

THE HAMLYN LECTURES

EIGHTH SERIES

TRIAL BY JURY

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TRIAL BY JURY

BY
THE HONOURABLE
SIR PATRICK DEVLIN
One of Her Majesty's Judges in the High Court of Justice

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C O N T E N T S

<i>The Hamlyn Trust</i>	page vii
1. ORIGIN OF THE JURY	3
2. THE COMPOSITION OF THE JURY	17
3. THE JURY AS A JUDICIAL TRIBUNAL	41
4. THE CONTROL OF THE JURY	61
5. THE CONTROL OF THE JURY (contd.)	92
6. THE DECLINE OF THE JURY AND ITS STRENGTH	129
<i>Notes</i>	167

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THE Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn, of Torquay, who died in 1941, aged 80. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of dominant character, intelligent and cultured, well versed in literature, music and art, and a lover of her country. She inherited a taste for law, and studied the subject. She travelled frequently on the Continent and about the Mediterranean and gathered impressions of comparative jurisprudence and ethnology.

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows :—

“ The object of this charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European countries, including the United Kingdom, and the circumstances of the growth of such jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they

enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them.”

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The eighth series of four lectures was delivered by The Hon. Sir Patrick Devlin, at London University in November, 1956.

JOHN MURRAY

November, 1956.

Chairman of the Trustees.

ORIGIN OF THE JURY

CHAPTER 1

ORIGIN OF THE JURY

INTRODUCTION

TRIAL by jury is not a subject on which it is possible to say anything very novel or very profound. Having chosen it as the subject for these lectures, I am conscious that it is not one that will allow me to make the sort of original and enlightening contribution to English law and the study of comparative law which has been made by earlier Hamlyn lecturers; and also relieved that I shall not have to make an attempt in which in comparison with them I should not shine. I chose it because this lecture begins the eighth in the series and I did not like to think that the first decade in the life of the Hamlyn Trust might perhaps go by without any discussion of a subject which is so near to the heart of the Trust. For of all the institutions that have been created by English law, there is none other that has a better claim to be called—in the words of the Hamlyn Trust—“the privilege of the Common People of the United Kingdom”; it is one which no other European People enjoys¹; and it is one which for its healthy working requires the recognition by the Common People of the responsibilities and obligations attaching to it.

These lectures then are addressed to the common people, or to such of them as are interested in the way

that justice is done, and I hope that they will not find them too recondite or in parts too technical.* Certainly lawyers will find them very elementary. But I do not mean them to make up just a handbook for prospective jurors. I shall try to go deep enough to lay bare the workings of the jury system as it exists in England to-day. I shall be dealing with the present and not with the past, but I recognise that it is impossible to understand any English institution of any antiquity unless you know something of its history.

The English jury is not what it is because some lawgiver so decreed but because that is the way it has grown up. Indeed, its invention by a lawgiver is inconceivable. We are used to it and know that it works; if we were not, we should say that it embodies a ridiculous and impracticable idea. Consider what the idea is. Twelve (why twelve?) men and women are to be selected at random; they have never before had any experience of weighing evidence and perhaps not of applying their minds judicially to any problem; they are often, as the Common Law Commissioners of 1853 tactfully put it, "unaccustomed to severe intellectual exercise or to protracted thought."² The case may be an intricate one, lasting some weeks and counsel may have in front of them piles of documents, of which the jury are given a few to look at. They may listen to days of oral evidence without taking

* I have kept all legal references for the end of the book, where I have put also other matters of interest to lawyers.

notes—at least, no one expects them to take notes and no facility is provided for it in the jury-box, not even elbow room. Yet they are said to be the sole judges of all the facts. At the end of the case they are expected within an hour or two to arrive at the same conclusion. Without their unanimous verdict no man can be punished for any of the greater offences. Theoretically it ought not to be possible to successfully enforce the criminal law by such means.

How is it done? Two answers to that question can be given at once. The first is that the account which I have just given of the jury process, though not inaccurate, is a very superficial one. There is a great deal going on beneath the surface that tends to shape the jury's verdict. Most lawyers would readily assent to the generalisation that the jury is the sole judge of all questions of fact and the jury itself is invariably told that it is; but it is a generalisation that, when one stops to think more about it, is found to need a good deal of qualifying. The second answer is that the jury system is not something that was planned on paper and has to be made to work in practice. It developed that way simply because that was the way in which it was found to work and for no other reason.

ORIGIN OF THE JURY SYSTEM

It began as something quite different and the nature of its origin is shown by its name. A juror was a man who was compelled by the King to take an oath. It was the Normans who brought over this device

whereby the spiritual forces could be made to perform a temporal service and the immense efficacy which they possessed in medieval times used for the King's own ends. The oath then was so strong a guarantor of veracity that, provided that the men who were compelled so to answer were the men who must know the truth about a matter, there could be no better way of getting at the facts. No doubt it needed all the royal authority as wielded by the Norman kings to enforce this form of compulsion which is and always has been repugnant to the English mind. The King used it for obtaining information which he wanted for administrative purposes, for example, in the compilation of the Domesday Book, and the people who were compelled to answer were those who lived in the place where the inquiry was being held and who must therefore know the facts. Thus the jury originated as a body of men used in an inquisition or, in the English term, an inquest. The coroner or crowner, that is, the King's officer, and the jury he summons and the inquest he conducts come closer to the original of the jury than any of the forms it later took.

But the inquest was not at first associated with the administration of justice. Indeed justice was not thought to need any form of preliminary inquiry. Disputes were settled simply by one of the disputants proving himself by one means or another to be the better man. Trial by battle was one obvious way; it too was introduced by the Normans and was not liked by the English. Or a man might show the superiority

of his own oath by bringing as many of his neighbours as he could as compurgators to swear to the value of it and then some process of oath-counting, possibly ending in a fight, went on. It is all very reminiscent of schoolboy justice. Trial by ordeal was the most popular of the recognised means; and perhaps deservedly so by comparison with the others, because it was believed to signify the divine acceptance of a claim.

EARLY HISTORY

It was King Henry II who was directly responsible for turning the jury into an instrument for doing justice and Pope Innocent III who was indirectly responsible for its development as a peculiarly English institution. Henry II understood well the importance of extending the royal jurisdiction as a means of enlarging the royal power; and also the royal purse, for the conduct of litigation was in those days a profitable business. A jury which gave the King information for administrative purposes could also be used to give him information which would enable him to decide a dispute. The primitive nature of the older methods was in the second half of the twelfth century beginning to be recognised; the use of the jury was not only a superior procedure but was also one which could be used only in the King's courts, since he alone could compel the taking of an oath. By the Grand Assize and other petty assizes Henry ordained that in a dispute about the title to land a litigant might obtain a royal writ to have a jury summoned to decide the

matter. The character of the jurors was not thereby altered. They were men drawn from the neighbourhood who were taken to have knowledge of all the relevant facts (anyone who was ignorant was rejected) and were bound to answer upon their oath and according to their knowledge which of the two disputants was entitled to the land. When a party got twelve oaths in his favour, he won. This is the origin of the trial jury, though there was as yet no sort of trial in the modern sense. It is also the origin of the rule that the trial jury consists of twelve (it is, too, the reason why it is called the petty jury to distinguish it from the larger juries of presentment and attain) and also of the rule that the verdict of the twelve must be unanimous. Many romantic explanations have been offered³ of the number twelve—the twelve tribes of Israel, the twelve patriarchs, and the twelve officers of Solomon recorded in the Book of Kings,⁴ and the twelve Apostles. Not all of these suggestions are equally happy; the first implies that there may be a thirteenth juror who has got lost somewhere in the corridor and the last that there is a Judas on every jury. It is clear that what was wanted was a number that was large enough to create a formidable body of opinion in favour of the side that won; and doubtless the reason for having twelve instead of ten, eleven or thirteen was much the same as gives twelve pennies to the shilling and which exhibits an early English abhorrence of the decimal system. It is interesting to note that until trial in the

House of Lords was abolished in 1948 the figure of twelve was preserved there also and in a form nearer to the original; a verdict had to be supported by twelve peers and subject to that was given according to the majority.⁵

Some years before he originated the trial jury Henry II had found another use for the jury and that was as a jury of presentment or accusation. Instead of addressing a specific inquiry to a jury he addressed a general one. He required them in effect to report any of their neighbours whom they suspected of committing certain crimes. This was the origin of the bill of indictment and the grand jury; and the grand jury, though in the nineteenth century its work was superseded by an efficient police force and the committing magistrates, survived until 1933.⁶ The Assize of Clarendon, which in 1166 devised the procedure, marks the introduction of the jury into the criminal process. But the grand jury had nothing to do with the trial and indeed the Assize itself prescribes that those who are presented by it are to be tried by ordeal.

In November 1215 Pope Innocent III prohibited trial by ordeal. That at least was the immediate effect of the decree of the Fourth Lateran Council, though in form it merely forbade ecclesiastics from taking part in it. On the Continent, where the science of law and legal procedure was much further advanced than in England, the judges were quick to devise new and more rational forms of proving guilt. In England—

the Crown was then in the infancy of Henry III—the judges who went out on circuit were left to improvise. The gaols had to be delivered. For fifty years crimes had been tried by ordeal and the older modes had become things of the past. Something had to be devised and it was natural that the judges should use the jury. Was the prisoner willing to be judged by the neighbourhood? Would he “put himself upon his country”? If so, let him plead Not Guilty and take their verdict. The old phrase is to-day still occasionally used when the prisoner is given in charge to the jury: “and by his plea he hath put himself upon God and the country which country ye are.”⁷ If he would not put himself on his country, he got no trial at all and in the early days was probably condemned simply on the presentment of the grand jury or at best was kept in prison until he did plead: later, the *peine forte et dure* was employed to force him to plead. It seems always to have been accepted that he could not be tried by jury without his consent.

At first no sharp distinction was drawn between the jurors who presented and those who tried. It was not until 1352 that it was enacted by a statute of Edward III that no indictor should be put on the inquest. By that time the petty jury, formed on the model of the jury of the Grand Assize, was an established part of the process. The process was still, and for many years remained, an inquest—an inquiry of those who were supposed to know. Until 1348, after the jury had been sworn to try treason or felony, a proclamation was made in these terms⁸—

“ If any one can inform my Lords the King’s Justices, or the King’s Attorney-General, on this Inquest to be taken between our Sovereign Lord the King and the Prisoner at the Bar, of any Treasons, Murders, Felonies or Misdemeanours, done or committed by the Prisoner at the Bar, let him come forth and he shall be heard, for the Prisoner now stands at the Bar upon his Deliverance.”

These words date from not long after the time when the jury was expected to know all about the treasons, felonies and misdemeanours anyway and were very unsuited to an era in which all such information is sedulously kept from them. If in the twentieth century anyone had responded, there would have been nothing for it but to discharge the jury and begin all over again. But few Englishmen really enjoy “ coming forth ” and I never heard of the invitation being accepted.

The words illustrate vividly one stage in the metamorphosis of the jury, the stage in which they were changing from a body that acted on its own inherent knowledge into one that received information from outside. At first the information was supplementary and given haphazardly—perhaps privately to one or two of the jurors by the plaintiff or defendant (much as a party interested in the decision of a committee might nowadays buttonhole one of the members and put his point of view) or perhaps publicly in response to a general invitation. The idea of the reception of

evidence matured slowly. It began by the parties putting their case, but not really distinguishing between pleadings, evidence and argument. It ended with the jury as it is to-day—a body whose strict duty it is to “hearken to the evidence” and return a verdict accordingly, excluding from their minds all that they have not heard in open court. If any one of them has any knowledge of the facts, he must state it publicly, and the result of that to-day would probably be that he would be asked not to serve. Jurors are still drawn from the neighbourhood, but only because it would be inconvenient for them to be brought from afar.

NO SEPARATION OF POWERS

I shall say a little more about this later period of change when I come to consider the extent of the jury's present function as judges of the facts. Meanwhile in the history of the early period, will you note two things which especially contribute to an understanding of the way the jury works to-day? The first is that judge and jury were never formally created as separate institutions; there was never any separation of powers, never any conscious decision by anyone that questions of law ought to be decided by lawyers and those of fact by laymen. The jury derived all its powers from the judge and from his willingness to accept its verdict; even now, if he were to refuse to do so, he would offend against no statute and his judgment would be good until reversed by a higher court. In theory the jury is still an instrument used

by the judge to help him to arrive at a right decision ; from the first and, as you will see, throughout its development, the judges have kept the jury to that nominally subordinate role. The verdict has no legal effect until judgment is entered upon it. The jury's function was always, and still is, simply to answer the question so that judgment may be given. Its place in the trial has become important not because it has been granted or usurped additional powers but simply because the coming of rational methods of proof has given to the task of fact-finding an importance unrecognised by thirteenth-century judges ; if they had recognised it, they would probably have kept the task for themselves. We talk nowadays of the province of law and the province of fact almost as if they were separate jurisdictions, and sometimes of judges encroaching on the jury's province. No doubt the easiest way of explaining the modern relationship between judge and jury is to start from the hypothesis that the law is for one and the facts for the other. But you will find that judges have a good deal to do with the facts and you must not think of them simply as invaders on territory to which they have no title.

NO REASONS

The other point is that the origin of the jury's verdict explains a unique feature of it that is still of the first importance. Judges give their reasons, either so as to satisfy the parties or because they themselves want to justify their judgments. Even arbitrators detail their findings of fact. The jury just says yes or no. Indeed,

it is not allowed to expand upon that and its reasons may not be inquired into. It is the oracle deprived of the right of being ambiguous. The jury was in its origin as oracular as the ordeal : neither was conceived in reason : the verdict, no more than the result of the ordeal, was open to rational criticism. This immunity has been largely retained and is still an essential characteristic of the system.

THE COMPOSITION OF THE JURY

CHAPTER 2

THE COMPOSITION OF THE JURY

PROPERTY QUALIFICATIONS

THE juryman in the eyes of the law is the epitome of the reasonable man, the man in the street or, to take from a well-known judgment a phrase that is now becoming archaic, "the man in the Clapham omnibus." But it is an odd thing that if you stopped several men in the street or held up the Clapham omnibus while you interrogated the passengers, you would very likely find that only a few of them were qualified to serve as jurors. At common law the qualification was that the juror should be a freeman, not a villein or an alien. But from the earliest times statutes have imposed a property qualification as well. A man of property was thought less likely to be corruptible and more easily punishable by fine.¹ The qualifications in force at present were settled in 1825² and have remained the same ever since, notwithstanding that in the 130 years that have passed England has changed from an oligarchy in which the ordinary man had little say in the affairs of the country into a democracy in which every man and woman has the vote. A juryman must still be either a property owner or a householder. If he owns freehold property it must be of the annual value of £10 or more; and if leasehold property, it must be on lease

for not less than twenty-one years and of the annual value of £20 or more. If he is a householder, he must reside in property of an annual value of not less than £30 in London and Middlesex and £20 elsewhere, or in "a house containing not less than fifteen windows." These figures, which were doubtless significant in 1825, are no longer of much importance. They may be compared with those which are the upper limits for the purposes of the Rent Acts, namely, £100 in London and £75 elsewhere. There may be a few country cottages which have an annual value of less than £20, but at least since the recent revaluation which came into force in April, 1956, there cannot be many properties below that annual figure. The real factor therefore restricting the jury franchise is not the exclusion of any appreciable number of property owners and householders but the exclusion of all citizens who are not householders, and that means the majority of the adult population.

QUALIFICATIONS FOR THE SPECIAL JURY

The qualifications that I have stated are those for what used to be called the common jury, to distinguish it from the special jury. At first special juries often consisted of persons with special qualifications, professional or trade, for determining the issue to be tried. There was once even a jury of attorneys summoned to try a complaint by Sir Thomas Seton, Justice (the first perhaps of a select band of judicial litigants), that he had been called a traitor in the presence of the Treasurer and Barons of the

Exchequer; the jury gave him 100 marks damages.³ But this useful form of specialised jury did not survive, and the special jury became simply a jury with special social or property qualifications. The Act of 1825 provided that it should be formed out of "persons of higher degree,"⁴ to be used, as Blackstone puts it, "when the causes were of too great a nicety for the discussion of ordinary freeholders."⁵ The method of selection was for the proper officer of the court to select from the Sheriff's book, in the presence of the attorney for each side, forty-eight of those whom he considered to be the principal freeholders. The plaintiff's attorney then struck twelve names from the list; the defendant's attorney struck another twelve; the remaining twenty-four were returned as the panel and the first twelve called into the box constituted the jury. This method continued in force until the Juries Act of 1870 provided for a separate class of special jurors; they were to be persons "who shall be legally entitled to be called an esquire, or shall be a person of higher degree or shall be a banker, or merchant,"⁶ or who should occupy premises of a higher value than that required for the common jurymen. From 1870 until 1949, when it was abolished,⁷ there was a special jury list for civil cases and it was the arena for all the great *causes célèbres*. All that is now left of it is the City of London Special Jury which can be used when a jury is required in any trial in the Commercial List.⁸ That too is getting rarer and I do not think that there have been more than one or two cases since the war.

EXEMPTIONS AND DISQUALIFICATIONS

The property qualification, settled in 1825, is subject to certain disqualifications on specific grounds and to exemptions, most of which were settled in 1870.⁹ The chief alteration since then has been the removal in 1919 of the disqualification of women.¹⁰ The 1825 Act settled the age limits as twenty-one to sixty.¹¹ Disqualification is now very limited,¹² and anyway a person disqualified is liable to serve if his name is included in the jurors' book.¹³ The chief exemptions are peers, members of Parliament, county and town councillors, lawyers, clergymen, medical men of all sorts (including dentists, chemists and veterinary surgeons), soldiers and sailors, policemen and post office servants. That is not a comprehensive list, but it is sufficient to show that the exemptions are wide enough to affect quite considerably the character of the jury.

The jury is not really representative of the nation as a whole. It is predominantly male, middle-aged, middle-minded and middle-class. This is due mainly to the property qualification and to some extent to the character of exemptions. It is the property qualification that makes it chiefly male simply because there are far fewer women householders than there are men. At one time it was suggested that the names of men and women should be kept in separate boxes and drawn alternately so as to make up a jury equally composed of both sexes, but it was ruled that this was not in accordance with the statute and that the names must be drawn from one box indiscriminately.¹⁴ I have

never seen more than four women on a jury and you are almost as likely to find none as three; two is the commonest number and one is quite usual. The property qualification is one of the two factors that tend to make the jury middle-class, the other being the exemptions. Low though it is, the qualification must have the effect of excluding some of the working-class, while the exemptions cover a large section of the upper and upper middle classes; the loss of ability resulting from the exclusion of so many professional men and women is especially severe. It is the property qualification again that helps to determine the middle-age of the jury, since young men are less likely to be householders: the upper limit of sixty, settled at a time when the average age of the adult population was much lower than it is to-day, excludes many men and women of vigorous intelligence.

The property qualification would be intolerable if it still operated to the same effect as it did in 1825. But the fall in the value of money means that nowadays most property owners and householders, instead of only the upper section of them, are qualified to be jurors. When the *Common Law Commissioners* reported in 1853 they noted ¹⁵ that the value of money had dropped and therefore the qualification had widened since 1825. They viewed this with concern because they thought it might bring into the jury box people of low intelligence and also people who would feel as a peculiar hardship the loss of a day's wage. The spread of free education has removed the former difficulty and the payment, which is now provided for

jurors,¹⁶ has removed the latter. To-day there are few men and women who, whatever their station in life, would not make just as good jurors as those who find their way into the jury-box. In the United States the possession or occupation of property is not an ordinary qualification; in most States where there is any property qualification it is simply that of being a taxpayer.¹⁷ The age limit in most American States is sixty-five.¹⁸

It is very unlikely that in England there will in the foreseeable future be any alteration in property qualification. It does not remain merely because Parliament has not found time to alter it for it must have been fully considered when the reforming legislation of 1949 was introduced. The upper age limit was, as a war measure, raised to sixty-five without any ill effects; but a recent suggestion that it should be restored to that age was declared by the Home Secretary, to the accompaniment of much jocosity about parliamentary septuagenarians, not to be acceptable.¹⁹

It may seem surprising that in a country which has had universal suffrage for longer than a generation the jury should still rest upon a comparatively narrow base. Looked at from that angle, the argument for a change seems very strong. But it might be dangerous, so long as the unanimity rule is retained, to equate the jury franchise with the right to vote. No one expects the country to be unanimous in favour of the Conservative Party, but the jury must be unanimously for a plaintiff or a defendant. The approach to

unanimity must be helped to some extent by the fact that the jury is drawn from the central *bloc* of the population and it is difficult to estimate what the effect might be of the inclusion of more diversified elements. If unanimity is insisted upon and the narrow franchise is preferred, it is no doubt right that juries should be taken out of the middle of the community where safe judgment is most likely to repose.

Sometimes in their verdicts jurymen seem to show their origins. It is safe to assume that most of them drive motor-cars more frequently than they go for walks; but the favour they extend to motorists does not extend to motorists' insurance companies. Lord Justice Scrutton spoke of his experience thus²⁰:—

“When first I was called to the Bar it was very difficult for an insurance company to get a verdict in their favour from a jury. Better counsel prevailed and the time came with a more extended insurance practice when one could rely fairly confidently on a fair hearing from a jury, although there was a slight prejudice against an insurance company which took the premium and did not pay. Then came the introduction of the motor policy with third party claims, direct claims for amounts claimed by third parties instead of claims for damage to the subject-matter, and, for part of my experience, it was almost impossible in fact to get a jury to find in favour of motorists when there were very few motors. As time went on and as probably half the jurors owned motors

themselves, the view of juries changed and they might be relied on to decide fairly between plaintiff and defendant even although the defendant was a motorist; in fact it was very difficult, and I believe it still is very difficult, to get any criminal conviction against a motorist from a jury."

Thirty years later those words are still true. The Lord Chief Justice said last year that the number of cases in which motorists were charged with reckless driving, and the evidence was enough to shock decent people, and yet juries would not convict, was truly remarkable.²¹ It is true also, I think, that juries show a particular dislike towards the activities of Government Departments. It may be said that the small tradesman who owns a motor-car plays too large a part in the jury system, and there are some who think that that is too high a price to pay for cohesion.

The outstanding characteristic that unites a jury—and I do not suppose that it would be weakened by any extension of the franchise—seems to me to be a genuine satisfaction in seeing that justice is done. I believe that the British have a taste for umpiring and feel flattered by having disputes referred to them. But above all they take pleasure in the service of the law. The virtue that makes them a law-abiding people makes them also good guardians of the law and gives them a sense of fairness that makes them happy judges. They put up with the inconvenience of it—the waiting and the hanging about and the interference

with the daily round—not only because they assume it as a proper responsibility but because, once they get into the jury-box, they enjoy being there. Even when outside the box and sitting in court awaiting their turn they perform, though perhaps few of them are aware of it, an important service to British justice. They sit there as witnesses of the legal process. The public that attends the criminal court is ordinarily made up of those in search of sensations, those who have a taste for crime and casual onlookers who drop in for a little. The juries in waiting are of a different sort. They are “the country.” They are men and women who would not normally spare the time to go to court; nor would it have enough attraction for them to compete successfully for their leisure. But they are interested when they get there. They are there on the first day of an assize when the pleas of guilty are being taken and a half or a whole day may go by before a trial is reached. They see the way the accused is treated, listen to the police evidence of character, hear the sentences that are passed, and silently approve or disapprove. That Justice should be done *coram populo* is a good thing for the lawyers as well as for the public. It reminds them that they are not engaged upon a piece of professional ritual but in helping to give the ordinary man the sort of justice he can understand. Upon what jurymen think and say when they get home the prestige of the law in great measure depends.

SELECTION OF THE PANEL

These then are the people from whom panels of juries are taken as required for the sittings of the court. All those who are liable to jury service are marked on the Electors List with a "J" and from time to time their names are put up on church doors and other appropriate places and the sheriff keeps a Jurors' Book with the names recorded in them. When the court requires a panel to be formed, the judge signs a precept to the sheriff to summon a sufficient number of jurors and those whom he selects form the panel. Anyone who has been present when the Commission is read at the opening of an Assize will have heard the High Sheriff called upon to produce "the several writs and precepts to you directed and delivered": the precepts were his warrant for making up the panel. In making up the panel the sheriff is required to see that the proportion of women to men on the panel is the same as the proportion on the lists from which he selects the panel, provided that he is to ensure that, if possible, there shall be at least fourteen women on every panel.²² Apart from this he must select names from the list indifferently. In the old days anyone who wanted to pack a jury (and frequently it was the Crown who did) began by getting the sheriff to see that only the well-disposed got on the panel. The remedy which the law provided for that was the challenge to the array; this allowed a party to challenge the whole panel on the ground that the selection had not been made impartially.

If the sittings are likely to last for some time, the jurors on the panel are instructed to attend in sets spread over the period; so that unless a juror is caught in a long case, he is required to be in attendance only for a limited period, usually not more than five days. If the panel runs out during the sittings the judge can order a new panel to be returned. Or if there are not enough left on the panel to complete a jury, either party can apply to the judge to order a *tales de circumstantibus*; the sheriff must then bring in enough "able men of the county present" to make up the jury. But you cannot have *tales* without *quales*, *i.e.*, you must start off your jury with a number of *quales* who have been properly summoned before you can make up with *tales*. These technicalities discourage the unlearned. Readers of *Forensic Fables* may remember the case in which the judge inquired of two eminent counsel whether either of them wished to pray a *tales* and the unexpected results that followed from their unwillingness to admit their bewilderment: the Moral of the Fable is "Talk English."²³

SELECTION OF THE JURY FROM THE PANEL

The selection of the jury is done in two stages. The first, which we have already considered, is the selection of the panel, and that is done by the sheriff. The second is the selection of twelve jurors from the panel and that is done by the clerk of the court either alphabetically or by some form of balloting.²⁴ The usual way is to have the names of all the jurors on the

panel written out on similar cards; the cards are mixed and then drawn in the order that chance has decreed.

CHALLENGES

Just as a party who is dissatisfied with the panel can make a challenge to the array, so a party who is dissatisfied with any one of the twelve taken from the panel can make a challenge to the polls, that is, to the individual juror as distinct from the array. Anyone who has heard a jury sworn in a criminal trial will have heard the accused told of his right of challenge by the clerk of the court: "If therefore you would challenge them or any of them, your time is as they come to the book to be sworn, and before they are sworn, and you shall be heard." The formula dates from ancient times when a large folio Bible used to be placed upon a stand in the view of the prisoner and each member of the jury, as his name was called, came to the Book, placed his hand upon it and took the oath.²⁵

Challenges to the poll are of two sorts, peremptory and for cause. The peremptory challenge is one for which no reason need be assigned; it is given only in criminal cases and only to the accused and the number is now limited to seven.²⁶ A challenge for cause means that the party challenging must if he is to succeed show either that the juror challenged is not qualified to serve on the jury or else that he is biased or has a discreditable character. If a challenge is made on these grounds and if a *prima facie* case for the challenge is made out, the issue is tried on what is

called the *voir dire* and the juror challenged can then be examined with a view to establishing the ground for the challenge. The old practice was for the judge to nominate two jurors, preferably out of those already sworn, to act as triers and to determine the matter. This is probably still the practice in civil causes, though it is so long since anything of the sort has happened that it is difficult to be dogmatic. But in criminal cases the statute now provides that any challenge for cause shall be tried by the judge.²⁶

INFORMALITY IN CHALLENGING

In England challenges both in civil and in criminal matters are now uncommon, and the challenge for cause is obsolescent. The last reported case that I have found in the books on the topic is about ninety years old. Occasionally counsel for the defence in a criminal trial wants to object to a particular person (perhaps someone whom he or his client has seen serving on a previous jury) or to jurors of a particular trade or profession. If so, he will probably make his reasons known to the clerk of the court. The objection is then often dealt with informally. If the prosecution assents (and it is of course realised that counsel for the defence has seven peremptory challenges at his disposal) and after the matter has been mentioned privately to the judge, the clerk of the court disposes of the matter by not calling the person objected to into the jury-box.

The most usual cause of a departure from the strict order of the ballot is to secure an all-male jury. The Act of 1919²⁷ gives the judge power, either at his own

instance or on application, to order that the jury shall be composed of men only or women only as the case may require. The chief object of the section was probably to relieve women of the embarrassment of serving on mixed juries in cases of sexual offences against males. The procedure is rarely, if ever, used. Here again the preference seems to be for informality. The judge may think an all-male jury to be desirable (it is not the universal practice to require one) or counsel for the defence may wish for one; the clerk of the court will then give effect to the judge's direction without formal order. The seven peremptory challenges given to the defence are always enough to enable counsel for the defence to obtain an all-male jury. If men and women were on the panel in equal numbers, he would probably be able to obtain one; but since the men always outnumber the women, he can be quite sure of getting one. Consequently, if he wishes for it in any case in which he thinks it is more advantageous to his client, the point is often conceded without requiring the formal challenge. It may, I think, fairly be argued that all this informality has gone too far. It is fundamental that the ballot should be respected since it is the only secure way of obtaining an impartial jury: if it is to be departed from, it should be done openly and in the manner authorised by law.

COMPARISON WITH AMERICAN PRACTICE

Although the challenging of jurors is now so little used, I have dealt with it in some detail for two reasons. The first is that it is important that the right

should exist and be recognised. Trial by jury will be useless as a safeguard for the subject, as it has proved useless in the past, if it means trial by a packed jury. Therefore the precautions which the law takes to secure that a jury is unbiased and independent must be preserved and understood; the fact that they have not been necessary in the last hundred years or so does not mean that they will never be necessary again.

The second reason is that the disappearance of the challenge in England can usefully be contrasted with the practice in the United States. It is always interesting to see the same institution developing differently in different climates. The jury system in the United States has in the years of its independent existence diverged acutely from the English in this matter of the challenge. I do not mean the challenge to the array, which is not much more used in the States to-day than it is here, but in the challenge to the polls. The *voir dire* has become in the United States a pre-trial procedure of great importance, in which the advocates on each side vie with one another to secure a jury of individuals whom they think look favourably on their client's case. To some extent the position under the common law has been altered. In all states peremptory challenges have been allowed in civil causes as they never were at common law; in most states the number varies from two to six; in the Federal Court each party is entitled to three peremptory challenges.²⁸ There is no rule, as there is in England,²⁹ that counsel must show a *prima facie* ground for challenge before he can interrogate the

proposed juror. Moreover, counsel is allowed to interrogate within reasonable limits for the purpose of deciding whether to exercise a peremptory challenge.³⁰ The possibility of bias is very widely explored and a prospective juror seems to be asked an infinity of questions about his views. If a plaintiff's case rests on an oral contract, has he a prejudice in favour of contracts being in writing? If the defendant is wealthy, would that influence him in assessing damages? If a party is a foreigner, would he dislike that? If the defendant is a bank, has the juror ever had his overdraft harshly treated? If the juror discloses that he has a predisposition on any of these matters, nevertheless if he declares that his opinion will yield to the evidence and that he will give his verdict according to the evidence and to the law that is laid down by the court, he cannot usually be successfully challenged for cause unless there is some reason for discrediting his declaration.

USE OF THE VOIR DIRE IN AMERICA

Naturally it is not very often that a juror will either admit to a rooted prejudice or assert that he would maintain it in the teeth of the evidence. But that does not greatly diminish the importance of the *voir dire*. By a careful exercise of peremptories, but still more by a skilful use of his power of questioning and of the opportunities which it gives for making a personal contact with the jury, the advocate will seek to secure a jury of individuals favourably disposed towards himself and his case. The textbooks (for in

the United States textbooks are not confined as they are here mainly to theoretical matters, but deal in detail with the practical conduct of the case) make this quite clear.³¹ The selection of the jury is considered a "fine art" which the advocate must carefully study. The *voir dire* offers the advocate "an opportunity of educating the jury on the issues in the case"; a chance to "create a favourable atmosphere" or "condition the jury to the desired viewpoint." It is the right time at which to make a frank disclosure of any difficulties there may be—such as a client's criminal record or past history of motor accidents—and "extract a promise" from the jurors that they will not allow these things to prejudice their verdict. It is part of the art that an advocate should be alert to detect jurors who seem unsympathetic and get rid of them if he can by the use of his peremptories.

The *voir dire* can occupy quite an appreciable time. I can usefully refer you for illustration on this and other points to the *Hiss* case, for you will all be familiar with it as a recent notable trial.³² At the first trial the *voir dire* lasted just over, and at the second just under, two hours. I do not think that this procedure would now be acceptable to English ideas, not so much because it may add substantially to the length of the trial as because in its American form it conflicts with our traditional methods of advocacy. By the end of it the advocate has found out a good deal about the jurors and it is inevitable that his conduct of the case and his style of oratory will be

influenced by the desire to appeal to them as individuals. The English tradition is that advocacy should be quite impersonal: counsel should not say what they think or feel; they should simply submit their case. Likewise, they should address the jury as an impersonal body of twelve and the less they know about them as men and women the better.

THE BIASED AND THE UNFIT

In fact they know nothing at all about them; and it is very doubtful whether they would be allowed to find out anything very much. In a case over a century ago,³³ where the charge was obtaining goods by fraud, counsel for the defence wanted to ask each juror whether he was a member of an association for the prosecution of persons committing frauds upon tradesmen. The judge refused to allow it, saying:—“It is quite a new course to catechise a jury in this way.” I can guess that an American advocate would be astounded by this. There may be, he would say, a juror who is so predisposed to one side or the other as to make him by common consent an unfit judge; what is done to detect and eradicate such a man? The answer is that nothing is done and that unless his predisposition happens by chance to be known to the parties or their solicitors, he will undoubtedly serve on the jury. We can defend the obsolescence of the challenge only by claiming that such people are rare and that individual prejudices become so diluted in the jury-room that they count for little in the end.

Nevertheless, there can be a degree of laxity that is almost indefensible. Often counsel and solicitors do not bother even to observe a juror while he is taking the oath. How otherwise can one account for the fact that after a trial in Wales conducted in English two jurors were able to make an affidavit saying that they understood no English? ³⁴ Here is another case ³⁵ from Monmouthshire Quarter Sessions in which there was an application for a new trial. The solicitor for the defence said on affidavit that during the trial he noticed one of the jurors sitting in a huddled position in the left-hand corner. After the trial another juror had told him that the man appeared to be very sleepy and "gave some indication of having taken drink earlier in the day"; and that he did not join in the verdict which was given only by eleven jurors. In the next case, the affidavit went on, it was found impossible to proceed owing to the juror having "fallen fast asleep and only being roused by repeated shakings." Mr. Justice Phillimore acidly observed that the solicitor had not thought fit to mention the "huddled position" so long as there was a chance of an acquittal; and pointed out also that the juryman must have been able to stand up to take the oath between the two cases. The court held that there was not enough material on which to grant the application.

THE DANGERS OF THE DISUSE OF THE CHALLENGE

The disuse of the right of challenge threatens the fundamental principle that the verdict of a jury, once given, is final. That principle is based on the

assumption that a juror who is disqualified from service or unfit for it will be successfully challenged and excluded from the jury. So it is old law and well settled that the personation of a juror (besides being a misdemeanour), is a good ground for declaring a mistrial, since its effect is to deprive the accused of his right of challenge.³⁶ The difficulty is to distinguish impersonation from misnomer; if the prisoner is not misled and knows who the juror really is, his right of challenge is unimpaired. The leading case on this point is *Mellor's* case in 1858³⁷ in which fourteen judges heard the application for a new trial. In this case Joseph Henry Thorne, having been called from the panel, William Thorniley entered the box by mistake. Six out of the fourteen judges held that this was a mere misnomer, and seven out of the fourteen held that in any event the court had no jurisdiction to order a new trial. The six and the seven were almost identical but not quite and together they produced a combination of eight in favour of dismissing the application. Lord Chief Justice Campbell who presided and was one of those who held that there was a mistrial said³⁸ :—"This prisoner might have had reason to believe that Joseph Henry Thorne was impartial and that William Thorniley had a spite against him." He pointed out that "to constitute a valid trial it is quite as essential that the jury should be clothed with legal authority as the judge." He thought it undoubted that if it were to be discovered by some mistake that the name of the judge who presided had not been inserted in the commission, this

would be a mistrial; and he had heard of a judge who, not content with hearing his name in the commission read in open court by the Clerk of Assize, always himself verified the fact "by ocular inspection . . . from an apprehension of the terrible responsibility he would incur if his name should have been omitted." I am afraid that one at least of the unnamed judge's successors is less meticulous.

The substitution of a Mr. Thorniley for a Mr. Thorne does not seriously shake the public confidence in British justice. But it is a different matter if a juror is subsequently found to be half-drunk or wholly ignorant of the language in which the trial is conducted. It is not then so easy to dismiss the complaint by saying that the prisoner ought to have exercised his right of challenge, if everybody knows that the invitation to challenge is in practice treated as perfunctory. "Finality is a good thing but justice is better" said Lord Atkin in a case in the Privy Council in 1933,³⁹ in which the Board quashed a conviction on the ground that one of the jurors did not understand English. If, Lord Atkin said, the prisoner knew of the alleged defect and stood by and took his chance, he might be precluded from taking the objection; but if unknown, the court should give effect to it. This sounds like good justice. But if all that is implicit in it is developed, it is capable of doing serious injury to the principle of finality; and in a later case in the Court of Criminal Appeal its authority has been doubted.⁴⁰ These are the difficulties that flow from the abandonment of the challenge and the *voir dire*.

THE JURY AS A JUDICIAL TRIBUNAL

CHAPTER 3

THE JURY AS A JUDICIAL TRIBUNAL.

As the jury changed its character from a body of witnesses into a body of persons who had to determine facts on the evidence placed before them, it became a judicial tribunal and fit to be invested with judicial attributes. The judges punished as misconduct any deviation by the members of the jury from judicial standards and as contempt of court any interference by outsiders with the discharge of their judicial duties. There is no code embodying this. The rules came into existence piecemeal during the long period in which the jury was changing its character.

JUDICIAL IMMUNITY

Jurymen are invested with judicial immunity. They have full judicial privilege and are not accountable for anything said or done in the discharge of their office, and any threats or abusive language directed towards them as jurymen is punishable as contempt of court.

SEGREGATION

When it was established that the jury might no longer receive information privately or externally, it became necessary to see that its members were not laid open to improper influences from outside. The simplest

method of ensuring that no one communicated with them while they were functioning as jurors was to keep them physically separate during their period of office, especially of course during their consideration of their verdict. This is to some extent still the method which the court uses, but as in modern times interference with jurors is negligible and generally only accidental, the law now has been able to relax the precautions which it formerly took and to rely much more upon the good sense of jurors. They are kept separate as a body while they are in the jury-box and also while they are in the jury-room considering their verdict, but except at those times they are no longer physically segregated. Until 1940 the old practice still prevailed in capital cases, that is to say, the jury was segregated throughout the whole trial from the moment they went into the box and took the oath until they were discharged. They had board and lodging at the expense of the county and were under the charge of the jury bailiff whose duty it was to see that no one communicated with them; and they were not allowed to have newspapers. Many a housewife must have been startled by the call of a policeman asking for a case of her husband's night things, for of course the name of any jurymen who served on the trial was not known until he was called into the box. Under war conditions this rule was relaxed,¹ and the relaxation has since been made permanent²; the jury may now be permitted to separate at any time before they consider their verdict. It is still, however, the practice during a murder trial for them to be given

lunch by themselves in a room at the courts. There is also a very general practice, particularly at assizes in a small town, of refusing bail to an accused man during the luncheon adjournment since it would obviously be undesirable that he should find himself perhaps in a small restaurant lunching near some of the jurors. The jury, when it separates during adjournments, is usually warned not to discuss the case with any outsider.

INCOMMUNICADO

All that is left of the old rule is that the jury must be held incommunicado while they are considering their verdict. They are then put in charge of the jury bailiff who takes them to the jury-room and who remains outside the door. No one may communicate with them without the leave of the judge and such communication is only for the purpose of ascertaining whether they have agreed upon their verdict, whether they are likely to be able to do so within any measurable time or whether they want any further help. If the jury has anything it wishes to say, it must either ask to be brought back into court, when its foreman can state in open court what the jury wants to know; or it may communicate by means of a note to the judge. It is then the duty of the judge to read out the note in open court or at least to show it to counsel on both sides, even if it be upon a matter of little or no importance, for there must be no secret communication between the jury and anyone, not even the judge.³

All these rules are still stringently enforced. In a case in 1949⁴ the jury half an hour after they had retired asked to be allowed to go out to lunch and were permitted to do so : the conviction was quashed. If the summing-up is drawing to a close at the time of the luncheon adjournment, or at the end of the day, it is common practice to break off and leave a few formal sentences unsaid. This keeps the proceedings on the right side of the line that divides the hearing from the consideration of the verdict, and allows the jury to separate.

THE PRESS AND COMMENT ON PENDING TRIALS

Modern conditions, which have allowed the rule on physical separation to be relaxed, have demanded stronger protection against indirect influence that may be brought to bear on the jury, particularly by publications in the press. Comment on matters that are *sub judice* has always been punishable as contempt of court ; but the court is especially vigilant whenever there is danger of a jury being prejudiced. The rule is wide. For example, a newspaper investigation into the crime with articles reporting its progress has been forbidden : so has a publication purporting to forecast what the defence of the accused person would be.⁵ In a case in 1949,⁶ while a trial for murder was pending, a newspaper published allegations about other offences with which the accused was said to have been concerned as well as other inflammatory matter : the editor was committed to prison for three months and the proprietor fined £10,000. Carelessness is also

punished. In 1954⁷ a newspaper reporter by an honest mistake attributed to a witness a piece of evidence which she did not give; it was in fact evidence which was to have been given by another witness, but when the prosecution tendered it the judge rejected it as inadmissible and the witness was not called. The prisoner was not in fact prejudiced, since he was acquitted. The newspaper was fined £1,000. This may be contrasted with the practice in America. In the *Hiss* case the supposed evidence of a witness which had been excluded as inadmissible on the first trial was published by a newspaper, apparently without objection, notwithstanding that a second trial was pending.⁸

The press as a rule is extremely careful. There are inevitably occasions in court in which a discussion takes place in the absence of the jury about the admissibility of evidence and thereby the nature of the evidence is revealed. If it is ruled out, the press takes care not to publish it, so as to avoid the danger of any jurymen learning about excluded evidence. One danger has not, in spite of recent discussion about it,⁹ been dealt with. In the preliminary proceedings evidence may be admitted, and therefore properly published in the press, and thereafter excluded at the trial. If a jurymen has read the evidence in the press, it is said that it is useless then to exclude it at the trial. It might be a wise precaution for the defence to ask that evidence, which it considers objectionable and which is given in the preliminary proceedings, should not be published; and it is very likely that the press

would comply. It is only in a few cases of exceptional public interest that a juror is likely to read an account of the preliminary proceedings and it is doubtful if in any event he will read it with such attention as to carry away any very clear recollection of a particular part of the evidence.

SECRECY OF WHAT PASSES IN JURY ROOM

What goes on in the jury room is not only to be subject to no interference but it is also to be kept secret. It is doubtful whether there is any formal obligation upon a juror not to disclose what takes place in a jury room and it says a good deal for the sense of responsibility of the average juror that it never seems to have been necessary to decide the point. In a sensational case the public, or at least the press, would give a great deal to learn something of what went on in the jury room but except in one or two rare cases there has never been any public discussion of it. By contrast in the United States, the views of individual jurors in sensational trials seem to be quite generally known, and neither they nor the judge are protected from comment.⁸

The lack of any formal obligation to secrecy is a vestige of the embryonic jury. Since jurors were originally purveyors of what was supposed to be public knowledge, there was nothing for them to be secret about. The case of grand jurors was different. They had from the first a semi-judicial function to discharge and from early days they were made to take an oath of secrecy: "The King's counsel, my fellows,

and my own, I will observe and keep secret.” No similar passage is contained in the oath of the petty juror. In the notorious case of the poisoner Armstrong in 1922 the writer of a newspaper article claimed to report what had been said to him about the evidence after the trial was over by a member of the jury. This was brought to the attention of the court which was hearing the appeal in the case and Lord Chief Justice Hewart described it as “improper, deplorable and dangerous”; he said that every jurymen ought to observe the obligation of secrecy imposed by the oath of the grand juror.¹⁰ It so happened that about the same time a case was heard in the civil Court of Appeal in which one of the rules about juries was discussed and observations were made about the *Armstrong* case. Lord Justice Bankes said¹¹: “It has also been generally accepted by the public as a rule of conduct, that what passes in the jury room during the discussion by the jury of what their verdict should be ought to be treated as private and confidential. I may say that I saw the other day with astonishment and disgust the publication in a newspaper of a statement by the foreman of the jury in an important criminal trial as to what took place in the jury room after the jury had retired. I do not think it necessary to express any opinion as to whether such a publication amounts to a contempt of court, but I feel confident that anyone who read that statement will realise the importance of maintaining the rule.”

But while it may be doubtful whether a jurymen can be punished for disclosing what goes on in the

jury room, there is no doubt that the court itself will not listen to any tales or investigate them. All the jury must be in court when the foreman is asked to stand up and give their verdict so that it may be given in the presence of them all. And when he has given it the clerk of the court says : " And that is the verdict of you all ? " ; and thereafter if no jurymen dissents the jury is discharged and it is *finis rerum*. The court will not listen to any jurymen who has second thoughts or allow any of them to assert thereafter that he was not a consenting party to the verdict. How otherwise could there be finality ?

THE UNANIMITY RULE

This leads naturally to a consideration of the unanimity rule. The rule makes a startling exception to the ordinary processes of English administrative life where decisions, even the most momentous, are almost invariably produced from a majority vote. Why is the verdict of a jury thought to require a degree of assent which for most purposes would be rejected as impracticable ? The answer is that no one ever planned that it should be that way ; the rule is simply an antique. Twelve witnesses were required to support the winning party and naturally for that purpose their testimony had to be unanimous ; when the twelve witnesses were translated into judges, the unanimity rule, notwithstanding that its original significance had then departed, remained with them. The rule was clearly settled in 1367, long before the jury was exercising any real judicial function ; in a case in that

year the justices took a verdict from eleven jurors (not omitting to imprison the nonconformist twelfth) and were made to sue out a new inquest.¹² The retention of the rule is a classic piece of conservatism; "that preposterous relic of barbarism" Hallam called it.¹³ It is of course not unique, in the law or elsewhere, to find something retained long after the reason for creating it has vanished. Judges wear ermine in winter because they once needed to keep themselves warm; but it does not seriously impede their movements and anyway they now keep most of it for ceremonial occasions. The singular thing about the unanimity rule is that it is retained as the active principle of the verdict.

You may say that I am treating unanimity as more exceptional than in fact it is; you may argue that in practice many decisions are obtained by taking what is called "the sense of the meeting" without resorting to a vote. That is true. England is a nation of committees and the committee temperament is responsible for the satisfactory working of many public institutions. But as compared with a jury the ordinary committee is at a great advantage in avoiding the necessity for a vote. Most of its members are known to each other and used to working together. There are devices, such as the adjournment for further consideration or the appointment of a sub-committee to report, which often liquefy initial divisions. But unanimity is demanded from a jury after a few hours' discussion.

PHYSICAL PRESSURES FOR UNIFORMITY

The requirement survives notwithstanding that the older and harsher methods of obtaining unanimity have now been abandoned. The imprisonment of nonconformists was soon given up as being too drastic; but for centuries after that it was habitual to keep the jury confined until it reached agreement, however long it took. Blackstone notes,¹⁴ though with the implication that the practice was obsolete, that a judge need not wait for the verdict beyond the end of the assize, but could take the jury with him to the next town in a cart. Both before and after Blackstone's time the rule was that the jury was to be kept without meat, drink, fire or candle; this continued until 1870¹⁵ and was strictly enforced. Here is an example from Elizabethan days which reads like a cautionary tale from the Garden of Eden¹⁶ :—

“The Jury being withdrawn after Evidence, and remaining a long Time without concluding on their Verdict, the Officers, who attended them, seeing their Delay, searched them, and found that some had Figs and others had Pippins; which being moved to the Court, they were examined on Oath, and two of them confessed that they had eaten Figs before they were agreed on their Verdict, and three confessed that they had Pippins, but had not eat any of them; and that this was unknown to the Parties. Those who had eaten were each of them fined five Pounds, and those who had not eaten the Pippins, were each of them fined forty Shillins; but the Verdict was,

upon great consideration, and Conference with the other Judges, held to be good."

About the same time John Mucklow was fined twenty shillings for being found with "sugar-candy and liquorish."¹⁷ It is very difficult for a minority to hold out indefinitely in such conditions and without pippins or liquorish, and it is obvious that many verdicts so obtained must in fact have been majority verdicts, however they were made to appear—perhaps even minority verdicts if the minority was determined enough. All this is very reminiscent of the verdict's origin. What was sought was not a rational conclusion but a sign, something akin to the result of the ordeal or to triumph in battle; the process could not be determined until it was obtained and, once obtained, the methods of obtaining it were thought less important than the fact that it was there. The defects of the rule were seriously studied during the nineteenth century by the Commissioners for the Reform of the Criminal Law and others and recommendations made for its modification which, like so many other recommendations on legal subjects, have passed into oblivion.

The practice of keeping a jury into the night or without refreshments and other amenities is now obsolete. But as recently as 1908¹⁸ a jury who said they were unable to agree were told by the judge that they would be locked up for two hours; they found the prisoner guilty and the Court of Criminal Appeal considered the procedure to be regular. To-day it is very unusual for a jury to be out

for more than four or five hours. If after three or four hours they come back into court to say that they cannot agree, it is customary to ask them to make a further effort to sink their differences; and if that fails, they are discharged. There must then be a new trial. In a criminal case it is almost conventional now to accept a second disagreement as tantamount to an acquittal and to drop the prosecution. In a civil case the parties can by consent take a majority verdict; but it is not the practice to agree upon that in advance and, once a disagreement is announced, it is usually too late since by that time one side feels that it has greater reason than the other to expect an adverse verdict. Any formal compromise is strictly forbidden to a jury, for example, an assent to a verdict for the plaintiff conditional upon a low award of damages.

EXHORTATION INTO UNANIMITY

The extent to which a jury can be exhorted into unanimity is a delicate question. The fundamental principle is that while it is right that every member of the jury should take into account the opinions of the others, he must not assent to a verdict that goes against his conscience. A direction given by Mr. Justice Finlay is now very generally used ²⁰ :—

“ In the first place, I desire to point out to you how vitally important it is that you should agree. I am not prepared yet to release you, because the consequences—the enormous expenditure of public money in this case, the consequences to the public and to every member of the public—are so grave that it is a matter of most vital importance

that you should agree, and I must ask you to make another effort to agree. The other matter which I should like to say a word on is simply this, that with a view to agreeing there must inevitably be some give and take. I would exhort any member or members of the Jury who may be disposed to differ from their comrades, to consider the matter carefully, to weigh what is said to them, to remember, if they are a small minority—I do not know—to remember that they may be wrong, and while I would not for one moment suggest to a single member of the Jury to be false to his oath, I would most strongly urge upon all of you and upon each individual among you the extreme importance from the point of view of the Prisoner and from the point of view of the public and from every point of view, of agreeing.”

In 1919 a direction was approved by the Court of Criminal Appeal that I think might now be treated as questionable²¹: “If a substantial number take one view, as a rule it is expedient that the others should subordinate their views to the majority.” In 1936 in the Court of Appeal Lord Wright said²²: “If a judge does tell the jury that the minority must give in to the majority simply to avoid a difference of opinion, that is a misdirection in law.” A judge may emphasise the misfortune of disagreement, but must not create the impression in the minds of the jurors that there is a legal duty to agree at any cost.

It might be supposed that, when all physical pressure on the jury was removed, disagreements

would increase. Another factor which one would suppose might tend towards an increase is the spread of education and loss of class-consciousness; the leadership of one or two socially superior men is now less likely to be accepted. The decline in the proportion of civil juries may tell on the other side, since in criminal trials an incipient disagreement may often be resolved by an acquittal which gives the defence the benefit of the doubt. It is impossible to say what effect, if any, these factors have had on the percentage of disagreements, since no statistics are kept. My opinion, which I have checked with others, is that the percentage at present is quite small—perhaps 1 per cent. or 2 per cent.

PROPOSALS FOR REFORM

Since no one knows what goes on in the jury room, one can only speculate about the nature of disagreements. I think it probable that they fall into two quite distinct classes. The first is the genuine disagreement between two more or less evenly balanced views and the second is the minority of one eccentric. The advisability of modifying the unanimity rule has, I think, to be considered differently in relation to the two classes.

MAJORITY VERDICT

I do not think that there would be any support for the view that verdicts should go by a bare majority. Reformers generally have suggested a majority of eight to four or nine to three. Moreover, they have

recognised that it would be very undesirable if a poll were to be taken at the outset and a majority verdict reached before there had been a strenuous attempt to secure unanimity. To meet this point one suggestion has been that a majority verdict should not be accepted until, say, six hours after the jury has first retired.²³ This still leaves the danger that a majority will settle down from the beginning to play out time; and most people would be unhappy at the thought of a minority of three or four being overridden unless the majority verdict was, as it were, accompanied by some convincing assurance that it was the only way out of the deadlock. Another suggestion, which would erase this last criticism, is that the taking of a majority verdict should be at the discretion of the judge. The difficulty about that is that there is no way in which the judge could satisfy himself that the possibilities of unanimity had really been exhausted and no principle upon which the discretion could be exercised. It would be as appropriate in all cases as in none. If it was to be exercised in every or in the great bulk of cases, it would have the same effect on the jury as if it were a written rule. If in few or none (which is much more likely, for the strength of the law is precedent and, where there is none, it is the habit of judges to proceed with great caution), it would give no substantial relief. An important point that has been made by Dr. Evatt²⁴ is that the taking of a majority verdict may endanger the practice of secrecy; there may be speculation about the reasons

for the dissension, and a minority that has been overruled may be tempted to give tongue.

Notwithstanding these objections I should myself be happy to see a majority verdict taken in civil cases subject to safeguards of the type I have been discussing. Modifications of this sort have now been introduced into many of the states of America²⁵ and Australia.²⁶ In some the reform has been extended to the criminal verdict, and of course in Scotland the verdict has always gone by a majority. In crime I should prefer to stick to the English habit. Whatever its origin, unanimity is now so ingrained in our procedure that its eradication would seem to take from the verdict a virtue that in the criminal law it needs. The criminal verdict is based on the absence of reasonable doubt. If there were a dissenting minority of a third or a quarter, that would of itself suggest to the popular mind the existence of a reasonable doubt and might impair public confidence in the criminal verdict.

ODD MAN OUT

There is, I believe, much well-informed support for the view that the other type of disagreement—that caused by the odd eccentric—should be tackled. The man whose spiritual home is the minority of one and who, often in compensation for his social ineffectiveness, delights in the power of veto, is a nuisance; and there can be no doubt that every now and again he turns up on a jury. A majority of eleven would probably be taken by the public as proving that the

outsider was a crank rather than as showing that there was any real possibility of the defence being right.

But the fact is, I believe, that the eccentrics do not turn up often enough and so the demand for reform is not strong enough to defeat the faith reposed in traditional and well-tried methods. The evil caused by disagreements is not great. When they occur, they can sometimes be grievous to the parties concerned and they are always expensive, but they are not numerous enough to create a general problem. The sense of satisfaction obtainable from complete unanimity is itself a valuable thing and it would be sacrificed if even one dissentient were overruled. Since no one really knows how the jury works or indeed can satisfactorily explain to a theorist why it works at all, it is wise not to tamper with it until the need for alteration is shown to be overwhelming. If an institution has been constructed to plan, we may have some confidence in improvements suggested by planners. But the jury, like so many English institutions, has been constructed biologically rather than mechanically. In the fields of legal and political science the English have found the green fingers of gardeners more useful than precision instruments.

THE CONTROL OF THE JURY

CHAPTER 4

THE CONTROL OF THE JURY

QUESTIONS OF LAW

“THE facts are for you and the law is for me.” That is the theme which with variations will be found at or near the beginning of every charge to a jury. The questions of law which are for the judge fall into two categories : first, there are questions which cannot be correctly answered except by someone who is skilled in the law ; secondly, there are questions of fact which lawyers have decided that judges can answer better than juries. The questions that are reserved to judges under the second category constitute the biggest of all the limitations (and there is a number of others) upon the jury’s function as judge of fact. This limitation is significant because it is based frankly on the view that there are matters of fact which it is not safe to leave to a jury. Lord Chief Justice Cockburn in 1879 protested strongly against the terminology which turned matters of fact into questions of law. He said ¹ :

“ The right mode of dealing with a question of fact which it is thought desirable to withdraw from the jury is to say that it shall, though a question of fact, be determined by the judge.”

VERDICT MUST BE SUPPORTED BY EVIDENCE

The first and most important rule is that a verdict must be supported by some evidence or it will be set aside; and likewise it will be set aside if, although supported by some evidence, it is contrary to the weight of evidence. The former is used generally to defeat a verdict for the plaintiff or the party having the burden of proof, because he has not brought enough evidence to discharge the burden; the latter is used generally to defeat a verdict given against him who has brought overwhelming proof.

The rule, as I have just stated it, would seem to be a commonplace rather than a rule of law. Of course, you will say, there must be evidence to support a verdict, and of course it must be a rule that the law will not recognise a verdict that is unsupported. It is properly within the sphere of the law to lay down general principles of this sort; there is the rule of law that the burden of proof is on the prosecution or the plaintiff; there is the rule of law as to the degree of proof required—beyond a reasonable doubt in criminal cases and on the balance of probabilities in civil.

But these rules take effect by means of directions to the jury. The jury is trusted to apply the directions as it thinks fit; the judge does not demand that it should treat a particular inference as amounting to a probability or tell it what doubts it should consider reasonable. The distinction between these rules and the rule I am considering is that the latter rule is not applied by the jury at all. It is applied by the judge and, if he is not satisfied that there is evidence on

which reasonable men could act, he must not let the case go to the jury. Again, so stated, the rule might seem to be a commonplace. If there is not evidence upon which reasonable men could act, it must be immaterial whether the case is left to the jury or not since their verdict could only be negative. So the rule would be otiose were it not for the fact that judges and juries can take a different view of what reasonable men should think. When there is such a difference, it is not, as might be supposed, the view of the jury who *ex officio* are the reasonable men that prevails, but the view of the judge. This understood, the rule can be restated in its true terms: the verdict cannot be supported unless a reasonable lawyer thinks that there is evidence upon which reasonable men could act. There can be no doubt about the difference between the reasonable lawyer and the reasonable man. When twelve men unanimously return a certain verdict, they must believe that there is evidence to support it. When the judge rejects their verdict, he is not really telling them that not a single one among them is a reasonable man. What he is telling them is that there is a certain minimum of evidence which the law requires and that as a trained lawyer he is a better judge than they are of what that minimum should be. What the minimum should be is not a question of law but a question for lawyers.

IS THERE ENOUGH EVIDENCE ?

Does this not, you may ask, make nonsense of the jury as a tribunal? If it cannot be trusted not to give

a verdict based on no evidence at all, how can it be trusted to give a true verdict? But there is in truth a fundamental difference between the question whether there is any evidence and the question whether there is *enough* evidence. I can best illustrate the difference by an analogy. Whether a rope will bear a certain weight and take a certain strain is a question that practical men often have to determine by using their judgment based on their experience. But they base their judgment on the assumption that the rope is what it seems to the eye to be and that it has no concealed defects. It is the business of the manufacturer of the rope to test it, strand by strand if necessary, before he sends it out to see that it has no flaw; that is a job for an expert. It is the business of the judge as the expert who has a mind trained to make examinations of the sort to test the chain of evidence for the weak links before he sends it out to the jury; in other words, it is for him to ascertain whether it has any reliable strength at all and then for the jury to determine how strong it is. Thus what looks at first sight to be an unjustifiable limitation turns out to be a sensible rule. The trained mind is the better instrument for detecting flaws in reasoning; but if it can be made sure that the jury handles only solid argument and not sham, the *pooled* experience of twelve men is the better instrument for arriving at a just verdict. Thus logic and common sense are put together to make the verdict.

CONTRARY TO THE WEIGHT OF EVIDENCE

The power of the jury is, as I have said, limited at both ends. The native intelligence of the jury operates, as it were, upon the middle of the evidence, albeit a very large middle; it must not act entirely without evidence and it must not go entirely against the evidence. The check at each end may be justified by substantially the same considerations. To say that a verdict will be set aside if it is "contrary to the weight of the evidence"—that is the rather misleading phrase often used—does not mean that the weights are to be more or less evenly balanced or that the scales are to be set by the judge; that would make the assessment by the jury altogether superfluous. It means that the weight of the evidence contrary to the verdict is enough to crush it; the test is whether twelve reasonable men, if they had appreciated the evidence rightly and applied the law as laid down to them, could have returned the verdict. In the ordinary case perversity or something rather like it must be shown. Originally, I think, it had to be perversity and nothing short of it. The judge had to be satisfied that the verdict could be accounted for only on the assumption that the jury had disregarded the law as he had laid it down or had ignored evidence that it did not like. Later on the term "miscarriage of juries"² was coined to cover cases in which a jury, without being manifestly perverse, had gone seriously astray. Then, as cases grew more complex, it came to be recognised that a jury could return an insupportable verdict simply because it was bemused by a mass of material

beyond its power to handle. A good example of this latter type of case—and it is also a leading authority containing the relevant principles as laid down by the House of Lords—is one that was known in its time as the “*Sunshine Roof case*,”³ in which an inventor sued a motor manufacturing company upon two alleged contracts—one an agreement to take a licence and the other an agreement to treat as confidential information about the invention. The jury found that both agreements had been made. The House of Lords set aside the finding on the first agreement, but affirmed it on the second together with the very large sum in damages which the jury had awarded for the breach. The decision is illuminating because it shows that the jury’s “unreasonableness” in relation to the first agreement was not considered to affect the justice of their verdict on the rest of the case⁴ and also because it shows that there are limits to the usefulness of a jury in cases of this sort. The Lord Chancellor said⁵: “I cannot help thinking, however, that in the present case, after a prolonged trial and thousands of questions in examination and cross-examination, it was impossible for the jury to have kept all the facts in their minds. Both in the Court of Appeal and in your Lordships’ House we have had the advantage of a transcript of the shorthand note, a copy of all the letters and a book containing all the documents. By one counsel or another we have been repeatedly referred to letters and to passages in the evidence which we had in front of us in order that we should see them and weigh them. If the jury had

had the same advantages as we have had, in this long and complicated case, of having such a transcript of the evidence before them and the whole of the correspondence under their eyes, they could not have arrived at the conclusion that the licence agreement was made."

ATTAINTS

I have suggested that these limitations upon the jury's powers work to produce an acceptable blend of logic and common sense. But that is an *ex post facto* justification: it is not the explanation of how the limitations come to be. My judicial forefathers would never have thought it necessary to justify in this way their interference with a jury's verdict. To begin with, it was not until the sixteenth century that the jury had to be considered as a body of reasonable men exercising a rational function. Before that time they were a body summoned to give a verdict according to what they knew, or were supposed to know, the truth to be and were not required to exercise any power of judgment. As they were witnesses rather than judges, so a wrong verdict was to be thought of as perjury rather than an error of judgment and punishable accordingly. The remedy of a person aggrieved by a verdict which he thought to be false was to obtain a writ of attaint. (I am dealing now chiefly with the jury in civil actions, and I shall consider later in what respects the criminal jury differed.) He then got a larger jury, made up usually of twenty-four men of greater standing than the first, to try again the same

issue. If they found contrary to the first finding, then the first jurors were held guilty of perjury and were punished by fine or imprisonment, and the first judgment was reversed. As evidence came in, attaints went out. This was inevitable; the verdict of the attaint jury could not falsify the earlier verdict unless it was based on exactly the same evidence and anyway a misapprehension of evidence could not be treated as perjury. The process was hastened—and indeed anticipated—by the reluctance of attaint juries to convict the petty jurors and so cause them to be harshly punished. During the fifteenth century attaints were becoming obsolete (they were not formally abolished till 1825) and there was a need for something to be put in their place. It was not practicable simply to put the verdict of a jury beyond question; errors might be endured but not perversity or corruption. The punishment of jurors for misconduct during the trial had always been in the hands of the judges themselves and it was easy and natural to use that power for the punishment of false verdicts. It was natural also that in the exercise of the power a fine distinction should not be drawn between a perverse or corrupt verdict and one which the judge thought to be wholly unreasonable. Where the interests of the Crown were concerned, the powers of the judges were often reinforced by statutes; thus an Act of 1534 authorises punishment for giving “an untrue verdict against the king, contrary to good and pregnant evidence ministered to them.”⁶ In grave cases of misconduct which might lead to injustice it

was the practice of the court not only to punish the jurors but to grant a new trial. If, for example, the jury while considering its verdict communicated with one of the parties and afterwards found for him, a new trial would be ordered. The same course could be taken in the case of an unacceptable verdict. When at last in 1670 in *Bushel's case*⁷ the great judgment of Chief Justice Vaughan put an end to the punishment of jurors, and the jurors, who had been imprisoned for acquitting William Penn on the charge of taking part in an unlawful assembly, were released on habeas corpus, nothing was left except, where it was appropriate, the power to order a new trial.

ORIGIN OF JUDICIAL INTERFERENCE

Thus judicial interference with the jury as judges of fact began, as it were, at the far end; verdicts were being rejected as being contrary to the weight of evidence before the other doctrine—that they must be supported by some evidence—grew up. The reason for this is that the latter doctrine could not be formulated until it was made clear that the jury must act on nothing but the evidence; so long as they were entitled to act on their own knowledge not openly stated, lack of evidence could not falsify the verdict. A gap of more than two centuries separated the time when the jury first began to be assisted by evidence from the time when they ceased altogether to act on their information. In 1499 Vavaseur J. said⁸: “Evidence is only given to inform their consciences as to the right. Suppose no evidence given on either

side, and the parties do not wish to give any, yet the jury shall give their verdict for one side or the other." In 1702, the court said⁹: "If a jury give a verdict on their own knowledge, they ought to tell the court so, that they may be sworn as witnesses."

If all the issues of fact are admitted, the question whether the plaintiff is entitled to relief at law, *i.e.*, whether he has a good cause of action, must be a question of law. Thus it has always been open to a defendant to submit that the case should be withdrawn from the jury on the ground that the facts, if proved, disclose no case in law against him; if that be the position at the end of the plaintiff's case, why go on with the controversy on the facts? But an issue of fact may embrace two things. First, there are the primary facts—what was observed: secondly, there are the secondary facts or the inferences that can properly be drawn from the primary facts. Such inferences are of two sorts—those which lead to a conclusion of fact and those which lead to a judgment of fact. Thus from the fact that the tyre-marks of a car were observed on the road, it may be inferred or concluded that the driver applied his brakes hard; from the fact that he braked hard, it may be inferred that he was either driving too fast or not keeping a proper look-out and therefore adjudged that he was driving carelessly. When a defendant demurs, *i.e.*, submits that there is no case against him in law, the facts upon which he demurs are not always all primary

facts. He must then submit that upon all the facts, primary and secondary, there is no case against him. But secondary facts can be discussed only in terms of what inferences *ought* to be drawn. So a defendant who submits that there is no case to answer must show that the primary facts proved, together with all the inferences that can reasonably be drawn from them, make out no case against him in law. It was in this form that the demurrer—a demurrer upon evidence as well as a demurrer upon law—began to take shape as soon as the testimony of witnesses was allowed.

It is easy to see therefore how the question whether there was any evidence to support a finding of fact became assimilated with the question whether the facts disclosed supported the cause of action alleged, and the two together treated as a question of law. It is easy to see too how the unreasonable verdict came to be confused with the perverse, and the perverse attributed to a wilful refusal to apply a piece of law that the jury disliked, and so regarded as an error of law to be corrected by the court. No clear-cut distinctions on these matters were to be made during the time when the jury was slowly changing its character from a body of witnesses into a tribunal of fact, and they were all put together as questions of law.

This then is the explanation of how a judge comes to penetrate so deeply at either end into the jury's province as judge of fact. Like most explanations

about English institutions it is an historical one, but that does not mean that the present rule is of no more than historical interest. The reason why a man has ten fingers may be of purely biological significance, but that does not detract from the practical importance of fingers. If no use other than the original one had been found for them, they would not have survived the abandonment of tree-climbing as a human pursuit by more than the million or so years that may be required for a change in the species. Changes in the law may be slow but they are faster than human evolution, and rules that do not serve a useful purpose wither away. I have earlier in this lecture sought to show that although the principles I am considering originated from the days before the jury had obtained its present status and while it was frequently suspected of perversity or corruption, they still serve to produce what I have called the best blend of logic and common sense in the verdict of twelve reasonable and intelligent men.

JUDGE AS MAKER OF VERDICTS

You may have observed that in this account that I have given of how the verdicts of juries came to be partly controlled by the judges there is no trace of any suggestion that the judges could themselves return a verdict. Where the judge held that there was no case to go to the jury, there was no need for a verdict; the plaintiff was nonsuited and judgment entered accordingly. But if the plaintiff produced over-

whelming proof so that no jury could find for the defendant without going against the weight of the evidence, what then? To be logical, the judge ought to direct the jury as "a matter of law" to find for the plaintiff. But in practice he has never done so and his power to do it is at least doubtful. He lets it go to the jury and leaves the verdict to be challenged afterwards. If the verdict is successfully challenged, the relief granted is generally an order for a new trial. Such an order would again seem to be illogical. If the evidence is the same at the second trial as at the first, there can only be one verdict; so why go to the expense of another trial? Why not enter judgment forthwith? There is no doubt that by the Rules of the Supreme Court made under the Judicature Act, 1875, the court can enter judgment, if it wants to, without granting a new trial: in particular, the Court of Appeal is given power "to give any judgment or to make any order which ought to have been made."¹⁰ But like most wide powers given to judges by statute, it has been used with much caution. The traditional doctrine that judges cannot make a verdict is hard to shake.

Thus, it is not at all clear that the possessor of an erroneous verdict will not obtain this much benefit from it—that he will get a second chance, at least if he can show that the second chance may have better prospects than the first. It is difficult to see why he should be allowed to take advantage of the jury's unreasonableness at the first trial to convert defeat

into victory. Nevertheless, while it cannot be said to be settled, I think that the better opinion probably is that the Court of Appeal ought not to enter judgment against the possessor of a verdict unless it can be shown that such a judgment was inevitable, not merely upon the evidence which he did call, but also upon that which he might be expected to call on a new trial.¹¹

Moreover, it is not yet definitely settled that a court can arrive at a verdict as distinct from arriving at a judgment. There is a distinction between setting aside a verdict and entering judgment accordingly, and substituting for a wrong verdict given by a jury the right verdict. If the court sets aside a verdict for the plaintiff and does not wish to grant a new trial, there being no verdict for the plaintiff upon which he can claim judgment, the court must enter judgment for the defendant. But if the court sets aside a verdict for the defendant, the position is different. There is then no verdict upon which the plaintiff can claim to have judgment and the court cannot enter judgment for him without first itself making a verdict. If it is the only verdict that could be returned by a reasonable jury, there would seem to be no logical reason why the court should not give it; and every reason of expense and convenience why it should not order a new trial in order to arrive at an inevitable conclusion. Still, it would be so great a departure from tradition for the court to give a verdict of its own motion, that I believe the better opinion still is that, notwithstanding the wide words of the rule, it ought not to be done; as

recently as 1935 Lord Wright said that, for the court so to do would amount, not to "controlling, but to superseding the jury" and exercising the function of affirmatively finding the facts."¹²

One may hazard the guess that on this point the traditionalists are fighting a losing battle. The weakness of their position is that if it were tested by a series of new trials in which juries gave verdicts which the judges would not uphold, the judges would in the end have to assert their supremacy : and, if in the end, why not at the start? Already, some judges have shown restiveness at being asked to order new trials with all the consequent expense in cases where they regard the verdict as a foregone conclusion, and Lord Justice Mackinnon has protested against "games of forensic dialectics."¹³

NO NEW TRIAL IN CRIMINAL MATTERS

I have now reached a point where the criminal law is far enough apart from the civil to make it necessary to go back and see where the divergence began. The chief practical difference is that in crime there can never be a new trial. The chief formal difference is that, once the prisoner has been given in charge to the jury, nothing but a verdict can discharge him : the case cannot be withdrawn from the jury and there can be no judgment *non obstante veredicto*. The origin of these differences goes right back to the period of the attain. The attain jury was never used in criminal cases. A convicted prisoner was not allowed to dispute the verdict of the petty jury. This was because in

theory he could not be tried by a jury without his consent—the alternative of *peine fort et dure* if he did not “put himself on his country” was not an agreeable one, but that was not considered by the law to detract from the validity of his consent—and having chosen to be judged by his neighbours, he must abide by their verdict just as he had to abide by the outcome of the battle or the result of the ordeal. If the prisoner was acquitted, the Crown had in theory the right to the attaint but in practice never used it, perhaps because it would not have been very effective; if, notwithstanding the predisposition of the juries of those days to favour the Crown, the petty jury acquitted, the chances of an attaint jury reversing the verdict would be slender. The more effective way of deterring the petty jury from improperly acquitting was the threat of punishment for misconduct. That, as I have said, was used in civil cases also when the attaint became obsolete, but from the first it was used much more extensively in criminal cases. I have already quoted the statute of 1534 which authorised punishment for giving an untrue verdict against the king. The punishment was often administered by a superior court such as the Star Chamber but it was also done by the judges themselves. In a case in 1602,¹⁴ where the jury acquitted of murder, Popham C.J. and Gawdy and Fenner JJ. who tried the case, *fuervnt valde irati*, and committed and fined the jurors. But in all these cases the matter stopped there; the jury could be punished but the prisoner could not, and there could be no new trial. Something

of the nature that denied to the prisoner the right to an attain here worked in his favour; it would not be right to put a man in jeopardy again, any more than it would be right to make him fight a second battle or endure another ordeal. As Chief Justice Pratt said in 1724¹⁵: "It was never yet known that a verdict was set aside by which the defendant was acquitted, in any case whatsoever upon a criminal prosecution."

When a verdict was returned for the prosecution that was contrary to the evidence, the courts could find ways of getting round it, if need be by repleiving and recommending a pardon.¹⁶ In 1907 the position was put on a statutory basis. The Act creating the Court of Criminal Appeal gives the court power to "allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence."¹⁷ Since under the Act only the prisoner has the right of appeal, the result is that a verdict of Guilty can be overridden while a verdict of Not Guilty remains unchallengeable. The power to order a new trial is not included among the powers of the Court of Criminal Appeal. The idea that a man should not be put in jeopardy twice appeals so strongly to the fundamental instincts of the Englishman that it has been used successfully to forbid any second trial even in a case in which the court is being asked to set aside a verdict of Guilty. Not even if the ground of the appeal is that the defence has discovered new evidence that would prove his innocence can the court order a second trial; it must either set aside or confirm

the verdict according to its own opinion of the value of the new evidence.

A CRIMINAL TRIAL MUST END IN A VERDICT

The other great difference is that the verdict of a criminal jury can never be dispensed with. If the prosecution does not in the opinion of the judge offer some evidence which would justify a conviction, he does not, as in a civil case, withdraw it from the jury; he directs the jury as a matter of law to find a verdict of Not Guilty. If the prisoner in the course of the trial changes his plea to Guilty, he must not (as would have happened if he had pleaded Guilty in the first instance) be sentenced upon his own confession; he is in charge of the jury and therefore there must be a verdict; the jury must be told that the prisoner having in their presence by his changed plea confessed the crime, they should find him Guilty without hearing further evidence and then upon their verdict he will be sentenced.¹⁸ A trial, once begun, must end in a verdict unless the case falls within one of the recognised categories which justify the discharge of the jury without giving a verdict, such as a disagreement, illness, interference with the jury or the misconduct of one of them, or the utterance of inadmissible and prejudicial evidence. Without a verdict there cannot be a judgment.

VERDICT CONTRARY TO JUDGE'S DIRECTION

But, you may ask, if in a criminal case the judge is bound to take the verdict of the jury and cannot give

judgment without it, how in the last resort does he control the jury?

“The foreman of the jury . . . told the Chief Justice that the court nor counsel should not make any verdict for them—they, as an English jury, would make their own verdicts themselves: and, thereupon, gave a general verdict for the defendants.”¹⁹

This seventeenth-century breath of defiance blew out of court a special verdict drawn up by counsel on both sides so that a point of law could be argued. The Lord Chancellor was shocked when he heard of it; he declared that whereas formerly he had had so great an opinion of a London jury that, if his whole estate lay at stake, he would willingly have them try it, now he would rather see his house on fire than hear of such another verdict; and he granted a perpetual injunction. In the twentieth century we proceed on the well-founded assumption that juries will be more tractable. I do not suppose that any judge sitting to-day has ever had to consider what he should do if a jury returned a verdict contrary to his direction. But I must consider the question here, for unless I answer it to your satisfaction, you will not understand the nature of a verdict in a criminal case.

UNSUPPORTABLE VERDICT OF GUILTY

Let me take first the case of a jury returning an unsupportable verdict of Guilty. This might happen either because they refused to accept the judge's

direction that the prosecution had made out no case in law or—even less likely—because the defence had rebutted a *prima facie* case by overwhelming proof of innocence. In either case the judge must accept the verdict; that is clear; there is no power, as there is in a civil case, to order a new trial. But the first situation, *i.e.*, where the jury return a verdict of Guilty notwithstanding that the prosecution has made out no case in law, creates no difficulty except possibly a procedural one. In a civil trial, the difficulty does not arise at all because the case is withdrawn from the jury; in a criminal trial, although the judge is bound to leave the case to the jury and accept their verdict, he need not enter judgment upon an improper verdict or pass sentence. The simple way of dealing with the situation, now that there is a Court of Criminal Appeal, is for the judge to postpone sentence, grant bail to the prisoner and give him a certificate of fitness to appeal; the Court of Criminal Appeal will then put the matter right. That does not mean that the judge before 1908 was powerless; he could then have dealt with the matter either by stating a case for the Court of Crown Cases Reserved²⁰ or possibly, in an appropriate case, by granting a motion in arrest of judgment. The latter situation, *i.e.*, where a verdict of Guilty is returned notwithstanding overwhelming proof of innocence, is likewise since 1908 easily dealt with by the Court of Criminal Appeal. I am not sure that before 1908 there was any way of dealing with it within the limits of legal procedure; the situation must be so rare that it might be difficult to find a

precedent for it. But there is no doubt that it could have been dealt with by the expedient of respiting the prisoner and recommending a free pardon. A free pardon has the effect of nullifying the verdict of the jury and is equivalent to a declaration of innocence.²¹

ILLUSTRATIVE CASES

Two cases illustrate the position under modern law. The first is in 1911²² and I give you the facts as stated in the report—

“ At the close of the case for the prosecution counsel had submitted to the judge that there was no case to go to the jury. The judge said that probably there was no intention to steal, and that if he were a jurymen he would so find; but that the case ought to be left to the jury. Counsel accordingly did not put appellant into the box, and the judge directed the jury in favour of appellant. The jury, however, brought in a verdict of Guilty. The judge would not accept the verdict, and remarked that he had thought the jury had some common sense. Had he thought they would act in the way they had, he would not have left the case to them. He then directed the case for the defence to be proceeded with before the same jury, and added a few more words of summing up, directing the jury again that no *animus furandi* had been proved against the appellant. The jury again brought in a verdict of Guilty, and this verdict was adopted, but

the judge postponed sentence, and granted a certificate for appeal.”

Perhaps the jury was stung by the reference to its common sense or perhaps mystified by the nature of *animus furandi*. There appears to have been some evidence of an intent to steal, for the Court of Criminal Appeal said that if the whole case had been before the jury at once, they could not very easily have interfered. But they quashed the conviction on the ground that the trial was unsatisfactory.

Here is another case, decided in 1938,²³ which illustrates the point that there can be no second trial. I should perhaps interpose a word about that rule so as to explain two apparent exceptions to it. The first is that if the whole proceedings have been defective, *e.g.*, because the court had no jurisdiction, so that there has in law been no trial at all, there can be ordered what is called a *venire de novo*, a new arraignment. That does not offend against the rule that a man must not be put twice in jeopardy for the same offence, for in the first proceedings he was not legally in jeopardy at all. The second exception is that in any case in which it is proper to discharge a jury without its giving a verdict there must be a second trial: technically it is not a second trial since the first trial has not been completed. I called these exceptions “apparent” because the true position is that the rule does not apply at all unless there has been a valid and complete trial. If after that the accused is put on trial again, he is entitled to plead

autrefois convict or *autrefois acquit*, as the case may be.

In the case in 1938²³ to which I referred, the judge was dissatisfied with a verdict of Guilty because he felt he had made an error in his summing-up. So he refused to accept the verdict and ordered that the accused should be tried again. No doubt he thought he was doing the fair thing by the accused, but in fact he was depriving him of the opportunity of having the conviction quashed on appeal. At the new trial before another judge the accused pleaded *autrefois convict* and the plea was upheld, but the judge sentenced him upon the earlier conviction. Mr. Justice Humphreys in the Court of Criminal Appeal described the case as a comedy of errors and said—

“Anything more contrary to law it would be difficult to imagine. No judge has the right to say that he refuses to accept the verdict of a jury because he thinks that he ought to have directed them on the law and has failed to do so. The matter did not stop there, because the Acting Chairman proceeded to do what no one in this country has power to do, namely, to direct that there should be a new trial.”

UNSUPPORTABLE VERDICT OF NOT GUILTY

These cases illustrate what happens when a jury returns a verdict of Guilty contrary to the law. What is the position if they return a similar verdict of Not Guilty? The grand distinction between the two is that while in the former case they would be returning a

verdict contrary to the judge's formal direction, in the latter case they would not. Although it may be quite obvious that, unless the jury are going to disregard the judge's direction on the law, they can only return a verdict of Guilty, yet he may never formally direct them to return that verdict.

Suppose that on a charge of dangerous driving, the facts, *i.e.*, the primary facts, are undisputed and the judge considers that the only possible inference to be drawn from them is that the driving was dangerous within the meaning that he puts upon that word. In such a case, if the tribunal of fact consisted of an arbitrator or a bench of justices who had stated a case, a higher court would impose its own view; an acquittal would either be unreasonable or would mean that the tribunal had misunderstood the true meaning of the word "dangerous" and thereby fallen into an error of law. In trial by jury that cannot be done. While in such a case the judge might put the matter very strongly in his summing-up, he cannot direct a verdict of Guilty or refuse to accept a verdict of Not Guilty if returned. In short, there cannot be in law a perverse verdict of acquittal. In a case in 1935²⁴ Lord Chancellor Sankey said that for the judge to say that the jury must in law find the prisoner Guilty would be to make him "decide the case and not the jury, which is not the common law." As the Lord Chief Justice said²⁵ recently, in a debate in the House of Lords, no one has ever yet been able to find a way of depriving a British jury of its privilege of returning a perverse verdict.

ILLUSTRATIVE CASE

The point is illustrated by a case in 1921.²⁶ In this case the accused was indicted for keeping a gaming house. He had hired a hall for whist drives and the only question was whether progressive whist was unlawful gaming. In an earlier case²⁷ the court had held that since in the game of progressive whist chance predominated over skill, it constituted unlawful gaming. So the judge told the jury that it had been decided that progressive whist was illegal and that there was no real dispute about the facts. He invited them to give a special verdict; at the request of defence counsel he put in the question: "Did skill or chance predominate?" at the same time telling the jury that their answer could make no difference to the result. The jury answered the question by saying that skill predominated. The judge disregarded this as irrelevant and convicted. Mr. Justice Avory in the Court of Criminal Appeal said that the judge was not justified "in the course which he took of dictating the verdict instead of leaving the jury to find their own verdict on the facts in accordance with a proper direction as to the law applicable to the case."

INTERMEDIATE VERDICTS

I have said that a judge can never give a jury a formal direction to find a verdict of Guilty. But in cases in which there is a choice of more than two verdicts, he can formally direct them that they are not to return an intermediate verdict. For example, the burden is on the defence to prove insanity, and if they do not

produce any real evidence of it, the judge can withdraw that issue from the jury.²⁸ He does not, however, in such a case direct a verdict of Guilty, even though insanity may be the only substantial defence; he tells the jury that they may either convict or acquit but must not return the special verdict of "Guilty but insane." Another example relates to the defence of provocation in the crime of murder. Killing under provocation is not murder but manslaughter, and it is open to the jury on a charge of murder, instead of either acquitting or convicting, to find the prisoner guilty of the lesser crime. Provocation is often thought of and conveniently spoken of as a "defence," but it is not something which the defence has to prove. To sustain the charge of murder the prosecution has to prove "malice"; provocation negatives malice and therefore it is for the prosecution to satisfy the jury that the killing was unprovoked.²⁹ Nevertheless in 1946³⁰ it was decided by the House of Lords that, unless there is something in the circumstances of the crime to suggest provocation, the judge should not leave the issue to the jury but should direct them that they must either convict or acquit of murder. It is difficult to justify this decision theoretically. Since the burden is on the prosecution to prove malice, it ought in principle to be open to the defence to submit that the proof is insufficient; and in no other case is such a submission restricted by the requirement that the judge has to be satisfied that there is something to be said in support of it. The justification for the decision is a practical one, and I

refer to it as an interesting modern example of the way in which the courts are still prepared to encroach on the province of the jury for practical reasons. It had been the rule for some time before 1946 that the judge was entitled to tell the jury in a proper case that there was not sufficient provocation for a verdict of manslaughter.³¹ I strongly suspect that if before 1946 the Court of Criminal Appeal had been asked to give the basis of the rule, they would have said that provocation was a defence and the onus was on the accused to prove it. If, when the House of Lords laid down the true rule, it had allowed all the logical consequences to follow, there would have been a danger that a jury out of mercy or sentiment might too easily accept a suggestion of provocation as a way of escape from a conviction for murder; so the liberty of the jury to do so has been somewhat arbitrarily restricted.

JURY'S POWER OF ACQUITTAL

There may well be cases in which the killing is not in doubt and the formal direction not to return a verdict of manslaughter is therefore tantamount to a direction to return a verdict of Guilty. Still, if the direction is ignored, the court must, I think, accept the verdict. There is no way in which a verdict of acquittal can be nullified. As Lord Chief Justice Mansfield put it in 1784³²: "It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it in *their power* to do wrong, which is a matter entirely between God and their own

consciences." Mr. Justice Willes said : " I admit the jury have the *power* of finding a verdict against the law and so they have of finding a verdict against evidence, but I deny they have the *right* to do so."

GENERAL VERDICTS AND SPECIAL VERDICTS

I have now touched upon a number of points at which the criminal jury differs in its working from the civil, but before I summarise the effect of the distinctions there is one further matter to be noted. Verdicts are of two sorts, general and special. A general verdict is in a criminal case one of Guilty or Not Guilty; in a civil case it is a verdict for the plaintiff or the defendant, as the case may be, and if for the former, for a specified sum in damages. A special verdict is returned when separate issues of fact are left for a jury's determination by means of a series of questions which they answer according to their findings. A jury cannot be required to deliver a special verdict; it can insist upon its right to deliver a general verdict only.³³ In principle there is on this point no distinction between a civil and criminal jury, but one has grown up in practice. Civil juries are constantly being asked to return special verdicts, and it is taken for granted that they will be willing to do so as they always are; they are not even told of their right to refuse. It is not so in criminal cases. By that sort of intuitive sense which plays so great a part in the regulation of our affairs, both in the law and otherwise, it has been felt that any regular practice of interference with the generality of the criminal verdict might impair the

freedom and independence of the jury, and it is therefore rarely, if ever, asked for. Quite recently the Court of Criminal Appeal has declared that special verdicts ought to be found only in the most exceptional cases.³⁴

As well as this practical distinction, there is also a formal distinction, but one which is not for that reason insignificant. When a civil jury returns a special verdict, judgment is entered in accordance with its findings. When a criminal jury returns a special verdict, the judge cannot enter judgment himself but must direct the jury as a matter of law what general verdict—Guilty or Not Guilty—it ought to return on the basis of the facts it has found : so that the last word remains with the jury.

THE SOVEREIGN POWER OF ACQUITTAL

The fundamental distinction between the power of the civil jury and the power of the criminal jury is that a verdict of a civil jury cannot survive if it is contrary to law and a verdict of acquittal can. This great power of acquittal rests upon three pillars. First, there must be a verdict; the defence can never be withdrawn from the jury; the word of condemnation must come from the lips of their foreman. Secondly, there is no power to demand a special verdict. The jury cannot therefore be made to explain their verdict; they cannot be questioned upon it. They are to be told what the law is, but in any case which involves both fact and law no one is to know whether they have followed the law or not, for under a general

verdict no one can know how they have distinguished between fact and law. As Lord Mansfield said in the passage I have quoted : " The distinction is preserved by the honesty of the jury. The constitution trusts, that under the direction of a judge they will not usurp a jurisdiction which is not in their province." The third is that even in a case in which a verdict of acquittal is such that it can only be contrary to law, nevertheless it is the last word. That is secured by the fact that the common law gives no power to the judge to set it aside ; and that the statutory power of setting aside a verdict vested in an appellate court, which is the way whereby the unlawful verdicts of civil juries can be controlled, cannot in a criminal case be invoked at the suit of the prosecution.³⁵

I do not mean that juries are above the law. They should obey the law. But it is an obedience which they cannot be compelled to give. They are the wardens of their own obedience and are answerable only to their own conscience, so that no man can be convicted against the conscience of the jury. The thirty-ninth clause of Magna Carta may have had little or nothing to do with the origin of the jury.³⁶ But it is a fact that the great statement is now being literally fulfilled and has not been whittled down. No man shall be condemned except by the lawful judgment of his Peers or by the law of the land. Whenever there is a condemnation without a trial by jury, it is because Parliament has so willed. Wherever there is a trial by jury, the condemnation must be by a judgment which is both lawful and the judgment of the country. If his

countrymen condemn a man and they exceed the law, he shall go free: if the law condemns him and nevertheless his countrymen acquit, he shall go free.

CHAPTER 5

THE CONTROL OF THE JURY (contd.)

OTHER QUESTIONS OF LAW

IN my last lecture I said that there were several ways in which the judges had seemed to invade the province of fact by formulating so-called "questions of law." I have dealt with the most important of them—the rule that there must be a certain minimum of evidence to justify a verdict and a certain maximum that the verdict must not disregard. I must now consider what other "questions of law" there are.

"LIBEL OR NO LIBEL"

In one instance the judges suffered a statutory rebuff. The contest began in criminal libel—eventually affecting civil libel as well—and raised issues of constitutional importance. On the issue "libel or no libel," the rule now is that it is for the judge to decide whether the words complained of are *capable* of a defamatory meaning and for the jury to decide whether they are *in fact* defamatory. Thus the judge asks himself what meanings the words are capable of bearing and if one or more of those meanings can reasonably be thought to be defamatory, he leaves the case to the jury to say whether the words are in their view defamatory; if none can be thought to be defamatory, he decides the case as a matter of law

against the plaintiff. This sounds much like the general rule we have been considering, the issue whether the words are capable of bearing a defamatory meaning being equated to the issue whether there is any evidence that could justify a verdict for the plaintiff. But in fact the rule has an historical explanation that is all its own. The present law of defamation began to take shape in the seventeenth century¹ and its most rapid development during that period was in connection with defamation as a crime, particularly seditious libel, a crime which was always dealt with by the Star Chamber. It was unnecessary in that court to distinguish between fact and law. After the abolition of the Star Chamber the judges did not like to leave the question, libel or no libel, entirely to the jury, especially when after *Bushell's Case* in 1670² their control over juries was lessened. They divided the matter into three issues, which in 1731³ were formulated by Lord Chief Justice Raymond as follows: First, was the defendant guilty of publication; that was fact for the jury. Secondly, did the libel refer to the persons alleged to be libelled and was it applicable to them; that was fact for the jury. Thirdly, did the words amount to a libel; this was a matter of law for the judge. This is the origin of the rule which still exists as a rule of pleading, that the whole of the libel must be set out on the record; that enabled the judge to decide from the record whether the words complained of were defamatory or not.

FOX'S LIBEL ACT

Thus the law stood up to Fox's Libel Act of 1792.⁴ The way in which it was operated is conveniently shown in the case of the Dean of St. Asaph in 1784.⁵ The case of the Dean occupies 107 pages of the law reports, most of them being taken up by a speech by Erskine. The Dean, being, it was alleged, "a person of a wicked and turbulent disposition" and maliciously designing "to draw the government of this kingdom into great scandal, infamy and disgrace," published a "Dialogue between a Gentleman and a Farmer." Mr. Justice Buller at the trial directed the jury in accordance with Lord Raymond's ruling and Erskine moved for a new trial, which was refused. According to Lord Chief Justice Mansfield, with whom Mr. Justice Ashurst agreed, the jury ought to be directed to answer the first two questions only, and if they answered them both in the affirmative they should return a verdict of Guilty. That did not mean however that the defendant was guilty in law; their general verdict of Guilty was to be treated as a special verdict, finding no more than it was their province to find. The judge should then determine the third question and enter a verdict accordingly. Mr. Justice Willes would not subscribe to this doctrine. He held that, although it was "meet and prudent that the jury should receive the law of libels from the court," they were not bound to act upon the judge's direction and could give a general verdict of acquittal without being obliged to give their reasons. The result of this would be that the prosecution would have to convince both

judge and jury. If they did not convince the judge, he would not leave it to the jury; and if they did not convince the jury, there would be an acquittal. Mr. Justice Willes' dissenting judgment was given statutory effect in Fox's Libel Act. Section 1 enacts that the jury may give a general verdict of Guilty or Not Guilty upon the whole matter put in issue and are not to be required or directed to find the defendant guilty merely upon proof of publication and of the sense ascribed to it by the prosecution. But the Act preserved the defendant's right to the double protection, for by section 4 it was enacted that he might move in arrest of judgment on such ground or manner as by law he might have done before the passing of the Act. Fox's Libel Act in terms applied only to criminal cases, but it was said by those who had favoured the view of Mr. Justice Willes that the Act was only declaratory of the common law. During the nineteenth century this view gradually prevailed but at the same time the double protection was relaxed. Perhaps it was felt that the defendant ought not to have the best of both worlds and that if the matter was going to be determined by the jury the judge ought not to interfere merely because his own opinion was different, but only if he felt that the verdict of the jury was unreasonable. In 1882⁶ the present rule defining the provinces of judge and jury was authoritatively settled by the House of Lords.

THE RULE TO-DAY

Thus, although the origin of the rule is different, the

line that divides the province of judge and jury in libel cases approximates very closely to the ordinary line. The chief difference to-day is that judges tend to interfere on the ground that words are incapable of being defamatory rather more freely than they would interfere on the general ground that there is not enough evidence. This may be because they have not completely forgotten the days when they claimed dominion over the whole question, libel or no libel. But more probably it is due to the fact that the borderline is much more disputable than it is in the ordinary case. The distinction between a meaning which words are capable of bearing and that which in fact they bear is not an easy one; if a man thinks that a meaning is plain, he often finds it difficult to see how the words can be capable of any other. In practice it is perhaps desirable that juries should not in finding words to be defamatory have as large a liberty as they have in other actions, since complaints of libel and slander frequently introduce matters calculated to draw the untrained mind away from the strict rights and wrongs of the case. By contrast, at the other end of the verdict, the judges are more reluctant to set aside a verdict that words are not defamatory than they are to set aside the ordinary verdict as perverse, and it is very difficult to find any case at all in which such a verdict has been interfered with.⁷ It is clear at least that it is only in the most extreme cases that the courts will say that there was a libel where a jury has found none.⁸

CONSTRUCTION OF DOCUMENTS

None of the difficulties that led to Fox's Libel Act arose in the action of slander. This was because the right of the judges before 1792 to decide whether words were libellous did not pertain to the action of defamation but was simply part of the rule by which the judges reserved to themselves the right to interpret all documents. Except in libel that rule still stands. The principle which the judge applies is that the words used are to be given their plain, ordinary and popular meaning unless it can be shown of any word that it was to be understood in a special or technical sense. The rule is that the construction of words in their ordinary meaning is a question of law for the judge, while the imposition of a secondary meaning, special or technical, raises a question of fact for the jury. The rule appears at first sight to be an inversion of what it ought to be; you may think that the jury would be a better judge of plain, ordinary and popular meanings and the judge better fitted to handle technical meanings. As usual, the explanation of the rule is historical and the present justification for it is practical. The documents which came before the courts in medieval times nearly all related to land⁹; they were conveyances prepared by lawyers; even if the jury was literate, which I do not suppose it ever was, jurors could not have made head or tail of them. Moreover, conveyances were the tools of the lawyer's trade; it was important that the words in them should have fixed meanings so that they could be used precisely; it was quite unimportant that they should

be comprehensible to laymen. There are traces of this attitude still to be found in Lincoln's Inn. The modern principle that words should be given their popular meaning came in only when laymen began to prepare their own business documents. The established rule that all writing should be construed by the judge was applied to them as a matter of practical convenience, for otherwise, as Baron Parke said in 1841,¹⁰ there would be no certainty in the law. Already commercial contracts were being expressed in standard forms—bills of lading and policies of insurance—and it became as necessary for businessmen as it had been for lawyers that they should know in advance how the language they used was likely to be interpreted.

No evidence can be given of what is the natural and ordinary meaning of words; the judge acts on his own knowledge. But frequently laymen drawing up a commercial contract or writing letters which are held to constitute a contract use words which have a trade meaning or a local meaning understood by them and different from their ordinary meaning. Evidence must then be tendered to show that the parties meant the words to have a secondary meaning and, if that is disputed, the question, like any other question of fact, must be submitted to the jury.

In this division of function between judge and jury there is a significant principle to which I shall return because it is manifested in other branches of the law besides the construction of documents. Where there is

need for uniformity a jury is no use. Therefore questions of fact which are liable to recur, such as the ordinary meaning of words in common use, are, it may be said, best tried by a judge who follows precedent. The unusual case, such as the special meaning, where there is no question of uniformity, can safely and properly be left to a jury.

IMPLIED TERMS—REASONABLENESS

The question whether a term should be implied in a contract is also a question of law. This is so often akin to a question of construction that it is perhaps natural that it should be governed by the same rule. But here again it appears at first sight to involve a question of fact rather than of law. A term is not to be implied into a contract unless it is necessary for its business efficacy and is also such as the parties as reasonable men might have been expected to have agreed upon at the time if they had thought about it. This sounds like a good point for a jury, since they ought to be good judges of business efficacy and reasonableness. But in fact it is one of a number of miscellaneous matters which the judges have declared to be questions of law; and which, if they have any common thread running through them, it is this—that judges and not juries ought to be left to decide what is reasonable. “Reasonable” is a deceptive word. To make a good decision about what is reasonable does not demand the use of any reasoning power; the decision is not made by any rational process. If it

were, the reluctance of judges to leave it to a jury could be understood since the jury is not trained to reason. But "reasonable" as used in the law and in its popular sense means simply what is fair and just. We think of that now as pre-eminently a jury question. But in fact it has only become so in modern times. The function of the jury was first to supply information and later to find the primary facts; there was no code for the judge to apply to the facts; it was for him to give judgment in terms of what was the fair and just thing to do upon the facts. If from the first that had been the duty of the jury, we should never have had any law at all—only a collection of unexplained verdicts. The law was made by the decisions of judges upon what was fair and just being gathered together as precedents. When the fundamental principles of the law had been formed, the judges, in order to avoid too close definitions, left a lot to be filled in, subject to the general provision that what was to be done was to be "reasonable."

COVENANTS IN RESTRAINT OF TRADE

Take, for example, covenants in restraint of trade. An employer does not want an employee to leave him and take a lot of customers with him; likewise, the buyer of a business with its goodwill does not want the vendor to set up in competition in the next street. They are allowed therefore in the contract of service or of sale to impose restraints on the future activities of the servant or the seller. But they must not be too severe. It would be contrary to the public interest if

a man were allowed to barter away altogether his right to trade; so the law is that a restraint of trade is illegal unless it is no more than is reasonable. The law on this matter was settled long ago by the judges as a matter of public policy. If it were being established to-day, it would be done by statute with regulations made under it which prescribed precisely the radius within which a competing business might not be set up (no doubt with a schedule setting out different radii appropriate to different categories of business) and the duration of time for which the covenant might be enforced. When the law does that sort of thing (as it does, for example, in the Factory Acts and the regulations made thereunder which prescribe the precautions that are to be taken for the safety of workmen), no one doubts that it is for the judge to interpret the regulations. But if instead of a law made rigid with detail there is a flexible provision that the employer is to take all such precautions as are reasonable or is to impose only such restraint as is reasonable, is the working out and application of such a general provision any the less a question of law? The judges thought not and so have always kept in their own hands the decision whether a particular restraint of trade was reasonable or not.

PRACTICAL JUSTIFICATION

This is a theoretical justification for calling the question of reasonableness in restraint of trade a question of law. But there is also a practical justification for it of the sort we have already noticed, which

probably, as is generally the case in the development of English law, played a greater part in the foundation of the rule. Judges were doubtless afraid that if reasonableness was left to jurors they would apply different measures in a sphere of the law in which there was need for uniformity. Buyers and sellers of businesses and masters and servants who were making their contracts of service wanted to know what sorts of covenants they could properly include; judicial decisions could provide a yardstick which the random verdicts of juries could never do. The same practical justification distinguishes the decisions about reasonable notice. The rule now is that what amounts to reasonable notice or a reasonable time is a pure question of fact, but that rule was not settled until after many decisions of fact had been given by judges and crystallised into law. The judges determined the month's notice for domestic servants, the six months' notice to quit a yearly tenancy and the day's notice of dishonour of a bill of exchange. These are cases, and there are many others (for example, the forty days' freedom from arrest on civil process granted to members of Parliament before and after each session) in which it is important to have general rules; decisions in which the reasonable time depends solely on the circumstances of the case create no precedent and can best be determined by a jury. Lord Mansfield proceeded on this principle. In 1786¹¹ he said: "Whenever a rule can be laid down with respect to this reasonableness, that should be decided by the

court, and adhered to by every one, for the sake of certainty.”

The truth is that it is only when a body of law is fully developed that it is practicable to leave questions of reasonableness to a jury. When the standard of what is fair and just has been applied by the judges so as to evolve generic rules, the application of it to particular cases within the genus can safely be left to a jury. The modern treatment of what is reasonable as a pure question of fact is one of the signs that the common law has reached complete maturity.

EMPIRICAL DIVISION BETWEEN FACT AND LAW

There are other examples which show that the division between fact and law, whatever the justification for it now, has been developed empirically. In the crime of perjury it is necessary to prove that the false swearing was material to the issue being tried. In the defence of non-disclosure in an action on insurance policy, it is necessary to prove that the fact which was not disclosed was material to the risk insured. The former is a question of law for the judge¹² and the latter a question of fact for the jury.¹³ There is no logic about that but much good sense. The judge is most fit to say what matters in legal proceedings; and a jury of businessmen most fit to say what sort of information a reasonable underwriter would consider to be material when he is assessing a risk.

As in perjury, so in malicious prosecution. The proof of the latter requires among other things that

the prosecution should have been brought without an honest belief in the guilt of the accused and without reasonable cause. The existence of honest belief is a question for the jury. The jury must also find the facts which are said to constitute the grounds for the belief, but it is then for the judge to say whether on those facts the belief was reasonable or not. The justification given for this is that the judge is better able than the jury to determine whether or not it is proper to institute a prosecution.¹⁴ This is a very doubtful justification. As Lord Colonsay said in 1870¹⁵ :

“ For what is it that a judge would have to determine? He would have to determine whether the circumstances warranted a reasonable and discreet man to deal with the matter, that is to say, not what impression the circumstances would have made upon his own mind, he being a lawyer, but what impression they ought to have made upon the mind of another person, probably not a lawyer.” *

The more likely explanation of the rule is that judges were afraid that if juries were given too free a hand, every prosecution that failed might be turned into an action for damages. But by 1870 the rule was too firmly established to be upset even by the House of Lords, though it was there severely criticised.¹⁶ It has proved in practice to be one of the most unpalatable mixtures of law and fact.

CONTROL OF AWARDS OF DAMAGES

The last category that I shall consider of questions of law is of those that relate to damages. There are two principles to be considered here : by the application of the first a jury's award of damages may be either increased or reduced and by the second it may be nullified altogether.

The first of these is not a special power reserved to the judge but is no more than a special use of his general power to keep the verdict within the limits of reason. The award must be of a size which in relation to the circumstances reasonable men could have arrived at, that is to say, it must not be "out of all proportion to the facts."¹⁷ Within an upper and a lower limit determined by that test—they are in practice very generous limits—¹⁸ the jury's discretion is absolute. If a jury's award of damages is set aside there must be a new trial ; the Court of Appeal will not substitute a figure of its own. What the court would do if a succession of juries persisted in awarding excessive damages has never had to be decided. For many years there was in force a practice whereunder a superior court—a Divisional Court or a Court of Appeal—did in effect substitute its own figure for the jury's, though it avoided doing so in form. If the court considered the award—say £5,000—excessive, it fixed the sum it thought to be appropriate—say £1,500—and made an order for a new trial unless the plaintiff agreed to reduce his damages to £1,500. That gave the plaintiff a choice but not the defendant ; if

the defendant thought that a new jury would have given even less than £1,500, he had no remedy; the court justified a course which deprived the defendant of his chance of a better verdict by saying that the right to a new trial was discretionary and therefore the order could be made conditional. The practice was formally challenged in the Court of Appeal in 1884¹⁹ and approved. Twenty years later an appeal was made to a higher tribunal and in 1905²⁰ the House of Lords condemned the practice as unconstitutional in that it deprived the defendant without his consent of his right to have damages assessed by a jury.

REMOTENESS OF DAMAGE

The other way in which a judge can interfere with a jury's award of damages is by virtue of the rule that remoteness of damage is a question of law. Here again this is not really a special rule but an example of the general rule of law that there must be evidence to support a verdict. It is, I think, an example which illustrates better than any of the others under the general rule the true nature of the division between questions of law and questions of fact.

Damage is too remote if there is not a sufficiently close causal connection between the wrongful act and the injury that is being compensated. Mr. Smith is run down and killed: Mrs. Smith is left very badly off; should she be compensated? She has to move to a less expensive neighbourhood and consequently a shopkeeper loses a valuable customer: should he be

compensated? Mr. Smith's private secretary is not re-engaged by his successor and has to take a less remunerative job; he gets the job which would otherwise have gone to Mr. Brown and Mr. Brown in turn has to take a less remunerative job; and so on. The same problem is encountered in questions of causation, which often arise under contracts of insurance. The insurer promises to pay for loss caused by enemy action and the question arises how much of the consequences that flow from, say, the torpedoing of a merchant ship by an enemy submarine, can fairly be described as loss caused by enemy action? The larger the interval between the event and the casualty, the more likely it is that other events will occur and make their contribution and so complicate the problem to be solved. Possibly they will have come in from the start. A ship is so severely damaged in a storm that she can only sail at half speed and thereby she is rendered much more vulnerable to submarine attack; is it the storm or the torpedo that is the cause of her loss?

These sort of questions have appeared in the case-books over the last century and with increasing frequency in the last fifty years. At first, judges declared that all questions of causation were questions of law; then they began to declare that they were questions of fact; and a confusing number of dicta can now be found to support both propositions.²¹ The earlier school drew a distinction between the *causa causans* and the *causa sine qua non* and sought to isolate the *novus actus interveniens*; the later and

more robust school, which is now in the ascendant, deprecated the use of Latin and said that the whole thing was a matter of common sense. The truth is, I believe, that questions of causation are questions of fact but that they can be left to the jury only subject to the limitations that are imposed on all questions of fact, namely, that there must be some evidence to support a jury's conclusion. That means in effect that the law leaves it to the judge to draw a line; beyond that line he tells the jury not to look; on the near side of it he leaves it to them to pick out the event which, judged by common-sense standards, they think to be the real cause. If in relation to the injury or loss complained of the act alleged to be the cause is beyond the line, the judge will direct the jury that the damage is too remote, which is only another way of saying that there is no evidence of damage in law. There is no fundamental principle of law or morals involved in drawing the line. That a line is drawn at all is simply a recognition of the fact that it is not practicable to make a man pay for all the consequences of his act and that his liability must be limited to the more immediate consequences.

RULES TO PRODUCE UNIFORMITY

Since the test is a practical one, ought it not, you may ask, to be left to the jury as practical men to determine? The answer to that illuminates the meaning of "a question of law." If it were left to the jury in each case to do what they thought fair and practical, results would be bound to differ enormously.

The same class of sufferers would be relieved by one court and not by another; there would be no law in the matter. Wherever there is need for uniformity, there must be a rule. The jury is not by its constitution capable of making rules and therefore the judges must make them. A rule that the damage must not be too remote is too general to be left to a jury for application by them. It cannot be expressed more precisely, and so its strength as an instrument for producing uniformity depends upon its application by a limited number of people of the same way of thinking acting with the guidance of precedents. It is quite true that it is a rule which is intended to be applied in a practical way. But then so is every rule that is a part of the common law. The question that has to be answered at the end of every trial is: "Shall the plaintiff be granted relief by way of damages or otherwise?" or "Shall the prisoner be punished?" One way of achieving justice would be to leave it all to the jury: let them say what should be done on the facts which they find to be proved. Then there would be no law, no uniformity in the administration of justice. The rules which the judges made to produce uniformity—rules defining causes of action and crimes—were made by them as practical men drawing on their experience of the needs of the community and its moral sense, and they constitute the common law. Most of the rules which the judges made in this way are categorical; and rules of that sort enable law and fact to be more sharply separated. The judge states the category and defines it and leaves it to the jury to

determine whether the facts proved fall within it. The rule on remoteness of damage is not categorical in this sense and that means that the judge often has to draw a line in relation to the particular case. He seems then—just because he is dealing with the particular and not with the general—to be dealing with facts rather than law.

WHERE TO DRAW THE LINE

This is how the rule on remoteness illustrates the connection between what the ordinary man most easily understands by a question of law—a question, for example, about the rule which defines a trespass or a theft—and a question of law which involves the drawing of a line in a particular case to determine whether there is enough evidence to go to the jury. The effect of every rule of law is to limit the power of the jury. A man may not be punished because the jury thinks he has done wrong but only if he has committed a crime; a man may not be given damages simply because the jury thinks he deserves compensation. The judges drew the general lines which prescribed the different categories of crimes and of other wrongful acts which carried with them the liability to compensate. But sometimes general lines cannot be drawn without getting too much rigidity; in such cases the judges draw particular lines. But in both cases their function is essentially the same. It is to limit and define the question which the jury has to answer. The more limited the jury's function the greater the chance of uniformity in the administration

of justice. The rule that there must be a minimum of evidence as weighed by a judge—and that means, as I have said, estimated by one of a body of men who think alike and are guided by precedent—helps to bring uniformity into the administration of justice in the same way as every other rule of law does; and in this sense it may properly be termed a rule of law. Or, putting the point another way, the question where to draw a line, whether particular or general, is a question of law.

INFORMAL CONTROL OF THE JURY'S FUNCTIONS

All these rules which we have been considering and by means of which the judge controls the mind of the jury can be formally stated and are to be found in the textbooks. There are also informal ways in which the judge influences and shapes the verdict, and no account of the relationship of judge and jury would be complete if it did not consider them. The judicial influence springs from the nature of the process. It is such that without the assistance of the judge a jury in many cases could not arrive at a just verdict. Juries are, of course, quite capable of listening to a story told by a witness on one side and then to another story told by a witness on the other and deciding which they believe. But few cases are quite as simple as that. The witness's story has to be tested in the light of the probabilities as well as by the impression he makes in the witness-box; parts of the story, it may be suggested, are corroborated by independent evidence

or by facts that can be proved with certainty; the other side will point to similar facts with which the story is said to come in conflict. There are therefore many side issues whose determination may help in greater or less degree to decide the main issue. Somebody has to sort all this out. Then there is generally a large area in debate which depends on inference. There are many deeds done that are unwitnessed, and proof of the doing of them rests on inference from circumstantial evidence. In criminal trials, especially, the act charged is frequently proved beyond dispute and guilt depends on proof of the wicked intent. The accused's probable state of mind may then have to be gathered from a number of small incidents, each of which may be in dispute, and the effect of them must be summarised and weighed.

If to-day twelve men and women were put into a committee room and told that they must listen to the evidence and find the facts, they would call for pen and paper, make careful notes and some at least of them would want to take a vigorous part in questioning the witnesses; they would ask for copies of the depositions and of all the documents produced in the case. But trial by jury did not grow up in that atmosphere. The parts to be played in it by judge and jury were being worked out when documentary evidence was slight, duplication of documents laborious and a juror's powers of reading and writing very limited. In 1790²² in a case where there was a question of disputed handwriting, the judge refused to admit evidence of the comparison of hands; for if he

did, he said, the situation of a jury which could neither read nor write would be impossible. For the first half at least of the following century most public matters were determined by oral discussion without documentary aids. There was not, for example, any machinery for copying Cabinet documents; the system was that either the original was circulated by being passed round from Minister to Minister or it was placed on the Cabinet table for perusal before the meeting.²³ The way in which business was generally done was for someone to read aloud the parts of the document that were most material and then for the thing to be settled by discussion. That was the way the thing was then done in court and it still is the way. Is it merely a disinclination to move with the times that has kept the procedure at a jury trial the same as it was in the days when the typewriter and the duplicator were unknown? No: there is more to it than that. The jury was not designed as a body of professional investigators and the operations of twelve men, each seeking to penetrate to the heart of the mystery by his own route, would soon reduce the trial to chaos.

THE RULES OF EVIDENCE

It is of the essence of the jury system that the conduct of the inquiry is left in the hands of the lawyers. The collection of material is in the hands of counsel and solicitors, for the judge is not an inquisitor. When the material is collected, it has to be presented. This means that a selection has to be made and that

involves two processes, first, the exclusion of what is deemed to be irrelevant, and secondly, the emphasising of what is deemed to be particularly relevant. In both these processes the judge plays a major part, in the first formally and in the second informally. I spoke too soon when I said that I had finished with the formal rules which the judges have made for controlling the verdict; for the rules of evidence must be so regarded. Only the material which the law permits to be used can go to the making of a verdict. The first object of the rules—they have other uses—was to prevent the jury from listening to material which it might not know how to value correctly. What a man is said to have said, *i.e.*, hearsay, may often be of some weight even though the man is not there to be cross-examined about it and though he might, if he came, deny saying it. But the danger of hearsay is that the jurymen, unused to sifting evidence, might treat it as firsthand; so, except for limited purposes, it is not allowed. Similarly, a knowledge of the accused's previous convictions might often help in determining whether or not he had committed the crime, but because with a jury the prejudice created might outweigh its value, the evidence, again except for limited purposes, is not allowed. The law of evidence not only makes these and other categorical formulations, but also leaves to the judge the general power to exclude anything that he considers to be quite irrelevant. The relation between these two offers another example of the duality in the judicial function. Just as "the question

of law" embraces not only the general question whether the facts fall within the category of a cause of action settled by precedent but also the particular question whether the facts of a particular case are sufficient to sustain the cause of action, so the judge determines relevancy by admitting categories of evidence according to the principles settled by precedent and admitting particular pieces of evidence according to his own judgment. In both cases the law is at work in the task of limitation and definition by the drawing of general and particular lines.

All the material which gets into the ring that is kept by the rules of evidence is not of course of equal value, and it is the task of counsel and then of the judge to select and arrange. In discharging this task counsel can be helpful but not disinterested and the jury must look chiefly to the judge for direction on the facts as well as the law. It is his duty to remind them of the evidence, marshal the facts and provide them, so to speak, with the agenda for their discussions. By this process there emerges at the end of the case one or more broad questions—jury questions—which have to be decided in the light of common sense. That after all is the only virtue with which a jury is necessarily equipped. Its members are not selected for their intellectual powers; they are chosen at random; they are not even required to pass an intelligence test. They are not expected to do the sifting and the correlating, or to examine closely documentary material. In the "Sunshine Roof" case where, as

Lord Atkin put it, the jury did not give effect to "the compelling significance of the written word," he added²⁴: "It can hardly be said that the jury lose sight of the documents, for they barely see them." All the analysis should be done for them so that there is in the end served up to them for their decision only the big questions. Thus during the hearing of the case they are free to listen and to absorb impressions: they need not attend too closely to detail or run up every alley to make sure for themselves that it is a blind one. This division of labour between judge and jury is a good thing for both. A judge who tries a case alone often has to give so much time to noting down the evidence, and to fitting each incident as it comes along into the structure of the case as a whole, that he may miss some of the advantage that can be gained from just listening to a witness and forming a general impression of his truthfulness and reliability.

THE SUMMING-UP

I have spoken of this as an informal limitation on the jury's function, and I stress the word "informal." They can approach the facts in any way they like, but neither their constitution nor the trial process is designed to encourage them to do so. In practice, whether they are giving a special or a general verdict, they arrive at it largely by determining the matters which the judge remits to them. The summing-up is a vital part of the jury trial. The judge will be careful to differentiate between fact and law. He lays down

the law and tells the jury that they must take it from him; if he misdirects them on law, it is a ground of appeal. On fact he tells the jury that they are free agents and they are not bound by any opinion on fact which he may express. But it is obvious that they are likely to be very much influenced by his opinions on the facts and by the way in which he presents them; and so what is loosely called a "misdirection of fact" is also a ground of appeal. It is difficult to define a misdirection of fact. It is really anything which causes an appellate tribunal to think that the presentation of the facts was seriously unbalanced. The jury must not be misled into following a wrong line of approach to the facts and the essential parts of the case for each side must be put to them.

There is no stereotyped pattern for a summing-up and no formulas are prescribed.

"Mr. Justice Stareleigh summed up, in the old-established and most approved form. He read as much of his notes to the jury as he could decipher on so short a notice, and made running comments on the evidence as he went along. If Mrs. Bardell were right, it was perfectly clear that Mr. Pickwick was wrong, and if they thought the evidence of Mrs. Cluppins worthy of credence they would believe it, and if they didn't, why they wouldn't. If they were satisfied that a breach of promise of marriage had been committed, they would find for the plaintiff with such damages as they thought proper; and if, on the other hand, it

appeared to them that no promise of marriage had ever been given, they would find for the defendant with no damages at all.”²⁵

JUDGE'S RIGHT TO COMMENT ON THE FACTS

The above is the summing-up in the celebrated case of *Bardell v. Pickwick*. I suppose that the passage is intended to be satirical: but it is a curious fact that the novelist's son, Sir Henry Dickens, who was the Common Serjeant at the Old Bailey when I first went to the Bar, never departed very far from “the old-established and most approved form.” It is a pattern that cannot go wrong, but a jury probably finds some dissection of the evidence more helpful—something which extracts the issue to be proved and segregates the material relating to each. Some judges like to perform that task with complete neutrality, others will indicate an opinion on some of the issues or on the value of some pieces of the evidence: unless it be in favour of the defence in a criminal trial it would be exceptional for the judge to put forward an opinion on the case as a whole. Nevertheless a judge is permitted to express his opinion freely and, if he wishes, strongly. The only limitation placed upon him is that he must not put any point unfairly and must make it clear to the jury, either expressly or by implication, that on the issues of fact which are left to them they are free to give his opinion what weight they choose. The permissible strength of an expression of opinion must depend on the strength of the evidence; in a

doubtful case a judge will be careful not to give too strong a lead. Here is rather an extreme example—in what one hopes was a clear case—of an observation that was passed by the Court of Criminal Appeal in 1910²⁶ (albeit with the comment that it was “very strong”): “He practically stands convicted by the evidence of the prosecution. You must do your duty.”

Some extreme examples of this sort and some cases in which the judge has been thought himself to prosecute have given rise from time to time to the proposal that the judge should be forbidden to comment upon the evidence. I doubt if this would achieve what the proposers want unless the judge was prohibited altogether from dealing with the evidence, for the mode of its presentation to the jury is likely to influence them just as much as any express comment. In most of the United States the judge is not allowed to comment on the evidence²⁷; the charge is strictly confined to the statement of the principles of law which the jury has to apply. Even in States where there is no complete prohibition, the practice seems to be against any detailed examination of the evidence; in the *Hiss* case, for example, in New York, in which there were two trials (the second because of a disagreement) each lasting over a month, each charge was a short and colourless document read in an hour or so.²⁸ These restrictions on the duty of the judge originated, I believe, in the distrust of judges as servants of the Crown that naturally filled the minds of the Founding Fathers. But the remedy should, I think, have been sought in the appointment of

impartial judges. Those who originated the practice were misled by the form of trial by jury and missed the reality of it. They fell victims to the deceptive brocard that the facts were for the jury and the law for the judge, into supposing that there could be no proper reason why the judge should meddle with the facts. Of the principle which they introduced Professor Thayer has written ²⁹: "Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words."

COMBINATION OF JUDGE AND JURY

The reality of trial by jury consists of a combination of judge and jury. That is the historical development. Trial by jury means a compounding of the legal mind with the lay. The prescription for this compound has been one of the greatest achievements of the common law. The influence of the judges is exercised both in the general and in the particular. In the general it is exercised by means of the rules we have been considering and which were formulated by the judges of the past and which make questions of fact partly for the judge and partly for the jury; in the particular it is exercised through the summing-up. It can be said that the object of the process is to produce a directed verdict if "direction" be given its double meaning of guidance as well as of commandment. The jury is not allowed to search for a verdict outside the circumference delineated by the judge; and within the circumference its search is directed by the judge in that he marks out the paths that can be taken through

the facts, leaving to the jury the final choice of route and destination. If it is to work at its best, it needs a skilful and impartial judge just as much as an independent and sensible jury. It is important to remember not only that the jury system is a peculiarly English institution but that so also is the English conception of the judicial office and of the prestige that is to be attached to it. Professor Thayer has written ³⁰ :

“It must be remembered that in England the judges have always, in theory, been great ministers of the Crown; and that even to this day much of the reality and many visible signs and symbols of this high place and power remain.”

I should be going outside the subject of these lectures if I were to enlarge upon that; but I hope that some day a Hamlyn lecturer will explain the nature of the judicial office under the common law of England, trace its development and show how unique it is as a factor in the administration of justice. No one who has held the office can fail to be conscious of the power that flows, not from any quality of his own but from the position that has been made for him by the judges of England. This, far more than any personal talent that he may have, disposes a jury to listen with respect to the views of the judge on fact as well as on law.

DIFFERENCE OF OUTLOOK OF JUDGE AND JURY

This does not mean of course that the jury invariably accepts the guidance of even the wisest judge. If it did, the process of trial by jury would be valueless.

The criminal trial illustrates more easily than the civil the sort of divergence that is likely to arise. It would be an over-simplification to say that the judge tends to favour the prosecution and the jury the defence; and it would be a very dangerous simplification too to make unless I at once followed the uttering of it with an explanation. First, I think that in a criminal trial the judge appears to the jury to be a more imposing personage than he does in a civil case, and perhaps a little terrifying. There is much ceremony, particularly at Assizes, that invests the judge with the majesty of the law and identifies him with the enforcement of law and order. Then the burden of proving guilt—"beyond a reasonable doubt"—is so heavy that it is no use prosecuting at all except upon a strong case; and the strength of the case most often lies in the palpable facts, the sort of facts that are assessable in a summing-up, whereas the hope of the defence very often lies in impalpabilities—the willingness to make allowances for muddle-headedness, illogicalities and unreasonableness—impalpabilities that are less appealing to the legal mind than to the lay. Finally, there is, or has been, a tendency for counsel for the prosecution not to prosecute firmly enough. The last half-century has seen a welcome transition in the role of prosecuting counsel from a persecuting advocate into a "minister of justice."³¹ But in some places the pendulum has swung so far, and the ministry has moved so close to the opposition, that the prosecution's case is not adequately presented, and counsel, frightened of

being accused of an excess of fervour, tend to do little except talk of reasonable doubt and leave the final speech on the facts to the judge. In England administration of justice depends as much on the presentation of two opposing cases as government in England depends on the two-party system. The result of the deficiency is that the duty of seeing that the prosecution's case is effectively put to the jury is sometimes transferred to the judge, and thus the balance of the trial is upset. Blackstone lamented³² that the refusal to allow counsel to the prisoner meant that the judge had to act as the advocate for the defence; it is even more lamentable when he finds that he has to act as counsel for the prosecution.

But I have digressed from my purpose. I was not intending to do more than to illustrate the obvious fact that judges and juries do not always agree in their conclusions. Most judges can recall a number of cases which would have been decided differently if they had been sitting alone. That does not mean that one can necessarily say that one or the other must have been in error. No doubt there are cases in which judge and jury, pursuing the same train of reasoning, arrive at opposite conclusions. But usually when there is a difference of opinion the explanation is that the jury has given weight to factors that impress the lay mind more strongly than the legal. I think it is an essential part of the system that the law should recognise that there are cases in which such factors should be dominating. Not that the jury system leaves the lay mind to operate uncontrolled. The control does not

reside solely in the statement of the law by the judge but also in the influence exerted by the legal mind. The judge's task is not merely to expound the law to the jury but also to offer them an approach to the facts that is based on the ideas that lie behind the law—dispassion, logic and respect for authority. It is not with him, as it may well be with the jury, the only trial in which he will ever take part; he is perhaps less interested than they are in the fates of the individuals concerned and more interested than they in a decision that will conform. Hard cases make bad law; the jury is sometimes too frightened of the hard case and the judge of the bad law. This is the eternal conflict between law in the abstract and the justice of the case—how to do what is best in the individual case and yet preserve the rule. It is out of this dialectic that the just verdict comes. At its best it comes from the coalition of the lay mind with the legal; but if there is conflict, it is the lay mind that predominates. That is what is meant by trial by jury.

POWER OF JURY WITHIN LIMITS

I have now covered the limitations, formal and informal, on the power of the jury to determine the facts. What I need to do in conclusion is to emphasise the extent of the power that resides within those limits. It is very great indeed. I have spent so long in demonstrating that the domain is not as great as it is popularly supposed to be that I must remind you now that what is left still vastly exceeds that which the judges hold. The middle area in which

the jury is subject to no command is much larger than the curtailments at either end; the jury is free to go everywhere where in the judgment of the law a reasonable man would wish to go. You must remember too that before the reasoning faculties come into play a judgment has in most cases to be made upon the reliability of oral evidence and that in making this judgment the jury is almost unfettered. Lastly, there is the great factor to which I shall in the end return, for it is of supreme constitutional importance—the unassailability of the verdict of acquittal.

**THE DECLINE OF THE JURY
AND ITS STRENGTH**

CHAPTER 6

THE DECLINE OF THE JURY AND ITS STRENGTH

No account of trial by jury would be satisfactory if it ignored the fact that this mode of trial has in civil cases diminished enormously since the turn of the century. In this lecture I propose to discuss this diminution and to compare trial by jury with trial by judge alone and finally to attempt an assessment of its value.

RIGHT TO A JURY IN CRIMINAL CASES

I must preface what I have to say on the first point by reminding you that, although the right to trial by jury has in criminal cases never been cut down, a great number of criminal offences is none the less tried without a jury. Crime in England falls into two classes—summary offences and indictable offences. With the first class we are not concerned; the offences that fall into this category are mainly breaches of statutes designed to regulate behaviour and not criminal in the full sense of the word. In the case of every indictable offence the accused has a right to trial by jury. But in a great number of them—all except the most serious—he can, if he chooses, ask to be tried summarily by the magistrates. It does not follow that he will be so tried. In deciding upon the mode of trial the magistrates have to consider the nature of the case

and whether the limited punishment that they have power to inflict is adequate; and in certain cases they cannot proceed to summary trial without the consent of the prosecution. Yet, about 85 per cent. of indictable offences are in fact tried summarily¹—a fine tribute to magistrates. The statistics show that at the present day there are approximately five or six thousand trials by jury every year.

DECLINE IN FACILITIES FOR JURY TRIAL IN CIVIL CASES

In civil litigation there has been in the last century a marked decline not only in the popularity of trial by jury but also in the facilities that are afforded for it.² Until 1854, trial by jury was the only form of trial used in any court of common law. In that year the first small breach was made. Trial by a judge alone could thereafter be had by consent of both parties and the judge was empowered to refer matters of account.³ The next change was made in 1873, the great year of law reform; the power to remit matters of account to a referee was extended to “matters requiring prolonged examination of documents or accounts or any scientific or local investigation”⁴; this phraseology is still part of the law. A more significant though subtler change was made in 1883.⁵ Six causes of action were selected for special treatment and, with one addition made later, they are still placed in a separate category: they are libel, slander, malicious prosecution, false imprisonment, seduction and breach of promise of marriage. In these six cases trial by jury continued to be obtainable as a matter of course, but

in all other cases it had to be specially asked for. Thus, while the right to a jury was maintained in all cases except those in the "prolonged examination" class, the alteration was so contrived as to make trial by a judge alone appear to be the general rule and trial by jury the exception. Later, the procedure was tightened by requiring the application for a jury to be made within a fixed time limit.

The war of 1914-1918 provided a good ground for at least a temporary change, for towards the end of it jurors were no longer easily available. In 1918⁶ the right to a jury was abolished except in seven cases, *viz.*, the six cases previously enumerated together with cases of fraud; in all other cases trial by jury was made discretionary. The Act of 1918 was a piece of emergency legislation designed to expire six months after the end of the war, but when it did expire, it was replaced by another Act⁷ intended to be permanent. As a permanent alteration it was not well received; indeed, it was criticised so severely that in 1925⁸ Parliament restored the *status quo ante* 1918. But the restoration was not long lived. In 1933,⁹ as part of a drive for cheaper litigation, Parliament substantially re-enacted the 1920 Act, the chief alteration being that the right to a jury in cases of fraud was granted only to the party charged. This is the present position. As it has lasted now for twenty-three years and has been accompanied by an immense decline in the volume of trials by juries, one must take it as settled.

Up to 1913 there was still trial by jury in the majority of cases; the figures¹⁰ show that in that year there was a jury of 55 per cent. of the cases tried in the High Court. By 1918 that figure was reduced to 36 per cent.; and in 1919, the first year when the new legislation took full effect, it was down to 16½ per cent. Then came the post-war litigation boom, remembrances of which can still give elderly barristers a severe attack of nostalgia. The desire of litigants to get their cases on and have them expeditiously tried was a powerful aid to the new legislation. In 1920, 1921 and 1922 the number of cases tried in one or the other form was nearly two and a half times as great as in 1913 and the proportion of jury trials had fallen to 10 per cent. or below; in 1922 it was nearly down to 8 per cent. Thereafter, as the volume of litigation fell, the proportion increased; and when by 1926 the legislative *status quo* was restored, the figure was up to over 36 per cent. and remained at about that level till after 1933. After the new enactment of that year it fell fairly sharply (in 1935 it was down to 12 per cent.) and the war of 1939–1945 completed the debacle.

The popularity of trial by judge alone is now decisively established; the proportion of jury trials is now 2 per cent. or 3 per cent. of the whole. About half of this is composed of the excepted cases (which form only a minute fraction of civil litigation) and the other half consists of cases in which a successful application has been made by one side or the other—

usually a plaintiff and often with a case that is weak in law.

It must not be supposed that this severe decline is due to a jury being refused when asked for; the number of refusals is in fact quite negligible.¹¹ An attempt after 1933 to suggest that trial by jury ought not to be granted unless there was a special reason for it was decisively negated by the full Court of Appeal, which held that the discretion to grant it was quite unfettered.¹² The decline is due to the fact that juries are not being asked for. One of the causes of that is undoubtedly the decline itself which made trial by jury an exceptional proceeding: there is a strong tendency on the part of practitioners—particularly solicitors' managing clerks—to avoid exceptional procedure and to stick to the paths with which they are familiar.¹³ The sort of cases in which it is applied for are those where personal issues are involved, *e.g.*, an allegation of misconduct and wrongful dismissal or a quarrel leading to an assault. Cases within the excepted classes are not invariably tried by jury. Cases of libel and slander, for example, are quite frequently submitted by the parties to a judge alone and a defendant charged with fraud prefers, more often than not, not to claim his right to a jury.

TRIAL BY JUDGE ALONE

Thus it is that the last eighty years have seen a revolution in the mode of trial at common law. What

is it that has caused the new mode to capture so completely the public favour? To answer that question I must begin by stating what is meant by trial by judge alone. It means of course the substitution of a reasoned judgment for a verdict : but it means more than that. For the legal reforms which introduced the new mode of trial also created as part of the regular machinery of justice a Court of Appeal with plenary powers. This new creation has affected trial by jury very little ; the supervisory powers which I have already described as having been exercised over verdicts by the judges of the common law courts were not thereby greatly enlarged ; the verdict of the jury is not really more assailable than it was before. But a judgment on fact is easily assailable and quite frequently assailed, and the Court of Appeal has full power to review it.

Trial by a judge alone might with some exaggeration be described as trial by a judge and three lords justices. It is potentially a combined operation. Trial by jury combines the work of judge and jury ; in a simple case it will be mainly the work of the jury and in a complicated case the judge will contribute a great deal. Trial by judge alone becomes a combined operation only in a minority of cases. But I called it potentially that because the delivery of a reasoned judgment is an essential part of the process and enables the defeated party to make up his mind whether he wants to proceed to the second part of the operation. If he does, the judgment of fact that

emerges at the end is the joint work (I shall elaborate on this later) of the trial judge and the appellate judges in much the same way as the verdict is the joint work of judge and jury.

HISTORICAL EXPLANATION

The creation of this mode of trial has, as usual, an historical explanation. Before the Judicature Act there were, broadly speaking, two forms of trial in use in England. The first was the peculiarly English conception of trial by jury. The other was the sort of trial that took place in the Court of Chancery where the ordinary method of proof was by affidavit and the production of documents. This latter system of the documentary rather than the oral trial is very like the form of trial which is generally in use in many Continental systems to-day. In trial by jury the appeal on questions of fact was, as you know, very strictly limited. On the Chancery side, on the other hand, the appeal was almost unlimited. In theory, the judge of first instance—the Master of the Rolls or later a Vice-Chancellor—sat as the deputy of the Lord Chancellor.¹⁴ If the deputy's decision was questioned everything was open to review in the same way as it still is in Chambers, for example, when a judge reviews the decision of a master. The Chancery appeal therefore was by way of rehearing; and, as witness actions were comparatively rare and all the material was documentary, there was no difficulty about it. But when witness trials without a jury were introduced on

the common law side by the Judicature Act the legislators had to make up their minds whether they should give the judge the impregnability of a jury or the vulnerability of a Vice-Chancellor. The problem was not entirely novel. It had arisen on appeals from the Court of Admiralty to the Judicial Committee of the Privy Council. The practice laid down by the Board was that it would rarely, if ever, interfere with the finding of fact by the judge who had seen the witnesses and was deemed to be especially experienced: the appellant, it was said, "undertook a task of great and almost insuperable difficulty."¹⁵

REHEARING

The legislature decided to follow the Chancery practice, and accordingly the Rules provide that "all appeals to the Court of Appeal shall be by way of rehearing."¹⁶ Doubtless it was assumed that, as had been done in Admiralty matters, the court would put its own limits on the exercise of this wide power. From the start it does not appear to have been contemplated that in a witness action the witnesses should literally be heard again. What happened was that the oral evidence, reduced into writing in the form of the judge's note, became part of the documentary material upon which the Court of Appeal pronounced. That meant that in matters of credibility the court was generally dependent on the judge's conclusions. So the principle was formulated that if he believed one witness rather than another, the Court of Appeal

would rarely, if ever, interfere.¹⁷ More than that, if his position as one who had heard the witnesses gave him any advantage in the application of the facts, the court would not interfere unless it felt that he had failed to use it or had misused it.

Thus on the issues of primary fact a trial judge is now placed in much the same position as a jury. If one has regard to the fact that trials by judge alone are far more frequent than trials by jury, I do not suppose that a finding based on credibility is more frequently interfered with. On matters of inference, however, the Court of Appeal regards itself as free to form its own conclusions and in as good a position as the trial judge to do so; they do not begin their review with any presumption that in such matters the judgment appealed from is right.¹⁸

There is worth noting one event which I believe has had a considerable effect on the functioning of the Court of Appeal (as well as on much else) and that is the invention of shorthand. Without a shorthand note of the evidence the Court of Appeal was not in as good a position as the trial judge to draw inferences, for the trial judge alone had knowledge of the whole of the evidence from which the inferences had to be drawn; the Court of Appeal had only a condensed version of it given in the judge's own note. The shorthand note was not officially substituted for the judge's note until 1940¹⁹ but it had been the practice long before that for shorthand notes to be used in the Court of Appeal in cases of any length.

PRIMARY FACTS AND SECONDARY FACTS

May I now return to the "combined operation" and describe more closely what I meant by the term? In the Court of Appeal the work of the judge below is not discarded. His finding of the primary facts is the raw material on which the court works. Because he has had the advantage of seeing the witnesses, he is accepted as the better tribunal for the determination of the primary facts; but the appellate court has a complementary advantage, which makes it the better tribunal—at any rate in a case of any length or complexity—for the determination of the secondary evidence, that is, the drawing of inferences. Throughout the trial the case is alive and kicking: when it gets to the Court of Appeal it is dead. Issues change and develop as the trial proceeds and as witnesses tell their different, and sometimes unexpected, stories; points that left the starting-post apparent winners fall out of the race and dark horses take up the running. Even a short case can be full of surprises. It is not always easy for a judge, who has been in the thick of the thing from the beginning, to select at the end of it the best viewpoint for the case as a whole, especially if he follows the traditional practice of delivering whenever possible an unreserved and extempore judgment simply on the basis of his own note. In the Court of Appeal the material is fixed. Counsel on both sides, having now, as they had not at the trial, the advantage of knowing what evidence the judge has believed and what rejected, can sort out the material at leisure,

disregarding the bad points and making the most of the good ones. Little bits of evidence that passed unnoticed at the time are seen in the light of a new definition of issues to become greatly significant. Thus the Court of Appeal is much better equipped than the trial judge for the ascertainment of the secondary facts; the case is, as it were, laid out flat before them and three minds consult together on the right conclusions to be drawn. The joint work to which I referred is the work of the trial judge in determining the primary facts combined with the work of the appellate judges in determining the secondary facts.

You will realise that I am looking at only one aspect of the work of the Court of Appeal and its relationship to that of the trial judge. I am not here concerned with the function of the Court of Appeal as a court of error; it corrects errors of law and also such manifest errors of fact as judges at first instance from time to time commit, and as such it is a superior court. Nor do I overlook that in the vast majority of cases the trial judge finds all the facts, primary and secondary, without appeal. But in comparing the jury trial with its rival I have to examine the merits of the rival mode when it is, as it were, fully extended. The essential virtue of the rival mode is that it permits a new appraisal of the secondary facts; it is comparatively unimportant, though not insignificant, that if the appraisal goes deep enough, the primary facts are not protected from the probe; but the primary facts are rarely disturbed. The value of the appraisal is not

dependent on the fact that the Court of Appeal is a superior court. If the intellectual power of a lord justice were not any greater, as of course it is, than that of a trial judge, the process would lose little or nothing of its merit; its merit lies in the performance of a valuable complementary function.

This valuable element is altogether missing from trial by jury. The price that has to be paid for a verdict is that the pronouncement of a few words, which can be accepted or rejected but not reviewed, disposes of primary and secondary facts alike. Is the price too high? I am myself convinced that the jury is the best instrument for deciding upon the credibility or reliability of a witness and so for determining the primary facts. Whether a person is telling the truth, when it has to be judged, as so often it has, simply from the demeanour of the witness and his manner of telling it, is a matter about which it is easy for a single mind to be fallible. The impression that a witness makes depends upon reception as well as transmission and may be affected by the idiosyncrasies of the receiving mind; the impression made upon a mind of twelve is more reliable. Moreover, the judge, who naturally by his training regards so much as simple that to the ordinary man may be difficult, may fail to make enough allowance for the behaviour of the stupid. The jury hear the witness as one who is as ignorant as they are of lawyers' ways of thought; that is the great advantage to a man of judgment by his peers.

But if the trial judge is not as good as a jury in deciding upon credibility, he is by training better equipped than they are for the task of drawing inferences and reaching sound conclusions upon a mass of facts. It is curious, therefore, that the alternative mode of trial should select as the focal point for review that part of the trial judge's work at which he is at his best as compared with the jury, and treat his finding on primary facts as having almost the same untouchability as that of a jury. But that it should be so is dictated by the fact that both modes are modes of oral trial; whoever hears the witnesses, whether it be judge or jury, must be conceded the advantage. The point, however, emphasises what is lost by giving to the jury a supremacy over the secondary facts which the trial judge, in this matter their superior in assessment, is denied; and it illustrates too what is lacking in the alternative mode. No way has been found of gaining the superiority of the jury as judges of the primary facts without being saddled with their inferiority as judges of the secondary.

FORMING VALUE JUDGMENTS

You may question my views on the inferiority of the jury as judges of the secondary facts. You can point out that the handling of secondary facts requires not only the drawing of inferences, where the jury may be at a disadvantage, but also the forming of what are called "value judgments." When all the evidence,

direct and indirect, has been considered, it has to be evaluated; there has to be determined, for example, whether the defendant was careless. This is done by deciding what degree of care should in the circumstances have been observed by the reasonable man; and is not the jury better equipped to do that than the trial judge or the Court of Appeal?

The answer to that question discovers, I think, the fundamental reason why trial by jury in civil litigation has declined. In a case which was unique I should say unhesitatingly that a question of carelessness was better settled by a jury than by any other tribunal. Where there is no precedent to act as a guide, a common opinion is better than a single one. But cases that come up for trial rarely are unique. Few litigants are willing to take the risks inherent in exploring unfamiliar ground. The client likes to be assured by his solicitor that, provided the facts can be proved, his case belongs to a type which is recognised as suitable for redress. The fact is that the great bulk of civil litigation now consists of cases about two types of alleged carelessness—that of an employer towards his workmen and that of a motorist towards other users of the road. Whenever cases about carelessness belong to a type, it is inevitable that there should also grow up a typical standard of care; it is not something that can be put into a formula which the jury can be told to apply; it depends upon a knowledge of the sort of approach that is generally made to cases of the type.

If each question of carelessness had to be decided anew by fresh minds, the jury would be in its element and the liability of employers would probably be subject to surprising variations; but where a case belongs to a type, it is an informed mind that is needed rather than a fresh one.

DAMAGES—VALUE JUDGMENTS

The point is perhaps better demonstrated by considering the question of damages. That involves a "value judgment" in the literal sense of the word. But all compensation for physical injury must basically be a conventional figure. There may be consequences of it, such as the loss of earning power, which can be turned more or less accurately into money, but there is no means of assessing the pain and suffering and deprivation that follows from the loss of a hand. If only one hand were lost in a year, a figure that twelve men thought appropriate would be more likely to give satisfaction than one fixed by a single man. But where a number of hands is lost each year, there will be general dissatisfaction if the sums awarded do not conform to type. Fluctuations must be confined within conventional limits and a judge is supposed to know what they are; if the award strays too far outside them, it will be brought back to the norm by the Court of Appeal²⁰ and thus a more or less uniform standard is maintained. But a jury has no knowledge of the conventions; and the power of the Court of Appeal to intervene is—just because the

jury is not supposed to be conforming to a standard which it cannot know about but to following its own feelings and experience—severely restricted.

But, you may object, all this does not show that a value judgment by a jury is inferior to that made by a judge. If it is the best judgment in a unique case, why is it not also the best judgment in a typical one? If it does justice between the parties, does it matter that it does not conform to a standard approved by lawyers? That is a big question which I shall try to answer later in this lecture. At the moment I am engaged in answering the smaller question of why it is that trial by jury has declined. If a case belongs to a type, it is obvious that the result of the trial can be predicted with much greater confidence if it is taken before a judge alone than before a jury. All litigants want justice but they also want to know whether they are likely to win or lose and how much. A mode of trial which allows a solicitor to predict whether the chances of success are good, bad or indifferent, and what sort of damages the plaintiff may be awarded, has great attractions.

EXPENSE OF THE JURY TRIAL

Another reason that is often given for the decline of the jury trial is the greater expense of it. Trial by judge alone is bound to be more expeditious and therefore cheaper. A judge can do a great deal in shaping the course of a trial and reducing it to the points which he thinks matter. The jury cannot express itself until the end and so everything that is

admissible, evidence or argument, must be allowed in. Speeches to a jury are longer and more elaborate and there is a greater inclination to cross-examine for immediate effect. Against this it may be argued that the verdict of a jury is more likely to put an end to the litigation. It should, if all goes well, exclude the possibility of an appeal on fact and one expensive process may well cost less than two cheaper ones. But if all does not go well, the cost in the end is likely to be greater still. In an appeal from a judge alone the Court of Appeal usually has all the material before it and can act finally, putting right anything that may have gone wrong. Moreover, it can correct with equal facility an error either of law or of fact. In a jury trial a misdirection to the jury on law may vitiate the whole verdict, if it is a general one, and then the remedy must inevitably be a new trial. To reduce this danger as far as possible a jury is now generally asked in all but the simplest cases to deliver a special verdict in the form of answers to questions submitted by the parties and settled by the judge. This limits the effect of a misdirection to the particular question which it touches, and the other answers may be sufficient to allow judgment to be entered for one side or the other. The trial judge may if he wishes, and the practice has grown very common, defer giving rulings on law until after the special verdict has been returned. This means that facts have to be found which, when the law is settled, will be immaterial; and it also means that quite a long questionnaire is often submitted to a jury. This sometimes has a puzzling effect on a jury,

and if then they give answers which can be said to be inconsistent, it will open up another avenue of attack on the verdict. It means too that after the jury have answered a long examination paper they may be told that there is no evidence to support their answer to the first question, and so learn that they have laboured in vain. That does not enhance the prestige of trial by jury. Nor is it satisfactory to sum up to a jury on the basis that there is some evidence to be considered on both sides—and the case cannot be summed up on any other basis—and then later to overrule their verdict by holding that there was no evidence for them to consider.²¹ Yet if the judge takes a bold course and directs the jury on his view of the law without allowing for any alternative, the probable result, if he is wrong, is an order for a new trial.

On the whole I think that trial by jury is likely in the end to cost more than the other mode. What perhaps is even more of a deterrent to the litigant who has to decide at an early stage what sort of trial he wants is that the amount of the cost is so much less predictable. The possibility of a second trial, whether as the result of a successful appeal or of a disagreement, introduces an incalculable element.

THE ELEMENT OF CERTAINTY

I return to what I said was the fundamental reason for the decline in jury trials. Nearly all the cases in the civil lists now belong to two or three types, and they are not the types of case whose determination calls for the qualities in which the jury excels. There

is not usually hard swearing on both sides. Much turns on the determination of the secondary facts and even more on correct evaluation, which is done by applying a standard that judges are familiar with and juries are not. The element of uncertainty, which would be present in a high degree in all litigation if there were no recognised standards, is by comparison with the jury trial much diminished in the trial by judge alone. The people who are most influential in the choice of mode of trial are, I suppose, solicitors and their managing clerks. So long as judges command the general confidence of the public, the litigant is not likely to demand a jury unless his solicitor advises it. A high degree of uncertainty is naturally abhorrent to a solicitor. The client will want to know what his chances of success are, whether he ought to compromise and, if so, for how much; and what the trial is going to cost: and he will be inclined to blame the solicitor if he cannot get any satisfactory answer. So the market has turned against trial by jury. The quality of the product remains as good as ever it was but there is no longer the same demand for it. If I were to say that it cannot meet the competition from mass-produced judgments given according to the book and at cheap rates, I should have to pursue the metaphor only very cautiously, both out of respect to the judiciary and because I should not wish it to be thought that there is any imminent danger of automation coming to the Strand. But I can without offence compare the verdict of a jury to a handmade article. It is expensive and in these

days too much of a luxury for the ordinary user; but that does not necessarily mean that it is not still for certain uses the best.

“ THE TOUCHSTONE OF CONTEMPORARY
COMMON SENSE ”

Nor does it mean that the diminution in civil trials by jury is a good thing for the law. There has been removed an influence on the common law that did much to make it what it is. The point has been most excellently put by Sir William Holdsworth ²²—

“ The effects of the jury system upon the law are no less remarkable and no less beneficial. It tends to make the law intelligible by keeping it in touch with the common facts of life. The reasons why and the manner in which it thus affects the law are somewhat as follows: If a clever man is left to decide by himself disputed questions of fact he is usually not content simply to decide each case as it arises. He constructs theories for the decision of analogous cases. These theories are discussed, doubted, or developed by other clever men when such cases come before them. The interest is apt to centre, not in the dry task of deciding the case before the court but rather in the construction of new theories, the reconciliation of conflicting cases, the demolition of criticism of older views. The result is a series of carefully constructed, and periodically considered rules, which merely retard the attainment of a conclusion without assisting in its formation. It is

only the philosopher, or possibly the professor of general jurisprudence, who can pursue indefinitely these interesting processes. Rules of law must struggle for existence in the strong air of practical life. Rules which are so refined that they bear but a small relation to the world of sense will sooner or later be swept away. Sooner, if, like the criminal law or the commercial law, they touch nearly men's habits and conduct; later, if, like the law of real property, they affect a smaller class, and affect them less nearly. The jury system has for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary common sense.”

JURY AS A JUDICIAL INSTRUMENT

There are many worshippers who believe that trial by jury is always the best tribunal for the trial of every question of fact. They maintain that the only valid grounds for preferring trial by a judge alone are convenience and comparative cheapness, the impracticability of keeping twelve men in readiness for hearing every case and the consideration that so many cases involve mixed questions of law and fact.

I think it must be agreed that there are some determinations in which twelve minds are better than one, however skilled, and most people would accept that the determination whether a witness is telling the truth is one of them. But apart from this I cannot believe that there is any mystical quality distilled from twelve men selected at random which enables them in

all cases to find the facts better than a judge alone could do. I do not see how those lawyers who hold that view reconcile with it the interference that judges exercise over the jury's fact-finding powers—not merely with the fact of that interference but still more with the theory on which it is based, which is that a jury cannot always be trusted to behave as reasonable men : nor can it be reconciled with the decline in the popularity of trial by jury. There is in truth no quality that resides in the jury alone or that could enable them to find the facts unaided. The simplification that the law is for the judge and the facts for the jury is a very convenient one to work with in the conduct of a trial but I have, I hope, convinced you that for the serious student of the jury system it is quite misleading. There is no difference in origin between questions of fact and questions of law ; there is simply a point at which a particular way of dealing with the facts in order to produce justice becomes sufficiently well recognised to be adopted as a general rule and so to become law. I illustrated that when I was comparing the functions of judge and jury in deciding what is or is not reasonable. It can be illustrated too at almost any point in a trial. The judge, who tells the jury in a road accident case that out of the complex of circumstances which they may think show that the plaintiff deserves some compensation they must have regard only to the question whether the defendant was negligent, is doing essentially the same thing as the judge who suggests to the jury that out of the complex of circumstances

which they may think show that the defendant was negligent they ought to pay special attention to the question whether or not he knew that his brakes were defective. In each case the judge is formulating for the jury the significant question of fact. In the former case he is formulating it in the manner laid down by his predecessors and therefore as a matter of law; in the latter he is applying his own judgment to the facts. I do not forget the important practical distinction that in the former case he commands and the jury must obey and in the latter case he advises only. But that is not the essential distinction. When a judge tells a jury that there is no evidence on which they can convict, he is applying his own judgment to the facts and not laying down any general rule, yet he commands. What the judge is doing from the beginning of his summing-up to the end is putting the wisdom of the law—the wisdom of his ancestors and that of his own—at the service of the jury so that it meets with their own innate sense of fairness to produce a true verdict.

MERITS V. LAW

Is a verdict so produced the best that can be got? Is the mode of trial, by judge and jury combined, better than trial by judge alone? I do not think that that question can be answered without asking a counter-question: tell me what sort of justice you want to get and I shall tell you which mode of trial is more likely to get it. Is there then more than one sort of justice? Yes: the justice of the case is the best compromise

that can be obtained between the demands of the law and judgment on the merits. Those two points are always separated by some distance, long or short, and justice can be brought to rest anywhere between them; almost inevitably it will be nearer the one than the other. "But," a judge may say, "this is really not so. I try many cases in which no legal technicalities are involved and in which I deliver a judgment on the merits that I am quite satisfied complies with the law. Take the common accident case in which an employer is said to have been careless about a workman's safety; I have only to decide, entirely on the merits, whether carelessness on the part of the management or of the workman—or, if both, in what proportions—contributed to the accident." It is quite true that that is a judgment on the merits, but it is not a judgment on all the merits, only on those that the law permits the judge to consider. The only question of liability that the law allows to be discussed is whether one or both were careless. It is irrelevant that the employer is in a small way of business and that he personally took all the care he could, the fault being that of some workman for whom he was responsible. If the management was not careless, it is irrelevant that the workman was injured because he took a risk in an attempt to shorten the job and so save his employer money; he may have given long and faithful service to his employer and the injury may have crippled him for life, but that will avail him nothing. An ordinary man, not bound by the law and taking all the circumstances into consideration, might in such a

case easily end up by saying : “ Well, his employer can well afford to pay him something.”

Observe that I am not contrasting law and justice. I am contrasting a judgment according to law with a judgment according to the merits. Judgments according to the merits do not necessarily make justice. They would do so if there were only one judge and he always remembered to decide everything the same way and he went on living for ever—in short, if justice on earth were divine and not human. But for human justice the law is indispensable. If, on substantially the same set of facts, one workman succeeded and another did not, it would rightly be said to be unjust that the one should be given compensation and the other not. It is an essential attribute of justice in a community that similar decisions should be given in similar cases. But that can be done only by following the law. It would not do if one judge were to deem it just that workmen should be compensated by their employer for all injuries incurred in his service, while another deemed it just that an employer should be responsible only for his own personal carelessness. So the law gives the general rule. No general rule ever fits exactly any particular case. A just decision is as much an abstract notion as the average duration of life. The average life of an Englishman is known to a fraction of a second, but anyone who expired at the correct moment would deserve to be entombed beneath a mortality table. If I were commissioning a statue to represent justice, I should not stipulate for a lady with ample draperies and a pair of scales : I should

ask a sculptor of the modern school to design an embodiment of Colonel Bogey.

This is why ministers of justice have to serve two mistresses—the law and the *aequum et bonum* or the equity of the case. Their constant endeavour is to please both. That is why the just decision fluctuates, as I say, between two points. In most systems the just decision is tied pretty closely to the law; the law may be made as flexible as possible, but the justice of the case cannot go beyond the furthest point to which the law can be stretched. Trial by jury is a unique institution, devised deliberately or accidentally—that is, its origin is accidental and its retention deliberate—to enable justice to go beyond that point. The essentials of the device are that the tribunal consists of a comparatively large body of men who have to do justice in only a few cases once or twice in their lives, to whom the law means something but not everything, who are anonymous and who give their decision in a word and without a reason.

The fact that juries pay regard to considerations which the law requires them to ignore is generally accepted. I do not mean by that that they frequently and openly flout the law, but that they do not always succeed in separating the wheat from the chaff. Certainly a jury is not as good a separating machine as a judge would be; and the reason why a jury is to be preferred in some cases is because there are some cases in which a little admixture of chaff is not a bad thing.

It is, for example, generally accepted that a jury will tend to favour a poor man against a rich man : that must be because at the bottom of the communal sense of justice there is a feeling that a rich man can afford to be less indifferent to the misfortunes of others than a poor man can be. There is no doubt, likewise, that juries, however often they may be told that they are not to have regard to the consequences of their verdict, do take the penalty into consideration, and have always done so, particularly if it is the death penalty. An interesting recognition of the jury's aptitude for going beyond the law is to be found in the evidence given to the Royal Commission on Capital Punishment 1949-1953²³ by those who favoured the retention of the M'Naghten Rules on insanity while agreeing that in some cases their application might be too rigid. Lord Chief Justice Goddard said : " I think a jury can always be trusted to do justice where it might be impossible to bring the case strictly within the M'Naghten Rules." Lord Simon, a former Lord Chancellor, said that in practice the Rules were qualified and added : " A British jury, whatever you say, will see that it is qualified if they are really convinced that it is a proper case."

PREDICTABILITY V. UNCERTAINTY

The essential virtue then of trial by jury is that it is a mode of trial whereby the law, while remaining generally in control of the decision, loosens its grip on it so as to allow it to move nearer than it could otherwise do towards the *aequum et bonum*. Of course

the jury cannot be allowed to stray too far from legal principles. Theoretically it is not recognised that they should stray at all : the system works by a practical acceptance of the fact that jurors will be jurors. There are disadvantages attached to this. You cannot move away from the law without sacrificing some of the virtues inherent in law ; the further you move away from the law the less predictable the decision becomes. If justice were divine, predictability would be irrelevant : the divine law is clear and simple and an all-seeing judge would in the twinkle of an eye divide the sheep from the goats. But human justice is not concerned simply with good and evil. Justice in civil matters is often simply a process of adjustment which has not got to bestow serious blame on anyone but to determine how the consequences of an unfortunate act ought to be paid for. The process of adjustment cannot be performed in the twinkling of an eye but is inevitably an expensive one. A man will legitimately want to know in advance what the judgment is likely to be so that he may decide whether to incur costs in disputing a claim or to offer a sum in settlement. At an earlier stage he may want to know whether, if he does an act, he is likely to be held liable at all. One of the services which the law does for a community is to enable such questions to be answered with some accuracy ; the further the process moves from the strict application of law the more uncertain the advice will be. If you want certainty or predictability, you must keep the judgment running close to the law. If you want the best judgment in the light of all the facts

when they have emerged, then it will be one that has moved nearer to the *aequum et bonum*. The unique merit of the jury system is, that it allows a decision near to the *aequum et bonum* to be given without injuring the fabric of the law, for the verdict of a jury can make no impact on the law.

But such a decision may well injure the element of predictability, which has rightly a part to play in the administration of justice; and so you will find that in modern times the mode of trial is allowed to depend upon the importance of that element in relation to the type of case that is being tried. When, for example, a man is on trial for his liberty, predictability is quite unimportant. What is then wanted is a decision on the merits that will after the event satisfy the public that justice as the ordinary man understands it has been done. Likewise, when a man's honour or reputation is at stake, he is more concerned to have a judgment that fits his merits than to weigh the probable cost of a lawsuit against the offer of a compromise. In any case in which there is going to be hard swearing on both sides, the result is unpredictable anyway until the witnesses have been heard and compared. Cases which have one or more of these characteristics will be probably either criminal or, if civil, will fall into one of the categories in which trial by jury is given as of right. If the case is of a common type in which there is no hot dispute on the facts—for example, the ordinary accident case on the roads or in the factories; there is often an acute conflict on certain parts of the evidence but rarely wholesale perjury—a

jury is not normally allowed, unless the case has some exceptional feature : otherwise, if a jury were allowed in one, it would have to be allowed in all. The exceptional feature is very often that the injuries are unusually severe. Thus I think it will be found that the cases in which trial by jury is ordered—whether the order is made under a claim of right or in accordance with the general principles by which the discretion is exercised—are those in which for one reason or another it is specially important to one or other of the parties that he should have a judgment that fits the merits of his particular case. In discriminating in this manner, the law and the practice are, consciously or unconsciously, following the traditional way that I have already traced. The judges have always tried to reserve general matters for themselves and to leave to juries those which turn on the circumstances of the particular case. It is in this sphere that trial by jury excels. It is true that the figures I have given you show that in civil cases it is comparatively little used. That does not suggest to my mind that it is an inferior instrument but rather that the civil cases to which it is best adapted are at the present time, as it happens, comparatively rare.

JURY AS SAFEGUARD OF INDEPENDENCE AND QUALITY OF JUDGES

This is all that I have to say about the jury as an instrument for doing justice. But its value does not lie solely in the fact that for some cases it is the best judicial instrument. It serves two other purposes of

great importance in the constitution. The first and lesser of these is that the existence of trial by jury helps to ensure the independence and quality of the judges. Judges are appointed by the executive and I do not know of any better way of appointing them. But our history has shown that the executive has found it much easier to find judges who will do what it wants than it has to find amenable juries. Blackstone, whose time was not so far removed from that of the Stuarts, thought of the jury as a safeguard against "the violence and partiality of judges appointed by the Crown."²⁴ Commenting on that in 1784, Mr. Justice Willes said²⁵: "I am sure no danger of this sort is to be apprehended from the judges of the present age: but in our determinations it will be prudent to look forward into futurity." Although in 1956 we may claim that "futurity" has not yet arrived, it still remains prudent to look forward into it.

I spoke of the quality of the judges as well as of their independence. I did not mean by that their quality as lawyers or even as virtuous men: that must be left to the Lord Chancellor. I meant their quality as purveyors of the sort of justice that the Englishman wants to have. The malady that sooner or later affects most men of a profession is that they tend to construct a mystique that cuts them off from the common man. Judges, as much as any other professional, need constantly to remind themselves of that. For more than seven out of the eight centuries during which the judges of the common law have administered justice in this country, trial by jury ensured that Englishmen

got the sort of justice they liked and not the sort of justice that the government or the lawyers or any body of experts thought was good for them. The very high percentage of non-jury cases in the civil lists, coupled with the fact that there is no great pressure for trial by jury, entitles the judges to claim that the justice they dispense is still, in the best sense of the word, popular justice. But it is well to remember that if judges ceased to be popular, if their outlook became remote from that of the ordinary man, trial by jury is there as the alternative.

JURY AS SAFEGUARD AGAINST REPUGNANT LAWS

The second and by far the greater purpose that is served by trial by jury is that it gives protection against laws which the ordinary man may regard as harsh and oppressive. I do not mean by that no more than that it is a protection against tyranny. It is that : but it is also an insurance that the criminal law will conform to the ordinary man's idea of what is fair and just. If it does not, the jury will not be a party to its enforcement. They have in the past used their power of acquittal to defeat the full operation of laws which they thought to be too hard. I daresay that the cases in which a jury defies the law are very rare. Juries do not deliberately marshal legal considerations on one side and broader considerations of justice and mercy on the other and bring them into conflict on the field of conscience. Their minds are not trained to the making of an orderly separation and opposition; they are more likely to allow one set of considerations

to act upon the other in such a way as to confuse the issues. One way or another they are prone to give effect to their repugnance to a law by refusing to convict under it, and no one can say them nay. The small body of men, who under modern conditions constitute the effective body of legislators, have to bear this in mind. It affects the character of the laws they make, for it is no use making laws which will not be enforced. They may put it down to the perversity of juries, though for my part I think that if there is a law which the jurymen constantly shows by his verdicts that he dislikes, it is worth examining the law to see if there is something wrong with it rather than with the jurymen. I do not mean that juries are altogether blameless in this respect; I have already recorded the opinions of two eminent judges on juries and the traffic laws. Juries are not often too tender to the wicked but they sometimes are to the foolish. I think that a jurymen, if he can visualise the possibility of finding himself in the same situation as the man in the dock, finds it very difficult to be firm; it is an inevitable defect of the system that jurymen are not practised in detachment. It may be, therefore, that the jury system means that some good and necessary laws are only weakly enforced. Likewise, democracy may mean that some good and necessary measures of government are not taken when they should be. There are no freedoms to be got without payment.

I referred to the effective legislators to-day as a small body of men, for under our parliamentary

system as it has now developed, the executive frames nearly all the laws and the framing of a law is nine-tenths of the work of legislation. The ordinary member of Parliament participates in law-making by helping with the details, but in all matters of principle he is obedient—subject to his conscience—to the party whip, which is the executive. Subject to conscience. The executive knows that in dealing with the liberty of the subject it must not do anything which would seriously disturb the conscience of the average member of Parliament or of the average jurymen. I know of no other real checks that exist to-day upon the power of the executive.

MATTERS OF CONSCIENCE—AN ANALOGY

I hope that you will not think it fanciful if I find a parallel between the relationship of the executive to Parliament in the matter of legislation and the relationship of the judge to the jury. In the last resort Parliament makes the law just as a jury makes the verdict. But Parliament accepts the direction of the executive in much the same way as a jury accepts the direction of the judge. The power of initiating and formulating legislation which is held by the executive bears a general resemblance to the powers of the judge over the trial—those of defining the field of inquiry, settling the minimum of evidence which must support a verdict and the maximum which must not be ignored, and of formulating the issues to be tried. The judge gets his way by giving directions of law and the executive gets it by the party whip; and both sorts

of command may in matters of conscience be rejected. The increasing activity of government has led to the conferment upon the executive of vast legislative powers which are all its own. The country accepts that now, just as it accepts the increase in trial by judge alone which is a product of modern litigation.

It would be absurd to push the analogy too far. In truth it is not an analogy so much as a double illustration of the English genius for arriving at a practical reconciliation of theoretical opposites. Democratic government poses the problem of how to ensure that efficiency, which needs decisive action and abhors unlimited debate, is not dehydrated into expert administration but is well watered by the popular will. Justice poses the problem of how to reconcile the rigidity of the law with the popular idea of what is fair and just. The English brought into being, as the basis of each solution, two institutions that have gained the admiration of the world—Parliament and the jury. But it was not their creation that was a work of genius. Creators deserve no credit unless they perceive the ultimate of their conception; and no English man of affairs who has contributed to anything that has lasted has ever seen more than a step ahead. It is the practice of *solvitur ambulando* which the English have made perfect. They excel in the art of knowing where to place their feet. The eyes that see, the head that plans, the hands that are outstretched to grasp—all these will fail unless the stance is firm. Step by step, and every step a feeling of the way, the Crown and Parliament in politics and Judge and Jury in the law,

have come together; no articles bind them one to the other; their motions are governed by a common understanding.

JURY AS LAMP OF FREEDOM

Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives. To many of us the boundaries between Whitehall and Westminster are uncertain and confused. We are anxious that government should be strong and yet fearful lest the gathering momentum of executive power crush all else that is in our State. We look for some landmark that we may say that so long as it stands, we are safe; and if it is threatened, we must resist. It is there, this beacon that seven centuries have tended ²⁶ :

“Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae.”

These are the words of the Great Charter which Blackstone said secured to every Englishman that trial

by his peers which is the grand bulwark of his liberties ; and which he took as the text for one of the most celebrated passages in the *Commentaries*. His words today are still after two centuries as fresh and meaningful as when they were written and I wish in closing this subject to commend them to you.

“ So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate ; not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations, which may sap and undermine it ; by introducing new and arbitrary methods of trial ; by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters ; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution ; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.”²⁷

N O T E S

So far as I know, there is no up-to-date English book on trial by jury; in the United States there is, among others, *Law and Tactics in Jury Trials* (1949) by F. X. Busch. Nor is there any modern English work on the history of trial by jury: the latest, now a centenarian, to be devoted by name to the subject is Forsyth's *History of Trial by Jury* (1852). The best historical account I have found is by Professor Thayer, of Harvard, which he disguised under the title of *A Preliminary Treatise on Evidence at the Common Law* (1898). It is also of course dealt with in different volumes of Holdsworth's *History of English Law*, 3rd ed., 1922.

CHAPTER 1

ORIGIN OF THE JURY

- ¹ Forms of the jury system are in use in other European countries, but for the most part they are not very convincing adaptations of the English system. An account of some of them as they were a century ago is in Forsyth, *op. cit.*, p. 346.
 - ² Quoted in *The Jury Laws and their Amendment*, by T. W. Erle (1882) at p. 68.
 - ³ Duncomb's *Trials per Pais* (1682), p. 83.
 - ⁴ I Kings iv, 7.
 - ⁵ Blackstone's *Commentaries*, IV, p. 349; Hawkins *Pleas of the Crown*, II, s. 44, s. 66.
- The same rule was observed in the deliberations of the grand jury. The bill had to be found by a majority of at least twelve; and in order that the minimum might also be the majority it was the practice for the grand jury to consist of twenty-three: Archbold's *Criminal Pleading*, 28th ed., 1931, p. 77.
- ⁶ The grand jury was abolished by the Administration of Justice Act, 1933, s. 1 (1).
 - ⁷ In the Central Criminal Court a plea of Not Guilty is still entered on the record as "Puts."
 - ⁸ Archbold's *Criminal Pleading*, 32nd ed., 1949, p. 182.

CHAPTER 2

THE COMPOSITION OF THE JURY

- ¹ See, for example, 15 Hen. 6, c. 5; Thayer, *op. cit.*, pp. 149-151.
- ² Juries Act, 1825.
- ³ Duncomb's *Trials per Pais* (1682), p. 92.
- ⁴ Juries Act, 1825, s. 30.
- ⁵ *Commentaries*, III, p. 357.
- ⁶ Juries Act, 1870, s. 6.
- ⁷ Jury Act, 1949, s. 18.
- ⁸ *Ibid.*, s. 19.
- ⁹ Juries Act, 1870, ss. 8-10.
- ¹⁰ Sex Disqualification (Removal) Act, 1919, s. 1.
- ¹¹ Juries Act, 1825, s. 1.
- ¹² The main disqualifications are those put upon aliens of less than ten years domicile and on persons convicted of buggery. The Act of 1870 clearly intended to disqualify all felons, but is so worded that the abolition of outlawry and attainder has made it ineffective: see *R. v. Kelly* [1950] 2 K.B. 164.
- ¹³ Juries Act, 1922, s. 2.
- ¹⁴ *R. v. Evans* (1920) 15 Cr.App.R. 111 at 114.

- 15 Quoted in Erle, *op. cit.*, p. 68.
 16 Juries Act, 1949, s. 1.
 17 Busch, *op. cit.*, p. 145.
 18 *Ibid.*, p. 143.
 19 *The Times*, February 24, 1956.
 20 *Gowar v. Hales* [1928] 1 K.B. 191 at 196.
 21 *The Times*, February 16, 1955.
 22 R.S.C., Ord. 36, r. 9A. The same rule is made for criminal juries under the Indictments Act, 1915; S.R. & O. 1920, No. 2015.
 23 *Forensic Fables*, by O. (1926), p. 45.
 24 *R. v. Frost* (1839) 9 C. & P. 129 at 135 and 136.
 25 *Mellor's Case* (1858) 1 Dearsley & Bell 468 at 470.
 26 Criminal Justice Act, 1948, s. 35.
 27 Sex Disqualification (Removal) Act, 1919, s. 1.
 28 Busch, *op. cit.*, pp. 103 and 198.
 29 See *R. v. Dowling* (1848) 3 Cox C.C. 509 at 510. In *R. v. Edmunds* (1821) 4 B. & Ald. 471, Abbott C.J. ruled that the bias of a juror must be proved by extrinsic evidence and not by interrogating him.
 30 Busch, *op. cit.*, pp. 114 and 117.
 31 *Selecting a Jury* by Harry Sabbath Bodin in Trial Practice Series (1954).
 32 Two books on it published in England are *The Strange Case of Alger Hiss* by The Earl Jowitt (1953) and *A Generation on Trial* by Alistair Cooke (1950). The time taken by the *voir dire* is mentioned in the latter at pp. 102 and 283.
 33 *R. v. Stewart* (1845) 1 Cox C.C. 174, *per* Alderson B. at 175.
 34 *R. v. Thomas* (1933) 24 Cr.App.R. 91.
 35 *Ex p. Morris* (1908) 72 J.P. 5.
 36 *R. v. Wakefield* [1918] 1 K.B. 217.
 37 1 Dearsley & Bell 468.
 38 *Ibid.*, at 473. See also *R. v. Bottomley* (1922) 38 T.L.R. 805.
 39 *Ras Behari Lal v. R.* (1933) 50 T.L.R. 1.
 40 *R. v. Kelly* [1950] 2 K.B. 164.

CHAPTER 3

THE JURY AS A JUDICIAL TRIBUNAL

- 1 S.R. & O. 1940, No. 1869.
 2 Criminal Justice Act, 1948, s. 39 (4).
 3 *R. v. Furlong* (1950) 34 Cr.App.R. 79.
 4 *R. v. Neal* [1949] 2 All E.R. 438.
 5 Halsbury's *Laws of England*, 3rd ed., Vol. 3, p. 10.
 6 *Ex p. Haigh* (1949) 93 S.J. 220.
 7 *R. v. Evening Standard* [1954] 1 All E.R. 1026.
 8 Jowitt's *Strange Case of Alger Hiss*, pp. 145 and 146.

- ⁹ *Ibid.*, p. 148.
- ¹⁰ *R. v. Armstrong* [1922] 2 K.B. 555 at 568. The simplified form of oath quoted in the text was settled by the Oaths Act, 1909.
- ¹¹ *Ellis v. Deheer* [1922] 2 K.B. 113 at 118.
- ¹² Thayer, *op. cit.*, p. 88.
- ¹³ Quoted in Forsyth, *op. cit.*, p. 245.
- ¹⁴ *Commentaries* III, p. 376.
- ¹⁵ By the Jurors Act, 1870, s. 23, jurors were permitted to have fire and refreshment at their own expense.
- ¹⁶ *The Complete Jurymen or a Compendium of the Law relating to Jurors* (1752), p. 171.
- ¹⁷ Thayer, *op. cit.*, p. 155.
- ¹⁸ *R. v. Hartleigh* (1908) 1 Cr.App.R. 17.
- ²⁰ *R. v. Klein* [1932] unreported.
- ²¹ *R. v. Quartermaine* (1919) 14 Cr.App.R. 109.
- ²² *In the Estate of Wright* [1936] 1 All E.R. 877 at 880 and 882.
- ²³ The recommendations of the Commissioners of 1830 are discussed in Forsyth, *op. cit.* at p. 251 and Erle, *op. cit.*, p. 100.
- ²⁴ *Australian Law Journal* (1936), Vol. 10, Supp., p. 70.
- ²⁵ Busch, *op. cit.*, p. 34.
- ²⁶ *Australian Law Journal* (*supra*), p. 66.

CHAPTER 4

THE CONTROL OF THE JURY

- ¹ Thayer, *op. cit.*, p. 202. The method recommended by Cockburn C.J. has been followed in only one instance. Administration of Justice Act, 1920, s. 15 provides that the effect of any evidence given with respect to foreign law (which technically raises a question of fact) is to be decided by the judge and not by the jury.
- ² *Wood v. Gunston* (1655) Style 466; a case in which a new trial was granted because the jury had gone wrong on damages: it is the case generally relied on as authority for granting a new trial where a verdict cannot be supported.
- ³ *Mechanical & General Inventions Co. v. Austin* [1935] A.C. 346.
- ⁴ *Ibid.*, at 370.
- ⁵ *Ibid.*, at 356.
- ⁶ 26 Hen. 8, c. 4.
- ⁷ 6 St.Tr. 999.
- ⁸ Thayer, *op. cit.*, p. 133.
- ⁹ *Powys v. Gould* (1702) 1 Salk. 405.
- ¹⁰ R.S.C., Ord. 53, r. 4.

- ¹¹ See *Millar v. Toulmin* (1886) 17 Q.B.D. 603 at 605 and *Allcock v. Hall* [1891] 1 Q.B. 444 at 446.
- ¹² *Mechanical & General (supra)* at 379. *Millar v. Toulmin (supra)* was an action by a commission agent to recover a commission on the sale of property. A strong Court of Appeal (Esher M.R., Bowen and Fry L.JJ.), regarding a verdict by the jury for the defendant as against the weight of evidence, set it aside, refused to order a new trial and entered a verdict for the plaintiff; it may be assumed that the amount of commission due, if the plaintiff was successful, was not in dispute. The case went to the House of Lords and the decision of the Court of Appeal was reversed, the House holding that the verdict of the jury was right, but Halsbury L.C. added that he would have been unable in any event to concur with the course pursued by the Court of Appeal; he did not think that Ord. 58, r. 4, gave jurisdiction to the Court of Appeal to find a verdict for themselves and actually to assess damages. The two other Lords who constituted the court, Lords Watson and FitzGerald, gave no opinion on this point. In *Allcock v. Hall (supra)* the Court of Appeal set aside a verdict for the plaintiff and entered judgment for the defendant so that the point did not arise. But Lopes L.J. at 448 said that the point was governed by the decision of the Court of Appeal in *Millar v. Toulmin* and that the view of Halsbury L.C. was only *obiter*. The passage cited from the speech of Lord Wright in the "*Sunshine roof*" case was given in support of Lord Halsbury's view; and in the same case at 369 Lord Atkin expressed the view that the Rules of Court did not permit the giving of a verdict for the plaintiff and that if they did, they would not be within the rule-making power.
- ¹³ In *Poliakoff v. News Chronicle Ltd.* [1939] 1 All E.R. 390 the defendants published a statement about the plaintiff which was hardly disputed to be defamatory, the substantial defence being that the plaintiff had suffered no serious damage and that it was a gold-digging action. The judge in summing up dealt solely with this point and gave the jury no direction about the issue of libel or no libel. The jury found for the defendants. An application was made to the Court of Appeal for a new trial. The defendants had to concede that the judge had taken it for granted that there would be a verdict for the plaintiffs and, therefore, that the summing up was technically defective, but submitted that the jury had obviously intended to find a verdict for nominal damages. Moreover, the defendants had paid £100 into court and it was agreed that it was inconceivable that the jury would have returned a verdict for more than that sum. The Court of Appeal refused to order a new trial. MacKinnon L.J. said at 394: "If we sat here

as umpires to preside over the game of litigation as pleaded by counsel for the parties, it might be that upon all those facts, we should say: 'The rules were not strictly observed and there must be a new trial.' But, he said, the order would only result in the waste of costs since upon the whole of the facts no other result could possibly be arrived at except that which was practically the result of the present case, namely, a verdict for the plaintiff for a nominal sum although in form the verdict was incorrect.

There are two other cases of interest in which the court formally substituted a verdict for that of the jury although in substance they carried out what they thought was obvious. In *Holdsworth v. Associated Newspapers, Ltd.* [1937] 3 All E.R. 872 the trial judge withdrew a libel case from the jury on the grounds that the words were not capable of a defamatory meaning. Scott and Slesser L.JJ. (Greer L.J. dissenting) held that the words were capable of a defamatory meaning. The natural consequence of this would be to order a new trial but Slesser L.J. declined to do so on the ground that a plea of justification was bound to succeed; this was in effect finding a verdict for the defendants. On this point Scott L.J. differed from Slesser L.J. The result was that no new trial was ordered because the majority did not support the order, the majority on this point consisting of Greer L.J. who thought there should be no new trial because the words were not defamatory and Slesser L.J. who thought that there should be no new trial because a plea of justification was bound to succeed. In *Newstead v. London Express Newspaper, Ltd.* [1939] 4 All E.R. 319 the jury failed to agree upon whether the words had a defamatory meaning, but assessed the damages, if any, at a farthing. This assessment did not constitute a verdict, for as *du Parcq L.J.* put it at 331: "When a jury has failed to agree on the question of liability, its opinion as to what the damages should have been can have no legal effect." This would naturally lead to a new trial but the Court of Appeal was asked not to order a new trial on the grounds that the words were incapable of a defamatory meaning. All the Lords Justices held that the words were capable of a defamatory meaning. A new trial was therefore ordered by the majority, MacKinnon L.J. dissenting on the ground that the jury had assessed the damages at a farthing and in his view no other twelve reasonable people would arrive at a larger figure. He said at p. 329: "It is said that we are bound to permit, if not to direct, a further trial of this case, and, if another jury disagrees, then yet another, and so on. That is in order that eventually some jury may answer the first question in the negative, or, answering it in the

affirmative, may give the plaintiff the farthing upon which one jury has already agreed, and upon which I am satisfied any reasonable jury would agree. I do not think that we are constrained to adopt this course, for I think that we sit here to administer justice, and not to supervise a game of forensic dialectics." If this reasoning is right, then the Court of Appeal could always substitute its own verdict for the jury's verdict if it was satisfied that its own verdict was the only one on which reasonable men could agree. As *du Parc* L.J. put it at p. 331 the Court of Appeal would be "itself deciding what damages ought to be awarded, a decision which it has no power to make."

¹⁴ Thayer, *op. cit.*, p. 164.

¹⁵ *R. v. Jones* (1724) 8 Mod. 201 at 208. *R. v. Middlesex Quarter Sessions* (1952) 36 Cr.App.R. 114 affords an interesting modern example of the old principle. This was a case in which the judge improperly directed the jury to return a verdict of Not Guilty before they had heard the evidence and the prosecution moved in the High Court for certiorari to quash the acquittal. But as the irregularity did not in law nullify the trial and so give ground for a *venire de novo* the court refused to disturb the verdict.

¹⁶ Thayer, *op. cit.*, pp. 161 and 163; Holdsworth, *op. cit.*, Vol. 9, p. 137.

¹⁷ Criminal Appeal Act, 1907, s. 4 (1).

¹⁸ *R. v. Heyes* [1951] 1 K.B. 29.

¹⁹ Thayer, *op. cit.*, p. 173.

²⁰ Crown Cases Act, 1848; a similar practice existed before that; see Archbold's *Criminal Pleading*, 22nd ed., p. 271.

²¹ Halsbury's *Laws of England*, 3rd ed., Vol. 7, p. 244.

²² *R. v. Dollery* (1911) 6 Cr.App.R. 255.

²³ *R. v. Lester* (1938) 27 Cr.App.R. 8.

²⁴ *Woolmington v. D.P.P.* [1935] A.C. 462 *per* Sankey L.C. at 480.

²⁵ *The Times*, February 16, 1955.

²⁶ *R. v. Hendrick* (1921) 15 Cr.App.R. 149.

²⁷ *Morris v. Godfrey* (1912) 106 L.T. 890.

²⁸ *R. v. Windle* [1952] 2 Q.B. 826.

²⁹ *Woolmington v. D.P.P.* (*supra*) *per* Sankey L.C. at 482.

³⁰ *Holmes v. D.P.P.* [1946] A.C. 588 *per* Viscount Simon at 597.

³¹ *R. v. Scholey* (1909) 3 Cr.App.R. 183 and *R. v. Alexander* (1913) 9 Cr.App.R. 139.

³² *R. v. Shipley* (1784) 4 Doug. 171 *per* Mansfield C.J. at 176 and *per* Willes J. at 178.

³³ Blackstone's *Commentaries*, Vol. 3, p. 377: *Devizes Corporation v. Clark* (1835) 3 Ad. & El. 507; *R. v. Jameson* (1896) 12 T.L.R. 551 at 593.

- ³⁴ *R. v. Bourne* (1952) 36 Cr.App.R. 125. I omit as in a class by itself the verdict of "Guilty but insane" which is technically a special verdict and is provided for in terms by the Trial of Lunatics Act, 1883, s. 2 (1).
- ³⁵ No one can doubt that the prosecution has no right of appeal from a verdict of Not Guilty. But if the defence appeals, does that allow the prosecution if wrong on the point appealed, to uphold the verdict on other grounds? Can the prosecution sustain the conviction by challenging a finding of fact against them (on the ground, for example, that it is unsupported by the evidence) but from which they could not themselves have appealed? These questions are suggested by the case of *R. v. Wheat* [1921] 2 K.B. 119. In this case the prisoner was charged with bigamy and his defence was that he had reasonable grounds for believing, and did in fact honestly believe, that his lawful wife had divorced him; the defence accepted that on this point the burden of proof was on them. It being doubtful whether this constituted a good defence under the Act, the trial judge asked for a special verdict so that this point of law might be determined by the Court of Criminal Appeal. The jury found that this defence was made out on the facts; but in accordance with the judge's direction that it was not a good defence in law, they returned a verdict of Guilty which was upheld in the Court of Criminal Appeal. In delivering the judgment of the court, Avory J. said that there was no evidence to support the jury's finding that the prisoner had reasonable grounds for his belief and that the appeal should be dismissed on that ground alone: the judgment then proceeded, on the assumption that the facts were as found by the jury, to declare that the direction in law was right and to uphold the conviction on that ground also.

This judgment means that if the court had differed from the trial judge on the law, they would still have upheld the conviction on the ground that there was no evidence to support the jury's finding of fact. On this hypothesis the trial judge should have directed the jury that the defence, if established on the facts, was a good one, but he should have directed them also that there was not sufficient evidence in support of it. If the jury had accepted that direction they would have returned a verdict of Guilty. But if they had not accepted it and had returned a perverse verdict, the trial judge would have been bound to accept the verdict and it could not thereafter have been attacked in the Court of Criminal Appeal. If a verdict of Guilty is obtained because of a misdirection in law, ought the accused to be thereby prejudiced? It is true that all he loses is his chance of a perverse verdict; but that does mean

that his true fate according to law is ultimately decided by judges and not by the jury.

The view that if the defence appeals, it allows the prosecution, as it were, to cross-appeal, is strengthened by a consideration of the practice under the Crown Cases Act, 1848: that Act is still in force though it has not been used since *R. v. Cade* [1914] 2 K.B. 209. The judge's powers under that Act arise only if there has been a conviction, but in that event he can "reserve any questions of law which shall have arisen on the trial."

- ³⁶ Holdsworth, *op. cit.*, Vol. 2, p. 215 shows how the jury may be said to be authenticated by Magna Carta.

CHAPTER 5

THE CONTROL OF THE JURY (contd.)

- ¹ Holdsworth, *op. cit.*, Vol. 8, pp. 334 *et seq.*
² 6 St.Tr. 999.
³ *R. v. Francklin* (1731) 17 St.Tr. 626 *per* Raymond C.J. at 671.
⁴ 32 Geo. 3, c. 60.
⁵ *R. v. Shipley* (1784) 4 Doug. 171.
⁶ *Capital & Counties Bank v. Henty* (1882) 7 App.Cas. 741; see particularly on the history of the matter the speech of Lord Blackburn at p. 771 onwards.
⁷ Some of the earlier authorities cited as illustrations of interference should be carefully examined to see what test was actually being applied. For the present test was not being universally applied until modern times.
⁸ *Broome v. Agar* (1928) 138 L.T. 699.
⁹ Holdsworth, *op. cit.*, Vol. 7, p. 392.
¹⁰ *Neilson v. Harford* (1841) 8 M. & W. 806 at 823.
¹¹ *Tindal v. Brown* (1786) 1 T.R. 168.
¹² Perjury Act, 1911, s. 1 (6) which is declaratory of the common law.
¹³ *M'Dowell v. Fraser* (1779) 1 Doug. 260.
¹⁴ *Fraser v. Hill* (1853) 1 Macq.H.L. *per* Cranworth L.C.
¹⁵ *Lister v. Perryman* (1870) L.R. 4 H.L. 521 at 540.
¹⁶ *Ibid.* at 531, 535 and 538.
¹⁷ *Bocock v. Enfield Rolling Mills Ltd.* [1954] 3 All E.R. 94.
¹⁸ *Merest v. Harvey* (1814) 5 Taunt. 442 and *Loudon v. Ryder* [1953] 2 Q.B. 202 are examples of figures that are probably far greater than any judge would have awarded and which were left undisturbed.
¹⁹ *Belt v. Lawes* (1884) 12 Q.B.D. 856.
²⁰ *Watt v. Watt* [1905] A.C. 115. Halsbury L.C. at 119 has an interesting paragraph on the origin of the practice.

- ²¹ A collection of dicta on causation are set out in *Royal Greek Government v. Minister of Transport* (1950) 83 Ll.L.R. 228 at 235 and a similar collection on remoteness of damage in *Mehmet v. Abdeni* [1951] 2 K.B. 405 at 409. See also *Cork v. Kirby* [1952] 2 All E.R. 402 per Denning L.J. at 407. These are mainly commercial cases. On causation as a jury question in the ordinary common law case, see Esher M.R. in *Englehart v. Farrant* [1897] 1 Q.B. 240 at 243.
- ²² *Macferson v. Thaytes* (1790) Peake 20.
- ²³ *The Cabinet Council, 1783-1835*, by A. Aspinall; *Proceedings of the British Academy* (1952), Vol. 38, pp. 171-172.
- ²⁴ *Mechanical & General Inventions Co. v. Austin* [1935] A.C. at 370.
- ²⁵ *Pickwick Papers*, by Charles Dickens, Chap. 34.
- ²⁶ *R. v. Hepworth* (1910) 4 Cr.App.R. 128.
- ²⁷ Busch, *op. cit.*, p. 276. The prohibition does not apply in the Federal Courts.
- ²⁸ Cooke, *A Generation on Trial*, pp. 266 and 324.
- ²⁹ Thayer, *op. cit.*, p. 188. For other adverse comment, see Jowitt, *op. cit.*, p. 150 and Taylor on *Evidence*, 12th ed., p. 28.
- ³⁰ Thayer, *op. cit.*, p. 207.
- ³¹ The phrase was used by Avory J. in *R. v. Banks* (1916) 12 Cr.App.R. 76.
- ³² *Commentaries*, Book 4, p. 355.

CHAPTER 6

THE DECLINE OF THE JURY AND ITS STRENGTH

- ¹ This approximate percentage is taken from *Criminal Statistics* published by the Home Office. The figures given in these publications for the last three years are as follows:

“ 1952 (Cmd. 8941)
131,047 offences of which
111,148 were dealt with summarily, and
19,899 sent for trial by jury.

1953 (Cmd. 9199)
115,784 offences of which
97,578 were dealt with summarily, and
18,206 sent for trial by jury.

1954 (Cmd. 9574)
106,371 offences of which
89,650 were dealt with summarily, and
16,721 sent for trial by jury.”

Not all those sent for trial by jury would in fact be tried as a

large percentage, roughly about two-thirds, would plead Guilty.

- ² The steps by which the right to a jury was gradually diminished are fully discussed in *Ford v. Blurton* (1922) 38 T.L.R. 801; *Kodak Ltd. v. Alpha Film Ltd.* [1930] 2 K.B. 340 per Greer L.J. at 354 and *Hope v. G.W. Ry.* [1937] 2 K.B. 130.
- ³ Common Law Procedure Act, 1854.
- ⁴ Judicature Act, 1873, s. 57.
- ⁵ R.S.C., Ord. 36.
- ⁶ Juries Act, 1918, s. 1.
- ⁷ Administration of Justice Act, 1920.
- ⁸ Supreme Court of Judicature (Consolidation) Act, 1925, s. 99 (1) (h).
- ⁹ Administration of Justice Act, 1933, s. 6.
- ¹⁰ I am greatly indebted to the Lord Chancellor's Department for giving me the figures from which I have calculated the percentages in the text.
- ¹¹ It is not possible to give exact figures of refusals. A separate application for trial by jury is extremely rare; the mode of trial is usually dealt with on the summons for directions when it comes before the Master and naturally no record is kept of whether there is any special discussion about it or whether trial by judge alone goes through as a matter of course. I am greatly indebted to Master Diamond for giving me his view of the matter. During the period between May 30 and July 20, 1956 he heard 175 summonses for directions and in four of them there was an application for a jury. He also during the same period gave directions in 110 summonses for summary judgment under Ord. 14; no jury was asked for in any of these and they are not the type of case in which a jury would normally be asked for or ordered; but as in about half of them an order was made for trial before a judge alone, the total figures show that there were four applications for a jury in about 225 cases. These figures confirm the view that Master Diamond had previously expressed as a matter of general impression. In the four applications one was a case of libel which was granted as a matter of course and the other three were discretionary cases; in two of them a jury was ordered and in the third refused. There was no appeal from any of these decisions.

There can be no doubt that any litigant who seriously wanted a jury would not rest content with its refusal by a Master, but would take the matter on appeal to the judge in chambers. The number of appeals therefore should give an accurate indication of the number of litigants who feel really

aggrieved by the denial of a jury. In a period of over four years there were four such appeals from orders of Master Diamond. In the legal year 1955-1956 there were from all the Masters four such appeals (Mr. Newman, Chief Clerk of the Summons and Order Department, has kindly supplied me with this figure).

When these figures are considered in relation to the number of cases that are entered for trial every year in the High Court (the figure in the legal year 1955-1956 was 3,412) they warrant the statement in the text that refusal of trial by jury is absolutely negligible as a cause of the decline.

- ¹² *Hope v. G.W. Ry. (supra)*.
- ¹³ An example of this is the reluctance of solicitors who do not specialise in commercial causes to apply for those they get to be transferred to the Commercial List.
- ¹⁴ See *Colonial Securities v. Massey* [1896] 1 Q.B. 38 at 39.
- ¹⁵ *The Julia* (1860) 14 Moore 210 at 255.
- ¹⁶ Now R.S.C., Ord. 58, r. 1.
- ¹⁷ The present principle and a consideration of the authorities leading up to it is very fully dealt with in the speech of Lord Wright in *Powell v. Streatham Manor Nursing Home* [1935] A.C. 243 at 263. See also *Crofter v. Veitch* [1942] A.C. 435 per Lord Thankerton at 460, *Yuill v. Yuill* [1945] P. 15 and *Watt v. Thomas* [1947] A.C. 484.

The cases in which a judge's finding on credibility is rejected are generally those of a complicated character, in which the judge's rejection of a witness's story is based upon some fundamental misconception of the evidence as a whole; or those in which a lengthy narrative has twisted and turned as the case has developed, and the judge has failed to check his conclusions on credibility by a review of the probabilities that emerge from the evidence as a whole. In his judgment in *Yuill v. Yuill (supra)* Greene M.R. referred to a case of this sort in 1933, in which he had appeared as counsel, and showed how this sort of situation might arise. I may perhaps be allowed to refer to a case in which I appeared as counsel and Lord Greene presided in the Court of Appeal: *Pesquerias y Secaderos De Bacalao De Espana, S.A. v. Beer* (1947) 80 Ll.L.R. 318. The case is of some interest as it involved the question of when the Civil War began in Spain and concerned the incidents leading up to it. Lord Greene's judgment is a masterly analysis of the evidence and of his reasons for rejecting the judge's disbelief of one of the principal witnesses; the judgment was described in the House of Lords (82 Ll.L.R. 501 at 513) by Lord Simonds as one that "in its skilful marshalling of complicated facts, in its cogency of

reasoning, and in its felicity of language, equalled any judgment that I have had the privilege of reading," an opinion with which Lord du Parcq expressed his wholehearted agreement.

- 18 This may be putting the position too definitely. See Professor Goodhart, "Appeals on Questions of Fact," L.Q.R., Vol. 71 at p. 407. See also *Geo. W. McKnight* (1946) 79 Ll.L.R. 167 *per du Parcq* L.J. at 180.
- 19 R.S.C., Ord. 66A, r. 1.
- 20 The Court of Appeal does not interfere with a judge's award of damages simply because it differs from it. But it will interfere with it a good deal more freely than with a jury's award. The principle is stated in *Davies v. Powell Duffryn* [1942] A.C. 601, *per* Lord Wright at 617.
- 21 For some recent observations on these points, see *Turner v. Metro-Goldwyn-Mayer* (1950) 1 All E.R. 449 *per* Lord Porter at 453.
- 22 Holdsworth, *op. cit.*, Vol. 1, p. 349.
- 23 Cmd. 8932, p. 82.
- 24 *Commentaries*, Book 4, p. 349.
- 25 *R. v. Shipley* (1784) 4 Doug. 73 at 173.
- 26 The text of the 39th Clause is set out in Holdsworth, *op. cit.*, Vol. 2, p. 214.
- 27 *Commentaries*, Book 4, pp. 349 and 350.

