper accountancy or business practice may be beyond them. This is one reason why the jury has largely disappeared in civil matters.

While on the subject of the length of trials it needs to be added that the presence of the jury itself lengthens the trial. Speeches and summing up take longer when there is a jury, and the judge has not the same freedom to stop the case or to dispense with superfluous argument when he has made up his mind for one side or the other.

It has already been mentioned that the jury system causes inconvenience and often financial loss to those who are summoned to serve; and if this is thought to be of no importance, account must also be taken

⁹ *Patel* [1951] 1 T.L.R. 1018.

of the consequential indirect loss to society. The forty-four day trial previously referred to represented a loss of time for the jury alone, in trying the case, of 582 man-days, or in other words two man-years on the basis of a five-day week. Until 1949, common jurors in criminal cases were paid nothing—nothing for their loss of wages or profits, and nothing even for their bus fare to the court; since that date they have been compensated on a frugal scale.

GENERAL ARGUMENTS FOR THE JURY SYSTEM CONSIDERED

Criticisms of the jury, expressed by a few vocal radicals such as Heber Hart and Claud Mullins,¹⁰ represent distinctly a minority opinion in England. The mass of inarticulate legal opinion (if legal opinion ever deserves that adjective) appears to be in favour; also, such public pronouncements as are made on the subject by lawyers are generally very much in favour. Among judges and leaders of the Bar, the excellence of juries is almost an article of faith. For example, Sir Alfred Denning, in the first Hamlyn Lectures, appeared to give unqualified adherence to this mode of trial. The Royal Commission on Capital Punishment reported in 1953 that it had been “struck by the almost unanimous tributes paid by the judges and other experienced witnesses to the reliability and common sense of British juries.”¹¹ This body of

¹⁰ Hart, *The Way to Justice* (London 1941), 88 *et seq.*; Mullins, *Crime and Psychology*, 2nd ed. (London 1944), 36, 198; same, *Fifteen Years' Hard Labour* (London 1948), 49 *et seq.*

¹¹ Cmd. 8932 of 1953, p. 202.

opinion is impressive and somewhat reassuring: all the more so since it may seem to be against nature that a professional class should welcome the intrusion of amateurs. On the other hand, the rationalist will want demonstration rather than assertion, and this is by no means prominent in most of the discussions.

Perhaps the best reasoned statement comes from the pen of the greatest exponent of the criminal law in the nineteenth century.¹² In his *History*, Stephen propounds, as his own opinion, for several eloquent pages, the main disadvantages of the jury that have been adverted to above. Juries consist of twelve unknown men, who bear no social responsibility for their decisions. They do not give reasons for their verdicts, and this generally excludes the possibility of an effective appeal on the question of fact. The verdicts of juries are unjust in a minority of cases which are more numerous than in trials by judges without juries. It continually happens that some members of the jury fail to follow the evidence; in fact, says Stephen, "The great bulk of the working classes are altogether unfit to discharge judicial duties, nor do I believe that, rare exceptions excepted, a man who has to work hard all day long at a mechanical trade will ever have either the memory, or the mental power, or the habits of thought, necessary to retain, analyse, and arrange in his mind the evidence of, say, twenty witnesses to a number of different minute facts given perhaps on two different days. . . . I think that the habit of flattering and encouraging the poor . . .

¹² Stephen, *H.C.L.*, i 566 *et seq.*

has led to views as to the persons qualified to be jurors which may be very mischievous."

Stephen's proposal was that in all criminal cases of any considerable difficulty or importance, there ought to be at least a power to summon special juries. Subject to this, he proceeded to pronounce himself in favour of juries, notwithstanding all he had said against them, for the following collateral advantages. First, the verdicts of the "good men and true" are accepted by the public with more readiness than the verdicts of judges. Secondly, trial by jury brings ordinary citizens into the administration of justice. Thirdly, the jury relieves the judge of part of the responsibility of his office. In this third point Stephen confessed that he was speaking as himself a judge; and there is no doubt that judges favour juries for this reason. It is better to be a judge sitting with a jury than a single judge, in the same way as it is better to be a member of a firing squad than a single hangman. This desire on the part of the judges for a lightening of their own grave responsibility may perhaps be a little surprising when one remembers the readiness with which they have extended the doctrines of constructive treason and constructive murder. Whenever a judge extends a capital offence by straining the law against a defendant, though of course he is moved to do so by considerations of the public interest, he necessarily takes personal responsibility for the sentence that follows. Moreover, even in the ordinary case where no extension of the law is involved, the division of responsibility is often more apparent than real, because the way in which the judge

sums up may be decisive in causing the jury to convict or acquit. Throughout Stephen's discussion he assumed that the alternative to trial by jury was trial by a single judge. His third point would presumably disappear, or at least be greatly qualified, if trial were by a bench of three judges, or one judge with assessors; probably also, if the death penalty were abolished.

On Stephen's first two points, it is hard to understand how they can seriously be balanced against the public evil of miscarriages of justice, if, as Stephen thought, these in fact occur. The proposition that there is a relative lack of confidence in the decision of a judge appears to be negated, at the present day, by the fact that when persons are given a choice between jury trial and non-jury trial (by stipendiary or lay magistrates), it is the latter that for one reason or another is usually selected. Whatever other motives may guide this choice, the fact that it is made shows some confidence in the alternative mode of trial. In civil disputes business men (and their advisers) do not concur in the view that a jury is the best possible tribunal, and they have been steadily superseding it, either by agreeing to arbitrate or by electing a trial before a judge alone. Civil juries are now used principally in cases of defamation and breach of promise, where the plaintiff hopes that the jury will mark their own importance and power by awarding the outrageous damages usual in these cases. Even in criminal matters, nearly all defendants who are given the chance of summary trial in a magistrates' court (including a court held by a single stipendiary) accept it and waive trial by jury. Moreover, it should not

by any means be assumed that the public automatically acquiesces in the verdicts of juries. After the trial and conviction of Mrs. Maybrick for poisoning her husband, petitions for reprieve poured in on the Home Office from all parts of the kingdom, the signatures to which were said to amount to nearly half a million; and this was because, as *The Times* wrote in a contemporaneous leader, the public was not satisfied of her guilt.

Stephen's other argument, that trial by jury interests people in the administration of justice, certainly has a measure of truth. Those who serve upon a jury frequently find that the intellectual effort, and the unifying effect of shared social responsibility, are broadening experiences. On the other hand, it seems obvious that this democratic education can neither be the primary purpose nor a sufficient justification of the jury system. No one has suggested that there should be juries making decisions within Government Departments, though this would bring ordinary citizens into the business of government. Similarly, we could, if we wished, have juries in hospitals deciding whether surgical operations are necessary on the medical evidence, and juries at Harwell determining the most hopeful lines of advance for atomic energy. Such juries would undoubtedly find their work both interesting and educational.¹³

¹³ It is of some relevance to note the same argument as that approved by Stephen in a somewhat different application. The grand jury came in time to have its effective function superseded by the examining magistrates, and it was abolished as superfluous in the economy drive of 1933. The abolition was resisted by traditionalists who wished to see laymen continue to be associated with the administration of justice,

Stephen's idea of making more use of special juries has become impossible, special juries having been abolished in criminal cases, as well as in nearly all civil cases, by legislation (promoted by the Labour Government but accepted by the Opposition) in 1949. On the other hand it is, of course, true that the standard of education of the general public has advanced since Stephen's day. This is perhaps partly counterbalanced by the fact that the juror's qualification of owning freehold of £10 annual value, or occupying a house of £20 annual value, which has remained unchanged since 1825, has come through the fall in money values to be applied to a wider class.

A discussion following somewhat the same lines as Stephen's, but from the pen of a political philosopher, is to be found in Sidgwick's *Elements of Politics*.¹⁴ Sidgwick thought that a competent judge would normally be, through practice, better at drawing conclusions of fact from the evidence than a jury. Also, jurymen tend to be unduly influenced by popular dislikes and sympathies. It is important for various reasons to give some public functions if possible to ordinary citizens; but this, he thought, is hardly a strong argument for giving them *judicial* functions especially. In capital and political cases, however, the intervention of the jury, which has to share the responsibility for a conviction, tends to protect the administrators of the law from public odium. After

even though this brought about useless expense and delay and the waste of witnesses' time. Some judges still lament the disappearance of grand jury, e.g., Sir Travers Humphreys, *Criminal Days* (London 1946) 168.

¹⁴ 4th ed. (1919) 491 *et seq.*; the book was written in 1891.

this discussion, which is much longer than I have made it, Sidgwick's conclusion is somewhat unexpected, and is like Stephen's: as regards criminal trials of importance the balance of the argument seems to him to be in favour of the jury; but he adds that "perhaps we may predict that if civilization continues to progress, the arguments on the negative side will be ultimately found to be decidedly the stronger." On the phrase "criminal trials of importance," it may be noted that the only trials in which, in his previous discussion, Sidgwick has allowed any advantage to the jury are those on capital and political charges. This restriction disappears in Sidgwick's conclusion, which may be thought to be a last-minute abandonment of his earlier reasoning.

Some champions of the jury go much farther than these writers, and are prepared to assert that a jury is better than a judge in the determination of facts. Lord Halsbury said: "As a rule, juries are, in my opinion, more generally right than judges." The printed report of this remark, which was made in the course of a public speech, does not indicate the grounds upon which the rather striking generalisation was based.¹⁵ Lord du Parcq, in another public address, thought that "when questions of fact have to be decided, there is no tribunal to equal a jury, directed by the cold impartial judge."¹⁶ Mr. Justice Croom-Johnson gave his testimony as follows:

¹⁵ (1903) 38 *Law Journal* 469. In the more sober atmosphere of a court of law, Lord Halsbury said that though he fully appreciated the value of trial by jury, he could not share the somewhat superstitious reverence which in some quarters was attached to it (*De Freyne v. Johnston* (1904) 20 T.L.R. 454).

¹⁶ *Aspects of the Law* (Holdsworth Club, 1948) 10.

“Speaking for myself, with almost a lifetime of experience of jury trials in criminal cases, . . . juries pay the most careful and anxious attention to anything that is brought before them; they not infrequently are able to ask questions which indicate how close is their recollection of evidence.”¹⁷

One of the strongest supporters of the jury is Mr. Justice Humphreys, who, writing in an extra-judicial capacity, said: “The correctness of a jury’s verdict has almost come to be an axiom with me”; and he added that in the very rare cases in which the verdict was subsequently shown to be at least probably wrong, there was something in the trial to account for the mistake.¹⁸ This idea that the jury is always right unless it has been misled is the orthodox opinion in the Court of Criminal Appeal, and explains why that court rarely interferes with a verdict except for some procedural defect. A critic might say that, even if the proposition is accepted, the jury cannot escape part of the responsibility for going wrong when there is some trivial slip in a matter of procedure or evidence. Sir Travers Humphreys is ready to admit the limitations of the jury as a tribunal for trying complicated issues,¹⁹ and makes it plain that his

¹⁷ See *The Trial of Craig and Bentley*, ed. H. Montgomery Hyde (London 1954) 224–5.

¹⁸ *A Book of Trials* (London 1953) 17.

¹⁹ This appears somewhat obliquely from *ibid.* 77, where the author, writing of a case of fraud, casually remarks: “It was useless to institute criminal proceedings unless the fraud was one which could readily be understood by the average jurymen. So far as the £20,000 was concerned, therefore, we were unable to advise any criminal prosecution.” He does not expressly acknowledge that it is some defect in the jury system that it prevents necessary prosecutions from being brought.

approval of it is based partly on tradition. "Trial by jury in England," he says, "is no mere question of the most convenient method of trying an issue of fact. It is part of the History of England; it is one of those traditions which collectively make up that which, for want of a better expression, we call the British Constitution."²⁰

A debate in the House of Lords in 1949 showed forth a chorus of praise for the jury. Viscount Simon referred to the "manifold merits of the jury system," and expressed the opinion that the jury "tends to cancel out or to mellow the isolated extreme view which perhaps one man would form." He read with approval a long appreciation from Sir Patrick Hastings' autobiography, which included the opinion that "as a tribunal for dispensing justice they are absolutely without equal," and "during all the years that I have practised before them I hardly remember a single instance in which they were wrong in the decision which they gave, . . . according to the law of justice and common sense." Lord du Parc also joined in the debate to say: "I have never felt such complete satisfaction with the result of cases which I have heard as when I had the assistance of a jury. Sometimes I have had a doubt as to the wisdom of my own decisions on questions of fact, but I do not think I have ever had a doubt as to the decision arrived at, when I have summed up a case, by a jury." He quoted Lord Justice Bankes as confessing that he had sometimes thought a jury wrong, but on reflection afterwards had come to the conclusion that it was the

²⁰ Humphreys, *Criminal Days* (London 1946) 157.

jury who were right and he was wrong; and Lord Sterndale had made a similar observation. One may, of course, accept these last remarks as a truthful statement of what *sometimes* happens: whether it gives anything like a sound indication of the general reliability of a jury's verdict as compared with the decision of a judge is another matter.

The only doubtful note in the debate was sounded by Lord Goddard, who said: "I have often wondered whether the lip service that we all pay to the great palladium of British justice, the jury, is well justified, because it is a fact that many criminals want to be tried by the magistrate and not by a jury if they can possibly persuade the magistrate to take that course; and the same applies nowadays very much to civil cases."¹

On the whole these opinions of the judges must be accepted as an impressive and reassuring tribute to the good sense of juries, coming from men who should be in the best position to judge them. They can by no means be dismissed as mere examples of legal conservatism, well attested though that phenomenon is. One cannot imagine judges speaking as they do if juries frequently gave flagrantly unreasonable verdicts condemning the innocent.

At the same time, one or two facts should be kept in mind when assessing the value of judicial encomiums. I have nothing to say about those dithyrambs in which the butcher, the baker and the electric-light maker are credited with an insight superior

¹ Parl. Deb., House of Lords, vol. 161, cols. 178 *et seq.*, March 8, 1949.

to that of the professional judge; belief in this miracle puts an end to all discussion of the merits of the jury. If, however, we fix our attention on the more sober testimonial of Mr. Justice Humphreys, that his juries have always—given a fair chance—been right, it is relevant to point out that what this means is that the judge always agrees with the verdict, and would have decided the same way had the matter been left to him—which does not in itself show that the jury is any better tribunal than a judge sitting alone. Moreover there is one particular explanation why the trial judge should generally agree with the jury: it may be that what really happens is that the jury agrees with the trial judge, following hints dropped by the judge in the course of summing up. In short, judicial approvals of the jury may sometimes mean merely that the jury does no harm, which is not to say that it is of any positive use—though the English never, except in times of severe financial stringency, abolish a venerable institution merely on the ground that it is useless, provided that it does not do catastrophic damage.

There is still another reflection to be made on a judge's remark that verdicts are always right. He may mean merely that no person to his knowledge has been unjustly convicted; the other question, whether guilty persons have been improperly acquitted, may not be present to his mind. In fact, as will be shown, there is a considerable body of opinion that juries tend, particularly in certain types of case, to acquit too readily.

Finally, the statement that a jury is always right may bear the special meaning that the jury always

does justice even though it does not apply the strict law. Sir Travers Humphreys, who was quoted above for the opinion that the correctness of a jury's verdict is almost axiomatic with him, says elsewhere that to his mind, one of the strongest reasons in favour of the jury is the fact that the jury "may not be asked for, and ought not to state, the reasons for the conclusions, thus giving the tribunal, in exceptional cases, the right or at least the power to let the Heart to some extent sway the decision of the Head."² This remark shows that a jury's verdict may be "correct" in the opinion of this judge even when it disregards the law.

The commendations of the jury may be balanced by a few judicial criticisms of the jury, though these are found chiefly in civil cases. Mr. Justice Bargaive Deane, giving evidence before the Royal Commission on Divorce in 1910, said that when he was at the Bar, and was asked whether they should have a trial by jury, or not, he always considered the nature of the case. If he had a thoroughly good case he would try by a judge: if it was a very doubtful case he would advise that the trial should be by jury. Again speaking of civil cases, Sir Ellis Hume-Williams, who was Recorder of Norwich, referred to the disastrous consequence that may follow when one strong but mistaken member leads the jury into a wrong verdict, as does sometimes happen. He then added: "In criminal cases, of course, a jury is, and must always remain, essential, excepting such as are dealt with under the summary jurisdiction of magistrates."³

² *Criminal Days* (London 1946), 159

³ *The World, the House and the Bar* (London 1930), 182.

No reason was offered why the jury in criminal cases should be regarded as immune from the errors admitted sometimes to beset it in civil cases.⁴

When barristers or solicitors praise the jury, it is generally by way of pointed contrast with their attitude to judges. "It is better," declared Sir Hartley Shawcross, "to risk a bad jury making a mistake in a single case than to have a bad judge able, if not checked by a jury, to make mistakes throughout his judicial career."⁵ One hears it remarked that judges by the nature of their profession become censorious and cynical, apt to put the worst interpretation on conduct, and tending to regard the defendant as "the usual man in the usual place"; whereas the jury find the whole thing unusual and see in the defendant a fellow citizen. These aspersions on the judges are hardly to be reconciled with the high praise of the English Bench to be heard from the same quarters when no question of abolishing the jury is in issue. Also, they are not altogether consistent with the fact, quite generally admitted, that an experienced judge can generally secure the verdict he thinks proper by the way he sums up.

In support of the jury, it is claimed that fact-finding does not require professional expertise. One man's opinion of the credibility of a witness is as good

⁴ A. E. Bowker, *Behind the Bar* (London 1947), 96, reports a civil action where a "Trotskyite" jurymen refused to find a verdict for anyone because he did not believe in law; his comment as a barrister's and judge's clerk is: "It just goes to show that you never can tell what is likely to happen with a jury." On the next page he relates a case where one of the jury in a civil action was the plaintiff's brother-in-law, and held out for a verdict for the plaintiff.

⁵ (1947) 10 *Modern Law Review* 8.

as another's. Even if there is an art to find the mind's construction in the face, a judge is no better at it than a jurymen. "A judge," says one learned writer, "is not accustomed to testing his conclusions. He can live in the firm conviction that he is a shrewd judge of character. A man who never knows of his mistakes is apt to think that he is generally right."⁶ It is true that a judge can rarely test his conclusions after the trial is over, but does he not test them as the trial proceeds? A judge may form a provisional estimate of the reliability of a witness, and he is often in a position to check this estimate later when the witness is cross-examined, or when contradicting evidence is called. Again, the judge may learn in time of certain peculiarly untrustworthy types of evidence, such as the identification evidence already considered; members of the jury have not the opportunity to gain this specialised experience.

A concrete reason for preferring the verdict of a jury is sometimes advanced, that jurors drawn from all walks of life and accustomed to make terms with the world are better able to understand and appraise conduct than one who lives the remote life of a judge. This, however, is only partially true. If, as in the trial of Steinie Morrison, the principal evidence comes from illiterate Russian Jews inhabiting the East End of London, none of whom seems ever to have recognised the principles of conduct which guide the average Briton, an ordinary middle-class jury may find itself out of its depth, while the professional judge may

⁶ R. M. Jackson, "Jury Trial Today," in *The Modern Approach to Criminal Law* (London 1945) 100.

through his long experience at the criminal Bar and on the Bench have a much better understanding of the outlook of these people. Many persons who serve on a jury have led narrow lives.

The jury has the advantage of bringing a younger element into the administration of justice, and, now, a feminine element. It may be thought that this is a valuable corrective for a Bench composed predominantly of aged males.⁷ On the other hand, dissatisfaction with judges is expressed chiefly in connection with their sentencing policy, in which the jury has no part.

It is sometimes said that juries can better apply prevailing ethical standards than can judges with their absolute devotion to the words of statutes and their strict doctrine of precedent. But, as said before, the primary function of juries is to find facts, not to apply ethical standards. An ethical standard is involved in applying the law of negligence, yet in civil cases we have learnt to trust to judges in this field. Where an allegation is made of professional or technical incompetence, a judge may be better able to appreciate the issues than a jury.

Even if the jury does represent the mass mind,

⁷ Mr. Cecil Whiteley's remark on women jurors is of interest. He says: "Women magistrates have proved themselves to be of great value and assistance both in the summary courts and at quarter sessions. They take their judicial duties seriously, are anxious to learn, and have usually been identified with useful and important public work of various kinds. Women jurors, on the other hand, are summoned merely because they are householders; they are usually widows or spinsters who, having led sheltered lives, know very little about the world other than their immediate circle" (*Brief Life* (London 1942) 205).

there is the defect that it is vulnerable to outside influences. In the Middle Ages juries could be bought or intimidated by rich and powerful defendants, and in modern times they have proved to be dangerously susceptible to racial and national feelings, as in Ireland before independence. The law makes provision for the local prejudice of juries, by providing that the place of trial can be moved on this account; but nothing can be done to neutralise national prejudice. A good feature of English law is the strict control of newspaper comment pending trial through the law of contempt of court, which stands in marked contrast to the laxity in this respect in France and the United States⁸; on the other hand, the English system is at fault in permitting the publication of prejudicial evidence disclosed at the preliminary inquiry before magistrates.

Barristers who practise in the criminal courts are usually warm supporters of the jury, perhaps partly because the advocate is an actor by temperament, loving to have a fresh and appreciative audience for his histrionic talents. Defending counsel enjoys his greatest success in getting off a man against whom the evidence tells strongly, and his best chance of doing this is before a jury. Here again there is a curious contradiction in the opinions put forward. The same great advocate who asserted that juries were practically infallible, and that if his own interests were at stake he would sooner submit the facts to the judgment of twelve of his fellow-countrymen than to

⁸ For a note on the American situation see [1955] *Criminal Law Review* 424-5.

a haphazard selection from among the judges of the High Court, saw no inconsistency in adding that "the deficiencies and disadvantages of a jury make them more amenable to the guidance of a counsel whose whole object is to lead their minds to a particular conclusion." In other words, and this is a fact that every one knows, a jury is much more in the hands of a clever and experienced barrister than is the judge, which increases the chance of a miscarriage of justice if the sides are unequally represented. Some of the outstanding advocates of their time have explained how the essence of their method is the persuasion of the jury. Thus, in cross-examining the chief witness for the prosecution, "the defending counsel," said Sir Edward Clarke, will hint at the nature of his defence in such a way as to set the jury thinking what the answer to the prosecution's case is. "Presently comes the speech in which the defence is formulated; and if, listening to that speech, a jurymen says to himself, 'Why, that is just what occurred to me when the witness was in the box,' the verdict, so far as he is concerned, is safe. The conclusion which his own intelligence has suggested must be right."⁹

That juries can be led in this way into improper acquittals is quite generally recognised by lawyers, and is the foundation of some favourite legal anecdotes which take the stupidity of juries as the obverse of the cleverness of counsel. Lawyers who relate these

⁹ The quotations in this paragraph are from a discussion of cross-examination by Clarke (Solicitor-General from 1886 to 1892) printed in E. W. Fordham, *Notable Cross-Examinations* (London 1951) 192-3.

stories include the staunchest supporters of the jury. An example is Sir Travers Humphreys, who, when he comes to recall the work of the leading defenders of his youthful days, forgets all he has said upon the reliability of the jury's verdict. The learned judge tells us of Gerald Geoghegan: "He obtained some wonderful verdicts by his power of captivating a jury." Wildy Wright could produce "ingenious arguments swallowed by a jury like a mayfly by a trout," and George Elliot "was a most successful defender of prisoners; he could hypnotise a jury sometimes into returning a verdict directly contrary to the evidence."¹⁰

It will be seen from this review that the reader has a considerable choice of creeds. He can accept the tremendous statement of Lord Justice Bankes that the jury is always right, and that the trial judge who disagrees with the verdict at the time will afterwards come to see how right it was. He can believe, following one of the opinions of Mr. Justice Humphreys, that the jury, though no more right than the judge, is always right unless some unusual circumstance in the trial has misled it. He can believe, with Stephen, that the jury sometimes makes mistakes that a judge would not, but that these failures of justice are compensated by collateral advantages. Finally, he may think that the reliability of the jury is one of the surprising myths of the twentieth century, and that no collateral advantages can be sufficient to balance the evils of unmerited acquittals and unjust convictions.

¹⁰ *Criminal Days* (London 1946), 77, 87, 97.

The collateral advantages suggested by Stephen have already been sufficiently considered. An additional one which is sometimes given is that the necessity of directing the jury tends to keep the common law free from subtlety and jargon; it means, in the words of Lord du Parcq, that "the law has remained capable of expression in simple language, and that any supposed rule or doctrine which could not be simply expressed has seldom found any permanent place in the common law." Although this is a common opinion, it seems to be purely fanciful. In truth, the criminal law is notable for its strained and technical use of language, for instance in the doctrine of constructive murder, and in its interpretation of malice, grievous bodily harm, possession, breaking and entering. The obvious way to reduce the law to simple and intelligible form would be to codify it, but this has always been resisted by the majority of judges.

The collateral justification for the jury favoured by most people is the desirability of having a popular veto on the enforcement of the criminal law. This is the traditional argument for the jury; whether it has any relevance at the present day has already been considered.

THE PROPOSAL FOR TRIAL BY THREE JUDGES

Many discussions of the jury are vitiated by the assumption that the choice lies between the verdict of a jury and the decision of a single judge; this assumption enables the supporters of the jury to pray

in aid the proverb that many heads are better than one. In fact, as said before, the choice is not limited in this way; what needs consideration is whether criminal cases would not better be decided by a bench of three judges, who would require unanimity in order to convict. At present we trust to the head of one judge in matters of sentence—I think improperly; a bench of judges would be greatly preferable. In magistrates' courts we have in some large towns the single stipendiary magistrate, adjudicating both on guilt and on sentence—again I think improperly; the only check in either instance is by appeal. Trial by a single judge or magistrate provides no adequate safeguard against the vagaries of the individual. Trial by three judges, giving reasons for their decision and subject to correction on appeal, should in all human experience be a better trial than by jury; if it is not, there must be something gravely wrong in our method of appointing judges.

An intermediate solution is possible. Even if it is better to have non-lawyers than lawyers to decide facts, this does not make out the case for the unselected, inexperienced tribunal which is the jury. It would, surely, be better to have a body of lay magistrates, carefully selected for suitability and obtaining experience through holding office for a period of years. Two such lay magistrates might well sit, as assessors, with the professional judge; in the gravest cases there might be four or six. This would give us a system similar to the German *Schöffengericht*, in whose favour the jury was abolished in Germany in 1924. Dr Mannheim says that “it is the *Schöffengericht* which,

more than any other Continental criminal court, shows a tendency to replace the jury system, not only partly, but altogether.”¹¹ It would, of course, be possible to provide for the judge deciding questions of law and procedure, while the lay assessors have equal votes with him on guilt and treatment, unanimity being required for conviction. The reasons for the decision could be stated by the judge as president of the court. Very much this system already prevails in a court of quarter sessions presided over by a legally qualified chairman when it hears an appeal from a court of summary jurisdiction, only this court is allowed to decide by majority. It would be possible, if thought desirable, for the lay assessors themselves to be experts in particular fields, *e.g.*, commerce where the trial is for a commercial fraud, or psychiatry where abnormal mental states are in question.

THE GROWTH OF SUMMARY TRIAL AT THE EXPENSE OF JURY TRIAL

Notwithstanding the panegyrics on the jury, it occupies a comparatively minor place in the administration of criminal justice at the present day.

When Parliament creates new statutory offences it generally provides, unless they are of considerable gravity, that they shall be tried summarily by magistrates, or at least provides such summary trial as an option. Jury trial is too costly and cumbrous for minor offences. Summary offences outnumber indictable offences more than six to one.

¹¹ 53 *Law Quarterly Review* 404 *et seq.* See also the favourable account of the system in R. C. K. Ensor, *Courts and Judges* (Oxford 1933) 60 *et seq.*

Even if we confine ourselves to indictable offences, which in principle are triable by jury, the great majority are now dealt with summarily by magistrates. Nearly all crimes by juveniles are tried by magistrates sitting in juvenile courts. For adults, many indictable offences can be dealt with summarily with the consent of the accused. When it comes to the point, offenders show no great affection for trial by jury, and readily give their consent to summary trial; they are influenced partly by the fact that the powers of punishment of magistrates are smaller than those of courts sitting with juries,¹² and partly by the fact that they thus get a speedier and cheaper trial. On the other hand there is a better chance of acquittal at the hands of a jury, than before magistrates, particularly in certain types of case.

It should not fail to be noticed that the waiver of jury trial has advantages for the prosecution as well as for the defendant. Not only is the case heard more cheaply and expeditiously, but there is an improved chance of conviction. In return for these advantages the prosecution may have to forgo the possibility of a heavy sentence; yet even this drawback is largely remedied by the new legislation which provides that justices may, in suitable cases, after trying offenders, send them to quarter sessions for the increased sentences that it is in the power of quarter sessions to bestow.¹³ It is said that the summary trial of indictable offences is so favoured by the police that a graver

¹² Magistrates who deal summarily with an indictable offence can only imprison up to six months and fine up to £100.

¹³ First introduced in 1948, the provision is now in the Magistrates' Courts Act, 1952, s. 29.

charge will sometimes be reduced in order to enable it to be disposed of summarily.¹⁴ Magistrates, too, give a liberal construction to their powers, notwithstanding occasional rebukes from the Divisional Court. Finally, the whole process has received the blessing of Parliament, which, mindful of the expense and difficulty of jury trial, has progressively extended the power of summary trial and removed defects in the procedure, as by the legislation just referred to.

The result is that about 84 per cent. of indictable offences are tried summarily, only 16 per cent. being sent for trial on indictment before a jury. This proportion has remained pretty constant since 1919,¹⁵ except that during the years of the Second World War the proportion of those committed for trial was even lower. If one compares jury trial with all summary trial, the figures become still more surprising: in 1958, only 3½ per cent. of all persons tried for offences were tried on indictment. When, from this small percentage, there are deducted the defendants who on appearing for trial plead guilty, and so are not tried by jury at all, the ratio of defendants actually tried by jury becomes in some years little more than one per cent. From a social standpoint,

¹⁴ Instances are given by Albert Lieck in (1924) 157 *Law Times* 308. A man charged with breaking and entering a warehouse and stealing will be dealt with for the larceny only. The place where a larceny occurred (as in a ship or dock, or even in a dwelling-house) will be ignored and the trial proceed as for a simple larceny; unlawful wounding becomes assault; attempt to pick pockets becomes loitering in a street with intent to commit felony. "There are a thousand such devices, some less defensible than others."

¹⁵ See R. M. Jackson in *The Modern Approach to Criminal Law* 105 *et seq.*

then, summary trial is evidently much the more important. It is true that juries generally deal with the most serious offences for which punishment is likely to be most severe. But the most serious offences are (apart from murder) generally committed by old offenders, who for their earlier offences will very likely have been tried by magistrates; and it is universally agreed that the way in which the beginner in crime is treated is of decisive importance. Thus it can hardly be said that from any point of view the responsibility imposed on magistrates is less than that on judges and juries. The whole process whereby the effective administration of most of the criminal law has been shifted from juries to magistrates is a striking vote of confidence in the magistracy by all concerned, if it is not also a vote against the efficiency of the jury system.

INFLUENCE OF THE SUMMING-UP

In his summing-up the judge is enabled, if the phrase may be permitted, to predigest the evidence for the jury. That at this late stage of the case such assistance should be deemed necessary is an acknowledgment of the peculiar difficulties of an amateur tribunal. Sir Alan Herbert expresses the point in his inimitable way when, in his book, *Uncommon Law*, he makes Mr. Justice Swallow address the jury as follows:

“Gentlemen of the jury, the facts of this distressing and important case have already been put before you some four or five times, twice by prosecuting counsel, twice by counsel for the

defence, and once at least by each of the various witnesses who have been heard; but so low is my opinion of your understanding that I think it is necessary, in the simplest language, to tell you the facts again.”

It was only after the experience of many years that judges formed this low view of the jury's understanding. In the earlier part of the eighteenth century the judge only explained the law to the jury, and did not sum up the evidence to them.¹⁶ By 1841, however, it was recognised to be the right and duty of the judge to state what impression the evidence had produced on his mind, in order to prevent the jury being misled by worthless evidence.¹⁷ The reservation is that the judge must not use such language as to lead the jury to think that he is directing them that they must find the facts in the way that he indicates.

Quite apart from any expression of opinion by the judge, the way in which he marshals the facts may present a strongly persuasive argument for one side or the other—and it must be remembered that it is the judge who has the real “last word” with the jury. At the trial of Craig and Bentley, for example, the Chief Justice, dealing with the charge against Bentley, recounted the case for the prosecution at a length which took four or five pages in the transcript of the

¹⁶ See *per* Willes C.J. in *Winsmore v. Greenbank* (1745) Willes at 583, 125 E.R. at 1333.

¹⁷ *Davidson v. Stanley*, 2 M. & G. at 727, 133 E.R. at 939; *cf. Prudential Assce. Co. v. Edmonds* (1877) 2 App.Cas. at 500; *O'Donnell* (1917) 12 C.A.R. 219. “It is not wrong for the judge to give confident opinions upon questions of fact”: *per* Channell J. in *Cohen* (1909) 2 C.A.R. at 208. See also Sokolov in (1932) 10 *Canadian Bar Review* 228.

shorthand note; but he stated Bentley's defence in only one sentence, namely, his denial of the essential facts alleged against him; the summing-up was held in the Court of Criminal Appeal to be a fair one, and the conviction of Bentley was affirmed.¹⁸ Had it been held to be unfair, the conviction would, of course, have been reversed.¹⁹

The different ways in which judges might interpret their duty were thus stated by Lord Justice Fry: "Some judges almost tell a jury how they ought to find, and so seem to me to assume a function which is not theirs according to our constitution. I have always striven to avoid doing this, and to leave the question really as well as formally to the jury, taking, however, great care that they should never find a man guilty whom I believed innocent."²⁰ It will be seen that even this statement, which professes to show respect for the function of the jury, admits that the judge does not allow the jury to commit what he regards as the great injustice, namely, convicting a

¹⁸ *The Trial of Craig and Bentley*, ed. H. Montgomery Hyde (London 1954).

¹⁹ "When a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury": *Dennick* (1909) 20 T.L.R. 74; 3 C.A.R. 77.

²⁰ Agnes Fry, *Memoir of Sir Edward Fry* (Oxford 1921) 69. Lord Alverstone recorded that "In the old days it was the practice for the judge to read extracts from his notes of the evidence of the various witnesses in the order in which it was given, and there was little attempt at arrangement or marshalling of the facts so as to give the jury the advantage of being able to judge of the weight of any particular evidence given. . . . Before I was on the Bench the advantage of this practice [of arrangement] was appreciated, and many of the best judges took pains in their summing up to marshal the facts of the evidence so as to give juries the necessary guidance. I followed the new practice" (*Recollections of Bar and Bench* (London 1915) 289).

man whom the judge thinks innocent. The jury may, if it likes, acquit a man whom the judge believes guilty; the judge sees no great harm in this. The other judges referred to by Lord Justice Fry, who lead a jury not only on the question of acquittal but also on the question of conviction, to the extent that they are successful, destroy trial by jury in fact though not in name. It was the realisation of this that led France and some States of the United States to forbid the judge to sum up to the jury in criminal cases; it may be significant that in these countries, where the jury through the absence of a summing-up was left with a real responsibility, the mode of trial worked so unsatisfactorily as to fall into general disrepute. In the courts of most States of the United States (as distinct from the federal courts) the judge may not comment upon the evidence, and in many he must only give written instructions to the jury, or speak before the counsel make their addresses. The result is to rob the judge of authority and to give the trial over to the contending counsel.¹ In France one expedient after another has been tried. Until 1881 the presiding judge summed up to the jury somewhat in the English fashion, but the lack of confidence in the impartiality of the judge meant that this was regarded as an unfair last word for the prosecution. Accordingly, in that year, the summing-up was abolished, and this had the result that the president

¹ J. C. Smith in (1955) *Cambridge Law Journal* 86-92. The prevalent American rule is sternly criticised by Professor Edmund M. Morgan in his Foreword to the American Law Institute's *Model Code of Evidence* (1942) 9-10, and is rejected in Rule 8 of the Code.

extended his *interrogatoire* and said much in the course of his examination of the accused that he had previously said in the summing-up. Even so, there were so many acquittals, partly as a result of the absence of a summing-up, that the heroic step was taken of sending out judges and jury together, in order that the judges might exert the influence in private that they were no longer allowed to do in public. This is the present position. Since there are three judges to seven jurors, and since the voting is preceded by a discussion in secret conclave under the direction of the president, the judges in France now have a greater opportunity of influencing the jury than is allowed in England. This system has by no means brought general satisfaction, and may be abandoned.

Looking at these strains and stresses of the jury system in other countries, we may find the comparative success of the English jury not in its ability to nullify unpopular laws, nor in its superior ability to ascertain facts, but in the fact that our system of summing up enables the judge to give the jury a lead, which the jury follows sufficiently often to give an appearance of reliability to the mode of trial. It need hardly be pointed out that this explanation of the jury's success is not one that yields any very strong argument for a continuation of the system. As Sidgwick said, the English practice of summing up is "a compromise hardly consistent with a full belief in the superiority of plain common sense." Nor, he added, does the compromise really obviate the objections to entrusting decisions to an inexperienced

tribunal. For "even supposing the conclusion of the judge to be always plainly stated, it does not follow that the jury will adopt it; indeed, to prove this would prove too much, as it would show that the intervention of the jury was no less superfluous than harmless. In fact, it is notorious that English advocates continually address appeals to juries which would have no weight with experts, and that these appeals sometimes prevail against the clearly indicated opinion of the judge." The advocates who address these "appeals" are of course the advocates for the defence.

There is no social generalisation without exceptions, and instances can be found in which the jury has conspicuously justified itself, as in the case of Mrs. Rattenbury, where the jury very rightly acquitted against an unfavourable summing-up.

THE INSCRUTABILITY OF THE VERDICT

It was said before that the jury's deliberations are secret. This reserve is continued by the jury in its public behaviour. The function of the jury is simplicity itself: merely to return a verdict of guilty or not guilty. No reasons need or can be stated. When a judge gives a judgment, on the other hand, there is a convention that he must formulate reasons for his decision. Even where he is concerned only with questions of fact, the judge must state the facts he finds to exist, the evidence he rejects, and the inferences he draws; and he must relate his findings of fact to the legal rule. With the jury, this intellectual process is left in the dark.

This characteristic of the jury may be explained partly on historical grounds. Professor Plucknett has written that in the Middle Ages "the court treated the jury as it did the hot iron or the cold water, or as one would treat a spinning coin: it put the simple question and got a short answer—'guilty' or 'not guilty.' How that short answer was reached one did not enquire; like the ordeal the jury was inscrutable." Nowadays the jury have no private knowledge of the facts, and evidence is given in open court; but the verdict still has the same oracular character. It seems to be in the nature of a jury as a composite lay tribunal that it is unable to give a reasoned opinion.

One matter on which, in the absence of information, it is impossible to form a sound judgment is the extent to which the jury understands the judge's direction of law. The law on some topics is extremely difficult, and a number of different legal issues may be raised in a trial; yet all must be explained in terms the jury may understand. In the lecture-room a law teacher may spend an hour or more explaining the intricacies of the law of provocation, and his audience will consist of young men at their most receptive age, above average in ability, and already possessing some legal background. Even then they are not asked to apply their newly won knowledge in a case involving life or death for a human being. This is what the jury are expected to do, and there is no final check or test to discover whether they are not labouring under some serious misapprehension.

One particularly likely misapprehension is in

respect of the mental element in crime. All experienced magistrates know the danger of a defendant pleading guilty to a charge of larceny when in reality he is not guilty because he meant to return the thing taken or had a claim of right to take it. The layman does not appreciate the difference between the crime of larceny and the civil wrong of conversion; if a defendant now realises that his taking was wrongful, he frequently supposes he must be guilty of a crime. In the same way, the inexperienced jurymen unless carefully instructed will tend to suppose that a verdict of "not guilty" of larceny is inappropriate if the defendant has taken the thing. For this reason a jury's verdict of "guilty with a recommendation to mercy" should be suspect: one sometimes cannot be sure that it does not mean: "guilty of the act but no criminal intent and therefore a recommendation to mercy." Yet judges frequently accept this verdict without question as one of guilty.

Very occasionally the jury's misapprehension comes to light. This may happen when the jury, unbidden, add a rider to their verdict, as when, in an old case, upon an indictment at quarter sessions for poisoning horses, the jury found a verdict of "guilty by mischance," and were then told by the chairman that they must say either guilty or not guilty, whereupon they brought the defendant in guilty but recommended him to mercy on the ground that he had no malicious intent, but administered the material to benefit the condition of the horses. The chairman accepted this as a verdict of guilty and sentenced the defendant to imprisonment. The jury were, of course,

wrong; on the facts as they found them they should have returned a verdict of not guilty. But the chairman (who was probably not legally qualified) was also wrong; he should have directed the jury in the circumstances to return their verdict as one of not guilty. No appeal was taken and the defendant suffered his imprisonment.

In a later case, the jury found the defendant guilty of obtaining food by false pretences, but added that there was no sufficient evidence of any intention to defraud.² The finding clearly showed that they had not understood the judge's direction, and the conviction was quashed. The defendant was fortunate because the jury by adding the unnecessary words revealed their own misapprehension. Had they merely returned the verdict of guilty with a recommendation to mercy, the defendant's only remedy would have been by appeal; and the Court of Criminal Appeal is loth to interfere with the verdict of a jury where there is some evidence to support it and no defect in the proceedings.

The courts have been careful to preserve the impenetrability of the jury's verdict, and it is not the practice to interrogate the jury upon their reasons. In *Larkin* (1948)³ a departure was taken. The accused was indicted for murder. He had cut a woman's throat with a razor, and it was open to the jury to find either that the act was wilful murder or that it amounted to manslaughter. It would be manslaughter if the accused merely intended to frighten the woman

² *Gray* (1891) 7 T.L.R. 477; 17 Cox 299.

³ [1943] K. B. 174: see the fuller statement of facts in 29 C.A.R. 18.

with the razor, but she accidentally fell on it, or if he killed her intentionally but on adequate provocation. The jury returned a verdict of manslaughter, and it then became the function of the judge to pass sentence. In order to do so the judge, not unreasonably, thought that he had better ascertain from the jury which view they had taken of the facts: obviously the sentence for a negligent killing might differ from one for killing under provocation. The judge therefore asked the foreman of the jury: "Did you come to the conclusion that this woman accidentally fell on the razor?" "We did, sir." "It was an accident? That was the reason?" "We have come to the conclusion that we can find no evidence to prove that it was murder." The judge then said: "It is not a question of murder. I said that, if it were done deliberately, it was not murder if, in your view, there was provocation, and whether you thought it was provocation or whether you thought it was an accident the verdict would be manslaughter just the same. . . . I want to know for my own purposes whether you did come to the conclusion that it was an accident or provocation?" The foreman: "Provocation." An appeal was taken on the ground that the foreman's answers were inconsistent, which indeed they were. It was held that the inconsistency of the answers did not affect the verdict of guilty of manslaughter, which was valid; and the Court of Criminal Appeal deprecated the putting of questions to the jury where the verdict was legally unambiguous. Mr. Justice Humphreys, on this somewhat inauspicious occasion,

thought it necessary to give the jury its usual sentimental credentials. He said: "In this country we consider that a jury is the best possible tribunal yet devised for deciding whether a man is guilty and, subject to the direction in law of the judge, of what offence he is guilty, but no one has ever suggested that a jury is composed of persons who are likely at a moment's notice to be able to give a logical explanation of how and why they arrived at their verdict."

This remark hardly seems to have been relevant to the case before the court, because what the trial judge tried to find from the jury was not why they decided as they did but what they decided. It is one of the blemishes of the criminal law that provocation-manslaughter and negligent manslaughter go by the same legal name, when for the purpose of punishment they must be considered as distinct offences. However, it is true to say that juries cannot be asked to return a reasoned verdict. Quite apart from the difficulty that different jurors may arrive at their decision for different reasons, the giving of satisfactory reasons for a decision is an art requiring some practice. Lord Mansfield's reputed advice to a newly-appointed colonial judge—"Give your decision, because it will probably be right, but do not give your reasons, because they will probably be wrong"—applies to juries. Even an experienced judge often does not arrive at his decision by way of conscious reasoning: what happens is that as he listens to the evidence, he begins to feel the answer in his bones. The purported reasoning in his judgment is rationalisation, an *ex post facto* statement of how he has come

to feel. The jury's verdict may be right even though it is not thus verbally rationalised. But the absence of reasoning hinders control of the verdict, and is one of the factors preventing a scientific assessment of the reliability of the jury as an institution. It cannot be taken as conclusive evidence against the jury system that a few instances of misapprehension come to light, for no system of human government is perfect, and even judges occasionally fall into error. The true cause for disquiet is our lack of knowledge of the inner working of the system, which makes it impossible to estimate the frequency with which mistakes occur.

THE REQUIREMENT OF UNANIMITY

The rule that the jury of twelve must be unanimous in order to return a verdict helps to ensure that the case is proved beyond reasonable doubt. It operates entirely in favour of the accused; if the jury disagree he cannot be convicted, though he cannot be acquitted either; in such circumstances he may be retried. The safeguard of unanimity must not be over-emphasised, because the members of the jury do not merely ballot their opinions but state them in discussion; since they are allowed to persuade each other, a minority will, unless tenacious, tend to be overborne by the "public opinion" of the jury room. Thus the real verdict is likely to be that of only a few of the more intelligent or persuasive members who take the lead. However, there is always the possibility of some individual member of the jury standing out against the rest on account of extreme intelligence, vindictiveness, or sentimentality, or because of his unwillingness to

withdraw an opinion too hastily given, or unwillingness to incur the responsibility of a conviction.

The foreman, as chairman of the jury, occupies a key position in the deliberations. There has been much discussion and agitation about the selection of suitable persons as chairman of Benches of magistrates, and it might be thought that the choice of the foreman of the jury would be regarded as deserving the same close attention. Actually, his election is a hasty and ill-considered affair. In theory the foreman is selected by the members of the jury before they enter the jury-box; but they have little time to get to know each other to make a wise choice; and in order to avoid embarrassment and speed things up the court usher will often make a suggestion which the jury will be thankful to accept.

The Court of Criminal Appeal has varied on the question whether the jury can be directed in effect to take a majority decision. In a case of 1919 the judge was allowed to tell the jury that a minority should subordinate their views to that of a substantial majority. In 1939 this form of direction was disapproved, and it was laid down that the minority can properly give in only if they are honestly and sincerely led to come to a view different from the view they had hitherto held—in which event they would of course cease to be a minority. But the practice appears to have partially changed again in 1952, when the judge was allowed to tell the jury that there might be a certain amount of give and take and adjustment of views within the scope of their oath. The phrase “give and take” appears on its face to be a euphemistic way

of saying that a juror who does not hold an opinion may adopt it as his own because another juror holds it, in return for that other juror returning the compliment in respect of some other element in the case. This would be carrying the Englishman's reputed genius for compromise too far, and it can hardly have been the intention of the court to approve it. For example, the jury might interpret the direction to mean that juryman *A* should agree to concur in a verdict of guilty under count 1, in return for juryman *B* agreeing to concur in a verdict of not guilty under count 2. Such an astonishing application of Flaubert's dictum that "one should always compromise, even when the alternatives are irreconcilable" would clearly be improper in a criminal case. Nor would it be right for a jury disagreeing between verdicts of battery and manslaughter to compromise on a verdict of aggravated battery. The case of 1952 was followed in 1953, when, however, the Court of Criminal Appeal explained "give and take" as "pooling their ideas and paying attention to the ideas of each other." Read in this way, the phrase becomes innocuous except to the extent that it is misleading.⁴

There have been proposals for putting matters on a clearer footing by taking the verdict of a large majority—say ten out of twelve persons. Even under the present law this could be done if one or two jurors die or fall ill; the verdict of the majority could then, with the consent of both sides, be accepted. In South

⁴ The cases referred to are: *Quartermaine* (1919) 14 C.A.R. 109; *Mills* [1939] 2 K.B. 90; *Walheim* (1952) 36 C.A.R. 167; *Creasey* (1953), *The Times*, October 20 (the quotation in the text is not given in the report in 37 C.A.R. 179).

Australia and Tasmania a verdict of ten out of twelve jurors is received after they have deliberated for a certain number of hours (four and two respectively), except in capital cases when a unanimous verdict is required. (In Tasmania a verdict of ten may be accepted even in a capital case if it is for an acquittal.)⁵ In Scotland, a bare majority—eight out of fifteen jurors—is sufficient, and a similar position prevails in Continental countries that have adopted the jury; this would be regarded as most undesirable in England. Stephen discussed the question and expressed an opinion against modifying the unanimity rule, except possibly by allowing a large majority to acquit after a certain time.⁶ This suggestion, though Stephen made it only tentatively, has much to commend it. We have recently witnessed obscenity trials in which the disagreement of the jury, necessitating a second trial, has been the source of vexation and heavy expense to the defendant publisher. In an address in 1954, Lord Goddard suggested that a majority of a certain size, say at least nine against three, might be accepted.⁷ He evidently contemplated that it might be accepted even for a conviction, and in this form the proposal has perhaps little chance of winning agreement, notwithstanding the Australian precedents; but it might well be adopted in the one-way fashion that Stephen suggested, allowing the large majority to acquit. There is, of course, no

⁵ Barry and Paton, *Introduction to the Criminal Law of Australia* (London 1948) 11.

⁶ *H.C.L.*, i 305; cf. [1954] *Criminal Law Review* 502.

⁷ *The Times*, November 10, 1954; see the reply by Mr. Justice Humphreys in a letter to *The Times*, November 11, 1954.

compulsion upon the Crown to re-indict a man after a disagreement of the jury, but it is the usual practice to re-indict once, and then, if the jury disagree a second time, to enter a *nolle prosequi* or consent to a directed acquittal. Sometimes, for special reasons, the Crown abandons a case after a single disagreement of the jury.⁸

In view of the importance at present attached to the unanimity of the jury, we may find some inconsistency in the practice of judges in never instructing a jury that they must be unanimous. No doubt the reason is that it is not desired to encourage minority views. As Mr. C. H. Rolph has pointed out in one of his penetrating essays in the *New Statesman*, the clerk's formal question at the end—"And that is the verdict of you all?"—can hardly be accounted adequate instruction in the rights of a minority.

UNDUE FAILURE TO CONVICT

There are probably few cases, comparatively speaking, in which the verdict of the jury results in an unjust conviction. To say that there are none, as is sometimes done, particularly by Home Secretaries at question time, is merely to show ignorance. Even if one looks only at the cases that attract universal attention and get into the various Trials Series, two—Beck and Slater—were officially acknowledged to have resulted in mistaken convictions; two—Florence

⁸ As in *Merryfield*, *The Times*, August 7, 1953, and *Lord Montague*, *The Times*, March 3 and April 7, 1954. In the latter case the prosecution was abandoned because of the undesirability of calling upon the alleged boy victims to give evidence again.

Maybrick and Edith Thompson—are generally regarded as having had the same result, while others—such as Steinie Morrison, Thorne, and Rouse—are thought by a considerable body of opinion to be wrong or very doubtful convictions upon the evidence, whatever may have been the guilt of the accused.⁹ In all these instances the accused persons actually suffered punishment; there was no reversal on appeal, or free pardon from the Home Secretary to prevent the punishment being suffered. Moreover, they were all charges of murder, where the accused employed experienced counsel, and the jury, knowing the terrible punishment, must have taken their work with the utmost seriousness. If one adds the verdicts in the ordinary run of criminal cases that get reversed on appeal, and the verdicts that are open to doubt though they are not reversed on appeal, the presence of the jury hardly seems to give a full assurance that the innocent will not be convicted.

Still, it is true to say, or one hopes one is right in saying, that these are the somewhat rare exceptions. That innocent persons do not generally get convicted is partly because juries are not given much opportunity. “The white flower of innocence,” it has been poetically said, “is a rare plant and seldom blooms in the dock.” In more prosaic language, cases are so

⁹ There is an extensive literature on the cases mentioned, among which are Lustgarten, *Verdict in Dispute*, and G. de C. Parmiter, *Reasonable Doubt*. Although Slater could not be proved innocent, the evidence did not come anywhere near establishing his guilt. There is no doubt that Rouse was in fact guilty, as appears from the confession that he made before being executed, which has the ring of truth. (See J. C. Cannell, *New Light on the Rouse Case* (London n.d.).)

carefully sifted by the police and prosecuting counsel before trial that almost the only ones coming before the jury are those in which there is a considerable body of evidence of guilt; if by chance the evidence should prove to be weak the judge would generally bend himself to secure an acquittal. On the other hand it is sometimes made a matter of complaint, in private, by senior police officers, that juries are too prone to acquit serious offenders where, on a reasonable view, guilt is clearly established. It is generally known that juries acquit more readily than a bench of magistrates.

A number of different reasons conduce to this state of affairs. An inexperienced tribunal faced with the responsibility of trying serious charges is apt to fear its strange responsibility, and sometimes grasps at any straw held out by defence counsel as a reason for acquitting. This is more so with crimes of fraud and passion than with odious crimes like murder for gain. Again, the jury know that if they convict the sentence is out of their hands—unlike magistrates who can convict but give an absolute discharge. Magistrates can act by majority, whereas the jury must be unanimous. The jury are more readily moved by advocacy than is an experienced magistrate, and it is commonly understood that the great defenders' triumphs have often been due to their way of ingratiating themselves with the jury—though methods are now more subtle than in the Buzfuz era. Jurors sometimes have a quite unreasonable distrust of fingerprint evidence. Whereas magistrates tend to believe the police officers who appear before them regularly, and who are

generally found to speak the truth and perhaps never caught out in a lie, though regularly alleged to be lying by defendants who are plainly guilty, a jury is readily influenced against the police and is slow to convict on police evidence alone. It must be confessed that in this last respect the jury is more in the right than are some magistrates. A policeman's word should not be taken against that of the citizen merely because the former is in uniform, and on a conflict of evidence it is always necessary to ask whether the case has been brought home beyond reasonable doubt. Although it is doubtless rare for a policeman to give wilfully false evidence against a man whom he believes innocent, it is not unknown for a policeman who believes the defendant guilty (as he generally does) to embroider and strengthen his evidence with the object of procuring a conviction. Also, despite many official denials that promotion in the Force depends upon securing convictions, it is probably true to say that some young constables believe that it does. For these reasons an uncritical acceptance of all police testimony, which is sometimes observed in magistrates' courts, is to be deprecated.¹⁰ On the other hand, a man is not, to say the least of it, to be suspected

¹⁰ In a letter to the *Evening Standard*, May 18, 1955, Mr. C. H. Norman, a shorthand writer in the courts, told of a case before a London stipendiary magistrate whom he named, where the evidence for the Crown consisted entirely of police and official witnesses. All the policemen admitted in cross-examination that they had altered their notebooks to agree with one another. The defendants called many independent witnesses besides giving evidence on their own behalf. The magistrate convicted, saying privately to Mr. Norman: "We magistrates must support the police in these cases, otherwise we should be lost."

of dishonesty merely because he is a policeman, as some juries seem to think; nor is the jury-box the proper place in which to obtain revenge for a past injury, real or imagined, sustained at the hands of the police. In the United States, popular distrust of police testimony has tended to wholesale acquittals, which have brought the administration of justice into disrepute.

That the shortcomings of the jury do not result in even more acquittals than at present is due in large part to the tactful way in which the judge handles the jury. Bacon's advice to the judge—"You shall be a light to jurors to open their eyes, not a guide to lead them by the noses"—is a counsel of prudence, for too obvious an attempt to overbear the jury in the summing-up may lead to rebellion, or else to reversal on appeal. But an experienced judge can so marshal the facts and indicate the probabilities that, while professing to leave everything to the jury, he has in truth made their verdict himself. A tendentious summing-up becomes all the more persuasive when it is not dogmatic and purports to leave an unfettered choice to the jury. The judge, moreover, speaks with all the prestige of his position, and with the appearance of impartiality deriving from the fact that he has hitherto played no prominent part in the trial. To the jury he is, in Stephen's striking phrase, "the voice of Justice itself." I was told by a recorder, who was a strong supporter of the jury system, that when first appointed he used to sum up to the jury with absolute impartiality, and the result was that the jury, being left to do its own thinking, acquitted

most of the defendants. To avoid these failures of justice the recorder changed his method and summed up in the direction he thought proper. The result was the expected number of convictions.

It must next be said that the jury system gives criminals an improved chance of escaping on appeal on technical points. The complications of our law of evidence are due partly to the existence of the jury, and the misreception or misrejection of evidence at the trial may cause the conviction to be quashed. In an effort to minimise this danger, the trial judge will incline to exclude relevant evidence for the prosecution where its admissibility is doubtful, while giving great latitude to the defence. This one-sided treatment of the evidence itself helps to secure acquittals.

Most reversals on appeal are for misdirection. Under our system, the judge must give a full direction to the jury on both the law and the facts, and he does so on the conclusion of the evidence, with little or no time to prepare his summing-up in written form. In a complicated case there is quite a possibility that the judge will make some error of commission or omission, and such an error will be seized on in an appeal. If the error is one that may have misled the jury a conviction will be quashed, notwithstanding that the Court of Criminal Appeal thinks the accused guilty. The court has power to dismiss an appeal where no substantial miscarriage of justice has occurred, but this power is not used to usurp the province of the jury.¹¹

¹¹ For many years the Court of Criminal Appeal was reluctant to act under this power, but in 1944 the House of Lords gave it a generous interpretation, holding that in deciding whether

It may be taken, then, that in one way or another the jury system tends to the acquittal of criminals who if tried under a purely professional system would be convicted.¹² This is not a defect that the lawyer by his training can readily appreciate. Yet it is an evil when a guilty person is acquitted: not only may a dangerous criminal be turned loose on society, but the efficacy of punishment as a system of general deterrence is impaired; also, if social agencies can do anything for the rehabilitation of a criminal, the sooner he is convicted of his offences the better.

Some improvement could be made, even while retaining the jury system, if the Court of Criminal Appeal were empowered to order a new trial. However, proposals to this effect have been rejected, it being thought undesirable that a person should be tried twice for the same offence.

Another line of approach would be to remove certain types of case from jury trial, where it has been found to work particularly badly. Mr. Cecil Whiteley, in his book *Brief Life*, refers to three types in particular in which juries are prone to acquit. They are: (1) indecent assaults on young girls and boys; (2) acts of gross indecency between male persons; and (3) being

the power should be used, the appeal court should consider whether a reasonable (not a perverse) jury, after being properly directed, would, on the evidence properly admissible, without doubt convict (*Stirland* [1944] A.C. 315). This ruling has done something to improve matters, but the appeal court may still hesitate to say that a jury would without doubt have convicted.

¹² In Scotland still another factor operates—the possibility of evading the responsibility of a verdict of guilty by giving what Sir Walter Scott called “that bastard verdict . . . that Caledonian *medium quid*—the verdict of “not proven.” See T. B. Smith in [1954] *Criminal Law Review* 502.

under the influence of drink when in charge of a motor-car. The first group will be considered later. On the second, the author remarks that most charges are brought in respect of acts committed in public urinals; they can only be tried by jury, and there is no power to fine for the offence. "What a waste of public time and money these cases are and how disturbing for honest police officers who know that they have sworn the truth! They should be summary offences of 'public indecency' and dealt with by the magistrates, with power to fine or bind over on the first conviction, and to impose a sentence of imprisonment after a second or third conviction." On the third group, where acquittals have lately reached the dimensions of a public scandal, Mr. Whiteley points out that a defendant could not claim to be tried by jury for the offence before 1925; the Criminal Justice Act of that year increased the maximum penalty to four months' imprisonment, an apparent increase in severity which was in fact a measure of leniency, because it gave the defendant the right to opt for trial by jury. He usually exercises this right because juries tend to acquit in the face of all evidence. The remedy would be to put this offence back to trial by magistrates, who would have power to punish by disqualifying the offender from holding a driving licence.

THE ABSENCE OF APPEAL BY REHEARING

The exaggerated deference accorded to the jury has the effect of restricting the grounds of appeal. Since the Court of Criminal Appeal sits without a jury, it

cannot retry the case on appeal without the possibility of the verdict of the jury being upset by a bench of judges. The sacrosanctity of the verdict is taken to exclude this possibility, with the consequence that there is no full appeal from a conviction on indictment. Appeals are limited to questions of law and misdirection, where the jury may be regarded as having been misled—except that a verdict may also be upset if it is grossly unreasonable. Apart from such manifest perversity the Court of Criminal Appeal will not generally interfere in a doubtful case where it is inclined to take a different view of the facts from the jury. This is partly because, as said already, a court of judges is disinclined to interfere with the verdict of the jury, which is regarded as the constitutional tribunal on the question of fact. Partly it is because the jury does not give reasons for its verdict, so that any error of reasoning which may in fact have taken place remains concealed. Partly, again, it is because on an appeal to the Court of Criminal Appeal there is generally no rehearing of the witnesses; the jury, which has heard the witnesses, is accordingly supposed to have been in a better position to draw inferences than the appellate court.¹³ But the absence

¹³ Stephen, writing before the Criminal Appeal Act, thought that trial by jury was inconsistent with an appeal by way of rehearing (*H.C.L.* i 523). Although this is the general opinion, it is not altogether true. One could have trial by jury, and, in the event of conviction, and (as now) with leave of the court, a rehearing on appeal before three judges without a jury. Even without a rehearing, the Court of Criminal Appeal could, by reading the transcript of the trial, and if it had more time and were not in thrall to the jury system, exercise a freer discretion than now in acquitting for insufficiency of evidence.

of rehearing by witnesses in the appellate court is itself due to the superstitious reverence for the jury, which forbids too extensive a procedure for reconsideration by mere judges. Even where fresh evidence has come to light since the trial, the Court of Appeal will not generally hear it, since this would be "opposed to the old-established, trusted and cherished institution of trial by jury."¹⁴

The upshot is that it is far easier for a person convicted by a jury to take and win an appeal on an unmeritorious point of procedure or evidence than it is for him to reopen on appeal the really serious question of his guilt. While the jury system encourages unmeritorious appeals, to which an easy ear is given, it discourages those on questions of substance. Lest this should be thought to be an exaggeration, the testimony of Lord du Parcq (a strong supporter of the jury) may be quoted. He said that "the verdict of a jury which has been properly directed on the law, and has not been permitted to hear inadmissible evidence, is, in practice, almost unassailable. If there is something more than a scintilla of evidence to support it, it will stand."¹⁵ Lord du Parcq actually claimed this as an advantage of the jury, since it discouraged and shortened the number of appeals. In civil cases this may or may not be a good thing, but it is astonishing to find an eminent judge regarding the severe restriction of appeals in the most serious criminal cases as a praiseworthy feature. In fact it is chiefly in these cases that the chances of successful

¹⁴ A dictum of Darling J. quoted in *Rowland* [1947] K.B. at 463.

¹⁵ *Aspects of the Law* (Holdsworth Club, 1948) 15.

appeal on the merits are so restricted, for elsewhere the jury has largely disappeared.

Although it is open to the Crown to grant a free pardon where a miscarriage of justice may have occurred, this power is not generally used so as to give an effective appeal against a jury's verdict. On a conviction of murder the Home Secretary will, according to recent practice, commute the death sentence to life imprisonment if there is a scintilla of doubt about the accused's guilt—not because a scintilla of doubt is enough to justify an acquittal, which it is not, but because the irrevocable nature of the capital penalty makes it an undesirable punishment if there is the remotest possibility of error. This exercise of discretion is irrelevant to the present discussion, and the Home Secretary, like the Court of Criminal Appeal, will refuse to interfere with a conviction merely on the argument that the verdict was wrong.

This defect in our arrangements may be illustrated by referring again to the case of Alice Johnson (p. 118). Had Mrs. Johnson been convicted before magistrates of some trumpery breach of regulation, she could, given the financial backing, have had the charge determined all over again by the quarter sessions. But because she was charged before a jury with the serious crime of sending letters threatening to murder, she was deprived of an effective appeal by rehearing, and in fact was not allowed to appeal at all against her first conviction.

Another illustration is the case of Steinie Morrison, who was convicted of murder before Mr. Justice

Darling and a jury in 1911. Whether or not Morrison was guilty of the crime of which he was convicted,¹⁶ the gravest doubts may be felt about the sufficiency of the evidence against him; and the tendency of the judge's summing up was for an acquittal. An appeal to the Court of Criminal Appeal failed, though the court seems to have indicated that they themselves would have acquitted Morrison. They said: "Bearing in mind that we are not entitled to put ourselves in the position of the jury, we can only come to the conclusion that the appeal must be dismissed." The Home Secretary interfered, but only to commute the punishment to penal servitude for life; it has been too often the practice to allay uneasy consciences with this kind of compromise. One must hasten to add that the practice of the Court of Criminal Appeal has improved since 1911: in 1931, for the first time in a case of murder, the court allowed an appeal on the ground that the conviction was against the weight of the evidence.¹⁷ Yet it can still not be said that the court will as a regular matter reconsider a case on the facts. It is still excessively hard to get the court to upset the verdict of the jury where there is no defect in the procedure or evidence. Thus Lord Goddard, giving judgment in a recent case, thought it right to repeat the time-honoured formula: "The question whether the evidence left doubt in the minds of the jury is not a question for this court. There

¹⁶ See Edward Abinger, *Forty Years at the Bar* (London n.d.), 67-9; H. Fletcher Moulton in his introduction to the case in the *Notable British Trials Series*, pp. xxiv-xxv.

¹⁷ *Wallace*, 23 C.A.R. 32.

was evidence on which the jury could convict, and the appeal will be dismissed.”¹⁸

THE JURY AND JUVENILES

Formal trial by judge and jury has proved to be unsuitable for children and young persons, who have now become almost entirely the responsibility of magistrates in the juvenile court. Unfortunately there are still exceptional cases (homicide, and where a child is charged jointly with an adult) in which the juvenile must or may be tried by judge and jury.

There is a strong body of opinion for abolishing jury trial where children are the victims. One reason for this is that juries have no experience in assessing children's evidence, which can be dangerously misleading (p. 123). Another and opposite reason is the surprising tendency of some juries to acquit for sexual offences against children. Partly this is because of the rule requiring corroboration of the child's evidence, which, as was shown earlier, is in one respect at present too strictly applied. Partly it is because of the shortness of a child's memory. As was pointed out in the valuable and neglected Report of the Departmental Committee on Sexual Offences against Young Persons,¹⁹ even an adult witness may find it difficult to remember in detail what happened weeks or months before; a child finds this difficulty much greater. It is possible for more than five months to

¹⁸ *Robinson, The Times*, May 10, 1955. On the facts, however, the dismissal of the appeal in this case was well justified.

¹⁹ Cmd. 2561 of 1925, pp. 36 *et seq.* Cf. Cecil Whiteley, *Brief Life* (London 1942) 96.

elapse between the date of the offence and the trial. Whereas an adult witness will probably keep reminding himself of the facts of the case before the trial in which he is to give evidence, a child will not naturally do this, and it is important for the child's own sake that he should be allowed to forget. Even if the child remembers the central incident, false details and exaggerations may creep into his account, which will be made much of by counsel for the defence, armed as he is with the child's earlier statement; and the result may be, and often is, that the jury are led to reject the whole of the evidence, even in the essential respects in which it was true.

The breakdown of justice brought about by these factors was expressed by the Committee in the following words:

“ We have been surprised by the weight and authority of evidence to the effect that cases which are brought into court are based on truth, even if details are inaccurate. None of the very experienced witnesses examined gave us a case in which he had felt that the evidence given by the young person was wholly false. In view of the weight of this evidence it is unsatisfactory to find, both from the general evidence and from the statistics, that there is a large number of cases in which the evidence of the child or young person is not accepted.”

The Committee's opinion that a child's evidence is never wholly false would not be accepted by all lawyers with experience in these matters. However, it obviously is important for the sake both of acquitting

innocent defendants and of convicting guilty ones that the child's evidence should be formally and finally taken at the earliest possible moment, which would require a change in the present law. The case should be tried summarily, either by magistrates in the juvenile court, or by a specially constituted summary court, but in any event not by jury. It would also help very greatly if the punishment mentality in cases of this type were modified. If a defendant were assured that, at any rate on first conviction, nothing worse than probation, medical examination and treatment lay in store for him (which is all that he will receive from many courts even at present, after a fiercely contested court battle), the police would find it easier to persuade him to plead guilty, thus saving the child from the distress of giving evidence.²⁰ And the first conviction would, if the rules of evidence were altered, help powerfully to secure a second conviction upon the offence being repeated, which would be the time for thinking about punishment.

There is another reason for abolishing jury trial of these cases. This is the traumatic effect on the child of having to give evidence before a large court. A valuable report of a joint committee appointed by the British Medical Association and the Magistrates' Association, published in 1949, recommended that for this reason all sexual crimes in which children are

²⁰ Cf. Mullins, *Fifteen Years' Hard Labour* (London 1948) 201. Mr. Mullins says that he generally ordered these offenders upon conviction to undergo treatment, and upon acquittal on technical grounds he frequently persuaded them to take treatment just the same.

alleged to be the victims should be tried in a comparatively quiet and informal tribunal analogous to the juvenile court; say by a judge, recorder or chairman, sitting with two juvenile court magistrates. In effect this follows proposals made by Claud Mullins and Cecil Whiteley. At present, the child's evidence may have to be gone over by him as many as six times. There is also the long waiting period before trial, when the child has to remember his evidence, and at the end of which he will be faced with a cross-examination which is trying even for an adult; and the hearing before quarter sessions or assizes also involves a much greater strain because of the formidable atmosphere, the robes and wigs, and the much greater number of onlookers.

FUNCTION OF THE JURY CONFINED TO THE QUESTION OF GUILT

The jury decide the question of guilt, but not the consequential question of treatment. In England, arguments based on extenuating circumstances are hardly ever addressed to the jury, because they are recognised to be none of the jury's business. These extenuating circumstances are urged only after conviction, when the judge is considering the sentence. The English practice in these matters differs from that in many States of the United States, where the jury is allowed to assess punishment in certain classes of case, with results that have caused much dissatisfaction.¹ It also differs from that in France, where the jury has always had the power to find extenuating

¹ J. C. Smith in [1955] *Cambridge Law Journal* 92.

circumstances and so reduce the powers of sentence possessed by the judge, and where, since the institution in 1941 of the procedure whereby the judges retire with the jury, it has become impossible to separate questions of law and fact in the course of argument. The French practice is now for judges and jury to collaborate on all questions of law, fact, responsibility and punishment. In England the jury has no control over punishment, except in so far as this follows from the crime for which a conviction is pronounced. Although the jury may recommend to mercy, this is merely a spontaneous gesture on its part; the judge must not mention to the jury that they have the right to do so,² and the recommendation need not be followed—for instance, the judge may refuse to endorse it, and the Home Secretary to follow it, because of the accused's bad character, which was unknown to the jury.³

As was intimated above, the only way in which the jury can control punishment is by convicting of a lesser offence, which has the effect of reducing the

² *Larkin* [1943] K.B. 174. It may be questioned whether this ruling is right or practicable in a case like "mercy-killing" where the strong sympathy of the jury will evidently be engaged. If the judge does not remind the jury of their power to recommend to mercy, the only result is likely to be an acquittal. A judge of such experience as Lord Goddard used to mention the recommendation to the jury in these circumstances (A. E. Bowker, *Behind the Bar* (London 1947) 274-5).

³ Between the years 1900 and 1949, reprieves were granted to 74 per cent. of those convicted of murder but recommended to mercy by the jury: Royal Commission on Capital Punishment, Cmd. 8932 of 1953, pp. 8-10. A. E. Bowker, *op. cit.*, p. 280, says that in his experience recommendations to mercy were invariably ignored by Home Secretaries in cases of poisoning.

maximum punishment to which the offender can be sentenced. Sometimes, as on a charge of murder arising out of a "mercy-killing" or suicide pact, the jury, with or without the concurrence of the judge, return a verdict of manslaughter only, though in law it should be murder. In extreme circumstances the jury may even acquit, as when a mother has killed her infant child; but an outright acquittal on sympathetic grounds is unusual, as indeed is a reduction to manslaughter. Before the passing of the Infanticide Act, 1922, heartrending scenes occurred when young girls who had killed their illegitimate children were found guilty of murder and had to face the dread ordeal of being sentenced to death. Almost everyone in court might realise that the sentence would never be carried out; but the girl herself, and her distraught mother at the back of the court, would unfortunately be the exceptions. The Act of 1922 removed some but by no means all the occasions on which the law demanded the obscene mockery of a death sentence that was not seriously intended.

Accordingly, the Royal Commission on Capital Punishment bent itself to securing a more general solution. The proposal it produced was that in capital cases the jury should after conviction be given evidence of the accused's character, antecedents, mental condition, and so on, and invited to find whether in the light of the evidence there were mitigating circumstances. If the jury found mitigating circumstances, there should be an automatic sentence of imprisonment for life, reviewable of course by the Home

Secretary.⁴ It is to be observed that the Commission did not propose to entrust the jury with any substantial power to decide what punishment should actually be imposed, even in cases clearly calling for clemency, such as mercy-killing, but allowed them only to prevent the announcement of the sentence of death, which generally would not be carried out anyway. This modest proposal was rejected by an overwhelming vote in the two Houses, and consequently by the Government, as being undesirable in itself and inconsistent with the accepted theory of the jury's function. So strongly did the Lord Chief Justice feel about it that he intimated that if the proposal were accepted, he would feel unable to continue his association with the administration of justice. It is perhaps not unfair to say, however, that the objections voiced almost unanimously by the leaders of opinion were either sentimental or question-begging. The proposal would, it was thought, be contrary to "the wisdom of centuries"; it would make the law more flexible, when the law ought not to be made more flexible; the proper function of the jury was only to determine questions of fact; murder should always earn "the dread sentence," even though this was not to be carried out; the jury would have a very difficult task, and indeed an intolerable burden, in finding whether there were extenuating circumstances, especially if these were not defined; in short, the scheme was completely wrong, shocking, unworkable

⁴ Cmd. 8932 of 1953, pp. 194 *et seq.*

and impracticable, and could not even be tried for an experimental period of five years.⁵

This controversy is probably not of lasting importance, because there must come a day when even England will turn her back on capital punishment, with the morbid excitement and violent emotions that it so plainly stimulates. Apart from the problem of capital punishment, the limitation of the jury's function to the determination of guilt is accepted as sound. It would be impossible to make advances in penal theory and practice if this all-important matter were to be entrusted to an ephemeral body of amateurs. On the other hand it must be confessed that the division of functions imposes a certain strain. A judge, in imposing sentence, may not be certain what facts the jury has found. This difficulty is particularly prominent in crimes of elastic definition, such as manslaughter (p. 247) and bigamy. More serious is the psychological conflict that may be induced in the juror who has a strong sense of social responsibility. It is asking much of a man to return a true verdict in the manner of a computing machine and without thinking of the consequences to which that verdict may lead. The present division of functions between judge and jury supposes full confidence in the judge. If a juror is violently averse to the sentencing policy of the Bench, the only way in which he can make sure of thwarting it is by bringing in an acquittal. In France, Belgium, Spain and Austria, estrangement between jury and judge frequently resulted in refusals

⁵ Parl. Deb., H.L., Vol. 185, col. 137 *et seq.*; H.C., Vol. 536, col. 2075.

of the jury to convict, and this was met—successfully, in the opinion of some observers—by giving the jury a full share in the determination of the penalty.⁶ In England a similar situation has arisen with respect to driving offences. Although acquittals for these offences by juries are condemned by lawyers, and very often deserve the severest censure from any public point of view, some failure of justice must be recognised to be the almost inevitable consequence of the present restriction of the jury's powers. Jurors generally do not believe, with judges, that prison is the sovereign remedy for the dangerous or drunken motorist. If these offences are to be left to jury trial, it appears rational to suppose that a greater number of convictions could be secured, with much benefit to the public, if the jury in convicting were able to stipulate that the punishment should be confined to deprivation of the driving licence. Unhappily the debate on the capital punishment Report does not suggest that the legislature will allow itself to be influenced by rational considerations.

⁶ Mannheim in 53 *Law Quarterly Review* 400.

CHAPTER 11

MAGISTRATES' COURTS

THE topic of justice in magistrates' courts can be dismissed rather briefly, because, unlike the jury system, it has been the subject of full investigation and discussion, so that the main issues have been well considered and are generally known.

LAY OR PROFESSIONAL JUSTICE

The bulk of summary jurisdiction is dispensed by unpaid justices of the peace, otherwise called magistrates, sitting in over a thousand courts. There are stipendiary magistrates in London and some large towns, but the total of these paid professionals is only forty-two, and there is no tendency to increase their number; rather the reverse. Even in London itself, lay justices do a large amount. The position is altogether different in Ireland, which is covered by a system of stipendiary magistrates; in Scotland too, the bulk of summary jurisdiction is exercised by sheriffs and sheriffs-substitute, who are comparable to our stipendiaries. The French *juge de paix* is also an official. Paradoxically, the English amateur justice of the peace is entrusted with much wider powers than the *juge de paix*, for whereas the former can, when sitting in court with his colleagues, sentence to imprisonment for as long as six months or a year, and inflict substantial fines in addition, the

French magistrate (who sits alone) can only punish the petty offences known as *contraventions* (his sole field of jurisdiction) by imprisonment for five days and a fine of 6,000 francs—about £6.

The English system is sometimes said to be better than the French because the justice of the peace does not belong to an official hierarchy. This, however, is not a cogent argument in favour of having unpaid justices. The English stipendiary belongs, in a sense, to an official hierarchy; but he does not seek promotion, and his promotion does not depend on the favour of an official prosecutor. Any defects that may be found in the hierarchical system of the French magistracy are not inherent in a system of professional magistrates.

A second argument for the English system is that, as with the jury, it brings the ordinary citizen into the administration of justice. There may be something in this, provided that the quality of justice does not suffer through ignorance and inexperience. As a by-product of this advantage, it is claimed that because criminal justice is largely administered by laymen it has to be kept simple and intelligible. The argument was considered in the discussion of the jury system. No one who has any acquaintance with the labyrinth of cases, statutes, orders and by-laws constituting English criminal law can really believe that it is simple and intelligible.

If we put aside these somewhat illusory advantages of amateur justice, a few solid merits remain. Because amateur justice is part-time justice, it may hold less risk that staleness and cynicism will grow

from the never-ending series of sordid cases than does the professional kind. The lay justice is not compelled to continue this work for the sake of his living; he does it because it is in some way its own reward. However, even if this difference between lay and professional justice is true as a generalisation or tendency, the extent to which it is realised in practice depends on human factors. The stipendiary magistrate may show all the qualities of freshness and humanity to be expected of a layman; and for this there is lasting memorial in the great-hearted books written by Mr. Cecil Chapman, who dispensed justice in several London courts during a long and honourable career, and still more strikingly in the silver snuff-box presented to Mr. J. B. Sandbach, on his retirement from Marlborough Street, by the barrow-boys of London—though he had, he said, “done nothing to deserve such generosity, except fine them for obstruction.”¹ There must have been something in his manner of arriving at the fine to justify esteem. Mr. Claud Mullins, during his tenure at the North London Magistrates’ Court, was a pioneer in having offenders psychiatrically examined and treated. If a stipendiary is temperamentally unsuited to his job at the time of appointment, that indicates a fault in the method of appointment. After all, no one argues that an amateur dentist is better than a professional one because the professional is likely to get bored; yet a dentist’s work is infinitely more monotonous than that of a magistrate. There is a general impression that stipendiaries are overworked; even if

¹ *This Old Wig* (London 1950).

this were true it would be remediable, but in fact it is not true; a stipendiary sits only for three or four days in the week, and Mr. Mullins habitually complained of underwork.² If we now turn to lay magistrates, the assumed virtues of the amateur will not necessarily be seen in any particular individual. The lay magistrate may cling to office merely because of its power and prestige; he may be testy, bigoted, unreceptive and harsh. The conclusion seems to be that either system of magistracy can be made to work if the selection is wise, while either can be disastrous if the selection of magistrates is made on the wrong principles or insufficiently considered.

I think that it is true to say that the best stipendiary is greatly superior to the ordinary run of lay justices' courts. In particular, stipendiaries have generally shown themselves to be better than the lay magistracy in resisting the arrogation of power by the police in court proceedings—as is shown by the way in which some London stipendiaries, in shining contrast to most lay magistrates, refuse to accept police objections to the grant of bail as conclusive. The complaint is constantly made against lay magistrates that they are too much under the thumb of the police.

In England the stipendiary generally acts alone, whereas when lay magistrates are sitting as a court of summary jurisdiction the quorum is two, and frequently there are three or more. This difference is heavily in favour of the lay court. There is grave risk in entrusting the administration of justice to an individual, because once appointed he is virtually

² *Fifteen Years' Hard Labour* (London 1948) 68-70.

uncontrollable, save in the infrequent cases that go on appeal. Since we have no system of probationary magistracies, it is quite possible for an irremediable mistake to be made in appointment. There is not even a medical examination to see whether the candidate for appointment is deaf.³ The decisions of the single stipendiary may be affected by an oncoming physical or mental illness. An unsuitable lay magistrate is less capable of doing harm, because, as a member of a collegiate court, he can be outvoted. Again, in the lay court there will be some doubts or differences of opinion which will be settled by discussion among the justices; judgment without discussion, as happens in the one-man court, is apt to be unreflective.

This is not logically a difference between professional and lay justice; it is a difference between one-man and collective justice. On the Continent the administration of justice is both professional and, except in the most trivial cases, collegiate. In France, as has already been pointed out, the *juge de paix* has jurisdiction only over *contraventions*, defined to cover the most trifling offences. Offences next in order of seriousness, *délits*, are tried before the *tribunal correctionnel* composed of three judges. The most serious offences, *crimes*, are tried before the *cour d'assises*, composed of no fewer than three judges and a jury.

It would be theoretically possible to introduce

³ On this and other points Albert Lieck wrote from a lifetime's experience in his *Bow Street World* (London 1938), Chap. 17.

in England a court consisting of two or more stipendiaries; but as a general solution this is ruled out at the moment not only by the question of expense but by the impossibility of recruiting enough lawyers of sufficient competence and experience. It would, of course, be practicable to double our forty-two stipendiaries in order to enable all courts to have at least two magistrates. Another solution would be to have a magistrates' court consisting of two lay magistrates with a stipendiary as chairman, the stipendiary travelling within the county on circuit, and being present at least for the more serious cases.⁴ This would seem to have much to commend it: if there are any distinctive virtues in professional and lay magistrates respectively, a court containing both would seem to combine them all. It would offer both the technical knowledge and experience of the professional, and the freshness, common sense and knowledge of the world of the layman. The Royal Commission on Justices of the Peace supported this proposal to the extent of saying that it would be a good thing if stipendiaries extended the practice adopted by a few of them of sitting with lay justices rather than alone.⁵ But the Commission refused to propose any general increase in the number of stipendiaries, and thought that to add

⁴ The operative word is "serious," not "difficult." It is impossible to know beforehand which cases will turn out to present difficult questions for determination; but offences can be classified by the likelihood of their being serious. For example, parking offences are never serious, and present no treatment problem, whereas all cases of larceny or careless driving must be classed as serious, in the sense that a difficult treatment problem may arise.

⁵ Cmd. 7463 of 1948, p. 62.

stipendiaries to lay courts would cause the lay magistrates to think that they had no real responsibility or authority.⁶ It seems slightly inconsistent to advocate introducing lay magistrates into the stipendiary's court, but not stipendiaries into the lay magistrates' court. In fact the logic is understandable only on the supposition that existing stipendiaries are an evil to be accepted but neutralised as far as possible. The idea of having a professional judge with lay assessors, on the lines of the German *Schöffen* previously referred to, still appeals to some observers, and deserves more study than it has received. It is a pity that the Royal Commission did not hear evidence from lay magistrates who were accustomed to sit with stipendiaries, before producing its *a priori* objection to the system. There is certainly no reason in law why lay magistrates sitting with a stipendiary should feel inferior, for they have an equal say in the decision with him.

The chief difficulty in the way of a system of stipendiaries is the practical one that it would require the appointment of about five hundred stipendiaries, which if done in one operation would involve "scraping the barrel" of available legal talent. But there would be no need to cover the whole country at once—a start could be made with the densely populated areas. Also, the demand once started would in time bring about the supply. It is argued that the supply would tend to take the form of youngish men who have obtained legal qualifications with the intention of securing such appointments. However, if the stipendiary were sitting with lay

⁶ *Ibid.* p. 56.

magistrates, comparative youth might not be a disadvantage, because the tendency in a wholly lay Bench is for youth to be under-represented.

It must be confessed that this discussion of the relative merits of lay and professional justice is at present merely theoretical, because England is more firmly committed than ever to the lay system. Before the war, lay magistrates did not enjoy anything like the immunity from criticism of the jury, and many lawyers expressed the most profound dissatisfaction with them—some of the sharpest reprimands in individual instances of injustice coming from the Divisional Court under the presidency of Lord Hewart. As a result of proposals made by the Royal Commission of 1948 a number of improvements have been made in the lay Bench, and criticism seemed to die down, though there are, lately, signs of its revival. It is plain that a majority of critics still wish to see reforms in the lay system rather than any extension of the professional one.⁷

The major defect in the system of lay magistrates is not so much their ignorance of law, because that can be remedied by advice from the clerk, but their tendency to lack of knowledge of problems of treatment. This lack of knowledge is at present shared by many professional judges. If we look forward to the future, when still further advances will have been made in psychiatry and in our knowledge of the causes of crime, the selection of treatment, even at

⁷ But among judges who have expressed decided opinions in favour of stipendiaries are Sir Travers Humphreys, *Criminal Days* (London 1946) 170 *et seq.*, and Sir Henry Slessor in a letter to *The Times*, August 17, 1948.

the level of the magistrates' court, may well become too difficult a matter for the amateur to handle. Even at the present day there are criticisms of magistrates' courts for the persistence of some of them in sending first or early offenders to short periods of prison, and for their failure to take careless drivers off the roads by suspending their driving licences.⁸

THE APPOINTMENT OF LAY JUSTICES

Lay justices are appointed by the Lord Chancellor on the recommendation of advisory committees for counties and boroughs, which are themselves appointed by the Lord Chancellor. If we are to have suitable persons appointed as justices, everything depends on having suitable persons as members of the local advisory committees who do the recommending. Unfortunately the names of the members of these advisory committees are kept secret, so that it is not possible for an observer to judge whether they are well constituted. Both the Lord Chancellor himself and the members of his advisory committees are thus protected from public criticism in their exercise of public power. The reason advanced for this apparently furtive practice is that it is necessary in order to prevent people canvassing for nomination. It may be replied that if members of the advisory committees know their job they will make it clear to anyone who canvasses their support that this is itself a ground for disapproval.

⁸ For a fuller discussion see Lord Chorley (as he now is) in 8 *Modern Law Review* 1; R. M. Jackson in 9 *ibid.* 1.

Everyone agrees in principle what the ideal justice of the peace should be. In the words of the Royal Commissions of 1910 and 1948, justices should be men of moral and good personal character, general ability, business habits, independent judgment, and common sense. They should regard their appointments not as a reward for past service but as offices of trust requiring onerous public work. They should come from every social grade and all shades of creed and political opinion, though appointments should not be influenced by considerations of political opinion. In fact before 1948 appointments were frequently made on a political basis with a view to giving all political parties a fair share. The Commission condemned the practice, but refused to sponsor the Howard League's suggestion for area sub-committees which would have put the area committees in touch with all parts of their counties. Even this suggestion might not have provided a guarantee that all suitable names would be considered. There has been some improvement since the Royal Commission reported, but naturally it will take time for any new policy to show itself in the composition of the Bench, and complaints are still made—were, indeed, made by Lord Jowitt when he was Lord Chancellor—that advisory committees continue to ignore the claims to appointment of those not engaged in politics.⁹

⁹ In an address to the Magistrates' Association in 1949, Lord Jowitt said that he sometimes thought that his advisory committees "neglected that small class of people who are completely non-political, and yet they are the most valuable set of people from whom appointments to the Bench could be made." It is surprising to call persons who do not take an active part in politics a "small class."

Thus it seems that no great progress has been made in putting an end to the discredited practices of political jobbery, and it is still difficult for a man to become a justice of the peace by any other route. Local councillors, having been elected to represent their party, still regard themselves as entitled to become magistrates after some years on the council.

The Royal Commission also commented upon the relative lack of younger persons, and persons from the lower income groups. The proportion of adult court justices in the prime of life, that is to say under forty years of age, was only 1.3 per cent. of the total; even if one went up to forty-five years of age, the proportion was only 4.7 per cent. Of these the greater number were women. Since the Commission's Report, efforts have been made to rectify this situation, but some would say insufficient efforts. Whether the situation be remediable or not, the fact is that lay justice means, at present, predominantly aged justice. The Commission considered a proposal that courts should be held in the evenings, in order to allow persons to be appointed as justices who were fully employed in the day; but objections were found to this idea, particularly that work cannot be done well if those in court are tired.

It may be doubted whether the system of appointment to magistracies will be satisfactory until all hole-and-corner methods are swept away and vacancies are publicly advertised and appointments made upon interview, references and tests. A practical kind of examination could be devised, persons "short-listed" being invited to sit on the bench as

observers, and then to give their opinions on the cases they have heard, in order that their ability to appreciate the significant facts and to form a wise judgment can be tested.

The practice of regarding appointment to the Bench as a reward for past public services is objectionable, but becomes doubly so when the magistrate attempts to combine his judicial duties with a continuation of activity in local government. In a recent survey of forty magistrates' courts it was discovered that in thirty-six of them at least half the magistrates were active in politics.¹⁰ This means that, since the commission for each area is limited, fewer places are left for teachers, professional men and women, intelligent mothers, and others interested in social work. It means, too, that the councillor magistrate, who often has to earn his living as well, has insufficient time for the proper performance of his judicial duties. The responsibilities attaching to the office of magistrate are now so great that they should be regarded as absorbing all the energies that a man can spare for public work.

For centuries the justices of the peace were responsible for performing the functions of local government, and this has left its legacy in the custom whereby prominent members of local councils become *ex officio* magistrates. This relic of the past is indefensible at the present day, because the kind of man who may make a good councillor may lack the

¹⁰ See the *Daily Mirror* "Spotlight on Justice" (1954) which contains a disquieting survey by a body of observers of the functioning of magistrates' courts.

qualities of character and temperament necessary for judicial office; besides, the same man cannot in his spare time perform with satisfaction the duties of two such important offices. The Royal Commission therefore recommended the abolition of all *ex officio* magistracies except those of mayors.¹¹ The exception was an illogical one; but in any case the Government, while recognising that *ex officio* appointments were objectionable from the point of view of justice, retained them all as a concession to local government sentiment. This deplorable feebleness, which was castigated even by *The Times*, means that not only mayors but chairmen of county and district councils continue to be magistrates during their period of office, though they may be utterly unfit to sit on the Bench. Their term of office is so short, and they are such busy people, that they cannot be expected to undergo a period of training or to acquire experience in the art of justice.

THE TRAINING OF JUSTICES

It is universally agreed that all magistrates who undertake judicial duties need systematic training for their job, but no fully effective steps have been taken to secure this. Courses are organised by the Magistrates' Courts Committees, and both residential and correspondence courses are provided by the Magistrates' Association, but they are not compulsory and the majority of magistrates do not use the

¹¹ Cmd. 7463 of 1948, pp. 41, 44. The Commission thought that the mayor should not preside except on formal and ceremonial occasions.

facilities offered. It is surely time for exhortation to be replaced by compulsion. No magistrate should be allowed to adjudicate until he has undergone training in the elements of evidence and procedure, and above all in the progress of thought about the treatment of offenders and the practical remedies that Parliament has put into his hands. Shall a defendant be bound over, put on probation, fined, ordered to pay compensation, sent to a probation home or a probation hostel, imprisoned, or, in the case of juveniles, placed in a foster-home or sent to an approved school or Borstal institution? These are but some of the possible courses open to the magistrate, and to make a wise choice he must realise the need for studying the character and background of the offender and know the likely effect of each form of treatment. It is essential for him—and this applies to stipendiaries as much as to lay magistrates—to visit the kind of institutions to which he will be committing people, but few magistrates at present do it.

The obstacle in the way of compulsion is, of course, the attitude of mind that regards appointment to the Bench as a reward for past public or party services. Those who wish to obtain merely the dignity of the office and to write the letters "J.P." after their names may be allowed to do so, as long as the magistracy is regarded as a reward for public service, and they could perform the notarial function of authenticating certain legal documents, but they should not be allowed to administer justice without first learning something of the skill needed for it.

The proposal for the better education of lay

justices is a commonplace of discussion and certainly offers a hopeful line of advance. But whether this specialised education can be more than superficial for most magistrates, and whether it can really do in place of a professional chairman, is a matter on which I need offer no further comment.

THE AGE OF RETIREMENT

A senile court is a great evil. As one writer vividly puts it, "nothing is more upsetting to an inexperienced witness than to have to shout embarrassing or unmentionable things at a deaf old gentleman."¹² According to a survey made by the Royal Commission, over 60 per cent. of adult court justices on the active list were aged sixty or over; 82 per cent. were between sixty-five and seventy-four inclusive; 11 per cent. were over seventy-four. Moreover, although older justices were more likely than younger justices not to attend at all, the older justices who did attend were more frequent in their attendance; and the older magistrates held the great majority of chairmanships.

The reformers wanted the age limit to be sixty-five, with power to extend it in individual cases; but the Royal Commission was not willing to fix it lower than seventy-five, with sixty-five for juvenile court justices. This recommendation has since been put into effect.¹³ It seems strange that a person should

¹² J. A. Joyce, *Justice at Work* (London 1952) 52.

¹³ By the Justices of the Peace Act, 1949, the Lord Chancellor may transfer from the active list to a "supplemental list"

be entrusted with power over the fortunes and liberties of others at an age when his intellect is likely to be somewhat impaired, not to mention his vigour, acuity of sense, and capacity to understand the young. The existence of some or indeed many justices who retain their youthful qualities notwithstanding advanced age does not destroy the case based upon general observations.

THE CHAIRMAN OF THE BENCH

A great improvement has been made in respect of the election of chairman, which is now by secret ballot of the justices, so that there is no longer any need for election to the chair to go by senility, or for mayors to assume the chair in right of their office when they have never served as magistrates before.

However, human nature being what it is, there is a strong tendency even under the system of ballot to go on re-electing the same chairman, even though he has become unfit for his office, because of the reluctance to give offence to an old and honoured colleague. This can only be prevented by fixing a strict legal limit to the time for which a chairmanship can be held.

THE RATIONALISATION OF JURISDICTIONS

Petty sessional divisions are extremely ancient and have not been thoroughly reconsidered since easier and speedier travel made it feasible for a court to draw

justices who are of the age of 75 or who by reason of age, infirmity or other like cause, should cease to exercise judicial functions.

its clients from a much wider area than formerly. Under the Act of 1949, Magistrates' Courts Committees are established which can propose schemes for re-arranging divisions.

The Act also removes some anomalies in respect of commissions of the peace. Before 1949, a number of small boroughs had their own commissions, which meant that they had their own justices who, owing to the small number of cases, did not obtain adequate experience, besides not furnishing enough work to occupy a full-time clerk. The Royal Commission, following the Roche Committee on Justices' Clerks, recommended that separate commissions of the peace should be abolished in the smaller boroughs, from which it would follow that these boroughs would become merged in the county machinery, though courts would still be held within the boroughs by the county justices. Unfortunately this sensible proposal met with a chorus of disapproval from the boroughs affected, who regarded their local commissions as a matter of tradition and prestige, and so it was not fully adopted. The compromise embodied in the Justices of the Peace Act is that non-county boroughs lose their separate commissions if they have a population under 35,000, unless, having their own quarter sessions, they have a population of at least 20,000 or else are specially saved by order of the Lord Chancellor.

THE CLERK TO THE JUSTICES

The position of the justices' clerk is a curious anomaly. When justices were country gentlemen, trying

offenders in the privacy of their own houses and according to such procedure as might suit them, with small right of appeal, they did not need an exact knowledge of the law. In time, however, it became the practice of justices to appoint someone, perhaps a local solicitor, as their clerk, who would not only take a note of the evidence and keep records in order but advise his masters on matters of law. At the present day the legal knowledge of the clerk is essential to the proper working of the lay magistracy. Thus has arisen the peculiar situation in England that whereas justices are entrusted with the duty of deciding cases involving points of law, all the technical knowledge is possessed by their servant, on whose advice they must therefore rely. If legal argument takes place in court, the argument is addressed to the justices, who may hardly follow a word of it; in reality, however, it is intended for the ears of the clerk. Rulings on points of procedure and evidence are supposed to be made by the justices, the clerk having no authority to control the proceedings of the court; in practice, however, the decision must be taken by the clerk, who is thus led or tempted to interfere in the proceedings in a way that is theoretically unwarrantable. The clerk, in a word, has power without acknowledged authority or responsibility. This imposes a constant strain upon the working of the system, it being alleged either that magistrates do not sufficiently heed the advice of their clerk, or, more frequently, that they are too subservient to him.

If the clerk is regarded as the real judge of the

law, he and the justices may be compared to the judge and jury respectively in a trial on indictment, except that the justices, unlike the jury, are specially chosen for their competence, and devote a substantial part of their lives to the administration of justice. This comparison makes the justices seem like a good special jury with continuity of experience. Since the justices are accustomed to dealing with evidence, the advice of the clerk is not required on questions of fact, and the opinion is held that he should confine himself to the legal aspects of the case. Another difference between the clerk and a judge is that the clerk's advice is normally given to the justices in the privacy of their retiring room. It has been suggested that it would be an improvement for the clerk to sum up the law to the Bench in public¹⁴; if he did this, the resemblance between him and a judge sitting with a jury would become closer. The suggestion would have the advantage of obviating the need for the clerk to retire with the Bench, which tends to foster the impression, often well founded, that he exercises an undue domination over the justices; also, there would be a public check on how the clerk does his job, and whether he gives the directions relevant to the defence that has been raised; and the defeated party would have some material for judging whether the magistrates have applied the law stated to them by the clerk. There are, however, many who would

¹⁴ This was put forward in *Looking Ahead*, a Conservative Party report, published in 1945; the proposal was approved on the other side of the political fence by the Haldane Society in its *The Justice of the Peace Today and Tomorrow* (1946). See also 7 *Howard Journal* 199.

object just as strongly to a proposal that a clerk should sum up in public as to a proposal that a judge should retire with the jury—so deeply do traditional practices affect our valuation.¹⁵ Apart from the offence to tradition, the proposal has the practical disadvantage that it would add considerably to the length of cases. Under the present system the clerk can, if he is allowed to retire with the justices, see how the discussion goes and remind the justices of any point that they are in danger of overlooking; this is more expeditious than giving a full summary of the law in every case.

Consternation was recently caused when some decisions of the Divisional Court limited the right of the clerk to retire with the justices. Under the new ruling, he should not retire with them as a matter of course, but only when his advice is sought, and then only in order to advise on questions of law, elucidate his note of the evidence, or explain the practice of neighbouring Benches in dealing with similar offences.¹⁶ One of the reasons for this restriction is that the defendant may feel that the clerk has a bias against him, perhaps because the defendant has appeared so often before the clerk previously, or because of the way the clerk has questioned him in the witness-box, or brought out the evidence for the prosecution, and he may therefore feel that he has been unjustly treated if the clerk closets himself with the justices before their decision has been announced.

¹⁵ It is a horrifying breach of procedure for a judge to communicate privately with the jury: *Green* [1950] 1 All E.R. 38.

¹⁶ Practice Note [1953] 1 W.L.R. 1416.

However, the new practice does not altogether eliminate the occasions on which such a sense of injustice may be felt. Limited as it is, it has aroused strong criticism from some magistrates who feel themselves in need of the constant advice and support of their clerk.

DECISION BY MAJORITY

It is one of the inconsistencies of English law that whereas the verdict of eleven out of twelve jurors is not sufficient for conviction, a bare majority of magistrates is accepted. The decision of magistrates may therefore be reached by two out of three, or even four out of seven. Obviously, three experienced magistrates dissenting out of seven show a much more formidable body of dissent than one jurymen holding out against eleven. It is difficult to imagine any argument for unanimity on the jury that does not apply, with much stronger reason, to the decision of magistrates.

CONCLUSION

Passing in review the distinctive features that were attributed at the beginning to the English criminal trial, it will be seen that the first, namely the reticent attitude maintained by the judge during the adduction of evidence, emerges with full marks. The question and answer method of eliciting evidence in chief was accorded approval on balance, and the common law practice of cross-examination was thought to be an essential safeguard. In the law of evidence, full approval was given to the cautionary rules of corro-

oration, and new ones were suggested for three other cases: identification evidence, evidence in charges of writing anonymous letters, and all evidence that experience shows is likely to be warped by sexual motives. The English rules excluding prejudicial evidence of bad character and similar criminal acts survived critical inquiry, notwithstanding the difficulty occasioned in their application.

It is impossible to assess one's own impartiality, and these approvals may, for all I know, be the result of an insular bigotry; but, to balance them and show some kind of open mind, the foreigner has been given the best of it on a number of other counts. The defendant's freedom from being questioned at the trial was thought to be inferior to the practice in Continental countries, where he can be asked questions without compulsion to answer. The French version of the hearsay rule was preferred to ours, and, as regards the composition of the tribunal that is to try the issues of fact, the tendency of the argument was to prefer the German *Schöffen* system to our juries and lay and stipendiary magistrates.

