CHAPTER XIX

PERJURY

In Anglo-Saxon legal procedure, judicial oaths played a very important part, being taken both by jurors and by compurgators. Both these classes were punishable for any perjuries they uttered. But the functions of the modern witness had not yet been differentiated from those of the juror; and perjury by witnesses was consequently an unknown crime[1]. And when, in the fourteenth century, witnesses did begin to be brought in to inform the jury, perjury by them was not made a punishable offence. Hence it became a maxim that the law regarded every witness's oath as true. Even the ecclesiastical courts, though treating breaches of faith in general as matters within their jurisdiction, took no notice of the grave breach of faith involved in giving false witness. But, before the end of the fifteenth century, the Star Chamber sometimes interposed to punish perjuries. And, in the sixteenth century, Parliament itself began to interfere with the immunity of witnesses; dealing in 1540[2] with subornation of perjury, and in 1562[3] with perjury itself. But for each of these offences it imposed only a pecuniary penalty, recoverable civilly by a penal action. Finally, however, the Star Chamber, in 1613, declared perjury by a witness to be punishable at common law[4]. Sir James Stephen emphatically characterises this decision as "one of the boldest, and, it must be added, one of the most reasonable, acts of judicial legislation on record[5]."

The offence thus created was one which could only be committed in a judicial proceeding[6], and by a witness who

[1] See Pollock and Maitland, II. 539; Stephen, *Hist. Cr. Law*, III. 240.
[2] 32 Hen. VIII. c. 9, s. 3. [3] 5 Eliz. c. 9.
[4] *Rex* v. *Rowland*, 3 Coke Inst. 164 (K. S. C. 415).
[5] *Dig. Cr. Law*, 1st ed. p. 345.
[6] *The Keepers of the Liberties* v. *Gwinn*, Style 336 (K. S. C. 416).

gave false evidence on oath. But the law gradually came to assume a far more complicated form. Parliament specified various matters which were not judicial proceedings, yet in which the telling a falsehood upon oath was to be a Perjury. Again, some classes of witnesses came to be allowed by statute to give evidence in judicial proceedings on mere affirmation, without any oath; and falsehood by them, though no Perjury, was made as severely punishable as if it were one. Moreover, the judges proceeded to declare that, in any matter wherein the law required an oath to be taken, the taking it falsely —if it were not judicial, and so not a Perjury—would be at least a common-law misdemeanor[1], punishable with fine and imprisonment, though not with the penalties of Perjury.

Happily the multifarious rules on these subjects have now been reduced to a comparatively simple and logical form. The noble task of codifying our criminal law, a task attempted by the statesmen of a generation ago[2] on a comprehensive scale but with no practical result, was resumed in 1910 by Lord Loreburn in a more fragmentary manner but with legislative success. For he carried the Perjury Act, 1911 (1 and 2 Geo. V. c. 6); which modifies not only the common law but also the provisions of upwards of a hundred and thirty Acts of Parliament.

It creates, or continues, numerous offences of False Public Statement. All, however severely punishable, are only misdemeanors. In each of them the offence lies in the breach of the oath or affirmation or declaration; that breach constituting only one single crime, however many be the lies that falsify the evidence. A fresh lie does not create a fresh perjury, but is merely a fresh proof of the one general perjury; or, in technical phrase, "matter for a new *Assignment* of Perjury." "Assertory" oaths, not "promissory" ones, are concerned.

The Statute classifies the offences into three groups.

(A) The grade most heinous consists of the offences punishable with seven years' penal servitude, or with two years'

[1] *Reg.* v. *Foster* (R. and R. 459, K. S. C. 417). [2] See p. 531 *infra*.

imprisonment (whether with or without hard labour), or with a fine (whether in addition to one of the preceding punishments or alone). Of these there are several.

(1) "Perjury"; a term which is henceforth to be restricted, as it was originally, to the case of *forensic* false evidence. It is defined—s. 1 (1)—as the crime committed when a person, lawfully "sworn[1]" as a witness (or an interpreter) in a *judicial* proceeding wilfully makes a statement, material in that proceeding, which he knows to be false or which he does not believe to be true.

The term "judicial" is, however, employed here in a wide sense which will cover not only inferior courts, like petty sessions, or courts outside the common law, like a court-martial, but even many matters of mere administrative business. For it is—s. 1 (2)—to include all proceedings "before any court, tribunal, or person, having by law the power to hear, receive, and examine evidence on oath[2]." Yet clearly the offence will not be committed unless the evidence be actually taken before a person who has legal power to take it. Thus when a Registrar in bankruptcy, who was presiding over the examination of a debtor, left the room to discharge other duties but bade the solicitor go on questioning the debtor, false answers given after his leaving were held to be no perjury[3]. And when justices of the peace held an informal preliminary meeting, at which they took evidence, in order to lighten the labour of their statutory licensing-session, a

[1] The expression is here not limited to religious Oaths, but includes also the taking of a legal Affirmation or Declaration—s. 15 (2). But the *child* who gives evidence without being sworn (*infra*, pp. 383, 393) still remains punishable for its falsity only by being sent for a month to a mere "place of detention."

[2] Difficulties as to the common-law "territoriality" of criminal jurisdiction (*infra*, p. 416) the Act obviates by treating as perjuries punishable in this country not only—s. 1 (4)—such as are committed here for the purposes of a judicial proceeding in colonial or foreign territory, but also—s. 1 (5)—all that are committed for the purposes of an English judicial proceeding, though committed in other parts of the King's dominions or (if before a British functionary) even in some foreign country.

[3] *Reg.* v. *Lloyd*, L. R. 19 Q. B. D. 215.

witness who swore falsely at this unauthorised meeting was held to have committed no offence[1].

(2) Similar conduct when committed, outside all judicial proceedings, by a person who has been "required or authorised by law to make any statement on 'oath' [including, by s. 15, Affirmation or Declaration] for any purpose"; s. 2 (1).

In these two crimes—A (1) and A (2)—in which, whether in a judicial or a non-judicial proceeding, the offender has been "sworn," it is not necessary that his statement should be false at all. The man becomes punishable simply through uttering an assertion, false or true, which he does not positively "believe to be true"; s. 1 (1), s. 2 (1). For a man who tells the truth quite unintentionally is morally a liar. Bracton (fo. 289) enforces this principle by the grotesque illustration of a Jewish juryman who, by concurring in a verdict that Christ was born of a virgin, committed a perjury, whilst his Christian colleagues of course committed none[2]. Conversely, false swearing is no crime when it is not wilful, but merely inadvertent (see p. 302).

On the other hand, a rule of peculiar, and perhaps unfortunate[3], leniency is borrowed by the Act, from the older law, for these two important offences—A (1) and A (2)—and also for one—viz. B—of those that are less heinous. For in these three crimes no guilt is incurred by a wilful false statement unless it be "material[4]" to the proceeding, or the purpose, for which it was made. This lenient old rule has often enabled witnesses, who had wilfully given false evidence, to escape all punishment. Fortunately the judges construe the rule very narrowly. Thus they have held that the evidence need not be material to the actual issue of the litigation—a lie about his solvency by a man who merely offers himself as

[1] *Rex* v. *Shaw*, 6 Cr. App. R. 103.

[2] Falsity as to a *mental* fact suffices; *e.g.* the witness's belief, or his "I cannot remember"; *Reg.* v. *Schlesinger*, 10 Q. B. 470.

[3] The Indian and Canadian Penal Codes shew no such leniency.

[4] *I.e.* such as might actually affect the mind of the tribunal. Materiality as to the *sentence* suffices; *Rex* v. *Wheeler*, 24 Cox 603.

bail is sufficiently material to a criminal prosecution. Again, evidence may be sufficiently "material" even though it were material, not intrinsically, but only by its facilitating the jury's acceptance of other testimony which had an intrinsic materiality[1]. Thus mere trivial details, mentioned by a witness in giving his account of a transaction, may become important by their leading the jury to believe that his knowledge of the transaction is complete, and his evidence therefore likely to be accurate. On the same ground, all statements made by a witness as to matters that merely affect his credibility are material[2], *e.g.* his denial of having been convicted of a crime. And even if the false evidence were legally inadmissible, yet this need not prevent its being regarded as "material" enough to form the subject of an indictment for perjury. There is, for instance, a rule that when a witness answers questions that relate merely to his own credibility[3], his answers are to be taken as final; so that no other witness can legally be brought to contradict them. Yet if, by a breach of this rule, some second witness be permitted to give this contradiction, and he give it falsely, he may be indicted for perjury; for, so soon as the contradiction was admitted, it did affect the credit given to the previous witness, and so became "material[4]."

The long-disputed question whether it is for the judge or for the jury to say if a statement was or was not "material," is determined by the Act in favour of the judge; s. 1 (6).

(3) The wilful use of a false affidavit for the purposes of the Bills of Sale Act, 1878[5]; s. 2 (2).

Moreover this first grade of crimes includes the following

[1] "A witness's statements as to his identity—his name, abode, position in life—are material. For they affect the degree of trust which the jury will give him." *Per* Darling, J., at C. C. C., Jan. 12, 1923.

[2] *Reg.* v. *Baker*, L. R. [1895] 1 Q. B. 797 (K. S. C. 419).

[3] *Infra*, p. 365.

[4] *Reg.* v. *Gibbon*, L. and C. 109.

[5] 41 and 42 Vict. c. 31. See Williams' *Personal Property*, Pt. I. ch. II.

two offences which may be committed even when no formal oath or affirmation has been taken[1].

(4) False statements, whether they be "sworn" to or not, made with reference to effecting the celebration or registration of a marriage; s. 3 (1).

(5) False statements, sworn to or not, with reference to the registration[2] of a birth or of a death; s. 4 (1).

(B) A less guilty group of offences consists of some that are not punishable with penal servitude but only with two years' imprisonment, or a fine, or both (s. 5).

In these no Oath has been taken. They are committed when statements, wilfully false in a *material* particular, are made in a "Statutory Declaration[3]"; or in some document which the offender was authorised to make, or some oral declaration which he was required to make, by a public general Act of Parliament[4].

(C) The least heinous grade is that of the offences for which the punishment is imprisonment for a year (with, since 1914, hard labour) with or without a fine, or a fine alone. These offences arise when a man makes (either in writing or orally) a representation "which he knows to be false or fraudulent" for the purpose of getting himself registered, or of procuring a certificate of some one's being registered, on the statutory roll of persons legally qualified to practice a particular calling—*e.g.* medicine or dentistry; s. 6[5].

[1] The Criminal Justice Act, 1925 (s. 28), will allow in *both* these two offences—(4) and (5)—the alternative of trial at Petty Sessions; but in that case the utmost punishment for either would be a fine of £50.

[2] On indictment for this offence a fine cannot be inflicted along with penal servitude or imprisonment, but only in substitution for them.

[3] See the Statutory Declarations Act, 1835 (5 and 6 Wm. IV. c. 62). The Criminal Justice Act, 1925, s. 24 and sched. 2, will allow the alternative of trial at Petty Sessions; with a possible punishment of, at most, six months' imprisonment and £100 fine.

[4] As when a voter is questioned by the returning officer at a general election.

[5] The Act is so comprehensively framed that perhaps no form of Public Statement is omitted. But what of false statements given orally, and not on oath, by a witness at a Local Government public inquiry?

In all these various offences, from Perjury downwards, wilfulness is an element essential to guilt. The man who makes an untrue assertion, but with an honest belief that it is true, commits no crime. His clerk made out the account, or his solicitor prepared the affidavit; and then he, on reading it over, felt no doubt of its correctness. Though due to inadvertence or forgetfulness or mistake—even careless and stupid mistake—his untrue words were not due to wilfulness. The case would be different if, instead of an actual belief that his assertion was true, he had had no belief either way[1]; for, by making the assertion, he pledged himself that his mind was not a blank with regard to it, so he lied "wilfully." It may however be doubted whether such non-belief would support a conviction for those offences—A (4) and B and C—which the Act requires to be committed not only wilfully but *knowingly*.

If any one incites a person to commit either perjury or any other offence against the Act, he commits, of course (*supra*, p. 80), a misdemeanor for which he may be fined and imprisoned with (since 1914) hard labour. But if his incitement prove so successful that the other man does commit the offence, there is then an actual Subornation; and for this the suborner may be visited with as severe a punishment as for the perjury, or other offence, itself (s. 7).

For all the above-mentioned offences a time-honoured precaution, which the common law of Evidence imposed in prosecutions for perjury, is perpetuated. "A person shall not be liable to be convicted of *any offence* against this Act (or of any offence declared by any other Act to be, or to be punishable as, perjury or subornation of perjury) solely upon the evidence of one witness as to the falsity of any statement alleged to be false"; s. 13. Otherwise there would but be one man's oath against another's—the statement originally sworn to by the defendant, and, on the other hand, the

[1] See L. R. 9 A. C. at p. 203.

contradiction of it now sworn to by the witness for the prosecution. (See *infra*, p. 392.) But it is sufficient if this one direct witness be corroborated by some admission which the prisoner has made, or by circumstantial evidence[1].

The Divorce Court is commonly regarded as "the playground of Perjury"; and not merely because a perverted sense of honour frequently prompts adulterers to falsehood. But the crime is still more common in the collision cases of the Admiralty Court; where sailors often manifest a clannish zeal for their ship. The Commercial Court is probably the tribunal most free from mendacity.

[1] Cf. *Rex* v. *Saldanha* (*The Times* of Nov. 1st, 1921, C. C. A.).

CHAPTER XX

BIGAMY

BIGAMY, as Blackstone tells us, properly signifies being married *twice*; but in law is used as synonymous with polygamy, or having a plurality of wives at once. (In 1790 a man named Miller was pilloried for having married so many as thirty women, for the sake of getting their money.) It originally was a purely ecclesiastical offence. But in 1603, by 1 Jac. I. c. 11, it was made felony. This statute, after being repealed and re-enacted by 9 George IV. c. 31, is now reproduced in the Offences against the Person Act, 1861 (24 and 25 Vict. c. 100, s. 57).

The offence is committed when a person who

(1) has previously been married,

(2) and has not since been legally divorced,

(3) goes through a legally recognised ceremony of marriage with another person,

(4) whilst the original wife or husband is still living;

(5) unless the original wife or husband has been continuously absent from the accused husband or wife during the seven years preceding the second marriage; and has not during that time been known by him or her to be living.

1. *Previously married*[1]. To sustain an indictment for bigamy the first marriage[2] must have been valid according to the law of the domicil of the parties, so far as concerns their personal capacity to marry[3]; and according to the law of the place of celebration, so far as concerns the ceremonial form.

[1] As to the proof of this, see pp. 331, 332 *infra*.

[2] A "marriage" under polygamous (*e.g.* Moslem) law does not suffice; L. R. [1917] 1 K. B. at p. 360. Cf. *Seedat* v. *The Master*, South African L. R. [1917] 302; and see 29 New Zealand Rep. 371.

[3] Dicey's *Conflict of Laws*, 3rd ed. p. 678. But see p. 865 as to the growing tendency to test Capacity by the same rule as Form.

Amongst possible causes of voidness may be mentioned the fact of either party being an idiot at the time of marriage; or the fact of the parties being within the prohibited degrees of relationship (as upon a man's marriage with his niece). So too, if the prisoner's first wife were actually the wife of someone else, at the time of her marriage with him, this marriage would necessarily be void. Consequently for him to proceed to marry some other woman will, though apparently a bigamy, be really no crime[1]. Similarly if *X* marries first *A*, and secondly *B*, and then thirdly, after *A*'s death, marries *C*, this marriage between *X* and *C* will not be indictable as a bigamy; inasmuch as the marriage with *B* was a mere nullity.

But besides those invalid marriages which are actually void (*i.e.* which may be treated as null by any court where evidence is given of the circumstances that invalidate them), there are others which are only voidable, *i.e.* the cause of their invalidity is merely one for which a court of matrimonial jurisdiction may set aside the marriage, if called upon to do so, whilst both the parties are still alive. But, until thus set aside, such a marriage must be treated by all courts as valid. Hence even a voidable marriage, as where either party to the marriage is then under the age of capacity (fourteen and twelve respectively[2], or is sexually impotent), has always been regarded as sufficient to fix the wife's Nationality and Domicil, and to render any second marriage bigamous.

2. *Not divorced.* It will be a good defence to a charge of bigamy, if the prisoner prove that the first marriage had been validly dissolved[3] (or judicially declared to have always been void), before the celebration of the second marriage. The divorce must be a legal one; legal, that is, by the law of the

[1] Lord Euston in 1871 married *A*. Afterwards, on finding that *B*, whom she had married in 1863, was still alive, he sued for nullity of marriage. But her successful defence was that in 1863 *B* was already married to *C*, who lived till 1867.

[2] Halsbury, XVI. 281; Com. Dig. *tit.* Baron, B. 5; 2 P. Wms. 561; Dyer 369.

[3] A "decree nisi" is *not* enough; a point too often overlooked.

country where the divorced parties were domiciled at the time[1]. If it were not thus valid[2], the fact that, by an error of law, they honestly though mistakenly supposed it to be valid, will not prevent the second marriage of either of them from being criminal. But if valid under that country's law, a divorce will be effectual here as a defence to a charge of bigamy, even though the ground on which it was granted was one that would not have enabled the parties to obtain a divorce in this country, had they then been domiciled here.

3. *Legally recognised ceremony.* Bigamy, like homicide, forms one of the rare exceptions to the principle that criminal jurisdiction is purely territorial. For, if the person accused be a British subject, it is immaterial in what territory (even though it be outside the British dominions altogether[3]) the second marriage took place; and he may be tried in any part of the United Kingdom where he may be in custody. But a person who is not a subject of His Majesty cannot thus be tried here for a bigamy committed outside the United Kingdom.

The second marriage (the alleged crime) must have been in a form recognised by the law of the place where it was celebrated[4]. But any form, legally recognised there, is sufficient. It is enough that it would have been good on some occasions; notwithstanding its being one which could not have been effectual on that particular occasion, even had the guilty person not been already married. Thus it is no defence for a man, accused of bigamy, to shew that he is a Christian, and that the form of marriage which he went through at his

[1] *Le Mesurier* v. *Le Mesurier*, L. R. [1895] A. C. 517. It may be convenient to note here that by the Administration of Justice Act, 1920, s. 15, questions of even a *foreign* law must now be decided by the judge himself, instead of being, as formerly, submitted, as questions of Fact, to the jury.

[2] Moslem divorces do not suffice in England; L. R. [1917] 1 K. B. 634.

[3] *Earl Russell's Case*, L. R. [1901] A. C. 446. Cf. p. 143 *supra*.

[4] *Reg.* v. *Allen*, L. R. 1 C. C. R. 367 (K. S. C. 423). In India, if the first marriage be under monogamous law, a second marriage even under a polygamous law will be a criminal bigamy; *The Emperor* v. *Lazar*, 39 Madras 551.

second wedding was one that is valid for Jews alone. Nor is it any defence to shew that the parties were too near akin to be able to contract a valid marriage. For the ground upon which bigamy is punished is the broad one of its involving an outrage upon public decency by the profanation of a solemn ceremony.

4. *Original spouse still living.* The prosecution must establish the fact that the prisoner's original husband or wife was still living at the time of the second marriage. Still it is not necessary that this should be shewn by the direct evidence of some one who can speak to having seen that person alive at that date. It may be sufficiently established by mere probable inference from circumstances; *e.g.* from the fact that the prisoner's first wife was alive and well a few days before his second marriage. But the fact of her having been alive merely within the often-cited period of "seven years" before that marriage, will frequently be utterly insufficient to justify an inference that she was still alive when it was solemnised. For the effect of shewing that she was alive at some time within these seven years is merely to neutralise the presumption[1] of her death, not to reverse it and so throw back the burden of proof upon the prisoner. It simply releases the jury from any technical presumption; and sets them free to look to the circumstances of the particular case. From the woman's age and health, the climate of the country in which she resided, the period which has elapsed since she was heard of, and similar circumstances, they must draw an inference as to whether she did or did not survive until the time when her husband married again.

5. *Not absent for seven years.* It is provided by the statute[2] that it shall be a conclusive defence to shew that the prisoner's original spouse (1) had been continuously absent from the prisoner (even though by his wilful desertion), during the seven years preceding the second marriage, and (2) had never

[1] *Infra*, pp. 331, 333.

[2] 24 and 25 Vict. c. 100, s. 57; cf. 1 Jac. I. c. 11, s. 2.

been heard of by the prisoner meanwhile. It is not necessary that the prisoner should give express proof of both the elements requisite to this defence. For if his wife's continuous absence for seven years be proved, this will suffice to raise a *primâ facie* presumption of her not having been heard of throughout that period[1]. But of course the prosecution may rebut this presumption, by shewing that within the seven years the fact of her being alive had become known to the prisoner.

We now come to a difficulty about which there have been keen controversies. If it be shewn (1) that the prisoner's wife was alive at the time of his second marriage, and (2) that at some time during the seven years preceding the second marriage he had known of her being still alive, must he necessarily be convicted? What if, subsequently to his last hearing of her as alive, he had received authoritative[2], though mistaken, assurance that she was dead? So far as the mere language of the statute goes, he undoubtedly has satisfied its definition of bigamy. Yet he may have done nothing which he did not honestly believe, and reasonably believe, to be perfectly lawful. For a long time judges differed in their decisions as to whether such a belief would or would not be a good defence for the re-marrying. But in 1889 it was decided in the Court for Crown Cases Reserved, by nine judges to five, that the general principle of criminal law, that a person cannot be guilty of a crime unless he has a guilty mind, is so fundamental that it must here override the omission of the statute in not expressly including a mental element as an essential requisite in the offence of bigamy. Accordingly the majority of the court held that the prisoner's *bonâ fide* belief, on reasonable grounds, that his wife was dead, would excuse his

[1] *Reg.* v. *Curgerwen*, L. R. 1 C. C. R. 1 (K. S. C. 426).

[2] He must not act upon mere rumour but must make searching inquiries, proportionate to the seriousness of such an act as marriage. "My husband was a sailor; and a sailor—whom I did not know and have never since seen—told me in Hull that he died in Chatham hospital" was held insufficient by Pickford, J.

re-marrying even within the seven years[1]. In the United States the opposite view prevails. And in England it is now settled[2] (despite earlier rulings to the contrary) that no such excuse is afforded by a similar mistaken belief, at the time of the later marriage, that the former marriage had been to a *married* person, and was therefore void; or, similarly, that this former marriage had been dissolved by a Divorce.

As regards the evidence which will be available at the trial, it should be noted that, although the husbands or wives of accused persons were excluded by the common law from giving evidence at the trial of the accusation, Parliament has greatly relaxed this exclusion. The Criminal Evidence Act, 1898[3], now admits the husband or wife to give evidence *for* a prisoner; and, if the accusation be one of Bigamy, the husband or wife may, by the Criminal Justice Administration Act, 1914[4], also be called even for the prosecution, and without the consent of the person accused.

Bigamy is a felony, punishable with penal servitude for not more than seven years or less than three, or with imprisonment (with or without hard labour) for not more than two years[5]. It is, like manslaughter, a peculiarly "elastic" crime[6]; the degrees of guilt varying—according to the degree of deceit practised and the sex of the person wronged—from an offence closely approximating in heinousness to a rape[7], down to cases in which the parties' only guilt consists in

[1] *Reg.* v. *Tolson*, L. R. 23 Q. B. D. 168 (K. S. C. 15). On the other hand, his merely *conjectural* (though correct) belief of her being alive will not make it a crime for him to re-marry after seven years' absence; for the Act requires Knowledge.

[2] *Rex* v. *Wheat*, 15 Cr. App. R. 134; L. R. [1921] 2 K. B. 119.

[3] *Infra*, p. 411. [4] *Infra*, p. 412.

[5] Lord Russell, L.C.J., added "and the having two mothers-in-law."

[6] During the one year 1920 the sentences inflicted for it by one very experienced judge ranged from four years' penal servitude down to a single day's imprisonment.

[7] Hence when the guilty party is the man, the judge, before passing sentence, usually inquires from the "wife" whether sexual intercourse had taken place between them before the "marriage." If it had *not*, his guilt is much greater.

their having misused a legal ceremonial for the purpose of giving a decent appearance to intercourse which they knew to be illicit. Indeed there may even be cases of an undoubtedly criminal bigamy where there is no moral guilt at all. For both parties may have been misled by some very natural misapprehension of law. The great, and unhappily increasing, dissimilarity between the matrimonial laws of civilised nations has made it but too easy for a man and woman to be husband and wife in one country and yet not so in another.

The other party to the bigamous marriage, if aware, at the time, of its criminal character, became guilty of aiding and abetting the crime; and accordingly may be indicted for bigamy as a principal in the second degree. On the other hand, when a woman, who reasonably believes her husband to be dead, marries a man who knows (but conceals) the fact of his being still alive, this man will escape all punishment; for the woman committed no crime, so he cannot be treated as an accessory[1].

It may be added that where a bigamy is committed, but the other party to the second marriage has no knowledge of its invalidity, she or he may, after the criminal proceedings, bring a civil action to recover damages for the tort of Deceit, which the prisoner committed in pretending to be free to marry[2].

[1] *Draft Criminal Code for Jamaica*, p. 112.
[2] Chitty's *General Practice*, p. xviii. Cf. p. 96 *supra*.

CHAPTER XXI

LIBEL

A LIBEL[1] is such a writing or picture as either defames an individual ("private" libel) or injures religion, government[2] or morals ("public" libel).

We have already seen[3] that most crimes are also torts. But the most conspicuous illustration of this is afforded by the defamatory, or private, Libel. It is a crime which not only is a tort, but is constantly treated as such in actual practice. For (1) it is only a misdemeanor, and accordingly not affected by the rule which delayed, and therefore usually frustrated, civil proceedings for crimes that were of the degree of felonies. And again, (2) it is a crime which, unlike most others, is often committed by persons whose pecuniary means are large enough to enable them to pay whatever compensation a civil court may award. Hence libels are much more frequently followed up by civil than by criminal proceedings. And the judges of the present day desire to see *indictments* for defamation restricted to those cases in which the libel is sufficiently aggravated, either by its intrinsic gravity or by its obstinate repetition, as to be likely to provoke its victim to commit a breach of the peace[4].

Hence a detailed exposition of the general principles of the law of libel should be sought rather in books on Torts[5] than in those devoted to criminal law. It may, therefore, be sufficient for the purposes of the present volume if we indicate

[1] The *Oxford Dictionary* states that the original meaning, "a little book" (*libellus*), had been narrowed to the present meaning of an unlawful book at least as early as 1631.
[2] *E.g.* 151 C. C. C. Sess. Pap. 459.
[3] *Supra*, p. 20.
[4] Yet an accusation of mere incompetence in business ("hopeless mismanagement"), with no charge against honesty or honour, was held by the Court of Criminal Appeal to be suitable for indictment (*Rex* v. *Dawson*, Aug. 19, 1924).
[5] See Pollock on Torts, ch. VII.; Salmond on Torts, ch. XIV.

very briefly the fundamental principles which are common to both the civil and the criminal law of libel, and then explain the distinguishing features of the latter aspect of this wrong[1]. The following principles are common to both its aspects:

(I) Anyone who publishes a defamatory document concerning another person, so as to tend to bring him into hatred[2], contempt, or ridicule[3], is guilty of "publishing a defamatory libel[4]." This "document" may consist of either a written or a pictorial[5] composition; *e.g.* even of an effigy suspended from a mock gibbet.

(II) The publication need not be "malicious" in the popular sense of that word (*i.e.* it need not be due to spite, or, as it is called, "express malice"), nor even in the statutory one (*supra*, pp. 148, 164) of evil intention. A printer's purely accidental omission of a "not" will suffice. It is true that the Libel Act, 1843, when dealing with criminal libel, does in terms restrict the offence to "malicious publication." But from the mere fact of publishing such matter, without any of the recognised legal grounds of excuse, the law draws an absolute presumption that the publication was malicious. Hence it is now settled[6] that it is not even necessary for the prosecutor or plaintiff to make in his pleadings any formal allegation that the libel was published maliciously. The law of libel has thus, at last, worked itself free from entanglement with the old fictions of a "constructive malice," which sometimes (as in the case of ardent social or political reformers) was—in Lord Macaulay's words—"only a technical name for benevolence[1]."

(III) The unlawful meaning which the document is alleged to have conveyed must be one:

(i) which it was reasonably capable of conveying to ordinary people of the class addressed[2], and

(ii) which it actually did convey to the particular person to whom it was published.

(IV) Everyone who circulates, or authorises the circulation of, a libel is *primâ facie* regarded as publishing it. But if he can be shewn to have been a mere unconscious instrument (as, for instance, is generally the case with a newsboy), this will be a sufficient defence[3]; some mental element being necessary to constitute such an act of "publication" as will render the doer responsible for it.

(V) There are certain occasions upon which the publication of (what would on ordinary occasions be) a libel becomes privileged[4]. Such a privilege may be either:

(*a*) *Absolute*; *e.g.* for publication in a House of Parliament[5], or by its order; and also for publication in a Court of Justice[6].

(*b*) *Qualified*; *i.e.* arising *primâ facie*, but ceasing if the prosecution shew that the publication was made with a spiteful motive, or, in other words, that there was "express" malice on the part of the defendant. A privilege of this qualified character is conceded to matter that is published under a legal or even a social duty; or as a fair comment

[1] See Stephen, *Hist. Cr. Law*, II. 298–305; Stephen, *Dig. Cr. Law*, Arts. 96, 179–183, 291–303.

[2] Even merely amongst a narrow circle of associates, *e.g.* a little coterie of anarchists; *Rex* v. *Malatesta*, 7 Cr. App. R. 273.

[3] In one of the United States, it has thus been held libellous to describe a man as "a Tory." With emphatic rhetoric the Supreme Court of Georgia thus ruled the point: "When the name of Washington shall grow cold to the ear of the patriot, when the poles of the earth shall be swung round to a coincidence with the equator, then and not till then will it cease to be a libel" to call a man a Tory; *Giles* v. *The State*, 6 Cobb 284, A.D. 1849.

[4] *Reg.* v. *Munslow*, L. R. [1895] 1 Q. B. 758 (K. S. C. 432).

[5] *Monson* v. *Tussauds*, L. R. [1894] 1 Q. B. 671.

[6] *Reg.* v. *Munslow*, *supra*.

[1] *Miscell. Works*, IV. 189.

[2] *Capital and Counties Bank* v. *Henty*, L. R. 7 A. C. at p. 776.

[3] *Emmens* v. *Pottle*, L. R. 16 Q. B. D. 354.

[4] As to libels in conjugal life, see p. 74 *supra*.

[5] *Rex* v. *Lord Abingdon*, 1 Esp. 225 (K. S. C. 440).

[6] *Watson* v. *Jones*, L. R. [1905] A. C. 480. This covers communications made to a solicitor, or a constable, even when legal proceedings are as yet only in contemplation, by a person who may (or may not) become a witness in the case. See 30 T. L. R. 591. Contrast 30 T. L. R. 596.

upon a subject of public concern[1]; or for the protection of any of the interests of the person publishing it (or, probably even of the interests of the person to whom it is published[2]); and to fair and accurate reports of Parliamentary or judicial proceedings[3]; and also, by statute[4], to such fair and accurate reports of public meetings, or of open sittings of public bodies, as are published in a "newspaper" and relate to some matter of public concern.

(VI) It is the function of the judge to decide (i) whether the document is reasonably capable of bearing the alleged defamatory meaning, *e.g.* a banker's note on a cheque "Refer to drawer" is *not* defamatory; (ii) whether the occasion was privileged; and—where there exists a qualified privilege—(iii) whether there is *any* evidence of express malice. All other matters, including now even the fundamental question whether the document is or is not a libel[5], are left to the jury. For the crime lies not in the document itself but in the act of publishing it; and the guilt or innocence of that act lies in the surrounding circumstances (of which the jury alone are the judges). Red-hot coals, destructive on the floor, may be welcome in the fireplace.

But though the criminal and the civil rules as to cases of libel are, fundamentally, thus similar, they differ as regards some few minor points. These are the following:

(1) No civil action will lie for a libel unless it has been

[1] *Thomas* v. *Bradbury*, L. R. [1906] 2 K. B. 627. *E.g.* public cricket matches.

[2] *Coxhead* v. *Richards*, 2 C. B. 569; Kenny's *Tort Cases*, p. 337.

[3] *Usill* v. *Hales*, L. R. 3 C. P. D. 319 (K. S. C. 442).

[4] 51 and 52 Vict. c. 64, s. 4. This Act also gives "newspapers" a statutory privilege for their reports of *judicial* proceedings that seems to be an Absolute one (see Gatley on Libel, p. 162); though Dr Blake Odgers contended for its being Qualified only.

[5] See Lord Campbell's *Lives of the Lord Chancellors*, ch. CLXXVIII., and May's *Constitutional History*, II. 253–263, as to the historic controversy, during 1752–1791, on this important constitutional question, ultimately settled by Mr Fox's Libel Act, 32 Geo. III. c. 60.

published to some *third* person; since the sole object of such an action is to secure to the plaintiff compensation for the wrongful loss of that esteem in which other people formerly held him[1]. Hence a defamatory letter sent to the very person defamed will not, in the ordinary course, become actionable; though a defamatory post-card addressed to him will be[2]. But the reason for the criminal prohibition against libels is, on the other hand, their tendency to provoke the libelled person into committing a breach of the peace; and this tendency is naturally greatest when it is directly to himself that the defamation is addressed. Accordingly a publication to the actual person defamed is quite sufficient to support an indictment[3].

(2) The *truth* of the matter complained of—even though the jury find it to have been published "maliciously"—has long been a good defence in a civil action for libel. For it "justifies" the words, by shewing that the plaintiff has no right to that reputation which he claims compensation for being deprived of. But the common law did not regard this as being any defence to criminal[4] proceedings; for the truer the charge, the more likely was it to cause a breach of the peace. An honest man may often despise calumnies; but a rascal is sure to resent exposure. Hence in criminal courts it used even to be a maxim that "the greater the truth, the greater the libel[5]." But this difference between the civil and criminal rules has been almost wholly removed by Lord Campbell's Act (6 and 7 Vict. c. 96), which permits the truth—the substantial truth, even with errors of detail—of a

[1] *Barrow* v. *Llewellin*, Hobart 62 (K. S. C. 437).

[2] *Infra*, p. 332 n[5].

[3] *Clutterbuck* v. *Chaffers*, 1 Starkie 471 (K. S. C. 438). Cf. 4 Bl. Comm. 150. It is often said that when the publication is, thus, only to the person libelled the indictment must expressly allege an intent to cause a breach of the peace. But it would seem that this is not really necessary; for in *Reg.* v. *Adams* (L. R. 22 Q. B. D. 66) the count contained no such allegation.

[4] Hobart 253; Moore 627; 5 Coke Rep. 125.

[5] Journalists are said to add "and the greater the libel, the greater our circulation."

private[1] libel to be a valid defence to criminal proceedings for it. This permission to "justify" the defamation is, however, subject to a proviso that the defendant must further allege expressly, and prove to the satisfaction of the jury, that it was for the public benefit that the matter in question should be made known. The existence of this proviso makes it possible to repress the publication of statements which, though quite true, are objectionable, whether on grounds of decency, or as being disclosures of State secrets, or as being painful yet needless intrusions into the privacy of domestic life. It may be for the public benefit to make it known that a man is suffering from an infectious fever; but not that he is suffering from heart-disease, or from some carefully concealed deformity (like that club-foot, the consciousness of whose existence embittered the whole life of Byron).

(3) There is no civil action for libelling a *class* of persons, if, as must usually be the case, its members are too numerous and unascertainable to join as plaintiffs in a litigation. But since, technically speaking, it is not by the persons injured, but by the King, that criminal proceedings are carried on, an indictment will lie; provided only that the class defamed be not an indefinite (*e.g.* "the men of science," "the Socialists") but a definite one (*e.g.* "the clergy of the diocese of Durham[2]," "the justices of the peace for the county of Middlesex").

(4) No civil action for a libel upon a person *deceased* has ever been brought by his representatives[3]; for the dead have no legal rights and can suffer no legal wrongs. But in those extreme cases where the libel, under the guise of attacking the dead man, attacks living ones by bringing his posterity into contempt or hatred, they—like any other class of persons who are injured by a libel—may obtain protection from the

[1] Hence Mylius, who accused the King of bigamy, was prosecuted, not as for a seditious libel, but as for a private one; thus enabling him to plead Truth, and thereby to enable the King to disprove it (*The Times*, Feb. 2, 1911).

[2] *Rex* v. *Williams*, 5 B. and Ald. 595. Cf. 2 Swanston 503.

[3] *Reg.* v. *Labouchere*, L. R. 12 Q. B. D. at p. 324.

criminal law[1]. Yet to extend that protection to the case of ordinary attacks upon the reputation of persons deceased, would be to impose an intolerable restraint upon the literary freedom of every writer of modern history[2]; especially as the lapse of time might have rendered it impossible for him to obtain *legal* proof of the truth of his statements, and as that truth, moreover, even if proved, might not be of sufficient public moment to constitute a statutory defence to criminal proceedings. Historical criticism may, no doubt, cause much pain to the descendants of the person criticised; but mere mental suffering never suffices, by itself, to render an act wrongful.

(5) In civil actions, a master is liable for *all* libels published by his servants in the course of their employment. But in criminal cases, it is[3] a good defence if he prove that the libel was published neither by his authority nor through his negligence. Cf. p. 45 *supra*.

Besides differing thus in their treatment of libellous writings the two systems also differ in their treatment of the cognate subject of unlawful *oral* utterances[4]. These never create, as a defamatory libel does, a twofold liability, at once civil and criminal. For if the spoken words are merely Slander, *i.e.* if they only defame private persons, a civil action will lie in certain grave cases[5]; but an indictment will not lie[6] (except in those rare instances where the words tend quite directly

[1] See *Rex* v. *Topham*, 4 T. R. 130; *Reg.* v. *Ensor*, 3 T. L. R. 366; *Rex* v. *Hunt*, 2 St. Tr. (N. S.) 69, for libelling Geo. III. in Geo. IV.'s reign. As to blackmailing by threats to libel the dead, see 6 and 7 Geo. V. c. 50, s. 31.

[2] See however the careful provision in the Italian Penal Code (Art. 399) to make possible such prosecutions. In 1916, at Tacoma, U.S.A., a man was convicted as a libeller for having written that George Washington was "a slaveholder and an inveterate drinker"; Parmelee's *Criminology*, p. 460.

[3] 6 and 7 Vict. c. 96, s. 7.

[4] If I dictate to my shorthandwriter a defamatory letter, I only publish a Slander. There is no libel, until the words are written down; and no crime until the writing is "published."

[5] See Pollock on Torts, ch. VII. s. 1.

[6] But the Indian Penal Code (s. 499) allows criminal proceedings. Yet unwisely: for oral utterances are heard by few, are transient, are often hasty, and are always apt to be misapprehended.

to a breach of the peace[1], as when they convey a challenge to fight). And, conversely, if the oral words are blasphemous[2], or obscene[3], or seditious, or reflect on the administration of justice, an indictment can be brought (as for similar *written* words); but no civil action can.

Libel is a misdemeanor, punishable with fine and imprisonment[4]. In the case of seditious, blasphemous, and other public libels there appears to be no limit to the period of imprisonment[5]; and similar words uttered orally are punishable similarly. But in the case of defamatory libels, the term has been restricted by statute to two years, when the libel was published with a knowledge of its being false; and, in all other cases of defamatory libels, to a single year[6].

Originally, hard labour could not be imposed in any case of Libel, whether defamatory or public. But for all libels, except seditious ones, it now can be. For the Criminal Justice Administration Act, 1914, provides, s. 16 (1), that any sentence of imprisonment without option of fine may, in the discretion of the court, impose hard labour, "notwithstanding that the offence is an offence at common law, or that the statute under which the sentence is passed does not authorise the imposition of hard labour."

[1] *Reg.* v. *Langley*, 6 Mod. 125 (K. S. C. 437). In *London* 2 and 3 Vict. c. 47 makes such words, if uttered "in a public place," punishable at petty sessions.

[2] For the lenient rule, recently established, as to what constitutes an indictable blasphemy, see *Reg.* v. *Ramsay*, Cababé and Ellis 126; and *Bowman* v. *Secular Society*, L. R. [1917] A. C. 406. Cf. my remarks in 1 Cambridge Law Journal, 127. The framers of the French code of 1924 for Cambodia, similarly found it necessary to protect current feeling, and imposed penalties on all who mock any idol or defile it (arts. 209–216).

[3] On obscene publications, see 39 Calcutta 390.

[4] For a libel in a "*newspaper*" a judge's order is needed before taking criminal proceedings against the proprietor or editor.

[5] In the case of *seditious* libels or utterances, the form of imprisonment must be only that of offenders of the first division (49 and 41 Vict. c. 21, s. 40).

[6] 6 and 7 Vict. c. 96, ss. 4, 5.

CHAPTER XXII

OFFENCES AGAINST INTERNATIONAL LAW

With a view of discharging those duties to the other nations of civilised mankind which are imposed upon us alike by political prudence and by International Law, our criminal law has made provision for the punishment of all persons who (1) infringe the rights of the ambassadors sent to us by foreign nations, or (2) commit acts of piracy, or (3) violate the neutrality due from us to belligerent nations.

(1) As regards offences against the privileges of ambassadors, it is unnecessary to add to the brief mention that has already been made of the statute of 1708[1], which makes it a misdemeanor (with remarkable peculiarities of procedure) to execute even a judicial civil process against the person or goods of any ambassador or his registered servant.

(2) Of piracy according to International Law (or "piracy *jure gentium*") we obtain a good example when the crew of a vessel mutiny, and seize the ship. But, old and famous though the crime is, there is not, even now, any authoritative definition of it[2]. Clearly it is not every felony that becomes piracy by being committed on board ship; for violence is essential, so mere larcenous pilfering would not suffice. The Judicial Committee of the Privy Council has endorsed[3] the rule, laid down so long ago as 1696, that piracy is "only a sea term for robbery." But this is not[4] absolutely precise; for an unsuccessful though violent attempt at pillage would be treated as a piracy if committed at sea; although on land it would not be a robbery, but only an assault with intent to rob. Moreover some menacing thefts which by English law

[1] 7 Anne, c. 12; *supra*, p. 93.

[2] Stephen, *Hist. Cr. Law*, II. 27; *Dig. Cr. Law*, Arts. 108–122.

[3] In *Att. Gen. of Hong Kong* v. *Kwok-a-Sing*, L. R. 5 P. C. 199.

[4] Cf. Oppenheim's *International Law*, 2nd ed. I. 340–348.

do technically amount to robberies would not be regarded as piracy if they were committed at sea. Probably the best approach to a correct definition is "any armed violence at sea which is not a lawful act of War"; *e.g.* by mutineers on board. For a pirate must be one who may be taken to be a source of danger to the vessels of all nations; and therefore those who act solely against a particular belligerent and in the interests of the Power that is at war with it, are not pirates, even though they go beyond their commission[1]. Nor will they be, even though their action be spontaneous and without any commission at all from the Power (whether a recognised State or not) whose interests they serve[2]. But, whatever be the precise limits of piracy *jure gentium*, it is at least clear that nothing that does not fall within them would be taken account of, as a piracy, by the common law.

But by statute it has further been made piracy:

(*a*) For any British subject to commit hostilities at sea, under the commission of any foreign Power, against *other British subjects*[3];

(*b*) For any British subject, or any resident in the British dominions, to take part in the slave trade[4].

Every piracy, whether of the common-law form or of the statutory, is a felony, and usually punishable with penal servitude for life[5]. But if accompanied by any act that may endanger life it is punishable with death[6]. It is an offence now almost unknown in our courts; no case having occurred since 1894, and that only an unimportant one[7].

(3) Previously to the nineteenth century, there was no

[1] "Enemies not of the human race, but solely of a particular State"; for the essence of Piracy "consists in the pursuit of private, as contrasted with public, ends"; see *Republic of Bolivia* v. *Indemnity Co., Ltd.*, L. R. [1909] 1 K. B. 785.

[2] In *re Tivnan*, 5 B. and S. at p. 680. Cf. L. R. [1909] 1 K. B. 785.

[3] 11 and 12 Wm. III. c. 7, s. 7. [4] 5 Geo. IV. c. 113, s. 9.

[5] 1 Vict. c. 88, s. 1, and the Penal Servitude Acts.

[6] 1 Vict. c. 88, s. 2.

[7] *Criminal Statistics of England and Wales*, issue of 1901, p. 29.

hindrance in the way of an Englishman's following the profession of a soldier of fortune wheresoever he chose; saving only the claim of the King of England to his continued loyalty, and perhaps to his services if they should be needed[1]. The former right of the King was considered to be in jeopardy in James I.'s reign, and an Act (3 Jac. I. c. 4) was passed with the object of preventing subjects of the Crown from being contaminated in religion or loyalty by the Jesuits whom they might meet in Continental armies[2]. The second right appears to have been in the mind of the framers of the statute passed in 1736[3], now repealed, which made it felony, without benefit of clergy, to enlist in the service of any foreign prince; an enactment which seems, however, to have remained a dead letter. But the modern development of International Law created a new reason for similar prohibitions; and in the nineteenth century Foreign Enlistment Acts were passed with the object of preserving England's neutrality, by forbidding her subjects to give any assistance to foreign belligerents. In treatises on International Law[4] the student will find narrated the growth of the principle of Neutrality, as determining the course of conduct to which nations are now bound to adhere, whenever a condition of war exists between Powers with whom they themselves are at peace. The ancient powers of the Crown in England being insufficient to enable it to prevent its subjects from committing acts which might be at variance with the modern conceptions of the obligations of neutrality, Parliament found it necessary to make participation in foreign hostilities a criminal offence. The first Foreign Enlistment Act was passed in 1819[5], to restrain outbursts of sympathy with the revolt of Spain's South American colonies against her. During the

[1] See Stephen, *Hist. Cr. Law*, III. 257–262; *Dig. Cr. Law*, Arts. 104–107.

[2] See the preamble to the Act.

[3] 9 Geo. II. c. 30.

[4] See Dr T. J. Lawrence's *Principles of International Law*, pp. 628–658; Oppenheim's *International Law*, 2nd ed. II. 347–377.

[5] 59 Geo. III. c. 69.

American Civil War, it proved insufficient to prevent the traffic between English shipbuilders and the Confederate Government; and was accordingly replaced in 1870 by a more stringent enactment[1]. Under this one, the chief offences forbidden are:

1. To enlist oneself or others—without a licence from the Crown—for service under a foreign State which is at war with a State that is at peace with us[2].

2. To equip, build[3], despatch, or even agree to build, within British dominions—without licence from the Crown—a ship with reasonable cause to believe that it will be employed in such service as aforesaid[4].

3. To fit out, within the British dominions—without a licence from the Crown—any naval or military expedition to proceed against the dominions of any State that is at peace with us[5].

Each of these offences is a misdemeanor, punishable with a fine and with imprisonment for a period not exceeding two years, with or without hard labour. All ships or munitions of war in respect of which the offence is committed are to be forfeited to the Crown.

The student must bear in mind that, though it is sometimes said that "International Law is part of the laws of England," this is true only in that loose historical sense in which the same is also said of Christianity. But an indictment will not lie for not loving your neighbour as yourself. Equally little will it lie for trading in contraband of war, or for the running of a blockade. Both these acts are visited by International Law with the penalties of confiscation; but neither of them

[1] 33 and 34 Vict. c. 90.

[2] s. 4. This is an offence whether committed within *or even without* the British dominions.

[3] The previous Act (of 1819) forbade nothing short of the ultimate "equipping, fitting-out, or arming" of a ship. See the case of the *Alexandra*, 2 H. and C. 431.

[4] *Ibid.* s. 8.

[5] *Ibid.* s. 11; see *Reg.* v. *Jameson*, L. R. [1896] 2 Q. B. 425.

constitutes any offence against the laws of England, or is even sufficiently unlawful to render void a contract connected with it[1].

[1] See *Ex parte Chavasse*, 4 De G. J. and S. 655. To trade with persons domiciled amongst a nation with whom *our own* country is at war seems to have been regarded in William III.'s time as an indictable misdemeanor at common law; 1 T. R. at p. 85. Cf. a case in 1319 of trading with Scotland during our war with her (Rolle's Abr. *tit.* Prerogative). But in 1817 Sir Samuel Romilly repudiated this doctrine as one which "no one" would now hold (*Life of Robert Aspland*, p. 383). In 1914 it was made a statutory misdemeanor, punishable with seven years' penal servitude, for any one thus to trade with the enemy "during *the present war*," except in such transactions as might be permitted by royal proclamation (4 and 5 Geo. V. c. 87).

CHAPTER XXIII

OFFENCES OF VAGRANCY

THE historical interest and the juridical anomalies of the Vagrancy Act are such as to justify a fuller reference to it here than the importance of the offences created by it might seem to call for. An experienced observer of criminal proceedings has pronounced it, somewhat sweepingly, to be "the most unconstitutional law yet lingering on the statute book[1]." It is a survival from a long series of penal enactments—enforced by imprisonment, flogging, enslavement, and death—whereby the legislature strove to grapple with the difficulties created by the steady increase in the numbers of the migratory population. Legislation for this purpose began so far back as 1388; when the dearth of labourers, caused by the devastations of the Black Death in the period 1348–1369, had produced competition amongst employers and, consequently, many migrations of labourers towards the districts where they could profit by this competition. The legislature interposed in order to check both the rise of wages consequent upon all such free exchange between labour and capital, and also some more genuine evils, arising from the mendicancy of such of the wanderers as did not obtain employment, and the dishonesty of many of them who did not even seek for it. To this latter class of vagrants, a dangerous addition was made in the reign of Henry VIII. by the arrival of the first Gipsies. The establishment under Elizabeth of a compulsory parochial assessment, for the relief of the destitute, naturally led to the imposition of further penalties to protect parishes from the arrival of strangers who might become a burden on the local assessment. The modern reform of our industrial legislation and of our system of poor-relief has now swept

[1] Serjeant Cox's *Principles of Punishment*, p. 212.

away almost the whole of the long series of enactments which four centuries had accumulated. But there still remains the Vagrancy Act, 1824; whose provisions might be unintelligible if we did not regard them as a supplement to the old Poor Law, intended to prevent indigent persons from wandering out of their parishes, and to restrain the offences likely to be committed by such wanderers. Offenders against the Act (5 Geo. IV. c. 83) are of three classes; according to the maximum punishment which can be inflicted upon them. Every case is tried at Petty Sessions; though in cases of the third class, as will be seen, the sentence is not pronounced there.

I. The first class consists of the persons who are guilty of the more trivial offences of vagrancy. Typical instances are:

(1) A person whose wilful neglect to work causes him or her, or any of his or her family, to become chargeable to the parish.

(2) A person wandering abroad to hawk goods without a pedlar's licence.

(3) A person begging[1] in any public place[2], or encouraging any child to do so.

(4) A common prostitute wandering in the public streets and behaving riotously or indecently[3].

All these are technically denominated by the Act "*Idle and disorderly persons.*" They are liable to a punishment of imprisonment for not more than a month with or without hard labour, or a fine not exceeding £5.

[1] For any able-bodied man to beg was made an offence by 12 Ric. II. c. 7: but a university student might beg if the Chancellor of the University had given him a certificate. At Bridgwater such a certificate is still preserved.

[2] Metropolitan magistrates have held that a street box-collector can be convicted of begging, if she receives *any* share of the money collected.

[3] The Town Police Clauses Act makes it an offence for her simply to "loiter and importune" in a street. But within the precincts of the Universities of Oxford (6 Geo. IV. c. 97, s. 3) and of Cambridge (57 and 58 Vict. c. lx) she commits an offence by merely wandering in a public street and not giving a satisfactory account of herself.

II. The second class consists of the persons who are guilty of the more grave forms of vagrancy. The following instances may be cited (see also p. 179 n. *supra*):

(1) A person convicted for a second time of any of the offences of the former series. The two need not be both of the same species.

(2) A person running away and leaving his wife or child chargeable to the parish.

(3) A person endeavouring to procure alms by exposing deformities or by making fraudulent pretences.

(4) A person found in a building, or inside an enclosed yard or garden, for any unlawful (*i.e.* criminal[1]) purpose.

(5) A person gaming[2], in an open and public place, at some game *of chance*[3], with cards, coins, or other instruments[4].

(6) A person telling fortunes; or using any subtle craft, by palmistry or otherwise, to deceive[5], *e.g.* casting astrological nativities.

(7) A person wandering abroad, without visible means of subsistence, and lodging in unoccupied buildings or under a tent or in a cart, and not giving a good account of himself. Between eight and nine thousand persons annually are convicted of thus "sleeping out," as this offence is commonly designated.

(8) A male person (α) knowingly living, wholly or in part, on the earnings of prostitution, or (β) persistently soliciting, in public, for immoral purposes. This much-needed prohibition of the calling of a *souteneur* was added by the Vagrancy Act, 1898 (61 and 62 Vict. c. 39). Prosecution for it may also be by indictment.

[1] Not mere immorality; *Haynes* v. *Stephenson*, 25 J. P. 329.

[2] *I.e.* playing for stakes contributed, wholly or even in part, by the *players* themselves; not for a prize given entirely by someone else. See above, p. 47 n. Cf. 36 and 37 Vict. c. 38, s. 3.

[3] But a publican commits an offence by permitting gaming at *any* game, even one of skill, on his licensed premises; *e.g.* bowls played for beer.

[4] This does not cover the depositing of money on a bet made with a person standing in a street to receive bets upon a horse race; *Reduay* v. *Farndale*, L. R. [1892] 2 Q. B. 309.

[5] A *fortune-teller* who believes in his skill is nevertheless guilty, *Stonehouse* v. *Mason*, L. R. [1921] 2 K. B. 818. But an avowed juggler is not; *Johnson* v. *Fenner*, 33 J. P. 740.

All these are styled "*Rogues and Vagabonds.*" (Both words originally meant simply "wanderers," the "rogues forlorn" of King Lear; from the Latin *rotare* and *vagari*.) They may be punished with imprisonment up to three months[1], with or without hard labour, or with a fine not exceeding £25.

III. The third class consists chiefly of those who have been twice[2] convicted—or who have resisted arrest when apprehended on even a first charge—of any offence of the second series[3]. Such a person is technically an "*Incorrigible Rogue.*" The procedure is curious. The offender, as in the two previous classes, is convicted at a court of Petty Sessions; but this court can only commit him to imprisonment (with hard labour) until the next court of Quarter Sessions. (In 1924, 143 were so committed.) That court will receive the conviction, and without further accusation can inquire and pass the sentence upon it; which may extend to a year's further imprisonment, with hard labour, and in the case of a male, the prisoner may also be ordered to be whipped[4].

[1] By 2 and 3 Geo. V. c. 20 the eighth class may be imprisoned for *six* months (or, on indictment, for two years).

[2] The two convictions need not be for offences of the same species.

[3] Other than the eighth, the *souteneur*.

[4] This is only done in bad cases: *e.g.* where a vagrant, thrice deported, had thrice returned unlawfully to England; or where a man had forced a child to beg, by threatening to drown it.

BOOK III

MODES OF JUDICIAL PROOF

CHAPTER XXIV

THE NATURE OF PRESUMPTIONS AND OF EVIDENCE

A READY knowledge of the law of evidence is essential to all who are engaged in forensic practice. The occasions for applying it arise suddenly; and the rules must be put in force forthwith, before the witness has had time to break them. Hence, as Sir Henry Maine has remarked, there is probably no other legal accomplishment so widely diffused amongst the members of the English bar as skill in appreciating evidence and familiarity with the law relating to it.

The restrictions imposed by the English rules of evidence are in startling contrast to the laxity[1] of proof allowed in Continental tribunals[2]. But the constitutional value of our stringency is great. For it has done much towards producing that general confidence in our criminal courts which has kept popular feeling in full sympathy with the administration of the criminal law, and has thereby facilitated the task of government to an extent surprising to continental observers. In the emphatic words of the late Professor W. L. Birkbeck, Q.C., "the Jury and the law of Evidence are Englishmen's two great safeguards against the worst of all oppressions—that oppression which hides itself under the mask of justice." And these two safeguards are intimately connected; for the

[1] The danger of laxity is illustrated by the fact that, about 1750, to serve a client indicted at the Old Bailey for robbery, an attorney named Brecknock forged an almanac to show that there had been no moon that night (Burke's *Connaught Circuit*, p. 129).

[2] France, unlike England, permits (*a*) leading questions, (*b*) hearsay evidence, (*c*) evidence of matters only remotely relevant.

one is a product of the other. Our rules of evidence were created in consequence of a peculiarity of English procedure in taking away from the trained judges the determination of questions of fact, and entrusting it to untrained laymen. The Romans had no law of evidence; for, with them, questions of fact were tried in civil cases by a *judex* who was a citizen of rank; and in criminal cases by a court actually forbidden to check a witness[1]. But in England jurymen's inexpertness led the courts to establish many rules for the exclusion of certain kinds of evidence that seemed likely to mislead untrained minds.

Whenever, in any country, a tribunal is called upon to decide any question of fact, it must do so either by obtaining actual evidence, or by the easier yet less precise method of employing, instead, some *à priori* presumption. Before commencing a detailed account of evidence, it may be convenient to explain the technical substitutes which thus sometimes replace it. Presumptions are of three kinds.

(i) *Praesumptiones juris* (*i.e.* drawn by the Law) *et de jure* (*i.e.* in an Obligatory manner). These are inferences of fact so overwhelming that the law will not permit evidence to be called to contradict them. Such is the presumption (*supra*, p. 49) that an infant under seven cannot have a guilty intention. Such presumptions, though in form connected with the law of Proof, are in truth rules of substantive law disguised in the language of mere adjective rules.

(ii) *Praesumptiones juris*, *i.e.* inferences of fact which only hold good until evidence has been given which contradicts them. They consequently afford merely a *primâ facie* proof of the fact presumed; a proof which may be overthrown by evidence which negatives it, or by collision with some other and still stronger presumption which suggests a contrary inference. Thus, in the United States, when slavery existed, there was, in the slaveholding States, a *primâ facie* presumption

[1] Mommsen, *Straf.* 422; Strachan-Davidson's *Problems*, II. 119.

that every man of black or mulatto skin was a slave, unless he proved himself to be a freeman.

(iii) *Praesumptiones hominis*, or *facti*. These do not really deserve to be classed amongst legal presumptions; for though, like the two preceding classes, they are inferences of fact, the law does not (as in those two cases) command juries to draw them, but only advises their doing so. A good instance of such a recommendation is the presumption that arises from possession of goods recently stolen (see p. 334).

The presumptions important enough to call for detailed notice here belong mainly to the second class, the *praesumptiones juris, sed non de jure.*

(1) There is a presumption of this kind against the commission of any crime[1]. This holds good, not merely in criminal trials, but probably also in every civil case where any allegation is made that a criminal act has been committed[2]. Thus in an action on a life-insurance policy, the presumption is against suicide. So strong is this presumption that in order to rebut it, the crime must be brought home to a prisoner "beyond reasonable doubt"; and the graver the crime, the greater will be the degree of doubt that is reasonable. Hence (*a*) the commission of the crime—that the horse actually was stolen, or the man killed—must be clearly proved; so clearly, that circumstantial evidence will rarely suffice to prove it[3]. Thus on a charge of murder the fact of death must be very fully proved; which can rarely be done unless the body be produced, mere circumstantial evidence of death thus being usually insufficient[4]. Moreover (*b*) after proving that the crime was committed, the prosecution must also prove distinctly that it was committed by the very person accused; so that when two men are charged with a crime, and it is made clear that one of them committed it, but it cannot be shewn which one, both must be acquitted[1].

[1] *Reg.* v. *Manning* (K. S. C. 446). It must be remembered that there is no similar *general* presumption of innocence of all crimes, alleged or unknown. So if a prisoner assert his good character, he must give proof of it.

[2] But as to whether the presumption is *equally* violent against a defendant who in a *civil* action is charged with crime, see p. 389 *infra*.

[3] *Infra*, pp. 343, 344.

[4] Hale P. C. ch. XXXIX. (K. S. C. 449); 3 Coke Inst. 104 (K. S. C. 449).

Strong as is the presumption of Innocence, it is not too strong to be sometimes rebutted by the presumption of the Continuance of Life[2]; *e.g.* in a case of bigamy, the presumption that the prisoner would not have contracted a second marriage unless his first wife were dead, may be outweighed if it be shewn that she was alive only five and twenty days before this second wedding took place[3]. But it may be useful to note that an amount of testimony which is not sufficient to rebut the presumption of innocence entirely[4] (*i.e.* to shift the burden of proof so completely as to compel the prisoner to call legal evidence of circumstances pointing to his innocence), may yet suffice to throw upon him the necessity of offering, by at least an unsworn statement, some explanation[5]. If he remain silent and leave this hostile testimony unexplained, his silence will corroborate it, and so justify his being convicted. A frequent illustration of this occurs in the case where a person accused of theft is shewn to have been in possession of the goods shortly after the stealing[6].

(2) There is a presumption against the commission of any immoral act. Hence cohabitation, with the general reputation of being husband and wife, is, in most cases, sufficient *primâ facie* evidence of marriage[7]. And birth is presumed to be legitimate. But the presumption against moral wrong-doing is not so strong as the presumption against criminal wrong-doing. Hence's *A*'s cohabitation with *B* does not constitute

[1] *Rex* v. *Richardson*, Leach 387 (K. S. C. 448). [2] *Infra*, p. 333.

[3] 2 A. and E. 540; *secus*, if no more shewn than that she was alive twelve months before the second wedding, 2 B. and Ald. 389.

[4] For illustrations of such insufficient evidence see *Reg.* v. *Walker*, Dearsly 280 (K. S. C. 450); *Reg.* v. *Slingsby*, 4 F. and F. 61 (K. S. C. 452). Contrast *Reg.* v. *Hobson*, Dearsly 400 (K. S. C. 453).

[5] *Reg.* v. *Frost*, 4 St. Tr. (N. S.) 85 (K. S. C. 374). Cf. 7 Cr. App. R. 58.

[6] *Infra*, p. 334.

[7] *Doe dem. Fleming* v. *Fleming*, 4 Bingham 266 (K. S. C. 458).

such strong evidence of his being married to her as will justify his being convicted of bigamy if he proceeds to marry *C*[1].

(3) *Omnia praesumuntur ritè ac solenniter esse acta*[2]*; i.e.* all things are presumed to have been done in the due and wonted manner. This presumption acquires increased weight as the event recedes in time. It is one of great force, especially when applied to public or official acts. Thus from the fact that a church has been frequently used for the celebration of marriage services the court will infer that it had been duly licensed for that purpose. Similarly the fact of a person's acting in a public office (*e.g.* as sheriff, justice of the peace, or constable), is sufficient *primâ facie* evidence of his having been duly appointed to it[3]. And there is a presumption that in any Government office the regular course of business has been followed (*e.g.* that the particulars on a postmark represent the time and place at which the letter was handled in the post). Even in a private establishment the course of dealing may become so systematic and regular as to justify a similar employment of this presumption[4]. Thus a letter left in the ordinary course with a servant for delivery to his master may be presumed to have reached the master's hands. Or a letter, duly addressed and posted, and not returned soon afterwards by the Dead Letter Office, to have been duly delivered. Or a postcard, duly posted, to have been read during its transmission[5]. Again, a deed will be presumed to have been executed on the day whose date it bears[6]. And the holder of a bill of exchange is deemed *primâ facie* to be a "holder in due course." And any one who has entered into a contract is presumed to be of sufficient age to be legally competent to contract[7].

[1] *Morris* v. *Miller*, 1 W. Bl. 632 (K. S. C. 459). So, again, identification merely by a photograph is usually *not* sufficient to identify an alleged adulterer (L. R. 1896, P. 75). [2] See Irish Rep. [1924] 2. 157.
[3] *Rex* v. *Borrett*, 6 C. and P. 124 (K. S. C. 461).
[4] *Macgregor* v. *Kelly*, 3 Exch. 794. Cf. p. 542 *infra*.
[5] L. R. [1915] 3 K. B. D. 32; [1916] 2 K. B. D. 615.
[6] *Malpas* v. *Clements*, 19 L. J. R., Q. B. 435. [7] 1 T. R. 649.

(4) The possessor of property, real or personal, is presumed *primâ facie* to be full owner of it[1]. In the case of real property, accordingly, the presumption is that he is seised in fee simple.

(5) There is a presumption that any existing state of things will continue for some time further[2]. Accordingly if a partnership or agency is shewn to have once existed, those who allege it to have been subsequently dissolved will have the burden of proving the dissolution. This presumption is often applied in questions as to the duration of human life. Where a person is once shewn to have been living he will be presumed to have continued alive[3] for some time longer; though the strength of this presumption will depend upon the particular circumstances of the case, such as his age and his state of health. But if it be shewn that for the last seven years he has not been heard of by those persons who would naturally have heard of him had he been alive, the presumption of his continued existence becomes reversed[4].

(6) A sane[5] adult is presumed to intend all the consequences likely to flow directly[6] from his intentional[7] conduct[8].

Besides these obligatory presumptions of Law, there is one discretionary presumption of Fact[9] which deserves careful

[1] L. R. 1 Q. B. 1; 5 Taunt. 326; 8 C. and P. 537.
[2] *E.g.* train's, or motor-car's, rate of speed. Or again that Mr Bradlaugh, an atheist in 1882, was still one in 1884; see p. 351 *infra*.
[3] *Reg.* v. *Jones*, L. R. 11 Q. B. D. 118 (K. S. C. 428); *Reg.* v. *Willshire*, L. R. 6 Q. B. D. 366 (K. S. C. 429).
[4] *Hopewell* v. *De Pinna*, 2 Camp. 113; compare 2 A. and E. 540.
[5] Every man is presumed sane, until the contrary is proved.
[6] As to the indirect consequences, see 7 Cr. App. R. 140.
[7] Not from the *accidental* going-off of his gun; 8 Cr. App. R. 211.
[8] 7 Cr. App. R. 140; 8 Cr. App. R. 211. This is *not*, as is often stated, an irrebutable presumption; see Cr. App. R. 2. 57, 14. 116; Irish L. R. [1910] 2 K. B. 29. Drunkenness, for instance, may rebut it. For its application in Homicide, see p. 140 *supra*.
[9] It is not a presumption of Law, for it does not need sworn evidence to rebut it; the prisoner's unsworn explanation suffices. For a similar presumption, as to Accomplices, see p. 393 *infra*.

attention—viz. that the possessor of goods recently[1] stolen may fairly be regarded as either the actual thief or else a guilty receiver[2]. His possession raises also—but less strongly—a presumption of his guilty connexion with any further crime that accompanied the theft, *e.g.* a burglary, an arson, or a murder.

We have said that this presumption arises in the case of goods which had been stolen recently. It therefore does not arise until proof has been given that the goods in question have actually been stolen[3]. Thus it is not sufficient that a tramp is wearing three gold watches and gives quite contradictory accounts as to how he got possession of them[4]. As to what time is near enough to be "recent," no general rule can be given; for the period within which the presumption can operate will vary according to the nature of the article stolen. Three months has been held sufficiently recent for a motor-car, and four months for a debenture-bond (10 Cr. App. R. 264). But for such articles as pass from hand to hand readily, two months would be a long time; particularly in the case of money. In regard to a horse, it has been held that six months is too long[5]. Eight months is too long to be "recent" for a bale of silk (17 Cr. App. R. 191). And it would seem that, whatever the article were, sixteen months would be too long a period[6]. This presumption does not displace the presumption of innocence so far as to throw upon the accused the burden of producing legal proof of the innocent origin of his possession. He merely has to state how it did originate. If his account is given at, or before, the preliminary examination, and is minute and reasonably probable, then he must not be convicted unless the prosecution can prove the story to be untrue[1]. But if he has put forward two inconsistent accounts, his explanation cannot be regarded as satisfactory; and the prosecution need not call evidence to rebut these varying stories. Even if he give an explanation which the jury disbelieve, or give none at all, they are not bound to convict him[2]; though they probably will do so. For, if his story *might* reasonably be true, the Crown has not given proof "beyond reasonable doubt."

A kindred presumption of guilt arises when a murdered body is found in the possession of some one who is concealing it[3].

[1] *I.e.* recently before he obtained possession; though perhaps long before he was arrested.

[2] Lord Alverstone, L.C.J., and Phillimore, L.J., habitually advised juries to prefer the latter view. In a case in 1918 the goods stolen in a burglary were found in the prisoner's possession two days after it. Avory, J., said, "Possession so long afterwards is not sufficient evidence of stealing; you had better convict of receiving." Possession even so early as twenty minutes after the theft may support a verdict of receiving; 17 Cr. App. R. 124, cf. 18. 118.

[3] *Rex* v. *Yend*, 6 C. and P. 176 (K. S. C. 468).

[4] Cf. p. 343 *infra*; but contrast, in *London*, no. (iii) on p. 352.

[5] *Reg* v. *Cooper*, 3 C. and K. 318 (K. S. C. 468).

[6] 2 C. and P. 459 (K. S. C. 469), *per* Bayley, J.

Evidence.

A litigant, whose case is not made out for him by any Presumption, must convince the tribunal by producing Evidence. The evidence known to our courts admits of a ready classification, according to differences in its intrinsic nature, into three kinds; which are respectively described in the Indian Evidence Act as (*a*) Oral evidence, (*b*) Documentary evidence, (*c*) Material—meaning thereby not "relevant" but "physical"—non-documentary evidence. The same principle of classification has been carried out, in other phraseology and in a slightly different arrangement, by Jeremy Bentham, as follows:

1. "Real" evidence, *i.e.* that consisting in the condition of physical matter, even a living human body[4]; as, for example, a fence, a uniform, a finger-print, a tattoo mark,

[1] If he "raises a reasonable doubt," this suffices; 2 Cr. App. R. at p. 242.

[2] The absence of satisfactory explanation does not *compel* a jury to convict; *Rex* v. *Schama*, 11 Cr. App. R. 45, 182. Cf. 13 Cr. App. R. 17.

[3] See *The Trial of Wainwright*, p. 226.

[4] Thus a very close resemblance of features affords "real" evidence of Consanguinity; see my remarks in *Law Quarterly Review*, XXXIX. 297.

a wound, an assailant's bitten finger, a smell of prussic acid, the lion-bitten shoulder which identified Dr Livingstone's corpse. Thus blood stains upon a knife are "real" evidence of its having caused a wound[1].

2. "Personal" evidence, *i.e.* evidence which was produced directly by the mental condition of a human being[2]. This may be either,

(*a*) Involuntary; *e.g.* a blush,

(*b*) Voluntary, *i.e.* intended to be Testimonial; *e.g.* an affidavit. It may be either,

(i) Oral, or

(ii) Written[3].

There is also a very dissimilar, but not less important, mode of classifying evidence, which turns upon differences in its logical bearing upon the question before the court. Considered from this point of view, all evidence is either (i) direct, or (ii) indirect (or, "circumstantial[4]").

(i) Direct evidence is testimonial evidence to one or more of the *facta probanda* (or "facts in issue"), the essential elements of the question under trial; *i.e.* those facts which, if all of them be proved, render legally necessary a decision favourable to the litigant producing them.

(ii) All other evidence is "circumstantial." This term consequently includes:

[1] "Wash this filthy witness from your hand"; *Macbeth*, II. sc. 2. Once at Ennis an assassin's detached finger, blown off by the bursting of his gun, identified him.

[2] Or, indeed, of an animal; as when the stolen horse (whose identity is denied), on being taken to prosecutor's yard, goes at once to its own stable and its own stall.

[3] So early as 1315 we find a writing used "per evidence a lenqueste" —by way of evidence to the jury; Y. B. 8 Edw. II. p. 35.

[4] The student must distinguish between this technical use of the word, and a more popular one, in which it is also applied to evidence, but means simply "full of detail," "circumstanti*ated*," (*e.g.* "his tedious and circumstantial description"); and in which it consequently may be as applicable to a witness's Direct as to his Indirect evidence.

(*a*) all "real" evidence[1];

(*b*) all "involuntary personal" evidence;

(*c*) such testimonial evidence as concerns only *facta probantia; i.e.* circumstances which tend to prove, or to disprove, some *factum probandum*, or "fact in issue." Thus in a prosecution for libel, the act of publication by the defendant is a fact in issue; whilst the similarity of the defendant's ordinary handwriting to that on the envelope in which the libellous document was posted, is a fact that tends to prove this fact, and so becomes relevant to the issue.

The following are instances of some of the principal forms of circumstantial evidence familiar in criminal cases: the rank of the defendant, his disposition, his motives, his threats, his opportunities, his preparations, his attempts, his false statements, his silence, his fabrication or destruction of evidence, his flight, his possession of stolen property. But circumstantial evidence is just as applicable in civil cases as in criminal. Thus, in an action on a loan, the defendant may call evidence of the poverty of the plaintiff in order to help to prove that the money was not lent[2]. Yet the controversies with regard to its value have arisen almost entirely in connexion with criminal offences[3]. For the much greater severity of the penalties that may be inflicted for them has caused many persons to challenge the probative force of circumstantial evidence, as being logically inadequate to support a conviction for (at any rate) any capital crime.

The question thus raised is so fundamental as to need our careful consideration. It is clear that in dealing with any testimonial evidence whatever, whether "circumstantial" or "direct," a jury may be misled. For they have to depend upon:

(1) the accuracy of the witness's original observation of the events he describes;

[1] *E.g.* a weapon *tightly* grasped by a corpse shows suicide, not murder. A small dose of poison suggests murder; a large one, suicide.

[2] *Dowling* v. *Dowling*, 10 Ir. C. L. 236. [3] See p. 543 *infra*.

(2) the correctness of his memory; and

(3) his veracity.

But in addition to the risks of mistake, forgetfulness, and falsehood, which thus arise even when none but direct evidence is given, there are additional risks to run in dealing with circumstantial evidence. For here the jury have also to depend upon:

(4) the cohesion of each circumstance in the evidence with the rest of that chain of circumstances of which it forms a part;

(5) the logical accuracy of the jury themselves in deducing inferences from this chain of facts. "The more ingenious the juryman the more likely is he to strain his facts to fit his theory" (Alderson, B.). For "every fact has two faces." Readiness in detecting them and seizing on the favourable aspect is an important qualification in an advocate. Thus excitement on being accused may be due either to consciousness of guilt or to indignant innocence. Lord Jeffrey (*Life*, I. 359), in defending Paterson for poisoning his wife, was met by proof of his having once contemplated that murder; but this very fact he claimed as exculpative, urging that contemplation of so horrible a purpose must have made a husband ultimately recoil from it.

These fourth and fifth hazards have impressed some writers so deeply as to make them urge that no conviction for any capital offence should be allowed to take place upon merely circumstantial evidence. But those who so contend have not always realised that in every criminal case the *mens rea* must necessarily be proved by circumstantial evidence alone[1] (except when the prisoner actually confesses). Nor have they realised how extremely obvious may often be the inference to be drawn from circumstantial evidence; as, for instance, in a case where the evidence is of an "alibi[2]." Indeed the

[1] Aided by legal presumptions, *e.g.* that "a man intends the natural consequences of his act"; or as to murderous malice; *supra*, pp. 140, 233.

[2] Or of identification by Sir F. Galton's plan of Finger-prints. Of the first million finger-prints recorded by the London police, no two correspond in more than seven out of the eleven "characteristics" by which they are classified. Galton estimated that the chances against a single finger of one man being identical with the same finger of another are sixty-four thousand millions to one. The chances against all five finger-prints of a hand tallying with those of another man's hand are much over thirty-two *millions of millions* to one. An important extension of these records has been "Poroscopy," the examination of the pores (instead of merely the ridges) in the finger-prints. By the Telestograph, finger-prints can now be wired by our police to those of foreign countries. Cf. p. 543 *infra*.

circumstantial element often plays a large part in what would pass, at first sight, as excellent "direct" evidence. Thus a witness may depose that he saw *A* point a rifle at *B* and fire it; saw the smoke, heard the crack, and saw *B* fall; and then, on going up to him, saw a bullet-hole in his leg. But still he did not see *A*'s bullet strike *B*; so this fact (the really essential one) depends entirely upon circumstantial evidence; *i.e.* it has to be merely inferred from these other facts which he actually did see[1].

No distrust of circumstantial evidence has been shewn by English law. It does not even require that direct evidence shall receive any preference over circumstantial. Memorable instances of important capital convictions, whose correctness is unquestioned, that were based solely on indirect evidence are found in the trials of Courvoisier for the murder of Lord William Russell in 1840[2], and of Crippen in 1910 for the murder of his wife (*infra*, p. 345 n.; 5 Cr. App. R. 255). Reference may also be made to *Rex* v. *Nash* (6 Cr. App. R. 225); and *Rex* v. *Robertson* (9 Cr. App. R. 189).

Indeed some experienced English and American lawyers have even gone so far as to prefer circumstantial evidence to direct. "Witnesses," say they, "can lie; circumstances cannot." Undoubtedly many famous cases may be cited where

[1] Accordingly, in an old case under unpopular Game Laws, a friendly jury accepted the hypothesis of the poacher's counsel, that the gun fired by his client was not loaded with shot, and that the pheasant died of mere fright. And the superior court did not set aside this verdict (though, it being a civil case, they had full jurisdiction to do so). 4 T. R. 468.

[2] *The Times*, June 19, 1849; Townsend's *Modern State Trials*, I. 267, where an account will be found of the grave question raised by this case as to the duties of an advocate to a client whom he knows to be guilty.

great masses of direct evidence have proved to be utterly misleading[1]. Such cases have shewn that the direct and explicit assertions of scores of witnesses, by being given on *opposite* sides, may create a far greater uncertainty than that which attends the employment of circumstantial evidence[2].

Three such cases may be briefly referred to.

(1) In the *Leigh Peerage Case*[3], the claimant of a title based his claim on his alleged descent from one Christopher Leigh. The proof of such descent was the alleged inscription on a monument, which was said to have formerly stood inside Stoneleigh Church. Thirty witnesses appeared before a committee of the House of Lords, and swore orally to their recollection of the monument; and affidavits to the same effect were made by about thirty others. But these sixty witnesses were contradicted (*a*) by twenty-one other witnesses, who denied altogether that any such monument had existed; and also (*b*) by the fact that their own descriptions of its shape, its colour, and the inscription carved on it were utterly irreconcileable[4]. Accordingly the committee refused to believe these sixty persons.

(2) In *Elizabeth Canning's Case*[5], thirty-five witnesses swore that a gipsy (of peculiarly unmistakable features) who

[1] For the remarkable error in "direct" evidence of identity in Adolf Beck's case see p. 533 *infra*. Similarly, twenty-one witnesses mistakenly identified one Thompson in 1912; 7 Cr. App. R. 203.

[2] On the general controversy see pp. 39–52 of Wills on Circumstantial Evidence. The whole volume deserves the careful study of every advocate.

[3] A.D. 1832. See the Committee's Report.

[4] To take, for instance, only some seven out of the first thirty, they thus differed as to the colour of the monument: "nearly black"; "a kind of dove colour"; "black with white letters"; "had been originally white"; "black"; "light marble with dark introduced into it"; "bluish grey." As to its shape: "oblong"; "square at top, but narrowed to a point at bottom"; "square at bottom, but narrowed to a point at top"; "square at top and square at bottom." And as to the inscription on it: "all Latin"; "a great deal of it English"; "all English except *anno domini*"; "all Latin."

[5] 19 St. Tr. 283. See *Cornhill Magazine*, 1904. A full account of this extraordinary case will be found in an article in *Blackwood's Magazine* for 1860, p. 581, written by a well-known metropolitan magistrate, who considers it "perhaps the most inexplicable judicial puzzle on record"; and also in one contributed by me to the *Law Quarterly Review* in 1897.

had been convicted of a robbery in Middlesex, was in Dorsetshire at the time of the robbery; but were contradicted by twenty-five other witnesses, who swore to having seen her then in Middlesex. Besides shewing by this contradiction how untrustworthy even the most direct testimonial evidence may be, the case further emphasises the same lesson by the instance of Canning's own narrative of abduction and robbery, which was discredited by its sheer improbability, without being contradicted at all.

(3) But the case of *Reg.* v. *Castro*[1], the longest and most remarkable trial in our legal history, affords the most vivid illustration of the untrustworthiness of direct evidence. A butcher, named Orton or Castro, came forward in 1866 claiming to be Sir Roger Tichborne, a young baronet who was believed to have perished in 1854 in a shipwreck. On Orton's being ultimately tried for perjury, 212 witnesses were examined for the Crown, and 256 for the defence. These included four large groups of people who respectively gave the following items of direct evidence:

(1) the claimant is not Roger Tichborne;

(2) he is Arthur Orton;

(3) he is not Arthur Orton;

(4) he is Tichborne.

These four vast groups, accordingly, served only to prove each other to be untrustworthy; and the case had therefore to be decided by circumstantial evidence, such as the claimant's degree of education, his ignorance of the affairs of the Tichborne family, and his conduct towards them and towards the Orton family.

These cases shew vividly that testimony, even when a large number of witnesses corroborate each other, may be quite untrustworthy; and therefore that direct evidence is not necessarily to be believed. It may even be less trustworthy

[1] *Annual Register*, vols. for 1871, 1872, 1873, 1874.

than circumstantial evidence[1], if the latter happens to consist of a great number of detached facts, which are severally proved by different witnesses. For, in such a case, each witness's contribution may well appear to him too trivial for it to be worth while to commit perjury about it (though, on the other hand, the same triviality which thus diminishes the chance of mendacity, increases somewhat the chances of mistake and of forgetfulness). But in all other cases circumstantial evidence must certainly be pronounced to be less trustworthy than direct evidence; since a dangerous source of error is introduced by the difficulty of reasoning from the fragmentary items of proof to the conclusion to be proved. For, though "circumstances cannot lie," they can mislead[2]. They may even have been brought about for the very purpose of misleading; as when Joseph's silver cup was placed in Benjamin's sack, or when Lady Macbeth "smeared the sleeping grooms with blood."

Unfortunately it is in the graver rather than the lesser crimes that circumstantial evidence has the most frequently to be relied upon; because in such crimes an offender is the more careful to avoid eye-witnesses. Just as adultery can scarcely ever be proved by direct evidence[3], so no deliberately planned murder is likely to be carried out when any third person is at hand. Hence comes it that if a child has died just about the time of birth, though the question whether it was born alive or dead can usually be settled easily in civil actions (friends of the mother, who were present at the

[1] Especially in Oriental countries, where "truthfulness is an eccentricity, and evidence on oath a marketable commodity"; Sydney Smith's *Forensic Medicine*, p. 472.

[2] As when Bodin tells us that "For the woman not to weep when accused is one of the strongest presumptive proofs of witchcraft that Grillard and other Inquisitors had observed, after having tried and executed very many witches"; *Démonomanie*, IV. ch. IV.

[3] Lord St Helier said that if direct evidence of adultery be given, this very fact should inspire doubts as to the truth of the accusation. But the combination of guilty passion with opportunity affords some circumstantial evidence of it.

birth, being called), yet its determination on a criminal trial for infanticide is usually most difficult[1]. For it ordinarily has to depend wholly on circumstantial evidence, and this has to be drawn from post-mortem appearances of an ambiguous character. Hence has arisen a widespread impression that the evidence *requisite* to prove live birth is different in civil and in criminal cases; the only difference being, in reality in the evidence usually *available* in the one and in the other.

These various considerations point to the conclusion that circumstantial evidence should be admitted, but admitted only with watchful caution. With this conclusion the practice of English courts accords. (The caution, however, as Stephen[2] points out, must not be excessive; as when some maintain that there should be no conviction unless guilt be "the only possible inference" from the circumstances. For even in the best-proved case there must always be some possible hypothesis which would reconcile the evidence with innocence[3].) The prudent hesitation of English law in regard to circumstantial evidence has found expression in some familiar restrictions upon its employment. Two of these are of special importance.

(*a*) No conviction for larceny is to be allowed unless the fact that a larceny has actually taken place be proved fully[4]. It is not enough that a penniless tramp has been found to be wearing two diamond rings. To convict him of larceny, it must further be proved that these rings had somewhere been stolen; and this must be proved either by direct evidence or at least by exceptionally strong circumstantial evidence. Usually therefore it will be necessary to bring the owner himself, to prove his loss of some article and its identity with

[1] "Almost impracticable" (Ogston's *Medical Jurisprudence*, p. 220); "almost impossible" (Atkinson's *Medical Practice*, p. 217); "absolutely impossible" (T. F. Smith's *Med. Jur.* p. 224).

[2] *General View of Criminal Law*, pp. 265–275.

[3] Cf. the hypothesis mentioned, *supra*, p. 339 n.

[4] Cf. p. 196 *supra*.

the article which is the subject-matter of the indictment[1]. But it is possible that even circumstantial evidence may be so peculiarly strong as to justify a conviction without any such direct proof; as where a person, on coming out of a barn, is found to have corn (or one coming out of a cellar is found to have wine) concealed under his coat[2].

(*b*) Similarly no conviction for homicide is allowed unless the fact that there has been a death be proved fully. This again must be done either by direct evidence (*e.g.* the finding of the body), or by circumstantial evidence of an exceptionally strong character[3]. Hale and Coke illustrate the importance of this rule by actual instances in which persons were executed for murder, and yet their supposed victims subsequently reappeared alive[4]. Hence in a case where the father and mother of a bastard child were seen to strip it and throw it into the Liverpool Docks, and the body could not afterwards be found, Gould, J., nevertheless advised that, as there was a bare chance that the child might have been carried out to sea by the tide and picked up alive, the parents ought not to be convicted of its murder[5]. It thus is usually necessary that the body, or some identifiable portion of it, should be found[6].

[1] *Rex* v. *Joiner*, 4 Cr. App. R. 64. Hence the frequent impunity of those who make a trade of picking up stray balls on golf-links.

[2] *Reg.* v. *Burton*, Dearsly 282.

[3] *Rex* v. *Hindmarsh*, 2 Leach 569.

[4] Hale P. C. c. XXXIX.; 3 Coke Inst. 104 (K. S. C. 449).

[5] Cited in *Rex* v. *Hindmarsh*, loc. cit. Doubt has been thrown on this ruling as over-cautious. But *Rex* v. *Farquharson* (Sussex Assizes, June 29, 1908) is similar. The prisoner confessed having thrown her baby into a tidal stream. It was proved on the next morning the body of a baby of the same sex and age was found on the shore, a mile away, in the line of current. Jelf, J., told the jury that they could not convict unless satisfied that the body found was that of the prisoner's child. In *Rex* v. *Armstrong* (*The Times*, Aug. 18, 1875), a man had been thrown overboard in a Gold Coast river, rife with sharks, and his body was never seen again. Archibald, J., left the case to the jury, saying, "The rule only requires the jury to act with caution."

[6] The phrase *corpus delicti*—though often applied to the body of a murdered man, or the stolen goods, or any other Thing which is the subject-matter of criminal conduct—more properly means the criminal Conduct itself, *e.g.* the act of killing the man, or of stealing the goods. See the phrase discussed by Wills (*Circumstantial Evidence*, p. 324).

A memorable instance of the identification of a mere portion occurred in a famous American trial of 1850; that of Professor Webster, of Harvard University, for the murder of Dr Parkman[1]. The body had been burnt in a furnace in the Professor's laboratory and the only identifiable portion left was the victim's false teeth; but they fortunately were of a peculiar character.

[1] 5 Cushing 295. Compare, too, Crippen's case, in England in 1910; where no head and no bones were found and no organs that indicated sex, but only pieces of flesh, on one of which was an identificatory scar. And in *Rex* v. *Peacock*, an Australian case (13 Commonwealth L. R. 619), the murderer had burned the whole of the corpse, yet was convicted. Cf. *Rex* v. *M^cNicholl*, Irish L. R. [1917] 2 K. B. 557.

CHAPTER XXV

THE GENERAL RULES OF EVIDENCE

WE now come to consider the chief general rules of evidence. They consist, as we have seen (p. 328 *supra*), mainly of rules of Exclusion. And they are not limited to excluding such matters as are irrelevant to the issue to be tried. For even of relevant testimony there are two kinds which it is highly desirable to exclude[1].

(*a*) Evidence of matters so slightly relevant as not to be worth the time occupied in proving them. If every circumstance which might tend to throw light on the matters in issue were let in, trials would be protracted to an intolerable length; especially (Maine says) in India, where extraordinary ingenuity is exhibited in discovering every fact which has the remotest bearing on a question under litigation.

(*b*) Evidence which, though relating to facts that are not only relevant but even important, is itself of such a character that experience shews it to be likely to impress persons of merely ordinary intelligence as being a more cogent proof of those facts than it really is. "Hearsay" affords a conspicuous example of this kind of evidence. The legal rules of evidence were probably developed in consequence of the gradual discovery by judges that certain kinds of proof were apt to be thus accepted, by inexperienced jurymen, with a degree of respect which was undeserved. Hence an adherence to the rules was insisted upon chiefly in cases where it was by jurymen that the evidence was to be weighed. Accordingly where the functions of the Court alone are concerned (as in determining the sentence for a convicted prisoner), facts are often taken into account which have not been established in accordance with the strict rules of evidence[1]. So the law of evidence was not reduced to definite form until long after our forensic procedure had become familiar with the practice of producing witnesses to give evidence to juries. It was in civil courts that—in the seventeenth century—the rules of evidence first arose; and they thence passed to criminal courts, where, however, they came to assume an even greater importance than was accorded to them in civil ones[2].

A marked distinction between the civil and the criminal views of the law of evidence is that its rules may in civil cases be waived, either by consent or by an order made on a summons for directions; but in criminal cases the rules of evidence are matters *publici juris*, and cannot be dispensed with by consent of the parties[3]. For, here, others than they have an interest at stake. Not merely the single person accused, but also every other inhabitant of the realm, has an interest in seeing that the prisoner's liberty or life is not taken away except under the whole of the safeguards which the law has prescribed. Thus a photograph, unverified by oath, cannot be given in evidence even if both parties are willing that it should be.

And till recently there was a further grave distinction. For in civil cases, a new trial is not allowed merely because of an improper admission or rejection of evidence at the original trial, unless this error had occasioned "some substantial wrong or miscarriage[4]." But in criminal cases a

[1] "Experienced citizens, and judges of the highest eminence, reach conclusions in their own private affairs by reference to a more relaxed standard than the courts allow. But the issues pronounced upon by courts are attended with such grave consequences that in matters of evidence a standard of admissibility so cautious as to be meticulous is in fact essential" (Lord Birkenhead, L.C.).

[1] But the fact that the prisoner is present and does not deny them, does often give ground for receiving them, even technically, as Admissions.

[2] "In criminal courts the rules of Evidence are strictly observed; and in six months you learn more of practical advocacy there than in ten years elsewhere" (Lord Brampton).

[3] *Reg.* v. *Bateman*, 1 Cox 156 (K. S. C. 191); cf. L. R. 1 P. C. at p. 534; 11 Cr. App. R. at p. 300. But the quasi-civil character which the early law attached to mere misdemeanors (*supra*, p. 98), has occasionally led, in their case, to slight relaxations of this rule; see, *e.g.* p. 397 *infra*. America tends to relax it; cf. 190 U. S. 197; 195 U. S. 138.

[4] Rules of the Supreme Court; Order 39, Rule 6.

jury's verdict of Guilty used to be liable to be quashed if *any* inadmissible evidence for the crown had gone in; even though that evidence was trivial, and though the rest of the evidence was amply sufficient to warrant a conviction. Happily, however, the Criminal Appeal Act, 1907[1], has abolished this scrupulosity. For it provides that "the court may (notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appeal), dismiss an appeal if they consider that no *substantial* miscarriage of justice has actually occurred." A similarly wide power of dismissal had already been adopted by the High Court in dealing with appeals from rulings given about evidence in courts of Petty Sessions[2].

So, now, a small slip in the evidence will not entitle a prisoner to appeal successfully if (even had an opposite ruling been given) the only reasonable and proper verdict for the jury to return would still have been the same, one of Guilty. In other words, if every reasonable jury not only might, but certainly must, have convicted. Yet there may be a sufficient "miscarriage of justice" to warrant setting aside a conviction[3], even though the Court of Appeal itself thinks the conviction justifiable. It is sufficient that it would have been "fairly and reasonably" *possible* for the jury to have refused to convict, had the rules of evidence been strictly observed. For the prisoner has lost that chance of acquittal[4]. Hence a prosecutor should not press for the admission of any evidence which is at all of doubtful admissibility. But, on the other hand, a prisoner's counsel should not be too eager to take objections to evidence; for the jury resent any technicality which closes the avenues to truth, and therefore a successful objection often creates in their minds a prejudice more injurious than the excluded evidence itself would be. American

[1] 7 Edw. VII. c. 23, s. 4; *infra*, p. 497. [2] *Shortt* v. *Robinson*, 63 J. P. 295.
[3] Wrongful rejection: 2 Cr. App. R. 119. Wrongful admission: 1 Cr. App. R. 83, 128; 5 Cr. App. R. 14, 233.
[4] 3 Cr. App. R. 177. Cf. 9 Cr. App. R. 171, 175.

lawyers are often surprised at the rarity, in English trials, of objections to evidence.

If any improper evidence is given, the judge should strike it out of his notes and should bid the jury pay no attention to it. In an extreme case, where the evidence has made too much impression to be counteracted thus, he should discharge the jury and re-try the prisoner before a fresh jury.

We will first explain the fundamental doctrines of Evidence, applicable in all courts whether civil or criminal; and then pass to the consideration of such rules as are peculiar to courts of criminal jurisdiction. The following are the fundamental principles which require our attention.

Rule I. *Omnia praesumuntur pro negante;* or, as the rule is more fully expressed by Justinian, "ei incumbit probatio qui dicit, non qui negat[1]."

Thus the creditor who claims a debt has the burden of proving it to be owed[2]. Similarly, in any criminal accusation[3], the burden of proof always lies upon the accuser as regards the *actus reus*, and usually also as regards the *mens rea*; while the accused, on the other hand, is entitled to maintain "a sullen silence." And this duty of every affirmant to make out his case is so clearly imposed by law that, although the judge is not a judge of Fact, yet he is a judge as to the Absence of Fact, and so must not allow the jury to pronounce a verdict in the affirmant's favour if the only evidence he has produced be so slight that no reasonable man could accept it as establishing the fact which is to be proved. Thus if it is necessary to shew that a transaction took place on a Monday, and the evidence only shews that it took place "either on a Monday or else on a Tuesday," there would be no case which the judge could submit to the jury; unless

[1] *Dig.* XXII. 3. 2.
[2] And even in civil cases the defendant's refusal to give information does not satisfy the plaintiff's burden of proof; L. R. [1922] 1 A. C. at p. 185.
[3] *Rex* v. *Hazy*, 2 C. and P. 458 (K. S. C. 471); *Williams* v. *East India Co.*, 3 East 192 (K. S. C. 472).

indeed this evidence were eked out by some presumption, as for instance, "omnia[1] rité esse acta." So, again, if a prisoner be identified only by footmarks, but a hundred similar pairs of boots have been sold in his village. Hence it may quite logically happen that a defendant may be acquitted, and yet that the witnesses against him, on being indicted before the same jury for perjury, may also be acquitted.

Sometimes, however, this rule, that the burden of proof is on the affirmant, may happen to come into collision with the fundamental presumption of innocence[2]; which throws the burden of proof on any person who alleges misconduct, even though his allegation of misconduct be a *negative* averment, a charge of omission. In such a collision of rules the presumption of innocence must usually be allowed to prevail; and the accuser will generally be required to give proof not only of his affirmations but even of his negations[3]. To this principle, however, a somewhat perplexing exception arises in those cases where the affirmative fact, which would disprove guilt, is one which (if it exists) lies peculiarly within the knowledge of the litigant whose interest it is that this guilt should be disproved. For in these peculiar cases, so soon as the accuser has given so much evidence as a reasonable man might consider to be sufficient to establish the positive elements of the offence, there then is cast upon the accused person the burden of disproving the negative element by producing affirmative counter-evidence. So if he fail to produce that evidence, this failure may be taken as proving that no such affirmative evidence exists, and accordingly as establishing the accuser's negative allegation. Thus on an indictment for misprision of treason, though it is for the Crown to prove that the prisoner knew of the treason, it yet

[1] *Supra*, p. 332. [2] *Supra*, p. 330.

[3] In civil actions for Malicious Prosecution the plaintiff has to prove the negative fact that there was "no reasonable cause" for prosecuting; L. R. 11 Q. B. D. 440. So in ejectment for *non*-insurance; 8 A. and E. 571.

may legally leave the prisoner to prove (if he can) that he discharged his consequent duty of disclosing it to some magistrate[1]. And similarly in proceedings for practising medicine without a qualification, or selling game without a licence, or producing a play without the author's consent, so soon as the active conduct alleged has been proved, it has often been left to the defendant to prove that he possessed the qualification or licence or consent[2].

But it is only in this unusual class of cases—viz. accusations of omission, and where the act omitted is such that its performance could *best* be proved by the accused—that a defendant's mere silence can suffice to prove any element of his guilt. Usually, the utmost hostile inference that can be drawn from his silence does not amount to Proof but merely to Confirmation. It is not sufficient to rebut so strong a presumption as that of Innocence; but it is capable of being taken into account to corroborate other evidence which, even uncorroborated, was already legally adequate to effect that rebuttal[3]. Of course the value of this fact of silence increases in proportion as the ground of defence, about which the defendant is silent, lies the more particularly within his own knowledge. In *Att.-Gen.* v. *Bradlaugh*[4], an action for penalties for acting as a Member of Parliament without having taken the oath, the informant alleged that the defendant's religious views made him incompetent to take an oath; and this assertion was supported by evidence. As the defendant could himself have disproved the assertion if it were not true, the jury were directed to take into account the fact that he had not done so. And in divorce proceedings, if the co-respondent is present in court, and yet does not go into the witness-box to assert his innocence, this corroborates (though only slightly)

[1] *Rex* v. *Thistlewood*, 33 St. Tr. at p. 691. Cf. L. R. [1915] 1 K. B. 618.

[2] *Rex* v. *Turner*, 5 M. and S. 206 (K. S. C. 474); *Rex* v. *Scott* (supplying cocaine without licence), 86 J. P. 68 (A.D. 1921). Cf. Ir. R. [1908] 2. 214. See however the doubt raised in Halsbury's *Laws of England*, XIII. 435–436.

[3] Cf. L. R. 10 Q. B. at p. 574. See also 27 L. J. R., Ex. 41.

[4] *The Times*, July 1, 1884; and on appeal, L. R. 14 Q. B. D. 667.

the evidence given against him. So, in the proceedings, in 1820, on the allegation of adultery against Queen Caroline, great stress was laid upon her failure to bring her devoted attendant Bergami, the alleged adulterer, as a witness to her innocence[1].

The importance of this rule as to a defendant's silence is very great, now that the Criminal Evidence Act, 1898[2], has allowed all accused persons to give evidence for themselves on oath. For, though this Act forbids counsel (see p. 408 *infra*) to comment on the prisoner's not giving evidence, no such restriction is imposed upon the judge; and indeed jurymen themselves are usually quick to notice the prisoner's abstention.

It should be noted, in conclusion, that there are a few exceptional criminal cases in which the legislature has thrown upon the prisoner the *onus probandi* of a part of the issue. The following are instances:

(i) By the Explosive Substances Act, 1883[3], it is a felony, punishable with penal servitude for fourteen years, to be in possession of any explosive substance under suspicious circumstances, unless the prisoner can shew that his possession was for a lawful purpose.

(ii) By the Larceny Act, 1916, s. 28 (2) it is made a misdemeanor for a person to be found by night in possession of housebreaking implements, "without lawful excuse (the proof whereof shall lie on such person)"; see p. 179 *supra*.

(iii) By 2 and 3 Vict. c. 71, s. 24 it is made an offence to be in unlawful possession, in any street or public place, in the *Metropolitan* Police District, of goods which may reasonably be suspected of being stolen, unless the prisoner gives a good account of how he came by them (punishable by two months' imprisonment, with or without hard labour).

[1] Lord Eldon, for instance, in his speech in the House of Lords (Nov. 2, 1820) treats this failure as "amounting to a tacit admission."

[2] See p. 407 *infra*. Cf. 1 Cr. App. R. 62, 64, 218; *Rex* v. *Corrie*, 68 J. P. 294; *Ward* v. *Bp of Mauritius*, 23 T. L. R. 52.

[3] 46 and 47 Vict. c. 3, s. 4.

Rule II. The mode in which testimonial evidence is given.

The admirable method adopted is one which was gradually developed by the common-law courts. They ultimately went unfortunately far in excluding evidence, but they elicited in the best possible manner all that was not excluded (whilst in Chancery, far more evidence was always admissible, but the mode of elicitation was such as to render all of it far less trustworthy). The witness must give his testimony not "spontaneously" but "responsively," *i.e.* not in a consecutive narrative, but by brief answers to brief successive questions. This method affords the opposing party an opportunity of objecting, before it is too late, to any question which tends to elicit an answer that would not be legally admissible as evidence. The questions moreover are put by counsel, and not by the judge[1]. But in French criminal trials, they are still put through the medium of the presiding judge (for though the prisoner's counsel may, now, carry on an examination or cross-examination, he usually can only do so by getting the leave of the judge for each question[2]); and the French Code of Criminal Procedure provides that a witness must not be interrupted in his answer. Hence, upon the trial of M. Zola (in connexion with the Dreyfus case) in 1898, more than one of the military witnesses made a continuous speech that occupied over a quarter of an hour; and General de Pellieux was called as a witness expressly on account of his extreme eloquence.

The questions proposed to a witness may occur in as many as three successive series.

(1) He is first "examined in chief" by the party that has called him; with the object of eliciting from him evidence in

[1] Yet so late as *Lilburne's Case* (1649) a strong court told him that a prisoner might not cross-examine the Crown witnesses, but only suggest questions for the court to put (4 St. Tr. at p. 1334).

[2] "With the result that his cross-examination becomes comparatively ineffective," wrote Lord Russell of Killowen (*Life*, p. 320), after attending the trial of Capt. Dreyfus at Rennes.

support of that party's view of the question at issue[1]. The counsel ought to control his witness; and check him from tendering any inadmissible evidence.

(2) He is then cross-examined by the opposite party, in order to diminish the effect of the evidence which he has thus given, and perhaps also to obtain evidence in support of the case of the party cross-examining. For a cross-examination is not, as is sometimes imagined, limited to the scope of the examination-in-chief. But it should be limited to matters relevant to the issue (indirectly relevant at least, if not directly)[2]. Yet irrelevant questions are sometimes asked quite properly, simply to test a witness's intelligence, or to throw a dishonest witness off his guard. Hence judges are slow to interfere with a cross-examiner. Cross-examination may reduce the effect of the evidence given in examination-in-chief either (1) simply by eliciting further facts which tend to harmonise that evidence with the case set up by the cross-examiner[3]; or (2) by shaking that evidence itself. This latter effect may, for instance, be produced by bringing the witness to admit that his opportunities of observing the facts narrated were inadequate, or that his character or bias is such as to make it unwise to rely on his veracity, or again, by involving him in such inconsistencies of statement as to make all such reliance impossible on (at any rate) this particular occasion[4].

(3) Finally, a witness who has undergone cross-examination may be re-examined by the party who originally called him; in order to shew the real meaning of the evidence

[1] "Far and away the most important function of an advocate is the examination-in-chief; to think it is the cross-examination is a great mistake" (Atkin, L.J.). "Cross-examination is far easier than examination-in-chief" (Lord Alverstone, *Recollections*, p. 283).

[2] See 12 Cr. App. R. at p. 76.

[3] A prisoner's evidence, in 1911, "I am an industrious man and recently worked for seven years in Devonshire," was cancelled by the cross-examiner's well founded question, "Was it not at Dartmoor?"

[4] Quintilian's instructions on the cross-examination of witnesses still retain all their value; *Inst. Orat.* v. 7.

elicited by the cross-examination[1]. A re-examiner may, for instance, get the witness to explain any ambiguous expressions which he may have used on cross-examination; or his motives (*e.g.* provocation) for any conduct which he may have admitted when under cross-examination[2]. Thus, if the cross-examiner has asked, "Didn't you once assault a neighbour?" the re-examiner may ascertain what this neighbour had done to you that made you assault him. Or if the witness has been asked in cross-examination, "What are you to receive for coming here to-day?" the re-examiner may ask, "And what have your journey here and your loss of time cost you?" But re-examinations are limited strictly to the matters that have been elicited in the cross-examination. Hence, in an action against a ship-owner for negligence in his mode of loading a cargo, after a witness for the plaintiff had stated that deck-loading was perilous, and had consequently been asked by the cross-examiner, "Isn't it usual in summer voyages?" it was held not to be permissible for the re-examiner to ask, "Are those summer deck-cargoes carried at the risk of the ship-owner or of the cargo-owner?" For such a question would go beyond the range of the cross-examination and open up a new inquiry.

It should be added that if either an examiner-in-chief or a cross-examiner has elicited from a witness some portion of a conversation or of a document (even though he may have brought out all that it was legally permissible for *him* to ask for), his opponent becomes entitled to elicit (in his subsequent cross-examination or re-examination) all the rest of

[1] Re-examination is so difficult that the leading counsel rarely trusts it to his junior. A great advocate said that "unless conducted irregularly, it is useless."

[2] Mr Richard R. Harris has an apt story of a witness, who had sworn to the sanity of a testator, being asked in cross-examination, "What will you get as a legatee if the will be found valid?" "£10,000." But the re-examiner asked, "And what, as next of kin, if it be found invalid?" "£50,000." I have heard a cross-examiner's question "Have you been prosecuted for theft" (which the witness admitted) followed by the re-examiner's "With what result?" and the answer "Acquittal."

that conversation or document, so far as it concerned the same subject. Thus if the examiner-in-chief asks, "Why did you go to that house?" and receives for answer, "Because of a remark my brother made to me," *he* cannot go on to ask what this remark was (for that would be to adduce hearsay evidence): but the opposite party, when he comes to cross-examine, will be fully entitled to ask.

Rule III. Questions put to a witness by the counsel who produces him (whether in examination-in-chief or in re-examination), must not be "leading" ones[1].

A question "leads" if, though it admits of several answers, it suggests that a particular answer is desired by the questioner. Thus an examiner-in-chief must not ask "Wasn't it a wet day?" but, "What sort of weather was it?"; not, "Was it eleven o'clock?" but, "What time was it?"; not, "Was he drunk?" but, "What was his state as to sobriety?"; not, "When he was leaving did he offer you £5?" but, "When he was leaving what did he do?" Leading questions are objectionable because (1) to a false witness they suggest what particular lie would be desirable; and (2) even an honest witness is prone to give an assenting answer from mere mental laziness. But these objections are not likely to apply to a cross-examination, so leading questions are freely permitted there[2]. To certain portions, also, of the examination-in-chief the objections are inapplicable: and therefore, as leading questions save much time, they are allowed even in it in the following cases:

(1) As to undisputed matter; *e.g.* the name, address, and occupation of a witness. If a fact has been deposed to by a witness, and he has not been cross-examined about it, this

[1] Leading questions were objected to even as early as the trial of Lilburne in 1649. The Attorney-General having asked a witness such a question, Lilburne interposed, "I pray, Sir, do not direct him what to say, but leave him to his own conscience and memory" (5 St. Tr. 1337).

[2] Hence there is often a struggle as to which party shall call a witness; for it must affect the right to cross-examine, and may affect the right to make the last speech to the jury.

may *primâ facie* be taken to imply that the fact is undisputed, and accordingly that subsequent witnesses may be "led" with respect to it.

(2) As to the identity of persons or things; *e.g.* "Is this the watch that you missed?" Thus an examiner may ask, "Is the prisoner the man you saw?" Yet a jury would be more fully impressed if counsel asked first, "Would you recognise the man?" and then bade the witness point him out.

(3) For the purpose of contradicting the account which some previous witness, *A*, has given of his own utterances, a subsequent witness, *B*, may be asked a leading question; as, "Did *A* say so-and-so?" But, *before* this is asked, *B* should be got to give his own version of what *A* said.

(4) Sometimes a witness, in the course of his examination-in-chief, shews himself to be hostile to the party producing him—meaning thereby, not that he merely gives evidence which is at variance with that party's case, but that he shews an evident unwillingness to disclose what he knows in favour of it. Thereupon the judge may, if he think fit, permit the examiner to contend with this unwillingness by asking leading questions.

(5) If the witness merely proves to be forgetful, no such permission will be given to ask questions that are strictly leading ones; yet after an examiner-in-chief has thoroughly tested and exhausted his witness's memory, he will usually be allowed to suggest points for recollection[1], *e.g.* even to ask, "Was nothing said on the subject of the...?"

Rule IV. A witness speaks to his Memory and not to his reasoning or his opinion.

What he remembers will be admissible in evidence even though his recollection of the facts is only weak, *e.g.* "my impression" (but, of course, its value may consequently be trifling). Lord Eldon admitted testimony to the genuineness

[1] Cf. *Courteen* v. *Touse*, 1 Camp. 43.

of handwriting although it was twenty years since the testifier had seen the alleged writer[1]. And a letter has been admitted[2] as evidence though the witness to its authorship could go no further than to say, "It is in a disguised hand; I believe it to be his writing, but I would not like to swear positively to it[3]."

A witness should not be asked to answer a question of Law; L. R. [1911] 1 K. B. 484. And it is only for his memory that a witness is brought into court, not for his powers of judgment (unless he be called as a scientific expert, *e.g.* a chemist in a case of poisoning). Hence an ordinary witness must not be asked, either in examination-in-chief or in cross-examination, to draw inferences (18 Cox 178). "As *A* and *B* occupied the same cabin, would *A* have put this message into writing if he meant it for *B* only?" is an argument, not a question. Thus, similarly, on reminding a witness that his answer is a contradiction of the evidence which some previous witness has given, even the common question, "If *A* says the contrary to what you have just told us, is what he says untrue?" is, strictly speaking, one which he need not answer[4]. Similarly a cross-examiner has no right to ask, "Did you go to the prisoner's house as a spy[5]?" for this is a matter not merely of facts but of the view to be taken of those facts. Yet he may ask under what directions the witness went there, for what purpose he went, what he did when there, what report he afterwards made to those who employed him; and

[1] 8 Vesey, at p. 474. The permission has been carried in America even to sixty years; 63 S. W. 194.

[2] *Reg.* v. *Bernard*, 8 St. Tr. (N. S.) at pp. 981, 927; cf. 29 St. Tr. 740.

[3] No less a judge than Lord Tenterden refused to withdraw from the jury the question as to a defendant's signature although the only evidence of its genuineness was that of a witness who "stated, after much hesitation, that he believed the signature was the defendant's; yet upon cross-examination, after again hesitating several minutes, said he believed it was *not*; but upon re-examination stated, though again hesitatingly, that he believed it was"; *Beauchamp* v. *Cash*, D. and R., N. P., 3.

[4] "If you had known this fact, would you have taken the shares?" is similarly inadmissible; 11 Cox 435; cf. L. R. 4 Ch. 719.

[5] *Reg.* v. *Bernard*, 8 St. Tr. (N. S.) at p. 935; 1 F. and F. 240.

then, on the strength of the answers, he may urge to the jury that the conduct of the witness was that of a spy.

Rule V. Evidence must be relevant; *i.e.* it must be confined to the question at issue.

A party may prove all circumstances that are relevant to the facts in issue, but no others. The circumstances thus relevant consist not only of those which form part of the facts in issue themselves, but also of all such further circumstances as may be necessary to identify or to explain these. This, for instance, will include, in a criminal case, not only the prisoner's commission of the crime and his guilty knowledge, but also—as facilitating a belief in these—his opportunities[1], motives[2], and subsequent conduct, and the credibility of the witnesses produced at his trial.

Thus, where a prisoner, accused of murder, bore the somewhat unusual surname of Lamson, evidence was admitted that luggage had been deposited in that name on the day of the murder at a railway station near the scene of the crime; it being proof of opportunity, though very slight proof[3]. Not only is the prisoner's own conduct relevant, but so soon as it has been shewn that others were combined with him in carrying out a joint criminal purpose, evidence may be given of any conduct of their's which forwarded this joint purpose; even though such conduct took place in the prisoner's absence and though they are not indicted along with him[4]. This rule is of specially frequent application on trials for conspiracy (p. 294 *supra*); but is by no means confined to them. Thus if *A* be indicted for uttering counterfeit coin, evidence may be given of his accomplice *B* going into a market and passing

[1] Evidence that skeleton-keys were found at the house of a person accused of burglary will thus be admissible if the burglary were effected by keys, but not if effected by a crowbar; 17 Cr. App. R. 88.

[2] Thus if a man be charged with the murder of his *wife*, evidence may be given of his being in love with another woman. So, in a case of theft, evidence of Poverty may be given.

[3] *Reg.* v. *Lamson*, C. C. C. Sess. Pap. xcv. 572.

[4] *Rex* v. *Stone*, 6 T. R. 527; *Rex* v. *Winkworth*, 4 C. and P. 444.

it there, though *A* himself did not go. Similarly, if *A* and *B* have agreed that *B* shall obtain goods at a shop by a false pretence, what *B* says in the shop may be given in evidence against *A*, though he was not there, and even though *B* is not indicted along with him.

The legal limits of relevancy exclude much evidence which, in non-legal matters, would be thought very cogent. Thus if the question at issue be as to how a man acted on one occasion, evidence of the way in which he acted on some other similar occasion is not considered sufficiently relevant to be admissible. Accordingly in civil courts, in a dispute as to what the terms of a contract were, a litigant cannot corroborate his account of them by giving proof of the terms of other contracts which his opponent made on the same subject-matter with other persons[1]. Yet evidence of these other contracts would have been quite admissible had the dispute related—not, as here, to what the opponent actually said when making the present contract, but—to what was his state of mind when making it; *e.g.* whether or not it was with a fraudulent intent that he introduced into it some ambiguous terms[2].

And in criminal courts the same principle serves to exclude evidence of the prisoner's past offences[3]. It is true that evidence of his *good* character is always regarded as relevant (*infra*, p. 397); illogically, but from historical causes. Yet his *bad* character is not regarded as similarly relevant to the question whether he committed the *actus reus*. Consequently evidence of other (even similar) offences of which he has been guilty cannot be given in order to corroborate the proof of

[1] *Hollingham* v. *Head*, 4 C. B., N. S., 385. Cf. *Holcombe* v. *Hewson*, 2 Camp. 391, where the fact that the beer which *A* had sold to *C*, *D*, and *E*, was good was held to be irrelevant to the question whether that which he had sold to *B* was also good.

[2] *Barnes* v. *Merritt*, 15 T. L. R. 419.

[3] "Are you going to arraign his whole life? Away, away; that is nothing to the matter," protested Lord Holt, two centuries ago; 12 St. Tr. 864. See a useful essay in *L. Q. R.* XXXIX. 212. Experience shews that jurors give highly exaggerated weight to evidence of bad character.

his having committed this one. Yet in French criminal procedure such evidence plays a most important part[1].

Nor is there, even in English law, any intrinsic objection to giving evidence of the prisoner's having committed other crimes, if there be any special circumstance in the case to render those crimes legally relevant. Thus burglary may be brought home to a man by shewing that a cigar case, which the burglars left behind them in the house, had that day been stolen from its owner by *him*. Or, to shew the motive of the present offence, some other crime may be disclosed[2]: as where a murder is accounted for by proving that the deceased had been an accomplice with the prisoner in some previous crime, and consequently was a person to be got rid of; or where an earlier act of sexual passion between *the same two* persons renders probable the further existence of their passion[3]. And the conduct of a prisoner, even subsequently to his offence, may throw light upon it; as where a thief, on being arrested, shoots his arrestor[4].

Moreover, a distinction similar to that which we have already (*supra*, p. 360) noticed in civil courts holds good in criminal ones. Whilst the fact of a prisoner's having committed even *similar*[5] offences is not relevant to the question whether he committed the *actus reus* of which he is accused now, yet, so soon as this *actus reus* has been fully established, evidence of those previous offences may well be relevant to the question of his state of mind in committing this act (his *mens rea*), as soon as that defence has been foreshadowed by the defendant, at either the preliminary examination or the trial (cf. 16 Cr. App. R. 157). Such evidence was originally

[1] In the famous trial of Landru at Paris in 1921, for ten murders, the President began by saying "*It is my duty* to enlighten the jury as to the antecedents of the accused." The Roman *quæstiones* paid more attention to those antecedents than to the testimony about the crime which was being tried; Strachan-Davidson's *Problems*, II. 119.

[2] *Reg.* v. *Neill*, C. C. C. Sess. Pap. CXVI. 1417 (K. S. C. 483).

[3] *Rex* v. *Ball*, L. R. [1911] A. C. 47.

[4] Cf. *Rex* v. *Armstrong*, 16 Cr. App. R. 149. Cf. p. 362 n[1]. *infra*.

[5] *Rex* v. *Fisher*, L. R. [1910] 1 K. B. 149; cf. 2 K. B. 746.

admitted only in exceptional offences where proof of *mens rea* was peculiarly difficult; like embezzlement, or false pretences. But now its admissibility is recognised as a general rule; in no way limited to peculiar classes of crime[1]. On the indictment of a baby-farmer for the murder of a particular child, the Judicial Committee[2] held that the Crown might give evidence (i) that the bodies of other infants also had been found secretly buried on the premises occupied by the prisoner; and (ii) that several infants had been received by him on payment of inadequate sums similar to that paid in the case of the particular child for whose murder he was indicted. Evidence of other similar offences is now held admissible to disprove Accident or Mistake; or to prove guilty Knowledge; or (if more than one previous offence can be shewn) to prove, as in *Makin's Case*, a System of conduct. On a trial for administering an abortive drug, evidence of other similar administrations cannot be given to help to prove this administration; but may to prove the intent, if the act be admitted but criminal intent be denied. In one instance the legislature has even extended this principle to evidence of offences that are not of a precisely similar kind. For under the Larceny Act, 1916, s. 43 (1), on indictments for receiving stolen goods, so soon as it has been established that the prisoner did have possession of the stolen property, the fact of his having been convicted, within five years previously to the receiving, of "*any* offence involving fraud or dishonesty" is admissible to shew guilty knowledge[3]. And on indictments for receiving stolen goods the same section, s. 43 (1) also admits evidence of the fact that other property, stolen

[1] Evidence may be given even of crimes *subsequent* to the one under trial; *Reg.* v. *Rhodes*, L. R. [1899] 1 Q. B. 77; cf. 6 Cr. App. R. 205.

[2] *Makin* v. *Att.-Gen.* (for New South Wales), L. R. [1894] A. C. 57 (K. S. C. 485). (This decision is by some regarded as declaring the evidence admissible to prove, not merely the *mens rea*, but even the act of killing. See *per* Pickford, J., 5 Cr. App. R. 240; *per* Lord Atkinson, 6 Cr. App. R. 37.) Cf. *Rex* v. *Smith*, 11 Cr. App. R. 229 (the "Brides in the Bath" case).

[3] If prisoner has had seven days' notice of this evidence.

within a year before this offence, has been in the defendant's possession.

By a distinction precisely the converse of that which is thus applied in the case of a prisoner's character, the badness of a *witness's* character is always relevant, but its goodness is not. For the party by whom witnesses are produced cannot (in the first instance) corroborate them by offering proof of their good character or even of their having on former occasions told the same tale they now tell[1]. But the party hostile to these witnesses may discredit their characters, or may prove that at one time they told a different story. Sometimes this is done by mere cross-examination[2]; sometimes by evidence, *e.g.* evidence to shew:

(1) That the witness is notoriously mendacious. This course is now very rare; for it was decided in *Rex* v. *Watson*[3] that no evidence can be given of any particular misconduct of his, and the only question to be asked is the vague general one, "Is he to be believed on his oath[3]?"—as if mendacity were a fixed habit that did not vary with subject matter and with personal interests. The party who has produced the witness can never discredit him thus, even if he turn out utterly hostile. When such evidence is given it entitles the other party to contradict it by proof of his witness's good character for veracity (19 St. Tr. 588, 595).

(2) That he is biassed. Bias may, for instance, be shewn by evidence that the witness has received money, or has offered money to other witnesses; or that he has threatened revenge[4]. And even mere relationship to the litigant who produces him is some evidence of bias[5]. But no proof of bias

[1] Similarly, evidence to corroborate a prisoner's defence by shewing that he told his present story before ever he was accused, is considered too remote to be relevant. A far-seeing offender might tell an apt lie.

[2] The celebrated cross-examination of the spy, Castles, by Sir Charles Wetherell deserves study; 32 St. Tr. 284.

[3] 32 St. Tr. 486; *Reg.* v. *Brown*, L. R. 1 C. C. R. 70.

[4] *Rex* v. *Yewin*, 2 Camp. 637 (K. S. C. 543).

[5] *Thomas* v. *David*, 7 C. and P. 350 (K. S. C. 544).

can be given unless the witness has been cross-examined on the point, so as to have had an opportunity of explaining the circumstances.

(3) That on some relevant fact, to which he now deposes, he had previously made a statement inconsistent with what he now says. Here, again, before proof can be given of the discrediting statement, the witness's attention must be specifically drawn to it in cross-examination, in order that he may, if possible, explain it. In criminal cases this mode of discrediting is very common[1]; because most of the witnesses at the trial have already given evidence, viz. at the preliminary examination before the justice of the peace who committed the prisoner for trial. At common law, if the previous statement were in writing (*e.g.* a deposition[2] at this examination for commitment), the cross-examiner had to put it in as part of his own evidence (thereby giving the other party a right to a speech in reply), before even asking the witness about it. But now by statute (28 and 29 Vict. c. 18, s. 5) he need not put it in, unless he desires actually to contradict what the witness says in cross-examination. Yet the judge may use it for such a contradiction, although the cross-examiner has not put it in. Even if put in, it merely cancels the evidence previously given, and must be allowed no probative effect beyond this[3].

Even the party who produces a witness is allowed to discredit him by thus proving a previous inconsistent statement of his, should he turn out to be (in the opinion of the judge) hostile to that party; *i.e.* not doing his best to answer frankly (cf. p. 357 (4) *supra*). And, even without any such recognition of his hostility, the assertion which he now makes may be contradicted by the subsequent witnesses, called on the same

[1] Even in civil cases, the opposite party occasionally calls for any signed "proof" of his intended evidence, which the witness may have given to the solicitor; cf. p. 384 n². *infra*. But there is no obligation to produce it.

[2] See p. 457 *infra*. But word for word agreement with a deposition looks like learning by heart; and so is far more suspicious than slight variances.

[3] 1 Cr. App. R. 156; 17 Cr. App. R. 64.

side, if it be a fact which is intrinsically relevant to the issue. For clearly those witnesses who could have spoken to this fact if they had been examined before he was, cannot be excluded by the mere accident of his having been called first[1].

Besides these three modes of discrediting a witness by the evidence of other persons, his credit may, as we have said, be shaken by his own[2] cross-examination, and shaken in a manner much more extensive[3]. For he may be cross-examined not only on the matters already mentioned—his mendacity, his bias, his former inconsistent statements—but as to any past conduct of his of a discreditable character[4]. This rule is often made use of to elicit facts which are admissible for this purpose, with the real purpose of employing them to bear upon the main issue in the case; though that bearing is too remote to render them legally admissible on the ground of relevancy to it. Thus on an indictment for ravishing *A*, a letter written to the prisoner immediately afterwards by *A*'s father, demanding a pecuniary compensation, cannot be put in evidence to discredit *A* herself (unless there be legal proof that she authorised its being written). But, if her father be called as a witness he can be asked about it, to discredit him; and it will thus effect, indirectly, the more important result of discrediting her.

It must be noted that the answers which a witness gives to questions that are put merely to discredit him, are "final"; *i.e.* the cross-examiner cannot call evidence to disprove them, for thus to digress into the determination of side-issues might render a trial interminable[5]. (The legislature has, however,

[1] *Greenough* v. *Eccles*, 5 C. B. (N. S.) 803; cf. 8 Bing. 50.

[2] But not by cross-examining *another* witness about him.

[3] But the party *producing* a witness cannot put to him discrediting questions.

[4] This power of putting painful questions, which may revive even long-forgotten frailties, would be intolerable but for the high sense of responsibility traditional at the English bar.

[5] Hence if to a cross-examiner's question "Did you once seduce a woman?" the witness *A* has answered "No," a subsequent witness *cannot* be asked, even in cross-examination, "Did *A* once tell you that he had seduced *B*?"

created an exception in one case, in which the disproof is peculiarly simple and peculiarly important. For by 28 and 29 Vict. c. 18, if a witness denies, or refuses to answer about, having been convicted of a crime, evidence of that conviction may be given.) If, however, the discreditable act were relevant not merely to credit but also directly to the actual issue in the litigation, evidence might of course be given, in regard to it, in contradiction of the witness; for such evidence would have been intrinsically admissible even if he had never been examined. For instance, on an indictment for rape, if the prosecutrix be cross-examined as to her unchastity with third persons, and deny it, she cannot be contradicted; and consequently, witnesses to her good character cannot be called by the prosecution to confirm her denial. But if the question had related to her previous unchastity with the prisoner himself, or to her being a common prostitute, her denial might be contradicted. For these facts, if true, would not merely affect her credit but would be relevant to an essential part of the issue, viz. whether the act now complained of took place against her will. Similarly, if in cross-examination a witness denies having been drunk at the time when he watched the events that are in issue, he may be contradicted on this point by direct evidence.

Thus evidence cannot be called to contradict a witness, except as to his answers about (1) his bias[1], or (2) his own previous inconsistent statements, or (3) facts which the opposite party could have proved as part of his own case.

Rule VI. The best evidence must be given or its absence must be accounted for.

The rule is still usually stated in this traditional and general form; but its actual application[2] is limited to one particular case, viz. the proof of the contents of a written

[1] *E.g.* if he has denied having expressed hostility to the prisoner.

[2] See Wigmore, *Evidence*, §§ 1173, 1287; Chamberlayne, *Evidence*, § 480; Thayer, p. 488.

document. The mere fact that the document has actually been drawn up, or the mere condition of it, may be proved by secondary evidence; that is, by the production, not of the document itself, but of remoter evidence derived from it through some intermediate channel (the recollections, for instance, of a witness who has seen it). But if, on the other hand, it is desired to prove what the actual contents of the document were, then the rule now under discussion excludes —even in cross-examination—all mere secondary evidence. A witness must not be asked on what day an unproduced letter was dated; but he can be asked on what day he received it. So where it is sought to give the contents of a message sent by telegram in evidence against the sender of it (*e.g.* when the surgeon, whom it summoned, sues for his fee), the original paper handed in by him at the post-office must be produced. The subsequent paper, which the telegraph boy delivered, cannot be given in evidence for this purpose (unless it be proved that the first-mentioned paper has been destroyed or lost). It, however, would be otherwise if the object were to prove not what message was sent, but what message was in fact received (*e.g.* when the surgeon summoned is sued for negligence); for then the positions would be reversed, and the paper brought by the boy would be the necessary "best evidence."

Accordingly when, in any litigation, a witness is asked, "Was any bargain made on this subject?" the opposing counsel will probably interpose by asking, "Was it made in writing?" For if it were embodied in written words, the witness must not give parol evidence about them. Thus a witness, as Lord Eldon said, "may be asked whether a particular house was purchased and conveyed; but, if he states that it was conveyed by a written instrument, then the examination must stop there." Similarly it would not be permissible to ask, "Did you write a note to your master asking to be taken back into service?" for that would be to elicit the contents of the note without producing it. The

utmost that the examiner can do will be to ask, "After leaving your master's service did you write to him?" and, on getting an affirmative answer, to proceed: "After so writing were you taken back into his service?"

But the rule only applies where the object desired is to prove what actually were the contents of a document. Hence where words have been uttered orally, by a person who apparently read them out from a paper, if the object be to shew, not what the words of the document itself were, but what he actually did utter, any persons who heard him may narrate what they heard, and his paper need not be produced. For the words he uttered may have varied from the written ones[1]. Similarly, such a question as, "What did you tell your clerk to state in the letter?" would be quite permissible, if the point to be proved be not the actual contents of the letter, but merely what the witness intended those contents to be; (as, for instance, where the only object is to shew his knowledge of the matters thus mentioned by him to the clerk).

It will, however, sometimes happen that no primary evidence is available. In that case the production of the document will be dispensed with, and secondary evidence may take its place. The following are the most frequent instances in which this occurs:

(1) When the writing has been destroyed; or where, after proper search having been made for it, it cannot be found[2]. Thus on a trial for forgery the contents of the note, which was alleged to have been forged, were allowed to be proved by parol evidence, because the prisoner had himself swallowed the note[3].

(2) When its nature is such that it is physically impossible to produce it; as in the case of a placard posted on a wall[4],

[1] *Rex* v. *Sheridan*, 31 St. Tr. 673–674; cf. 1 St. Tr. (N. S.) 558.

[2] See the remarkable case of Lord St Leonards' lost Will; L. R. 1 P. D. 154.

[3] 14 East 276. Similarly when the ledgers, which a witness was about to produce, were stolen from him at the porch of the Central Criminal Court (*supra*, p. 211) oral testimony became admissible instead.

[4] *Rex* v. *Fursey*, 6 C. and P. at p. 84 (K. S. C. 384).

or of a tombstone. This has at times been extended to cases where it was not absolutely impossible, but only extremely inconvenient, to produce the writing; as when, in *Rex* v. *Hunt*[1], parol evidence was admitted of the inscriptions on the banners and flags that had been displayed at a meeting. Similarly, if the possessor of the document has, and insists on, a legal privilege to withhold it (cf. pp. 383, 384 *infra*).

(3) When the writing is in the possession of the opposite party[2] and, though notice[3] has been given to him to produce it, he fails to do so. Sometimes the very nature of the litigation (*e.g.* an indictment for stealing this very document) is of itself a sufficient notice to him that he is expected to produce it[4].

(4) When the secondary evidence which is tendered consists of an admission, by the opposite party himself, as to what the contents of the document were[5].

(5) When the original is a "public" document, it is now provided by statute that it may be proved by means of an examined copy[6].

(6) When the original is an entry in a banker's book it is now provided by statute that it may be proved by a copy of the entry, if verified by some officer of the bank, either orally or even by mere affidavit[7].

[1] 3 B. and A. 566.

[2] A private prosecutor is not a "party."

[3] The student must distinguish (1) this notice to Produce, given by one party to the other, to secure the right to tender secondary evidence, from (2) the notice to Admit, given similarly, to save the expense of proving the genuineness of documents, and (3) a Subpœna *duces tecum*, issued by the court, to compel a witness to bring a document to the trial.

[4] Prosecution of a motorist for excessive speed implies notice to produce his licence.

[5] *Earle* v. *Picken*, 5 C. and P. 542.

[6] 14 and 15 Vict. c. 99, s. 14. Copies are of various kinds. "Exemplified," under the seal of a tribunal; "Official," signed by the custodian-officer; "Attested," bearing a certificate from some one who has checked it; "Plain" (but perhaps examined with the original by a witness who can swear to it).

[7] 42 and 43 Vict. c. 11.

The rule of Best Evidence goes no further than simply to postpone all secondary evidence whatever of the contents of documents to the primary evidence of them. It takes no heed of the different degrees of value of various kinds of secondary evidence. For instance, it will allow a witness to give his mere recollections of the contents of a document, even when some attested copy of it is available. And the rule ceases to have any operation at all, where the Thing under discussion is not a written document. For where, in any litigation, the quality or condition of some chattel is in dispute, the law does not similarly require the chattel itself to be produced in court for actual inspection[1]. If the purchaser of a horse, or of a diamond-ring, or of corn, refuses payment of the price because the animal is unsound, or the jewel is false, or the grain does not come up to sample, he need not produce the horse, or the ring, or the sample (though he will arouse suspicion by not producing it). Similarly, in an action to recover compensation for the damage sustained by a bicycle which a cart has run down, it will not be technically necessary at the trial to produce the bicycle. Equally little is any principle of Best Evidence applied to the proof of handwriting; for it is not essential that the party, who is alleged to have signed a document, should himself be called to prove, or (as at a trial for forgery) to disprove, his handwriting. And to prove that a person holds a public office (*e.g.* that of a justice of the peace or of a solicitor), it is sufficient to shew that he is in the habit of acting as a holder of it, without producing his written commission which conferred the office; (*supra*, p. 332).

[1] So difficulty may arise if a "document" be offered in evidence—not as a Statement, but—merely as an identificatory mark on a Thing. In *Reg.* v. *Pierce* (45 C. C. C., S. P. at p. 377) Willes J. and Martin B. allowed a witness to identify two debentures by stating their numbers, without producing them; just as oral evidence of the brand on an ox or the number of a cab would be similarly receivable. For identification Martin B. had allowed a witness to describe even the indorsement on a deed; and had been approved by the Queen's Bench. Cf. 3 Adam 143 (Scotch); contrast 33 C. C. C., S. P. 253. But even mere ticks in a stock-book, against items sold, need production if tendered as Statements; 38 C. C. C., S. P. 126.

Finally it may be noted, as a further illustration of the limited application of the "best evidence" principle, that the law does not prescribe any preference between different species of Primary evidence. Thus the testimony of a witness who had watched through a telescope an assault which took place a mile away, would not be postponed to the testimony of the actual victim of the attack.

Rule VII. Hearsay evidence is inadmissible. That is to say, a witness who has received from some one else a narrative of facts, even though they be the very *facta probanda*, is not allowed to give this narrative in evidence[1].

The untrustworthiness of mere Hearsay was recognised in England as early as 1202; and in the same century Bracton repeatedly disapproved of all such "testimonium de auditu alieno[2]." Yet when the procedure of trial by jury and witnesses became established, hearsay evidence was at first freely admitted. Thus, in 1603, on the trial of Sir Walter Raleigh, a witness was allowed to narrate that "Mr Brooke told me he had heard of a most dangerous plot." But in 1660, we find hearsay only received after direct evidence has been given, and merely to corroborate it; and thus not admissible of itself (5 St. Tr. 1195). And within another generation the full modern principle of exclusion had become accepted—probably before any other rule of evidence. For in 1683, the one caution which Algernon Sidney's counsel could furnish him with was to bid him, "Desire that evidence of Hearsay from witnesses may not be given; and *suffer it not* to be given." Accordingly in 1684 (9 St. Tr. 1189) Lord Jeffreys, C.J., says, "What the witness heard from the woman is no evidence. If she were here herself and did say it, but not swear it, we

[1] Thus a witness cannot prove his own age; for he only knows what older people have told him about it.

[2] Pollock and Maitland, II. 620. The Romans recognised its defects even in the time of Plautus: "Pluris est oculatus testis unus quam auriti decem: qui audiunt, audita dicunt; qui vident, plane sciunt"; *Trucul.* II. 6. Yet in 1598 even Bodin said, "In cases of witchcraft, common repute is almost infallible" (*Démonomanie*, IV. 4).

could not hear her; how then can her saying it elsewhere than here be evidence before us? I wonder to hear any man that wears a gown make a doubt of it!" Hence is it that a witness cannot prove the date of his own birth (*Rex* v. *Rishworth*, 2 A. and E. 476, 9 C. and P. 722), though the American courts, sacrificing logic to convenience, do permit this. Yet he may prove that his birthday has always been kept on the date mentioned in the birth certificate of a person of his name.

But in continental countries, even now, hearsay evidence remains acceptable. In the Dreyfus case the great bulk of the evidence given was the merest hearsay[1]. For on the continent, as in Scotland, trial by jury was not introduced until so late an epoch that the admission of hearsay had become a practice too inveterate to be shaken. Before that introduction it was comparatively innocent, for when trained judges are to determine the facts in dispute they can trust themselves to give hearsay evidence only its due weight.

The peculiarly emphatic exclusion of hearsay in England is due to its untrustworthiness; since it is derived ultimately from an absent witness who was not on oath and did not undergo cross-examination[2]. And the exclusion is further justified by the necessity of avoiding that prolongation of trials which would be produced by the admission of a range of evidence, so indefinitely wide, and yet of such trifling value.

Hearsay usually appears in the shape of some other person's statements, written or oral; but evidence of his mere conduct, unaccompanied by any statement, will be rejected on the same principle, if it be adduced for the same purpose, viz. that of shewing his state of mind with regard to some fact

[1] In a famous Belgian trial (1901) the following fifth-hand evidence was received, "He told me that Mme. Lagasse had heard from a lady that Van Steen told her he knew the prisoners were guilty." In the great French case of Calas, A.D. 1762 (*Encyc. Britannica*, Art. *Calas*), his threat to murder was only proved at *sixth*-hand.

[2] Hence "Did you find, *as a result of your inquiries*, that he had done much business?" is not a lawful question.

which it is sought thereby to prove. As was said by Baron Parke, the conduct of some deceased sea-captain, who examined every part of a vessel and then deliberately embarked in her with his family, cannot be given in evidence to shew that she must have been seaworthy[1].

It is important to notice that the rule only excludes evidence about such statements or conduct as are merely narratives of a fact that is in dispute in the litigation; but not evidence about such statements or conduct as actually constitute such a fact, *i.e.* when "saying is doing." Thus in an action for slander, a witness can of course narrate the defamatory words which he heard the defendant utter; they are in issue. And, similarly, evidence may be given of any statement which, though not itself constituting a fact relevant to the issue, nevertheless accompanied and explained[2] some relevant act. For such a statement throws light upon the character and purpose of this act, and so is itself a part of the *res gestae*. Thus a slap may have been accompanied by a greeting or by a curse. A gas-fitter rushes excitedly off a landing-stage, exclaiming, "My God! the landing-stage is on fire. I did it[3]." Probably the statement need not in law have been uttered by the very person who did the act. It is sufficient if it were uttered in his hearing and he can be taken to have assented to it; as when evidence was given against Lord George Gordon of the various seditious cries uttered by the rioters whom he led (21 St. Tr. 535). Similarly not only the remarks made by persons engaged in drilling, but also those made by persons who were watching them drill, have been allowed to be given in evidence against the former to shew the illegal purpose of the drilling[4]. And when a libellous picture has been exhibited in public, remarks uttered by the spectators whilst looking at the picture may be given

[1] 7 A. and E. at p. 388.

[2] But if a witness say "He came with a letter in his hand," he must not add "and he said 'My father is dead.'" For these words explain no *act*.

[3] This utterance secured a verdict for £200,000 against the Liverpool Gas Company; *The Times*, Aug. 23, 1875.

[4] 1 St. Tr. (N. S.) 1071.

in evidence to shew whom the figures in it were meant to represent[1]. But the rule is confined to utterances that are strictly simultaneous with the *res gestae*[2]; and even such as are made only a few minutes after the transaction is over will be regarded as mere narratives, and excluded[3].

In some criminal cases a complaint, not uttered till some time after the conduct complained of, is admitted in evidence. But this is only allowed after the person complaining has given testimony as a witness in the case[4]; and, even then, only for the purpose of supporting[5] that testimony (by shewing the complainant's consistency of conduct), and not as being intrinsically any evidence[6] of the alleged act complained of. (So in a wife's suit for judicial separation, on the ground of cruelty, the question, "Did the petitioner complain to you of her husband's cruelty?" is always allowed to be put, even by the examiner-in-chief, to such of her witnesses as are examined subsequently to herself.) Thus, in cases of violent sexual assault on a female, evidence that she complained about it, on the first reasonable opportunity, will be admitted in criminal (but not in civil) proceedings if she has been examined as a witness[7]. And, besides the fact of the complaint's having been made even the details[8] uttered

[1] *Du Bost* v. *Beresford*, 2 Camp. 511 (K. S. C. 497).

[2] *Aveson* v. *Lord Kinnaird*, 6 East 198 (K. S. C. 498).

[3] *Reg.* v. *Bedingfield*, 14 Cox 341 (K. S. C. 501). A dumb man's *fingered* narrative is "Hearsay," not an Act. C. C. C. xc. 979.

[4] Hence not at all, if she die before giving evidence.

[5] But it does not "corroborate" it; for it comes only from the person to be corroborated; 18 Cr. App. R. 123. Cf. p. 363 n[1]. *infra*.

[6] Hence any details in it, not repeated by her at the trial, are not evidence at all.

[7] This illogically lax criminal rule is a survival from the old "Appeals" of Rape, before the law of Evidence arose; great importance being attached in them to prompt complaint.

[8] *Reg.* v. *Lillyman*, L. R. [1896] 2 K. B. 167 (K. S. C. 503). The complaint must not be caused by *leading* questions (12 Cr. App. R. 280). And perhaps should not be *written* complaint; for the recipient has not the opportunity of noticing the complainant's demeanour. *Rex* v. *Osborne*, L. R. [1905] 1 K. B. 551, shews that the permission as to details is *not* limited to those sexual crimes in which Consent would be a defence.

in it are now held admissible. The whole rule is now extended even to sexual offences against males[1]. But in non-sexual crimes, the details of a complaint certainly cannot be admitted; and the more recent authorities deny that even the bare fact of a complaint's having been made can be. In ordinary civil cases the strict rule against Hearsay clearly excludes that fact[2].

There are, however, some well-ascertained and much more important cases in which mere hearsay (*i.e.* a narrative of the past), is freely and fully admitted as evidence. Of these exceptions we may now discuss such as are accepted equally in civil and criminal tribunals (postponing for the present some others which only concern the latter). The following deserve careful attention:

(1) Admissions made by, or by the authority of, the party against whom they are produced[3]. (The term "admission" is here used in the wide sense which it always bears in civil cases; though in criminal cases it is usually applied only to those individual details of fact which do not involve the guilty intent, an admission of full guilt being styled a "confession.") The authority to make it need not expressly relate to the particular statement; so a man will be responsible for admissions made on his behalf in the ordinary course of business by his partner or his agent, or even by some one to whom he has referred a third person for information on the topic[4].

An admission may be made either expressly, in words (either spoken or written), or tacitly, by mere silent conduct. An instance of an express admission is furnished by the case

[1] *Rex* v. *Camelleri*, 16 Cr. App. R. 162.

[2] *Beatty* v. *Cullingworth*, 60 J. P. 740; (C. A.) *The Times*, Jan. 17, 1897.

[3] The admission is, of course, evidence only against that party and not against others whom he may accuse in it. *E.g.* an adulterous wife's diary is evidence against herself but not against her adulterer; a landlord's notice to quit on a day named is evidence against him that the years of tenancy end on *that* day, but not against the tenant.

[4] *Williams* v. *Innes*, 1 Camp. 364 (K. S. C. 507).

of *Malthy* v. *Christie*[1]. One party to the case, who was an auctioneer, had issued a catalogue in which he described certain goods as being the property of a bankrupt; and this fact was held to render it unnecessary for the other party to produce any further proof that the person to whom they belonged had really become bankrupt. A tacit admission arises when, at a policeman's demand, a motorist produces a licence; thereby implying that he is the person named in it. A less simple but more frequent illustration is afforded whenever a statement is uttered in the presence of some one who would naturally contradict it if it were not true, and who nevertheless remains silent. *Qui tacet consentire videtur*; he impliedly admits its truth. In this way, hearsay is often rendered admissible by the question, "Was the other party [to this litigation] present, within hearing, when you heard that man say this?" Thus in an action for breach of promise of marriage, if the plaintiff was heard to say to the defendant, "You always promised to marry me," his mere silence is sufficient corroboration of her statement[2]. Yet the mere fact of the other party's having been present will not let in this evidence, if the circumstances were such as to make it unlikely that he would contradict the statement even if he knew it to be false. And since the act of admission lies purely in his demeanor (*e.g.* his silence), and the statement uttered before him only becomes admissible as accompanying and explaining that demeanor, it follows that if his conduct involves no admission[3]—*e.g.* usually, if he denies the truth of the assertions—then, though uttered in his presence, they cannot be taken as evidence against him[4]. And even without his going so far as to deny it, his demeanor may fall short of constituting any such admission as will render it evidence. Thus

[1] 1 Esp. 340 (K. S. C. 506).

[2] *Bessela* v. *Stern*, L. R. 2 C. P. D. 265. Similarly on being accused of crime; 13 Cr. App. R. 215; contrast 21 Cr. App. R. 23. Cf. p. 351 *supra*.

[3] It is for the judge to say if there is evidence of conduct that *might* involve it; and then for the jury to say if it *did* involve it.

[4] *Rex* v. *Christie*, L. R. [1914] A. C. 545; contrast 14 Cr. App. R. 1.

when a magistrate brought a prisoner into the presence of his dying victim, who then made a statement to the magistrate about the crime, which the prisoner did not contradict, this statement was nevertheless held to be inadmissible[1]. For the prisoner might well have been kept silent by his respect for the magistrate, and his silence therefore raised no fair inference of his assent. In the same way, if a person, after having received a letter asserting that he had made a promise of marriage or accusing him of having committed a crime, should never send any reply to the letter, this inaction will be no proof that he admitted the promise or the accusation, and consequently will not enable his opponent to put in the letter as evidence against him[2]. Yet it would be different in the case of any letter—such as a mercantile one—which it would be the ordinary course of business to contradict at once, if the recipient dissented from the statements it contained. So the fact that, to a letter which contained a statement of accounts, no reply was sent, is some evidence of the correctness of those accounts; though weaker than silence when *spoken to* about them (14 Q. B. 664). In like manner, when papers are found in a person's possession, even though they were not written *by* but *to* him, they may be evidence against him. For his conduct in having preserved them affords some evidence that the contents of them had reached his knowledge; and also some (though weaker) evidence that he approved of them.

It must be remembered (see p. 355) that when an admission is given in evidence against a party, he can demand that the whole statement, and not merely the inculpating part, shall be brought out. And if this statement was qualified or explained by any other statement made at the same time, or if it referred expressly or impliedly to any previous statement,

[1] *Reg.* v. *Gilligan*, 3 Crawford and Dix 175; cf. *Child* v. *Grace*, 2 C. and P. 193. See p. 395 *infra* as to its admissibility as a "Dying Declaration."

[2] *Wiedemann* v. *Walpole*, L. R. [1891] 2 Q. B. 534. Cf. L. R. [1921] 1 K. B. 22; a letter taxing the recipient with paternity of a child.

such statements may be incorporated with the inculpating statement. But this rule as to taking the whole of an admission has no application to warrants of arrest; for they are not admissions, *i.e.* statements of what *has been* done, but of what is directed *to be* done.

(2) When in examination-in-chief a witness has said, "In consequence of what I heard or read, I did so and so," the cross-examiner will be entitled (though the party calling the witness was not) to ask what the witness heard, or to call for the document which he read. For otherwise the witness's evidence would be left incomplete.

Thus if, on *A*'s trial for murdering *B*, *A* supports his defence of suicide by evidence of *B*'s saying "I have taken poison," the Crown can elicit by cross-examination the remaining words "which *A* sent me." A re-examiner may similarly supplement a cross-examination (cf. p. 355).

(3) A man's bodily sensations, or his state of mind, may be proved by narrating the description he gave to the witness, provided that he gave it simultaneously with the feeling. *E.g.* telling a doctor "I have a pain *here*"; or Lord St Leonard's declaration, p. 368 n., as to legacies he meant to insert in his will; but probably not his subsequent statements as to what he had inserted—a matter of Fact, not of Intention.

Four other exceptions arise in cases of Death.

(4) Thus, one exception is, that in questions of Pedigree, evidence is allowed to be given of statements that were made, before any dispute arose, by deceased members of the family, as to births, marriages, or deaths (or the dates when these events occurred), or as to relationships. The deceased person must have been an actual member of the family, not a mere servant or friend[1]. And he must have made his statement before any dispute on the matter had arisen, as that might have tainted him with some bias. But he need not

[1] But in *conveyancing* the statutory declaration of a stranger is readily accepted, even in his lifetime, to establish matters of pedigree.

have spoken from personal knowledge of the fact he narrated; family tradition is sufficient.

The introduction of this exception is due to the difficulty of obtaining any first-hand evidence of events after intervals of time so long as those over which disputed genealogies often extend. It is, however (for no very obvious reason), restricted to cases strictly genealogical; so that if a defendant, sued for the price of jewellery, sets up a plea of Infancy, he cannot support it by merely proving what his deceased mother said as to the date when he was born (*Figg* v. *Wedderburne*, 6 Jurist 218).

(5) A similar exception is recognised in regard to disputes as to Public Rights, which may concern all the King's subjects (*e.g.* the existence of a highway), and even as to General Rights, which concern only some large class of people (*e.g.* the customs of a manor, or the boundaries of a parish). For in all such cases—unlike disputes as to a private right of way or the boundaries of a private person's estate—evidence of mere Repute is admissible. And it may be given even by narrating statements that were made (whether orally or in writing) before any dispute arose, by deceased persons who were likely to have a competent knowledge of the subject[1]. But such statements can only be given in evidence so far as they do relate to current Repute. They cannot be adduced to shew any particular facts that would bear on the question[2], *e.g.* the fact of the deceased person's having seen boys whipped or cakes distributed at a particular place, by some person who wished thereby to commemorate its being a parish-boundary.

(6) Declarations made by a person, now deceased, against his pecuniary or proprietary interest are admissible. Thus a declaration of a deceased person as to the terms of his tenancy of a house has been admitted as sufficient both to rebut the

[1] *E.g.* "*X*, who died twenty years ago, used to say that no one dared lock the gate of that road."

[2] *Rex* v. *Bliss*, 7 A. and E. 550.

presumption of law (*supra*, p. 333) that the person in possession of real property holds it in fee simple, and also to establish the actual amount of rent which the deceased paid[1]. And when any such declaration is admitted, all details which form part of the same statement will be admitted, even though they were in no way against the deceased man's interests[2]. Thus the fact of a life estate having been surrendered has been proved by the entry in a deceased solicitor's ledger of his having been paid for carrying out the surrender; and the date of a child's birth by a similar entry, in the accoucheur's accounts, of the payment of his fee for his attendance[3]. This class of evidence usually takes the form of written entries made by the deceased; but it is none the less admissible if the declaration were oral (27 T. L. R. 202).

Since this principle only admits declarations against the pecuniary or proprietary interests of the deceased man, his declaration that he—and not the suspected persons—committed a crime, would not be admissible on behalf of those persons should they be indicted for that crime[4].

(7) A similar privilege is extended to statements (whether written or oral) made by a person, now deceased, in the discharge of a *duty* (mere habit does not suffice) which he owed to an employer, in the ordinary course of his employment[5]; even though they may be actually in favour of his own interests. Thus the fact that a man was served with a writ may be proved by the indorsement made on it by the deceased clerk who served it[6], and the note entered by a deceased drayman, in a book kept for that purpose, of having made delivery of certain goods is evidence that those goods were so delivered[7]. But, as the mere routine of business

[1] *Reg.* v. *Churchwardens of Birmingham*, 1 B. and S. 763 (K. S. C. 512).
[2] *Warren* v. *Greenville*, 2 Strange 1129 (K. S. C. 511).
[3] *Higham* v. *Ridgway*, 1 East 109.
[4] 11 Cl. and F. at p. 112.
[5] *Reg.* v. *Buckley*, 13 Cox 293; a case of *oral* statement.
[6] *Poole* v. *Dicas*, 1 Bing. (N. C.) 649 (K. S. C. 514).
[7] *Price* v. *Earl of Torrington*, 1 Salk. 283 (K. S. C. 514).

affords a less effective guarantee for accuracy than does self-interest, this privilege is restricted by limitations that were not imposed upon the one which we last explained. Thus a statement is not rendered admissible by having been made in the course of employment, unless it was made at the time of the occurrence to which it relates—*i.e.* within so few hours of it as to be practically a part of the transaction (29 T. L. R. 28). Moreover the admission of such a statement will be limited strictly to its mention of those circumstances which were essential to the performance of the duty; and will not, as in the case of a statement made against interest, cover the collateral details which may have been added. A third limitation is that it must record, not mere hearsay but, the personal knowledge of the person recording[1].

Rule VIII. The judges of the eighteenth century went far in excluding the testimony of witnesses who seemed to them to be likely, from personal interest in the case or other causes, to give but untrustworthy evidence. But a reaction was initiated by Jeremy Bentham. He pointed out that even the stupidest jurymen are on the alert to suspect bias in a witness; and moreover that from every witness's evidence, whether true or false, instructive inferences may be drawn—the very fact that he thinks it worth while to lie being itself a suggestive one. The influence of Bentham has brought about legislative reforms which have removed almost all objections to the competency of witnesses on the ground of Bias[2] or of Character; it being left to the jury to take account

[1] Cf. *Ryan* v. *Ryan*, 25 Irish L. R. 185. Here a deceased Irish priest had had—unlike Anglican clergymen—the duty, when registering a baptism, of stating if the child had been born in wedlock. He had therefore recorded it as child of "J. H. and H. F. *his wife*." The register, though evidence of the baptism, was held not to be evidence of the wife-hood; for it was not shewn that he had "personal knowledge" of the wedding ceremony.

[2] In 1843, Lord Denman's Act made mere interest cease to be a disqualification; and in 1846 and 1851 Lord Brougham's Acts qualified even the parties to a suit to give evidence.

of these considerations when deciding upon the value of their testimony.

But an adequate degree of *Understanding* is, of course, necessary in a witness; and, on the ground of want of understanding, children or insane persons may be excluded if the judge finds, on investigation, that they are incapable of comprehending the facts about which they are to testify. Yet a lunatic is not necessarily incompetent to give evidence[1]. The arbitrary rule treating children under seven years of age as necessarily too young for criminal Liability has, however, no counterpart in the law of Evidence, it being now settled that competency depends not upon the precise age but upon the actual intelligence of the witness[2].

The value added to testimony by its being given under supernatural sanctions is frequently so great that the law formerly made it essential to the competency of every witness that he should know and accept the religious obligation of an *Oath*. (Increased intercourse with the East led in the seventeenth century to the recognition of Muhammadans, and in the eighteenth to that of Hindus, as satisfying this condition, and being entitled to be sworn with their own sacred ceremonies.) But now, even in the case of adult witnesses, the requirement is no longer universal; for, by the Oaths Act, 1888[3], "Every person objecting to be sworn, on the ground either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation in all places and for all purposes

[1] *Reg.* v. *Hill*, 2 Den. 254. At Leeds Assizes on Dec. 2, 1914, in *Rex* v. *Firth*, before Shearman, J., an asylum attendant was convicted, on a lunatic's evidence, of assaulting her. It was ruled by the Supreme Court of the United States (107 U. S. 419), that it is for the judge, after hearing evidence as to the mental condition of the witness, to decide whether or not his insanity extends so far as to prevent "his giving a perfectly accurate and lucid statement as to what he has seen and heard." Cf. C. C. C. S. P. III. 617.

[2] *Rex* v. *Brasier*, 1 Leach 199. Five is usually too young; 2 Cr. App. R. 283. In old days the minimum age was twelve; it now seems to be about six. But even at twelve corroboration is desirable; 19 Cr. App. R. 29.

[3] 51 and 52 Vict. c. 46; replacing a more limited Act of 1869.

where an oath shall be required by law." And a "child of tender years," who has not yet learned the nature of an oath may in criminal cases give evidence unsworn[1], if it is of sufficient intelligence and "understands the duty of speaking the truth." But the accused is not to be convicted on such evidence unless it be corroborated by material evidence which implicates him (cf. p. 393).

Rule IX. There are some questions which it is quite legal to ask, but which a witness may, if he think fit, equally legally refuse to answer. Such a privilege arises, for instance, in the following cases:

(1) A witness cannot be compelled to answer any question, or produce any document[2], which tends to criminate him[3]. He must pledge his oath that his answer would have this effect; and it will then be for the Court to decide whether the question seems to be one which, under all the circumstances of the case, it would really endanger the witness to answer. For a merely remote possibility of criminal prosecution[4] will not be regarded as sufficient to entitle a witness to withhold information[5]. Yet even a man who has already been tried for an offence and been acquitted may still be in risk of criminating himself in connexion with the very same crime, *e.g.* by admitting his having been an accessory after the fact.

[1] 4 and 5 Geo. V. c. 58, s. 28 (2). In *Rex* v. *Wilson* the C. C. A. (July 14, 1924) recognised that the judge has still a right to question a boy of thirteen as to his religious belief and practice; even at the end of his evidence.

[2] *E.g.* the bill of sale whereby he disposed of an armed ship to a belligerent. But his refusal lets in secondary evidence; 2 E. and B. 940; *supra*, p. 369.

[3] "One of the most sacred principles of the law of this country"; Lord Eldon (Buck, 540). But a prisoner *giving evidence* on his own trial has no privilege against criminating himself as to *that* accusation; p. 408 (3*a*).

[4] *Rex* v. *Boyes*, 1 B. and S. 311 (K. S. C. 535).

[5] By 24 and 25 Vict. c. 96, s. 85, in a few peculiar offences of Misappropriation, *e.g.* by agents, custodians, directors, etc. (*supra*, p. 237), a witness has no privilege in any *civil* court against criminating himself in respect of such an offence; but he is exempted from prosecution for it if he "first disclosed" it when thus under compulsory examination. See also 6 and 7 Geo. V. c. 50, s. 43. Cf. 4 and 5 Geo. V. c. 59, s. 166, as to compulsory admissions in bankruptcy.

(2) A witness cannot be compelled to produce his title deeds for inspection. If however he is himself a party to the particular litigation, he does not enjoy this privilege; except for deeds that are irrelevant to his opponent's case.

(3) A husband or wife cannot be compelled to disclose any communications made to him or her, during the coverture, by his or her wife or husband. This rule is based on the importance of preserving the confidences of married life.

(4) Counsel and solicitors cannot be compelled—and indeed are not even permitted—to disclose facts confided to them by[1] or on behalf[2] of a client, or to produce any documents received by them from a client in their professional capacity, unless the client consents to waive this privilege; for it is his, and not theirs. No such protection, however, exists if the adviser was being consulted, not merely in order to protect his client against the results of a past criminal act, but to facilitate the commission of some future one. Nor does the privilege cover facts merely collateral to the confidence, *e.g.* that he saw his client sign the perjured affidavit (Cowper 845).

There is no similar privilege[3] for confidences entrusted to a medical[4] or even to a clerical adviser[5]; nor for business secrets (*e.g.* the secret marks upon bank-notes).

(5) By a still stricter rule, one of Exclusion rather than of Privilege, a witness cannot be compelled, and indeed will

[1] *Rex* v. *Withers*, 2 Camp. 578 (K. S. C. 534). But a third party, who overheard the confidence, has no such privilege.

[2] *E.g.* the statements made to them by a witness as to what evidence he can give in a litigation contemplated, even though not yet commenced. Such statements are taken down in writing (and often then signed by the witness); his "proof."

[3] Nor even an exemption from the—theoretical—law of Misprision (*supra*, p. 279).

[4] But any other disclosure of those confidences would be an actionable breach of the doctor's obligation to secrecy.

[5] *Rex* v. *Gibbons*, 1 C. and P. 97 (K. S. C. 524); cf. L. R. 17 Ch. D. at p. 681. Yet see Phillimore's *Ecclesiastical Law*, p. 704.

not be permitted[1], to answer any question which involves a disclosure of any official communications (whether written or oral) which are such that—in the opinion of the judge—disclosure of them would be contrary to public policy[2]. Hence in the case of prosecutions so important as to have been (not merely nominally but actually) instituted by the executive government, the name of the informer need not be disclosed by a witness, nor can he be asked if he were himself the informer[3]. But it would seem that this rule does not extend to the case of communications made to a private prosecutor, even where the prosecution is practically in the hands of the police; all that can be done is to postpone the question until the course of the trial may make manifest its importance.

Where any of these privileges is waived by a person who is at liberty to waive it, the answer he gives will be perfectly good evidence, even against himself; both in the proceedings in which it is given and in any subsequent litigation. But if, on the other hand, he claims his privilege, and yet is illegally compelled to answer, his answer will not be evidence against him as an admission, either then or in any subsequent litigation. Yet against other parties it is evidence (since the privilege is only his and not theirs); and consequently, if he were not himself a party to the particular litigation, the validity of the trial will not be affected by the reception of his answer.

Rule X. Where a document is tendered as evidence the necessary proof of its genuineness varies with its age.

(1) If the document be less than thirty years old, express evidence of its genuineness must be adduced[4]. In ordinary cases, it is not necessary to do more than to shew that the

[1] *Rex* v. *Hardy*, 24 St. Tr. at pp. 818, 820. The exclusion will not let secondary evidence in, as it does in other cases of Privilege.

[2] *E.g.* a captain's report to the Admiralty about a naval collision.

[3] *Marks* v. *Beyfus*, L. R. 25 Q. B. D. 494. As to reports made to a Superintendent of Police by his constables, see 65 J. P. 209.

[4] But conveyancers do not require any such proof on a sale of real property, even for recent documents; the genuineness being sufficiently corroborated by the fact that the vendor is in possession of the property.

document or the signature to it is in the handwriting of the person by whom it purports to have been executed. Handwriting may be proved by any witness who from knowing the person's handwriting can swear to the genuineness of the document; or under a modern statute[1], even by merely letting the jury compare the document in question "with any writing proved, to the satisfaction of the judge, to be genuine," *e.g.* a signature made by the person whilst actually in the witness-box before them.

But there are some instruments to whose validity some further circumstance is essential; and in such cases, that circumstance must also be proved. Thus where attestation by witnesses is essential to the document (as in the case of a bill of sale) it must be shewn to have been duly attested. To establish this fact one of those witnesses must, if possible, be produced. But if none of the attesting witnesses can be found, the handwriting of one of them must be proved; and some evidence must be given as to the identity of the person who actually executed the instrument with the person who is under discussion in the litigation, unless the attestation clause itself sufficiently identifies him. Again, in the case of deeds the further ceremony of sealing[2] is necessary; but where there is an attestation clause the courts will, if the signature be proved, accept this clause as sufficient evidence of the sealing and delivery[3].

(2) In the case of documents more than thirty years old, just as in questions of pedigree (*supra*, p. 379), the law of evidence is relaxed to meet the difficulties produced by the lapse of time[4]. Such documents, if produced from a proper

[1] 17 and 18 Vict. c. 125, s. 27; extended to criminal cases by 28 and 29 Vict. c. 18, s. 8.

[2] Any act suffices by which the party adopts the affixed seal.

[3] *In re Sandilands*, L. R. 6 C. P. 411. Cf. 7 Taunt. 253.

[4] "Time with his scythe is ever mowing down the evidences of title; wherefore the law places in his other hand an hour-glass by which he metes out periods of duration that shall supply the place of the muniments his scythe has destroyed" (Lord Plunket).

custody, "prove themselves," *i.e.* no express evidence of their genuineness need be adduced. Nor is it necessary that the custody from which such instruments come should be the most proper custody for them to be in. It is sufficient that the custody, though not the best, is a natural one, *i.e.* one which, under the circumstances of the particular case, appears to the judge to be one naturally consistent with the genuineness of the document. Thus, although papers relating to an episcopal see properly pass on the death of one bishop to his successor in office, yet an ancient document would be allowed to "prove itself," if it were produced from the custody of a deceased bishop's descendants[1].

[1] *Meath* v. *Winchester*, 3 Bing. (N. C.) 183.

CHAPTER XXVI

RULES OF EVIDENCE PECULIAR TO CRIMINAL LAW

In criminal cases the general principles of Evidence are supplemented by some rules, and modified by others, which do not hold good in civil litigation. Of these the following deserve explanation here.

Rule I. A larger minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature[1].

Even in the latter case, *e.g.* in actions of debt, a mere scintilla of evidence would not warrant the jury in finding a verdict for the plaintiff; for there must (as we have seen[2]) be so much evidence that a reasonable man might accept it as establishing the issue. But in criminal cases the presumption of innocence is still stronger[3], and accordingly a still higher minimum of evidence is required; and the more heinous the crime the higher will be this minimum of necessary proof[4]. The progressive increase in the difficulty of proof as the gravity of the accusation to be proved increases, is vividly illustrated in Lord Brougham's memorable words in his defence of Queen Caroline: "The evidence before us," he said, "is inadequate even to prove a debt—impotent to deprive of a civil right—ridiculous for convicting of the pettiest offence—scandalous if brought forward to support a charge of any grave character—monstrous if to ruin the honour of an English Queen[5]."

[1] "It is not enough that Justice should be morally certain. She must be immorally certain—that is, certain *legally*" (Charles Dickens).

[2] *Supra*, p. 349; cf. 13 C. B. (N. S.) 916.

[3] *Supra*, p. 330.

[4] The practical working of this is well shewn by the fact that whereas the average percentage of convictions on criminal indictments in general is about eighty, it is little more than fifty per cent. on indictments for murder (even after deducting the cases in which insanity is proved).

[5] *Speeches*, I. 227.

It was formerly considered that this higher minimum was required on account of the peculiarities of criminal procedure, such, for instance, as the impossibility of a new trial, and (in those times) the refusal to allow felons to be defended by counsel and to allow any prisoners to give evidence; and consequently that it was required only in criminal tribunals. This view is still taken in America; but in England it was more usually considered that the rule is founded on the very nature of the issue, and therefore applies without distinction of tribunal[1]; *e.g.* if arson be the defence to an action on a fire-policy, or forgery to one on a promissory note; see Stephen's *Dig. Ev.* art. 94, Taylor's *Evidence*, § 112. But the American view was taken by Lush, J. (L.R. [1917] 1 K.B. at p. 357); and is taken by Mr Phipson (*Evidence*, p. 10). Cf. 10 Moo. P.C. 502.

History shews how necessary is some such rule, emphatic and universal, in order to protect prisoners from the credulity which the shifting currents of prejudice will inspire about any offence, or class of offences, that may for the moment have aroused popular indignation. No less enlightened a jurist than Bodin maintained, in an elaborate treatise[2], that persons accused of witchcraft ought to be convicted without further proof, unless they could demonstrate themselves to be innocent—"for to adhere, in a trial for witchcraft, to ordinary rules of procedure, would result in defeating the law of both God and man[3]."

Whenever, therefore, an allegation of crime is made, it is the duty of the jury—to borrow Lord Kenyon's homely phrase—"if the scales of evidence hang anything like even, to throw into them some grains of mercy"; or, as it is more commonly put, to give the prisoner the benefit of any reason-

[1] But see p. 330 n. *supra*.

[2] *Démonomanie*, ed. 1598; bk. IV. ch. IV.

[3] Similarly when in 1899 Esterhazy confessed in the *Observer* newspaper that he had forged the famous "bordereau," in order that the suspicions against Capt. Dreyfus might be eked out by some item of actual evidence, he justified himself by the plea that "on the trial of Spies, it is always necessary to forge some documentary evidence [fabriquer des preuves matérielles], or no spy would ever be convicted."

able doubt. Not, be it noted, of every doubt, but only of a doubt for which reasons can be given; for everything relative to human affairs and dependent on human evidence is open to some possible or imaginary doubts. "It is the condition of mind which exists when the jurors cannot say that they feel an abiding conviction, a moral certainty, of the truth of the charge. For it is not sufficient for the prosecutor to establish a probability, even though a strong one according to the doctrine of chances; he must establish the fact to a moral certainty[1]—a certainty that convinces the understanding, satisfies the reason, and directs the judgment. But were the law to go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether[2]." As was said by Cockburn, C.J., in the *Tichborne Case*, "It must not be the mere doubt of a vacillating mind that has not the moral courage to decide upon a difficult and complicated question, and therefore takes shelter in an idle scepticism." Or as the same truth was expressed by a great Irish judge, "To warrant an acquittal the doubt must not be light or capricious, such as timidity or passion prompts, and weakness or corruption readily adopts. It must be such a doubt as, upon a calm view of the whole evidence, a rational understanding will suggest to an honest heart; the conscientious hesitation of minds that are not influenced by party, preoccupied by prejudice, or subdued by fear[3]."

Accordingly, a verdict of acquittal does not necessarily mean that the jury are satisfied of the prisoner's innocence[4]; it states no more than that they do not regard the evidence as legally sufficient to establish his guilt[5]. There is therefore a fallacy in the old forensic argument of prosecutors, "you

[1] See 13 Cr. App. R. 211 for a case of "the very gravest suspicion" yet not beyond reasonable doubt.

[2] *Per* Shaw, C.J., on the trial of Prof. Webster (*supra*, p. 345), 5 Cushing.

[3] Kendal Bushe, C.J., *Dublin Univ. Mag.* XVIII. 85. [4] *Supra*, p. 350.

[5] Moreover "the acquittal of the whole offence is not an acquittal of every part of it, but only an acquittal of it as a *whole*"; Pollock, L.C.B. (C. C. C. Sess. Pap. XLVI. 886).

must convict the prisoner unless you think my witnesses ought to be convicted of perjury." For the jury may well be in utter doubt as to the soundness of either alternative.

This abstract, and therefore necessarily vague, direction—that they must be satisfied "beyond reasonable doubt"—is the only restriction which, in ordinary cases, English criminal law imposes upon the discretion of juries in pronouncing upon the sufficiency of evidence[1]. The civil and the canon law, on the other hand (like the Mosaic[2], the Roman[3], and the modern Scottish[4]), required at least two witnesses[5], and, from the frequent difficulty of obtaining these, had to fall back upon confessions extorted by torture. The English common law, by avoiding the unreasonable rule, escaped the cruel consequence[6].

The cases are rare indeed in which English law exacts any defined minimum of proof for even a criminal charge[7]. But the following are important ones.

[1] *Rex* v. *Nash* (6 Cr. App. R. 225) deserves study as a case where there was just enough circumstantial evidence to support a conviction for murder.

[2] Deut. xix. 15.

[3] Testis unus, testis nullus. [4] 6 Justiciary Rep. 128.

[5] See Ayliffe's *Parergon*, p. 541. In some cases indeed (see Best on Evidence, p. 81) the canon law exacted far higher degrees of proof; as when it provided that no cardinal was to be convicted of unchastity unless there were at least seven—or in Fortescue's time, according to him (*De Laudibus*, c. 32), twelve—witnesses. This requirement was rendered the harder to comply with by the further rule of canon law, that in criminal cases a woman could not be a witness. The result may well have been the same as was produced by the similar rule of the Koran, requiring all accusations of adultery to be supported by four eye-witnesses; namely, that (according to Sir William Muir) "the threat of punishment became almost inoperative." For by introducing artificial rules of proof into the law of evidence it is easy to effect a modification of the substantive law, whilst appearing to modify merely the adjective law; the disguise being closely akin to that under which the Praetores Urbani succeeded in surreptitiously reforming the laws of Rome (Maine's *Ancient Law*, ch. III.).

[6] Pollock and Maitland, II. 657.

[7] Only in two instances is corroboration required by statute in *civil* courts; viz. in bastardy proceedings and in actions for breach of promise of marriage. As to Divorce, see L. R. [1907] p. 334; and p. 394 *infra*. Claims against a dead man's estate are viewed jealously if the claimant is not corroborated (L. R. 31 Ch. D. 1 and 117).

(1) In treason and in misprision of treason, it is provided by statute[1] that a prisoner is not to be convicted except upon the evidence of two lawful witnesses, deposing either to the same overt act or at least to separate overt acts of the same kind of treason; or upon his own voluntary confession in open court. To secure the benefit of this rule the oath by which persons were admitted, in Ireland, into the Fenian society was always administered by a single one of its members, with no third person present.

(2) Upon an indictment for perjury or subornation of perjury, or for any of the cognate offences created by the Perjury Act, 1911 (though the taking of the oath, or the giving of the false evidence, may be proved by one witness), the falsity of that evidence itself cannot be legally established merely by the testimony of one witness[2]; for that would be only oath against oath. On each "assignment" of perjury the contradicting witness must be corroborated; and on some material point. The question as to whether a point is sufficiently material is for the judge, not the jury, to decide. It is not necessary that the corroborating fact should be so important that from it, standing alone, the falsity of the perjured statement could have been inferred. The corroboration may be by a second witness, or documentary evidence, or an admission by the prisoner[3], or some other similar circumstance[4]. But merely to shew that the supposed perjurer has made statements directly contradictory of each other (even though both of them were made on oath)[5] will not suffice. For this leaves it still utterly uncertain which of the two statements was the

[1] 1 Edw. VI. c. 12, s. 22; modified by 7 and 8 Wm. III. c. 3, s. 2; *supra*, p. 277. But in most *treason-felonies* one witness suffices.

[2] 1 and 2 Geo. V. c. 6, s. 13 (the Perjury Act, 1911). See pp. 302–3 *supra*.

[3] *Reg.* v. *Hook*, D. and B. 606 (K. S. C. 422). In some American cases, perjury has been proved without any witness, by a combination of two evidentiary documents; *e.g.* where both a letter written by the prisoner *and* an invoice written to and preserved by him, contradicted him as to the ownership of property. Such proof would probably be held sufficient in England also.

[4] *Reg.* v. *Parker*, C. and M. 646.

[5] *Rex* v. *Harris*, 5 B. and Ald. 926.

false one; and the indictment cannot be framed in a merely alternative form.

(3) Under the Criminal Law Amendment Act, 1885, it is provided in regard to certain offences against women and children that no person shall be convicted of these upon the evidence of one witness alone, unless such witness be corroborated in some material particular, and by evidence which implicates the accused.

(4) Similar corroboration is required in those cases in which under the Criminal Justice Administration Act, 1914 (*supra*, p. 383), a very young child is allowed to give evidence without being sworn[1]. The precaution is wise; for a tribunal of adults is apt to place undue reliance upon these little people; forgetting that, though less fraudulent than adults, they are more imaginative. Hence the judge should caution the jury (18 Cr. App. R. 165). "Children are a most untrustworthy class of witnesses; for, as our common experience teaches us, they often, when of a tender age, mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, and are greatly influenced by fear of punishment, by hope of reward, and by desire for notoriety[2]." They are both "suggestionable" and even "auto-suggestionable."

(5) Where a witness was[3] himself an Accomplice[4] in the very crime[5] to which the indictment relates, it is the duty of the judge to caution the jury strongly as to the invariable danger of convicting upon such evidence without corroboration[6].

[1] See p. 544 *infra*.

[2] Mr Inderwick, K.C.

[3] In the opinion of the jury.

[4] Even if merely as accessory *after* the fact.

[5] But if *A* and *B* steal a horse, and *B* sells it to *C*, and *C* is tried for receiving, *A* would not need corroboration at *C*'s trial.

[6] A like caution is given when a charge of *sexual* crime is supported by the complainant alone; 9 Cr. App. R. at p. 220; for there "corroboration, though not essential in law, is always required in practice," 18 Cr. App. R. 121. But if the judge has given the due caution, a conviction will be upheld; *Rex* v. *Crocker*, 17 Cr. App. R. 45; *Rex* v. *Jones*, 19 Cr. App. R. 40; cf. 18. 50, 65, 142.

Moreover this corroboration must confirm not merely a[1] material particular of the witness's story, but some particular which connects the prisoner himself[2] with it[3]. For, as the accomplice knows the whole history of the crime, he may tell a true tale, capable of thorough corroboration, and yet may easily insert in it the name of an innocent man, in place of one of the actual offenders. Hence it is not enough that an accomplice is corroborated as to the weather on the night of the burglary and the number of windows broken through[4]. And if there are two prisoners, and the accomplice's evidence is corroborated as regards one of them only, this will not suffice to dispense with the warning as regards the other.

Corroboration by another accomplice, or even by several accomplices[5], does not suffice. But a spy, since his complicity extends only to the *actus reus* and not to the *mens rea*, is not truly an accomplice, and so does not need corroboration[6].

But these common-law rules as to the necessity of corroborating accomplices amount (as we have said) only to a caution and not to a command[7]. Accordingly even in capital

[1] Not *every* material particular; for were it so there would never be any need for the accomplice's evidence.

[2] Hence in Affiliation proceedings the mere fact of Parturition is not corroboration enough.

[3] *Rex* v. *Baskerville*, L. R. [1916] 2 K. B. 658. *E.g.* that at prisoner's house a knife was found, stamped with the same private house-address as was stamped on one which the burglar had dropped; C. C. C. Sess. Pap. CXLVII. 683. Or the prisoner's silence when accused may corroborate (14 Cr. App. R. 1); but contrast 19 Cr. App. R. 27. Cf. p. 375 *supra*.

[4] So in the Divorce Court (where this sort of corroboration is always required for the evidence of private detectives) if such a detective says, "I saw respondent and co-respondent enter the hotel together, and I called this policeman's attention to it," it is no sufficient corroboration for the policeman to say merely, "He did shew me *a* man and *a* woman entering that hotel."

[5] *Rex* v. *Gay*, 2 Cr. App. R. 327. "A jury is no more bound to believe two informers than one," said Whiteside, C. J. Cf. 15 Cr. App. R. 177.

[6] *Rex* v. *Bickley*, 2 Cr. App. R. 53; *Reg.* v. *Mullins*, 7 St. Tr. (N. S.) 1111. Yet a man who has thus taken up falsehood as his trade must be peculiarly untrustworthy.

[7] "Not a rule of law, a rule of prudence"; 12 Cr. App. R. 17. 45–6, 81; 13. 215; 14. 121. But where it is by *Statute* that corroboration is required, the case must be withdrawn from the jury if there be no corroboration.

cases verdicts of conviction, based solely on the uncorroborated evidence of an accomplice, have upon appeal been held good. And, even the urgency of the caution may vary according to the consistency of the accomplice's story, the extent of his complicity, and the heinousness of the crime. Thus the caution may be withheld altogether in cases where the charge implies so little moral guilt as not to taint a man's credibility at all; *e.g.* in the case of non-repair of a highway[1].

(6) The Motor Car Act, 1903, s. 9 (1), in making it an offence to exceed the speed of twenty miles an hour on any public highway, provides that no conviction for it is to take place "merely on the opinion of one witness" as to the rate of speed. But a single witness does suffice if he speaks, not to his mere "opinion," but to a Fact which he has ascertained by stop-watch and measured distance (70 J. P. 211).

Rule II. To the doctrine which excludes Hearsay evidence there are—besides the general exceptions which we mentioned along with it—some further ones which are peculiar to criminal cases. Three of these deserve careful consideration.

(1) The admission of the complaints made by victims of sexual offences; *supra*, p. 374.

(2) Upon an indictment for Homicide[2], the *dying declarations* of the slain man respecting the cause of his death are admitted under certain circumstances. This exception seems to have been fully recognised as early as 1697. At the Old Bailey, in that year, whilst it was held, in one trial for murder, that evidence could not be received as to the murdered man having said beforehand that he and the prisoner were going to fight a duel, yet in another, where a painter in Lincoln's Inn Fields was indicted for having killed two

[1] *Reg.* v. *Boyes*, 1 B. and S. 311 (K. S. C. 535).

[2] *Rex* v. *Mead*, 2 B. and C. 605 (K. S. C. 519). For this is the one crime where it is certain that the victim will be unable to be a witness at the trial of the man who wronged him.

bailiffs, their "dying words" were admitted as evidence against him[1]. Such declarations are admitted because the religious awe inspired by the approach of death is deemed fully equal to the sanction of any judicial oath[2]. Hence the rule has been held to be inapplicable to declarations made by a child of the age of four[3]. And, similarly, it will not apply unless the deceased thought his death quite imminent. It is not sufficient that he was "in fear of death[4]" or "thought he was going to die[5]." He must have felt nothing short of "a settled hopeless expectation of death[6]." If, however, he had thus abandoned all hope of recovery when he made the declaration, the fact that his medical attendants were not equally hopeless, or that he did actually survive for several days after making it, will not render the declaration inadmissible. The present tendency, however, is to reject dying declarations except in the clearest cases, testing them with "scrupulous and almost with superstitious care[7]." The declaration may even exculpate the prisoner, *e.g.* be a confession of suicide, intentional or accidental.

It should be carefully remembered that the rule is limited, not merely to trials for crime, but to trials for Homicide; and thus will not apply when the person who caused a death is under trial, not for it, but only for some earlier crime (perhaps an abortion or a violent robbery) of which the death was a result[8].

(3) When a witness (whether for the prosecution[9] or the defence[10]) has made a *Deposition* before the justice who sent

[1] Hargrave MSS. in British Museum, No. 146, p. 162.
[2] *Rex* v. *Woodcock*, 1 Leach 502. "They are an exception to all rule; but they always produce the greatest effect"; Coleridge, J., in 1845.
[3] Cf. *Reg.* v. *Jenkins*, L. R. 1 C. C. R. 187 (K. S. C. 515).
[4] C. C. C. Sess. Pap. CXXVI. 841.
[5] *Reg.* v. *Neill*, C. C. C. Sess. Pap. CXVI. 1417 (K. S. C. 483).
[6] *Reg.* v. *Peele*, 2 F. and F. 21; *Reg.* v. *Gloster*, C. C. C. Sess. Pap. CVIII. 647 (K. S. C. 518). "I think I am dying" was, after objection, held sufficient by Lush, J., in *Rex* v. *Klaproth* (C. C. C., Feb. 21, 1921).
[7] *Per* Byles, J., in *Reg.* v. *Jenkins*, L. R. 1 C. C. R. 187 (K. S. C. 515).
[8] *Rex* v. *Hind*, Bell 253.
[9] 11 and 12 Vict. c. 42, s. 17.
[10] 30 and 31 Vict. c. 35, s. 3.

the case for trial, it may be used at the trial, instead of calling the witness himself, if he has died in the interval, or has become insane, or is too ill to travel, or is being kept away by, or on behalf of, the prisoner[1]. But it is well to notice that if the witness has merely gone abroad, it cannot be used; except perhaps in misdemeanor, and even then only by consent of the opposite party.

A deposition must bear the signatures both of the witness and of at least one of the committing magistrates; but it is not necessary to call any evidence to prove their genuineness. If the witness refuse or be physically unable to sign it would appear that this signature may be dispensed with[2]. When a deposition is put in as evidence, it must be proved (i) that the absence of the witness is due to one of the grave causes which we have mentioned; and that the prisoner[3] (ii) was present when the witness gave the evidence which it embodies, and (iii) had an opportunity of cross-examining him[4].

A witness's deposition will not be thus available as evidence at a trial, unless the offence for which the prisoner is being tried is substantially the same as—or arises out of the same set of circumstances as[5]—that for which he was committed.

Rule III. Evidence of the prisoner's *good character* is always admissible on his behalf in criminal courts. Yet evidence of his *bad* character is usually excluded there (p. 360 *supra*); and in civil proceedings all evidence of character is excluded[6]. Hence this exceptional admissibility is only

[1] *Rex* v. *Harrison*, 12 St. Tr. 833. Cf. *The Times*, March 7, 1855; and C. C. C. Sess. Pap. CVII. 581.
[2] *Rex* v. *Holloway*, 65 J. P. 712.
[3] Facts (ii) and (iii) are often proved by a policeman whom the committing justice has bound over to prosecute. The Criminal Justice Act, 1925, s. 13 (3), will, from June 1st, 1926, allow them to be proved by a certificate from the committing justice or his clerk.
[4] I have known a deposition excluded on the trial of a foreigner, because the witness to its admissibility, being ignorant of the foreign language, could not prove that the interpreter's words had really informed the prisoner of this opportunity.
[5] *E.g.* a murder, and a wounding with intent to murder; 2 Cr. App. R. 257.
[6] See p. 544 *infra*.

intelligible as a relic of the Anglo-Saxon exculpation by the oaths of compurgators (see Pollock and Maitland, II. 634).

But, ancient and well-established as is this rule, opinion has been considerably divided as to its exact scope. Is the "character," which the witnesses are thus allowed to describe, the disposition or the reputation of the accused person? In *Reg.* v. *Rowton* the Court for Crown Cases Reserved adopted, though only by a majority, the latter alternative[1]. Accordingly, in strictness, no evidence ought to be given about the prisoner's disposition, and still less about any particular acts of his. The witness, therefore, to borrow Erskine's words[2], is not to say "what *A*, *B*, or *C* told him about the man's character, but what is the *general* opinion concerning him. For 'character' is the slow-spreading influence of opinion, arising from a man's deportment in society, and extending itself in one circle beyond another till it unites in one general opinion. That general opinion is allowed to be given in evidence."

But, as Lord Ellenborough long ago said, "No branch of evidence is so little attended to[3]"; and this strict rule of law is still constantly and humanely disregarded in practice. For the present conditions of busy life in crowded cities often render it impossible for a man's conduct to have been under the continuous observation of many persons for so long a time as would enable any "general opinion" about it to grow up. Even neighbours and customers of his know nothing about him beyond their personal experience. Yet a departure from the strict rule opens out an inconveniently wide field of inquiry. For a witness's individual opinion of his neighbour's disposition may have to be supported or tested by protracted consideration of the innumerable facts which led him to form it. But evidence of a man's general reputation affords terse and summary proof of his disposition. On the other hand, this briefer and more technically correct

[1] L. and C. 520 (K. S. C. 528); cf. 1 Cr. App. R. 213. American courts also adopt it.

[2] In his speech in defence of Hardy.

[3] *Rex* v. *Jones*, 31 St. Tr. 310.

mode of proof has the disadvantage of excluding all evidence (such as perhaps might have been obtained from the very same witness who proves the good reputation) of a deep-rooted evil disposition that rendered the man utterly unworthy of the good reputation which he enjoyed.

Either method of proof, however, would admit that negative evidence which in practice is so frequent, "I never heard anything against him." Such negative testimony may be the best of all tributes to a man's disposition; for most men are little talked of until fault is found with them[1].

Evidence of good character is thus peculiar in its nature, as being a case in which the witness speaks as to other people's knowledge, instead of as to his own. And the forensic procedure in regard to it is also peculiar. For the opposite party has no right to make a speech in reply upon it; nor ought he even to cross-examine upon it, unless he knows that he can thereby elicit a definite charge against the prisoner, *e.g.* his having committed other similar offences. But evidence of good character even though obtained only by cross-examination of the Crown witnesses, or given by himself alone, can be rebutted by evidence of a bad reputation[2]; but not by evidence of bad disposition, still less of particular bad acts (except that it sometimes[3] may be rebutted by evidence of previous convictions).

A defendant's counsel must not assert his client's good character unless he is going to call evidence of it. On the other hand, if he do not call any, the prosecution ought never to make any comment upon this omission.

The probative value of evidence to character must not be overrated[4]. It is not sufficient ground for disbelieving solid

[1] Cf. Cockburn, L.C.J., in *Reg.* v. *Rowton*, L. and C. 536 (K. S. C. 533).

[2] But such evidence is so rare that neither Cockburn, L.C.J., nor Coleridge, L.C.J., had ever seen it given (C. C. C. Sess. Pap. cxv. 170).

[3] Under the following statutes: 7 and 8 Geo. IV. c. 28, s. 11; 6 and 7 Wm. IV. c. 111; 24 and 25 Vict. c. 96, s. 116; 24 and 25 Vict. c. 99, s. 37.

[4] "If you feel a doubt, you are entitled to take character into account. But only if the evidence has left your mind in doubt should you give any weight to testimonies to character" (Avory, J., at C. C. C. 1922).

evidence of facts. Were it so, no one would be convicted; for every criminal had a good character until he lost it. But it may be of great importance where mistaken identity is the defence. Or again determining which of two inferences should be drawn from a fact; and consequently in all questions of *mens rea*, since they must always be matters of mere inference. It thus is very useful in cases where a man is found in possession of recently stolen goods. At a charity-bazaar at Lincoln, about 1900, when an alarm was raised that a purse had been stolen, the thief slipped it into the coat-pocket of a bishop who was present; but any suspicions that might have been aroused by its being found in this pocket were effectually rebutted by the episcopal character of the wearer. Yet, even for such purposes, evidence of good character is, by a curious paradox, of least avail where it is most needed; namely in offences of great heinousness. For "in any case of atrocious criminality the act is so much out of the ordinary course of things, that, if perpetrated, it must have been produced by motives not frequently operating on the human mind. Therefore evidence as to the character of a man's habitual conduct in common circumstances will here become far inferior in efficacy to what it is in the case of accusations of a slighter guilt[1]."

After conviction, however, evidence of character will always be of great importance in determining what punishment should be inflicted on an offender.

Rule IV. In criminal proceedings Admissions, made by (or on behalf of) a party to the litigation, are received in evidence less readily than in civil cases.

In civil tribunals, any admissions which have been made by the plaintiff, or the defendant, or the duly authorised agent of either, can be given in evidence quite freely. But in criminal cases, the admissions of the prosecutor cannot, as

[1] *Per* Shaw, C.J., at the trial of Prof. Webster; *supra*, p. 345. See a good review of the effect of evidence of Character in 13 Cr. App. R. 125.

such, be given in evidence; for, technically speaking, he is no party at all to the proceedings, they being brought in the name of the Crown itself. And even the admissions, or—to use the term commonly applied to full admissions of criminal guilt—the Confessions (*supra*, p. 375), made by the person accused are not allowed to be given in evidence unless it appears that they were quite voluntary[1]. (Whether or not they were so is a question for the judge, not the jury, to decide[2].) Even though no circumstances raise any doubt as to the character of the confession, it is now held to be the duty of the prosecutor to bring evidence of its having been given voluntarily[3].

For though a litigant's own admissions might at first sight well appear to be the most satisfactory of all forms of evidence—and indeed were so regarded in the civil and the canon law[4]—experience has now shewn them to be open, especially in serious criminal charges, to two serious hazards of error. For (i) eagerness to secure the punishment of a hateful offence may lead a witness to exaggerate, even unconsciously, what was said to him by the person accused; and (ii) eagerness to propitiate those in authority may lead

[1] A similar doctrine prevails in the United States. Yet many scandals do arise there from the police putting arrested persons through "the Third Degree" by protracted questioning (*e.g.* 9 p.m. to 4 a.m.), or withholding of water, or even blows; cf. the "Sweat-box Case," *The State* v. *Ammons* (80 Mississippi 592). The Supreme Court rebuked these practices in December, 1924. Yet in 1925, in New Jersey, Harrison Noel, arrested for murder, was questioned by the police for eleven hours, and then, after two hours of sleep, for ten hours; *i.e.* for twenty-one hours out of twenty-three. He then made a confession. Of what value?

[2] *Reg.* v. *Warringham*, 2 Den. at p. 448.

[3] *Ibrahim* v. *Rex*; L. R. [1914] A. C. 599.

[4] Lord Stowell said: "A confession generally ranks highest in the scale of evidence;...it is taken as indubitable truth,...a demonstration, unless indirect motives can be assignedto it" (2 Hag. Con. 316). But now the Divorce Court will not act upon an uncorroborated confession except "with the utmost circumspection and caution" (L. R. 1 P. and D. 29). It may be due to morbid self-deception; or to a desire for divorce; or even to mere craving for notoriety. Cf. L. R. [1907], P. 334; and 27 T. L. R. 9.

the accused person himself to make untrue admissions[1]; and (iii) he often means guilty only of the act, not of the evil intent. Hence English criminal lawyers have long[2] recognised that "hasty confessions are the weakest and most suspicious of all evidence[3]."

The rule may be stated thus: a confession must be excluded if it was made (i) in consequence of (ii) any inducement (iii) that was of a temporal character and (iv) connected with this accusation, and (v) that was held out to the accused by a person who had some authority over the accusation.

(i) *In consequence of.* The confession will only be inadmissible if it was due to the inducement. Where therefore the inducement has been deprived of all influence, as by lapse of time or by some intervening warning (*e.g.* a magistrate's statutory caution), the confession will stand.

(ii) *An inducement.* It is not necessary that the prisoner should have been pressed to confess guilt; it is sufficient if he were pressed to say anything whatever. Thus, "It might be better for you to tell the truth and not a lie[4]," will suffice to exclude a confession; although "Speak the truth *if you speak at all*," is harmless.

[1] A desire to shield an accused friend often leads convicts under sentence for some other offence, knowing that they are not likely to be again prosecuted, to make false confessions of having committed the crime which he is accused of.

[2] The (now) indubitable falsity of the confessions made by many persons who suffered death for witchcraft, has done much to bring about this change in the legal estimate of the probative value of such evidence. Mr Inderwick (*Side-Lights on the Stuarts*, p. 164), cites two instances of women who confessed, although they declared privately that their confessions were false; their motive being an actual desire to be put to death, in order to escape the obloquy under which they lived.

[3] Sir Michael Foster's *Crown Law*, p. 234. Yet in French law, great importance is still attached to them. Thus on the prosecution of the Abbé Auriol, in 1881, for the murder of two of his parishioners, when the questions of the examining magistrate failed to elicit from him any incriminating admission, the Abbé was shut up in complete isolation for thirty-seven days. On the thirty-seventh he at last made a full confession. See H. B. Irving's *Studies of French Criminals*.

[4] *Reg.* v. *Bate*, 11 Cox 686.

It is immaterial whether the inducement consisted in a threat of evil or in a promise of good[1]. Thus the admonitions, "Tell the truth, or I'll send for the police," and, "Tell the truth and it will be better for you," are equally objectionable; and either inducement will be fatal to the admissibility of any confession which it may elicit. Although at one time the courts were ingenious[2] in so construing colourless words as to detect a hint of some inducement, it is now clear that the words of any alleged inducement must be construed only in their natural and obvious meaning[3].

(iii) *Temporal.* An inducement will not exclude confessions produced by it, unless it were of a temporal character. To urge that it is a moral or religious duty to speak out, is not likely to cause a man to say what is untrue; and therefore will not affect the admissibility of what he says. Hence where a prisoner had been urged by the prosecutor to tell the truth "so that if you have committed a fault, you may not add to it by stating what is untrue[1]"—and similarly where the mother of one of two boys said to them, "You had better, *as good boys*, tell the truth[4]"—the confessions which ensued were received as legal evidence.

(iv) *Connected with the accusation.* If the inducement had no bearing upon the legal proceedings connected with the accusation, it will not exclude the confession. Thus a confession was admitted in spite of its having been obtained by the promise, "If you will tell where the property is, you shall see your wife[5]." And if even an objectionable inducement

[1] *Reg.* v. *Jarvis*, L. R. 1 C. C. R. 96 (K. S. C. 525).

[2] Cf. 8 C. and P. 140; and 2 M. and R. 514. [3] *Reg.* v. *Baldry*, 2 Den. 430.

[4] *Reg.* v. *Reeve*, L. R. 1 C. C. R. 362. Similarly the exhortation—"With the profession you make of being a Christian, it is only right for you to clear the innocent ones," has been held not to exclude the consequent confession (*Reg.* v. *Peters*, C. C. C. Sess. Pap. CXXVII. 209). Cf. *Rex* v. *Stanton*, 6 Cr. App. R. 198.

[5] *Rex* v. *Lloyd*, 6 C. and P. 693 (K. S. C. 527). The decision that "Tell and you shall have some gin" will exclude a confession, is a ruling of very little authority; see Russell on Crimes, p. 2021 n.

to confess one crime should produce also a confession of some second and unsuspected offence, such confession will be admissible upon a trial that is only for the latter crime.

(v) *By a person in authority.* A person in authority means one who had some opportunity of influencing the course of the prosecution[1]; *e.g.* a magistrate or a constable[2], or even a private person if he is prosecuting or is likely to prosecute. Thus if an accusation be made against a servant, and she make a confession to her master or mistress in consequence of some inducement held out by him or her, it would be excluded if the charge were one of stealing their property; whilst if it were a charge of killing her own child, they would have no such "authority" in the matter as to give any disabling effect to the inducement[3]. It is sufficient if the person in authority is present, silently acquiescing, when some third party spontaneously holds out the inducement.

But the mere fact that it was to a constable (or other person in official authority) that a confession was made, will not cause it to be rejected, when no inducement was held out. And this will be so even if no preliminary warning had been given to the accused who made it; and even though he made it in answer to questions put to him by this person in authority. "To innocent people it is a most valuable safeguard to have an opportunity of knowing and answering the charge[4]." But questions thus asked are viewed jealously by the judges; and in 1918 they formulated instructions[5] about them (26 Cox 230).

[1] *Rex* v. *Gibbons*, 1 C. and P. 97 (K. S. C. 524).

[2] A person who has the prisoner in custody, even though not a constable, is "in authority," *e.g.* a searcher of female prisoners. *Reg.* v. *Windsor*, 4 F. and F. 361.

[3] *Reg.* v. *Moore*, 2 Den. 522.

[4] *Per* Lord Russell, C.J., 62 J. P. 279.

[5] These lay it down that "when a police-officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person, *whether suspected or not*, from whom he thinks that useful information can be obtained." Yet this questioning must not be hostile or oppressive. But "whenever a police-officer has made up his mind [cf. 18 Cr. App. R. 47] to charge a person with a crime, he should first caution such person before asking any (or any further) questions." Hence persons "in custody" should not be questioned—nor even be allowed to volunteer a statement—until after being cautioned. And when a voluntary statement is made, no questions must follow it "except for the purpose of removing ambiguity in what he has actually said." The usual caution (*infra*, p. 453) should be ended with "be given in evidence," omitting the deterrent words "against you." "After arresting, a constable"—said Lord Brampton—"should keep his mouth shut, but his ears open."

Even, however, when English law regards a confession as being rendered inadmissible by some inducement, it does not exclude evidence of any *acts* that may have been performed along with, or in consequence of, the giving of this excluded confession; *e.g.* the surrender, or the discovery, of stolen property. Moreover it does not exclude confessions themselves when not obtained by an inducement, even though they may have been obtained by some underhand means; *e.g.* by intoxicating the prisoner[1], or by abusing his confidence (as by a gaoler appropriating a letter which he had promised the prisoner to put into the post[2]), or by artifice (as by falsely asserting that some of the prisoner's accomplices are already in custody[3]). In such cases, however, the judge will warn the jury not to attach to the confession too much weight.

A further difference between civil and criminal courts, in their treatment of admissions, concerns such admissions as are made by mere agents. In civil proceedings, wherever the acts of an agent will bind the principal his admissions will also bind him, if made in the same affair and at the same time, so as to constitute a part of the transaction[4]. But criminal law does not adopt this wide rule; it never holds a principal liable for admissions made by his agents except when he has authorised them expressly. Accordingly an

[1] *Rex* v. *Spilsbury*, 7 C. and P. 187.

[2] *Rex* v. *Derrington*, 2 C. and P. 418.

[3] *Rex* v. *Burley*, 1 Phil. Ev. (7th ed.) 111.

[4] See Story on Agency, ss. 134, 451. Thus, in an action against a railway company by a passenger for the loss of his luggage, the admissions of the station-master as to the way in which the loss took place, made by him the next day after the loss, in answer to inquiries for the luggage, are good evidence against the company; *Morse* v. *C. R. Railroad*, 6 Gray 450.

admission made by a prisoner will not be evidence against his accomplices in the crime, unless it had been expressly authorised by them[1]. Yet, as we have seen (*supra*, p. 294), so soon as a common criminal purpose has been shewn, evidence of the *acts* of one accomplice, though done in the absence of the others, will be admissible against all of them.

Rule V. The principles relating to the Competency of witnesses are not identical in civil and in criminal courts.

We have already mentioned (*supra*, p. 383) the cases in which recent statutes have permitted evidence to be given in criminal proceedings by children who do not understand the nature of an oath, if they be sufficiently intelligent and be aware of the duty of speaking the truth. A converse and far more important peculiarity in the criminal rules of evidence is that by which (A) accused persons, and (B) the wives or husbands of accused persons, are entitled to refuse to give evidence (and, until very recently, were indeed entirely incompetent to give it).

(A) The common law disqualified every person who had an interest in the result of any legal proceeding—whether civil or criminal—from giving evidence in it. Hence, of course, the actual parties to that proceeding, since they had the strongest interest of all, were disqualified; plaintiffs and defendants in civil cases, and prisoners in criminal ones. (But the prosecutor in a criminal case could give evidence; for technically he is no party to the proceedings, the Crown being the *dominus litis*.) Prisoners, however, until early in the eighteenth century, were usually questioned (though not upon oath) by the judge himself, at the conclusion of the Crown evidence, in order to elicit their defences[2]. And this

[1] *Reg.* v. *Swinnerton*, C. and M. 593. So, in the Divorce Court, a respondent's confession (which, even against herself, needs corroboration, see p. 401 n[4].), is no evidence against the co-respondent. An incriminating letter written by her to him, but lost in the post, will be no evidence against him (though it would be, had he received and preserved it; *vide supra*, p. 377).

[2] See *Harrison's Case* in 1692, 12 St. Tr. 159.

often was of great assistance to them; especially as no felon could then be defended by counsel. On the other hand, it gave wide scope for judicial cruelty, as was too often shewn by Lord Jeffreys and other judges in the Stuart period[1].

In civil cases the evidence of the parties was rendered admissible in 1851[2]. Subsequently in 1872 there began a series of legislative enactments which enabled prisoners to give evidence in the case of a few particular crimes. The judicial experience of the working of these exceptional privileges proved so favourable that ultimately a general enactment was passed[3]—the Criminal Evidence Act, 1898.

By it:

1. The person charged is made a competent (but not compellable) witness for the defence[4] at every stage of the proceedings[5], whether he be charged solely, or jointly with some other person[6]. The judge should (73 J. P. 359) inform him of his right to give evidence. It is to be given from the box and not from the dock[6].

2. (*a*) On committal for trial, he gives his evidence immediately after the magistrate has delivered the usual statutory caution as to the ultimate use that may be made against him of anything he may say.

[1] And by Page, J., even so late as 1741. See in *Tom Jones*, bk. VIII. ch. XI., Fielding's vivid picture of Page's satirical questioning of a prisoner until "everybody fell a-laughing. It is indeed charming sport to hear trials upon life and death! But I own I thought it hard that there should be so many of them—my lord and the jury and the counsellors and the witnesses—all upon one poor man, and he too in chains. He was hanged; as, to be sure, it could be no otherwise."

[2] Lord Brougham's Act; 14 and 15 Vict. c. 99.

[3] 61 and 62 Vict. c. 36. It does not extend to Ireland; s. 7 (1).

[4] Not merely of himself, but of fellow prisoners also.

[5] This does not include proceedings before the Grand Jury, for they have nothing to do with the defence. Nor can a prisoner, after pleading guilty or being convicted, give evidence on oath in mitigation of punishment, as there is then no "issue"; he can only, as at common law, make an unsworn statement. *Reg.* v. *Hodgkinson* (64 J. P. 808). If co-prisoners wish to give evidence, they give it in the order in which their names stand in the indictment.

[6] See p. 544 *infra*.

(*b*) At trial, he gives it immediately after the Crown witnesses; unless he is going to call some witness[1] of his own (other than a mere witness to character). When he thus does not call a witness, the fact of his having himself given evidence creates no right of reply; so that, if he be undefended by counsel the Crown counsel will have no opportunity at all of commenting upon the evidence he gives.

3. He must not be cross-examined *to credit*; except

(α) as regards some offence which is such that evidence of its commission would intrinsically be admissible evidence for the prosecution (*e.g.* as bearing upon the question of *mens rea*) in the present proceedings[2];

or (β) when he has put in[3] evidence of his good character;

or (γ) when his defence is such as to assail the character of the prosecutor[4], or of the prosecutor's witnesses[5];

or (δ) when he has given evidence against a co-defendant[6].

4. The prosecutor must not comment on the fact of a prisoner's having refused to give evidence[7]. But the court is not placed (as in the United States it is) under any such

[1] If he do call witnesses, his evidence usually comes *before* theirs.

[2] Thus a conviction against a schoolmaster, for an assault upon a scholar, was quashed because the defendant had been asked whether he had been previously convicted of a similar assault on another scholar; *Charnock* v. *Merchant*, L. R. [1900] 1 Q. B. 474. Had the previous assault been on the *same* scholar, the evidence would probably have been admissible.

[3] But not when one of his witnesses has merely volunteered an eulogy of him, unasked; 17 Cr. App. R. 36.

[4] A *living* prosecutor; *e.g.* not the murdered victim; 14 Cr. App. R. 87.

[5] But not by merely denying, even violently, the truth of the evidence against him; 39 T. L. R. 457. Study *Rex* v. *Preston*, L. R. [1909] 1 K. B. 568, and *Rex* v. *Hudson*, L. R. [1912] 2 K. B. 465; the principle is vague. His answers to cross-examiners are no part of his "defence"; 3 Cr. App. 67.

[6] He is liable to be cross-examined by (or by counsel for) any person tried along with him whom he has prejudiced by his evidence. But if questions be put to him for a co-prisoner whom his evidence has *not* prejudiced, this will give the Crown a right to a speech in reply as against that prisoner (*Reg.* v. *Paget*, 64 J. P. 281). Cross-examination by or for a co-prisoner should precede the Crown's cross-examination.

[7] s. 1 (*b*).

restriction[1]. Experience, however, seems to shew that juries now, without the help of any comment, readily draw for themselves a hostile inference from the prisoner's refusal. (Cf. 3 Cr. App. R. 232.)

Experience has already shewn that this statute, though so great a departure from what had been a fundamental principle in English criminal procedure, has worked admirably. Lord Brampton[2] found it "a danger to the guilty, but of the utmost importance to the innocent" (*Reminiscences*, ch. 46). We may add that there is also in force another statute which departs even further from the ancient principles; viz. the Evidence Act, 1877[3]. Under this, whenever criminal proceedings are taken merely to test or to enforce some *civil* right, the party charged is not only competent but even compellable to give evidence, and either for the defence or even for the prosecution.

The prisoner had at common law a right (at any rate when undefended by counsel[4]) to make a statement in his own defence without being sworn. And the Criminal Evidence Act, 1898, expressly provides[5] that "nothing in this Act shall affect any right of the person charged to make a statement without being sworn." This proviso seems intended to operate even in the case of a prisoner who does give evidence on oath; enabling him (at any rate if undefended) to add to it an argumentative unsworn statement[6].

[1] Such comment by the court is "in some cases unwise, in others absolutely necessary"; *Reg.* v. *Rhodes*, L. R. [1899] 1 Q. B. 77. Cf. 12 Cr. App. R. 257.

[2] See the testimony of no less competent a critic than Sir H. B. Poland, in *A Century of Law Reform*, ed. 1901, p. 54. But it has no doubt led to much perjury; Grantham, J., thought by nine in every ten, Rowlatt, J. (in 1920) by three in every four, of prisoner-witnesses.

[3] 40 and 41 Vict. c. 14.

[4] And probably even when defended; *Reg.* v. *Shimmin*, 15 Cox 122, *Rex* v. *Bernay* (*The Times*, June 3, 1907).

[5] s. 1 (*h*).

[6] Allegations of Fact made by him in it are, of course, not "evidence"; as they would be if he took the option of swearing to them and facing cross-examination. Hence as against co-prisoners, they must be disregarded; but as regards himself the jury are allowed to give them whatever weight they may think fit.

If any persons who took part with the prisoner in his crime should be indicted along with him for it, they would nevertheless, even at common law, be competent (and indeed compellable) to give evidence, either for him or for the prosecution, unless they were put up for actual *trial* along with him. Accordingly, a prisoner who desired to call any co-prisoners as witnesses would request a separate trial[1]; if he obtained it, he then could call them although their own trial had not yet taken place. Sometimes the Crown calls one of a group of prisoners, as "King's evidence"; but it often takes a formal verdict of acquittal before calling him, to enhance the weight of his evidence.

Even since the Act which rendered accused persons competent to give evidence, a prisoner will still sometimes apply thus to be tried apart from those indicted along with him. For some fellow-prisoner whom he wishes to give evidence on his behalf, may—perhaps from the dread of cross-examination—be unwilling (although now competent) to do so at his own trial[2]. Or the applicant may desire to avoid the danger of the jury's taking into account against himself some evidence which, legally, is only admissible against some fellow-prisoner.

(B) The common law imposed an incompetency to give evidence, not only upon the person under accusation, but also upon that person's wife or husband[3]. Thus, if several prisoners were tried together, not only all of them but also all their spouses were thus disqualified from giving evidence (even though each one of them was charged in an entirely separate count). The rule produced strange results. Serjeant

[1] In cases of felony or treason, prisoners can even *compel* a separate trial, by "severing" in their peremptory challenges (*infra*, p. 481).

[2] Even though *A* may have been bound over, by the magistrate who committed *B*, to give evidence for *B*'s defence, he cannot be compelled to give such evidence if he be himself indicted *and tried* along with *B*.

[3] Yet no other relationship, not even that of parent and child, was regarded as producing sufficient community of interest with a prisoner to create any incompetency. I saw, in 1909, a woman tried for murder on the evidence of her two brothers and her mother.

Ballantine, in his *Reminiscences*, mentions having once prosecuted a man who obtained an acquittal by calling his mistress to prove an *alibi*, viz. his having been away at the races with her. Had he, instead, taken his wife, she could not have thus given evidence for him. On the other hand, Rush (the Norfolk murderer of 1848) was hanged on the testimony of his mistress. He had promised to marry her; and, had he kept his word, it would have saved his life.

An exceptional competency was, however, almost of necessity, conceded in those cases where the crime consisted in some act of personal violence committed by the prisoner upon the wife or husband. And, in recent years, a few statutes created further exceptions in the case of those crimes in which prisoners themselves were being rendered competent. But the whole doctrine has now been thrown into a new form by the Criminal Evidence Act, 1898[1]. The changes thus effected may be summarised as follows.

(I) In all *ordinary* criminal cases:

1. The husband or wife of the party charged is now competent to give evidence, but only for the defence, and only on the application of the party charged[2] (and is not compellable[3] to give evidence).

2. And this husband or wife has the full liability of an ordinary witness to be cross-examined as to credit; not merely the (very limited) liability of a prisoner who becomes a witness under this Act[4].

3. A prisoner's omission to call the husband or wife is not to be commented upon by the prosecution[5].

4. To call the husband or wife has the same effect as calling any ordinary witness for the defence, in giving the Crown the right of reply.

(II) Moreover, in the following *exceptional* cases, the

[1] 61 and 62 Vict. c. 36. [2] s. 1 (*a*).

[3] *Rex* v. *Leach*, L. R. [1912] A. C. 305. Not even for the defence.

[4] *Supra*, p. 408. [5] s. 1 (*b*).

husband or wife of the party charged is a competent witness for either the defence or even the prosecution, and quite irrespectively of the consent of the party charged[1].

1. Cases where the common law itself recognised an exception to the general rule[2]; viz. upon charges of personal violence committed against the husband or wife in question[3]. This covers assault or attempt to murder; but not crimes that involve no actual violence, like bigamy or libel.

2. Cases where, under the Married Women's Property Act, 1882[4], the husband or wife is taking criminal proceedings for an offence committed against his or her property by the prisoner.

3. Cases of the sexual offences dealt with by sections 48–55 of the Offences against the Person Act, 1861, or by the Criminal Law Amendment Act, 1885; Incest[5]; Bigamy[6].

4. Cases specified in Part II. of the Children Act, 1908[7], *e.g.* offences involving bodily injury to a person under sixteen; or in the Prevention of Cruelty to Children Act, 1904.

5. Cases of persons charged under the Vagrancy Act[8] with neglecting to maintain (or with deserting) their families; or with being *soudeneurs*.

6. Cases where criminal proceedings are taken to test or to enforce a *civil* right[9].

Even before the Act of 1898 the husband or wife was already *compellable* to give evidence in nos. 2 and 6; and, according to the prevailing opinion, in no. 1 also. But it is decided (*Rex* v. *Leach*, L. R. [1912] A. C. 305) that in the other three cases (nos. 3, 4 and 5) the husband or wife, though a competent witness, is *not* a compellable one.

Rule VI. Documents which require to be stamped are treated differently in civil and in criminal courts.

For purposes of revenue an artificial restriction upon the

[1] s. 4. [2] *Supra*, p. 411. [3] s. 4 (1).
[4] 45 and 46 Vict. c. 75, ss. 12, 16; *supra*, p. 185.
[5] 8 Edw. VII. c. 45. [6] 4 and 5 Geo. V. c. 58, s. 28 (3).
[7] 8 Edw. VII. c. 67, s. 27. [8] 5 Geo. IV. c. 83; *supra*, pp. 324–327.
[9] Evidence Act, 1877, s. 6 (1); *supra*, p. 409.

admissibility of documents as evidence has been created by the imposition of Stamp Duties upon certain classes of them. Familiar instances are the stamp upon receipts for the amount of £2 or over; the sixpenny stamp upon a written agreement whose subject is of the value of £5; and the *ad valorem* stamp of 2*s.* 6*d.* per £100 on mortgages and bonds. Under the earlier Stamp Acts, a document that ought to bear a stamp, and yet bore none, was incapable of being used as evidence in any court whatever, whether civil or criminal. Thus on the trial of a man for having burned down his shop, with intent to defraud the Insurance Company of the sum for which he had insured it, it was held that the absence of any stamp on the policy of insurance rendered it inadmissible in evidence, even though it was tendered for the mere purpose of proving the particular intent alleged in the indictment[1].

Hence such duties formed a conspicuous example of taxes on Litigation; which Bentham condemned as "the worst of all taxes, being denials of justice, co-operating with every injury and with every crime, and directly violating that first of statutes, Magna Charta—'Justice shall be sold to no man[2].'" But the severity of their operation was greatly mitigated in 1854, when an enactment (now replaced by the Stamp Act, 1891[3]) established with respect to them an important difference between civil and criminal courts. For whilst in civil proceedings unstamped documents are still incapable of being given in evidence, without at least the payment of penalties[4], the absence of a stamp no longer prevents any document from being given in evidence in criminal proceedings.

Rule VII. The testimony of witnesses who are abroad can be made available much more easily in civil than in criminal courts.

[1] *Rex* v. *Gilson*, 2 Leach 1007; R. and R. 138.
[2] *Works*, IV. 582. [3] 54 and 55 Vict. c. 39, s. 14 (4).
[4] And some instruments (*e.g.* bills of exchange and bills of lading) can only be stamped at the time of execution; so that, if not stamped then, they cannot be rendered admissible as evidence even by payment of penalty.

The fundamental principle which, as we have seen, excludes hearsay evidence rendered it impossible for such persons to give their testimony by merely sending letters or affidavits, without coming to England to appear in court in person. Even an official telegram from the Madras Government in answer to an inquiry addressed to it by the India Office cannot be given in evidence[1]. But in civil courts this difficulty has now been overcome by making a general provision for taking the evidence of such witnesses upon oath, with full formalities, in the foreign country where they reside[2]; by granting a commission or appointing a special examiner.

But in criminal courts no such general rule prevails[3]. In some exceptional instances, however, statutes have sanctioned the taking of evidence abroad for use in criminal cases. The most important of these provisions is one, contained in the Merchant Shipping Act, 1894[4], which provides for all cases in which an accused person is himself in the foreign country where the witness is (as may well happen if the crime be committed at sea, or abroad). For it permits any deposition on oath made outside the United Kingdom before a proper official—a magistrate if in a British possession, or a British consular officer if in a foreign country—*in the presence of the accused* to be given in evidence in any criminal proceedings here to whose subject-matter it relates, if, at the time of using it, the witness is not in the United Kingdom[5].

[1] *Reg.* v. *O'Flynn*, C. C. C. Sess. Pap. cxx. at p. 916.

[2] *Rules of the Supreme Court*, Order XXXVII. rule 5.

[3] Accordingly in the Tichborne proceedings, the witnesses from Chili, whose evidence had been taken in that country for the civil action, had to come to England to give evidence in person at the criminal trial.

[4] 57 and 58 Vict. c. 60, s. 691.

[5] The other statutes are of a less general character. By 13 Geo. III. c. 63, on a prosecution in the King's Bench Division for an offence committed in *India* (*infra*, p. 426), the court may issue a mandamus to Indian courts to take evidence publicly in court; a provision which is extended by 6 and 7 Vict. c. 98, to any offence against the Slave Trade Acts committed outside the United Kingdom, but within the *Empire*. In extradition proceedings, the Extradition Act, 1870 (33 and 34 Vict. c. 52) allows written depositions taken abroad to be given in evidence.

BOOK IV

CRIMINAL PROCEDURE

CHAPTER XXVII

LIMITATIONS ON CRIMINAL JURISDICTION

We have now explained the Substantive law of crime; and also that portion of the Adjective law which regulates the evidence by which crimes are to be proved. We have, finally, to consider the remaining portion of adjective law; that which regulates the procedure by which offenders who have committed crime are brought to punishment. We may begin by mentioning some limitations upon the exercise of this procedure; and then go on to describe the various courts in which it is exercised.

Limitation by Time

To civil actions, lapse of time may often operate as a bar; *Vigilantibus, non dormientibus, jura subveniunt.* But it can rarely affect a criminal prosecution. For the King could do do wrong; and consequently it was impossible that his delay in pressing his claims, whether civil or criminal, could be due to any blameable negligence. Accordingly at common law it was a rule that those claims remained unaffected by lapse of time; *nullum tempus occurrit regi.* And though, as regards civil claims, this kingly privilege has now been subjected to grave limitations by 9 Geo. II. c. 16, it still operates almost unimpaired in criminal prosecutions. Hence, in several noteworthy cases, offenders have been brought to justice many years after the commission of their crimes. In 1905 John Appleton received sentence of death (afterwards commuted) on his own confession of a murder committed in 1882

(*The Times*, July 15, 1905). The trial of Governor Wall[1] took place nineteen years, that of Edward Shippey[2] thirty years, and that of William Horne[3] thirty-five years after the respective murders of which they were accused. Stephen[4], indeed, mentions a prosecution in 1863 for the theft of a leaf from a parish register no less than sixty years previously.

But this rule, that lapse of time is no bar to criminal justice, is subject to a few statutory exceptions. Of these the following are the chief[5]:

(i) A prosecution for treason or misprision of treason must be brought within three years from the commission of the crime; unless the treason either consists of an actual plot to assassinate the Sovereign, or was committed abroad[6].

(ii) Offenders against the Riot Act[7] must be prosecuted within twelve months.

(iii) A prosecution for the misdemeanor of carnally knowing (or attempting to know) a girl between the ages of thirteen and sixteen must be brought within twelve months[8].

(iv) A prosecution by indictment under the Perjury Act, 1911 (s. 4), for making a false statement in registering a birth or death, must be brought within three years.

(v) And for the innumerable offences which are punishable on summary conviction the prosecution must be within six months[9]. For the (very rare) exceptions, see Odgers' *C. L.* II. 1045.

Limitation by Territory

According to International Law, a State ought only to exercise jurisdiction over such persons and property as are within its territory. And in criminal matters it cannot always

[1] 28 St. Tr. 51; *supra*, p. 129. [2] 12 Cox 161; A.D. 1871.
[3] *Annual Register*, II. 368; *Gentleman's Magazine* for 1759, pp. 604, 627.
[4] *Hist. Cr. Law*, II. 2.
[5] Others are mentioned in Stephen, *Hist. Cr. Law*, II. 2.
[6] 7 and 8 Wm. III. c. 3, ss. 5, 6; *supra*, p. 277.
[7] 1 Geo. I. st. 2, c. 5; *supra*, p. 286.
[8] 18 and 19 Geo. V. c. 42, s. 1.
[9] 11 and 12 Vict. c. 43, s. 11.

exercise jurisdiction over an offender even though he actually be within its territory. For it is forbidden by International Law to try[1] foreigners for any offences which they committed outside its territorial jurisdiction. One unique exception is, indeed, allowed. For persons guilty of any act of "Piracy *jure gentium*[2]" are treated as the common enemies of all mankind, and any nation that can arrest them may exercise jurisdiction over them[3], whatsoever their nationality, and wheresoever their crime may have been committed, even within the territorial waters of some other nation[4].

Hence the activity of a nation's criminal courts is usually confined to those persons[5] who have committed offences on its own soil[6] or on one of its own ships. Accordingly, persons who come into a State's territory, after having committed a crime elsewhere, usually incur no risk of being punished by the courts of their new home for what they did in their old one. In modern times, however, to counterbalance this immunity, almost all civilised countries have concluded Extradition treaties; mutual arrangements whereby any person who betakes himself abroad after he had perpetrated a serious offence may be arrested, and then sent back to take his trial in the country where this offence was committed, if it were not a "political" crime. Since 1870 England has made such treaties with thirty-eight foreign countries. Most of them

[1] Dr T. J. Lawrence's *Principles of International Law*, s. 98, p. 207. The prohibition includes "penal actions" (p. 7); L. R. [1893], A. C. 150.
[2] *Supra*, p. 319; Lawrence, s. 102, p. 214.
[3] As to Conspiracy here for piracy on the high seas, see *Reg.* v. *Kohn*, 4 F. and F. 88. Conspiracy abroad to kill here is not triable here.
[4] *The Marianna Flora*, 11 Wheaton at p. 41; *In re Tivnan*, 5 B. and S. at p. 677. But this would not cover acts which, like trading in slaves, are made piracy by local laws alone. For one country—or even several countries—cannot add to International Law.
[5] But it covers such persons even though they be aliens; *Courteen's Case*, Hobart 270; *Ex parte Barronett*, 1 E. and B. 1.
[6] As to "territorial waters," see 41 and 42 Vict. c. 73. In our Atlantic island of Ascension a manslaughter was committed in 1851 but no competent tribunal existed there. Hence a special commission was issued for a trial at Winchester (cf. p. 143 *supra*); thirteen witnesses were brought from Ascension (*The Times*, March 5, 1852).

preclude the extradition by us of any British subject. The foreign offender is surrendered under a warrant from the Home Secretary, after an investigation (under an order from him) by the chief magistrate at Bow Street.

Extradition transmits an offender from the territory of one nation to that of another. But even within a nation's own territory, if her constitution be a federated or quasi-federated one, some similar provision may be necessary, in order to transmit offenders from one of the component local jurisdictions to another. Thus within the British Empire, the Fugitive Offenders Act, 1881[1], provides for a surrender, akin to an extradition by a foreign nation, where a person who had committed an offence in one part of the King's dominions[2] has fled to another part of them. The range of crimes for which such a person may be thus surrendered is naturally much wider than in the case of extradition to a foreign country. It comprises all offences that are punishable (in the territory where they are committed) with not less than twelve months' imprisonment with hard labour. The statute moreover applies even though the conduct with which the fugitive is charged would have constituted no offence at all if committed in that part of the King's dominions to which he has fled[3].

International Law, although forbidding States to exercise criminal jurisdiction over any foreigner for an offence committed by him outside their territorial jurisdiction, nevertheless leaves unlimited their power to punish their own subjects. Yet nations vary in their readiness to exercise this power in respect of crimes which their subjects have committed whilst away from their native soil. Great Britain (like France and the United States) prefers, in nearly all cases, to adhere to the principle that crimes are local matters, to be dealt with where they are committed. But to this general rule she has by modern statutes made a few exceptions; empowering her courts to exercise jurisdiction over English subjects who commit certain specified offences even upon foreign soil[1].

[1] 44 and 45 Vict. c. 69. As to Protectorates, see 5 and 6 Geo. V. c. 39.

[2] In consequence of the annexation of the Transvaal, the question was very quickly raised whether this Act applies only when the territory in which the offence was committed formed part of the King's dominions at the date of the offence, or will apply even though the territory did not become incorporated into these dominions until after the crime. Contradictory decisions on this point have been given in South Africa.

[3] In 1923 we sent back five fugitives to the colonies and received one from them; and extradited ten foreigners, and obtained six persons by extradition.

Doubt has arisen as to whether, even when a man is in England, he would commit any offence against English law by conspiring to commit—or being accessory to the commission of—a crime in some country abroad[2]. For as English courts have no official knowledge of foreign law they cannot be sure that the act, however wicked, is actually a crime by the law of the particular foreign country concerned. Similarly, if a thing stolen abroad were brought to this country by a man who had knowingly received it abroad, and persons knowingly received it from him here, it appeared to lawyers to be doubtful whether they could be punished here[3]. The general principle still remains unsettled, but particular cases have been dealt with by statute. Conspiracy (or incitement) here to commit a *murder* abroad has been made indictable[4].

[1] This is the case with, as we have seen, homicide (24 and 25 Vict. c. 100, s. 9, *supra*, p. 143) and bigamy (*ibid.* s. 57, *supra*, p. 306); and piracy (*supra*, pp. 319, 417). So is it with treason and misprision of treason (35 Hen. VIII. c. 2, s. 1); with offences committed by colonial governors (11 Wm. III. c. 12; see *Reg.* v. *Governor Eyre*, L. R. 3 Q. B. 487); with (*supra*, p. 322) unneutral foreign enlistment (33 and 34 Vict. c. 90, s. 4); with offences against the Ballot Act, 1872, or the Corrupt Practices Act, 1883; or the Official Secrets Act, 1889 (52 and 53 Vict. c. 52, s. 6); and with some offences against the Explosives Act, 1883 (46 and 47 Vict. c. 3). And by the Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60, s. 687), with *any* offence committed by British subjects who are, or have within three months been, seamen on a British ship. Cf. p. 298 n[3], *supra*.

[2] This doubt was debated hotly in 1858; when various persons had conspired in London to assist Orsini in his project of assassinating Napoleon III. in Paris. Orsini's attempt was made on January 14th, 1858, the Emperor escaping unhurt; but ten of the spectators being killed, and a hundred and fifty-six wounded. The three bombs inflicted 516 wounds.

[3] Cf. C. C. C. Sess. Pap. LXXXIV. 295; LXXXVIII. 638.

[4] 24 and 25 Vict. c. 100, s. 4; *Reg.* v. *Most*, L. R. 7 Q. B. D. 244.

And the offence of dealing in this country with goods stolen abroad has been dealt with by the Larceny Act, 1916[1]; which provides that it shall be an offence, punishable with seven years' penal servitude, to receive, or to have[2] in possession, in this country, without lawful excuse, any property stolen outside the United Kingdom, knowing such property to have been stolen. Property is to be deemed to be "stolen" whenever it has been obtained under such circumstances that if the act had been committed in the United Kingdom it would have constituted an indictable offence, even though not a larceny. The Act applies not only to cases of receiving in England goods stolen abroad by other persons, but even to cases where the thief himself is found in possession of the goods in England.

A person, although himself abroad, may by the hands of an innocent agent commit a crime in England; *e.g.* by posting in France a libellous letter or a forged telegram, which the postman will deliver for him in London. If the Frenchman come to England, he may be tried here. Similarly[3], if money be sent in a letter from England to Holland, in consequence of a false pretence made in London, there is an "obtaining" here, sufficient to give jurisdiction to our courts; for the Dutch criminal has made the English postmaster his agent[4] to receive the missive[5].

[1] s. 33 (4).

[2] Thus covering cases in which not only the act of stealing, but even that of receiving, took place abroad.

[3] *Rex* v. *Stoddart*, 2 Cr. App. R. 237.

[4] Conversely, a man who without quitting England posts forged bills from here to a foreign country may be held guilty of uttering them *there*. And the very wide definition of "fugitive" in the Extradition Act renders it possible for him to be even extradited by us for trial there, as a "fugitive criminal": *Rex* v. *Codfrey*, L. R. [1923] 1 K. B. 24.

[5] Public-houses are sometimes erected *across* the boundary between Canada and the United States; so that guests may, at need, step into the territory of the laxer liquor-law, and thus avail themselves of the territorial limitation of jurisdiction.

CHAPTER XXVIII

CRIMINAL COURTS

We may now proceed to describe the various courts that possess a general criminal jurisdiction; considering them in the order of their dignity.

I. *The High Court of the King in Parliament.*

This is the highest court in the realm. Its title must not mislead the student into supposing either that the King sits there in person, or that the word "Parliament" is used in the usual modern sense, as including the House of Commons. But a Parliament, when deprived of the Sovereign and of the Commons, becomes simply the House of Lords; by which, accordingly, the jurisdiction of this court is exercised. That jurisdiction is twofold: (A) as a Court of Appeal, and (B) as a Court of First Instance.

(A) In civil matters the House of Lords is the only final court of appeal on all questions of law from English secular tribunals. But in criminal causes it is only one, and far the less active, of two such courts. Until 1907 its functions of appeal were limited to those extremely rare errors of law which are apparent on the record itself[1]. Such an error would appear in any indictment that disclosed no crime. But the Act of 1907[2] which created the new Court of Criminal Appeal provides that from it there may be an appeal to the House of Lords on any point of law which the Attorney-General certifies to be of such exceptional *public* importance that it is desirable to have the highest decision on it[3]. A sitting of "Parliament"

[1] Chitty says that the record contains (*inter alia*) the judge's commission, the indictment by the Grand Jury, the arraignment, plea, issue, award of jury, verdict, judgment (*Practical Treatise on Criminal Law*, I. 720). But it never shews the evidence, or the rulings of the judge as to admission or rejection of evidence, or his statements in his summing up to the jury.

[2] 7 Edw. VII. c. 23. *Infra*, p. 497.

[3] *Rex* v. *Ball*, L. R. [1911] A. C. 47.

for legal appeals differs very gravely from an ordinary sitting of the House of Lords. For, by the Appellate Jurisdiction Act, 1876, there must be present at least three "Lords of Appeal[1]"; and, on the other hand, by a rule of constitutional etiquette which has prevailed since *O'Connell's Case* in 1844[2], all peers who are not lawyers abstain from giving a vote. Moreover, under the Act of 1876, the Lords of Appeal may be allowed by the House of Lords to hold these sittings after the prorogation of Parliament; and the Crown may authorise them to sit even after Parliament has been dissolved.

(B) The House of Lords is also a court of first instance. In this capacity, unlike that already mentioned, it can try questions of fact as well as of law[3]; and the modern rule of etiquette excluding non-legal peers has no application here. But as the early Chancellors, being ecclesiastics, could take no part in capital trials, it became the practice for the Crown to appoint some peer (it will now probably be the Lord Chancellor himself) as Lord High Steward, to preside. Criminal cases may deserve to be tried before this august tribunal, on account of the dignity of either (1) the accused or (2) the accusers.

(1) Peers when accused of treason, or felony, or the misprision of either, must be tried by their noble peers[4]. This privilege depends upon nobility of blood, not upon the right to a seat in the House of Lords; and accordingly is possessed by peeresses in their own right, wives of peers, infant peers, and non-representative Scotch or Irish peers. The

[1] 39 and 40 Vict. c. 59. These may be either Lords of Appeal "in Ordinary" (*i.e.* salaried life peers appointed by virtue of the Appellate Jurisdiction Act, 1876), or peers of the realm who have held high judicial office.

[2] Knight's *Popular History of England*, VIII. 520.

[3] It thus forms the nearest surviving approach "to the old *judicium parium*" (Holdsworth, I. 389).

[4] Pollock and Maitland, I. 410. But for mere misdemeanors a peer is tried by an ordinary jury of commoners. The Duke of Leinster was so tried in 1923. Lord Clancarty was so tried (July 22, 1920); the indictment containing twenty-five counts, eleven of which related to eleven obtainings by similar false pretences, all which issues were disposed of in one trial.

weight of authority is decidedly in favour of the view that a peer cannot waive the privilege[1], cumbrous and inconvenient though the form of procedure is[2], as was vividly shewn by the trial of Earl Russell for bigamy (L. R. [1901] A. C. 446). All prosecutions of peers are, however, commenced in one of the ordinary courts, by an indictment found by an ordinary grand jury; this indictment being subsequently removed into the House of Lords (or into the Lord High Steward's Court) by a writ of *certiorari*.

Bishops cannot be tried by the House of Lords. No bishop has ever been so tried; and Archbishop Cranmer and Bishop Fisher were tried by ordinary juries[3]. Bishops may however sit at the trial of a secular peer, until the final moment when the lords come to the vote of "guilty," or "not guilty." This disqualification for pronouncing judgment doubtless arose from the rule of canon law which forbade clerks to take part in any sentence of death; though it also has been explained by the doctrine of "ennobled blood[4]."

(2) Any person, whether peer or commoner, who is impeached by the House of Commons must be tried by the House of Lords. A peer may be thus impeached for any crime; and so may a commoner for, at any rate, any high misdemeanor[5]. But as the House of Commons is itself now able to exercise directly an effective political control over the proceedings of the great officers of state, judicial procedure by impeachment has fallen into utter disuse. Its

[1] See Hansard, CCCX. 245 (Jan. 31, 1887).

[2] It will be found vividly described in *Blackwood's Magazine*, Dec. 1850, in an account of the trial of Lord Cardigan in 1841, for firing at Capt. Tuckett in a duel; the latest instance before Earl Russell's case.

[3] Yet the Resolution of the House of Lords excluding bishops from trial by the peers (Lords S.O., No. 61), depends upon the doctrine of "ennobled blood"; which Bishop Stubbs regards as historically a mere absurdity.

[4] Anson on the Constitution, I. 226.

[5] On the controversy whether a commoner can also be impeached for felony and for treason, or may for these crimes insist on being tried by "his peers," the conflicting cases from 1330 to 1689 are collected in Hatsell's *Precedents* (IV. 397). It is now generally thought that he *is* impeachable even for these graver crimes. Cf. Anson, I. ch. IX., s. 2.

inconveniences[1] were vividly manifested in the proceedings against Warren Hastings; which lasted from 1786 until 1795. Since Lord Melville's impeachment in 1805[2] there has been no instance of it; and none is likely to arise. For impeachment, as Lord Macaulay says, "is a fine ceremony, which may have been useful in the seventeenth century, but not one from which much good can be expected now."

II. *The Court of the Lord High Steward of the United Kingdom.*

This court differs in name, rather than in substance, from the tribunal first mentioned. It sits for the purpose of trying peers for treason, or felony, or misprision of either, if the recess or the dissolution of Parliament makes it impossible to have recourse to the House of Lords in its technical form. But it has never sat since 1686. The court consists of such temporal peers as the Lord High Steward[3] may summon. But they must not be fewer than twenty-three; since the court decides by a majority, and there cannot be a valid vote of guilty or not guilty unless twelve concur in it. On trials for treason or misprision of treason, it is provided by 7 Wm. III. c. 3 that all the peers who have seats in the House of Lords must be summoned. To this court, unlike the High Court of Parliament, no bishop can ever be summoned; hence there is no doubt that a bishop cannot be tried by this court. Again—though in trials by the High Court of Parliament all the members are equally judges of law as well as fact—in this court there is a division of functions akin to that between a judge and a jury. For the Lord High Steward is the sole judge on questions of law, but cannot vote on facts; and the facts are determined by the rest of the court (who are called "the lords triors").

[1] For an account of the cumbrous process of impeachment, see Anson on the Constitution, I. 384.

[2] 29 St. Tr. 549. It was described by a lawyer as "not an impeachment of waste, but a waste of impeachment."

[3] Who is appointed only for the particular occasion.

III. *The Court of Criminal Appeal.*

Except for those rare errors of law which are actually (in technical phrase) "apparent on the record," the common law provided no court of appeal in criminal cases, although it made abundant provision for civil appeals. Hence the judges had recourse to the wise practice of holding informal meetings to discuss questions of difficulty which had arisen before any of them at criminal trials. By 11 and 12 Vict. c. 78 these informal meetings were superseded by the establishment of a formal tribunal—the "Court for Crown Cases Reserved"—with power to determine points of law that arose upon the trial of any prisoner at either the Assizes or the Quarter Sessions. By the Judicature Acts, this jurisdiction was transferred to the High Court of Justice, *i.e.* the lower section of the Supreme Court of Judicature. Such appeals could be made by the prisoner only, not by the Crown. But he could not make them as of right; for he could not compel the judge to reserve a point. And only questions of law could be reserved, never questions of fact. The annual number of such appeals averaged only eight.

A more comprehensive principle was established by the Criminal Appeal Act, 1907, which created a general "Court of Criminal Appeal[1]," that can review any question whether of law or of fact. This Court now consists of the Lord Chief Justice of England along with (by 8 Edw. VII. c. 46) all the judges of the King's Bench Division. It may sit in several divisions; but a sitting requires a quorum of at least three judges[2]. To render impossible an equal balance of opinion, it is enacted that the number of judges present must always be an uneven one. And, further to secure certainty in the law, only a single judgment—as in the Judicial Committee—is usually to be delivered.

This Act of 1907 abolished (s. 20) a very rare form of appeal—the Writ of Error. By this, a decision of the King's Bench

[1] For a full account of its working, see p. 497 *infra*.

[2] In *Rex* v. *Norman* (April 29, 1921) *thirteen* sat.

Division upon a point of law that was "apparent on the record" of a criminal case might be brought before His Majesty's Court of Appeal (*i.e.* the upper section of the Supreme Court of Judicature), though that Court was debarred, by s. 47 of the Judicature Act, from receiving any other form of appeal in *criminal* matters. Thence the case might be carried up to the House of Lords.

Thus, since 1907, both His Majesty's Court of Appeal[1] and (in its *collective* form) the High Court of Justice have ceased to exercise any jurisdiction as courts of criminal law.

IV. *The King's Bench Division of the High Court of Justice.*

This tribunal exercises the criminal jurisdiction of the ancient *Curia Regis*[2]. Hence, though the Lord Chancellor is the highest of the judicial functionaries of the realm, not he but the Lord Chief Justice (who presides in this Division) is the head of our criminal judicature. And from it alone is it now usual to select the judges of assize; not from any of the other Divisions of the High Court.

Like the House of Lords, the King's Bench Division has cognizance both of matters of first instance and of matters of appeal.

(A) As a court of first instance, the King's Bench Division possesses (though in modern times it is not in every year that it exercises[3]) an original jurisdiction in four classes of offences. For it can try the following ones:

(1) Any crime committed out of England by one of our public officials in the execution of his office[4].

[1] Except that in the *quasi*-criminal offences of obstructing (or not repairing) a highway or bridge or river, the Act of 1907 confers—s. 20 (3)—on the convicted offender the same full rights of appeal as if he were a defendant in a civil action at assizes; apparently including the right of resort to His Majesty's Court of Appeal.

[2] Anson, *Law and Custom of the Constitution*, II. ch. X. sect. 1. § 1.

[3] In 1922 four persons were so tried; in 1923 none.

[4] For crimes by governors of colonies such trial was authorised so far back as 11 Wm. III. c. 12; and 42 Geo. III. c. 85 made it applicable to all officials abroad.

(2) Any misdemeanor, in whatever part of England committed, for which an "information[1]" (dispensing with all recourse to a grand jury) has been filed by some officer of the Crown.

(3) Any indictable crime (whether a misdemeanor or even a felony or treason) that has been committed in Middlesex.

(4) Any indictable crime, in whatever part of England committed, an indictment for which has been found in some other court (*e.g.* at the Assizes) and has since been removed by *certiorari* into the King's Bench Division for trial. The object of such a removal may be either to secure a "trial at bar," or to enable the case to be tried with some of the incidents of civil procedure.

A trial at the bar of the King's Bench Division takes place before three of its judges with (usually) a special jury[2]. But cases that have been removed into the King's Bench Division for trial are usually tried not at bar but before a single judge of that Division; either in London, or else at some Assize (usually that of the county whose grand jury found the indictment) but on its civil side (the King's Bench Division having no power over the criminal side of an Assize Court). The costliness of this procedure makes it impossible for any but a rich defendant to apply for it. In such proceedings, unlike ordinary criminal ones, a special jury may, if the charge is one of misdemeanor, be obtained, at the wish of either the prosecutor or the defendant.

(B) In its appellate functions the King's Bench Division is much more active. They are usually exercised through two (or three) of its judges sitting as a Divisional Court. The appeals are of two kinds.

(1) By a writ of *Certiorari* the proceedings of Quarter Sessions or of any still lower tribunal—but not of Assizes or of the Central Criminal Court—may be brought before it, at

[1] *Infra*, p. 460.

[2] The latest cases are those of the leaders of the Jameson Raid, 1896; of Lynch, 1903; and of Casement, 1916 (12 Cr. App. R. 99).

the instance of either the prosecutor or the defendant, to be reviewed and, if necessary, quashed for error of law; *e.g.* absence of jurisdiction.

(2) By a Case being stated by justices of the peace at petty sessions[1] (at the instance of either prosecutor or defendant), any question of law that has arisen before them may be submitted to the King's Bench Division.

V. *The Courts of the Commissioners of Assize.*

These ancient itinerant criminal tribunals are created by two commissions[2] issued two, three, or four times[3] a year (according to the county), to judges of the High Court and some eminent members of the bar, authorising them to try the prisoners presented for trial by the grand juries of the several counties for which the Assize is to be held. One criminal commission is that of Oyer and Terminer ("to hear and to determine"); giving authority to try all prisoners against whom true bills have been found at that particular Assize. The other is that of General Gaol Delivery, giving authority to try all prisoners who are in gaol or have been released on bail; whatever may have been the Assize at which

[1] Courts of Quarter Sessions also may state a case for the consideration of the King's Bench Division, but only in regard to some matter that has come to them on appeal from petty sessions.

[2] See Stephen, *Hist. Cr. Law*, I. 75–144.

[3] The counties are grouped into seven circuits; one of which, the "North and South Wales circuit" has two Divisions. Of the Winter Circuits, some begin as early as Jan. 11; only Manchester, Liverpool, and Leeds have an Easter Circuit; of the Summer Circuits, some begin as early as May 24; of the Autumn Circuits, some begin as early as Oct. 12. The Winter and Summer ones are civil as well as criminal; but at the Autumn one (which is held in only forty-seven towns, instead of the fifty-nine and fifty-seven of the two greater circuits) no civil business is usually taken, except in six large towns. By the Assizes and Quarter Sessions Act, 1908 (8 Edw. VII. c. 41), power is given to dispense with the holding of any Court of Assizes, or of Quarter Sessions, if, on the fifth day before its appointed date, there are not yet any cases for it to try. And the Administration of Justice Act, 1925 (15 and 16 Geo. V. c. 28. s. 1) empowers the Lord Chief Justice and Lord Chancellor to dispense with the holding of a forthcoming Assize at any place where no substantial amount of business is expected on that occasion.

the bills against them were found. There is, in practice, little difference between the lists of prisoners triable under the two commissions; and the two commissions form only one document. The courts thus held, are now, by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 18, to be regarded as branches of the High Court of Justice. They can try any indictable offence whatever, and are the most important of our criminal courts of first instance. But they have no appellate jurisdiction.

In London and its suburbs, for a population of over eight millions, the function of the Assizes is discharged by the Central Criminal Court—a special tribunal created by 4 and 5 Wm. IV. c. 36; the Commissions of Oyer and Terminer and of General Gaol Delivery for the metropolitan district being addressed to the Lord Mayor and Aldermen of the City of London, along with all the judges of the High Court, the Recorder, the Common Serjeant, and others. The Lord Mayor is, titularly, the head of the commission. The sittings under these commissions are held monthly. They sometimes proceed in as many as four courts simultaneously (once, in 1911, in five); one or another legal member of the commission presiding in each of these.

VI. *General Quarter Sessions*[1].

These, in their oldest form, are meetings of the justices of the peace[2] of a particular county; and two at least of such justices must be present. They are held once a quarter[3], or, by adjournment, oftener. More recently, 108 cities and boroughs have also obtained the privilege of a local Court of Quarter Sessions; presided over, however, not by justices of the peace, but by a Recorder, who is the sole judge. He must be a

[1] More technically, "The Courts of the Sessions of the Peace"; quarterly *or other*. Those for London try one-fifth of all the persons indicted in England and Wales and are held twice a month. But the Quarter Sessions of the *City* of London, though sitting to hear appeals, try no jury cases. These, however trivial, go to the Central Criminal Court.

[2] The title "justice of the peace" occurs as early as 1378; Rot. Parl.

[3] Within three weeks before, or after, quarter-day; C. J. Act, 1925, s. 22.

barrister of at least five years' standing[1]. Every Court of Quarter Sessions, whether for a county, a city or a borough, has both an original and an appellate jurisdiction.

(A) As a court of first instance it can try all indictable offences except[2]:

(i) Such felonies—other than burglary[3]—as are punishable, on even a first conviction, by penal servitude for life or by death.

(ii) Certain specified crimes which, though less grave than those already enumerated, are likely to involve difficult questions of law; *e.g.* praemunire, blasphemy, conspiracy, incest, forgery, bigamy, concealment of birth, perjury, libel, the offences created by the Criminal Law Amendment Act, 1885[4].

For all indictable crimes, except these two classes, Courts of Quarter Sessions have a jurisdiction concurrent with that of the Assizes[5].

[1] In the Quarter Sessions of counties (except two or three populous ones possessing salaried Chairmen) there is no such guarantee for the accurate administration of justice. It is a singular paradox that our constitution should permit trials (not merely for petty matters of police but) for charges that seriously affect men's character and liberty to be conducted by persons who, however honourable and eminent, are legally untrained, whilst it requires a civil suit for the smallest ordinary debt to be heard before a professional lawyer. The evil is the greater because criminal practice, being badly paid, does not attract the most experienced advocates; and because the Bench at Sessions, being a numerous body, have less sense of responsibility than an individual judge. The percentage of successful appeals from *County* Sessions is more than double that from convictions before Recorders.

[2] 5 and 6 Vict. c. 38. Before this Act it could try almost any crime; though in practice it rarely dealt with the most serious felonies. For Peterborough's unique powers, see 15 Cr. App. R. 122.

[3] Sessions are now authorised (6 and 7 Geo. V. c. 50, s. 38) to try such cases of burglary as are *not* grave or difficult. More than two-thirds of the indictments for burglary, actual or attempted, are now tried by them.

[4] The Criminal Justice Act, 1925, s. 18, Sch. 1, removes, as from June 1, 1926, some of the exceptions. *E.g.* conspiracies to cheat and defraud, fraudulent conversion (*supra*, p. 236), brothel-keeping, sacrilege (*supra*, p. 180), arson of crops or stacks, false statutory declarations at Quarter Sessions, are made triable.

[5] Quarter Sessions of counties and boroughs try more prisoners than the Assizes and the Central Criminal Court combined. Thus in 1927, only 3077 persons were tried at these latter courts, but 4059 at Quarter Sessions. Of the latter about two-thirds go to the Quarter Sessions of counties, and about one-third to those of boroughs. Nearly three-quarters of the indictments for offences against Property are tried at Quarter Sessions; but only about a fifth of those for offences against the Person.

(B) All Courts of Quarter Sessions have also an appellate[1] jurisdiction (extending to questions not only of law but even of fact) over convictions that have taken place at Petty Sessions. But its details can more conveniently be considered in connexion with the latter tribunals (see p. 443).

VII. *The Coroner's Court.*

The Coroner's Court, which has a history stretching back for seven hundred years[2], is held as a Court of Record for inquests upon cases of homicide or sudden death[3]. But its criminal function is only to accuse and not to try. The finding of a Coroner's inquest, accusing a prisoner of murder or manslaughter is equivalent to an indictment by a grand jury. It is the practice, however, in such cases to take the precaution of also preferring a bill of indictment before the grand jury; and if this bill is thrown out it is not usual to offer any evidence upon the coroner's inquisition[4]. But if a true bill be found, the accused can be tried upon both the indictment and the inquisition together.

VIII. *Petty Sessions*[5].

These constitute a noteworthy survival of the mediaeval idea of a Popular justice; (now generally superseded by the

[1] The Quarter Sessions for the City of London, as we have seen (*supra*, p. 429 n.), sit only for this appellate work and for civil business.

[2] See Pollock and Maitland, I. 379; and the introduction to the Selden Society's *Select Coroners' Rolls*. 1 Bl. Comm. 346.

[3] From 30,000 to 37,000 inquests are held in each year.

[4] For "in coroners' courts, witnesses often do not fully appreciate the responsibilities of their evidence"; Avory, J. See p. 545 *infra*.

[5] This is a modern term; of somewhat uncertain origin and meaning. "There is some difficulty," said Patteson, J., "in saying what is a Petty Session" (8 C. and P. 440). The current definitions limit it to cases where *two or more* justices are present. But it is difficult to see what other name than it can be given to a court held by a single justice when exercising

Royal justice, which acts only as Magna Charta provides (s. 45) through professional experts "*qui sciunt leges regni*"). For they are composed of justices of the peace, gentlemen or ladies[1], not necessarily of legal experience, nominated to their office by the Lord Chancellor; who acts on the advice of the Lord Lieutenant in the case of the county justices, and of the Home Secretary in the case of borough[2] justices. The sittings of Petty Sessions constitute the basis of the government of this country. By being held in every locality, and with great frequency, they effectively secure public order and tranquillity. Through them "more than through any other agency (except the tax-gatherer) are the people brought into contact with the government[3]." And by them mainly is the popular standard of justice educated. In the scale of dignity such sittings of justices of the peace are the lowest of our criminal courts; but the amount of work done by them is so vast that they play a far more important part in our penal system than some tribunals of much greater dignity. "They have to deal with a wider range of subjects and a greater variety of cases than even a judge of the High Court[4]." The vast majority—say, about two-thirds of a million annually—of our criminal cases are entirely disposed of by justices in

(*infra*, p. 435) his summary jurisdiction. The term "Session" does not itself involve any idea of plurality. For every Recorder, though sitting alone, is said to hold a Session; and an alderman of the City of London, though sitting alone, can constitute a petty sessional court (52 and 53 Vict. c. 63, s. 13 (12)), and therefore, *a fortiori*, a petty session. Some writers, who require two justices, seem to suppose a court of petty sessions to be identical with a petty sessional court; but two justices, if sitting in an "occasional" court-house, would admittedly constitute the former, yet would not constitute the latter. In two modern Irish statutes (6 and 7 Wm. IV. c. 34, ss. 2, 7, and 14 and 15 Vict. c. 92, s. 1) a *single* justice is spoken of as constituting a Petty Session.

[1] See p. 479. In April 1925 there were 669 women magistrates in the counties of England and Wales, and 405 in the boroughs. There are in all about 25,000 justices; sitting for 85 "counties" (in 750 petty sessional divisions) and 227 boroughs.

[2] For now the Crown may, on the petition of any borough, grant it a separate commission of the peace. But the persons appointed to act as justices under this are not thereby authorised to act in any Quarter Sessions.

[3] Lord Brougham. [4] Troup's *Home Office*, p. 79.

their Petty Sessions; and the remainder are usually commenced before them. General consent, corroborated by statistical evidence[1], testifies that in these matters—where, as there is no jury, the questions for the bench to decide are far oftener of fact than of law, and where no punishment of great severity can be imposed—the justices discharge their duties with conspicuous success.

In exercising some of their many functions they do not constitute a court of law (although they may have to sit in public, and to take evidence and act on it); as in some of their licensing duties[2]. In others, although they do constitute a court, it is not one of summary jurisdiction; as when conducting a merely preliminary examination into some grave charge, which they will send to be tried by a jury[3]. And even when sitting as a court of summary jurisdiction, to try a charge and adjudicate upon it finally, they do not always constitute a "Petty Sessional Court"; as when sitting in a building which they only occasionally use[4].

By the Children Act, 1908 (8 Edw. VII, c. 67, s. 111), a court of summary jurisdiction, when dealing with any case that concerns a person under sixteen, with no adult co-defendant, is called a "Juvenile Court." It (*a*) must sit either in a different room, or else at a different time, from its ordinary one; and (*b*) must exclude all persons, except those directly concerned in the proceedings and the newspaper reporters[5].

[1] *Infra*, p. 443, n. 5. Gneist, the most authoritative of all foreign critics of our institutions, pronounces English justices of the peace to exhibit "den Charakter des Richteramts in seiner besten Gestalt."

[2] For the decision in *Boulter* v. *Justices of Kent* (L. R. [1897] A. C. at pp. 563, 573) narrows the wide definition of "court of summary jurisdiction" given in the Interpretation Act, 1889. When sitting thus (*i.e.* not "judicially" but "administratively"), they may act on *unsworn* testimony or on their own knowledge.

[3] *Infra*, p. 452. [4] *Infra*, p. 435. Yet they still are a "Petty *Session*."

[5] In 1923 these courts tried 28,769 juveniles; the "children" being about as numerous as the "young persons." Less than five per cent. were girls. Nearly nine-tenths were found guilty; but of these only about a half were actually punished (chiefly by Fines), and about a fourteenth were put under Probation. Even when the charge is proved, the Act forbids a conviction to be recorded.

CHAPTER XXIX

SUMMARY PROCEDURE

THE summary jurisdiction of justices of the peace is the creation of statutes. Parliament has thus immeasurably extended the common-law powers of justices, whilst at the same time reducing to a minimum[1] their legal responsibility; and the steady tendency of modern legislation is towards giving enhanced importance to these courts of summary jurisdiction. It is advisable, therefore, to consider their procedure somewhat fully.

This summary jurisdiction is not exclusively criminal, but extends also to a few civil cases. It may in some matters be exercised (though even in them only to a limited extent) by a single justice; but in most it is necessary to have either two ordinary justices[2] or a Stipendiary magistrate or a Metropolitan Police magistrate[3]. It is always subjected to a stringent limitation of Time; for the proceedings must be begun within the six months following "the time when the matter arose[4]." And for its exercise a prescribed Place of meeting is now made essential, in order to secure ready access for the public. Two classes of such places are recognised.

[1] See now 11 and 12 Vict. c. 44.

[2] If several justices sit, the majority decide; the Chairman has no casting vote. Accordingly if the votes be equal, the matter must either drop in order to be renewed before a different Court, or else one justice must withdraw his vote—perhaps the junior, or one whose vote is opposed to that of the Chairman.

[3] The latter two classes of magistrates must be barristers of several years' standing; each accordingly is empowered to exercise all the power that a fully petty-sessional court of two justices would possess. "Stipendiaries" are appointed in some provincial towns; if one sits with other justices, he has only a single vote. But a "Metropolitan Police magistrate"—there are twenty-five such, sitting at fourteen courts—is the sole judge, even though other justices be on the bench with him.

[4] 11 and 12 Vict. c. 43, s. 11. Exceptions are most rare. Cf. p. 416 n. *supra*.

(1) The habitual place of meeting of the justices of the locality—their "petty sessional court-house[1]." *Two* justices, by sitting here, constitute themselves a "Petty Sessional Court"; and such a court alone can exercise the summary jurisdiction to the full. For a single justice, wherever sitting, can only hear certain classes[2] of cases; and even in them he can pass only a limited sentence—an imprisonment of not more than fourteen days, or a fine of (including costs) not more than twenty shillings[3].

(2) In counties, even the area of a single petty sessional division may be so wide as to make it convenient to provide in it subsidiary places of meeting for use in case of emergency. Such a place is called an "occasional court-house[4]." When sitting in it, even a bench of two or more justices can inflict no greater sentence than that which a single justice could; though they are not limited to his range of cases[5].

Justices can compel the attendance of any witness in any case before them (alike in their summary jurisdiction[6], both civil and criminal, and also in their preliminary hearings of indictable offences), by issuing a summons to him to come[7], or even, in case of need, a warrant to bring him. The hearing of any matter within the summary jurisdiction is commenced by stating to the defendant the substance of the information or complaint[8]. If he denies its truth, the case proceeds. The prosecutor, or complainant, opens his case by a speech; and

[1] As to "Juvenile Courts," see p. 433 *infra*.

[2] *E.g.*, "Found drunk" in a public place; Vagrancy offences.

[3] 42 and 43 Vict. c. 49, ss. 20 (7), 20 (9), 49.

[4] *Ibid.* s. 20 (4).

[5] s. 20 (7).

[6] 11 and 12 Vict. c. 43, s. 7.

[7] Or to produce documents or things; 4 and 5 Geo. V. c. 58, s. 29.

[8] The "information" (or, similarly, the "complaint") is at once the foundation of the justices' jurisdiction and the definition of the charge (*Reg.* v. *Hughes*, L. R. 4 Q. B. D. 614); it is in the nature of an indictment. (The summons or warrant is, on the other hand, a mere process to secure the defendant's presence; and consequently its absence or its illegality does not

then calls his witnesses, who are examined in chief, cross-examined, and re-examined. The defendant may then similarly open his case, and his witnesses are similarly heard. The other party may then, if necessary, call rebutting evidence. But neither side has (as at trials before a jury) any right to make a second speech; unless some point of law arises. The decision of the justices is then given. If it be against the defendant, they have power, both in civil and in criminal cases, to adjudge him to pay to his opponent such costs as they shall think fit. If, on the other hand, they dismiss the case, they can similarly direct costs to be paid to the defendant; or by him, if the charge was (see p. 438) proved.

The summary jurisdiction of Petty Sessions covers, as we have said, both civil and criminal cases.

(1) The civil jurisdiction is the less important. Amongst the matters coming within it are bastardy[1] proceedings; disputes between employers and workmen; matrimonial separations; claims for District rates, or for contributions due under Public Health Acts from the owners of house property, for making streets or repairing sewers, (contributions which are sometimes of large amount[2]). These civil proceedings are commenced by a "complaint." It is never made on oath, and

affect the jurisdiction of the court, so long as he is in fact present before it to answer to the accusation.) But the charge so defined need not be adhered to with such strictness as an indictment is. For, as Lord Russell said, the hearing is not "of," but only "based on" the information. By 11 and 12 Vict. c. 43, ss. 1, 9 the justices may disregard any small variance between the information (or complaint) and the evidence adduced in support of it, and give judgment against the defendant accordingly; unless he has been so far misled by the variance that it is right to adjourn the proceedings to enable him to meet the charge in the shape it has now assumed. (But they are not authorised actually to "amend" the summons or information or complaint, as is so often done, in order to fit it to the unexpected evidence that is thus given.) This provision, however, only applies to variances in the mere circumstances of the charge; not to evidence which discloses some charge legally different from that alleged in the information or complaint, even though the difference be only that between being "drunk and riotous" and being "drunk"; *Martin* v. *Pridgeon*, 1 E. and E. 778.

[1] In 1927 there were 7988 applications for affiliation orders; 6570 of which were successful. As to orders for Adoption, see p. 545 *infra*.

[2] *E.g.* £546 from one estate; *Corbett* v. *Badger*, L. R. [1901] 2 K. B. 278.

need not be made in writing[1]. Only a summons can in the first instance be issued; though, should the defendant fail to appear in obedience to the summons, a warrant for his arrest may then be issued, if the complainant substantiates his claim upon oath[2]. As in all other civil proceedings, the defendant can be compelled to give evidence on oath. If the case be decided in favour of the plaintiff, it can only produce an order to pay money, which creates a mere "civil debt." Hence payment of it cannot be enforced by imprisonment; except in case of wilful non-payment[3] when the defendant has it in his power to pay; and even then it is only a civil and not a criminal imprisonment.

(2) But in criminal cases the summary jurisdiction covers some hundreds of offences; *e.g.* many petty forms of dishonesty or of malicious damage, acts of cruelty to animals, transgressions against the bye-laws that secure order in streets and highways, and violations of the laws relating to game, intoxicating liquors, adulteration of food, revenue, public health, and education[4]. The proceedings commence with an "information," which (unlike a "complaint") must usually be in writing[5]; and may (though it need not) be on oath. If it be on oath a warrant may, even in the first instance, be issued for the arrest of the defendant[6]. If it be not on oath, only a summons can be issued in the first instance[7]; though if the defendant fails to appear in answer to the summons, a

[1] 11 and 12 Vict. c. 43, s. 8.

[2] *Ibid.* s. 2.

[3] Or, in the case of a bastardy order (42 and 43 Vict. c. 49, s. 54).

[4] Occasionally a severe pecuniary penalty is possible; *e.g.* that for keeping a gaming-house may amount to £500 (17 and 18 Vict. c. 38, s. 4); and so may that upon a railway company which provides any special facilities for conveyance to a prize fight (31 and 32 Vict. c. 119, s. 21). In 1921 fines of £2000 and £2500 were inflicted at Old Street police-court on smugglers.

[5] You "lay" an Information, but "make" a Complaint.

[6] 11 and 12 Vict. c. 43, s. 2.

[7] For the comparative statistics see p. 452 *infra*. In London police courts, it is the courteous practice that defendants who appear on a summons stand outside the "dock"; and only those who have been arrested have the humiliation of going inside it.

warrant can then be issued[1]. At the hearing, as the proceedings are criminal, the defendant cannot be compelled to give evidence; though since the Act of 1898 (*supra*, p. 407) he now can do so if he desires. If the hearing results in a conviction the sentence may impose imprisonment (which can only very rarely exceed six months) or a fine; and payment of the fine is enforceable by (criminal) imprisonment[2]. The justices are invested in these criminal cases with a remarkable statutory power of shewing mercy[3]. For if, though the charge is proved, they think it unwise[4] actually to punish, they may discharge the offender on his giving security to be of good behaviour and appear when called on; or they may even, in spite of the charge being proved, dismiss it altogether. But, in taking either course, they may, if they like, order the defendant to pay to the prosecutor, as damages, any sum up to ten pounds[5] (cf. p. 95 *supra*), and to pay costs.

The summary criminal jurisdiction was originally concerned only with non-indictable offences; but it has since been extended to some exceptional cases of indictable ones. Some of these are misdemeanors. Thus, as already mentioned[6],

[1] By the common law anyone accused of crime must appear in person at the bar of the criminal court. But, by statute, courts of summary jurisdiction, as the offences are trivial, may try an offender in his absence, except in London (11 and 12 Vict. c. 43, s. 13). Thus if a defendant who has been served with a summons does not appear at the appointed time, the justices may either issue a warrant to bring him up, or they may instead proceed to hear and determine the case without him.

[2] But without *hard* labour; Criminal Justice Administration Act, 1914, s. 16 (1). A convicted "juvenile adult" (*infra*, p. 509) may be sent on to Quarter Sessions to be *there* sent to a Borstal institution.

[3] And they exercise it in some twelve per cent. of their cases; indeed in about forty per cent. of those *indictable* offences that they determine summarily.

[4] *E.g.* from the character, antecedents, age, health, or mental state of the offender; or from the triviality of his offence, or the extenuating circumstances.

[5] 7 Edw. VII. c. 17, s. 1 (3). Even now "it would be well"—as Lord Brampton said long ago— "if justices oftener bore in mind this power of awarding damages."

[6] *Supra*, p. 160. As to magisterial Orders for matrimonial separation after an *aggravated* assault, see p. 161 *supra*.

assaults (when not so grave as to be of a felonious character[1]) may be thus tried, provided that the person assaulted be himself the prosecutor. And, by consent of the accused, charges of libel when brought against the publishers of a *newspaper*[2] may also be tried summarily. And even some cases of felony may be thus tried.

By the Summary Jurisdiction Acts, 1879 and 1899[3], power has been given to Petty Sessional Courts to deal summarily with three large classes of offenders, whom previously they could only have committed for trial by a jury, in a higher court. The power is only to be exercised if, during an examination for such commitment, the justices "become satisfied by the evidence that it is expedient to deal with the case summarily." The expediency will, of course, depend both upon the circumstances of the particular case and also upon the antecedents of the person accused. But even when the justices desire thus to try an offender summarily, his own consent[4]—or, if he be a child under twelve, the consent of his parent or guardian—will also be necessary to waive his common-law right of being tried by a jury. The three classes who may thus be dealt with are the following:

(i) "Children" under fourteen, when charged with any indictable offence whatever, except homicide. But the punishment must not exceed one month's "detention" or a fine of forty shillings, with or without a whipping; and a whipping may be ordered alone[5].

[1] 24 and 25 Vict. c. 100, ss. 39, etc. And when not charged as an "affray" *i.e.* fighting in a public place, so as to cause general affright.

[2] 44 and 45 Vict. c. 60, s. 5. But the libel must be of only a trivial character, and the only punishment that can be inflicted is a fine (which must not exceed £50). See also p. 471, n. 2, *infra*.

[3] And *now* the Criminal Justice Act, 1925, s. 24. Six-sevenths of all the trials for indictable offences take place thus.

[4] Such consent is usually given readily; in order to avoid the risk of imprisonment whilst awaiting trial, and of receiving a severer sentence than it is possible for the Petty Sessions to inflict.

[5] 42 and 43 Vict. c. 49, s. 10 (1). The whipping will be with a birch rod, and not more than six strokes. Even in cases of Felony, the child may be merely fined; 4 and 5 Geo. V. c. 58, s. 15 (3). No whipping for girls.

(ii) "Young persons," from fourteen until sixteen years of age[1], when charged with any indictable offence whatever, except homicide. The limit of punishment is, however, extended to three months' imprisonment, with or without hard labour (but only if too unruly or depraved for mere "detention"); or, instead, to a fine of £10.

(iii) Adults (*i.e.* those who have reached sixteen) only when charged with certain particular offences[2] (Criminal Justice Act, 1925, s. 24 and Sch. II.); the chief ones being:

Simple larceny, thefts punishable like larceny, stealing from the person, stealing fixtures, stealing electricity, stealing by lodgers, stealing in a port or dock, stealing trees or shrubs in private grounds, stealing by a clerk or servant; embezzlement, obtaining by false pretences, obtaining credit by fraud, receiving stolen goods, falsification of accounts; arson of crops, malicious damage (even when over £5); false statutory declarations; assaults occasioning actual bodily harm, inflicting grievous bodily harm, indecent assaults on persons under sixteen, attempts at suicide; procuring, abetting, or inciting to, any offence which can be dealt with summarily.

But the punishment must not exceed six months with hard labour, or a fine of £100, or both. And for merely inciting to commit an offence punishable summarily the maximum punishment must be no greater than for actually committing that offence.

By a converse innovation, the Summary Jurisdiction Act, 1879, has made it possible for the graver of the non-indictable offences to be dealt with, instead, by indictment. For it enacts

[1] See 8 Edw. VII. c. 67, s. 128 (1).

[2] The additions made to the list of these offences by the Act of 1925 begin to take effect on June 1st, 1926. It might be well if, when an adult accused of *any* small indictable offence admits it, justices were authorised to record the admission and send him to the higher court for sentence only, instead of trial (cf. III. on p. 327); thus saving the witnesses from having to attend that court.

(s. 3) that any offence (except assault) for which, on summary conviction, a sentence of imprisonment for more than three months can be imposed, shall be dealt with by indictment if at the hearing, before the charge has been gone into, the defendant claims to be tried by a jury[1].

When dealing summarily with indictable offences the justices may now, by 8 Edw. VII. c. 15, s. 6, order the convicted defendant to pay the costs of the prosecution. Their consecutive sentences, for his two or more *indictable* offences, must not exceed in the aggregate twelve (for *un*indictable, six) months; C. J. A. Act, 1914, s. 18.

The same Act provides (s. 13) that no sentence of imprisonment passed on a *summary* conviction (whether for an indictable or a non-indictable offence) shall be for less than five days. For four days or less, "detention" in police custody may be ordered.

An important restriction upon *all* exercise of summary jurisdiction by justices must be noticed. In consequence of the difficulties of the English law of land, they have immemorially been debarred from dealing with any question which involves the decision of a *bonâ fide* and legally possible claim to real property or to some right therein. Hence if a riotous crowd pull down the fences enclosing a gentleman's estate, which they reasonably, even though erroneously, believe to be common land, the justices cannot try them.

The practical importance of the various powers of justices is vividly shewn by our criminal statistics. Thus, in 1926, in addition to all the civil cases and to several thousand merely "quasi-criminal" ones, which they determined, they decided summarily no fewer than 617,823 charges of petty offences[2], as well as 56,275 charges of indictable offences

[1] Accordingly, when any person appears before justices upon a charge of any such offence, they must—before taking any evidence—inform him of his right to be tried by a jury (42 and 43 Vict. c. 49, s. 17 (2)). Fewer than forty a year exercise the right—a tribute to the public confidence in Petty Sessions.

[2] Such charges are proved in about eight cases out of every nine. Of the petty offences proved, only about a thirtieth end in Imprisonment.

against persons who elected to be tried summarily; besides committing 7136 persons for trial before a jury[1].

Appeals from Petty Sessions

There are, as we have already seen (pp. 427, 431), two tribunals by which the summary proceedings of justices may be reviewed; the King's Bench Division and the Quarter Sessions.

(1) The control of the King's Bench Division is exercised in two ways:

(*a*) It may issue a writ of *certiorari* to bring up a conviction, and quash it, if necessary, for some defect of law which vitiates it; *e.g.* if the justices have convicted on an "information" that was not laid within the six months[2].

(*b*) It may determine any case which justices have themselves stated for its decision, as to any point of law that has been determined by them[3] (whether apparent on the face of the proceedings, or not); *e.g.* where they have overruled a defendant's objection that the evidence against him was not

[1] A further and a noteworthy (though not a strictly official) service rendered by these courts in London (and sometimes elsewhere) is that of giving advice *in camerâ* to the poor in their difficulties. Sir James Vaughan, the late Chief Magistrate of the Metropolis, says: "To our courts the poor resort with confidence; they come and lay before us their own various troubles and difficulties, and cases of oppression which they have met with; and they ask our advice. The confidence thus engendered amongst the people of a district is such that very many wrongs are redressed without issuing any summons at all, simply by the magistrate's sending a message by a constable to the party complained about." A French eyewitness of these consultations found "quelque chose de frappant à voir la confiance qu'ont les malheureux dans la bonté des magistrats. C'est pourquoi la justice reste toujours populaire." (Franqueville, *Syst. Jud. G.-B.* II. 326.)

Continental observers are moreover surprised to find in every London police-court, and in many provincial ones, both a Poor-box and a Police-court Missionary. In fully four hundred courts of Petty Sessions there are now such Missionaries, male or female—working with a success universally recognised.

[2] *Supra*, p. 434. This Division may also intervene to compel justices to perform duties devolving upon them; *e.g.* by granting a Mandamus, or rule, requiring them to issue a summons or to hear and determine a charge.

[3] 20 and 21 Vict. c. 43, s. 2; 42 and 43 Vict. c. 49, s. 33.

legally sufficient to support a conviction. They may state such a case at the instance of either party; not like appeals from trials before juries, which can only be (p. 425 *supra*) at the instance of the defendant[1].

(2) The appellate jurisdiction of Quarter Sessions is not, like that of the King's Bench, coextensive with the whole range of the summary jurisdiction of justices. It arose first in the case of particular offences to which it was expressly attached by the respective statutes that prohibited them. And for most of the non-indictable offences such an appeal came to be thus allowed to the defendant; and occasionally even to the prosecutor. But, now, the Criminal Justice Administration Act, 1914, has made a general provision that any person aggrieved by any conviction of a court of summary jurisdiction, for any offence[2], may appeal to Quarter Sessions (unless in the lower court he admitted his guilt[3]). On the other hand, these appeals are not—like those to the King's Bench Division—limited to questions of law; for the Quarter Sessions hear the whole case over again[4] (even new witnesses, who were not heard at Petty Sessions, being admissible). The appeal is heard before the justices of the Quarter Sessions alone, without any jury[5].

[1] Even when justices have refused to state a case, the King's Bench Division may order them to do so (42 and 43 Vict. c. 49, s. 33).

[2] 4 and 5 Geo. V. c. 58, s. 37 (1). Even for an *indictable* offence; though previously no appeal was allowed in such cases. But there is no similar *general* right of appeal from Petty Sessions in civil cases.

[3] But, even after that admission, the Criminal Justice Act, 1925, s. 25, will (from June 1, 1926) allow him to appeal against his *sentence* (though not against his conviction). It also allows (s. 7) an appeal against a Probation Order. And by s. 20, on *all* these appeals, either party, if dissatisfied with the determination of a point of law, may apply to have a case stated, as in 1 (*b*).

[4] Accordingly it is not here, as in appeals in higher courts, for the appellant to shew that the decision of which he complains was wrong; but for the respondent to shew that it was right. Hence if the prosecutor does not appear, the Quarter Sessions will have to quash the conviction (*Reg.* v. *Purdey*, 5 B. and S. 909); and this even though the appellant does not dispute its validity, but only desires a lighter sentence.

[5] The number of cases in which any of these appeals are made, either to the King's Bench or to Quarter Sessions, is very small; the yearly average

being less than a hundred to the former, and (since the Act of 1914) about three hundred to the latter (in 1923 only 252); though the yearly total of summary convictions approaches 500,000. Appeals to the King's Bench average under a dozen by *certiorari* and under ninety by case stated; about half being unsuccessful. There is barely one appeal to Quarter Sessions for every thousand convictions. Doubtless considerations of expense have much to do with this; yet, even after allowing for them, these statistics, coupled with the further fact that less than half (in 1923 less than a third) of the appeals to Sessions are entirely successful, afford noteworthy evidence of the satisfactory working of our courts of summary jurisdiction. Further proof is given by the fact that it is rare now for a borough to ask for the creation of a stipendiary magistracy; and by the further fact that six-sevenths of the persons accused of indictable offences shew their confidence in Petty Sessions by asking to be tried there instead of before a jury. After close personal observation of our English police-courts, a learned French lawyer, the Comte de Franqueville, came to the conclusion that "il est difficile d'imaginer une organisation plus simple, plus pratique, plus prompte, ou plus humaine" (*Le Système judiciaire de la Grande-Bretagne*, II. 710). An advocate once prominent as a defender of prisoners says: "I had very great experience with country Benches. I am bound to say that, as a rule, very little fault could be found with the manner in which they did their work" (Montagu Williams' *Leaves of a Life*, II. 208). Lord Birkenhead said in 1921: "The work done in this country by justices of the peace is, on the whole, done most efficiently. The amount of care and attention given to their work by lay magistrates in this country is extraordinary."

CHAPTER XXX

ORDINARY PROCEDURE

I. Preliminary Steps

From the modern and purely statutory form of procedure which prevails in courts of summary jurisdiction, we now pass to the more ancient form which prevails in those courts where offenders are tried in the common-law manner, that is to say, by a jury. In this procedure—still styled "ordinary," though now far rarer than the summary—there are ten possible stages which call for explanation. These are:—1. Information; 2. Arrest; 3. Commitment for trial; 4. Prosecution, *i.e.* Accusation; 5. Arraignment; 6. Plea and issue; 7. Trial and verdict; 8. Judgment; 9. Reversal of judgment; 10. Reprieve or pardon.

During the greater portion of the history of English criminal law its provisions for the detection and arrest of offenders were[1], as we have said[2], very defective. In the earliest times, indeed, excellent provision had been made by the system of Frankpledge[3]. A frankpledge was a group of adult males—sometimes all those within a particular township, sometimes only a "tithing" or group of ten, selected individually—who were liable to amercement if they did not surrender to justice any one of their number who committed a crime (each individual in the group is sometimes also called a "frankpledge"). This institution apparently only existed south of the Humber; but probably arose there as far back as the Anglo-Saxon period. From at least the time of Henry I. a "view of frankpledge" was taken by the sheriff periodically, at which the above-mentioned amercements were collected. After the frankpledges fell into decay in the fourteenth

[1] "In 1800, in no department of English government was inefficiency so pronounced as in that of police"; W. L. M. Lee's *History of Police*, p. 214.
[2] *Supra*, pp. 29, 282.
[3] Pollock and Maitland, I. 568.

century, England possessed no effective machinery for arresting criminals or for preventing the commission of crime, until the creation, by Sir Robert Peel's energy, of the modern police force. Even in London, as is stated in the preamble to his Act of 1829, "the local establishments of nightly watch and nightly police were found inadequate to the prevention and detection of crime, by reason of the frequent unfitness of the individuals employed, the insufficiency of their number, the limited sphere of their authority, and their want of connection and co-operation with each other." But since the successive establishment of metropolitan, borough, and county police-forces[1], the detection of offenders is so efficient that in some fifty-five[2] per cent. of the known cases of indictable crime, a prosecution takes place; and some six-sevenths of these prosecutions succeed[3].

Rewards are no longer offered officially for information. They are now discredited as creative of false testimony and as impairing the weight of true.

1. *Information.*

Every justice of the peace has by his commission the duty of "conserving the peace" by taking active steps to exact securities from suspected persons, to suppress riots, and to apprehend offenders. These duties he still actively exercises (though the judges of the King's Bench Division, on whom also they are conferred, have long ceased to do so, regarding as more constitutional a differentiation of function which keeps the judicial office apart from all the strictly executive work of government).

Hence in ordinary procedure, just as in summary, the first step usually is to lay an "information" before a justice of the peace[1]. It may be laid by any person who is aware of the facts, whether or not he be the person aggrieved. It usually is not technically necessary that it should be in writing or be upon oath. But unless both these formalities are observed, the justice can only issue a summons to the accused to attend, instead of a warrant for his arrest.

[1] There are now some 60,000 constables; making 186 Forces.

[2] Before the Great War the proportion was as high as sixty-five; but now the number of policemen is diminished, whilst their time is largely diverted to non-criminal duties, *e.g.* with regard to street traffic and cattle-disease.

[3] "Forty years ago," said Sir C. Mathews in 1912, "it was an every-day occurrence for defendants' counsel, when there was no defence, to attack the credit of the policemen witnesses. To-day this practice has become almost obsolete."

2. *Arrest.*

Where there is good ground for supposing—as, for instance, from the gravity of the charge—that a mere summons would not suffice to secure the attendance of an accused person, he should be arrested[2], in order to bring him before a magistrate. On accusations of indictable offences, a warrant is sometimes obtained—only in about ten per cent. of the arrests for such crimes—in order to authorise the arrest. But the cases in which arrest is legally permissible, without any such special authorisation, are numerous (see p. 448 *infra*).

I. Special authorisation for arrest always takes in modern times the form of a written warrant[3]. This may be issued in cases of political crime by a Secretary of State or any other Privy Councillor; or, in any criminal case whatever, by a judge of the King's Bench Division or (as usually happens) by a justice of the peace[4]. It authorises the person executing

[1] *Supra*, p. 437. The justice may belong either to the district where the offence was committed or even (unlike Summary jurisdiction) to that where the offender is. Do not confuse such informations with the far rarer and more formal "informations" by officials of the Crown, which are a substitute for indictments; *infra*, p. 460.

[2] See Pollock and Maitland, *Hist. Eng. Law*, II. 582.

[3] In early times (Pollock and Maitland, II. 578) it was the duty of anyone who discovered that a grave crime had been committed to raise orally a "hue and cry" (*hue* is an exclamation of pursuit, akin to *hoot*). This gave to all taking part in it the same powers of arrest as a written warrant now-a-days would.

[4] If issued by an ordinary justice of the peace, it formerly could only be executed within the district to which his commission extended; though it could be executed in any other district as soon as it had been "backed" by any justice commissioned there. But now, by the Criminal Justice Act, 1925, s. 31 (3), any warrant lawfully issued by a justice to compel the

it to arrest the person therein described[1]. When executing the warrant, he (by the Criminal Justice Act, 1925, s. 44) need not now have it with him. Since the charge is not a civil but a criminal one, he is allowed to break open even the outer doors of a house if he cannot otherwise seize the person who is to be arrested (*e.g.* if those in the house will not give him up). If the charge be one of treason, violent felony, or dangerous wounding, he may, moreover, use any degree of force that may be necessary to effect the arrest, or prevent the escape[2], of the accused; even to the infliction of wounds or death upon him. If, on the other hand, the accused should kill the arrestor he will be guilty of murder[3]. But if a constable attempts to arrest offenders illegally (*e.g.* on a void warrant) they will be guilty only of manslaughter if, in resisting such an arrest, they kill the constable.

II. Even when no warrant has been issued, the common law often permits an arrest to be effected; a permission accorded not only to a constable but even to private persons. The power has been further extended by modern statutes, especially in the case of constables.

(A) A private person, without any warrant, may arrest

appearance of a witness, or to apprehend a person charged with an offence (whether punishable on indictment or summarily) may be executed in any place in England or Wales, although outside the jurisdiction of that justice.

Whenever, in such a manner, a warrant is executed outside the district of the justice who issued it, the accused is usually taken back to be examined in that district. But it is permissible for him to be instead brought before some justice of the place of his arrest (11 and 12 Vict. c. 42, s. 11); though, even then, the trial at the Assizes or Sessions will usually take place in the district where the warrant was originally issued.

[1] The justice may endorse on it a direction to the police to admit to bail in sums specified; C. J. A. Act, 1914, s. 21 (1).

[2] For in *felonies* Flight is tantamount to Resistance. But if the warrant were only on a charge of *misdemeanor*, though it would equally be murder to kill the arrestor (Foster, p. 311), yet the arrestor would not be justified in killing the accused man merely to prevent his flight. Should, however, the misdemeanant actually resist arrest, the arrestor will be justified in counteracting this resistance by any necessary force, even fatal; *i.e.* he may, and must, stand his ground, instead of first trying to avoid a conflict in the manner that the law requires (*supra*, p. 107) in cases of Chance-medley.

(i) Any person who, *in his presence*, commits a treason or felony or dangerous wounding. The law does not merely permit, but requires, the citizen to do his best to arrest such a criminal[1]. And as he is thus acting not only by a right but under an imperative duty, he may break outer doors in pursuit of the criminal. And for a treason or a violent felony he may use whatever force is necessary for capturing the offender, as, for instance, shooting at him, if he cannot otherwise be prevented from escaping; so that if the felon's death results, the case will be one of justifiable homicide.

(ii) Any person whom he reasonably suspects[2] of having committed a treason or felony or dangerous wounding, provided[3] that this very[4] crime has been actually committed by some one (whether by the arrested person or not). But in this case, as also in all the statutory ones about to be mentioned, the law, though permitting a mere private person to make an arrest (and so making it murder for a guilty man to kill him by resisting it), does not command him to do so; and hence confers no *general* right to effect it by breaking into a house or by using blows or other violence[5].

(iii) In addition to these two common-law powers, modern statutes permit any private person to arrest anyone whom he "finds[6]" (*a*) signalling to a smuggling vessel[7]; or

[1] 2 Hawkins P. C. c. 12, s. 1. Besides this power to arrest, with a view to permanent detention, a person who actually has committed grave crime, every private citizen has also the right to prevent such crimes, by seizing any man who is *about to* commit a treason or felony or even a breach of the peace, and detaining him *temporarily*, until the danger is over.

[2] A felony *unknown* to him will not justify arrest; 3 C. & K. 149.

[3] This proviso is mentioned so early as Y. B. 9 Edw. IV. fo. 26 *b*.

[4] See an interesting case, *Walters* v. *Smith*, L. R. [1914] 1 K. B. 595. Though the mistake does not justify the arrest, it may defeat any action for malicious prosecution.

[5] *I.e.* the private person will be justified for arresting the suspected felon, even by fatal violence, if the suspicion be correct; but an *innocent* man is not bound to submit to a private arrestor, so a killing, by either of them, would be a Manslaughter.

[6] Accordingly, if the offender has completed the offence, even though he has gone "but a single yard" away before detection or even before apprehension, it is too late to arrest him.

[7] 39 and 40 Vict. c. 36, s. 190.

committing any offence under (β) the Vagrancy Act[1], (γ) the Larceny Act, 1916[2], or (δ) the Coinage Offences Act, 1861[3]; or (ε) committing *by night* any indictable offence whatever[4];

(iv) or, if the arrest be authorised by the owner of the property concerned, anyone whom he finds committing any offence against (α) the Malicious Damage Act, 1861[5], (β) the Night Poaching Act[6], (γ) the Town Police Act[7], or (δ) the Metropolitan Police Acts[8].

(B) A police constable, even when acting without a warrant, has powers still more extensive than those of a private person. Moreover, as his official position renders it in all these cases a duty[9] for him to make the arrest, it will, in any of them, be a duty, even for an innocent person, to submit to him and not resist arrest[10]. He is entitled to call for the assistance of any able-bodied bystander, if necessary; L. R. 1 C. C. R. 20.

(i) Like a private person he may arrest anyone who commits, in his presence, a treason, or felony, or dangerous wounding; and may break doors or use fatal violence if necessary[11].

(ii) (Unlike a private person[12]) he probably may arrest, for *permanent* detention, anyone who, in his presence, commits even a mere breach of the peace[13].

[1] 5 Geo. IV. c. 83, s. 6, *supra*, p. 324.

[2] Sec. 41 (1) (except extortion by libelling). Or any one offering stolen goods for sale or pawn; s. 41 (2).

[3] 24 and 25 Vict. c. 99, s. 1.

[4] 14 and 15 Vict. c. 19, s. 11.

[5] 24 and 25 Vict. c. 97, s. 61.

[6] 9 Geo. IV. c. 69; s. 2.

[7] 10 and 11 Vict. c. 89, s. 15.

[8] 2 and 3 Vict. c. 47, s. 66, and c. 71.

[9] But for him to assist a householder in ejecting an intruder, though a kindly act, is no part of his duty; for a mere trespass is no crime. Hence if the intruder resist him, it will be only a common assault, not an assault "on a constable in the execution of his duty."

[10] But as to *needless* handcuffing, see p. 155 n. *supra*. And until the arrested person has been actually charged, his finger-prints cannot be taken without his consent.

[11] Yet in firing at an escaping felon, he will do well to send his first shot into the air and to aim his second one low.

[12] *Supra*, p. 449 n. 1.

[13] 1 Hale P. C. 587; 2 Hale P. C. 90. But see East P. C. c. 5, s. 71.

(iii) He may arrest anyone whom he reasonably suspects[1] of treason, or felony, or dangerous wounding, whether (unlike the restriction on such arrest by a private person) the crime has *actually* taken place or not[2]; *e.g.* because he finds a man hurrying away and carrying housebreaking tools. It would seem that in these arrests also he may use any necessary violence even though fatal[3], and may break outer doors; but some authorities limit these powers to cases where the crime has actually taken place[4].

(iv) Like a private person, he may arrest in the five cases in (A) (iii).

(v) And, even *without* any authorisation of the owner of the property, in the four cases enumerated under (A) (iv).

(vi) He may arrest any person loitering at night in a highway or yard, whom he reasonably suspects of having committed, or even of being about to commit, a felony against the Larceny Act, 1916, the Malicious Damage Act, 1861, or the Offences against the Person Act, 1861[5].

(vii) In *London*[6] a constable may also arrest (α) any person reasonably suspected of having committed, or even about to

[1] A constable at Queenstown had more than fifty times questioned and arrested persons, when about to sail for America, "purely on suspicion, without any information," yet had not once been mistaken; C. C. C. Sess. Pap. CXLVII. 103.

[2] *Lawrence* v. *Hedger*, 3 Taunton 13; *Beckwith* v. *Philby*, 6 B. and C. 635. These cases shew that the constable's privilege, where the supposed crime has not in fact taken place, extends to cases where he acts merely on his own suspicion, without any third person having made the charge. As to its being murder for the supposed felon to kill the constable, even where no felony has actually taken place, see *Rex* v. *Woolmer*, 1 Moody 334.

[3] This power to use violence in arresting felons extends also to the preventing of their escape. Hence convicted prisoners who are felons can, under armed supervision, be employed over a wide range of land (as at Dartmoor) in out-door labour; a coveted advantage not so open to misdemeanants, for the risk of their successful flight would be great.

[4] See the Children Act, 1908, s. 19, for a constable's power to arrest persons reasonably suspected of offences involving bodily injury or other cruelty to a person *under sixteen*.

[5] Ss. 41 (3), 57, and 66 of these Acts.

[6] 2 and 3 Vict. c. 47, s. 64.

commit, *any* indictable offence; and even (β) anyone loitering at night who cannot give a satisfactory account of himself.

As a person who arrests another without waiting to obtain a warrant usually does so because he must act instantly, if he is to act at all, the law on the subject ought to be clear and simple. But as the foregoing summary sufficiently shews, modern legislation has rendered it highly complicated, and (to use the words of a very learned writer) "most unsatisfactory and—to private persons—almost a snare[1]."

3. *Commitment for Trial*[2].

Of the persons who appear before justices of the peace, for preliminary examination upon charges of indictable crime, about thirty per cent. come in mere obedience to a summons[3]. The others are brought up in custody; say, about ten per cent. under warrants, and about ninety per cent. after being arrested without a warrant[4].

As the summons or warrant is merely a process to secure appearance, the justice must take cognizance of *any* information laid against the defendant when before him (even upon an illegal arrest), and may commit him for trial thereon[5].

A preliminary examination (unlike most of the summary hearings) never requires the presence of more than a single justice[6]. There is full power of compelling the attendance of witnesses[7], either by summons or (if necessary) by warrant;

[1] Mr C. S. Greaves, Q.C.; *Criminal Law Consolidation Acts* (p. 188).

[2] Study in detail ss. 12, 13, 14 of the Criminal Justice Act, 1925.

[3] But of persons tried for non-indictable offences, near eighty per cent. appear on mere summons, about twenty per cent. on arrest without warrant, and only two per cent. under warrants.

[4] A person arrested without a warrant may be—and, if it is impracticable to bring him before a justice within twenty-four hours, *must* be—released on bail by the officer in charge of the police station, unless he thinks the offence serious; Criminal Justice Act, 1925, s. 45.

[5] *Rex* v. *Hughes*, L. R. 4 Q. B. D. 616.

[6] And even if there be two or more they are not a "Petty Sessional Court"; since *it* sits only for summary jurisdiction. The six months limit (p. 434) does not apply to these Examinations.

[7] And production of documents, etc. Cf. p. 435 n. 7, *supra*. But until an actual prosecution has begun, a justice has no power to summon any one to come and afford information. The police have to pursue their inquiries as best they can.

and if, on appearing, they refuse to give evidence, the justice may commit them to prison for a week or until earlier submission. At common law the accused could not, as a right, demand the assistance of an advocate, nor could the public insist upon admission[1]. And it would seem[2] that this rule still holds good, in spite of the wide general language in which recent statutes[3] have required justices to act "in open court"; which, however, must be interpreted as restricted to cases of summary jurisdiction alone. The practice, followed in some rare cases, of communicating only in writing the names and addresses of particular witnesses, and forbidding the accused to put any questions about them openly, is justifiable only in this view of the proceedings as not being necessarily public.

It must be noted that at these preliminary inquiries the presence of the accused is absolutely essential[4].

The preliminary examination is conducted as follows. The prosecutor "opens his case" by any necessary explanation. Then his witnesses are examined in chief, cross-examined, and re-examined; their evidence being taken down in writing at the time by the clerk to the justices. The Crown witnesses having been heard, and their evidence summed up[5] by the prosecutor (if he wishes), the examining justice (or his clerk for him) then reads the charge to the accused, explaining its nature. He then asks him if he has anything to say; telling him he need not say anything unless he likes, and has nothing to hope or fear from any promise or threat, and that

[1] Cf. 11 and 12 Vict. c. 42, s. 19.

[2] *Boulter* v. *Justices of Kent*, L. R. [1897] A. C. 556. A contrary view was at one time taken by the law officers of the Crown.

[3] *E.g.* 42 and 43 Vict. c. 49, s. 20 (1); 52 and 53 Vict. c. 63, s. 13 (11).

[4] 11 and 12 Vict. c. 42, s. 17. Contrast the power given to justices in their summary proceedings to try a defendant in his absence for petty offences, if he fails to appear when summoned; *supra*, p. 438 n. 1.

[5] Oke's *Magisterial Synopsis*, p. 887 (contrast p. 436 *supra*). Any adjournment of the proceedings must be for not more than eight clear days; unless both prosecutor and accused consent to a longer one. Contrast summary proceedings; there there is no such limit of time.

whatever he says will be taken down and may be used at his trial[1]. He also asks whether he wishes to be sworn and give evidence; and whether he wishes to call witnesses. The defendant may either remain silent (a frequent course, but for an *innocent* man a most unwise one[2]); or leave it to his advocate to make a statement, or himself make one. If he do make a statement it is taken down in writing and afterwards read over to him and signed by one of the examining justices. After this, the prisoner's witnesses[3], if any, are examined, cross-examined, and re-examined; and their evidence is taken down in writing. The "deposition" of each witness, on either side, is read over, to him and the accused, at (by the Act of 1925) the end of *his* examination; and is signed by him and by the justice[4]. Even if the accused call witnesses, the prosecutor's advocate has no second speech.

The examining justice (or, if there be more than one, the majority) must then determine (1) whether or not there is a strong enough case to justify committing the accused for trial[5]; and (2) if so, where that trial is to be. If the offence is

[1] The old final words "against you" are omitted. But it is only *against* him that this statement is evidence; so it is for the Crown to determine whether or not to put it in at the trial. But it is usual to put it in. It is prudent to do so, for it may become important to the Crown as contradicting evidence given subsequently for the prisoner; and also kind, for to make prisoner put it in would give the Crown the final speech. What the prisoner said before the magistrates is not evidence unless the prosecutor make it so; but if he do, it then becomes evidence for the prisoner as well as against him, *i.e. all* parts of it are evidence.

[2] "The sooner an innocent man discloses his defence, the better for him"; Lord Alverstone, L.C.J. "It is astounding that solicitors should expose innocent clients to such risk as is involved in reserving the defence"; Low, J. See also Wills, J., in 67 J. P. 396.

[3] By the Criminal Justice Act, 1925, s. 12 (5), the prisoner's solicitor or counsel speaks (*a*) *before* him and his witnesses, should he call any; but (*b*) *after* prisoner's own evidence (if any) should he call no witnesses.

[4] In a case at the C. C. C. in November 1922 (*Rex* v. *Bevan*) the depositions filled 320 pages.

[5] If they dismiss the charge, this does not bar a subsequent accusation before some other justice. Should they think the charge not merely groundless but malicious, the Costs Act, 1908, empowers them to make the prosecutor pay costs.

one which Quarter Sessions are competent to try[1], the case must be sent thither[2], unless there are special reasons for preferring a trial at the Assizes[3]. Again, (3) if the accused ask to be released on bail[4] the court must determine whether this is to be allowed, and, if it be, on what terms. In cases of treason, however, bail cannot be granted by a justice, but only by a Secretary of State or a judge of the King's Bench Division. But in cases of felony the matter is in the justice's discretion. In misdemeanors he had not, at common law, even a discretion (when once the preliminary examination was over), but was bound[5] to release the accused on his finding adequate bail[6]. But, by statute[7], he obtained a discretion in those grave misdemeanors for which the costs of prosecution may be charged on the county. As the Act of 1908 (*infra*, p. 494) renders all misdemeanors so chargeable[8], the discretion seems to be now equally universal[9].

The Bill of Rights forbids the requiring of "excessive" bail; but justices must use their own judgment as to what

[1] *Supra*, p. 430.

[2] Assizes Relief Act, 1889 (52 and 53 Vict. c. 12). "The mere fact that the Assizes come before the Sessions is not a sufficient 'special reason'"; Avory, J. (June 1925).

[3] The Criminal Justice Act, 1925 (s. 14) provides that, instead of being committed to the Assizes or Quarter Sessions of the normal locality, he may be sent to the like court of another locality, for greater convenience either in time or in place, or for greater economy.

[4] This word means properly (1) the contract whereby the man is "bailed" (*i.e.* delivered) to his surety, but is also applied to (2) that surety himself. Either the justice or the surety may be spoken of as "bailing" the man. Such sureties were vividly described in the thirteenth century as "a living prison" (Pollock and Maitland, II. 589). Even now-a-days the surety, if he should desire to discharge himself, is allowed to arrest the defendant (and even to break into his house for the purpose) that he may give him back again into the custody of the court by which he was bailed.

[5] The current but anomalous view that the K. B. D. judges are *still* so bound was negatived in *Rex* v. *Phillips*, 38 T. L. R. 897.

[6] *Supra*, p. 96.

[7] 11 and 12 Vict. c. 42, s. 23.

[8] Except mere quasi-criminal ones as to roads and bridges.

[9] By C. J. A. Act, 1914, s. 23, justices who do not grant bail to a misdemeanant must tell him of his right to apply to the K. B. Division for it.

sum is adequate without being excessive[1]. Here, as also in exercising their discretion about admitting to bail at all, they have simply to consider what likelihood there is of the defendant's failing to appear for trial[2]. That likelihood will be affected by (1) the gravity of the charge[3]; (2) the cogency of the evidence; (3) the wealth of the offender (which renders him both more willing to bear the forfeiture of bail and less willing to bear the disgrace of a conviction); (4) whether the proposed sureties are independent or are likely to have been indemnified by the accused[4]; and (5) the probability of the accused tampering with the Crown's witnesses, if he be at large[5]. But experience shews that, on the whole, very few persons admitted to bail fail to appear for trial[6]. Hence of recent years the judges have urged[7] magistrates to grant bail very readily; and (especially if the offence is a small one and the day of trial is distant) to accept the recognizances of the accused himself, even without any sureties, unless they see grave reason to think that he will not appear for trial if left at large.

[1] In 1925 three London bankers, accused of fraudulent conversion, had to give bail in £10,000 each.

[2] The importance of release on bail was great even as late as the seventeenth century. There was no provision of adequate food for prisoners awaiting trial. Hence, 19 Car. 2, c. 4 recites that "they many times perish before their trial."

[3] Bail has occasionally been allowed even on charges of murder; as where the circumstances pointed to a verdict of justifiable homicide.

[4] *Reg.* v. *Butler*, 14 Cox 530. All arrangements, between a person bailed and his sureties, that if he abscond he shall indemnify them for the bail forfeited, are so contrary to public policy that they are void as agreements; and moreover are indictable as conspiracies to pervert the course of justice, even though no intention to pervert it be alleged (*Rex* v. *Porter*, L. R. [1910] 1 K. B. 369). But as to surety's *expenses*, see 16 C. B. 614.

[5] Hence bail is less readily granted during a preliminary inquiry, when the depositions have not yet been completed, than after its conclusion. During the preliminary inquiry a magistrate has power to remand the accused in custody for a period not exceeding eight days, by warrant; and for three days, by a verbal order (11 and 12 Vict. c. 42, s. 21).

[6] In 1927, of the 7242 persons committed for trial, only 4084 were sent to prison. Three-sevenths, 3158, thus were bailed; of whom only 29 absconded.

[7] The need of such injunctions is shewn by the fact that many persons sent to prison to await trial are ultimately acquitted; (yet not necessarily *innocent*, cf. p. 485 n. 5, *infra*).

It will further be the duty of the justices to transmit to the court where the trial is to take place the depositions of the witnesses and the prisoner's statement; of which we have already spoken[1]. The depositions are important for several purposes. (*a*) They enable the opposite party to check the evidence given at the trial, and to cross-examine or contradict a witness whose evidence there varies from that which he gave at the commitment. (*b*) They form a substitute[2] for the witness in the event of his being, at the time of the trial, either dead or too ill to travel[3] or to give evidence[4]. But his absence abroad does not suffice to render them admissible[5]. (*c*) They assist the draftsman who has to frame the indictment. (*d*) They enable the judge to learn the difficulties of the case before he charges the grand jury. And (*e*) they inform the defendant as to the precise case which he has to meet[6]. To him[7] this is obviously an advantage, and it is often an advantage to the public, for if the case thus disclosed be a strong one, the defendant is the more likely to plead guilty. It is, however, to be regretted that our law does not take some measures for securing a reciprocal disclosure of the intended defence. At present it is too easy for him to raise at

[1] Moreover, committing justices may now, by 3 Edw. VII. c. 38 (*infra*, p. 459), provide legal aid, at the public cost, for any *poor* prisoner whose defence is so complex that he needs legal aid.

[2] Being a legally-required official record they are the "best evidence" (*supra*, p. 366) of what passed at the committal; and cannot be altered by oral evidence. Indeed oral evidence is probably not admissible even merely to supplement their omissions, when they are used as "substantive evidence" (*i.e.* as a substitute for an absent witness); though it is when they are used to contradict a witness who does appear. C. C. C. Sess. P. XLVI. 915.

[3] 11 and 12 Vict. c. 42, s. 17. [4] *Reg.* v. *Wicker*, 18 Jur. 252.

[5] Except by consent, in cases of misdemeanor; perhaps. *Supra*, p. 397.

[6] Hence *he* has, after commitment, a statutory right to purchase copies of them at 1½*d.* per ninety words (11 and 12 Vict. c. 42, s. 27); before commitment 6*d.* is charged. But the witness has no such right; and indeed ought not to be supplied with a copy.

[7] As was said by Jessel, M.R., in *Benbow* v. *Low* (L. R. 16 Ch. D. 95): "If you give one party the opportunity of knowing the particulars of the evidence that is to be brought against him, you give a rogue an enormous advantage." Hence in civil proceedings, the defendant, though entitled to know the nature of the claim against him, is not entitled to know by what evidence it will be supported (*Lever* v. *A. N. Ltd.*, L. R. [1907] 2 K. B. 626).

the trial some speculative defence, which there is then no opportunity of contradicting, and to support it by witnesses about whom it is too late to make inquiries. The facility has become greater now that the prisoner himself is allowed to come forward as a witness.

The justice, having already bound over each witness (on signing his deposition) to appear at the trial, now binds over some one, usually a policeman, to prosecute, *i.e.* to prefer a bill of indictment before the grand jury. He may commit to prison anyone who refuses to be thus bound over to give evidence at the trial[1]. Witnesses and prosecutors are only bound over in their own recognizances; though defendants, as we have seen, are usually required to find one or two sureties also. "A recognizance," says Blackstone[2], "is an obligation of record, which a man enters into before some court of record, or magistrate duly authorised, with condition to do some particular act, as, to keep the peace." Although the magistrate's court is not a court of record, yet its records are, in this respect, on the same footing as those of the higher courts[3]. It is a contract not by parol nor by deed, but of record[4]; since, so soon as it is actually enrolled, the record of the court is conclusive evidence as to its existence and terms, and often is the only evidence of them. For the party bound need not sign anything (though in some courts he does); but may merely assent orally to the court's oral question. His assent consists in an admission of his owing to the Crown some specified sum of money to be payable unless a specified condition be fulfilled; *e.g.* unless he appear at the next Assizes. Unlike other contracts (which have to be sued upon) recognizances admit of direct enforcement. For, if the condition be not fulfilled, the recognizance may at once be "estreated"; *i.e.* an extract (Norman-French, *estrait*) shewing the terms of the obligation

[1] 11 and 12 Vict. c. 42, s. 20.
[2] 4 Bl. Comm. 341.
[3] See Brooke's Abridgement, tit. *Recognizance*; pl. 8.
[4] Anson on Contracts, part II. ch. IV.; Chitty on Contracts, ch. I. s. 2.

is copied from the court's record, and is sent to the clerk of the peace; who thereupon directs the sheriff to levy the amount upon the defendant's goods[1].

A useful innovation has been made by the Criminal Justice Act, 1925, s. 13, with regard to witnesses whose evidence seems likely to be unnecessary at the trial, either as being covered by the admissions of the accused or as being merely formal. They may be bound to attend the trial conditionally only; *i.e.* only if they receive from the prosecutor or the accused a notice to attend. Non-attendance will enable their depositions to be read, if notice has *not* been given; s. 13 (3) and (4).

Finally the court may, in fit cases, assign to the accused a solicitor and a right to a counsel, under the Poor Prisoners' Defence Act, 1903[2]. The solicitor will select the counsel.

[1] 3 Geo. IV. c. 46, s. 2. See *Reg.* v. *Smith*, 17 Cox 601, as to the difficulty of effectually binding an infant by recognizances, because of his incapacity to contract.

[2] 3 Edw. VII. c. 38. It authorises justices of the peace, upon committing a prisoner for trial, to certify that a solicitor and a counsel ought to be assigned to him, and the expenses of his defence defrayed out of public funds. Or a similar certificate may, instead, be given subsequently, at any time after reading the depositions, by a judge of the assize, or the chairman of the quarter-sessions, at which he is to be tried.

But this power is only to be exercised where (1) the prisoner has not "reserved his defence" (cf. p. 454) but has set up before the committing justices some defence which is of such a nature as to render it "desirable in the interests of justice" that he should have legal aid in preparing and conducting his defence, and at the same time (2) he is too poor to obtain such aid at his own expense. A complex alibi is, for instance, such a defence as calls for the application of the Act.

The chief value of the Act lies in its providing a solicitor; for it has long been the practice of the judges, if they find the prisoner to be undefended in any case of exceptional difficulty or gravity, to ask some counsel to undertake his defence. Since the Act, however, such a counsel usually receives a fee, under an order signed by the judge.

CHAPTER XXXI

ORDINARY PROCEDURE

II. From Accusation to Sentence

4. *Prosecution.*

The process of commitment by a justice of the peace which we have described, though in actual practice it is adopted in almost every instance, is not legally essential[1] for bringing an accused person to trial before a jury[2] (except in the few crimes to which the Vexatious Indictments Act[3] applies). All that is truly essential is some mode of "Prosecution," *i.e.* of formal accusation. Such an accusation may be made either (1) by a crown official's Information, or (2) by a jury's Presentment.

(1) An *Information* is a written complaint made on behalf of the Crown by one of its officers and filed in the King's Bench Division. Since such a mode of accusation dispenses with any accusing jury, and with any examination before a justice of the peace, it is only allowed in cases of misdemeanor. The Attorney-General has the right, *ex officio*, to file informations at his own discretion, but it has become practically obsolete[4]. The other official who can file them is the Master of the Crown Office; but he can only do it after obtaining an express permission from the King's Bench Division, and such permission is rarely asked for. It is never granted unless the misdemeanor is of a peculiarly pernicious character.

[1] Yet very important; for there is no legal machinery by which witnesses can be compelled to appear before the grand jury to support the accusation, if they have not been bound over by a committing justice to appear and to give evidence.

[2] Thus occasionally when a coroner's inquest has occupied an unusually protracted time, the magisterial inquiry is omitted; as in the case of Paine (*The Times*, Feb. 25, 1880), who was indicted for a remarkable manslaughter (by plying with intoxicating liquor) without being taken before a magistrate, the coroner's inquest having lasted five days.

[3] *Infra*, p. 471. [4] But in 1911 one was filed against Mylius for libelling the King; see p. 316 n., *supra*.

Thus informations are not to be filed for libels unless the prosecutor was attacked in some official capacity, or in outrageous terms. Cf. *Ex parte Bowen*, 27 T. L. R. 180 (assault by police). They are tried at the *civil* sittings.

(2) A *Presentment*[1] is a written accusation of crime presented on oath by a coroner's jury[2] or a grand jury. If the accusation has been laid before the grand jury by some prosecutor, their presentment then obtains also the more specific name of an *Indictment*. Practically every case that comes to a petit jury for trial comes on Indictment. But grand juries were suspended temporarily during the late War; and mere commitment for trial then enabled the clerk to present an indictment[3].

In Saxon times Ethelred the Unready enacted the Law of Wantage: "Let a moot be held in every wapentake; let the twelve senior thegns go out, and the reeve with them; and let them swear on a relic that they will accuse no innocent man nor conceal any guilty one[4]." But the most recent authorities[5] doubt both the permanence and the generality of this law; and consider the consecutive history of our modern grand juries to go back only as far as A.D. 1166. In that year Henry II. prescribed, in the Assize of Clarendon, a very similar procedure; probably taking it, not from the Anglo-Saxon precedents, but from the Frankish inquests as adopted in Normandy. The ordinance of Henry II. required twelve knights, or other freemen, of every hundred, and four men (who would probably be *un*free) of every township, to send in

[1] The term is also often used in a narrower sense, in which it is limited to cases where a grand jury speaks from its own personal knowledge (*e.g.* accusing persons who are responsible for the obvious non-repair of some well-known highway). Such presentments are now-a-days extremely rare. They are, however, interesting as survivals of the grand jury's ancient function of *initiating* accusations.

[2] *Supra*, p. 431.

[3] By the Criminal Justice Act, 1925, s. 19, he is again enabled to do so at any *Quarter Sessions* at which all the persons for trial have, on commitment, admitted their guilt; and there will be no grand jury.

[4] Stubbs' *Select Charters*, part II.; *Constit. History*, I. 611.

[5] Pollock and Maitland, I. 442; II. 642. Holdsworth, I. 12.

accusations of murder, robbery, larceny, and harbouring of criminals. In 1176 arson and forgery were added[1].

At the present day a grand jury may consist of any number of persons from twelve to twenty-three, but twelve must agree upon any presentment[2]. There is no property qualification for grand jurors at Assizes; and women are now eligible.

The grand jury was, as we have seen, established in order to multiply accusations of crime. By a curious inversion its present function is that of revising, and thereby diminishing, such accusations; though the old form of oath remains, viz. "You shall present all matters touching your present service that may come to your knowledge." The grand jury hear the witnesses for the prosecution (or so many of them as they desire)[3]. But no counsel are present to conduct the examination; or to guard against the possibility of the bill's being ignored through some misapprehension of law. It is not usual for the grand jury to have the depositions before them; so the examination takes place with no clue to the facts to be elicited. Moreover it is conducted in private, without a note of it being made beyond the mere name of each witness examined, and all the grand jurors are under an oath of secrecy. There is thus little check upon any untruthful witness. Moreover the grand jury never see either the defendant or his witnesses. Thus the sole function of a modern grand jury is to repeat badly what has already been done well: to hear in secret, imperfectly, and in the absence of the accused, one side of the case[4], after both sides of it have

[1] Stubbs' *Select Charters*, part IV. These ordinances came to fix a line between felonies and mere "trespasses," *i.e.* misdemeanors (*supra*, p. 98).

[2] Cf. the similar rule which applies in the court of the Lord High Steward (*supra*, p. 424); and to juries on lunacy inquiries (53 and 54 Vict. c. 5, s. 97), and at coroners' inquests (50 and 51 Vict. c. 71, s. 3). Even on the petit jury, unanimity was not required until 41 Edw. III.

[3] But if the accused *admitted* his guilt to the examining justice, the grand jury are now required to return a true bill *without* hearing any witnesses (10 and 11 Geo. V. c. 81, s. 4). See also p. 545, *infra*.

[4] Of the bills laid before them, grand juries ignore about two per cent. But the inquiries made in 1859 by the then Lord Chancellor led him to the conclusion that even at the Central Criminal Court more than half the bills ignored ought to have been tried. See Hansard, March 10, 1859.

already been heard fully in open court, and with full opportunity of legal aid. A bad tribunal is laboriously and expensively brought together, in order to revise the work of a better one[1].

The written accusation laid before a grand jury is called a "bill of indictment[2]." They may "ignore" it; though this will not prevent the same accusation from being presented to some later grand jury. If, on the other hand, they find it a "true bill," it then becomes an "Indictment." Sir Matthew Hale, under Charles II., described an indictment as "a plain,

[1] The Royal Commission on Delay in the K. B. Division reported (*The Times*, December 16, 1913) in favour of the abolition of grand juries, both at assizes and at sessions. Their suspension during the war produced no complaint; and saved much expense (*e.g.* in the metropolitan police district alone more than £10,000), relieving many witnesses from an extra day's attendance.

Those who still defend the retention of the grand jury rely chiefly upon the following arguments. (1) That it affords to some country gentlemen useful (though brief) legal experience; and by their presence adds to the dignity of the court. (2) That there ought to be some means by which to bring to trial political offenders whom magistrates have declined to send to it. (But as to the oppressiveness of this particular means, see p. 470 *infra*.) (3) And that, on the other hand, the grand jury, being more independent of the Crown than a justice is, will be more prompt to dismiss any groundless prosecutions for political offences in the very rare occasion of such prosecutions. (4) That a more emphatic assurance of innocence is afforded if an accusation is ignored before anything beyond the accuser's side of the case has been heard. This fourth argument assumes, somewhat questionably, that innocence is more clearly demonstrated by acquittal upon a secret and imperfect hearing of the prosecution, than by acquittal upon a public hearing of the defendant's vindication of himself. "I should have directed you to ignore the bill, as there is no evidence to sustain it; but, that the defendant may clear his character, I recommend you to return a true bill" (Bailhache, J., in *Rex* v. *Welton*, Oxford Assizes, October, 1915). As Lord Denman said, "If the grand jury agree with the committing magistrate, they are useless; if they differ from him, they may defeat justice irreparably, and yet they do not clear the character of the accused effectually." De Franqueville pronounces the grand jury "tout au moins inutile" (I. 357); Sir Henry Maine thought it "secret, one-sided, irresponsible...an obstruction to justice" (*Speeches*, pp. 184, 191). In Scotland no grand jury exists, except in Treason; and there appears to be no desire for its establishment. A Scottish indictment is an accusation by the Lord Advocate or the Procurator-Fiscal.

[2] This is usually drawn on circuits and at the Central Criminal Court by the Clerk of Assize, or of Arraigns, or by the Clerk of Indictments; at Quarter Sessions, by the Clerk of the Peace. See forms of it in the Appendix.

brief, and certain narrative of an offence committed[1]." The growth of technicalities soon destroyed both the brevity and the plainness. But, happily, the sweeping alterations introduced by the Indictments Act, 1915 (5 and 6 Geo. V. c. 90) have reduced this portion of criminal procedure to a simple and rational system, making it easier for the accused to defend himself, and harder for him to escape by mere technical objections. An indictment now consists of three parts: (1) the commencement; (2) the statement of offence; (3) the particulars of offence. For examples, see p. 536 *infra*. The Act abolishes the rhetorical "Conclusion" which previously, in some shape or other—*e.g.* "against the peace of our Lord the King, his crown and dignity"—usually terminated indictments, although rendered superfluous by an Act of 1851; cf. the last lines of p. 537.

(1) The *Commencement* states the place of the court's jurisdiction; usually a particular county or borough. At common law, an offence could only be tried by the court within whose jurisdiction it (or a part of it) was committed. Thus in larceny the venue (*i.e. vicinetum*, neighbourhood) may be laid in any county where the accused has had the goods in his possession. The Criminal Justice Act, 1925, s. 11, provided that a person charged with any indictable offence may instead be proceeded against and punished in any place in which he was apprehended, or is in custody, or has appeared to a summons, *on that same charge*, just as if the offence had been committed there; unless this alternative would make him "suffer hardship." (And if a person be charged with more than one indictable offence, *all* may be dealt with in any place where *one* of them could be.) Appeal is allowed.

The form of Commencement prescribed by the Act of 1915 (Schedule I, rule 2) is as follows:

[1] Hale P. C. 169. Yet in charges of treason, conspiracy, or fraud, indictments were often of remarkable length. Thus the indictment in *O'Connell's Case*, in 1844 (5 St. Tr., N. S., 1) was a hundred yards long. In France the indictment of Landru, in Nov. 1921, for murder, took two hours to read aloud!

"The King *v. A. B.*

Hants Quarter Sessions held at Winchester[1]

Presentment of the Grand Jury.

A. B. is charged with the following offence [*or* offences]."

(2) Then come one or more[2] paragraphs; each of which is called a "count," and describes an offence whereof the prisoner is accused. If there be more than one paragraph, they must be consecutively numbered. Each count is practically a separate indictment.

The *Statement of offence*, with which every count must begin, merely names the crime charged, *e.g.* "Murder," "Manslaughter," "Cruelty to a child, contrary to section 12 of the Children Act, 1908." Under the Act of 1915 it must use ordinary language, avoiding technical terms as far as possible; and need not set out all the essential elements of the offence. But if the offence be a statutory one, the statute and the particular section must be specified in the Statement. (Schedule I, rule 4 (3).)

(3) The *Particulars of Offence* follow, in order to inform the accused as to the circumstances—*e.g.* time, place, conduct, subject-matter—of the crime which has thus been alleged against him. Here, again, ordinary language is to be employed, and the use of technical terms is not to be necessary (Schedule I, rule 4 (4).) The particulars may, too, be very brief; *e.g.* "*A. B.* on the first day of July 1916, in the county of Cambridge, murdered *Y. Z.*" But they must be sufficient to indicate to the accused "with reasonable clearness" (Schedule I, rule 9) the occasion and the circumstances of his crime. This is necessary in order that he may be able to know what defence to offer; and, moreover, may be able, should he blunderingly be prosecuted a second time for this same

[1] Or whatever other tribunal is the "Court of Trial."

[2] There were twenty-four counts in the indictment in 1922 of Horatio Bottomley, M.P., for fraudulent conversion. As to the limitation on plurality of counts, see p. 468 *infra*.

misdeed, to protect himself by shewing—see p. 475 *infra*—that the identical charge has already been dealt with[1]. Hence if a count be not detailed enough, but too "general," the judge may quash it; for "generality of accusation is difficulty of defence." A count, for instance, would be too general if it merely alleged the act of "inciting *A* to commit an indictable offence," or of "attempting to induce *A* to contravene the law of the land," without specifying what the particular offence or contravention was. Formerly it was also required that no count should run in the alternative—as by alleging that the prisoner murdered *A or* wounded him; the result being to purchase precision at the cost of prolixity, for a further count was added in order to allege the second of the alternatives. But by the Act of 1915 (Schedule I, rule 5 (1)) in the case of any *statutory* offence which is defined by alternatives—as, for instance, conduct performed with any one of different intentions, or in any one of different capacities, or consisting of doing or omitting any one of different acts—a count may now allege the different alternatives which the defining statute sets out. A good instance is afforded in the Act of 1915 itself: "ill-treated *or* neglected the said child, *or* caused *or* procured the said child to be illtreated *or* neglected, in a manner likely to cause the said child unnecessary suffering *or* injury to its health" (Form 6).

To be good, a count should state in the "Particulars of Offence" (i) the party indicted; (ii) the party injured; and (iii) the facts and the intent that are necessary ingredients of the offence. But the Act of 1915 (Schedule I, rules 7, 9), relaxes the precision formerly required in stating them.

(i) The party indicted should be described. But it need only be in such a manner "as is reasonably sufficient to identify him," without necessarily stating his occupation or abode or even his correct name. And if his name is unknown,

[1] Hence an indictment should not charge a theft of a coat "and other articles"; 17 Cr. App. R. 131.

and he refuses to disclose it, he may be indicted as "a person unknown." You may add, "but who was personally brought before the jurors by the keeper of the prison."

(ii) The party injured should be described; but only with the like reasonable sufficiency. And, if this be impossible, he too may be described as "a person unknown"; as in the case of the murder of some stranger found dead.

(iii) The acts, circumstances, and state of mind constituting the offence should be set out. Here, again, certainty was formerly required. And in some offences the due degree of legal certainty could only be obtained by employing particular technical expressions; *e.g.* in indictments for any treason by saying "traitorously"; for any felony, "feloniously"; for burglary, "feloniously and burglariously." But now, by the Act of 1915 (Schedule I, rule 9) it will usually "be sufficient to describe any place, time, thing, matter, act, or omission whatsoever (to which it is necessary to refer in any indictment) in ordinary language, in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to." In the Appendix the student will find actual forms of Indictments, which will make these rules clearer to him.

A count must never be "double"; that is to say, must not include two separate offences. (Yet the whole of any *single* transaction, however complex, may be comprised in one count; *e.g.* when *A*, *B*, *C* and *D* have set upon *E* and *F* together, and robbed them[1].) And in early days no indictment could contain more than one count. This simplicity of statement made inevitable a miscarriage of justice, if the facts proved at the trial happened to deviate even slightly from those alleged in the indictment. To avoid this danger, a plurality of counts was soon allowed, describing the same crime in many forms, as if there had been so many distinct

[1] *Reg.* v. *Giddins*, C. and M. 634. For the alternative possibility, of subdividing a single but complex transaction into separate counts, see *Reg.* v. *Brettell*, C. and M. 609. *E.g.* nine counts for a wounding of nine cows.

occurrences[1]. Later practice came to permit even entirely different crimes to be charged in the same indictment; of course in different counts. But all of them had to be of the same grade, *i.e. all* must be treasons or all be felonies or all be misdemeanors.

But the Act of 1915 (s. 4; Schedule I, rule 3) forbids the joinder of several charges in the same indictment, except when[2] all the charges either "are founded on the same facts," or else "form, or are a part of, a series[3] of offences of the same or a similar character." On the other hand, wherever a joinder does thus become permissible, the old prohibition against joining felonies and misdemeanors together is removed[4]. That prohibition was due to the fact that the procedure at a trial for felony is slightly different from that at trials for misdemeanor. But the Act (s. 4) gets over this difficulty by enacting that "where a felony is tried together with any misdemeanor, the jury shall be sworn, and the person accused shall have the same right of challenging jurors, as if *all* the offences charged in the indictment were felonies." The relaxation, however, does not extend so far as to allow a treason to be joined with a crime of either of the lower grades; the differences in procedure being too great.

As a logical rule, the evidence should of course establish, and the conviction also be for, the actual offence stated in the count which it concerns. But (1) even by common law,

[1] Thus in *Reg.* v. *Daniel Good* (C. C. C. Sess. Pap. XVI. 233), a case of murder where only the headless trunk of the victim was found, there were thirty-five counts alleging different modes of death.

[2] Nor even then if embarrassing; *e.g.* adding to *murder* another crime. But when possible it is desirable to multiply counts rather than to multiply indictments, as it saves costs (18 Cr. App. R. 26). Two indictments cannot, even by consent, be tried together (15 Cr. App. R. 23).

[3] *E.g.* sixteen separate assaults on sixteen persons (18 Cr. App. R. 42, cf. 59); seventeen makings of *the same* false pretence to seventeen persons, all counts tried at once (C. C. C. February, 1924).

[4] Thus to a count for a woman's felonious bigamy there may be added one for her misdemeanor in obtaining a separation allowance by the false pretence of being the wife of a soldier (the "second husband").

"averments are divisible"; so that if the words in which a count states an offence involve the statement of some minor offence, the petty jury can reject part of the averment and convict of the minor offence alone, though it was not stated separately. Thus a statement of murder will be a statement of manslaughter if the words "of malice aforethought" be omitted; whilst similarly every statement of aggravated larceny includes one of simple larceny. And the legislature has gone still further, in two ways. For (2) in some cases it has enabled juries to convict of the crime which has in fact been proved, although it is not the crime charged in the indictment[1]. Thus on an indictment for any crime the jury may convict of an attempt to commit it[2]; and on one for robbery, of an assault with intent to rob[3]; on one for embezzlement, of either stealing as servant or simple stealing; on one for stealing, of embezzlement or[4] false pretences; on one for murder, of concealment of birth[5]; and on one for rape, or any felony under section 4 of the Criminal Law Amendment Act, 1885[6] (*e.g.* having carnal knowledge of a girl under thirteen), the jury may instead convict of an indecent assault, or of procuring connexion by threats or by false pretences, or of having carnal knowledge of a girl under sixteen[7]. (3) Again, the legislature has in other cases permitted juries to convict of the crime alleged in an indictment, even though a different (but a graver one) has been proved by the evidence. Thus, on an indictment for misdemeanor, if the facts given in evidence

[1] In one instance, that of Incest, they are allowed to convict of a specified crime even *graver* than that charged; see 8 Edw. VII. c. 45, s. 4 (3).

[2] 14 and 15 Vict. c. 100, s. 9. Yet the crime may be a felony, whilst the attempt is only a misdemeanor.

[3] Larceny Act, 1916, s. 44 (1).

[4] *Ibid.* s. 44 (2) and (3).

[5] 24 and 25 Vict. c. 100, s. 60. [6] 48 and 49 Vict. c. 69, s. 9.

[7] *I.e.* where the girl, instead of being under thirteen, is found to be between thirteen and sixteen. By the Children Act, 1908 (8 Edw. VII. c. 67, s. 12 (4)) on an indictment of a person over sixteen for the manslaughter of a person *under* sixteen who was in his charge, the jury may instead convict of any of the numerous offences of cruelty set out in the section. Hence any such indictment will tacitly involve several distinct issues.

prove not only the constituents of the crime alleged, but further elements which constitute some felony in which it has been merged, the prisoner may still be convicted of the misdemeanor[1], notwithstanding its merger; as when a person is indicted for obtaining goods by false pretences, and the false pretence proves to have constituted a felonious forgery. Again, if, on an indictment for obtaining by false pretences, the defendant is proved to have obtained the property by means amounting to stealing, he may be convicted as indicted[2]. A further similar provision is that an accessory before the fact to any felony may be indicted, tried, convicted, and punished as if he were a principal felon[3].

Moreover, in all these three groups of substitutions, a prisoner, on being arraigned, may now plead guilty to the substitutable offence, instead of to the one charged in the indictment (4 and 5 Geo. V. c. 58, s. 39 (1)).

At common law any person may prefer a bill of indictment to a grand jury, without even giving notice to the person accused; so that the latter may never know anything of it until the grand jury have actually found an indictment against him, and even then know nothing more of the case he has to meet than the bare outline which the indictment affords him. In practice, indeed, bills are scarcely ever presented to the grand jury until after a preliminary inquiry before a justice[4]. But the common-law liberty of indictment makes it possible for innocent persons to be subjected to great anxiety and expense by groundless prosecutions instituted from spite[5] or in the hope of extorting money. Yet the only remedy of such a person is the costly and uncertain one of an action for malicious prosecution[6]. Hence the legislature has restricted the power of prosecution in the case of some crimes which experience shewed to be peculiarly often made the subject of false accusations. This restriction is imposed by the Vexatious Indictments Act, 1859[1], in cases of (1) perjury and subornation of perjury; (2) conspiracy; (3) obtaining by false pretences; (4) indecent assault; and (5) keeping a gambling house or a disorderly house. And by subsequent statutes, in cases of (6) libel[2]; (7) misdemeanors under the Debtors' Act, 1869[3]; or (8) under the Criminal Law Amendment Act, 1885[4]; or (9) under Part II of the Children Act, 1908 (8 Edw. VII. c. 67); or (10) indictable offences under the Merchandise Marks Act, 1887[5]; or (11) offences under the Prevention of Corruption Act, 1906 (6 Edw. VII. c. 34); or (12) the Punishment of Incest Act, 1908 (8 Edw. VII. c. 45). For these no bill is to go to a grand jury unless either

(i) the prosecution has been directed by a judge; or by the Attorney-General or Solicitor-General, or, in the case of perjury, by some other official having power to make such accusation;

or (ii) the accused has been committed for trial, in the ordinary way, by a justice of the peace;

or (iii) the prosecutor has been bound over by a justice of the peace, in recognizances, to prosecute forthwith; and thus get the accusation disposed of promptly. When, on a preliminary examination for any of the offences above specified, the justice refuses to send the case for trial, the prosecutor can demand to be thus bound over to prosecute[6], and so still take the case to a grand jury. But he does it at the risk of being ordered, in case of acquittal, to pay the costs of the accused and of his witnesses[7].

[1] 14 and 15 Vict. c. 100, s. 12. Cf. 3 C. and K. 200.
[2] Larceny Act, 1916, s. 44 (4). [3] 24 and 25 Vict. c. 94, s. 1. *Supra*, p. 90.
[4] Except for mere quasi-criminal offences as to Highways.
[5] At Cambridge Assizes in Jan. 1906 a true bill was found against a man whom two benches had refused to commit. He was acquitted.
[6] Pollock on Torts, ch. VIII. iii.

[1] 22 and 23 Vict. c. 17. Cf. the Vexatious *Actions* Act, 1896.
[2] 44 and 45 Vict. c. 60, s. 6. But upon any prosecution of the publisher of a *newspaper* for libel, the check is still closer; for the only way of commencing it is by obtaining the order of a judge (51 and 52 Vict. c. 64, s. 8).
[3] 32 and 33 Vict. c. 62, s. 18.
[4] 48 and 49 Vict. c. 69, s. 17. [5] 50 and 51 Vict. c. 28, s. 13.
[6] 22 and 23 Vict. c. 17, s. 2. It is noteworthy that in several cases at the Central Criminal Court juries ultimately have convicted where a justice had thus refused to commit. [7] 8 Edw. VII. c. 15, s. 6 (2).

5. *Arraignment.*

An *indicted* defendant (contrast p. 438 n. 1) must personally appear[1] at the bar of the court in order to be "arraigned," *i.e.* called to a reckoning (*ad rationem*), by hearing the indictment read; and to plead to it. (The only exception is that, if the trial be in the King's Bench Division and be merely for misdemeanor, the defendant may, by leave of the court, appear by attorney.) If he do not appear, the court will issue a bench-warrant for his arrest and "estreat" (p. 458) his recognizances; and will "enlarge" *sine die* the recognizances of the prosecutor and the witnesses. As a general rule, too, the defendant must remain in court during all the proceedings[2]. But in cases of mere misdemeanors the Court may give him leave of absence so soon as he has pleaded[3].

6. *Plea and issue.*

When the indictment has been read[4] to him he has several courses open. He may either (1) confess; or (2) stand mute; or (3) take some legal objection to the indictment; or (4) plead to it.

(1) If he confesses, *i.e.* "pleads guilty[5]" he may be at once sentenced. But in serious cases, lest he should be confessing under some misapprehension as to the law or even as to the facts of his case, the court often advises him to withdraw his plea of guilty, and so let the matter be fully investigated[1]. As to confessing substitutable offences, see p. 470.

(2) If he "stands mute," *i.e.* says nothing at all, a jury must be impanelled to try whether he is thus mute "of malice," or "by the visitation of God." In the latter case, the question will arise whether or not he can be made to understand by signs. But if he is mute merely from malice, a plea of not guilty will at once be entered[2]. In treason and misdemeanor, standing mute used at common law to amount, on the other hand, to a confession of guilt. But in felony the matter was less simple. It was preferred to try him; yet he could not be tried by jury (instead of by ordeal) without his own consent. To extort that consent he was (until 12 Geo. III. c. 20) subjected to the *peine forte et dure*, by being laid under a heavy mass of iron, and deprived almost entirely of food. Many prisoners deliberately preferred to die under this torture rather than be tried; because, by dying unconvicted, they saved their families from that forfeiture of property which a conviction would have brought about[3].

(3) He may shew that the indictment is, on the face of it, open to some legal objection; *e.g.* that a count is too general in its language, or that the court has no jurisdiction to try the offence. Legal objections may be raised by a demurrer[4]; or (which for technical reasons is the far more common course) by a motion to quash the indictment, *e.g.* if the offence alleged is not an indictable one (1 C. and K. 112). Such a motion may be made at any time before the verdict.

[1] Hence corporations, since they were incapable of appearing in person, were originally outside the criminal law (*supra*, p. 63).

[2] Cf. 17 Cr. App. R. 193. And he must be capable of understanding the proceedings. Hence the trial of a deaf person or a foreigner may have to be delayed until a competent interpreter is found. For a negro prisoner who spoke Fanti alone, only two competent interpreters could be found in all England (*The Times*, Dec. 9, 1908).

[3] Thus the Tichborne claimant was absent on a few of the 188 days of his trial for perjury.

[4] Under the Indictments Act, 1915, it is the duty of the clerk of the court, "after a true bill has been found on any indictment, to supply to the accused person, on request, a copy of the indictment free of charge." Formerly a felon could not even *buy* one; for fear of his basing on it an action for malicious prosecution.

[5] Nearly half of the prisoners indicted at Assizes or Quarter Sessions plead guilty. They may plead guilty to some only of the counts; or even to only a part of a count, *e.g.* "I admit the jewels but not the money"; or to a substitutable offence, not mentioned in the indictment (see p. 470, *supra*).

[1] In the remarkable case, however, of Constance Kent who, to clear her father's memory, pleaded guilty in 1865 to the Road murder of 1860, Willes, J., at once pronounced sentence of death (*The Times*, July 22, 1865).

[2] 7 and 8 Geo. IV. c. 28, s. 2. For a modern instance of a verdict of mute of malice, see C. C. C. Sess. Pap. CLVIII. 46; Nov. 1912.

[3] The memorable John Gerbage (*supra*, p. 267) thus avoided forfeiture (Y. B. 21 Edw. III. 23).

[4] The crown may demur to a prisoner's "plea."

(4) He may put in a "plea" to the indictment. The most important pleas are:

i. A plea to the Jurisdiction. This plea is rarely made. For an objection to the jurisdiction of the particular court (as when a man is indicted at the Quarter Sessions for perjury), being a legal objection, may also be raised in the manner just now explained. And if the offence is one over which no English court at all has jurisdiction (*e.g.* an offence committed on board a foreign ship on the high seas), this defence can clearly be raised not only as a legal objection but even under "Not guilty[1]."

ii. A plea in Abatement; *i.e.* an objection alleging some fact which shews that there is in the indictment some error of form, as when a peer is arraigned before Assizes or Quarter Sessions[2]. Such pleas, however, have been rendered obsolete by the powers given to amend indictments[3].

iii. A general plea in Bar. A plea in bar means a substantial defence. A *general* plea in bar raises the "general issue," and traverses (*i.e.* denies) the whole indictment by alleging that the defendant is "Not guilty."

iv. A special plea in Bar[4]. These are extremely rare, as almost any matter of defence can be raised under "Not Guilty." The only ones which require any notice are:

(α) That of Justification, in cases of libel; where the defendant pleads, under Lord Campbell's Act[5], that the

[1] *Rex* v. *Johnson*, 6 East 583. Cf. *Reg.* v. *Jameson*, L. R. [1896] 2 Q. B. 425.

[2] In *Rex* v. *Bray* (Old Bailey Sess. Pap. for 1819, p. 460) a thief had to be acquitted because the indictment styled the prosecutor as Augustus Stanley, whereas his name was Augustine. Cf. p. 538 n. *infra*.

[3] 5 and 6 Geo. V. c. 90, s. 5; 14 and 15 Vict. c. 100, s. 24.

[4] To any special plea the Crown may put in either a "demurrer" on grounds of law, or a "special replication" on grounds of fact. *E.g.* to a plea of "autrefois acquit" the Crown may reply "not acquit of arson but only of murder by arson" (*Reg.* v. *Serné*, *supra*, p. 138, *infra*, p. 476).

[5] 6 and 7 Vict. c. 96; *supra*, p. 315. Such a plea may shew vividly how peculiar to prisoners is the privilege of tendering evidence of good character (*supra*, p. 397). If *A*, being indicted for libellously accusing *B* of theft, should plead the truth of the accusation, *B* (being not a prisoner but a prosecutor)

matter charged as libellous is true, and that it was for the public benefit that it should be published. But on this plea costs may be given against the defendant if he fails to establish it. Along with this defence he may (contrary to the general rule, p. 477) plead at the same time "Not guilty."

(β) A Pardon from the Crown.

(γ) Autrefois acquit; and (δ) Autrefois convict. The general principle of common law is *Nemo debet bis vexari*—a man must not be put twice in peril for the same offence. Hence, if he be indicted again, he can plead as a complete defence his former acquittal or conviction[1]. Even though it were in a foreign country that the acquittal or conviction took place, it will none the less constitute a defence in our courts[2]. To determine in any particular case whether such a plea is available, it is necessary to ask: (1) Was the prisoner "in jeopardy" on the first indictment? (2) Was there a final verdict? (3) Was the previous charge substantially the same as the present one?

(1) A prisoner cannot have been in jeopardy if the indictment was legally invalid; for no conviction upon it would have been effectual. If therefore he defeats it by some plea to the jurisdiction (*e.g.* where he has been indicted in the wrong county), or by getting it quashed[3], he will still remain liable to be again indicted on the same charge.

(2) It is necessary that a final verdict should actually have been given. If the petit jury were discharged without a verdict (*e.g.* on their being unable to agree), this will no more prevent a second trial than would the fact of a former bill having been ignored by a grand jury.

cannot call evidence of his own good character to disprove its truth; though he could do so, if he were *indicted* for the theft.

[1] And a similar plea is allowed by statute (42 and 43 Vict. c. 49, s. 27) in cases where an indictable offence has been dealt with summarily (the ordinary forms of plea being confined to acquittal or conviction by a jury). As to assaults, see also 24 and 25 Vict. c. 100, s. 44.

[2] *Rex* v. *Roche*, 1 Leach 134 (acquittal by Dutch court).

[3] But a conviction quashed *on appeal* becomes an acquittal.

(3) To determine whether the two charges are "substantially" identical is often a subtle problem. They are sufficiently nearly identical, if evidence of the facts alleged in the second indictment would legally have been enough to procure some conviction on the first indictment; (whether it were a conviction for the offence actually charged in that first indictment, or even for some other, either of an equal or of a lower degree of heinousness). Hence the two indictments must refer to the same transaction[1]. Yet the intent or the circumstances alleged in the one may be more aggravated than those alleged in the other. Thus an acquittal (or similarly a conviction) for a common assault bars a subsequent indictment for an unlawful wounding[2]; and an acquittal for manslaughter bars a subsequent indictment for murder[3], and *vice versâ*. But acquittal for wounding with intent to murder does not bar a subsequent indictment for murder[4]; and an acquittal on an indictment for murdering *A* by burning a house in which he was asleep, does not bar a subsequent indictment for the arson of the house[5]. For in each of these

[1] They may do this even though they have stated some of the immaterial circumstances in contradictory ways. Thus if *A* has been indicted for murdering *B* on Monday in one parish, and has been acquitted, he can plead *autrefois acquit* if he be subsequently indicted for murdering him on Tuesday in the adjoining parish, provided he can shew by evidence that, though the averments thus differ, the two charges relate to the same transaction.

[2] In *Reg.* v. *Grimwood*, 60 J. P. 809, a man was indicted on four counts; the first three charging the infliction of grievous bodily harm etc., but the fourth merely a common assault. On the first three counts the jury disagreed, but they convicted him of the common assault. He was sent to the Assizes, to be again tried on the first three counts. At the Assizes, however, he pleaded *autrefois convict* (by the verdict as to the common assault); and was accordingly discharged.

[3] 2 Hale P. C. 246. Similarly an acquittal for any crime bars a second indictment for an attempt to commit that crime, now that (by 14 and 15 Vict. c. 100, s. 9) a jury, on an indictment for any completed offence, can convict of a mere attempt. And, since by 6 and 7 Geo. V. c. 50, s. 44 (2) a jury may convict of embezzlement upon an indictment for larceny—or *vice versâ*—an acquittal for either of these felonies bars a subsequent indictment for the other on the same facts.

[4] *Reg.* v. *De Salvi*, C. C. C. Sess. Pap. XLVI. 884. For there may be Murder without either a "wounding" or an "intent to murder."

[5] *Reg.* v. *Serné*, C. C. C. Sess. Pap. CVII. 418.

two pairs of charges, members of the pair are so dissimilar that proof of the allegations made in the second indictment would not necessarily call for some conviction under the first one[1].

In misdemeanors, by a harsh rule, judgment on a plea of *autrefois acquit* or *convict* is final: so that if the accused be defeated on it, he cannot proceed to establish his innocence, but must be sentenced. Yet in felony or treason he is allowed to "plead over," *i.e.* to put in a further plea of Not guilty.

7. *Trial and Verdict.*

"Justice," says Lord Bacon, "is sweetest when it is freshest." Hence, in grave cases, the Habeas Corpus Act makes definite provision to secure this freshness; by providing that if any man, who has been committed on a charge of either treason or felony, be not indicted at the next Assizes after his commitment, he must be released on bail[2]; and if at the next subsequent Assizes he be not both indicted and tried, he must be discharged altogether.

When a person indicted pleads *Not guilty* to the accusation he thereby "joins issue[3]" with the Crown. This issue must be decided by a Trial[4]. If the accused be a peer, and

[1] Similarly an acquittal for burglary with intent to commit larceny will not bar a subsequent indictment for the larceny; though, if the first indictment had charged burglary with an actual larceny, it would be otherwise.

[2] Unless the witnesses for the Crown cannot appear.

[3] The student will be on his guard against the current misuse of this expression, which treats it as meaning to *agree with* a debater's contention—the very opposite of its real meaning.

[4] Modern practice concedes to every accused person the right to know, before his trial, what evidence will be given against him. Hence if any one who was not produced before the committing justice is to be called as a witness, full information should be furnished to the accused, both as to his name and as to the evidence he will give. If this has not been done, his evidence should not be pressed at the trial if the accused objects (per Hawkins, J., in *Reg.* v. *Harris*, C. C. C. Sess. Pap. XCV. 525). The same principle applies to letters or other documents. Moreover every witness whom it is proposed to call for the Crown must be named on the back of the bill presented to the grand jury that they may, if they like, call him. And every witness so named must be made to attend at the trial, in order that if the Crown do not call him, the prisoner may be able to do so. For the prose-

the accusation be either of treason or of felony, the trial will, as we have seen (*supra*, p. 422), take place before the peers. But in all other cases his indictment will be tried *per patriam* —by a petit jury composed of twelve representatives of his countrymen[1]. The history of such trials is noteworthy. Originally, accusations made by the grand jury were tried by ordeal. After the abolition of ordeals in 1215, every accusation had to be referred back to the grand jury, sometimes with the addition of some further colleagues[2]. In the course of a century, it came to be the practice for these new jurors alone to undertake this duty of revision, without the presence of the original accusers; and at last the latter were definitely excluded by a statute of 1352. This produced our present system of two juries. But both juries proceeded upon common repute, or upon their personal knowledge; men who knew the circumstances of the crime being often put on as additional or "afforcing" jurors. About 1500, however, such

cuting counsel is not bound to call all his witnesses (2 C. and K. 520; C. C. C. Sess. Pap. XCI. 83, 136; CII. 317), since the evidence of some of them may seem to him to be irrelevant or even untrustworthy. But should the prisoner elect to call a Crown witness who has been thus passed over, he thereby makes him his own witness; and the Crown can accordingly cross-examine the witness, and can reply on his evidence (*Reg.* v. *Cassidy*, 1 F. and F. 79).

[1] See Pollock and Maitland, I. 138, II 617; Stubbs' *Const. Hist.* I. s. 164; Stephen's *Hist. Cr. Law*, I. 254. "The most transcendent privilege which any subject can wish for is, that he cannot be affected in his property or liberty or person but by the unanimous consent of twelve of his neighbours and his equals. This, for a long succession of ages, has secured the just liberties of this nation" (3 Bl. Comm. 379). It is true that, as an instrument of accurate inquiry, the value of the jury may sometimes be small. In matters of complicated mercantile accounts, or in scientific disputes about a prisoner's insanity or the results of a poison, or in any very protracted investigation, trial by a common jury—"that bizarre creation" as Garofalo calls it—would have little superiority over trial by Ordeal or by Compurgation, were it not for the guidance afforded in the judge's summing up. Hence, ever since the Rules of 1883 (Order XXXVI. rule 7), trial by a judge, with no jury, has been recognised as the normal *civil* method. But in criminal cases it is not so important that the verdict should be accurate as that it should be humane, and moreover be supported by public sentiment; to let some guilty men escape is a less evil than to punish any innocent man. Consequently, in all criminal accusations that are of any gravity, the protection afforded by trial by jury is a privilege worthy of the eulogium pronounced on it by Blackstone.

[2] Pollock and Maitland, II. 628, 647; Holdsworth, I. 323, 334.

persons ceased to be added to the jury itself, and instead were sent to give evidence before it. This differentiation of the functions of the witness from those of the juror was intensified, two centuries later, by allowing witnesses to be called expressly on behalf of the prisoner. Documentary evidence became common before that of witnesses; and it seems probable that even the evidence of witnesses was at first usually received in a written form. At any rate the practice of producing the witnesses themselves at the trial, to give their evidence orally in open court—though well-established in non-political cases at least as early as Elizabeth's reign[1]—did not become usual in trials for treason until the Commonwealth[2]. Under James I. and Charles I. the evidence produced to the jury in political trials usually consisted only of "examinations," *i.e.* reports of what had been said by witnesses when interrogated by royal commissioners, in the absence of the prisoner and in private—perhaps in prison or even on the rack. Often the accused himself was thus interrogated; as when Peacham, in 1615, was examined "before torture, in torture, between torture, and after torture[3]." But from the time of the Commonwealth onwards the modern course of trial has prevailed, in political as well as in non-political cases[4].

To serve as a petty juror in criminal cases (or as a common juror in civil ones) a person[5] must (1) be over twenty-one

[1] Sir T. Smith's *Commonwealth of England*.

[2] The provision made (*supra*, p. 277) by 1 Edw. VI. c. 12 to secure the production of at least two witnesses in open court in all cases of treason was regarded as having been impliedly repealed by 1 and 2 P. and M. c. 12.

[3] *Supra*, p. 269; 2 St. Tr., at p. 871. On the trial of Lord Essex in 1600 (1 St. Tr. 1333), in which many of these "examinations" were used, Coke, then Attorney-General, blamed the "overmuch clemency" of Elizabeth in having had no witness racked or tortured whilst being examined.

[4] A recent inroad upon the dignity of trials is checked by the Criminal Justice Act, 1925, which makes it an offence, punishable by a fine of £50, to sketch for publication, or to photograph, in any court whether criminal or civil, any of the persons concerned in a judicial proceeding: (s. 41).

[5] Of either sex. For the Sex Disqualification (Removal) Act, 1919, 9 and 10 Geo. V. c. 71, provides that "A person shall not be disqualified by sex or marriage from the exercise of any public function, or from...holding any

years of age[1]; and (2) be the owner, in fee or for life, of lands or tenements worth £10 a year or of long leaseholds worth £20 a year, or else be the occupier of a house rated at £20 a year, or if in Middlesex at £30[2]. In each county the sheriff returns a "panel[3]," or list, at every assize, of persons thus qualified whom he has summoned. There is no fixed number; but forty-eight is a frequent number at Assizes, and thirty-six at Sessions. From this panel[4] the clerk calls twelve names, and the prisoner then has the opportunity of challenging any of these jurors.

Challenges are now almost unknown in England[5], though less rare in Ireland[6]. They may be either to the "array" (*i.e.*,

civil or judicial office;...and a person shall not be exempted by sex or marriage from the liability to serve as a juror." But the judge who tries a case, criminal or civil, may—on application of either side or at his own instance—make an order "that the jury shall be composed of men only, or of women only." It has since been provided, by Rules, that every jury panel shall include women in the same proportion as they hold in the local list of persons qualified to be jurors; and, if possible, not fewer than fourteen women. But husband and wife are not to be on the same panel.

[1] If over sixty he may claim exemption.

[2] In boroughs that have a court of Quarter Sessions (*e.g.* Cambridge) the qualification for its jury is that prescribed for Local Government elections. Consequently *there* every woman is qualified as a juror for Sessions (though not for Assizes) if she have reached the age of thirty and be the wife of (and reside with) a local-government elector.

[3] *I.e.* a strip (Latin, *pannus*); hence names written on a strip of parchment. In Scottish law, however, the person or persons accused is, or collectively are, called "the panel," *i.e.*—the *list* named in the indictment.

[4] At the Assizes there is also a further panel of "special" jurors, of greater wealth, *i.e.* householders rated at not less than £100 a year (33 and 34 Vict. c. 77); but for criminal cases a jury is never taken from this list, except in the rare cases where the indictment has been found in, or removed into, the King's Bench Division; see p. 427 *supra*.

[5] This rarity makes it easy to arraign together before one jury prisoners concerned in different indictments; thus saving time.

[6] In the United States, from the diversities of race and language, they are employed freely, sometimes occupying two or more days of a trial. Hence, "experience in the selection of a jury is one of the 'fine arts' of an [American] advocate." A like cause may lead to a like result in East London. In one case, there, eight of the twelve jurors were Polish Jews who could not write. Maître Lachaud, that most successful defender of prisoners in France, made it his rule, "I challenge every man who looks intelligent." In Ireland a kindred rule was at one time current; "Challenge every juror who wears a neck-tie."

the whole panel), where the sheriff has composed it in an unfair manner, *e.g.* by choosing men on the ground of their religion; or to the polls (*i.e.* to individual jurors). Felons jointly indicted sometimes challenge *different* groups of jurors, so as to secure being tried separately; *e.g.* when one prisoner has made admissions, or been found in possession of papers, that would not be legal evidence against the other man. An individual may be thus challenged either for cause shewn, or even "peremptorily" (*i.e.* without shewing cause). A challenge for cause may be made *propter respectum*, *e.g.* to a peer; *propter affectum*, *e.g.* for being near of kin to the defendant; *propter defectum*, *e.g.* for infancy or alienage; *propter delictum*, *i.e.* on the ground of the juror's having been convicted of some infamous offence, *e.g.* perjury. These objections may be raised either by the Crown or by the accused. But a "peremptory" challenge can be made only by the accused; and by him only in cases of treason or felony[1]. Thus a misdemeanant cannot exclude his bitterest enemy without legal proof of the hostility[2]. In treason the prisoner has thirty-five peremptory challenges, and in treason-felony and felony twenty.

The jury are then sworn[3]. If the case be one of felony or treason, the indictment is read over to the jury; which is called "charging[4]" them with the inquiry concerning the

[1] Hence in treason and felony the jurors have always been sworn separately —to give the prisoner a full opportunity of challenging each—while in misdemeanor they were, till the Oaths Act of 1909, sworn in groups of four.

[2] But in misdemeanors the defendant is generally allowed to exercise the privilege (which the Crown possesses in all criminal trials) of requiring any jurors to "stand by," *i.e.* not to serve unless a full jury cannot be made up without them (*Reg.* v. *Blakeman*, 3 C. and K. 97).

[3] The Criminal Justice Act, 1925, s. 15, provides against death or illness of a juror, or of *two*, during a trial; allowing the remainder to act, if prosecutor and accused consent in writing.

[4] Until they had performed this charge, by completing the inquiry, the common law did not permit them, in cases of treason or felony, to depart from the custody of the court, however protracted the trial might be. In 1873, in *Reg.* v. *Moore*, an Irish trial for murder (114 witnesses), the jury were thus secluded for more than six weeks (*The Times*, Sept. 11, 1873, p. 4).

In misdemeanors, however, the common law did not impose any such

prisoner. It is not so read in cases of misdemeanor, because there the defendant was always entitled to a copy. The indictment is then "opened"; that is to say, the counsel for the prosecution[1] addresses the jury; in order to direct their minds to the main questions in dispute, to tell them what evidence he proposes to adduce, and to explain its bearings upon the case[2]. If the prisoner is not defended by counsel[3], and the case is simple, this speech is often waived. Such a waiver affords a good illustration of the important principle that a prosecuting counsel stands in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in a civil litigation. For this latter advocate has a private duty—that of doing everything that he honourably can to protect the interests of his client. He is entitled to "fight for a verdict." But the crown counsel is a representative of the State, "a minister of justice[4]"; his function is to assist the jury in arriving at the truth. He must not urge any argument that does not carry weight in his own mind, or try to shut out any legal evidence that would be important to the interests of the person accused[5]. "It is not his duty to obtain a conviction by all means; but simply to lay before the jury the whole of the facts which compose his case, and to make these perfectly

necessity. And now by the Juries Detention Act, 1897 (60 and 61 Vict. c. 18), upon the trial of any person for a felony (other than treason or murder or treason-felony) the court may, if it see fit, permit the jury to separate, at any time *before* they consider their verdict, in the same way as if the trial were for a misdemeanor.

[1] A prosecutor who employs no counsel is not allowed (as he is in summary proceedings) to make any such opening speech or to examine the witnesses.

[2] In Scotland there is no such speech; its absence makes the work of the jury harder.

[3] Probably about two-fifths are not. In their case "it is the duty of the judge *to watch their interests;* though he is not there to be the counsel of either side, but to do justice"; Lord Reading, L.C.J., at C. C. A., Aug. 28, 1919.

[4] 4 F. and F. 499. Cf. L. R. [1916] 2 K. B. at p. 623.

[5] *E.g.* if the prisoner has written one letter confessing the crime, and another retracting this confession, the Crown must not put the former in evidence without producing the latter also. Similarly, if the victim of an alleged assault has been examined by the police-surgeon, this surgeon should be called by the Crown, even if he negative the assault. Cf. p. 546, *infra*.

intelligible, and to see that the jury are instructed with regard to the law and are able to apply the law to the facts[1]."

On concluding his address, the prosecuting counsel calls his witnesses, one after another; and each is examined in chief, cross-examined, and re-examined, successively[2]. Then, the Crown evidence being thus completed, the prisoner's counsel sometimes submits that it is not such as could reasonably satisfy any jury that the accusation is established; and he therefore asks the judge to withdraw the case from the jury. If the request be refused or not made, then comes the defence of the person accused[3].

(1) If the accused has no witnesses to call (except witnesses merely to character), he may nevertheless himself give evidence on oath (should he desire to do so) and be cross-examined upon it[4]. After doing this (or declining to do it), and calling any witnesses to *Character*; then

(*a*) if he have no counsel, he may address the jury in his own defence;

(*b*) if he have counsel, the prosecuting counsel may, should there actually be adequate cause[5], make a second speech, summing up the Crown evidence and commenting on the prisoner's own evidence[6] (if any). Then the counsel for the accused addresses the jury[7].

[1] Sir J. Holker, Att.-Gen. (*The Times*, Feb. 25, 1880).

[2] *Supra*, p. 353. And the prisoner's statement to the committing justice is usually read now; cf. p. 454.

[3] The old "inquisitorial" character of our criminal trials survives in the rule that in criminal trials a judge can call a witness (62 J. P. 232, 149 C. C. C. Sess. Pap. CLXVII, 175); but in civil trials he cannot do so except by consent of the litigants (L. R. [1910] 1 K. B. 337). See also 20 Cr. App. R. 86.

[4] See p. 407 n. 4, *supra*.

[5] *E.g.* if the evidence has proved to be other than was indicated in his opening speech; *Reg.* v. *Holchester*, 10 Cox 226.

[6] *Reg.* v. *Gardner*, L. R. [1899] 1 Q. B. 150.

[7] By a somewhat harsh privilege, the Attorney-General or Solicitor-General, *if present in person*, may—in both (*a*) and (*b*)—make a final speech in reply. Otherwise a prisoner, by calling no witnesses, secures the right to the last word. In Ireland he never has that right, even though he call no witnesses. In most of the United States he never has it. In France always.

(2) But if the accused has witnesses to Facts then, so soon as the Crown witnesses have finished, his counsel[1] (or he[2]) "opens" his case. Then his witnesses (including himself, if he desire to give evidence on oath) are examined, cross-examined, and re-examined[3]. His counsel (or he) makes a second speech, summing up the defence. Finally the prosecuting counsel makes a speech in reply.

When both cases have thus been fully stated it becomes the duty of the judge to sum up the case to the jury; a security for justice unknown to the tribunals of classical antiquity[4]. He not only directs them as to any points of law that are involved in the case, but also advises[5] them, though not imperatively, as to the bearing and value of the evidence. There was no enforceable standard for summings up until the creation of the Court of Criminal Appeal. But now it requires every summing up to be not only accurate but also adequate.

[1] Where several prisoners, who are being tried together, take the same course as to calling (or not calling) witnesses, their respective counsel usually make their speeches (not in order of professional seniority but) in the order in which their several clients' names occur in the indictment (*Reg.* v. *Barber*, 1 C. and K. 439). Where, again, some prisoners call witnesses but others do not, the counsel for the latter will have the right to the last word; and so will not speak until after the Crown counsel has replied upon the evidence tendered by the other prisoners (*Reg.* v. *Burns*, 16 Cox 195; cf. C. C. C. Sess. Pap. XCVIII. 363, CVII. 147, CXI. 602, CXIX. 22).

[2] See p. 409 *supra*. To statements of Fact in his address "the jury may, as regards *himself*, pay any degree of credence that they may think fit" though they are not uttered upon oath (Channell, J.).

[3] In the rare cases where the witnesses for the defence introduce new matter of importance which the prosecution could not have foreseen (*e.g.* an alibi, or insanity), rebutting evidence, to contradict them, may be called even at this late stage. *Reg.* v. *Frost*, 4 St. Tr. (N. S.) 384; *Rex* v. *Stimpson*, 2 C. and P. 415.

[4] Yet in England it is found as early as 1348; Holdsworth, III. 614. But in France the judges were deprived in 1881 of the power of summing up, as they were thought to exercise it too exclusively in the interests of the prosecution. American lawyers complain of the restrictions whereby some of their States limit or abolish the judges' power to express an opinion on questions of fact, and to control trials "and hold the jury to its province" (see Prof. Roscoe Pound's *Spirit of the Common Law*, p. 123). They attribute to this lack of guidance many undeserved acquittals.

[5] *Supra*, p. 478 n. Cf. 18 Cr. App. Rep. 132; and L. R. [1906] A. C. 130.

The judge may ask the jury to answer definite questions of fact; but they are entitled to refuse to do so, if they prefer to give a general verdict.

The jury then have to consider their verdict[1], and may, if necessary, retire for this purpose[2]. The jury may, at their discretion, return either a "special" verdict, *i.e.* one on the facts alone[3], or a "general" verdict, pronouncing on both the facts and the law[4]; *i.e.* "Guilty," or "Not[5] guilty." The verdict may dispose of the whole indictment in the same way, or may pronounce the prisoner guilty on some counts but not on others, or even on one part of a divisible count but not on the residue. We have already seen (p. 469) that, in a few exceptional cases, juries are empowered by modern statutes to convict of an offence other than that which the evidence has established. The first delivery of the verdict is not final; for the court may direct the jury to reconsider it. If they

[1] A verdict must be the utterance of twelve jurors; so that in the petty jury, as there are but twelve, unanimity is essential. But in any larger jury, such as a grand jury or (Lunacy Act, 1920) a jury on an inquisition of lunacy —and similarly with the Peers (*supra*, p. 422)—a mere majority suffices, if it consist of twelve. In Scotland (the jury there consisting of as many as fifteen) the verdict of a majority suffices. In India, a High Court jury is of nine, and the verdict of six suffices if approved by the judge, whilst in the Sessions courts the verdict of a simple majority suffices if approved by the judge. In France, a simple majority suffices. As to illness, see p. 481 n[3].

[2] They are no longer debarred from "food, drink, and fire" after retiring; the Juries Act, 1870, permits them to have, at their own expense, "reasonable refreshment."

[3] These are rare; but a modern instance occurs in *Reg.* v. *Dudley*, L. R. 14 Q. B. D. 273 (K. S. C. 61); *supra*, p. 76.

[4] It has sometimes been suggested that the jury are thus "made judges of the law as well as of the facts." But this is not so; for it is their duty to adopt the law as laid down to them by the judge. (See 21 St. Tr. 1039; and, in U. S. A., 2 Sumner 243, 15 Sup. Ct. 273.) True there is *now* (contrast Nov 48, Yelv. 24, 6 St. Tr. 967) no legal redress if they violate this duty; *e.g.* if they declare a homicide to have been a murder although by law it was justifiable. But this legal impunity only shews that their duty of making their verdict accord with the law, is—like their duty of making it accord with the evidence—not a jural but an ethical obligation.

[5] Meaning that there is not full legal proof of guilt; but not necessarily that they think him *innocent*. See pp. 390–1. Scotland, by a third alternative verdict ("Not proven," like Rome's "Non liquet"), avoids this ambiguity; and so renders "Not guilty" a clearly definite exculpation.

find it hopeless to agree, the judge may discharge them. Cases have been tried even four times, owing to successive disagreements; *e.g.* Tease, at Belfast, in 1909.

We have said that of all the persons who are indicted nearly three-sixths plead guilty. We may add that about two-sixths are tried and found guilty, and rather more than a sixth are tried and acquitted.

On being convicted of felony or treason, the prisoner is asked if he has anything to say why the court should not give judgment against him. The inquiry contemplates only objections *of law*; *i.e.* grounds for a motion in arrest of judgment (now practically unknown). The question might well be abandoned, as not only useless but also apt to elicit irrelevant and mendacious protestations of innocence[1]. Cf. Lewis' *Criminal Code*, p. 193.

After conviction, but before judgment, was the usual time to pray Benefit of Clergy[2]. This privilege was so remarkable that it deserves the student's attention. After William the Conqueror separated the ecclesiastical from the secular courts, the clergy began to put forward a claim that all persons in holy orders should be exempt from secular jurisdiction in all litigation, civil and criminal. Any clerk accused of crime was accordingly sent to the bishop's court. He was tried there before a jury of clerks, by the oaths of twelve compurgators; a mode of trial which usually insured him an acquittal. But even if he were convicted, the court could not inflict death, but could only degrade him and imprison him. About 1300, however, a change was made, by surrendering no accused clerks to the bishop until after they had undergone

[1] A salient instance of the untrustworthiness of such protestations is that of Alvin, sentenced to death at York for murder in 1712. During the "condemned sermon" he made a loud protest of his innocence; which so startled the preacher, the Rev. Mr Mace, that he fell dead in the pulpit. Alvin claimed this as a Divine vindication of himself. Yet, at his execution, he confessed his guilt. (Poulson's *History of Holderness*, II, 407.)

[2] See Pollock and Maitland, I. 441; Holdsworth, III. 293.

conviction in the secular court, and had thereby forfeited their chattels. And it was also settled that the clergy had no such "benefit" in civil cases, or in misdemeanors, or (soon afterwards) in treason. But, on the other hand, the benefit was extended to all persons eligible for ordination, although not actually ordained; *i.e.* to all males who could read; which soon came to mean, who could learn a few words by heart. But in 1487 it was enacted that these mere laymen should have the benefit only once, and should be branded on the thumb to shew that they had had it[1]. Under Henry VIII. benefit of clergy was removed from "wilful murder of malice aforethought" (*supra*, p. 126). Under Elizabeth all surrenders to the bishop, and all distinctions between ordained clerks and laymen, were abolished; and henceforth every person who obtained the benefit became liable to be kept in gaol for a year. Under William III. the benefit was extended to women, and independently of their being able to read; and under Anne reading was made unnecessary for men also. On the other hand, successive statutes took away the benefit from the more heinous crimes; until in Blackstone's time there were one hundred and sixty felonies in which it could not be claimed, *i.e.* which were really capital. Finally, in 1827, benefit of clergy was abolished by 7 and 8 Geo. IV. c. 28. It survived longer in parts of the United States; and was successfully claimed in South Carolina at least so recently as 1855 (*State* v. *Bosse*, 42 S. C. 276; cf. 35, 372).

8. *Judgment.*

Sentence is sometimes postponed, in order to give the prisoner an opportunity of mitigating it by making restitution or giving information; or in order to inflict on him *some* punishment without any obvious disgrace, when it is intended merely to discharge him on recognisances.

[1] A book of 1633 (*Whimsies*, p. 69) says, "If a prisoner, by help of a compassionate prompter, hack out his Neck-verse (Psalm li. 1) and be admitted to his clergy, the jailors have a cold iron in store if his purse be hot; but, if not, a hot iron, that his fist may cry *Fiz*."

A criminal decision, whether of conviction or of acquittal, constitutes a conclusive estoppel as between the crown and the prisoner. But in any subsequent civil proceeding between either of them and a third party, that decision is no estoppel. Some authorities doubted its being even admissible as mere *primâ facie* evidence. But it was decided to be so in *Re Crippen*, L. R. [1911] P. 118.

Already, in our successive accounts of the various kinds of criminal offences, we have mentioned, in connection with each one, the character of the punishments which the law prescribes for it. All that now remains, therefore, is to state some provisions which affect punishment in general. Thus the Bill of Rights provides that "excessive fines ought not to be imposed, or cruel and unusual punishments inflicted." Hence judges cannot create new punishments[1].

The forms of punishment now permitted by law are death, penal servitude, imprisonment (with or without hard labour), whipping, fine; and, chiefly in the case of juvenile offenders, detention (in reformatories, etc.).

The penalty of Death[2] is now practically restricted to cases

[1] Thus where a defendant was sentenced to be imprisoned, and also to ask the prosecutor's pardon and advertise the fact in certain newspapers, this was held bad, except as to the imprisonment (1 Wilson 332).

[2] The hanging does not operate now through suffocation, but—by a "long drop" invented by Professor Haughton of Dublin—dislocates the vertebræ and so produces an instantaneous and painless death. Persons under sixteen cannot now be sentenced to death, but are "detained" during the King's pleasure; 8 Edw. VII. c. 67, s. 102. No one under *eighteen* is in practice ever executed. Bishop, aged eighteen, was executed in 1925. Women are rarely executed; but in 1923 one was, and another in 1926.

Sir Harry Poland says (*Seventy-two years at the Bar*, p. 321) "I have found that the fear of penal servitude is nothing like such a deterrent as the fear of being hanged." Mr Justice McCardie pronounces the latter fear "the most powerful deterrent that has been, or can be, known." But for the penalty of Death the burglar would find it worth while to kill his victim to prevent his appearance as a witness; and a prisoner already in penal servitude for life would have nothing to fear if he killed his warder. On Dec. 1, 1925, under a like immunity, a prisoner awaiting execution in a Burmese gaol, raised a mutiny in which seven were killed. "That bit of rope,' said a convict once, in England, "is a great check on a man's temper."

of murder[1]. The average annual number of capital sentences is about thirty, and only about half of these are actually carried out[2].

Penal servitude was established in 1853[3] to take the place of transportation[4]. It is never imposed for less than three years[5]; whilst, on the other hand, the usual maximum for which a person can be sentenced to imprisonment with hard labour—or to any form of imprisonment for a statutory[6] offence—is only two years[7]. The number of sentences of penal servitude passed in 1923 was 474; or about one in every fourteen convictions upon indictment. An offender who, after having once been convicted of any felony, is again convicted of some felony, may, as a rule, be sentenced to penal servitude for life[8]. But a misdemeanant's legal maximum of punishment is not thus affected (except under special statutes) by his former offence.

[1] There are, however, three other capital offences: viz. treason and certain forms of piracy and arson (*supra*, pp. 163, 277, 320). But although since 1820 nineteen persons had been convicted of treason, the death sentence was commuted in each case until Casement's in 1916.

[2] Executions are usually deferred until after the third Sunday after the passing of the sentence; and take place at eight in the morning, and not on a Sunday or a Monday.

[3] No one under sixteen can be sentenced to it.

[4] Transportation had been originally established by the device, which in 1665 Kelyng (fo. 45) treats as still novel, of giving pardons conditional on the convict's remaining in a colony for seven years, and passing five of them in service. At the end of that service he received a grant of land.

[5] 54 and 55 Vict. c. 69. Until this statute the minimum was five years.

[6] Where it is by the common law that a punishment is prescribed, there is no maximum limit to imprisonment. Hard labour—now always permissible, but nominal (see p. 318 and p. 490 n. 1)—is the creation of statute-law.

[7] Practically speaking, a sentence of two years' imprisonment with hard labour is more severe than one of three years' penal servitude. For a convict in penal servitude is no longer kept in separate confinement at all; but from the first is employed only in associated labour. Moreover his dietary is more liberal than in most of the time of an imprisonment, and his labour less continuously severe, and more often in the open air. But his privilege of earning by good conduct (as fourteen convicts in fifteen do) a ticket of leave, releasing him after serving about three-fourths of his term, has now been extended to persons under imprisonment for over a month, after serving five-sixths of it.

[8] But if this second felony be simple larceny, only to *ten* years' penal servitude. All "life" sentences are reconsidered after twenty years. As to "Preventive Detention" after penal servitude, see p. 508 *infra*. Cf. p. 546 *infra*.

Imprisonment involved, at common law, simply the deprivation of liberty; but now it may take several forms. (α) A nominal[1] obligation to perform (not only work but) hard labour may be added to it. Such imprisonment was first authorised in 1776. (β) Ordinary punishment, without this hard labour, is now known technically as that imposed upon "offenders of the Third Division." (γ) Below this[2] is that of "offenders of the Second Division"—who enjoy easier discipline, *e.g.* as to prison-dress and letters and visits (though not as to food or labour), and are kept apart from the Third Division. Persons imprisoned in default of finding sureties must be placed in this class. (δ) A still lighter form of imprisonment is that of the "offenders of the First Division." These do not wear prison dress, and in fact incur little inconvenience beyond the mere detention. All persons imprisoned for sedition[3], for criminal contempt of court[4], or for offences against[5] the Vaccination Acts, must be placed in this division. These are the only forms of criminal imprisonment[6]. If no division is specified by the judge, a prisoner is put into the

[1] For the labour is not really "hard," now. (But the sentence involves the prisoner (if a male) in having to spend some of the first weeks in solitary confinement.) So the C. J. A. Act, 1914, s. 16 (1), now allows it for all offences, even common-law ones; though forbidding it for mere non-payment of fines. Crank and treadmill are gone. Cf. p. 318 *supra*.

[2] In order to keep those prisoners that are not of criminal habits out of all contact with the hardened offenders. It is useful in cases like default of fine, or drunkenness, or petty assaults.

[3] 40 and 41 Vict. c. 21, s. 40.

[4] 61 and 62 Vict. c. 49, s. 5.

[5] *Ibid.* s. 41.

[6] In 1923, the number of criminal sentences of imprisonment *without* option of fine was 31,072; only about one-seventh being after trial on indictment. The prisoners received were classified thus: (a) with hard labour, 25,594; (b) in the third division, 18,234; (c) in the second division, 1719; (d) in the first division, 9. And 629 juvenile offenders were sent to reformatories, and 463 to industrial schools. Civil-debt prisoners are about 11,000 yearly. At Assizes, great care is taken to send to the second division such offenders as had never fallen into crime before. But justices of the peace avail themselves far too little of this classification.

Sentences at Quarter Sessions *now* date from pronouncement. But those at an Assize date from, and include, its Commission Day. Hence an Assize sentence of "three days' imprisonment" *may* only mean instant discharge.

third. There exists also an even more lenient form of incarceration which is used in cases of *civil* debt.

By the Children Act, 1908 (8 Edw. VII. c. 67, s. 102) a person under fourteen cannot be sentenced to imprisonment; nor even one under sixteen, unless he be too unruly or too depraved for confinement in a mere Place of Detention. It must be remembered (see p. 97 n. *supra*) that a sentence for *felony* involves forfeiture of any pension unless the sentence be only one of imprisonment for not more than twelve months and without hard labour. And an Old Age pension is forfeited by a sentence of imprisonment (for *any* offence) during two years after release if the imprisonment do not exceed six weeks, or during ten years if it do.

Lighter than imprisonment is "Detention under penal discipline" as "inmate" (not "prisoner") of a Borstal Institution. See p. 509 *infra*.

Offenders under sixteen may be sent to "Custody in a Place[1] of Detention" for a month or less; or (a) if between twelve and sixteen years of age, to a Reformatory School for not less than three, and not more than five years; and (b) if under twelve (or under fourteen but of good character), to an Industrial School[2].

Whipping (now possible only under statutes) is authorised[3] for male offenders, even adults, in a very few gross cases, such as robberies with violence, and also in the case of "incorrigible rogues[4]." Boys who are under the age of sixteen may be sentenced to a whipping in a very much wider range of cases,

[1] In 1921, 36 were so sent. As to "Detention in *Police* Custody" for four days or less, even of adults, by a sentence at petty sessions, see p. 441.

[2] 8 Edw. VII. c. 67, ss. 57–106. An Industrial School retains no one after sixteen; a Reformatory School, no one after nineteen. For an offender's maintenance in either, his parent may be ordered to pay. And by s. 99 a fine or damages or costs incurred by an offender under sixteen may be exacted, instead, from the parent or guardian *if* his neglect conduced to the offence. Probation has largely suppressed Reformatory Schools; practically halving the number sent.

[3] The character of the whipping is regulated by 26 and 27 Vict. c. 44, s. 1. The whole of it must be inflicted at one time.

[4] *Supra*, p. 327. And of Procurers; 2 and 3 Geo. V. c. 20, ss. 3, 7 (5).

including various offences against the Larceny Act, 1916, the Offences against the Person Act, 1861, the Malicious Damage Act, 1861; and boys under fourteen[1], when convicted summarily of *any* indictable offence may be ordered to be whipped, with or without other punishment. Boys of fifteen or less are sometimes released on their fathers promising to chastise them.

Fining[2] is a punishment rarely resorted to in the higher criminal courts. It is employed in less than one per cent. of the convictions upon indictment, and this only in cases where the offence involves little or no moral guilt. But it is inflicted by courts of summary jurisdiction in about ninety per cent. of their convictions for petty offences.

By the modern repeal of all the statutes which for certain offences prescribed minimum punishments, English criminal courts have obtained, at the present day, a complete power of remitting punishment—a discretion very rarely intrusted to judges under the continental codes[3].

It has become common (see Cr. App. R. 5. 172, 2. 159) for judges, when determining the sentence on a prisoner, to be asked to "take into account" other charges of the same *kind* of offence, on which warrants have been issued against

[1] 42 and 43 Vict. c. 49, s. 10 (1); 8 Edw. VII. c. 67, s. 128 (1). In 1923, 530 persons were whipped; only 16 of them after an indictment.

[2] A fine must be distinguished from the (now vanished) amercement. An amercement was a pecuniary penalty fixed by the jurors; but a fine is fixed by the court. The earliest fines were compositions agreed upon between the judge and the prisoner, to avoid imprisonment, at a time when the King's judges had no power to impose pecuniary punishments (Pollock and Maitland, II. 515).

Care should be taken, when inflicting a fine, to ascertain the resources of the person fined, and to proportion it to them. The Portuguese Code consequently measures every fine by multiples of the offender's actual daily income. Yet even this does not meet the fact that the loss of a day's small earnings is felt more keenly than the loss of a day's large earnings.

[3] The evil effect of minimum punishments in creating in the minds of juries an exaggerated reluctance to convict is vividly illustrated by the fact that on the final abolition of the minimum limit of punishment (ten years' penal servitude) for unnatural offences, the percentage of trials for such crimes which ended in convictions rose at once from the remarkably low rate of 35 to 47. *Criminal Judicial Statistics*, issue of 1896, p. 26.

him, and which he now (1) admits to be true, and (2) desires to be now dealt with. Cases so dealt with should then be endorsed on the indictment. The total punishment does not usually exceed what would be the maximum for *one* offence of that class. In one case in 1925, fifty-two such other charges were thus taken into account. It is a wise practice; for the offender thus secures a free start on coming out of prison, instead of being rearrested. But charges of offences of a different kind (*e.g.* false pretences as against burglary) are less readily taken into account.

Besides these punitive measures, a court may also make orders whose effect is of a purely preventive character. Thus, with the object of removing the young from criminal surroundings, a Court of Petty Sessions may order children frequenting the company of thieves or found begging, and destitute children who are orphans or whose parents are undergoing penal servitude or imprisonment, to be sent to a certified industrial school till they reach the age of sixteen[1]. Another preventive measure is that of Supervision of an adult by the police for a fixed period after his punishment; for whenever a prisoner is convicted of felony, or of one of certain grave misdemeanors, after having been previously convicted of a crime of equal degree[2], the judge may direct that, after completing his sentence, he shall be subject to supervision for a specified period; perhaps three years. (As to the Preventive Detention of habitual criminals, see p. 508 *infra*.) At the other extreme, even a person who has not committed actually any offence at all may be required to find sureties[3] for good behaviour or to keep the peace, if there be reasonable grounds to fear that he may commit some offence, or may

[1] The Industrial Schools Act (29 and 30 Vict. c. 118), s. 14.

[2] Prevention of Crimes Act, 1879 (42 and 43 Vict. c. 55), s. 8. And at the opposite extreme, an offender who deserves *no* actual punishment may be supervised; but by a "Probation Officer": see *infra*, p. 510.

[3] "This power of binding over is the most useful power that a justice possesses. And it is the only one which he derives from his commission and not from any Statute" (Sir Chartres Biron).

incite others to do so, or may act in some manner which would naturally tend to induce other people (even against his desire) to commit one[1].

After the judgment itself has been given there are further Orders which the judge may have cause to make.

(*a*) Of one such we have already spoken[2]—the order which, after any trial for theft, the court may make for Restitution, to the true owner, of stolen property which has been identified at the trial.

(*b*) Another, of much more frequent application, may be made in respect of Costs. In criminal law costs do not "follow the event." The common law knew nothing of costs. And the statutes which introduced them did not mention the Crown —an omission which Blackstone elevates into rules that it is the prerogative of the Crown not to pay costs, and that it would be beneath its dignity to receive them[3]. Hence, as criminal proceedings are technically at the suit of the Crown, no judgment for costs could be given in them. Even if the prosecution were in fact brought by a private individual, the law in no way reimbursed him for the outlay he had incurred in discharging this public duty. But criminal courts are now empowered—the latest and most comprehensive statute being the Costs in Criminal Cases Act, 1908[4]—to order the reasonable costs of the prosecution and of the witnesses for the defence, or of either of them, to be repaid out of public funds, in the case of any *indictable* offence. (The merely quasi-criminal offence of obstructing a road or river is excepted.) The power is given, not only to Assizes and Quarter Sessions,

[1] *E.g.* a controversial lecturer, whose open-air addresses are such that a breach of the peace will naturally result, may be required to find sureties; *Wise* v. *Dunning*, L. R. [1902] 1 K. B. 167. See p. 284, *supra*.

[2] *Supra*, p. 224.

[3] III. 400; cf. *Rex* v. *Abp of Canterbury*, L. R. [1902] 2 K. B. 503.

[4] 8 Edw. VII. c. 15, s. 1. The scale of costs allowed to witnesses is fixed by the Home Secretary. See Statutory Rules and Orders of 1920, no. 354. The money is paid *locally*, out of the rates of the county or county-borough where the offence was committed.

but also to justices of the peace when dealing summarily (*supra*, p. 439) with an indictable offence, or when holding (*supra*, p. 452) a preliminary examination about one. Neither side, usually, will receive an allowance for witnesses who speak only to character. The costs allowed to a prosecutor are said to have averaged about £10; but see p. 95 n. 1.

Besides these orders upon public funds, orders for costs may now also be made upon individuals concerned in the criminal proceedings. For (s. 6) any court that convicts[1] a person of an indictable offence may now order him[2] to pay the taxed costs of the prosecution[3]. A similar power has long existed in case of non-indictable offences (*supra*, p. 436). And, on the other hand, there are a few exceptional cases in which a private prosecutor, if the trial has ended in an acquittal, may be ordered to pay the taxed costs of the defence. The principal instances of this are where a persistent accuser has, under the Vexatious Indictments Act[4], been at his own demand bound over to prosecute; or where the prosecution is for a defamatory libel[5]; or where an accusation (of *any* indictable offence) has not only been dismissed at the preliminary examination by the justices, but has been pronounced by them to have not been "made in good faith[6]."

(*c*) The common law knew nothing of orders for Damages in criminal proceedings; as they are instituted for punitive

[1] Even though it inflict no punishment beyond binding over; C. C. C. Sess. Pap. CLVII. 453. The prosecution must convince the court that the defendant has adequate means to pay the costs.

[2] For *felonies* this had been permitted by the Act of 1870 (*supra*, p. 95), before which a conviction for treason or felony caused a forfeiture of the prisoner's goods. And a sentence of death for treason or felony involved, as a necessary consequence, an "attainder" (4 Bl. Comm. 374). A person attainted (*attinctus*, "blackened") became dead to civil rights; his lands were forfeited, and his blood was "corrupted," so that descent could not be traced through him. These consequences were abolished by the Forfeiture Act. But an attainder may still be produced by a judgment of outlawry; though such judgments are, in practice, obsolete. The last was in 1859.

[3] The court will probably fix a maximum to the amount to be thus paid by the person convicted, *e.g.* £1000 in *Rex* v. *Morriss* in Dec. 1925.

[4] 30 and 31 Vict. c. 35, s. 2; *supra*, p. 471.

[5] 6 and 7 Vict. c. 96, s. 8.

[6] 8 Edw. VII. c. 15, s. 6 (3).

and not compensatory purposes. But a great economy of time and money is effected whenever a single judicial investigation into any wrongful transaction can be made to cover all its consequences, reparative as well as penal. Hence the French code freely permits the appearance, at criminal trials, of a *partie civile* to claim damages against the prisoner[1]. An experimental, and therefore very limited, step in this direction was taken by the Forfeiture Act, 1870[2]; which in cases of felony empowers the court to order a convicted prisoner to pay a sum not exceeding one hundred pounds, by way of compensation for any loss of property suffered by any person through the felony. Thus a prisoner convicted of forging a bill of exchange may be made to repay to the prosecutor money which he has lost by discounting it. But the clause, being limited to losses of property, does not extend to injuries to the person[3].

9. *Reversal of Judgment.*

Along with the steps which may be taken at this stage to secure a revision of any supposed error in the judgment, it may be convenient to recall those other modes and occasions of appealing to higher tribunals which we have already noticed at earlier stages of the ordinary criminal procedure; as the student will thus obtain a general view of the subject. The following are the prisoner's opportunities, at the various successive stages, of defending himself against errors of law.

I. Before trial.

(*a*) A motion to quash the indictment; for insufficiency apparent on the face of it. As the court has a discretion to refuse to quash an indictment, even for a valid objection, there is no appeal from the refusal; and the prisoner, if he

[1] "L'action civile peut être poursuivie en même temps et devant les mêmes juges que l'action publique" (*Code d'Instruction criminelle*, art. 3).

[2] 33 and 34 Vict. c. 23, s. 4.

[3] For the power to award compensation (*a*) when dismissing trifling charges—if in summary proceedings, up to £10 only—see pp. 95 and 438; (*b*) on convicting for malicious injuries to property, see p. 167.

wishes to press his objection, must do it by demurrer, or else wait till after trial.

(*b*) A Demurrer[1]; alleging, similarly, that the indictment is on the face of it insufficient. The court has no discretionary power of refusing to hear objections raised thus; but demurrers involve such disadvantage that they are unfamiliar now.

II. After trial.

(*a*) A motion in arrest of judgment; for any objection in *law* that appears on the face of the record (unless it be merely formal). A felon as we have seen (*supra*, p. 486) is *asked* if he raises such objection.

(*b*) An application to the Court of Criminal Appeal.

The creation of a general Court of Criminal Appeal[2], by the Criminal Appeal Act of 1907[3], constituted a revolution in the administration of our penal justice. Previously (except[4] for cases tried in courts of a merely summary jurisdiction) the general principle had been that in criminal cases—unlike civil ones—no appeal was allowed to either party upon any question of Fact. And even on questions of Law the Crown had little opportunity of appeal and the prisoner not[2] an unlimited one. If a jury wrongfully acquitted a man, the Crown had, as it still has, no redress. If it wrongfully convicted him, his only resource was to apply to the Home Secretary for a pardon —a derogatory form of redress for an innocent man. The Act of 1907 does not enlarge the Crown's opportunities of appeal; but it greatly extends those of every prisoner convicted[5] upon a trial by jury. (To convictions at Petty Sessions[6], or on trials by the Lords, it does not apply.)

(A) In the rare cases where his offence is the merely quasi-criminal one of obstructing a highway or bridge or navigable

[1] *Supra*, p. 473 [2] *Supra*, p. 425. [3] 7 Edw. VII. c. 23.

[4] *Supra*, pp. 442–3.

[5] Or pleading guilty. But *not*, now, if found "Guilty but insane"; *Felstead* v. *Director P. P.*, L. R. [1914] A. C. 534. *Supra*, p. 60 n. 3.

[6] Except as to the *sentences* on "Incorrigible Rogues" (*supra*, p. 327), or on "juvenile adults" (p. 438 n.), sent from Petty to Quarter Sessions.

river, he has the full right of appeal as in a civil action; s. 20 (3).

(B) And even when the offence charged is a truly criminal one—as in almost all cases it will be—he nevertheless has (s. 3)

(1) an *absolute* right to appeal on any question of pure law[1];

(2) a right, *in case of* his obtaining leave either from the judge who tried him or from the Court of Criminal Appeal itself or from one of its judges[2], to appeal on any question of fact, or of mixed fact and law;

(3) a right, *in case of* his obtaining leave from the Court of Criminal Appeal or from one of its judges, to appeal against the sentence passed on him (unless, as in murder, the sentence is one fixed definitely by the law)[3].

A prisoner who desires to appeal should—s. 7 (1)—give notice of his desire within ten days after his conviction; but the Court may[4] grant him an enlarged time. Accordingly—s. 7 (2)—any sentence of death, or even of corporal punishment, is not to be carried out until the ten days, or the enlarged time, be over; nor until the appeal, if then instituted, be disposed of. If the prisoner be poor, the Court may assign him, at the public expense, a solicitor and a counsel. Applications for leave to appeal are usually made in writing; the appellant has no right to be present. He has, however, a right to be present at the hearing of the actual appeal, unless it be on a matter of pure law. At actual appeals the Director of Public Prosecutions must—s. 12—see that the prosecutor is duly represented.

On every appeal, or application for leave to appeal, the judge who tried the appellant must furnish to the Court his

[1] But the Registrar of the Court—s. 15 (2)—may bring before it promptly any appeal on a purely legal point that seems to him untenable; and the Court may deal with it at once, without hearing arguments.

[2] From his refusal an appeal lies to the full Court.

[3] No leave is needed as to *sentence* of "Preventive Detention"; p. 508.

[4] Except in the case of an offence punishable with death.

notes of the trial and a report giving his opinion upon any points arising in the case (s. 8). (Or, if the appeal involves only a question of pure law, the Court may require the judge to "state a case" as in the old practice of the Court for Crown Cases Reserved; s. 20.) And in view of the possibility of an appeal, shorthand notes are to be taken, at the public expense, of every criminal trial before a jury[1] (s. 16); thus rendering universal a practice which, by the sedulous caution of the City of London, had been in force at the Old Bailey for nearly two centuries. Moreover the Court, when dealing with the appeal, are empowered (s. 9) to order the production of documentary or "real" evidence, and to receive evidence from witnesses, whether they were called at the trial or not, either in open court or by depositions for the purpose. (But new evidence, not given at the original trial, is never to be made a ground for *increasing* the sentence.) They may also, if necessary, appoint some expert, *e.g.* a chemist or a specialist in lunacy, to act with them as an assessor; or appoint a special commissioner to report to them on any question which involves such a scientific or local investigation, or such a prolonged examination of documents or accounts (*e.g.* in cases of embezzlement), as cannot conveniently be conducted before themselves. Provision is made (ss. 12, 13) out of public funds for all the expenses connected with an appeal, including even those of the appellant's own attendance. It thus costs him no money to appeal.

Groundless appeals, such as impede so greatly the administration of justice in the United States (see p. 506 n.), are discouraged by various provisions[2]. There is, for instance, the

[1] These do not include the speeches of counsel (unless the judge order it, so as to make clear what issues are actually raised). Yet they are costly. Mr Ashton, K.C. says, "I have known a hopeless appeal cost the country a three-figure bill for transcripts" of the shorthand notes.

[2] Nevertheless, in 1924, Avory, J., declared the Court to be habitually "burdened with frivolous appeals." In a case "frivolous to a marked degree" the Court had (April 16, 1923) to peruse six hundred pages of transcripts. "Ninety per cent. of the applications are frivolous"; 15 Cr. App. R. 542. And many of the successful appeals release, on a mere technicality, men who are guilty.

necessity of obtaining leave to appeal, whenever the point is not one of mere law. There is also a provision, s. 4 (1), that, even where the appellant is technically in the right, his appeal may be dismissed if "no substantial miscarriage of justice has actually occurred," and the jury not only might, but *must*, have convicted even if the law had been duly followed. A fact, for instance, has been elicited by an improper leading question; but the fact was of no moment. There is, further, in the case of appeals against a sentence, a power—s. 4 (3)—for the Court to alter that sentence by increasing instead of diminishing it. Moreover although, between the institution of an appeal and the decision of it, the appellant escapes the treatment of an ordinary prisoner[1], (being merely detained in a very lenient custody or in rare cases admitted to bail), yet this period will not count (except by special order of the[2] Court) as any part of the punishment. So any man who appeals on untenable grounds postpones thereby the time of his final return to liberty.

But if—s. 4—a substantial miscarriage of justice has occurred, (whether from the judge's wrong decision of a question of law, or from the jury's having returned a verdict incapable of being supported when regard is had to the evidence[3], or from any other cause), then the appeal will be allowed, the conviction quashed, and a judgment of acquittal entered[4]. If the conviction were for theft, the Court can review not only the conviction but also—s. 6 (2)—any order that may have been made for the restitution of the property alleged to have been stolen.

If the appellant has not objected to his conviction, but only to the severity of his sentence, the Court may quash that

[1] If he be under two concurrent convictions and appeal against only one of them, yet both sentences are thus suspended.

[2] Which is never made in any case where the grounds of appeal are so slight that leave to appeal was originally refused; 16 Cr. App. R. at p. 90.

[3] If the verdict be *unreasonable*; cases merely weak are not retried.

[4] But a New Trial, unfortunately, cannot be ordered (except after a merely abortive one); even though the prisoner be clearly guilty.

sentence, and pass instead "such other sentence (whether *more* or less severe) as they think ought to have been passed"; s. 4 (3). It will not quash a sentence unless it be so excessive as to shew an error of Principle. If, on *any* appeal, the Court finds that, though the appellant did commit the crime, he did so in a condition of irresponsible insanity, they may quash the conviction, and commit him to custody as a criminal lunatic. As to appeal from a verdict of Insanity, see p. 60 n. 3 *supra*.

The decision pronounced by the Court will usually be final[1]. But in those rare cases, where a point of law is raised which is of such exceptional *public* importance that the Attorney-General certifies that it is desirable to have the highest decision on it, that certificate will enable either party to take the case from this Court directly to the House of Lords; s. 1 (6).

The Act leaves untouched the Crown's prerogative of mercy; and the Home Secretary will thus still be able to institute inquiries of his own, in which he will be free from the technical rules of evidence, and also will be able to consider pleas for mercy based upon grounds which a court of law cannot accept. Or he may instead (s. 19) refer to the Court of Criminal Appeal either the whole case, or any special point in it.

The Act does not extend to Scotland or Ireland. But in 1925 a Departmental Committee found its working to have been so successful that they recommended its extension to Scotland.

The Act has conferred great benefits, by remedying mis-

[1] But its decisions (like those of the Judicial Committee and unlike those of the House of Lords) are *not* absolutely binding on itself; cf. the effect of Cr. App. R. 2. 62 on 2. 51; and of 12. 81 on 12. 44; and of 14. 17 on 4. 64; and of 18. 81 on 14. 141. Indeed of all the forms of English judiciary law, whilst real property law is the most stable, criminal law is the least so. "Criminal law," says Sir Harry Poland, "is an essentially fluctuating thing...since our judges rightly interpret it in accordance with the spirit of the age." For "the static mind of the lawyer," as Sir Clifford Allbutt puts it, "must perforce come to terms with the dynamics of the biologist"; or, we may add, of the sociologist.

carriages of justice[1] and (still more) by removing the former public anxiety as to the possibility of such miscarriages. It has also raised the level of summings-up, and has done something towards standardising sentences. And it does not seem to have weakened that sense of responsibility in the minds of jurymen which is the great safeguard of accused persons. Countless are the acquittals that have been secured by the influence of those impressive words—still used, though now unjustifiable—"Remember that your verdict is final."

10. *Reprieve, and Pardon.*

The execution of the sentence may be postponed by a Respite of it, *i.e.* a Reprieve of the offender; or be altogether remitted by a Pardon.

Postponements may be granted not only by the Crown but even by the judge. For except in cases of murder, a judge of assize may not only delay[2] the delivery of his judgment, but may even, after delivering it, delay its execution. And, in the case of capital sentences, it is his imperative duty thus to respite it if the prisoner be proved either to be insane or to be pregnant[3]. But a Pardon lies beyond all judicial discretion, and can be granted by no authority below that of the Crown itself[4]. It may be absolute, or be subject to some condition[5],

[1] At present, about six per cent. of the persons convicted on indictment try to avail themselves of the Act. But scarcely one-eighth of these finish with *any* degree of success. *E.g.* in 1923, out of 6541 persons convicted on indictment, 373 applied for leave to appeal, of whom 59 obtained it; 33 others appealed as of right. Of these 92 appellants, 44 gained nothing; and some of the others only little. Thus our jury-courts make but few blunders.

[2] *E.g.* in order to see if restitution is made; or, again, even when only a binding-over or a discharge is contemplated, in order to visit the offender penally with some inconvenience, whilst avoiding the disgrace of an actual sentence of Imprisonment.

[3] The reprieve for pregnancy occurs as early as A.D. 1348; Statham, *Corone*, 65, 78.

[4] Anson on the Constitution, II. 2. 27. The Crown can review the whole history and condition of the offender; and even take into account popular emotion, as when in Lee's case, at Exeter some forty years ago, the damp gallows had thrice failed to act.

[5] *E.g.* the pardons which introduced transportation; *supra*, p. 489. Or the pardon granted, about 1730, to a condemned criminal on condition that he would allow the great surgeon Cheselden to perforate the drum of his ear, that the consequent effect upon hearing might be ascertained.

or only "remit" a portion of the punishment, or "commute" it to a milder form. Pardons may be granted by the King for all crimes, except two. For (*a*) under the Habeas Corpus Act the King cannot pardon the offence of sending a prisoner out of England to evade the protection of the writ of habeas corpus[1]; and (*b*) even at common law, he cannot pardon a person convicted of a common nuisance until after the nuisance has been abated[2], for such a pardon might prejudice the rights of the private persons injured by the nuisance[3]. Moreover[4] upon an impeachment by the House of Commons, a pardon by the Crown cannot be pleaded as a defence so as to prevent the trial; though it does save from punishment. A breach of the statutes of a corporation (*e.g.* a University or a college) is not a "crime"; and so is not within the Crown's power of pardon (2 Str. 912; *Dr Bentley's Case*).

It has often been maintained that a perfect code would remove all necessity for a power of pardon. "Happy that nation," says Beccaria, "in which clemency shall come to be considered dangerous." But long experience has shewn that human foresight is incompetent to frame, and human language to express, a faultless scheme of legislation. The power of pardon therefore is one which is indispensable to the wise administration of penal justice[5]. Yet it is a power which, if exerted to the full, would suffice to overthrow the whole fabric of the criminal law; for mercy to the Few may be cruelty to the Many. President Taft found that this power "must be wielded skilfully, lest it destroy the prestige and supremacy

[1] 31 Car. II. c. 2, s. 11. [2] *Supra*, p. 15.

[3] Contrast the converse rule that it is only *before* any informer has commenced an action that the Crown can grant a pardon in the case of conduct forbidden under some penalty recoverable in a civil action by a common informer; *supra*, p. 16.

[4] By the Act of Settlement (12 and 13 Wm. III. c. 2).

[5] The power has, on an average, been exercised in about three hundred cases a year; but only four per cent., or less, of these are *complete* pardons. In 1923 only in 188 cases; and *no* complete pardon. Very rarely (in 1923 only once) is the remission due to any doubt as to the justice of the conviction.

of Law[1]. Sometimes the President is deceived in his exercise of it. I was." (*Ethics in Service*, p. 60.)

The Social Results

Four and a half centuries ago, Chief Justice Fortescue laid down the fundamental rule—"I could rather wish twenty evil-doers to escape than one man to be condemned injustly" (*De Laudibus*, ch. XXVII.). The outline I have given of the English law of criminal procedure and evidence may serve to shew how effectually its rules are now moulded into a shape that affords the amplest practicable security against the unjust condemnation of any innocent man[2]. Accused persons find themselves protected by the humane attitude of the judge[3] and of the prosecuting counsel, by the right to a "dock defence[4]"; by the freedom conceded to the prisoner's counsel; by the publicity of the proceedings and the right of reporting them[5] to a still wider public; by the stringency[6] of the rules which prescribe the quantity and the character of the evidence which the Crown[7] must produce; by the facilities for securing witnesses for the defence at the cost of

[1] King George V's accession was celebrated by partial remissions of sentences to 11,873 offenders! Whilst her predecessor had in four years of office pardoned only seventeen criminals. Mrs Fergusson, the governor of Texas in 1925–26, pardoned 3500 in two years.

[2] Berry, the executioner, says in his memoirs that, of the 140 persons he had hanged, all but three *expressly* admitted to him their guilt.

[3] See M. Cruppi (p. 50), and M. de Franqueville (II. 389, 477, 687).

[4] *I.e.* the right to call upon any counsel practising in that court whom he may see there (however eminent) to undertake his defence for the modest fee of £1. 3*s*. 6*d*. In July, 1921, at the C.C.C., a conspiracy case in which a "dock-brief" was given with this small fee, lasted twenty-three days.

[5] Pollock on Torts, c. VII. s. 3. "Les journalistes, c'est là *le vrai et utile public*" (De Franqueville, II. 698). The local newspapers' reports are the great check on Petty Sessions. See Hansard, June 25, 1812, for Romilly's regret that Quarter Sessions *then* lacked that check.

[6] Even as far back as 1722 (as appears in *Bishop Atterbury's Case*) lawyers noticed that English courts required a greater "certainty of evidence" than continental courts did.

[7] A stringency which is often relaxed in favour of the *accused*. "So much latitude is now given to prisoners as almost to create a second standard of the admissibility of evidence" (Shearman, J., July 14, 1924). Cf. Cr. App. R. 8. 76; 10. 164. "If a point of evidence is a near thing, I never decide it against the prisoner" (Lord Darling). And even clearly admissible evidence is sometimes excluded in his favour; 9 Cr. App. R. 244; cf. 20. 51.

public funds; and by the rejection of all convictions from which even a single juror dissents[1]. In the sense of security against miscarriages of justice[2] thus inspired in the nation at large, we may find adequate explanation of an anomaly which has often surprised foreign observers of English institutions. They have remarked that our criminal courts, the courts which come most violently into conflict with the interests of the defendants against whom they adjudicate, are not—as would seem natural, and as has actually been the case in many countries—the most unpopular of all our tribunals, but the least so. Moreover the confidence universally felt, that every accused person will be tried by a fair method and in a fair spirit, goes far to facilitate the protection of life and property, by rendering it easier in England than in many countries for the police to obtain

[1] An instructive contrast to this picture may be found in Mr H. B. Irving's *Studies of French Criminals*. He maintains that, in spite of the great legal genius of the French, their administration of penal justice is imperilled, in one direction by "absence of true cross-examination, loose rules of evidence, and almost unavoidably partial judges," and in the other by "undue licence in advocacy, and emotional juries" (p. 126). He describes modern French practice as requiring the judge's questioning of the prisoner at the public trial to be "a caustic, dramatic and closely reasoned presentation of the case for the prosecution, to which the prisoner must make the best reply he can" (p. 309)—a vivid contrast to the English prisoner's right of utterly refusing to be questioned. This description is corroborated by M. Cruppi (*La cour d'Assises*, Paris, 1898, p. 133), who says: "Le président, par son interrogatoire passionné, pendant de longues heures, se fait l'auxiliaire de l'accusation." Yet that interrogation is not required by the Code but is merely a creation of custom. A French jurist of the highest authority, the Comte de Franqueville, in his elaborate treatise on *Le Système judiciaire de la Grande Bretagne* (Paris, 1893), admits that the French preliminary examination, conducted in private, is far from satisfactory; that the form of the *acte d'accusation*, with its recital of every unfavourable point in the prisoner's antecedents, prejudices the accused in the eyes of the jury; that the interrogation of the prisoner by the presiding magistrate is often open to criticism; and that it might be better if counsel for the defence were allowed to cross-examine witnesses directly, instead of being confined to suggesting questions for the Court to put.

[2] J. D. Lewis (*Causes célèbres de l'Angleterre*, p. 10) states that, after a wide study of English criminal trials from the time of James II., he found only three cases in which any person had been actually executed, who had afterwards been proved quite innocent; viz. the clear cases of Shaw (executed at Edinburgh in 1721 for the supposed murder of a daughter who had in reality committed suicide), of Jennings (executed at Hull in 1762 for theft, by a mistake of identity), and the much more doubtful case of Eliza Fenning

information and assistance in their efforts to bring criminals to justice[1].

The spirit of fairness and humanity that characterizes English criminal courts is not of recent origin. Recent years have, however, done so much to improve the procedure which this spirit animates, that they have now raised those courts to a unique degree of efficiency. Says an experienced American lawyer[2], "I prefer the swift and sure, yet careful, methods of English criminal jurisprudence to our own cumbersome, technical, dilatory way of dealing with criminals[3]."

(executed in London in 1815 for an alleged attempt at poisoning). That of the inn-keeper Jonathan Bradford (executed in 1736 for the murder of a traveller), though a case of legal innocence, was one of moral guilt; as he had entered the traveller's room to kill him, but found him slain already by his own valet.

[1] A high authority at Scotland Yard states (*The Times*, Dec. 1, 1921) that "In England the police can count upon the assistance of the entire public; even, occasionally of criminals themselves. In most other countries, there is a dull hostility against the police." "En Angleterre, tout le monde facilite la tâche de la police. En France, il en est autrement. Nous avons vu un bon bourgeois de Paris recevant les félicitations du préfet de police pour avoir eu le courage de fournir aux autorités des renseignements que même un portefaix de Londres se fût cru deshonoré en cachant. Et puis ce bonhomme de Paris est chassé de son habitation par le mépris des voisins!" (J. D. Lewis, *Causes célèbres de l'Angleterre*, p. 351.) In 1902 all Europe was shocked by the gigantic "Phantom Millions" fraud in France of the Humberts. Yet when, on their flight in Spain, a Spanish gentleman pointed them out to the police, he was consequently expelled from his clubs. At Palermo, in 1910, a hundred persons saw Professor Nicabi assassinated; but none would give information to the police. Moreover French juries acquit a much larger percentage of prisoners than English ones do. (*Cr. Jud. St. of* 1896, p. 27.)

[2] Fishback's *Recollections of Lord Coleridge*, p. 55.

[3] President Taft said in 1911 that half of the *guilty* men tried there were acquitted. Cf. President Coolidge's official address of May, 1925. "Lynch law" was partly due to dissatisfaction with the uncertainties of the forensic administration of justice. "When citizens," said Filangieri long ago, "see the sword of justice idle they snatch a dagger." In 1889–1918 there was in the United States an annual average, now rapidly diminishing, of 107 lynchings (95 per cent. of which were in the Southern States); whilst the annual average of executions by process of law was less than three-quarters of that number. "In no other country is the deterrent effect of punishment so vitiated by delay, chicanery, and futile appeals"; *Autobiography of President A. D. White*, I. 137; cf. II. 77, 504. These appeals sometimes continue through two or even four years. See also Thayer on Evidence, p. 528. In June, 1922, the American Bar Association convened a meeting of jurists to devise reforms of procedure to check "the vast wave of crime now sweeping over the country." Its committee reported that at least 8500 murders occur annually in the United States. The number reported to the English police never reaches 180.

CHAPTER XXXII

ORDINARY PROCEDURE

III. Detention and Probation

Our review of the long-accustomed forms of Punishment, all of them instituted mainly for Deterrence, must be supplemented by consideration of three recent methods of dealing with convicted offenders, which aim instead at Seclusion or at Reformation. They are intended, not for the average criminal, but for those who are either worse or better—less capable or more capable of reclamation—than he.

In the reaction of the nineteenth century against penal severities, a theory arose that punishments should be solely directed to the Reformation of the offender. But protracted experience has shewn that noble aim to be far more difficult of achievement than this theory pre-supposed. The great number of Recidivists, a number now increasing in almost every country[1], sufficiently attests this. Thus in England, the number of persons in prison again, after four or more previous convictions, was 32,781 in the year 1891: but it had risen in 1909 to 57,591[2]. Now the great object of criminal law is to prevent crime. Hence, if any particular offender has been convicted so frequently as to make it clear that he cannot be kept from crime through the medium of either reformation or deterrence, it remains only to effect that prevention in a

[1] That the mere *proportion* of reconvicted to first-convicted prisoners should be on the increase is, of course, a hopeful sign; as shewing that fewer persons are falling from innocence into crime. But not that the actual *number* of reconvicted prisoners should increase. Happily it is now diminishing in England; being only 30,625 in the year 1927, as against 101,472 in 1911–12, despite the great improvement meanwhile in methods of identification. It is noteworthy that the greater the degree of recidivism, the greater is the proportion of female recidivists in that degree.

[2] Happily of the persons sent to prison in 1927 only 18,862 had been *thus often* convicted before; whilst in 1913 the corresponding number had been 53,372.

direct way, by placing him in a seclusion where it will be impossible for him to repeat his offences. Unless so secluded, he will not only continue his offences, but will also train others to offend, and will moreover transmit his aptitudes to a tainted posterity. "The interests of justice are sacred; the interests of the offender are doubly sacred; but the interests of society are thrice sacred" (Anatole France). For social safety, it has been made possible, by the Inebriates Act, 1898, to seclude for three years those offenders whose cravings for alcohol have proved to be incorrigible[1]. A similar seclusion is still more necessary in the case of similarly incorrigible cravings for crime. If we cannot deter from it, we must debar from it. Hence in France, a criminal whose record shews him to be thus hopeless, must be placed in perpetual *relégation*, in a penal colony. Accordingly the Prevention of Crime Act, 1908 (8 Edw. VII. c. 59) enables the court which sentences to penal servitude a person whom a jury has convicted of felony[2], and has also pronounced to be an "habitual criminal[3]," with at least three previous serious convictions since the age of sixteen, to add a further[4] sentence of merely "Preventive Detention" after the end of the penal servitude. This detention may be for any period between five years and ten (but not, as the Bill at first proposed, for life). It goes on under treatment less rigorous than in prisons; *e.g.* as to hours, food, visits, recreation, and earnings[5]. It will be

[1] Against the once notorious Jane Cakebread, who died in 1898, 281 convictions for drunkenness stood recorded; Eleanor Larkin underwent her 228th in 1920. Lord Herschell mentions a woman who underwent 404 imprisonments for drunkenness.

[2] Or of coining, false pretences, conspiracy to defraud, or being found by night about to commit burglary.

[3] If the indictment has charged him with this "habitualism"; which it can only do by consent of the Director of Public Prosecutions. Consent is not given unless the man has already undergone penal servitude once; and is over thirty; and the present offence is grave.

[4] The offender can (*supra*, p. 498 n.), without leave, appeal against this.

[5] By 1928, 160 persons were already actually undergoing it; and during 1927 some 42 were sentenced (prospectively) to it. About half are aged over forty; and about half have undergone more than ten convictions.

practically that of a Farm Colony. The cases are periodically considered with a view to discharge on licence; but of the men released the proportion that have done well is "very small" (Troup's *Home Office*, p. 123). Cf. p. 534 *infra*.

Such old offenders as these are usually beyond reclamation, but young ones are exceptionally capable of it. Thus good results have long been obtained by sending boy-criminals to Reformatory Schools instead of to prisons. The experiment of a similar treatment of older lads was tried in 1902 at Borstal Prison, near Rochester. Its success led to the passing of s. 1 of the Prevention of Crime Act, 1908; under which an offender who has attained sixteen but is not yet twenty-one—a "Juvenile Adult"—when convicted on indictment of a crime punishable by imprisonment, may be sent for not more than three years, or [now] less than two, to "detention" as an "inmate" of a "Borstal Institution," instead of to prison. In 1925 the judges declared three years to be the desirable minimum. By the C.J.A. Act 1914, s. 10, and 15 & 16 Geo. V. c. 86, 46 (1), even a court of summary jurisdiction may send a *reconvicted* juvenile adult, whose new offence is one punishable with at least a month of prison, to assizes or sessions; which can decide for or against Borstal treatment for him. There are now five Borstal Institutions; and during 1927 there were sent to them 568 youths and 34 girls. They receive physical, industrial, and moral training[1]. Good behaviour is rewarded by enjoyment of a Summer Camp[2]. After two years, they are usually released on licence and pass the next two years under the supervision of an admirable Society—the "Borstal Association." Its more than a thousand Associates (many of them unpaid) afford to these licencees the assistance and advice that ex-prisoners receive from the excellent Discharged Prisoners' Aid Societies. And about three-fourths of the Borstalians pass through these two years

[1] In prisons themselves a kindred course is now followed in the "Young Prisoners' classes" (formerly called "Modified Borstal treatment"), for those between nineteen and twenty-one. [2] In 1928, 495 enjoyed it.

of freedom without committing any offence against the law; and even of those who have been at liberty for eleven years a majority have proved equally law-abiding. Some six thousand persons have now undergone Borstal treatment; and only about 35 per cent. have again been convicted. As many of them are mentally or corporeally defective, these results surpass expectation.

Borstal treatment is not for those physically weak; nor for first offenders or other novices in crime; but for hale lads who have been imprisoned and have obviously taken to a career of lawlessness. Anyone, whether youth or adult, who has committed only a single offence, and that a trivial one, can usually be checked effectually by a simpler method. It has long been a practice of the judges—where a convicted offender's character and surroundings make it desirable—to release him without immediate punishment; but bind him to appear for his sentence should his conduct make this necessary, and to be of good behaviour meanwhile. (See 30 St. Tr. 1130 for an instance in 1809.) To commend this practice, and to approve its exercise even in courts of summary jurisdiction, s. 16 of the Summary Jurisdiction Act, 1879, was passed. The matter is now regulated by the Probation of Offenders Act 1907 (7 Edw. VII. c. 17). Under this statute, any court, whether of summary or of higher jurisdiction, which considers that, though an offence is proved, it is inexpedient to inflict actual punishment, may release the offender on recognizances to be of good behaviour and to appear for judgment, within a time not exceeding three years, *if* called on. It may also order him to pay damages (not exceeding £25 if it be a summary court) and costs. The Court may attach conditions to the recognizance; *e.g.* as to restitution, residence, intoxicating liquor, entering a Farm Colony or a Refuge or an Inebriates' Home, or even quitting Great Britain. It may, in addition, place him under the supervision of a Probation Officer; whose duty will be to visit him periodically, report on his behaviour, and "advise, assist, and befriend

him." If he behaves badly, he may be fined £10, or receive sentence for his original offence. A court of summary jurisdiction may even release him without recognizances[1]. In 1927 the Act was applied to one-half of the persons against whom indictable offences were *summarily* proved; whilst of these half were put under Probation Officers. In all, 15,989 were so put (96 per cent. of them by petty sessions), nearly half of them being aged under sixteen. Barely five per cent. of the probationers offend again within the same year[2]. Cf. p. 525 n. 1 *infra*.

This lenient release is not appropriate where the first offence is one of great gravity[3], like coining or forgery or doing grievous bodily harm. Its indiscriminate application is apt to produce in the locality an impression that every person may commit *one* crime with impunity. Nor is it appropriate when a person who has already been on probation commits a second offence, even a slight one. In France the application of similar leniency upon a third or even a fourth offence is said to have "volatilisé" the criminal law in some districts. Obviously this light treatment must have some tendency to encourage crime; both by the offender's prospect of comparative immunity and also by the victim's reluctance to undertake the trouble of prosecuting for a result so slight.

But for a first offender, whose offence is not a heinous one,

[1] Probation usually varies between half a year and two years.

[2] Mr Wheatley, invaluable in London courts, was during 1908–24 the probation officer to 2629 persons. He stated that "the great majority" of them have done well *permanently*. A probation officer's task is nevertheless a difficult one. A departmental committee in 1922 reported that thorough success in it requires "a keen missionary spirit based on religious convictions"; as with Mr Wheatley. A kindred system of "Liberté surveillée," established in 1912 in France, has worked disappointingly; partly from being applied too indiscriminately, and partly from the lack of supervisors, especially of good ones. At a conference of jurists in 1925 it was stated, without contradiction, that out of the 300 supervisors in Paris only twenty worked efficiently.

[3] On Oct. 26, 1925, the C. C. A. in two bad cases of theft by first offenders, confirmed sentences of nine months and of twelve months; and one of three years' penal servitude on a second conviction.

it is desirable to avoid imprisonment[1]. Prisons are a great deterrent to those who have never been in them; but often have little terror for those who have had actual experience of their comforts[2]. And their effect on the young is apt to be[3] degrading. Too often have juvenile offenders "entered gaol as Imps, but come out of gaol as Devils." Hence when his case cannot be met by a fine, a first offender is often sufficiently punished by the disgrace of the public exposure to make it well to dispense with any graver immediate punishment. A stigma has accrued and has to be lived down[4].

Should the offender be again brought before the court, charged with having violated the conditions of his recognizances or having committed a second offence, the charge must be proved by sworn evidence, and the accused be allowed to cross-examine and give evidence on oath and call witnesses. But the question is not for a jury but for the court.

The success of Probation is now so clear that the Criminal Justice Act, 1925, ss. 1 (1) and 2 (1, 2), requires every Petty-Sessional Division to have (1) at least one probation officer, and also (2) a Probation Committee[5] to supervise him and remunerate him. This comprehensive system will involve a cost of about £100,000 a year; a sum far less, however, and productive of far better results, than Imprisonment would have involved.

[1] But it must be remembered that a first prosecution does not necessarily mean a first offence. In 1925, in a case of first conviction, fifty-one previous offences were admitted and "taken into account."

[2] Warmth, clothing, regular meals, medical aid, and a clean separate room, are potent attractions to English idlers; as a prison's coolness in summer is to Neapolitan ones. Cf. p. 547 *infra*.

[3] Sentences of a fortnight or less (happily seven times rarer in 1924 than in 1909) are long enough to degrade but too short to reclaim.

[4] On the other hand the prospect of public notoriety does actually attract some vain persons to crime; especially to grave crimes, like attacks on Royalties. Hence Czecho-Slovakia has forbidden publication of the portraits of criminals who attempt to kill any high public official.

[5] Except in London; where the Home Secretary will act as one.

CHAPTER XXXIII

THE PROBLEMS OF PUNISHMENT

Our consideration of the various modes of punishment now recognised in English criminal law, may recall the remark (*supra*, p. 36), that neither they, nor the abstract doctrines of Punishment which have given rise to them, can be regarded as having attained a final—or even a temporarily stable—form. Nor can our doctrines as to punishment, and our present modes of inflicting it, be said even to be in logical accord with each other. "All theories on the subject of Punishment," said Sir Henry Maine in 1864 (*Speeches*, p. 123), "have more or less broken down; and we are at sea as to first principles." Citing these words in 1924, Mr Justice McCardie added "Again and again I have heard men of juristic distinction express the same opinion." And in 1925 Lord Oxford, also citing them, added "Nothing has since been said or written that has brought us any nearer to those principles." Continental jurists express an at least equal distrust as to the systems pursued in their countries. But to Englishmen the importance of arriving at definite principles on this subject is peculiarly great; for our abolition of minimum punishments has given our judges a range of discretion, and therefore of responsibility, not usually entrusted to continental tribunals[1].

One important rule has been laid down by John Stuart Mill[2]; viz. that, as the Deterrent power of any punishment depends more on what it seems to inflict than on what it actually does inflict, it is well to select penalties that seem more rigorous than they really are. Thus, he adds, Death-

[1] Cf. Franqueville, II. 706. Sir Raymond West has described an instance in which, under the rigid minima of the French Code, it had been necessary in Egypt to sentence a boy who had stolen a turnip to three years' imprisonment. *Supra*, p. 492.

[2] *Hansard*, April 21, 1868.

penalties in fact are less cruel than any penalties which modern legislatures would be likely to substitute for them. Less cruel, we may add, for instance, than the "living tomb" of perpetual subterranean isolation to which the Swiss law consigned the assassin of the Empress of Austria.

Yet, though Penology is still an incomplete science, it is an ancient one. The experience of centuries rendered familiar, long ago, various leading considerations which habitually affect the minds of legislators in determining the maximum penalty for any given class of offences, and the minds of judges in determining the particular penalty to be inflicted in any given instance. Thus the ancient Roman lawyers enumerated[1] seven points to be taken account of: 1. *Causa*, *e.g.* wanton aggression, or parental chastisement; 2. *Persona* (both of offender and of victim); 3. *Locus*, *e.g.* sacrilege or not; 4. *Tempus*[2], *e.g.* night or day; 5. *Qualitas*, *e.g.* open theft or secret; 6. *Quantitas*, *e.g.* theft of one sow or of a whole herd; 7. *Eventus*[3], *e.g.* mere attempt or consummated crime. Practically speaking, the Offence itself, and the Offender.

I. As regards the Offence, account must be taken: (1) of the greatness or smallness of the evil likely to result from acts of its class[4]; (2) of the facility or difficulty with which it can be committed[5] or, again, with which it can be detected; (3) of the frequency or rarity with which, at the particular time concerned, acts of this class are being committed[6];

[1] *Dig.* 48, 19, 16. The passage, which is a striking one, is the only extant fragment of Claudius Saturninus, an Antoninian magistrate. Cf. an admirable corresponding enumeration of topics made by Blackstone (4 Comm. 13).

[2] The Code made in 1892 for Samoa provides (chap. ϕ), that "If any one breaks a law on a *Sunday*, this aggravates the act."

[3] At Lagos men, convicted of murder, urged "But we did not *eat* her."

[4] Hence (*supra*, p. 279) the severity with which treason is punished, or a sentry's sleeping on duty; even when the ethical guilt is small.

[5] Hence the severity with which servants are punished for thefts of their employers' property; and the leniency usually shewn to the rank and file after the suppression of a great rebellion.

[6] Frequency mitigates the wickedness, but increases the need for deterrence. Conversely, the fact that felonies against property have (in proportion to population) fallen to less than half of what they were a generation ago, has made possible the lighter sentences which are now inflicted for them.

(4) of the aggravating or extenuating circumstances which accompanied this particular act—for instance, (α) the victim, as where a woman or a child is assaulted, (β) the place[1], (γ) the time[2]; (δ) the company, a crime being more dangerous if committed by a group of men than if by one alone.

II. As regards the Offender himself, account must be taken: (1) of his age[2], health and sex[3]; (2) of his rank[4], education[5], career, and disposition[6] (previous offences of the same kind count more in raising sentence than do those of a different kind); (3) of his motive; (4) of any temptation[7], or intoxication (*supra*, p. 61), under the influence whereof he acted; (5) of his susceptibility[8] to punishment, *e.g.* an imprisonment meaning much more, but a fine meaning much less, to a nobleman than to a ploughman; (6) of the evil which the judicial proceedings have inflicted on him already, *e.g.* his imprisonment whilst awaiting trial[9].

Numerous as are these determining circumstances, a complexity is introduced by the fact that the same circumstance does not always operate in the same way. We have already (pp. 34, 35) noticed this in the conspicuous instance of

[1] Cf. pp. 171, 219, *supra*.

[2] Cf. p. 176, *supra*.

[3] Of our grave offenders, women form only one-tenth.

[4] See 16 Cr. App. R. at p. 194. Privilege augments Responsibility.

[5] To have had a good education and done well at College is often urged in mitigation. Yet it may aggravate guilt; "*he* ought to know better."

[6] The practice of diminishing a sentence because the accused has pleaded guilty or has made restitution or has disclosed the whereabouts of the stolen property (cf. 15 Cr. App. R. 81, 85, 95) may be justified, even in theory, by regarding this attitude of his as proof of a penitent disposition; and so (as Lord Bacon says) "a footstool for mercy." He deserves credit for making a clean breast of it; or, again, for not having gone into the witness-box to perjure himself.

[7] Cf. p. 34, *supra*; and p. 547, *infra*.

[8] In 1896 I heard a prisoner urge, in mitigation of sentence, "Whenever I've been sent to prison before now, it has always been for such a very long time."

[9] But the habitual practice of taking any such preliminary detention into account, in sentencing a convicted prisoner, (the whole period being now usually deducted from a sentence of imprisonment, see 2 Cr. App. R. 149), requires, as its logical consequence, legislative provision for affording to acquitted prisoners (if clearly innocent) a pecuniary compensation for similar detention. Cf. p. 533, *infra*.

Temptation; which sometimes extenuates the punishment, and sometimes aggravates it. For, since the aims for which punishment may be inflicted are numerous—deterrent, preventive, reformative, retributive, reparative (*supra*, pp. 30–36)—the effect of a circumstance may vary according to the particular aim which is predominant in the mind of the particular legislator or judge. For example, that the person murdered was the husband or wife of the murderer, is usually regarded as enhancing the wickedness of the crime; yet there are some modern codes which treat it as an extenuation. Indeed, as Sir Samuel Romilly observed, "Often the very same circumstance is considered by one judge as matter of extenuation, but by another as a high aggravation of the crime." He gave, as illustrations, the facility of the offence, the frequency of it, the fact of the offender's being a foreigner, or of his being young (which can be treated as a proof either that he is not yet hardened or that he is precociously wicked[1]).

Since Romilly's time, the difficulties surrounding this subject have grown greater instead of less. For the development of a science of Criminology[2] has disclosed to us the unexpected complexity of the problems of crime. The jurists of the eighteenth century—Romilly himself, for instance, and his masters Beccaria and Bentham—have earned a just fame through their successful efforts to purge mediæval criminal law of its aimless severities, by abolishing mutilations, minimising the number of capital punishments, and reforming the prisons. But experience has shewn that they exaggerated the simplicity of the problem they were dealing with. They treated the human race as if all its members were possessed of equal moral responsibility, except a few

[1] Political motive, similarly, whilst often thought to extenuate (cf. p. 417 *supra*), may well sometimes aggravate. A bank-cashier, who had defrauded his bank, urged in 1909 that "I don't look upon it as a crime; for capitalists are the ruin of this country."

[2] The student may refer to Prof. A. Prins' admirable treatise, *La Science pénale*, and to Tarde's *La Philosophie pénale*.

abnormal individuals, all of whom were equal in their abnormality. And they supposed that, if punishment were but aptly selected, the threat of it would effectually restrain all ordinary human beings from crime[1]. But, since their time, the experience of three generations has tested their doctrines. The numerousness, in every country, of "Recidivists," who return time after time to gaol, has shewn how exaggerated were the hopes once entertained as to the reformative effects of well-directed imprisonment. For soul, as for body, surgery is found far less effective than sanitation. The cure of criminal habits is difficult. But the prevention of them is more easy. Nothing, it has been said, more signally marked the reign of Queen Victoria than the diminution of crime[2]. Yet even this recent prevention[3] has been effected less by any improvements in the criminal law than by improvements in the social surroundings of the people. Crime has diminished; not so much because people were more strongly deterred from it by the terrors of punishment, as because they were raised further above temptation to it, by better education[4], purer literature,

[1] Even so experienced a lawyer as Romilly could say (in the speech of Feb. 9, 1810, already cited) "If punishment could be made an absolute certainty, a very slight penalty would suffice to prevent almost any species of crime, except crimes arising from sudden passion."

[2] The statistics of 1911 shewed a nearly continuous decrease of *indictable* crimes since at least 1857 (beyond which date, accurate comparison is not possible). The annual number of persons tried for them was, in the period 1862–6, 2860 per million of population; but by 1920 had fallen to 1612 per million. Yet in 1926 it rose again to 1986.

[3] Which, unhappily, is almost peculiar to England.

[4] A connection between ignorance and crime is manifested by the fact that in England the proportion of persons who can neither read nor write is six times as high amongst prisoners as it is amongst the general population (judging by the signatures to marriage-registers). In London the proportion of people who have passed beyond Standard IV is more than six times as high as amongst persons indicted. Of 46,807 persons sent to English prisons in 1923, only 3968 could read and write well; and but 307 were of "superior instruction." In France, however, the proportion of grave offenders is greater (as 4 to 3) amongst people who can read and write than amongst adult illiterates; and one in twenty of such offenders is of "superior instruction." (*Compte général* for 1912, pp. xvi, 41, 82.) Education in France is more often purely secular than in England or Ireland.

greater sobriety[1], healthier dwellings[2], increased thrift, more systematic provision for the events of sickness, accident, and fitfulness of employment, readier assistance for orphans and other destitute children, and new opportunities of elevating companionship[3]. How much more the criminality of a country depends upon its fiscal and administrative[4] laws than upon the laws that directly concern crime, has been growing increasingly clear ever since Quetelet first shewed by arithmetical illustrations that the ratio of convictions to population varies both with physical and with economical changes. Familiar examples of this are the decay of smuggling since the reduction of customs-duties, and of piracy since the development of steam navigation. Others are the increase of violent assaults in periods of high wages (as also, for a different reason, in the months of heat); and the increase of thefts in years of bad trade or in the months of winter. Not indeed that poverty, in itself, is a main cause of crime. For the parts of England where there are fewest acts of dishonesty are not those where pauperism is at its lowest[5]; nor are they most numerous where it is highest. But what Indigence does not do, Instability will. Any sudden economic change, which intensifies poverty abruptly, will produce a temporary increase of theft; though it lessens drunkenness, and consequently crimes of violence. Experience of the influence of external causes has led some observers

[1] Statistics at Zurich shew Sunday to have, there, nearly thrice its normal seventh share of each week's crime. Cf. England's drunken Saturdays.

[2] In Ireland, the ratio of indictable offences to population was in 1900 six times as high in towns as in rural districts. In the several districts of Liverpool, juvenile crime is found to vary in proportion, not to the poverty of a district but to its nearness to open spaces for play.

[3] It is rare to find in prison any boy-scout or girl-guide.

[4] Some truth underlies the exaggeration that "One policeman is worth two gaolers; and one street-lamp is worth two policemen."

[5] Indeed the very opposite is more nearly the case. Cornwall, extremely high in pauperism, has very little theft; whilst Lancashire and Northumberland have much more theft, yet little more than half as much pauperism. The Prison Commissioners in 1901 found that of 1386 juvenile prisoners only 106 had been led into crime by "want."

of prison-life into extreme generalisations; as when Lacassagne says that "A nation has only just so many criminals as she deserves," or Mr J. W. Horsley that "Crime is only condensed alcohol." We may more safely say that the chief causes of crime are poverty, drink (decreasingly now) and betting (increasingly now); or, as Mr Justice McCardie puts it, "the elemental passions of avarice, anger, and lust."

During the present generation, the reaction against the views of the eighteenth century has carried a very important group of jurists—the "Italian" or "Positive" school of criminologists—into an opposite extreme. Instead of treating nearly every offender as a responsible being, capable of being deterred from crime by the threat of punishment, these writers, all but discarding any idea of deterrence, treat nearly every grave offender as an irresponsible being, the victim of either his nature or his nurture, either his defective cerebral organisation or his unfavourable social surroundings. This "Scuola Positiva[1]" has formulated a five-fold classification of criminals, grouped accordingly as their respective crimes spring:

(1) merely from Passion;

(2) from Opportunity (the man offending only when exposed to some active temptation and restrained by no external check);

(3) from acquired Habit (usually the result of social surroundings);

(4) from Insanity (in its vast variety of grades, from neurasthenic absence of self-control to active mania);

(5) from innate Instinct[2] (which these writers regard as usually an atavistic inheritance from some early stage in the development of the human race).

[1] Created by the physician Cesare Lombroso, and the lawyers Garofalo Ferri, and Colajanni. I have written of them in the *Journal of Soc. of Comparative Legislation*, 1910, pp. 220–228.

[2] Aristotle's "Brutishness"; Ethics VII. 5. Like Caliban, "a devil, a born devil, on whose nature Nurture can never stick."

This fifth class, the supposed "born-criminals," intermediate between the madman and the savage, have been subjected to elaborate investigation by these Italian writers; who allege them to be recognisable by pathological signs, visible not only in the skull and skeleton but even in the skin, hair, ears, hands, muscles and eyes. Some Russian psychopathologists have carried this so far as to allocate different colours of the eye to different species of crime; finding, for instance, chestnut-brown prevalent in murderers, and slate-colour in robbers[1].

Of the five groups, the first two are corrigible; but the third (to which most thieves belong) passes easily into incorrigibility, and the fourth and fifth, from the outset, are usually incorrigible[2]. For these last three, therefore, as *déséquilibrés*, the only appropriate treatment is "Segregation," (*i.e.* non-punitive detention in what is rather an asylum than a prison). And this must continue for an indeterminate period[3]; that is to say, permanently, except when the treatment proves so successful as to bring any particular offender to such a condition of mental health as makes it safe to release him. Meanwhile the detention is to have not only a curative, but also a compensative purpose; being so regulated as to try[4] to obtain from the labour of the criminal a sum of money which will make amends to the victim of the crime. In the case of offenders of the first two classes the raising of this compensation-money is, indeed, to be practically the sole object of their detention.

[1] I have heard a prisoner (apparently of Lombrosian views) plead in mitigation of sentence that on one foot he had *six* toes.

[2] Hence the extreme Lombrosians would seclude such men as soon as their pathological signs are recognised, without waiting until they have committed a crime. But the less extreme would merely use those signs to eke out weak evidence on an actual accusation of crime.

[3] Measured, not by the guilt of the Act, but by the obduracy of the Man.

[4] Hopelessly, however; for a prisoner, even when hale enough to be employed (15 per cent. are not), costs more than he earns. His *gross* earnings in 1920–21 were £44. 2*s.* 9*d.* a year; his gross cost for maintenance and supervision £121. 7*s.* 10*d.* Thus in 1923–24 a man's *net* cost in prisons was £84. 10*s.*; in penal servitude, £100. 7*s.*

In these Italian theories, it is obvious that criminal law, properly so-called, disappears from view; and is replaced by civil law in some cases, and by the art of medicine in others. The writers of this school have certainly rendered great services by drawing attention to the necessity of distinguishing between different types of criminals[1]. They have thus warned legislators against the old error of trusting uniformly to the deterrent efficacy of punishment; and, still more, have warned judges of the necessity of an "Individualisation of Punishment," based on such an inquiry into the career and characteristics of each offender as will make it possible to adapt his particular penalty to his particular needs[2]. But their influence is now waning. The pathological peculiarities upon which so much stress has been laid by them are now shewn to occur in many persons who are free from all taint of criminality; and even should they occur in criminals more frequently than in others, this may be a mere result of economical surroundings, for the surroundings of most criminals are those of poverty. Nor is the innate instinct to crime at all so frequent as these writers assume; experience shews that most criminals are much like other men, and that it is only by gradual steps that they have fallen. The fact that most criminals are born of non-criminal parents, considered in view of the success of the training given in institutions like Dr Barnardo's to children of the poorest classes, shews that it is less to Inheritance than to Environment that crime is due. The orderliness of the people of a colony may shew little inherited trace of the convict founders. And the fear of Punishment does go far in restraining ordinary people from crime. The Italian writers are—just as, on the other hand, were the eighteenth-century writers who laid exclusive stress

[1] Van Hamel well says: "Former lawyers had bidden men study Justice; Lombroso bade Justice study men."

[2] The importance of this Individualisation has been recognised ever since Wahlberg published his *Princip der Individualisirung in der Strafrechtspflege* (Vienna, 1869). Hence codes err that fix a minimum to punishments.

upon Deterrence—too eager to reduce the complex problem of crime to an artificial simplicity.

Lombrosian influence soon waned. The tide was turned against it by two elaborate books—Baer's *Der Verbrecher in anthropologischer Beziehung* and Aschaffenburg's *Das Verbrechen.* The waning has gone on[1]. "There are now very few thorough-going adherents of Lombroso," said Lord Oxford in 1925. Dr Goring, in an invaluable treatise "The English Convict," tabulated elaborate medical statistics concerning three thousand grave offenders. The results challenge the Italian theories at almost every point; and lead to the inevitable conclusion that "there is no such thing as an anthropological criminal type" (p. 370). This conclusion is, of course, quite compatible with the familiar fact that the proportion of persons more or less defective, in body or mind, is usually higher amongst prisoners than amongst the general population. That fact is readily intelligible, quite apart from any theory of innate criminal propensities. For every one who has less than the average physical and mental powers for earning an honest living, has more than the average temptation to get his living dishonestly; and is hampered also in any effort to evade the police. Thus the proportion of feeble folk, of one sort or another, will always be higher amongst criminals than amongst ordinary people; and higher amongst criminals arrested and punished than amongst those who succeed in evading detection. The Prison Commissioners, in 1914, endorsed (p. 23) the conclusions of Goring's book; convinced that "there are no physical or mental or moral characteristics *peculiar* to the inmates of our prisons....The

[1] Prof. Dwight, the Harvard anatomist, wrote in 1911 that "The rise and fall of Lombroso's school is one of the most curious episodes in the history of science in the nineteenth century." Even in Italy there is a reaction under the "Humanist" school, led by Lanza, who base penal law upon the human Conscience. Prof. Karl Pearson holds that no one has more gravely "disregarded the laws of scientific procedure" than Lombroso.

man is not predestined to a criminal career by a tendency which he cannot control[1]."

In the case of offenders whose minds are obviously feeble and who fall into crime from mere weakness of will, a seclusion[2] in farm-colonies under philanthropic surveillance might well be substituted for punitive imprisonment. The same feebleness which makes them yield to the first tempter, or to the first impulse, makes them also unable to feel any deterrent force in so apparently remote a prospect as that of legal punishment. Hence it is not by threats of a punitive seclusion, but only by the direct action of a preventive one, that they can be effectually withheld from committing crime.

Nor are these the only considerations which render necessary some extension of the variety of our modes of dealing with convicted offenders. Multifarious as were the forms of punishment practised by our ancestors, the humane abolition of many of them, the virtual restriction of capital punishment to cases of murder, and the reluctance to inflict corporal pain upon adult offenders[3], have left us with practically no alternatives but those of penal Detention (in its various forms) and of pecuniary Fines. But a fine is not an adequate punishment for any offences that involve serious guilt[4]. Nor, again, is it a punishment always practically available, even in the case of the pettiest offences. For offenders are often penniless;

[1] Mr Clifford Rickards, in 1920, after acquaintance with several thousand convicts in penal servitude, "unhesitatingly confirms" Dr Goring's refutation of Lombroso (*A Prison Chaplain*, p. 66).

[2] As aimed at by the Mental Deficiency Act, 1913. Many degrees of mental disorder or weakness so lessen the power of self-control that the man, with his diminished responsibility, becomes "unfit for ordinary penal treatment, yet not capable of being certified as insane." About one per cent. of our prisoners seem to be thus "sub-normal."

[3] Mutilation for the mere sake of Punishment survives only in Moslem countries. But, for another aim, a recent Californian statute (No. 224) allows the Court to inflict an emasculative operation on men guilty of sexual wrong to a girl under ten.

[4] And even where a fine would intrinsically be an appropriate punishment, the legal maximum, at present set to it, often renders it inadequate. Thus the statutory 5*s.* has been joyfully found a slight set-off from the profits of keeping a shop open all Sunday.

a large portion of the total number of persons fined go to prison for default of payment[1]. Yet, where a fine is an unsuitable or an impossible penalty, it is doubtful whether the only alternative—that of penal Detention—adequately effects the principal aims which the criminal law has in view. Detention may (1) gratify the prosecutor's Resentment, but it does not, as at present organised, afford him (2) any Compensation[2]. It does, for the time being, effect (3) a Prevention of the continuance of the offender's criminal career; but in the case of short sentences (which "enable one criminal to do the work of many"), the suspension is brief, and (4) far too brief to secure his Reformation[3]. And as regards (5) its Deterrent effects, though both its irksomeness and its degradation are greatly dreaded by those on whom it has never been inflicted, yet so soon as persons have actually undergone imprisonment, the prospect of such incarceration (in spite of its involving the loss of alcohol and tobacco), ceases to have much influence upon their minds[4]. Thus prison-warders

[1] Justices should be careful to order them only a Second Division imprisonment (*supra*, p. 490 n. 6). [2] See p. 520 n. 4.

[3] Even a juvenile offender undergoes little amendment in less than three months (*Report of Prison Commissioners for* 1901, pp. 12, 44). But in longer periods the influence of the chaplain often has effect. Even an agnostic observer like Saleilles says of it, "Each one may think as he prefers about the Truth of religion; but its Reformative value no criminologist can afford to neglect. For no more powerful instrument of Reformation can there be" (*Individualisation*, s. 97). Reformation, however, is less often effected in prison than by the aid now so constantly afforded upon discharge from prison. "You get a helping hand when you leave a prison, but not when you leave a workhouse," said a first offender. I once saw a young governess tried for attempting abortion. She desired to plead guilty but was dissuaded. Despite her full confession, fully corroborated, a "humane" jury found her not guilty. Never shall I forget her look of distress as she left the dock acquitted; but friendless, penniless, pregnant, ill. A conviction would have brought her both shelter and medical care in prison, and friendly guidance (see p. 532 *infra*) on her discharge.

[4] "Women often go out of prison, saying they have never been so well or so happy anywhere else"; *Pr. Com. Report of* 1901, p. 332. See the same *Report*, pp. 44, 347, 388, 391, 445, as to the contrast between the casual wards of workhouses and the prison, with its better food, warmer rooms, separate room at night, cleaner bedding, gratuity on discharge, and its officers "who speak civil and don't shout at you"; cf. *supra*, p. 327. "Old offenders often commit crime to get into prison, to recruit their energies for fresh depredations"; Dr John Campbell's *Thirty Years' Prison Experiences*, p. 124. Deterrence thus is weakest where most needed. And the proposals, now current, to "brighten" prison-life by concerts, theatricals, and dances, would render it still less deterrent. When Mme. Sarah Bernhardt and her company visited California in 1913, they were engaged to act in the prison at St Quentin, though their language was French; on the declared ground that "every prisoner ought to be given a chance." Of what?

Even in India the death-rate of prisoners is under two-thirds of that of the general population. And English prisons are ranked as "among the best sanatoria in our island." In Howard's day it was otherwise. English prisons were then nests of typhus ("gaol-fever") by which, as 19 Car. 2, c. 4, s. 2 states, "sometimes the judges, justices, and jurors have been infected; and many of them died thereof." Thus successive "Black Assizes" were fatal even to judges: at Oxford in 1577 to Bell, C.B. (and, it is said, to all the 300 persons in the court); at Exeter in 1586 to Flowerdew, B.; at Taunton in 1730 to Pengelly, L.C.B.; at the Old Bailey in 1750 to Abney, J., Clarke, B., and the Lord-Mayor. These last fatalities are still to-day commemorated at the Central Criminal Court by the sweet herbs which, from May until autumn, are scattered as disinfectants upon the several judicial benches.

find the old offenders actually easier to manage than the first-convicted ones; for the routine has grown pleasant to them. Hence an experienced official (Major A. Griffiths) has even said that "one-half of the people in our prisons ought never to have been sent there, and the other half ought never to come out." The unfortunate fact that an actual experience of imprisonment does thus reduce its deterrent power over the offender (as well as impair his reputation and his self-respect), has led to a widespread exercise of the modern statutory powers[1] of releasing first offenders without punishment. Hence comes the paradoxical result, that persons, who would have been punished had they committed some unlawful act so petty as to admit of a fine, often enjoy immunity when they commit a graver offence.

Even if we hesitate to say, with Professor Vinogradoff[2], that Imprisonment is "the most unsatisfactory" of all modes of punishment, we cannot but recognise the desirability of

[1] *Supra*, p. 510. Cf. a study by Dr Kaarlo Ignatius, in *Zeitschrift für die gesamte Strafrechtswissenschaft* for 1901. In 1923, there were 17,923 persons thus released, after being proved guilty of *indictable* offences. The persons so released form over one-third of those found guilty of indictable crime.

[2] *Historical Jurisprudence*, p. 57.

introducing new modes. Bentham[1] has shewn the efficacy of penalties of mere Ignominy—forfeitures not of liberty or money but of Reputation—which submit the offender to the ridicule or censure of public opinion. His remarks find illustrations in Gierke's interesting historical pamphlet, *Der Humor im deutschen Recht*. The "Drunkard's cloak" of Commonwealth times, and the Stocks (obsolete since about 1870[2] but never abolished) are kindred English instances. In Russia the Soviet Criminal Code has a punishment of Public Censure; *i.e.* the publishing of the conviction and the advertising of it at the offender's cost in newspapers. It permits also a condemnation to Compulsory Labour for prolonged hours, but at the offender's own home without any loss of liberty.

In France a desire is already apparent for a wider extension of corporal punishment. In England that close reasoner, Mr W. S. Lilly (*Idola Fori*, p. 241), has expressed a similar view. And in his *Studies by the Way* (p. 59) the late Lord Justice Fry, from long experience as a county magistrate, wrote that "For the purpose [even] of Reformation, short and intense punishments are often better than long punishments—a sharp flogging than a long confinement. I often wish that the criminal law of this country gave more power of inflicting punishments of this description." The Court of Criminal Appeal said (April 15, 1919), "There can be no doubt that with certain types of people there can be no such deterrent as that of flogging."

In India, in 1862, flogging ceased to be inflicted; but the results led to its early revival at the unanimous demand of the local Governments. Sir Henry Maine, in introducing the Bill, pronounced flogging (*Speeches* p. 122), "though it should be sparingly employed and carefully guarded," to be "the most strongly deterrent of known punishments." Cf. Judge Rentoul's *Stray Thoughts*, p. 182; Mercier's *Crime and Criminals*, p. 282; Rickards' *Prison Chaplain*, p. 202; Lombroso's *Crime*, § 212. The power (p. 439 *supra*) of petty sessions to whip boys summarily convicted of *indictable* offences might profitably be extended to malicious non-indictable ones. Fines punish the parents; not the boy.

[1] *Penal Law*, II. ch. XV.

[2] I saw a man in them at Halifax about 1854.

The actual effects of our penal system during the past decade deserve review. Despite high prices and widespread excitement, a remarkable diminution in serious crime took place after the outbreak of war in 1914. The offenders tried by jury in 1913 numbered 12,511; but those in 1918 only 5904. Those tried at Petty Sessions in 1913 numbered 731,048; but those in 1918 only 427,572. On the other hand, the number of *juvenile* offenders increased markedly. In 1913, the boys and girls sent to Reformatories numbered only 1250; but in 1918 they were 1685, and would have been more numerous had accommodation been available. At Middlesex Sessions in the year 1917–18 there were more prisoners of the five ages sixteen to twenty, than of all the fifty and more ages that exceed twenty. This increase seemed due mainly to domestic control being relaxed by the absence of so many fathers—and so many school-teachers and Scoutmasters—at the war. Moreover, the readiness with which employment could be obtained, whilst it kept many adults from crime, had often the opposite effect upon boys and girls; who thus obtained high wages and a freedom from domestic life and control. In August 1920, the Education Office ascertained that of young thieves sixty-eight per cent. had no excuse on the ground of poverty.

But amongst adults the lessening of crime was due in part to this same facility of obtaining employment; in part, too, to the absence, in the army, of many persons of weak or of turbulent natures. Moreover, the energy which prisoners exhibited when employed on any work intended for the army suggests that, even amongst the criminal classes, the war aroused a patriotic public spirit which tended to restrain

them from evil. This energy in army-work was shown in the excellence of both its quantity and its quality. It was partly because many prisoners had friends at the front; but partly also because "the crisis made a higher conception of Duty take hold of people's minds" (Lush, J.). A fourth cause lay in the restrictions placed on the sale of alcoholic liquors. The subsequent partial relaxation of those restrictions was rapidly followed by marked effects; the convictions for drunkenness, which in 1913 were 204,038, had fallen by 1918 to 29,075; but in 1920 were 91,812. (By 1923 they had fallen back to 74,751.) Increase of drunkenness is always accompanied by an increase of crime.

To the diminution produced by the War in serious offences, one singular exception must be noted. Military life, by removing men far from their homes, weakened matrimonial ties; and thus greatly multiplied bigamies. During the five years ending in March 1914, the average annual number of imprisonments for that crime was only 79; but in the year ending in March 1919 it had risen to 663. At the Central Criminal Court, before the war, bigamies averaged less than five per cent. of the cases tried; but in 1919 this five became twenty-two per cent. In 1924 and 1925 it fell below ten per cent. The cause which multiplied bigamies must have had some share also in another change. "Since the war, Abortion has increased: and the consciences of a great many people have become deadened as to its guilt" (Darling, J., at C. C. C., January 23, 1920). Many, it may be added, of the divorce cases tried since the war arose out of the unfaithfulness of wives during their husbands' absence on military duty.

That serious offences, in general, would again become more frequent after the war, was inevitable. Tramps who had passed into the army during hostilities, resumed, upon demobilisation, their habits of vagrancy; many habitual criminals similarly relapsed. And the young offenders whom the circumstances of the war led into evil courses, often

continued to pursue them, or even fell into more heinous guilt. Moreover, some men of previously excellent character returned home seriously unsettled; the excitements of combatant life having bred in them a spirit of recklessness. Again many non-military men who were employed at home, in trade or on railways or in docks, during the war, became used to a rate of wages so high that on its fall, in peace-time, they preferred pilfering to economising; though many of them were still earning substantial wages when detected. Indeed the chaplain of Brixton Prison—confirming my remarks on p. 518 *supra*—says even of criminals in general that usually they "do not come to prison because they have not enough money but because they have too much"; the money has led them to gamble or to drink (*Prison Com. Report* for 1919–20).

The latest statistics (those of 1927, published in 1929) are discouraging. The oft quoted diminution in the number of persons in prison, and of prisons themselves, must be discounted; being largely due to the recent wise reluctance to imprison first offenders and to the remarkable reduction[1] in the length of sentences of imprisonment. It is clear that, whilst in 1913 only 63,269 persons were tried for indictable offences, yet in 1926 the number had risen to 79,591. And the number of such offences known by the police to have been committed had risen from 97,933 to 133,460[2]. True, the general strike and the coal-stoppage made 1926 an abnormal period. But 1927 proved to have "the highest crime-rate of any year (except 1926) in the last twenty." The means of repressing crime are lessened; so many new duties purely civil having been thrown on the police, *e.g.* as to road-traffic and cattle diseases. But it is satisfactory to know that the most alarming class of offences—those of violence to the person—are steadily falling; and were in 1927 only about half of what they averaged in 1900–04. It is at

[1] Lord Sterndale has reckoned it to be a reduction to *one-fifth* of the average sentences of half a century ago. Cf. p. 547 *infra*.

[2] Which, however, is only the same proportion to population as in 1908–12.

any rate clear that our present humane administration of criminal justice is sufficiently effective to afford us no cause to regret the abandonment of the severities of a century ago[1]. That in 1929, amidst widespread distress, with fourteen hundred thousand persons out of work, there should be no alarming increase of crime, and no strained relations between the police and the populace, is a fact noteworthy and encouraging.

Four grave social problems embarrass us; those of the delinquent, the degraded, the defective, and the dependent classes. But the gravest of the four is the problem of delinquency.

[1] Those theoretical severities are, however, often quoted by popular writers without any recognition of the great extent to which they were limited in actual practice. Thus in 1810 (*Ann. Reg.* p. 410), out of 145 persons sentenced to death for aggravated thefts, only two were executed. In 1820 there were 352 sentences of death for forgery of bank-notes, but only 21 were carried out; and a general total of 1236 sentences of death, of which only 107 were carried out. In 1810, out of 476 only 66 were. In the five years 1814–18 there were 4557 capital sentences passed; but only 434 were carried out. See Parl. Papers of 1819, XVII. 299. During the seventy years 1749–1819 in London and Middlesex executions took place for only twenty-five species of capital felonies, though nearly two hundred then existed. Cf. Spencer Walpole's *Hist. Eng.* IV. 73.

Individual cases of severity are often quoted in a like one-sided manner. Much has been written about "Kelly, who was hanged in 1785 for stealing sixpence farthing." But that sum was the little all of a poor sailor, to whose throat Kelly and another highwayman set their knives and robbed him.

CHAPTER XXXIV

COMING CHANGES

THE student's task in mastering the principles of English criminal law and procedure—a task which it is hoped that the present volume may in some slight degree facilitate—will be rendered far more easy should those principles ever be reduced by the legislature to an authoritative form. But the codification of criminal law—though successfully accomplished in all the leading continental countries, in India, and in several of the principal British colonies—seems in England to be more remote than some fifty years ago, when it formed in successive sessions a prominent feature in the programme of Lord Beaconsfield's cabinet. They, in 1878, introduced a Criminal Code Bill, which had been drafted by Sir James Fitzjames Stephen; and reintroduced it in 1879, after it had been recast by a committee of judges, and again in 1880, with some few further alterations. Had the Bill passed, it would not only have reduced the present law to a briefer and more precise shape, but would also have introduced some important reforms. For it would have (1) recast the present distinctions between felony and misdemeanor, (2) recast the present law as to coercion and compulsion, (3) removed from the law of murder all cases of merely "constructive" malice, and (4) simplified the multiform law as to thefts and frauds. And it would, further, have effected several changes in procedure; as, for instance, with regard to indictments, venues, special juries, challenges, costs, and appeals. But the Bill still awaits enactment[1].

Meanwhile some particular reforms are being effected piece-

[1] "It is impossible to view without humiliation the entire cessation of any effort to improve the form of English law, and the apathy with which that cessation has been regarded;...our want [of a criminal code] produces practical and substantial inconveniences" (Sir Courtenay Ilbert, *Legislative Methods* 1901, p. 162).

meal. Thus the Act of 1907 created a general Court of Criminal Appeal. And in 1911 the Perjury Act, in 1913 the Forgery Act, and in 1916 the Larceny Act, gave instalments of codification.

And, turning from legislation to current practice; we may note the much greater care now taken in the Individualisation of sentences—fitting the punishment not only to the crime, but also to the particular criminal[1]. New plans, again, are being tried in penal administration; in the hope of promoting the Reformation of offenders and so checking Recidivism, (cf. p. 507, *supra*). Thus in our prisons educational classes are being multiplied, largely by voluntary help; and voluntary visitors also are being brought into touch with prisoners. This spontaneous philanthropy is in striking contrast with the recent French experience described on p. 511 n. *supra*. A visible sign of the present attitude towards those incarcerated is the disappearance of the traditional broad arrow from their clothing; (a contrast to the days when, as at Wakefield in 1817, one in six of those prisoners who attended the chapel attended it in chains). Again, upon release from gaol, assistance in the critical first days of liberty is offered by the Discharged Prisoners' Aid Societies; and is accepted by nearly half of those liberated. To that temporary help these Societies—whose expenditure is about £27,000 a year —add efforts to secure employment for the ex-prisoner; and they are now attempting to secure friendly supervision of his after-career. A kindred motive has introduced the employment of women-police; rather for their ethical and preventive influence than for coercive activities. At the end of 1925 there were 131 women so employed south of the Tweed; 46 of them being in London.

Amongst possible changes which have come under public

[1] Some of us who knew London Sessions will remember how earnestly the late Mr McConnell, before determining a sentence, would say to the prisoner, "Tell me something about yourself. Especially tell me *anything good* about yourself." And the invitation was seldom fruitless.

discussion are—the adoption, by agreement of the judges, of some approximate standard of sentences for familiar types of crime (and the Court of Criminal Appeal is tending to create one); the abolition of grand juries[1]; the enlargement of the public provision for the prosecution of offenders[2]; the provision, as in France[3], of counsel for the defence of all indicted prisoners; and a more systematic allowance of compensation from public funds to convicted prisoners who establish their innocence[4], or even (as in Scandinavia) to acquitted prisoners who have undergone actual detention in gaol whilst awaiting trial—a detention which takes place under rules more severe than those sometimes applied now to convicted prisoners. Some reformers advocate the introduction of the American permission of Indeterminate sentences. In these, the judge fixes only a minimum and (in some cases) a maximum; and the executive authority can release the prisoner at any intermediate time when it considers him sufficiently reclaimed. "Six months to five years" is a frequent American sentence.

[1] *Supra*, p. 462. Mittermaier, *Englische Strafverfahren*, s. 15.

[2] Usually the Director of Public Prosecutions undertakes less than eight hundred cases in a year; in 1927, 643. On the success in Scotland of its universal system of public prosecutions, see the *Edinburgh Review*, CCXXXIII. 202; cf. p. 10 *supra*. But it is too often forgotten that, even in England, every Chief Constable of a borough or a county, and the Superintendent of Police in every petty-sessional division of a county, is practically an active local Public Prosecutor. See p. 548 *infra*.

[3] The *Code d'Instruction Criminelle*, art. 294, compels French assize-courts to assign counsel to every undefended prisoner. For England, see the Poor Prisoners' Defence Act, 1903 (3 Edw. VII. c. 38); *supra*, p. 459.

[4] Cf. Ferri's *Sociologie criminelle*, pp. 502–4. Some such compensation is now recognised by law in Portugal, Scandinavia, Austria, Belgium, France, Germany, and Switzerland. In England in 1848 Mr Barber, a solicitor, received £5000 after a transportation for supposed forgery. In 1901, our Treasury granted £600 to Mr Lillywhite, who had been brought in custody from New Zealand on a charge of murder. In 1905, it awarded £5000 to Mr Adolf Beck, after actual conviction; on demonstration that fifteen witnesses had been mistaken in identifying him. This was only the eighth case of compensation during seventy years. In 1921, a grant of £250 was made to Mrs Gooding, who had twice been wrongfully imprisoned for libel on prosecutions by the actual libeller! In 1928 (*The Times*, Aug. 9) Oscar Slater received £6000 when his conviction was quashed; (though quashed not on the merits but only for the judge's error of law).

But the persistent increase of crime in the United States does not prepossess us in favour of Transatlantic penal methods. An indeterminate sentence misses the opportunity of educating the community by a definite measure of judicial condemnation; and it relegates the prisoner to the judgments of a secret officialism, thereby tempting him to hypocrisy. Yet even the most acute executive officials cannot infer much, as to what will be a convict's behaviour after release, from merely watching his behaviour in confinement. For habitual offenders are, when in prison, as a Home Secretary found (*Hansard*, May 27, 1908), "generally speaking, excellently behaved, orthodox worshippers in chapel, and in many cases regular communicants." So out of 377 persons, selected by experts as suitable for release from Preventive Detention, nearly two-thirds proved unfit for it, and were reconfined or even reconvicted[1]. One, released on his word of honour to reform, committed four crimes within forty-eight hours from his liberation.

But all these proposed changes in our penal system are of so limited a character as to shew that the main structure is accepted on all hands as sound. The broad rules of English criminal law and procedure—in spite of a few imperfections in their substance and many imperfections in their form—embody such extensive experience, and are animated by so strong a spirit of fairness and humanity, that our criminal courts, great and small alike, may well recall the tribunal depicted by a great writer[2], "où, dans l'obscurité, la laideur, et la tristesse, se dégageait une impression austère et auguste. Car on y sentait cette grande chose humaine qu'on appelle La Loi; et cette grande chose divine qu'on appelle La Justice."

[1] Cf. p. 509 *supra*.

[2] Victor Hugo, *Les Misérables*, VII. ch. 9.

SUPPLEMENT OF NOTES

SUPPLEMENT

Reports of Judicial Proceedings.

(note to p. 10)

By the Judicial Proceedings (Regulation of Reports) Act, 1926 (16 and 17 Geo. 5, c. 61), it is made an offence, punishable on summary conviction, for any "proprietor, editor, master-printer, or publisher" to print or publish any demoralizingly indecent details of any judicial proceedings; or *any* details of any matrimonial judicial proceedings (except certain specified particulars, *e.g.* the names of the parties and the witnesses, the summing-up, the verdict, and the judgment). The offender may be sentenced to imprisonment for not more than four months, or to a fine not exceeding £500, or to both.

Still (s. 3) no prosecution is to be commenced without the sanction of the Attorney-General.

Knock-Outs.

(note to pp. 10 and 292)

But in the case of an habitual "dealer," it is now made a statutory offence, punishable summarily, (1) for him to give or offer any gift or consideration to any other person for abstaining from bidding at an auction, whether generally or only for a particular lot; and similarly (2) for the other person to accept such a gift or consideration. A fine up to £100 or imprisonment not exceeding six months, or both of these, may be inflicted. But there can be no prosecution without the consent of the Attorney-General or Solicitor-General. See 17 and 18 Geo. 5, c. 12.

Punishment Deterrent.

(note to p. 31)

For instances of the efficiency of punishment in the training of animals and fishes, see Washburn's *The Animal Mind*, p. 248; E. M. Smith's *Mind in Animals*, p. 50; and R. M. Yates' *The Dancing Mouse*. Mr Yates says that "situations which are potentially disagreeable repel an animal with a constancy which is remarkable."

The Mental Deficiency Acts.

(note to p. 58)

These make provision for the care and control of persons who, though not insane, have—before reaching the age of *eighteen*—shewn that, whether from inherent causes or from disease or injury, they have never acquired full powers of mind.

By the Mental Deficiency Act, 1927, s. 1 (i), the four classes of them are defined as follows:

a. *Idiots*; those unable to guard themselves against common physical dangers.

b. *Imbeciles*; those incapable of managing themselves or their affairs, (or, in the case of children, of being taught to do so).

c. *Feeble-minded*; those who require care, supervision and control, for their own protection or for the protection of others, (or, in the case of children, who appear permanently incapable of benefiting from ordinary school-instruction).

d. *Moral Imbeciles*; those in whose case mental defectiveness is coupled with strongly vicious or criminal propensities, and who require care, supervision and control, for the protection of others.

Our tests of our neighbours' sanity are sometimes peculiar. I remember a witness (Oct. 4, 1903) stating, as evidence of a defendant's insanity, that "He is eccentric. I have worked with him for thirteen years; and he is never late but always there at his time."

Too Insane for Execution.

(note to p. 60)

Thus, in a case which aroused "a public outcry" in 1922, (*Annual Register*, p. 9), Ronald True was convicted of murder; the jury declaring him, in spite of his peculiarities, to be not insane within the McNaughton rules. He was accordingly sentenced to death. But a committee of medical experts, whom the Home Secretary consulted, pronounced him not sane enough to be able to shew cause why he should not be executed. The execution accordingly was indefinitely postponed; and, I believe, still remains so.

Intoxication as a Defence.

(note to p. 62)

We have seen that drunkenness—even though it lead a man to do what he would not have done had he been sober—is not *in itself* any excuse for his crime. Consequently although he were so drunk that he could not form an intention—and therefore must be acquitted of murder, or of wounding with intent to do grievous bodily harm—he nevertheless may be guilty enough to be convicted of a manslaughter, or of an unlawful wounding.

Suspended Pensions.

(note to p. 97)

Beyond this (theoretically absolute) forfeiture of the pensions of those convicted felons who are under a *severe* sentence of imprisonment, a more general though less drastic penalty has been established by the Ministry of Pensions. I am indebted to a high authority for the information that, under

the Instructions issued by that Ministry, *every* convicted offender, whether felon or misdemeanant, whose sentence is one of imprisonment at all (however brief and whether with or without hard labour), finds any pension which comes to him from that Department *suspended* until the end of his imprisonment. But after his release, the future instalments will be paid to him. In practice they also are thus paid even when the pension has been absolutely forfeited under the Act of 1870. "Moreover in the case of pensions paid by other Departments to former members of the Army or Navy or Air Force, there is usually a power to restore any pension forfeited under that Act; and this power is not dependent upon the nature or length of the imprisonment."

Larceny by a Trick.

(note to p. 206)

This offence, often so difficult to distinguish from False Pretences, is usually the student's chief perplexity in criminal law. It cannot be better defined than in the words of Lord Sumner:

"'Larceny by trick' is a short way of saying that the actual delivery *de manu in manum*, though it wore the outward appearance of Consent on the deliverer's part, was in that respect illusory. Because—owing to the deception practised on him—his mind did not go consensually with his physical action"; (*Lake* v. *Simmons*, L.R. [1927] A.C. at p. 503).

There thus is no more a Consent or a Contract than when a pocket is picked. But in False Pretences there is a Consent; and therefore a Contract, though only a voidable one. Cf. p. 242 *supra*.

Clandestine Borrowings.

(note to p. 211)

Scotland similarly does punish the clandestinely taking possession of a motor-car and proceeding to use it with knowledge that the owner would not permit the act. If it were held to be no offence, "in these days when one is familiar with the circumstances in which motor-cars are openly parked in the public street, the result"—said a Scottish Court—"would be not only lamentable but absurd." (*Justiciary Reports* [1926] 100.)

Ashwell's Case.

(note to p. 216)

The affirmation of the conviction, though due only to an equal division of judicial opinions, seems nevertheless to settle the law authoritatively. Cf. 8 H.L.C. at p. 392.

Yet the opposite view—that the legal "taking" was the (admittedly innocent) actual physical taking, and that the conviction ought therefore to have been quashed—has been approved not only by Lord Loreburn but also by Lord Birkenhead. The latter writer says (*Fourteen English Judges*, p. 321), "Stephen's reasoning, that it was *not* Larceny, seems conclusive. But apparently we must accept the decision as one that the 'taking' did not occur until Ashwell realized the mistake."

Concealment of Incumbrances.

(note to p. 246)

By the Law of Property Amendment Act, 1925 (15 Geo. V., c. 20, s. 183 (i)), it is made a misdemeanor, punishable with fine and two years' imprisonment, for a vendor of either real or personal property (including choses in action) to conceal from the purchaser—or intending purchaser (s. 205, xxi)—thereof, any instrument or incumbrance material to the title, or to falsify any pedigree affecting the title; *with intent to defraud.*

Handicap Races.

(note to p. 252)

The decision in *Reg.* v. *Button* was followed, and carried further, in an Australian case, *Rex* v. *Lambassi*. (Victorian Law Reports 1927, p. 349.)

Lambassi gave a false name and false particulars of his alleged performances; and thereby secured *the opportunity of competing* in a handicap foot-race. He was handicapped. But there was no evidence that the handicap actually obtained by his falsehoods was more favourable than would otherwise have been given to him; and he swore that those falsehoods were not such as would be likely to obtain him one. He ran and won; and received the prize-money. He was convicted; and the Supreme Court affirmed the conviction.

"Falsity" in Forgeries.

(note to p. 259)

A singular illustration of the nature of that Falsity which is indispensable to a forgery is afforded by the case of *Britian* v. *Bank of London*; (11 W. R. 569, and *The Times* of April 21, 1863). It was said by *The Times* to have decided "one of the most curious and knotty points of criminal law that ever arose." The action was for a false imprisonment.

A cheque given by Browne to Britian was cashed by the Bank of London; who ultimately, in their usual course, cancelled it and returned it to Browne. He, without changing any letter in it, "touched up" the signature so as to make it less like his own ordinary writing; and then took it back to the Bank, alleging that Britian had forged it. The Bank, believing this, repaid him; and gave Britian into custody, but ultimately abandoned the prosecution. Britian brought this action for false imprisonment. A verdict in his favour was sustained, on appeal, by a court of four judges. They held the arrest unjustifiable (see p. 449 *supra*); as no felony had been committed. For Browne's tampering with the cheque did not amount to a forgery; since it gave no new operation to the cheque but left its legal effect unaltered. Browne was guilty only of a fraudulent misdemeanor.

Presumption of Regularity.

(note to p. 332)

"A foot-passenger is justified in assuming that a car coming towards him will be driven moderately and prudently. He may cross the road on that assumption; and is not disentitled to recover damages because—acting on that assumption—he has crossed the road without looking, and has sustained injury through the car being driven at an excessive pace." Nevertheless "while vehicles are bound to go at a steady pace and not to be driven furiously, foot-passengers crossing the carriage-way are bound to look after their own safety and not to run obvious and unnecessary risk." (Beven on Negligence, pp. 688 and 693.)

So, again, if a Will, which is proved to have been kept by the testator in his own custody, be not forthcoming at his death, there is a primâ facie presumption that it was destroyed by himself; and also a presumption that it was destroyed with the intention of revoking it. And, as was said in *Colvin* v. *Fraser* (2 Hagg. at p. 235), "these presumptions may be resolved...into the reasonable probability of fact, deduced from the ordinary practice of mankind and from sound reason. Persons in general, keep their Wills in places of safety." It cannot be presumed that someone else destroyed it without the testator's authority. For that would be to presume a crime.

Circumstantial Evidence.

(note to p. 337)

The value of Absence of Motive as circumstantial evidence of innocence is habitually exaggerated by those who defend prisoners. "Do not judge by Motives," said Lord Brampton, "for they depend upon the character of the individual." Because, as was said by Darling, J., "a motive which ordinary men would think inadequate may be perfectly sufficient to a person of criminal mind." Many great crimes have been proved quite beyond doubt, although their motives were never ascertained.

Fingerprints.

(note to p. 339)

It is usual to take the fingerprints of any offender who is sentenced to a month or more of imprisonment. Scotland

Yard already (1929) possesses prints from over half a million persons; to which it adds about 36,000 annually. The number of persons identified by fingerprints averages fifteen thousand in each year. They are so minutely classified that it is sometimes possible to find the needed one in less than a minute.

Unsworn Children.

(note to p. 393)

Moreover a child who thus gives evidence without being sworn is not adequately corroborated by the *unsworn* evidence given by other similar children. See *Rex* v. *Coyle* (N. of I. [1925] 208). Nor is any complaint, which this child has made, an adequate corroboration. For a complaint is (see p. 373 *supra*) proof merely of the complainant's consistency of conduct; and not evidence at all of the facts alleged in it.

Witnesses to Character.

(note to p. 397)

The student should notice that it is only to *defendants* that our criminal courts concede the anomalous privilege of calling such witnesses.

Earl Russell prosecuted a group of libellers who had accused him of a felony; and they pleaded as a defence the truth of their charges against him; (cf. p. 315 *supra*). It was held that, though thus accused of crime, he could not support his denial of the accusation by calling evidence of his good character. "If Lord Russell," said Hawkins, J., "had wished to call a host of witnesses to prove that his general character was unimpeachable, I should not have allowed him; for it would not have been evidence" (*The Times*, June 8th, 1897). Cf. *Cornwall* v. *Richardson*, Ry. and M. 305.

Prisoner's own Evidence

(note to p. 407)

Sir Herbert Stephen, from his long and wide experience as Clerk of Assize, wrote in 1926, "As a general rule, a prisoner who is *not* called as a witness can have little hope of an acquittal."

A fellow-prisoner tried along with him is not debarred, as the prosecutor is, from commenting on his not having gone into the box.

Evidence before Coroners.

(note to p. 431)

The strict rules as to judicial evidence are habitually relaxed at Coroners' Inquests. For their proceedings are investigations rather than trials. The coroner "is bound to collect, as far as he can, all information and knowledge from neighbours and others who can throw any light upon the cause of death"; (Wills, J.). So hearsay evidence is freely taken. But the jury, before finding a verdict that accuses any person of *crime*, should disregard everything except strictly legal evidence. See Jervis on Coroners, pp. 15, 255.

Adoption.

(note to p. 436)

By the Adoption of Children Act, 1926 (16 and 17 Geo. 5, c. 29), a remarkable innovation was introduced into our legal system. Under this statute not only the High Court and any County Court, but even any court of summary jurisdiction, can make an order transferring to an Adopter the rights and duties of the natural parents or guardians of the person adopted. But this latter person must (1) be under twenty-one years of age, and (2) have never been married, and (3) either be twenty-one years younger than the Adopter, or else be so near of kin that the two cannot lawfully marry each other. And the Adopter must be over twenty-five years of age.

Countermanding a Grand Jury.

(note to p. 462)

Consequently it is provided by the Criminal Justice Act, 1925, s. 19, that if, up to the fifth day before holding any Quarter Sessions, no person has been committed for trial

there who has not thus admitted his guilt to the examining justice, the attendance of a grand jury shall not be required. And accordingly any indictments "may be presented to the court without having been found by a grand jury."

But no such provision is made for similar circumstances at Assizes.

Prisoner's Counsel.

(note to p. 482)

An illustration of the limits which honour imposes upon an advocate, even when *defending* an accused person, was afforded by the Irish Court of Criminal Appeal in *Att. Gen.* v. *O'Leary* (Ir. Rep. [1926] at p. 451). They held it to be correct to say that such a defender, if he do not produce the prisoner to give evidence, must not suggest to the jury that another person, not under trial, committed the crime. But, if he can indicate to the jury any portion of the *evidence* which shews that another person may have committed it, he is entitled to point this out.

The reader may be reminded of what has been already said at p. 339, n. 4 *supra*.

Penal Servitude.

(note to p. 489)

By the Penal Servitude Act, 1926 (16 and 17 Geo. 5, c. 58), when a person is convicted of two or more indictable offences which are not punishable by penal servitude and for which the *aggregate* sentences might amount to three or more years' imprisonment, the court which convicts him may, instead of inflicting imprisonment, sentence him to penal servitude for a term not exceeding seven years, and not exceeding the term of the aggregate possible sentences. But—see *Rex* v. *Ascoli* (20 Cr. App. R. 156)—only if it consider that even the maximum sentences applicable under the ordinary law would be inadequate for this multiplicity of offences.

Attractive Prisons.

(note to p. 512)

Professor Ferri, the great Italian criminalist, wisely says that "The State should never lose the sense of Proportion in its respective attitudes to those who do commit offences, and to those who continue innocent despite both poverty and opportunities for crime. It is not prudent to make artisans and labourers realise that inside prison their material advantages—and in England their intellectual advantages also—are no less, and sometimes are even greater, than those which they obtained when in their freedom outside prison." Cf. pp. 524–5 *supra*.

Facts mitigating Punishment.

(note to p. 515)

That the offender ultimately gave useful information to the Crown, will tell in his favour: 9 Cr. App. R. 142.

Youth is now treated habitually as a circumstance that should reduce the penalty; even at so ripe an age as twenty-three or four. Cf. 20 Cr. App. R. 102, 118, 138, 182.

Probably the most illogical plea ever urged in mitigation was that suggested by a jury at the Central Criminal Court in November 1923, in the case of *Rex* v. *Mavor*. The jury accompanied their verdict of Guilty with a recommendation to mercy. When asked why, the foreman replied "*From the lack of evidence.*" Mr Justice Swift easily induced them to withdraw that recommendation.

Lenient Sentences.

(note to p. 529)

Not very long ago it was the habitual practice to inflict five years' penal servitude upon postmen who stole any letters entrusted to them. But, as Lord Hewart, L.C.J., said (in *Rex* v. *Woodcock*, Nov. 26, 1928): "In recent years greater

leniency has been shown. And with results that are by no means satisfactory." He accordingly passed a short sentence of penal servitude, though it was the postman's first conviction. And the Recorder of London also noted (*Rex* v. *Taylor*, Feb. 1st, 1929) that "offences by postmen are becoming more and more prevalent."

Prosecutions.

(note to p. 533)

An offender may be prosecuted either

(I) Officially:
  (a) by the local police, or
  (b) by the Director of Public Prosecutions, if the offence be very heinous or otherwise important.

(II) By a private prosecutor. (Contrast Scotch procedure, *supra*, p. 10, n. 2.)

Before the institution of our modern police system (see p. 446 *supra*) pressure was habitually put upon the victim of a crime to make him undertake the trouble and expense of prosecuting. As Edward Gibbon Wakefield complained in 1831, the criminal law benefited the whole community, just as a bridge does; yet the tolls for using it were levied upon those unlucky travellers whom it had failed to carry safely. Cf. p. 494 *supra*. But now, as the authorities are ready to take proceedings at the public expense for any offence that really calls for it, even the persons injured by the crime are usually reluctant to incur the trouble and cost of a prosecution; despite the pecuniary contribution they would receive from the county rate.

Sometimes, however, the man wronged feels anxious that the prosecution should be conducted with full skill; and he therefore lays the information himself. In such a case it is "not only permissible but desirable" that he should thus exercise the general right (see p. 10, n. *supra*) of prosecuting. Hence the committing justices ought not to forestall him by

binding over an unconcerned constable; see *Rex* v. *Ely Justices* (45 T. L. R. 93). The likelihood of a guilty offender's being merely placed under Probation, and so escaping all actual punishment, tends now to make private prosecutions rarer.

The extraordinary two prosecutions of Mrs Gooding (*supra*, p. 533 n. and *The Times*, Aug. 11, 1921) were private ones.

The Latest Statistics

"Through variety of times and things in this unconstant world"—as Hooker phrases it—the statistics of our criminal courts alter much from year to year. The last bluebook of them, published in April 1929, gives the facts of 1927.

In that year the number of *indictable* offences that became known to the police was 125,703; (which was about eight per cent. above the average of the years 1922–26). Prosecutions for these were commenced against 65,163 persons. Of them a few were ultimately not sent for trial; but 7136 were tried at Assizes (3077) or Quarter Sessions (4059). Thus the great bulk—say about seven-eighths—were tried summarily.

For *non*-indictable offences the annual number of persons tried has fluctuated much during our twentieth century; at first decreasing, from over seven to under six hundred thousand in 1921; but subsequently rising again. In 1927 they were 617,823. Fluctuations still greater have occurred in the relative proportions of different classes of these petty offences. Thus prosecutions on charges connected with Motor-vehicles numbered in 1904 only 3879; but had risen in 1927 to 183,448 (thirty per cent. of the prosecutions for petty offences). On the other hand, charges connected with Drunkenness were in 1913 so many as 204,038; but in 1927 they had fallen to 70,869. This decrease is officially attributed to the higher price and lower strength of intoxicating liquors, restricted hours of sale, lack of money, and (cf. p. 528) to a welcome change in public opinion. The Scotch statistics shew a similar

result; some 50,000 drunken defendants in 1914, but only 20,000 in 1927.

The practice of inflicting short imprisonments—which familiarize the man with prison-life and thereby weaken its deterrent effect, yet are not long enough to exercise on him any reformative influence—is happily on the decline. In 1909 imprisonment for only a fortnight or less was inflicted upon 109,015 offenders; but in 1927 only upon 14,576.

The value of the Discharged Prisoners Aid Societies is shewn by the fact that in 1926 fifty-eight per cent. of the men discharged, and twenty-five per cent. of the women, were aided by them. In the same year the London police magistrates shewed their high estimate of the similar philanthropic work done by the Police Court Missionaries, by entrusting to their care no fewer than 15,375 persons. Of these there were 2482 who were placed under supervision, Missionaries being appointed as their probation officers.

In 1926 the average earnings of a prisoner (cf. p. 520 *supra*) were under £36 for the year. In Scotland the average in 1925 was similar—£37. The men are weak and indolent.

Only one prisoner in twenty can read and write *well*. Cf. p. 517 *supra*.

Of the 23 women charged in 1927 with having killed their newly-born children, fourteen were charged only with Infanticide, under the Act of 1922.

About 33,000 guilty persons were released on Probation; not quite half of them being also put under the supervision of a Probation Officer.

On December 31, 1927, 160 persons were undergoing Preventive Detention; and 42 persons were in that year sentenced to it prospectively. Five years is the most usual period. Cf. p. 508 *supra*.

Coroners' inquests in 1927 found verdicts of Suicide in 4863 cases; but adjudged the deceased to be *felo de se* in only 93 of them; less than 2 per cent. (See above, p. 113.)

APPENDIX

FORMS OF INDICTMENTS

After mastering the rules for the drafting of an indictment, the student may impress them on his memory by the following illustrations, taken from the Indictment Rules 1915–16. For a full form of indictment for Treason, see 12 Cr. App. R. 99.

(I) COMMENCEMENT.

The King *v.* A.B.

Durham County Assizes held at Durham
Presentment of the Grand Jury

A.B. is charged with the following offence [*or*, offences]

(II) COUNTS. The Commencement will be followed by one or more Counts[1]; as in the following various examples.

A

STATEMENT OF OFFENCE.

Murder.

PARTICULARS OF OFFENCE.

A.B., on the day of in the county of , murdered J.S.

B

STATEMENT OF OFFENCE.

Manslaughter.

PARTICULARS OF OFFENCE.

A.B., on the day of in the county of , unlawfully killed J.S.

[1] All the counts ought to be tried together; 13 Cr. App. R. 173.

C

STATEMENT OF OFFENCE.

Accessory after the Fact to Murder.

PARTICULARS OF OFFENCE.

A.B., well knowing that H.C. had murdered C.C., did on the day of and on other days thereafter, in the county of , receive, comfort, harbour, assist and maintain the said H.C.

D

First Count.

STATEMENT OF OFFENCE.

Arson contrary to section 2 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A.B., on the day of , in the county of , maliciously set fire to a dwelling-house, one F.G. being therein.

Second Count.

STATEMENT OF OFFENCE.

Arson contrary to section 3 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A.B., on the day of , in the county of , maliciously set fire to a house with intent to injure or defraud.

E

First Count.

STATEMENT OF OFFENCE.

Larceny.

PARTICULARS OF OFFENCE.

A.B., on the day of , in the county of , stole a bag, the property of C.D.

Second Count.

STATEMENT OF OFFENCE.

Receiving stolen goods contrary to section 91 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A.B., on the day of , in the county of , did receive a bag, the property of C.D., knowing the same to have been stolen.

A.B. has been previously convicted of felony, to wit, burglary, on the day of at the Assizes held at Reading.

Contrast a form in use before the Act of 1915, for Larceny and Receiving:

Cambridgeshire, to wit.

The jurors for our Lord the King upon their oath present that John Doe, on the 1st day of January in the year of our Lord 1903, an umbrella and a gun, of the goods and chattels of Richard Doe, feloniously did steal take and carry away; against the peace of our Lord the King, his crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Doe afterwards, to wit, on the day and year aforesaid, the goods and chattels aforesaid, before then feloniously stolen taken and carried away, feloniously did receive and have, he the said John Doe (at the time when he so received the said goods and chattels as aforesaid) then well knowing the same to have been feloniously stolen taken and carried away; against the form of the statute in such case made and provided, and against the peace of our said Lord the King, his crown and dignity.

Some points on the interpretation of indictments deserve to be noted though of lessened importance now that indictments are simplified.

The doctrine[1] (of uncertain authority but widely maintained) that penal Statutes should be construed "strictly"—*i.e.* in favour of the person accused—is not applied to indictments. An indictment, like any ordinary document, must be so construed *ut res magis valeat quam pereat*[2]. Hence, if its words be capable of different meanings, it must be construed[3] "in that sense in which the party framing the indictment must have used it if he intended his charge to be consistent with itself"; that is to say, in the sense most favourable to the prosecution[4]. Again, as in ordinary instruments, surplus words may be rejected; *utile per inutile non vitiatur*. Should two entire clauses be absolutely contradictory, so that one or the other must be rejected as surplusage, it is, as in deeds, the later one[5] that must be so rejected (not, as in wills, the earlier).

An indictment was, we have seen, an utterance of the grand jury, not of a State official. Hence if, at the trial, the evidence varied, even in some triviality of a mere name, from the allegations in the indictment, the judge could not, at common law, alter the indictment to fit the evidence; for he had no right to tamper with that sworn utterance of other men. The miscarriages of justice thus caused were avoided by introducing a multiplicity of counts, so as to tell the same story in

[1] Broom's *Legal Maxims*, p. 550.
[2] Anson on Contracts, IV. ch. II. s. 1.
[3] *Rex* v. *Stevens*, 5 East, at p. 257.
[4] Yet in the old times of extremely severe punishments the judges often evaded that severity by an exaggerated strictness *against* the prosecution, in the construction of indictments. Cf. p. 474 n. *supra*. In Mr Cohen's interesting work on the Indictments Act (p. 4) we read of an accusation for murder being quashed in 1827, "because it stated that 'the jurors on their *oath* present,' instead of 'on their *oaths*.'" Similarly in 1829, under a statute which prohibited the stealing of "rams, ewes, or sheep," one Puddifoot was indicted for stealing a *sheep*. The evidence being that he stole an *ewe*, the conviction was held wrong (1 Moody, 247); a decision which recalls some of the subtleties of the Roman legis actiones which might fail if vines were described as "vites" instead of as "arbores"—the word used in the Twelve Tables. An equally striking instance is *Rex* v. *Woolcock*, 5 C. and P. 516. Abraham Lincoln remarked that "the old lawyers would have been willing to hang a man for merely blowing his nose. But they would have quashed the indictment if it did not say which hand he blew it with."
[5] *Wyatt* v. *Aland*, Salk. 325. Cf. 2 Bl. Comm. 381.

a variety of ways and thus be ready for many possible variations in the evidence. A better remedy was provided by conferring on the court a statutory power—though only a very limited one—of amending indictments. But the Act of 1915 confers a comprehensive authority:

s. 5.—(1) Where, before trial, or at any stage[1] of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment[2] of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice; And may make such order as to the payment of any costs, incurred owing to the necessity for amendment, as the court thinks fit. (5 and 6 Geo. V. c. 90.)

[1] Even after an *in*decisive verdict; 13 Cr. App. R. 158.
[2] *E.g.* by adding "with intent to defraud"; 17 Cr. App. R. 182.

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