

**TRIAL ON INDICTMENT IN  
NINETEENTH CENTURY ENGLAND**

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# Trial on Indictment in Nineteenth Century England

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## S U M M A R Y

The aim of this thesis is to assess how far trial on indictment in nineteenth century England conformed to the present day concept of a fair trial.

What by contemporary English standards are considered the essential elements of a fair trial the thesis deduces from current statute and case law. Having identified these elements it attempts to discover how far they were present in the nineteenth century system. The analysis broadly follows the chronology of the trial itself, with particular attention paid to legal aid, the campaign to abolish the rule rendering prisoners and their spouses incompetent as witnesses in their own defence, and appellate remedies. The conclusion reached is that, although at the start of the nineteenth century the trial system fell well short of the twentieth century model, by the century's end it had (except in relation to legal aid and appellate remedies) moved much closer to it.

For its analysis of the trial system the research draws upon eighteenth and nineteenth century law texts supplemented by evidence as to trial practice gleaned from contemporary reports of trials (in particular the reports in *The Times*, the Central Criminal Court Sessions Papers and Legal Journals), legal memoirs and biographies, and unpublished material in the Public Record Office and elsewhere. The most important single unpublished source consulted has been the notebooks which record the reserved criminal cases which came before the Common Law judges between 1785 and 1828.

Reports of Royal Commissions, and Select Committees, draft Bills and the Reports of Parliamentary Debates (supplemented by articles in newspapers and journals) have provided the raw material upon which the account given of the reforms made and attempted during the century is based.

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## INTRODUCTION

**'How men were tried. There is no better touchstone for a social system than this question'**

Marc Bloch, Feudal Society.

At common law trial on indictment was the trial by a petty jury of twelve of an accusation of crime (indictment) brought by a grand jury or jury of presentment.

The roots of the system lie in the twelfth and thirteenth centuries. Juries of presentment date back to at least the assizes of Clarendon 1166 and Northampton 1176 (which required the representatives of each hundred and township to present to the King's Justices the names of those suspected of crime). The petty or trial jury, on the other hand, was an expedient devised in the thirteenth century to fill the gap caused by a Papal ban upon what until then had been the normal mode of trying suspects, namely the ordeal [1].

At first, trial juries were drawn from the ranks of the presenting jurors attending before the royal Justices, and, like presenting juries, were expected to act of their own knowledge. In 1352, however, the accused was given the right to object to the presence of an indicting juror on the trial jury [2]. Also (and this development is difficult both to date and trace) the practice grew up of allowing the Crown to call witnesses to inform the jury. The size of the trial jury had early been set at twelve. By the mid-fourteenth century it was also a requirement that its verdict be unanimous [3]. At some unknown date between the thirteenth and mid-fifteenth centuries, the rule arose that

the accused could challenge upto thirty-five jurors peremptorily and an unlimited number for cause [4].

By the sixteenth century, although a jury might still act upon its own knowledge (a rule affirmed a century later in Bushell's case (1670) [5] and not rooted out of our law until the early nineteenth century [6]) the evidence of witnesses was the material upon which jury verdicts were now principally based. And to ensure that there should be no shortage of such material, statutes of Philip and Mary [7] required magistrates in felony cases to examine prisoners and their accusers, and to write down the material portions of what they said for use subsequently at trial.

With the use of witnesses to prove the allegation against the accused, trial on indictment had by the sixteenth century begun to assume its modern shape. The first detailed account we have of trial procedure comes from this period [8]. The indictment is found by a grand jury of twenty-three after hearing the Crown witnesses. The accused is arraigned upon it. If he pleads not guilty and puts himself on his country (i.e. agrees to jury trial) a jury is empanelled to try him. If he refuses to plead (or having pleaded not guilty refuses jury trial) he is put to the peine forte et dure (i.e. pressed by weights until he either agrees or expires). The jury having been empanelled, the evidence for the Crown, upon whom the proof lies, is gone through. First, the magistrates' examinations of the accused and the witnesses against him are read. Next the Crown witnesses are called. They testify on oath. Of their evidence the accused has had no forewarning. He is allowed no counsel to defend him. Lest he detect a flaw in it he is refused a copy of the indictment. There are no rules of evidence. The accused is not always

confronted by the witnesses who speak against him. Confessions, obtained by torture from the accused himself or his accomplices, are not only admitted in evidence but regarded as particularly cogent proof. The accused cannot himself give sworn evidence nor can he call witnesses. For his defence he is obliged to confine himself to disputing with witnesses and the prosecutor, during the course of which altercation he may be questioned both by the judge and prosecuting counsel. After the judge has heard enough he charges the jury, and then proceeds to hear the next case. After they have heard two or three cases the jury will consider their verdicts in them.

The seventeenth century saw important changes in the system. The use of torture was discontinued. The ban on the accused's calling witnesses was relaxed; by mid-century he was allowed to call witnesses (although not to have them sworn). After the Revolution of 1688 the pace of reform increased. In 1695 [9] the practice in treason trials was drastically modified, the accused being granted the right to counsel, to a copy of the indictment, and to have his witnesses sworn. Also the judges, determined that there should be no return to the judicial bullying of prisoners which had been so prevalent under Scroggs and Jeffreys, now prohibited all interrogation of the accused [10] (a protection which also had the consequence of rendering him incompetent to testify in his own defence). From around the same period we have the outlines of a hearsay rule [11].

During the eighteenth century the process of reform continued. In 1702 prisoners accused of felony were given the right to have their witnesses sworn [12]. By about 1730 judges were also starting to allow them the help of counsel in



questioning witnesses [13]. Evidential protection for the accused increased. By 1750 it was fast becoming a settled rule that a confession obtained by improper inducement was not to be left to the jury [14], and a settled judicial practice to warn juries against convicting on unconfirmed accomplice evidence [15]. In 1772 the peine forte et dure was abolished [16]. Henceforth refusal to plead was to be treated as equivalent to a plea of guilty.

At the beginning of the nineteenth century, which is the period with which this Thesis is concerned, there was much complacency about the trial system. English criminal procedure was spoken of by native and foreigner alike as liberal, tender to the prisoner [17]. One doubts, however, whether present day accused would have viewed it in this light; its shortcomings were too numerous for that. As Glanville Williams puts it:-

'Until one dips into legal history it is hard to realise how recent is our present notion of justice to the accused person and a fair trial.' [18]

A jurist looking at present day English law as to trial on indictment might, given the adversarial nature of our system, identify the following as basic to the concept of a fair trial:-

- (i) an impartial and legally trained judge [19] and an impartial jury [20];
- (ii) the accused's right to be legally represented at his trial [21], to have unrestricted access to legal advice and assistance if in custody awaiting trial, and to have the State pay for such advice and representation if he is too poor to do so [22];

- (iii) notice to the accused in advance of trial of the case he has to meet [23];
- (iv) the allowance to the accused of adequate time to prepare his defence [24];
- (v) disclosure to the accused pre-trial of any 'unused material' in the possession of the prosecution [25];
- (vi) protection of the accused against prejudicial pre-trial publicity [26];
- (vii) full opportunity for the accused to test and challenge the evidence called by the prosecution , if oral, by cross-examination, or by other means if in documentary form [27];
- (viii) full opportunity for the accused to answer the charge he faces by himself giving evidence and by calling witnesses;
- (ix) the right of the accused to the last word with the jury [28];
- (x) full and adequate direction of the jury by the judge as to the relevant law;
- (xi) a built in safeguard against wrongful conviction in the form of a requirement that Crown prove its case beyond reasonable doubt;
- (xii) the right of the accused, if convicted, to appeal such conviction [29].

The rules of evidence may also be seen as part and parcel of a fair trial [30], but many of these rules, some laid down in the nineteenth century, are now being challenged, for example the requirement of a corroboration warning in respect of the evidence of an accomplice giving evidence for the prosecution, and the evidence of a victim of a sexual offence.

This Thesis seeks to discover how far trial on indictment in nineteenth century England conformed to the present day concept of a fair trial, and whether the reforms effected during the century had, by 1900, made any significant improvement to the lot of the accused. At a time when some of the evidential rules laid down in the nineteenth century are under attack or are being reconsidered, it is salutary to examine the period in which these rules were created, and to ask how the present day situation is so different that they are no longer required or need modification?

The approach adopted is to examine the protections which nineteenth century law conferred upon the accused, the handicaps to which he was subject, and the extent to which these protections and handicaps were during the century variously added to, expanded, reduced and abolished.

In its analysis of the situation of the accused, the Thesis follows the chronology of the criminal process. After an introductory chapter describing in outline the nineteenth century English criminal justice system, it examines first how far an accused awaiting trial was able to prepare his defence and was protected against prejudicial publicity. It turns next to the trial itself. The role and character of the nineteenth century judge, the character of juries, and legal

representation for prisoners are all examined. The focus then switches to the rules of criminal procedure and evidence, the subjects considered under this head being the grand jury, criminal pleading, arraignment, the weapons available to an accused with which to attack the prosecution case, the means available to him of getting his version of events before the jury, the protective shield thrown around him by the law of evidence, and lastly the physical hardships inflicted on both prisoners and juries during trial. Finally, appellate remedies are examined.

## CHAPTER 1

### AN OVERVIEW OF THE NINETEENTH CENTURY CRIMINAL JUSTICE SYSTEM

#### (a) Classification of offences

Of major importance in nineteenth century criminal procedure was the classification of indictable offences into treasons, felonies, and misdemeanours. The accused's right to bail, to counsel, to a copy of the indictment and jury panel, his right of jury challenge, the mode of prosecution, the number of offences which could lawfully be charged in the indictment, whether the trial was by common or special jury, the penalty which the accused would suffer on conviction and the prosecutor's right to costs after such conviction, all depended upon the legal category into which the offence charged fell.

Treason, the essence of which was breach of allegiance, was of two kinds - high treason (breach of allegiance to the King) and petit treason (defined by the Treason Act, 1351 [1] as 'when a servant slayeth his master, or a wife her husband, or when a man secular or religious slayeth his prelate to whom he owed faith and obedience'). It was capital, and involved forfeiture of lands and goods, and for men (and until 1790 for women also [2]) an aggravated form of death penalty. Petit treason was abolished in 1828 [3], such offences being reduced to the rank of murder.

Felonies were offences punishable by death (only petty larceny was non-capital), forfeiture of goods to the Crown and escheat of lands. Prosecutions for felony could be by either appeal

or indictment. Appeal was an ancient mode of prosecution in which trial was by battle. Well nigh obsolete since the end of the medieval period, it had survived as a means by which the relatives of a deceased could still harass one who had been tried and acquitted of his murder. In 1819 an attempt to use it for just this purpose [4] led to its speedy abolition by statute [5]. In the early common law the list of felonies had been short - homicide, rape, arson, robbery, burglary, housebreaking and larceny - but by 1800 it had (due largely to the fondness of eighteenth century Parliaments for the capital penalty) swollen to over two hundred [6]. Not all those capitally convicted were, however, executed. The Crown had the power, liberally exercised in practice, to commute the death penalty to some lesser sentence such as transportation, whilst for some felonies the accused could escape hanging by pleading benefit of clergy.

Misdemeanours were offences less than felony. They were not capital nor did they involve forfeiture of property. The punishment for misdemeanour at the start of the century ranged from imprisonment, to the pillory, whipping (also commonly imposed for the felony of petty larceny), and the fine. Prosecution for misdemeanour could be either by indictment or by information laid in the King's Bench.

#### **(b) Police, prosecutors, and deterrence**

At the start of the century, England lacked an efficient police force. The basic policing unit was the parish, responsibility for keeping the peace and catching wrongdoers resting with the parish constable. Elected annually the constable was unpaid, and those unlucky enough to be appointed often employed deputies to perform their duties for

them. In towns there was commonly a paid watch to supplement the efforts of the constables. London had a more elaborate system of watch than other towns, but there was no organisation covering the whole area. In the event of outbreaks of major disorder the magistracy could swear in special constables or, as a last resort, call in the militia, or the army [7]. The system was essentially amateur and hopelessly inadequate.

As for prosecuting criminals, this was regarded as a private rather than a public responsibility -

'a matter for the victims themselves or for other private individuals who could be persuaded to take a sufficient interest in the matter.' [8]

To encourage men to prosecute the law offered both rewards and immunities. A number of felony statutes offered prosecutors a pardon and a reward ranging from £10 to as much as £40 depending on the crime. In addition, the Home Office regularly offered sums for the detection and prosecution of criminals. So too did parishes, boroughs, associations for the prosecution of felons, banks and insurance offices. A criminal caught red-handed would commonly be wooed with promises of immunity and a share of the reward money to name and give evidence against his accomplices. There was an obvious potential for abuse. It was not unknown for men to be entrapped into or even falsely accused of crime so that a thieftaker could claim the £40 Parliamentary reward. McDaniel's case (1756) [9] had been the most notorious case of this kind but it had its nineteenth century counterparts [10]. The system also led to a heavy dependence upon accomplice evidence to secure convictions.

To deter the would-be criminal the law relied upon savage punishment.

By mid-century the picture was much changed. Thanks to Peel the metropolis now had a professional police force, and so too did some boroughs and counties [11], and the day when all would do so, although not yet arrived, was not far off. The country still lacked a system of public prosecutors, but prosecutions were now increasingly overseen by either police, or publicly employed solicitors, and financed out of public funds. In 1879 a Director of Public Prosecutions would be appointed [12], albeit with limited powers. Rewards were now of far less importance than at the start of the century. In 1818 the fixed Parliamentary rewards in felony had been replaced by rewards granted at the court's discretion [13]. As for Home Office offers of rewards and pardons these had in 1850 only a limited life span ahead of them. In the 1880s their use would be discontinued altogether because of the meagre results they were, by then, yielding in terms of the detection and conviction of criminals [14]. Finally, in the matter of punishment the law was becoming more humane. The number of offences capitally punishable showed a huge decrease - in 1861 it stood at just four. Transportation was in decline, and in 1867 would end altogether. The pillory had gone by 1837 [15]. Whipping had been abolished as a punishment for women in 1820 [16]. In 1861 it would, with some exceptions, be abolished as a punishment for males over sixteen [17] (only to be restored a year later by the Garrotters Act [18] for offences of robbery with violence). For most indictable offences the punishment was now usually imprisonment in one of its various forms or gradations.



**(c) The courts**

The courts having jurisdiction to try indictments at the start of the nineteenth century were essentially those swept away by the Courts Act, 1971.

The first tier courts were in London the Old Bailey, in England outside London the Courts of Assize, and in Wales and Chester the Courts of Great Sessions. To this list can be added the Court of King's Bench which, despite possessing a very wide criminal jurisdiction [19], in practice tried cases of high misdemeanour but little else. Between them these courts tried all capital cases as well as a share of the non-capital felonies and misdemeanours. In 1800 the number of Old Bailey Sessions was eight per year. The Great Sessions and the Assizes were, save in the northern counties, held twice a year. In the event of an outbreak of major disorder between Assizes judges could be sent out under a Special Commission to try offenders.

The second tier courts were the Courts of Quarter Sessions, which sat quarterly in every county, and in such cities and boroughs as had a separate commission of the peace. Although in theory they had jurisdiction to try all crimes other than treason, in practice all they tried were cases of petty larceny and misdemeanour [20].

The bulk of the work of the first tier courts was done by the judges of the three common law courts (King's Bench, Common Pleas and Exchequer). They were twelve in number and tried the most serious Old Bailey cases (the less serious being tried by the City Judges, that is the Recorder and Common Serjeant of London) [21], and all the Assize cases (assisted when necessary by Commissioners

appointed ad hoc to help get through the work at a particular Assize). They took no part, however, in the trial of Great Sessions cases; these were tried by four Welsh judges.

The Welsh and the City Judges were part-time judges. When not sitting they were free to, and commonly did, practise at the bar. Several were also M.P.s. Quarter Sessions also relied on part-time judges [22]. At county Sessions the Chairman of the county bench acted as judge, whilst at borough Sessions the judge was commonly the Recorder of the borough who would often, although not always, be a barrister (practising or non-practising).

The only court having jurisdiction to review a conviction on indictment was the King's Bench, which had power to grant a new trial to a person convicted before it of misdemeanour, and to quash the conviction of accused tried before any court who could prove error on the face of the record (in error there was a further right of appeal from the King's Bench to the House of Lords). The number of accused who benefited from these procedures was no more than a handful per year. A less formal appeal procedure lay in the practice of judges' reserving cases. In the case of a trial held at the Old Bailey, at Assizes or the Great Sessions (but not Quarter Sessions), it was open to the trial judge, in the event of a conviction, to reserve any point of law, which had arisen during the trial and as to which he entertained doubt, for consideration by all the common law judges (commonly referred to as "the Twelve Judges"), who, if they considered the conviction bad in law, could either recommend a pardon or arrest of judgment. Whether a point was reserved was entirely at the discretion of the trial judge, and in the first half of the century

the number of cases reserved in a year rarely exceeded twenty. The only other means of overturning a conviction or sentence was extra-judicial - petition to the Home Office.

In the second quarter of the century the structure of the higher criminal courts was remodelled. In 1830 the courts of Great Sessions were abolished, and Chester and the Welsh counties brought within the Assize system, with three additional common law judges appointed to help with the increased volume of Assize work [23]. In 1834 the jurisdiction of the Old Bailey was both extended territorially, and placed on a statutory footing by the Central Criminal Court Act [24]. The following year borough Quarter Sessions were reformed. Henceforth the sole judge of a court of borough Sessions was to be the Recorder of the borough, appointed by the Crown from the ranks of barristers of five years standing or more [25]. An Act of 1842 [26] brought the law into line with practice by declaring that Quarter Sessions were to have no jurisdiction to try cases of treason, murder, capital felony or felony for which an offender could, on first conviction, be sentenced to transportation for life, whilst in 1847 there was enacted the first of a series of statutes [27] giving petty sessions jurisdiction to try minor felonies (a jurisdiction which was steadily expanded over the next forty years). In 1848 the practice of reserving cases was placed upon a statutory footing with the establishment of a Court for Crown Cases Reserved [28]. The same Act also gave Quarter Sessions the power to reserve cases.

By the time these reforms were effected the volume of work, both at the Old Bailey and at Assizes, was much increased compared with the early years of the century. This reflected itself in the

frequency of court sittings. The Act of 1834 required that there be at least twelve Old Bailey sittings a year, whilst in the 1840s Special Commissions began to be regularly issued for the holding of a third Assize in the larger counties.

The Judicature Act, 1873 had relatively little effect on the higher criminal courts. The duties of the common law judges, now re-styled High Court judges, remained, so far as criminal work was concerned, essentially unchanged, as did their number (in 1900 there were still only seventeen Queen's Bench Division judges [29]). For a few years, Chancery judges were sent out on Assize; this did not prove a success and the scheme was soon abandoned [30]. In the late 1870s the experiment was tried of uniting adjacent counties for Assize purposes and of holding four Assizes a year. The reform, carried through under powers conferred by the Winter Assizes Acts, 1876-7 and the Spring Assizes Act, 1879, worked badly, and in 1888 the Government reduced the number of Assizes to three in most counties.

**(d) Numbers tried and conviction rates**

In 1805 the total number of persons committed for trial on indictment was only 4,605 [31]. By 1818 this figure had risen to 13,567 [31]. In 1863 it was 20,818 [32]. From this peak it began slowly to drop back to around 15,000 in the 1870s and 12,000 in the last decade of the century [32]. But for the policy of making petty felony triable summarily the figures for the second half of the century would, of course, have been far higher. Of those committed for trial the percentage acquitted was in the last quarter of the century running at around 17% [32] (in 1805 it had been 24% falling to 19% in 1818) [31].

**(e) Trial on indictment in 1800**

In 1800 in prosecutions for indictable offences, the first step following arrest was normally examination of the accused before a magistrate. Such examinations, which were the precursor of the present day committal hearing, normally took the following course. The magistrate would take, in the presence of the accused and subject to cross-examination by him or his lawyer, the evidence of the prosecutor and his witnesses and reduce the same to the form of depositions. The accused would then be called upon for his defence and, if he chose, could make an unsworn statement (which would be taken down in writing by the magistrate), and call witnesses of his own (in the 1830s some benches were adopting the practice of declining to hear defence witnesses, but in 1848 the right of the accused to call witnesses was affirmed by statute). Alternatively he could (and, if legally represented, even at this early date, commonly would, where the evidence against him was strong) 'reserve his defence'. If the evidence called made out a prima facie case of guilt the magistrate would commit the accused for trial (usually in custody), bind over the prosecutor and his witnesses to attend and send the depositions and the accused's examination (if any) to the court of trial.

Such preliminary examination, although usual, was not an essential step. It could be by-passed by the prosecutor going direct to the grand jury for a bill of indictment, or in misdemeanour by the prosecutor proceeding by information in the King's Bench, whilst in homicide an accused against whom a coroner's jury had brought in a verdict of murder or manslaughter would be committed for trial by the coroner, and could be tried upon the coroner's

inquisition (the document recording the result of the inquest) without either preliminary examination or indictment.

Pending trial, the prisoner had no right to a copy of the evidence against him, nor in felony of the indictment upon which it was proposed to try him. Neither was there any duty on the prosecutor to disclose witnesses or evidence helpful to the defence case. If he could pay for it, the prisoner would usually be able to get legal advice and representation. Protection against adverse press publicity pending trial was more theoretical than real.

At the court of trial, the first task was the finding of bills of indictment against those committed for trial. All bills which prosecutors were seeking to prefer at that session of the court would go before a grand jury. The jury would hear, in private, the evidence in support of each indictment, and if this disclosed a prima facie case they would endorse the indictment 'true bill' and the accused would be arraigned and tried on it. Prisoners against whom no indictment was found would be discharged.

Arraignment consisted of calling the accused to the bar of the court, putting the indictment to him and calling upon him to plead to it. Most prisoners pleaded either guilty or not guilty, although occasionally an accused would plead specially in bar, enter a dilatory plea or move to quash the indictment. If the accused refused to plead or, having pleaded, refused to be tried by jury, he was deemed to have pleaded guilty.

If the prisoner pleaded not guilty, the next step was to empanel a jury to try him. Most juries

in criminal cases were common juries (that is drawn from the ranks of men between twenty-one and sixty who owned freehold land worth £10 a year or occupied a house worth £20 a year), although special juries (consisting of jurors who were bankers, merchants or of the rank of esquire or above) were normally used to try cases of misdemeanour in the King's Bench. The accused had the right to challenge jurors for cause, and in treason and felony there was also a right of peremptory challenge.

A jury having been empanelled, they would be put in charge of the accused and the trial would commence.

In 1800 it was unusual, except in treason, for either side to be represented by counsel, and even where the accused did have counsel, if the charge was felony, the counsel was not permitted to make a speech to the jury on his behalf. Where there was no prosecuting counsel the judge would prosecute, calling the witnesses and examining them from the depositions sent up by the examining magistrate.

After a short opening speech from prosecuting counsel (where there was one) the Crown witnesses would be called in turn and examined on behalf of the Crown. The accused had the right to cross-examine, although the right to cross-examine as to credit was more curtailed than it is today. The prosecution having closed its case, the judge would then call upon the accused to make his defence. He could not give evidence on his own behalf (a disability which during the debates on the early nineteenth century Prisoners' Evidence Bills was commonly defended on the ground that it protected him from the 'moral torture of cross examination') but was permitted (save in misdemeanour where

represented by counsel) to make an unsworn statement. He could also call witnesses, either as to fact or character. The right to call character witnesses was, in fact, but one of a number of advantages and protections he enjoyed under the nascent law of evidence which are still with us today (the others included the rules as to the burden and standard of proof, the rules excluding hearsay and involuntary confessions, and as to the corroboration of the evidence of accomplices and complainants in sexual cases). If he called evidence, the prosecution had the right to the last word with the jury. The judge would then, if the case was one of any difficulty, normally, although not invariably, sum the case up, after which the jury would consider their verdict. Often they would reach a verdict in the jury box without leaving court, but if the case presented any difficulty they would retire to consider their verdict. If the jury's verdict was not guilty, the accused would be discharged. If the jury convicted, it would be open to him to move in arrest of judgment, the common grounds for such motion being indictment error and variance (between the indictment and the evidence called in support of it), which if made out would result in the prisoner being discharged (such a discharge left him at risk of being indicted afresh but in practice such risk was small). If the prisoner made no successful motion in arrest of judgment, he would be sentenced, along with the rest of those convicted, at the end of the session.

To modern eyes one of the most striking things about criminal trials at the start of the century is the hardships to which both accused and prisoners were subjected. Court rooms were often inadequate, with two courts sometimes sitting in the same room [33], and at one court-house the



court room open to the street [34]. The conditions in which prisoners were held beneath the court were often insanitary and grossly cramped. During the trial the prisoner would be required to stand (unless ill or infirm). Courts, in order to get through the work, would commonly sit until late at night, or even into the early hours of the morning, despite protests of exhaustion from the prisoner and his counsel. In capital cases, the jury, once empanelled, would not be allowed to separate until they had reached a verdict, and once they had retired to consider a verdict would be kept without food, fire or drink until they reached a verdict, being only discharged without a verdict, where it could be shown that continued enclosure would be dangerous to the life of one or more of them.

**(f) Reform of the Trial System**

As will hereafter appear, during the course of the nineteenth century significant reforms and developments occurred both in trial procedure and in criminal evidence. The path of the reformer was, however, often far from easy. It took fifteen years to get the Prisoners' Counsel Act, 1836 on the statute book, and over half a century to persuade Parliament to overturn the prohibition upon the accused and his spouse giving evidence.

## CHAPTER 2

### PREPARING FOR TRIAL

'The sessions are on' said Kaggs 'if they get the inquest over and Bolter turns King's evidence: as of course he will ... they can prove Fagin an accessory before the fact, and get the trial on on Friday, and he'll swing in six days from this.'

Charles Dickens, *Oliver Twist*, c. 50.

#### (a) Knowing the case that must be met

For most prisoners tried on indictment in the nineteenth century the prosecution process began with arrest followed by a preliminary examination before magistrates [1], and where this procedure was adopted the prisoner, by the time he was arraigned, would know both the charge he faced and the evidence upon which it was based.

He would learn what offence was alleged at the time of arrest [2] and he would be told again at the preliminary examination. In most cases the information given would be perfectly adequate for his purpose but not in all. To tell a man that he was charged with conspiracy to defraud or with embezzling £5 might leave him no wiser as to the particular transaction impugned. In such a case it was open to the accused to apply to the prosecution for particulars of the charge and, if these were refused, to apply to a judge [3]. In barratry and nuisance cases the practice of ordering particulars dates back to the eighteenth century [4], but it was only in the 1820s and 1830s that it began to be extended to embezzlement and conspiracy [5]. Unrepresented prisoners, of course, would seldom know of their right to apply for such an order,

and, even if they did, lack of means might prevent them exercising it pre-arraignment [6].

The prisoner would learn what evidence the charge was based on at the preliminary examination. To secure his committal for trial, the prosecutor had to adduce evidence sufficient to establish a prima facie case, and the depositions of the witnesses would generally [7] be (and after 1848 had to be) [8] taken in the presence of the accused. Indeed it was very much in the interest of the prosecutor that they should be so taken, because, at trial, the depositions of witnesses who had died or who were too ill to attend or who were being kept out of the way by the accused, could only be read if the accused had been present when they were taken and given the opportunity to cross-examine [9]. In treason he was, by statute, also entitled to have delivered to him ten days before trial, a list of the Crown witnesses (with their addresses and occupations) [10]. But this marked the limit of the law's indulgence. From fear of concocted defences, inspection of or a copy of the depositions was denied to him [11].

However, what a prisoner could not obtain from the court, he could sometimes obtain indirectly. The practice of reporting committal hearings meant that if his case was of interest (and even if it was not) some newspaper (local or national) might well carry details of the evidence given [12]. Even if there was nothing in the press, if he was represented at the committal by a solicitor the latter would invariably take a full note of the evidence [13], and if unrepresented but literate he could take his own note. However, none of these expedients was foolproof. Examining magistrates had power to exclude both press and solicitors from preliminary hearings [14], and some benches were

not slow to do so. Further the taking of an accurate and full note by any but a shorthand writer was made extremely difficult by the practice adopted in some courts of having the witnesses' depositions taken by a clerk, out of the hearing of both the magistrate and the accused, and then simply read over to the witnesses in open court [15]. It is impossible to guess how many prisoners ended up with some note of the committal evidence, but the number must have been small. The vast majority of accused were undefended and such prisoners, even if they appreciated the advantage of a note (and the first offender might well not do so) were often too illiterate to take one [16]. Without a note, the prisoner trying to prepare his defence would have to try to remember the evidence given, and here the old hand, familiar with the procedure and well able to appreciate the points in the evidence against him, would be likely to fare better than the novice.

Reform came in 1836 with the Prisoners' Counsel Act which gave prisoners the right both to inspect and take copies of the depositions [17]. Welcome though the Act was it had a number of shortcomings. In the first place, it gave the prisoner no right to inspect or take copies of any statement he had made at the committal hearing [18], nor to take copies of other documentary exhibits [19] (anatomical exhibits seem not to have been subject to the prohibition on inspection [20]). A potentially more dangerous loophole was exposed in 1845 when Patteson J. held that the Act gave no right to copies of witness statements taken post-committal [21], such ruling leaving it open to prosecutors to adopt the Irish practice of deliberately keeping witnesses back at committal [22]. In Ireland the defence were in such cases refused even the names of the new witnesses [23];

English judges, after initially adopting the same rule, proved more accommodating, being willing to allow defence counsel to inspect the back of the indictment to get the witnesses' names [24]. Another defect of the Act was that copies of depositions had to be paid for [25]. In 1848 the provision in the 1836 Act was re-enacted by the Indictable Offences Act but, although the wording of the clause was altered, nothing was done to deal with the problem of keeping back witnesses. However, later the same year, in Ward [26], Cresswell J. said that he thought that the fair course in such a case was for the prosecution to apprise the defence of the character of the additional evidence, and within a few years this had become settled practice [27], being strongly affirmed by Willes J. in 1867 [28] and Brett J, in 1870 [29]. But what redress did the defence have where notice was not given? To this question the Australian courts gave a bold answer: the evidence could not be adduced [30]. All English judges were prepared to offer, however, was an adjournment to give the defence the opportunity to consider and meet the new evidence, and it was not until 1884 that even this right was clearly established [31]; in 1867 the furthest Willes J. had been prepared to go was to say that failure to give notice was a matter about which the defence would be entitled to make strong comment [28].

There was also the question whether the 1836 Act applied to coroner's depositions. This was a point of some importance, for the accused was not necessarily present at the coroner's inquest, and although the majority of those committed for trial for murder or manslaughter by coroner's inquisition also underwent a preliminary examination before a magistrate, not all did [32]. Decisions on the point were conflicting [33] and the accused's right

to a copy of such depositions was not finally placed beyond doubt until 1887 [34].

But committal upon a coroner's inquisition was not the only procedure whereby an accused could be brought to trial without the safeguard of a preliminary examination. At common law it was possible for a prosecutor to by-pass the magistrates' court completely, and simply go before the grand jury with his witnesses and ask for a bill of indictment. If the grand jury found a true bill, the first the accused would know of the proceedings was when he was arrested pursuant to the court's warrant, and he would stand his trial without knowing what the evidence against him was [35]. In 1859 the freedom of prosecutors to apply to the grand jury in this way was curtailed by the Vexatious Indictments Act [36], which declared that henceforth no indictment for perjury, conspiracy, indecent assault or certain other misdemeanours should be presented to or found by a grand jury, unless the accused had been committed for trial, or the prosecutor bound over to prosecute or give evidence, or the indictment was preferred by the direction of or with the consent of a judge of one of the superior courts. But the Act applied only to this limited class of offences, and, as the Criminal Code Commissioners forcefully pointed out in 1879, in all other cases the potential for abuse remained [37]. Within months of their report just such a case as they had described occurred, with its victim an Alderman of the City of London [38]. The Criminal Code Bills sought to close the loophole but after the dropping of the 1883 Bill nothing further was done [39].

Then there was the procedure in misdemeanour by way of criminal information; here again there was no committal, and, where the information was

ex-officio, no disclosure whatever of the prosecution evidence pre-trial [40] (a state of affairs which remained unaltered until ex officio informations were abolished in 1967).

Just as it was the policy of the common law to deny the accused a copy of the Crown evidence, so also it denied him a copy of the indictment [41]. The rule had been abolished as regards high treason in 1695 [42] and was abolished in misdemeanour in 1819 [43], but as regards felony it remained unreformed throughout the nineteenth century [44].

The hardship denial of the indictment caused to an accused was not that it left him uncertain as to the offence for which he was to be tried (in the vast majority of cases this could not be in doubt), but that it made it more difficult for him to take indictment objections. Indeed, there is some ground for believing that judges may have regarded this as a powerful reason for maintaining the rule [45]. Hawkins claimed that the court had a discretion to allow the accused a copy of the indictment for pleading purposes [46], but it is doubtful whether this represented early nineteenth century practice [47]. However, a counsel determined to obtain a copy of the indictment would often be able to get one. He had a right to have the indictment read once slowly [48], and if this was done, he would of course be able to copy down what was read, and such was the prolixity of nineteenth century indictments that the mere threat to call for the indictment to be read (in practice all that was usually put on arraignment was a summary) would often induce the Crown to furnish a copy [49].

During the second half of the century repeated calls were made for reform of the rule [50], and clauses conferring upon those accused of felony the

right to a copy of the indictment were included in all of the Criminal Code Bills [51] and many of the Criminal Appeal Bills [52]. In fact, however, the matter had by the 1850s become less urgent due to the extent to which the scope for successful objections to the indictment had been cut down by Lord Campbell's Act. A final irony was that for all the clamour for reform, the scope of the rule was in 1848 actually extended with the Treason Felony Act of that year giving the Crown the option to prosecute certain treasons as felony, a course which, if adopted, deprived the accused of his right to a copy of the indictment [53].

Although a prisoner accused of homicide had no right to demand a second post mortem, by the second half of the century one finds courts prepared to allow defence doctors to examine organs removed on such examination.

**(b) Disclosure of unused material**

In a murder case in 1838 Patteson J., insisted that the prosecution call all eye-witnesses to the killing irrespective of their supposed sympathies and whether or not their names were on the back of the indictment [54]. In Pook [55] in 1871 Cockburn L.C.J. went even further, declaring it the duty of the police to ensure that the defence were given all information available about the alleged crime. These doctrines however failed to take root and by 1900 the law still imposed no obligation on either prosecution or police to disclose 'unused material'.

**(c) Access to legal advice and representation**

The majority of those committed for trial were committed in custody [56]. Save in treason, where the prisoner's counsel had a statutory right of



access to him [57], the right of a remand prisoner to see a lawyer depended upon the rules of the prison in which he was detained.

The rules of most prisons seem to have allowed fairly generous access to lawyers [58]. Indeed, in Newgate in the mid 1840s the regime was if anything too liberal, with sham attorneys and clerks of low attorneys being allowed to prowl amongst the remand prisoners touting for business; in the end, in order to protect prisoners from exploitation (which ranged from gross overcharging to out and out fraud) [59], the magistrates were obliged to deny access to all save duly qualified attorneys and their properly accredited clerks [60].

A recurrent problem for much of the century was the practice of some prison governors and police of insisting that interviews between attorneys and prisoners take place in the presence of a prison or police officer [61] (defence medical examinations [62] and the interviewing of possible prisoner witnesses [63] were sometimes also made subject to a like requirement). Indeed, it was only in the 1870s that the problem was finally tackled with both the Metropolitan Police General Orders, 1873 and the Prison Rules, 1878 providing for interviews to take place in the sight (but not the hearing) of police or prison staff [64].

During the first half of the century, a serious obstacle to remand prisoners hiring lawyers lay in the practice of the police in some areas of taking from a prisoner all money found on him on arrest. In the 1830s judges repeatedly intervened to stress the impropriety of the practice (save in cases where it was clear that the money seized was stolen) [65] but for all that it continued,

particularly in Staffordshire, well into the 1840s [66].

In the 1890s a small but important improvement in police practice was made by a Home Office circular directing that an arrested person be allowed to make immediate communication with a friend or lawyer [67].

**(d) Time to prepare for trial**

The time available to a prisoner to prepare for his trial would vary according to the nature of the charge he faced. A prisoner charged with high treason could not be put on trial until at least ten days after he had been served with a copy of the indictment, a list of the witnesses and a copy of the jury panel [68]. And in misdemeanour, the accused, if not in custody, had the right to traverse, that is to put off his trial until the session of the court next after that at which he was arraigned [69]. In felony, however, no such indulgence was given. There the prisoner would be put on trial at the session immediately following his committal (usually on the same day as the bill was found against him by the grand jury), which could mean, where he had been committed just before the session, his being tried within days of his arrest [70]. In 1812 Bellingham was tried for the murder of Spencer Perceval three days after the deed, and hanged four days later. Nor was his an isolated case. At the Old Bailey, where even in 1800 there were eight sessions a year, prisoners frequently took their trials within days and sometimes within hours of their committal. At the Assizes and Quarter Sessions, with their less frequent sittings, the problem was less acute [71].

In 1844 the Law Magazine [72] called for all prisoners to be allowed fifteen clear days between committal and trial. However, the only reform made was in the opposite direction, namely the abolition in 1851 of the right to traverse in misdemeanour [73].

Where his case was called on before he was ready to go to trial, it was always open to the prisoner to apply for a postponement. In the early years of the century the attitude of judges to such applications was markedly unsympathetic. In Bellingham's case an application by his counsel for a postponement to allow medical evidence to be called as to the accused's sanity was brushed contemptuously aside [74]. In 1835 a protest staged by the Old Bailey bar against prisoners having their cases called on when they were unprepared with either counsel or witnesses, merely drew from the Common Serjeant the retort, 'Every prisoner is bound to be ready to take his trial on the first day of the session' [75]. As the century wore on judicial attitudes began to change, with the courts becoming gradually less hostile to such applications [76], but even in 1900 it still remained the law that a prisoner indicted for felony could not demand of right a single day to prepare for his defence, and it was regarded as neither unusual nor unfair to expect counsel, briefed from the dock or assigned by the court, to conduct the defence after a hurried conference with the prisoner over the dock rails.

## CHAPTER 3

### PRE-TRIAL PUBLICITY

'It was much to be lamented that ... no case now occurred ... which was not forestalled by ... accounts ... [in] the newspapers ... which created a prejudice against accused persons from which it was very difficult, if not impossible, to divest themselves'

per Gaselee J., Old Bailey, September 11, 1828.

In 1800, as now, stirring up prejudice against an accused awaiting trial was prohibited on pain of committal for contempt [1]. But it was a prohibition to which the press paid little heed. Newspapers had since the 1780s habitually reported evidence given at inquests [2] and preliminary examinations of accused [3]; and such reports did not confine themselves simply to the evidence given; if an accused committed for trial was known to be of bad character the public would be told [4]; in notorious cases every scrap of information and rumour which could be gleaned about the accused and the crime would be laid before the reading public [5]; any confession, which he had made since being taken into custody would be reported, and where possible reproduced verbatim [6], as would any letters by him on which the press had been able to get their hands [7]. Not infrequently what was published was wholly false. In 1823 Thurtell had to stand trial for murder falsely accused by The Times of having murdered before [8]. Worse still false reports were often coupled with blatant attempts to prejudge guilt. In 1824 the banker Fauntleroy was tried for forgery at the Old Bailey, having already been tried and convicted by the press; and in the press campaign against him no newspaper had behaved worse than The Times, which

had published a long but untrue biography depicting him as a voluptuary, who had spent his ill gotten gains on women and gaming [9].

And the press's bad example was readily copied by others. A notorious case would, pre-trial, spawn handbills, pamphlets, and ballads about the crime, often containing the most scurrilous untruths about the accused [10], and on the day of the trial placards advertising such wares would be displayed outside the court building [11]. Whilst Thurtell was awaiting trial, he had to take proceedings in the King's Bench [12] to prevent the Surrey Theatre putting on a play, based upon the murder of which he was accused, and depicting him as the murderer.

Largely unsuccessful attempts to prevent the reporting of preliminary examinations and inquests (ex parte proceedings as they were called) had been made since the 1780s [13]. In 1782 when newspaper reports of Bow Street examinations first began to be published, the Attorney General threatened to take action unless they ceased. The threat was heeded for a short time but soon things were as bad as ever. In 1796 the press appeared to have won a victory when, in Curry v. Walter [14], it was held that no action would lie for publishing a true report of an unsuccessful ex parte application to the King's Bench for a criminal information. They were further encouraged when three years later in Wright [15] Lawrence J. expressed his agreement with this ruling. In 1804, however, the trend was reversed when Heath J. jailed for contempt the printers of the Sussex Journal for publishing an account of the evidence given at the preliminary examination of an accused for murder [16]; the mere publication of ex parte evidence before trial was, he declared, highly criminal. In 1806 Serjeant

Best, in an attempt not to clarify the law (which was he claimed clear) but to make it better known and give it teeth, sought leave to introduce a Bill making the publication of all ex parte proceedings in criminal cases an offence punishable with fine and imprisonment, and giving a penalty of £100 to anyone who would prosecute in such a case [17]. In the end, however, he bowed to arguments that the Bill infringed the liberty of the press and dropped it. In Fisher [18] in 1811 the King's Bench condemned such publications in trenchant terms. 'Their only tendency', declared Lord Ellenborough C.J.,

'is to prejudge those whom the law still presumes to be innocent, and to poison the sources of justice'.

Seven years later in Fleet [19], the court, in making clear that the embargo applied equally to reports of coroners' inquests was equally forthright. The press, however continued to ignore the prohibition, although some provincial magistrates and coroners were by now seeking to prevent ex parte hearings being reported by holding them in private [20].

In 1823 Park J. took up the topic. During the trial of Thurtell and Hunt he condemned the ex parte reports which had circulated pre-trial, not only on the ground that they created prejudice, but also because they led to the accused being furnished with what they had no right to, namely a written account of the evidence against them [21]. Months later during the trial of Pallett he warned that, if the press continued to publish reports of inquests, it would be the duty of coroners to exclude them [22]. These comments stung The Times into a fierce reply. Giving publicity to inquests, was, it claimed, in the public interest; it helped

to ensure that those responsible for atrocious crimes were detected, and also served as a check on coroners (it cited a recent case in which press reports of an inquest had helped to expose an attempt by a coroner to stifle a murder prosecution [23]). Park was not deterred. The next year at Fauntleroy's trial [24], he repeated his criticisms, and later that year Abbott C.J. [25] stressed that the fact that such reports were so numerous and frequent did not render them in any way lawful.

How little the press was inclined to obey judicial bans on publication is illustrated by the way it behaved during the trial of the Cato Street conspirators in 1820 [26]. There, upon the accused severing their challenges, the court directed that no part of the proceedings in any of the trials should be published until the conclusion of all. Its reasons for making the order were two-fold - preventing prejudice to the accused and also preventing Crown witnesses from reading what others had said in evidence. Such orders were by no means new; they had been made three years previously in Watson [27] and Brandreth [28], but, as in those two cases, the order was no sooner made than it was breached. This time, the editor of the culprit newspaper, The Observer, was brought to book. Denman [29], his counsel, argued that he had done no wrong. There was no risk of prejudice to waiting jurors since they were obliged to sit in court during all the trials in order to be ready when called, whilst there was real advantage in such publication from the accused's point of view, for, if false evidence was given, members of the public reading of the same might thereby be induced to come forward in favour of the defence. But Abbott C.J. would have none of it and imposed a heavy fine.

By mid-century the attitude of the press to such bans was still obdurate. In 1848 The Times ignored a ban imposed by Perryn J. in relation to a case of treason-felony which he was trying in Dublin [30], and boasted in its leader:

'We care as little for the solemn warning of Mr. Justice Perryn as for a veto of the Grand Llama of Thibet'.

Had the law officers, instead of merely bemoaning in opening speeches to juries, the conduct of the press, sought vigorously to enforce the law, there might have been some prospect of putting an end to the evil, but no law officer was ever prepared to go that far.

That press freedom to comment upon pending cases was bitterly resented by prisoners is demonstrated by the frequency with which the topic was broached before juries by prisoners and counsel alike [31]. But what could a prisoner do about such damaging publicity? If he had the means, he could bring proceedings to restrain further publication, but to do so would often merely make matters worse [32]. An alternative course was to apply for a postponement of the trial, but it was rare for such applications to be granted [33]. In cases of extreme prejudice it was open to the King's Bench to order a change of venue; but there were doubts as to the scope of the jurisdiction (particularly in capital felony) [34] and applications were sparingly granted [35]; the remedy was in any event beyond the means of a poor prisoner. In the vast majority of cases the only antidote which the law was able to offer to prejudicial publicity was a direction to the jury in the summing up (often reinforced by observations from Crown counsel in his speech) to put all that



they had read and heard about the case out of their minds.

In 1856 local prejudice against Palmer, the Rugeley poisoner, stirred up in no small measure by the newspapers [36], led the Attorney General to decide to move the trial to London. Certiorari was granted by the Lord Chief Justice removing the case into the Queen's Bench [37]. The object of the removal was to transfer the case to the Old Bailey. But then doubts arose as to the power of the Court to order such transfer (if it did not have such power the only alternative would be the inconvenience of a trial at bar). To get round the problem, a special Act [38] was passed giving the Queen's Bench power to order the trial at the Central Criminal Court of indictments found elsewhere. Thereafter most applications for change of venue were made under this Act. The Act did not however change the court's attitude to such applications; to have any hope of success an applicant had to make out a very strong case [39].

By the time Palmer's Act was passed the attitude of the courts to reports of ex parte proceedings was changing. In 1843, Denman, who by now was Lord Chief Justice, in his evidence before the House of Lords Select Committee on the Libel Law argued that the publication of reports of preliminary examinations before magistrates was in the public interest. Such reports, he claimed, often led to the detection and punishment of crime and the vindication of character, and the accused was not prejudiced thereby for the public, realising that they were ex parte, postponed judgment on the case until after trial [40]. In 1858 in Lewis v. Levy [41], Lord Campbell, citing Denman's arguments, refused to lay down that the publication of reports of preliminary examinations

was unlawful; it was important, he said, that the proceedings of courts of justice should be universally known. In Gray (1865) [42] the Irish Judge, Le Froy, offered another argument in favour of such reporting - it was important that the public should know that magistrates did their duty impartially. Three years later in Wason v. Walter [43] Cockburn C.J. declared that the publication of a fair account of what took place in public courts was of great advantage to the public, and that this was as true of ex parte proceedings as any other. The coup de grace was administered in Usill v. Hales [44] in 1878 where it was held that the publication of a fair and accurate report of proceedings in open court upon an ex parte application to a magistrate for a summons for perjury was not only lawful but privileged.

The courts' new stance upon ex parte reports left the press free to publish with impunity all the evidence given at an accused's committal, including evidence which would or might be held inadmissible at trial [45]. They were thus free to publish and did publish (often verbatim) evidence of alleged confessions of guilt [46] and evidence about previous convictions in bail applications [47]. It left unaltered the old rule that it was contempt to publish prejudicial comment.

As the century wore on the behaviour of the press gradually became more responsible in this regard. By 1865 the only details of an accused's criminal past which were given in police reports in The Times were those spoken to in evidence, and comments prejudging guilt were only occasionally to be found in its columns [48]. However, the latter vice was one which it had only recently given up [49]. In 1850, whilst the Mannings were awaiting trial for murder, both The Times and The Observer

left their readers in no doubt as to their belief in the accuseds' guilt. The behaviour of other newspapers was slower to change. As late as 1886 the Barnsley Chronicle is to be found regaling its readers with an unflattering biography (including the whole criminal record) of a local man awaiting trial for murder [50]. In 1894 The People published an article alleging, quite falsely, that a woman called Hermann awaiting trial for murder had been convicted of a similar offence some years previously [51]. In 1895 The Review of Reviews published an article containing a scurrilous attack on Jabez Balfour, then awaiting trial for fraud [52]. In 1901 Bennett, the Yarmouth murderer, was the target of a vicious press campaign both before and during his trial [53].

Much of the blame for this state of affairs must be laid at the door of the Law Officers for failing to act to stamp out such abuses. Proceedings for contempt in such cases were rare, and when they were brought it was usually the victim of the attack who brought them [54]. Indeed, during the latter half of the century, the only notable intervention by the Law Officers to prevent comment upon a pending criminal trial appears to have been the contempt proceedings brought against the Tichborne Claimant (then awaiting trial for perjury) and two M.P.s for asserting at a public meeting that he was innocent and the victim of a conspiracy - proceedings which scarcely had an even handed look about them when one reflected that the Attorney had not lifted a finger to stop the constant press attacks on the Claimant [55].

## CHAPTER 4

### THE TRIBUNAL

'It is a disgrace to the county to impose on the judge the necessity to act as counsel against the prisoner.'

Patteson J. in R. v. Anon.  
(The Bedford Mercury, March 23, 1844)

#### (a) The trial judge

Between the nineteenth century judge and his present day counterpart there were three striking differences. First, he would conduct the prosecution [1] where no counsel was briefed to do so. Second, save where he consented to reserve a point of law or where the trial was for misdemeanour in the King's Bench, his rulings, jury directions and conduct were not subject to review by a higher court. Third, he was not always legally qualified.

#### (i) Judges prosecuting

At the start of the century, judges prosecuted the majority of indictments. Only in Government prosecutions (for treason or sedition) and in Mint and Bank cases were prosecuting counsel regularly to be seen [2]. These cases apart, it was unusual to find counsel retained on either side. At the Old Bailey at the July session 1800, counsel prosecuted in only one case in eight. In the rest the judge prosecuted [3].

Nonetheless, prosecuting counsel were now seen in greater numbers than they had been a hundred years before. In 1700 it was almost unheard of for counsel to prosecute in felony, and it was only

when, in the 1730s, the courts relaxed the prohibition on counsel appearing for prisoners, that a trickle of counsel instructed to prosecute had begun to appear [4]. Some incentive had been given for the employment of counsel in felony by statutes of 1752 and 1788 [5], which gave the courts power to award prosecutors their legal costs in such cases, but despite this reform the numbers of prosecutors employing counsel had remained small. Many were simply too poor to do so. And even where a prosecutor had means, his inclination would be not to do so. Why incur the expense (by no means certain to be reimbursed) of employing counsel to prosecute a prisoner, who, almost certainly, would not have counsel himself? What was the need? Why not do what most people did and leave it to the judge? After all he would perform the task for nothing.

By the end of the nineteenth century, the position had been completely reversed. Most cases on indictment were now prosecuted by counsel, the only place where the practice of judges prosecuting still lingered on being at Quarter Sessions and to a very limited extent before the City judges. Indeed, it had recently been dealt a well nigh fatal blow by the Criminal Evidence Act, 1898 (once this was in force the judge who prosecuted would, as part of that task, have to cross-examine the prisoner, and what could look more unfair?) Nonetheless, it was to be a few years' dying, receiving a mention in the 1904 edition of Pritchard's Quarter Sessions Practice [6]. The coup de grace came eventually came in 1908 with the Costs in Criminal Cases Act of that year [7].

The first calls for change had come in the 1830s. An early landmark was the Report of the Royal Commission on County Rates in 1836 [8]. This

had condemned the practice of judges prosecuting in complicated cases as inefficient and a false economy, and had recommended that a prosecuting counsel's fee be allowed both at Assizes and Quarter Sessions in all cases involving an arguable point of law, or in which there were three or more witnesses. A decade later, the red judges (from whom there had been rumblings on the subject since the early 1830s) [9], increasingly irked at having themselves to prosecute serious cases, decided to make a stand on the issue. Complaining that it was unseemly for a judge to act as prosecutor [10], they refused to have any further truck with the practice, and when cases came before them, with no counsel briefed to prosecute, they now simply handed the depositions down to one of the counsel in court with a request that he prosecute [11]. Their stand, which was applauded in *The Times* [12], the Commons [13], and in legal journals [14], proved something of a turning point, and in the second half of the century the practice of judges' prosecuting died out entirely at Assizes and became much diminished at Quarter sessions [15].

How was this change effected, given that, even by the end of the century, a system of public prosecutors (for which there had been repeated calls since the 1830s) [16] still had not been established? There appear to have been two main factors. First, money to finance prosecutions was made increasingly available. The courts' power to make awards of costs to prosecutors was extended [17], and at the same time the burden which such awards made on the rates was reduced when the Government in 1835 agreed to meet half the cost [18]. Second, it was no longer being left simply to the prosecutor to decide whether counsel should be employed. At the Old Bailey and at some Quarter Sessions there was by the 1850s a 'soup system' in

operation, under which briefs in cases in which no counsel had been retained to prosecute, were handed out by the clerk of the court to members of the bar mess in rotation [19]. In Liverpool, Manchester and Leeds responsibility for briefing counsel in prosecutions rested with an attorney, appointed and paid by the Council to prosecute all cases within the borough (Liverpool had been first with such a scheme in the 1830s, followed in less than a decade by Manchester and Leeds) [20]. In many petty sessional divisions of counties, the clerk to the magistrates would act as prosecuting attorney in all cases where the examining magistrates had certified that counsel ought to be retained to prosecute [21]. In the metropolis and in boroughs (where by statute [22] the clerk to the magistrates was prohibited from undertaking prosecutions) the police were pressed into service: one of the police officers in the case would be bound over to prosecute thereby investing him with the authority to instruct an attorney and through him counsel [23]. Private enterprise also made a contribution: poor prosecutors were now often openly touted by attorneys with offers to conduct their cases for such costs as the court allowed [24].

That Recorders and Chairmen were still to be found prosecuting at Quarter Sessions in the last years of the century was due in part to a gap in the law (the statutory power to award prosecutors their costs, although it had been extended during the century to certain classes of misdemeanour, still did not apply to all), but more to a belief, on the part of county benches in particular, that it was wrong to spend public money employing counsel to prosecute simple and straightforward cases ([25]. Nowhere was this view held more tenaciously than in Surrey, which in the last quarter of the century, was still applying costs

rules made fifty years before, and refusing prosecutors a counsel's fee in all cases where the prisoner had no counsel, a practice which resulted in almost all undefended prisoners being prosecuted by the Chairman [26].)

From the accused's point of view, the obvious objection to judges' prosecuting was the look of the thing and the potential for unfairness. If there was no prosecuting counsel and a Crown witness was hostile, it was the judge who would have to cross-examine him on his deposition; if he proved favourable to the defence when cross-examined it was the judge who had to re-examine to limit the damage; if the accused called witnesses (or gave evidence himself as he could do after 1885 in many cases of sexual assault) it was the judge who had to cross-examine. This descent of the judge into the arena not only looked unfair, but when done in a partisan spirit (an ever present danger where counsel appeared for the defence) it could actually work unfairness. Occasionally, however, having the judge prosecute would work to a prisoner's advantage. Depositions often came to a judge too late for him to have any hope of mastering them, and if a case was complicated, for it to be prosecuted by a judge who was not master of his brief, inevitably increased the prisoner's chances of escape [27].

#### **(ii) Unappealability**

The fact that the conduct and behaviour of judges were not subject to review had two unfortunate consequences.

First, it had an adverse effect upon the standard of summings up. The fact that appeal on questions of law was at the judge's discretion led



to the absence of a body of law (such as has been developed by the Court of Appeal in the present century) as to the legal directions which a summing up must contain, and the form such directions should take (a gap which the pitiful precedents of summings up in books such as Chitty [28], and the occasional rulings of the Court for Crown Cases Reserved did little to close). There being no authoritative guidance on the question judges summed up as they saw fit.

So far as one can judge from trial reports, summings up by the common law judges were generally full and thorough both as to law and evidence, although even as late as 1836 one can find Patteson J. acceding to a request from a jury to dispense with the summing up [29] - a practice common amongst the City Judges and one which could result in a prisoner being convicted by a jury without the latter having been given a word of legal direction from the judge. But the red judges, albeit that they dealt with the most serious cases, represented but a tiny fraction of the total establishment of criminal judges (as late as 1915 the Queen's Bench Division judges numbered only 18 out of a total establishment of around 200) [30]; and among the inferior judges much laxer standards prevailed.

In the first half of the century, summings up in trials before the City judges were often perfunctory, if not omitted altogether [31]. Indeed one of the reasons why the City judges were during this period able to get through the prodigious number of cases they did, was by delivering summings up bereft of legal direction, and containing at most a scattering of observations on the evidence. The same bad practice also prevailed at many Quarter Sessions. And, although the second half of the century saw an improvement

in standards, even at the Old Bailey the tradition still had not entirely died out. Mr. Commissioner Kerr, who sat there as third City judge between 1859 and 1901, remained until the day of his retirement notorious for his one line summings up, and his refusal to take a note of the evidence [32]. Indeed, so deeply ingrained was the practice that some Quarter Sessions Chairmen were still dispensing with summing up as late as 1913 - a state of affairs which the Court of Criminal Appeal astonishingly refused to condemn [33]. The vice of all this was that the accused was denied the benefit of having the jury clearly directed upon such elementary but vital matters as the burden and standard of proof and the legal ingredients of the offence charged.

The lack of an appeal remedy also meant the absence of a vital check on judicial misconduct.

Amongst the common law judges standards of conduct appear, on the whole, to have been reasonably high. At Assize trials in the 1820s prisoners can be seen asking the judge to act as their counsel, and receiving the assurance that he would watch their interests [34] (which was, of course, all that the expression meant) [35]. And the promise was kept. If there was an indictment or other legal point available to an unrepresented prisoner the judge would take it on his behalf [36]. A prisoner, who pleaded guilty to a capital charge, would be strongly urged to retract his plea and take his trial so that the case against him could be scrutinised to see whether there was in fact a defence available to him [37]; and where judicial pressure proved unavailing, it was not unknown for the judge to direct that the evidence be gone through [38], or even that a plea of not guilty be entered [39]. To jurors, called on to

try on overwhelming evidence the guilt of a man, whom they had themselves heard plead guilty, such a proceeding must have seemed bizarre, but occasionally it was the means of saving a prisoner's life [40]. If prosecuting counsel opened a case unfairly he would be stopped [41]. Witnesses called to prove a confession would be subject to a rigorous judicial interrogation as to the events leading up to its being made so as to leave no doubt as to its voluntariness [42]. A medical man, who in an infanticide case sought to rely upon the discredited test of floating the lungs as proof that the child was born alive, would leave court with a judicial flea in his ear [43]. On occasions in joint trials one even finds a defence counsel, seeking to cast blame on an undefended prisoner, warned from the bench not to try and hang the judge's client to save his own [44].

But for all the generally high reputation of red judges, some inevitably fell short of the standard expected. Abinger C.B., for instance, had throughout his judicial career a reputation for arrogance and lack of impartiality. Indeed, in 1843 his conduct towards Chartist prisoners, when presiding over a special commission in Lancashire and Cheshire [45], was the subject of protest both in the press and the Commons, whilst his contemporary Gurney B. was notorious for the unseemly haste with which he despatched cases (rushing through the calendar like a wild elephant through a sugar plantation was how one of his brethren described him to a Royal Commission [46].) Later in the century, Stephen J. earned criticism for his habit of late sitting (a penchant which he shared with Hawkins J.) [47] and of subjecting to an 'interrogatoire' prisoners who gave evidence under the Criminal Law Amendment Act [48]. And red

judges were certainly not immune from the vice of the pro-prosecution summing up. Indeed so bad was Stephen J.'s conduct in this respect in the Maybrick case [49] that it was the subject of calls in the United States (Mrs. Maybrick was American by birth) for England to copy the practice of the State courts there, and confine judges' summings up to a charge upon the law only [50]. However, such conduct was viewed far less critically than it is today. It was the right of a judge, claimed Brougham, to tell the jury what his opinion of the case was, and this was not a minority view [51].

It was, however, on the lower rungs of the judicial ladder that the effects of the lack of remedy against judicial misconduct were most pronounced. In the 1830s and 1840s trials before the City judges were a by-word for unfairness. They were rushed through so fast that prisoners sometimes did not even take in what was happening [52]. Often a trial would take no more than three or four minutes from start to finish [53]. In one year in the 1830s the average length of the trials held at successive Old Bailey sessions was calculated by one observer to be no more than 8½ minutes [52]. Worst conducted of all were the evening trials. During the sessions it was the custom for the sheriffs to give two lavish dinners a day, one at 3 o'clock and a second at 5 o'clock. The City judges, who dined at 5 o'clock, were notorious for returning to the bench afterwards the worse for drink [54]. In 1837 a City Alderman made an attempt to put a stop to these dinners [55] but they continued (albeit somewhat better conducted in later years) until 1877, when the dining room at the Sessions House was destroyed by fire [56]. The way Old Bailey trials were conducted was a regular subject of press comment at this time [57], but the only occasion when such comment seems to have had

any effect was when The Times, in December 1838, made a particularly strong attack on Mirehouse, the Common Serjeant, for the way he had recently tried a sixteen year old called Saunders for theft [58] (after the article Mirehouse for a time at least changed his ways [59].) The second half of the century happily saw a considerable improvement in judicial behaviour so far as the Old Bailey was concerned [60]. Not so at county Quarter Sessions however. The reputation of such courts remained consistently bad throughout the century. Amongst the more serious criticisms commonly levelled against them were failure by Chairmen to take a proper note of the evidence [61], the display of open bias against prisoners and pressing them unfairly [62]. It was also a commonplace that county magistrates were generally more severe than red judges in the matter of sentence (notwithstanding that they tried far less serious offences than did the latter) [63].

### **(iii) Lay judges**

Chairmen of county Sessions also represented after 1835 the only class of judge not required to be legally qualified. Later in the century a few Chairmen were judges or retired judges [64], but at the start of the century the nearest most benches ever came to having a legally qualified Chairman was a man who had read for the bar but never practised [65], and the great majority could not boast even that slender link with the law. Prior to the Municipal Corporations Act, 1835 a similar state of affairs had prevailed at many borough Quarter Sessions; in 1835 the Royal Commission on Municipal Corporations had found that in only 78 out of the 191 boroughs, where the Quarter Sessions was presided over by a Recorder, was there any legal requirement that he be legally qualified

[66], and that in a number of Quarter Sessions the court was constituted in much the same manner as county Sessions [67]. However, the 1835 Act changed all this by providing that henceforth the sole judge at all borough Quarter Sessions should be a Recorder appointed by the Crown from the ranks of barristers of at least five years standing [68]. In 1844 it was made obligatory for the Chairman of Middlesex Sessions to be legally qualified [69], and when the County of London Sessions was established in 1888 the County Council were empowered to apply to the Crown to appoint a legally qualified chairman for the sessions (which they did) [70]. Calls for it to be made compulsory for all Chairmen to be legally qualified were repeatedly heard during the century but went unheeded [71], and it was not until 1962 [72] that this modest reform in fact went through.

The consequences of having laymen acting as judges were inevitably unsatisfactory. They were wholly unequipped to act as counsel for unrepresented prisoners. What law they knew and the technique of summing up they picked up in the main from watching other Chairmen. If a difficult legal point cropped up the Chairman would often be left floundering. It was seldom much use for him to look to the Clerk of the Peace for help, for Clerks of the Peace, although solicitors, were rarely practitioners in or knowledgeable about criminal law [73]. At some courts it was the practice for the Chairman to canvass the view of a member of the bar not engaged in the case [74]. At others the Chairman would muddle through as best he could without giving reasons for his rulings [75]. Nor was it uncommon to find the law mis-stated in a Chairman's summing up. In 1844 the Law Times declared that county Quarter Sessions could not, as presently constituted, hope to survive the

establishment of an appeal system, so bizarre were the propositions daily laid down as law by county Chairmen [76]. But with no appeal remedy (apart, after 1848, from the reservation of a case at the court's discretion), there was no higher court to expose their errors and mistakes, and the matter could be brushed under the carpet.

The unsatisfactory way in which points of law were dealt with at county Sessions stood in sharp contrast to the careful way in which they were dealt with at Assizes - where a point of difficulty cropped up during an Assize trial, the normal practice was for the judge immediately to rise and seek the view of his brother judge sitting in the adjoining nisi prius court [77] (a useful practice albeit one that has now died out).

#### **(iv) Other questionable practices**

As surprising as the use of lay judges, was the survival of vestiges of practices which had flourished in the days of Scroggs and Jeffreys but had been outlawed following the Revolution. One was judicial questioning. Judges who mid-century condemned police questioning as the impertinent assumption of a power which even the bench did not possess, had short memories. In the first quarter of the century, it had been by no means unknown for a prisoner who made an unsworn statement to the jury, to be questioned on it by the judge (and often in anything but a friendly spirit) [78]. Also, occasionally still to be found was a trace of the obnoxious seventeenth century practice of discharging a jury where the prosecution case broke down, in order to give the Crown the chance to plug the gap in its case. In 1825 Bayley J. discharged a jury where the adult complainant in a rape case proved wholly ignorant of the nature and obligation

of an oath in order that she might receive instruction [79], whilst in 1861 Hill J. discharged a jury in a corruption case where the principal prosecution witness, after refusing to give evidence, was committed for contempt (a course which the Queen's Bench refused to condemn) [80].

**(b) The Trial Jury**

**(i) Eligibility to serve on a trial jury**

'The composition of the jury list seems to be conducted on the principle of selecting the most uneducated and incompetent persons in the county) with the requisite property qualification.'

10 L.T.(1847-8), 319.

The hallmark of trial juries in the nineteenth century was their wholly unrepresentative character.

The only persons eligible to serve as jurors were men aged between 21 and 60 and possessed of the requisite property qualification [81].

In 1800 the qualification for county Sessions and Assize jurors was the ownership of freehold land worth £10 a year or leasehold land worth £20 a year, the occupation of a house with fifteen or more windows, or occupation of a dwelling with an annual value for rating of at least £20 (£30 in London and Middlesex) [81]. In Wales the qualification was (until 1870) [82] 3/5 of that for English counties, whilst in the City of London and in boroughs the qualification depended upon local custom [83].



## (ii) Types of trial jury

Most of those tried on indictment were tried by common juries (juries selected from the general pool of those eligible for service), but a handful were tried by special jury or by a jury de medietate linguae.

A special jury consisted of jurors who were either of the rank of esquire or above or bankers or merchants [84] (after 1870 those who satisfied a special rating qualification were also eligible to serve) [85]. Trial by such a jury was available upon the application of either prosecutor or accused but only in cases of misdemeanour pending in the King's Bench or on the Revenue Side of the Exchequer [86]. To have a country case tried by a special jury it was necessary first to remove the indictment into the King's Bench. An order for a special jury having been there made the case would then normally be tried at nisi prius [87].

Special jurors, unlike common jurors whose service in criminal cases was unpaid [88], received a fee of a guinea for each case they tried; and it was not the practice to fine them for non-attendance [89].

Down to 1852 one of the most distinctive features of the special jury was the way in which it was selected. It was not, as was a common jury, selected by ballot from a panel returned by the sheriff. Instead it was 'struck': the sheriff would attend upon the proper officer of the court with the freeholders' books, and the latter, in the presence of the Crown solicitor and the Defendant's attorney, would nominate forty eight jurors out of the book, upon which the Crown solicitor would strike out twelve, and the defendant's attorney

another twelve. The twenty four remaining would then be returned for the trial, and of those of the twenty four who attended those jurors whose names first appeared on the list would serve [90].

The backgrounds of special jurors meant that they could usually be relied upon to find for the Crown in political cases, and in the first third of the century out of the small number of criminal cases tried each year by special jury, a significant number were political prosecutions (some 183 between 1816 and 1834) [91].

The jury de medietate linguae owed its origin to a statute passed in the time of Edward III [92] with the object of attracting wool merchants to England. By this statute any alien might, upon arraignment, claim the right of being tried by such a jury. If he did, a jury would be empanelled consisting as to one half of aliens (if so many could be found, and if not, of as many as could be found) and as to the rest of native born citizens [93]. The alien jurors did not have to be of the same nationality as each other or as the accused. Nor did they have to possess the property qualification required of English jurors. The privilege was abolished in 1870 [94] on the ground that to continue it was to suggest that foreigners could not receive a fair trial from an English jury [95]. Upto its abolition it was anything but a dead letter. Each year a number of accused would claim the right of being so tried [96], although counsel would often try to dissuade clients from doing so on tactical grounds.

### **(iii) Juries for the trial of special issues**

Special issues would normally be tried by a common jury empanelled in the usual way. To this

rule there was an important exception. The issue of whether a woman capitally convicted was pregnant (pregnancy entitled her to a respite of execution until the child was born) was tried by a jury of matrons [97] selected from amongst the women present in court [98], who would, with the assistance of a surgeon if they required it [99], examine the accused and deliver a verdict. By the 1840s the procedure was widely discredited [100], and as a safeguard against a mistaken verdict the Home Office would usually order a medical examination of any woman found not pregnant [101]. 1848 saw the abandonment of the policy of granting only a temporary respite to convicts found pregnant. Henceforth the reprieve in such cases would be permanent [102]. During the century a number of attempts were made to abolish the jury of matrons but in fact it survived until 1931 [103].

#### **(iv) Jury packing**

In Ireland jury packing (achieved by ruthless use by the Crown of its stand-by powers to get Catholics off juries) was a source of grievance throughout the century [104].

In the first quarter of the century there were also loud complaints about packed English juries. These centred around the special juries used to try Crown cases in the King's Bench and the Exchequer. The same men, it was said, sat upon such juries term after term. They were chosen, it was claimed, because they could be relied upon to find for the Crown, and if they ever failed to do so they were never called to serve again. This state of affairs, it was said, arose because of the way the forty eight jurors to be struck were chosen; the Crown, so the allegation went, had an unofficial list of jurors regarded as 'sure men', and if a

name was drawn by the officer of the court which was not on that list, the Crown solicitor would ensure that he was passed over by urging some objection, such as that he would not attend if summoned, or that he was dead; if this failed, jurors objected to would be got rid of by the Crown solicitor naming them amongst the twelve he desired to have struck; in this way a body of jurors amenable to the Crown could be and was obtained [105].

Allegations of packing had been made by Horne Tooke at his trial in 1794 [106], and thereafter the subject would not go away. In 1808 it was raised by one of the sheriffs with the Chief Baron [107]. The following year it was the subject of a petition to and debate in the Commons [108]. In 1818 a Report from a Special Committee set up by the City appeared to lend weight to the complaint [109]. In 1821 Bentham joined in with a devastating attack, published under the title 'Elements of the Art of Packing' [105]. Faced with mounting public unease, Peel decided to act, and by the Juries Act, 1825 it was provided that in London and Middlesex the forty eight jurors from whom a special jury was to be struck should henceforth be selected by ballot [110]. This put an end to complaints of packing. In 1852 the system was further reformed, with the Common Law Procedure Act providing that special juries at Assizes should no longer be struck, but that instead the sheriff should be directed to return a specified number of special jurors, not exceeding forty eight, from which the jury should then be selected by ballot [111]. In 1870 this procedure was applied to London and Middlesex as well [112]. Henceforth a struck jury could only be had by special order of the trial judge [113].

Packing of common juries does not appear to have been a problem in England at any stage during the century. The potential for abuse was, however, certainly there, for the law left it entirely to the discretion of the sheriff how the panel was selected [114] (with the only safeguard for the accused being his right to challenge the array, upon which challenge he bore the burden of proof). In 1881 a Select Committee [115] had commended the Irish system of mechanical selection of panels but the idea was never taken up here.

**(v) The poor quality of common juries**

To critics the main shortcoming of common juries was their poor quality [116]. Educated men, it was claimed, were rarely to be found on them. Instead, they consisted in the main of small farmers and shopkeepers, often wholly unfitted by either education or intelligence to try complicated issues. That the educated and well to do rarely served on common juries was due to several factors. First, the vast majority of those exempt from jury service came from these classes [117]. Second, it was comparatively easy for a man who was not exempt to buy his way out of jury service. Until the 1825 Act transferred the duty to parish overseers, the task of compiling jury lists fell to the parish constable who 'in consideration of some trifling gratuity often omitted the names of persons best qualified to serve' [118]. After the Act the same result could be achieved by an approach to one of the poorly paid sheriff's officers by whom the work of compiling jury panels was in practice done [119]. Yet another factor was the law's insistence on making land the basis of the qualification for jury service, thereby placing outside the net those whose wealth consisted of personal property [120]. Even more important was a practice amongst

sheriff's officers (going back, it would seem, to the 1820s) [121] of not including special jurors on common jury panels. This practice, for which there was no warrant in the 1825 Act, was repeatedly condemned by both judges and Royal Commissions [122] but it continued largely unabated. The 1870 Act went so far as to declare that special jurors were not to be exempt from serving on common juries [123], but even this made little difference. In 1878 Serjeant Cox, the Second Judge at the Middlesex Sessions, wrote to The Times [124], saying that he doubted whether any judge or counsel had ever seen a special juror on a common jury at those Sessions. By 1913 the practice still had not been wholly eliminated [125], despite repeated judicial fulminations [126].

At the Committee Stage of the Juries Bill, 1873 [127] the Attorney General, arguing that the quality of juries would thereby be improved, introduced an amendment proposing that all common juries should henceforth consist of four special and eight common jurors. The amendment was strongly attacked as an attempt to introduce caste justice [128] and was in the end withdrawn. Nor did a clause in the 1873 and 1874 Bills proposing that a trial judge should have power to direct trial by special jury in felony fare any better [129].

#### **(vi) Working class jurors**

The last quarter of the century saw increasingly vociferous demands, particularly from the T.U.C. (the matter was the subject of resolutions at every Annual Congress between 1873 and 1883) [130], that working men be allowed to serve on juries.

By the 1870s trickles of artisan jurors had already begun to appear at London and borough Sessions [131]. In his letter to The Times [132], Serjeant Cox described his experiences of this new breed of juror: most asked to be excused on the ground of financial hardship.

The T.U.C. itself accepted that its reform proposal would never work unless working men received compensation for the financial loss which jury service involved, and demanded that they be so compensated. This led to jibes in The Times [133] and elsewhere that working men wished to share in the privileges but not the burdens of jury service.

Although the calls to widen the base of jury service fell largely on deaf ears, the demand that jurors be paid did not. As long ago as 1821 Bentham [134] had pointed to the anomaly of paying those jurors who were best able to afford to serve, namely special jurors, a guinea per case, whilst the humble common juror received only 8d a day in civil cases and nothing at all when sitting on a criminal jury. Bills providing for the payment of common jurors were introduced in 1863 [135] and 1865 [136]. In 1870 the battle appeared won when the Juries Act passed with a section which provided for common jurors to be paid 10/- a day out of civil fees paid by civil litigants [137]. Unhappily, the provision proved unworkable. In many courts there was simply no money with which to pay the common jurors, and early in 1871 the Government had to repeal the section [138]. Between 1874 and 1898 no less than thirteen Bills [139] on the subject were presented to Parliament, but none reached the statute book, and it was not until 1949 [140] that this blot on the law was removed.

**(vii) Jury challenge as a protection against jury bias**

Given the make up of common juries, it was inevitable that there should be complaints of class bias. And there were. In 1913 the Departmental Committee on Jury Law reported that there was a belief that jurors discriminated against trade unionists and those holding different political views from their own [141], and the same complaint had been made from time to time by the T.U.C. [142].

The only means the accused had of countering jury bias was through exercise of his right of challenge. His most valuable right in this regard was that of peremptory challenge but the extent of this varied according to the nature of the offence being tried. In treason he had up to thirty five such challenges [143]. In felony up to twenty [143] (in Ireland the right was confined to capital felony) [144]. In misdemeanour he had, in strict law, no right of peremptory challenge, but, in practice, he was often allowed to challenge without assigning cause until he had exhausted the jury panel [145]. In addition to the right of peremptory challenge an accused had, whatever the charge, the right to challenge individual jurors for bias or other sufficient cause.

For the effective exercise of his right of challenge the accused needed to know the background of prospective jurors. But this information the law was loath to grant. In treason he had by statute [146] the right to have a copy of the jury panel delivered to him ten days before trial, a document which, after 1825 at least, would state the full name, address, occupation and qualification of every juror on the panel [147].



In felony and misdemeanour, however, there was no right to see the panel. In 1844 the Law Magazine [148] argued that felony should be placed on the same footing in this respect as treason, but the judges were wholly against such a reform, refusing to allow the prisoner a copy of the panel even in treason-felony. In Dowling and Lacey [149] in 1848 counsel tried a new tack. They claimed the right to examine jurors on the *voire dire* before they were sworn, with a view to discovering whether grounds for challenge existed. In making such application they were doubtless seeking to copy American practice, where the right to conduct such examination had been upheld by the courts as a necessary incident of the right to trial by an impartial jury, guaranteed by the Sixth Amendment to the United States Constitution (1791) [150]. The judges, however, would have no truck with such a procedure. English law permitted jurors to be examined only after the ground of challenge had been stated [151], and even then only to a limited extent. For the rest of the century judicial practice on this question never shifted. The largest concession counsel was ever able to wring from a court was to be allowed to put a question to the jury panel as to whether any of them had any connection with, for example, the body which was financing the prosecution [152].

## CHAPTER 5

### REPRESENTATION BY COUNSEL

'Trials would take too long if men of law were allowed.'

Staunford, Pleas of the Crown, f. 151.

A great number of cases were disposed of ... with the usual rapidity exercised by the ... Common Serjeant and several prisoners were placed at the bar to be tried, convicted, and sentenced in the same breath with the reading of the charge against them.'

9 L.T. (1847), p. 319.

#### (a) The right to counsel

In 1800 a prisoner's right to counsel varied according to the nature of the offence charged. Those indicted for treason had by statute the right to 'full defence by counsel' [1]. Misdemeanants had a like right by common law [2]. In felony the position was more complicated. In strict law the accused had no right to counsel [3], but the prohibition had in practice been much eroded. It had since as early as the fifteenth century been customary in capital cases to allow prisoners to have counsel to argue law [4], and in the course of the eighteenth century a further exception had been added - judges had adopted the practice in felony cases of allowing the prisoner to have counsel to examine and cross-examine witnesses on his behalf [5]. This left felony prisoners subject to only one (albeit important) handicap:- they could not have counsel to address the jury on their behalf [6].

**(b) The Prisoners' Counsel Act, 1836**

Between 1821 and 1836 repeated attempts were made to remove this handicap and to give those charged with felony the right to make full defence by counsel [7].

At first there was little enthusiasm for reform. Of five Bills introduced between 1821 and 1828 only one got beyond the second reading stage. Twice (in 1824 and 1826) leave to bring in a Bill was refused outright, and by a large majority [8].

In the 1830s, however, the tide began to turn. 1834 saw a Prisoners' Counsel Bill for the first time pass all its stages in the Commons, and the Bill of the following year did even better, passing all its stages in the Commons, and being referred by the Lords to a Select Committee. In February, 1836 the legislative round began again for what was to be the last time. The 1836 Bill, which was identical to that of the previous year, was referred by the Commons to a Select Committee. The Select Committee reported in favour and it was passed by a substantial majority. In the meanwhile, the Home Secretary had asked the Criminal Law Commissioners to report on the question. Their Report also was strongly in favour of the principle of the Bill [9]. It duly passed the Lords but with amendments (the most important being that striking out clause 2 which gave the prisoner's counsel the right to the last word). The Commons with reluctance accepted the amendments and in August the Bill received the royal assent [10].

Throughout the Parliamentary debate the stance taken by the supporters of the Bill was that the case for reform was unanswerable. The state of the law was they argued anomalous: a man was

allowed counsel to defend him for a twopenny trespass, but denied the like privilege where his life was at stake [11]. That was illogical. It was also unjust, for it denied the prisoner on trial for his life counsel to speak for him, however unequal he might be to the task of addressing the jury himself. It was no answer to say (as Hawkins had in his Pleas of the Crown) that an innocent man needed no counsel to make a simple honest defence. The vast majority of prisoners were uneducated and incapable of making a speech explaining the facts of the case intelligibly, be they innocent or guilty. Indeed, even an educated man might find the task daunting [12]. And so unbending was the law that the rule was enforced against children and the infirm:

'Your counsel cannot speak for you, you must speak for yourself ... this is the reply given to a poor girl of 15 - to a foreigner - to the feeble - to the blind - to the old.' [13]

The result was that men who, with counsel to speak for them would be acquitted, were, for want of counsel, convicted [14]. England and Ireland were alone among the countries of Europe in denying this right to prisoners [15]. They were also out to step with the practice in the United States and in the colonies [15].

The reformers' arguments left their opponents unmoved. They could see no need for the Bill. It was not true that innocent prisoners had difficulty in explaining themselves to juries [16], and in any case the the judge acted as counsel for unrepresented prisoners [17]. The Bill was simply not wanted. The judges and the bar were hostile to it [18] nor was there any popular demand for change [19]. Further if it became law serious disadvantages would follow:- the length and

therefore the cost of criminal trials would be vastly increased [20]; counsel would appeal to the passions and emotions of juries and lead them astray by ingenious and unmeritorious arguments [21]; the Bill would also lead to judges and prosecuting counsel adopting a less temperate attitude towards prisoners (in his summing up the judge would have to deal with the arguments raised by defence counsel, and expose the fallacies therein, whilst prosecuting counsel would tend to conduct cases with more heat if the defence counsel had a speech) [22].

The reformers answered these objections point by point. To say that the judge was the prisoner's counsel was misleading [23]. The judge was incapable of defending the prisoner satisfactorily, for he had no access to him and so could not possibly know the details of his defence [24]. Also it was his duty to hold the balance between the parties not to act as advocate for one side [25]. All the saying meant was that it was the duty of the judge to watch the interests of the prisoner, and to see that no point of law which told in his favour was overlooked [26]. That the legal profession and the judges were against the Bill proved little. Both were notorious for their conservatism [27]. As for the lack of public demand for the Bill, this was no yardstick of merit. There had been no public demand for the Act of 1695 which granted prisoners the right to counsel in treason, yet all now acknowledged the value of that reform [28]. The argument about expense and delay was unworthy. As Romilly had put it:

'too much time could not be consumed when the object was to discover truth and administer justice' [29].

In any event it was false. The vast majority of prisoners went undefended through want of means, and that situation the Bill would not alter one iota [30]. Rather than leading to wrongful acquittals, the Bill would be likely to result in more convictions, for juries would no longer acquit out of sympathy excited by the prisoner's inability to defend himself [31]. As for the claim that judicial impartiality and prosecutorial fairness would be compromised, experience in trials for treason and misdemeanour did not bear out the claim, nor did the experience of the courts of the United States and the colonies [32].

### **(c) Poor Prisoners**

To the majority of prisoners the Act was utterly irrelevant. Whatever their legal right, in practice they were denied counsel by their poverty. In 1800 less than one prisoner in four tried at the Old Bailey had counsel, and by the end of the century, although things had improved, defended prisoners were still in the minority [33]. Nor was the position any better in the country [34]. Indeed at county Quarter Sessions it was markedly worse.

That public opinion was prepared to tolerate prisoners being tried for their lives undefended appears to have been due to several factors. First, criminal procedure was viewed as essentially liberal [35]. Cottu and other foreign observers had commented upon how favourable to the accused was English law, and was this not a just verdict? The judge would see that the prisoner had the benefit of any legal point which was in his favour, and he could be convicted only if a jury of twelve were unanimously of the view that his guilt had been proved beyond a reasonable doubt [36]. Given

these safeguards the risk of an undefended prisoner being wrongfully convicted was surely minimal. Second, the employment of counsel in criminal trials was still a comparatively recent phenomenon, and it was still the exception rather than the rule to find counsel instructed for the prosecution even in serious cases [37], and if the prosecution had no counsel, how could it be said that the accused was at a disadvantage?

During the campaign for the Prisoners' Counsel Act, the question of legal representation of poor prisoners was, in fact raised. A clause entitling poor prisoners to have counsel assigned to them was included in each of the 1833-36 Bills (counsel so assigned were to act without fee). Before the Lords' Select Committee on the 1835 Bill members of the bar spoke out against the clause, claiming that it would cause inconvenience and loss to the profession [38], and, although it appeared in the 1836 Bill, it was dropped before the Bill reached the Lords.

But the subject, once raised, would not go away. In 1843 Serjeant Cox [39] treated the launching of the Law Times as an opportunity to revive the topic. Counsel should, he argued, be assigned to poor prisoners from the pool of unemployed barristers who attended criminal courts. They ought to be paid out of the same fund as counsel briefed by the prosecutor, but, if need be, they would almost certainly work without fee [40]. The correspondence to which his article gave rise, revealed that in 1835 one of the sheriffs had out of his own pocket, funded a free representation scheme for Newgate prisoners, only to see it break down after one session (despite encouraging results), due to opposition from the lawyers (see p. 88.below).

In 1856 the call for the state to provide legal aid was repeated by Charles Greaves in a Report to the Lord Chancellor [41] on Criminal Procedure. An attorney and counsel paid for out of public funds should, he argued, be assigned to any poor prisoner found by the visiting magistrate of a gaol to have reasonable grounds of defence.

Calls for state funded criminal legal aid were doomed to go unanswered [42]. A scheme utilising the free services of the unemployed bar was, however, less easily dismissed. Not only would it answer (however imperfectly) the needs of poor prisoners, but it would also provide young men seeking to break into the profession with much needed experience and an opportunity to show their worth. Moreover, it was all perfectly practicable. In Scotland a free representation scheme for poor prisoners had been operated successfully by the profession since the sixteenth century [43].

Periodically, during the second half of the century variants on Cox's scheme were proposed. In 1860 one of the City judges [44] announced that he would be glad to see the younger members of the bar defend all cases of poor prisoners which were undefended, and said that he would provide all facilities in his power for the purpose. In 1882 it was suggested, in a letter to The Times [45], that barristers, who were willing to defend prisoners for a nominal fee (say 2/6d. to be paid out of the rates), write their names on a special list to be lodged with the gaoler or an officer of the court. In 1899 it was suggested in the Irish Law Times [46] that defence briefs should be allotted to counsel, who were willing to undertake such work without fee, on a soup basis. Nothing came of any of these proposals. All foundered on



the rule of professional etiquette which prohibited a barrister from appearing in court without a brief marked with the minimum fee of one guinea [47].

By the 1890s the subject was one which was coming to be raised with increasing frequency in debates upon the Criminal Evidence Bills which the Government was seeking to get through Parliament, but the breakthrough did not come until the Dorset Sessions scheme of 1902 [48], which in turn led to the Poor Prisoners' Defence Act of 1903.

Prior to 1903, assignment of counsel and defence in forma pauperis were the only provision which the law made for the needs of poor prisoner, and they benefited but a handful.

#### **(i) Assigning counsel**

Assignment was a practice developed by the judges as a means of ensuring that prisoners facing grave charges did not go undefended for want of means. The judge would ask one of the counsel present in court to undertake the prisoner's defence without fee, and the request was never in practice refused.

It was suggested in a letter published in The Times in 1903 [49] that the practice dated from the time of the 1836 Act. The suggestion has the attraction of neatness but is certainly wrong. During the debates on the Prisoners' Counsel Bill of 1834, one of the arguments used against the assignment of counsel clause which it contained, was that the judges already had power to assign counsel, and counsel never refused to act [50]. Also one can find in The Times reports of criminal trials instances of counsel being assigned to poor prisoners in felony as early as the 1820s.

Assignment of counsel to argue a point of law on behalf of a poor prisoner can be traced back to at least the seventeenth century. The practice of assigning counsel to conduct his defence appeared first in treason. The Treason Act, 1695 required the court to assign to the accused, immediately on his request, such counsel (not exceeding two) as he should desire, but was silent as to what was to happen if he was too poor to fee them. By the late eighteenth century, if not earlier, the gap had been supplied by a rule of bar etiquette, requiring counsel assigned to a poor prisoner to act without fee. Erskine spoke of the rule in 1800 when accepting assignment as counsel for the penniless lunatic Hadfield, charged with shooting at the King [51].

By around 1820 the practice in treason had begun to spread to felony. The Times for 1818 reports a judge at Lancaster Assizes asking counsel to undertake the defence of two brothers called Fitzpatrick [52], who were charged with robbery and too poor to be able to afford counsel. No further such cases appear in The Times reports of trials until 1825 when two are reported (the first a trial of two brothers called Daw [53] at Horsham Assizes for murder, the second a trial for murder at Monmouth where the accused was a pauper who had no English) [54]. There is reason, however, to think that the practice was at this date still new, for at the Old Bailey in April of that year, a horse thief called Probert [55], who applied to the court to assign him counsel was told by the Lord Chief Justice that the court had no power to assign counsel to undertake his defence (it could only assign counsel to argue law (in the event the day was saved by one of the counsel in court volunteering his services). Nor does Probert's case stand alone. In 1823 at Monmouth a prisoner

called Redding [56], charged with capital felony, who requested assistance on the ground that he was too poor to employ counsel, was merely told by Park J. that he would see justice was done to him. A further, and in some ways even stronger indication of the novelty of such practice, is to be found in cases such as Nuttall (1817) [57] where poor prisoners are found asking not for counsel to be assigned, but for the judge to act as their counsel. Certainly, assignment in felony appears to have been unknown when Chitty published his treatise on Criminal Law in 1816, for he makes no mention of it, despite discussing in detail both assignment of counsel in treason (for which he actually gives a precedent of an assignment) and defence in forma pauperis [58].

So far as one can judge from trial reports, assignment of counsel to poor prisoners in felony cases was, and remained, a rare occurrence during the late 1820s and 1830s, but became increasingly common during the 1840s and 1850s [59].

From the start, the power to assign seems rarely to have been exercised save in murder cases, and there was certainly not at any time during the first half of the century anything approaching a policy of assigning in all capital cases [60]. Given the number of capital offences on the statute book, and given also that the majority of capital convictions for offences other than murder did not result in executions [61], this is not so surprising. But even in murder cases (where execution would normally follow conviction) practice was far from uniform. During the period 1820 to 1850, year in year out, prisoners were tried for murder (and convicted and, in some cases, executed) without counsel to defend them [59].

Occasionally, the prisoner's lack of representation in such cases was out of choice [62], but more usually it was because he was poor and the court had not seen fit to assign him counsel. In some cases, the reason why no counsel was assigned was almost certainly that the judge, having read the depositions, considered the case weak, and thought counsel unnecessary. Where the accused was obviously insane, judges, rather than assign counsel, would simply call the surgeon of the gaol to prove the fact [63]. In infanticide cases (where due to the primitive state of medical science it was notoriously difficult to prove a live birth), often the judge would, without troubling to appoint counsel, himself demolish the prosecution case by his cross-examination of the medical witnesses [64] (this judicial technique was indeed responsible in no small measure, for the very high acquittal rate in this class of case). On the other hand, if the case was complex this might incline the judge to assign. In Johnson [65], a case of murder tried in 1859 the judge assigned counsel to the prisoner well into the prosecution case, the reason for this belated assignment apparently being that the case had turned out to involve more difficulty than had initially been thought. With some judges failure by a prisoner to ask that counsel be assigned would result in his going undefended. During an Old Bailey trial in 1844 [66] Abinger L.C.B. excused his failure to assign on the ground that the accused had not requested counsel. In Geering [67] in 1849, counsel was not assigned until application was made by the prisoner's daughter, by which time one of the prosecution witnesses was already in the middle of his evidence, and this despite the fact that the case (being one of murder by poisoning in which the prosecution were seeking to get in evidence of

other deaths from poison) was one which cried out for an assignment. In an Irish case [68] from the same period, it was actually laid down that the court would not assign counsel of its own motion. In other cases the decisive factor appears to have been that the judge did not intend to leave the prisoner for execution if convicted [69]. And then again some judges seem to have been more reluctant than others to assign. One such was Martin B. In each of the years 1857, 1858, 1859, 1861 and 1862, he is to be found presiding over a murder trial with the prisoner undefended. In two of the cases, it is possible to justify the failure to assign, for in one a pro-defence summing up secured an acquittal [70], and in the other [71] it looks as though it was his intention from the beginning to spare the prisoner in the event of conviction. But it is difficult to offer any reason, other than dislike of the practice, for his not securing representation for Jones [72], a young woman indicted at Kingston Assizes in 1859 for the murder of her child, and convicted after a trial in which she had been in a fainting state throughout, or for his refusal at Stafford Assizes in 1861 of an application by another Jones [73] (the only one of five prisoners jointly indicted for murder who was undefended) to have counsel assigned to him. The fifth case [74] appears to have been one in which he over-estimated his power to get the jury to do as he wished, a pro-defence summing up failing to procure the acquittal of the prisoner for the murder of her child.

By 1860, assignment in murder cases had become an almost routine practice, with judges often taking the initiative in the matter. But the occasional case in which an accused stood trial undefended could still be found. Nine such cases appear in The Times trial reports for 1860-69, and

six for the period 1870-79 [75]. The last case in those reports of an undefended prisoner convicted of murder is Eatwell in May, 1864 whilst the last case of a prisoner tried for murder undefended is Sherwood in May, 1879 (where the jury convicted of manslaughter only). After 1880 one hears no more of such cases, it by then being invariable practice to assign in murder. However, it was still extremely rare [76] to find counsel assigned in any other class of case. Factors such as youth, mental disability, or the severity of the punishment which would follow conviction rarely influenced judges to assign counsel where the charge was not capital [77]. Indeed as late as 1910 [78], the Court of Criminal Appeal found it necessary to say that in rape cases 'the judge should endeavour to secure the representation of the prisoner by counsel'.

In 1903 Grantham J. [79] sought to justify to the Select Committee on the Poor Prisoners' Defence Bill, the illiberality of the judges in the assignment of counsel:-

'I do not very often do it except in murder cases. I always do it then. I do not do it in any other cases because I defend the prisoners myself if they are not defended. I could in murder cases but I think it better not. My difficulty is to get a man that I think can do it properly and that I think I ought to ask, because at the present time he gets no fee for it ... if you go to a good man and ask him to do that you may be depriving him of an opportunity of earning a fee in another case or in another court'.

As a means of providing representation for the poor in capital cases, assignment was far from ideal. The counsel assigned would have no brief to work from. Having in most cases been brought in only when the case was about to start, and, in some cases, at an even later stage (instances are by no means uncommon of a prisoner requesting, or the

judge making, an assignment only after the prosecution opening, or even during the course of the evidence) [80], he had generally to try and pick the case up as he went along. He would normally be allowed access to the depositions, and the court might also grant him a few moments to confer with his client, but normally he got little more indulgence than that. And, if during the course of the case enquiries fell to be made, he had no attorney to assist him.

Nor was there any guarantee that the counsel assigned would be proficient. The selection was made from amongst those in court not already engaged on the case. Sometimes the judge would call on the senior counsel in court [81]. Sometimes one of the barristers present would volunteer his services [82]. Occasionally the accused would be invited to choose from the barristers in court [83]. But, however the choice was made, the risk was that the prisoner would end up with a counsel lacking the experience and ability necessary for an effective defence [84].

In England, one occasionally finds assigned counsel bemoaning in jury speeches the lack of an attorney to assist them [85]. In Ireland, however, matters went further than mere grumbling. In a number of cases around mid-century, the court's power to assign counsel to a prisoner without also assigning an attorney was openly questioned. In January 1848, on the trial of the Codys [86] for murder, counsel assigned by the court expressed doubt as to the propriety to taking an assignment without an attorney, but, under pressure from the Lord Chief Justice of Ireland with reluctance agreed to do so. In Fogarty [87], tried at Down Assizes in 1850, counsel, requested by Pigott C.B. to undertake the defence of a prisoner charged with

murder, declined to do so unless an attorney was assigned. He was supported in his stance by one of the leaders present, who told the judge that there was a feeling among the bar that no counsel could with propriety undertake the defence of a prisoner without receiving instructions from an attorney. He further asserted that where counsel was assigned the Crown should pay him a fee, as upto a very recent period had been the rule. Pigott retorted that it was his opinion that a judge might properly call on a barrister 'to give his honorary services to a prisoner who was unable to employ one', and cited a case tried recently at Clonmel, where counsel had at the request of the judge defended a prisoner without the assistance of an attorney. He conceded, however, that he could not compel counsel to act. The impasse was eventually broken when a solicitor present agreed to act. The case was deemed worthy of reporting in an English series of law reports. There is reason to think that in Ireland the reluctance to accept an assignment without an attorney continued after 1850. Certainly, as late as 1873, the Irish Law Times [88] was receiving letters from correspondents denying the power of the court to assign counsel without an attorney, and criticising members of the bar who accepted such assignments. In England, however, the practice seems always to have been and continued to be to assign without an attorney [89].

#### **(ii) Defence in Forma Pauperis**

The other method whereby poor prisoners could in theory secure legal representation was by applying to defend in forma pauperis.

Under the statute 11 Hen. VII, c. 12 paupers (by the nineteenth century the definition of a pauper was a person who was not worth £5 in the



world) [90] were granted the right to sue and defend causes with the assistance of counsel and attorneys assigned by the court (who were to act without fee) and were exempted from the payment of all court fees.

In the course of the eighteenth century defendants had occasionally been allowed to defend in forma pauperis in criminal proceedings in the King's Bench [91], on the analogy of the 11 Hen. VII, c.12. It is not clear, however, from the reports of such cases whether the judges regarded the procedure as available in criminal cases generally or only in cases pending in the King's Bench.

In 1818 a prisoner called Stokes [92] convicted of murder at York Assizes, made application in the King's Bench to sue out a writ of error in forma pauperis. Parke B., before whom the application came, said that he was not aware of any precedent for such a proceeding, but was not prepared to say it could not be done. He suggested that a simpler course would be to get the trial judge to reserve the case. This was in the end done, and no final ruling on the application was ever given.

In Page in 1831 [93] and Nicholson in 1840 [94] one finds defendants being granted leave to defend in forma pauperis. Predictably, both were prosecutions in the King's Bench, the first for perjury, the second for libel.

After this one hears little of in forma pauperis in criminal cases, but it continued until the end of the century to be treated by text writers [95] as a means whereby poor prisoners could obtain free legal representation.

Whatever its theoretical availability, it appears in practice, to have been a dead letter. How little used it was is nowhere better demonstrated than by a leading article which appeared in the Solicitors' Journal in 1856 [96], suggesting that the procedure be extended to criminal cases. The problem, as much as anything, may have been prisoners' ignorance of the right. Whilst old hands would know of the court's power to assign counsel, there must have been few either amongst the criminal population or amongst the hangers-on around jails and police offices, who had heard of this King's Bench procedure with its latin name and its requirement for a supporting affidavit.

**(iii) The Dock Brief and the I.P. system.**

The bar, had it chosen to do so, could have solved the problem of the undefended prisoner, by sanctioning a free representation scheme of the type urged on it repeatedly during the century. In fact (apart from its co-operation in the assignment system) the only concession it made to the plight of the poor prisoner, was to permit counsel, in such cases, to accept briefs direct from the prisoner, his friends or family.

The rule of etiquette that a barrister might not accept instructions save through an attorney was, at the start of the nineteenth century relatively new [97], and was not regarded as applying to all species of work [98]. In particular, it was generally believed not to apply to non-contentious work, and as late as 1888 [99] finds the Attorney-General, in a letter to The Times, repeating an opinion, given by his predecessor in office in 1872, that it was not a

breach of etiquette for counsel to deal with the client direct in non-contentious matters.

So far as the criminal courts were concerned, it was as late as the 1840s, common place, at least in London, for barristers to accept briefs for both prosecution and defence from the client direct. This came out into the open in 1844 when two Old Bailey barristers, who had acted for a prosecutor without an attorney, found themselves severely censured both by the court and the press [100]. The pair sought to defend themselves against the criticism by asserting that it had long been the practice, both at the Central Criminal Court and the Middlesex Sessions, for counsel to accept briefs for both prosecution and defence without the intervention of an attorney [101], and indeed, on September 24, a meeting of the Central Criminal Court Bar Mess passed a resolution asserting the existence of a custom to that effect [102]. Significantly, neither the resolution nor the assertions of the two barristers at the centre of the row were contradicted by any senior member of the bar [103].

In the debate which followed, the legal periodicals were firm in their condemnation of counsel, who conducted prosecutions without an attorney [104], but they found the matter of defence briefs less easy. The Law Times, in a leader on October 19, was prepared to accept that acting for a prisoner without an attorney was permissible, provided that the brief was handed to counsel by prisoner over the bar [105].

In the following month, in a case at the Old Bailey where it turned out that counsel had been retained for a prisoner called Ball [106] not by an attorney but by the Governor of Newgate, Rolfe B.

refused to condemn the proceeding, despite prosecuting counsel's assertion that the more proper course was for the prisoner to brief counsel from the dock.

In 1850 the practice of counsel acting for prisoners without an attorney received apparent judicial approval in Doe d. Bennett v. Hale [107], with Lord Chief Justice Campbell's observation that

'in criminal cases it is conceded that the practice of a barrister not to plead unless instructed by an attorney does not prevail ...'

It is arguable that Lord Campbell was there merely referring to the practice of judges' assigning counsel to poor prisoners, and, indeed the passage concludes with a reference to the practice. However, that is not how his words were interpreted by the Law Times, which, in a leader discussing the decision, spoke of it being

'common practice on some circuits, as on that of North Wales for instance, for a prisoner when arraigned, to hand a fee to counsel who was bound to defend him without the requirement of a brief and an attorney' [108].

The justification, which the Law Times offered for the practice was one which a correspondent had offered nearly six years earlier, necessity:-

'It would be manifestly a hardship on a poor prisoner to be deprived of the protection of defence by counsel because he is unable to raise a double fee and, in truth, defences can usually be conducted almost as well without a brief as with one' [109].

In fact, the practice of accepting briefs from prisoners direct was certainly, so far as London was concerned, one of long standing. In 1836 a

Report on the state of Newgate prison disclosed that two wardsmen (both serving convicts) were permitted to draw briefs for fellow prisoners for a fee of 5/- per brief, which they were allowed to retain [110]. Such briefs when drawn would then be placed in the hands of counsel either before trial by the prisoner's family or friends or by the prisoner himself on arraignment.

One species of defence brief, which appears to have evolved from the practice of briefing counsel direct, was the dock brief or 'docker' [111].

In the twentieth century the dock brief represented a method whereby a prisoner could secure the services of counsel for a nominal fee. Its essential features were these:- counsel was briefed by the prisoner in open court, the prisoner being entitled to have the services of any counsel in court, who was not already engaged in the case, upon tendering a fee of one guinea plus clerk's fee (after 1951 two guineas plus clerk's fee) [112]. As in a case where the court assigned counsel, there was no solicitor and no written brief, save where the prisoner had chosen to write one or have one written for him.

The Report of the Committee on Legal Aid & Advice in 1945 [113] spoke of the dock brief as an institution which had existed from time immemorial, and Abel-Smith and Stevens [114] speak of it having existed for many centuries before the general right to counsel was conceded. Neither cites any evidence to support these assertions.

In fact, there is good reason for supposing that the dock brief is far more modern than this. It is important to begin with, to rid oneself of the notion that the dock brief represented a means

of obtaining representation for a purely nominal sum. True, that is what it had become by the mid-twentieth century, due to the ravages of inflation, but in the nineteenth century the fee payable on a dock brief was anything but derisory. It represented in the first half of the century more than a week's wage for a working man [115]. It was the minimum brief fee which a barrister was allowed to accept, and it represented the standard brief fee which was being paid for prosecutions at the Old Bailey, Middlesex Sessions, and at Assizes and county Quarter Sessions [116]. The size of the fee alone indicates that it almost certainly had a nineteenth century origin, and indeed there are other reasons for so dating it. In the first place, it is difficult to believe that the right to deliver a dock brief can have antedated the right to employ counsel in felony cases, and so far as felony is concerned, it appears that it was only in the 1730s that the courts began to allow prisoners to have counsel to assist them examine witnesses. Secondly, one finds no references to dock briefs in any of the early nineteenth century practitioners' text books, not even in books like Chitty's Criminal Law, which discuss in minute detail the assignment of counsel in treason and defence in forma pauperis [117]. Third, the earliest references to something resembling a dock brief appear to come from around the 1840s. Fourth, there is the case of Ball (1844) referred to above. This is significant for two reasons. First, for the fact that the Governor of Newgate thought it necessary to shoulder the burden of briefing counsel for prisoners, who could afford to pay a brief fee but not an attorney's fee. If the dock brief was then a known and well established right what need was there for him to do so? Second, for the comment made on the case in the Law Times:-

'It was not foreseen (by the Aldermen when they barred all but attorneys and their properly authorised clerks from Newgate) that many a prisoner might raise a guinea to pay a counsel's fee without being able to pay an attorney, and that all who were in this situation would consequently remain without a counsel'.

Then there is a comment made by Phillipps, the barrister and text writer, in his evidence to the 1835 Select Committee upon the proposal that counsel should be assigned to all poor prisoners desiring representation:-

Where are (such counsel) to get their instructions? Are they to communicate with the dock? That would be rather new in the practice of the Bar' [118].

Finally, there is the fact that, in the late nineteenth century, some very elementary rules concerning dock briefs were uncertain. For example, was a prisoner charged in the magistrates' court entitled to a dock brief? Was counsel entitled to take a fee of more than one guinea for a dock brief? Was counsel entitled, where the prisoner was charged on more than one indictment, to a separate one guinea fee for each indictment? [119] This scarcely suggests an institution of much antiquity.

A feature of the dock brief, which requires explanation, is why the briefing of counsel took place in court rather than beforehand. A partial explanation is offered by a letter, published in The Times during the 1844 controversy, from a correspondent signing himself Veritas [120]. The letter, after arguing strongly in favour of prisoners being allowed to instruct counsel direct, made this point. If the prisoner delivered his brief to counsel and the grand jury then threw out

the bill, he would lose the brief fee, for the invariable rule of the bar was never to return brief fees come what may. Accordingly a poor prisoner, who could not afford to lose a guinea, was well advised to hold back his brief until he knew that a bill had been found (by no means a certainty with grand juries at the Old Bailey in the first half of the century even in clear cases) [121] and taking this course usually meant counsel being briefed in court. Nor is it difficult to imagine other circumstances which would compel a prisoner to brief counsel in open court, for example difficulty in raising the fee.

There seems good reason to suppose that the dock brief simply represented one of two alternatives open to a prisoner who wanted to brief counsel but either could not afford or did not wish to have the services of a solicitor. The first was to have his friends or family brief counsel direct before trial. This had the advantage that counsel would have plenty of time to prepare the case, but the prisoner risked losing the fee if the grand jury threw out the bill. Second, to leave the briefing of counsel until his case was called on, which was the course he would have to take where the fee had only been raised at the last minute, and which he might wish to take in order to make sure that he did not pay over a fee unnecessarily [122].

If the dock brief offered the prisoner the opportunity of avoiding paying out a brief fee unnecessarily, its obvious disadvantage was that counsel instructed in this way had little time to take proper instructions from his client. Some prisoners would hand over with their fee a prepared statement of the case, but many did not, in which case counsel would have to work from such scrambled



instructions as he was able to get over the dock. Some counsel made light of these difficulties. It was always Montagu Williams' boast that the only defence brief he ever required was a copy of the depositions [123], and, in days when prisoners could not give evidence, such a robust approach certainly left counsel free to develop what he considered the most promising line of defence, without the embarrassment of being trammelled by instructions from the client. The other advantage of the dock brief to the very poor was that the fee, although far from derisory, was low - the lowest for which a barrister's services could be got - and remained unchanged during the nineteenth century despite inflation.

Whatever its merits, at no time during the second half of the nineteenth century, does the dock brief appear to have been particularly popular with prisoners. Indeed, some evidence of how relatively uncommon it was, is to be found in the periodic complaints in the last quarter of the century that prisoners were ignorant of their right to a dock brief [124].

In London, the dock brief was overshadowed by a rival system which like the dock brief cut out the need for a solicitor, but which, unlike the dock brief, allowed counsel time to get up the case properly. This was the I.P. (in person) system. A barrister's clerk, who joined the profession in the 1870s, described in his biography how, during the 1870s, 1880s and 1890s, I.P. work, although confined to the less reputable of the profession, yielded those who had it a rich living. He describes the way the system worked thus:-

'After a prisoner had been committed for trial, his friends would procure, at the cost of a few shillings, a copy of the

depositions ... hand them to the barrister of their choice, who would accept them as a brief, decide if witnesses were to be called and fight the case in court for a small fee paid in cash. The fee ... was generally made up of shillings or florins not always too clean' [125].

He goes on to say that I.P. defences were eventually stopped when abuses crept in, and large I.P. fees were taken for work which obviously should have been done in a more conventional manner [126]. What he says about the taking of large fees for I.P. work receives some confirmation in the proceedings of the Select Committee on the Poor Prisoners' Defence Bill, for one of the suggestions put to Grantham J., when giving evidence to the Committee, was that the normal fee for an I.P. brief was 5 or 10 guineas. Grantham was in fact able to offer little information about the matter. He said that he thought the I.P. system a lot less frequent than fifteen or twenty years before when he had heard a good deal of it, adding that it was a form of practice, which had been very much discouraged by the Bar, but he was unable to contradict his questioner's claim that there were still about half a dozen I.P. cases every session [127].

The I.P. system appears to have represented simply a continuation of the tradition, which existed in the 1830s, and to which the Central Criminal Court Bar vouched in 1844. Its survival was no doubt due to uncertainty as to the scope of the prohibition upon counsel receiving instructions from a client direct, which, until the end of the century was far from total. How much uncertainty there was about the matter, even as late as 1900, is demonstrated by an incident which occurred in October of that year. A member of the Manchester bar telegraphed the Secretary to the Bar Council,

asking whether he would be in order to accept a brief from a woman to defend her husband in the police court the next day. The Secretary telegraphed back 'believe counsel so entitled; have no direct decision here' [128]. Before the year was out the practice had been condemned by the Bar Council, but what is revealing is the Secretary's reaction when confronted with the problem. The Report of the Committee of the Bar Council on Dock Defences published late in the same year [129], in fact mentioned I.P. defences in police courts, observing that the practice, which at one time had prevailed in London to a considerable extent, was highly undesirable and had it was believed almost ceased.

#### **(iv) Charity and other sources of assistance**

For the prisoner who was destitute and could not afford to brief counsel, his only hope of representation (assignment apart) lay in private charity or the efforts of his friends [130].

In 1896, it was out of money raised by her friends that counsel was, at the last minute, procured for Mrs. Dyer, the baby-farmer [131], and even after the passing of the Poor Prisoners' Defence Act, 1903 one still finds examples of prisoners (especially prisoners charged with murder) being defended out of a fund raised by subscription [132]. Amongst those most likely to have their defence funded by friends were members of criminal gangs (usually the money was raised by holding a 'benefit' in a public house) [133].

For those who had no friends, or no friends able to raise money on their behalf, charity was an occasional provider of representation. In 1813 the murderer Cornwell was defended at the expense of

the committing magistrate, who had been moved by his complaint that he was friendless and unable to fee counsel [134]. In 1844 a prisoner at Berkshire Sessions had his counsel's fee paid by a member of the bar who took pity on him [135]. In the same year, during a piracy trial at the Old Bailey, one of the jurors trying the case offered to pay for counsel for the prisoners, an offer which Abinger C.B. declined on the ground that no counsel could do justice to a case who came into it half way through [136]. In 1873 a local man came forward to offer a substantial sum for the defence of the West Auckland poisoner Mary Ann Cotton, when he heard that her furniture had had to be sold to provide her with counsel [137].

In the first half of the century particularly, one comes upon instances of members of the bar stepping forward to defend unrepresented prisoners gratuitously. In 1801, at the Old Bailey trial of a woman called Harvey for murder of her child, the 'prisoner appearing very much affected', counsel humanely volunteered to defend her [138]. In 1831, at Chelmsford Assizes, whilst the trial of a fourteen year old boy for murder was under way, Clarkson, a London barrister in a substantial way of practice, intervened to offer his services to the lad, who would otherwise have gone undefended [139]. Even as late as the 1880s one finds Geoghegan, one of the best known juniors at the criminal bar, intervening in a case to offer his assistance to a fellow Irishman [140]. Such interventions, since they were subject to judicial approval, were presumably regarded as analagous to an assignment, and therefore no breach of etiquette.

From time to time complaints appeared in the press of barristers doing criminal work for less

than the minimum brief fee. Usually touting rather than charity was the motivation here [141], but not always (Marshall Hall is said to have accepted a dock brief at a fee of less than a guinea because he had taken pity on the accused) [142].

Where the charge was capital, a foreigner without means would sometimes be provided with counsel by his Government [143].

One of the few examples of systematic charity in the matter of prisoners' representation was to be found at the Central Criminal Court. There had in 1835 been the scheme of sheriff Salomon. He had paid a Mr. Yorston, out of his own pocket, to attend at Newgate to take written statements from prisoners of their defences, so that they could be handed to such counsel as they selected, or to the court by which they were tried. Yorston had also to advise him of the names of prisoners who appeared to be innocent, but were without defence, and for such prisoners he had retained counsel at his own expense. The scheme worked well but came to an end after only one session due to opposition from the profession [144]. A less ambitious, but more enduring scheme, was that, which dated back to at least the late 1820s, whereby the sheriffs of London and Middlesex intervened in selected cases to provide counsel for prisoners who would otherwise have been unrepresented. The first case in which The Times trial reports mention counsel being retained in this way, is the trial of Sheen in 1827 [145] for murder. In the main, the sheriffs' intervention was confined to cases of murder, but occasionally one sees them providing counsel for a poor prisoner charged with a lesser crime. In 1851 [146], for instance, they provided counsel for a foreigner charged with theft, and for a 'strange sickly looking girl' called Adams [147]

charged with perjury. In 1859 [148] they briefed counsel to defend a girl called Sloman charged with concealment of birth.

Where the sheriffs did intervene, no attorney was employed, the attorney's work being done by one of the under-sheriffs (see e.g. Gould 1844 [149] where the under-sheriff swore an affidavit in support of an application for postponement, and was present in court, giving instructions to counsel, during the application).

During the course of an Old Bailey case in November, 1882 [150] counsel referred to a fund maintained by the sheriffs, out of which the fees for counsel were paid. It is not possible to identify with certainty the fund referred to but there is reason to suspect that it may be the Sheriffs' Fund, a charitable fund founded in 1807-8 to help distressed prisoners and their families [151].

The London system may not have been unique. A scattering of cases suggests that it was in the second half of the century being copied outside London and Middlesex [152].

Towards the end of the century, another source of funds for those charged with major crime was the press. Newspapers would from time to time set up defence funds for prisoners whose plight had caught the public imagination. One of the earliest examples of such a fund was that established in 1888 by the Sussex Daily News for Sabina Tilley charged with child murder [153]. But there was another form of press involvement which was less desirable - that whereby those accused of sensational crimes sold their life stories to the Press in return for the funds to employ fashionable

counsel. The Home Office were always unhappy about this practice, and, in 1915 in the case of Smith ('the brides in the bath' murderer), refused to allow the prisoner to assign the copyright in his projected life story to the newspaper (a refusal which led to a strong letter to the Home Secretary from Marshall Hall [154], the counsel who was to have been retained out of the funds the newspaper had agreed to provide). The Home Office concern was, however, well founded. By the 1930s some newspapers were no longer content with life stories, but were demanding as the price of legal representation for notorious murderers a sealed letter confessing guilt not to be opened until after the prisoner's execution [155].

**(v) The Mackenzie adviser and the amicus curiae**

For prisoners who took their trial undefended (as so many did) the only possible sources of assistance other than the judge were what in the twentieth century has become known as the MacKenzie adviser, and the amicus curiae.

The right of a prisoner to have a friend sit near him 'to take notes, quietly make suggestions and offer advice' was upheld by the King's Bench in 1831 [156]. The privilege appears, however, to have been little exercised in trials on indictment.

The practice of counsel present in court intervening as amicus curiae to suggest points of law in favour of an unrepresented prisoner was of considerable antiquity [157], and such interventions were common at busy courts well into the 1850s [158]. It is not hard to understand why. At a busy court, there would at any one time be sitting in court counsel who were not engaged in the case being tried, some waiting for their cases

to be called on, others briefless and trying to improve their skills by watching their seniors, and get their faces known amongst attorneys (all the while hoping against hope that a brief might come their way). An experienced counsel would be unlikely to stand by and watch a prisoner be convicted for want of counsel to draw the judge's attention to a point of law in his favour, whilst for a briefless barrister intervention would be a means of getting noticed and gaining experience on his feet.

#### **(d) Reform**

By the 1890s the pressure to remove the accused's incompetency, coupled with the increasing number of statutes which actually did so, made the issue of legal representation ever more urgent. It was obviously only a matter of time before the Government got a Prisoner's Evidence Bill on the statute book, and when it did so every unrepresented prisoner would face the problems which undefended prisoners were already experiencing in those cases where statute made them competent. In addition to having to cross-examine and state his case to the jury unaided, he would have to make (without legal advice) the crucial decision whether to give evidence or not, and, if he gave evidence without counsel to take him through his examination in chief and to re-examine, there was great danger of his defence (and, in particular his answer to prosecution cross-examination) not being adequately laid before the jury, even if the judge intervened to assist.

The matter had first been taken up in 1883 when Leighton had moved an amendment to the Criminal Code Bill that no Bill would be



satisfactory which did not provide for the assignment of counsel to poor prisoners [159].

In 1893 the Society of Chairmen and Deputy Chairmen of Quarter Sessions in England and Wales passed a resolution to the effect that provision should be made in the Evidence in Criminal Cases Bill then going through Parliament for the assignment of counsel to poor prisoners who desired to be legally represented, such counsel to be paid out of public funds [160].

The Lord Chancellor, believing that such a clause might remove some of the objections to the Bill, decided to refer the question to the judges.

Of the judges only Cave J. was wholeheartedly in favour of the proposal, the attitude of the majority being that the reform was not needed and likely to lead to a whole host of evils not least of which would be waste of court time, and great public expense [160].

Faced with such an overwhelming majority against the proposal it was quietly dropped.

In 1894 the Law Journal [161] took up the question, suggesting that in the case of poor prisoners the conventional dock fee ought to be paid by the county.

The matter was next raised during the debate on the 1897 Criminal Evidence Bill, when the M.P. for Leeds proposed that the Bill should include provision for the defence of poor prisoners [162]. The proposal was lost but led the Senior Treasury counsel, Sir Harry Poland Q.C., in a letter to The Times to argue that a system of assigning counsel alone would not meet the need. It was essential

that a solicitor should also be assigned to get up the case.

During the Committee Stage of the 1898 Bill, an unsuccessful attempt was made by Gibson Bowles to move an amendment providing for the assignment of counsel to poor prisoners [163].

While the 1898 Bill was on its way through Parliament pressure for reform was mounting.

At a meeting of the Bar Council on January 17, 1898 a motion was proposed by Lord Robert Cecil 'That in the Opinion of the Council it is desirable that every prisoner should be defended by counsel' [164]. The next month, the Council appointed a Special Committee to report upon the matter.

During the following months, the Committee made extensive inquiries as to the practice in other parts of the English speaking world. The replies made interesting reading. In Scotland, agents (i.e. solicitors) 'for the poor' were appointed annually by the Faculty of Advocates; the agents visited the gaols and 'counsel for the poor' were then instructed by them appearing at trial without fee. In Victoria by Order in Council all persons without means charged with capital offences, and all aboriginals charged with an indictable offence might, on application to the sheriff, be provided with the services of such barrister and solicitor as they might select, the fees being paid out of monies voted by Parliament. Substantially the same practice obtained in New South Wales and New Zealand. In Queensland, however, only aboriginals and Polynesians were defended at Government expense. In Canada, it was the practice of the superior courts to assign counsel to prisoners who were unable to afford to

retain one, but the services of such counsel were honorary and unpaid. In Massachusetts, prisoners accused of capital crime were defended at the expense of the Government by counsel assigned by the court.

In November the Committee reported [165]. It came out strongly in favour of free legal representation for poor prisoners. In 1899 the Annual General Meeting of the Bar approved the report, and passed a resolution (framed in words borrowed from the report) that:

'it is in the interests of all prisoners (considering their interests alone) that they should be defended by counsel, and that the passing of the Criminal Evidence Act, 1898 renders it more desirable than before that they should be so defended'.

However, the resolution having been passed, the Bar Council took no steps to secure its implementation. Eventually the Dorset Sessions Bar gave a lead.

In 1902 they put into operation at their Sessions a free representation scheme based on the Scots system [166].

According to a letter published in The Times in April, 1903 [166], the scheme was a great success. 'Even in the absence of the assistance of solicitors', declared the writer,

'remarkable results were achieved; it is considered that at least five persons were acquitted who would otherwise have been convicted, in cases involving either indecent assault, housebreaking or uttering false coin. The length of sittings was not increased because in clear cases prisoners pleaded guilty on the advice of counsel, and relied upon an appeal for the mitigation of sentence'.

Unfortunately, when news of the scheme got abroad it was attacked by other members of the bar as improper and a breach of etiquette. The matter was referred by the Sessions Bar to the Attorney-General, and he recommended them to discontinue it which they did.

However, the Dorset Scheme had created a very favourable impression, and in 1903 a group of barrister M.P.s [167] introduced a Poor Prisoners' Defence Bill [168], providing for a national scheme of free legal representation for all prisoners committed for trial; any prisoner not having the resources to instruct counsel might apply to have solicitor and counsel allotted to him; the solicitor should be allotted from a list, kept in counties by the clerk of the peace and in boroughs by the town clerk, of solicitors who had given notice of their willingness to undertake poor prisoners' work without fee, and they, like any counsel instructed under the scheme, were to work without fee. The Bill received an enthusiastic reception in The Times and its correspondence columns, but it was attacked by Poland and by some of the judges. Poland complained that the scheme was unworkable, would fail for want of solicitors prepared to work without fee, and argued that it was anomalous that it was limited to proceedings on indictment [169]. There was also opposition amongst the London bar - it was declared unnecessary and undesirable by the Central Criminal Court Bar Mess and unworkable by the Bar Messes of Middlesex and the County of London Sessions [170].

Despite this opposition, the Bill was referred to a Select Committee. The Committee, in its Report [171], accepted the principle that a prisoner without means ought to be in no worse a position to establish his innocence than the

prisoner who was able to pay for legal assistance. It also acknowledged that, although it was the business of the judge to see that the prisoner's defence was fully developed, yet the judge was not in a position to do this as efficiently as counsel, because he had no opportunity of communicating with the prisoner and ascertaining the details of the defence. It stressed that the problem was particularly acute where, as at county Quarter Sessions, the judge was not legally qualified. But although it accepted the principle of free representation, the Committee recommended that the Bill be drastically remodelled in two respects. First, solicitors and counsel defending a poor prisoner under the Bill were to be paid out of funds provided by Parliament. Second, legal assistance should only be afforded to a prisoner where this appeared desirable, having regard to the nature of the defence set up by him in evidence given or statements made at the committal hearing.

The requirement that the prisoner should disclose his defence at committal was something which had been urged upon the Committee by the judges (in particular, Grantham J. in his evidence to it) [172], who ever since the coming into force of the 1898 Act, had been inveighing with regularity and ferocity, against the practice of prisoners 'reserving their defence' [173]. It was, they argued against the prisoner's interests and calculated to lead to sham defences.

All of this, of course, ignored the fact that, under Jervis' Act, a prisoner was at committal required to be cautioned against speaking. However, the judicial hostility to the reserved defence carried the Committee with it: an honest defence ought to be disclosed at the first opportunity, and a prisoner not disclosing his

defence at committal was not deserving of legal assistance paid for by the State.

The Bill, as amended received the royal assent on August 14, 1903 with a commencement date of January 1st, 1904. S. 2 provided for the making of rules to carry the Act into effect, and work upon the rules began in late 1903. It did not go smoothly. When the draft rules were produced they contained a rule intended to ensure that prisoners were left in no doubt that disclosure of defence was a precondition to legal aid. The rule in question (draft rule 3) [174] provided that examining magistrates might, after delivering to the prisoner the statutory caution under s. 18 of the 1848 Act, explain to him that they had power to certify that the case was one in which legal aid should be given at the public expense, if the nature of his defence, as disclosed in his statement or evidence, satisfied them that it was desirable to do so, and it appeared that he had not himself the necessary means. Both the Bar and the Law Society [175] protested strongly against the rule, arguing that it would practically compel the prisoner to make a statement committing himself to a line of defence, and would be contrary to the statutory caution. There was no answer to the point and the clause had to be dropped.

The reception the Act got in the higher courts when it came into force was very mixed. None of the judges who saw fit to comment on its provisions welcomed it as a long overdue reform [176]. At Middlesex Sessions, the Judge, Sir Ralph Littler Q.C., told the grand jury that the Act was useless and 'probably mischievous as well'. At Manchester Assizes Bigham J. painted the Act as being positively disadvantageous to prisoners - it robbed

them of a line of defence which in the past had served them well, namely

'I am a poor man and cannot get the assistance which a rich man can get. Therefore my case is not put before the jury as it ought to be be.'

From the Lord Chief Justice it received a favourable reception, but not because it conferred a boon on prisoners. To him the merit of the Act was that it compelled prisoners to disclose their defence 'The scheme and motive of (the) legislature' he declared (adding that this was the opinion of his brethren too) was

'to induce innocent people, who are unjustly charged and who have a true defence to disclose their defence at the earliest possible moment, and to induce them to abstain from the practice, which has worked so much harm in the past, of prisoners under all circumstances, whether innocent or guilty, reserving their defence.' [177]

The Justice of the Peace, when reporting this speech commented:-

'judges generally seem to think that the Act was passed to assist only innocent people unjustly charged'. [177]

Other judges contented themselves with indicating that they proposed to construe the Act restrictively. Clearly, attitudes had changed little since 1893.

## CHAPTER 6

### THE INDICTMENT

'Mr. Montagu Williams ... anticipating that a true bill might be found in the Empion case applied to the Recorder in that event to appoint Wednesday in the February session for ... the trial. Mr Williams said he made the application on the ground of the formidable dimensions of the indictment, which he said, amid some laughter, he understood had taken three learned gentlemen to draw and three other learned gentlemen to carry into court.'

The Times, January 12, 1875,  
Central Criminal Court report

#### (a) Finding the Indictment

Proceedings at the court of trial began with the finding of the bill of indictment by the grand jury.

The grand jury was a filter whose purpose was to weed out weak and baseless cases. Only a grand jury could find a bill of indictment, and a prosecutor seeking a bill had to lay his evidence before it for its scrutiny.

It consisted of not less than twelve nor more than twenty-three jurors and reached its decision by majority vote [1]. At Assizes the grand jurors were normally all county magistrates [2]. At the Old Bailey and Quarter Sessions, however, they were chosen from amongst the common jurors, with care taken to ensure that those selected were, by rateable value or description, of a better class than the ordinary common juryman [3].

At the start of the session for which they had been summoned, the grand jurors would be sworn [4] and the judge would then deliver his charge to



them, in which he would give them legal directions about any case likely to give difficulty. The witnesses in the various cases would then be sworn in batches in open court [5], and sent along to the grand jury room to wait their turn to be examined by the grand jury. The examination was conducted in private and in the accused's absence. If in a case the jury were satisfied that there was prima facie evidence of guilt, they would indorse the bill 'true bill' and it would be carried into court to be tried; if it did not so satisfy them they would indorse it 'no true bill' in which event the accused would, at the end of the session, be discharged by proclamation (which would usually be an end to the prosecution) [6].

In the first half of the century a complaint frequently levelled at London grand juries was that they regularly threw out clear cases, which had already passed the scrutiny of examining stipendiary magistrates [7]. In the 1820s and 1830s they threw out each year almost ten per cent of the bills sent before them [8]. Indeed, so bad was their reputation in this respect that it earned them the nickname 'The hope of London thieves' [9].

For this state of affairs, there were several reasons. First, London grand jurors, not being magistrates, had little legal knowledge and no experience of examining witnesses [10], and were thus poorly equipped for the task they had to perform. Also, they had to 'work in the dark'; they were not furnished with the depositions; all they had to work from was the bill and the names indorsed on its back [11] (this was in marked contrast to the practice in Ireland where grand juries worked from the depositions and never saw the witnesses) [12]; they thus had no idea what the witnesses were expected to say; the inevitable

result was that on occasions they would fail to get from witnesses evidence vital to the prosecution case. Another factor was tampering with witnesses. Of the cases which broke down at the grand jury stage, many did so because the prosecution witnesses were either kept away by the defence, or bribed to change or water down their evidence [13]. By changing his evidence a witness ran little risk. The fact that the grand jury hearing took place in private, with no record kept, before jurors without depositions, made perjury difficult to detect and impossible to prosecute [14]. Eventually, a partial solution was found, that of allowing a clerk to attend the grand jury, furnished with the depositions, to explain the case to them and to assist in the examination of witnesses. Already in use in the Queen's Bench in the 1830s, the procedure was in 1838 adopted at the Old Bailey. The result was a sharp drop in the number of bills thrown out [15].

Reform was not, however, enough to satisfy critics of the grand jury. They wanted to see it abolished - in London at least. To them the grand jury was wholly unnecessary; if a stipendiary magistrate had found a prima facie case, what need was there to have his decision reviewed by a jury of laymen? Nor was this all. There was the inconvenience to witnesses, and the expense to the public caused by grand jury hearings; even where it was known that the accused was going to plead guilty at trial, the prosecution witnesses still had to appear before the grand jury, whilst in contested cases the system meant their having to attend court twice; and for this dual attendance the public paid [16]. Others criticised the secrecy of grand jury proceedings; the public was not admitted and if a bill was thrown out no-one knew why [17]. Then there were the opportunities

the system offered to the vexatious and to blackmailers. Anyone could go straight to the grand jury and ask for a bill without troubling with a committal hearing and without any notice to the accused [18]; in such a case the first the accused would know of the matter would be on arrest after bill found [19]. Even worse a prosecutor, having obtained his bill, was under no obligation to bring it on for trial [20], a state of affairs which was an incentive to blackmail. In 1859 Parliament tried to stem the abuse with its Vexatious Indictments Act (see p. 25 above).

Some of the loudest demands for reform came from the grand jurors themselves. In the 1840s and 1850s grand juries at the Old Bailey and the Middlesex Sessions repeatedly made presentments 'as to their own inutility' [21]. Bills for the abolition of metropolitan grand juries were introduced in 1849, 1852 and 1857 [22]; all were lost through lack of Parliamentary time. Following his translation to the Lords, Thesiger, the promoter of the 1852 and 1857 Bills, introduced Bills there in 1860 and 1861 [23] but with no greater success. Opposition to the reform both in Commons and Lords centred around claims that the Bill was the thin end of the wedge (the first step to the abolition of all grand juries), and that it would mean the sweeping away of a valuable constitutional safeguard (for the future the decision as to whether a man should stand trial would in London rest with an official removable at the pleasure of the Crown) [24]. After the loss of the Bill of 1861 calls for abolition were still heard periodically [25], and indeed in 1892 a Bill [26] was actually introduced for the abolition of grand juries at Quarter Sessions; it was however lost. The Criminal Evidence Act, 1898 led to a short-lived controversy as to whether an accused

had a right to give evidence before the grand jury [27], but, with the number of bills thrown out running at less than 1% per annum [28], grand jury reform had ceased to be a burning issue.

**(b) Pleading rules**

The indictment which came back from the grand jury room would, even in a simple case, be a prolix document, often well nigh unintelligible to anyone but a lawyer. And within its pages might lurk an error or flaw which would win a prisoner an unmeritorious acquittal.

The law required indictments to be certain with both offender and offence described with accuracy and minute particularity; indeed, so complex were the rules of criminal pleading that it took Chitty, writing in 1816, over 130 pages to expound them [29]. And since the law did not permit amendment of indictments, the effect of the accused's being able to point to a defect was that the prosecution automatically failed.

Nor was it merely indictment defects which would bring a prosecution to a halt. A variance between the indictment and the evidence called to support it would have the same effect. To try and reduce the risk of variance to the minimum, it was usual for the pleader to include in an indictment a number of alternative counts all founded on the same transaction, hardly differing from each other except in small particulars, but intended to cover every possible combination of facts which the evidence might prove [30]; but this, of course, also served to add both to the length of the document and to the risk of formal errors creeping in.

Where there was an indictment defect or a variance, the accused would normally take the point after verdict by motion in arrest of judgment [31]. It was open to him to raise the objection to the indictment on arraignment (by plea of abatement or demurrer), but there were grave disadvantages in so doing. First, in misdemeanour, if a plea in abatement [32] or demurrer [33] was determined against the accused, he would not normally be allowed to plead over [34]. Second, if the plea succeeded it would not result (as would a successful motion in arrest of judgment) in his discharge, but would merely delay the proceedings for a short time:- the indictment would be quashed and a fresh bill sought from the grand jury, with the accused remanded in custody in the interim [35] (in theory a fresh bill could also be preferred against an accused who was discharged upon motion in arrest, but it was not usual for this to happen) [36].

For an example of how minor indictment defects and variances could win a prisoner an unmeritorious acquittal one need look no further than Sheen's case [37]. In 1827 Sheen killed his child by deliberately cutting its throat in its mother's presence, and was indicted for murder. In the indictment the name of the child was given as 'Charles William Beadle'. At the trial the only evidence adduced as to the child's name was to the effect that he was always called 'William' or 'Billy', in the light of which the judge directed an acquittal on the grounds of variance. A fresh indictment was at once preferred again charging the accused with murder of the child, but this time containing no less than thirteen counts, varying the name and description of the child in every conceivable combination. On arraignment the accused pleaded autrefois acquit, averring in his

plea that the child mentioned in both indictments was the same, and that he was as well known by the name of Charles William Beadle as by any of the names and descriptions in the new indictment, and the plea being supported by evidence the jury were directed to bring in a verdict of autrefois acquit. And Sheen's was not an isolated case: a perusal of the nisi prius reports of the time throws up many other examples - a prisoner acquitted of murder because the indictment misstated the cause of death [38], of arson because the indictment omitted the word unlawfully [39], of burglary because the ownership of the premises burgled was laid in the wrong person [40], of forgery because the indictment misdescribed the forged document [41], or failed to follow its wording exactly [42].

However, it is important not to overstate the problem. In the main, it was only in cases where the prisoner had counsel that indictment points were taken [43], and the percentage of prisoners who had counsel was throughout the first half of the century small (although it must be conceded that where counsel did appear it was a matter which would invariably claim their attention, many of them displaying great ingenuity [44] in the points taken to such an extent that the consideration of such points formed a substantial part of the work of the Twelve Judges).

The first attempt at reform came in 1826. By his Criminal Law Act of that year, Peel made two small changes in the law [45]. First, the Act set out a list (and unfortunately for the cause of reform only a short list) of formal defects which were not to be a ground of arrest of judgment or proceedings in error [46] (the effect was that where an indictment contained one of the specified defects the objection had to be taken by demurrer

or not at all, and if taken by demurrer would only delay and not defeat the prosecution). Second, it gave the court power to amend the indictment where, upon a plea of abatement, it was shown that the name or addition (i.e. rank, occupation, residence) of the accused was mis-stated [47].

In 1828 came another small reform, the 9 Geo. IV, c. 15 empowering the court in cases of misdemeanour to amend the indictment where there was a variance between the indictment and a written document or record produced in evidence - a power which was extended in 1848 to cases of felony tried at sessions of Oyer and Terminer and Gaol Delivery [48], and in 1849 to cases of felony tried at Quarter Sessions [49].

Useful as these reforms were they only scratched the surface of the problem, and by the 1840s there were calls for root and branch reform. The acquittal in 1841 of Lord Cardigan of attempted murder by reason of the misnomer of his victim in the indictment brought the problem into the public eye [50], and the following year saw a Times leader [51] calling for legislation on the subject during the coming Parliamentary session. In 1844-5 the subject was considered by the Criminal Law Commissioners. Their Eighth Report [52] made clear the need for reform but was guarded as to the form it should take. Not so Greaves in his answer to a questionnaire from them. The whole system of criminal pleading, he argued, needed to be remodelled:- indictments should be framed in the simplest and plainest form so as to be intelligible to anyone of average intelligence with the courts given power in cases of defect or variance to order amendment [53].

For a time it looked as though the campaign for reform would come to nothing but eventually in 1851 reform did come in the shape of Lord Campbell's Criminal Procedure Act. As regards indictment defects, this declared first that the defects listed in the 1826 Act should not invalidate an indictment [54], and second that all formal objections to the indictment must be taken before the jury was sworn and not afterwards, the court to have power upon such objection to order the indictment to be amended [55]. In cases of variance it gave the court the same power to amend as possessed by a judge at nisi prius [56] (that is power to amend in the case of any variance not material to the merits of the case, which did not prejudice the accused in his defence) [57]. It also simplified the forms of indictment in the case of certain crimes (in particular homicide and those involving criminality in relation to documents) [58]. In its objective of seeking to prevent acquittals based on unmeritorious pleading points the Act was largely (although not completely) [59] successful; certainly, there was following the Act a marked reduction in the number of indictment points reserved and taken upon writ of error. What it did not, however, tackle was the problem of the prolixity of indictments (itself a by-product of the rules as to certainty and variance). An attempt was made to address this problem along the lines suggested by Greaves in the Criminal Code Bills of 1878 to 1883, but it was not until 1915 that the nettle was in fact grasped [60].



### (c) Arraignment

The grand jury having returned a true bill, the accused was then arraigned, and in 1800 there were aspects of the law as to arraignment and plea which were anything but favourable to him.

Mention has been made already of the law's refusal to allow the accused to plead over in misdemeanour. Even more harsh was its treatment of those who refused to plead. If when called on to plead a prisoner made no answer, a jury would immediately be empanelled to try whether he was mute of malice or by visitation of God [61]. If the jury found him mute of malice, or, if on arraignment he had expressly declined to plead or answer directly (which conduct was taken as dispensing with the need for a jury's verdict on the question), or if, having pleaded, he refused to put himself on his country, his contumacy was treated as equivalent to a conviction, and the court would proceed forthwith to sentence [62]. This had always been the law in treason, petty larceny and misdemeanour, and when the peine forte et dure was abolished in 1772 the rule had been applied to felony as well [63]. Eventually, in 1827 the law was reformed, Peel's Criminal Law Act providing that henceforth an accused who, on arraignment, pleaded not guilty was deemed thereby to put himself on his country, and that where a prisoner, on arraignment, was mute of malice or refused to answer directly, the court should have power to direct that a plea of not guilty be entered [64].

Another problem and one at least as common in practice as contumacy was that of the prisoner who had (or might have) a defence in law, but who, despite the judge's (and his counsel's) entreaties

insisted on pleading guilty, conceiving that to plead not guilty would be to add falsehood to crime. In 1860 Lord Brougham in an attempt to deal with this difficulty, introduced a Bill [65] into the Lords which proposed that the question put on arraignment be altered from 'Are you guilty or not guilty?' to 'Do you wish to be tried or do you plead guilty?' This sensible small reform, although having the support of the Lord Chancellor and of many outside the House (not least prison chaplains) [66], however, failed to pass into law.

## CHAPTER 7

### ATTACKING THE PROSECUTION CASE

'The self-defending prisoner unless he is an old hand usually does not cross-examine at all, or attempts to put his cross-examination into controversial assertions for which he gets pulled up. What questions he does ask result in emphasising the case against him.'

A.M. Sullivan, *The Last Serjeant*, p. 124.

The accused having entered a not guilty plea and been given in charge to a jury, the prosecution would begin to call its evidence.

What witnesses the prosecution called was a matter for its discretion. During the first half of the century there was a tendency for judges to react to the refusal of the prosecution to call a witness, whose name appeared on the back of the indictment, by either calling the witness themselves [1] or insisting that the Crown tender him for cross-examination [2]. After 1860, however, this practice was abandoned, the only obligation now cast upon the Crown, in respect of witnesses it chose not to call, being that of having them at court in case the defence wished to call them [3] (a rule change which, in an age when the calling of evidence by the defence gave the Crown the reply, had major implications for trial tactics).

The defence had the right to insist that those witnesses the Crown did call remained out of court until called [4], and where the prisoner was represented the right was invariably insisted upon.

To undermine and discredit the evidence of prosecution witnesses, the accused had the tool of

cross-examination. However, at this date its effectiveness as a defence weapon was limited by two factors - the denial of legal representation to poor prisoners, and legal rules placing curbs upon cross-examination.

**(a) Lack of legal representation**

Attempts by unrepresented prisoners to cross-examine were, for the most part, pitifully ineffective [5]. Sometimes the judge would make the task even harder by insisting that all questions be put through him. In trial reports, one occasionally finds an example of effective cross-examination by an undefended prisoner, but few prisoners displayed such skill, and those who did were apt to be regarded with suspicion [6].

**(b) Curbs on cross-examination**

**(i) Leading questions**

As for legal curbs, the propriety of defence counsel putting leading questions in cross-examination was, at the start of the century, regarded by some judges as doubtful [7], and the objection was still being taken (albeit unsuccessfully) as late as 1836 [8].

**(ii) Cross-examination of witnesses as to their pasts**

More important were the obstacles to the cross-examination of witnesses as to their discreditable pasts. Of these the most obvious was the rule which rendered a person, who had been convicted of (and received judgment for) treason, felony or crimen falsi [9], incompetent to testify [10]. (after 1828 competency was restored, save in

crimen falsi, once the convict had served his sentence) [11]. Any prisoner wishing to raise such a conviction against a witness had to produce a copy of the record of the conviction or judgment [12], whereupon unless a pardon was produced the witness would be held incompetent. If he failed to produce a copy of the record, not only would the witness be permitted to testify, but the prisoner would be debarred from cross-examining as to the conviction [13].

Then there was the privilege against self-incrimination which in 1800 had a wider scope than it does today, entitling a witness to decline to answer, not only on the ground of incrimination of crime, but also where the answer would expose him to a penalty, forfeiture or ecclesiastical censure [14]. In 1806 the judges advised the Lords that the privilege also excused a witness from answering a question which would expose him to an action for debt [15], but this ruling was reversed by statute the following year [16].

In the latter half of the century the scope of the privilege was gradually reined in by the judges. In particular, whilst acknowledging that a witness might lawfully refuse to answer a question where the answer would form a link in a chain of evidence leading to his conviction [17], they insisted that they, not the witness, were to be the judges of whether a question was incriminating, although controversy on the point lingered on until the 1880s [18].

By the 1850s Brougham was advocating that the law should go even further than this. In 1853 he included in his Law of Evidence and Procedure Amendment Bill [19] of that year a clause abolishing the privilege, and substituting for it a

rule forbidding incriminating answers being used against the witness in subsequent proceedings. But the clause met strong opposition. It was argued that such a change in the law would be a means of circumventing the prohibition upon the interrogation of prisoners, and might also result in a witness being compelled to disclose facts which would lead to the discovery of other evidence against him which could be used to procure his conviction. These arguments carried the day and the clause was lost [20].

The most troublesome aspect of the privilege was, however, that part of it which related to degrading questions. In a number of seventeenth and eighteenth century cases [21] it had been held that a witness was not obliged to answer a question which would degrade or disgrace him (e.g. whether he had been whipped for petty larceny), and the rule had been applied to attempts to question jurors upon the trial of a challenge for cause [22]. According to Peake [23], the rule fell into desuetude during the eighteenth century, only to re-emerge with a vengeance at the start of the nineteenth, with Lord Ellenborough ruling not merely that degrading questions need not be answered, but also that they should not be put [24]. He sought to justify his ruling on the ground of public policy - if such questions were allowed witnesses would not come forward. Others offered as a justification for the rule the grievance to a witness of having old disgraces dragged up after he had rehabilitated himself [25]. But as Best C.J. pointed out there was another side to the coin:- if such questions were not permitted juries would be prevented from learning facts about a witness's character which it was important for them to know, and innocent men might suffer [26]. So far as one can judge from contemporary trial

reports, the new rule was far from universally enforced. One finds, for instance, numerous examples from the first quarter of the century of accomplices called by the Crown being cross-examined unmercifully as to their character [27]. Reported cases also afford instances [28]. Indeed, it appears that Lord Ellenborough may himself have had a change of heart on the subject, for, in a case in 1818, he is reputed to have threatened to commit a witness for contempt unless he answered a question as to whether he had previously been imprisoned [29].

From the defendant's point of view the important thing, so far as such cross-examination was concerned, was not to be able to compel an answer, but to be able to put the question, a refusal to answer being generally treated by the jury as tantamount to an admission [30]. And his right to do so had by 1850 been clearly established. The last case in which a judge is reported as disallowing a question as degrading is Pitcher [30] in 1823, and a severe blow was dealt to the authority of such cases by Denman's Act of 1843, which restored to competency those convicted of *crimen falsi* or undergoing punishment for treason or felony. For it was scarcely to be believed that it was Parliament's intention that those, who had, by reason of their infamy, formerly been incompetent as witnesses should now be not merely competent but also protected from questioning about their infamy. And if such questions could be put to witnesses of this sort why not to all witnesses? Indeed, by the 1850s, serious doubt was being expressed as to whether there was in fact any privilege to refuse to answer degrading questions [31]. In 1853 Brougham in his Evidence Bill sought to put the matter beyond doubt by abolishing the privilege, but the clause did not

pass. In 1865 any lingering doubt as to the right to question witnesses as to previous convictions was removed by s.6 of the Criminal Procedure Act of that year [32], which provided that if a witness declined to answer such questions, the conviction might be proved against him (thereby extending to criminal cases a rule laid down for civil cases by the Common Law Procedure Act, 1854).

Although the 1865 edition of Russell on Crime had treated it as arguable that the privilege still survived, eight years later it was laid down by Cockburn L.C.J. in the clearest terms that there was no such privilege [33]. After this it was treated by text writers as defunct [34]. The only remnant which survived was in relation to jury challenges, albeit that the privilege had displayed a considerable capacity for survival in relation rape prosecutions [35].

By 1892 the want of such a privilege was being keenly felt. Two of the leading advocates of the day [36], who had the previous year, in two notorious cases, pushed cross-examination as to character to its limits, found themselves roundly condemned both in the leader and the correspondence columns of The Times [37]. Several letters suggested that English law adopt the plan of the Indian Evidence Act, 1872 (already adopted in English courts martial) and give the judge the power to disallow any question as to credit, unless of the opinion that the imputation conveyed by it would, if true, seriously affect the credibility of the witness [38]. Arguably, judges already had such power at common law [39], and, in any event, as The Times leader pointed out, leaving the matter to the discretion of the judge did not solve the problem: judges were always reluctant to intervene because they could never feel sure they had a



complete knowledge of the facts of the case; also, to disallow the question was to shut the stable door after the horse had bolted; by the time the question had been asked, the damage had been done; in the end one had to trust to the discretion of the advocate not to ask such questions. In the event the storm passed and nothing was done [40].

**(iii) The rule in The Queen's case**

Another serious fetter on cross-examination as to credit was that imposed by the judges in 1820 by their ruling in The Queen's case [41]. There they had advised the House of Lords that a party seeking to cross-examine a witness about a previous statement in writing by him, had to show the writing to him, and, if he acknowledged it as his, read it as part of his (the party's) evidence. In criminal cases, the document upon which defence counsel would most frequently seek to cross-examine would be the depositions, although prior to 1836 the refusal of the law to allow a prisoner either to inspect or have a copy of the depositions represented an obstacle (albeit not an insurmountable one) to such cross-examination. When prisoners were by the Prisoners' Counsel Act, 1836 given the right to a copy of the depositions, the judges took steps to ensure that cross-examination upon depositions should henceforth be in accordance with the rules laid down in The Queen's case. In 1837, before going out on circuit, they issued a Practice Direction [42]. A Crown witness was not to be asked about what he did or did not say in his deposition, unless it had first been read out, and, if it was so read out, it was to be treated as evidence for the prisoner. Such a rule was extremely disadvantageous to the defence: it deprived the cross-examiner of the advantage of surprise; it meant that the exposure

of the discrepancy between the witness's evidence and his deposition was bought at the price of having the whole deposition go in; and since the deposition, when read, became part of the defence case, such cross-examination automatically gave the Crown the right to the last word with the jury.

Before 1837 was out a determined attempt had been made to test the resolution of the Judges to enforce the Practice Direction. In Edwards [43], a murder case tried before Littledale and Coleridge JJ. (neither of whom had been present when the Practice Direction had been agreed to by the judges), defence counsel claimed that not all the judges were applying the new rules (Tindall C.J., it was said, had treated it as an open question whether the rules were binding). Further, it was argued that, under the new rules, a prisoner was in a worse position than he had been before the Act (which could scarcely have been the intention of Parliament); before the Act, it was claimed, defence counsel had commonly been allowed to cross-examine upon depositions without putting them in (Adolphus for the Crown conceded the existence of such a practice but claimed it was irregular), and that, moreover, the judges had frequently themselves undertaken such cross-examination. In the end the judges in Edwards cut short the debate by doing just that.

Edwards thus affirmed a possible avenue of escape from the rigours of the Practice Direction. However, few judges were, it seems prepared to allow it to be used. The report of Edwards' case refers to the Practice Direction being enforced by most judges, and gives a long list of judges who had enforced it [44]. Occasionally, one finds over the next twenty years examples of judges being prepared to follow Edwards, and themselves cross-

examine on the depositions, or allow counsel to be their mouthpiece, without putting them in, but the general attitude appears to have been that ascribed by the Common Law Commissioners to Patteson J. 'I will not break the law and you must not'. [46]

A device resorted to to evade the Practice Direction was that of placing the deposition in the witness's hand, asking him to read them to himself, and then asking him when he had done so whether he stood by his answer [47]. The justification offered for not putting the deposition in in such a case was that the witness was not being cross-examined on it, but simply being invited to refresh his memory. However, in 1843 the Fifteen Judges in a reserved case [48] declared it illegal. Their decision (probably because it was never reported) appears to have gone unnoticed, and certainly it did not put a stop to the practice. In Matthews, 1849 [49], Pollock C.B. described it as on the extreme verge of established rules of practice, and, in 1851, the matter was considered by the Court for Crown Cases Reserved in Ford, which repeated the 1843 ruling. Even after this, one finds occasional, albeit unsuccessful, attempts to revive the practice [51].

Yet another technique used to evade the Practice Direction was simply to ask the witness whether he had ever said what he was now saying before? Strictly, the question was improper. As Patteson J. stressed in Shellard (1840) 'have you always said so except before the magistrates?' was the correct way for the question to be put [52]. However, it was not unknown for judges to turn a blind eye, and allow such questions despite prosecution objections.

One limitation imposed by the judges on the Practice Direction was to hold that it did not apply to depositions irregularly obtained [53]. As to whether it applied to coroner's depositions was uncertain [54].

That the rule in The Queen's case operated as a powerful disincentive to cross-examining upon depositions is beyond doubt. Counsel, upon being told that he must put the deposition in, would commonly abandon this line of cross-examination [55].

In 1854 the rule was abolished as regards civil cases by the Common Law Procedure Act [56]. Henceforth a witness in a civil case could be cross-examined about previous written statements without putting such statements in, although, if it was sought to contradict him from the statement, then it had to go in. In 1856 Greaves in a Report on Criminal Procedure [57] recommended that criminal law be brought into line with civil law on this point, and in 1865 this was done by the Criminal Procedure Act, 1865 [58].

## CHAPTER 8

### GETTING ACROSS THE PRISONER'S STORY I THE COMMON LAW RULES

'Now where a man who is interested in the matter in question would also prove it, 'tis rather a cause for distrust than any just cause for belief ... and the law removes them from testimony to stop them sliding into perjury'

Gilbert, Evidence, p. 122.

#### (a) The Incompetency Rule

As well as seeking to undermine and discredit the prosecution evidence, an accused would also be concerned to get his own version of events before the jury. But here he faced a handicap. The law denied him the right either to give evidence himself or to call his wife to give evidence on his behalf.

Contemporary lawyers explained the disability in terms of a larger rule - the doctrine of incompetency through interest, which barred from the witness box, in civil and criminal suits alike, any person regarded as having an interest in the outcome of the proceedings. However, for all that text writers spoke of the incompetence of the accused and of the parties to a civil suit as being of a piece, and offered the same justification for the rule in both cases, namely that the evidence of an interested person would inevitably be biased and therefore worthless [1], the two cases were not in fact the same. In the first place, an accused was permitted to do something which the parties to a civil suit could not do, namely make an unsworn statement. Secondly, there was, so it was claimed, a far more compelling reason than interest, for

refusing to allow an accused to give evidence on his own behalf, namely the need to protect prisoners against self-incrimination [2]. To abolish the incompetency rule would, so the argument went, lead to the establishment in England of something akin to the disliked French form of procedure, with prisoners compelled by rigorous cross-examination (conducted, where there was no prosecuting counsel, by the judge) to convict themselves out of their own mouths [3]. The country had had experience of such a system in the days of Scroggs and Jeffreys [4], and after the Revolution had set its face against prisoners being subjected to such 'moral torture' [5].

Faced with the law's refusal to allow him to testify an accused had to resort to other means to get his story across.

#### **(i) Cross-examination**

One such means was cross-examination. By putting his case to the prosecution witnesses in cross-examination, an accused could not only make clear, at an early stage, what his answer was, but occasionally might even succeed in getting those witnesses to agree that the facts were indeed as he asserted. But cross-examination is a lawyer's tool, and, although in reports of nineteenth century trials one occasionally comes across undefended prisoners capable of cross-examining with real skill, effective cross-examination was beyond the majority of undefended prisoners. The common error of the undefended prisoner, when called on to cross-examine, was to make assertions instead of putting questions; this would frequently produce a rebuke from the bench after which the accused would generally lapse into silence [6]. Nor was this an area in which the

judge could do much to aid the prisoner. The judge could probe weaknesses, and inconsistencies in the prosecution evidence but he could not (save where the prisoner had given his account on arrest or at committal, or, where, during his attempts at cross-examination, he gave some clue as to his what his case was) put the prisoner's version to witnesses because he had no means of knowing what it was [7].

### **(ii) The pre-trial statement**

Another device was the pre-trial statement - a statement made either on his arrest to the arresting officer or before the committing magistrate. The Crown, although not obliged to lay such statements before a jury, would generally do so [8] and indeed many judges openly favoured this course [9]. One of the grounds, on which Patteson J. (in 1844) [10] exhorted police officers not to stop prisoners volunteering statements, was that such statements were often a means of demonstrating the innocence of the accused. But many prisoners made no such statements. Indeed, at committal hearings, such prisoners as had lawyers would, even in the 1800s, commonly reserve their defence [11], a practice which adverse judicial comment did little to discourage.

### **(iii) The unsworn statement**

The method of getting the prisoner's story before the jury, which approximated most closely to the giving of evidence, was the making of an unsworn statement.

However, the privilege of making such a statement was not accorded to all prisoners. Undefended prisoners, and defended prisoners charged with treason and (until 1836) felony

enjoyed the right, but a defended prisoner charged with misdemeanour did not.

In White (1811) [12] Lord Ellenborough sought to justify the rule in misdemeanour on the grounds of

'the confusion which would necessarily follow if a case were to be conducted at the same time both by counsel and by the party himself'.

Reports of misdemeanour trials in The Times [13] and the State Trials Reports [14] suggest that White was confirming an existing practice rather than laying down any new rule. However, the practice was certainly not one of any great antiquity. As recently as 1795 Rooke J., in the trial of Redhead Yorke for misdemeanour, had allowed the defendant and his counsel to share the task of examining and cross-examining witnesses, and at the end of the evidence had further given the defendant the option of addressing the jury in person or by his counsel. The rule laid down in White was reaffirmed by Abbott C.J. in 1824 in Perkins [16]:- 'If', said the Chief Justice,

'the party addresses the jury in person he must cross-examine the witnesses, for if counsel cross-examined and the party spoke great inconvenience would ensue'.

Abbott was, however, prepared to admit one qualification to the rule, namely that a defendant, who employed counsel merely to argue points of law and suggest questions to him for cross-examination, would not thereby lose his right to address the jury.

Ellenborough's argument about confusion was less than convincing. In felony trials it was, and



had been for many years, regular practice for counsel to cross-examine and the accused to address the jury, and noone appears to have found the practice productive of confusion there.

An undefended prisoner was called on to make his unsworn statement (or defence as it was commonly called) at the close of the prosecution case, as was the defended prisoner in felony. In treason, however, the prisoner, if defended (and prisoners in treason invariably had counsel), was called on for his defence after his counsel had addressed the jury and his witnesses had given evidence [17].

The law was remarkably indulgent to prisoners in respect of the content of unsworn statements. All manner of hearsay could be and was introduced [18]. Passages from newspapers and books could be read [19]. However, there were limits to judicial tolerance. In the early part of the century blasphemy cases were a recurrent problem in this respect. The accused would frequently seek to defend himself by quotations from religious texts. This would lead to an admonition from the bench that he should not try and justify one blasphemy by another, which would be followed by protests from the accused that the judge was preventing him from defending himself [20].

Another indulgence which the law extended was that the prisoner, instead of delivering his defence *ex tempore*, could, if he wished, put in a written defence, and either read it himself or have it read for him by an officer of the court.

A written defence offered in many ways the best method of getting across the prisoner's answer. Often such defences were the handiwork of

friends [22] or lawyers [23]. Indeed, in Newgate in the 1820s, there seems to have been a flourishing trade in written defences, a prisoner who could not afford to brief counsel using what money he had to pay for a defence to be written [24].

The written defence did, however, have its disadvantages, of which the gravest was that, being of necessity prepared in advance of the trial, by the time the prisoner was called on to deliver it it might well have been rendered wholly inapposite by the turn the evidence had taken. This disadvantage could, of course, be avoided if the defence was actually prepared as the case was going on, and this was sometimes done [25]. Bought defences were a particular source of danger to prisoners. They rarely assisted and could often do the prisoner dreadful harm. It was not unknown for a prisoner to hand in a paper to be used in his defence, only to discover, when it was read, that it was an admission of guilt, coupled with a plea in mitigation [26]. Some judges sought to protect prisoners handing in bought defences by insisting on reading the defence themselves, or having it read and explained to the prisoner before it was put in [27].

Those prisoners, who did not come into court armed with a written defence, generally made a poor show of explaining their case. Young children would often merely sob and say nothing [28]. And many adults fared no better. Illiterate, inarticulate, in awe of the court, terrified for their lives, without friends or advice, not knowing what to say they said nothing. In a case before the Reading special commission in 1831, of ten prisoners, jointly indicted for riot, only one, when called upon, offered a defence [29]; and

newspaper reports of trials show that this was by no means an uncommon phenomenon [30], even where the charge was capital. Those prisoners who did manage to get a few words out in their own defence rarely went beyond a bare denial ('I am as innocent as the child unborn' [31]; 'I know nothing of it' [32]), a few words of explanation ('I was intoxicated' [33]), or the offering of a stock defence (e.g. the pickpocket's claim 'I found the handkerchief under my feet, I picked it up got on the footpath and the policeman collared me' [34]). Yet others, making no attempt at defence, simply begged for mercy ('I hope you will be merciful, I have a wife and two children' [35]). Where the evidence was circumstantial or complicated, it was an exceptional prisoner who was able to deal with the points against him in an orderly and reasoned fashion. Most prisoners, if they attempted to speak at length, descended into rambling irrelevance [36]. At a trial in 1843 [37] the jury were so irritated by having to sit through the prisoners' speeches, that they asked the judge whether it was necessary for them to sit and give attention to matters entirely irrelevant such as the last two speeches. Even a man of education might find the task of making an effective address beyond him [38].

For all that most undefended prisoners, when addressing the jury, cut a poor figure and did their cases little good, a few were able to use the right effectively [39].

One way of making the statement of an undefended prisoner a more effective vehicle for getting across his defence would have been for the trial judge, at the end of the prosecution case, to call his attention to the principal points against him, and to invite him to deal with them one by

one. This was in fact the solution adopted in the Indian Code of Criminal Procedure Act 1861 [40] and there is evidence that it was also by the 1880s and 1890s being adopted unofficially at some Quarter Sessions [41]. In the 1800s one occasionally sees the technique used by examining magistrates [42], but in jury trials it was apparently unknown.

Where a prisoner was defended by counsel, it was often a nice question whether he should make an unsworn statement [43]. Where the charge was treason, there was much to be said against his doing so (most prisoners in practice did not), for, if he made a statement, he would make it after his counsel had addressed the jury, and the danger would be that he would end up merely doing, for a second time and less well, what his counsel had already done, thereby risking trying the jury's patience. Where the charge was felony the position was somewhat different. If the prisoner did not make a statement, the jury would hear no address from either him or his counsel (except in so far as his counsel had been able to address argument to them under the guise of a submission to the judge on law), and this was clearly a factor to be weighed in the balance. In some cases the decision was easy to make. Where the defence was insanity, the best way of convincing the jury that the prisoner was mad, could sometimes be to let him address them. And if the prisoner had an explanation or facts to offer, which could not be otherwise got before the jury, there was clearly no alternative but for him to offer a defence, and, in such a case, it was obviously prudent for the defence to be written and approved, if not drafted, by counsel. Where there was nothing to be gained by a defended prisoner making an unsworn statement, the sensible course was for him, when called upon, to 'leave it to his counsel'. But not all

prisoners were prepared to do what was sensible. Some, upon being called upon, proceeded to offer an ex tempore defence which left their counsel in despair. Nor was it unknown for a prisoner to hand in, to be read, a written defence which his counsel had not even seen still less approved [44]. In some of these cases, poor communication between counsel and client was no doubt to blame (a far from uncommon problem in an age where it was unusual for counsel to have conferences in criminal cases, and where many counsel were, in any event, instructed so late in the day as to render a conference impractical). In others, the explanation was pigheadedness, dissatisfaction at counsel's failure to bring out a point which the prisoner mistakenly believed vital to his defence, or fear that, if he said nothing, it would go badly for him with the jury. In capital cases, it was not unknown for defended prisoners to seek to make a second statement to the jury at the end of the judge's summing up, and such requests were usually indulged in favorem vitae [45].

The prisoner who succeeded in making an effective defence to the jury was, however, still not out of the wood. In the first place he might find prosecution witnesses being recalled so that matters raised by him in his defence could be put to them. In Carey (1803) [46] the prisoner, charged with the murder of his wife, handed in a written petition in which he alleged that the deceased had been afflicted by asthma and consumption for some years before her death. The judge had the deceased's father called to deal with the point. In the 1800s the course was one commonly adopted [47] at the Old Bailey, and we find it referred to as late as 1884 [48]. That such a course should be adopted where the prisoner had not put his case to the witnesses was understandable, but, on

occasions, one finds witnesses being recalled even where he had done so. Secondly, the prisoner's statement would be subject to comment from the judge. In the eighteenth century, it was the practice to tell juries that a statement by a prisoner, uncorroborated by evidence, was worthless [49]. This mode of direction was still being employed at the start of the nineteenth century. However, not all judges took such a strict line [50]. Thus in Power (1805) [51] one finds the Recorder of London commending the explanation given by the prisoner in her defence as 'probably true'. By 1840 however, judges, whilst warning juries that the prisoner's statement was made without the sanction of an oath and had not been tested by cross-examination, were, it seems, generally prepared to concede to such statements some evidential weight. In Beard (1837) [52] Coleridge J. said that a prisoner's statement would carry such weight with the jury as, all the circumstances considered, it was entitled to. In Dyer (1844) [53] Alderson B. said that if the prisoner's statement fitted in with the rest of the evidence it would be very material. By the 1880s the doctrine laid down in Beard and Dyer seems to have gained general acceptance [54]. How far juries in fact heeded such directions is hard to say. The point that the prisoner had failed to call witnesses to support what he said where, if he was speaking the truth, such witnesses did exist, was obviously a powerful (if often unfair) one, but where the prisoner was the only person who could prove the truth of what he was saying, it can hardly have struck an intelligent jury as fair to criticise him for failing to do what the law did not permit him to do. Third, if the account, which the prisoner gave in his unsworn statement, was one which he had not mentioned on his arrest, or before the examining magistrate, on this score also he

courted the risk of adverse judicial comment [55]. This risk was at its height in the closing years of the century.

**(iv) The calling of witnesses**

The fourth and final means of getting the prisoner's version before the jury was by the calling of witnesses to fact - persons who had witnessed the events giving rise to the charge, or who could otherwise (e.g. by giving evidence of alibi) demonstrate the prisoner's innocence.

In the matter of the calling of witnesses, the position of prisoners had during the seventeenth and eighteenth centuries been much improved. The common law rules, which denied a prisoner in a capital case process to compel the attendance of his witnesses and the right to have them sworn, had been swept away by statute [56], and by 1835 it was also settled law that, in a criminal case, there was no obligation to tender conduct money to a witness subpoenaed on behalf of a defendant [57].

However, for all these improvements in the law, poor prisoners often had the greatest difficulty in getting material defence witnesses to court. A prisoner, who was in custody and who could not afford an attorney, even if he was aware of his right to issue subpoenas (and many would not be), would rarely be able to serve them. Even if he could get a message to his witnesses, and they were anxious to help, their poverty would frequently prevent their doing so. Attending as a witness at Assizes or county Quarter Sessions would usually involve travel, and, if the accused came from a part of the county remote from the county town, attendance would for his witnesses involve a costly journey, or, if they could not afford to pay

for transport, many days walk [58]. Having made the journey to the court of trial, the witnesses would then have to wait until the case was called on. The wait could extend over many days, during which they would have to provide themselves with food and accommodation. At the Old Bailey in 1819 it was by no means uncommon for witnesses in Middlesex cases to have to hang about the court for ten to twelve days and upwards [59].

Sometimes, prisoners' attorneys would try and reduce the expense by warning witnesses for the day or time at which they believed the case was likely to come on. But this was a risky game. All cases in the calendar were liable to be called on at any time, and, if, when a prisoner's case was called on, his witnesses had not arrived, judges would rarely put the case back to wait for them to arrive [60]. The publishing of a daily list would have done much to alleviate the problem. This modest reform had been canvassed before a Royal Commission in 1816, but it was to be many years before it was implemented [61].

Where a prisoner had witness difficulties, it was, in theory, open to him to apply to the court to postpone his trial. However, such applications were sparingly granted. The application had to be supported by an affidavit, and this requirement would not be dispensed with simply because the prisoner was poor [62]. In the affidavit the prisoner would have to give the name of the witness, indicate the nature of the evidence he would give and detail the efforts he had made to procure his attendance [63]. Even where the prisoner had good grounds for postponement, he might still be refused if he made his application too late (it was by no means unknown for a prisoner not to raise the matter of his absent witnesses



until asked by the judge, at the close of the Crown case, if he had witnesses to call, and there were some judges who held that an application made after the jury had been sworn came too late) [64].

How reluctant judges were to grant postponements in the early part of the century is well demonstrated by the case of Nesbitt [65], tried for murder at Maidstone Assizes in July, 1820. When the case was called on, Nesbitt's counsel applied to have the case stood over to the next Assize, on the ground that the prisoner, on his arrest, had been deprived of money, in consequence of which he had been unable to secure the attendance of his witnesses. Counsel added that an affidavit in support of the application was being prepared and would be ready in a few hours. Wood B. rejected the application, out of hand, declaring that plenty of time had been allowed.

As well as granting postponements, judges would, on occasion, give cases a fixed day, but, predictably, the majority of such applications appear, in practice, to have been made and granted for the convenience of counsel rather than for the assistance of their clients and their clients' witnesses [66].

Then again, the witnesses had to be competent at law, and the doctrine of incompetency through interest debarred the accused from calling two important categories of potential witnesses - his wife, and co-prisoners standing trial with him and it was not unknown for unscrupulous prosecutors to silence potential witnesses for an accused by indicting them with him [67]. Also barred from the witness box were children, Quakers, and atheists.

To these fetters upon the calling of defence evidence, Bentham was for adding another. He urged that the prisoner's right to call alibi evidence be made conditional upon his having served before trial an alibi notice, giving details of the alibi and the witnesses to be called in support of it [68]. Alternatively, the court might, he suggested, be empowered to adjourn the trial to enable the prosecution to investigate a late disclosed alibi. In 1835 his idea was taken up briefly by a House of Lords' Select Committee [69], but in the end it was dropped, and it was not until 1967 that the alibi notice became part of English criminal procedure. In fact in the nineteenth century such a reform was hardly needed. Alibi evidence had a bad name [70], and was universally distrusted [71], nowhere more so than in Ireland where the word 'aliboy' was in everyday speech a synonym for false witness [72], and where a false alibi was classified as a Kerry or a Tipperary alibi [73], according to whether it bore upon the whereabouts of the accused or a Crown witness at the material time. Foster [74], writing in 1762, had warned that the only alibi deserving of credit was that disclosed at the first opportunity, and that an alibi raised only at trial, which the prosecution had had no opportunity to investigate, ought to be 'heard with uncommon caution', and the same point was regularly hammered home to nineteenth century juries [75].

**(b) The impact of the Prisoners' Counsel Act 1836 upon the right to make an unsworn statement**

When the Prisoners' Counsel Act 1836 gave prisoners charged with felony the right to have counsel address the jury on their behalf, the question immediately arose had the prisoner's right himself to address the jury survived the Act?

There was nothing in the wording of the Act to suggest that it had not. On the contrary, the wording of the Act followed that of the Treason statutes (viz. the prisoner was to have the right to make 'full defence' by counsel), and under the Treason Acts a prisoner represented by counsel was always permitted to make a statement.

The judges, however, chose to construe the Act restrictively. In Boucher, at Gloucester Assizes (1837) [76], Coleridge J., at the conclusion of counsel's speech in a felony case, refused an application by the prisoner to make a statement saying:

'Prisoner, your counsel has spoken for you I cannot hear both'.

This ruling was followed by Bosanquet J. the next year in Burrows [77]. He gave as his reason for so ruling that:

'the recent statute only meant to put prisoners in the same situation as they were before where defended by counsel in cases of misdemeanour, and in those cases certainly a defendant could not be allowed the privilege of two statements, one by himself another by counsel.'

He rejected the analogy of treason, saying that treason had always been considered an exception, the reason for the greater privilege being that the statute giving the right to counsel in treason said that the accused was to be permitted a full defence. This reasoning, of course, ignored the fact that a prisoner's unsworn statement was not simply an exercise in advocacy, a second speech, but a vital opportunity to give his explanation, and that if denied the right to make a statement where represented, this meant that he was in a

worse position in this respect than if undefended. Further, so far the treason point is concerned, Bosanquet seems to have overlooked the fact that the wording of the 1836 Act was, if anything, wider than that of the treason statutes (it empowered accused to make 'full answer and defence by counsel'). In Rider (July 1838) [78] Patteson J. offered another reason for the rule, namely that if a prisoner stated to a jury what he could not prove, the jury ought to dismiss what he said from their minds, and, in so far as what he said was comment upon the evidence, his counsel could do this much better than he could. This analysis ignored the fact that unrepresented prisoners had always traditionally been allowed to say whatever they wished in answer to the charge, and, in particular, had always been permitted to give explanations of the evidence against them as well as comments upon it, and that not all judges denied such explanations evidential weight. In Taylor (1859) [79] Byles J. offered a third objection to the practice, namely that it would:

'lead to prisoners being examined on their own behalf without the sanction of an oath and then a speech commenting on their statement.'

If a prisoner defended by counsel could not make a statement, could he get round the difficulty by giving his explanation through his counsel? In Beard [80], decided at the same Gloucester Assize as Boucher, Coleridge J. answered this question with an emphatic no. 'I cannot permit a prisoner's counsel', he said, 'to tell the jury anything which he is not in a position to prove'. The following year he repeated this ruling in Butcher [81]. The ruling was, in fact, in line with that which had been given in a clutch of civil cases in the early 1830s [82].

Not all judges, however, were willing to construe the new Act as excluding the prisoner's right to make an unsworn statement. In March 1838, at Oxford Assizes, in a case called Malings [83] defence counsel was, in his speech to the jury, bemoaning the fact that his client could not make his own defence, when the trial judge, Alderson B, interrupted him saying:

'I see no objection in this case to his doing so. I think it is right that a person should have an opportunity of stating such facts as he may think material ... besides it is often the genuine defence of the party and not a mere imaginary case invented by the ingenuity of counsel.'

Later that same day, Gurney B., sitting in the adjoining court, was induced to follow the same course in the case of Walkling [84], but it is clear that he was influenced principally by considerations of judicial comity, and he was at pains to stress that Malings was a very peculiar case, and that he did not wish his (Gurney's) ruling to be drawn into a precedent. In 1884 [85], Serjeant Ballantine was to claim in a letter to The Times that Alderson B. later 'recalled' the decision in Malings. Whether this is right or not, there seems little justification for Gurney's comment that it was a very peculiar case (it was a charge of wounding with intent where the prisoner had made a statement to the magistrates in the same terms as his unsworn statement to the jury). If counsel in Burrows was correct, Alderson had, prior to Malings, given a similar ruling on the Northern Circuit, and six years after Malings we find him declaring in Dyer (1844):

'I would never prevent a prisoner from making a statement though he has counsel ... If it were otherwise the most monstrous injustice might result to prisoners.'

Another judge who was for allowing a defended prisoner to make an unsworn statement was Denman L.C.J., who is cited by counsel in Burrows as having recently ruled to that effect in a case on the Western Circuit.

In Williams [86] in 1846 Rolfe B., after having Malings cited to him, said there was good sense in the decision and decided to follow it.

Cases like Malings, Dyer, and Williams were, however, against the trend, and by 1850 the practice, followed it seems by almost all judges of the superior courts, was to allow a prisoner to make a statement in a felony case only if unrepresented. This was certainly what was said in 1884 in the course of the correspondence in The Times generated by the O'Donnell case. And there is confirmation for the claim from a number of sources. First, the Old Bailey Sessions Papers - those for 1846 show only one case, out of all the hundreds of felony trials held at the Old Bailey in that year, where a prisoner represented by counsel made an unsworn statement. Second, there is the reaction of Rolfe B. in Williams, when first confronted by counsel's application that his client should be allowed to make an unsworn statement:

'I never heard of such a thing. It is contrary to all the rules of practice'.

Third, there is the observation of prosecuting counsel in Manzano (1860) [87] that defence counsel's application that the prisoner be allowed to make a statement was unusual. Indeed, it was the post-1836 refusal of judges to allow defended prisoners to make unsworn statements that gave rise to the standard defence ploy of complaining to the jury that the prisoner's mouth was closed (what a

Times leader [88] was to refer to as 'the stock argument about the marvels the prisoner could prove if his mouth were not shut').

It may be that at Quarter Sessions a laxer rule prevailed than at Assizes and the Old Bailey (certainly a correspondent to The Times in 1884 was for so saying) [89], and, even at the Old Bailey and before Assize judges, one gets occasional deviations from normal practice. In Taylor (1859) Byles J. allowed a prisoner the option of having his counsel make a speech to the jury or making a statement himself. In Manzano (1860) (a murder case), Martin B. allowed the prisoner to make a statement of how he came into possession of certain clothes belonging to deceased, because of the importance of the case, although he added that it was a bad practice requiring, as it did, the judge to make comments on the prisoner's statement (perhaps adverse to him), insamuch as the counsel for the prosecution had no right of reply. In 1871, at Hampshire Assizes, Pigott B. in the case of Stephens [90], allowed two prisoners represented by counsel to make statements, saying:

'I think no harm or injustice is ever done by permitting prisoners to tell their own story. It is often a truthful statement'.

In the early 1860s two unsuccessful applications that prisoners be allowed to make unsworn statements made at the Old Bailey were thought worth reporting by the editors of the Old Bailey Sessions Papers [91].

Where the judge refused to allow a statement by the prisoner, and there was no pre-trial statement, defence counsel, if he could not get the prisoner's version out by cross-examination, or by

the calling of witnesses, had only one course open to him - to put his client's account to the jury as a hypothesis [92].



## CHAPTER 9

### GETTING THE PRISONER'S STORY ACROSS II THE FIRST REFORMS

'If they threw on the accused the onus of proving that he had used all means of making a ship seaworthy, they must in justice allow him to be called as a witness'.

The Attorney-General (1876) P.D. XXVIII, 900.

#### (a) First attacks upon the incompetency rule in criminal cases

If 1836 saw the prisoner's right to make an unsworn statement curtailed, the 1820s and 1830s saw a major assault launched on the doctrine of incompetence through interest. The doctrine had been savaged by Bentham [1], and satirised by Dickens [2], and gradually it began to buckle.

In 1829 the absurd rule which prohibited the victim of a forgery from giving evidence to prove the falsity of the forged document was abolished [3].

In 1843 Lord Denman's Act abolished the rule save in the case of the parties individually named on the record and their spouses [4].

Next to fall was the rule rendering the parties to a civil suit incompetent. This was abolished, as regards County Courts by the Act of 1846 [5] which created them, and as regards the superior courts by Brougham's Law of Evidence Amendment Act of 1851. The reform was bitterly opposed by the Lord Chancellor and viewed with great mistrust by the profession [6].

The bar upon the testimony of the spouses of the parties, which the 1851 Act had left untouched, survived only two years longer, being abolished by Brougham's Evidence Further Amendment Act, 1853.

Following the reform of the incompetency rule in respect of parties to civil actions and their spouses, it was perhaps inevitable that there would be an attempt to abolish the rule in criminal cases. That attempt came in 1858 with Brougham's Law of Evidence Further Amendment Bill [7], which proposed that the accused and his spouse should be competent but not compellable in all trials on indictment. The Bill got no further than a first reading.

It was reintroduced the following year [8]. On the motion for leave, it was strenuously opposed by the Lord Chancellor and other Law Lords. It would, they argued, entirely alter the administration of justice. Like the 1858 Bill it got no further than a first reading [9].

In 1860 Brougham tried again with a Bill of more modest scope - it was only to apply to trials for misdemeanour. It was greeted with a marked lack of enthusiasm, although Lord Campbell was prepared to concede a proposal limited to cases of assault and libel might have value. Like its predecessors it was dropped after its first reading [10].

During the rest of the decade, no serious attempt at legislative reform of the criminal rule was made.

In 1863, a private member called Whalley introduced a Petty Offences Bill [11], which sought to make the accused competent in his own defence in

all summary proceedings. His object, he declared, was to counter police perjury in magistrates' courts. The Bill received no support and was withdrawn at the second reading stage [12].

The following year it was reintroduced by Whalley and M'Mahon [13]. The Solicitor-General spoke strongly against it, arguing that it would expose accused persons to cross-examination, and to the risk of a failure to testify being taken as evidence of guilt. At this it was withdrawn [14].

In 1865 Bills to make the accused a competent witness in all criminal proceedings were introduced by M'Mahon and Scully, and by Fitzroy Kelly [15]. On the second reading debate on Kelly's Bill the Attorney-General, whilst speaking out strongly against reform, gave an assurance that the Government would try to give an opportunity for full discussion of the question. Upon that assurance M'Mahon agreed to the second reading of his own Bill being deferred [16]. Such opportunity was, however, never afforded and both Bills were lost.

If legislative reform was still many years off, several writers on criminal law and evidence did during the 1860s add their voices to the demand for reform. In 1860 Pitt Taylor, the author of what was by many regarded as the leading textbook on evidence (and the draftsman of the 1851 Act), pointed to the recent sensational case of the Reverend Hatch (who having been convicted of indecent assault retaliated by prosecuting his accuser to conviction for perjury) as clear proof of the need for reform [17]. Two years later, J.F. Stephen published his *General View of the Criminal Law*, in which he restated and developed

before a wider public, arguments he had first put forward in a lecture in 1857 [18].

But although the calls for change excited no general enthusiasm, it was difficult to deny that the existing rule was open to severe criticism.

First, there was the charge of inconsistency. If the law excluded the accused from the witness box on the ground of interest, why, it might be asked, was the prosecutor, who was frequently by payment of the expenses and otherwise as much interested as the party accused, not similarly incompetent? The answer that the prosecutor was the Crown not the complainant hardly convinced. Also, if interest was a ground of incompetency how came it that the law admitted accomplices as witnesses? Again, if the accused was incompetent he ought logically to be incompetent for all purposes, and yet he was not (on a motion for a criminal information the court would receive affidavit evidence from him; and there were many interlocutory applications in proceedings on indictment where the law would act upon the affidavit of an accused).

Then there were the practical difficulties and anomalies to which the rule gave rise.

In felony and misdemeanour, the effect of the rule, when combined with the prohibition upon an accused who had counsel making an unsworn statement, was literally to close the mouth of such accused, and leave him to rely upon indirect expedients such as pre-trial statements as a means of getting his version across.

There was the ridiculous state of affairs the rule could lead to in cases of affray or factional

violence, nowhere better described than by the Irish Q.C., O 'Hagan:-

'A fight took place between two factions ... coming home from a fair. Informations and cross-informations were sworn with the very object of including among the accused such individuals as could give evidence for the defence. The 'Ryans' ... were first put upon their trial. Their opponents, 'the Carrolls', came to the table one after another and told one side of the story. Where their evidence closed, the case closed. The jury retired to consider their verdict and then what occurred? The Carrolls all walked into the dock to take their trials before a new jury, and the Ryans walked out of it for a time in order to be examined as witnesses. The new jury heard a new case. Each jury was forced to decide upon one-sided evidence" [19].

And a similar turning of the tables occurred where a person, convicted on the evidence of a single witness, prosecuted that witness for perjury. On such a prosecution, it would be the alleged perjurer whose mouth was closed, and in the event that the prosecution was successful, (and the device was, as in Hatch's case, sometimes used as an indirect means of appealing a jury's verdict) one would have conflicting verdicts, brought in by different juries, in relation to the same subject matter, neither of which would have heard the principal witness in the case tried by the other.

The exclusion of the prisoner's spouse from the witness box, produced its share of absurdities. Of these none was more striking or notorious than the rule in bigamy prosecutions that the first wife was incompetent and the second wife competent [20]. Added to this was the problem that it was uncertain whether a reputed wife was caught by the bar [21].

However, if Parliament was showing no enthusiasm to reform the rule, some inroads were being made on it in the courts.

In the first place, the problem posed by cross-indictments for assault was occasionally dealt with by trying them together [22].

Second, by the 1850s, it had come to be settled law that a prisoner who had pleaded guilty, or against whom the Crown had offered no evidence or entered a nolle prosequi, was competent to give evidence for an accused jointly indicted with him [23]. And there were some judges who were prepared to push this principle even further. In 1845, at Maidstone Assizes, Alderson B. allowed a prisoner to call his co-accused notwithstanding that the latter was herself contesting guilt [24]. In 1870 Mellor J., without giving reasons, took the same course in a trial at Worcester Assizes [25]. So too did a number of other Assize judges including Piggott B., Lush J. and the Irish judge, Ball J. [26]

It was inevitable that, sooner or later, the point would be tested, and the occasion came in Payne in 1872 [27], when Keating J. reserved the question. The Court for Crown Cases Reserved was emphatic that the practice was wrong. If a prisoner was allowed to be called for a fellow prisoner he would be subject to cross-examination whereby lay great dangers; he might for example be cross-examined as to his past life; alternatively he might be asked questions which he would find himself obliged to decline to answer on the grounds of self-incrimination; and in either case the result would be seriously to injure his case.

Another stratagem one finds being used to render prisoners, both contesting guilt, competent for each other was application for separate trials. Around the mid-century, such applications seem to have been but rarely granted. In Barber (1844) [28] an application, supported by an affidavit from Barber's attorney to the effect that it was intended such separate trial to call the other prisoners for the defence, and that it was believed that their evidence would lead to his acquittal was rejected out of hand by Gurney B. Separate trials he said, were often desired by prisoners, but the application was never granted save where, as in the recent case of Sealey, the Crown consented to severance. It may be that as the century wore on judicial practice on the point grew more lenient. In the 1890s it was being claimed in several quarters that applications for separate trials were seldom refused [29]. If that be right, the change appears to have been a very recent one, for reports from the 1870s and 1880s indicate a continuing judicial reluctance to grant separate trials [30]. The only class of case in which, throughout the century, judges would always grant a separate trial was that in which conspiracy had been charged against defendants, the evidence against whom disclosed substantive offences in respect of which they would, if charged therewith, have had to have been tried separately [31].

Yet another device which appears sometimes to have been employed, to enable prisoners jointly indicted to testify for each other, was that of severing their challenges. The prisoners would exercise their rights of challenge separately and to such extent as to create the risk of exhausting the panel of jurors present at court. Where such a course was taken by prisoners, it was open to the court (in order to prevent the panel being

exhausted), so long as sufficient jurors remained to make up a jury, to direct a separate trial of one or more of the prisoners; and, indeed, the Crown could apply to the court for such a direction [32]. The threat of severing challenges was, where the number of accused was large, a very powerful one, for, exhaustion of the panel would involve delay whilst the sheriff summoned a fresh panel [33]. One sees the device being employed successfully in Chartist trials in the 1840s [34]. In *Sealey* in 1844 [35], severance of challenges was the means by which defence counsel were proposing to try and achieve separate trials, until the consent of the Crown to severance of the indictment rendered such a proceeding unnecessary. In *Fisher* [36] in 1848 Platt B., referring expressly to *Sealey*, said it was an ill practice for a judge to allow severance of challenges, but, ill practice or not, it was still sufficiently prevalent for Greaves to have devoted several paragraphs to it in his Report on Criminal Procedure in 1856 [37].

The practice of admitting a prisoner (who had been acquitted, pleaded guilty, had his trial severed, or was otherwise permitted to give evidence) to testify for a co-prisoner gave rise to some novel problems. Could such a prisoner, called at the trial of his co-prisoners A and B, who gave evidence for A which incriminated B, be cross-examined by B? In *Woods & May* (1853) [38] one of the City judges had ruled that he could, and this was also the decision of the Court for Crown Cases Reserved two years later when the point was tested before them in *Burdett* [39]. Jervis L.C.J., however, left open the question whether there would be a right to cross-examine where a prisoner called a witness, who did not criminate his fellow prisoner. In that situation, he said, the latter



would have only the right to examine the witness as his own witness.

Attempts to outflank the prohibition upon the wife of a prisoner giving evidence for his co-accused at their joint trial, go back further in time. The point had come before the Twelve Judges as early as 1826 in Smith [40], and they had upheld the trial judge's ruling that a prisoner could not call in proof of an alibi the wife of a co-prisoner. However, Smith was a case where the wife's evidence was arguably capable of benefiting her husband as well as the prisoner seeking to call her. What if calling the wife on behalf of a co-prisoner would not in any way benefit her husband? Did the principle in Smith's case apply then? Phillips, writing in 1838 [41] argued that it might well not, and that was in fact the view taken (albeit with considerable hesitation) by Wightman J. in Bartlett & Anderson (1844) [42]. This aberrant authority was however, eventually overruled in 1872 by the Court for Crown Cases Reserved [43], which held that the wife of a prisoner jointly indicted stood in the same position, as regards the admissibility of her evidence, as her husband.

#### **(b) United States and Colonial reform**

Outside England matters were, in the 1860s, moving at an altogether faster pace. In 1864 the State of Maine passed a statute making the accused and his spouse competent but not compellable witnesses [44]. Similar legislation followed in other States, and by 1878 no fewer than twenty-eight American States had passed statutes permitting prisoners and their spouses to testify [45]. Nor was it only in the United States that the reform was being brought in. Three years

before the Maine reform, a statute was passed giving judges in British India power to examine the accused, and to put to him such questions as they thought necessary (the provision did not however apply in the Presidency Towns of Calcutta, Madras, and Bombay, where English law continued to apply) [46]. In 1872 the Indian Evidence Act (drafted by Stephen) was passed, one of the provisions of which was s.120 which made the spouse of an accused competent as a witness for the defence.

### **(c) Piecemeal reform in England**

Although the Bill of 1865 seeking to effect major reform was lost, some modest legislative inroads were made in England in the 1860s on the bar on prisoners' evidence.

The first comprised a clutch of statutes designed to remove all doubt that the Acts of 1851 and 1853 applied to proceedings on the Revenue side of the Exchequer [47], which were arguably criminal proceedings.

Next, in 1867, came the Master & Servant Act [48], which provided, as part of its framework for the enforcement of contracts of employment, certain penal provisions, breach of which was punishable summarily by fine and imprisonment, and gave persons accused of such breaches, and their spouses, the right to give evidence in their own defence. This was but a small breach in the general rule, the offences being summary only and essentially civil in character. Nevertheless, it marked the beginning of a trend of creating ad hoc exceptions to the general rule, which by the 1890s had succeeded in reducing the law to a state which cried out for reform.

The next such statute followed four years later in the shape of the Merchant Shipping Act 1871 [49], a temporary Act but one which could scarcely be dismissed as an unimportant breach.

The Act:

- (i) made it an indictable misdemeanour punishable by two years' imprisonment to send an unseaworthy ship to sea;
- (ii) cast upon a person charged with such offence the burden of showing that he used all reasonable means to ensure her being sent to sea in a seaworthy state, or that her going to sea under such circumstances was reasonable and justifiable;  
and
- (iii) made such person a competent witness in his own defence.

The exception was later to be justified, in Parliamentary debates [50], on the ground that, where the law cast a burden of proof upon an accused, common justice required that he be allowed to give evidence in order to discharge such burden. However, the argument was less convincing than it sounded. It was not difficult to instance cases, both at common law and under statute, where the accused bore a burden of proof but with no right to give evidence.

The 1871 Act marked the opening of the floodgates. In the next seven years no less than ten more Acts were passed, giving persons charged with offences created thereby, the right to give evidence in their own defence. In the case of six of these Acts (the Coal Mines Regulation Act, 1872 [51], Metalliferous Mines Regulation Act 1872 [52], the Sale of Food & Drugs Act 1875 [53] the Merchant Shipping Acts, 1875 and 1876 [54] (which placed on a permanent footing the provisions as to

unseaworthy ships contained in the 1871 Act) and the Threshing Machines Act, 1878) [55] the justification could be, and was, offered that the Act cast a burden of proof on the accused. Another of the Acts, the Conspiracy & Protection of Property Act, 1875 [56], could be regarded as merely extending the exception created by the Master & Servant Act, 1867, and, yet another, the Evidence Act, 1877 [57], could be claimed to deal with proceedings which, though criminal in form, were essentially civil in character. But for the exception created by the remaining two Acts, the Licensing Act, 1872 [58] and the Contagious Diseases (Animals) Act, 1878 [59] no such apology could be offered.

These ten Acts were conspicuous for their failure to adopt any common form of wording. Seven of them were silent as to cross-examination, and none faced up to the issue of whether the failure of an accused to give evidence might be used against him, as by being made the subject of comment.

#### **(d) Russell Gurney's Act**

In the same year as Parliament passed the Master & Servant Act, it also attempted to tackle the problem of the prisoner prevented from calling witnesses by poverty. The Criminal Law Act of 1867 required examining magistrates to ask the prisoner whether he wished to call witnesses. If he elected to do so, depositions were to be taken from such witnesses, and, if they gave evidence material to establish his innocence (and not going simply to character), they were to be bound over to attend the court of trial, where the judge would have power to order their expenses paid out of public funds. The principle of the Act was not in

fact new. A similar scheme was being operated by magistrates in the West Riding as early as 1851 [60].

Despite the hopes of its promoter, Russell Gurney, the Act was to prove of only limited value to prisoners. Ten years on getting witnesses to court was still a real problem for many poor prisoners [61]. One of the shortcomings of the Act was that it was only witnesses who attended the committal hearing who could be bound over to attend trial, and for a prisoner in custody getting witnesses to attend the committal hearing could be just as much a problem as getting them to attend the trial. Also, since payment of witnesses' expenses was only made after trial, a prisoner, whose witnesses were too poor to afford to make the journey to the court of trial and provide for their subsistence there, whilst waiting for the case to be called on, was in no better position after the Act than before it [62]. Third, the Act (like the Poor Prisoners' Defence Act, 1903) made assistance conditional on the prisoner showing his hand.

By the 1890s, to assist prisoners to get their witnesses to court, it was the practice in some gaols for the staff to go round the week before trial, and ask remand prisoners if there were any witnesses they wished to have called at their trial, and, if there were, to request the police to contact them [63]. In 1892 the Home Secretary gave an undertaking to take steps to see that this practice was adopted at all gaols [64].

#### **(e) Quakers and atheists**

A small reform passed in 1869 benefiting prisoner and prosecutor alike was the abolition of the incompetency of atheists to give evidence in

criminal proceedings. By the Evidence Further Amendment Act [65] such witnesses were to be permitted to affirm, thereby extending to them a privilege which Quakers had enjoyed, in criminal cases, since 1833 [66].

## CHAPTER 10

### GETTING THE PRISONER'S STORY ACROSS III THE FIGHT FOR REFORM 1870-1885

'the rule of law which incapacitated the accused ... from giving evidence on his own behalf had the effect of excluding the evidence of the person who knew most about the transaction'.

Sir Charles Russell (1888) P.D., CCCXXIV, 70.

#### (a) The attack on the incompetency rule mounted in the late 1870s

Not only did the 1870s see the creation of exceptions to the rule of the accused's incompetency, but they also saw the rule itself come under sustained attack.

The subject was debated by the Social Science Congress in 1874 [1]. A survey of the practice in the United States, published by the Society for the Amendment of the Law, showed that a majority of American states had abolished the incompetency rule, and that the general view in those States in which the reform had been tried was that it had worked well [2]. The survey in fact merely served to confirm the message, which had been put abroad by Russell Gurney, upon his return from serving as one of the Alabama arbitrators. He had, he said, been assured by both the Chief Justice and the Attorney-General of New York that the system had been the means of preventing wrongful convictions, and that judges and lawyers, who had originally been hostile to the reform, were now fully convinced of its advantages and utility.

In 1876 [3], 1877 [4] and 1878 [5] Bills for abolition were introduced in the Commons.

The scheme of the 1876 Bill was unoriginal. The accused and his spouse were to be competent but not compellable, with no fetter placed upon cross-examination as to credit. Introduced too late in the session to have any hope of becoming law, the 1876 Bill provided Ashley, its promoter, with an opportunity to test the Parliamentary water. The reception it received on its second reading debate was not encouraging. Of the eight members, who spoke in the debate, six came out strongly against the Bill, variously condemning it as a retrograde measure [6], a return to barbarism [7] and a Bill for torture [8]. The two members who spoke in its favour were Whalley [9] (the co-promoter of the Petty Offences Bills of 1863 and 1864) and Russell Gurney [10], the Recorder of London. Whalley's support was more of an embarrassment than a help, for, predictably, the ground he gave for favouring the Bill was that it would be an antidote to police perjury [9]. Russell Gurney could not, however, be so easily dismissed. He had huge experience and a high reputation as a City judge, and had recently discussed the working of the reform with a number of U.S. judges and lawyers, as well as observing trials in which the accused had given evidence. At the end of the debate, Ashley withdrew the Bill, but indicated that he regarded Russell Gurney's support as important for changing public opinion [11]. His words might have carried more conviction had not Russell Gurney's brother Old Bailey judge, Sir Thomas Chambers, the Common Serjeant, spoken out strongly against the Bill in the debate [12], and had the Attorney-General (who only troubled to enter the chamber towards the end of the debate) offered his support rather than speaking against the Bill [13].

The 1877 Bill did not get beyond a first reading. The 1878 Bill, however, made much more



satisfactory progress. On the second reading debate, the majority of those who spoke were in favour of the reform [14], and the language used by its opponents was more temperate than it had been in the 1876 debate (Serjeant Simon, for example, whilst still opposing the Bill, no longer saw fit to dub it a Bill for torture) [15], and at the end of the debate it was given its second reading by a substantial majority (185 to 76) [16].

The stance of the Government had also changed. The Attorney-General, whilst pointing to drawbacks and confessing to a great difficulty in making his mind up on the reform, was not overtly hostile. On the contrary, he offered encouragement to the reform lobby. The Government, he told them, was, in the course of preparing a Criminal Code, which would contain a provision dealing with the matter of prisoners' evidence, and he suggested to Ashley that the Bill ought to go to a Select Committee, so that the Government should have the benefit of that Committee's report when it brought in its own measure [17]. This offer Ashley willingly accepted [18].

Why did the 1878 Bill fare so much better than that of 1876? A number of possible answers suggest themselves. First, the 1876 Bill had attracted a good deal of attention in the legal press and elsewhere [19], and some powerful voices had been raised in its support. Further, an extraordinary rape case, tried at Liverpool in 1877 [20], had seemed to vindicate reformist claims that the right to give evidence would be a boon to the innocent. Another factor must have been the decision of Ashley and Russell Gurney, the Bill's promoters, to include in it clauses protecting the accused against cross-examination as to previous convictions, and against any adverse inference

being drawn from any failure on his part to give evidence [21], thus meeting two of the major criticisms which had been made of the 1876 Bill. Perhaps, also, the speeches in the 1876 debate did not, even then, mirror accurately the state of opinion in the House.

In the Commons debates on the two Bills, the arguments marshalled for and against the reform were ones that were to be heard, again and again, over the next twenty years.

On the one side, it was urged that the existing rule made it difficult for juries to get at the truth. They were denied the explanation of the one person who knew most about the facts [22]. To allow the accused to give evidence would lead to the acquittal of the innocent, and the surer conviction of the guilty [23]. This, it was claimed, had been the experience of the American criminal courts, and there was no reason to think that the reform would work any less satisfactorily in England [24].

The arguments against the reform were various.

First, whilst it was not denied that the reform would lead to more convictions, it was disputed that it would be for the benefit of innocent prisoners. On the contrary, it would operate to their disadvantage. It would undermine the principle that it was for the prosecution to prove the guilt of the accused [25]. The accused would, in practice, be compelled to go into the witness box or risk the jury drawing a damning inference from his failure to do so [26]. An innocent prisoner, who had a criminal record or was of bad character, would be placed in an impossible dilemma: if he gave evidence, he risked his record

or character being brought out in cross-examination [27]; if he did not give evidence, he risked the jury taking against him on that score [26]. For the innocent, but uneducated, prisoner (undefended as most were), there was the real risk that his nervousness and confusion might create an impression of guilt, and, under cross-examination at the hands of skilled experienced counsel he might easily be made to appear guilty [28] (particularly if he yielded to the temptation to lie to make his case better) [29], with no counsel of his own to undo the damage by re-examination. (Serjeant Simon suggested that no more than one prisoner in twenty would be capable of standing up to cross-examination) [30]. In short, the reform, if carried, would set at nought the principle of English law that an accused could not be compelled to criminate himself, in favour of the continental system of moral torture of prisoners [31], and would result in prisoners who, under the existing system, would be acquitted through the weakness of the prosecution case, under cross-examination convicting themselves out of their own mouths [32].

Second, in the case of undefended prisoners there were very real practical problems. With no counsel to examine and re-examine, how was the prisoner's story to be brought out, if he could not tell it, and what guidance would he receive and from whom as to whether he should testify? [33]

Third, the reputation of the bench would be compromised. Where there was no prosecuting counsel, or, where prosecuting counsel was inexperienced or inept, the judge would be obliged to undertake the task of cross-examining the accused. This would destroy the appearance of judicial impartiality, and lead to unseemly wrangles between bench and prisoner, particularly

where (as at some county Quarter Sessions) the judge was biased and unscrupulous [34].

Fourth, the reform, if carried would lead to the most shocking perjury, which would injure public morals and the administration of justice [35].

Fifth, it was untrue that under the existing system a prisoner could not give his explanation to the jury. On the contrary he could give his explanation on arrest, or before the examining magistrate, and, where undefended, by an unsworn statement at trial [36].

#### **(b) The Criminal Code Bills**

For the period 1878 to 1883 the focus for the reformers was a succession of Criminal Code Bills, each of which contained a prisoners' evidence clause.

The scheme of a Criminal Code had originated with J.F. Stephen [37], and by late July, 1877 the Government was converted, with Stephen instructed to start work drawing up a Bill [38]. Stephen, using his own Digest of Criminal Law as his starting point, did the work with remarkable rapidity, and when the Bill was introduced into the Commons in May, 1878, it contained, as the Attorney-General had promised, a prisoners' evidence clause [39]. However, this clause was very different to Ashley's scheme. Modelled on the provisions of the Indian Code of Criminal Procedure [40], it provided that a prisoner should, at the close of the prosecution case, have the option, if defended, of being examined by his counsel, and, if undefended, of making a statement. The examination or statement would not be on oath, but the

prosecution would have the right to cross-examine him on it, although they would not be allowed to put questions going to either credit or character. After being cross-examined, he might, if defended, be re-examined or, if undefended, give such further explanation as he pleased. His statement, not being on oath, he would not be liable to be prosecuted for perjury.

In an article written in 1877 [41], Stephen had sought to justify dispensing with the oath in the case of prisoners on two grounds. First, it would not be practical to prosecute prisoners who gave false evidence on oath for perjury, and yet not to prosecute them would undermine respect for the administration of justice. Second, the temptation for an accused to lie was so great that it would overbear the ordinary sanction of truthfulness which the oath provided. The Solicitors Journal, commenting on the 1878 Code Bill, offered another reason - dispensing with the oath solved the problem of cross-examination as to credit:-

'if the prisoner's evidence is put forward as prima facie credible because the prisoner is examined on oath, the logical consequence is that he ought to be cross-examined as to credit; but, where his evidence is not on oath, this reasoning does not apply.' [42]

One problem, which Stephen's clause did not attempt to deal with, was that of protecting the accused, who chose not to give evidence, against the risk of an adverse inference being drawn from his silence.

By early June, 1878 it was clear that the Bill had little hope of passing that session. It was too bulky and there was too little time left, and on August 15th, it was withdrawn and referred to a

Royal Commission consisting of Stephen, Lord Blackburn, Lush L.J., and the Irish judge Barry J. for report and revision [43].

The Commission worked at great speed, and by Spring it had produced a revised Code Bill [44]. As its later published Report made clear, it was divided on the question of whether prisoners and their spouses should be allowed to give evidence [45], and although its Code Bill contained such a provision, the clause was very different to that in Stephen's 1878 Bill. A prisoner, or his spouse, should be a competent witness for the defence. If they gave evidence, it would be on oath, and, like any other witness, they would be subject to cross-examination, although the court would have a power to limit cross-examination of the accused as to credit to such extent as it thought fit [46]. Once again, the problem of the accused, who chose not to give evidence, was not addressed.

On April 3, 1879 the Bill was given its first reading in the Commons [47]. In introducing the Bill, the Attorney-General was diffident in his approach to the prisoners' evidence clause, telling the House that on the subject his mind was evenly balanced. He acknowledged that there could be no means of arriving at the truth so surely as that of the examination of the accused, but, on the other hand, the change might operate harshly in the case of a man unjustly accused of crime, but whose antecedents were of a character which would unfairly prejudice him if they were exhibited to the jury. He should, he said, be glad of full and ample discussion of this point of the measure, and, if the House should exhibit a feeling adverse to the introduction of such a principle, he would at once consent to its withdrawal [48]. The debate, which followed, showed that the reform was far from

popular in all quarters [49]. By the summer of 1879 it was becoming obvious that the Bill, like that of 1878, would be lost through lack of Parliamentary time [50], and, on June 12th, the coup de grace was administered when Lord Chief Justice Cockburn wrote a long letter to the Attorney-General criticising the First Part of the Bill (mainly on drafting grounds), and promising further letters, commenting on the other parts of the Code [51]. A month later the Bill was withdrawn [52].

**(c) Weston and the extension of the right to make an unsworn statement.**

At this juncture, Cockburn, who was reputed to be an opponent of the proposal that prisoner should be permitted to give evidence [53], saw fit unilaterally to introduce a major modification of the law as to unsworn statements. In 1879, in a murder case (Weston) at Maidstone Winter Assizes [54], he ruled that defence counsel might, in his speech to the jury, give the accused's account of how the fatal shot came to be fired, adding that counsel were in the place of the prisoner and entitled to say anything which he might say. This ruling represented a repudiation of Beard, which had, for nearly forty years, been regarded as settling the point. However, being a decision of the Lord Chief Justice, it was followed by several puisne judges, although at least one declined to follow it [55].

In 1881, by coincidence, the very same point arose before Cockburn's successor in office, Lord Chief Justice Coleridge. Again, the case was a murder case (Le Froy) [56], and, again, the venue was Maidstone. With some reluctance, Coleridge

acceded to Montagu Williams' application that he be allowed to tell the jury his client's account of events. However, once the case was over, he lost little time in calling a meeting of the Council of Judges to discuss the propriety of the practice adopted in Weston's case [57].

At the meeting, held in the Queen's Bench rooms on the 26th November, 1881 (three weeks after the Le Froy trial), the judges present passed, by a majority of 19 to 2, a resolution that

'It is contrary to the administration and practice of the criminal law, as hitherto allowed, that counsel for the prisoner should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence'.

The two dissentients were Hawkins and Stephen JJ. (Stephen J. had at the meeting moved an amendment that it was undesirable to express any opinion upon the matter, but this had been lost, again 19-2, with himself and Hawkins its only supporters) [57].

In January 1882, North J. announced the decision of the judges in a case at Reading Assizes, and the announcement was given publicity in legal journals [58]. This ought to have settled the point but, astonishingly, it did not.

In December 1883 at the Old Bailey, on the trial of O'Donnell [59] for murder, Sir Charles Russell, in the teeth of objection from the Attorney General, prevailed upon Denman J. to allow him to state the prisoner's account to the jury, arguing that he was only claiming the right to do that which the prisoner could do himself, if undefended. Denman offered to reserve the point,



which led to the Attorney-General abandoning his objection. On the same day as the jury's verdict was received in the O' Donnell case, the Attorney-General wrote to Coleridge L.C.J., asking that the uncertainty as to the law upon the point be removed, and suggesting that the next time the question arose in a case of no great public importance, permission to make the statement should be refused and the point reserved. He added that, if the practice was henceforth to be as laid down in O'Donnell's case, it was in his view essential that the Crown be allowed a right of reply. He mentioned that he had raised with Denman J. the question of the judges having already had a meeting upon the point, but was assured by him that this was not so (Denman, who was not present at the meeting, was later to explain that he had forgotten about it). Coleridge replied to the Attorney's letter by return, telling him of the November, 1881 resolution and expressing the view that, because of possible difficulties about reserving the point, the best way forward might be to make the resolution generally known. This was done. The correspondence was published both in *The Times* and in a number of legal journals, and a lively correspondence followed in *The Times* [60].

Several of those who wrote supporting the resolution did so on the ground that there was a danger that counsel, in placing his client's version before the jury, would embellish it or omit parts which he considered damaging to the prisoner [61].

Within months of Cockburn's ruling in the Weston case, another development took place which was to prove of lasting importance - judges began to allow prisoners represented by counsel to make an unsworn statement to the jury.

Amongst those most prominent in fostering this change was Hawkins J., one of the dissentients at the November, 1881 meeting. Hawkins was, in fact, either the first or one of the first judges to allow in an unsworn statement. The case was Hull & Smith, a robbery case tried at Leeds Assizes on February 3, 1880 [62]. As defence counsel began to complain to the jury that his clients' mouths were closed, Hawkins J. observed that it was not so:

'Prisoners were at liberty to make any statement they chose; the jury were not bound to believe it, but it ought to be taken into consideration ... if the prisoner had made a statement in writing, he saw no objection to it being read, but if it were an oral statement, it might be better to have it from the prisoner himself'.

Before finally committing himself to allowing the two prisoners before him to make written statements, Hawkins left court to consult with Lush L.J., who was sitting in the adjoining court. On his return, he said that Lush L.J. entirely agreed with him and had himself so acted in more than one case. There was no decision of the Court for Crown Cases Reserved to the contrary and, in so far as the books contained dicta to the contrary, they were only the expressions of opinion of individual judges made probably under circumstances not fully set out in the reports. It would be a barbarous state of the law if a prisoner were not permitted to give his own explanation. In 1884 Lush L.J.'s Marshall, in a letter to The Times, revealed that the former's reason for agreeing to the course proposed by Hawkins was that, under Jervis' Act, a prisoner had a right to make a statement before the examining magistrates, and any such statement might go before the jury; if he had the right before the magistrates why should he not have the same right when actually before the jury? [63]

The course taken by Hawkins J. in Hull & Smith appears to represent a substantial change of view and stance on his part. In the Penge murder case three years before, he had listened in silence to Sir Edward Clarke's lament that his clients could not give their explanation, and had certainly not proffered to them the opportunity to make a statement to the jury [64].

Hawkins' example was followed by Bowen J. in August, 1880 [65] and by Coleridge L.C.J. in January, 1881 [66].

At the November 1881 meeting of the judges, the propriety of allowing prisoners, represented by counsel, to make unsworn statements was raised but the matter adjourned sine die [67].

Opinion was, however, clearly moving in favour of the new practice. On May 4, 1882, at Liverpool, in the case of Shimmin [67], Cave J. declared that for the future he intended to allow prisoners, whether defended by counsel or not, to make a statement at the conclusion of counsel's speech, subject to the prosecution having a right of reply. He added that the rule was one in which the other judges of the High Court concurred. In a later case at the same Assize [68], he reiterated what he had said in Shimmin, adding that it was important that the profession generally should be acquainted with the practice intended to be followed in future. Some assumed that Cave J. was declaring a new rule of practice, decided upon by the Council of Judges [69], but subsequent events make this doubtful [70].

In Everatt [71], in January 1883, Hawkins J laid down the same rule as had Cave J. at Liverpool, and that year also saw Day J., Lush L.J.

and North J. adopt the new practice [72]. It was also spreading to Quarter Sessions [73].

However, there were dissentient voices. In Taylor & Boynes [74], tried in May 1883, Coleridge L.C.J., upon the application of counsel, and after consulting with the Master of the Rolls, 'against his better judgment' allowed the defendants to make an unsworn statement, but, before the case was over he had repented of his decision, and declared that he would not do so again until the opinion of all the judges had been obtained. In December, 1883, Williams J., in a letter to the Times [60], had come out strongly in favour of the practice, stating that nothing but an Act of Parliament would induce him to depart from it. His letter produced a spirited rejoinder from Lord Bramwell, condemning the new practice root and branch [60]. In Houlty [75], an arson case tried at York Assizes in late January, 1884, Field J. refused an application by defence counsel for leave for the prisoner to make an unsworn statement, saying that he could not change the law because he thought the law unjust. By March 1884 Day J. had had a change of heart. In Velasquez [76], tried at the Old Bailey in that month, he refused to allow a defended prisoner to make a statement, observing that the last time he had done it had been in a capital case, and the result had been disastrous for the prisoner. In Attwood & Tatham [77], tried in November, 1884, A.L. Smith J. reverted to the practice, which had been followed by Byles J. in Taylor [78], of putting the prisoner to his election whether he would make a statement himself, or have counsel address the jury on his behalf, ruling that he could not do both.

Understandably, there was uncertainty at the bar as to what the position was. In Ross [79],

tried at the Old Bailey in April 1884, Geoghegan, a very senior and experienced junior, expressed his regret that a recent rule of the judges prevented the prisoner from giving his own version of the matter, and the trial judge, Stephen J., had to interpose to make clear that the November, 1881 resolution merely prohibited counsel relating their client's instructions to the jury and did not prevent the prisoner himself making a statement.

Watters [80] in 1883 appears to be the first case in which Stephen J. (the other dissident at the 1881 meeting) is recorded as permitting an unsworn statement by a defended prisoner, but, from this time on, he was in the forefront of those supporting the change in the law, particularly post-1885.

By early 1885, it appears that the matter had recently been before the Council of Judges again, and a resolution in favour of the new practice adopted, for, in Millhouse [81] in January 1885, Coleridge L.C.J. declared himself bound by a resolution of the judges (with which he did not agree) to allow a prisoner, represented by counsel to make an unsworn statement, but said that the resolution did not extend to a case where the prisoner proposed to call witnesses, and on this ground declined to allow the prisoner to do both. And, certainly, from 1885 onwards there are numerous instances of successful applications by counsel for their clients to be allowed to make unsworn statements [82]. But it is clear that there was still dissension and reluctance on the part of some judges to accept the new practice. In 1888, complaint was made, in a Commons debate on prisoners' evidence, that there were some judges who still refused to allow a prisoner defended by counsel, to make an unsworn statement [83], and

indeed divergent judicial practice was offered as the principal justification for amending the Criminal Evidence Bill, 1898 so as to include a clause preserving the right of prisoners to make unsworn statements [84].

If the rule allowing defended prisoners to make unsworn statements was the subject of dissension, so was the manner in which the right was to be exercised. First, there was the question of the stage in the case at which such statement should be made. Stephen J. always insisted that the statement be made before counsel's address, on the grounds that it would otherwise be merely a corroboration of what counsel had said [85], and this had certainly been the course taken in Malings and Dyer in the 1840s. Other judges, however, took the view that the statement ought to be made after counsel had addressed the jury [86]. Then, there was the doubt about whether written statements were to be permitted. In Riegelmutth (1886) [87] Stephen J. refused to allow to be read a statement, which the prisoner had not himself composed. In the Maybrick trial (1889) [87] he similarly refused to allow Sir Charles Russell to put in a written statement. This represented a departure from the practice in treason cases, in pre-1836 cases and in undefended cases, and it was certainly not the practice followed by all the judges [88]. Less controversial was the rule that the making of a statement gave the prosecution a right of reply. In 1883, in his letter to the Lord Chief Justice, the Attorney-General had asked for such a right, and the right of reply was in fact quickly established by such cases as Shimmin [67]. It represented a tacit acknowledgment that what was said in such statement was evidence, for (the Attorney General's prerogative right apart) only the calling of evidence gave the Crown a right of

reply. It also represented a reversal of the rule laid down in Taylor in 1859 and in Manzano in 1860.

What prompted the judges to overturn, in the space of six years, a rule which had stood since the 1840s? Cockburn's decision in Weston, which started the ball rolling, came at a time when the Criminal Code Commissioners, in a Bill which he had recently publicly criticised, were proposing, albeit with some diffidence, that prisoners and their spouses be rendered competent witnesses. He was a reputed opponent of that reform. Was Weston an attempt by him to head off the reform by introducing an alternative answer to the problem of the defended prisoner's inability to place his explanation before the jury, or was it simply a 'hard case'? (certainly it would be difficult to find a case which demonstrated more forcibly the injustice of denying a defended prisoner an opportunity of placing his explanation before the jury). Perhaps both. The practice, which evolved out of the controversy, engendered by the Weston and Le Froy cases, of allowing defended prisoners to make unsworn statements was certainly hailed by opponents of reform as having solved the problem of the prisoner's mouth being shut [89]. It enabled the defended prisoner to give his explanation (as Stephen had proposed in his 1878 Bill) whilst at the same time safeguarding him from cross-examination. It was, as one correspondent to The Times put it in November, 1881:-

'a wholesome ... compromise between the old idea of the prisoner's mouth being closed ... and the new idea - a very dangerous one - of administering an oath to and cross-examining him' [90].

However, there is no reason whatever to believe that this was the object of Hawkins and Stephen

JJ., the two principal architects of the new practice. Stephen had for over twenty years been an advocate of allowing prisoners to give evidence, and Hawkins was, in the 1880s, no less enthusiastic in his support for the reform. They may have seen it as a temporary solution to the problem of the defended prisoner until a Prisoners' Evidence Act could be passed, but certainly not as a substitute for such an Act.

For all the controversy the subject of unsworn statements by defended prisoners generated in the 1880s, the right, once established, was one of which the bar seems to have availed itself sparingly. In the majority of trials on indictment in the 1880s and 1890s where the prisoner had counsel, the right seems not to have been taken up [91], counsel taking the view 'that they could put the case for the defence much better than the accused' and fearing 'the possible effect of an unwise statement from their client'. However, it remained a valuable right in cases like Weston where the true facts were known only to the prisoner and the complainant or deceased, and, where a statement was the only way of getting the prisoner's account before the jury.

#### **(d) The later Criminal Code Bills**

Whilst the judges were busy hammering out the new rules for unsworn statements, in Parliament attempts were still being made to get the Code, with its prisoners' evidence clause, passed into law.

On February 6, 1880, the Conservative Government introduced its third Criminal Code Bill [92] On the same day three private members introduced a Criminal Code (no. 2) Bill containing



a batch of wordy clauses dealing with prisoners' evidence. The Government Bill passed its second reading but the calling of a general election put an end to its further progress, the private members Bill having in the meanwhile been dropped.

When Parliament reassembled after the election, the Attorney-General in the new Liberal Government announced that the Government did not intend to introduce a Criminal Code Bill in the present session [93].

In 1882, came yet another attempt to pass the Code into law - this time in the form of a Criminal Law Amendment Bill [94], which contained a large portion of the Code. The Bill passed its second reading [95], but was dropped at the committee stage.

1883 saw what was to be the final Government attempt to pass the Code into law. Honouring a promise made during the second reading debate of the 1882 Bill [96], the Government introduced a Bill containing only the procedural part of the Code - the Criminal Code (Indictable Offences Procedure) Bill [97]. The prisoners' evidence clause [98] was in the same terms as that in the 1879 Bill. During the second reading debate, a number of members touched upon the matter of the prisoners' evidence clause. Most who did were in favour of reform [99] but not all - Morgan Lloyd, for example, moved an amendment to the effect that no Bill would be satisfactory which directly or indirectly compelled an accused, or his spouse, to submit to cross-examination. When the Irish nationalist M.P.s came into the Chamber (they arrived, to the Attorney General's evident annoyance, at a late hour) [100] the atmosphere changed markedly. They launched into a fierce

criticism of the Bill, attacking a number of its clauses as calculated to lead, in Ireland, to oppression and abuse [101] (interestingly the prisoners' evidence clause, although criticised by one of their number, was not a particular target of their anger; indeed one of them actually conceded that there might be something to be said for it) [102]. When to the opposition of the Irish members were added complaints from English members [103] that the House was not being afforded a proper opportunity to debate the measure, the fate of the Bill was virtually sealed. It ended up predictably withdrawn. One thing of value which the debate did throw up, and which was ultimately to find its way into the 1898 Act, was the suggestion that prisoners should give evidence from the witness box and not the dock [104].

#### **(e) The Bills of 1884**

With the dropping of the 1883 Bill, the Criminal Code passed into history. The attempts to abolish the bar on prisoners' giving evidence, however, continued unabated, and there were by now clear signs that public opinion was moving in the reformers' favour. In 1882 the subject had been debated at the Social Science Congress and in the correspondence columns of *The Times*, and most of those who had spoken and written called for reform, a call echoed in 1883 in a *Times* leader and by *The Law Society* [105]. The response was the introduction in 1884 of Bills in both Lords and Commons.

The Commons' Bill [106] was a Government Bill. The Lords' Bill [107] was sponsored by Lord Bramwell who was fast emerging as one of the principal advocates of reform. He told the House

that he had long been in favour of the reform and that recent correspondence in the press had convinced him that it was now within the range of practical politics. He explained that if the Bill currently going through the Commons passed there, he would withdraw his own Bill [108].

Both Bills were extremely short. They declared that a prisoner and his spouse should be competent at every stage of the proceedings. In the matter of cross-examination as to credit, however, they diverged. The Government Bill provided that the accused should not be asked any question tending to show that he had committed or been convicted of any offence other than that charged save where such evidence was admissible to prove his guilt of the offence charged or where he had given evidence of good character. Bramwell's Bill contained no such restriction (like Hawkins J. he believed that an accused who gave evidence should enjoy no special privileges). Both were silent as to the matter of comment upon an accused's failure to testify.

Bramwell's Bill passed through the Lords quickly and easily, completing all its stages in just over three weeks [109]. At the second reading debate, of the six peers who spoke five were enthusiastically in favour, whilst the sixth, Lord Brabourne, whilst expressing some misgivings declared that he would not oppose the Bill.

The Commons Bill had a much more difficult passage. After it had passed its second reading, the Government succeeded in getting it referred to the Grand Committee rather than to a Committee of the Whole House. This led, however, to loud complaints that the Government was stifling debate [110]. In the Committee itself so many amendments

were moved that in the end the Government was obliged to withdraw the Bill. At this the Lords' Bill was also dropped.

The 1884-85 session saw the Government try again. In November Lord Bramwell re-introduced his Bill of the previous session [111]. Like the 1884 Bill it passed through its stages in the Lords quickly and without difficulty [112]. In December it was given its first reading in the Commons. In February, 1885 the Government introduced its own Bill [113] (couched in identical terms to its 1884 Bill). This never got beyond the first reading stage and in July it was withdrawn, with Lord Bramwell's Bill again being dropped.

**(f) More ad hoc reform**

But whilst attempts to secure general reform were proving unavailing, the trend established in the 1870s of individual statutes creating ad hoc exceptions to the rule continued. In the space of three years five statutes (the Married Women's Property Acts, 1882-84 [114], the Corrupt and Illegal Practices Prevention Act, 1883 [115], the Explosive Substances Act, 1883 [116] and the Criminal Law Amendment Act, 1885) [117] were passed, containing provisions rendering accused persons charged on indictment with certain specified offences competent in their own defence, and their spouses similarly competent. Also in 1881 the statutory exceptions to the incompetency rule were also imported into the law as to courts martial [118].

Of these statutes by far the most important were the Explosive Substances Act, 1883 (passed in a single night following a wave of dynamitard outrages) and the Criminal Law Amendment Act, 1885.

S. 3 of the 1883 Act made manufacture or possession of explosives in suspicious circumstances an offence, save where the accused proved that the manufacture or possession was for a lawful purpose, and made an accused charged with such offence and his spouse competent in his own defence (a provision justified on the familiar ground that the section cast a burden of proof on the accused).

That the 1885 Act contained a prisoners' evidence clause was due to the efforts of private members. During the passage of the Bill through the Commons a handful of backbenchers persuaded the House and the Government to include such a clause as a safeguard against blackmailing prosecutions [119]. The clause (s. 20) was particularly far-reaching, conferring upon the prisoner and his spouse the right to give evidence not only in relation to offences charged under the Act (i.e. unlawful sexual intercourse, procuring prostitution, permitting premises to be used for unlawful sexual intercourse, abduction, gross indecency and brothel keeping), but also in respect of charges of rape, indecent assault on a female, and abduction contrary to ss. 53-55 of the Offences against the Person Act, 1861.

The section was silent as to cross-examination as to credit. S. 4 of the 1883 Act, however, was explicit - the prisoner was to be subject to cross-examination to the same extent as an ordinary witness.

Neither Act sought to safeguard from adverse comment or inference the prisoner who elected not to give evidence. In this they followed a pattern set by earlier Acts.

After the 1885 Act nothing was ever to be quite the same again. The Act meant that, at almost every Assize and Old Bailey session, there would now be in the calendar for trial a number of serious indictable offences in respect of which the accused had the right to give evidence in his own defence, and the experience of the practical working of s. 20 would henceforth regularly be prayed in aid in Parliament and elsewhere both for and against the proposal for general reform. Also, the Act exposed the law to the charge that it was fragmentary and inconsistent. If a prisoner accused of rape could give evidence in his own defence, what logic denied the privilege to a man on trial for his life?

Within a year of the coming into force of the Act different opinions were being expressed as to how well it was working. Stephen J., in an article in *The Nineteenth Century*, claimed it was working well [120]. Cross-examination of prisoners was not being used as an instrument of torture. Very little use was in fact made of the power to cross-examine and cross-examination as to credit was rare. The *Law Journal* was less satisfied [121]. It pointed to the inconsistent way in which the provisions of the Act were applied by different judges. Where a prisoner did not tender himself as a witness, it was, said the *Journal*, the habit of Denman J. to discourage comment on the fact, whilst Lopes J. had declared in terms that it was unfair to suggest that it was fear of admitting facts showing his guilt which had caused the prisoner to stay out of the witness box. Stephen J., on the other hand, adopted the opposite practice, not only allowing the prosecution to comment upon the prisoner's failure to testify, but commenting upon the fact himself in his summing up, and also subjected the prisoner, if called, to a form of

'interrogatoire'. The Times reports of criminal trials for 1886 confirm the justice of the criticism. At Exeter in February, in a case of indecent assault, Hawkins J. expressly warned the jury against drawing any adverse inference from the accused's failure to testify. Three months later, in a trial under the Corrupt and Illegal Practices Prevention Act, 1883, Pollock J. stood by and allowed Avory, who was prosecuting, to comment strongly on such failure [122].

## CHAPTER 11

### GETTING THE PRISONER'S STORY ACROSS IV VICTORY FOR THE REFORMERS

'the prisoner ... now ... was entitled to to go into the witness box, much to his disgust in many cases, and tell the truth or what he called the truth.'

Bigham J., grand jury charge 1904.

- (a) 'Irish members ... taught the House of Commons how to talk for twenty-four hours without pause' [1].

Between 1886 and 1895, no less than nine Bills were introduced in Parliament, seeking to make the accused and his spouse competent witnesses in all cases.

Such of the Bills as started life in the Lords (as seven of them did) encountered, in general, little opposition there. Where the Bills ran into trouble was in the Commons, where the Irish Nationalist M.P.s were determined that the reform should not pass, and were prepared to adopt any and every obstructionist tactic to defeat any Bill introduced on the subject. They conceded readily enough that in England the reform might be advantageous, but were adamant that:-

'Ireland was not in a suitable condition for the application of such a reform; ... owing to agrarian and political conditions there the administration of public justice inspired little confidence.' [2]

An accused had to cope with biased magistrates and judges, packed juries, and Crown counsel over zealous to secure convictions, whilst in summary cases his rights of appeal were far more limited



than those of his English counterpart. However desirable it was in principle, in Ireland the reform would simply lead to oppression [3].

By the time the Irish M.P.s turned their attention to the Prisoners' Evidence Bills, the Commons had already experience of their ability to block legislation. The most notorious incident had been in 1881 when, on the first reading of the Protection & Property Bill, they had responded with forty-one hours of obstruction. To try and limit their obstruction the Commons had in 1882 amended their standing orders [4].

The 1886 [5] Bill ended up being counted out on its Commons' second reading [6] but, had it not been, O'Brien, the M.P. for Tyrone North, left the House in no doubt it would have been blocked [7]. During the Commons' second reading of the 1887 Bill [8], the Government attempted to buy off the opposition of the Irish members by offering to exclude Ireland from its provisions [9], but the offer was spurned [10]. A Bill excluding Ireland would be the thin end of the wedge:-

'once the principle was established in England, the temptation to extend it to Ireland would be irresistible.'

The debate ended up being adjourned in the early hours of the morning, to complaints by the Attorney General of Irish obstruction, in order that M.P.s might 'get away for some little though much needed rest' after the Irish members had prolonged it by moving a succession of adjournment motions [11].

The offer to exclude Ireland having been rejected, the Government, in reintroducing [12] the Bill in 1888 [13] offered no such concession. At the second reading stage, a number of M.P.s urged

on the Government the wisdom of excluding Ireland [14], but the Government stood firm, arguing that, if the Bill conferred, as they believed, a benefit upon accused persons, it would be both illogical and wrong to deny Irish prisoners that same benefit [15]. The nationalists' reponse was a promise to use all their efforts to defeat the Bill [16]. Predictably, it became bogged down in committee, and, eventually in November, the Government was obliged to withdraw it.

The spectre of Irish opposition, coupled with pressure of Parliamentary business, almost certainly lay behind the dropping of the 1889 [17] and 1891 [18] Bills (the first was withdrawn at the second reading stage, the latter was dropped, after having passed all its stages in the Lords, without ever reaching the Commons).

On the Lords' second reading of the 1892 [19] Bill, the Government was urged to exclude Ireland [20]. It would not. In the Commons several members tendered the same advice [21]. By the end of the second reading debate the Government indicated it was ready to give way on the point [22], but this did not save the Bill which ultimately foundered in committee.

In introducing the 1893 [23] Bill, the Lord Chancellor accepted that for the last six years the measure had been blocked by Irish opposition. Like its predecessors this Bill also ended up being withdrawn, but not this time due to Irish opposition, but to the delay that had been caused by the Government seeking the opinion of the judges upon a proposal, by the Society of Chairmen and Deputy Chairmen of Quarter Sessions in England and Wales, that there should be included in the Bill a clause empowering the court to assign counsel (to

be paid out of the public funds) to prisoners who desired to be defended by counsel [24].

In 1895 the Government introduced two identical Bills [25] in the Lords. Both excluded Ireland [26]. The first never reached the Commons and the second got no further than the second reading.

If the attempts to carry the reform during this decade were defeated, the Parliamentary debates at least had the merit of throwing up new points for discussion. In the Lords' debate on the 1887 Bill, Lord Salisbury argued for unrepresented prisoners being given assistance from the bench in order to get across their defence [27], whilst in the Commons Bradlaugh pressed for the inclusion of a clause requiring magistrates to caution prisoners that they were not obliged to give evidence [28]. In the 1888 debate Wharton asked whether a prisoner's giving evidence without calling other witnesses would give the prosecution a right of reply, observing that, if it would, the Bill was a trap [29].

The opposition of the Irish members was in stark contrast to the state of English opinion which, after 1885, was very much pro-reform. The speeches of English M.P.s and Lords during the debates on the Bills were overwhelmingly favourable [30]. The Times, in a leader in 1891 [31], treated the matter as too clear for argument. Four senior criminal judges [32] publicly expressed dismay that what they regarded as an essential reform had still not been enacted, adding their voices to that of Stephen J. [33], who had advocated the reform many times in print, and those of the Law Lords who had spoken in Parliament. Moreover events both at home

and abroad were making it increasingly difficult to deny the need for reform.

During the period 1882 to 1893 no less than six colonial legislatures passed statutes rendering the accused and his spouse competent witnesses in criminal proceedings - India [34], South Australia (1882) [35], New Zealand (1889) [36], New South Wales (1891) [37], Queensland (1892) [38] and Canada (1893) [39], and, according to Windeyer, the Chief Justice of New South Wales, in a letter to *The Times* in 1896 [40], in that jurisdiction the reform had been found to work well.

At the same time, back in England, Parliament was continuing to add to the list of statutory exceptions to the incompetency rule - with no less than nine Acts, creating such exceptions, being passed between 1885 and 1895. Some of the new statutory exceptions could be justified on the old ground that the Act in question threw a burden onto the accused (e.g. the Betting & Loans (Infants) Act, 1892 [41], and the Corrupt & Illegal Practices Act, 1895) [42], but for the exceptions created by such statutes as the Public Health (London) Act, 1891 [43], the False Alarms of Fire Act, 1895 [44] and the Law of Distress (Amendment) Act, 1895 [45] it was difficult to find any explanation other than fashion. Of the newly created exceptions, the one of the most practical importance was that created by the Prevention of Cruelty to Children Act 1894 [46] (which like the Criminal Law Amendment Act, 1885 permitted child complainants to give unsworn evidence subject to a corroboration requirement). Two of the statutes (the Diseases of Animals Act, 1894 [47] and the Merchant Shipping Act, 1894) [48] merely re-enacted exceptions created by earlier Acts.

These developments, in their turn, led to a change in the way the reformers argued their case.

First, they began to pray in aid, increasingly, the way in which existing statutes, which permitted prisoners to testify had been found to work in practice. In the debate on the 1888 Bill, the Attorney-General (drawing no doubt heavily on Stephen J.'s article of 1886) claimed that the unanimous testimony of bar and bench was that the Criminal Law Amendment Act was working well [49]. In the debate on the 1895 Bill, Lord Halsbury cited the case of Barber [50], tried and convicted at the Old Bailey for fraud, and subsequently sued for damages for the same fraud. At the trial of the civil action, Barber had given evidence in his own defence, and, so convincingly, that the jury stopped the case, leading the trial judge, Lord Coleridge, to observe that, if the defendant had been able to give evidence at his criminal trial, he could not possibly have been convicted and punished [51].

Second, it was urged that the law was now in a thoroughly anomalous and unsatisfactory state, and could not be allowed to remain in such condition. This was a multi-faceted point. There were first of all the anomalies and problems created by the poor drafting of the Criminal Law Amendment Act, 1885. Of these the most glaring was the fact that a prisoner was competent in his own defence in cases of rape but not in cases of attempted rape. Then there was the difficulty which arose when an accused was charged in the same indictment with offences under the 1885 Act, in respect of which he was competent, and common law offences, such as conspiracy and common assault, in respect of which he was not [52]. What was the status of evidence given by the prisoner, in the course of such trial,

which bore upon the question of his guilt or innocence of the common law offence? Was it inadmissible and was it the duty of the judge to direct the jury to disregard it? To this problem at least, an answer had not been long in coming, the Court for Crown Cases Reserved ruling in Owen (1888) [53] that if a prisoner, in the course of giving evidence upon a charge in respect of which he was competent to give evidence, made a statement in the nature of an admission of another charge, such statement stood in the same position as any other admission against interest. But how satisfactory an answer was it? There was also the point, stressed by Lord Halsbury in the debate on the 1895 Act, that the prosecutor, by the way he framed his charges (e.g. by charging conspiracy rather than the substantive offence) could effectively determine whether the accused would be capable of giving evidence at his trial or not [54].

The 1885 Act, however, was only part of the problem. Wherever one turned, one could find anomalies. A prisoner could be examined when charged with personation of a voter, but not where the charge was personation for the purpose of fraud. He could be examined where the charge was sending an unseaworthy ship to sea, but not where the charge was manslaughter by so acting. He was competent to give evidence where charged with unlawful possession of explosives, but not where charged with manslaughter arising from such possession. On a charge of forging a trade mark he was competent, but not when charged with any other species of forgery. Where the charge depended upon the sending of a letter he could give evidence if the case was one of libel, but not where the allegation was of sending a threatening letter [55]. Then there was the bizarre nature of some of

the statutory exceptions. What public policy required that a man charged with giving a false alarm of fire, or, levying distress, when not the holder of a bailiff's certificate, (both offences punishable by fine), should be competent to give evidence in his own defence, but denied the right to a person charged, under the Chimney Sweepers Act, 1894, with soliciting business in a manner calculated to cause annoyance (an offence likewise punishable by fine)? Again, the number of statutory exceptions was now so numerous that, as Lord Herschell claimed in the debate on the 1895 Bill (with some exaggeration), it now required a special education, on the part of those who presided at criminal trials, to know, whether or not, the persons accused before them were capable of giving evidence or not [56]; and certainly the public was bemused to the extent that judges at the Old Bailey were, according to Poland, adopting the practice, in cases where the accused was incompetent to give evidence, of pointing this fact out to the jury, lest they fall into error, and draw an inference against the accused by reason of his failure to do what the law prohibited him from doing [57].

Added to the above were the problems caused by careless drafting, and lack of uniformity in the wording of the statutes creating exceptions to the incompetency rule. The point was devastatingly made by Frederick Mead, a London stipendiary magistrate, in 1892 in an article in *The Nineteenth Century* [58] 'Different words' he wrote 'introducing varying incidents have been continuously used. For example in four cases a defendant, but not the wife or husband, may be called (Merchant Shipping Act, 1876, Contagious Diseases of Animals Act, 1878, Metalliferous Mines Regulation Act, 1872, Threshing Machines Act,

1878). In two cases a defendant may call his wife but a woman, when charged, is deprived of the reciprocal advantage (Sale of Food and Drugs Act, 1875). Sometimes it is left to the discretion of the defendant whether the husband or wife shall be called, sometimes to that of the proposed witness, whether husband or wife.'

The only way, so it was argued, of bringing the law to a satisfactory condition was either to abolish the incompetency rule or the exceptions to it, and of these two courses the latter was not a practical possibility, for, as Lord Coleridge C.J. put it, it was too late for any going back [59].

**(b) Sir Herbert Stephen lends a hand**

1896 saw the Government introduce yet another Prisoners' Evidence Bill [60]. Like so many of its predecessors, it passed the Lords easily and quickly enough. In the Commons, however, it got no further than a first reading, being eventually withdrawn to ironic opposition cheers in July. A private member's Bill [61], introduced in February, seeking to make prisoners competent in all summary cases fared no better.

The same year also saw the beginning of a sustained English campaign against the reform. In the van of the campaign was Sir Herbert Stephen, the Clerk of Assize of the Northern Circuit, and the son of the late Stephen J.

In 1895 he had written to The Times [62] complaining that, in cases where prisoners gave evidence, the bar was departing from its traditional standards of fairness. In April 1896, he published an article in The Nineteenth Century [63] attacking the current Government Bill. The



article was provocatively entitled 'A Bill to Promote the Conviction of Innocent Prisoners'. The thrust of his argument was this. The only persons, who could comment upon the merit of the proposed reform, were those who had seen it working in practice. The chief class of cases in which prisoners gave evidence were those under the Criminal Law Amendment Act, 1885 which were invariably tried either at the Central Criminal Court or at Assizes. It followed that it was from amongst those, who were regularly present at or engaged in these cases, that opinions as to its workings should be canvassed, not from judges like Lord Esher, Lord Halsbury and Lord Herschell, who had spoken in favour of the Bill in the Lords, but who had probably never seen a trial in which a prisoner had given evidence, and had certainly not been engaged in such cases on any regular basis. He himself had considerable experience of such cases, first as a practising barrister on the South Eastern Circuit, and, since 1889, as Clerk of Assize of the Northern Circuit (his estimate was that there were 100-200 cases a year on the Northern Circuit, in which prisoners were competent to give evidence, either under the Criminal Law Amendment Act or under one of the other Acts permitting prisoners to testify). His experience led him to the conclusion that, whereas in cases where prisoners were not competent to give evidence not one in a thousand was wrongfully convicted, in cases where prisoners did give evidence at least one a year was wrongfully convicted. A number of factors contributed to such wrongful convictions. First, where prisoners gave evidence, the jury decided the case on a balance of probabilities. Second, innocent prisoners were convicted because of the way they gave their evidence; if they gave it badly or dishonestly it went against them, and yet there were many prisoners who could not answer

a series of questions, concerning a matter in which they had a strong interest, without looking as though they were lying, and not a few people were absolutely incapable of answering questions straightforwardly and to the point. Third, where prisoners gave evidence, prosecuting counsel examined them and addressed the jury, not as ministers of justice, but as if striving for a verdict at nisi prius. He conceded, however, that there might possibly be something to be said for allowing a prisoner to give evidence where statute cast upon him a burden of proof, or, where the proceedings though criminal in form were litigious in substance. Stephen had chosen his ground cleverly. Until then opponents of reform had never had been able to dispute the reformers' claims that the reform had been tried in criminal cases in the United States and in the Colonies, and, in England, in civil cases and in prosecutions under the 1885 Act, and had been found to work well. Now here was someone, with considerable experience of the 1885 Act, claiming that it worked not in favour of but to the prejudice of innocent prisoners.

The article started a controversy which only stopped when the 1898 Bill became law.

In May 1896, there was published a report upon the current Bill by a committee of the Bar Council [64]. This reached quite the opposite conclusion to Stephen. It unanimously recommended that the principle of the Bill was, on the whole, a sound one, and should, in the interests of public justice, be made of general application. The committee's only misgiving was about

'the difficulty ... frequently experienced by prosecuting counsel under existing Acts in judging as to the propriety of commenting or

not upon the prisoner's absence from the witness box'

and suggesting that, if the Bill became law, the judges should be invited to give guidance on the propriety of such comment.

Pitt Lewis, who was on that committee, published a reply to Stephen's article, in the May issue of *The Nineteenth Century* [65], under the title 'A Bill for the Protection of Innocent Prisoners'. Despite its title, the article, in fact, appeared to confirm several of Stephen's claims. In the first place, Pitt Lewis conceded that it was difficult, if not impossible, to answer arguments based on personal experience, particularly when they came from a person "as to whose opportunities of judging and whose sincere desire to judge rightly there can be no manner of doubt". He further conceded that there were three classes of prisoner who suffered by giving evidence:-

- (i) those against whom the prosecution case was weak, but whose guilt was exposed in the course of their evidence;
- (ii) those who, though innocent, brought about their own conviction by lying on collateral matters; and
- (iii) those who told the truth at their trial, but told it so badly, and in such a bungling way that the jury did not believe them.

The first class he claimed were deserving of sympathy only if one regarded a criminal trial, not as a search for truth, but as:-

'a ... game of skill ... in ... which the party on the defensive was entitled to be declared the winner of the game, and acquitted, unless the attacking party ... have strictly and conclusively proved their case, without any aid whatsoever from the party on the defensive'.

The second class were equally undeserving of sympathy. The third class of sufferers was he admitted deserving of sympathy but it was extremely small, for, the conviction of such persons required not merely a stupid accused, but an equally stupid jury, and against the hardship suffered by them should be balanced the advantage, which other innocent prisoners reaped, through being able to prove their innocence in the witness box. He concluded with the claim that there was no risk of the impartiality of the bench being compromised by the reform, and lamenting the bar which the current Bill sought to place on cross-examination of prisoners.

In June came Windeyer's letter to The Times [66], asserting that five years' experience of the working of the New South Wales Criminal Evidence Act had left him wholly in favour of the reform. Within days there appeared in The Times a letter from Stephen [67], claiming that the English experience was to the contrary.

### **(c) The 1897 Bill**

1897 saw a yet further addition to the list of statutes which permitted accused persons, charged thereunder, to give evidence - the Chaff Cutting Machines Act [68]. The Act was passed without opposition, the ground of the exception being the casting by the Act of a burden of proof on the accused. It also saw the Government introduce yet another Criminal Evidence Bill [69].

It would seem that the Government's original intention was that the Bill should extend to Ireland, but, when on the motion for leave, the Attorney-General was pressed upon the point by Maurice Healy, he equivocated and said that he would consult with the Attorney-General for Ireland and the Chief Secretary [70]. Healy's warning shot worked, for when the Bill was introduced it had a clause excluding Ireland, and, in the second reading debate, the Attorney General admitted that this had been done for purely 'parliamentary reasons' [71].

This was not its only omission. Unlike the Bill of the previous year (and the majority of the Bills introduced between 1884 and 1896), it failed to give any protection to the accused in the matter of cross-examination. In moving the second reading, the Attorney-General sought to explain this volte face. It had been urged, he said, by many lawyers, including Lord Selborne and Lord Bramwell, that it was not right to throw any immunity around the accused. He had asked many judges whether they found that the power of cross-examination had worked hardly to the prisoner, who had given evidence, and they, one and all, said that it had not. It seemed better to have one uniform and simple code of law, and he was confident that the judges would never allow the position of the prisoner to be prejudiced, or the licence of counsel to go too far in the matter of examination or cross-examination of prisoners [72].

During the second reading debate, little emerged that was new. The Attorney-General, predictably, prayed in aid the unsatisfactory state of the existing law, with all its anomalies. There were, he said, two systems under which accused persons were now tried and one or other ought to be

abandoned. He argued that the reform had worked well in the United States and the Colonies. It had been supported by such great judges as Stephen J., Lord Coleridge, Lord Bramwell, Lord Selborne and many others, and, coming to living judges, almost every judge on the bench was in favour. He certainly knew no judge who was against. The Bill was also supported by a number of important bodies including the Law Society [73].

The Bill's opponents paraded the usual stock arguments against reform. They were particularly severe in their criticism of the failure of the Bill to protect against cross-examination as to credit [74], it being pointed out that, in the Colonies where the reform was said to be working well, such protection was given [75]. Nor was the Attorney-General's claim that the 1885 Act had worked well allowed to pass unchallenged. That was not, said Lloyd Morgan, the view of the rank and file of the bar who had actual experience of its working [76]. Amongst those who spoke out against the Bill were the Irish members who had not been appeased one whit by the exclusion of Ireland [77].

The bulk of the House however was pro-reform and the Bill passed its second reading by a substantial majority (210 to 41) [78]. Despite this encouraging vote it became a victim of the pressure of Parliamentary business and ended up being withdrawn.

**(d) The Bar Council Report and the continuing public debate**

In the meanwhile, a committee of the Bar Council had, in March 1897, produced a Report on the Bill. This time Stephen was on the committee. The majority of the committee, predictably, came

out in favour of the principle of the Bill, but, with the exception of Pitt Lewis, were strongly in favour of there being included in the Bill a clause, along the lines of cl. 1(d) of the 1896 Bill, restricting cross-examination as to credit. They also repeated what the 1896 committee had said about the matter of prosecution comment upon the prisoner's failure to give evidence. Stephen produced a minority report. This repeated the arguments of his 1896 article, but with additional criticisms (the Bill would offer a strong temptation to the prosecution to be careless in preparing their cases, because they would trust to the prisoner's evidence, or his refusal to give any, to make out their case; it would produce perjury which, in practice, it would be hopeless to punish; and given that the current conviction rate stood at over 80%, the slight increase in convictions which the Bill would procure, seemed to him an advantage of little importance). He acknowledged that the question of cross-examination was one of difficulty. To protect prisoners against cross-examination as to previous convictions or character would place them in a position, to which as witnesses, they were not entitled. On the other hand, if they were so examined, a man of suspicious character would always be convicted. He thought that, on the whole, the second was the greater evil of the two. In an attempt to draw the sting of the report, he expressed regret that the committee had not attempted to ascertain the opinion of the relatively small number of barristers, who had been frequently engaged in defending prisoners since the passing of the Criminal Law Amendment Act. Such men had an experience of the results of prisoners being allowed to give evidence, which made their opinion of unusual weight when compared with that

of the leaders of the profession and other eminent persons.

The following month, in a letter to The Times [79], Stephen took the matter a stage further. After claiming that of the judges, Day, Vaughan Williams, Lawrence and Collins, were all of the opinion that the Bill was a mistake, he stated that, on the Northern Circuit, between 5 and 10 innocent persons were convicted each year, as a result of giving evidence. He also launched an attack on the absence of a provision in the Bill protecting the prisoner against cross-examination. It was forgotten, he said, that you may not ask any other witness was the prisoner convicted of so and so? The true purpose of cross-examining prisoners as to previous convictions was not for the purpose of damaging his credit, but to make the jury think that, because he had done it, or something like it, before, he had done it again, and this operated very harshly on habitual criminals, who were often arrested and charged simply because a crime had been committed and they were in the neighbourhood at the time.

Nor was Stephen without support. In April, the North London and Middlesex Sessions Bar Mess sent to the Lord Chancellor a copy of a resolution they had passed, protesting strongly against the Bill. The letter which accompanied it invited the Lord Chancellor to read Stephen's Article in The Nineteenth Century, if he had not already done so [80].

The correspondence columns of The Times for 1897 also contained a number of letters supporting Stephen. Frederick Mead confirmed that, in his experience, defence counsel were considerably hampered in those case where the prisoner could now



give evidence. If counsel failed to call his client, the failure would be the subject of a damning comment on the part of the prosecution. If he did call him, he thereby lost the right of reply, and, if the prisoner had a tainted character, he would be cross-examined about it. All this was a hard price to pay for the privilege of taking an oath [81]. The absence of a restriction in the 1897 Bill on cross-examination as to credit was also criticised in articles in both *The Times* [82] and *The Scots Law Times* [83]. Another correspondent pointed out that the problem was particularly acute in magistrates courts, where the average borough J.P. believed that the past of the prisoner was, as much, or more to do with the case, as the evidence for the prosecution [84]. The plight of the ignorant prisoner without counsel was also referred to in letters time and time again. A chairman of Quarter Sessions argued that such a prisoner was far better served by making an unsworn statement, than by going into the witness box and running the risk of being reduced to confusion and self-contradiction under cross-examination [85]. Alfred Lyttleton [86], the Recorder of Oxford, suggested that the type of reform needed was something along the lines of the Indian Code of Criminal Procedure Act, 1882, under which the judge was required to call the prisoner's attention, one by one, to the heads of evidence against him, and invite him to offer his explanation if he wished. Stephen took up the suggestion with enthusiasm, whilst at the same time ridiculing a claim by Evelyn Ashley that what Lyttleton was advocating was the exact replica of existing procedure at Quarter Sessions [87].

The start of the New Year saw the debate still continuing in the columns of *The Times*. A correspondent, with experience of the Indian Code,

pointed out that that also had its shortcomings, since judges, in drawing the attention of prisoners to the points against them often cross-examined and put questions which assumed the guilt of the prisoner, whilst a failure to answer would lead to an adverse inference being drawn by the jury [88]. Another correspondent predicted that the need for impecunious prisoners to be legally defended would be rendered all the greater by the Act [89].

In March, 1898, Stephen published a sixty-four page pamphlet, obviously written with an eye on the forthcoming Bill, entitled 'Prisoners on Oath Past Present and Future'. The pamphlet, in addition to restating his case on the matter, contained a detailed analysis of and reply to every argument advanced by the reformers in both the 1897 Commons' debate and in The Times correspondence.

On March 2nd, Grantham J. wrote to The Times urging that there should be no restriction on cross-examination of prisoners, citing a case which he had tried in which the cross-examination of a prisoner as to his past had prevented a guilty man escaping and a complainant's reputation being blasted.

**(e) The passing of the Criminal Evidence Act, 1898**

In the meanwhile, the legislative round had begun again with the Government introducing into the Lords its latest Criminal Evidence Bill [90].

In the debates on the Bill, one senses that it was realised on all sides that this time the reform would finally be carried. The 1897 Bill had passed its Commons' second reading by a large majority, and the Government now made a determined effort to buy off all remaining opposition. The new Bill 'for

purely Parliamentary reasons' excluded Ireland [91], and, in order to head off the critics of unrestricted cross-examination, included a clause limiting cross-examination as to credit.

As was to be expected, the Bill passed quickly through the Lords. On the Lords' second reading debate in March, the Lord Chancellor and Lord Herschell both went out of their way to try and discredit Stephen's claim that the 1885 Act was yielding an annual crop of 5 to 10 wrongful convictions on the Northern Circuit [92]. They stressed that no particulars, no facts, no proof had been offered in support of the claim, and, asked how, if specific cases had been cited, Stephen could hope to prove either that the prisoner in question was innocent, or, that it was his giving evidence which convicted him. They also cited Home Office statistics to show that his figure of 100 to 200 for the number of cases, tried annually on the Circuit, in which prisoners gave evidence was hopelessly overstated (it was in fact less than 100 per year). Further, said the Lord Chancellor, if Stephen were right one would expect to find complaints about the working of the Act in petitions to the Home Office, but extensive research by the Home Office had failed to reveal a single such complaint (when, in the Commons' debate, this bad point was repeated by the Attorney-General [93] it was speedily demolished by Maurice Healy, who pointed out that a prisoner was hardly likely to petition on the ground that his own evidence had got him convicted) [94]. Lord Herschell rounded off the attack on Stephen by refuting the latter's claim that he (Lord Herschell) had no experience of prisoners giving evidence. He had, he said, in fact appeared for the Crown in one of the first prosecutions brought under the 1883 Act.

It is clear from Home Office files that, prior to the debate, a good deal of work had been done by the Department's officials to try and unearth material which could be used to discredit Stephen's arguments, and, embarrassingly, the research, as well as yielding the statistics deployed in the debate, had also resulted in an internal memorandum [95] stating that there could be no doubt that the proportion of 'shaky' convictions was larger in cases under the Criminal Law Amendment Act than in others. Considering how few such cases were in proportion to the total number of convictions, the number of petitions on the ground of innocence was striking. And one of the reasons for this, it was suggested, was the law of evidence. In rape cases, for example, if the accused did not give evidence he suffered, but, if he did, almost inevitably the jury would frame the question to be decided by them "Which is telling the truth he or she?" and, if they did, no doubt they would convict many guilty men who under the general law of evidence would escape, but the result would be a number of shaky convictions. Home Office experience showed this was the case, and one could not help thinking that, among the shaky convictions, there might be an unusual proportion of miscarriages of justice. The memorandum concluded:-

'the experience of the Department ... does seem to ... suggest that the assimilation of the general law of evidence to the law applicable to rape and other similar cases was likely, among other effects, to increase the number of shaky convictions founded rather on a strong probability than a probability which excludes reasonable doubt, (which) would, of course, tend to increase the number of wrongful convictions'.

If the Lord Chancellor was aware of this memorandum, he made no reference to it, but

concluded the debate by presenting a petition from the Law Society in favour of the Bill [96].

Between the Lords' second reading in March and the Commons' second reading in April there was a flurry of correspondence in The Times. An Indian judge had pointed out that, under the Indian system, the problem of innocent prisoners telling obvious lies, in a foolish attempt to better their case, was well known [97]. Frederick Mead [98] said that with undefended prisoners, who were often too ignorant even to understand what was meant when they were called upon to ask questions, there was, in his experience, rarely difficulty if they were allowed or encouraged to make any statement they pleased as the evidence proceeded. But a rigid adherence to procedure, which required them to reserve all their explanations till the end of the prosecution case, put them at the same disadvantage whether they were in the dock or the witness box.

Hawkins J., during the same period, also pronounced against the Bill on the ground that, under the law as it then stood, the prisoner had every opportunity of telling his story under the best possible circumstances, namely when first before the magistrates. If his story was truthful, it might lead to his being discharged there and then, whilst, if he went to trial, the fact that he had disclosed his story at the first opportunity and thereby given the prosecution the chance to investigate it would be in his favour [99].

At the second reading debate in the Commons twelve of the members who spoke spoke against the Bill, and of these half were lawyers [100].

The Attorney-General's speech opening the second reading debate was, in the main, a

repetition of the arguments he had used the previous year. There were, however, some differences. In the first place, he had to explain why the Government had changed its mind, yet again, on cross-examination. He gave as the reason fairness to the prisoner. He repeated the Lord Chancellor's attack on Stephen's claims, and rejected calls for the adoption of the Indian practice of the judge calling the prisoner's attention to the points against him. Interestingly, throughout the progress of the Bill, he declined to be drawn on the question of judicial opinion on the subject (a change of stance from the previous year which did not pass unremarked) [101].

The opponents of the Bill stressed that opposition to the measure had of recent years increased [102]. Pickersgill and Atherley-Jones claimed that the rank and file of the bar were against the Bill [103] and it was also said that the judges were against it [104]. It was argued that the real object of the Bill was not to protect the innocent, but to increase the number of convictions. Of those who were tried and convicted, 60% had been previously convicted and 90% were of depraved character. Persons of this sort, guilty or innocent, would make a poor showing in the witness box [105]. It was their habit, innocent or guilty, to tell lies to get out of scrapes, and, if liable to cross-examination as to their way of life, would have little hope of escaping conviction, innocent or not [106]. Several members commented upon the Government's about turn upon the subject of cross-examination [107], Bowles observing that the Bill changed every year [108]. A remark of Cotton L.J. about the adverse change the Bill would work in the relationship between judge and prisoners was cited [109], and one of the arguments which had been used

against the Prisoners' Counsel Bill in 1836 was disinterred, namely that the Bill would lead to an increase in the length of trials [110]. The Bill nevertheless passed its second reading by a large majority [111].

In June there was a long debate upon a motion that the Bill should be referred to a Select Committee [112]. The motion, if passed, would have destroyed all hope of the Bill passing that session, and the Government would have none of it. The principle of the Bill had been clearly established by the large majority with which it had passed its second reading. In the end the Bill was referred to a Committee of the Whole House.

The discussion of the Bill in committee was extensive and wide ranging.

Some members, recognising that the Bill was going to pass, embarked on a damage limitation exercise. Amendments were moved proposing that the Bill should be for a trial period of 3 [113], 5 or 7 years [114], that it should not apply to Magistrates' courts [115], that it should not apply to prisoners under 16 years of age [116], and, even, that it should not apply to Wales [117]. All were blocked.

A matter which it was predictable would loom large in the Committee's deliberations was the Government's failure to include in the Bill a clause prohibiting comment upon the failure of a prisoner to give evidence. And so it proved. Lloyd Morgan moved that the Bill be amended to include a clause to the effect that the failure of a prisoner to give evidence should not raise any presumption against him, and that no reference to or comment upon such failure should be made during

the trial [118]. To omit such a clause he argued was to compel prisoners to give evidence. The Solicitor-General was dismissive. Although in many cases it was, he said, a hard thing that comment should be made upon a prisoner's failure to give evidence, there was a residue of cases in which comment was necessary. As to the rest, the judges could be relied upon to see that the right of comment was not abused [119]. Also, there were practical problems about prohibiting comment. How was such a prohibition to be enforced? Was a counsel who commented to be guilty of contempt? Were proceedings to be instituted against a judge who made comment? [120] (in fact a very effectual remedy had been proposed by Lloyd Morgan as long ago as 1892 - the quashing of any resulting conviction) [121]. And then again by prohibiting comment, you would prevent a judge telling the jury not to allow themselves to be prejudiced by the accused's failure to give evidence [122]. He could have added that none of the existing statutes which allowed prisoners to give evidence contained such a clause, nor had any Prisoners' Evidence Bill since 1878. But Lloyd Morgan was not alone in his misgivings. Other members pressed the Solicitor to give way [123]. His response was to offer a partial concession. He would agree to a prohibition upon comment by counsel for the prosecution. On the question of comment by the judge however he declined to yield [124]. It would he argued be wrong to place such a fetter upon the judge. Where an accused's defence reflected gravely on the character of prosecution witnesses, to the extent that an acquittal would mean their ruin, it was only just that the judge should be allowed to comment upon the failure of the accused to back up his attack by evidence. In the end, this was where the Committee agreed to draw the line. A suggestion by Abel-Thomas that the judge



should, in a case where the accused failed to give evidence, be required to charge the jury that no adverse inference should be drawn therefrom was lost.

The clause restricting cross-examination of a prisoner as to his character and previous convictions unsurprisingly generated much discussion. Gibson Bowles urged the Government to drop it [125], whilst Healy from the Irish benches urged that all cross-examination of a prisoner as to his character be prohibited [126]. Others urged the Government to strike out the provision permitting a prisoner, who had attacked the character of the prosecutor or his witnesses, to be cross-examined as to his own bad character. Such a provision, they argued, would inhibit him in his defence. Further, it represented a substantial change in the law and one wholly to his disadvantage. Under the existing law a prisoner was unrestricted in his right of cross-examination; he could attack the character of prosecution witnesses without any fear of thereby having his record put in [127]. But the Attorney-General stood his ground and the sub-clause to the proviso remained. One important drafting concession was, however, won from him. He agreed that in clause 1 the words 'person charged' should be substituted for 'person called' [128]. This small amendment had the effect of preventing the Crown cross-examining a prisoner's spouse as to his character in cases where he attacked the character of a prosecution witness but did not himself give evidence.

The Government also agreed to the inclusion in the Bill of clauses providing that the giving of evidence by the accused should not give the Crown a right of reply (a particularly vital safeguard)

[129], and that an accused who gave evidence should do so from the witness box [130]. It also accepted an amendment which made it clear that the Act would leave unaffected the right of a prisoner to make an unsworn statement, both at committal hearings and at trial [131].

A proposal that the Bill include a clause putting it beyond doubt that the right to testify was not to extend to hearings before the grand jury was however lost [132], as were proposals that prisoners should have the right to refuse to answer questions criminating them of the offence charged [133], that there be included a clause declaring that nothing in the Bill should affect the burden of proof [134], that prisoners under 16 who gave evidence should not be subject to cross-examination [135], that prisoners and their spouses giving evidence should not be subject to prosecution for perjury [136], and that the trial judge should be under a duty to caution an undefended prisoner that he was not obliged to give evidence, but that if he did he would be subject to cross-examination [137]. An amendment proposing that undefended prisoners be assigned counsel was rejected by the Chairman of the Committee as outside the scope of the Bill [138].

The Committee stage was concluded in late July. The Bill received its Commons third reading the following day, and on the 12th August it received the royal assent.

**(f) The first year of the New Act.**

The new Act got off to an inauspicious start, with uncertainty as to its commencement date [139], and controversy as to whether it gave prisoners the right to testify before the grand jury [140], and no sooner had the Court for Crown Cases Reserved ruled against such a right [141] than Hawkins J. began openly to cast doubt upon whether prisoners were entitled thereunder to give evidence before examining magistrates [142]. Nor were prisoners showing any great enthusiasm to avail themselves of their right. At the July, 1899 session less than half of the prisoners tried at the Old Bailey gave evidence in their own defence [143], whilst of sixty one prisoners charged with murder whose cases were reported in The Times for 1899 only nine went into the witness box [144].

Part of the reluctance of prisoners to testify may have been due to fear of prosecution for perjury, for during 1898-99 there was much debate as to whether a perjury prosecution should follow as of course where a prisoner was convicted after giving evidence in his own behalf [145]. Wright J. even talked of raising the question before the Council of Judges [146]. The policy ultimately adopted was to reserve prosecution only for aggravated cases. Really there was no alternative. To have indicted everyone who gave perjured evidence for himself would, as Grantham J. pointed out, have meant the judges being on circuit almost continuously [147].

At the same time as the issue of prosecution for perjury was being debated, the judges were also adopting the practice (aped by prosecuting counsel) of criticising, as open to suspicion, any explanation offered by a prisoner in the witness

box which had not been offered before the examining magistrates. This marked the beginnings of an attack upon the reserved defence which was to find its clearest expression in the Poor Prisoners' Defence Act, 1903 [148].

Also some prosecuting counsel were beginning to adopt practices disloyal to the spirit, if not the letter of the Act, such as telling the jury in opening that the only satisfactory answer to the charge could be the answer of the prisoner, or, where the prisoner did give evidence, making the sneering comment that his evidence was only that of a prisoner [149].

As has already been seen the coming into force of the Act made a scheme of criminal legal aid daily more urgent, whilst at the same time sounding the death knell of the practice of judges prosecuting.

## CHAPTER 12

### THE LAST WORD

'In too many cases counsel for the defence being afraid of the speech in reply ... abstained from calling witnesses.'

Lord Brougham (1860) P.D. CLX, 85.

Throughout the nineteenth century, the fear of giving the prosecution the last word with the jury operated as a powerful deterrent to the calling of evidence by accused persons.

Where the prosecution was conducted by the Attorney-General there was nothing the accused could do to prevent the Crown having the last word, the Attorney having a prerogative right of reply whether or not defence evidence was called. In all other cases, however, whether the Crown had the reply depended upon the nature of the charge and the course the defence case took.

In treason, if the defence called evidence, both prosecution and defence counsel made closing speeches, with the Crown having the last word. If no defence evidence was called, the defence had the last word.

In misdemeanour, the accused's position was more disadvantageous still. If he called evidence not only would this give the prosecution the last word, but his counsel had no right to a closing speech (only one speech was allowed to defence counsel which, irrespective of whether there were defence witnesses to call, had to be made immediately upon the close of the Crown case) [1].

These rules meant that, in deciding whether to call witnesses, the defence would have to weigh the benefit it hoped to reap from their testimony against the harm it might suffer from the prosecution reply (in misdemeanour that harm could be particularly great if the defence witnesses failed to come up to proof or were badly mauled in cross-examination, for the defence, lacking a closing speech, would have no opportunity to try and repair the damage). That counsel frequently chose to hold back available evidence rather than risk a reply is beyond doubt [2].

Nor was this the only impact which the reply had on trial tactics. After 1820 it was but rarely that defence counsel would risk cross-examining a Crown witness on discrepancies between his testimony and his deposition, for, in order to do so, he would have to put the deposition in, and the putting in of any document by the defence at any stage gave the prosecution the reply [3]. Again, defence counsel when addressing the jury had to take care not to state facts not in evidence for to do so would give the Crown the reply [4]. Unless one knew one's opponent, even the calling of character witnesses involved an element of risk, for strictly the calling of such witnesses gave the prosecution the reply, and, although the right was one which Crown counsel was expected to exercise only in exceptional circumstances, if he decided to stand on his rights the judge could not prevent him doing so [5]. The only situation in which the defence case could be conducted without concerning itself about the risk of reply was where the prosecutor was in person, prosecutors in person not being allowed to address the jury either by way of opening or reply [6].

Pre-1836, the rules in misdemeanour in theory applied also in felony. However, since in felony the accused's counsel could not address the jury on his behalf, the practice was for Crown counsel not to avail themselves of the right of reply where defence evidence was given [7]. Indeed, on some circuits, indulgence went further than this, it being the custom for prosecuting counsel not to make even an opening speech (save in complicated cases) [8]. Thus, in felony trials, at the close of the prosecution case, what the jury would hear would be the accused's unsworn statement followed by any evidence he chose to call, with no prosecution reply to either.

The Prisoners' Counsel Bills had obvious implications as regards the reply, as the Attorney-General was not slow to point out in debate [9]. If felony prisoners were given the right to make full defence by counsel, the Crown would beyond doubt henceforth exercise the same right of reply in felony as in misdemeanour. The point appears to have been overlooked by the draftsmen of the early Bills [10], for they are completely silent on the question of the reply. The first Bill to provide for the point was that of 1833, which proposed that the prisoner should have the last speech in both felony and misdemeanour. In 1835 the Criminal Law Commissioners came out strongly in favour of allowing the accused the last word [11], and both the 1835 and the 1836 Bills contained a clause to that effect. When the 1836 Bill reached the Lords, the clause was struck out at Committee stage, the principal ground of opposition to it being that it would create an inconsistency of practice between civil and criminal cases [12]. At the third reading stage an attempt was made to reinstate it but failed by ten votes [13], and the Bill was sent back to the Commons with the clause struck out. The

Commons refused to accept the amendment, but with only a day of the session left, Ewart reluctantly gave in and the Bill was passed in the form in which it had come down from the Lords [14].

The judges were not slow to spell out what the implications of the new Act would be as regards the reply. In early 1837 they issued a Practice Direction [15]. In felony cases, counsel for a prisoner was not to be permitted to cross-examine a prosecution witness upon his deposition, without putting in the deposition, which would in turn give the Crown the right of reply; the calling of character witnesses would give the reply although it would be a matter for discretion whether counsel would exercise it; the Law Officers would be entitled to reply although no evidence had been produced on behalf of the prisoner. Thus, the matter was clear - as its opponents had predicted, part of the price to be paid for the right to full defence by counsel in felony was that the prisoner who called evidence would be subject to the reply.

A question which soon had to be faced was whether, in a case where there were several accused, the calling of evidence by one gave the prosecution a right of reply against all. It received from the judges no clear answer [16].

Events took an important turn in 1853 with the publication of the Second Report of the Royal Commission on Common Law Procedure [17]. This stressed that, in civil cases, the one great object of counsel for a defendant was to avoid calling witnesses so as not to expose the case to the danger of a reply. The upshot of the Report was s. 34 of the Common Law Procedure Act, 1854, which, while it did not abolish the reply in civil suits, did give counsel for a defendant who called



evidence, the right to make a second speech at the close of such evidence. This meant that henceforth the defendant's counsel would, at least, be able to deal with any ground which had been lost in the course of the defence case.

The passing of the 1854 Act obviously posed the question whether the reform should be extended to criminal cases. In 1856 the Lord Chancellor commissioned a report on criminal procedure from Charles Greaves. He recommended [18] that criminal and civil procedure be brought into line on this point. He also argued forcibly against the Law Officers' prerogative right to the last word. On the question of whether the law should be altered to give the prisoner the last word in all cases, he pointed out that the Second Report of the Criminal Law Commissioners had favoured such a reform, and that the last word was given to the prisoner in civil law systems, in Scotland and under the New York Criminal Code. He also acknowledged that the existence of the Crown's right of reply led in many cases to evidence material to a prisoner's case not being called. However, in his view, the balance of convenience was against making such a change. There was no evidence that the right of reply had led to practical inconvenience. If defence counsel were allowed the last word the judge would often be placed in the embarrassing position of having to expose in his summing up the unsoundness of the defence arguments; also there would be no incentive for prisoners not to bring forward all manner of irrelevant evidence.

The Government took no steps to give effect to Greaves' recommendation, and in 1860 Denman and Ewart presented a Bill [19] to bring the practice in felony and misdemeanour into line with that in civil suits. It passed the Commons but the Lords

sent it back with an amendment to the effect that it should be left to the discretion of the trial judge whether the defence should have a second speech (such discretion to be exercised in the light of the number of witnesses called and all other relevant factors). The amendment was strongly attacked in the Commons [20] and in the end the Bill was lost. In 1861 a similar Bill was introduced but did not get beyond a first reading [21]. Eventually, in 1865 the reform was carried in the form of s. 2 of the Criminal Procedure Act. The Act, by permitting prosecution witnesses to be cross-examined on their depositions without the deposition being put in, also limited the scope for the reply [22].

Although the 1865 Act did not, as Greaves had recommended, abolish the Law Officers' right of reply, that right was by now coming under attack from other quarters. In the Practice Direction of 1837 the judges had spoken of the right as being exercisable not only by the Attorney General but by any counsel representing him, but by the 1860s not all judges were prepared to allow it so wide a scope. In 1858 Byles J. declared the right limited to the Attorney-General personally [23], and the following year he repeated this ruling in a Mint prosecution [24]. In 1865 Martin B. denied the claim of the Attorney-General of Chester to exercise the right, declaring it exercisable only by the Attorney-General of England in person [25]. Also, hard on the heels of the 1865 Act came arguments that the Act had abolished the prerogative right. This palpably unsound argument was rejected by a number of judges [26] but it took a long time dying. As late as 1872 [27] the point was still being taken at the Old Bailey. The judges gave equally short shrift to arguments that the right was limited to the Attorney-General and not

claimable by the Solicitor-General. In 1878 Hawkins J. [28] attempted a reverter to the old rule, declaring that any counsel representing the Law Officers could claim the right, but his decision was against the tide of opinion, and in 1884 the matter was put beyond doubt by a resolution of the Council of Judges [29] that henceforth the right would be allowed only in cases where the Law Officers were personally involved [30].

The problem of how the right of reply should be exercised in cases involving co-prisoners was one which still had not been fully solved even by the 1860s. In Blackburn [31] in 1853 Talfourd J. had held obiter that, where prisoners were jointly indicted for the same offence, the calling of evidence by one gave a right of reply against all, and there were other decisions, both earlier and later to like effect [32]. In Marlow & Beesley (1867) [33] however, Smith J. held that the Crown only had a right of reply against those prisoners who called evidence, a ruling which was followed in several subsequent cases [34], including Burns (1887) [35], where it was further held that in such a case counsel for the prisoners on whose behalf no evidence was called could make their speeches after the reply for the Crown. In Trevelli (1882) [36] Hawkins J. steered a middle course between these conflicting lines of authority by holding that the calling of evidence by one prisoner would give the Crown a right of reply against all prisoners to whose case the evidence was relevant, and this ruling too attracted its adherents [37].

The Criminal Code Bills, 1878-83 proposed no change in the law as to the reply. However, a clutch of cases in the 1880s reversing the rule forbidding the making of unsworn statements by prisoners defended by counsel, brought a change in

the law, with the rule laid down in Manzano (1860) [38], that the making of such a statement did not give the Crown the right of reply, being overturned [39].

A point which was slow to be appreciated during the long debate about prisoners giving evidence was that the reform, like that of 1836, had implications for the right of reply. One of the first M.P.s to raise the question was Wharton, who in the debate on the 1888 Bill asked whether the giving of evidence by a prisoner would give the Crown the reply, observing that if it did the Bill would be a trap [40]. But by most it went unnoticed. Certainly, none of the Prisoners' Evidence Bills introduced in the 1880s and 1890s contained any provision on the point, and it was only at the Committee stage of the 1898 Bill that the Government was prevailed upon to agree to the inclusion of a clause providing that the giving of evidence by the accused should not give the prosecution the right of reply [41].

For all that the reply had an impact on trial tactics, its importance in this regard must not be over-stressed. It is worth reminding oneself that many prisoners had no witnesses as to fact to call in any event [42]. Then again, the right of reply could only be exercised by counsel and it was by no means in every prosecution that counsel was briefed. And, if the prisoner was undefended, his ignorance of the rules as to the reply would prevent his being influenced by them. The dilemma as to whether to call evidence and risk the reply assumed its most acute form in capital cases, and this was to remain true in the twentieth century almost down to the abolition of the death penalty for murder [43].

## CHAPTER 13

### CONDITIONS AT TRIAL

'The hungry judges soon the sentence sign  
And wretches hang that jurymen may dine'

A. Pope, *The Rape of the Lock*, III, 21

#### (a) For prisoners

At many courts the conditions in which prisoners waiting to be tried were held were very bad. In 1887, a Home Office Committee reported [1] that at eight court houses prisoners, waiting to be brought up, were held in cupboard like boxes with bases measuring little more than two feet square [2], whilst at other places the practice was to keep them together unsegregated in a single dark room with no seats, no heating and inadequate sanitary facilities [3].

When he was eventually brought into court the prisoner was brought up unshackled [4], and was usually spared the indignity of having to hold up his hand on arraignment and verdict taken [5]. But unless he was infirm [6] he was expected to stand however long his trial lasted [7], and as now, he would (save in misdemeanour where he was sometimes allowed to sit with his counsel) have to communicate with his lawyers by notes or whispered instructions from the dock [8].

Further, since it was the practice for courts to sit until late at night, a prisoner might find his case called on or continuing at an hour at which both he and his counsel (if he had one) were physically exhausted. At the Old Bailey late sittings were traditional (fostered in part by the

sheriffs' practice of holding a dinner at 5 p.m. for the judges) [9]. At Assizes the cause was more usually a heavy list and too few days allotted to get through it. Protests about the practice were made in Parliament from time to time but little usually came of them. When in 1834 an M.P. complained that at the recent Armagh Assizes Baron Smith had tried fourteen cases (some of them capital) between 6 p.m. and 6 a.m. [10], several M.P.s sprang to his defence claiming that he had merely been trying to spare the prisoners the hardship of having their cases put over to the next Assize, and although the Commons voted to hold an inquiry into this and other charges against the judge, nothing came of it.

As the century wore on, courts moderated their sitting hours but late sittings continued to occur from time to time both at the Old Bailey [11] and at Assizes [12] right through until the end of the century.

#### **(b) For the Jury**

If the way prisoners were treated during long trials was deplorable, the treatment meted out to jurors was if anything worse.

The power of a trial judge to adjourn a trial, which did not finish within the day, had been established in the last years of the eighteenth century [13], but where a trial for treason or felony was so adjourned, the jury were not permitted to separate over the adjournment [14]. Instead they would be taken either to a room in the court building [15] or, more usually, to a hotel, and kept there over the adjournment in the charge of a bailiff sworn to allow no-one to speak to them. Old Bailey juries were normally taken to a

hotel (the London Tavern, the London Coffee House, the City Terminus Hotel, the Cannon Street Hotel, all were used at different times during the century) [16]. Provincial juries did not always fare so well. In 1848 a York jury complained that all they had been provided with were six shake-downs on the floor (the under-sheriff, when taxed by the judge, claimed that this was the accommodation normally provided) [17].

The purpose of the rule against separation was to prevent the jury being tampered with [18]. It never applied in misdemeanour (there the jury were allowed to return home overnight) [19] and indeed in the eighteenth century had not always been strictly applied in felony cases. To jurors the rule caused huge inconvenience, particularly at weekends when they were locked up, not merely overnight, but on two consecutive nights and for the whole of Sunday, with a communal outing to church [20] or an airing in a quiet spot such as the Temple Gardens [21] the only relief from the tedium.

It also had an unfortunate impact upon the way trials were conducted. It was one of the causes of late sittings. To avoid having to lock the jury up, judges, would sit late to finish a case [22], with the result that the defence case was taken at a time when the powers of concentration and comprehension of jurors (as well as accused) were at their lowest ebb. Later on in the century it bred an unwillingness to start felony trials after lunch. In The Tichborne case, it was the principal reason why the Claimant was charged with the misdemeanour of perjury rather than the felony of forgery [23].

Once the jury had retired to consider their verdict, they became subject to an even more stringent regime [24]. They were to be kept locked up without fire food or drink until they reached a verdict. In cases of long retirement jurors would often become faint or ill through lack of food. Where this happened a surgeon would be sent in to examine them. If he swore that to continue to hold them would involve risk to the life of one or more of their number they would be discharged, but nothing short of risk to life would normally persuade a judge to discharge them [25].

At Assizes if a jury still had not reached a verdict by the time the judge was ready to leave the Assize town, it was open to him to have the jury placed in a cart, carried along behind him as he made his way to the next county town, and shot into a ditch if they had not agreed by the time he reached the county border [26]. In a Lords' debate in 1859 [27] and in Winsor v. R. [28] in 1865, the judges were at pains to assert that carting had never been practised or sanctioned by the common law. In this, however, they were badly mistaken. Carting may have been rare in the nineteenth century but it certainly took place. A jury was carted at Tralee Assizes in 1825 [29], whilst as late as 1848 Platt B., whilst sitting at Oxford Assizes, gave orders for a cart to be got ready for a jury which could not agree [30].

Until 1865 whether a judge had power (in the absence of danger to life) to discharge a jury which could not agree [31], and whether there could be a second trial after a discharge in such circumstances [32] were regarded as doubtful questions. The doubts were finally removed by the decision of the Court for Crown Cases Reserved in Winsor v. R., but, even after this decision, judges



remained very slow to discharge juries which could not agree.

The law's tactic of starving jurors into verdicts made jury trial a lottery in cases of disagreement and the feeling was that the loser in such lottery was usually the accused. As Pope had it 'wretches hang that jurymen may dine' [33].

Another rule inconvenient to jury and accused alike was that which obliged the judge, in the event of the death, illness or other absence of a juror, to discharge the jury and start again. Since on such a retrial the usual practice was simply to call a new juror to fill the gap, swear the jury thus afforced again, and then read over to them the evidence given in the aborted trial [34], the remaining jurors had the tedium of hearing evidence gone through twice whilst the accused ended up being tried by a jury one of whom had not heard all the witnesses.

As the century wore on there was inevitably pressure for reform [35]. The first rule to be done away with was that which denied a jury fire and refreshment after retirement. By the 1860s it had already been done away with in Ireland [36], and, even in England there had been occasional infractions in civil cases [37]. Between 1864 and 1869 no less than four Bills were presented to the Commons containing clauses providing for the abolition of the rule. It was finally done away with by the Juries Act, 1870, which declared that henceforth the matter should be in the trial judge's discretion.

The rule prohibiting the separation of juries in treason and felony proved much more enduring. Between 1864 and 1897 nineteen Bills [38] on the

subject were presented to Parliament, but it was only in 1897 that the reform was finally carried [39], and even then treason, treason-felony and murder were excepted (in these cases the separation rule continued to be applied right down until 1948) [40]. The rule that illness, death, or absence of a juror obliged the judge to discharge the jury proved equally resistant to change. Bills for its reform introduced in 1868 [41] and 1874 [42] were lost and it was not until 1925 that the rule was finally altered [43].

A solution to the problem of deadlocked juries, which was periodically canvassed during the century was that of the majority verdict. Majority verdicts in civil cases had been advocated by the Common Law Commissioners in 1831 [44], and investigated so far as criminal cases were concerned by the Criminal Law Commissioners in 1845 [45]. During the second reading debate on the Juries Bill, 1873 (which proposed to reduce the size of the jury to seven in all save capital cases) the Attorney-General canvassed abandoning the unanimity rule in non-capital cases, but by the Committee stage, having ascertained that the judges were divided on the proposal, he dropped it [46].

## CHAPTER 14

### EVIDENTIAL PROTECTION I ONUS AND STANDARD OF PROOF; THE EXCLUSION OF EVIDENCE (PROCEDURAL RULES)

' ... the testimonies and proofs of the offence ought to be so clear and manifest as there can be no defence of it'.

Coke, Inst. iii, 29, 137.

The protection conferred upon the accused by the law of evidence was throughout the nineteenth century substantial. Not only did the law cast the burden of proof on the prosecution but it rigorously excluded hearsay, involuntary confessions and evidence of the accused's bad character, and insisted that juries be cautioned against the dangers of convicting without corroboration where the charge was perjury, or the evidence came from an accomplice or a rape complainant.

#### (a) Burden and standard of proof

That it was for the prosecution to prove guilt beyond reasonable doubt was, in 1800, a rule well known to lawyer and layman alike. One has to look no further than the Commons' debates on the early Prisoners' Counsel Bills to see this [1]. This is not to say, however, that juries always received a direction on the matter [2]. And where a direction was given it might take one of a number of forms, ranging from one framed in terms of proof beyond reasonable doubt [3] to a direction to convict if guilt was proved (or clearly proved) [4], or proved to their (complete) satisfaction [5], or if they believed the prosecution witnesses [6] (this was in fact the form of direction contained in the

precedent of a summing up given in Chitty's Criminal Law published in 1816) [7].

In the heyday of capital punishment, a judge, who intended to leave a prisoner for execution if convicted, would sometimes warn the jury of this when directing them on the standard of proof [8], and even in the second half of the century it was not unknown for summings up in capital cases to buttress the direction on the standard of proof with a warning that the life of a fellow creature was at stake [9]. Such warnings proved, if anything, too effective, and in the 1850s and 1860s Pollock C.B. reacted to the acquittal rate in capital cases by trying to water down the standard of proof [10]. His much criticised initiative (which consisted of directing the jury that the degree of certainty for a conviction was merely that upon which they were accustomed to act in their own 'grave and weighty concerns') [11] did not, however, survive his retirement from the bench in 1866.

That the burden upon the prosecution included a duty to disprove defences raised by the accused was in the nineteenth century less than clear. Text writers [12] and judges often wrote and talked as if the burden of proving defences was on the accused. Whether the burden referred to was persuasive or merely evidential was rarely made clear, but this is hardly surprising given that the distinction between the two burdens was at the time but imperfectly understood [13]. One defence upon which the accused undoubtedly did bear the persuasive burden was insanity. The law presumed a man to be sane, and if a prisoner relied upon insanity as a defence it was for him to prove it. This had been clear law since Arnold's case in 1724, if not before [14]. But insanity seems not

to have been regarded as a case alone. In 1816 one can find Abbott J. directing a jury that it was for a prisoner who relied on the defence of duress to 'make it out most satisfactorily' [15]. Again take murder. It had been laid down by both Gilbert and Foster [16] that in murder, once the fact of killing was proved against a prisoner, the burden was then on him to prove that the case was not one of murder, either by proving matters (such as provocation or lack of intent) which reduced the offence to manslaughter or which showed that the killing was justifiable or excusable (i.e self defence, accident), the law presuming malice from the fact of the killing, and throughout the century it was normal practice so to direct juries [17]. In Woolmington in 1935 [18] the House of Lords held that the burden on the accused was only evidential, but in the nineteenth century it was spoken of [19] and seemingly regarded as persuasive [20]. And it may well be that the rule laid down by Foster spread over into non-fatal assault as well. Certainly, in two cases this century (Davies 1913 and Lobell 1957) [21], the Court of Criminal Appeal has had to overturn rulings by High Court judges that in assault the burden of proof on the issues of accident and self defence was on the accused (rulings which the prosecution in each case sought to uphold by reference by dicta from nineteenth century homicide cases). Also, it must not be forgotten that, as the century wore on, in an increasing number of statutory offences the burden of proof on particular issues was cast by statute on the accused [22].

A question never answered at any time during the century was to what standard of proof an accused was required to prove an issue upon which he bore the burden of proof? When in 1843 the judges in M'Naghten's case [23] delivered what

still remains the definitive exposition of the law of insanity in criminal cases, they wholly ignored the question. Indeed, the question seems to have been neither asked nor answered (at least in England) until the 1930s, either in relation to insanity or to issues upon which the accused by statute bore the burden of proof [24]. The usual jury direction in such cases was that it was for the accused to make out, to (clearly) prove the defence or issue, that it was for him to satisfy them upon it, or that they must believe the defence made out [25]. It may be that many, if asked, would have said that the standard of proof required of the accused was proof beyond reasonable doubt [26]. Certainly the use of expressions such as 'believe', 'satisfy' and 'clearly prove' suggest this.

#### **(b) Procedural aspects**

The area in which the nineteenth century law of criminal evidence most clearly lacked maturity was its procedural aspect.

#### **(i) Elementary rules**

At the start of the century, some elementary questions as to admissibility still awaited resolution. For example, by whom was a factual issue upon which admissibility depended to be determined, the judge or the jury? Upon whom did the burden of proof in relation to such issue rest? Was it open to the accused to call evidence on the issue and, if so, at what stage? In Woodcock [27] in 1789 Eyre C.B. had held that it was for the jury to determine the admissibility of a dying declaration, and, although this aberrant ruling was within a matter of years overturned by the Twelve Judges [28], as late as 1853 one could find doubt

being expressed as to whether the issue of whether a prosecution witness was married to one of the accused, and therefore incompetent, was one for the judge or the jury [29]. As for the burden of proof, in 1848, Patteson J. is to be heard observing arguendo in the Court for Crown Cases Reserved that it was for the prisoner to prove that a confession had been procured by an inducement [30]. And, although in Warringham [31], three years later, Parke B. laid down the precisely opposite rule, there is no certainty that his ruling was taken as settling the point, for forty years later [32] counsel is still to be found arguing before the Court for Crown Cases Reserved, albeit unsuccessfully, that the burden was on the prisoner. Warringham had, however, been followed in Jenkins [33] in 1869 where Kelly C.B. held that, where a question arose as to the admissibility of a statement as a dying declaration, the burden of proof of the state of mind of the declarant was on the prosecution, and the standard of proof was proof beyond reasonable doubt. In a case heard at the Old Bailey in 1828 [34] Gaselee J. refused to allow defence counsel to call evidence bearing upon the issue of the voluntariness of a confession save as part of the defence case, despite counsel's protests that, by that time, the confession might well have been allowed in and the damage done. There was, said his lordship, no precedent for such a proceeding.

**(ii) Trying admissibility in front of the jury**

From an accused's point of view no feature of the law of evidence was more unsatisfactory than the way issues of admissibility were tried.

Eighteenth century practice had been for legal argument as to the admissibility of confessions to

take place in the presence of the jury [35], and the advent of the nineteenth century brought no change. Reported cases [36] indicate that where the Crown sought to put in confession evidence, the procedure followed was for the witness, who was to prove the confession, to be questioned minutely as to what had passed between him and the prisoner prior to the making of the confession, and, if anything emerged which cast doubt on its admissibility, the judge would hear argument on the point and rule. Reports make no mention of the jury being invited to withdraw at any stage and the clear impression one gets is that the jury was present throughout. That would be consistent with what we know about eighteenth century trials, and it would also explain a case such as Yarham (1846) [37], where defence counsel, in his closing speech, is to be found making reference to a statement earlier ruled inadmissible by the judge.

Nor do confessions appear to have been a case apart. On the contrary, there are grounds for believing that throughout the century the normal practice was for all legal argument, whether as to admissibility or otherwise, to take place in the presence of the jury. In the debate on the 1824 Prisoners' Counsel Bill Denman referred to the practice of counsel in felony cases using legal objection and argument as an indirect means of making a jury speech [38]. Other evidence is afforded by reports of trials. In 1837 [39] one finds Parke B. explaining in his summing up a ruling he had earlier given on an indictment point, and in 1840 [40] a judge is to be seen taking the same course in relation to a ruling on admissibility - a step which suggests that the jury had been present during argument. From the report of an 1843 [41] case it is clear that argument as to the right of reply took place in front of the



jury. The case of Ingrey [42] tried before the Lord Chief Justice in 1900 is even clearer. In Forster [43] in 1855 a jury, in convicting the accused of uttering counterfeit coin, added that they found this verdict without considering in the least the evidence of a subsequent uttering which had been adduced by the Crown - a rider which suggests that they had been present when the admissibility of this evidence was argued. Then there is the frequency with which one finds objections as to admissibility being taken during the prosecution's opening speech [44] - a state of affairs which is difficult to explain save on the basis that there was no duty on the Crown to refrain from opening potentially inadmissible evidence, which in turn is consistent with a practice of arguing admissibility in front of the jury. There is also twentieth century material, which appears to look back to an earlier practice of conducting legal argument in the presence of the jury. In the judgment of the Lord Chief Justice in Thompson (1917) [45] there are dicta which seem to imply that argument in front of the jury was the normal rule, and sending the jury to their room the exception. Then there is the difficulty which the Court of Appeal was still having as late as 1973 [46] in stamping out the practice of having submissions of no case argued in front of the jury.

As the nineteenth century wore on, however, one sees attempts made to protect the accused against the prejudice to which the existing practice gave rise. A variety of expedients was resorted to. In a handful of 1820s cases [47] one finds evidence of something resembling the American practice of counsel discussing points of law with the judge at his bench in voices too low to be heard by the jury. The practice does not however seem to have taken root, and one hears no more of

it thereafter. In Taylor [48] in 1851 the judge, on the application of both counsel, gave a ruling, before the trial began and out of the hearing of the waiting jury, upon a question of similar fact evidence. In Winslow [49] in 1860, again before the trial began, and with the express object of avoiding prejudice to the prisoner, Martin B. received written submissions from counsel upon the admissibility of similar fact evidence, and gave a ruling thereon in private. During the remainder of the century the practice was occasionally adopted in other cases [50]. In 1917, however, it was severely condemned by the Court of Criminal Appeal, on the ground that it gave rise to no shorthand note [51]. An expedient occasionally resorted to at the Old Bailey in the 1860s was that of requiring a witness, before he answered a question, the answer to which it was thought might well be inadmissible, to write down the answer so that the judge might consider it [52]. Yet another was to couch the objection or argument in terms which the jury were unlikely to be able to follow [53].

The first case in which an English court is reported as sending a jury away whilst a question of admissibility was argued, would appear to be Ivimy [54] tried at the Old Bailey in 1880. The practice was, however, slow to take hold. It was becoming more common by 1910 [55], and seven years later in Thompson the Lord Chief Justice, in expressing his disapproval of Winslow, observed that where the judge considered that it would unfairly prejudice the accused to hear legal argument in the presence of the jury he should direct the jury to retire to their room. However, he made clear that the accused had no right to require that the jury be sent out. The matter was one for the discretion of the judge. This was in

fact the same rule as had been laid down by the American courts in the 1880s and 1890s [56]. The first practitioners' book to make mention of the practice appears to have been the 1921 edition of Roscoe [57], which noted that the jury was sometimes asked to retire whilst questions of law were argued.

**(iii) Procedure where inadmissible evidence got before jury**

For much of the century, where inadmissible evidence got in front of the jury, the practice was for the judge simply to strike it from his notes and tell the jury to disregard it [58]. By the start of the twentieth century, however, there were signs that the courts were beginning to recognise there were some cases where justice demanded that the trial be stopped and the jury discharged [59].

**(iv) Exclusionary discretion**

Of an exclusionary discretion one finds no trace. If evidence was admissible the judge was bound to admit it, however slight its probative value [60]. As late as the 1870s and 1880s, even in capital cases, arguments that similar fact evidence tendered by the Crown had little weight, or would cause damning prejudice, were simply brushed aside [61]. Such matters had no bearing upon admissibility. However, although a judge had no power to exclude unfairly prejudicial evidence, a suggestion to prosecuting counsel not to press the evidence (coupled where there was doubt as to admissibility with a threat to reserve the point) would often suffice to prevent its being laid before the jury. As early as 1858 one finds Williams J. [62], when faced with an argument that the prior utterings relied upon by the Crown were

too remote in time to have any probative value,  
declaring:-

'the judge reposes confidence in counsel that they will not give in evidence what has no tendency to prove guilty knowledge but only to prejudice the prisoner'.

By the early twentieth century, the practice of urging counsel not to press evidence was sufficiently firmly established to be described by Lord Moulton in Christie [63] as 'very salutary' and 'usually sufficient' to prevent the evidence being put in. Indeed, prior to 1898 it was by this means that judges, who were so minded, were able to prevent prisoners, who availed themselves of a statutory right of giving evidence, being cross-examined as to character.

## CHAPTER 15

### EVIDENTIAL PROTECTION II

#### HEARSAY

'You must not tell us what the soldier or any other man said', interrupted the judge, its not evidence.'

C. Dickens, *The Pickwick Papers*, c. 34.

The rule against hearsay, with roots going back to the seventeenth century, was throughout the nineteenth strictly enforced in criminal cases.

In the early years of the century this strictness led to severe curbs being placed upon the leading of evidence of complaint in rape and sexual assault. That evidence of complaint was admissible in such cases was too clear for argument. The practice of admitting it went back to Hale's day and far beyond [1]. Indeed, without evidence of fresh complaint, a rape prosecution stood little chance of success [2]. But a complaint, being in law not evidence of the truth of the facts stated [3] but merely of consistency on the part of the complainant, the judges were by the 1820s refusing to allow the prosecution to lead more than the fact of a complaint having been made [4] (it being left to the prisoner to elicit the terms of the complaint if he wished, as he might do where the story the complainant had told initially differed from that which she was now telling). The rule, which had been criticised by Parke B. in 1839 [5], was seen at its most bizarre in *Wink* (1834) [6] where Patteson J. held that a police constable, who had received a complaint of robbery from the prosecutor, could not be asked whom the prosecutor named as his attacker, but could be asked whether, in consequence of the name given, he

went in search of any person and who that person was (a distinction which proved too subtle for some of Patteson's brethren) [7]. In the second half of the century, some judges were openly refusing [8] to follow the rule and allowing the prosecution to lead both the fact and the terms of the complaint. Eventually in 1896 the question came for decision before the Court for Crown Cases Reserved in Lillyman [9], which held that the terms as well as the fact of a complaint could be led, giving as one of the justifications for so ruling that it prevented the jury speculating as to what the terms of the complaint were.

Confessions aside, the most important exceptions [10] to the rule in criminal cases were those relating to dying declarations and the reading of depositions. As the century wore on the law as to the first became ever more strict, whilst the scope for the latter was progressively enlarged.

At the end of the eighteenth century it had commonly been thought that dying declarations were admissible in all cases civil and criminal. Indeed, one finds the law so stated by text writers as late as 1810 [11]. And such a view of the law seemed in accordance both with principle and authority. With principle because the reason given for admitting such declarations in evidence, namely the unlikelihood of a man dying with a lie on his lips [12], applied as well to civil suits as to criminal. In accordance with authority because there was a handful of pre-1820 cases, which appeared to show that admissibility was not confined simply to homicide cases. Of these cases the most important was Wright v. Littler (1761) [13] in which Lord Mansfield had held the deathbed confession of an attesting witness to a deed that

he had forged it, admissible to impeach the validity of the deed (a decision later followed by Heath J. in an unreported case, cited with approval by Lord Ellenborough in judgments given in 1805 and 1808) [14]. The others were the Douglas Peerage case (1769) [15] where the dying declarations of Lady Douglas as to the paternity of the claimant had been held admissible, and Drummond (1784) [16] in which, on an indictment for robbery, the dying confession of another person recently executed that he was the true robber, had been rejected solely because the deceased as a convict would have been incompetent to give evidence.

By 1836 Parke B. was able to describe the theory of the general admissibility of declarations in extremis as 'long exploded' [17], the only class of case in which such evidence was by then admissible being homicide prosecutions. The first English case in which one finds this new strict rule applied is Doe d. Sutton v. Ridgway in 1820 [18] (there is a New York case to like effect in 1818) [19]. There the King's Bench refused to admit a dying declaration to prove pedigree in an ejectment action, Wright v. Littler being explained away on the basis that the declaration was admitted so that the party impeaching the deed should not, by the death of the attesting witness, lose the benefit of a matter which he could have put to him in cross-examination had he lived. Four years later came the important ruling of the same court in Mead [20] (a prosecution for perjury) that dying declarations were only admissible where the death of the deceased was the subject of the charge. Although the court did not condescend to give reasons for its ruling, it again apparently felt obliged to distinguish Wright v. Littler, and did so, this time on a somewhat different ground to that which it had offered in 1820, namely that the

declaration was self-accusatory and not accusatory of others. After these two decisions all that was needed to get rid of the old doctrine altogether was to administer the coup de grace to Wright v. Littler, and this was done in 1836 by a strong Court of Exchequer in Stobart v. Dryden [17].

This dramatic change of direction in the law probably stemmed from increasing judicial unease about the anomalous nature of this exception to the hearsay rule and the scope it offered for fraud. But why was the exception allowed to survive in homicide cases? The explanation offered by contemporary text writers was necessity. If dying declarations were not received in homicide cases, murderers would escape justice [21]. The reality, however, is probably that in homicide cases their admissibility was too well established to be questioned, there being numerous decisions (including several by the Twelve Judges) [22] in favour of their admission, some even dating back to the seventeenth century [23].

Mead did not quite mark the end of the old doctrine so far as criminal cases were concerned. In Lindfield (1848) [24] and in Hind (1860) [25], both of which were prosecutions for abortion, the dying declaration of the woman was admitted by the trial judge (Hind's conviction was in consequence quashed by the Court for Crown Cases Reserved; in Lindfield the jury's acquittal of the accused prevented the point being reserved). And unsuccessful attempts were made in 1830 [26], 1841 [27] and 1859 [28] to get dying declarations admitted in prosecutions for robbery, shooting with intent to murder (in this case, the death bed confession of a man, alleged by the defence to be the perpetrator of the offence, was sought to be put in to exculpate the accused) and for rape.



The rules applied after Mead to determine the admissibility of statements tendered as dying declarations in homicide cases were essentially the same as those laid down in the eighteenth century. The declarant must have been a person competent in law to give sworn evidence [29], the declaration must relate to the cause of the declarant's death [30], and at the time he made it the declarant must have been under a settled and hopeless expectation [31] of almost immediate death [32]. What was new, however, was the strictness with which judges now demanded that the accused's state of mind be proved, the result of which was rulings against which, in Wigmore's words, 'common sense revolts', rulings such as that in Mooney (1851) [33], where a declaration made by a woman, after she had been warned by a clergyman to prepare for death and had been heard commending her soul to God, was rejected on the grounds that the proof that she was aware she was in a dying state was not sufficient. A celebrated instance of this excessive judicial scrupulousness occurred in the 1870s. It had been held in a number of eighteenth century cases that the fact that the deceased knew he was in a dying state could properly be inferred from the nature of his wounds or illness alone [34]. And one finds the same proposition laid down both by text writers [35] and in reported cases in the first half of nineteenth century [36]. In 1875, however, in Morgan [37] Denman J., after consulting Cockburn L.C.J., refused to draw the inference, declaring that there was no case in which a judge

'had admitted the statement entirely upon an inference drawn from the nature of the wound itself and from giving the deceased credit for ordinary intelligence as to its natural results'

and four years later in Bedingfield [38] Cockburn L.C.J. rejected out of hand, as a dying declaration, a statement made by a woman minutes before dying of a severe throat wound inflicted inside a house from which she had fled. There was, he ruled, no evidence that she was aware she was dying. The two cases were severely criticised by commentators [39] as based on a mistaken view of the law, and were thereafter generally so regarded. Had they stood, however, the result would have been that the dying words of a victim who expired within minutes of the fatal injury being inflicted would in many cases not have been receivable as a dying declaration.

Their scrupulousness the judges justified on the ground that dying declarations, not being subject to cross-examination, were a dangerous species of evidence [40], and their admission an anomaly to be confined within as narrow bounds as possible. In the main the judges' stance was supported by text writers such as Phillipps and Pitt Taylor, who were at pains to point out the dangers inherent in such evidence (misreporting, animosity or resentment on the part of the deceased at his condition, or mistake or confusion caused by his injuries) [41]. Phillipps' assiduity had even thrown up a case of a man wrongly convicted and executed in 1749 for rape on evidence of a dying declaration [42]. A factor which must undoubtedly have played a part in shaping judicial attitudes was the frequency with which dying declarations were offered as evidence in homicide cases. At the present day, medical science has rendered the dying declaration well nigh obsolete. Victims of violence, who remain conscious or recover consciousness, now usually live to tell their tale in the witness box. In the nineteenth century any serious injury carried with it a high risk of a

fatal outcome [43], and, for this reason, it was commonplace for a victim of serious assault to be pressed (particularly if his condition took a turn for worse) to give his version, with a view to its being adduced in evidence in the event of his succumbing.

From the accused's point of view, the progressive narrowing of the scope for the admission of dying declarations in evidence was obviously welcome, as indeed were the principles, laid down early in the century, that he could pray in aid an exculpatory declaration [44], and, in cases where such evidence was called against him, lead evidence to show the deceased's bad character or unreliability as a witness [45].

One result of the judges' strictness in the matter of dying declarations was the enactment in 1867 of a provision designed to make it easier to get in evidence statements made by dangerously ill patients who subsequently died, Russell Gurney's Act [46] empowering magistrates to take out of court the deposition in relation to an indictable offence of any person dangerously ill and unlikely to recover, and making the same admissible in evidence at any later trial, provided that the accused was given notice of the taking of the deposition and the opportunity to attend and cross-examine, and the deponent was by the date of trial either dead or ill with no probability of his ever being well enough to attend trial.

In cases where the deceased died within minutes of the fatal blow, his dying words could arguably be received in evidence as part of the *res gestae*. Indeed, in 1834 [47] the dying words of a man run down by a coach were admitted on a prosecution of the coachdriver for manslaughter.

However, that door was effectively slammed shut by the ruling of Cockburn L.C.J. in Bedingfield that, to be admissible on this ground, the words spoken had to be contemporaneous with the fatal attack. The decision in Bedingfield, although severely attacked in the legal press, was nonetheless accepted as authoritative on the point [48]. Even before Bedingfield judges had, on the whole, shown a marked lack of enthusiasm for admitting dying statements in evidence on this ground in criminal cases [49].

So far as depositions were concerned, at the start of the century these could be put in only in felony [50], and then only subject to two stringent conditions, first that it be shown that the witness was dead [51], so ill as not to be able to travel [52] or was being kept out of the way by the accused [53], and that the deposition was taken in the presence of the accused and that he had had full opportunity to cross-examine the deponent [54]. The condition that the accused should have been present and had to opportunity to cross-examine, was one which some eighteenth century judges had been inclined to dispense with in the case of coroners' depositions [55], but in the nineteenth century it was strictly insisted upon in all cases - not least because it formed the principal justification for letting in this species of hearsay. Nonetheless, in practice this supposed safeguard was in many respects a hollow one. It was, in fact, rare for witnesses who gave evidence at committal hearings to be rigorously cross-examined. Most prisoners were undefended and had little skill in cross-examination, and attorneys when they were admitted (and many benches excluded them) [56] would often for tactical reasons ask but few questions [57]. Also effective cross-examination was frequently made difficult by the

objectionable but common practice of taking statements from witnesses out of court, and then merely having a witness's statement read out and confirmed by him in the prisoner's presence [58]. Again, because of the careless way in which depositions were often taken it was no uncommon thing for a deposition to omit important answers given in cross-examination [59].

As the century wore on the scope for putting depositions in evidence was increased by statute. In 1826 depositions taken by examining magistrates in misdemeanour became admissible to the same extent as in felony [60]. More thorough-going reform came in 1848 when, by Jervis' Act, strict rules were laid down as how examining magistrates should take depositions, and the procedure extended to cases of treason [61]. As well as dealing with the taking of depositions, the Act also declared in what circumstances they could be given in evidence at trial, namely where the deponent was dead or too ill to travel [62]. This poorly drafted section gave rise to a host of problems. What of witnesses kept out of the way by the accused; could their depositions still be read? In Scaife (1851) [63] the Court for Crown Cases Reserved held they could, also ruling that a deposition put in on this ground was, on a trial of co-accused, admissible only against the prisoner responsible for the witness's absence (thereby obliging the jury to undertake a feat of mental gymnastics of the type already common in confession cases). The Act was also silent as to the case of the witness who had become insane since committal (pre-1848 the deposition of such a witness had been held admissible on the basis that he was to be regarded as to all intents and purposes as dead) [64]. Then what of the words 'too ill to travel' how were they to be construed? Pre-1848, it had been held that illness would only

justify the reading of a deposition where it could be shown that the witness was so ill as unlikely ever to be fit to come to court [65], and that where the illness was not of this seriousness the appropriate course was postponement of the trial. The courts, however, felt obliged to construe the words of the Act literally, with the result that even temporary illness was now enough to allow a witness's evidence to be read [66]. In 1856 Greaves in his Report [67] to the Lord Chancellor on Criminal Procedure recommended that the section be redrawn to cover the cases omitted, including that of pregnancy (a constant source of difficulty in this connection) [68]. Nothing was however done. The only reform made in fact made in the law came in 1867 when Russell Gurney's Act, by requiring examining magistrates to take depositions from witnesses tendered by the defence, made it possible for the first time for the evidence of defence witnesses, who had died or were ill, to be read at trial.

## CHAPTER 16

### EVIDENTIAL PROTECTION III CONFESSIONS AND POLICE INTERROGATION

'For a constable to press any accused person to say anything with reference to the crime of which he is accused is very wrong'

Preface, Vincent's Police Code (1882).

#### (a) Confessions

One of the main exclusionary rules inherited by nineteenth century judges was that rendering involuntary confessions inadmissible. In Warwickshall [1] in 1783 the judges had defined an involuntary confession as one 'got by promises or threats' but the definition left unanswered two important questions. First, did the identity of the person offering the inducement matter? Second, what of the inducement itself? Would any promise or threat exclude, however trivial, and whatever its subject matter?

Upon the first question judicial opinion was as late as the mid-1830s divided, but by 1840 the rule was settled [2]:- only an inducement held out by, or with the sanction of [3], a person in authority (that is a person in a position to influence the conduct of the prosecution) would exclude. Pitt Taylor was later to suggest that the adoption of this rule was due principally to fear of opening

'a wide door to collusive practices ... (with) perjured witnesses ... called to affirm that they had urged the prisoner (that it would be best) to confess' [4].

As to the second question, if the reason for the exclusionary rule was (as dicta in Warwickshall and later cases suggested) [5] the likely unreliability of confessions obtained by inducements, it followed that the only inducements which ought to exclude were those of a kind calculated to lead the prisoner to make an untrue confession. And this approach in fact received a measure of judicial support. Indeed, the ruling of the Twelve Judges in Gilham [6] in 1828 (a decision never thereafter questioned) that a purely spiritual inducement would not exclude seems to have been based on just this reasoning. Likewise the refusal of judges to treat exhortations to tell the truth as inducements. How could it be said that telling a man to be sure to tell the truth was advising him to confess what he was not really guilty of? [7] Or yet again the 1840 ruling that property discovered in consequence of an inadmissible confession rendered the confession pro tanto admissible [8] (the finding of the property, so the argument ran, demonstrated that in that respect at least 'the party was not accusing himself falsely'). In 1842 Joy, the former Irish Chief Baron, published a treatise on confessions, in which he sought to argue that reliability was the true test of admissibility. '(The) ... threat or inducement held out must', he wrote,

'have reference to the charge, and be such as would lead (the prisoner) to suppose that it would be better for him to admit himself guilty of an offence which he had never committed' [9].

And he was able to cite in support a handful of English cases, in particular those of Green [10] and Lloyd [11] (both 1834) where the removal of the prisoner's handcuffs (desired by him as the price of confession), and a promise to allow the prisoner



to see his wife were respectively held not to render the confessions which followed inadmissible.

When Joy wrote the reliability test was in fact relatively little employed in cases of temporal (as opposed to spiritual or moral) inducement, proof of any such inducement commonly being treated as sufficient to exclude, without the need for any inquiry as to whether the inducement was in fact one which, in the particular circumstances, would have been likely to lead the particular accused to make a false confession. The judges justified this uncritical approach on two grounds. First, the difficulty of assessing the influence of an inducement on a prisoner's mind [12]. Second, the need for great caution before admitting confessions in evidence. Had not Hotham B. said in Thompson (1783) that it was 'impossible to be too careful on the subject'? [13] Indeed, in one class of case, namely where the prisoner had been told it would be better to confess, the rule as early as the 1830s was rigid and fixed. The use of any such expression rendered any confession which followed automatically inadmissible (even where the phrase had been intended and understood by the prisoner to be no more than an exhortation to tell the truth) [14].

As well as failing to make reliability the touchstone of admissibility, the judges were by the 1830s also displaying an increasing astuteness in spelling inducements out of seemingly innocuous phrases. In Enoch (1833) [15], for example, an admonition to a prisoner to confess 'otherwise the matter would lie on her and the guilty would go free' was held to be an inducement, and yet, as Joy complained, it is difficult to see what threat or promise was held out. In Mills (1833) [16] telling a prisoner 'it is of no use for you to deny it for

there is the man and boy who will swear they saw you do it' was held by Gurney B. to render his confession inadmissible, on the ground that it was 'an inducement to say something'. In Fleming (1842) [17] an admonition from a police inspector to a constable accused of stealing a watch 'Be cautious in the answers you give to the questions I am going to put to you about the watch' was held to exclude. In Croydon (1846) [18] an attorney's telling a suspect 'I dare say you had a hand in it; you may as well tell me about it' was treated as equivalent to saying it would be better to tell, and as therefore rendering what followed inadmissible.

Perhaps most bizarre of all was the line of cases which spelt an inducement out of forms of caution in daily use by police officers and magistrates. The starting point of this line of authority was Drew (1838) [19] where Coleridge J. held that to caution a person that anything he said would be given in evidence for or against him constituted an inducement. It might, he explained, lead the prisoner to put forward an untrue story which he believed would help him at his trial. He repeated the ruling in later cases [20] and it was followed in Ireland [21]. Police officers, in the light of Drew, altered the form of caution telling prisoners simply that what they said would be used in evidence against them, only to find that this would not do either. To tell a man what he says will be used against him was, said Maule J. in Jones (1843) [22], little different from telling him that it may be used for or against him. It was just as likely to lead him to say something that he supposed might make for him at his trial, and so constituted an inducement.

To many the judges' approach to the question of voluntariness was far too favourable to the

prisoner. The law was also coming under criticism for its obscurity [23]. By the 1840s the case law on confessions had swollen to huge proportions with some of the cases difficult, if not impossible, to reconcile.

Inevitably, there were calls for reform. A scheme suggested both by the Law Magazine [24] and by a number of those who answered a questionnaire put out by the Criminal Law Commissioners in 1844 [25], was that all confession evidence should be admitted, leaving it for the jury to decide what weight it deserved, and subject to the safeguard that no jury should be permitted to convict upon confession evidence alone. The first limb of the scheme, which had been canvassed by Bentham twenty years before, won a measure of judicial support. In Baldry (1852) both Parke B. and Campbell L.C.J. declared themselves attracted by it [26]. As for the proposed corroboration requirement, this was already part of United States law [27], where, taking as their starting point dicta of Hale [28] as to the danger of convicting a man of homicide where no body had been found, judges had developed the doctrine that a man could not be convicted upon his own confession without independent proof of the corpus delicti. The justification offered for the rule was well known cases of false confession such as those of Perry [29], Hubert [29], Wood [29] and the Boons [29]. Where English law stood upon the point was in the 1840s uncertain [30]. Apart from Hale's dicta there was a decision of Pollock C.B. in 1847 [31] to the effect that in bigamy some evidence of the legality of the prisoner's first marriage was required apart from his confession, but against this was an imperfectly reported case [32] in which Lord Kenyon had, *semble*, ruled that a man could be lawfully convicted on his own uncorroborated confession, and two rulings at nisi

prius. In addition there was a succession of cases from the first half of the century in which English courts had contrived to avoid ruling on the point [33].

In the end, the Law Magazine proposal was not taken up, and reform when it came, came at the hands of the judges themselves. In 1851, Campbell L.C.J. (fresh from piloting through Parliament his Criminal Procedure Act, which had so severely reduced the scope for the taking of technical points on indictments - then at least as great a cause of disquiet as the indulgent state of the law on inducements), turned his attention to confessions. In Baldry [34], a case which he had himself reserved, the Court for Crown Cases Reserved, at the same time as overruling the Drew and Jones line of cases, made it clear that in their view the pendulum in confession cases had swung too far in favour of prisoners. 'I cannot but concur,' said Parke B., 'with the observations of Mr. Pitt Taylor 'that justice and common sense seem to have been sacrificed on the altar of mercy', and with these words the other judges agreed. And after Baldry one undoubtedly sees a stricter approach being adopted to the question of voluntariness. The old inclination 'to torture words and speculate as to what words may have been misunderstood to mean' was now a thing of the past. In 1872 [35], a confession extracted from two young lads was actually let in, notwithstanding that it had been preceded with the exhortation 'you had better as good boys tell the truth' - an outcome which would have been unthinkable thirty years before.

Baldry did not, however, put an end to the call for reform. In 1856 a Bill [36] was presented to Parliament by Fitzroy Kelly which proposed,

inter alia, that no confession should be excluded on the ground that a promise or threat had been held out, unless the judge considered it of such a character as to cause an untrue admission to be made, and that confessions made to spiritual advisers should be privileged (this latter being a rule which Alderson B. had six years before vainly sought to establish [37]). It did not, however, pass. The battle to import a corroboration requirement into the law of confessions was lost by default. The Irish courts (whilst leaving open the position in homicide) twice came out against such a rule, and by the end of the century (despite the lack of any recent English ruling on the point), it had come to be generally accepted that the rule was not part of English law [39]. Calls for a corroboration requirement were during this period based not, as today, upon the risk of police fabrication (although dicta such as those of Cave J. in Thompson (1893) [40] show that not all judges were blind to this danger) but rather upon the danger of false confession.

The criticism which has been heaped upon the judges, most notably by Wigmore [41], for their indulgent approach to voluntariness pre-Baldry, tends to obscure the fact that in the first half of the century (and indeed after Baldry) the law of confessions was, on some points, far from favourable to the prisoner [42].

Take, for example, the practice of the Crown opening disputed confessions to the jury [43], or again the practice of arguing their admissibility in front of the jury [44].

Then there was the way in which the voluntariness rule was disregarded in the case of accomplices, called as King's evidence, who, in the

witness box failed to come up to proof. Any 'evidence' behaving in this way would be forthwith indicted, and would have adduced in evidence against him the admissions he had made before the examining magistrate. The fact that such admissions had been made under the clearest possible inducement was brushed aside. He had broken his compact with the Crown, and that breach, so it was argued, justified the Crown using his statements against him [45]. This rule was not finally reversed until 1861 when, in Gillis [46], the Irish Court for Crown Cases Reserved held that, though the Crown was fully entitled to put on trial an accomplice who broke his bargain, they were obliged to prove their case against him by legal evidence, and confessions made under a promise of immunity were not lawful evidence nor did nor could his breach of bargain make them so.

And most significant of all there was the refusal of the courts to treat oppressive and unfair conduct towards a prisoner, falling short of improper inducement, as a ground for exclusion. Their stance was that improper inducement was the only ground of exclusion and, if none was used, the prisoner's confession was admissible, no matter how unfair or reprehensible his treatment might have been in other respects. [47]. Admissions and confessions obtained from a prisoner when drunk [48], or when in a highly distressed state [49], or when in severe pain and about to go into labour [50] were thus admissible. Likewise confessions obtained by such means as the browbeating interrogation of a child [51], holding a prisoner in custody illegally [52], intercepting his mail [53], deceiving him as to the strength of the case against him [54], playing on his emotional vulnerability [55], promising that any disclosure he made would go no further [56], or sending a

clergyman to his cell to persuade him that divine forgiveness depended upon full repentance, and that full repentance involved making full disclosure to the civil authorities [57]. This gap in the law, which was never plugged during the century, gave rise to a much disliked but common police practice of sending into a prisoner's cell a fellow prisoner, or a policeman disguised as a prisoner, to win his confidence and worm admissions out of him, a practice still in use in Cumberland as late as 1883 [58].

Another aspect of the nineteenth century law of confessions, which has generally been overlooked, is the attempts made by judges in the first half of the century to find solutions to two problems which are still with us:-

- (i) the misreporting of confessions, and
- (ii) the plight of the prisoner who denied guilt but was incriminated by a confession made by a prisoner jointly tried with him.

The danger of confessions being misreported had been stressed by Foster and others after him [59], and it was something about which many felt unease. In the 1820s and 1830s an attempt was made to do something about the problem. In Sexton [60] in 1822 Best J. refused to allow a police officer to give evidence of a confession which he had not written down at the time it was made. And in Mallett [61] in 1830 Littledale J. took the same course, excluding a statement, returned by the examining magistrate and signed by the prisoner, but written in language which the prisoner herself had almost certainly not used. In the end the initiative came to nothing. In Roche [62] (1841) Denman L.C.J., despite having Sexton and Mallett cited to him, declined to exclude a statement of

the prisoner taken down in the third person, although he offered to reserve the point (a course rendered unnecessary by the jury's acquittal of the prisoner), and that was the last that was heard of the doctrine. Thereafter, judges, whilst stressing the dangers of misreporting, no longer treated paraphrasing as a ground of exclusion. In the last quarter of the century an attempt was made to deal with the problem by the Metropolitan Police General Orders [63] which stressed the need for officers to record at the time and in the prisoner's own words any statement volunteered by him.

The confession of a prisoner was in 1800, as now, no evidence against others named in it (this rule had been settled for well over a century) [64], but the danger was that the jury would, despite a warning from the judge that they should not do so, use it as evidence against all named in it [65]. How could the judge prevent their doing so? In 1789 [66] Buller J. had hit upon an imaginative solution. Faced with a case in which prisoner A was implicated in a confession made by prisoner B, he summed up the evidence as it affected A, requested the jury to come to a decision in his case but not to say what that decision was, and upon their announcing that they had done so, summed up the evidence as it affected B. It is difficult to be sure how widespread this technique became but one can see it in use at Assizes as late as 1844 [67].

Another device resorted to in the 1830s (and much favoured by Parke J.) was that of reading out the confession with the names of all the persons implicated omitted (juries were not, as today, furnished with copies of a prisoner's statement; instead it was merely read out by the clerk of the court). For a short time, this practice enjoyed



some currency on the Oxford Circuit [68], but the majority of judges were against it [69] (in part because of practical difficulties to which it could give rise) [70], and within a few years it had passed into limbo, not to resurface again until the Broadwater Farm case in 1987 [71].

Oddly enough, there was an even more obvious answer namely to have the prisoners separately tried. And there was a method by which this could be achieved, namely the severing of challenges (each prisoner would exercise separately and to the full his right of challenge thereby obliging the Crown to choose between agreeing to separate trials or seeing the jury panel exhausted and the trial delayed by the challenges). In practice, however, it seems to have been little used. Where prisoners were unrepresented it is easy enough to understand why there would be no severing of challenges and no separate trial (it would be an exceptional prisoner who knew of the right, still less appreciated the tactical advantages to be reaped from its use). But it is difficult to explain why counsel appearing for prisoners jointly accused so rarely availed themselves of the right. The answer may lie in judicial disapproval of the practice. Platt B. had certainly been condemnatory of it in a case in 1848 [72]. If that is not the explanation, the case of Blackburn in 1853 [73] becomes very difficult to understand. There counsel for one of three co-prisoners applied to the trial judge for an order that his client be tried separately, on the ground that he being named in the confession of one of his co-accused, would be prejudiced if tried together with that accused. He conceded that the application was novel, and in the event it was refused. But why did he not simply persuade the accused to sever their challenges? Was it that he tried to persuade them but they refused to agree

(possible but unlikely) or was it out of deference to judicial pronouncements on the subject? The only other possibility (again unlikely) is that the jury panel was so large that even the severing of challenges would not have won the prisoners a separate trial. Although one hears no more of severance of challenges in this connection, later in the century the practice of applying for and granting separate trials in confession cases did gain some limited currency [74].

**(b) Questioning by magistrates and police**

As the century wore on a question which increasingly demanded an answer was whether any special rules applied to confessions obtained by magisterial or police interrogation?

Until 1848 examining magistrates were entitled to question the prisoners brought before them. Indeed it was their duty to do so. The statutes 1 Ph. & M., c. 13 and 2 & 3 Ph. & M., c. 10 required them to take the examinations of such prisoners. However, in Wilson [75] in 1817 Richards C.B. refused to allow the answers of a prisoner upon his examination to be given in evidence. It was, he declared, irregular for magistrates to examine prisoners, for an examination itself imposed an obligation to tell the truth, and so amounted to a form of compulsion. This doctrine gained a certain currency. Wilson was still being cited in Burns' Justice of the Peace as late as 1830 [76], but it had been disapproved by Littledale J. as early as 1826 [77], and a succession of cases in the 1830s [78], upholding the right of the examining magistrate to put questions, robbed it of authority. Given that the provisions of the Marian statutes as to the examination of prisoners had

been re-enacted in 1826 [79] with their wording unaltered, its demise was perhaps inevitable.

But, for all that questioning of prisoners by examining magistrates was lawful, there was by 1800 a recognition that it was to be kept within limits. Although Lambard [80] and Dalton [81] had spoken of the Marian statutes as permitting confessions to be wrung out of prisoners, this was not how preliminary examinations were viewed two hundred and fifty years later. An examination, wrote Chitty [82] in 1816, was seen not as an additional peril to the prisoner, but as a privilege to him, an opportunity for him to clear himself of the charge at the preliminary stage. As a precaution against his being compelled to incriminate himself, there was first the safeguard of the caution:- it was accepted that before he put any question to a prisoner, an examining magistrate ought to caution him that he was not obliged to answer, and that any answers he gave might be used against him. The practice of magisterial cautioning, which has been traced back to 1730 (and is almost certainly even older) [83], as well as being a protection to the prisoner, also had the advantage of rendering it less likely that any confession, which he went on to make, would be held inadmissible at trial by reason of prior out of court inducements. Then there appears also to have been a general feeling (which the decision in Wilson itself reflects) that a prisoner upon his examination ought not to be pressed unduly. In 1824 a metropolitan magistrate, stung by press criticism that he had not attempted to get a confession out of a prisoner examined before him, protested that he was not there to drag confessions out of prisoners [84]. Nor was he alone in adopting this stance. It is clear from press reports of committal proceedings that examining magistrates in the 1820s and 1830s, if

they questioned prisoners at all, in the main confined themselves to questions seeking to clarify statements already made by the prisoners, and that often the only question put was whether the prisoner had anything to say to the charge [85]. Indeed, in the 1820s, one can find clear evidence of a practice (which in 1844 was to attract much criticism in replies to a Criminal Law Commission questionnaire) namely that of magistrates' shutting the mouth of a prisoner when he began to volunteer a confession by advising him not to commit himself [86]. By the 1840s, although the practice of questioning prisoners had not died out, it appears to have been much in decline. Prisoners, declared the 1844 edition of the Magistrates' Pocket Companion [87], were not upon their examination to be pressed to answer, examined or questioned like ordinary witnesses, and this advice appears to have been in accord with contemporary practice as described in the same year in evidence to the Criminal Law Commissioners [88]. When the law as to preliminary examinations was recast by Jervis' Act of 1848, the magistrates were stripped of all power to question prisoners. Thenceforth, at the conclusion of the evidence for the prosecution, the role of the examining magistrate would be merely to ask the accused if he wished to say anything, and to administer the caution prescribed by the Act [89]. If he went beyond this and put any questions any answers he got would be excluded at trial [90].

The transfer of the function of detecting crime from the magistracy to the reformed police inevitably raised the question of how far police officers were to be permitted to question those they arrested. Even in the 1820s there was occasional judicial criticism of police officers who took it upon themselves to question prisoners. In 1823, in the course of a summing up, Bayley J.

expressed the view that officers should refrain from attempting to pump prisoners [91], whilst two years later Gaselee J. expressed his disapproval of:-

'the habit of constables and gaolers getting into conversation with prisoners, who then made disclosures unfavourable to themselves, not supposing that those disclosures would afterwards be used against them' [92].

However, the law at this period was a long way from placing any bar upon such questioning. As recently as 1820, the judges of Ireland had, on a reserved case, held admissible a confession extracted by police questioning [93], and four years later their English brethren reached a like decision in the case of Thornton [94]. In each case more eloquent than the decision is the fact that defence counsel did not seek to found any objection upon the fact that the confession had been elicited by interrogation. In so far as any limitation did exist at this period upon the power of the police to question, it appears to have lain in the customary practice of cautioning - adopted, it seems, in imitation of magisterial procedure and, as there, having the advantage of rendering less likely the exclusion of any admission thus obtained.

By the late 1830s, however, the climate had changed. Judges were now setting their faces against police questioning. In 1838 [95] Patteson J. threatened with dismissal from the force an officer who had been in the habit of interrogating prisoners, whilst in 1839 both the Lord Chief Justice of England and one of the Irish Chief Justices expressed their strong disapproval of the practice [96]. Not all judges were, however, happy about this new fetter on the police. The evidence

published as an Appendix to the Eighth Report of the Criminal Law Commissioners spoke of a divergence of opinion and practice amongst the judges upon the point [97]. And even amongst those who disapproved of police questioning, there was some disagreement as to where the real evil lay. To some all police questioning of prisoners was improper [98], whilst to others it was objectionable only when not under caution [99]. By the 1850s, however, the new doctrine had carried the day. All questioning, whether under caution or not, was improper. One of the strongest affirmations of the rule came from Lord Campbell in Baldry (1852) [100], where, whilst overruling the absurd rule in Drew (1837) [101] that to caution a prisoner that his answer would be given in evidence was an inducement rendering his reply inadmissible, he stated emphatically that in England prisoners were not to be interrogated. This case, together with decisions in the 1860s, such as Mick (1863), settled the rule for the rest of the century.

Prior to Jervis' Act, a justification commonly offered by the judges for the rule was that police questioning was a usurpation of the function of the examining magistrate, without any of the safeguards which attended a magisterial examination [102]. When Jervis' Act deprived magistrates of their power to examine prisoners there was a change of judicial tack. Stress was now laid upon the fact that judges and magistrates were prohibited by law from questioning prisoners. If they could not question a prisoner, it was unthinkable that inferior officers of justice, such as policemen, should be allowed to do so (indeed this became the standard justification of the rule for the rest of the century and into the twentieth century) [103]. These magisterial analogies were not, however, the only reasons offered by the judges. The risk of

unfairness to the prisoner was also stressed [104]. An officer might mistake or misunderstand an accused's reply [105], or imperfect recollection might cause him to misrepresent it [106], and, even if he reported the prisoner's words with accuracy, the jury would have no idea of the tone of voice used or the manner in which the reply was given [107]. Also, given the police officer's 'natural ambition to convict' [108], there was always the danger of his unconsciously twisting or distorting a prisoner's words [109]. Then again, as Alderson B. pointed out, it was:-

"very easy to put captious and leading questions to a prisoner to induce him to give an answer which might be taken entirely contrary to its true sense'[107].

Another concern (although rarely openly expressed) was almost certainly the fear of invented confessions. The Metropolitan Police, in particular, had none too savoury a reputation in this respect in the 1840s [110]. To others the real objection lay in the relation in which the police questioner stood to his prisoner. It tended, they claimed, to make any statement obtained from the prisoner the very reverse of voluntary. The very act of questioning was an indication that the questioner might liberate the answerer if the answers were satisfactory, or detain him if they were not [111].

Joy, writing in 1842 [112], had suggested that the police should forbid the practice of police officers questioning prisoners. And this is in fact what ultimately happened. The Metropolitan Police General Orders, published in 1873 [113], prohibited any attempts by officers or others to extract a statement in the nature of a confession from a person brought to a police station on a

charge of felony, whilst the General Orders and Regulations issued by the Commissioner in 1893, as well as repeating the prohibition, contained specific reference to the impropriety of putting questions to accused persons [114]. Nor was this all. When in 1882 it was decided to publish a Police Code for the use of officers, included in it was a foreword from Hawkins J. on the duties of police constables, which laid down in clear terms that it was wrong for an officer to question a person who was in custody or whom he was about to arrest, and this foreword was still being included unaltered in revised editions of the Code in the mid-1920s.

Inevitably the new rule spawned its share of practical problems. One of the first was that some officers took the prohibition upon questioning to mean that it was their duty to stop up the mouth of any prisoner who attempted to confess to them, by immediately cautioning him [115]. The matter was commented upon by the Lord Chief Justice in a letter he wrote to the Criminal Law Commissioners in 1844 [116]. It was also the subject of judicial pronouncement in several reported cases from around the same era, with judges emphasising that, whilst it was no part of the duty of an officer to question a prisoner, neither was it his duty to caution and shut the mouth of a prisoner who was about voluntarily to confess [117].

Then there was the question of how far officers might legitimately question persons against whom there was suspicion, but who had not yet been arrested. To this the judges' answer was that once an officer had taken the decision to take a suspect into custody, it was not proper for him to put questions to him [118], but until that point was reached a suspect might be questioned after a



proper caution, although even here, the power should be exercised sparingly [119].

The most intractable problem was what stance the law should take where a police officer obtained admissions by questions in breach of the rule - as continued to happen with rather depressing frequency [120]. Upon this question the Irish judges initially took a very firm line. Until 1864, almost every reported Irish case on the point favoured the exclusion of answers so obtained [121]. In 1864, however, the point came before eleven of the Irish judges on a reserved case (Johnston) [122]. By a majority of eight to three they held that improper questioning did not, of itself, render inadmissible answers so obtained. The admissibility of such replies, like that of all confessions, depended upon their voluntariness. This decision, which was in accord with the views of the leading text writers [123], and with a number of English cases not least Wild (1835) [124], in which the Twelve Judges had held admissible a confession obtained by a civilian browbeating a fourteen year old boy who was in custody, and Cheverton (1862) [125] and Mick (1863) [126]. Amongst English judges the question had provoked its share of disagreement. Indeed, in Mick, Mellor J., whilst ruling the evidence in, observed that many judges would not have received it. 1864, however, seems to have represented a turning point, and after this the rule laid down in Johnston (1864) was to prevail unchallenged both in Ireland and England for the next twenty years. In Johnston, O' Brien J. had suggested a compromise rule:-

'that the police should be at liberty, without risk of censure, to question a prisoner so far as might be requisite for the guidance of their own conduct, and for the discovery of other evidence, but that the

answers to such questions should not be given against the prisoner at his trial [127]'

but neither this suggestion, nor the scheme adopted by the Indian Evidence Act, 1872 [128] of making all confessions to police officers inadmissible, took root.

In 1885, however, the controversy was resurrected when A.L. Smith J. in Gavin [129] refused to admit evidence of admissions obtained by police questioning. His lead was followed by Cave J. in Male & Cooper in 1893 [130], and in Morgan [131] in 1895, and by Hawkins J. in Histed [132] in 1898. However, in Rogerson [133] in 1886 the Chief Justice of New Zealand declined to follow Gavin, and it was expressly dissented from by Day J. in Brackenbury [134] in 1893. The sharpest denunciation came in Rogers v. Hawken (1898) [135], where Lord Chief Justice Russell declared that if Male & Cooper (1898) laid down that 'a statement made by an accused person in answer to a policeman ... which statement has not been brought about by any inducement ... or threat ... is ... inadmissible' it was both wrong in law and mischievous. In Gavin, the police interrogation had taken the form of confronting the prisoner with one of his co-accused and reading over to him the co-accused's statement, whilst in Male & Cooper one of the accused had had a witness's statement read over to her. This technique of interrogation (which seems to have been particularly prevalent in the Metropolitan Police, and which was no doubt conceived of as a way of outflanking the prohibition on questioning) lingered on into the twentieth century [136], and served to keep alive the controversy which Gavin had started, with several judges treating admissibility in such cases as a matter for the trial judge's discretion. In

Ibrahim [137] in 1914 Lord Sumner summarised the position thus:-

'the ... law is still unsettled, strange as it may seem for the point is one that constantly occurs in criminal trials. Many judges in their discretion exclude such evidence, for they fear that nothing less than exclusion of all such statements can prevent such improper questioning of prisoners by removing the inducement to resort to it ... Others less tender to the prisoner or more mindful of the balance of decided authority would admit such statements, nor would the Court of Criminal Appeal quash the convictions thereafter obtained if no substantial miscarriage of justice had occurred.'

The decision of the Court of Criminal Appeal in the capital cases of Voisin 1918 [138] and Booker 1924 [139] swung the balance heavily in favour of admissibility, but the doctrine that there was a discretion to exclude did not wholly disappear [140].

Cases like Voisin played an important part in clearing the way for the emergence of the modern system of police interrogation. However, the undermining of the bar upon the questioning of prisoners had begun before this. It started in fact with the 1912 Judges' Rules for the guidance of police officers. Not only did these contain no prohibition upon the questioning of persons in custody, but by rule 3:-

'Persons in custody should not be questioned without the usual caution first being administered.'

they implied that such questioning was lawful provided that it was preceded by a caution. The part played by the Rules in overturning the old practice is confirmed by the Report of the Royal Commission on Police Powers & Procedure, 1929. The

Commission found that, whilst most police forces (headed by officers trained on the principles set out in Hawkins' foreword to the Police Code) were still adhering to the old practice of not questioning prisoners, some limited the application of the principle to the offence for which the prisoner was in custody, and approved questioning as to other offences, whilst a few, taking their lead from rule 3, permitted a prisoner to be questioned even on the charge for which he was in custody [141]. In 1930, in an attempt to ensure uniformity of police practice, the Home Office, after consultation with the Judges, issued a Circular [142] stressing that:-

'Rule 3 was never intended to encourage the questioning or cross-examination of a person in custody after he had been cautioned on the subject of the crime for which he is in custody'

a point which was periodically reinforced by judicial pronouncement [143]. However, the interpretation given to rule 3 in the Circular, was never embodied in the Rules themselves [144], and by implication seemed to legitimise questioning concerning charges other than that for which the accused was in custody, which meant, of course, that the Rules could be simply outflanked by the use of holding charges [145]. By the 1950s the Circular was a dead letter [146], and all trace of the old rule was eventually to disappear when the Judges in 1964 revised the Rules [147].

## CHAPTER 17

### EVIDENTIAL PROTECTION IV CHARACTER AND SIMILAR FACT EVIDENCE

'Generally speaking it is not competent to a prosecutor to prove a man guilty of one felony by proving him guilty of another unconnected felony'

per Bayley J. in R. v. Ellis 1826 6 B. & B. 145.

#### (a) Character

The calling by the prisoner of witnesses to speak to his character was a common incident of criminal trials at around the start of the nineteenth century. Indeed, if an accused was of good character judge and jury would expect to hear the fact confirmed by witnesses [1]. If it was not, the obvious inference was that he was of bad character. In capital cases character evidence was often of critical importance. Without it an accused would generally have little hope of mercy at the hands of either jury or judge [2]. Nor is there any doubt that prisoners realised the importance of calling such evidence [3]. It was not unknown for as many as twenty and more character witnesses to be called by a single accused [4], and even lads of fourteen or fifteen, too poor to fee counsel, would sometimes manage to have a witness or two in court to give them a character [5]. Prisoners who had no witnesses would try and explain their absence:- the witnesses were too poor to travel or had not yet arrived [6].

Although character evidence would weigh with judges in matters of sentence, and in particular when deciding whether to recommend a man capitally convicted to mercy, the law placed limits on the use which juries might make of it. Jurors were

always told that it was only where the case was doubtful that they should pay any attention to evidence of good character [7]. Also character witnesses were debarred from deposing to particular acts reflecting credit on the prisoner. The only matter to which they might speak was the accused's general character [8]. In Rowton (1865) [9] the Court for Crown Cases Reserved sought to refine the law still further, ruling that a character witness was not entitled to give his own opinion of the accused's character but must confine himself to the accused's general reputation. This ruling, which ran counter to existing practice [10], was strongly criticised and widely ignored [11]. Text-writers added two further glosses - character evidence should bear reference to the nature of the offence charged, and relate to the same period as the offence [12].

Where evidence of good character was elicited or called by the accused it was open to the prosecution to contradict it. If he had previous convictions his character witnesses might be cross-examined about them [13]. Indeed, according to a ruling of Parke B., they could also be cross-examined about matters of which he had in the past been suspected [14]. Rebuttal evidence could also be called. Where the charge against the accused was committing felony or misdemeanour after previous conviction [15], the prosecution was by statute entitled to rebut any claim of good character by proving the previous conviction. There was also a right to call witnesses to prove the accused's bad character [16]. This latter right was seldom exercised in practice, with some judges denying that it existed [17]. However, when it was exercised the evidence given by the rebuttal witnesses would on occasion go far beyond matters of general character. For example, at an Old Bailey

trial in 1844 the prosecution were allowed to call in rebuttal of the prisoner's claim of good character a police officer to say that the previous Saturday he had seen the prisoner at the haunts of 'the swell mob' at around 2 a.m. [18] In Rowton the Court for Crown Cases Reserved placed beyond doubt the right of the Crown to call evidence in rebuttal, but at the same time insisted that such evidence must be limited to evidence of general reputation, which ruling had the consequence of preventing the Crown (statutory exceptions apart) proving in rebuttal the prisoner's previous convictions [19].

In the early part of the century, the calling of perjured character evidence was apparently common [20], and it was an evil the law was ill equipped to cope with. Unless the case was prosecuted by counsel (and most were not), there would be no channel through which the matter could be taken up, save where the judge himself recognised the prisoner as an old offender, and stepped in to expose him [21]; and, even where there was prosecuting counsel, given that it was the practice always to warn the defence if the Crown had evidence of bad character, the prisoner who was represented would, by the time the trial began, know whether the case was one in which he could risk calling perjured character evidence [22].

If the accused did not give evidence of good character, it was not normally open to the Crown to adduce evidence of his bad character. In 1810, in Cole [23], the Twelve Judges overturned a capital conviction for buggery because the trial judge had allowed be adduced in evidence an admission made by the accused on arrest that he had a 'natural inclination' to such practices. That case

administered the coup de grace to any lingering remains of the eighteenth century practice of allowing the Crown to bolster up its case with evidence of the prisoner's bad character and past convictions [24].

To the prohibition on the Crown adducing evidence of bad character there were, however, then as now exceptions. Of these perhaps the most important was that relating to admissible similar fact evidence considered below. But there were others too. An accused, who had on a previous trial pleaded his clergy, would have the letter F branded on his thumb for all the world to see [25]. An accused facing multiple indictments (a far more common situation in the nineteenth century than now due to the bar on charging more than one felony in an indictment) had little hope of concealing this fact from his jury. He would be arraigned on all indictments in the presence of the waiting jurors [26], and would then be tried successively on the indictments he faced, usually by the same jury [27] (the Crown normally only calling a halt when they had secured a conviction on one of them). If his case had attracted public interest (and sometimes even if it had not), the accused would often find that the whole of his past life had already been laid before the jury by the newspapers [28]. Sometimes the very offence charged would reveal him as a criminal (e.g. returning from transportation). And there were still other possibilities. In a case in 1885 the prosecution were allowed to put in evidence a ticket of leave found on the accused at the time of his arrest (on the ground that anything found on the prisoner was evidence against him) [29]. Then again, a prisoner's character might be disclosed as a result of the inadvertent or malicious remark of a witness, or an improper or imprudent question by counsel [30]. By the early



years of the twentieth century, judges were in such cases prepared to consider discharging the jury [31], but for much, if not all of the nineteenth century, a direction to the jury to disregard what they had heard was the most that the accused could hope for [32].

To all these perils, Parliament in 1827 added another. By s. 11 of the Criminal Law Act of that year persons committing a non capital felony, after a previous conviction for felony, were made liable to 'exemplary punishment'. The practical working of this provision was gravely disadvantageous to the accused, for the jury trying him knew throughout of the previous conviction. Not only was it read out when he was arraigned, but any verdict of guilty brought back by them had also to state whether they found the allegation of previous conviction proved. The Previous Convictions Act of 1836 attempted to correct this unfairness by directing that in such a case the subsequent offence should be tried first, and that, only after they had brought in a verdict of guilty of such offence, should the jury be charged to inquire into the previous conviction or have the part of the indictment concerning the same read to them. That ought to have solved the problem. It did not. Before the accused could be put in charge he had to be arraigned, and the courts held that the arraignment still had to be on the whole indictment, and such arraignment invariably took place in the presence of the jury in waiting [33]. When in Shrimpton (1851) [34] (a case concerning a similarly worded clause in the Prevention of Crime Act, 1851) defence counsel protested about the unfairness of arraignment in the presence of the waiting jury, the judges would have none of it. 'You are crediting the jury', said Alderson B. 'with attending to matters not before them', whilst

from the Lord Chief Justice he drew the pedantic riposte 'the jurors then present are not a jury in the case'. To modern eyes an obvious solution would have been to have had the waiting jurors out of court during arraignment, but in the 1860s sending the jury out of court at any stage would have struck lawyers as a very novel idea [35]. In 1861 the law was recast: the 1827 Act was repealed, but the principle of punishing more severely those convicted after previous conviction was continued by the Larceny and Coinage Offences Acts, with this improvement that henceforth the accused was not to be arraigned upon the previous conviction until the jury had brought in a verdict of guilty of the subsequent offence. This provision happily solved the problem [36].

In the last third of the century, practitioners had a fresh and worrying problem to cope with - statutes containing prisoners' evidence clauses, which gave the prisoner who elected to give evidence no protection against cross-examination as to credit. Not until 1898 was anything done to remedy this desperately unfair state of affairs [37].

#### **(b) Similar Facts**

In eighteenth century criminal trials one finds instances of evidence admitted as relevant which would today be dubbed similar fact evidence [38]. These cases were almost wholly ignored by contemporary text writers, no doubt because they were not regarded as involving any point of principle. In the nineteenth century, however, all this changed. In the first decade alone, the Twelve Judges heard two cases, both destined to become

landmarks in this area of law, namely Tattersall (1801) [39] and Cole (1810) [40].

In Tattersall's case the question for the judges was whether, upon a charge or uttering a forged bank note, it was open to the prosecutor to prove other similar utterings to show guilty knowledge. The question was important. Bank note forgery was in 1801 a growing problem [41], and was to remain so for the duration of the Napoleonic wars and indeed for some years after, and yet it was far from easy to bring offenders to book. The actual forgers were rarely caught [42], and prosecutions for uttering often failed because of the inability of the prosecution to prove guilty knowledge. Not more than one uttering could be charged in the same indictment, and an accused facing but a single charge could always plausibly claim that he had come by the note innocently, and had not realised when he passed it on that it was forged. In Tattersall the judges gave the bankers the answer they wanted:- evidence of other utterings was admissible. The ruling did not command universal support in the profession. Precedent was against it (in prosecutions for passing bad coin the evidence was always limited to the uttering charged in the indictment) [43]. Also, the admission of such evidence appeared to undermine the rule prohibiting the Crown from charging more than one felony in an indictment [44], as well as compelling the prisoner to defend himself against charges of which he had no notice. But three years later the King's Bench judges emphatically reaffirmed it in Whiley [45]. The case declared Lord Ellenborough was one of necessity. Since the mere fact of uttering did not of itself show guilty knowledge, proof of such knowledge had 'necessarily to be collected from other facts and circumstances'. The only significant limitation

placed on the rule was a requirement that the notes, the subject of the other utterings, be actually produced and proved forgeries by clear evidence [46].

In Cole, the point reserved was whether similar fact evidence, which went to show only that the accused was a man with a propensity to commit crimes of the type with which he stood charged, was admissible. The judges held that it was not. The decision, having been brought to the attention of the profession by Phillipps in the first edition of his work on evidence, quickly became the leading authority on the point, and has indeed never since been questioned - perhaps not surprisingly, given that to admit such evidence would be to drive a coach and horses through the prohibition on the Crown's leading evidence of bad character. For most of the first half of the century, the rule in Cole was commonly rendered by lawyers and textwriters in terms, which looked back to the old pleading rule in felony, namely that it was not competent for a prosecutor to prove a man guilty of one felony by proving him guilty of another unconnected felony [47]. It was left to Lord Chief Justice Campbell in Oddy (1851) [48] to give the rule a more modern sound, when he declared that it was not open to the Crown to seek to prove its case by evidence showing that the accused was a 'very bad man and likely to commit such an offence'.

With the rulings in Tattersall and Cole the law began to assume something of its modern shape. This is not to say, however, that the eighteenth century case law was discarded. In 1789 Buller J. had held that the finding in the accused's possession of items stolen from a house at the time it was set on fire was admissible to prove that the accused was the arsonist [49], and this ruling was

followed in several cases in the first half of the nineteenth century (e.g. Westwood (1813) [50] where, on a charge of night poaching, evidence that a coat, lost by a gamekeeper during a struggle with the poachers, had been found in the prisoner's home was held admissible to show that he was one of the gang, and Fursey (1833) [51] where, upon a charge of wounding a constable, the shape of the stab wound, which the accused had inflicted upon another officer in the same incident, was held admissible to show that the wound charged in the indictment was caused by the same weapon and the same assailant). These cases, although commonly cited as authority for the proposition that similar fact evidence was admissible to prove identity, could equally well be regarded as an application of another eighteenth century evidence rule, namely that, where several offences were so intermixed as to form a single transaction [52] or amount to a continuous offence, evidence of all was admissible upon the trial of an indictment for any of them [53]. This rule (and the linked pleading rule which permitted offences forming a single transaction to be charged in a single felony count) [52] is one which was constantly invoked and applied throughout the nineteenth century in cases ranging from group rape [54] to the theft of coal by means of a continuous mining operation from twenty different landowners [55], but with the courts drawing the line at multiple poisoning [56] and systematic embezzlement [57], and it was often in practice prayed in aid by advocates with no better argument to offer.

As well as drawing upon precedents from the previous century, the judges were at the same time also steadily adding to the categories of admissible similar fact evidence. In Donnall (1817) [58], to show that the deceased had been

poisoned by the accused, evidence was admitted that on a previous occasion, after taking tea with him, she had developed identical (albeit less severe) symptoms to those she exhibited immediately prior to her death. In Egerton (1819) [59] evidence of an attempt by the defendant to rob the prosecutor on the day following the robbery charged in the indictment was admitted by Holroyd J., on the ground that the latter incident corroborated the prosecutor's evidence as to the first. In Clewes (1830) [60] evidence of one murder was held admissible to show the motive (silencing a witness) for committing another.

From 1823 comes Voke [61], the first reported case of similar fact evidence being admitted to rebut a defence of accident. The accused, who was charged with maliciously shooting at A, had by his counsel cross-examined with a view to showing that the shooting might have been accidental, only to be confronted with evidence that he had shot at A on a second occasion that day. And after Voke one also begins to get an increasing number of cases in which similar fact evidence is admitted as going to prove intent. In Winkworth (1830) [62], for example, upon an indictment for robbery founded upon the defendant's actions in advising the prosecutor to give money to a mob, evidence was admitted of his presence on other occasions that day when the mob made demands for money at other houses. In Boynes (1843) [63], upon a charge of making a false declaration before a magistrate, Erskine J. held evidence that documents, which the accused accused had sent together with the declaration to a Benefit Society in support of a claim, were forged, admissible to prove that the declaration was wilfully false. In Mahoney (1848) [64], upon a charge of using an instrument to procure an abortion, in order to show with what

intent the instrument had been used the prosecution were allowed to adduce evidence that the accused had procured miscarriages of other women. In Cooper (1849) [65], upon an indictment for accusing a person of an unnatural offence with intent to extort money, evidence that the defendant had in the past obtained money in this way was admitted to prove with what intent the accusation was made.

Shortly after Voke, the guilty knowledge principle laid down in Tattersall, which had by this time already been applied to utterings of bad coin [66] and forged bills of exchange [67], was applied to a wholly new category of offence namely receiving stolen goods, the Twelve Judges holding in Dunn & Smith [68] (1826) that, upon such charge, the fact that there had been found in the accused's possession goods stolen from the prosecutor on other occasions was admissible to show guilty knowledge. But even as Dunn & Smith was being decided, there were still those in the profession who doubted the soundness of the rule in Tattersall [69]. And even in relation to uttering offences there was uncertainty as to the true bounds of the rule. It was, for example, still unclear whether the Crown was entitled to rely upon utterings subsequent to [70] or remote in time from [71] that charged in the indictment. There were also doubts as to whether utterings could be led which were the subject of other indictments [72], or which were of notes of a different bank or different denomination to that charged in the indictment [73]. By the 1850s most of these questions had been resolved and resolved against the accused [74], although upon some points the controversy was a long time dying [75].

The unhappiness of some at least of the judges with the principle of the uttering cases surfaced

in very public fashion in Oddy [48] (1851), where the Court for Crown Cases Reserved refused to extend Dunn & Smith holding that it was not open to the Crown in a receiving case, in order to prove guilty knowledge, to adduce evidence of the possession by the prisoner at the date of the receiving of other goods stolen at other times from other persons. In delivering the judgement of the Court Lord Chief Justice Campbell declared that the uttering cases went a great way, and that he was 'by no means inclined to apply them to the criminal law generally'. The following year, these dicta inspired one defence counsel to make an unsuccessful attempt to keep similar fact evidence out in an uttering case [76].

So far as receiving cases were concerned, the ruling in Oddy stood until 1871, when it was in effect overturned by s. 19 of the Prevention of Crimes Act [77], a provision strictly construed by the courts [78], and in practice but little used. But in relation to offences other than receiving, the courts, despite Oddy, showed no particular reluctance to extend the principle of the guilty knowledge cases. In Roebuck [79] (1855), for example, such evidence was admitted to fix guilty knowledge on a confidence trickster, who had tried to pass off as silver a chain of base metal. In Parker v. Green [80] (1862), upon a charge of permitting persons of bad character to assemble upon licensed premises, evidence of the same prostitutes having gathered on the premises on previous occasions was admitted to prove that the licensee knew of their character.

By the second half of the century, the principle in Yoke had also been extended, the Crown now being permitted to adduce evidence of anonymous incidents (i.e. incidents which could not



positively be linked with the accused) to rebut any possible suggestion that the death or other event charged in the indictment was accidental. One of the earliest of such a case was Bailey [81] (1847), where upon the trial of a maid for arson of a stable, evidence of two other recent fires at the prosecutor's premises was admitted to show that the stable fire was not accidental, the trial judge, Pollock C.B., citing in support of this ruling a murder case (Donnallan), in which the Crown, in order to show that the poisoning of the deceased was not accidental, had been permitted to call evidence to the effect that shortly before his death the branch of a tree, which overhung a dangerous and deep pool where he had been accustomed to fish, had been found sawn nearly through. And one sees the principle regularly applied after 1850 in cases of poisoning, in murder cases such as Roden (1874) [82] (evidence that a number of deceased's children had died at an early age admitted to show that the death of a child who had been found suffocated was not accidental), and Waters & Ellis (1870) [83] (a pre-Makin baby farming case), and in arson [84].

Multiple poisoning cases were, in fact, the class of case where the admission of similar fact evidence was perhaps most calculated to cause dismay to the defence. Under the rules of criminal pleading, a prisoner accused of multiple poisonings could only be tried for one murder at a time, but this rule was substantially eroded by the ease with which the Crown, after the ruling in Geering [85] in 1849, was able to get in evidence of the other poisonings. In Geering [85], Pollock C.B. held such evidence was admissible on two grounds. First, it was, along with the domestic history, admissible to show that that the administration of poison to the deceased was

felonious and not accidental (for authority he cited his own ruling in Bailey). Second, evidence that others connected with the accused had died, after exhibiting the same symptoms as had been displayed by the deceased whose death was the subject of the indictment, and that poison had been found in their bodies was admissible as evidence that his death had been caused by poison (a rule less unfair than it looks today, given the difficulty which the Crown, with the science of forensic pathology still in its infancy, often experienced at this time in establishing poison as the cause of death) [86]. Geering was to remain the leading authority on the question for the rest of the century. It was repeatedly followed in murder cases such as Garner (1864) [87], Cotton (1873) [88], Hersom (1878) [89], and Flannagan & Higgins (1884) [90], and was treated as rightly decided by the Judicial Committee in 1894 in Makin [91].

However, not all judges were happy to follow it. In Winslow (1860) [92], where there was evidence that the prisoner's employer and three members of his family had died of antimony poisoning at a time when they and the prisoner were residing under the same roof, Martin B. refused to allow the Crown to call evidence of the other deaths or their cause, despite prosecuting counsel's submissions that it went to show that the death of the deceased from antimony was not accidental, that the prisoner had had antimony in her possession, and (more desperately) that the deaths were all one transaction. He gave, however, no reasons for his ruling. And in 1887 the New Zealand Supreme Court took the same course in Hall [93]. There, upon a charge of murder by antimony poisoning, the Crown, despite defence objections, had been permitted to adduce evidence of an attempt

by the accused, at a date after the murder, to poison his wife with antimony. On appeal, the Crown sought to uphold the trial judge's ruling on three grounds. The evidence of the attempted poisoning was, they argued, admissible to show that the administration of antimony to the deceased was not accidental, second the poisoning and the attempt were all one transaction, and thirdly, the evidence went to prove what the symptoms of antimony poisoning were. The Supreme Court rejected all three submissions, and allowed the appeal. For its rejection of the Crown's third submission the court gave no reasons, but it may well be that Sir Herbert Stephen was right in his comment [94] that the court probably considered that there was abundant other evidence to show that the death was due to antimony. For its rejection of the first submission it did, however, give a reason, namely that for evidence to be admissible on this ground, there must first be proof aliunde that it was the prisoner who administered the poison to the deceased. And it may be that this same reasoning lay behind Martin B.'s ruling in Winslow.

Surprisingly late in the century (1861) one gets the first reported instance of similar fact evidence being admitted to rebut a defence of mistaken accounting in embezzlement [95].

By about 1870, one also finds lawyers and judges beginning to speak of 'system' [96] as a ground of admissibility of similar fact evidence. In 1876 this unhelpful proposition found its way into the first edition of Stephen's Digest [97], and thereafter continued to enjoy currency for the rest of the century [98] (although receiving no mention when, in Makin's case (1894), the Judicial Committee took the opportunity of stating the

principles considered to govern the admissibility of similar fact evidence).

Makin's case served to stress a point, which was in danger of being overlooked as the number of reported cases on similar fact evidence burgeoned, that the underlying principle governing the admissibility of such evidence in criminal cases was relevance [99]. What it did not bring out was how far the subject had come in the space of less than a hundred years. By 1894 it was possible to list over eleven categories [100] of admissible similar fact evidence, and it was in terms of such categories (conceived of as exceptions to a general exclusionary principle) that the subject now tended to be discussed both by lawyers and text writers [101].

For the accused, the steady expansion of the categories of admissible similar fact evidence, meant a corresponding erosion of the prohibition on the Crown's leading evidence of his bad character. But, given that the justification for admitting such evidence was always that it had probative value going beyond mere proof of propensity, prisoners never had any realistic hope of being able to stop, let alone reverse, the trend. What prisoners and their counsel could legitimately protest about (and they had to wait until the present century for the complaint to be heeded) was the absence of any exclusionary discretion on the part of the trial judge. If similar fact evidence was legally admissible, judges considered themselves bound to admit it, no matter how slight its weight nor how great the prejudice it would generate. In uttering cases, for example, the oft posed question whether utterings, remote in time from that charged in the indictment, could be proved was invariably answered yes. In Jackson

(1848) [102] Rolfe B. expressed the view that evidence of utterings twenty years before was in law receivable although adding that he would in such case 'direct the jury to pay no attention to it'. For the same reason, prosecuting counsel were commonly allowed to adduce similar fact evidence to rebut a defence, which it was theoretically open to the defence to raise, even though defence counsel had expressly disclaimed the intention of either raising or relying upon it. In Dale (1889) [103] evidence of previous abortions was held admissible to show the intent with which the accused had inserted a quill pen into the woman's vagina, despite the fact that his counsel had already made it clear that the issue was not intent but whether the instrument had been used at all. In Phillips (1848) [104] Rolfe B. held similar fact evidence admissible in an uttering case, despite defence counsel's protests that on the facts guilty knowledge was not an issue, giving as his reason that it was just possible that it might become an issue. Occasionally, a judge would hint to prosecuting counsel not to press evidence of dubious cogency [105], but the more usual judicial stance was that taken by Lush J. in Roden (1874) namely that 'the value of evidence cannot affect its admissibility'.

## CHAPTER 18

### EVIDENTIAL PROTECTION V CORROBORATION AND IDENTIFICATION

'An accomplice of the name of Durrant ... admitted that he came forward in the expectation of saving his life by convicting the prisoner'

R. v. Lynell, The Times, March 5, 1831.

At the start of the nineteenth century, the law required corroboration in three classes of criminal case - prosecutions for treason, and perjury, and cases involving the use of accomplice evidence. By the century's end further categories had been added to the list. Identification evidence was never, however, subject to such a requirement, nor indeed to any special rules for all that the dangers of mistaken identification were well known.

#### (a) Treason

In high treason by the statute 7 & 8 Wm.III, c. 3 [1] the overt acts alleged by the Crown had to be proved by two credible witnesses; treasons relating to coining fell outside this protection however, as did those where the overt act alleged was assassination wounding or maiming of the sovereign or an attempt thereat. Treason felony was also outside the rule. Petit treason, until its abolition in 1828, was also subject to a two witness requirement [2].

#### (b) Perjury

The corroboration requirement in perjury took a different form - a rule forbidding the conviction of the accused on the evidence of a single witness. This rule had been laid down as early as 1713 [3]

and its roots go back even further, but it was not until the first half of the nineteenth century that the law was spelt out with clarity. After hesitation as to whether there had to be direct evidence from two witnesses as to the fact alleged as falsely sworn [4], the courts had by 1850 settled for a less rigorous rule, holding that it was sufficient for the prosecution to prove the falsity by the evidence of a single witness supported some independent corroborating circumstance (such as a letter written by the accused admitting the falsehood) [5], or even by circumstantial evidence coming from more than a single source. Evidence of contradictory statements (whether or not on oath) made by the accused was however held insufficient per se [6], whilst in Parker [7] in 1842 Tindal L.C.J., in an important ruling, held that where the indictment contained a number of assignments of perjury, each such assignment was subject to a separate corroboration requirement.

### **(c) Accomplices**

#### **(i) The Accomplice System**

For the detection and conviction of criminals, the law in the early nineteenth century depended heavily upon the services of accomplices - a state of affairs which began to change only after the reform of the police [8].

The means by which accomplices were induced to come forward were various.

To criminals at liberty the law offered substantial incentives to betray others. More than a dozen statutes (all to be repealed in the late 1820s) offered a pardon to an accomplice, not being

in custody, who secured the conviction of two others for specified offences [9] (the accomplice could also claim a reward of upto £40 a head) [10]. In addition, private reward advertisements (with Home Office permission) regularly offered pardons to accomplices (a practice which lingered on until well into the second half of the century) [11].

But it was from amongst those in custody that accomplices were most frequently recruited. Attempts were commonly made to persuade arrested gang members to become 'evidences', that is to buy immunity for themselves by making full disclosure of and giving evidence against their associates [12]. Indeed, it was not unknown for them to be so exhorted by examining magistrates in open court [13]. In many cases, however, it was from the arrested man that the initiative came [14]. If the evidence against him was strong, his only way of saving his neck would often be to get himself admitted King's evidence. And where several members of a gang were caught red-handed there might be a race to be admitted 'evidence'. The decision as to whether a man was to be so admitted rested with the examining magistrates [15], who were urged to be cautious in whom they admitted [16], and to select the least infamous [17].

Before the examining magistrate, the accomplice would be examined on behalf of the Crown, with a warning from the bench to be frank in his evidence. He would also be told that no hope or promise was held out [18]. If, upon his evidence, a case was made out against those accused, he and they would be committed in for trial in custody [19]. At the court of trial, counsel for the prosecution would, on the first day of the session, apply to the judge for leave to admit the accomplice as evidence [20]. If leave



was given (as it normally, but not invariably, would be) [21], he would then be taken to give evidence before the grand jury, and if they found a bill he would be called at the trial [20]. His fate would depend upon how he gave his evidence. If he was frank and truthful, he would earn immunity (whether or not a conviction followed) [22]. The law books speak of his being entitled to a pardon, but the reality appears to be that accomplices who came upto proof were not pardoned, but simply not prosecuted [23]. If, however, he sought to resile from his deposition, either before the grand jury or on the trial, the judge would forthwith direct the prosecution to get a bill against him from the grand jury, and he would then be put on trial himself [24]. Hence the popular saying that accomplices:-

'fished for prey, like tame cormorants, with ropes around their necks' [25].

Occasionally, accomplices were recruited at trial. A prisoner jointly indicted who pleaded guilty, might (as now) receive an approach from the Crown to give evidence against his co-accused. Until 1843, it was essential in felony cases that he be called before sentence (for, once sentenced, he became incompetent until he had served the sentence) [26]. This was not, however, normally a source of difficulty, given the practice of putting off the sentencing of felons until the last day of the session or Assize. After Denman's Act (1843) had removed the bar of incompetency, some judges began to adopt the practice of sentencing prisoners who were to be called against co-accused before they gave evidence, on the ground that there was then no sentencing advantage to be gained by false testimony [27]. If the Crown's case was weak, it was not unknown in a multi-handed case for the

Crown to offer to enter a nolle prosequi [28], or even take an acquittal, against the prisoner considered least culpable if he would undertake to give evidence against his fellows [29]. As late as 1839 [30] one can find an example of prosecuting counsel making such an offer to an accused in front of the jury, and with the trial already well under way. Winsor's case [31] in 1866 established a yet further option. There, a jury, having failed to agree in the case of two women jointly accused of child murder, the Crown, on the re-trial, elected to try only one of them, and called the other as a witness without either entering a nolle prosequi or taking an acquittal against her - a procedure, for which some slight precedent could be found [32], and which, to the surprise of some, was held unexceptionable by the Court for Crown Cases Reserved.

**(ii) The corroboration requirement**

Of the dangers of accomplice evidence the judges were only too well aware, but they justified its use on grounds of expediency. Against all arguments that accomplices were incompetent from infamy of character [33], or from interest [34] they resolutely set their faces. Such matters they ruled went merely to credit, and a conviction based upon the evidence of an accomplice alone was nonetheless a legal conviction [35]. However, this strict legal rule was tempered by a practice of advising juries to acquit where the only evidence against the accused was the uncorroborated evidence of an accomplice. Joy, writing in about 1824, claimed that the practice was less than half a century old [36]. In this, he was almost certainly wrong. Langbein found evidence that as early as the 1750s judges at the Old Bailey were directing juries to acquit where accomplice

testimony was not corroborated by independent evidence [37].

The protection afforded by the practice was much reduced by the way the judges chose to define corroboration. The stance they took was that any evidence, which confirmed an accomplice's story to any material extent (whether or not it implicated the accused), amounted to corroboration of it [38]. Evidence from the victim confirming that the facts of the offence (e.g. that four men took part, that they had blacked faces and wore shirts over their clothes [39], that one had a brazen-mounted pistol [40], that one fired a warning shot) was deemed ample corroboration. Again, where there were co-accused, confirmatory evidence implicating one was treated as corroboration as against all [41]. In Despard (1803) [42] Lord Ellenborough even went so far as to suggest that confirmation need not always come from an independent source, but might be found in the clearness and consistency of the accomplice's testimony in the witness box. With corroboration defined in such wide terms, a practice of warning juries not to convict upon unconfirmed accomplice evidence was hardly to be wondered at. If an accomplice could not even be confirmed as to the circumstances of the offence, there was cause for suspicion indeed.

It was from Ireland that calls for a stricter definition first came. In 1824 an anonymous Irish barrister published a pamphlet [43] arguing that evidence, to be corroborative of an accomplice, must implicate the accused, and the following year Jebb J., applied this test when trying a case of murder [44]. In Sheehan (1826) [45], the point was considered by eleven judges on a reserved case, and, by a majority of six to five, they held that juries should be told in most cases to disregard

accomplice testimony unless there was some corroboration of it, and that corroboration as to the circumstances of the case merely, and not of the person charged, was deserving of very slight consideration. Joy, writing in rebuttal of the 1824 pamphlet, sought to demolish this new fangled doctrine. In Ireland the subject was being treated as though it were *res integra* but it was not. No English judge, he argued, had ever held that corroboration need go to confirm the guilt of accused nor was there any reason why it should. The office of corroborative evidence was not to prove the guilt of the accused but to restore the credit of the accomplice by showing the truthfulness of his evidence, and any evidence which confirmed the truth of his story on any material point served to do that [46]. However, Joy was fighting a losing battle. By the time his book was published in England in 1836, the English courts were already beginning to embrace the Irish rule. In the space of three years no less than five English judges held that evidence, to amount to corroboration, must not merely confirm the accomplice, but must also implicate the accused [47]. At the same time, the old rule that what was corroboration against one of several accused was corroboration against all was abandoned [48]. Henceforth, it became increasingly common for judges to advise juries to acquit those as against whom the accomplice was not corroborated. Indeed, it was almost inevitable that they should do so. Given the new stricter definition of corroboration, adherence to the old rule would have not only been illogical, but would have made the prospects of acquittal of such accused dependent upon the accident of whether they were tried alone, or tried with others against whom there was corroboration [49]. A further refinement introduced at this time was the rule that an accomplice could not be

corroborated by another accomplice [50], or by his spouse [51]. But not all judges were subscribers to the new thinking. As late as 1838 an Irish Chief Justice was openly declaring his disagreement with the new definition of corroboration [52], and in 1845 Coleridge J. was still directing juries that confirmation as to one accused was confirmation as to all [53]. The new rule was, however, placed beyond doubt when, in 1855, the Court for Crown Cases Reserved, in Stubbs [54], held that a jury should always be told to acquit a prisoner accused by an accomplice unless there was corroboration as to that prisoner. The reason for the change of judicial stance was a recognition that evidence, which confirmed an accomplice's participation in a crime, offered no sort of guarantee that his accusations against others were true. As Jervis C.J. put it in Stubbs nothing was easier than:-

'for the accomplice speaking truly as to all the other facts of the case to put the third man in his own place'.

Of the twentieth century practice of telling juries that it is open to them to convict upon the uncorroborated evidence of an accomplice if they are sure that he is telling the truth, one finds but little trace in the nineteenth century [55]. Where there was no corroboration of an accomplice, the usual practice was for the judge to advise the jury to acquit [56]. Some judges indeed went further and actually directed a verdict of acquittal.

This latter practice had a long history. Joy thought it went back to about the 1780s. According to him shortly after Rudd's case (1775)

'a practice began to prevail of even not sending to the jury to be considered the uncorroborated testimony of an accomplice' [57].

He cites Durham & Crowder (1787) [58], where Perryn B. described the practice as 'a matter of discretion of the court'. He might also have referred to the case of Smith & Davis [59], decided three years earlier, where the court declared that, notwithstanding that an uncorroborated accomplice was legal evidence, it considered it too dangerous to suffer a conviction to take place on such evidence, and, *semble*, directed an acquittal. And, although not a hint of this appears in the law reports, the Twelve Judges appear to have felt some unease about the matter in Atwood & Robins (1788), for, whilst in that case they affirmed unequivocally the propriety of founding a conviction on uncorroborated accomplice evidence (so much so that the case came to be regarded as the *locus classicus* on the point), the entry in the Judges' Notebooks records that they recommended the prisoners to pardon thinking that they

'ought not to be executed merely on his (the accomplice's) testimony unconfirmed in any circumstance' [60].

The practice was still in evidence by the early nineteenth century, and was indeed to persist for the rest of the century. In Jones [61], in 1809, Lord Ellenborough, in rejecting a defence objection that on some counts the only evidence was unconfirmed accomplice evidence, restated in emphatic terms the rule laid down in Atwood & Robins, complaining that 'strange notions on the subject have lately got abroad'. In Jordan & Sullivan [62] in 1836 Gurney B. declared that he knew that persons had been convicted in the past on the evidence of an accomplice alone, but that he

hoped that it would never be so again, and that, as far as he could, he would take steps to see that it should not. In a burglary case in 1843, Coleridge J. directed an acquittal on the ground of want of corroboration, and was criticised by a law reporter for so doing [63]. In 1845 counsel, in making a submission of no case before Erle J. on the ground that the only evidence against his client was uncorroborated accomplice evidence, asserted that it was the constant habit of judges in such cases to direct an acquittal. From this proposition Erle did not dissent, but claimed that the position had been altered by Denman's Act, which had made even a felon who had been convicted and sentenced a competent witness [64]. Between 1830 and 1860, one also gets a line of cases in which judges refused to allow the Crown even to call accomplice evidence until they had demonstrated, by evidence called, that there was satisfactory corroboration of it (a practice justified by Hill J. in Sparkes (1858) on the ground that it avoided the court's time being wasted) [65]. In 1862 no less a judge than Blackburn J. is reported as having directed the acquittal of the accused in a fraud trial for want of corroboration of accomplice evidence [66] - for which he was roundly criticised in the Solicitors' Journal [67]. In 1895, on the trial of Taylor, the man accused with Oscar Wilde, Wills J. threw out some of the counts against the accused for the same reason [68] - for which he was criticised by the future Lord Darling in a self important letter to The Times [69]. Nor was the Taylor case an isolated example. In the 1898 edition of Roscoe [70] the practice is referred to and its legality questioned. Even as late as 1909 one finds the Justice of the Peace declaring it not unusual for judges to direct an acquittal, at the close of the prosecution case, where there was no corroboration of the accomplice [71].

Joy argued that these directed acquittals represented nothing more than an illustration of the something that happened daily in criminal courts - namely a judge treating a particular witness, whether an accomplice or not, as one who ought not to be listened to [72]. This suggestion may not in fact be far wide of the mark. Judicial distrust of accomplices was not always shared by juries, and it was not unknown for a jury in an accomplice case to bring back a guilty verdict in the teeth of advice from the bench to acquit (in a case in 1864 [73] Pollock C.B., faced with the flat refusal of a jury to follow his advice to acquit, ended up seizing upon a supposed defect in the indictment, and directing them to acquit on that ground, which very reluctantly they did), and, where that happened, the courts of review (even where they had jurisdiction, for example because the point had been reserved or because the case was one of misdemeanour tried in the King's Bench) would not interfere [74]. This being the state of the law, the only way in which a judge could make sure that an accused was not convicted upon the uncorroborated evidence of an accomplice he personally disbelieved or distrusted, was by a directed acquittal.

**(d) The Criminal Law Amendment Act, 1885**

The Criminal Law Amendment Act, 1885 made significant additions to the categories of case in which the law required corroboration. The new procurement offences it created were all made subject to such a requirement. It was this Act which introduced into our law the principle of allowing an accused to be convicted on the corroborated but unsworn evidence of a child witness, s. 4 of the Act permitting a child, who in the opinion of the trial judge possessed sufficient



intelligence to justify receiving her evidence, and who understood the duty to tell the truth, to give such evidence where the offence charged was defilement of a girl under thirteen or an attempt thereat. In 1894 the principle of s. 4 was applied by the Prevention of Cruelty to Children Act to offences of child cruelty and neglect, but more far reaching reform had to wait until the present century.

**(e) Rape**

Of the present day rule of practice requiring juries to be warned of the danger of convicting on the uncorroborated evidence of victims of sexual offences there was, at the start of the nineteenth century, no trace [75].

Hale, writing in the seventeenth century, had warned of the danger of false accusation in rape cases, observing that the charge was:-

'easily to be made..and harder to be defended by the party accused, tho' never so innocent' [76].

He had also urged that how far the complainant in such a case was to be believed depended upon her reputation and whether the attendant circumstances concurred with her testimony:-

'if she be of good fame; if she presently discovered the offence and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances which give greater probability to her evidence. But on the other hand if she be of evil fame and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to have been committed were such that it was possible that she might have been heard and she made no outcry; these

and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned [77].

Until the second decade of the twentieth century, Hale's words represented the only learning which law books offered upon the matter [78]. Inevitably they became part of the the defence lawyer's stock in trade [79], and they also on occasions found their way into judges' summings up [80] (especially where the judge was trying to secure an acquittal). However, (unlike the present day corroboration direction), they never had the status of directions which a trial judge was required to give, and it would be wrong to imagine that all nineteenth century judges gave rape juries a warning about the dangers of false charges. They did not [81]. Indeed, the only topic on which there appears to have been something approaching a uniformity of judicial approach was that of complaints, with most judges treating failure by the complainant to make prompt complaint as fatal to the prosecution case [82]. Such indeed was the importance attached to fresh complaint that, in 1827, a defence counsel actually went so far as to tell a jury that, by a rule of evidence which had become a rule of law, failure to complain for a long time was a bar to a conviction for rape [83].

By the 1920s Hale's learning had been supplanted by the present corroboration rule. Although the emergence of the new rule is difficult to date the seeds of change were probably sown by the Criminal Law Amendment Act of 1885. This Act made several fundamental changes in the law of sexual offences, all of which had implications for the future development of this area of the law of evidence. In the first place, (as already mentioned) it made several of the new sexual offences it created subject to a corroboration

requirement [84]. Second, upon a charge of unlawful carnal knowledge of a girl under 13, it permitted the complainant to give evidence unsworn, subject to a mandatory corroboration requirement [85], (from which it was but a small step to giving a corroboration warning in a case where the child's evidence was sworn). Third, it raised the age of consent from 12 to 16 - which meant that in future, the number of sexual cases in which the complainant would have to be treated as an accomplice, whose evidence required corroboration would be much greater than before [86]. Fourth, it made the accused and his spouse competent witnesses in relation to a wide range of sexual offences including rape [87] - a reform, which in Nebraska and several other American states, had already led to the imposition of a corroboration requirement in sexual cases [88].

The obvious starting point in any attempt to date the corroboration rule is Graham [89]. Decided by the Court of Appeal in 1910, it is the first reported case in which a criminal court is to be heard saying that a jury should be given something akin to a corroboration warning in sexual cases. The actual words of the judgement were:-

'the judge should explain that ... it is dangerous to act on the evidence of one person'.

Although the judgment is brief and cites no authority, it does not read as though the court considered that it was laying down any novel or revolutionary principle. But if the rule is older than Graham how much older is it?

At the Committee Stage of the 1885 Bill, the Home Secretary and the Attorney-General both justified their opposition to the inclusion of a

corroboration clause in the Bill, on the ground that it was already the practice of judges not to allow men to be convicted in sexual cases without corroboration [90]. This claim, although hotly disputed by a former Attorney-General and another lawyer M.P. [91], appears to find some confirmation in The Times trial reports from the period. For instance, in 1877 Field J. is reported as telling a jury in a rape case that the law required corroboration [92]. 'Was there', he asked, 'corroboration and did the complainant afterwards make immediate complaint?' Again, in 1889 the report of a charge to the grand jury contains a passage commenting upon the lack of corroboration in a case of indecent assault, in respect of which they were asked to return a bill [93]. All this appears to suggest that the rule goes back twenty or so years before Graham. But the matter becomes less certain when one remembers that at this period it was the habit of lawyers and judges to use the word corroboration very loosely as including any item of confirmatory evidence (whether of not it could be properly said to be independent of the complainant) [94]. Perhaps the strongest evidence against a date as early as the 1880s is the complete absence of reference to such a rule or practice in textbooks, legal journals, and reported cases from the period [95].

The first reported case, which affords any basis for suspecting the possible existence of such a rule, is in fact Moore v. Bishop of Oxford [96] (1904), in which the Privy Council overturned the conviction of a clergyman for the ecclesiastical offence of immoral intercourse with a woman, on the ground that there was no corroboration of the woman's testimony. The suspicion that such a rule was either in place or emerging at the date of Criminal Appeal Act 1907 is increased when one

discovers that in the first two years of the new court's existence want of corroboration was a ground of appeal in no fewer than three rape conviction appeals [97].

Whatever its age, it took some twenty or so years after the passing of the 1907 Act for the rule to assume its present shape, with the present day form of direction not emerging until 1924 [98]. Two factors which appear to have played a part in helping it take root were the adoption of the practice of giving a corroboration warning in all cases involving child complainants, and the creation by the Incest Act, 1908 of yet another category of sexual crime in which an accomplice direction would commonly be necessary [99].

What is perhaps most surprising about the corroboration rule is that it was so late to emerge. The absence of any requirement that the jury be given a Hale warning coupled with the inability of the prisoner and his wife to testify, made the blackmailing prosecution a thing to be feared, and throughout the century blackmailing suits and prosecutions were far from uncommon. In Ireland in the 1820s it was by no means unknown for a woman, who had been seduced, to launch a rape prosecution as a means of bringing her seducer to the altar [100], whilst in England a corroboration requirement had to be imposed in 1834 [101] to try and stem the flood of perjury and extortion in bastardy suits [102]. Nor does the position appear to have markedly improved as the century progressed. When in 1859 Parliament passed an Act to curb vexatious prosecutions, one of the six offences made subject to its provisions was indecent assault [103]. The following year saw the Reverend Hatch bring a successful prosecution for perjury against a young girl whose evidence had

secured his conviction and imprisonment for sexual assault [104]. In 1864, The Times considered the problem of false accusations against men sufficiently serious to devote a leader to it, which concluded with an observation that, unless things changed, it would be necessary to form a Society for the Protection of Men [105]. In 1869, during the Lords debate on the Evidence Further Amendment Bill, a former Lord Chancellor [106] argued that, if the bar upon parties giving evidence in breach of promise of marriage cases were to be removed, it would be essential to put in its place a corroboration requirement otherwise 'every case of seduction would be turned into one of breach of promise'. During the debates on the Criminal Law Amendment Bill of 1885 [107] and the Incest Bill of 1908 [108], the Commons were warned that by adding to the calendar of sexual offences they would be simply creating fresh opportunities for extortion. Further, in the second half of the century the move in other jurisdictions was towards a corroboration requirement. New York, in 1886, following the example of several other States, adopted a corroboration requirement in rape cases [109], whilst in England the newly created Divorce Court was, as early as the 1860s, refusing to find allegations of sexual crime proved unless there was corroborative evidence to support them [110].

#### **(f) Identification**

Nineteenth century lawyers were well aware of the fallibility of identification evidence. When in 1838 William Wills published his work on Circumstantial Evidence, he devoted several pages to the topic of mistaken identity [111]. Eight years later The Law Times [112] in a leader called for the law to be changed. Juries should not it argued be allowed to convict on identification

evidence alone. In 1848 Patteson J. wrote to a House of Lords Select Committee that the 'too ready credence' given by juries to identification evidence was a source of wrong convictions; he had, he said, had two such cases on his last Assize [113].

Despite the known risks, judges did not in the main regard identification cases as calling for special treatment. There was certainly no requirement that the judge give the jury any special direction or warning in such cases [114]. Dock identifications were regarded as acceptable [115]; indeed in 1843 Denman L.C.J. rejected out of hand a proposal by the Recorder of Newcastle for the outlawing of such identifications at committal hearings [116]. There was no practice of withdrawing from a jury fleeting glance identifications, such as that based upon the view afforded by the flash from the discharge of an assailant's gun [117]. And if defence counsel in his speech sought to impress upon the jury the fallibility of evidence of identification, by citing examples of past cases of mistaken identity, he might well find his arguments pooh-poohed in the judge's summing up. That was certainly the fate of a counsel who tried such an argument before Lord Denman at Somerset Assizes in 1849 [118]. But not all judges were of the Denman mould. Some, due no doubt to personal knowledge of miscarriages of justice, approached identification cases with especial care, buttressing counsel's arguments with warnings and examples of their own [119], and, on occasions, even going as far as to direct an acquittal where the quality of the identification was poor [120].

### (g) Identification Parades

In practice, one of the most substantial protections for prisoners was the identification parade (which, whatever its shortcomings, meant that there would be no dock identification).

The precise origin of the identification parade is unclear. In a memorandum to the Home Office written in January 1874 [121], the Commissioner claimed that it had been a feature of Metropolitan Police procedure 'almost ever since the establishment of the ...force'. The earliest force order on the subject so far traced dates from March, 1860 [122]. But, as is clear from the order itself, the practice is older than this, and, indeed, one only has to look in the Middlesex Sessions reports from the previous month to find an example of a case in which the prisoner was picked out on an identification parade [123]. Outside London the practice appears to go back to at least the 1850s [124].

In terms of fairness to the suspect, nineteenth century identification parades fell well short of present day standards. According to the Commissioner's memorandum of 1874, it was usual for parades to consist of between 8 and 10 persons, and this receives some confirmation in reported cases, (although it is possible to find a case in 1871 where over 15 persons were used on each parade) [125]. All this sounds satisfactory enough. However, because of the perennial difficulty of finding members of the public (particularly respectable persons) willing to stand on identification parades, a practice grew up of using police officers to make up the numbers [126]. Criticism of the practice by both defence counsel and judges (based upon the fact that police



officers, even in plain clothes, were usually readily recognisable as such) led the Commissioner in 1873 to issue instructions that henceforth police officers were only to be used in cases of emergency, and as a very last resort [127]. But the use of police officers was in fact merely part of a wider problem. Under force orders there was no obligation upon the officer assembling the parade to ensure that those on it were of the same general appearance and dress as the suspect - all that he was required to ensure was that they were of the same sex, and, if police officers, were in plain clothes [128]. This gap in force orders was capable of working great unfairness. It was plugged by the Commissioner in 1874 [129], but even after this, as the Beck [130] and Sheppard [130] cases were to demonstrate, cases of a suspect being placed on a line up containing men bearing not the slightest resemblance to him in dress or appearance, continued to occur.

Another source of unfairness was the practice of officers 'tipping off' identifying witnesses beforehand, by showing them a photograph or giving them a description of the suspect. Outlawed by Metropolitan Police General Orders in 1893 [131], the Court of Criminal Appeal was still trying to stamp it out twenty years later [132].

The shortcomings of identification procedures might have been more quickly remedied had text writers displayed the slightest interest in the subject, but none did, not even Wills.

#### **(g) Fingerprints**

Though nothing further was done in the nineteenth century to improve visual identification procedures, at the turn of the century there

occurred a development which was to have major implications for the identification of criminals. In 1900 a Home Office Committee [133], set up to advise on the identification of criminals, recommended that the existing methods [134] used to identify criminals with previous convictions [135] be replaced by the fingerprint classification invented by E.R. Henry. The following year a Central Fingerprint Bureau was established at Scotland Yard. The implications of the new technique for criminal investigation were quickly realised, and its use and value were placed beyond doubt when, in 1910, the Court of Criminal Appeal [136] upheld a conviction based solely on fingerprint evidence.

## CHAPTER 19

### APPELLATE REMEDIES

I am perfectly satisfied that many persons have suffered punishment where they have been positively innocent of the crime with which they were charged (where) ... if there had been any court of appeal ... there would have been a reversal of their conviction.'

E.A. Wilde (former sheriff of London) giving evidence to the Criminal Law Commissioners, 1836.

#### (a) Common law appellate procedures

England in the nineteenth century had no system of criminal appeal merely a handful of appellate procedures of limited scope - the motion for a new trial, the writ of error, and the practice of reserving cases.

##### (i) The motion for a new trial

Of the three procedures, the most satisfactory from an accused's point of view was the motion for a new trial, since it afforded a remedy against both judicial and jury error [1] and could be brought as of right. Had it been generally available in criminal cases, the nineteenth century would have had a criminal appeal system falling little short of the present day system. But it was not. It was available in only a tiny number of cases - the hundred or so cases of misdemeanour tried each year in the King's Bench in the exercise of its original jurisdiction [2]. It was not available in treason or felony [3] wherever tried, nor in cases of misdemeanour tried elsewhere than in the King's Bench (although an accused desirous of securing to himself a right of appeal in the event of an adverse verdict in misdemeanour, could,

before trial, move for certiorari to transfer the record into the King's Bench) [4].

**(ii) The writ of error**

The writ of error was available to any accused convicted before a court of record, but only in respect of legal error apparent on the record. Such errors included defects in the indictment or procedure such as want of jurisdiction, irregularity in the jury process, wrongful denial of a jury challenge, failure to put the allocutus and the passing of a sentence contrary to law [5]. They did not include errors made by the trial judge in his rulings upon questions of admissibility of evidence nor in his direction of the jury as to the law [6]. In civil suits the scope of error was much wider, it being provided by Westminster II, 1285 [7] that where a court gave a decision which would not appear on the record, the judge might be asked to seal a bill of exceptions recording the objection in a permanent form, which could then be used to found a writ of error. During the first half of the nineteenth century there was much uncertainty as to whether there was a right to tender a bill of exceptions in criminal cases [8]. Had the right been established, the effect would have been to give the prisoners a means of testing in a higher court any and every alleged irregularity or error in his trial. In the end the question was decided against prisoners with the result that in the nineteenth century, as in the eighteenth, the principal use to which the writ was put was that of questioning rulings on indictment points [9].

In the eighteenth century indictment error had been a happy hunting ground for lawyers, and many accused had seen their convictions overturned

because of a trivial formal error in the indictment [10]. In the nineteenth century, as has been seen, the scope for technical objections to indictments was progressively cut down by statute [11], and by 1851 their day was almost past, with the result that the number of writs of error slowed down to a trickle. Indeed by 1880 the writ was being described by Stephen as obsolete [12]. Even in its heyday it had been a cumbersome and expensive remedy. Before a writ could be brought the Attorney-General's fiat had to be obtained [13], and when that had been done there followed the time-consuming process of having the record drawn up and checked for accuracy and completeness [14].

### (iii) Reserving a case

Reserving a case was a review procedure of considerable antiquity [15]. A trial judge who entertained doubt as to the legal propriety of the conviction of a prisoner might reserve the case for consideration by the whole body of common law judges (the Twelve Judges) [16], sentence being postponed or respited until their decision was known. The case would then be considered by the judges at a meeting held at Serjeants' Inn [17], and their decision (which was binding on the trial judge) announced in open court at the next session of the trial court. If it was in the prisoner's favour he would be pardoned or judgment against him arrested. If it was against him the law would take its course [18].

Whether a point of law was reserved was entirely in the discretion of the trial judge. The judges claimed that this was no hardship to the accused since they never refused to reserve points of substance. But many remained unconvinced. Judges varied enormously in their willingness to

reserve cases, and the risk that an obdurate judge would improperly refuse to reserve a point was all too real, as the case of Russell (1832) and the Case of the Brazilian Pirates (1845) clearly demonstrated [19].

Faced with a refusal to reserve, the accused had only two courses open to him - first, where the point was capable of being so raised, to sue out a writ of error or move for a new trial, or if it was not to try and persuade the Lord Chancellor or other judges to bring pressure to bear on the trial judge.

Some courts had no power to reserve points. It was only where the trial was had at the Old Bailey or at Assizes [20] that a case could be reserved. Courts of Quarter Sessions, for all that they were more likely to fall into legal error than the superior courts [21], had no power to reserve [22].

Other aspects of the system which attracted criticism were the informality and secrecy of the procedure (with cases argued in private and no judgment or reasons for decisions given) [23], and the fact that the judges had no power to order a new trial [24] nor any power to quash convictions.

#### **(iv) The narrow scope of the above remedies**

As a safeguard against miscarriage of justice, the three remedies were hopelessly inadequate. They offered no redress against jury error [25] save in King's Bench misdemeanour trials. Where the judge misdirected the jury or wrongly admitted or excluded evidence, his error could not be challenged without his consent. Against harsh sentencing there was no redress save where the

sentence was illegal (in which case error would lie). In the main, the prisoners who benefited from the three procedures were those who had lawyers. Most reserved points were points taken by prisoners' counsel [26], and without the money to fee lawyers the prospect of a prisoner being able to sue out a writ of error or move for a new trial (even if he was aware of the existence of the remedy) was negligible [27]. And even in the case of defended prisoners the three procedures combined were in the 1820s giving rise to no more than forty or so cases a year [28].

#### (v) The Home Office

An inevitable consequence of the lack of adequate appeal remedies was reliance upon the royal prerogative as a means of putting right injustice. It was open to any prisoner to petition the Crown for a revision of his conviction or sentence and many did [29]. Upon receiving such a petition, the Home Secretary would call for a report from the trial judge and for his notes. If any 'new evidence' was exhibited to the petition the judge would be asked to consider and comment upon it [30]. The Home Secretary would also make further inquiries of his own which the case appeared to warrant [31]. If the result of these inquiries was to cast doubt upon the rightness of the conviction or the justice of the prisoner's sentence, a pardon or reduction of sentence would follow [32].

Successful petitions against conviction were rare [33]. A pre-condition of success was material [34] casting doubt on the correctness of the jury's verdict, and a prisoner in custody and labouring (as many were) under the twin handicaps of poverty and illiteracy was rarely in a position to marshal

such material [35]. Prisoners capitally convicted had a further problem - lack of time - the interval between sentence and execution in such cases often being no more than a day or two [36].

**(b) Attempts at reform 1844-1848**

It was not until the 1840s that a reform movement got under way [37]. In the van were Fitzroy Kelly, a future Lord Chief Baron, Ewart and McMahon, both of whom had played a prominent part in getting the Prisoners' Counsel Act, 1836 on the statute book, and Butt a leading member of the Irish bar.

To the reformers the case for reform was clear [38]. The law as it stood was illogical and unjust. How could it be right that in civil suits the parties had an unfettered right of appeal, whilst in criminal cases, where men's lives and liberty was at stake, there was no appeal on fact, and an appeal on law only at the judge's discretion? What logic allowed a defendant convicted of misdemeanour in the King's Bench the right to move for a new trial, but denied that right to those convicted of treason or felony? Miscarriages of justice were not unknown in criminal cases, and yet against a mistaken verdict there was no appeal merely a right to petition the Home Office, which was the worst possible tribunal of review with its secret and imperfect procedures. The cure for these ills, argued the reformers, was to copy the system in civil cases and give to all persons convicted on indictment the right to move for a new trial on both fact and law.

The reform campaign got under way in 1844 with Kelly's introduction of a New Trials in Criminal Cases Bill [39]. Introduced too late in the



session to have any real hope of becoming law, it was withdrawn upon an undertaking by the Government to look at the whole matter [40]. Of the Government promise nothing came. However, the following year the reformers' hand was greatly strengthened by the publication of the Eighth Report of the Criminal Law Commissioners [41], which came down strongly in favour of appeals on fact in criminal cases. More than a year went by without any indication from the Government that it intended to take action on the Report. In December, 1847 Ewart took up the matter in the House. Did the Government intend to take action on the Report? The Home Secretary declined to give him an answer [42].

The following year Ewart, by now convinced that the Government had no intention of acting, introduced his own Bill [43]. It was virtually identical with that of 1844. At the second reading he was prevailed upon by the Government not to press the Bill, but instead to await a Bill which Lord Chief Justice Campbell was about to introduce in the Lords, which would in all probability cover the same ground [44].

When Campbell's Bill was introduced, it contained not a word about new trials but merely confined itself to making improvements to the system of reserving cases. However, there was to be a Lords' Select Committee on the Bill, and, before that Committee, the reformers would have the chance to make their case.

The Select Committee sat for eight weeks taking evidence from ten witnesses - three judges, two ex-Lord Chancellors, two Chairmen of Quarter Sessions, and three pro-reform barristers (Kelly, Greaves and Pitt Taylor) [45]. The questions on

which it took evidence were reform of the law as to the reserving of cases and the desirability of allowing new trials in criminal cases.

On the first issue, Lord Campbell's proposal that the practice of reserving be placed on a statutory basis received general assent [46], but there were sharp divisions of opinion as to the advisability of allowing Quarter Sessions to reserve cases [47], and as to whether it should lie in the discretion of the judge whether a case was reserved or not [48].

On the question of extending the new trial system to all criminal cases the judges were hostile [49]. They put forward three arguments.

First, there was no call to change the law. Cases of wrongful conviction were extremely rare [50], and were dealt with as satisfactorily under the present system as they would be under a system of criminal appeal [51].

Second, the argument that the same appeal remedies ought to be allowed in criminal cases as in civil was misconceived. The two cases were not the same. The criminal law incorporated safeguards for the accused which were wholly absent in civil suits. Civil suits frequently involved difficult questions of both law and fact whereas in criminal cases the law and facts were usually straightforward, and the delay incidental to appeal, whilst tolerable in civil suits, would in criminal cases be a great evil [52].

Third, granting a general right of appeal would give rise to a host of inconveniences

which would far outweigh the supposed advantages [53].

No less than seven inconveniences were listed. First, it was said if an unrestricted right of appeal were granted every prisoner would appeal thereby generating a volume of work so great that the courts would be overwhelmed ('the floodgates argument') [54]. Second, if appeal were not to be a rich man's remedy, it would be necessary for lawyers to be assigned to poor appellants at enormous expense to the public [55]. Third, unless the public met the cost of resisting motions for new trials, such motions would go unopposed due to the inability or unwillingness of prosecutors to bear the cost [56]. Fourth, juries knowing that their verdicts were subject to appeal would be more ready to convict in doubtful cases [57]. Fifth, the deterrent effect of the criminal law, which depended (especially in capital cases) on the speed with which execution of sentence followed verdict, would be watered down by the delays that an appeal system caused [58]. Sixth, to allow new trials in criminal cases would be to open the door to fraud and perjury on a massive scale [59]. Seventh, if a general right of appeal were granted to prisoners it would be difficult to deny a like right to the prosecutor, which would be an end of the cherished principle that an acquittal was final [60].

When the Lords resumed their consideration of his Bill, Lord Campbell made it clear that, so far as he was concerned, there was to be no new trial clause [61], and he carried the House with him. The judges' arguments had won the day [62] and were for the rest of the century to remain the principal planks in the anti-reform case.

In the result, the Bill, when it became law as the Criminal Law Administration Amendment Act, made only minor and largely cosmetic changes in the law. Henceforth, reserved cases were to be heard by a court (to be known as the Court for Crown Cases Reserved) [63] sitting in public, with power to affirm or quash convictions, and consisting of at least five of the common law judges including one of the Chiefs, with Quarter Sessions given for the first time the power to reserve. But no other change in the law was made.

**(c) 1848-60 Fluctuating fortunes for the Reformers**

After their defeat at the hands of the judges the reformers licked their wounds. In 1853, however, Butt decided to raise the subject again, and introduced a Bill [64] modelled on those of 1844 and 1848, but containing provisions designed to meet the floodgates argument [65], and to ensure that appeals in capital cases were speedily heard [66]. It was met with a re-hash of the arguments used before the Select Committee [67] and failed to pass its second reading.

In 1856 there was published Greaves' Report on Criminal Procedure [68]. Before the Select Committee in 1848 Greaves had urged adoption of the principle of Ewart's Bill, and in his Report he again argued strongly for reform, but this time not from the standpoint of the prisoner but from that of the public. He made two points. First, before the Court for Crown Cases Reserved, a prisoner who succeeded in establishing that a legal error (for example the reception of inadmissible evidence) had been made during his trial, had his conviction quashed, even though the admissible evidence adduced at the trial was sufficient to justify his conviction. Second, the Home Office, in exercising

its review function, had inadequate means of testing the truthfulness of 'new evidence' laid before it, and in consequence there was the ever present danger of its being imposed upon, and there was in any event doubt as to whether it was really satisfactory that a jury's verdict given after a trial in open court should be treated as a nullity, save after review proceedings of a kind such as to satisfy all reasonable persons that it was erroneous. By way of solution he suggested that the Court for Crown Cases Reserved be given a discretionary power to order new trials, and that the Home Office be authorised to use district public prosecutors to investigate 'new evidence', with the further power to order a new trial where the result of the investigation was to cast doubt on the conviction.

Whether Greaves' Report was responsible for the shift of opinion is hard to judge, but the fact is that when a New Trials in Criminal Cases Bill [69] was introduced by M'Mahon in 1858, it received a much better reception than any of the earlier Bills had done. The majority of those who spoke in the second reading debate were in favour of the principle of reform, and although the stock anti-reform arguments were rehearsed [70], the most frequently voiced criticism of the Bill was that, as drafted, it would enable the prosecution to appeal an acquittal [71]. The vote taken at the end of the debate produced a majority of 54 in favour of the Bill [72].

After the vote, M'Mahon was pressed by the Attorney-General not to attempt to carry the Bill further that session. He was, he declared, in favour of the principle, but in its present shape the Bill was open to substantial objections and required considerable revision. This suggestion

did not go down well with all members, particularly after the Home Secretary declined to give an undertaking to bring in a Government Bill on the subject, and by a reduced majority the House voted that the Bill be committed [73]. However, no further progress was in fact made upon it.

The following year M'Mahon introduced the Bill again [74]. It was cordially welcomed by the Attorney-General who indicated that the Government was in favour of making some alteration in the law and would soon introduce its own Bill [75]. A general election in June stopped any further progress of the Bill, and when, following the election, M'Mahon re-introduced it [76], the new Liberal Government made it clear that it would oppose it, and it got no further than an adjourned second reading [77].

M'Mahon, however, pressed on. In 1860 he and Hutt introduced a modified version of the 1858 Bill [78]. The Government, however, was as good as its word. When on the second reading debate, the new Home Secretary, Sir Cornwall Lewis, was called on, he launched into a long speech rehearsing all the old anti-reform arguments [79]. The most effective part of his speech was that which dealt with a provision included in the Bill to meet 'the floodgates argument' (viz. a clause empowering the Queen's Bench to make the grant of a new trial conditional upon the defendant submitting to terms as to costs) [80]. What this clause meant, he argued, was that the right of appeal which the Bill conferred would be a rich man's remedy. Poor prisoners would not be able to appeal for they would not be able to comply with the terms as to costs. That was what currently happened in the case of appeals against summary convictions under statutes such as the Vagrancy Act, 1824 which

allowed appeals only on terms as to costs. Thousands had the right but because of clauses as to costs only a handful exercised it [81]. Appeal to the Home Office might have its shortcomings but it was at least free and open to everyone. This was a very damaging point, and M'Mahon's answer [82] that where there was merit in the appeal the question of costs might be waived, and, if not, the money would be found by friends and family did not convince. By the end of the debate it was becoming clear that the Bill was lost, and it was refused a second reading without a division.

A Bill [83] introduced the following session by Butt met with the same fate, Sir Cornwall Lewis expressing surprise that it should have been thought necessary to introduce again a Bill which had been negatived without a division in the last session [84].

Three years later Sir Fitzroy Kelly brought in a Bill [85], offering as his justification for doing so public dissatisfaction at the way in which the Home Office dealt with petitions for revision of conviction and sentence, but it came on too late to have any hope of being passed into law, and was withdrawn. It would be fourteen years before another Bill for the granting of a general right of appeal in criminal cases was introduced into the House.

#### **(d) Other developments**

Whilst the argument was continuing in Parliament, the power of Quarter Sessions to reserve cases was proving itself a useful reform. The Court for Crown Cases Reserved was not (as some had predicted) overwhelmed with such cases, but the figures showed how necessary the reform had been

(during the first ten years of the operation of the 1848 Act Quarter Sessions cases accounted for over half of the work (126 out of 237 cases dealt with) of the court - a situation which was to change but little during the remainder of the century [86].

The success of the reform may have been a factor in the enactment of the Summary Jurisdiction Act, 1857, which gave persons summarily convicted a right to require the magistrates to state a case for the opinion of the Queen's Bench. The Act, which applied also to decisions of Quarter Sessions upon summary appeals, created the curious situation that a person whose appeal had been dismissed by Quarter Sessions could require the bench to state a case, whilst a person who had been convicted before them could not. Indeed during the period 1844 to 1864 it was a curious irony (oddly enough never referred to during debates) that, whilst Parliament, was setting its face against rights of appeal on fact for persons convicted upon indictment, it was at the same time passing statutes giving such right to persons summarily convicted [87].

Outside Parliament there were attempts being made by the legal profession [88] to push forward the boundaries of existing appeal remedies.

In 1852 a defendant [89] succeeded in obtaining from the Queen's Bench an order for a new trial in a felony case. The case was one of theft, removed before trial from Hull Quarter Sessions into the Queen's Bench by certiorari, and then tried at Nisi Prius at York Assizes, and although the precedent it set does not seem to have been much followed [90], fifteen years were to pass before it was finally overruled [91].



The previous year in Alleyne [92] Lord Chief Justice Campbell had been prevailed upon to seal a bill of exceptions in a misdemeanour case. He subsequently repented of his decision in Esdale in 1858 [93], but even as late as 1867 [94] one finds an attempt being made by experienced counsel to get one of the City judges to seal a bill.

In 1860 Hatch's lawyers demonstrated how a perjury prosecution could be made to serve as an appeal tool [95]. The case caused a considerable stir [96]. In 1866 the Home Office actually advised a prisoner, who was alleging that he had been wrongly convicted of rape, to proceed as Hatch had [97]. In fact, however, the remedy was beyond the means of most prisoners [98] and during the rest of the century was but little used [99].

**(e) The subject that would not go away**

Despite the defeat of the 1860s Bills the question of criminal appeal would not go away. During the 1860s capital punishment was a subject of intense public debate [100], and in 1864 a Royal Commission was appointed which reported two years later [101]. It was inevitable that the Commission should touch upon the question of the revision by the Home Office of capital convictions and sentences. Most of the witnesses from whom it took evidence on the point favoured leaving things as they were, arguing that appeal to the Home Office was as favourable an appeal for prisoners as could exist. Some, however, were more critical. The misgivings which Greaves had expressed in 1856 were echoed by Baron Bramwell, whilst to Lord Cranworth it was wrong for the Home Office to commute the death sentence where doubt was felt as to the correctness of the conviction; the proper

course in such a case was to grant a pardon. In its Report the Commission diplomatically declined to make any recommendation as to whether there should be a right of appeal in capital cases, arguing that the question of appeal did not concern just capital cases [102].

It was, however, capital cases which formed the subject of the next Bill on criminal appeals introduced into the Commons - Sir George Jenkinson's Bill of 1870 [103]. The scheme of this Bill was that a person capitally convicted should have a right to appeal his conviction with the leave of the trial judge, such leave to be granted where the trial judge was satisfied by affidavit evidence that new evidence existed tending to support a defence of insanity or otherwise exculpatory of the prisoner. The appeal was to be heard by a court consisting of three common law judges and three members of the Judicial Committee of the Privy Council. The time limits for appealing and the setting down of the appeal were to be very short. At the hearing of the appeal, the appeal court should have power to inquire into any matter of law or fact. It should have power to examine witnesses on oath, to receive affidavits, to send for the notes of the trial judge and for letters and papers, and should report to the Queen as to the grant of a free pardon, the commutation of the carrying out of the death sentence or otherwise as should seem just. The Bill was given short shrift. It would, said the Attorney-General [104], lead to delay in the execution of capital sentences, and so undermine the system of capital punishment; it would lead to evidence being kept back in order to ensure a right of appeal. Worst of all, it would lead to verdicts being set aside 'after an investigation of a bastard description unknown to law' in which the

appeal court, never having seen the witnesses who gave evidence at trial, would proceed simply on written statements. Sir George pointed out that all of the objections raised applied equally to the revision of capital cases by the Home Secretary, but that was not enough to save the Bill which was refused a second reading without a division [105].

The topic was briefly alluded to again in 1874 by the Select Committee on the Homicide Law Amendment Bill [106], but here again the witnesses questioned [107] showed no enthusiasm for a right of appeal in homicide cases.

In 1878 Serjeant Simon and Sir George Bowyer introduced a Bill [108] proposing to give an unrestricted right of appeal on law and fact to those sentenced to death or penal servitude without previous convictions, and a right of appeal, with leave of the judge, in other cases. The most novel feature of this Bill was a clause giving an appellant the right to tender himself as a witness at the appeal hearing (with restrictions placed upon cross-examination as to credit, and a provision that failure to tender himself should not prejudice an appellant). The Bill was withdrawn at the second reading stage.

#### **(f) The Criminal Code Bills**

May, 1878 saw a far more promising development - the introduction of the Government-sponsored Criminal Code Bill [109], providing, inter alia, for the establishment of a Court of Appeal in Criminal Cases and empowering trial judges to grant new trials. The Bill, as has been seen, was ultimately withdrawn. In 1879, after revision by the Royal Commission, it was reintroduced [110], but again ended up being withdrawn.

1879 was nonetheless an encouraging year for reformers. It saw the enactment of the Summary Jurisdiction Act, conferring a general right of appeal in cases of summary conviction, and although the 1879 Code Bill did not pass, its appeal provisions met all their demands. The refusal of the trial judge to reserve a point of law was henceforth to be subject to appeal. The powers of the court on hearing reserved cases were to include the power to order a new trial. Trial judges were to have the power to order a new trial on the grounds that the jury's verdict was against the weight of the evidence, with a right of appeal against refusal. So too was the Home Secretary in cases where a petition for mercy raised doubt as to the correctness of a conviction. And to exercise criminal appellate jurisdiction a new court - the Court of Appeal in Criminal Cases - was to be constituted.

In 1880 the Government introduced its third Criminal Code Bill [111] (remodelled to take account of criticisms from the Lord Chief Justice, but with the appeal clauses unchanged). Three private members also introduced a Criminal Code Bill of their own [112], the appeal clauses of which differed in significant respects [113] from those of the Government Bill. A General Election put an end to any further progress on the Government Bill, the Private Members' Bill having in the meanwhile been dropped.

After a lull in 1881, in 1882 no less than three Bills [114] were introduced containing clauses dealing with criminal appeal - two Criminal Law Amendment Bills and a Death Sentences (Appeal) Bill. In the end all three had to be dropped.

In 1883 the Government made another major effort, with two Bills [115] being introduced into the Commons in tandem - the first yet another Criminal Code Bill containing the same appeal clauses as the 1879 Bill, and the other a Court of Criminal Appeal Bill providing for appeal on fact in capital cases. In the debate on the Code Bill the Government was criticised for bringing before the House two Bills containing different provisions on the same subject [116]. The debate on the Court of Criminal Appeal Bill saw it attacked on a variety of grounds. To some it was unnecessary; because of the numerous safeguards for the accused, wrong convictions in capital cases simply did not occur [117], and by providing an appeal remedy the Government would cause delay in the execution of sentence, and thus undermine the death penalty [118]. To others the fault of the Bill was that it permitted appeals as of right in capital cases only [119]. But for all the criticisms, the general reception given to the Bill was favourable, and, like the Code Bill, it passed its second reading by a comfortable majority [120]. But as before, it proved impossible to get the Code Bill through all its stages within the session, and both Bills in the end had to be dropped. This marked the end of Government involvement in the subject of criminal appeal for the rest of the century. And within a few years the appeal clauses of the Code were being publicly repudiated by Stephen, who announced that subsequent experience had led him to the view that:-

'substantially the existing system cannot be improved'.

**(g) The fight continues**

The efforts of reformers, however, continued with Bills being introduced in 1888, 1890 and 1892 [121], none of which got beyond the first reading stage. A novel feature of the 1888 Bill was that it proposed a right of appeal against sentence as well as conviction.

In 1892 there occurred a wholly unexpected development. Out of the blue the Council of Judges, in its annual statutory report [122], recommended to the Lord Chancellor the establishment of a Court of Appeal in Criminal Cases. Lack of uniformity in sentence was, argued the report, a serious problem, which could be solved if there was an Appeal Court with power to give authoritative guidance on sentencing. In order to discourage frivolous appeals the court should have power to increase as well as reduce sentence, and as a check on over-lenient sentencing the Attorney-General should have a power of appeal, to be exercised only in cases of extreme or systematic inadequacy of sentence. It was conceded that, at first, the number of appeals would be large, but the possibility of an increased sentence, and, after a short time the increased uniformity of sentences throughout the country and the consequent difficulty of obtaining an alteration of sentence, would combine to prevent hopeless appeals. As well as dealing with sentence appeals, the Court should, the report recommended, also have the duty of reviewing convictions and sentences referred to it by the Home Secretary, with power in such cases to quash the conviction or diminish the sentence but not the power to order a new trial.

There was no Government action on the report, but in 1895 a private member's Bill [123] was introduced, which was the 1883 Bill rehashed with additions to give effect to the report's recommendations. The Bill was given an unopposed second reading and referred to a Select Committee. The Select Committee reported the Bill in July without amendment, stating that it had not had sufficient time to conclude its investigations. After this it made no further progress [124]. A similar Bill the following year did not get beyond a first reading [125].

In 1897 a revised Bill [126] limited in scope to the reforms recommended in the 1892 report was introduced by Pickersgill. On the second reading it was given a lukewarm welcome by the Home Secretary and the Attorney-General. The Home Secretary conceded that:-

'there was a general consensus of opinion in favour of some alteration of the law giving some further appeal in criminal cases'

but he thought the scheme proposed by the Bill had serious shortcomings. He was unhappy about the appeal court being given power to increase sentences, and equally unhappy about the proposal that the Home Secretary should have power to refer cases to the court. This would put him in a difficult position. If he refused to refer a case he would be accused of denying access to the court, whilst if he sent all petitions to the court the judges would complain that he was handing over his business to them [127]. The Attorney-General, whilst acknowledging the problem of inequality of sentences, thought review by the Home Office an adequate remedy [128]. There were also criticisms of the Bill from the backbenches. There was general dislike of the provision for the increase

of sentences [129]. The wisdom of giving a general right of appeal against sentence was questioned; the courts would be flooded out with cases [130]. If the scheme were not to be a mockery legal assistance would have to be provided for poor appellants at public expense [131]. Disparities in sentencing were more apparent than real and, in so far as there was a problem, could it not as well be remedied by the judges issuing sentencing guidelines? [132] For some, the proposal that the appeal court should have power to review convictions at the request of the Home Secretary went nothing like far enough. If sentence appeals were to lie as of right why should conviction appeals require the Home Secretary's fiat? [133] Why did the Bill give no right of appeal at all in capital cases? What was the logic in allowing a man convicted of stealing a pair of boots to appeal his sentence but denying the like right to a man sentenced to death? [134] Nonetheless, despite all the criticism the Bill was given a second reading by a comfortable majority of 147 to 86. But it made no further progress.

The following year, Pickersgill, the promoter of the 1897 Bill, introduced a revised Bill [135], proposing that prisoners should have a right of appeal against conviction and sentence both on law and fact. The second reading debate was very thinly attended, and saw a strong attack launched on the Bill by both the Home Secretary and the Attorney-General [136], with all the arguments used by Sir Cornwall Lewis in the debate on the 1860 Bill being deployed against it. When the matter was put to the vote the Bill was defeated by a majority of 64.



Still the reformers would not give up, and in 1899 yet another Bill [137] was introduced but failed to get beyond the first reading stage.

The 1899 Bill was the thirtieth criminal appeal Bill to be presented that century. Out of the thirty only one - Lord Campbell's Bill of 1848 - had got onto the statute book, and in 1900 the prospects for reform looked no brighter than they had in 1848. There was still a general belief that wrongful convictions were rare, and that the procedures of reserving cases and petition to the Home Office provided an adequate remedy against error. However, a time bomb was ticking away. In 1896, in the course of an Old Bailey trial, the Common Serjeant made a blunder which would, within less than ten years, lead to a Committee of Inquiry Report, which would in turn help pave the way for the Criminal Appeal Act, 1907. His mistake was to refuse to admit, on an indictment for obtaining by false pretences, evidence, which, had it been received, would have proved beyond doubt that the case was one of mistaken identity, an error which he then compounded by refusing to reserve the point. As a result the accused was convicted. In 1904 the unfortunate accused, Adolf Beck, was wrongly convicted on mistaken identification evidence for a second time, but this time the mistake was discovered. The Committee of Inquiry [138] into his case expressed the view that, had the Common Serjeant reserved the question of admissibility raised at the first trial, the first conviction would almost certainly have been set aside, and the second conviction would never have taken place. In short, Beck had been twice wrongly convicted as a result of an event (namely the refusal of a judge to reserve a point of substance) which judges had throughout the nineteenth century been claiming would never happen. The Committee

recommended a right of appeal on law in all cases, but another sensational wrongful conviction a year later - that of Edalji [139] - obliged the Government to go the further step of allowing appeals on fact as well.

The failure to reform appellate procedures had, as has already been seen, consequences which went beyond the misfortunes of individual prisoners wrongly convicted or over-harshly sentenced who could get no redress therefrom. Lack of an appeal remedy meant that judicial misconduct (by no means unknown at Quarter Sessions and amongst the City judges in mid century) went largely unchecked, with adverse press publicity the only sanction. It also meant that judges in the lower courts (of whom many were laymen) were almost wholly without authoritative guidance (of the kind now given by the Court of Appeal) as to how the duty of summing up was to be discharged. The result was that many prisoners were convicted after summings up which, by twentieth century standards, were wholly deficient.

## CHAPTER 20

### CONCLUSIONS

'Nothing so easy as to repudiate the abuses of former days; nothing more difficult than to acknowledge and root out those of our own.'

Henry Rich M.P. (1841) P.D. LV1, 651.

The aim of this thesis has been to assess how far trial on indictment in nineteenth century England conformed to the present day concept of a fair trial. The conclusion is that at the beginning of the century it fell far short of such a concept, but that by the century's end (save in relation to legal aid and appellate remedies) it had moved close to the twentieth century model.

In 1800 the manner in which serious criminal charges were tried was for many Englishman a matter of pride. Against the risk of frivolous prosecutions there was the safeguard of the grand jury and, in felony, of the preliminary examination. By denying the accused the right to testify, but conceding to him the right to make an unsworn statement, the law enabled him to tell his story whilst at the same time protecting him against 'the moral torture' of cross-examination. Its evidential rules (particularly in relation to hearsay, confessions, character, and corroboration) were all highly favourable to him, and, by casting upon the Crown the burden of proving guilt beyond reasonable doubt, and requiring unanimity of trial juries, the risk of wrongful conviction was reduced to the minimum. To many it was hard to see how such a system could be improved upon.

By current standards, however, the system was badly deficient. Rights, today regarded as lying

at the heart of a fair trial, were denied to the accused as either unnecessary or, in some cases, as actually obstructive of justice. So that an accused should not know the case against him, and thus be enabled to fabricate a defence, he was denied a copy of the depositions. Lest he delay the trial by the taking of pleading points a copy of the indictment was refused him in felony. Legal representation, still, save in treason, a novelty in criminal courts, was regarded as wholly inessential. Calls for poor prisoners to be provided with legal representation would in 1800 have been greeted with astonishment. What need had prisoners of counsel in felony? Such cases were rarely prosecuted by counsel, and, in any event, what handicap was lack of counsel to an innocent man? It required 'no manner of skill to make a plain and honest defence.' [1] Nor was the law prepared to allow the employment of counsel serve to obstruct justice. It was considered important that any defence speech should come from the prisoner's own mouth:- his demeanour, as he made it, would often give an indication as to where the truth lay [2]. Hence, in felony, the assistance of counsel was to be limited to help in the examination or cross-examination of witnesses. The accused could not have counsel speak for him. Witnesses, whom a prisoner through poverty was unable to bring to court, went unheard. Against conviction on indictment there was no appeal on fact (save in King's Bench misdemeanour cases), nor in law (unless the judge saw fit to reserve a point, or there was error of law on the face of the record).

And these were by no means the system's only failings. It tolerated laymen acting as judges at Quarter Sessions. In the London courts, for want of someone to guide them through the evidence,

grand juries, year in year out, threw out bills in clear cases which had already passed the scrutiny of an examining magistrate. In political prosecutions in the King's Bench jury packing was an open scandal. For all its boasted tenderness to the accused, the law made him stand for the duration of his trial no matter how long it lasted. Prosecutions of child abusers regularly broke down because the victims were too young to be sworn. The rules of criminal pleading were so strict that each year trifling indictment defects and variances carried guilty men to an unmerited acquittal. In capital cases, rather than order a jury locked up overnight, courts commonly sat until the early hours of the morning, with the defence case taken at a time when the jurors' powers of concentration were at their lowest ebb. Juries which could not agree would be starved into a verdict, and, at Assizes, sometimes threatened with carting as well.

Of all the system's shortcomings none bore more harshly on accused than the lack of a system of legal aid. Where a prisoner through poverty was obliged to defend himself the trial was usually hopelessly one sided. His efforts at defence were generally 'pitiably even if he has a good case' [3]. Indeed, many accused, knowing the task beyond them, did not even try to defend themselves, and were convicted with scarcely a question asked or a word uttered in their defence. For them the trial rushed by 'like a dream which (they could not) understand.' [3]

Scarcely less grave was the lack of adequate appeal remedies.

By 1899, the trial system had moved much closer to that of today. Progress had been greatest in the the law of evidence. This had

during the century undergone extensive reshaping at the hands of both judges and Parliament. In accomplice cases a new and stricter definition of corroboration had been adopted. The law as to confessions had been cleansed of 'sentimental excesses'. Victims of child abuse too young to be sworn could now give their evidence unsworn. In cases of sexual assault Hale's old 'consistency of conduct' test was fast being displaced by the modern corroboration rule. A similar fact doctrine had emerged and, by 1900, assumed substantially its modern shape. Judges were starting to adopt the practice of hearing arguments about admissibility out of earshot of the jury. Since October 1898, prisoners had enjoyed the dangerous privilege of being able to give evidence in their own defence. Proclaimed in some quarters as a boon to innocent prisoners, arguably the most important effects of the Criminal Evidence Act, 1898 were (a) to strip the accused of his old immunity from cross-examination (henceforth, if he wished to offer an explanation of the evidence against him, he would have to offer it from the witness box, or run the risk of the jury drawing an inference to his discredit); and (b) to expose the accused, who attacked the character of Crown witnesses, to a new peril - retaliation in kind should he venture into the witness box. With this Act the the shape of the criminal trial was decisively and drastically altered, and with it both the trial system and the law of criminal evidence entered the modern age.

Progress in the field of procedure had, however, been less impressive. There had been reform. With a clerk to assist them London grand juries were no longer 'the hope of the London thief'. Minor indictment flaws and variances no longer won an accused his freedom. Abuses such as jury packing and the starving of juries were gone.

Late sittings and the practice of judges prosecuting were much curtailed. There was now a measure of protection for accused (albeit limited) against prejudicial pre-trial publicity. An accused now had the right to a copy of the depositions, and to notice of additional evidence (although not to sight of unused material, nor to a copy of the indictment in felony). He was allowed a seat during the trial, and in felony his counsel now had the right to address the jury (a privilege the value of which was much reduced by the rule that the calling of evidence by an accused represented by counsel served to give the Crown the last word with the jury). In the vital fields of appeal and legal aid, however, progress had been derisory.

Despite more than half a century's campaigning, the establishment of a Court of Criminal Appeal seemed as far away as ever. Indeed it had become the century's 'standing lost cause' [4], a saga that had run even longer than the campaign for a Prisoners' Evidence Act.

Progress towards a scheme of criminal legal aid had been only slightly greater. In the 1820s, shamed perhaps by the spectacle of prisoners, sometimes as young as eight, standing trial for their lives undefended, the judges had begun to adopt the practice of assigning counsel in capital cases, and the practice had gradually taken root. This, together with relatively inexpensive means of defence such as the dock brief and the I.P. system, were the century's answer to the problem of the poor prisoner. But it was a hopelessly inadequate answer. At the Old Bailey in the 1890s over 50% of all prisoner tried were still being tried undefended [5]. Almost equally ineffective had been the attempts made to assist prisoners to get

their witnesses to court. Russell Gurney's Act of 1867 had proved largely a dead letter, nor had the practice introduced in the 1890s of using police officers to warn defence witnesses apparently made much difference. Indeed, since the the passing of the Winter & Spring Assize Acts, 1876-9, in some country areas the difficulties faced by poor prisoners in trying to get witnesses to court had, if anything, got worse rather than better.

Some of the weaknesses of the nineteenth century system received early attention in the present century. In the wake of the Criminal Evidence Act, 1898 was enacted in 1903 the woefully inadequate Poor Prisoners' Defence Act, whilst in 1907 the Court of Criminal Appeal was set up. However, it was only in the 1960s that a scheme of criminal legal aid that was anything like satisfactory was established [6]. And from this same era date reforms such as the abolition of lay judges, the abolition of the Crown's right of reply and the banning of the reporting of committal proceedings, whilst the imposition upon the Crown of a duty to disclose unused material had to wait until 1981.

In the evolution of the trial system since 1800 the great landmarks have been the Prisoners' Counsel Act, 1836, the Criminal Evidence Act, 1898, the Criminal Appeal Act, 1907 and the Legal Aid & Advice Act, 1949. Between them they provide a useful measure of the progress which had been made during the nineteenth century, and which still remained to be made at its end.

In the last twenty years the law of criminal evidence, the nineteenth century's most important contribution to our trial system, has come under close and increasingly critical scrutiny. Since



1970 there have been four major reports upon it or upon aspects of it, and at the present time (along with other aspects of the trial system) it is under consideration by the Royal Commission on Criminal Justice.

The trend is not unexpected. Increasingly, the evidence code has begun to show its age. A particular problem field has been pre-trial interrogation. The growth, after the Second World War, in the practice of police interrogation created an obvious need for safeguards to protect suspects against the risk of their replies to questions being misreported, or worse still fabricated. But the law of evidence, whose rules still looked back to the era when interrogation was both sternly discouraged by the judges and rare in practice, offered none. In the absence of safeguards, malpractice and false allegations of malpractice flourished. By 1974 the problem had become so serious that the Court of Appeal called for something to be done, as a matter of urgency, to make evidence of admissions to police officers difficult both to challenge and fabricate [7]. But nothing was in fact done until the Police & Criminal Evidence Act, 1984 grasped the nettle. And even the extensive protections which that Act put in place have not put an end to the debate. There are now calls for yet more extensive protection - in particular for the introduction of a rule forbidding the conviction of accused upon unsupported confession evidence, and for s. 1(f)(ii) of the Criminal Evidence Act, 1898 to be amended so that the making of an allegation of police malpractice no longer exposes an accused, with a criminal record, to the risk of cross-examination about his record.

However, it is not simply a case of a new century posing new challenges. Other factors are at work as well.

The premises, upon which some rules of evidence are based are, by many now no longer accepted. In 1988 Parliament, rejecting the view that children as witnesses are less reliable than adults, abolished the mandatory corroboration requirement for children's unsworn evidence [8]. And one of the reasons why the corroboration rule, which applies in sexual cases, is currently under attack is that today few subscribe to the nineteenth century view that those who complain of sexual assault are more prone to make false allegations than those who allege non-sexual assault.

Again, some nineteenth century rules have come increasingly to be viewed as working unsatisfactorily in practice. One has already been referred to - the tit for tat rule laid down in s. 1(f)(ii) of Criminal Evidence Act, 1898 (i.e. the rule that an accused who attacks the character of a prosecution witness exposes himself to cross-examination as to his criminal record). This is seen as operating in some cases (the problem is not limited just to police malpractice cases) to deter the accused from laying his true defence before the jury. If he wishes to keep his record out (and, where that record is for offences of the kind for which he is standing trial, it is often seen as vital that he should do so) he has, under the Act, only two courses open to him: either to abstain from the attack (in which case he is effectively jettisoning his real answer to some of the evidence against him), or not go into the witness box (in which event the jury hear not a word from him, and learn of his case only so far as his counsel is

able to bring it out in the course of cross-examination of Crown witnesses).

Other rules perceived as working badly in practice are those relating to corroboration. They are seen as producing, by reason of their complexity, difficulties for judges and juries alike, and the unmeritorious quashing of convictions on appeal. It is also argued that the dangers against which corroboration rules seek to protect can, in an age when accused are no longer tried unrepresented, be better dealt with within the ordinary trial processes. No doubt, some modern species of accomplice, such as the 'supergrass' are as dangerous as any nineteenth century approver swearing away another's life to save his own neck or for a £40 reward, but these are dangers which defence counsel can and will, in any event, bring out by his cross-examination and in his final speech, and which the trial judge will, where necessary, stress in his summing up.

Increasing protection for suspects and accused in the form of legal aid and the Police and Criminal Evidence Act Codes of Practice have also played a part. It has led to demands for other protections, in particular the right of silence, to be abolished. Given the access that both suspects and accused have to legal advice and representation, given the safeguard of tape recording at the interrogation stage, what justification can there be, it is asked, for such a right? Whom, apart from the guilty, does it benefit? In the debate on the Criminal Evidence Bill, 1998 the 'shield for the guilty' argument failed to carry the day. But today it is beginning to prevail. Since 1967 in England and Wales there have been imposed obligations on accused to make pre-trial disclosure of alibis [9], of expert

evidence [10], and in serious fraud cases (if called upon to do so by the judge at a preparatory hearing) disclosure of the general nature of his defence [11], whilst in Northern Ireland the right of silence of both suspects and accused has been completely overturned [12].

Another (albeit less important) factor has been reforms made in the civil law of evidence, in particular in relation to hearsay. These have generated demands (only partially answered by the Criminal Justice Act, 1988) for a similar relaxation of the rule in criminal cases.

The Royal Commission on Criminal Justice, set up in the wake of the failures of the criminal justice system revealed by cases such as those of the Birmingham Six and the Guildford Four, will report in 1993. The law of criminal evidence is unlikely to survive that report in its present form, but there is a danger that the Commission will yield to pressure for a 'restoration of the balance' within the criminal justice system which, it is alleged, has swung too far in favour of the accused, by recommending the removal of safeguards which many see as an integral part of the concept of a fair trial. This Thesis has demonstrated that the nineteenth century was the springboard for many of the reforms which justify the description of our criminal trial as 'fair'. We must ensure that future historians are not able to attribute to the twentieth century the blame for the reversal of that trend.

## **F O O T N O T E S**

### **ABBREVIATIONS**

The five volumes of notebooks which record the reserved criminal cases which came before the Common Law Judges between 1785 and 1828 are referred to by the abbreviation (2-6) J.N.

## INTRODUCTION

1. T.F.T. Plucknett, *A Concise History of the Common Law* (5th ed. 1956), pp. 118-24.
2. 25 Ed. III, stat. 5, c.3.
3. J.B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), p. 86.
4. Plucknett, *op.cit.*, p. 433.
5. Bushell's case (1670) Vaughan 135.
6. R. v. Sutton (1816) 4 M. & S. 532.
7. 1 & 2 Ph. & M., c. 13 (1552) and 2 & 3 Ph. & M., c. 10 (1555).
8. Sir Thomas Smith, *De Republica Anglorum* (1st ed. 1583) pp. 94-103.
9. 7 & 8 Wm. III, c.3 (1695).
10. Stephen, Sir J.F., *A History of the Criminal Law of England*, i., pp. 440ff.
11. Beattie J.M., *Crime & the Courts in England 1660-1800*, 364.
12. 1 Anne, stat. 2. c. 9 (1702).
13. Beattie, *op.cit.*, pp. 356-7.
14. Beattie, *op.cit.*, pp. 364-6.
15. Beattie, *op.cit.*, pp. 370-5.
16. 12 Geo. III. c. 20 (1772), s. 1.
17. L. Radzinowicz, *A History of English Criminal Law*, I, pp.25-8 & 714-9.
18. Glanville Williams, *The Proof of Guilt* (3rd ed. 1963), p. 4.
19. As to the requirement for judges to be legally qualified see Supreme Court Act, 1981, s. 8 and Courts Act, 1971, s. 8; as to impartiality see e.g. R. v. Mulvihill (1990) 90 Cr.App.R. 372.
20. See Juries Act 1974, s. 11(1) (selection by ballot) and the law as to jury challenge.
21. R. v. Kingston (1948) 32 Cr.App. R. 183.
22. Legal Aid Act, 1988, Part V.

23. See s. 6(2) of the Magistrates Court Act, 1980; where there is an 'old style' committal, a voluntary bill or the transfer of a serious fraud case the accused's right to a copy of the evidence would appear to rest upon the common law obligation to give notice of additional evidence (rule 13 of the Magistrates Court Rules, 1952 (which gave the accused a right to a copy of depositions on payment) has been repealed but not yet replaced).
24. See Supreme Court Act, 1981, s. 77(2)(a), and Crown Court Rules 1982, r. 24(1)(a), which provide for a 14 day interval between committal and trial, and the common law power to grant a postponement to an accused not ready for trial.
25. Attorney General's Guide Lines (1982) 74 Cr.App. R. 302.
26. Contempt of Court Act, 1981, ss. 1 and 2.
27. See Criminal Justice Act, 1988, Sch. 2.
28. Criminal Procedure (Right of Reply) Act, 1964, s.1.
29. Criminal Appeal Act, 1968, s.1.
30. See e.g. s. 76 of the Police & Criminal Evidence Act, 1984 and the rules as to identification and corroboration of accomplices and complainants in sexual cases.

## CHAPTER 1

1. 25 Ed. III, st. 5, c. 2.
2. At common law the punishment for women traitors was burning; in 1790 the statute 30 Geo. III, c. 48 substituted hanging.
3. 9 Geo. IV, c. 31.
4. Ashford v. Thornton (1818) 1 B. & Ald. 405.
5. 59 Geo. III, c. 46.
6. Radzinowicz, History, I, p. 4.
7. Sir L. Woodward, The Age of Reform (2nd ed. 1962), pp. 465-7.
8. Cornish W.R. & Clark G. de N., Law & Society in England 1750-1950, p. 552.
9. R. v. MacDaniel (1756) 19 S.T. 745.
10. See e.g. R. v. Cooper & Bennet, The Times, Jan. 17, 1806; an article on 'Blood Money', The Times, Feb. 24, 1818 and a report in The Times, Feb. 27, 1818 of the examination of Thomas Limbrick.
11. The principal Acts were the Metropolitan Police Act, 1829, the County Police Act, 1839, and the County & Borough Police Act, 1856.
12. Prosecution of Offences Act, 1879.
13. 58 Geo III, c. 70.
14. PRO: HO 45/ 9961 X 6851.
15. 7 Will. 4 & 1 Vict., c. 23.
16. I Geo. IV, c. 57.
17. By the Larceny Act, the Malicious Damage Act and the Offences against the Person Act.
18. Garrotters Act, 1863.
19. The King's Bench had unlimited jurisdiction to try indictments in the county where it sat and was the only court which could try appeals of felony.



20. Chitty, Criminal Law (1st ed. 1816), I, p. 139 'It is now the common practice to try only petty larcenies and misdemeanours in this court'.
21. At busy sessions they would be assisted by a third 'civic' judge' (after 1834 the Judge of the Mayor's & City of London Court commonly acted as third judge).
22. As to the City judges see The evidence taken by the Royal Commission on the Corporation of London, 1854 P.P. (1772) XXVI, 1, (especially Q.s/ 5491 and 5626-7); as to the Welsh judges see the Report of the Common Law Commissioners, 1829, P.P. (46) IX, p. 1, App. 8. By 1850 the burdens of office were such as to prevent the City judges engaging in practice to any extent but they still continued to sit as M.P.s well into the second half of the century.
23. Law Terms Act, 1830.
24. Central Criminal Court Act, 1834.
25. Municipal Corporations Act, 1835, s 103.
26. Quarter Sessions Act, 1842.
27. Juvenile Offenders Act 1847 (which empowered petty sessions to try offenders under 14 charged with larceny); in 1858 the age limit was raised from 14 to 16. The first statute empowering petty sessions to try adult offenders for indictable offences was the Criminal Justice Act, 1859 (this gave jurisdiction to try cases of larceny and embezzlement in which the accused either pleaded guilty or the property was worth less than 5/-). The Summary Jurisdiction Act, 1879 raised the financial limit from 5/- to £2.
28. Criminal Law Administration Amendment Act, 1848.
29. The Election Petitions and Corrupt Practices Act, 1868 had provided for the appointment of three additional common law judges; this coupled with the abolition of the office of cursitor baron had increased the establishment to 17.
30. See 20 L.J. (1885) p. 13; R.M. Jackson, The Machinery of Justice in England and Wales, 4th ed., p. 47, and B. Abel-Smith & S. Stevens, Lawyers & The Courts (1967) p. 85.

31. Report of Select Committee on Criminal Law, 1819 P.P.(585) VIII, App 1.; the reason for the large increase in committals between 1805 and 1818 is obscure (see A.H. Manchester, Modern Legal History, p. 193).
32. Judicial Statistics, 1856-1900.
33. See 26 L.T. (1856) p. 126.
34. Guildford Assizes (see The Times, Aug. 7, 1862).

## CHAPTER 2

1. Although the Marian Statutes (1 & 2 Ph. & M., c. 13, and 2 & 3 Ph. & M., c. 10) provided only for the examination of those suspected of felony, by 1800 such examinations were commonly held in treason and misdemeanour cases (see R. v. Hunt, Jones & Moorhouse The Times, Aug. 27, 1819 (treason) and The Times Police Reports for 1800-1826). Statutory authority to hold preliminary examinations was first conferred in misdemeanour in 1826 (7 Geo.IV, c.64) and in treason in 1848 (Indictable Offences Act, 1848).
2. As to arrest by warrant see MacKalley's case, (1611) 9 Co. Rep. 67b. As to arrest without warrant by a constable see Burn's Justice of the Peace, (1st ed., 1755), Vol. 1, 302 and by a private citizen see 2 Hale P.C., c.10, p.2.
3. See R. v. Curwood (1835) 3 Ad. & E. 815, and R. v. Hamilton (1836) 7 C.& P. 448.
4. Barratry - see R. v. Ward (1701) 12 Mod.Rep. 516, and Clarke v. Periam (1742) 9 Mod.Rep. 340; nuisance - see R. v. Marquis of Downshire (1836) 4 Ad. & E. 698.
5. See R. v. Hodgson (1828) 3 C. & P. 422; R. v. Bootyman (1832) 5 C. & P. 300 (embezzlement); and Hamilton supra (conspiracy). Particulars became all the more necessary in embezzlement after s. 71 of the Larceny Act, 1861 permitted the Crown to join in one indictment up to three distinct charges of embezzlement.
6. A pre-arraignment application had to be supported by an affidavit - R. v. Esdale (1857) 8 Cox 69.
7. In the first quarter of the century (when magistrates' work still had a police aspect) the accused was not always present at "the initial hearing and sifting of evidence from which depositions eventually grew" (Pue, W.W., The Criminal Twilight Zone, (1983) 21 Alberta L.R., p. 329, and see also The Times reports of the examinations in the Ratcliffe Highway murders 1811, and in R. v. Keppel & others (June 11, 1823).
8. Indictable Offences Act, 1848, s. 17.

9. R. v. Woodcock (1789) 1 Leach 50; R. v. Eriswell (Inhab.) (1790) 3 T.R. 713; R. v. Dingler (1791) 2 Leach 561; R. v. Errington (1832) 2 Lew. 148; R. v. Arnold (1838) 8 C. & P. 621.
10. 7 Anne c. 21 re-enacting and extending 7 & 8 Wm III. c. 3.
11. See e.g. R. v. Holland (1792) 4 T.R. 691 where Kenyon L.C.J., refused an application by the defendant for a copy of the report of a Board of Inquiry upon which the prosecution was founded, stating that to grant it would be to 'subvert the whole system of criminal law'; and R. v. Sheridan (1811) 31 S.T. 543 where Downes L.C.J. refused an application for disclosure of the informations of the prosecution witnesses, saying 'no prosecutor can be compelled to disclose his evidence'. By 1836 some benches of magistrates were adopting the practice of supplying copies of the depositions to prisoners who asked for them (1836 P.D. XXXV, 185).
12. See chapter 3.
13. The practice was referred to in the debate on the Prisoners' Counsel Bill, 1836 (1836) P.D. XXXV, 184 & 228-9).
14. Their right to do so was established in a succession of cases in the first half of the century - Cox v. Coleridge (1822) 1 B. & C. 37, R. v. Borrton, (1820) 3 B. & Ald. 432, & R. v. Staffordshire JJ., (1819) 1 Chit. K.B. 217.
15. This practice was extremely prevalent prior to the Indictable Offences Act, 1848 (see Criminal Law Commissioners, 8th Report, 1845 P.P. (656) XIV 161, App.A, p. 314 'depositions were sometimes taken privately and then read over quickly to the prisoner and witnesses in circumstances such that the prisoner was "unprepared for attending them properly"), being condemned by some judges (see R. v. Forbes (1814) Holt 559 and R. v. Johnson (1846) 2 C. & K. 394) but not all (see R. v. Smith (1817) Holt 614). Although outlawed by the 1848 Act it was a long time dying (see R. v. Calvert (1848) 2 Cox 491; R. v. Christopher (1854) 4 Cox 76, and C.S. Greaves, Report on Criminal Procedure 1856 P.P. (456) L. 79.
16. See the statistics as to the literacy of prisoners given in the Judicial Statistics for 1857 onwards.

17. S. 3. A clause that prisoners be supplied with copies of the depositions was proposed at the Committee Stage of the 1834 Bill but withdrawn upon assurances that it was unnecessary ((1834) P.D. XXIV 98); the clause in the 1836 Act was introduced at the Committee Stage in the Commons, initially rejected by the Lords but later re-instated by them. Lord Abinger, the principal opponent of the clause, argued that it would put prisoners in a better situation than a defendant in a civil suit, and would lead to concocted defences ((1836) P.D. XXXV 229). The reformers urged that it merely represented the extension to poor prisoners of advantages enjoyed by those able to pay a solicitor (ibid.); as for concocted defences the only way to prevent these was to keep the prisoner in total ignorance of the evidence against him (ibid. 231). It was initially thought that the result of the Act would be that trial courts would be swamped with applications for copies of the depositions but this seems not to have proved the case (see *The Times*, Central Criminal Court report, Sept. 20, 1836).
18. *R. v. Aylett* (1838) 8 C. & P. 669 followed in Ireland in *R. v. Glennon & others* (1840) 1 Craw. & D. 359; and see 9 *Law Mag.* (1884), p. 61 referring to the difficulties the denial to the accused of a copy of documents annexed to the depositions caused in fraud cases.
19. *R. v. Sargent* (1851) 5 Cox 499.
20. *R. v. Spry & Dore*, *The Times*, Aug. 23, 1848 (murder) - application for leave for a chemist instructed by the defence to examine the stomach and stomach contents of the deceased granted but described by the court as 'unusual'.
21. *R. v. Connor* (1845) 1 Cox 233.
22. The Irish practice was referred to in the debates on both the 1834 and 1836 Bills - see 1834 P.D. XXIV, 1099 and (1836) P.D. XXXI, 1159-60.
23. *R. v. Lacey, Cuffey & Fay* (1848) 3 Cox 517.
24. *R. v. Duffy* (1843) 1 Cox 283, reversing the earlier decision of Patteson J. in *R. v. Gordon* (1842) 6 Jur. 99.

25. The clause introduced at the Committee Stage of the 1834 Bill proposed a charge not exceeding 6d. per folio ((1834) P.D. XXVI 1098); the clause in the 1836 Bill, in its original form proposed a charge not exceeding 4d. per folio, but as enacted it provided for the payment of a sum not exceeding 1½d. per folio.
26. R. v. Ward (1848) 2 C. & K. 759.
27. Note in 11 Cox 413.
28. R. v. Stiginani (1867) 10 Cox 552.
29. R. v. Greenslade (1870) 11 Cox 412.
30. R. v. Brown (1869) 6 W.W. & A.B. 269; an unsuccessful attempt to establish such a rule was made in the Irish case of R. v. Petcherini (1855) 7 Cox 79.
31. R. v. Flannagan & Higgins (1884) 15 Cox 403.
32. The practice of putting a man on trial on a coroner's inquisition, without any preliminary examination before magistrates, was viewed with considerable disfavour throughout the latter half of the century. There were three principal objections:-
  - (a) 'If a coroner's jury find a verdict of murder a prejudice is excited against the prisoner; if they find a verdict of manslaughter the (Crown's case) is prejudiced ... perhaps a conviction for murder is unknown (in such a case)' (Criminal Law Commissioners, 8th Report, p. 247 (Greaves));
  - (b) most inquisitions returned by coroners were technically defective (c.f. Pollock C.B. in R. v. Quail & others, The Times, Mar. 5, 1862 'there were so many technical objections that could be taken to a coroner's inquisition that hardly one in a hundred could be supported.');
  - (c) an inquest could be held in the absence of the person against whom the verdict was found, who would thus be deprived of the opportunity to cross-examine. Numerous attempts were made after 1850 to deprive coroners of their power to commit for trial; clauses to that end were included in the Criminal Code Bills of 1879 (cl. 506), 1880 (cl. 454) and 1883 (cl. 14), in the Criminal Law Procedure Bill, 1882 (cl. 71), and Criminal Law

Amendment Bill, 1882 (cl. 89) and in the Criminal Law Procedure Amendment Bill, 1890 (cl.3).

33. In *R. v. Greenacre* (1837), 8 C. & P. 35 Littledale J. and Tindal C.J. expressed doubt as to whether the Act applied to coroners' depositions, but ordered copies to be provided in the exercise of their inherent jurisdiction; in *R. v. White* (1852) 5 Cox 562, however, Platt B. reached the opposite conclusion; this latter ruling was very questionable given the wording of the section then in force (s. 27 of the Indictable Offences Act, 1848) - see the tortuous argument adopted in *Russell on Crime*, (4th ed.) 1865, p.352(h)); the Manslaughter Act, 1859 gave those committed by coroner's inquisition on a charge of manslaughter the right to a copy of the depositions, but was silent as to cases of murder.
34. Coroners' Act, 1887, s. 18(5).
35. See e.g. Tindal C.J. in *R. v. Simpson & others* (1842) Car. & M. 669 - 'It is one mode and a constitutional mode of commencing a prosecution that the witnesses shall go at once before the Grand Jury ... and wherever that is so it is impossible to give the depositions because none are taken'.
36. The Act's promoters claimed that it was needed to put a stop to vexatious and blackmailing prosecutions, and cited the case of *Mellersh* in 1853 ((1859) P.D. CLII, 1045-7); it was opposed by Lord Wensleydale as an interference with the privilege which every subject possessed to put the criminal law in motion (*ibid.* CLV, 96). A defect in the Act was exposed in *R. v. Lord Mayor of London ex p. Gosling* (1886) 16 Cox 77 where it was held that a prosecutor could require a magistrate who had refused to commit for trial to bind him (the prosecutor) over to prosecute and thereby acquire the *locus standi* to present a bill.
37. Report of the Criminal Code Commissioners, 1879 (1878/9 P.P. (Cmnd. 2345) XX 169) at p. 32-3.
38. He was Sir Francis Truscott; the facts were that the prosecutor, having failed to persuade a magistrate to issue a summons, had gone before the grand jury who, after hearing his sworn evidence that he believed the handwriting on a libellous postcard to be that of Sir Francis, had found a bill for criminal

libel; the case caused a considerable outcry in the press - see *The Times*, leader Sept. 23, 1879, and correspondence columns over the weeks that followed. Attempts were made in the Code Bills to close the loophole - see the 1878 Bill, cl. 34; the 1879 Bill, cl. 5; the 1880 Bill, cl. 453; the Criminal Law Amendment Bill, 1882, cl. 88; the Criminal Procedure Bill, 1882, cl. 70; and the 1883 Code Bill, cl. 81.

39. But see the Assizes and Sessions Act, 1908, s. 1(5) which required persons, having the right to present bills of indictment to grand juries, to give notice of their intention to do so more than 5 days before Commission Day.
40. See J.L.L.J. Edwards, *The Law Officers of the Crown*, p. 267. In the case of Crown Office informations, although there was no committal hearing, the defendant would be served with copies of the affidavits relied upon by the prosecutor in support of his application for an information, and would hear them read when he appeared to show cause (the practice appears in the reports in cases such as *R. v. Joliffe* (1791) 4 T.R. 285; *R. v. Burn* (1837) 7 Ad. & E. 190; & *R. v. Aunger* (1873) 12 Cox 407).
41. The rule is stated in Hale 2 P.C. 236, Foster, Crown Law 228-9, and Hawk. 1 P.C., c. 39, ss.13-15 but none offers any explanation for it. Kelyng (Rep. p. 3) mentions a Resolution passed by five of the Old Bailey judges in 10 Car. II to the effect that defendants should be refused copies of indictments, which gave as the reason for its passing the need to ensure that prosecutors were not deterred from prosecuting by the fear of civil proceedings (such an action could not be maintained without a copy of the indictment); for another reason for the rule see n. 45 below.
42. 7 Anne c. 21, s. 14.
43. 60 Geo. III and 1 Geo. IV, c. 4, s. 8 (expressed to apply to proceedings by the Attorney or Solicitor-General, but held in *R. v. Brown & O'Regan* (1844) 1 Cox 114 to apply to all cases of misdemeanour; according to Pennefather B. the accused was entitled to a copy at common law on payment).
44. The right to a copy in felony was finally conceded by the Indictments Act, 1915, Schedule, r. 13(1).



45. Pollexfen L.C.J. in R. v. Graham (1691) 12 S.T. 660 'If all people were to have copies of their indictment to make exceptions out of them before they pleaded, instead of days of gaol delivery, a whole year would be spent before they could be brought to their trial'.
46. Hawk., 2 P.C. 62c, repeated by the Criminal Law Commissioners, 5th Report, 1840 P.P. (242) XX, 1, chap.4, r.9.
47. R. v. Vandercomb (1796) 2 Leach 708.
48. R. v. Parr (1837) 7 C. & P. 836; R. v. Mitchell (1848) 3 Cox 5 ('if the court do not permit the Defendant to have a copy he will be obliged to get a shorthand writer to take a note of it, and it will be the duty of the Clerk of the Crown to read it slowly and distinctly' per Colman O'Loghlan); R. v. Dowling (1848) 3 Cox 509.
49. R. v. Grace (1846) 2 Cox 101 appears to be such a case (there the prosecution conceded a copy, and it was remarked by the clerk of the court that the indictment would have taken two days to read). The prolixity of nineteenth century indictments made the threat to call for the indictment to be read a very powerful one. Normally only a summary would be read to the jury; indeed in R. v. Newton (1844) 1 C. & K. 99 Tindal C.J. said that he had never in his life known an indictment to be read in full. The trend towards long indictments showed no signs of abating as the century wore on. In 1876 in the case of R. v. Banner & Oakley the indictment was reported by the Solicitors' Journal (vol. 21 (1876-7) p. 475) as 80 yards long. In the Albion Insurance case (1878) the indictment occupied some 25 yards of parchment and a copy cost £10. (The Times, leader, June 13, 1878).
50. E.g. by J. Pitt Taylor, Evidence (7th ed. 1878), p.125.
51. 1878 Bill, cl. 351-2; 1879 Bill, cl. 507; 1880 Bill, cl. 455; 1880 No. 2 Bill, cl. 301; Criminal Law Amendment Bill 1882, cl. 90; Criminal Law Procedure bill, 1882, cl. 72; Code Bill 1883, cl. 70.
52. Appeal in Criminal Cases Bills, 1844, cl. 15, 1848, cl. 14, 1859, cl. 19, 1860, cl. 18; Appeal in Criminal Cases Amendment Bill, 1864 cl. 14; New Trials in Criminal Cases Bills, 1852, cl. 31; 1858, cl. 23, and 1872, cl. 18; a like provision also appeared in the Criminal Evidence & Procedure Bill, 1856, cl. 20.

53. R. v. Mitchell (1848) supra, R. v. Dowling supra; R. v. Casey, Mullaney & Burke, The Times, Feb. 29, 1868.
54. R. v. Holden (1838) 8 C. & P. 609 (one can find a scattering of other cases to like effect namely R. v. Orchard (1838) 8 C. & P. 559n., R. v. Stroner (1845) 1 C. & K. 650, and R. v. Holland (1896) 99 Ir.L.T. 895). The rule enjoyed a brief currency in the early years of the present century (see Ram Ranjan Roy v. R. (1914) I.L.R. 42 Calc. 442 and R. v. Harris [1927] 2 K.B. 587 at 590) before being finally repudiated in Seneviratne v. R. [1936] 3 A.E.R. 36 and Dallison v. Caffery [1964] 3 W.L.R. 385.
55. R. v. Pook (murder), The Times, May 15, 1871.
56. The picture revealed by the Judicial Statistics for 1866 and 1876 is typical; of the prisoners convicted at Assizes and Quarter Sessions less than 15% had been on bail pending trial.
57. Treason Act, 1695, s. 1: 'such counsel shall have free access at all reasonable times'.
58. See e.g. the Rules for Newgate printed as an Appendix to the Report of the Select Committee on London Gaols 1813-4 P.P. (157) IV 249; the Rules of Wakefield House of Correction printed as Appendix 8 to the Report of the Select Committee of the House of Lords to inquire into the present state of Houses of Correction 1835 P.P. (439) XI 495; the rules of Caernarvon Gaol printed in the Report with Minutes of Evidence on the Conduct of the Governor of Caernarvon Gaol 1843 P.P.(422)(477) XLIII 261; the Report of the Inspectors of Prisons relative to the system of Prison Discipline 1843 P.P. (457) XXV, XXVI 1 recommended that all remand prisoners ought to have the right to see their legal advisers at all reasonable times and in private if desired.
59. For a useful summary of some of the worst abuses see letter to The Times, Oct. 8, 1844 from 'Veritas'.
60. The matter was referred to by Ald. Wood in R. v. Pond, The Times, Sept. 23, 1844.

61. Warders:- R. v. Potts Tucker & others, The Times, July 22, 1839 (Coleridge J. disapproved); R. v. Conroy & others, The Times, Mar. 3, 1856 (condemned by Willes J); R. v. Cunningham & Burton, The Times, May 13, 1885; police:- (1866) 30 J.P. 46 (police regulations offered as justification) and (1882) 46 J.P. 268.
62. Medical examination - R. v. Hinson, The Times, Oct. 28, 1869 (no medical examination of accused by doctor instructed by defence save in presence of prison medical officer).
63. Other prisoner - R. v. Watts, The Times, June. 5, 1896.
64. Prisons - Prison Act 1877 s. 39 and Prison Rules, 1878 (Special Rules for Prisoners awaiting Trial, r. 21); police:- Metropolitan Police General Orders, 1870 (PRO: MEP 8/3) and Metropolitan Police General Orders and Regulations, 1893 (PRO: MEP 8/4).
65. Money unconnected with charge ordered to be returned (R. v. Barnett (1829) 3 C. & P. 600; R. v. Jones (1834) 6 C. & P. 343; R. v. O'Donnell (1835) 7 C. & P. 138; R. v. Kinsey (1836) 7 C. & P. 447 (watch and other articles taken from prisoner charged with rape to be returned); R. v. Griffiths (1845) 1 New Pract. Cas. 119); but contra R. v. McKean & McKean, The Times, Aug. 12, 1826 and R. v. Pierce (185)2 6 Cox 117 (court no power to order restitution); prisoner charged with theft or fraud, partial restoration of money which could not be identified as proceeds of crime ordered restored for purposes of defence (R. v. Rooney (1836) 7 C. & P. 517 and R. v. Burgiss (1836) 7 C. & P. 488).
66. See (1845) 9 J.P. 98, and the cases of R. v. Carter & 4 Others The Times, Mar. 3, 1849 (prisoners complained that £2.3.0. seized from them had been applied by the police to defray the cost of feeding them and conveying them to Stafford, a practice described by Platt B. as monstrous) and R. v. Bass (1849) 2 C. & K. 822.
67. The circular is referred to in the 1893 General Orders & Regulations supra, reg. 309.
68. Treason Act, 1708 (7 Anne c. 21) s. 14.

69. Chitty, Crim. Law (1st ed. 1816), p. 483-4. Chitty offered the following explanation for the term traverse 'It is said that the term, from traverto to turn over ... means nothing more than turning over or putting off the trial to the following session ... though some have referred its meaning originally to the denying or taking issue upon an indictment, without reference to the delay of trial, which seems more correct'. He also offered this explanation why traverses were allowed in misdemeanour but not in felony:- 'parties to be tried ... for felony are well aware of the time their trials will proceed from the time they are committed, and their committal appraises them of the nature of the charge, and therefore they have full opportunity to prepare for their defence; and also it is a mere question of fact which is to be determined in case of felony whereas in many inferior misdemeanours, as for not repairing, intricate questions of civil right and ancient liability may come before the court for their decisions.'
70. See e.g. R. v. Anon., The Times, Feb. 7, 1835 'a prisoner was arraigned and prayed for a postponement of his trial as he had not been in gaol a quarter hour; the Recorder ordered his name to be placed lower down on the list'; R. v. Cooper, The Times, May 13, 1842 (offence committed 5th May; accused committed for trial 9th May (1st day of session) arraigned 12th May); R. v. Conner, The Times, Apr. 14, 1845 (prisoner committed for trial the previous Saturday), and R. v. Thomas & Thomas, The Times, Jan. 2, 1844 (prisoner arraigned the day following his apprehension).
71. With Assize prisoners the complaint was in some cases as to the delay in bringing them to trial, which could amount to six months and occasionally more.
72. The article is reprinted as Appendix C to the 8th Report of the Criminal Law Commissioners supra.
73. S. 27 (the right had been curtailed in the eighteenth century as regards those charged with obtaining by false pretences, sending threatening letters, and receiving (by 30 Geo.II, c. 24 and 39 & 40 Geo.III, c. 87), and again in 1819 by the 60 Geo. III and I Geo. IV, c. 4, ss. 3 and 5 (defendant committed 20 days or more before sessions of court of trial to plead at that session)).

74. R. v. Bellingham, The Times, May 13, 15, & 16, 1812 and see chapter 9.
75. R. v. Lyons, The Times, Oct. 29, 1835.
76. See e.g. R. v. Cooper, R. v. Conner, and R. v. Thomas & Thomas supra; R. v. Mellish, The Times, Nov. 28, 1851; R. v. Taylor (1869) 11 Cox 340 (postponement granted in murder case on ground defence not ready despite looseness of the supporting affidavit).

### CHAPTER 3

1. St. James Evening Post Case (1742) 2 Atk. 469.
2. See e.g. the reports of inquests to be found in The Times for the period.
3. See The Times police reports for the period and Denman's speech in R. v. Clement infra; applications to the King's Bench for criminal informations constituted another class of ex parte proceeding habitually reported in the press to the disadvantage of accused.
4. The Times police reports regularly included such descriptions of persons committed for trial as 'both have been in custody before for swindling' (Hawkins & Underwood, The Times, Mar. 17, 1800); 'a notorious pickpocket' (Eades, Jan. 14, 1808); 'a 13 year old hardened offender' (Flynn, Sept. 8, 1809); 'a most desperate well known character' (Adkins, Jan. 3, 1810); 'a notorious thief' (Phillips, Jan. 6, 1817); 'an old hand who has been transported and is otherwise well known to the police' (Oates, Nov. 1 & 8, 1826); 'a veteran pickpocket' (Shield, Feb 26, 1828); 'the associate and occasional leader of a gang of burglars' (Bedsar, Sept. 27, 1836).
5. Before the trial of Bellingham for the murder of Spencer Perceval, The Times (May 13, 1812) published a biography of him, which included the fact that he had been imprisoned in Hull for non-performance of a contract, and sent to prison in Archangel for being very troublesome to the Government there. Before the trial of Carter Tuck in November, 1811 for fraud, a number of damaging articles appeared in The Times: one (of Aug. 5) accused him of performing illegal marriages; another (of Aug. 8), as well as listing other offences of which he was suspected, contained the observation: 'when the irons were put on his legs he handled them and appeared to know how to tie them to prevent them rattling as well as one of the oldest thieves in town'. In its report (of Feb. 25, 1820) of the examination of Thistlewood for his part in the Cato Street conspiracy, The Times took pains to remind its readers of his acquittal for treason three years before.

6. E.g. Leary (The Times, Aug. 5, 1813 - alleged confession to Governor of Coldbath Fields Prison published); Stoffell & Scott (The Times, June 11 and 12, 1823); Thurtell & Hunt (The Times, Nov. 2, 1823 - in the event the Crown did not adduce the confession published in evidence because of doubts as to its admissibility); Greensmith (murder) (The Times, Apr. 10, 1837); Roach and others (The Times, Dec. 9, 1837).
7. E.g. The Times, Jan. 13, 1817 where an extract from a letter written by Watson after his committal for treason was published.
8. The allegation appeared in the issue for Nov. 6.
9. The Trial of Henry Fauntleroy (Notable British Trials Series) pp. 19 & 145. Thurtell and Fauntleroy were not the only accused to suffer in this way. In March, 1820, during the trial of Henry Hunt at York for riot, several of the newspapers suggested, quite falsely, that he had links with the Cato Street conspirators. In 1839 it was suggested in the Newcastle papers that an accused called Bolam had conveyed away his freehold property in anticipation of his forthcoming trial for murder (see 2 M. & Rob. 191). How damaging pre-trial press comment could be to an accused is demonstrated by a murder case (referred to but not identified by Serjt. Best ((1806) P.D. VI, 796) tried at the Old Bailey in 1800 before Grose J., where the jury, after a direction to acquit, surprised everyone by remaining out for several hours; on their return they told the judge the cause of their difficulty was that they were unable to keep clear in their minds what they had heard in evidence and what they had heard and read elsewhere.
10. In 1819 at the trial at Durham of Edens, Wolfe & Wolfe for murder, counsel for the defence complained of a handbill representing that the accused had confessed to the murder (The Times, Aug. 17). In 1817 at the trial of Jane Scott for petty treason a similar handbill was denounced as quite false by counsel for prosecution and defence (The Times, Sept. 10).
11. In R. v. Mead papers had been distributed among the jury at the very moment the case was about to begin (see R. v. Geach (1840) 9 C. & P. 500); see also Serjt. Ballantine's speech in R. v. De Vidil The Times, Aug. 23 & 24, 1861.

12. 2 L.J.(O.S). 43; The Observer, Nov. 23, 1823 p. 1; the play was called 'The Gamblers'. In R. v. Gilham (1827), Moo. & M. 165, Littledale J. surprisingly declined to treat as a contempt an exhibition (held at the same time as the trial of the accused for murder) in which there were on display a model of the murder scene, a bust of the accused, and a bust of Williams, the Ratcliffe Highway murderer.
13. 1 S.T.(N.S). 672 n.
14. Curry v. Walter (1796) 1 Bos. & Pul. 526.
15. R. v. Wright (1799), 8 Burr. 293 'the ... advantage to the country in having the proceedings made public more than counterbalances the inconvenience of the private person whose conduct may be the subject of such proceedings'.
16. R. v. Lee (1804) 5 Esp. 123.
17. (1806) P.D. VI, 795-6, and 902-3.
18. R. v. Fisher (1811) 2 Camp. 799 at p. 805.
19. R. v. Fleet (1818) 1 B. & Ald. 379.
20. In 1819 the Birmingham magistrates banned reporters from their courts on the ground that their activities were unfair to defendants (J. Lock, Marlborough Street, p. 120). In the same year the Oldham Coroner purported to ban the press from reporting the inquest into the death of one of those mortally wounded at Peterloo (R. Walmsley, Peterloo, The Case Re-opened, p. 319). In 1828 the Wakefield Coroner was reported in The Times as holding an inquest into a murder in private, and in the same edition reference is made to the fact that the preliminary examination of Pallett (as to whom see below) was held in private (The Times, Dec. 15, 1828).
21. The Trial of Thurtell & Hunt (Notable British Trials) pp. 193-4.
22. The Times, Dec. 13, 1823.
23. The Times, Dec. 19, 1823; in the present century the exposure of Smith, the 'Brides in the Bath' killer was due to the publicity given to an inquest into the death of one of his victims). The ruling of Park J. in the Thurtell & Hunt case itself provoked a storm of press protests, as to which see A.



Borowitz, The Thurtell & Hunt Murder Case, pp.11-20.

24. The Times, Nov. 1, 1824.
25. Duncan v. Thwaites (1824) 3 B. & C. 556 at 583; for other examples from this period of judicial condemnation of reports of ex parte proceedings see Scott & Wife v. Clement, The Times, July 13 & 14, 1828 (which provoked a hostile leader in The Times) and Gaselee J. in R. v. Fenn (The Times, Sept. 11, 1828), 33 S.T. 681 at p. 715)
26. See R. v. Clement below.
27. R. v. Watson (1817) 32 S.T. 1.
28. R. v. Brandreth (1817) 32 S.T. 755 at 766.
29. R. v. Clement (1821) 4 B. & A. 218.
30. R. v. Duffy (1848) 7 S.T. (N.S.) 795.
31. See e.g. R. v. Despard, The Times, Feb. 8, 1803; R. v. Patch (cited by Serjt. Best, (1806) P.D. VI, 79; R. v. Andrews, The Times, Sept. 25, 1811; R. v. Carter Tuck, The Times, Nov. 2, 1811; R. v. Henry Hunt, The Times, Mar. 7, 1820; letters to The Times published Nov. 18 and 22, 1823 from solicitors acting for Thurtell & Probert; and R. v. Corder, The Times, Aug. 8, 1828.
32. This was a point made by Serjt. Best in introducing the Bill referred to above; see also Re Fowler & Milson, The Times, May 18, 1896 'discussion of this matter in open court may bring about the very injury of which you complain' (per Russell L.C.J.).
33. Postponements were granted to Thurtell and to Bolam in 1839 (2 M. & Rob. 191) but this was exceptional; in R. v. Pallett above, for all his strictures about press reports, Park J. refused a postponement. For other instances of refusal of applications for postponement see e.g. R. v. Geach (1840) 9 C. & P. 500, R. v. Kirk & Drew, The Times, Aug. 7, 1845 (murder) where one of the grounds of refusal given by Rolfe B. was that it was dangerous to have it supposed that a jury could be actuated by prejudice or what they had heard out of court; R. v. Oscar Wilde, The Times, Apr. 25, 1895.
34. R. v. Holden (1833) 5 B. & Ad. 348.
35. (1856) P.D. CXL 1299 'changes of venue were rare indeed', and see e.g. R. v. Penprase,

- (1832) 4 B & Ad. 572, R. v. Dunn, (1846) 10 J.P. 740, and Ex p. Lynes, (1846) 1 Cox 246.
36. 1856 20 J.P. 66.
  37. Ibid. 70.
  38. 19 Vict. c. 16 (commonly known as Palmer's Act); for debates on the Bill see (1856) P.D. CXL 217-8, 512-3, 1767-70, and 2194-2200.
  39. See e.g. R. v. Ruxton (1862) 26 J.P. 773, and R. v. Rudge, Baker & Marten, The Times Jan. 12, 1886, and (1886) 50 J.P. 41.
  40. 1843 P.P. (513) V 259 (Minutes of Ev., Q. 429); there was little new about all this; Denman had advanced the same arguments in R. v. Clement above, and in an article in the Edinburgh Review in 1824 (vol. 40 p. 169); in the Lords' debate on the Defamation and Libel Bill in the same year Lord Campbell ((1843) P.D. LXX 1254) claimed that the police magistrates were of opinion that the benefit of ex parte reports exceeded the evil.
  41. Lewis v. Levy (1858) E.B. & B 537.
  42. R. v. Gray (1865) 10 Cox 184.
  43. Wason v. Walter (1868) 4 Q.B. 73.
  44. Usill v. Hales (1878) 14 Cox 61.
  45. This was still giving rise to problems in the 1930s - see R. v. Rouse, The Times, Feb. 24, 1931.
  46. See e.g. R. v. Carr, The Times, July 2, 1866 (murder); R. v. Fish, The Times, Apr. 21, 1876; R. v. Greany, The Times, Nov. 27, 1890 (murder).
  47. See e.g. Brown, The Times, June 4, 1860 ('who has recently undergone penal servitude'); Burgess, May 31, 1865 ('a ticket of leave man'); Fearman, The Times, May 25, 1870; Howlett, The Times, Mar. 1, 1880 ('a ticket of leave man'); Harris & Proughton, The Times, Mar. 9, 1890 ('previous convictions were proved against both prisoners').

48. For instances of prejudging in The Times during this period see e.g. Ellis, Ellis & Ellis, Feb. 17, 1855: 'evidence was given (at the committal) which rendered the case perfectly conclusive against all the prisoners'; Butler, May 11, 1865 where the report of the committal hearing describes the prisoner as 'impudently denying the charge'; McCann, May 27, 1870: alibi witnesses called by the accused at the committal hearing described as 'untrustworthy'; Jones, June 1, 1870 (murder): 'The prisoner has prepared a wild statement which is no secret even though he did not refer to it yesterday. In it he declares that, though found with the murdered people's property upon him, yet he is innocent of the murder as the clothes were given to him by the real murderer whom he professes to describe'.
49. The Times, Aug. 18, 1850.
50. Barnsley Chronicle (supplement), Oct. 2, 1886.
51. R. v. Armstrong, The Times, May 9, 1894.
52. Balfour see Re Stead (1895) 11 T.L.R. 492 'a rare rogue ... He will reappear at the Old bailey and then we may expect to hear no more of him for some time to come'; other victims of highly prejudicial press publicity in the last thirty years of the century included Mary Ann Cotton, 1873 (R.S. Lambert, When Justice Faltered, p. 128); Wainwright, 1875 (The Times, Nov. 24, false press reports of confession) and Charles Peace, 1879 (Trials of Charles Peace (Notable British Trials Series) p. 112).
53. See 110 L.J. 417, and E. Marjoribanks, The Life of Sir Edward Marshall Hall, K.C., pp. 145-6 and 151.
54. Proceedings for contempt in Parnell, (1880) 14 Cox 474, Barnado, The Times, Nov. 29, 1892, Armstrong 1894 supra, Fowler & Milsom, The Times, May 20, 1896, and Ex p. Smith (1869) 21 L.T. 294 were instituted by the accused or his representatives.
55. R. v. Onslow & Whalley (1873) 12 Cox 358.

#### CHAPTER 4

1. I.e. examine the prosecution witnesses.
2. C. Emsley, *Crime & Society in England, 1759-1900*, p. 138.
3. See Appendix 1.
4. Langbein, *Criminal Trial Before The Lawyers*, 50 U. Chicago L.R., 1 at p. 311.
5. The 25 Geo. II, c. 36 and the 18 Geo. III, c. 19. Under the first costs could only be awarded where the prosecution resulted in a conviction, and in deciding what award to make the court had to have regard to the means of the prosecutor. The latter Act removed both limitations. Before The 1752 Act the statutory rewards payable on the conviction of offenders represented the only means whereby the prosecutor could recoup his expenditure.
6. 2nd ed.
7. This removed the limitation on the power to award costs in cases of misdemeanour (see further n. 15 below).
8. 1836 P.P. (58) XXVII, 1 at p. 22-3; the Commission argued that where the judge prosecuted cases took longer because of the double labour cast on him which in turn increased the sum the county had to pay out in witness costs. Also cases were less well prosecuted because the judge was not master of the depositions. The same argument had been urged by Lord Wharncliffe to a Lords Select Committee on County Rates the previous year (1835 P.P.(206) XIV, 1 at p. 72).
9. See e.g. the evidence of Tindal C.J. and Park J. to the 1835 Select Committee. Their complaint was that to require the judge was inefficient and placed an unduly heavy burden on him obliging him to examine witnesses at the same time as taking a note of their evidence.
10. See e.g. *R. v. Anon* (1843) 1 Cox 48 'A judge ought never to prosecute' (Coleridge J.); *R. v. Anon, Bedford Mercury*, Mar. 23, 1844 'it is a disgrace to the county to impose on the judge the necessity to act as counsel against the prisoner' (Patteson J.); *R. v. Hezell* (1844) 1 Cox 348 'It is most unseemly for a judge to be called upon to act as prosecutor instead of holding the scales between the

- parties' (Creswell J.); R. v. Page (1847) 2 Cox 221 'The fiction of law in criminal cases is that the judge is counsel for the prisoner, but here it is sought not only to upset and reverse that doctrine and make me counsel for the prosecution, but to throw the whole burden of this prosecution on me. But I will not do it. It is indecent.'
11. See e.g. R. v. Lawrence (1844) 1 Cox 61; R. v. Robins (1847) 1 Cox 114; R. v. Farrell & Moore (1848) 3 Cox 169; 8th Report of the Criminal Law Commissioners, 1845, App. B., Q. 201. Isolated instances of counsel being handed the depositions and requested by the judge to prosecute can be found even before the 1840s (ibid.).
  12. The Times, June 18, 1847.
  13. (1847) P.D. XCIII, 761.
  14. E.g. 9 L.T. (1847) 256 and 283.
  15. 5th Report of the Judicature Commission, 1874 P.P. (Cmd. 2345) XIV, 307, App. 1, p. 14. Even as late as the 1870s it was possible to come across cases at Assizes in which no prosecuting counsel had been briefed (see letter from Bramwell B., ibid. at p. 3)
  16. Bills for the establishment of a system of Public Prosecutors had been presented in 1854, 1855, 1870, 1871, 1872 and 1873, but the only progress in fact made was the appointment in 1879 of a Director of Public Prosecutions with power to intervene to take over the conduct of a prosecution.
  17. The power to award costs in certain cases of misdemeanour had been given by the 7 Geo. IV, c. 64 (1826), and further extended in 1851 by the 14 & 15 Vict., c. 55 and the other statutes listed in the 5th Report of the Judicature Commission, App. 1, p. 15. But even by 1900 there still remained a very considerable number of misdemeanours in respect of which there was no such power (including keeping a disorderly house, vagrancy, nuisance and libel) - see Report of Departmental Committee on Allowances to Prosecutors and Witnesses in Public Prosecutions, 1903 P.P. (Cmd. 1650) LVI, 357 at p. xxi and para. 83 of the Report. Conferring a power to award prosecutors their costs and inducing courts to exercise it were two different things. Pre-1850 there was a number of courts which seldom, if ever awarded a prosecutor his legal costs. One

court which adopted this policy was the Old Bailey (see the Report of the Royal Commission on County Rates, 1836 supra p. 33, and the evidence of Tindal C.J. to the 1835 Select Committee (Q. 803). A similar policy on costs was followed at Middlesex Sessions (see 4 L.T. 283), Surrey Sessions and some other County Sessions (see Report of Select Committee on County Rates, 1834 P.P.(206) XIX, 1 and the Return of Rates of Allowances 1845 P.P. (in 390) XLI 411. In broad terms courts in the north appear to have been the most ready to make costs orders and courts in the Home Counties the least willing.

18. See 5th Report of the Judicature Commission supra, App. 1 p. 14. The decision of the Government to shoulder half the burden was less generous than it looked, for the effect of the abolition of statutory rewards had been to throw onto the rates costs which until then had been met out of reward money paid out of central funds (the practice being not to make any awards for costs where the reward money exceeded the prosecutor's costs).
19. The Old Bailey soup system was described by the Clerk of the Indictments and the Recorder in their evidence to the Select Committee on Prosecution Expenses, 1862 P.P. (402) XI, 1 (Q.s. 2257 and 2399). In 1892 it was made the subject of regulations issued by the Recorder and Common Serjeant (see Crew, The Old Bailey p. 50); Quarter Sessions operating a soup system included Middlesex Sessions, where the briefs were handed out by the County Treasurer, and Stafford County Sessions where the Clerk of the Peace exercised the patronage (see 5th Report of the Judicature Commission supra, App. 1, Table B). In some of the towns where a prosecuting attorney was employed briefs were distributed on a soup basis. An article in the Law Magazine for 1849 listed the following objections to the soup system:- briefs were given out without regard to the weight of cases or the ability of counsel; counsel so briefed had no attorney to whom he could turn for information which often led to his consulting the police instead; and less care was bestowed upon soup briefs because they were soup.
20. See Report of Select Committee on Public Prosecutors 1854/5 P.P. (481) XII, 1 (Q.s 76, 106, 975, 1579 & 2767) and (1870) P.D. CCI, 242, and (1871) P.D. CCV, 1766. By 1872 such a system was also in operation in Birmingham, Newcastle on Tyne and Brecon (see 5th Report

- of Judicature Commission supra App.1, Table B).
21. The practice was described as very prevalent in the Report on County Rates, 1836 (p. 22). See also 5th Report of Judicature Commission, p. 13. The objection to the practice was that it gave magistrates' clerks a vested interest in securing the committal of the accused (see (1855) P.D. CXXXVI, 1656).
  22. Municipal Corporations Act, 1835, s. 102 and Municipal Corporations Amendment Act, 1861, s. 5.
  23. Report on Public Prosecutors 1854/5 (Qs. 882-5 & 2140-2), and 5th Report of Judicature Commission, App. 1, p. 13. The objection to the practice was that it led to corruption, with officers being touted by attorneys - see (1854) P.D.CXXX, 666. In some areas the problem was avoided by the appointment of a reputable solicitor as attorney to the police with instructions to act in all cases in which police officers were bound over to prosecute (see R. v. Yates 1853 7 Cox 361).
  24. 5th Report of the Judicature Commission, App. 1, p. 13, and (1871) P.D. CCV, 1746.
  25. The argument was one which had been accepted by the 1835 Select Committee and the 1836 Royal Commission on County Rates as well as by the Royal Commission appointed to inquire into the costs of prosecutions 1859 P.P. (2575 - Sess. 2) XIII Pt. 1, 13.
  26. The practice at Surrey Sessions is described in many reports including the Fifth Report of the Judicature Commission, App. 1, p. 14. In the last quarter of the century Surrey Sessions enjoyed a poor reputation generally, being notorious not only for its niggardliness in the matter of costs, but also for its severity towards prisoners (as to which see (1882) P.D. CCLXIV, 404 and CCLXVII, 411).
  27. Royal Commission on County Rates, 1836, p. 22, and (1851)P.D. XIV, 828.
  28. Chitty, Criminal Law (1st ed. 1816), Vol. IV p. 331-2.
  29. R. v. Elliott, The Times, June 18, 1836. For examples of the practice before the City judges and at Quarter Sessions see e.g. R. v. Robinson, The Times, Oct. 14, 1802 (Surrey Sessions); R. v. Ingram, The Times, Sept. 17, 1823; R. v. Barrett, The Times. Sept. 17,

- 1823; R. v. Fawcett, The Times, Dec. 10, 1823 (all Old Bailey).
30. G.G. Alexander, The Administration of Justice in Criminal Matters (1915), p. 125.
  31. See e.g. R. Harris, The Reminiscences of Sir Henry Hawkins, pp. 40-1.
  32. See E.D. Purcell, 'Forty Years at the Bar' (1916) 'His summing up was usually in strong scotch. 'Gentlemen of the jury, you've heard counsel for the prosecution, and you've heard counsel for the defence. Consider your verdict'. See also F.W. Ashley 'My Sixty Years in the Law' pp. 97-9 and Pitt-Lewis, Mr. Commissioner Kerr, An Individuality, pp. 251 & 265 (and as to his failure to take a note pp. 174-5).
  33. R. v. Newman 1913 9 Cr.App. R. 134 (a decision still being cited as authority in Archbold (1931 ed.) p. 219.
  34. See e.g. R. v. Nuttall, The Times, Sept. 8, 1817 ("I hope, my lord, you will be so kind as to be counsel for me"; judge:- "I'll endeavour to see justice done to you").
  35. See e.g. the charge of Gurney B. to the Exeter grand jury on the 16th Aug. 1821 cited (1826) P.D. XV, 693.
  36. See e.g. R. v. Rawlings (1835) 7 C. & P. 150 (indictment point); R. v. Donnelly & Murray, (1835) 1 Moo. 438 (indictment point taken by Bolland B. in a case where the prisoners had pleaded guilty); & R. v. Wilson (1837) 8 C. & P. 111 (point of law).
  37. See Chitty op. cit. Vol. 1 p. 429, and (1826) P.D. XV, 289. Numerous instances of judges exhorting prisoners to retract guilty pleas are to be found in The Times reports of trials for the first half of the century. By the later years of the century, however, judges were contenting themselves with merely ascertaining that the prisoner understood the consequences of his plea (see e.g. R. v. Constance Kent, The Times, July. 22, 1865; & R. v. Bradford, The Times, July 25, 1872.)
  38. See e.g. R. v. Cashon & O'Brien, The Times Dec. 13, 1828; R. v. Wakely, The Times, Aug. 15, 1839; R. v. Bury, The Times, Mar. 6, 1873 (Quain J.; burglary; accused only 13).
  39. R. v. Rodanbosh, The Times, Dec. 18, 1856 (foreigner accused of attempted murder).



40. See e.g. R. v. Barber, The Times, Apr. 8, 1842 (boy aged 10 pleaded guilty to murder; on the judge's advice he retracted his plea; a confession which was the only evidence against him was ruled inadmissible and he was acquitted), and R. v. Moore, The Times, Mar. 26, 1860 (murder).
41. See R. v. Knowles, (1820) 1 S.T.N.S 505 Bayley J.:- 'Don't open that which is not evidence. I am obliged to watch as he has no counsel' (in the course of the trial Bayley both assisted the prisoner with the cross-examination of Crown witnesses and with the examination of his own witnesses. See also (1826) P.D. XV, 607 (R. v. Evans).
42. See e.g. R. v. Day (1847) 2 Cox 209.
43. See e.g. R. v. Green, The Times, July 2, 1825.
44. R. v. Anon., Berkshire Assizes, The Times, Dec. 30, 1830 (Park J.) and R. v. Salter & Kettle (1877) 41 J.P. 187 (Cockburn C.J. 'I object to the learned counsel saving his client by convicting the other; he is my client').
45. See D.N.B. and (1843) P.D. LXVI, 1037.
46. In 1844 at Lancashire Assizes Gurney insisted that all unrepresented prisoners put questions in cross-examination through him. This unfair practice, which both intimidated the prisoners and gave the witness thinking time, and was sufficiently unusual to be commented upon by a law reporter (R. v. Cook, (1844) 1 Cox 125). Generally his reputation was that of a 'severe and harsh judge' (D.N.B.) and see the anecdote told about him by Serjt. Robinson, Bench & Bar (1879).
47. The Times, Dec. 10, 1888. As to Hawkins' penchant for sitting late see Ashley, op. cit. pp. 176-8). Stephen J. earned even more notoriety for continuing to sit after diagnosed as suffering from mental illness - The Times, Mar. 6, 1891.
48. 21 Law Jo. (1886) 223.
49. 'He devoted so much of his charge...to heated denunciation of marital infidelity that the jury practically convicted her for that offence.' - New York Times report cited by Ryan & Havers, The Poisoned Life of Mrs. Maybrick, p. 211.
50. 29 Ir. L.T. (1895) 94.

51. See e.g. R. v. Hayden, The Times, Dec. 13, 1823 (Recorder of London to defence counsel): 'I shall state the case to the jury not according to your opinion but according to mine. The jury are not bound to take my impressions of this case but I am bound to state them'. See also Brougham, Miscellanea, Public Characters p. 39, referring to Ellenborough C.J. 'Upon each case that came before him he had an opinion, and while he left the decision to the jury, he intimated how he felt himself. The manner of performing the office of a judge is now generally followed and commonly approved'.
52. 10 Law Magazine (1833), Old Bailey Experiences, p. 276 "Full two thirds of the prisoners on their return from their trials cannot tell of anything that has passed in court not even very frequently whether they have been tried; and it is not uncommon for a man to come back after receiving his sentence on the day appointed for that purpose saying 'It can't be me they mean. I haven't been tried yet'".
53. Ibid. 277 'it was a boast at the Old Bailey that a recent City judge could despatch 60 or 70 trials a day'. See also 9 L.T. (1847) 319 'a great number of cases were disposed of during the morning with the usual rapidity exercised by the learned Common Serjeant, and several prisoners were placed at the bar to be tried, convicted and sentenced in the same breath with the reading of the charge against them'.
54. See (1836) 55 Quarterly Review, A. Hayward, The Origin of Dinners Clubs etc., 455 at 474-5; The Reminiscences of Sir Henry Hawkins pp. 39-41, Punch, Vol. 6 (1844) p. 218, article 'Justice after Dinner' with cartoon:- 'the roseate tinge, the look of fulness on justice in the evening compared with the pallid maid that summed up in the forenoon' and 'How often has a Recorder passed a tremendous sentence on an offender simply because he has seen his iniquity double'; Serjeant Ballantine's Experiences, pp. 54-5 'one cannot but look back with a feeling of disgust to the mode in which drinking, transporting and hanging were shuffled together'; Montagu J. Williams, Leaves of a Life p. 162
55. Motion by Ald. Lott 21.4.37 (Misc. Papers, Administration of Justice Committee; Corpn. of London Records Office).

56. The fire occurred on Feb. 26, 1877 (The Times, Feb. 27, 1877). When the dining room had been repaired the question of reinstating the dinners was referred to the judges but they were against it (Bowen Rowlands, op. cit., p. 19 and see also W.E Hooper, History of Newgate & The Old Bailey, pp. 17 and 134).
57. See e.g. 9 L.T. (1847), 319 and the Punch article quoted at supra; in 1831 it was also referred to in the Commons - (1831) P.D. V, 648.
58. The Times, Dec. 25, 1838, and also 1839 3 J.P. 2 'Indecent Haste':- 'five or six witnesses are examined; as many clever jokes perpetrated; a prisoner bantered; a jury charged; the verdict returned; the criminal sentenced to transportation; all in six minutes.'
59. The Times, Jan. 2, 1829 ('a wondrous improvement in the Common Serjeant's behaviour').
60. Attributable in no small measure to the influence of Russell Gurney (appointed Common Serjeant in 1856 and Recorder in 1857).
61. 20 Sol. Jo. (1875-6), p. 74 (the article offered to name three Chairmen who never took notes but simply underlined the depositions).
62. 18 Sol. Jo. (1873-4), p. 196 'the magistrates are looked on as all of a piece with the prosecution and the police' and 20 Sol. Jo. (1875-6), p. 74 which, after referring to the virulence of Quarter Sessions Chairmen against prisoners added 'the idea of many a country lout tried at Quarter Sessions must be that the magistrates and police are merely officers of different rank in the same department, the object of both being the conviction of prisoners'.
63. 11 L.T. (1848), 445 'It is notorious that the sentences at Quarter Sessions are so much more severe than those at the Assizes that prisoners deem it a matter of congratulation that they are tried by a Judge and not by a Chairman' and 13 L.T. (1849), 293 'in 1848 the average term of transportation imposed at quarter sessions was 7 years 10 months, at assizes only 7 years 3 months, with figures for length of sentences of imprisonment showing a similar pattern.
64. In the last quarter of the century Amphlett & Kay LJJ. were both Chairmen of County Sessions

- (97 L.T. (1894), 372-3). Also a few were County Court judges (see The Times, Sept. 27, 1899 - letter from 'A County Court judge').
65. A. Foote, Pie Powder, p. 69.
  66. Report of Royal Commission on Municipal Corporations, 1835 P.P. (116) XXIII, 1, App., Circuit Tables i-x.
  67. Ibid. para. 46 citing the example of Bristol where, because the Recorder did not attend the Quarter Sessions prisoners were tried by the Mayor and Aldermen. The Appendix to the Report (p. 53 et seq.) showed that in 46 out of 237 boroughs there was no office of Recorder.
  68. Municipal Corporations Act, 1835, ss. 103 and 105.
  69. 7 & 8 Vict., c. 71, s. 8 (to be Serjeant or barrister of at least 10 years standing).
  70. Local Government Act, 1888, s. 42.
  71. For examples of calls for it to be made obligatory for Chairmen to be legally qualified see (1838) P.D. XLI, 335; 8th Report of Criminal Law Commissioners, App. A; 2 L.T. (1844), 367 & 7 L.T. (1846), 478; 20 Sol. Jo. (1875-6), 74; The Times, June 6, 1882 and Sept. 27, 1893.
  72. The Third & Final Report of the Business of Courts Committee, 1936 (1935/6 (Cmnd. 5066) P.P VIII, 81) expressed the view that it was desirable that Chairmen be legally qualified. The Administration of Justice (Miscellaneous Provisions) Act, 1938 empowered courts of county Quarter Sessions to apply to the Lord Chancellor for the appointment of a legally qualified chairman, but it was not made obligatory that chairmen should be so qualified until 1962 (see Criminal Justice Act, 1962 s. 5).
  73. 97 L.T. (1894), 372-3 'The clerk is but a slender reed; his acquaintance with statute law (and) case law is slight' and see letter to The Times from 'A County Court judge' (supra) 'Clerks of the Peace rarely have any practical knowledge of criminal law and often belong to the class of family solicitor who 'do not take family work'. When a Clerk of the Peace advises the Chairman it is generally a case of the blind leading the blind'.

74. 2nd Report of the Criminal Law Commissioners, 1836, App.1, pp. 92 and 95.
75. 20 Sol. Jo. (1875-6), p. 74 'Some Chairmen of Quarter Sessions have never been known to venture any remark to counsel arguing a legal point before them. They dare not. They can only sit and listen with as great an appearance of wisdom as they can assume and when both sides are finished deliver their opinion oracularly one way or the other without giving any reason for it.'
76. L.T. 1844, 364. See also F.W. Ashley, *op. cit.*, p. 219 where he describes a summing up by a chairman in the early 1930s placing the burden of proof on the accused.
77. For examples of the practice see *R. v. Gibbons*, (1823) 1 C. & P. 97; *R. v. Evans* (1839) 8 C. & P. 765; *R. v. Coley* (1868) 10 Cox 356; *R. v. Goddard* (1882) 15 Cox 7; *R. v. Hurst* (1896) 18 Cox 374.
78. See e.g. *R. v. Webb* 1800 C.C.C. Sess. Pap., 6th sess., case 577 (Recorder); *R. v. Hanson* 1805 C.C.C. Sess. Pap., July sess., case 441 (Recorder); *R. v. Voss* *ibid.*, case 442 (Recorder); *R. v. Taylor* *ibid.*, case 473 (Recorder) and *R. v. Buckingham*, *The Times*, July 21 & 29, 1824 (Burrough J.).
79. *R. v. Wade* (1825) 1 Moo. 86. The problem of inability to understand the nature and obligation of an oath arose most commonly in the case of child witnesses, but they would normally be examined prior to their going before the grand jury, and if a child was at this stage found not to understand the oath, the prisoner would be remanded to the next Assizes so that the child could receive instruction in the matter (*R. v. Baylis* (1849) 4 Cox 23). It was also common for applications for postponement to be sought and granted for like reason (*R. v. White* (1786) 1 Leach 430; *R. v. Williams* (1836) 7 C. & P. 320; *R. v. Nicholas* (1846) 2 Cox 136 (no postponement where lack of understanding due to want of maturity rather than want of education), *R. v. Hall* (1849) 14 J.P. 25 (no postponement after jury sworn). No doubt these were the analogies which Bayley J. had in mind when he took the course he did. Twenty years later in *R. v. Whitehead* (1866) 30 J.P., 391 a court was urged, but refused, to take the same course where it became apparent during the course of the evidence of a deaf and dumb witness, who had already been sworn, that she lacked the requisite understanding of the oath.

80. R. v. Charlesworth (1861) 9 Cox 44.
81. Juries Act, 1825, s. 1.
82. Juries Act, 1870, s. 7.
83. Juries Act, 1825, s. 50.
84. Ibid., s. 31.
85. Juries Act, 1870, s. 6.
86. Chitty, Criminal Law (1816 1st ed.), p. 522.
87. Halsbury's Laws, 1st ed., vol.18, p. 268.
88. 17 L.T. (1852) 202; The Times, Dec. 12, 1858.
89. J. Bentham, Elements of the Art of Packing as applied to Special Juries particularly in cases of Libel Law, 1821.
90. Chitty, op.cit., pp. 523-4.
91. Sir L. Woodward, The Age of Reform, 2nd ed., p. 31; trials included those of leading radicals, such as Sir Francis Burdett, the Carliles, Cobbett, and Henry 'Orator' Hunt.
92. 29 Ed. III, c. 13 (confirming 27 Ed. III, st. 2, c.8).
93. Chitty, op. cit., p. 525.
94. Naturalisation Act, 1870, s. 5 (the Special and Common Juries Bill, 1868 had contained a similar clause).
95. (1870) P.D. CXCIX, 1129.
96. Perhaps the most celebrated example of an attempt to invoke the privilege was in the trial of the Mannings 1849 2 Car. & K. 844, where the issue was whether it was claimable by the foreign born wife of a British subject. The Times trial reports upto 1870 contain several examples of aliens being tried by such juries. For an attempt to invoke the privilege as late as 1882 see R. v. Howard, The Times, Apr. 3, 1882.
97. 4 Bla. Comm. 388. Prior to the Sex Disqualification Removal Act, 1919 it was the only type of jury on which a woman could serve.
98. Upon a plea of pregnancy being raised the court doors were closed to prevent women from

leaving court to escape the duty - R. v. Wycherley (1838) 8 C.& P. 262n.

99. In R. v. Wycherley supra Gurney B. held that the proper course, where the jury asked for the assistance of a surgeon, was for the surgeon to make his own examination and then give evidence of his findings in open court.
100. See the leading article in The Times of Oct. 25, 1847, which referred to numerous recorded instances of erroneous verdicts by juries of matrons, including a case 'a few years ago' in which a woman gave birth to a child 4 months after being declared by such a jury not with child.
101. See Taylor, Principles of Medical Jurisprudence, 8th ed. (1928) p. 31, citing R. v. Mary Ann Hunt (1847) 2 Cox 261 as one where the precaution had not been taken.
102. F. Bresler, Reprieve p. 54 (the change in practice was brought about by the public clamour caused by the case of Charlotte Harris (The Times, Aug. 3, 1849.)).
103. The Juries Bill, 1879 and the Criminal Code Bills had proposed to abolish the jury of matrons. It was actually abolished by the Sentence of Death (Expectant Mothers) Act, 1931 (as to which see (1931) P.D. CCXLVII, 1817-8).
104. See McEldowney & O'Higgins, The Common Law Tradition pp. 136-53, and H. Montgomery Hyde, Carson, p. 44 (explaining O' Brien L.C.J.'s nickname 'Peter the Packer'). Although the Crown had no right of peremptory challenge the right of stand-by (the right to defer stating the cause of its challenges until all the panel had been gone through) was where the panel was very large, as it usually was in Ireland, tantamount to an unlimited right of peremptory challenge (as to the right of stand-by see R. v. Horne Tooke (1794) 25 S.T. p. 1 at p. 25; R. v. Geach (1840) 9 C. & P. 499, and Mansell v. R. (1857) Dears & B. 375.
105. See Bentham, Art of Packing especially pp. 5 and 32-5; (1809) P.D. XIV, 183-4 & R. v. Cartwright, The Times, Aug. 5 and 7, 1820 and R. v. Henry Hunt, The Times, Mar. 16, 1820. The complaint of jurors being passed over on the ground that they would not attend was one of those most often heard. It was raised by Horne Tooke, by Sheriff Phillips in 1808 and in the Commons debate of 1809.

106. R. v. Horne Tooke (1794) 25 S.T. 127.
107. Bentham, *ibid.*, p. 126-33.
108. The petition of Henry White (1809) P.D. XIV, 175-90 and the debate thereon. In the debate the Attorney-General conceded that it had within living memory been the practice in the Exchequer to pay special jurors a double fee (2 guineas) if they found for the Crown.
109. The Times, Jan. 21, 1818. The Report appeared to confirm the existence of an unofficial list of jurors, and malpractice by the Crown. It also supported the claim that the same men sat as special jurors term after term (it found 22 men who had sat 30 times a year and 1 who had sat 55 times in a year).
110. Juries Act, 1825, s. 32. Peel had first proposed the reform in his Juries Empanelling Bill of 1824.
111. Common Law Procedure Act, 1852, s. 108.
112. Juries Act, 1870, s. 16.
113. Common Law Procedure Act, 1852, s. 109; Juries Act, 1870, s. 17; the 1913 Departmental Committee *supra* p. 112 found that juries were still occasionally struck in the old way.
114. 'There is no statutory provision prescribing the order in which names are drawn from jury lists to form a panel, and the undersheriff therefore has to carry out this important duty by whatever method he thinks best. We discovered that in practice a good deal of variety exists in the procedure adopted' - Departmental Committee, 1913 *supra*. para. 104.
115. Select Committee on Irish Jury Laws, 1881 para. 51. The adoption of the system was also recommended in a minority report to the Report of the 1913 Departmental Committee.
116. See the Second Report of the Common Law Commissioners, 1852-3 P.P.(1626), XL, 6 (poor quality of juries in agricultural areas); Select Committee on Special and Common Juries 1867/8 P.P. XII (401) 677 (Q. 1335 (Sussex juries) and App. 2 ('Common juries consist principally of farmers in rural districts and shopkeepers in towns'); and the Select Committee on the Irish Jury Laws, 1881 para. 10 (to the like effect). See also 10 L.T. (1847-8) p. 425 (for a particularly scathing attack) and the Attorney-General during the debate on the Jury Bill, 1873 (P.D. CCXIV,



546) 'a general deterioration in the character of juries.'

117. In 1864 Serjt. Pulling (in a Paper read to the Law Amendment Society) argued that the regulations as to exemptions greatly deteriorated the standard of juries (40 L.T. (1864-5) p. 112 and 197) a claim repeated during the Committee Stage of the Juries Bill, 1874 where Sir Chas. Russell observed (P.D. CCXIX, 289) that most of those who were Commissioners of Income Tax had accepted the office because of the exemption from jury service it carried with it. The Select Committee of 1867/8 had also recommended the abolition of many of the existing exemptions.
118. Peel, (1825) P.D. XII, 968
119. Report of the Select Committee of 1867/8, App. 2. The practice had been declared illegal and made punishable by fine by s. 43 of the 1825 Act.
120. The Jurors' Qualification Bills of 1823 and 1824 had sought to make the possession of Government or company stock above a certain value a qualification. The matter was also adverted to by the Law Amendment Society in a paper which it submitted to the Select Committee of 1867/8 and by the Departmental Committee of 1913.
121. Letter to The Times, Jan. 10, 1879 from the Under-Sheriff of Middlesex.
122. 2nd Report of the Common Law Commissioners supra, p. 6; 1st Report of the Judicature Commission 1868/9 P.P. (4130) XXV, 19; Report of the Select Committee of 1867/8 App.2.
123. Juries Act, 1870, s. 15.
124. Oct. 5, 1878.
125. Departmental Committee of 1913, para. 111.
126. Fry J. at Gloucester Assizes, The Times, Aug. 7, 1880; Bramwell L.J. and Coleridge J. (22 Sol. Jo. (1877/8) 422); Linscott v. Jupp (1891) 8 T.L.R. 130.
127. (1873) P.D., CCXVI, 1510. The scheme was a pet project of the Attorney. It had been rejected by the Select Committee of 1867/8, and canvassed by him at the first reading and Committee stages of the 1873 Bill.
128. P.D., *ibid.*, 1512 (Lopes), & 1514 (West).

129. The provision appeared as cl. 12 in the 1873 Bill and cl. 77 in the 1874 Bill; for Parliamentary reaction see (1874) P.D. CCXIX, 804-7.
130. T.U.C. Annual Congress Reports, 1873-83. The subject was also raised at Congress in 1892 and 1894.
131. The phenomenon was a consequence of the large increase in the burgess rolls caused by the Representation of the People Act, 1867 (Report of the Select Committee on the Juries Bill, 1870 P.P. (306) VI 61.
132. Oct. 5, 1878.
133. The Times, leader, Sept.17, 1878.
134. Bentham, op. cit., p. 140.
135. Jurors' Remuneration Bill, 1863.
136. Special and Common Jurors Bill, 1868.
137. S. 22.
138. Juries Act Amendment Act, 1871. For the background to the repeal see (1871) P.D. CCIV, 372.
139. The Juries Bill, 1874; the Jurors' Remuneration Bills, 1876/78/79/80; the Common Jurors' Remuneration Bill, 1886; the Jurors Payment Bills, 1893 (civil) and 1894; the Jurors Payment Bill, 1895; the Payment of Jurors Bill, 1896, and the Jurors' Expenses Bills, 1897/98.
140. Juries Act, 1949.
141. Para. 190.
142. T.U.C., 8th Annual Report, 1875.
143. Chitty, op. cit.. Vol. 1, 540-51.
144. Joy, Challenges to Jurors in Criminal Cases, pp. 150-3
145. R. v. Blakeman (1850) 3 C. & K. 97; Creed v. Fisher (1854) 9 Ex. 472 (the privilege seems to have been modelled upon the Crown's right of stand-by which enabled the Crown to exercise a right of peremptory challenge until the panel was exhausted). In Ireland those charged with misdemeanour were in 1871 given the right to challenge peremptorily upto 6 jurors (39 & 40 Vict., c. 78). It was also the

practice in some courts for the officer of the court, in misdemeanour, not to call the names of jurors in respect of whom either side had prior to trial raised objection - see Chitty, op.cit., 534-5 and 17 Sol.Jo. (1872-3) p.232.

146. Treason Act, 1695, s. 7, Juries Act, 1825, s. 1.
147. Juries Act, 1825, s. 15.
148. Printed as Appendix C to 8th Report of Criminal Law Commissioners.
149. R. v. Dowling (1848) 3 Cox 509; R. v. Lacey (1848) 3 Cox 517; for an earlier but equally unsuccessful attempt see R. v. Edmunds (1821) 4 B. & Ad. 471. In the 1840s some of the Irish judges had shown a disposition to follow the U.S. practice (see R. v. Francis (1841) Ir. Circ. Rep. 274).
150. As to which see C. La Rue Munson, Selecting the Jury, 4 Yale L.J. (1893) 173 at p. 179.  
151. A juror after challenge for cause could be examined as to the leaning of his affections or the sufficiency of his estate, but he could not be interrogated as to '(that)... which may tend to his own disgrace, discredit, or the injury of his character...or even whether he had previously declared his opinion that the prisoner is guilty' (Chitty, op. cit., 550).
152. Questions allowed as to whether jurors came from a particular locality (R. v. Edwards, The Times, Aug. 16, 1822; R. v. Brookes, The Times, Sept. 13, 1822; and R. v. McKeand, The Times, Aug. 18, 1826); whether they had any connection with the Bank of England (R. v. Rigand, The Times, Feb.17, 1826); whether any of them belonged to the Society by which the prosecution was brought (R. v. Richard Carlile (1819) 1 S.T.N.S 1387). In R. v. Nicholson (1840) 4 Jur. 558 the court expressed the view that the defendant should be furnished with the names of members of the society which had instituted the prosecution, so that he might exercise his right of challenge. Questions were disallowed in R. v. Swann (The Times, Jan. 15, 1820) as to who a juror's landlord was, and in R. v. Davidson (The Times, Oct. 24, 1820) as to whether any juror was a member of the Society bringing the prosecution.

## CHAPTER 5

1. 7 Wm. III, c. 3 (indictments for treason); 20 Geo. II, c. 30 (impeachment).
2. Those accused of misdemeanour, like defendants in civil suits, appear always to have been allowed counsel (4 Bla.Comm. 355 n. 8). This was one of many respects in which procedure in misdemeanour resembled civil procedure (others included imparlance & the right to move for a new trial where the trial had been in the King's Bench). Note also prosecutions in the King's Bench for misdemeanour were always listed in The Times under the head 'Civil Actions.'
3. Holdsworth, H.E.L., v., p. 192 and the authorities there cited. The rule denying counsel to those accused of treason or felony can be traced back to at least Edward I's reign (c.f. Y.B. 30 & 31 Ed. I (R.S.) 530). Text-writers offered a variety of explanations of it:- the court was counsel for the prisoner (Coke 3 Inst. 137); the evidence to (convict) must be so decisive that all the counsel in the world could not gainsay it' per Lord Nottingham in Lord Cornwallis' case (1678) 2 Harg. S.T. 726 (repeating and improving upon Coke 3 Inst. 137); 'trials would take too long if men of law were allowed' (Staunf, Pleas, f. 151); if the accused pleaded his own case his gesture or countenance would give some indication of whether he was speaking the truth (Staunf. *ibid*).; 'it requires no manner of skill to make a plain and honest defence which in cases of this kind is always the best' (Hawk. P.C., c. 39 s. 2); for an unlikely explanation see Sir J. Hawles in Colledge's Case (1681) 8 S.T. 723 at 726; a more cynical explanation is that the rule stemmed from a reluctance to allow a prisoner on a capital charge any advantage which might lead to an acquittal.
4. The concession was less generous than it sounded. The prisoner had to propose the point and only if the court thought it arguable would counsel be allowed (see e.g. The Trial of Lord Preston (1691) 12 S.T. 659 at 660 'It is not the prisoner's doubt but the doubt of the court that will occasion the assignment of counsel' per Atkins C.B.). The exception extended to assigning counsel to draw and argue a special plea such as pardon or autrefois acquit (c.f. R. v. Chamberlain (1833) 6 C. & P. 93). Other pre-eighteenth century exceptions permitted the prisoner

counsel in appeals of felony and upon a collateral issue (e.g. the right to sanctuary - see Hawkins c. 39, ss. 1 and 5).

5. This development appears to have occurred around 1730. Langbein, in his study of Old Bailey trials having found none in previous years, found unmistakable instances of counsel cross-examining for the defence in 1734-5 and regularly in the years thereafter. Beattie's study of the Surrey assize records led him to a similar dating. At first there appears to have been a lack of uniformity of judicial practice, some judges permitting counsel to put questions direct, others allowing counsel to suggest questions to the prisoner, whilst others insisted that questions be put through the court (17 S.T. 1022) and this was still, *semble*, a feature even in 1816 (see Chitty, *Crim. Law* (1st ed.) Vol. 1, 408).
6. Two devices commonly employed by counsel to outflank the prohibition were to make a speech 'under the mask of cross-examination' (as to which see n. 32 *infra*), and making jury points in the course of or under the guise of a legal submission to the judge (c.f. the Irish case (cited by Denman ((1824) P.D. XI, 215) where the judge in irritation asked 'Sir, are you addressing the court or the jury? to receive the answer 'I am addressing the court, my Lord, but I hope the jury will hear me'; see also *R. v. Case*, *The Times*, Aug. 21, 1821. Of the two devices the former appears to have been both generally employed and fairly generally tolerated by judges (see n. 32 *infra* and 2nd Report of the Criminal Law Commissioners pp. 3-4 and App. p.85).
7. The fate of the pre-1836 Bills was :- the 1821 Bill was refused a second reading; the 1822, 1823 and 1828 Bills had their second reading deferred; those of 1824 and 1826 failed at the motion for leave to bring in stage; the Bills of 1825 and 1833 reached the committee stage; the 1834 and 1835 Bills completed all their stages in the Commons; in the Lords the 1834 Bill did not get beyond a first reading whilst the 1835 Bill was referred to a Select Committee.
8. Even Brougham was initially against the Bill. He was converted in 1826 ((1826) P.D. XV, 626).
9. 2nd. Report of Criminal Law Commissioners. The Report recommended limiting the reform initially to capital felonies and to non-

capital cases in which prosecuting counsel addressed the jury.

10. (1836) P.D. XXXV 1249; royal assent: 20th August, 1836.
11. See e.g. Lamb and MacKintosh in the 1824 debate (P.D. XI, 182 and 300 citing respectively 4 Bla. Comm. 349 and Jeffries C.J. in R. v. Rosewall (1684) 10 S.T., 147, MacKintosh made the point the need for counsel was greater in treason than felony since traitors were usually men of education whereas most felons were not (ibid. 201). In 1826 debate Twiss (P.D. XV, 613-4) made the point that some misdemeanours were as grave as or graver than felony so that it could not be said that there was anything in the character of felonies which justified their being treated differently than misdemeanours. Also, sometimes the same facts could be charged as felony, misdemeanour or treason as the prosecutor pleased, thus giving the prosecutor the power to decide whether the prisoner should have full benefit of counsel at trial. On these latter points see also the evidence of Sir Frederick Pollock to the Criminal Law Commissioners, Grant ((1834) P.D. XXIV, 167), and Lord Lyndhurst ((1835) P.D. XXXIV, 761-2) who cited the bizarre way the existing rule operated in the case of offences which were misdemeanour on first conviction but felony upon a second or subsequent conviction.
12. (1824) P.D. XI 201-2 (Mackintosh); 210, 211 (Dr. Lushington) 217 (Denman); (1826) P.D. XV, 595 (Lamb), 610 (Twiss); (1836) P.D. XXXIV, 765 (Lord Lyndhurst) and the 2nd. Report of the Criminal Law Commissioners, pp. 2-3. The reformers argued that it was not simply lack of education and intelligence which led prisoners to acquit themselves so badly when they addressed the jury, there was also the terror of their situation. Also it often came as a complete surprise to the prisoner to learn that his counsel was not permitted to speak for him (Twiss (1826) P.D. XV, 610). Alderman Harmer told the Criminal Law Commissioners that it was innocent prisoners who were at the greatest disadvantage being 'surprised and confused by the false evidence called against them' (2nd Report, p. 3). A point made time and time again was that the class of case in which an address by counsel was most needful and the prisoner at the greatest disadvantage was that where the evidence against him was circumstantial (see (1824) P.D. XI. 210 (Dr. Lushington); (1826) P.D. XV 612 (Twiss); 623 (Scarlett), and 628

- (Brougham); (1834) P.D. XXIV, 163 (Althorp). See also the story as to Lord Lyndhurst's conversion to the principle of the 1836 Bill told in (1899) 111 Ed. Rev. 189.
13. Lord Lyndhurst at the report stage of the 1836 Bill ((1836) P.D. XXXV, 179. See also Twiss (1824) P.D. XI, 187; (1826) P.D. XV, 609 and Denman (ibid.) 630-1, and 2nd Report of the Criminal Law Commissioners, p. 3.
  14. (1824) P.D. XI, 217-20 (Denman), & 219 (Martin); (1833) P.D. XVI, 1201, (O'Connell); (1834) P.D. XXIV, 168 (Pollock); (1835) P.D. XXVIII, 868 (Buller), and 2nd Report of the Criminal Law Commissioners App. pp. 74 & 86.
  15. (1834) P.D. XXIV 158-60 (Ewart).
  16. (1833) P.D. XVI, 1200 'when a prisoner had a real defence it could require no speech from counsel' (Poulter); and (1834) P.D. XXIV, 824 Sir Eardley Wilmot (he had never seen a wrong conviction in twenty eight years' experience).
  17. (1821) P.D. VI, 945 (Lockhart), 1513 (Solicitor-General).
  18. (1826) P.D. XV, 597 'bar almost universally against (as were) the bench' (Attorney-General); (1836) P.D. XXXI, 497 'nine tenths of the profession and the judges were hostile' (Eardley Wilmot). By 1836 the reform had won converts amongst the judges most notably Lords Lyndhurst and Brougham and it was also claimed that the bar now favoured reform (1836) P.D. XXXIV, 763). Park J. threatened to resign if the 1836 Bill became law, but did not (A Century of Law Reform (1901) p. 50).
  19. (1824) P.D. XI, 194 (North); (1826) P.D. XV, 606 (Peel); ibid. 625 (Solicitor-General).
  20. A variety of chilling prognoses was offered: (1821) P.D. VI, 945 '12,000 hours annually would be spent on counsels' speeches in criminal cases.'; (1834) P.D. XXIV, 162 'The Assizes would be extended to three or four times their present duration'; (1835) P.D. XXVIII, 872 'the business of the West Riding Sessions would never be got through; (1835) P.D. XXIX, 356 'it would double or treble the county rates all over England.'; (1836) P.D. XXXIV, 771 'a large addition to the...number of judges would be necessary.'
  21. (1824) P.D. XI, 190-1 (North).

22. (1824) P.D. XI, 192 (North), 207 (Attorney-General); (1826) P.D. XV, 598 (Attorney-General); 606 (Peel); (1834) P.D. XXIV, 166 (Goulburn).
23. The maxim was so described by the Criminal Law Commissioners (2nd Report, p. 8). If it was misleading the judges themselves did little to disabuse the public of the misconception (see Chapter 4, n.44). The maxim was invoked by the judges in 1893 when advising the Home Office against introducing a system of criminal legal aid (see n. 161 below).
24. (1824) P.D. XI, 185 (Lamb); (1826) P.D. XV, 10 'from the prisoner he has no instructions at all' (Twiss); (1835) P.D. XXVIII, 629 'the only brief he got...was the depositions which were in fact the prosecutor's brief' (Twiss); and (1836) P.D. XXXIV, 767 (Lord Lyndhurst).
25. 'The duties clashed' Twiss (1826) P.D. XV, 610; see also (1821) P.D. IV, 945, 1514; (1826) P.D. XV, 210; (1834) P.D. XXIV, 159, 630. The point was neatly made by Ewart in his evidence to the Criminal Law Commissioners:- 'If he is an efficient counsel he transgresses his proper position as a judge' 2nd. Report, App. p. 31.
26. In this limited sense the maxim was accurate enough.
27. (1824) P.D. XI, 204 'the strong effect of habit - the repugnance to change long established rules'.
28. (1834) P.D. XXIV, 191. See also (1824) XI, 204 (the people were not competent to decide upon such nice questions). Two petitions were, in fact, presented to Parliament urging reform; the first from a number of Old Bailey jurors was presented by Martin at the start of the 1826 debate; the second was presented in March, 1827 (H.C. Journal, 1826-7, p. 328).
29. Romilly cited by Ewart at (1834) P.D. XXIV, 158. See also O'Connell (1833) P.D. XVIII, 612 'As to time why try men at all, if they had not time to try them justly'.
30. (1833) P.D. XXXV, 133 'Many prisoners would still remain without counsel to defend them, for they would not have the funds to procure such assistance; and in cases where the prisoner's guilt was clearly proved, no counsel of the least discretion would think of addressing the jury (Lord Abinger). A point made repeatedly was that the Act would result



in a shortening of cross-examination which would not longer be used as a vehicle for a jury speech ((1826) P.D. XV, 624 (Scarlett); (1835) P.D. XXVIII, 862 (Buller); 869 (O'Connell), 870 (Dr. Lushington); Second Report of the Criminal Law Commissioners p. 15, App. p. 69 and 74. It was also claimed that the dislike of the judge, and the ridicule of the profession would act as a brake on long speeches ((1835) P.D. XXVIII, 630): Abinger's point that responsible counsel would not trouble the jury with a speech if the case was clear is borne out by cases both pre- and post-Act (see e.g. R. v. Colvill, The Times, Jan. 12, 1803; R. v. Weaver, The Times, Jan. 5, 1822; R. v. Richards, The Times, Oct. 28, 1836; R. v. Rowe, The Times, Apr. 1, 1839; R. v. Fitzgerald, The Times, Sept. 23, 1870. It is not easy to assess what impact the Act had on court sitting times. However, it was widely believed that it had caused a considerable increase in the length and expense of Old Bailey sittings. In January, 1837 Sir Peter Laurie told the Middlesex Magistrates that in 1836 there had been 87 more sitting days than in 1835 and the cost had been £3000 more, which increases he attributed to the effects of the Act (The Times, Jan. 27, 1837). Later that year the salaries of the Recorder and Common Serjeant were increased by £500 p.a. each in consequence of evidence of increased burdens being imposed on the City Judges, particularly since the passing of the Prisoners' Counsel Bill (City of London, Administration of Justice Committee Records).

31. (1826) P.D. XV, 625 (Scarlett), 627 (Brougham).
32. (Denman); 2nd. Report of the Criminal Law Commissioners, App. 73.
32. (1824) P.D, XI, 189 (Lamb); (1826) P.D. XV, 590 & 593 Ewart); 2nd. Report of the Criminal Law Commissioners p. 12; and so far as intemperate conduct by prosecuting counsel was concerned the judge would, in any case, intervene to stop it (1836) P.D. XXXIV, 770 (Lord Lyndhurst). The point was also made that under the existing system judges commenting adversely upon points made by prisoners was by no means unknown, whilst heat between counsel was often generated by defence counsel seeking to make a jury speech under the guise of cross-examination ((1826) XV, 612; (1835) P.D. XXVIII, 630 (Twiss); (1834) P.D., XXIV 164 (O'Connell); (1836) P.D. XXXIV, 770 (Denman).

33. For Old Bailey statistics for the whole century see Appendix 1. Beattie found from a study of the Old Bailey Sessions Papers for the period Dec. 1799 to April 1800 that 96 out of 335 (28.6%) of defendants accused of property offences were represented by counsel, a figure which ties in with that for July 1800 given at Appendix 1.
34. An analysis of newspaper reports of trials on indictment in Staffordshire in 1843 shows counsel retained for the defence in only 25% of the cases, with the percentage of undefended prisoners being much higher at Sessions than at Assizes (Phillips, *Crime & Authority in Victorian England*, p. 104 n. 16). At the 1841 Summer Assizes the calendar for Nottingham county contained 12 cases in only one of which was the prisoner defended by counsel (*The Times*, July 23, 1841); see also n. 78 *infra*.
35. Manchester, *Modern Legal History* p. 166 citing 4 *Bla. Comm.* (5th ed) 3.32. As to foreign commentators see generally Radzinowicz, *History*, Vol. 1, 712-26. The debates on the Prisoners' Counsel Bills abound with tributes to the mildness and fairness of English criminal procedure - see e.g. (1821) P.D. IV, 945 & 946; (1824) P.D. XI, 186, 189 & 209; (1833) P.D. XVI 1199 (Poulter).
36. Peel in the 1826 debate urged the standard of proof and the jury unanimity rule as ground for leaving the law as it stood - P.D. XV, 608.
37. See generally Langbein, Beattie and chapter 4 *supra*. It is perhaps a little surprising that during the Commons debates the reformers did not make the point that any claim by judges to act as counsel for prisoners was inevitably compromised by the practice of their acting as prosecutors.
38. See 1835 P.P. (HL 130) XLVI, 317. Phillipps at pp.7-8 of his evidence and see also *The Times*, Feb. 10, 1836. Voices were also raised against the clause in the Commons on the Second Reading of the 1834 Bill (P.D. XXIV, 1097-8). It was claimed it would extend sessions from one sitting to the next, increase judicial patronage, and was unnecessary; in the event it passed the debate 33-25.
39. 1843 1 L.T. 635.
40. He also suggested a Society for the Defence of Prisoners to be funded by popular subscription

as were the many societies for the prosecution of felons. In 1884 there is reference to such a society in Finsbury but it was almost certainly fraudulent (The Times, Nov. 21, 1884).

41. 1856 P.P. (456) L 79.
42. In 1850 the magistrates in many counties were not prepared to order the fees of the prosecutor's counsel to be paid out of the county rates - see 1845 P.P.(in 390) XLI, 411 and generally chapter 4. See also Lord Harcourt (1881) P.D. CCLXVII, 431 'It was impossible that the state should undertake the defence of every prisoner as well as his prosecution.'
43. Allison, Principles of the Criminal Law of Scotland, vol. ii, p. 379. See also 33 Ir.L.T. (1899) 322 'Annually ..in each district two or three solicitors for the poor are appointed who visit the prisons and take the prisoners' statements and prepare their defences. Similarly, so many counsel are appointed on the various circuits the senior of those who volunteer being chosen'.
44. Mr. Commissioner Kerr (a Scot): G. Pitt Lewis, Mr. Commissioner Kerr and Individuality, p. 259
45. Letter Nov. 11, 1882 quoted 74 L.T. 32.
46. 33 Ir. L.T. (1899), p. 453.
47. Ibid. A guinea was the minimum fee in Cox's day but in 1824 one finds a reference to brief fees of half a guinea being paid at Westminster Hall (The Times, Apr. 12, 1824 (Middlesex Sess. cases)). Cox remarked then upon the brief fee rule as an obstacle to a criminal legal aid system - I L.T. 635.
48. Section d. Infra.
49. The Times, Apr. 14, 1903.
50. (1834) P.D. XXIV, 1098 (Aglionby).
51. R. v. Hadfield, The Times, June 18, 1800. Erskine's reply to Lord Kenyon's request that he act was 'I have ever understood it to be the universal opinion and practice of the bar that if a person accused of crime prays the court to assign him counsel and names any person who practises in the court in which the person is arraigned he is bound to give his assistance'.

52. R. v. Fitzpatrick & Fitzpatrick, The Times Aug. 22, 1818.
53. R. v. Daw & Daw, The Times, Mar. 28, 1825.
54. R. v. Thomas, The Times, Aug. 11, 1825.
55. R. v. Probert, The Times, Apr. 6 and 8, 1825. The actual exchange between Probert and the Lord Chief Justice is reported thus: 'My lord I have not been able to employ counsel for my defence, and I have therefore prepared within a few days a brief for that purpose, and I trust your lordship will assign some gentlemen at the bar to undertake my defence.' Lord Chief Justice: 'The court cannot assign any gentlemen to undertake your defence, they can only assign counsel to advise you in matters of law'.
56. R. v. Redding, The Times, Aug. 11, 1823.
57. R. v. Nuttall, The Times, Sept. 8, 1817; see also R. v. Sullivan, Limerick Assizes, The Times, Aug. 4, 1820.
58. Vol. 1, 407-14.
59. The Times reports of Assize and Old Bailey trials for the period 1820-60 reveal the following pattern

Decade	Cases in which counsel assigned	Murder cases in which prisoner undefended
1820-29	5	13
1830-39	4	20
1840-49	28	32
1850-59	61	19

The figures for murder cases in which the prisoner was undefended are almost certainly understated (they do not include cases in which, although the report does not state in terms that the prisoner was undefended, there are strong reasons for believing that he was).

60. Occasionally, one comes across assignments in cases other than murder - see e.g. R. v. Smith, The Times, Aug. 10, 1848 (manslaughter); R. v. Clarke, The Times, June 17, 1849 (arson); R. v. Chesham, The Times, Mar. 7, 1851 (poisoning); R. v. Jones, The Times, July 28, 1855 (theft); and also R. v. Heatherington and R. v. Chipchase no 70. infra.
61. See e.g. Woodward, The Age of Reform, 2nd ed., p. 470 'After 1838 and for the rest of the

century no person was hanged except for murder or (upto 1861) attempted murder'.

62. E.g. R. v. Jackson, The Times, Dec. 14, 1861,, R. v. Clark, The Times, Feb. 27, 1862; R. v. Dethridge, The Times, July 26, 1869.
63. See e.g. R. v. Hodkinson, The Times, Aug. 19, 1853; R. v. Sanson, The Times, Aug 20, 1855; R. v. Andrew, The Times, Aug.3, 1874.
64. See R. v. Anncliffe, The Times, Mar. 15, 1842 (a clear case); R. v. Crawford, The Times, July 20, 1840, and R. v. Riddle, The Times, July 13, 1842.
65. R. v. Johnson, The Times, Dec. 16, 1859. See also R. v. Orrell, The Times, Mar. 27, 1835.
66. R. v. McGregor & Lambert, (1844) 1 Cox 346.
67. R. v. Geering, The Times, Aug. 2, 1849.
68. R. v. Frith (1859) 9 Ir. Jur. 367.
69. Clearly demonstrated by two cases of attempted murder tried by Alderson B. at the 1837 Spring Assizes. In the first (R. v. Hetherington, The Times, Feb. 27) tried at Carlisle the judge took the initiative and had counsel assigned to the accused. In the second (R. v. Chipchase, The Times, Feb. 28) tried at the next Assize town (Newcastle) the prisoner was undefended. Both were convicted but only Heatherington left for execution.
70. R. v. Plant, The Times, Dec. 17, 1857 (Stafford).
71. R. v. Murray, The Times, Aug. 2, 1858 (York).
72. R. v. Jones, The Times, Mar. 30, 1859.
73. R. v. Jones, The Times, Dec. 21, 1861.
74. R. v. Hunnisset, The Times, Aug. 4, 1862.
75. The 1860s cases were R. v. Gallagher, Aug. 17, 1860; R. v. Jones supra; R. v. Hunisett supra; R. v. Moore, Aug. 15, 1862; R. v. Lancastell, Dec. 24, 1863; R. v. Eatwell, Mar. 5, 1864; R. v. Stowler, Aug. 12, 1865; R. v. Pink, Dec. 11, 1865; R. v. Smith, June 11, 1868 (5 of the 9 were convicted; 2 were found unfit to plead; 1 was acquitted; and the outcome of the other cases is not stated; in 3 of the cases Martin B. was the judge; 5 at least were infanticide cases.

The 1870s cases were:- R. v. Egan, July 21, 1870; R. v. Trewens, Aug. 1, 1870; R. v. Andrew, Aug. 3, 1874; R. v. Igo & Lynn, Dec. 9, 1874; R. v. Brown, Nov. 7, 1878; R. v. Sherwood, May 5, 1879; in 1 case the accused was acquitted; in another the accused was found not guilty by reason of insanity; in 2 the conviction was for manslaughter only; in the others the outcome is not given; 2 at least were infanticide cases.

76. Examples include;- R. v. Hollowell, The Times, Nov. 11, 1880 (rape); R. v. Haylock, The Times, Feb. 3, 1882 (poisoning); R. v. Dowling, The Times Jan. 11, 1889; R. v. Cook, The Times, Mar 7, 1889 (threatening letter); R. v. Adams, The Times, Nov. 6, 1896 (wounding with intent).
77. As to infancy see e.g. R. v. Sinden, The Times, Dec. 21, 1888 (boys aged 10 and 9) and R. v. Moss & Thomas, The Times, Dec. 25, 1888 (boys 10 and 8 - manslaughter). As to penalty see e.g. R. v. Arnemann, The Times, Mar. 10, 1890 (shooting at county court judge with intent - undefended - 20 years' penal servitude); R. v. Poulton, The Times, Dec. 6, 1890 (rape on daughter; undefended; penal servitude for life).
78. R. v. Gillingham 1910 5 Cr. App. R. 187
79. 1903 P.P. VII, 590. See also the Recorder of London's explanation of his pre-1903 Act practice - he had not liked to exercise (the power to assign) except very sparingly as he had not been able to make any order for the payment of a fee' (1904) 68 J.P. 40.
80. The Times report of R. v. Luie & Brown, Apr. 9, 1874, suggests that the usual course by then was for the judge, upon the conclusion of the prosecution opening, to inquire of the counsel in court whether any of them represented the prisoner. If that be right it would explain in part some of the late assignments one finds.
81. E.g. R. v. Daly & MacFarlane, The Times, Apr. 5, 1851.
82. E.g. R. v. Beveridge, The Times, Mar. 8, 1847.
83. See R. v. Thomson & Mullaly, The Times, Mar. 17, 1868 (Fenian case).
84. In 1868 the Law Journal (Vol. 3, p. 270) reported that the Home Secretary had been

approached to provide funds for the defence of a prisoner charged as accessory to a notorious murder on the grounds that an assignment of counsel would not secure adequate representation. The result of the application is not given but the Journal was not sanguine. One also sees from time to time traces of a doctrine that counsel asked by a judge to watch the case on a prisoner's behalf (which was one of the form of words used to assign) was not obliged to address the jury on his behalf but merely to see that he was tried according to law - see *R. v. Atter*, *The Times*, July 20, 1848 (the counsel involved was appropriately called Missing) and *R. v. Mahaig*, *The Times*, Dec. 25, 1863.

85. *R. v. Doidge*, *The Times*, Aug. 8, 1862.
86. *R. v. Cody & Cody*, *The Times*, Jan 31, 1848.
87. *R. v. Fogarty* (1850) 5 Cox 161.
88. 77 *Ir. L.T.* (1873) p. 3; by the end of the century the system in Ireland in capital cases was for counsel and solicitor to be assigned and paid out of public funds - O'Shaugnessy Q.C. in his evidence to the Select Committee on the Poor Prisoners' Defence Bill supra.
89. *Doe d. Bennett v. Hale* (1846) 18 *L.J.Q.B* 353 'we all known instances in which with the sanction of the judge barristers have defended prisoners without the intervention of an attorney' (per Lord Campbell L.C.J).
90. Chitty, *Criminal Law*, 1st ed. (1816), vol. 1, 413.
91. *R. v. Wright* (1736) 2 *Str.* 1041; *R. v. Morgan* (1745) 2 *Str.* 1214.
92. *R. v. Stokes* (1818) 3 *C. & K.* 189.
93. *R. v. Page* (1831) 1 *Dowl.* 507.
94. *R. v. Nicholson* (1840) 8 *Dowl. P.C.* 187; 4 *Jur.* 506
95. Archbold, (20th ed. 1886) devotes four lines to the assignment of counsel in capital cases but over a page to defence in forma pauperis.
96. 1 *Sol.Jo.* (1857), p. 702.
97. See *The Bar, The Attorney & The Client* (pamphlet 1852). See also Brougham's threat in 1824 (backed by his Circuit) to accept briefs direct (*The Times*, Dec. 9, 1851), the

campaign of Bird at Exeter 1845-50 (for which see 5 L.T. 359 & 15 L.T. 173); 3 L.T. 500; 36 L.T. 462 & 492; and Bar meeting reported in The Times, Feb. 5, 1852.

98. 13 Law. Mag. (1887-8), p. 195.
99. The Times, June 29, 1888. See also report of Bar Council's Professional Conduct Committee, Jan. 29, 1897.
100. The two barristers were Crouch and Pyke; the cases giving rise to the scandal were R. v. Pond, an Old Bailey case in which Crouch prosecuted (The Times, Sept. 23, 1844) and R. v. Thompson 1844 (a Middlesex Sessions case in which Pyke prosecuted (see generally 3 L.T., pp. 500-1; and 4 L.T. pp. 7,8, 12, 25 and 44).
101. 4 L.T., p. 44.
102. 4 L.T., p. 8.
103. 3 L.T., p. 501.
104. 4 L.T., p. 31; 32 Law Mag. (1844) p. 175.
105. 4 L.T., p. 45. See also 32 Law Mag. (1844), p. 178 where the practice of handing briefs across the dock was referred to as an established custom.
106. R. v. Ball, The Times, Oct. 25, 1844 and also (1844) 8 J.P. 721.
107. 18 L.J.Q.B. 353. The point at issue in the case was the right of a barrister to receive a brief from a client direct in a civil suit; the court held that he was, the want of an attorney being a breach of etiquette only, and a matter for the barrister's Inn and not for the court.
108. 15. L.T., p. 174.
109. 4 L.T., p. 25 'Necessity knows no law and if a prisoner came to be tried without the means of employing an attorney, no man at the bar would object to conduct his case if required to do so' adding ('but the truth is that this necessity is but occasional'). See also a letter to like effect in The Times, Oct. 2, 1844 (Bar etiquette).
110. Reply of the Inspectors to the Report of the Court of Aldermen so far as relates to the Prison of Newgate, 1835 P.P. (486), XLII, pp. 2 and 6.



111. For the term 'docker' see e.g. 29 Law Jo., p. 275.
112. Halsbury's Laws, 4th ed., Vol. 3. para. 1141. As to the fee of £1.3.6. see Bar Council Annual Statement 1906/7, p. 7. The privilege of making a choice from the counsel in court appears occasionally to have been afforded to prisoners assigned by the court - see case cited at n. 83.
113. 1944-5 P.P.(Cmnd. 6641) V, 187, p. 6.
114. Abel Smith and Stevens, Lawyers & The Courts, p. 32.
115. In 1847 the pay of a sergeant in the Metropolitan Police was 27/- per week (see R. v. Ashford, The Times, Mar. 4, 1847). The dock workers' strike of 1889 was for a minimum wage of 6d per hour. See also Cornhill Mag., Vol. 10 N.S. (1901) p. 446 'A workman's budget' - 'the class we are considering is...one earning from 20/- to 25/- to 40/- a week'. In November, 1882 a correspondent gave as the reason for the rarity of dock briefs that 'guineas are very scarce among them' (i.e. prisoners) 74 L.T., Nov. 11.)
116. Old Bailey prosecuting fees were in 1837 set at 1 guinea in all but the most complicated cases (The Times, Aug. 16, 1887 and Dec. 17, 1850). In 1903 the Report of the Departmental Committee to inquire into allowances to prosecutors and witnesses revealed that in half the counties the fee allowed to prosecuting counsel at Sessions was still 1 guinea (1903 P.P. (254,264) LVI, 357). At Stafford in 1878 Denman J. was assured by a local solicitor that there would be no difficulty in finding counsel to undertake an Assize defence for 1 guinea (R. v. Anwell & Simpson, The Times, Mar. 27, 1878).
117. Chitty, op.cit., Vol. 1, pp. 407-14. The silence in fact continues for much of the century. Archbold (20th ed. 1886), although it contains much learning about defence in forma pauperis, and refers to assignment of counsel by the court is wholly silent about dock briefs.
118. 1835 P.P. (HL 130) XLVI, 317 at p. 8 of his evidence.
119. Bar Council, Annual Statement, 1900-1.
120. The Times, Oct 8, 1844.

121. See chapter 6 for the percentage of bills thrown out at the Old Bailey in mid century and by the century's end.
122. The dock brief also operated as a protection to prisoners against swindling by sham attorneys. In the 1840s cases of prisoners being left without counsel at trial, after having paid out money to a sham attorney for a defence, were common, a grievance made much worse by the refusal of judges to put off trials in such circumstances - see generally (1844) 8 J.P. 721.
123. Per Recorder of London in R. v. Nunzio Calendo (1904) 68 J.P. 40.
124. E.g. 116 L.T. 493. In 1900 the Report of the Special Committee of the Bar Council on Dock Defences recommended that the Home Office take steps to draw the dock brief system to the attention of all prisoners.
125. F.W. Ashley, *op. cit.*, p. 80. For evidence of the existence of the system in the 1860s see Sol. Jo., June 15, 1861.
126. Ashley, *op. cit.*, p. 82.
127. 1903 P.P. (254,264) VII, 583.
128. Bar Council, Annual Statement, 1900/1.
129. Published Nov. 21, 1900.
130. (1859) P.D. CLIII, 402 'if a man were believed by his neighbours to be innocent he would not be suffered to remain without the means of moving for a new trial'; see also R. v. Boreham, *The Times*, Feb. 5, 1896 (schoolmaster charged with sexual offence defended out of fund subscribed by neighbours); R. v. Prince, *The Times*, Jan. 14, 1898 (counsel instructed by prisoner's friends).
131. F.W. Ashley, *op. cit.*, p. 177.
132. See e.g. (1904) 68 J.P. 100 (Newcastle case), 294 (R. v. Samways, Dorchester) and 533 (R. v. Hunt, Salisbury) friends of accused subscribing fund for his defence on a murder charge.
133. The practice is described in detail by Montagu Williams, *Leaves of a Life*, p. 90 and referred to in R. v. Buck, *The Times*, Mar. 8, 1860.
134. R. v. Cornwell *Wilkinson's Newgate Calendar*, Vol. 3, p. 42.

135. R. v. Jackson, *The Times*, Oct. 23, 1844.
136. R. v. McGregor & Lambert (1844) 1 Cox 346.
137. Lambert, *When Justice Faltered*, p. 128-9.
138. R. v. Harvey, *The Times*, Nov. 2, 1801.
139. R. v. Bell, *The Times*, July 30, 1831 (for other examples see R. v. Nuttall, *The Times*, Sept. 8, 1817 (murder); R. v. Probert, *The Times*, Apr. 6 & 8, 1825 (horse stealing); R. v. Timbrill, *The Times*, July 19, 1861 (prisoner charged with theft; on arraignment pulled some money out of his pocket and asked if any counsel would defend him; defended without fee).
140. R. v. Nash, *The Times*, Sept. 24, 1884.
141. See 48 *Law Mag.* (1852) p. 229 (circular letter sent out by counsel to solicitors offering to do work for low fees); 51 *L.T.* (1871), 227 (complaint against Old Bailey Counsel who sign briefs marked with guineas when they receive only shillings and who take a number of briefs at so many a dozen).
142. E. Marjoribanks, *Life of Marshall Hall*, pp. 35-6.
143. See e.g. The case of the Flowery Land pirates, *The Times*, Feb. 4, 1864, where the Spanish, Turkish and Greek consuls retained counsel for those of the accused who were their nationals.
144. 1 *L.T.*, p. 635 (results - of 23 prisoners from whom Yorston took statements 3 were discharged as a result of the grand jury throwing out the bill, 7 were acquitted and 9 had written statements read out to the court).
145. R. v. Sheen, *The Times*, July 14, 1827. See also R. v. Calkin, *The Times*, Jan. 9, 1832 (child murder).
146. R. v. Anon., *The Times*, Oct. 27, 1851.
147. R. v. Adams, *The Times*, Nov. 27, 1851.
148. R. v. Sloman, *The Times*, Feb. 1, 1859 (see also R. v. Parker, *The Times*, Sept. 23, 1854 (attempted murder)).
149. R. v. Gould, *The Times*, Apr. 11, 14 & 15, 1840; see also R. v. Waller, Balch & Noble, *The Times*, Nov. 17, 1892 where the under-sheriff was described as 'retained on behalf of the prisoners to instruct counsel'.

150. The Times, Nov. 19, 1882.
151. The objects of the fund were certainly wide enough to cover such payments, including as they did 'pecuniary aid to...objects of distress who come under the official cognisance of the sheriffs' and in the accounts of the fund for 1880/81 there is reference to a sum of £9.16.6. disbursed in counsel's fees.
152. R. v. Gould, The Times, Mar. 1, 1862 (murder), counsel retained by the sheriff of Berkshire; R. v. Brown, The Times, Mar. 29, 1864 (child murder), counsel retained by sheriff of Suffolk; R. v. Gaydon, The Times, Oct. 24, 1879, Old Bailey, murder case counsel retained by sheriff of Essex.
153. Ashley, op. cit., pp. 328-32.
154. Marjoribanks, op. cit., p. 51
155. See H. Montgomery Hyde, Norman Birkett, 1965 ed., pp. 447-8 (confession for use of newspapers signed by the murderer Buck Ruxton signed on the day following his arrest); and also PRO: HO 45/2, 1330 (trial of Stone for murder 1936, newspaper offered to fund defence in return for signed confession to be given to his solicitor to be held by him under lock and key but released to the newspaper in the event of his execution). The topic is also discussed in R.M. Jackson, The Machinery of Justice in England and Wales, 4th ed., p. 139 where the author quotes a case in which he was himself involved.
156. Collier v. Hicks (1831) 2 B. & Ad. 663 (cited with approval in McKenzie (1971) P. 33 whence the institution derives its name). Collier v. Hicks concerned a case before magistrates, but one occasionally meets with the practice in jury cases - see e.g. R. v. Jones, The Times Mar. 27, 1843, and the case (referred to in (1843) P.D. LXIX, 189) where Gurney B., having permitted two of the prisoner's friends 'to sit near him and assist him with their occasional advice and suggestions' put a stop to their intervention when it began to disrupt the trial).
157. Dalton, Countrey Justice, 1635 ed., 275 cited examples from the reigns of Henry IV and Elizabeth I.
158. In the debate on the Prisoners' Counsel Bill of 1834 it was said that when the poverty of a prisoner prevented him employing counsel 'all

the barristers present lent him what assistance they could by suggesting questions to the judge and raising points for his benefit' ((1834) P.D. XXIV, 167). In 1862 the Sol. Jo. (Vol. 6, p. 860) complained of the Old Bailey practice of counsel who acted as amicus not contenting themselves with merely informing the court of a decision or enactment but 'beset the judge with vociferous arguments in favour of their suggestions'. For examples of counsel intervening as amicus see e.g. R. v. Skinner, The Times, Feb. 10, 1834; R. v. Greensmith, The Times, Aug. 7, 1837); R. v. Hawtin (1836) 7 C. & P. 281; R. v. Edwards, (1838) 8 C. & P. 611 (in both the last two cases the prisoner was acquitted in consequence of the point raised by the amicus); R. v. Matthew, The Times, Mar. 27, 1854 (intervention on behalf of 7 year old charged with burglary); but the interventions were not always in favour of the prisoners (see e.g. R. v. Rawlins & Clark (1835) 7 C. & P. 50 and R. v. Piller (1836) 7 C. & P. 337).

- 159. (1883) P.D. CCLXXVIII, 97-8.
- 160. PRO HO 45/9784/2907E.
- 161. 29 L.Jo. (1894), p. 274.
- 162. (1897) P.D. XLVIII, 813 (Walton).
- 163. 1898) P.D. LX, 720-1 (the Chairman of Committee ruled the amendment outside the scope of the Bill); Viscount Cranborne had also put down an amendment along the same lines but in the end abandoned it, taking the view that the question ought to be dealt with in a separate Bill (1898) P.D. LXII, 748.
- 164. Bar Council records.
- 165. Report of 24th November, 1898 (Bar Council Records) and see 1899 63 J.P. 115.
- 166. The Times, Apr. 14, 1903 (letter), Apr. 27 (leader).

Under the scheme, the cases of all undefended prisoners were to be offered to members of the bar attending the Sessions, according to a strict rotation. The cases were to be offered first to counsel holding no briefs for either prosecution or defence successively in order of seniority, and, if the defences had not been then exhausted, to counsel who held no defence briefs successively according to seniority, and if the defences were not then exhausted the process was to be repeated until they were). No counsel was bound to accept any

such defence. Those who did were to work without fee. The local prison governor was told of the scheme, and undertook to inform undefended prisoners of it on the first morning of each session.

167. They were Bousfield, Cripps, Sir Joseph Leese, Perks, Kimber, Butcher, Atherley Jones, Marshall Hall, & Duke (1903) P.D. CXIX, 703).
168. 1903 P.P. (285) III 817.
169. The Times, letters Apr. 3 and Aug. 2, 1903. See also letter (12.8.1903) to Lord Chancellor (PRO LC02/148). In his correspondence with the Lord Chancellor Poland suggested two amendments to the Bill:-
- (a) that legal aid under the Act be made available to 'children, deaf and dumb persons, prisoners of weak intellect, and foreign prisoners like The Flowery Land pirates and The Lennie mutineers'.
  - (b) that legal aid under the Act be confined to representation by counsel only (his justification for this suggestion, which ran entirely counter to what he had been saying to The Times six years before was that in ninety nine cases out of a hundred a copy of the depositions with a written statement or an oral conference over the dock is the best possible brief for counsel). Others were concerned to prevent inexperienced counsel being given legal aid work. The Common Serjeant suggested that men of less than three years standing would do more harm than good. Herbert Stephen felt that the prisoner could be safeguarded by leaving it to the solicitor to secure counsel.
170. PRO LC02/148 - Middlesex Bar resolution 29.4.1903; Central Criminal Court Bar Mess letter May 19, 1903; North London Sessions Mess letter (undated). The arguments advanced by the bar were essentially the same as had been urged against the Prisoners' Counsel Act - that under the present system unrepresented prisoners were defended by the judge, and wrong convictions seldom, if ever, occurred, and that if the Bill became law the length of court sittings would be enormously increased.
171. 1903 P.P.(254,264) VII, 583.
172. See Q. 625 'I rather gathered that you think that before a prisoner was to be defended at the cost of the State he should have fully

stated what his defence was? Certainly. 626. That should be the one condition? That should be the basis of everything.'

173. See R. v. Simpson, The Times, Nov. 25, 1898 (adverse comment on failure to disclose defence at inquest); & R. v. Larder, The Times, Jan. 26, 1899. The Justice of the Peace for 1903 & 1904 (vols. 67 & 68) records numerous examples of judicial criticism of the reserved defence - Bigham J. 67 J.P. 557; Channell B. *ibid.* 571 & 583; unidentified judge, *ibid.* 583; Wills J. *ibid.*; Wills J. 68 J.P. 557 ('I reserve my defence is a common trick of solicitors who appear for prisoners who really have no defence. Sometimes it means I am going at Assizes to spring a defence upon the court, which nobody will be able to controvert because they do not know what it is and no inquiry can be made.')
174. PRO: LC02/148.
175. PRO: LC02/148: the Central Criminal Court and the Middlesex Sessions Bar messes sent in written objections, and the Council of the Law Society passed a resolution against the clause on Dec. 7, 1903. In April, 1904 the Lord Chief Justice wrote to the Lord Chancellor asking for the repeal of s. 48 of the 1848 Act, and suggesting that the examining magistrate should, instead of the statutory caution, say this to an accused:- 'You have heard the charge and the evidence against you. Do you wish to make a statement or give evidence upon oath? If you do, when the magistrate or magistrates have heard what it is, they will consider whether they can assist you to obtain legal assistance.'  
The proposal aroused no strong enthusiasm in the Lord Chancellor and was not pursued LC02/148.
176. (1904) 68 J.P., 29. The Law Times was also unenthusiastic:  
'for the small sum of one guinea any poor man can be defended by counsel, and this small sum is always forthcoming when a prisoner is made acquainted with such right and any defence exists' (115 L.T., p. 2).
177. (1904) 68 J.P., 26.180. Speech on receiving the Lord Mayor of London at the Law Courts (He had earlier in the year expressed the same view to a grand jury at Hertford: (1904) 68 J.P., 100).

## CHAPTER 6

1. At least 12 jurors had to concur in any majority verdict - Hawk., 2. P.C., c. 25, s.15.
2. J.F. & H. Stephen, Digest of Criminal Procedure (1883), p. 187; this was, however, a matter of practice, the law prescribed no qualification for county grand jurors (Report of the Departmental Committee on Jury Law, 1913 P.P. (Cmnd. 6817) XXX, 403, para. 58); for borough grand jurors the qualification was the same as for common jurors (see Juries Act, 1825, s. 1).
3. See Phillips, Crime & Authority in Victorian England, p. 103, and G.G. Alexander, The Administration of Criminal Justice, p. 91. The 1913 Committee found that in London it was the practice to call gentlemen who satisfied this test. As for boroughs outside London they were told that in Nottingham the practice was to choose persons of a superior class, and in Norwich to select 'professional men and persons of independent means' (para. 58).
4. The oath expressly enjoined secrecy. For the form of the oath see G.G. Alexander, op.cit., pp. 91-2
5. As bills began to emerge from the grand jury, witnesses in the later cases would be sworn; until 1856 such swearing of witnesses was done in open court by the common crier (often whilst a trial was going on); the Grand Juries Act, 1856 substituted a simpler and more seemly procedure:- witnesses were henceforth to be sworn by the foreman of the grand jury in the grand jury room.
6. When a bill was thrown out by the grand jury this did not rank as an acquittal; a second bill could not be preferred against the accused that session (R. v. Humphreys (1842) 1 C. & M. 601), and at the end of the session he would normally be discharged by proclamation; however, this was not a bar to the preferment of a fresh bill at the next session - Archbold, 20th ed. (1886) p. 88.
7. See e.g. Select Committee on Metropolitan Police Offices 1837/8 P.P. (578) XV, 321 evidence of Broughton (Q. 249) "We see bills thrown out to our astonishment in which the guilt is put beyond any possibility of doubt".



8. Amongst the records of the City of London is a draft report from its Administration of Justice Committee dated 3 August, 1838, in which it is stated that between November, 1834 and July, 1838 out of a total of 10,929 bills presented to them Old Bailey grand juries threw out 908 (8%); the records of the Committee for the same period contain an entry to the effect that 1 in 12 bills were ignored at the Old Bailey.
9. Per Sir. F. Thesiger at the Committee stage of the Grand Juries (Metropolis) Bill, (1857) P.D. CXLVI, 1439.
10. See the Select Committee on Metropolitan Police Offices 1837/8:- evidence of Good (Qs. 249-50) 'wholly unused to any business of the sort', and Thesiger, (1857) P.D. CXLV, 1429 'twenty three gentlemen generally unaccustomed to legal inquiries'.
11. Thesiger *ibid.*:- 'With nothing to guide them but the indictment containing the accusation and a list of witnesses on the back of it, they had to grope their way in the dark'; witnesses who gave evidence before the Select Committee on Metropolitan Police Offices were divided on the question of the desirability of furnishing grand juries with a copy of the depositions: Gregory (Q. 1667), and Codd (Q. 168) thought that the effect would be a substantial decrease in the number of bills thrown out whilst Brougham (Q. 252) thought it would make no difference; the jury were under such pressure to get through cases that they would not look at the depositions if provided with them.
12. See Bill 1816 P.P. (416)(O.14) II, 903 and (1816) P.D. XXXII, 547-8.
13. Select Committee on Metropolitan Police Offices 1837 P.P. XII (451), 309: evidence of Hardwick Q. 575 'there is the opportunity of smuggling witnesses away' and Gregory Q.s. 1666-8 (bribery); see also Select Committee of 1837/8 (*supra*) evidence of Brougham Q. 257 and Thesiger (1857) P.D. CXLV, 1426-7.
14. Thesiger (1857) P.D.CXLV, 1429 and (as Lord Chelmsford) (1859) P.D. CLII, 1612; see also 8th Report of the Criminal Law Commissioners, App. C, p. 358n.
15. The Queen's Bench practice is described in the evidence of W.S. Jones set out in Appendix B to the 8th Report of the Criminal Law Commissioners, Qs. 36-41. The Queen's Bench

was not, in fact, the first court to adopt this practice (it had been frequently adopted between 1660 and the late eighteenth century in State Trials (*ibid.* App. C., p. 358n.)); its adoption at the Old Bailey was recommended by the Administration of Justice Committee of the City in its draft report of August 3, 1838 and approved by the judges on November 2, 1838 (see App. C, p. 358n. *supra*, *The Times*, Nov 3, 1838 and 6 L.T. (1846) 219 where it was claimed that the adoption of the practice had reduced the number of bills thrown out from 12% to 5% of the total; see also Greaves, Report on Criminal Procedure, 1856 which refers to the practice being in use both at the Old Bailey and Durham, and the Old Bailey Rules of Dec. 12, 1892 r. 6 (cited in Archbold, 28th ed. (1900) p. 76)). The Jury Laws Amendment Bill, 1892 proposed that grand juries should be furnished with copies of the depositions.

16. See Select Committee on Metropolitan Police Offices 1837/8 *supra*, evidence of Codd Q. 168 and Thesiger (1857) P.D. CXLV, 1428-9, and (as Lord Chelmsford) (1859) P.D. CLII, 1611; the Law Magazine in an article furnished as a response to a questionnaire sent out by the Criminal Law Commissioners estimated that the attendance of witnesses before grand juries involved a cost to the county rates of some £3,500 p.a. (8th, App. C).
17. Thesiger (1857) P.D. CXLV, 1433 and (as Lord Chelmsford) (1859) CLII, 1429.
18. Select Committee on Metropolitan Police Offices 1837 *supra* evidence of Buckle Q. 1182; Thesiger (1859) P.D. CLII, 1429.
19. See Thesiger (1857) P.D. CXLV 1431-2. Also chapter 2.
20. See Thesiger (1857) P.D. CXLV 1431.
21. See Thesiger *ibid.* 1426; for the presentments themselves see the annual volumes of *The Law Times* under the heading 'Grand Jury'.
22. The Bills were the Administration of Justice (Metropolitan District) Bill, 1849 (referred to a Select Committee which reported favourably on it) ultimately dropped due to lack of Parliamentary time; the Grand Juries (Metropolitan District) Bill, 1852 (progress halted by general election), and the Grand Juries (Metropolitan District) Bill, 1857 (withdrawn because of lack of Parliamentary time). The basic scheme of the Bills was that

grand juries should be abolished in London, and that an information drawn up by the clerk of the court and based upon the committal charges should take the place of the indictment.

23. Indictable Offences (Metropolitan District) Bills, 1860 and 1861.
24. For the 'thin end of the wedge' argument see (1857) P.D. CLVI, 1433-4 and 1436 (Bowyer), (1859) P.D. CLIII, 1538, and (1860) CLVI, 901 (Lord Wensleydale). For the 'constitutional argument' see (1857) P.D. CLVI, 1436 (Bowyer) 1440-1 (Ayrton), 1445 (M'Mahon) 1447 (Cobbett) and (1859) P.D. CLIII 1530 (Lord Lyndhurst).
25. See e.g. presentment by Middlesex grand jury 1861 31 L.T. 465; presentment by Old Bailey Grand Jury 1864 40 L.T. 86; call for abolition by Law Society, The Times, Oct. 17, 1888.
26. Jury Law Amendment Bill, 1892.
27. See chapter 5.
28. In 1883 grand juries found no bill in 530 cases and true bills in over 14,000 (4%) - see Alexander, op. cit., p. 94; in 1898 the percentage of bills thrown out was only 1/8 (95 out of 3,645 bills) - see Judicial Statistics for 1898 (1900 P.P. CIII, 1).
29. Chitty, Criminal Law, 1st ed. (1816), Vol. 1, pp. 168-304.
30. Criminal Law Commissioners, 8th Report, 1845 P.P. (656) XIV, 161, p. 12-13 of the Report.
31. Chitty, op. cit., p. 442-3: 'the prisoner will have all the advantage he could possibly obtain in this way (i.e. by dilatory plea) by motion in arrest of judgment after taking the chance of a complete acquittal'. Objections based on variances of proof would sometimes be taken at the end of the prosecution case.
32. Abatement was the appropriate plea where the name or description of the accused was misstated.
33. A demurrer was a plea that the indictment was defective in substance or form.
34. 4 Bla. Comm. 334; Chitty, op. cit., pp., Vol.1, pp. 442 and 445.
35. Chitty, op.cit., Vol 1, p. 445 'after the indictment has been abated for misnomer the

court will not dismiss the prisoner but will cause him to be indicted de novo by the name disclosed in his plea' and p. 443 'if the defendant succeed in his demurrer on any formal exception he only obtains a little delay'; it was for this reason that abatement and demurrer were known as dilatory pleas.

36. Chitty, op. cit., Vol.1, p. 443; for examples of cases where the prisoner was re-indicted see e.g. R. v. Sheen, and R. v. Turner and Reader infra. In its leader of Dec. 31, 1842, calling for legislation on the subject, The Times asserted that a prisoner who escaped on an indictment point could not be re-arraigned. This mistake was pointed out by a correspondent in a letter published on Jan. 3, 1843, but the fact that it was made perhaps is an indication of how rare a second prosecution was in such cases.
37. R. v. Sheen (1827) 2 C. & P. 634, The Times, July 14 and 16, 1827.
38. R. v. Kelly (1825) 1 Lew. 193 (indictment charged prisoner with beating deceased on head with brick; what he had in fact done was knock him to the ground causing his head to strike a brick lying on the ground); see also R. v. Thompson (1826) 1 Moo. 139 and R. v. McDermott (1813) Russ. & Ry. 268 (accused indicted on 43 Geo. III, c. 58 for cutting with intent to murder; acquitted because injury caused by stabbing not cutting).
39. R. v. Turner & Reader (1830) 1 Lew. 49; c.f. R. v. Pearson (1831) 1 Moo. 313 (omission of 'against the form of statute').
40. R. v. Wilson (1806) Russ. & Ry. 116 (this was a common cause of acquittal).
41. R. v. Wilcox (1803) Russ. & Ry. 50 (indictment failed to state what forged instrument was).
42. R. v. Anon. (1827) 1 Lew. 234 (variance between indictment and forged document consisting of misspelling of a single word); R. v. Wright Roden & Holgate (1828) 1 Lew. 326 (indictment described forged document as signed in the name of Townend; in fact signed in name of Turnend); R. v. Goldstein (1822) Russ. & Ry. 473 (indictment set out verbatim wording of Prussian Treasury bill but contained no English translation of it).
43. Where a prisoner was undefended, indictment points were sometimes taken on his behalf by

the judge or by a counsel present in court as *amicus curiae*.

44. See e.g. *R. v. Fry & Fry* (1822) 5 J.N. 268 (defendant indicted for and convicted of burglary and theft of ten pounds in money; counsel moved in arrest of judgment on the ground that the money stolen was misdescribed in the indictment; pounds had no physical existence but were mere expressions of value used in computation and so could not be the subject of theft; the Twelve Judges held the conviction bad).
45. Peel had originally planned a more thoroughgoing reform but had been dissuaded - see (1826) P.D. XV, 1235): 'it was originally proposed to enact that if upon any indictment for felony or misdemeanour, the jury shall be satisfied that any person, time, fact, matter or other thing touching which evidence is given, is really the same person, time, fact, matter or thing intended by the indictment, it shall be lawful for the jury to find the defendant guilty notwithstanding any variance in the name or description contained in the indictment. It was thought, however, by some whom I consulted, and in whose judgment I place implicit confidence, that this enactment goes too far, and that it might introduce a laxity and uncertainty into indictments more mischievous than the excessive subtlety which it is intended to correct'.
46. S. 20 (the defects listed were averment of any matter unnecessary to be proved, omission of the words 'as appears by the record', or 'with force of arms', or 'against the form of the statute' instead of 'against the form of the statutes' or vice versa, description of a person by reference to his office rather than his name, where time was not of the essence of the offence omitting to state or mis-stating the time of the offence, and want of proper or perfect venue).
47. *Ibid.* s. 19.
48. By the 11 & 12 Vict., c. 46, s. 4.
49. By the 12 & 13 Vict., c. 45, s.10.
50. See *The Times*, Feb. 14, 1841.
51. *The Times*, Dec. 31, 1842.
52. 8th Report *supra*, pp. 8-16.

53. Ibid. App. A, p. 249 (the subject was also touched upon in a number of other answers to the questionnaire, see *ibid.* p. 216 (Deacon), p. 231-2 (Temple); Cobbett at p. 296 actually defended the existing law).
54. S. 24.
55. S. 25.
56. Under 3 & 4 Wm. IV, c. 42, s. 23.
57. Criminal Procedure Act, 1851, s. 1.
58. Ibid. s. 4 (murder, manslaughter), s. 5 (theft, forgery etc. of documents).
59. See e.g. *Sill v. R.* (1853) 1 El. & B. 553 (where it was held that, notwithstanding the 1851 Act, an indictment for obtaining goods by false pretences was bad if it did not state to whom the goods belonged; Lord Campbell at p. 556 said 'I hope that before long the Legislature will put an end to this nicety among others').
60. Indictments Act, 1915.
61. If the jury found him mute by visitation of God, they might also be called on to try his fitness to plead, on which issue the prison surgeon would normally be heard.
62. See *Chitty*, *op. cit.*, Vol.1, pp. 424-5.
63. By 12 Geo. III, c. 20; for examples of prisoners being executed after refusing to plead in felony see *R. v. Mercier* (1777) Leach 183 and another case referred to therein.
64. Ss. 1 and 2; this reform had, in fact, been urged by Blackstone, 4 *Comm.* 325 n. 4.
65. Plea on Indictment Bill, 1860 P.P. (241) V 207; Greaves in his answer to the Criminal Law Commissioners' questionnaire (*supra*) had suggested that prisoners should be taken to be pleading not guilty unless they volunteered a plea of guilty. The first attempt to carry the reform proposed by Brougham's Bill had in fact been made by Campbell L.C.J. in 1851 (Criminal Procedure Bill, 1851, cl. 28 (see (1851) P.D. CXVIII, 1373-4)).
66. (1860) P.D. CLIX, 757-9.

## CHAPTER 7

1. See e.g. R. v. Simonds (1823) 1 C. & P. 84; R. v. Bodle (1833) 6 C. & P. 186.
2. R. v. Beezley (1834) 4 C. & P. 220 (all witnesses on back of indictment ought at least to be tendered; Littledale J.); R. v. Bull (1839) 9 C. & P. 22 (prosecuting counsel ought not to keep back witnesses because their evidence would weaken the case for the prosecution; Vaughan & Williams JJ.); R. v. Barley (1847) 2 Cox 191 (Beezley cited with approval by Pollock C.B. and Coleridge J.).
3. R. v. Woodhead (1847) 2 C. & K. 520 (the prosecution's only duty was to have the witnesses on the back of the indictment at court - per Alderson B.); R. v. Edwards (1848) 3 Cox 82 (the judge would rarely interfere with prosecuting counsel's discretion as to which witnesses to call - per Erle J.); R. v. Cassidy (1858) 1 F. & F. 79 (Parke B.); R. v. Thompson (1876) 13 Cox 181.
4. See R. v. Goodere & others (1741) 17 S.T.1003, R. v. Colley & Sweet (1829) Moo. & M. 329; R. v. Wylde (1834) 6 C. & P. 380 (where the judge refused to allow a prosecution witness, who remained after being ordered out of court, to be examined).
5. In 1903 the Recorder of Leicester in his evidence before the Select Committee on the Poor Prisoners' Defence Bill was asked 'I suppose there is a certain number of ancient and skilful prisoners who can cross-examine reasonably well?' He replied 'There is no doubt that there is a certain class, but in my judgment the majority are wholly incompetent. The error made by prisoners attempting to cross-examine was:- to make statements instead of asking questions, and when reprovved for that either to lapse into silence or ask about irrelevancies' (1903) P.P. (254, 264) VII, 583). See also T.R. Bridgewater, The Poor Prisoner' Defence Act, 1903. and Gurney Campion, Justice & The Poor in England, pp. 50-1).
6. In the debate on the 1826 Prisoners' Counsel Bill, Lamb M.P. had alluded to a case where the trial judge had remarked that he considered it a bad thing when men such as the accused were seen so well versed in the knowledge of the intricate points of cross-examination ((1826) P.D. XV, 94); for examples of cases where the prisoner's skill in cross-

examining attracted the reporter's attention see e.g. R. v. Palmer, The Times, Nov. 8, 1810; R. v. Redding, The Times, Aug. 11, 1823 and R. v. Clover & Anor., The Times, Mar. 20, 1824.

7. R. v. Hardy (1794) 24 S.T. 735.
8. Parkin v. Moon (1836) 7 C. & P. 408.
9. Crimen falsi included forgery, perjury, subornation of perjury, bribing a witness to absent himself, and barratry but not conspiracy to defraud (Phillipps on Evidence, 8th ed., p. 17).
10. See Phillipps, op. cit., p. 19.
11. 9 Geo. IV, c. 32; competency could also be restored by a pardon.
12. East, 1 P.C., 78; it could not be established by cross-examination or even by an admission of the conviction and judgment by the witness (Phillipps, op. cit., p. 19-20).
13. Gilbert, p. 129.
14. Penalty (R. v. Gordon (Ld.) (1781) 21 S.T. 485; Raines v. Towgood (1796) Peake Add. Cas. 105); forfeiture (R. v. Newell (1707) Park 269); ecclesiastical censure (Chetwynd v. Linden (1752) 2 Ves. Sen. 450 (incest), Finch v. Finch (1752) 2 Ves. Sen. 491 (concubinage).
15. Lord Melville's case (1806) P.D. VI, 226-45.
16. 46 Geo. III, c. 47.
17. Cates v. Hardacre (1811) 3 Taunt. 424; Fisher v. Ronalds (1852) 12 C.B. 764.
18. R. v. Boyes (1861) 9 Cox 32, following Osborne v. London Dock Co. (1855) 10 Ex. 698 and Sidebottom v. Adkins (1858) 27 L.J.Ch. 152, and overruling Fisher v. Ronalds supra, Scott v. Millar (1859) John 328, and Ex p. Fernandez (1861) 10 C.B. 3. The judges also refused to countenance claims for privilege being made on behalf of a witness by counsel in the suit - R. v. Adey (1831) 1 M. & Rob. 94 and see generally R. v. Kingslake (1870) 11 Cox 499.
19. 1852-3 P.P. III, 337.
20. (1853) P.D. CXXIV, 1379-80.



21. R. v. Freind (1696) 4 S.T. 259 (Treby C.J.); Layer's Case (1722) 6 S.T. 93 at p. 259 (Pratt L.C.J.).
22. R. v. Cook (1696) 4 S.T. 748.
23. Peake's Compendium of Evidence, 2nd ed. (1801), p. 130 et seq.
24. R. v. Lewis (1802) 1 Esp. N.P.C. 225 (see also Alvanley C.J. in the civil case of MacBride v. MacBride (1802) 1 Esp. N.P.C. 242).
25. Phillipps, op. cit., p. 918.
26. Cundell v. Pratt (1827) M. & M. 108.
27. See e.g. R. v. Owen & Mitchell, The Times, July 9, 1801; R. v. Jacobs, The Times, Jan. 23, 1819; R. v. Webster, The Times, Dec. 20, 1823; R. v. Maurice, The Times, Apr. 16, 1824.
28. R. v. Watson (1817) 2 Stark. N.P.C. 591.
29. R. v. Frost & Holloway (1818) (unreported cited in Phillipps, op. cit., p. 922n).
30. R. v. Pitcher (1823) 1 C. & P. 85, and Alderson B. in Boyle v. Wiseman (1855) 10 Ex. 647; contra Holroyd J. in R. v. Watson supra p. 157 'if you propose a question to a witness and he declines to answer it, his not answering can have no effect on the jury'.
31. (1853) P.D. CXXIV, 1368-9 (Brougham); Best on Evidence, 1st ed. (1849), para. 143.
32. 28 & 29 Vict. c. 18, s. 6.
33. R. v. Castro, 1873, (Kenealey ed.) 32nd day 1, 396; cited Halsbury's Laws (3rd ed.), Vol. 15, 424n.
34. See Stephen, Digest of Law of Evidence (1st ed. 1876), art. 120, which, in dealing with the privilege against self-incrimination, makes no mention of degrading questions; Roscoe's Criminal Evidence, 12th ed. (1898), p. 132; Halsbury's Laws (1st ed.), vol. 13, p. 575. Contra Powell on Evidence, 8th ed. (1904), p. 100 which speaks of the privilege as possibly still existing.
35. In R. v. Hodgson (1812) R. & R. 211, the Twelve Judges held that the prosecutrix in a rape case could not be asked about her connection with other men, the question being one which had a tendency to degrade her. Later cases, however, held that such questions

might be put but she was not bound to answer - R. v. Barker (1829) 3 C. & P. 389 (Parke J.); R. v. Mercier (1842) 6 Jur. 243; R. v. Swann (1851) 15 J.P. 421. Her right to refuse to answer was upheld as late as 1870 by Willes J. in R. v. Cockroft (1870) 11 Cox 410. In R. v. Holmes (1871) 12 Cox 137 the Court for Crown Cases Reserved held that her answer to such questions was final, but ignored the question of whether she was bound to answer. In the result whether there was a privilege to refuse to answer in such cases remained uncertain until well into the twentieth century - see Archbold, 28th ed. (1931) p. 1046.

36. Sir Charles Russell in Osborne v. Hargreave & Wife (an action for slander) and Sir. Edward Clarke in Russell v. Russell (a divorce suit).
37. The Times, Jan. 2, 1892 (leader) and letters Jan. 1, 2, 7 and 12.
38. Indian Evidence Act, 1872 ss. 148-52; and a similar rule applied in civil actions, it being provided by O. 34, r. 38 of the R.S.C. that the judge should disallow any question put in cross-examination of any party or other witness which appeared to him to be vexatious or not relevant to any matter proper to be inquired into in the cause or matter.
39. Cooper v. Curry (1846) 11 J.P. 22.
40. In its Annual Statement for 1917 the Bar Council did, however, lay down rules as to the conduct of cross-examination modelled upon the Indian Evidence Act.
41. The Queen's Case (1820) 2 Brod. & Bing. 286.
42. 7 C. & P. 676.
43. R. v. Edwards (1837) 8 C. & P. 26.
44. Littledale and Coleridge JJ., Parke B., Tindal L.C.J., Park J., Bolland B., Bosanquet J. and Coltman and Patteson JJ. (9 out of the 15 judges).
45. R. v. Tooker (1849) 4 Cox 93b; R. v. Peel (1860) 2 F. & F. 21.
46. Second Report of the Common Law Commissioners, 1852-3 P.P. (1626) XL, 701.
47. See e.g. R. v. Barnett (1850) 4 Cox 269; a variant upon the theme was employed by counsel in R. v. Newton (1850) 4 Cox 262 where a witness was asked whether he recollected such

a fact when before the magistrates; Patteson J. disallowed the question despite counsel's protests that on the first trial of the case the trial judge had allowed the question to be asked.

48. Referred to in R. v. Ford (1851) 5 Cox 184.
49. R. v. Matthews (1849) 4 Cox 93.
50. R. v. Palmer (1851) 5 Cox 236; R. v. Brewer (1863) 9 Cox 49.
51. R. v. Moir (1850) 4 Cox 279; R. v. Price (1857) 5 Cox 405.
52. R. v. Shellard (1840) 9 C.& P. 277
53. R. v. Griffiths (1841) 9 C.& P. 746; R. v. Christopher (1850) 4 Cox 76.
54. In R. v. Barnett (1850) 4 Cox 269 it was held that the rule did apply to coroner's depositions but contra R. v. Maloney (1861) 9 Cox 6.
55. R. v. Taylor (1839) 8 C. & P. 726; R. v. Brewer supra.
56. S. 24.
57. Greaves, Report on Criminal Procedure, 1856 P.P. (456) L, 79
58. S. 5.

## CHAPTER 8

1. Gilbert, Evidence, p. 123 (he also argues that the evidence of an interested witness is incredible by reason of bias).
2. See also in this connection the prohibition upon examining magistrates and police officers interrogating prisoners and the caution.
3. See e.g. the Att.-Gen. (1865) P.D. CLXXVII, 942.
4. See e.g. Stephen (1857) 29 L.T. 146 and Ashley (1876) P.D. CCIX, 1182.
5. Stephen *ibid.* said that the last case he had been able to find in which the prisoner had been questioned by the judge was R. v. Harrison (1692) 12 S.T. 859; but see chapter 4, n. 78.
6. See chapter 7, nn. 5 & 6.
7. This point was forcefully made during the debates on the Prisoners' Counsel Bills.
8. (1882) 73 L.T., p. 229 & (1884) Ir.L.T. 317.
9. See e.g. R. v. Moore, The Times, Mar. 7, 1844 (Alderson B.)
10. R. v. Dickinson (1844) 1 Cox 27.
11. See e.g. R. v. Nutts & Riley, The Times, Dec. 9, 1800; R. v. Locke, The Times, Aug. 20, 1808; R. v. Broughton, The Times, Mar. 11 & 13, 1819, and see Copy of Case & Opinions printed by W. Shelmerdine & Co. (1802), pp. 3-4 cited by Beattie, Crime & the Courts, p. 276.
12. R v. White (1811) 3 Camp. 98.
13. E.g. R. v. Roper, The Times, Dec. 28, 1816 (perjury); R. v. Macklin & others (riot), The Times, July 25, 1818; R. v. Johnson & others (seditious libel), The Times Apr. 19, 23 & 26, 1819.
14. E.g. R. v. Peltier (libel) and R. v. Hedges & Hedges (conspiracy) (1803) 28 S.T. 529 and 1315 respectively; R. v. Dinney (1832) 3 S.T. (N.S.) 11.
15. R. v. Redhead Yorke (1795) 25 S.T. 1003.
16. R. v. Perkins (1824) 1 C. & P. 548.

17. 7 S.T. 276n.
18. R. v. Bellingham, The Times, May 15-16th, 1812 (letters).
19. R. v. Stephens (1839) 3 S.T.(N.S.) 1189 (newspapers); R. v. Thurtell & Hunt (Notable British Trials Series), p. 138 (newspapers).
20. R. v. Richard Carlile, The Times, Oct. 13, 1819; R. v. Ann Carlile (1821) 1 S.T.(N.S.) 1033; R. v. Davidson, The Times, Oct. 24, 1820; R. v. Waddington, The Times, Oct. 24, 1822; R. v. Tunbridge, The Times, Jan. 21, 1823.
21. See e.g. R. v. Thurtell & Hunt supra in which Thurtell read his defence, whilst Hunt had his read for him by the clerk of the court. Exceptionally counsel might be allowed to read the prisoner's statement - see e.g. R. v. Perrot, The Times, Apr. 1, 1800 (prisoner nervous).
22. R. v. Booth, The Times, July 18, 1823.
23. R. v. Harry, The Times, Aug. 19, 1817 and also the cases of R. v. Ripley & others, The Times, Apr. 7, 1815; R. v. Taylor & Taylor, The Times, Jan. 17, 1816; R. v. Woodyer, The Times, Mar. 21, 1859 (where the defence bore all hallmarks of lawyer's drafting).
24. Reply of Inspector of Prisons to the Report of the Court of Aldermen 1835 P.P. (486) XLIII, 283 (2 wardsmen allowed to charge their fellow prisoners 5/- per brief; the principal turnkey said that at some sessions 'not that long ago' they had drawn 20 to 30 briefs). See also The Times, July 27, 1836 (Court of Aldermen).
25. R. v. Brunt (1820) 33 S.T. 1177.
26. R. v. Mayo, The Times, Sept. 4 & 5, 1818, R. v. Burgess, The Times, May 28, 1819; in both cases the judge was Garrow B; in the first he directed the jury that it would be extremely hard to convert such a document into evidence against the prisoner; in the second he intervened to prevent it being read at all.
27. R. v. Meetham, The Times, Aug. 23, 1825 (the prisoner, upon being called upon for his defence, pulled many sheets of paper out of his pocket; Bayley J. said it might do him more harm than good, upon which two of counsel present in court looked over it and recommended him not to read it). Also R. v. Cain, The Times, Jan. 13, 1826: illiterate

prisoner handed in written paper; in answer to a question from judge admitted paper had not been read to her; judge asked Governor of Newgate to take the prisoner out and read and explain paper to her, and then ask if she wanted it read.

28. See e.g. R. v. Hunt, The Times, Oct. 25, 1823 (boy of 8 cried very much and said witnesses had sworn falsely); R.v. Mumford, The Times, Mar. 8, 1854 (boy aged 12 wept and begged for mercy).
29. R v. Hicks & others, The Times, Jan. 4, 1831; in 6 of the 12 criminal cases brought before the Bedfordshire Epiphany Sess for 1832 the Chairman of the Bench noted 'Defence says nothing' - Beds. R.O. PM 2629 Notebook of Pym.
30. See e.g. R. v. Gibbs, The Times, Mar. 27, 1819 ('I don't know that I can say anything').
31. A stock phrase frequently to be found in reports of trials in The Times and the C.C.C. Sessions Papers in the second quarter of the century.
32. See e.g. R. v. Jones, (1844-5) 21 C.C.C. Sess.Pap. (Nov. Sess.); R. v. Williams ibid. (April Sess.).
33. see e.g. R. v. Pratt (1844-5) 21 C.C.C. Sess.Pap. (Apr. Sess.) and R. v. Kirby ibid.
34. R v. Edwards (1845) 22 C.C.C. Sess.Pap. (May Sess).
35. R v. Johns (1845) 22 C.C.C. Sess.Pap. (May Sess.); see also R. v. Mitchell, The Times, Jan. 11 1803 (admits guilt (murder)); R v. Richardson & others, The Times, June 7, 1813 (R put in a confession and implored mercy); R. v. Oughton & Lee, The Times, Aug. 22, 1811 (Lee: 'My lord I have nothing to say but I hope you will spare my life'); R. v. Johnson, The Times, Jan. 16, 1817 (J threw self on mercy of court); R. v. Clark, The Times, Sept. 12, 1823 (C asked if he wished to put any questions: 'I wish to plead guilty').
36. R. v. Tibbs, The Times, Sept. 13, 1809; R. v. Andrews, The Times, Aug. 19, 1816.
37. R v. O' Connor & others (1843) 4 S.T. (N.S.) 935.
38. R. v. Barstow, The Times. Apr. 15, 1813 (ex clergyman).

39. R. v. Pilkington, The Times, Aug. 22, 1808.
40. India Act No. XXV of 1861 and see also Code of Criminal Procedure Act, 1882, s. 342.
41. Letter to The Times, Oct. 27, 1897 (Ashley).
42. See chapter 5.
43. See the comment of Alderson B. in R. v. Malings (1838) 8 C.& P. 242 that unsworn statements, by defeating the defence intended by counsel, often served to advance the cause of justice.
44. R. v. Skene, The Times, Feb. 16, 1812 where counsel stopped it being read; and R. v. Bennett, The Times, May 28, 1819 where counsel simply declared himself ignorant of its contents.
45. R. v. Codling (1802) 28 S.T. 177; R. v. Ashcroft & Holden, The Times, Sept. 9, 1817; R. v. Kerr, The Times, Oct. 31, 1815; R. v. Thurtell & Hunt 1824 (Notable British Trials Series) pp. 157-8.
46. R. v. Carey, The Times, Sept. 17, 1803.
47. R. v. Cullen & others, The Times, Aug. 12, 1800; R. v. Jackson, The Times, July 5, 1804; R. v. Cane, The Times, July 24, 1810; R. v. Heath, The Times, Nov. 7, 1811; R. v. Cuttis, The Times, Sept. 17, 1812 (worked to accused's advantage); R. v. Antonio, The Times, Sept. 19, 1814; R. v. Peru, The Times, July 13, 1816; R. v. Abbott, The Times, Feb. 25, 1822.
48. Letter to The Times, Jan. 8, 1884 (Littler).
49. Coleman's Trial (1688) 7 S.T. 1 where Scroggs C.J. upon the prisoner asserting in his defence 'I came home on the last day of August' asked whether he had any witness to prove this, and, upon being told that he had not, retorted 'Then you say nothing'.
50. R. v. Mansfield, The Times, Aug. 15, 1803 where the jury were told that the prisoner's defence must be considered as nothing, as there was no evidence to support it; R. v. Maddocks, The Times, Oct. 31, 1815 where Heath J., although he did not in terms say that the prisoner's defence was worthless, commented that he had made no attempt to substantiate it by calling witnesses; R. v. Vamplew, The Times, Mar. 2, 1822 (the judge interrupted the prisoner's defence to ask if he had witnesses to prove what he said); R. v. Jackson, The

Times, July 12, 1826 (Hullock B. remarked in his summing up upon the absence of friends who might have made out the prisoner's defence had it been true); R. v. Donovan, The Times, Jan. 4, 1839 (Gurney B. interrupted the defence closing speech to ask counsel if he intended to call witnesses, and, upon being told that he did not, said 'Then your statement goes for nothing'); see also leader in (1859) 23 J.P. 194 on Brougham's Bill to allow prisoners to give evidence: '(a prisoner's evidence) of course must be supported by corroborative evidence, otherwise it will run the risk of being disregarded and very properly, for courts insist upon legal evidence of everything they accept as fact'.

51. R. v. Power, The Times, Sept. 25, 1805; R. v. Duncan, The Times, Mar. 21, 1807 C.B. directed the jury that in considering the prisoner's (unsworn statement) it was fair to allow what he said in his own favour as well as what he said against himself'; R. v. Anon., The Times, Oct. 24, 1808 the Chairman of Clerkenwell Sessions directed the jury that they would give prisoner's statement what weight they considered it deserved.
52. R. v. Beard (1837) 8 C. & P. 142.
53. R. v. Dyer (1844) 1 Cox 113.
54. See e.g. R. v. O'Donnell, The Times, Dec. 3, 1883 Sir Chas. Russell accepted that effect could only be given to a prisoner's statement to the extent that it fitted in with the evidence for the Crown.
55. R. v. Herbert, The Times, Dec. 4, 1807 Grose J. commented upon the fact that the prisoner's defence had never been mentioned by him when he was first charged by the officer nor at any period before the trial; R. v. Rush, The Times, Apr. 2-5, 1849 (failure to give account before examining magistrate commented upon); R. v. Thompson, The Times, Mar. 25, 1854 the Chief Baron invited the jury to consider whether a statement made to the governor of the gaol had been concocted by the prisoner after he had reflected on the evidence. See also the cases cited at Chapter 5, n. 173).
56. 7 & 8 Wm. III, c. 3, s. 7 (in cases of treason the prisoner to have same process to compel witnesses for him as to compel witnesses against him); 1 Anne, st. 2, c. 9 (witnesses for the prisoner to be on oath in all cases of treason or felony). After the latter statute power to subpoena witnesses was granted to



- prisoners charged with felony Hawk., 2 P.C., c. 46, s. 165. (it had always been available to prisoners charged with misdemeanour - *ibid.*).
57. R. v. Cooke (1824) 1 C.& P. 321, and Pell v. Daubeney (1850) 5 Ex. Rep. 955 per Alderson B. *arguendo*.
  58. R. v. Simmons, *The Times*, Mar. 29, 1830 (Vaughan B. observed that in Norfolk, where the Assizes were held at the very extremity of the county, it was often impossible for a prisoner to procure the attendance of his witnesses). In 1878 the Judges pointed out the hardship to prisoners of trying them at distant places (Report respecting Circuits 1878 P.P. (311) LXIII, 1).
  59. Report of Select Committee on Gaols 1819 P.P. (579) VII, 1
  60. In the debate on the Prisoners' Counsel Bill, 1824 Martin M.P. mentioned a case in which Garrow B. had refused to put a capital case back until a character witness for the prisoner arrived saying 'I will give you credit for a good character' ((1824) P.D. XI, 219); R. v. Jones 1803 3 East 31 where Lawrence J. said that it was the constant practice at the Old Bailey not to put off trials because character witnesses were absent; R. v. Lowther, *The Times*, Mar. 8, 1833 (after the jury had been sworn, the prisoner applied to Gurney B. for a postponement, stating that she had counsel and witnesses coming on the morrow; she was told her application came too late, and had the galling experience of seeing her counsel come into court after she had been convicted, and explain that there were indeed witnesses coming the next day, and that it was on his advice that they had been held back in order to save expense to the prisoner who was poor); R. v. Lyons, *The Times*, Oct. 29, 1835 (the prisoner's protest that his witnesses as to character were absent was brushed aside by the Common Serjeant with the words 'We will give you the benefit of a good character').
  61. Report of Committee on State of Police of Metropolis 1816 P.P. (510) V, 1 (Minutes of Evidence p. 65). In 1834 and 1835 there were complaints in open court by Old Bailey counsel about the fact that it was impossible for counsel and prisoners to know when their cases would come on, which drew from the Common Serjeant the observation that they ought to have notice the night before at the latest

- (The Times, Dec. 8, 1834 and Jan. 2, 1835). At the end of 1835 it was announced that henceforth homicide cases would be taken on Friday and other capital cases on Wednesday (The Times, Nov. 2, 1835).
62. R. v. Palmer, The Times, Dec. 11, 1843 (a prisoner, who protested that he was too poor to employ an attorney to prepare an affidavit, was told by Cresswell J. that he had no doubt that some gentleman would take the case out of charity (which fortunately for the prisoner is what happened)). In R. v. Langhurst (1866) 10 Cox 353 Channell B. rejected an affidavit sworn by the prisoner's attorney on the ground that its contents were hearsay, and insisted on an affidavit from the prisoner's mother, notwithstanding that the ground of the application was that, because of her extreme poverty, the mother had found it impossible to procure the attendance at court of witnesses to prove her son's insanity.
  63. Lefroy B. in R. v. Mitchel (1848) 3 Cox 1.
  64. R. v. Wardle (1842) C. & Mar. 647 (contrary to Foster, 62 and not followed in R. v. Fitzgerald (1843) 1 C. & K. 201).
  65. R. v. Nesbitt (murder), The Times, July 24 & 29, 1820 (application to stand case out till next Assize, the grounds being that, on his arrest, the prisoner's money had been taken from him, in consequence of which he had been unable to procure the attendance of witnesses who were necessary to his defence; Wood B. refused the application, saying plenty of time already been allowed) and R. v. Luis & Brown, The Times, Apr. 9, 1874 (Brett J., upon being told by the prisoner that his witnesses were not at court, said 'I can't help that').
  66. See R. v. Lyons supra.
  67. Gilbert, pp. 131-2; East, 1 P.C., p. 313n; Archbold (1st ed. 1822), p. 97; R. v. Wright, The Times, Dec. 12, 1809 is a case which very much wears this appearance and led to strong criticism of the prosecutor by Lord Ellenborough.
  68. Bentham, Rationale of Judicial Evidence, Bk. 5, ch. 16. Other remedies suggested by him included refusing to receive any alibi witness, unless he was accompanied by a certain number of persons (in the nature of compurgators) to speak to his character, and giving the judge power, in a case where alibi evidence had been called, to adjourn the case

or discharge the jury so that the alibi and the witnesses called in support of it could be investigated (this he described as the only adequate remedy).

69. House of Lords' Select Committee on the Prisoners' Counsel Bill, 1835 P.P. (HL 130) XLVI, 317.
70. Bentham, op. cit., Bk. V, ch. 16 wrote that for every alibi that was true 'there are perhaps some hundreds ... which (are) false'. The Recorder of London in his Evidence to the House of Lords Select Committee on the Prisoners' Counsel Bill, 1835 (supra) said at p. 338 'I think the case of a true alibi is extremely rare'.
71. As to prevalence of false alibis in the nineteenth century see the material cited by R.N. Gooderson, Alibi, p.1ff. In the early eighteenth century, the Sessions House at the Old Bailey was frequented by professional alibi witnesses, known as Straw Men due to their habit, when plying for trade, of wearing straws in the buckles of their shoes (G.Howson, Thief Taker General, p. 141).
72. A.M. Sullivan, The Last Serjeant, p. 109.
73. M. Healy, The Old Munster Circuit, p. 168-70. A Kerry alibi was one which was true in every respect except one, the date. A Tipperary alibi was one designed to show that the Crown witnesses were on the day of the crime at places different to those to which they had spoken in evidence.
74. Foster, p. 368.
75. See e.g. an article in (1870) 48 L.T., 367, referring to observations on the subject made by Hannen J. in a recent case at Hampshire Assizes.
76. R. v. Boucher (1837) 8 C. & P. 141.
77. R. v. Burrows (1838) 2 Moo. & R. 19.
78. R. v. Rider (1838) 8 C. & P. 539.
79. R. v. Taylor (1859) 1 F. & F. 535.
80. R. v. Beard supra.
81. R. v. Butcher (1839) 2 M. & Rob. 228.

82. Smart v. Rayner (1834) 6 C. & P. 721, Stevens v. Webb (1835) 7 C. & P. 60; Duncombe v. Daniell (1837) 8 C. & P. 222.
83. R. v. Malings (1838) 8 C. & P. 242.
84. R. v. Walkling (1838) 8 C. & P. 243.
85. 76 L.T. 187.
86. R. v. Williams (1846) 1 Cox 363.
87. R. v. Manzano (1860) 2 F. & F. 64.
88. Dec. 13, 1884.
89. 13 Ir.L.T., 566.
90. R. v. Stephens (1871) 11 Cox 667.
91. R v. Crane & Debock (1861) 54 C.C.C. Sess. Pap. 154; R. v. Brown (1863) 61 C.C.C. Sess.Pap. 240.
92. 1882 26 Sol. Jo., p. 191; 13 Ir.L.T., p. 566; Mead (letter to The Times, April 9, 1898).

## CHAPTER 9

1. Bentham, Rationale of Judicial Evidence (1827).
2. Pickwick Papers, C. 34; see W.B. Odgers, 'A Century of Law Reform' (1901) 217 'When as a boy I read the Pickwick Papers I was always puzzled to know why Mr. Pickwick did not go into the witness box and say that he never promised to marry Mrs. Bardell and explain how the good lady came to make such a mistake'.
3. 9 Geo. 4, c. 32, s. 2.
4. 6 & 7 Vict., c. 85.
5. 9 & 10 Vict., c. 95, s. 84.
6. (1851) P.D. CXVI, 16 'when the parties were examined the difficulty of discovering the truth was rather increased'. Lord Truro was not its only opponent. Lord Campbell noted in his diary 'all the common law judges but one are hostile' (Bowen Rowlands, Seventy Two years at the Bar, p. 26). This doubtless explains why the Lord Chancellor, in the second reading debate, was loud in his complaints that the opinion of the common law judges had not been sought (P.D. *ibid.*). Promoted by Brougham the Bill had the support of Denman and Campbell and all but one of the county court judges (17 L.T. (1851), p. 99).
7. 22 J.P. 200; (1858) P.D. CLI, 1481.
8. Law of Evidence Further Amendment Bill. For text see (1859) 23 J.P. 185 and 193-4.
9. (1859) P.D. CLII, 760-6.
10. Law of Evidence Further Amendment Bill 1860 (see 24 J.P. 426; (1860) 35 L.T. 193; (1860) P.D. CLIX, 1085.
11. Petty Offences Bill, 1863 P.P. (240) III, 253.
12. (1863) P.D. CLXXII, 1203.
13. Petty Offences Law Amendment Bill 1864 P.P. (121) III, 237.
14. (1864) P.D., CLXXVI, 1433.
15. 'Mahon & Scully's Bill - Criminal Cases Evidence Bill, 1865 P.P.(8) I, 471; Fitzroy Kelly's Bill - Law of Evidence etc. Bill, 1865

(not printed in Parliamentary Papers but see (1865) P.D. CLXXVII, 933-45).

16. P.D., *ibid.*
17. *The Times*, May 18, 1860.
18. In a lecture to the Juridical Society (1857) L.T. 146.
19. 19 Sol. Jo. (1874-5), p. 575.
20. *R. v. Grigg* (1660) 1 Ves. Jr. 49.
21. In 1785 Lord Kenyon had held that a prisoner, who had referred to a woman as his wife during his trial, was thereby estopped from calling her as a witness unreported. The correctness of this ruling (cited by Phillipps, 8th ed. (1838), p.173) was doubted by Richards C.B. in *Campbell v. Twemlow* 1814 1 Price 81. In *R. v. Young* (1847) 2 Cox 291 Erle J. held that a reputed wife was competent and the ruling was followed in *R. v. Chadwicke* (1847) 11 Q.B. 173 and *R. v. Blackburn* (1853) 6 Cox 333, and, in fact, never thereafter seriously challenged.
22. (1892) P.D. I, 67 (Lord Halsbury L.C. referring to *Campbell* L.C.J..)
23. *R. v. Arundel* (1849) 4 Cox 260; *R. v. Fanny Archer* (1848) 3 Cox 228.
24. *R. v. Stewart & Stewart* (1845) 1 Cox 174; the reporter of this case doubted the correctness of the decision because of the proviso to Denman's Act, but there is no weight to this objection in view of the express decision in *R. v. Hicks & Drury* (1848) 3 Cox 190 that the proviso applied only to civil proceedings.
25. *R. v. Deeley* (1870) 11 Cox 607.
26. *Ibid* n.
27. *R. v. Payne* (1872) 12 Cox 118.
28. *R. v. Barber*, *The Times*, Apr. 11-20, 23, & 29, 1844.
29. *The Times*, Sept. 23, 1882 (report of proceedings of Social Science Congress (Hastings M.P.)).
30. In *R. v. Littlechild* (1871) L.R. 6 Q.B. 293 the Queen's Bench dismissed an appeal against a conviction before magistrates based upon the refusal of the magistrates to allow separate trials, so that one defendants might testify

for the other, stating that the matter was entirely one for the court's discretion. In *R. v. Foote & Ramsay*, *The Times*, Mar. 6, 1883 an application for separate trials on the like ground was refused by North J. who ruled that a joint trial could cause no injustice.

31. See *R. v. Boulton* (1871) 12 Cox 87 where the practice was condemned by Cockburn L.C.J. in much the same terms as had been used by Lord Ellenborough in *R. v. Wright & Others*, *The Times*, Dec. 12, 1809. See also *R. v Rowlands* (1851) 5 Cox 466 at p. 497.
32. Archbold, 20th ed. (1886), p. 171.
33. The practice of summoning a fresh panel when the panel had been so far exhausted by challenges that a full jury was not left appears to have been due to doubts as to the power of a criminal court to award a tales in cases of deficiency of jurors - see Archbold, 20th ed. (1886), 176.
34. *R. v. Frost & 12 others*, *The Times*, Jan. 1 1840; *R. v. Turner, Kelsall & others*, *The Times*, Oct. 12, 1842.
35. *R. v. Sealey* (1844) 8 J.P. 328.
36. *R. v. Fisher* (1848) 3 Cox 68.
37. 1856 P.P. (456) L, 79.
38. *R. v. Woods & May* (1853) 6 Cox 274.
39. *R. v. Burdett* (1855) 6 Cox 458.
40. *R. v. Smith* (1826) 1 Moo. C.C. 289.
41. Phillipps, *op. cit.*, p. 160.
42. *R. v. Bartlett & Anderson* (1844) 1 Cox 105. Other cases where a wife was admitted for a co-prisoner include *R. v. Moore & Turner* (1843) 1 Cox 59, and *R. v. Denslow & Newbury* (1847) 8 L.T. (O.S.) 559.
43. *R. v. Thompson* (1872) 12 Cox 202.
44. Wigmore, *Treatise*, 3rd ed. (1940), 579 n. 1.
45. Wigmore, *ibid.*, 579 and 12 Ir.L.T. (1878), 554; amongst the first states to follow the example of Maine were Massachusetts (1866), Connecticut (1867), New Hampshire and New York (1869) and New Jersey (1871). But note that until 1962 defendants in criminal cases in

Georgia were not permitted to testify on oath (Wigmore 579 n. 7).

46. Law Magazine, 4th series, vol. 1, p. 631; Code of Criminal Procedure Act, 1861 (India Act XXV of 1861).
47. 17 & 18 Vict., c. 122, s. 15; 18 & 19 Vict., c. 96, s. 36; 20 & 21 Vict., c. 62, s. 14; 28 & 29 Vict. c. 104, s. 34; The Customs Consolidation Act, 1876, s. 259.
48. Master & Servant Act, 1867, s. 16.
49. Merchant Shipping Act, 1871, s. 11.
50. This was the justification for the exception urged during the Commons debates on the 1876 Act ((1876) P.D. CCVIII, 900 'it seemed to him that if they threw upon the accused the onus of proving that he had used all reasonable means of making a ship seaworthy they must in justice allow him to be called as a witness'). In 1869 provisions in the Habitual Offenders and Bankruptcy Bills of that year had been criticised in the Law Journal (vol. 4, p. 151) on the ground that, where the law cast a burden of proof upon an accused, common justice required that he be allowed to give evidence in order to discharge that burden. An example of a statute casting a burden of proof on an accused without conferring a corresponding right to testify was the Factories Act, 1844.
51. Coal Mines Regulation Act 1872, s. 63 r. 4.
52. Metalliferous Mines Regulation Act, 1872, s. 34, r.4.
53. Sale of Food & Drugs Act 1875, s. 11.
54. Merchant Shipping Act 1875, s. 4., Merchant Shipping Act, 1876, s. 4.
55. Threshing Machines Act, 1878, s. 3.
56. Conspiracy & Protection of Property Act, 1875, s.11.
57. Evidence Act, 1877, s.1.
58. Licensing Act 1872, s. 51(4).
59. Contagious Diseases of Animals Act, 1878, s. 66(6).
60. The Times, Mar. 16, 1851.



61. Report of Committee of Judges respecting Circuits, 1878 P.P. (311) LXIII, 1, para. 4.
62. An Order in Council made under the Winter Assizes Acts, 1876-7 enabled a judge or 2 justices of the peace to order upto £20 to be advanced to the defence out of public funds to cover the travelling expenses of defence witnesses (it did not authorise the making of advances in respect of witnesses' subsistence).
63. See R. v. Woolf, The Times, Jan. 10, 1884; (1890/91) P.D.CCCLVI, 770; R. v. Watts & Hall, The Times, June 8, 1896.
64. (1890/1) P.D. CCCLVI, 770; S.O. 213 (Local Prisons), para.4 gave effect to the undertaking.
65. Evidence Further Amendment Act, 1869, s. 4.
66. Quakers & Moravians Act, 1833.

## CHAPTER 10

1. The Times, Oct. 6, 1874.
2. (1878) 12 Ir.L.T. 554, 563, 575, and 593.
3. Criminal Law Evidence Amendment Bill, 1876 P.P.(61) I, 511.
4. Criminal Law Evidence Amendment Bill, 1877 P.P.(76) I, 481 (promoters Ashley, Gurney & Clive).
5. Criminal Law Evidence Amendment Bill, 1878 P.P.(23) II, 243.
6. Sjt. Simon (1876) P.D. CCXXX, 1928.
7. Sjt. Simon (ibid.); Rodwell (ibid. 1927).
8. Sjt. Simon (ibid. 1928).
9. Whalley (ibid. 1938-9).
10. Russell Gurney (ibid. 1928-33).
11. Ashley (ibid. 1939).
12. Sir Thos. Chambers (ibid. 1933-4).
13. Ibid. 1936-7.
14. Of the 13 members who spoke in the debate (1878 P.D. CCLVII), the following spoke in favour of the Bill: Ashley (657) and Russell Gurney (676) its promoters, Burgess (666), Kenealey (674-6), Forsyth (674), Sir H. James (678), Mitchell Henry (683).
15. (1878) P.D. CCLVII, 660-4.
16. Ibid. 688.
17. Att. Gen. (ibid. 684-8).
18. Ibid. 688. The Threshing Machine Bill received its first reading on the same day (ibid. 689).
19. Sir J.F. Stephen (1877) 2 Nineteenth Century, 737, 'The Reform of the Criminal Law'. See also Alfred Wills (1878) 3 Nineteenth Century, 169 'Should Prisoners be Examined?'
20. The case was R. v. Greenwood, Jackson & Wild (referred to in The Times report of R. v. Sutcliffe & others, Nov. 12, 1877). It was referred to in the debate by Ashley (1878)

- P.D. CCLVII, 659 and Russell Gurney (ibid. 677).
21. Cl. 6 of the Bill prohibited cross-examination of the accused as to previous convictions or charges, or as to other offences (although not as to other matters of discredit), whilst cl. 10 provided that the failure or neglect of an accused to give evidence should not raise any presumption against him, nor should it be referred to or commented on during the trial.
  22. Ashley (1876) P.D. CCXXIX, 1183, & CCXXX, 1925-6; Russell Gurney (1878) P.D. CCLVII, 678.
  23. Ashley (1876) P.D. CCXXIX, 1182, 1184; (1878) P.D. CCLVII, 658, Forsyth (1878) ibid., 674.
  24. Ashley (1876) P.D. CCXXIX, 1183-4, Russell Gurney (1876) P.D. CCXXX, 1932, and (1878) P.D. CCLVII, 659.
  25. Simon (1876) P.D. CCXXX, 1928, & CCXXX, 1928, and (1878) CCLVII, 664; Chambers (1876) CCXXX, 1934: & Rodwell (1878) Rodwell CCLVII, 665.
  26. Simon (1876) P.D. CCXXX, 1928; Knatchbull-Hugessen, ibid. 1935-6; Att.Gen., ibid. 1936-7; Simon, (1878) CCLVII, 663-4, Roebuck ibid. 665; Paget, ibid. 670; Wheelhouse, ibid. 683. During the debate on the 1876 Bill both Ashley, CCXXX, 1926 and 1939, and Russell Gurney, ibid. 1932-3, argued that the accused could be protected by a clause such as that which they inserted in their Bills of 1877 and 1878. Bowyer, ibid. 667, argued that if a prisoner had an honest reason for refusing to give evidence, such as over-nervousness or prostration, it could be stated and would have due weight with the jury.
  27. Att.Gen. (1878) P.D. CCLVII, 686; the two later Bills contained a clause prohibiting cross-examination as to previous convictions.
  28. Rodwell (1876) P.D. CCXXX, 1923, Simon ibid. 1929; Att.Gen. ibid. 1937; Bowyer pooh-poohed the idea that nervousness would be a handicap; in a passage, taken from Hawkins, he urged that, however uneducated or nervous he might be, an innocent man could hardly fail to impress the jury with his plain unvarnished tale ((1878) P.D. CCLVII, 667); while Kenealey simply denied that that there was any probability of innocent persons being overwhelmed by nervousness (ibid. 673).

29. Herschell (1878) CCLVII, 668. Kenealey's answer to this was that 'If a man resorted to falsehood he must suffer the penalty of his vice or folly' (ibid. 674).
30. Simon (ibid. 661).
31. Paget (ibid. 671).
32. This argument, although touched on during the debates on the 1876 and 1878 Bills, was first fully developed in the debates on the later Prisoners' Evidence Bills.
33. Simon (1878) P.D. CCLVII, 662, Herschell ibid., 669; Bowyer and Kenealey (ibid. 673) suggested any re-examination could be carried out by the judge.
34. Simon (1876) P.D. CCXXX, 1929; Att.Gen. ibid. 1937-8; Simon CCLVII, 662-3 (laying particular stress on the dangers of the Act as it would be applied by Quarter Sessions chairmen); Ashley (ibid. 659), Russell Gurney (ibid. 677) and Henry James (ibid. 681) all claimed that the impartiality and fair-mindedness of English judges would prevent their being drawn into such conflicts, whilst Bowyer (ibid. 666) claimed that a similar fear had been expressed at the time of the Prisoners' Counsel Act, which experience had proved to be quite unfounded.
35. Chambers (1876) P.D. CCXXX, 1933-4; Wheelhouse CCLVII, 682.
36. Morgan Lloyd (ibid. 675) (he confined his comments to the right to make an unsworn statement) but, in later debates, the point was developed to include statements made on arrest and before examining magistrates (see e.g. Pickersgill (1898) P.D. LVI 988).
37. He raised the subject with the Lord Chancellor in a letter of 20.1. 1877 (PRO: LCO 1/42). On Feb. 6 he delivered a lecture on the subject of 'A Penal Code' to the Parliamentary Committee of the T.U.C. (The Times, Feb. 8, 1877). Later in the year he published an article with the same title in The Fortnightly Review (27 O.S., 362). And see generally (1878) P.D. CCXXXIX, 1935).
38. L. Stephen, The Life of Sir James F. Stephen, p. 380 'on 2nd August Stephen wrote he had just received instructions from the Lord Chancellor to draw up a Bill for a Criminal Code'. For his efforts he was well rewarded. He received 3000 guas. (PRO: LCO 1/42) and the

- promise of a judgeship, which promise was honoured on 3.1.79, when he was appointed a judge of the Q.B.D..
39. Criminal Code (Indictable Offences) Bill, 1878 P.P. (178) II, 5, cl. 368.
  40. Code of Criminal Procedure Act, 1861 (India Act No. XXV of 1861), s. 342 and Indian Evidence Act, 1872, s. 120 (spouse).
  41. (1877) 2 Nineteenth Century, 737 at pp. 753-4. The idea was not new the Chief Justice of New Jersey, in his reply to the questionnaire of the Society for the Amendment of the Law, had suggested dispensing with the oath when prisoners gave evidence ((1878) P.D. CCXXXVII, 668), and Ashley, in opening the second reading debate on the 1876 Bill, had indicated that he was prepared to dispense with the oath in the case of prisoners ((1876) P.D. CCXXX, 1926).
  42. Vol. 22 (1877/8), p. 277-8.
  43. (1878) P.D. CCXLII, 2038.
  44. 1878/9 P.P. (Cmnd. 2345) XX, 169.
  45. Report, p. 37.
  46. Criminal Code (Indictable Offences) Bill, 1879 (1878/9 P.P.(117) II, 175), cl. 523. The proviso giving the judge power to limit cross-examination as to credit attracted criticism from all quarters. Some, like Hawkins J., argued that a prisoner should enjoy no special protection in the matter of cross-examination, whilst those who favoured protection argued that giving the judge power to disallow questions as to credit was a useless remedy, for once 'the question ... has been asked the mischief is done' 73 L.T. (1882), p. 229.
  47. (1878-9) P.D. CCXLV, 310.
  48. Att. Gen. (ibid. 321-3).
  49. Cole (ibid. 329) (extremely dangerous; it would eventuate in a system of torture); Martin (ibid. 336) ('so far from its being for their benefit it would militate strongly against innocent persons'); Assheton Cross (ibid. 344) 'I have great doubt with regard to the examination of prisoners ... it may work great hardship against prisoners'.

50. (1878/9) P.D. CCXLVII, 1281 (July 3, 1879) (likely to be lost through lack of Parliamentary time).
51. 1879/9 P.P. (232) LIX, 233; (1878/9) P.D. CCXLVI, 1915 & CCXLVII, 953.
52. July 14.
53. 76 L.T. 187.
54. R. v. Weston (1879) 14 Cox 350. (The deceased had been killed by a single shot at close range. There were no witnesses to the actual shooting. The accused's defence to the charge of murder was that the gun had gone off accidentally during a struggle with the deceased for possession of it).
55. 76 L.T. 184.
56. R. v. Le Froy, The Times, Nov, 5, 7 & 9, 1881; (1883) L.T. 644.
57. 76 L.T. 100; 17 Ir. L.T. 644.
58. 26 Sol. Jo., 175 (so too did Lopes J. in a case at Worcester Assizes 26 Sol. Jo., 191); the ruling was severely criticised in a Times leader on Jan. 24.
59. R. v. O'Donnell, The Times, Dec. 3, 1883 (also in 99 C.C.C. Sess.Pap.).
60. The correspondents were Williams J. (Dec. 29, 1883, & Jan. 7 & 12, 1884); Lord Bramwell (under the pseudonym of 'B') (Jan. 2 & 5); Littler Q.C. (Jan. 3 & 8); & Dering (Jan. 4.).
61. The point was made by Williams J in his letter of Dec. 29. See also Stephen J. in R. v. Ross, The Times, Apr. 24, 1884.
62. R. v. Hull & Smith 68 L.T. 264; The Times, Feb. 3, 1880.
63. The Times, Jan. 21, 1884 (letter signed ML).
64. Notable British Trials Series, p. 200 (the trial was held in September, 1877).
65. R. v. Blades (Leeds Assizes), The Times, Aug. 5, 1880.
66. R. v. Gerrish 17 Ir.L.T., Dec. 15 ; The Times, Jan.14, 1882.
67. R v. Shimmin (1882) 15 Cox 122.

68. R v. Pembroke. The Times, June 10, 1882.
69. See letter 76 L.T.
70. See letter from Paget to The Times quoted 76 L.T. 187
71. R. v. Everett (1883) 97 C.C.C. Sess.Pap. 329 at 355.
72. (1883) 47 J.P. 342 and 355.
73. (1883) 47 J.P. 342 (Essex); 26 Sol. Jo. 39 (Sheffield).
74. R. v. Taylor & Boynes (1883) 15 Cox 265.
75. R. v. Houltyby (1884) 28 Sol. Jo. 84.
76. R. v. Velasquez The Times, Mar. 21, 1884.
77. R. v. Attwood & Tatham, The Times, Nov. 1, 1884.
78. R. v. Taylor (1859) 1 F. & F. 535.
79. R. v. Ross, The Times, Apr. 24, 1884.
80. R. v. Watters (1883) 47 J.P. 756; The Times, Nov. 28, 1883.
81. R. v. Millhouse (1885) 15 Cox 622.
82. E.g. R v. Cunningham & Burton (1885) 102 C.C.C. Sess. Pap. 154; R. v. McNally *ibid.* p. 342; R. v. Lee & Dredge, The Times, Apr. 29 1885; R. v. Hay, The Times, Nov. 6, 1885; R. v. Masters, The Times, Jan. 14, 1886; R. v. Riegelmutth, The Times, Mar. 11, 1886; R. v. Niblett, The Times, May 6, 1886; R. v. Edgar, The Times, Sept. 18, 1886; R. v. Rowe, The Times, Nov. 3, 1886; R v. Doherty, The Times, Dec. 20, 1888; R. v. Maybrick, The Times, Aug, 1-9, 1889; R. v. Valli (1890) 112 C.C.C. Sess. Pap. 1058;; R v. Jones (1891) 114 C.C.C. Sess.Pap. 1058; R v. Beezer & Donoghue (1893) 117 C.C.C. Sess.Pap. 482.
83. (1888) P.D. CCCXXIV, 120-1 (Sir. G. Campbell).
84. Gibson Bowles (1898) P.D. LXII, 750.
85. R. v. Ross *supra*; R. v. Masters 1886 *supra*.
86. Coleridge L.C.J. in Millhouse *supra*.
87. See n. 82 *supra*.
88. See e.g. R. v. Valli, R. v. Edgar *supra*.

89. Morgan Lloyd - Criminal Law Amendment Bill, 1882, Second Reading debate (1882) P.D. XXLXVII, 433.
90. The Times, Nov. 19 (quoted 26 Sol. Jo. 39). Sir Ed. Clarke at the committee stage of the 1898 Bill described it as 'an expedient of judges who have felt embarrassment and difficulty because the prisoner was not able to give his own evidence in the case' ((1898) P.D. LXII, 751).
91. T. Humphreys, Criminal Days, p. 45:- 'In my experience the privilege was rarely taken advantage of. Counsel usually took the view that they could put the case for the defence much better than the accused, and feared the possible effect of an unwise statement from their client'. Sir Ed. Clarke at the Committee stage of the 1898 Bill said that he had never known an unsworn statement be of any value to a prisoner, but knew of many cases in which a prisoner owed his conviction mainly to the fact that his statement gave information against him ((1898) P.D. LXII, 751).
92. Criminal Code Bill, 1880 P.P.(2) II, 1; the prisoners' evidence clause it contained (cl. 471) was identical to that in the 1879 Bill). On the same day three private members brought in a Code Bill of their own (the Criminal Code (No. 2) Bill, 1880 P.P.(47) II, 223) which contained a wordy batch of clauses dealing with prisoners' evidence, the effect of which was to make a prisoner competent to be examined on behalf of the prosecution, or on his own behalf, or on behalf of a co-accused, such examination not to be on oath, with the judge having a duty to protect the prisoner against improper cross-examination as to credit. The Bill was given a first reading but later dropped.
93. May 31; 1880 P.D. CCLII, 770.
94. Criminal Law Amendment Bill, 1882 P.P. (15) II, 1; the prisoners' evidence clause it contained was once more identical to that in the 1879 Bill.
95. (1882) P.D. CCLXVII, 402; the Second Reading debate threw up the observation from Morgan Lloyd (ibid. 433) that, if the practice adopted by Cockburn L.C.J, of allowing defended prisoners to make unsworn statements became general, every legitimate object sought to be achieved by the proposal to enable prisoners to give evidence would have been attained.



96. Home Secy., *ibid.* 430.
97. Criminal Code (Indictable Offences Procedure) Bill, 1883 P.P. (8) II, 249.
98. Cl. 100.
99. Of those who spoke to the prisoner's evidence clause, eleven were in favour of reform, three against, with three arguing for pre-trial interrogation.
100. Att. Gen. (1883) P.D. CCLXXVIII, 149. The Irish members appear to have thought that they were being accused of a conspiracy to obstruct the Bill (see e.g. McCarthy (*ibid.* 150) & Kenny (*ibid.* 156)).
101. Irish opposition - see e.g. O' Brien (*ibid.* 117): 'it would be the duty of every Irish member at every stage in the Bill, to register his protest against a Bill which they regarded as simply being a Coercion Bill under a dishonest disguise'; O' Donnell (*ibid.* 111), Daly (*ibid.* 127-32); & O'Connor (*ibid.* 139 and 149):- 'Irish members were bound to meet it with a most obstinate and stubborn opposition'.
102. O'Brien (*ibid.* 117).
103. Thompson (*ibid.* 337), Onslow (*ibid.* 338).
104. (1883) P.D. CCLXXVIII, 97 (Inderwick).
105. Correspondence in The Times had been favourable ((1884) P.D. CCLXXXV, 1301). The Law Society had come out in favour (*ibid.* 1880).
106. Law of Evidence in Criminal Cases Bill, 1884 P.P. (4) III, 523.
107. Law of Evidence Amendment Bill, 1884 P.P.(130) III, 521.
108. (1884) P.D. CCLXXXIV, 1301.
109. It received its First Reading on Feb. 11 and passed its Third Reading on Mar. 6. The only doubting voice in the Lords was Lord Brabourne who (*ibid.* 1303) expressed concern about the position of undefended prisoners, who declined to give evidence.
110. E.g. Morgan Lloyd (1884) P.D. CCLXXXIV, 1876; Warton (*ibid.*); Staveley Hill (*ibid.* 1881), West (*ibid.* 1882).

111. Law of Evidence Amendment Bill, 1885 (1884/5 P.P.(45) II, 359).
112. First Reading Nov. 3. Passed Third Reading Nov. 25.
113. Law of Evidence in Criminal Cases Bill, 1885 (1884-5 P.P.(65) II 363).
114. Married Women's Property Act, 1882, s. 53 & Married Women's Property Act, 1884, s. 1.
115. Corrupt and Illegal Practices Prevention Act, 1883, s. 53.
116. Explosive Substances Act 1883, s. 4.
117. (1885) P.D. XXX, 904-911; originator Picton.
118. 'Prisoners as Witnesses', (1886) 20 Nineteenth Century, 453.
119. (1886) 20, 323.
120. R. v. Labbett, The Times, Feb. 2, 1886 (indecent assault) where Hawkins J. directed the jury that no adverse inference ought to be drawn from the failure of the prisoner to give evidence; R. v. Wigger, The Times, May 10/11, 1886 (corrupt practices) where Pollock J. allowed prosecuting counsel to comment upon the failure of the accused to give evidence.

## CHAPTER 11

1. Arnold Bennett, *Clayhanger*, Bk. 2, c. 2.
2. C. Jackson, *Opposition to the Passage of Criminal Evidence Reform* (in McEldowney & O'Higgins, *The Common Law Tradition*, p. 186).
3. *Ibid.*, pp. 187-190.
4. *Ibid.*, p. 191.
5. *Law of Evidence Amendment Bill, 1886 P.P. (286 Sess.1) III, 85.*
6. *Counted out (1886) P.D. XXXVI, 1875.*
7. *Ibid. 1874 ' even if (the Bill passed its second reading)... it would be nothing more than a barren victory; for many of his (O'Brien's) friends, who were then absent would return in their full strength on Monday ...and the prospects of the Bill for that session would then be hopeless'.*
8. *Law of Evidence Amendment Bill, 1887 P.P. (316) III, 137.*
9. *Att.Gen. (1887) P.D. CCCXVII, 455.*
10. T.M. Healey (*ibid.* 464) 'if the Bill were passed for Ireland it would within a very short time be applied to Ireland'; Chance (*ibid.* 468) indicated that he did not trust the Government not to go back on such a pledge.
11. C. Jackson, *op. cit.*, p. 194.
12. *First reading Feb. 20.*
13. *Criminal Evidence Bill, 1888 P.P. (132) II, 407.*
14. Sir Charles Russell (1888) P.D. CCCXXIV, 71; Sir Henry James (*ibid.* 72-3); Crawford (*ibid.* 82); Bradlaugh (*ibid.* 84).
15. Sol.Gen. for Ireland (*ibid.* 88); Sol.Gen. (*ibid.* 91-2); Chief Secy. for Ireland (*ibid.* 97-9).
16. T.M. Healy (*ibid.* 75) 'he felt so strongly about the measure that he would treat it, if applied to Ireland, in the same spirit as the Coercion Bill of last year. He would devote his days and nights, as far as the Rules would allow him, doing all in his power to defeat it

and he would ask his Colleagues to meet the Bill in a similar spirit'.

17. Criminal Evidence Bill, 1889 P.P.(96) I, 491.
18. Evidence in Criminal Cases Bill, 1891 (the only references the Bill are in the Parliamentary Debates).
19. Evidence in Criminal Cases Bill, 1892 P.P. (228) III, 135.
20. Lord Herschell (1892) P.D. I, 668-9.
21. Osborne Morgan (1892) P.D. IV, 301; Sir Henry James (ibid. 305).
22. The Prime Minister (ibid. 307-8).
23. Evidence in Criminal Cases Bill, 1893 (1893/4 P.P. (315) III 93.
24. PRO: H0 45/9784/2907E.
25. Evidence in Criminal Cases Bill, 1895 and Evidence in Criminal Cases (No. 2) Bill, 1895 P.P. (236 Sess. 1) III, 87.
26. (1895) P.D. XXXII, 4.
27. (1887) P.D. CCCXI, 433.
28. (1887) P.D. CCCXVII, 456-7.
29. (1888) P.D. CCCXXIV, 73 (the 1876 and 1878 Bills had both included a clause making it clear that the Crown were to have the right of reply, but later Bills had been silent on the point).
30. Att.Gen. (1886) P.D. CCCVI, 1822 ('there is a general consensus in favour of it'); (1887) P.D. CCCXVII, 455 ('There is practically a consensus of opinion among those who have had much experience of the administration of the criminal law in favour of this change being made'); (ibid. 474) '(everyone) who has studied the subject at all knows what the feeling of this country is with regard to this matter').
31. The Times, Nov. 11, 1891.
32. Huddleston B., R. v. Massey & others, The Times, Jan. 15, 1885; Wills J., 1888; Matthew J. (1890) 25 L. Jo. 443 & The Times, July 21, 1890 (charge to Grand Jury, Bodmin); & Hawkins J., The Times, Nov. 24, 1890 (charge to Grand Jury, Norwich)

33. Most recently 'Prisoners as Witnesses', (1886) 20 Nineteenth Century, p. 453.
34. Code of Criminal Procedure Act, 1882 (India Act No X of 1882).
35. Evidence Amendment Act, 1882 (South Aust. 45 & 46 Vict., No. 245).
36. Justices of the Peace Act, 1882 (New Zealand, No. 15) applying only to summary trials. The principle was extended to all criminal trials by the Criminal Code Act, 1893 (New Zealand, 57 Vict., No. 56).
37. Criminal Law Amendment Act, 1883 (N.S.W. 46 Vict., No. 17).
38. Criminal Law Amendment Act, 1892 (Queensland 56 Vict., No.3).
39. Canada Evidence Act, 1893 (Canada, 56 Vict., c. 31).
40. The Times, June 6, 1896.
41. Betting & Infants Loans Act, 1892, s. 6.
42. Corrupt & Illegal Practices Prevention Act, 1895, s. 2.
43. Public Health (London) Act, 1891, s. 118.
44. False Alarms of Fire Act, 1895, s. 2.
45. Law of Distress (Amendment) Act, 1895, s. 5.
46. Prevention of Cruelty to Children Act, 1894, s. 12.
47. Diseases of Animals Act 1894, s. 57(3).
48. Merchant Shipping Act, 1894, s. 457(2).
49. (1888) P.D. CCCXXIV, 69.
50. (1895) P.D. XXXII, 3-4
51. Coombs v. Barber, The Times, June 27, 1877 (case report and leader).
52. The problem arose on the trial of Oscar Wilde where counts of gross indecency contrary to s. 11 of the Act were joined in same indictment as counts of conspiracy (The Times, Apr. 27, 1895).
53. R. v Owen (1888) 16 Cox 397

54. (1895) P.D. XXXII, 4.
55. Stephen J., (1886) 20 Nineteenth Century, pp. 453-4, and letter from Sir Harry Poland QC quoted by Lord Halsbury at (1898) P.D. LIV, 1172.
56. (1895) P.D. XXXII, 3.
57. Sir Harry Poland QC.
58. F. Mead, The Accused as a Witness, (1892) 31 Nineteenth Century, p. 188.
59. (1890-1) P.D. CCCLIII, 1068.
60. Evidence in Criminal Cases Bill, 1896 P.P. (134), III, 37.
61. Prisoners' Evidence Bill, 1896 (limited in scope to proceedings in Magistrates' courts) (1896 P.P.(56) VI, 221).
62. The Times, June 12, 1895.
63. (1896) 39 Nineteenth Century, p. 556.
64. Bar Council papers.
65. (1896) 39 Nineteenth Century, p. 812.
66. The Times, June 6, 1896.
67. The Times, June 16, 1896.
68. Chaff Cutting Machines Act, 1897, s. 5.
69. Law of Evidence (Criminal Cases) Bill, 1897 P.P. (101)IV, 199.
70. (1897) XLV, 266.
71. (1897) XLVIII, 784-5.
72. Ibid., 784.
73. Ibid., 780-4.
74. Lloyd Morgan (ibid. 787); Pickersgill (ibid. 789); Carson (ibid. 795-6); Bucknill (ibid. 801); Lloyd Wharton (ibid. 823).
75. Knox (ibid. 801).
76. Ibid. 785; see also Pickersgill, ibid. 788-9.
77. Knox (ibid. 802-5); T.M. Healy (ibid. 817, and 823-6)- he described the exclusion of Ireland as 'only a dodge', and 823-6.

78. Ibid. 826.
79. The Times, Apr. 16, 1897.
80. PRO: HO 45/9784/2907L.
81. The Times, Apr. 16, 1897 (F. Mead)
82. The Times, Apr. 9, 1897.
83. 3 Scots L.T. 275.
84. The Times, Apr. 24, 1897 (H.C. Richards M.P.).
85. The Times, Apr. 19, 1897 (A Chairman of Quarter Sessions).
86. The Times, Oct. 25, 1897.
87. The Times, Oct. 29, 1897.
88. The Times, Jan. 14, 1898 (J. Jardine).
89. The Times, Feb. 25, 1898 (A Chairman of Quarter Sessions).
90. Evidence in Criminal Cases Bill, 1898 P.P. (132) (277) (324) IV, 345, 351, & 357.
91. The Prime Minister (1898) P.D. LX, 728.
92. Lord Halsbury (1898) P.D. LIV, 1174-6; Lord Herschell (ibid. 1177-8).
93. (1898) P.D. LV, 981.
94. Ibid. 1022.
95. PRO: HO 45/9784/2907M.
96. (1898) P.D. LIV, 1184.
97. The Times, Mar. 15, 1898 (Winfield Bonser).
98. The Times, Apr. 9, 1898 (F. Mead).
99. In the Lords' second reading debate on 10th March Hawkins J. had been claimed by the Lord Chancellor as a supporter of the Bill (1898 P.D. LIV, 1171), but by the time of the Commons' second reading debate on 25 April he had undergone a change of mind (see Lloyd Morgan ((1898) P.D. LVI, 997) and Atherley Jones (ibid. at 1040-1) ('only the other day'). By July he was inveighing strongly against the Bill in his charge to a Grand Jury at Chelmsford (The Times, July 2, 1898).
100. 25 April (1898 P.D. LV, 977-985).

101. Lloyd Morgan (ibid. 996).
102. This had been commented on in 1896 L.J. 250.
103. Pickersgill (ibid. 985); Atherley Jones (ibid. 1034).
104. Lloyd Morgan (ibid. 996-7) claimed that the Q.B.D. judges were split 6:6 on the issue, with Channing and Wills JJ. doubtful, and that Vaughan Williams and Cotton LJJ. were also against the Bill; Pickersgill (ibid. 966) claimed that the Common Serjeant and the Chairman of Middlesex Sessions were against the Bill and the Recorder of London and the Chairman of London Sessions in favour.
105. Atherley Jones (ibid. 1036).
106. Pickersgill (ibid. 990).
107. Pickersgill (ibid. 986); Lloyd Morgan (ibid. 997).
108. Ibid. 1029-30.
109. Lyttleton (ibid. 1015-16).
110. Atherley Jones (ibid. 1038).
111. 218 votes to 91 (ibid. 1082).
112. (1898) P.D. LX, 303-38.
113. Ibid. 748-50 and LXII, 683-90.
114. Ibid. LX, 750 and LXII, 68.
115. Ibid. LXII, 693-6.
116. Ibid. LX, 518-32.
117. Ibid. LX, 743.
118. Ibid. LX, 662
119. Ibid. LX, 665-7.
120. Ibid. LX, 666.
121. PRO: HO 45/9784/B2907E.
122. Ibid. LX, 666.
123. Ibid. LX, 667-71.
124. Ibid. LX, 671.
125. Ibid. LXII, 728-31.



126. Ibid. LXII, 682.
127. Ibid. LXII 733-5.
128. Ibid. LX, 711.
129. Ibid. LX, 747 & LXII, 662-82.
130. Ibid. LX, 721.
131. Ibid. LXII, 748-52.
132. Ibid. LXII, 697-718.
133. Ibid. LX, 662 & 690.
134. Ibid. LX, 705-7 & LXII, 752.
135. Ibid. LX, 530-1.
136. Ibid. LXII, 747.
137. Ibid. LX, 651 & LXII, 690.
138. Ibid. LX, 720-1.
139. S. 7 provided that the Act should come into operation at the expiration of two months from the passing thereof. The doubt was as to whether the two months included the day on which it received the Royal Assent, and gave rise to a dispute as to whether the operative date was the 12th or the 13th October, 1898 (at some courts e.g. County of London Sessions the difficulty was avoided by putting back to the 13th all cases heard on the 12th in which the prisoner pleaded not guilty).
140. The Times, letters Oct. 10 & 18 (Cousens), Oct. 12 (Pitt-Lewis), Oct. 14 (Sir Herbert Stephen), and Oct, 29, 1898 (charge of Hawkins J. to Cambridge Grand Jury).
141. R. v. Rhodes (1899) 19 Cox 182.
142. Hawkins J. in a charge to a grand jury referred to in a letter published in The Times on Dec. 27, 1898 and also in (1899) 59 J.P. 24. The Times published letters on the topic from Sir Harry Poland Q.C. (Nov. 22, 1898, and Jan. 9 and 18, 1899).
143. (1899) C.C.C. Sess.Pap. (July Session).
144. The Times reports of criminal trials.
145. Wills J. at Mold Summer Assizes, 1898 had advised a grand jury against finding a bill for perjury against a prisoner, who had given

evidence on his own behalf under the Criminal Law Amendment Act, 1885, saying that otherwise there would be no finality (referred to in a letter in The Times for Oct. 10, 1898 from 'A Chairman of Quarter Sessions'). Ridley J. strongly favoured prosecution in order to 'teach prisoners the solemnity of the oath' (charge to grand jury at Worcester, The Times, Nov. 17, 1898). In December, 1898, in the course of a summing up, after telling the jury that, in his experience, if they wanted truth from the witness box, it was not from the prisoner they should expect to get it, he added he was much inclined to make a few examples by ordering prosecutions of prisoners for perjury (The Times, Dec. 10, 1898).

146. Feb. 11, 1899.

147. The Times, Jan. 23, 1899.

148. See for example R. v. Larder, The Times, Jan. 26, 1899. the Justice of the Peace had, on the eve of the Act coming into force, predicted that this would be the judges' attitude.

149. Letter to The Times, Nov. 7, 1898.

## CHAPTER 12

1. Greaves, Report on Criminal Procedure, 1856 P.P. (456) L, 79.
2. See Greaves *ibid.* Also (1826) P.D. XV, 601; (1836) P.D. XXXI, 498 (Pollock); & (1898) P.D. LIV, 1180 (Lord Herschell). Cox, writing in January, 1860, claimed that of nearly 30 innocent persons he had known convicted during the previous 15 years at least 2/3 owed their fate to this procedural difficulty (34 L.T. 201).
3. See chapter 7.
4. See *R. v. Horne* (1777) 20 How.S.T. 651 at 664; *R. v. Bignold* (1823) Dow. & Ry. 59 (Abbott C.J.); *R. v. Carlile* (1834) 6 C. & P. 643 (Park J.); Pitt Taylor, writing in 1878 (*Evidence* 7th ed., p. 354) thought that the better opinion was that the judge had a discretion to permit a reply in a flagrant case.
5. *R. v. Stannard* (1837) 7 C. & P. 673; *R. v. Whiting & Harvey* (1837) 7 C. & P. 771; *R. v. Patteson* (1838) 2 Lew. 262; *R. v. Hayes* (1840) 1 Cr. & D. 367; *R. v. Corfell* (1844) 1 Cox 123; *R. v. Briggs* (1858) 1 F. & F. 106; occasionally one finds judges refusing to allow the reply in such a case - see *R. v. Loughnan* (1842) Arm. M. & O. 253 (Pennefather B. and Torrens J.); *R. v. Brooks* (1843) 1 Cox 6 (a murder case in which Wightman J. based his refusal upon the fact that prosecuting counsel had not given notice of his intention to exercise the right), and *R. v. Dowse* (1865) 4 F. & F. 492 (where Pigott B. held that the 1865 Act had abolished the right in such cases).
6. *R. v. Brice* (1824) 2 B. & Ald. 606; *R. v. Gurney* (1869) 11 Cox 414.
7. (1824) P.D. XI, 208; *R. v. Edwards* (1837) 8 C. & P. 26 'it was never exercised because the prisoner's counsel could not address the jury' (Coleridge J.); see also *R. v. Codling & Others* (1802) 28 S.T. 177 (feloniously destroying and casting away a brig) and *R. v. Fursey* (1833) 3 S.T. (N.S.) 543 (cut and wound).
8. Criminal Law Commissioners. 2nd Report, 1836 P.P. (343) XXXVI, 183 at p. 10n. of the Report; for an example of the survival of the practice post-1836 see *R. v. Jackson &*

- Fletcher (1837) 7 C. & P. 776, where Parke B. directed that the opening be dispensed with.
9. (1824) P.D. XI, 207-8; (1826) P.D. XV, 600-1.
  10. For details of the Bills see chapter 5 notes.
  11. Second Report *supra*, p. 16.
  12. (1836) P.D. XXXV, 183 (Lord Abinger), 1247-8 (Lord Lyndhurst); another argument used against the clause was that it would lead to four speeches in every case ((1836) P.D. XXXVI, 600), which argument Pollock easily demolished.
  13. (1836) P.D. XXXV, 228.
  14. (1836) P.D. XXXV, 599-613 (debate on Lords' amendments), 1210 (Commons), 1247-9 (Lords) and 1323-5 (Commons).
  15. 7 C. & P. 676.
  16. In *R. v. Hayes* (1838) 2 M. & Rob. 155 Parke B. declined to allow the Crown a general reply but stressed that he was not laying down any general rule, whilst in *R. v. Jordan & Cowmeadow* (1839) 9 C. & P. 118 Williams J. allowed a general reply but stressed that it was to be exercised with great forbearance.
  17. 1852/3 P.P. (1626) XL, 701.
  18. At p. 33 of his Report.
  19. 1860 P.P. (167) III, 243.
  20. (1860) P.D. CLX, 1319; the Lords gave as their justification the need to prevent unnecessary additional speeches - *ibid.* 180-1.
  21. (1861) P.D. CLXIII, 221.
  22. S. 5.
  23. *R. v. Beckwith* (1858) 7 Cox 505 (Byles J.).
  24. *R. v. Taylor* (1859) 1 F. & F. 535 (Byles J.).
  25. *R. v. Christie* (1858) 1 F. & F. 75 (A.G. of Chester).
  26. *R. v. Currie* (1865) 62 C.C.C. Sess. Pap. 479 (Shee J.); *R. v. Toakley* (1866) 10 Cox 406 (Mellor J.); *R. v. Barrow* (1866) 10 Cox 407.
  27. *R. v. Dixblanc* (1872) 76 C.C.C. Sess. Pap. 260.

28. R. v. Wood (1878) 88 C.C.C. Sess. Pap. 72.
29. 5 S.T. (N.S.) 3n.
30. A determined attempt was made at the committee stage of the Criminal Evidence Bill, 1898 to include in the Bill a clause abolishing the prerogative right, but the amendment was disallowed as outside the scope of the bill (1898) P.D. LXVIII, 663-82.
31. 6 Cox 333.
32. See R. v. Jordan supra, and R. v. Serne (1887) 107 C.C.C. Sess. Pap. 122.
33. 12 Sol. Jo. (1867-8) 373
34. R. v. Harrington (1869) L.T. 57; R. v. Kain (1883) 15 Cox 388.
35. R. v. Burns (1887) 83 L.T. 29.
36. 15 Cox 289.
37. It was followed in R. v. Maslin (1883) 98 C.C.C. Sess. Pap. 183 and R. v. Vass ibid. 361.
38. R. v. Taylor (1859) 1 F. & F. 535; R. v. Manzano (1860) 2 F. & F. 64.
39. See e.g. R. v. Shimmin (1882) 15 Cox 122; R. v. Doherty (1887) 16 Cox 306.
40. (1888) P.D. CCCXXIV, 73.
41. (1898) P.D. LXII, 662-82 and 747; the point had, however, previously been raised by Lord Herschell in the second reading debate in the Lords (1898) P.D. LIV 1180; the Lord Chancellor had intimated that the Government would probably accommodate the objection.
42. See e.g. (1836) P.D. XXXV, 613 'Except the witnesses to character there was scarcely ever a witness called for the prisoner' (Att.Gen.).
43. See e.g. R. v. Craig & Bentley - D. Yallop 'To Encourage the Others' p. 179.

## CHAPTER 13

1. Report of Home Office Committee on the Accommodation in Court Houses and other places for Prisoners awaiting Trial at Assizes and Quarter Sessions - 1887 P.P. (Cmnd. 4791) XL1, 905.
2. The Central Criminal Court was one such; the most commodious boxes were those at Clerkenwell Sessions which had a base of 4' by 2'9, the smallest those at Bodmin the base of which measured only 2'4" by 2'6".
3. At 7 courts the committee found that there were no sanitary facilities whatsoever for prisoners.
4. Hawk., 2 P.C., c. 28, s. 1.
5. Hawk., 2 P.C. c. 28., s. 2.
6. For an example of a prisoner being allowed to sit on the grounds of alleged infirmity - see R. v. Fauntleroy, The Times, Nov. 1, 1824. Towards the end of the century prisoners were being allowed to sit, even though not infirm, although such cases were still sufficiently uncommon to be considered worthy of being reported - see R. v. Desmond, The Times, Apr. 21-8, 1868, R. v. Torpey, The Times, Mar. 2, 1871, R. v. Dixblanc, The Times, June. 12, 1872; R. v. Staunton & others, The Times, Sept. 13-18, 1877.
7. The practice was severely criticised in an article in The Times (Jan. 3, 1845) which complained of the inhumanity of calling on a prisoner to make his defence after he had been on his legs for 10 to 14 hours.
8. In trials for felony the judges always insisted that the prisoner take his trial in the dock (see R. v. Egan (1839) 9 C. & P. 485n; R. v. St. George (1840) 9 C. & P. 483; R. v. Douglas (1841) 1 C. & M. 193), even if he was a foreigner who had no English (see R. v. Zulueta (1843) 1 C. & K. 215). At the start of the century a laxer rule prevailed in misdemeanour, with defendants often being allowed (particularly if undefended) to sit at the table of the court, especially in trials in the King's Bench (see e.g. R. v. Carlile (1834) 6 C. & P. 636; R. v. Vincent & others (1840) 9 C. & P. 275; R. v. Lovett (1839) 9 C. & P. 462). By the end of the century, however, misdemeanants were invariably required to take their trial in the dock. For a case which went

- against the trend see *R. v. Edmonds*, *The Times*, May 8, 1872 - Bramwell B., with considerable reluctance, allowed a solicitor charged with manslaughter to sit with counsel.
9. See e.g. *R. Harris, Reminiscences of Sir H. Hawkins* pp. 40-1. The dinners were discontinued after a fire at the Old Bailey in 1877 (*W.E. Hooper, History of Newgate and the Old Bailey* pp. 17 and 134).
  10. (1834) P.D. XXI, 272-350; during the debate there was reference to an occasion when *Chambre J. (J.C.P. 1800-15)* had despatched 20 cases in one night (*ibid.* 318-9); see also (1816) P.D. XXXII, 1146, where one of the complaints made by Lord Cochrane against Lord Ellenborough was that at his (Cochrane's) trial for conspiracy, Ellenborough had insisted on sitting till 3 a.m. despite the complaints of his counsel that they were exhausted.
  11. Report of Commissioners appointed to inquire into the existing state of the Corporation of the City of London, 1854 P.P. (1772) XXVI, 701, p.290 (reference to the practice of the City Judges sitting until 9 p.m. to try London cases); see *R. v. Laerman* (murder), *The Times*, Aug. 4, 1890 (jury sent out at 7.35 p.m) and *R. v. Dyer* (murder) 1896 in which *Hawkins J.* (who was notorious for his love of late sittings) began the trial at 7 p.m. and concluded it at 9.30 p.m. (*F.W. Ashley, My Sixty Years in the Law*, pp. 177-8; *The Times* Mar. 22, 23, 1896).
  12. See e.g. *The Times*, Dec. 18, 1888 (*Stephen J.* sitting till 11 p.m. on Western Circuit); *The Times*, Feb. 25, 1889 (*Willes J.* sitting till 8 p.m. at Taunton); *The Times*, Dec. 12, 1898 (*Hawkins J.* sitting at Maidstone till well past 9 p.m. on 4 nights and till 11 p.m. on one night).
  13. *R. v. Hardy* (1794) 24 S.T. 199; *R. v. Stone* (1796) 6 T.R. 527 at 530 ('necessity justified what it compelled'); *Chitty, Crim. Law*, 1st ed. (1816), vol. 1, 628.
  14. *R. v. Hardy* supra; at the end of the eighteenth century there was a hostel in Westminster Hall where county juries were lodged during adjournments (*R. v. Hardy* supra).
  15. As in *R. v. Stone* supra; see also *Chitty, op. cit.*, vol. 2., 628; in the 1860s jurors at Dublin Assizes were lodged overnight in the

grand jury room; Cork juries were also lodged overnight at the court house (see (1865) P.D. CLXXVII, 1717 and (1866) P.D. CLXXXI, 869.

16. See The Times reports of Old Bailey trials.
17. R. v. Metcalfe & Robinson, The Times, Dec. 15, 1848.
18. If there was an improper separation the jury would be discharged - see R. v. Ward (1867) 10 Cox 573.
19. R. v. Kinnear (1819) 2 B. & Ald. 462.
20. R. v. Coates, The Times, Mar. 6, 8 & 9, 1875; R. v. Lamson, The Times, Mar. 13, 1882; R. v. Nash, The Times, Sept. 24, 1884.
21. R. v. Foster, The Times, May 14, 1859 (Temple Gardens); R. v. Dove, The Times, July. 19, 1856 (York jury allowed to walk in Clifford's Tower).
22. (1866) P.D. CLXXXI, 870 'the practice was for the judge to sit late to finish the case rather than lock the jury up' (Sir Colman O'Loghlen).
23. Ex p. Castro (1873) 37 J.P. 260 (Cockburn C.J.) and Russell L.C.J. (1897) P.D. XLIX, 86.
24. In the debate on the Juries in Civil Causes Bill, 1859 it was said that juries were sometimes allowed a plentiful supply of lamps in order to provide them with some heat, and that one judge at least had permitted them water on the ground that it was neither meat nor drink ((1859) P.D. CLIII, 1014).
25. 3 L.T. 113; (1857) 1 Sol. Jo. 128 (Old Bailey) 298 (Middlesex Sessions).
26. 3 Bla. Comm., p. 376 citing Lib. Ass. fel. 40, pl.11.
27. (1859) P.D. CLIII, 1029.
28. Winsor v. R. (1866) 10 Cox 276 per Cockburn L.C.J. at p. 10 and Lush J. at p. 325
29. R. v. Melroy, The Times, Apr. 2, 1825; The Law Magazine, Vol. 7 (1832), p. 46 n. 1 cites yet another instance from around this period of an Irish jury being carted 'on donkeys'.
30. R. v. Anon., The Times, July 18, 1848 (the jury in the event reached a verdict before the judge left town).



31. Co. Litt., 227b 'a jury sworn and charged in case of life or member cannot be discharged by the court or any other but they ought to give a verdict'; Co. 3 Inst., 1110; Hawk., 2 P.C. c. 47, s. 1; Foster, Crown Law, pp. 29-39; see also Lord Wensleydale ((1859) P.D. CLIII, 1038).
32. The main cause of doubt on this point was the decision of the Irish Court of Queen's Bench in Conway & Lynch v. R. (1845) 5 L.T.(O.S.) 458.
33. Alexander Pope, The Rape of the Lock, c. 3, 22. Long retirements were, however, the exception rather than the rule in both civil and criminal cases - see The Times reports of criminal cases and Lord Lyndhurst (1859) P.D. CLIII, 1021 (referring to civil suits) 'In nineteencases out of twenty the jury never retires; it comes to a conclusion at once'.
34. R. v. Gould (1763) 3 Burns' Justice of the Peace, (30th ed.), p. 98; R. v. Edwards (1812) R. & R. 24 (as to reading over the evidence see R. v. Beere (1842) 2 Moo. & Ry. 472).
35. The practice of starving juries was repeatedly condemned by Royal Commissions (e.g. The Common Law Commissioners, 2nd. Report, 1852/3 P.P. (1626) XL, 701), by judges (R. v. Charlesworth (1861) 9 Cox 44, where Crampton J. described it as 'a barbaric relic of ancient times which would be well got rid of' and law journals (e.g. 3 L.T. 113).
36. (1866) 1 Law Jo., pp. 73-4.
37. E.g. Smith v. G.N.Ry., The Times, Dec. 20, 1858 (where a juror on a doctor's advice was allowed  $\frac{1}{2}$  pint of port and a few sandwiches).
38. The Juries in Criminal Cases Bills, 1864/5/6; the Criminal Law Practice Amendment Bills, 1877/78; the Criminal Code (Indictable Offences) Bills, 1878 and 1879; the Criminal Code Bill 1880; the Criminal Code (No. 2) Bill, 1880; the Criminal Law Amendment Bill, 1882; the Criminal Law Procedure Bill, 1882; the Criminal Code (Indictable Offences Procedure) Bill, 1883; the Jurors' Detention Bills 1886/7/8/9/90; the Criminal Law Procedure Amendment Bill, 1890; the Criminal Law Procedure Amendment Bill, 1896 and the Jurors' Detention Bill, 1897 (which became law).
39. Jurors' Detention Act, 1897, s. 1.

40. Criminal Justice Act, 1948, s. 35(4).
41. Special & Common Juries Bill, 1868, cl. 9.
42. Juries Bill, 1874.
43. Criminal Justice Act, 1925, s. 15
44. Third Report 1831 P.P. (92) X, 375 (at p. 70); the Juries in Civil Causes Bill, 1859 sought to carry the reform through.
45. It was one of the subjects covered by the questionnaire circulated by the Commissioners in 1844 (see Appendix A to their 8th Report).
46. (1873) P.D. CCXVI, 1516.

## CHAPTER 14

1. See e.g. (1826) P.D. XV, 611-2 (Twiss) and 617 (Tindal); Hale 2 P.C. 289-90; 4 Bla. Comm. 358. Since Coke's day the high standard of proof demanded of the prosecution had been one of the justifications traditionally offered for the denial of counsel to the accused in capital cases.
2. See chapter 4.
3. Such text writers as discussed the topic at all (and most did not) spoke of the standard of proof as being proof beyond reasonable doubt (see e.g. Starkie, 4th ed. (1853), pp. 817 & 865, Best, 1st ed. (1849), p. 100, Taylor, 7th ed. (1878), p. 126, Stephen's Digest, 1st ed. (1876), art. 94. There are countless cases, both reported and unreported, in which judges can be found directing juries that guilt must be proved beyond reasonable doubt - see e.g. R. v. Rowe, The Times, Sept. 21, 1805; R. v. Thornton, The Times, Aug. 9, 1817; R. v. De Beauvoir (1835) 7 C.& P. 17; R. v. Sterne (1843) (cited Best, op.cit., p. 100); R. v. Belaney (1844) 20 C.C.C. Sess. Pap. 441; R. v. White (1865) 4 F. & F. 383.
4. See e.g. R. v. Brady (1821) 1 Leach 327 ('clearly proved'), R. v. Sidney Smith (1845) 1 Cox 260 ('satisfactorily proved') and Greenleaf, i, s. 29.
5. R. v. Higgins (1829) 3 C. & P. 603 ('satisfied' - a very common form of direction); R. v. Hazy & Collins (1826) 2 C. & P. 458 ('perfectly satisfied'); R. v. Howlett (1836) 7 C. & P. 273 ('satisfactorily shown'). As late as 1952 Lord Goddard was suggesting that trial judges should avoid all reference to reasonable doubt, and, instead, simply direct juries to convict only if satisfied of guilt (R. v. Summers [1952] 1 All E.R. 1059).
6. R. v. Beeson (1835) 7 C.& P. 142 ('believe'); R. v. Small (1837) 8 C.& P. 46 ('if you think').
7. Chitty, Crim. Law, 1st ed. (1816), Vol. IV, pp. 331-2.
8. See e.g. R. v. Brittle, The Times, Mar. 15, 1822 ('if they should feel compelled to return a verdict of guilty no judge could, in the discharge of his lawful duty, give the prisoners the least hope of mercy on this side of the grave' (Garrow B.)); R. v. Weston &

Eastwood, *The Times*, Dec. 28, 1822 ('This was a case in which, if the prisoners were found guilty, their lives would undoubtedly be forfeit.' (Bayley J.)); *R. v. Dyer & Dyer*, *The Times*, Apr. 20, 1827 (if the accused was convicted the law must take its course) and see also *R. v. Goodfellow*, *The Times*, Jan. 1, 1832; contrast *R. v. Gould* (1840) 9 C.& P. 364 where the jury were told by the judge that the trial did not affect the prisoner's life.

9. See *R. v. Belaney* supra ('if you convict while there is any rational doubt ... you may commit that foulest of all enormities - murder under colour of law..'), and Lord Campbell C.J. in *R. v. Palmer* (1856), *Notable British Trials Series*, p. 268 : 'the life of the prisoner is at stake and if you find him guilty he must expiate his crime by an ignominious death'. For examples from earlier in the century see *R. v. Kain*, *The Times*, Mar. 3, 1824; *R. v. Chapman*, *The Times*, Oct. 31, 1825.
10. On this episode see the footnotes to the report of *R. v. White* supra.
11. For examples of cases in which Pollock C.B. directed juries in these terms see *R. v. Manning & Manning* (1849) 30 C.C.C. Sess. Pap. 654 ; *R. v. Muller* (1864) C.C.C. Sess. Pap. 461; *R. v. Exall* (1865) 4 F. & F. 922 and *R. v. Kohl* (1865) 4 F. & F. 922.
12. See e.g. Archbold, 1st ed. (1822), p. 243 in relation to the defences of accident and self-defence in assault.
13. See Thayer, *A Preliminary Treatise on Evidence at the Common Law*, p. 355 and pp. 359-64.
14. *Arnold's Case* (1724) 16 How.S.T. 764, 765 'the defence of insanity must be clearly made out' (Tracy J.). See also *R. v. Offord* (1831) 5 C.& P. 168 and *R. v. Oxford* (1840) 9 C. & P. 255.
15. *R. v. Dennis & others*, *The Times*, June 19, 1816.
16. Gilbert 273 and Foster 255 (cited verbatim on this point by most nineteenth century text writers). In India the rule was given statutory force (*Indian Evidence Act*, 1872, s. 105).
17. See e.g. *R. v. O' Callaghan & Others*, *The Times*, Jan. 17, 1818; *R. v. Morrison* (1837) 8 C.& P. 22; *R. v. Greenacre* (1837) 8 C.& P. 35; *R. v. Kirkham* (1837) 8 C.& P. 115; *R. v. Holman*, *The Times*, Mar. 27, 1854; *R. v.*

Worsley, *The Times*, July 29, 1859; *R. v. Peace* (1879) *Notable British Trials Series*, p. 161; *R. v. Little*, *The Times*, May 6, 1886.

18. *Woolmington v. D.P.P.* (1936) 22 Cr.App.R. 72. The trial judge's direction in *Woolmington* was in identical terms to that commonly given in nineteenth century cases, namely 'In every charge of murder the fact of the killing being first proved all the circumstances of accident, necessity or infirmity are to be satisfactorily proved by the prisoner unless they arise out of the evidence produced against him'. (Infirmity is presumably a reference to insanity thus affording further evidence that the burden was conceived of as persuasive).
19. The 28th edition of Archbold (1931) quoted verbatim and without comment the passage from Foster above referred to, as had every previous edition.
20. See e.g. Cross on Evidence, 5th ed., p. 90 'The speech (of Lord Sankey in *Woolmington*) can be regarded either as making a change in the law or as an insistence on a distinction ignored by the old authorities between the legal and evidential burdens'. See also the following passage from Powell on Evidence, 8th ed. (1904), p. 262 'In criminal proceedings the burden of proof as a general rule rests on the prosecution on account of the presumption of innocence. That burden is discharged in cases of murder and manslaughter by simply proving the killing of the deceased, and it is for the accused to prove, if he can, those facts which will reduce the act to one of manslaughter or justifiable or excusable homicide' (the author then proceeds to consider cases in which the burden of proof is cast on the accused by statute).
21. *R. v. Davies* (1913) 8 Cr.App.R. 211 (accident); *R. v. Lobell* [1957] 1 Q.B. 547 (self defence). See also Archbold, 1st ed., p. 243.
22. For a list of statutes which cast a burden of proof on the accused see Taylor, *op. cit.*, pp. 340-4. See also authorities which cast on an accused, who relied upon an exemption, proviso, exception, or qualification contained in the statute creating the offence charged, the burden of proving the same, especially where subject matter of the exception etc. was peculiarly within his own knowledge - e.g. *R. v. Stone* (1801) 1 East 639; *R. v. Turner* (1816) 5 M. & S. 206, *Apothecaries Co. v.*

- Bentley (1824) 1 C.& P. 531, and see Zuckerman, The Third Exception to the Woolmington Rule, (1976) 92 L.Q.R. 402.
23. M'Naghten's Case (1843) 10 Cl. & Fin. 200.
  24. The first English case in which the standard of proof in insanity is discussed would appear to be R. v. Sodeman [1936] 2 All E.R. 1138. In Canada the point had been discussed as early as 1918 (see R. v. Kierstead 42 D.L.R. 193 and also R. v. Clark (1921) 61 S.C.R. 608), and in the United States much earlier still (see the discussion in Wigmore, 3rd ed., 2497).
  25. 'Make out' (R. v. Leigh (1866) 4 F.& F. 915); 'prove' (R.v. Stokes (1848) 3 C. & K. 185); 'clearly prove' (R. v. Kopsch (1925) 19 Cr.App.R. 350); 'satisfy' (R. v. Offord supra, R. v. Southey (1865) 4 F.& F. 864); sometimes the question was framed in terms of whether the jury 'believed' the defence evidence (R. v. Davies (1858) 1 F.& F. 69).
  26. C.f. R. v. Nobin Chunder Banerjee (1873) 13 B.L.R. 20 'The fact of unsoundness of mind as a defence must be clearly and distinctly proved before any jury is justified in returning a verdict under s. 84 of the Penal Code'
  27. R. v. Woodcock (1789) 1 Leach 500.
  28. According to the judgment of Lord Ellenborough in R. v. Hucks (1816) 1 Stark. 516, it was overturned upon a case referred to the Twelve Judges by the Irish bench.
  29. By Huddleston (later Huddleston B) in R. v. Blackburn (1853) 6 Cox 333.
  30. R. v. Garner (1848) 3 Cox 175.
  31. R. v. Warringham (1851) 2 Den. 447n.
  32. R. v. Thompson (1893) 17 Cox 641.
  33. In R. v. Jenkins (1869) 11 Cox 250 at p. 256.
  34. R. v. Fenn, The Times, Sept.12 1828.
  35. Beattie, op. cit., p. 365 'since the discussion of that evidence went on in the presence of the jury and the fact that the prisoner had confessed was disclosed to them, it must frequently not have mattered a great deal whether the confession was actually read or not', citing 129 Surrey Assize papers, Lent 1742, p. 5 (Simmons), 1743 p. 13 (Scate).

36. See e.g. R. v. Day (1837) 2 Cox 209 (boy of 8; Cresswell J. conducted investigation); R. v. Collier & Morris (1848) 3 Cox 57; R. v. Griffin (1853) 6 Cox 219; R. v. Frewin (1855) 6 Cox 530 (prisoner unrepresented).
37. R. v. Yarham, *The Times*, Mar. 30, 1846.
38. See chapter 5, n.7.
39. R. v. Blackson (1837) 2 C.& P. 43.
40. R. v. Megson Battye & Ellis (1840) 9 C.& P. 420.
41. R. v. Brooks (1843) 1 Cox 6.
42. R. v. Ingrey (1900) 64 J.P. 106.
43. R. v. Forster (1855) 6 Cox 521 at p. 522.
44. See e.g. R. v. Overfield, *The Times*, Mar. 22, 1824; R. v. Peel (1860) 2 F. & F. 21; R. v. Richardson (1861) 8 Cox 448; R. v. Bedingfield, *The Times*, Nov. 14, 1879 (where the trial judge intervened of his own motion); & R. v. Honour, *The Times*, July 30, 1898.
45. R. v. Thompson (1917) 12 Cr.App.R. 261 at p. 269 'whenever the judge in his discretion thinks it will unfairly prejudice the defence if the argument should be heard in the presence of the jury, he should direct the jury to retire to their room ... This course should only be adopted when the judge in the exercise of his discretion thinks that the defence would be unfairly prejudiced'; see also R. v. Anderson (1929) 21 Cr.App.R. 178 at p. 182 where the Court of Criminal Appeal held that a judge was not entitled to order the jury to withdraw during legal argument upon a point of admissibility without the consent of the defence'.
46. R. v. Falconer Atlee (1973) 58 Cr.App.R. 348 per Roskill J. at p. 354 'This court has said again and again that it is very undesirable that (submissions of no case) should take place in the presence of the jury'; a case which prompted the editor of the 1976 edition of Phipson to observe that formerly it had been the general practice for the jury to be present during such submissions.
47. See R. v. Turpin, *The Times*, Aug. 9, 1824 (discussion about incompetency of child witness, and need for case to be adjourned for her to be instructed as to the nature of an oath); R. v. Dewesbury, *The Times*, Sept. 7,

- 1824 (discussion about admissibility of document); R. v. Fauntleroy, The Times, Nov. 1, 1824 (discussion after accused's conviction on first indictment as to whether he should be tried on the remaining indictments); R. v. Scott, The Times, Sept. 10, 1827 (discussion as to sufficiency of evidence).
48. R. v. Taylor (1851) 5 Cox 138.
  49. R. v. Winslow (1860) 8 Cox 397.
  50. R. v. Beesley, The Times, Mar. 18, 1889 (voir dire as to competency of child witness); R. v. Davis & others, The Times, July 28, 1893 (application by prosecution for case to be adjourned pending the arrival of a witness recently discovered); R. v. Scott, The Times, Dec. 1, 1896 (bail during trial).
  51. R. v. Thompson supra.
  52. R. v. Ward (1860) 54 C.C.C. Sess. Pap. 576 and R. v. Carlos (1864) 59 C.C.C. Sess. Pap. 292 (where the witness instead of being asked to write down his answer was asked to whisper it to the clerk of the prosecuting solicitor).
  53. See e.g. R. v. Bartlett & Dyson, The Times, Apr. 13, 1886 where defence counsel, in applying to sever the indictment, said he did not think it convenient to go into the reasons for making the application, which immediately elicited from Wills J. an indication that he understood what those reasons were. And see also the observation of the Lord Chief Justice in Thompson supra that it was not necessary to send the jury out, where the question was capable of being argued in the abstract, as it frequently was when the evidence objected to appeared on the depositions.
  54. R. v. Ivimy (1880) 107 C.C.C. Sess. Pap 570.
  55. One finds reference to the jury being sent out whilst admissibility was argued in two appeal cases from around this time, namely R. v. Booth (1910) 5 Cr.App.R. 180 and R. v. Ballard (1914) 12 Cr.App.R. 1.
  56. See the note on The State v. Kelly in Vol. 42 Central Law Journal 158, and the authorities there cited.
  57. 15th edition, p. 287.
  58. See e.g. R. v. Crockett (1831) 4 C. & P. 545 'I must strike the whole of the evidence out of my notes' (Bosanquet J.), R. v. Blackburn



(1853) 6 Cox 333, where Talfourd J. announced that, having spoken overnight to Williams J., he had come to the conclusion that a confession which he had admitted in evidence on the first day of the trial was inadmissible, and he should therefore expunge it from his notes; R. v. Drage (1878) 14 Cox 85 where Bramwell L.J., upholding a defence submission that a piece of evidence tendered by the Crown was not in fact admissible, said 'I shall tell the jury they are not entitled to consider (the evidence).'

59. R. v. Rose (1898) 18 Cox 717 at p. 718.
60. R. v. Inhabitants of Eriswell (1790) 3 T.R. 707 at p. 711 Grose J. dreaded 'that rules of evidence should ever depend upon the discretion of the judges'. See also R. v. Christie (1914) 10 Cr.App.R. 141 at p. 149: 'I must protest against the suggestion that any judge has the right to exclude evidence which is in law admissible on the ground of prudence or discretion or so on' (per Lord Halsbury).
61. R. v. Roden (1874) 12 Cox 630 'The value of the evidence cannot affect its admissibility' per Lush J.; R. v. Flannagan & Higgins (1882) 15 Cox 403 at p. 410 'The question of its prejudicing the prisoners was not what he had to try' (per Butt J.).
62. R. v. Salt (1858) 3 F. & F. 835.
63. R. v. Christie supra at p. 160.

## CHAPTER 15

1. Hale 1 P.C., p. 632.
2. Phillips, 8th ed. (1838), p. 204 n 2.
3. It had been so held in Brazier's case (1779) 1 Leach 199 where the Twelve Judges held evidence of a complaint made by a child incompetent to give evidence wrongly admitted (a ruling repeated in 1808 in R. v. Tucker 3 J.N. 184 (case reserved by Serjt. Marshall). See also Archbold, 1st ed. (1822), p. 260. As to the confirmatory nature of such evidence see e.g. R. v. Megson (1840) 9 C. & P. 420 (evidence of complaint by dead complainant inadmissible), and R. v. Guttridge (1840) 9 C. & P. 471 (evidence of complaint by absent complainant inadmissible).
4. R. v. Clarke (1817) 2 Stark. 241 is commonly cited as authority for this proposition but in fact it is not. For later rulings on the point see R. v. Wink (1834) 6 C. & P. 397; R. v. Walker (1839) 2 Moo. & R. 212; and R. v. Osborne (1842) Car. & M. 622 (see also the Irish cases of R. v. Alexander (1841) 2 Craw. & D. 126; R. v. Maclean (1840) 2 Craw. & D. 35, and Quigley's case (1842) Ir.Circ. Rep. 677).
5. R. v. Walker (1839) 2 M. & Rob. 212.
6. R. v. Wink supra; for instances of nineteenth century judges admitting evidence of complaint in cases other than rape or sexual assault - see e.g. R. v. Ridsdale (1837) Stark. Ev. 469n. (shooting at the person); R. v. Lunny (1854) 6 Cox 477 (robbery); R. v. Foley (1896) 60 J.P. 569 (wounding with intent).
7. Cresswell J. in R. v. Osborne supra.
8. R. v. Eyre (1860) 2 F. & F. 579 (Byles J.), R. v. Wood (1877) 14 Cox 46 (Bramwell L.J.); Stephen's Digest (1st ed. 1876) art. 8 n. 'I heard Willes J. rule that they were on several occasions, vouching Parke B. as his authority"; Stephen goes on in the note to say that Bramwell B. had been in the habit of admitting the whole of the complaint, and adds his own view that the practice accorded with common sense.
9. R. v. Lillyman (1896) 18 Cox 346 (the Court added that another purpose of admitting such evidence was to show want of consent).

10. The other exception most commonly encountered in criminal cases was that relating to statements made by persons as to their bodily health and feelings. The exceptions relating to 'the admission of declarations in cases of pedigree, of old leases rents and other surveys' were of little importance in criminal cases, and this was also true of depositions taken before a judge magistrate or consular officer abroad under s. 270 of the Merchant Shipping Act, 1854.
11. Swift on Evidence (1810), p. 125 (see also McNally, Evidence (1802), pp. 381 and 386).
12. As to which see Wigmore, art. 1430 n. 1 and the cases there cited.
13. Wright v. Littler (1761) 3 Burr. 1244.
14. The two cases were Aveson v. Kinnaird (1805) 6 East 188 at 195 and Bishop of Durham v. Beaumont (1808) 1 Camp. 206.
15. Douglas Peerage Case 2 Harg. Collect. Jurid. 1769.
16. R. v. Drummond (1784) 1 Leach 337.
17. Stobart v. Dryden (1836) 1 Mee & W. 615 at 626.
18. Doe d. Sutton v. Ridgway (1820) 4 B. & Ald. 35.
19. Wilson v. Boeram (1818) 15 Johnson's Rep. 286 (Supreme Court of New York).
20. R. v. Mead (1824) 2 B. & C. 605 (perjury; motion for new trial); (see also the nisi prius decision of R. v. Hutchinson (1822) cited 2 B. & C. 608n).
21. East, 1 P.C. 353 (1803). This passage in East was, according to Wigmore, the unintentional source of the rule limiting the admissibility of dying declarations to homicide cases. However, Wigmore offers no evidence to support this thesis, and indeed the passage does not support any such limitation, merely describing dying declarations as a kind of evidence more peculiar to homicide. East was careful to make clear that necessity was not the ground of admissibility, and, as Wigmore points out, if the principle were applied logically dying declarations ought to be admitted in all cases of necessity, whatever the nature of the suit, and excluded in cases of homicide where the

circumstances of the death could be satisfactorily proved without the declaration.

22. See e.g. *R. v. Tinkler* (1781) East, 1 P.C. 354; *R. v. Radburne* (1787) East, 1 P.C. 358, and *R. v. John* (1790) East, 1 P.C. 357.
23. *R. v. Earl of Pembroke* (1678) 6 S.T. 1309; *Lord Mohun's Trial* (1691) 12 S.T. 967, and the other cases cited in *Wigmore*, art. 1431
24. *R. v. Lindfield* (1848) 12 J.P. 745.
25. *R. v. Hind* (1860) 8 Cox 300.
26. *R. v. Lloyd* (1830) 4 C. & P. 233.
27. *R. v. Gray* (1841) Ir. Circ. Rep. 76.
28. *R. v. Newton & Carpenter* (1859) 1 F. & F. 641.
29. *R. v. Pike* (1829) 3 C. & P. 598 (4 year old child).
30. *R. v. Mead supra*, *R. v. Murton* (1862) 3 F. & F. 492 (sed contra *R. v. Baker* (1837) 2 Moo. & R. 53).
31. *R. v. Woodcock* (1789) 1 Leach 500; *R. v. Peel* (1860) 2 F. & F. 21 Willes J.; *R. v. Jenkins* (1869) 17 W.R. 621 'an unqualified belief in the nearness of death'; *R. v. Mooney* (1851) 5 Cox 318 (clear impression that in dying state).
32. *R. v. Woodcock supra* *Eyre C.B.* ('soon to answer to his maker'); *R. v. Van Butchell* (1829) 3 C. & P. 629 ('almost immediate dissolution'); *R. v. Jenkins supra* ('expectation of impending and almost immediate death'); *R. v. Osman* (1861) 15 Cox 1 ('if he thinks he will die tomorrow it is not enough'); but contra *R. v. Bonner* (1834) 6 C. & P. 386 where *Patteson J.* held that it was not necessary to prove apprehension of immediate danger.
33. *R. v. Mooney (supra)*; other examples include *R. v. Spilsbury* (1835) 7 C. & P. 190 (deceased stated he should not recover; declaration rejected because his failure to take his leave of his relatives and settle his affairs suggested he entertained hope); *R. v. Nicholas* (1852) 6 Cox 120 (declaration rejected although, immediately after making it, the deceased said 'Oh God I am going fast. I am too far gone to say any more.')
34. *R. v. Woodcock supra*, *R. v. John supra*.

35. Phillips, *op. cit.*, 297.
36. *R. v. Bonner supra.*
37. *R. v. Morgan* (1875) 14 Cox 337 (based on a misunderstanding of *R. v. Cleary* (1862) 2 F. & F. 853).
38. *R. v. Bedingfield* (1879) 14 Cox 341.
39. See especially 14 Cox 339-40 and 343-5.
40. Ashton's case (1837) 2 Leach 147 ('opportunity of investigating the truth much less' Alderson B,); *R. v. Jenkins supra*:- 'a great anomaly and ought to be allowed with scrupulous and almost superstitious care, and, for this reason, that the prisoner is not present when it is made, there is no opportunity of cross-examination, and it is not made under the sanction of an oath' (Byles J.); *R. v. Hind supra* 'the reception of this kind of evidence is clearly an anomalous exception in the law of England which I think ought not to be extended' (Pollock C.B.); *R. v. Gloster* (1888) 16 Cox 471 where Charles J. cited with approval the above quoted passage from Jenkins.
41. Phillips, *op. cit.*, p. 305; Taylor, 7th ed. (1878), p. 612.
42. Phillips, *op. cit.*, p. 306 n. 1; the case was that of Richard Coleman executed in 1749.
43. The prospects of recovery improved somewhat in the second half of the century with the introduction of new surgical techniques, in particular the use of anaesthetics (ether first used in 1845) and antiseptics (first used in the 1860s) - Sir. L. Woodward, *The Age of Reform*, (2nd ed.), 620.
44. *R. v. Scaife* (1836) 2 Lew. 150.
45. *R. v. McCarthy* (1842) unreported cited Russell on Crime (6th ed.), p. 270.
46. Criminal Law Act, 1867 (30 & 31 Vict c. 35), s. 6.
47. *R. v. Foster* (1834) 6 C. & P. 325 followed in the Irish case of *R. v. Lunny supra.*
48. (1880) 15 Law Jo., pp. 5 and 18.
49. See *R. v. Jackson* (1864) 61 C.C.C. Sess. Pap. 128 (declaration made within thirty seconds of injury; trial judge prepared to admit in

evidence but said he would reserve the question of its admissibility, at which the prosecution abandoned the attempt to get the evidence in); R. v. Williams (1872) 77 C.C.C. Sess. Pap. 27 (statement made ten minutes after injury held not admissible). In R. v. Morgan supra, evidence that the deceased, whilst lying mortally injured had pointed at the prisoner, was let in without argument and unchallenged.

50. Under 1 & 2 Ph. & M., c. 13, and 2 & 3 Ph. & M., c. 10.
51. Hale, 1 P.C., p. 305; Buller, N.P. 242 (applies even where witness accomplice - R. v. Westbeer (1739) 1 Leach 12).
52. Hale, 1 P.C., p. 305.
53. Hamson's case 4 S.T. 492; Lord Morley's case (1666) 6 S.T. 776.
54. R. v. Woodcock supra; R. v. Dingler (1791) 2 Leach 561; R. v. Forbes (1814) Holt N.P. 599n.; R. v. Errington (1838) 2 Lew. 148.
55. Lord Morley's case supra; Bromwich's case (1667) 1 Lev 180; Thatcher & Waller's case (1677) T.Jones 53; R. v. Harrison (1661) 5 S.T. 1008; dicta of Lord Kenyon and Buller J. in R. v. Eriswell (Inhab.) (1790) 3 T.R. 721, citing Radburne supra (which is not in fact in point), a note of a case said to have been decided by Hotham B. (R. v. Purefoy, Peake Ev. (5th ed.), 6ln.); a ruling by Coleridge J. in Sills v. Brown (1840) 9 C. & P. 601, repudiated by Starkie, Phillips and Russell and by M. Smith J. in R. v. Rigg (1866) 4 F. & F. 1085.
56. R. v. Borron (1820) 3 B. & A. 432; Cox v. Coleridge (1822) 1 B. & C. 37; R. v. Staffordshire JJ. (1819) 1 Chit. 218; Collier v. Hicks (1831) 2 B. & Ad. 663.
57. Phillipps, op. cit., p. 565.
58. See e.g. R. v. Hake (1845) 1 Cox 226, and chapter 2.
59. Phillipps, op.cit., p. 567.
60. 7 Geo, IV, c. 64, s. 3.
61. 11 & 12 Vict., c. 42, ss. 17 and 18 (procedure) and s. 1 (extension to treason).
62. s. 17.

63. R. v. Scaife (1851) 5 Cox 243.
64. R. v. Eriswell (Inhab.) (1790) 3 T.R. 721.
65. R. v. Hogg (1833) 6 C. & P. 136; R. v. Wilshaw (1841) Car. & M. 14; and R. v. Savage (1831) 5 C. & P. 14.
66. R. v. Wilson (1861) 8 Cox 453 (witness said to be too ill to give evidence but not too ill to travel; held deposition could be read); R. v. Croucher (1862) 3 F. & F. 285 (pregnancy), and R. v. Stephenson (1862) 9 Cox 156 (pregnancy and illness).
67. 1856 P.P. (456) L, 79.
68. See e.g. R v. Shaw (1854) 6 Cox 464 (pregnancy not enough); R. v. Walker (1857) 1 F. & F. 534 (quaere was pregnancy illness); R.v. Meeson (1878) 14 Cox 40 (fact that witness expecting daily to be confined sufficient to enable deposition to be read); R. v. Goodfellow (1879) 14 Cox 326 (pregnancy alone enough) and R. v. Harvey (1850) 4 Cox 441 (weak from recent confinement; sufficient).

## CHAPTER 16

1. R. v. Warwickshall (1783) 1 Leach 267.
2. Early cases in which inducements held out by persons not in authority were held not to exclude include R. v. Row (1809) Russ. & Ry. 153, R. v. Hardwick (1811) 1 C. & P. 98n., and R. v. Gibbons (1823) 1 C. & P. 97. One of the doughtiests advocates of the exclusion of confessions obtained by inducements held out by persons not in authority was Bosanquet J. (see R. v. Dunn (1831) 4 C. & P. 543 and R. v. Slaughter (1831) 4 C. & P. 544n.). In R. v. Spencer (1837) 7 C. & P. 776. Parke B. observed that there was a difference of opinion among the judges upon the question, but two years later Patteson J., having had these dicta cited to him, felt able to say (in R. v. Taylor (1839) 8 C. & P. 733) that the opinion of the judges was in favour of admissibility.
3. See e.g. R. v. Pountney (1836) 7 C. & P. 302 (inducement held out by innkeeper in presence of constable); R. v. Moody (1841) 2 Craw. & D. 347 (implied sanction of constable); & R. v. Laugher (1846) 2 C. & K. 225 (inducement held out by spouse in presence of constable).
4. Taylor, 7th ed., p. 735; Taylor thought that a confession to a private person ought to be excluded if procured by an inducement calculated to induce a prisoner falsely to admit guilt (p. 734).
5. R. v. Warwickshall supra 'it comes in so questionable a shape....that no credit can be given to it'. For other dicta to like effect, see R. v. Thomas (1837) 7 C. & P. 345 (Coleridge J.); R. v. Court (1836) 7 C. & P. 486 (Littledale J.), and R. v. Moore (1852) 5 Cox 555 (Parke B.).
6. R. v. Gilham (1828) 1 Moo. 186 (R. v. Nute (1800) 2 Russ. C. & M. 832 is to like effect).
7. R. v. Court supra.
8. R. v. Gould (1840) 9 C. & P. 486; R. v. Butcher (1798) 1 Leach 265n.
9. Joy on Confessions, p. 5.
10. R. v. Green (1834) 6 C. & P. 393.
11. R. v. Lloyd (1834) 6 C. & P. 393.



12. Starkie, Ev., II, p. 36.
13. R. v. Thompson (1783) 1 Leach C.C. 291 'It is almost impossible to be too careful ... Too great a chastity cannot be preserved on this subject' (Hotham B.).
14. See e.g. R. v. Kingston (1830) 4 C. & P. 387; R. v. Dunn supra. In R. v. Jarvis (1867) L.R. 1 C.C.R. 96 Kelly C.B. said that "the words 'you had better' seem to have acquired a sort of technical meaning."
15. R. v. Enoch (1833) 5 C. & P. 539.
16. R. v. Mills (1833) 6 C. & P. 146
17. R. v. Fleming (1842) Arm. M. & O. 330.
18. R. v. Croydon (1846) 2 Cox 67.
19. R. v. Drew (1837) 8 C. & P. 140.
20. R. v. Morton (1843) 2 M. & R. 514 explained by Coleridge J. in R. v. Hornbrook (1843) 1 Cox 540.
21. R. v. Simpson (1849) 1 Ir.Jur. 200.
22. R. v. Jones (1843) cited in R. v. Attwood (1851) 5 Cox 322 and followed in R. v. Holmes (1843) 1 C. & K. 248, R. v. Furley (1844) 1 Cox 76 (all Maule J.) and in R. v. Harris (1844) 1 Cox 106 (Rolfe B.) and in Ireland in R. v. Hallam (1846) 1. D. & Osb. 88. In Ireland the principle laid down in these cases, semble, survived R. v. Baldry (see Taylor, op. cit., p. 743 citing R. v. Toole (1856) 7 Cox 244).
23. One finds this criticism being made as early as 1809 by the Twelve Judges in R. v. Row (1809) R. & Ry. 153 ('obscurity and discordance of cases'). See also Joy, op. cit., p. 3.
24. Vol. 28 (1842), p. 17.
25. 8th Report, 1845, App. A. evidence of Woolrych, p.281 (he would have retained the existing rule in capital cases) and Messrs Stone & Wall, p. 307.
26. R. v. Baldry (1852) 5 Cox 253.
27. Taylor, op. cit., p. 728, and Greenleaf, Evidence (1842), s. 217.
28. Hale, 2 P.C., 290.

29. Perry's case (1660) 14 S.T. 1312 (one of two brothers confessed that he and his brother and mother had murdered his master; they were all executed; two years later the master returned home, and explained that he had been kidnapped and sold to the Turks); Hubert's Case (1666) 6 S.T. 807, 821 (Hubert voluntarily confessed that he had started the Great Fire of London in 1666 'yet neither the judge nor any present at the trial did believe his guilt, but that he was a poor distracted wretch weary of life who chose to part with it in this way'); Wood's case (1810) (2 Life of Sir Samuel Romilly 2nd ed., p. 188) (court martial for mutiny; accused applied to another man to write a defence for him and read it thinking it calculated to excite compassion; he was executed before its falsity was discovered); the case of the Boons (1819) (cited Taylor, op. cit., p. 723) (two brothers saved from execution for a murder (to which one of them had confessed) by the timely appearance of the 'victim').
30. Greenleaf, op. cit., s. 217.
31. R. v. Flaherty (1847) 2 C. & K. 782.
32. R. v. Wheeling (1789) 1 Leach 311n. The two other cases were R. v. White (1823) Russ. & Ry. 508 and the curious case of R. v. Sutcliffe (1850) 4 Cox 270).
33. See R. v. Eldridge (1821) Russ. & Ry. 440; R. v. Falkener (1822) Russ. & Ry. 481; R. v. Tippet (1823) Russ. & Ry. 509; R. v. Tuffs (1831) 5 C. & P. 167.
34. R. v. Baldry supra per Campbell L.C.J..
35. R. v. Reeve & Anor. (1872) 12 Cox 179.
36. 1856 P.P.(111) V, 523, cl. 13 (Sir Fitzroy Kelly later became Kelly L.C.B.).
37. Ibid., cl. 15 (the decision of Alderson B. referred to is R. v. Griffin (1853) 6 Cox 219).
38. R. v. Unkles (1874) Ir. R. 8 C.L. 50 (unlawful disclosure by election agent of tenor of vote), and R. v. Sullivan (1887) 16 Cox 347 (unlawful publication of notice of seditious meeting).
39. See e.g. Best on Evidence, 9th ed. (1902), 459, and the omission of all reference to the point in Stephen's Digest, 1st ed. (1876).

40. R. v. Thompson [1893] 2 Q.B. 12.
41. Wigmore, 3rd. ed., art. 820a :- 'sentimental excesses'. For nineteenth century criticism of the rule see e.g. Phillipps, 8th ed. (1838), p. 424 'There is a general feeling which seems to be well founded that the rule has been extended much too far', citing Parke B.'s dictum that 'the doctrine of inducements has been carried to the verge of common sense', and the dictum of Pitt Taylor cited in Baldry. Wigmore was at great pains to explain the 'sentimental irrationality' of the judges in the matter of confessions. In fact, like their stance on indictment defects and variances (which goes back to Hale's time), it probably represents no more than an application of the well known principle that the judge should act as counsel for unrepresented prisoners, and be astute to detect and take on their behalf any technical point which may redound to their advantage.
42. In addition to the examples given in the text one can point to the emergence during the first half of the century of the 'person in authority requirement', and to the refusal of the judges throughout the century to have any truck with arguments that admissions made on oath in other proceedings were made under compulsion, and so inadmissible (see for a summary of the extensive case law on this point Archbold, 20th ed. (1886), pp. 265-8).
43. R. v. Elsley (1844) 3 L.T.(O.S.) 6 (counsel ought to open the precise words used so that the accused can have the benefit of any discrepancy (overruling R. v. Swatkins (1831) 4 C. & P. 548 where it had been held that counsel ought not to state the precise words used in case the confession turned out not to be admissible (it does not seem to have been realised that their real objection was to mention not of the terms but of the fact of the confession)).
44. See chapter 14.
45. R. v. Burley (1818) 2 Starkie, Evidence 13; R. v. Dingley (1845) 1 C. & K. 637 'A Queen's evidence who refuses to make full disclosure may be convicted on the confession he has made with a view to being admitted a Queen's evidence' (Pollock C.B.).
46. R. v. Gillis (1866) 17 Ir. C.L. 512.
47. R. v. Derrington (1826) 2 C. & P. 418 (Garrow B.).

48. R. v. Spilsbury (1835) 7 C. & P. 187; R. v. Carter, The Times Mar. 23, 1835 where Coleridge J. expressed disapproval of the conduct of the police but nonetheless let the confession in.
49. R. v. Anon. (Nottingham Assizes), The Times, July 22, 1825.
50. R. v. Mitchell, The Times, Dec. 24, 1823 (confession excluded on another ground).
51. R. v. Wild (1835) 1 Moo. C.C. 452, and R. v. Risborough (1847) 11 J.P. 280.
52. R. v. Thornton (1824) 1 Moo. C.C. 27 (fourteen year old boy kept in custody without food for a day, Bayley J. observing that his detention was probably illegal); contra R. v. Ackroyd (1824) 1 Lew. 49.
53. R. v. Derrington (1826) 2 C. & P. 418.
54. R. v. Burley (1818) Phill., Ev., (10th ed.), p. 420.
55. R. v. Gibney (1822) Jebb Cr. & P. Cas. 15 (acts done by those escorting prisoner to gaol calculated to excite horror in him at recollection of the crime); R. v. Nolan (1839) 1 Craw. & D. 74 (telling prisoner accused of murder that his father had been charged with the offence).
56. R. v. Shaw (1834) 6 C. & P. 372 (promise on oath not to tell) and R. v. Thomas (1837) 7 C. & P. 345 (advice not to confess coupled with promise of secrecy).
57. R. v. Gilham supra.
58. (1844) 8 J.P. 514 referring in particular to R. v. Smith (arson case at Ipswich); see also evidence of Cobbett to Criminal Law Commissioners (8th Report, App. A, p. 294 ('they (the police) put others to watch and overhear what is said by those who are to be tried and thus extort evidence from the mouth of the accused')). For the 1883 Cumberland case see 18 Ir. L.T. 617 (Carlisle Assizes, Day J.).
59. Foster, p. 243 'words in criminal cases are often misreported through ignorance, inattention or malice and are extremely liable to misconstruction'. See also R. v. Simons (1834) 6 C. & P. 540.

60. R. v. Sexton (1822) 1 Burns JJ. (29th ed.), p. 1081 (it was said in that case that Dallas C.J. had followed the same rule).
61. R. v. Mallett, (1830), MSS. Greaves, cited in Russell, 4th ed. (1865), p. 867.
62. R. v. Roche (1841) C. & M. 341.
63. Metropolitan Police General Orders, 1870 (PRO: MEP 8/3; Prisoners para. 32); Metropolitan Police General Regulations and Orders, 1893 (PRO: MEP 8/4) section XVII para.s 308 and 397.
64. Hale, 1 P.C., p. 585; Hawkins 2 P.C., c. 46, s.3; see also R. v. Boroski (1682) 9 S.T. 1 and R. v. Tonge (1662) Kel. 17.
65. R. v. Shakespeare & Clarkson, The Times, Feb. 16, 1899 (Old Bailey); after two hours deliberation the jury foreman told the Common Serjeant 'the difficulty the jurymen were in was to accept the statement in respect of one of the accused, and to blot it out of their minds in relation to the other'; in the end the jury convicted one prisoner and were unable to agree as to the other.
66. R. v. Young (1789) 1 Leach 505 (Buller J. spoke of having previously followed the same practice and said that Yates J. had also done so).
67. R. v. Clothier & Tiler (1844) 1 Cox 113. See also R. v. Holloway & Kennard, The Times, Dec. 15 & 17, 1831.
68. R. v. Maudsley (1830) 1 Lew. 110; R. v. Barston (1831) 1 Lew. 110.
69. R. v. Fletcher (1829) 4 C. & P. 250 (Littledale J.); R. v. Hearne (1830) 4 C. & P. 215 (Littledale J.); R. v. Hall & Ritson (1833) 1 Lew 110 (Alderson J.) and R. v. Foster (1833) 1 Lew. 110 (Denman J.); see also Russell, 4th ed. (1865), p. 867 'On the Oxford circuit it was the constant practice a few years ago to omit the name of any prisoner that was mentioned in the confession of another prisoner'.
70. R. v. Harding, Bailey & Shumer, Glouc. Spr. Ass., (1830) MSS. Greaves, cited Russell, op.cit., p. 867n. Littledale J.:-'Suppose two men are indicted, one as principal and the other as accessory, and the principal is named in the indictment and the accessory makes a confession admitting himself to be the

accessory to the principal, how is it to be known that he is accessory to such principal if the name of the principal is not to be read?'

71. R. v. Silcott 1987 Crim.L.R. 765.
72. Platt B. in R. v. Fisher (1848) 3 Cox 68 at p. 69.
73. R. v. Blackburn (1853) 6 Cox 333.
74. See R. v. Anon., The Times, Nov. 1 1862 (Old Bailey); see also Russell, op. cit., p. 868 n (b) 'It would be extremely beneficial to prisoners in such cases to be tried separately, and such a course is nothing more than expedient in cases of difficulty as it is almost beyond the power of a jury properly to discriminate between the evidence affecting different prisoners'. Greaves, the editor of Russell, had also advocated this course in his Report on Criminal Procedure 1856 P.P. (456) L, 79.
75. R. v. Wilson (1817) 1 Holt N.P. 597.
76. 25th ed., (1830), Vol. 1, p. 982.
77. R. v. Ellis (1826) Ry. & Moo. 432.
78. R. v. Court (1836) 7 C. & P. 486; R. v. Rees (1836) 7 C. & P. 568; R. v. Bartlett (1837) 7 C. & P. 569.
79. 7 Geo IV., c. 64, ss. 2 & 3.
80. Lambard, Eirenarcha, Bk. 2, c. VII.
81. Dalton's Countrey Justice, (1635 ed. folio) cap. III, p. 299.
82. Chitty, Crim. Law, 1st ed. (1816), vol. 1, p. 84.
83. Report of Royal Commission on Police Powers & Procedures, 1928/9 P.P. (Cmnd. 3297) IX, 127. App. 4.
84. R. v. Foster, The Times, Oct.1 & 2, 1824.
85. See The Times Police reports for the period.
86. See e.g. Reynolds, Marylebone Police Office, The Times, Jan. 2 & 3, 1824 (prisoner advised not to commit himself); 8th Report of the Criminal Law Commissioners, 1845, App. A : T, Paynter at p. 242, Messrs. Mee & Bigsby p. 256; R. v. Sansome (1850) 4 Cox 203 at p. 20;

- Pue, *The Twilight Zone*, (1983) 21 *Alberta Law Review*, p. 334 at pp. 346-7.
87. Eagle, *The Magistrate's Pocket Companion*, 2nd ed. (1844), p. 112.
  88. 8th Report of the Criminal Law Commissioners, App. A: T. Paynter, p. 242, Messrs. Mee & Bigsby, p. 256 and J.P. Cobbett, p. 293.
  89. S. 18.
  90. *R. v. Pettit* (1850) 4 Cox 164; *R. v. Berriman* (1854) 6 Cox 184.
  91. *R. v. Young & Aynsley*, *The Times*, July 31, 1823.
  92. *R. v. Baker*, *The Times*, Aug. 2, 1825; see also Park J. in *R. v. Read*, *The Times*, Jan. 2, 1844.
  93. *R. v. Gibney*, (1820) *Jeb.Res.Cas.* 15.
  94. *R. v. Thornton* (1824) 1 Moo. C.C. 27.
  95. Hill's Case (cited Roscoe, *Criminal Evidence*, 6th ed., p. 48).
  96. Denman L.C.J. in *R. v. Anon.* (Bury St. Edmunds Assizes), *The Times*, Aug. 1, 1839, & Dougherty C.J. in *R. v. Hughes* (1839) 1 *Craw & D.* 13.
  97. 8th Report of the Commissioners on Criminal Law, App. A: J.P. Fawcett, p. 219; W.H. Woolrych, p. 281; see also Rolfe B. in *R. v. Anon.* (1844) 2 *L.T.* 175.
  98. See e.g. Dougherty C.J. in *R. v. Doyle* (1840) 1 *Craw. & D.* 396; *R. v. Grey* (1856) 7 Cox 244n. (Le Froy J.); *R. v. Bodkin* (1863) 8 *Ir. Jur. N.S.* 240.
  99. Crampton J. in *R. v. Martin* (1841) *Arm. M. & O.* 197.
  100. *R. v. Baldry* (1852) 2 *Den.* 430.
  101. *R. v. Drew* (1837) 8 *C. & P.* 140.
  102. *R. v. Glennon, Toole & McGrath* (1840) 1 *Craw. & D.* 359.
  103. *R. v. Mick* (1863) 3 *F. & F.* 833; *R. v. Johnston* (1864) *Ir.C.L.R.* 60 at p. 88 (O'Brian J.) at p. 133 (Le Froy J.); *R. v. Anon.* 11 *Sol. Jo.* (1866) p. 168 (Chelmsford Assizes) 'I have no such powers, the magistrates of the county have no such powers, and is an ignorant

policeman to have the power to put such questions?' (Bramwell B.); Yeovil Murder Case (1877) 41 J.P. 187; R. v. Davitt, The Times, July 16, 1870 (Cockburn L.C.J.); R. v. Marshall, The Times, Feb. 28, 1874 (Cave J.); R. v. Gavin (1885) 15 Cox 656; & R. v. Male & Cooper (1893) 17 Cox 689.

104. See e.g. Alderson B. in R. v. Stokes (1853) 17 Jur. 192 'We are not always certain it is fairly done.'
105. Denman L.C.J. in R. v. Anon. cited at n. 96 above.
106. R. v. Toole (1856) 7 Cox 244.
107. R. v. Anon., The Times, Mar. 5, 1845 per Alderson B.
108. 'ambition to convict' Cox at (1844) 2 L.T. 356; R. v. Toole (1856) 7 Cox 244 ('natural anxiety to get convictions'); R. v. Stokes supra 'You ask questions to compromise the man not to get him off'.
109. Cox, (1844) 2 L.T. 356; R. v. Stokes supra per Alderson B.
110. 8th Report of the Criminal Law Commissioners, App. A: J.P. Cobbett, p. 294; Gribble, p. 318.
111. Per Pigott C.B. in R. v. Johnston supra at pp. 122-3; c.f. Christian J. in R. v. Hassett (1861) 8 Cox 511 'There was a difference in the value of testimony voluntarily given and that elicited in answer to questions.'
112. Joy on Confessions, p. 38.
113. PRO: MEP 8/3 'Prisoners' para. 8.
114. PRO: MEP 8/4 para.s 202, 203 and 306.
115. See the anecdote recounted W. Forsyth both in a letter to the Criminal Law Commissioners (8th Report, App. A, p. 253), and in Hortensius the Advocate, 3rd ed., p. 272, of a constable, who, when asked by counsel whether the prisoner had made a statement, replied 'No. He was beginning to do so, but I know my duty better and prevented him'. In the letter he describes the incident as having occurred recently at the Old Bailey.
116. 8th Report of the Criminal Law Commissioners, App. A, p. 211.



117. R. v. Dickinson (1844) 1 Cox 27, R. v. Watts (1844) 1 Cox 75, and R. v. Priest (1847) 2 Cox 378
118. R. v. Davitt, *The Times*, July 16, 18 & 19, 1870 (Cockburn C.J.).
119. R. v. Berriman (1854) 6 Cox 388 (Erle J.); R. v. Reason (1872) 12 Cox 228 (Keating J.).
120. See e.g. R. v. Reason (1872) 12 Cox 228 and the Yeovil Murder Case *supra*; in 1881 the Justice of the Peace remarked upon 'a growing tendency to infringe the rule ... forbidding the interrogation of prisoners'. In 1882 the Marquis of Salisbury, in a charge to a Quarter Sessions grand jury, went out of his way to draw their attention to two cases in the calendar where such improper questioning had occurred (1882) 46 J.P. 665.
121. Cases in which such evidence had been excluded included R. v. Doyle (1840) 1 *Craw. & D.* 396; R. v. Martin (1841) *Arm. M. & O.* 197; R. v. Devlin (1841) 2 *Craw. & D.* 151; R. v. Toole (1856) 7 Cox 244; R. v. Grey (1856) 7 Cox 244n.; R. v. Warrell (1861) 13 *Ir. Jur.* 357; R. v. Hassett (1861) 8 Cox 511; R. v. Bodkin (1863) 8 *Ir. Jur. N.S.* 340. The only case in which answers obtained by questioning had been received was R. v. Hughes, cited by Joy, *op. cit.*, p. 39.
122. R. v. Johnston, *supra*.
123. Taylor, 1st ed. (1848), p. 421, Joy, *op. cit.*, Phillips, 8th ed. (1838), p. 427.
124. R. v. Wild (1835) 1 *Moo. C.C.* 452.
125. R. v. Cheverton (1862) 2 *F. & F.* 833.
126. R. v. Mick (1863) 3 *F. & F.* 822.
127. At p. 105.
128. Indian Evidence Act, 1872, s. 25.
129. R. v. Gavin (1885) 15 Cox 656.
130. R. v. Male & Cooper (1893) 17 Cox 689.
131. R. v. Morgan (1895) 59 J.P. 827.
132. R. v. Histed (1898) 19 Cox 19; in R. v. Miller (1895) 18 Cox 54 Hawkins J. said that he did not expressly dissent from Gavin. Nor, *semble*, were Cave and Hawkins JJ. the only judges to follow Gavin. In 1893 the Justice of the Peace

at p. 310 claimed that the judges 'constantly reject or discredit answers to questions given by persons under suspicion at the time.'

133. R. v. Rogerson [1870] N.S.W.C.R. 234.
134. R. v. Brackenbury (1893) 17 Cox 628.
135. Rogers v. Hawken (1898) 19 Cox 122.
136. R. v. Pearson (1908) 1 Cr.App.R. 77; R. v. Firth (1913) 8 Cr.App.R. 162; R. v. Gardner & Hancox (1915) 11 Cr.App.R. 247; R. v. Grayson (1921) 16 Cr.App.R. 230; R. v. Adams (1923) 17 Cr.App.R. 77. See also a reference to the Metropolitan Magistrates having commented on the practice in 109 L.T. (1910) 389.
137. Ibrahim v. R. [1914-15] A.C. 509.
138. R. v. Voisin (1918) 13 Cr.App.R. 89.
139. R. v. Booker (1924) 18 Cr.App.R. 47.
140. R. v. Matthews (1913) 14 Cr.App.R. 23; R. v. Grayson supra; R. v. Taylor (1923) 17 Cr.App.R. 109; R. v. Brown & Bruce (1931) 23 Cr.App.R. 56; R. v. Dwyer (1932) 23 Cr.App.R. 156.
141. Report of the Royal Commission on the Police Powers & Procedure supra, p. 60, para.s 161-2.
142. Home Office Circular of Jan. 24, 1930 (536053/29).
143. See e.g. R. v. Brown & Bruce, and R. v. Dwyer supra; R. v. Rattenbury & Stoner (1935) Notable British Trials Series, p. 126.
144. The Inns of Court Conservative Association and the Bow Group both suggested to the 1962 Royal Commission on the Police that it should be included - see Gooderson, The Interrogation of Suspects, 1970 48 Can.B.R. 272.
145. The D.P.P. had told the Royal Commission of 1929 that the practice was 'from the point of view of the public a first rate procedure' but the Commission had condemned it (para. 159). It had been used in R. v. Booker supra and upheld in R. v. Whitway, The Times, Oct. 29, 1953, and in particular in R. v. Buchan (1948) 32 Cr.App.R. 126.
146. Glanville Williams 1960 Crim.L.R. 330.
147. Rule 1 of the 1964 Rules.

## CHAPTER 17

1. See e.g. R. v. Landfriede, *The Times*, Oct. 30, 1805 (jury ask if there are witnesses to the prisoner's character); R. v. Budge, *The Times*, Aug. 27, 1811 (a speech from counsel extolling his client's character prompted the judge to observe that, if such was the prisoner's character, why had no character witnesses been called?). The *Times* report of R. v. Howe, Mar. 20, 1813 (a murder case) commented on the failure of the prisoner to call a single character witness. See also R. v. Fonswick, *The Times*, Sept. 22, 1819 where the judge asked the prisoner if he had any person to give him a character. Also Beattie, *op. cit.*, p. 448 (speaking of the eighteenth century) 'To have no witnesses at all was almost certain to be disastrous, especially if the charge was particularly serious', and Langbein, *The Criminal Trial before the Lawyers*, p. 305 'The Old Bailey Sessions Papers often recite that the want of character evidence for the accused was material to his conviction.'
2. With the jury good character might sometimes win the prisoner a partial verdict (i.e. a verdict acquitting him of the capital part of the charge) - see Beattie, *op. cit.*, p. 443. As to the role of character evidence in the decision of judges to reprieve capitally convicted prisoners see Beattie, *op. cit.*, p. 443 and Green, *Verdict According To Conscience*, p. 443.
3. Beattie, *op. cit.*, 447: 'Prisoners appreciated the importance of character witnesses... large numbers managed to arrange from jail to get one or two witnesses to come to court.'
4. See e.g. R. v. Bryan, *The Times*, Aug. 5, 1814 (murder; 21 character witnesses); R. v. Blackburn, *The Times*, Mar. 29, 1815 (forgery; upwards of 20); R. v. Stent, *The Times*, Sept. 20, 1819 (attempt murder; a vast number); R. v. Sparkes, *The Times*, Jan. 2, 1823 (attempt murder; 17); R. v. Fauntleroy, *The Times*, Nov. 1, 1824 (forgery; 16).
5. See e.g. R. v. Allen, *The Times*, Oct. 31, 1814 (the accused, a lad of 15-16, said nothing in his defence but called a number of respectable persons who gave him a good character).
6. E.g. R. v. Solomon, *The Times*, Jan. 25, 1817 (young lad indicted for theft asked Recorder to postpone trial because his witnesses had

not yet arrived, which drew from the Recorder the usual answer 'We will give you a good character').

7. E.g. Lord Ellenborough C.J. in *R. v. Cock*, *The Times*, May 3, 1802 'good character can avail only in doubtful cases' and in *R. v. Davison* (1809) 31 S.T. 99 'If the evidence were in even balance character should make it preponderate in favour of the Defendant, but in order to let character have its operation the case must be reduced to that'; *Le Blanc J* in *R. v. Haigh*, (1813) 31 S.T. 1092 'If the evidence leaves it a matter of fair and reasonable doubt whether a party is guilty or not, in common sense if you prove that a prisoner upto that time has always maintained a good character it will apply and balance in his favour; but if the evidence of guilt is satisfactory to the minds of the jury, evidence of the prisoner's good character cannot and ought not to have any avail'. This form of direction had, *semble*, been in use since the late seventeenth century (see e.g. *Hyde C.J.* in *R. v. Turner* (1664) 6 How S.T. 565), and it was still being given as late as 1918 (see *R v. Bliss Hill* (1918) 13 Cr. App.R 125). It undoubtedly lies at the root of the direction which is still sometimes given today that 'good character cannot fight facts'. It had been strongly criticised by Greaves (Russell, 4th ed. (1865), 300); evidence of character was, he argued (as *Williams J.* had said in *R. v. Stannard* (1837) 7 C.& P. 673), evidence to be submitted to the jury to induce them to say whether they think it likely that a person, with such a character would have committed the offence, and ought even in plain cases to be left to the jury for them to consider along with the other evidence in the case. The direction was also open to the criticism that if the evidence was such as to leave the jury doubtful it was their duty to acquit whatever the defendant's character.
8. Archbold, 1st ed. (1822), p. 70; Phillips, 8th ed. (1838), p. 490.
9. *R. v. Rowton* (1865) 10 Cox 25.
10. This was conceded by Cockburn L.C.J. at p.30. The decision was at odds with earlier reported cases, in particular *R. v. Davison* supra where Lord Ellenborough C.J. had ruled that 'the correct mode of examining a witness to character is to ask him whether from his knowledge of the Defendant's general character he thinks him capable of committing the offence charged against him' and *R. v. Hemp*

- (1833) 5 C. & P. 468. Erle C.J. pointed out in the course of his dissenting judgment (at p. 33) that the effect of the majority decision would be to prevent an employer being called to say 'This man has been in my employ for twenty years, and I have always regarded him with the highest estimation and respect.'
11. Some of the strongest criticism came in Stephen's Digest, 1st ed. (1876), p. 167 where the comment was made 'The case is seldom if ever acted upon in practice.'
  12. These glosses seem to have originated with Phillips and to have been later generally adopted by other text writers.
  13. R. v. Hodgkiss (1836) 7 C.& P. 298.
  14. R. v. Wood & Parker (1841) 5 Jur 225 (Parke B. justified his ruling on the ground that 'character is made up of a number of small circumstances, of which his being suspected is one.'. Five years later in R. v. Rogan & Elliott (1846) 1 Cox 291 Erle J. refused to allow such a question).
  15. Previous Convictions Act, 1836 proviso; Prevention of Offences Act, 1851, s. 9; Larceny Act, 1861 s. 116; Coinage Offences Act, 1861, s. 37; Prevention of Crimes Act, 1871, s. 9.
  16. R. v. Hughes (1843) 1 Cox 44 (Rolfe B.); R. v. Lovejoy (1850) 14 J.P. 592 (Mr. Commiss. Gurney); in both cases the judge whilst allowing such evidence to be given said he had never heard of such a thing being done before.
  17. R. v. Burt (1851) 5 Cox 284 (Martin B. after consulting Erle J.).
  18. R. v. Collins, The Times, Apr. 17, 1844. There was in fact by the time of Rowton some authority for allowing in such evidence, viz. R. v. Hains (1695) Comb. 337 ('if the defendant give evidence of a general reputation, it may be answered by particular instances on the other side'), and R. v. Lovejoy supra, where Mr Commiss. Gurney allowed rebuttal witnesses to prove particular acts of dishonesty.
  19. See e.g. Cockburn L.C.J. at p. 31 where, after making it clear that the same rules applied to evidence called in rebuttal as to evidence led in chief, added 'evidence of particular facts...must be put out of consideration altogether.' See also Willes J. at p. 39

'particular acts must be excluded on the part of the prosecution, partly for the same reason that excludes them in the first instance, and partly from the reason that no notice has been given to the prisoner that you are going to go into an inquiry as to particular acts'. This was certainly the view of the text writers, see e.g. Taylor, 7th ed., p. 322 and Best, 9th ed. (1902), p. 239. It was also the view taken by a Canadian court in *R. v. Triganzie* (1888) 15 O.R. 294

20. *R. v. Roberts*, *The Times*, Sept. 23, 1820, where Best J. after cross-examining a character witness about a previous conviction of the prisoner's, observed to the jury 'It was an old saying that no man ever had a character until he came to the Old Bailey, and the reception of such testimony as had just been offered was a great stain on the administration of justice' adding that he had always done all he could to stamp out the practice.
21. *R. v. Roberts* supra affords one example of a judge intervening in this way. For others, see *R. v. Norris*, *The Times*, Aug. 2nd, 1804, where Grose J., in the course of his summing up, told the jury that the evidence of good character the prisoner had called would not avail him for reasons he would explain afterwards, and *R. v. Kelly*, *The Times*, Dec. 21, 1838 where a character witness was cross-examined by the Common Serjeant as to the accused's previous convictions. Old offenders, appearing before the City Judges, always ran the risk that the judge would remember their faces.
22. See the judgment of Martin B. in *Rowton* at p. 36.
23. *R v. Cole* (1810) 3 J.N., p.267.
24. As to such practice see Langbein, *op. cit.*, p. 303.
25. Langbein, *op. cit.*, p.304.
26. See e.g. *R v. Fauntleroy* supra; *The Times* for Mar. 7, 1843 reports the waiting jurors complaining of being kept out of court during the trial of Daniel M'Naghten (public interest was such that their seats had been commandeered by others); and *R. v. Shrimpton* (1851) 2 Den. 319, and the exchange therein between counsel and the judges referred to below.

27. For examples of cases of prisoners being tried successively on a number of indictments see *R. v. Oliver*, *The Times*, July 31, 1800 (tried on 2 indictments in succession); *R. v. Jonquay & Gails*, *The Times*, Feb. 17, 1803 (2 indictments in succession); *R. v. Warren*, *The Times*, Apr. 26, 1803; *R. v. O'Donnell*, *The Times*, Sept. 24, 1806, where the accused, on his second trial, addressed remarks to the jury concerning the first trial; *R. v. Guy*, *The Times*, Jan. 19, 1807; *R. v. Smith*, alias *Holmes*, *The Times*, Mar. 20, 1807; *R. v. Cannon*, *The Times*, Dec. 3, 1808; *R. v. Cole*, *The Times*, Aug. 11, 1810; *R. v. King*, *The Times*, July 15, 1811, where the Recorder actually told the jury that there were other indictments and trials to come; *R. v. Fauntleroy* supra, where Park J. expressed the view that it might not be right to have the same jury try all the indictments against the accused; *R. v. Goodfellow*, *The Times*, Jan. 1, 1831; *R. v. Mulvey*, *The Times*, Mar. 19, 1831; *R. v. Napier*, *The Times*, Sept. 18, 1839; & *R. v. Carn*, *The Times*, Jan. 10, 1885, where the report refers in terms to fact that the indictments were tried by the same jury.
28. See chapter 3.
29. 101 C.C.C. Sess.Pap. 5 (the Common Serjeant appealed to counsel for the prosecution not to press the evidence but he would not be dissuaded).
30. See *R. v. Anon.* (Guildford Assizes), *The Times*, Aug. 2, 1862, where a police officer volunteered that the accused had previous convictions; and *R. v. Tuberfield* (1864) 10 Cox 1 where prosecuting counsel elicited evidence from an arresting officer as to his then knowledge of the Defendant's character, as going to the question of whether he had reasonable grounds to arrest him.
31. See *R. v. Smith* (1916) 80 J.P. Rep. 199, and chapter 14.
32. In the first case noted at 30 above *Bramwell B.*, although remonstrating with the officer, did not consider discharging the jury.
33. *R. v. Anon.* (1851) 5 Cox 268 and *R. v. Shuttleworth* (1851) 3 C. & K. 375 (Alderson B. claimed that if the procedure were otherwise the accused would have no opportunity of challenging the jury).
34. *R. v. Shrimpton* (1851) 2 Den. 319.

35. See chapter 14.
36. R. v. Maria Fox (1866) 10 Cox 505 and R. v. Martin (1869) 11 Cox 343, where the Court for Crown Cases Reserved held that the new procedure applied even in a prosecution for the felony of possessing counterfeit coin after a previous conviction, despite the fact that it was only the fact of the previous conviction which made the offence felony.
37. By s. 1 proviso (f) of the Criminal Evidence Act, 1898.
38. See e.g. R. v. Rickman (1789) East, 2 P.C. 1035 (infra); R. v. Pearce (1791) Peake Add. Cas. 106 (libel - paragraphs other than those in issue admitted to corroborate testimony of printer and identify Defendant); R. v. Neville (1791) Peake 91.
39. R. v. Tattersall (1801) 2 J.N. 252 referred to by Ellenborough L.C.J. in R. v. Whiley & Haines (1804) 2 Leach 983.
40. R. v. Cole (1810) 3 J.N. 267 and referred to in Phillipps, 1st ed., pp. 69-70.
41. The increase in bank note forgery was reflected both in the number of prosecutions brought and the number of forged notes detected. Between 1783 and 1796 only 4 persons were prosecuted for bank note forgery. By 1801 the number of prosecutions had risen to 54. It was 63 in 1802 and after a falling off between 1803 and 1806 the figures picked up again rising to 120 in 1816, and 142 in 1817. In 1812 the value of forged notes detected by the Bank of England was £17,883; for 1817 the figure was £31,180 (see (1818) P.D. XXXVIII, xxxv-xl). The increase in forgery was accompanied by a huge increase in the number of bank notes in circulation (to which the Bank of England's decision to suspend cash payments for the duration of the war materially contributed). In the first half of 1797 the number of Bank of England notes in circulation was £10.8 million. For the corresponding period in 1817 the figure was £27.3 million. Bank of England notes were not of course the only bank notes in circulation; country banks also had power to issue notes (even after the Bank Charter Act, 1844 about 280 banks still retained the privilege of issuing their own bank notes. The forgery of bank notes was made easier by their still primitive design (see (1818) P.D. XXXVIII, 275 and 282. On the question of forged notes generally see (1816) P.D. XXXIII, 1178-9 and



XXXIV, 310-11, (1818) P.D. XXXVII, 1223-4 and XXXVIII, 272-84.

42. See e.g. the charge of Hullock B. to the Grand Jury at the York Summer Assizes, 1828 'It is seldom that the individual who actually commits a forgery is reached' (Sheffield Courant, July 25, 1828).
43. Per counsel in R. v. Whiley & Haines supra.
44. Chitty, Crim. Law, 1st ed. (1816), Vol. 1, 284-5. The remedy for breach of the prohibition was either to move, before arraignment, to quash the indictment, or, after arraignment, to ask the judge to call upon the prosecution to make their election. The objection could not be taken by demurrer or motion in arrest. The reason given for the rule was that to permit more than one felony to be joined might embarrass the prisoner in the exercise of his right of challenge. The rule did not apply in misdemeanour (where there was no right of jury challenge), it being possible to join any number of misdemeanours in a single indictment.
45. The argument about want of notice was rejected by Lord Ellenborough on the ground that 'prisoners must know that, without receipt of other evidence than that which the mere circumstances of the transaction afford, it would be impossible to ascertain whether they uttered ... with guilty knowledge...'. Ironically the same argument was one of the justifications advanced by his lordship for prohibiting witnesses being asked degrading questions.
46. R. v. Millard (1813) Russ. & Ry. 245; R. v. Phillips (1829) 1 Lew. 105 and R. v. Moore (1858) 1 F. & F. 73. The rule was departed from by Coleridge J. in R. v. Forbes (1835) 7 C. & P. 224 (where an admission by a prisoner in a letter that a bill of exchange not produced in evidence was forged was held admissible to prove the fact).
47. See e.g. counsel in R.v. Smith (1827) 2 C. & P. 633, and R. v. Dossett (1846) 2 C. & K. 306; Bayley J. in R. v. Ellis (1826) 6 B. & C. 145; and Russell, 4th ed. (1865).
48. R. v. Oddy (1851) 2 Den. 264.
49. R. v. Rickman supra.
50. R. v. Westwood (1813) 4 C.& P. 547.

51. R. v. Furse (1833) 6 C. & P. 81.
52. E.g. R. v. Young (1789) 3 T.R. 98, R. v. Thomas 1800 East, 2 P.C., 934.
53. Per Lord Ellenborough in R. v. Whiley supra.
54. R. v. Folkes (1832) 1 Moo. 354; (see also R. v. Rooney (1836) 7 C. & P. 517 and R. v. Giddins (1842) 2 Car. & M. 634 (two persons robbed in same incident); R. v. Ellis supra (theft of marked coins from till on different occasions during same day); R. v. Birdseye (1839) 4 C. & P. 386 (thefts from same shop separated in time by only minutes); R. v. Trueman (1839) 8 C. & P. 727 (arson of a row of 5 houses).
55. R. v. Bleasdale (1848) 2 C. & K. 765 and see also R. v. Firth (1867) 11 Cox 234 (theft of gas over period of years by means of secret pipe).
56. R. v. Winslow (1860) 8 Cox 397 and R. v. Hall (1887) 5 N.Z.L.R. 93.
57. R. v. Williams (1834) 6 C. & P. 626. The Larceny Act, 1861 created an exception to the prohibition on charging more than one felony in an indictment, permitting in cases of theft and embezzlement upto three charges, separated in time by no more than six months, to be included in the same indictment.
58. R. v. Donnall (1817) 2 C. & K. 308 n.
59. R. v. Egerton (1819) Russ. & Ry. 375.
60. R. v. Clewes (1830) 4 C. & P. 221.
61. R. v. Voke (1823) Russ. & Ry. 531 followed in R. v. Dossett supra.
62. R. v. Winkworth (1830) 4 C. & P. 444.
63. R. v. Boynes (1843) 1 Car. & Kir. 65.
64. R. v. Mahoney (1848) 12 J.P. 377.
65. R. v. Cooper (1849) 3 Cox 547.
66. R. v. Whiley supra.
67. R. v. Hough (1806) Russ. & Ry. 120.
68. R. v. Dunn & Smith (1826) 1 Moo. C.C. 146.

69. See Vaughan B. in R. v. Sunderland (1828) 1 Lew. 102 ('the rule has been much questioned by many able lawyers').
70. R. v. Taverner (1809) 4 C.& P. 413n. (such evidence admissible only where the utterings were in some way connected, as where the notes could be shown to be of the same manufacture); R. v. Smith (1831) 4 C.& P. 411 (prosecution declined to press the evidence when Gaselee J threatened to reserve the point).
71. R. v. Whiley supra (remoteness went to weight not admissibility); R. v. Ball (1808) 1 Camp. 324; R. v. Millard (1813) Russ. & Ry. 245 (doubt expressed as to whether an interval of 6 weeks between utterings was not a bar to admissibility).
72. R. v. Smith (1827) 2 C.& P. 633 (Vaughan B. refused to allow the evidence in); R. v. Hodgson (1828) 1 Lew. 103 (the court expressed great doubt as to the admissibility of the evidence); R. v. Kirkwood (1830) 1 Lew. 103 (Littledale J. admitted the evidence without hesitation).
73. R. v. Hodgson supra; R. v. Sunderland (1828) 1 Lew. 102.
74. R. v. Harrison (1834) 2 Lew. 118, and R. v. Forster (1855) 6 Cox 521 (later uttering); R. v. Jackson (1848) 3 Cox 89n. (remote utterings); R. v. Jones & Hayes (1877) 14 Cox 3 (subject of another indictment); R. v. Harris (1836) 7 C.& P. 29 (notes of different denomination or description).
75. R. v. Forster (1855) 6 Cox 521 (prosecutor asked judge to reserve question of whether uttering of another denomination of base coin so that point could be put beyond doubt); R. v. Salt (1862) 3 F. & F. 385 (admissibility of utterings remote in time); Byles on Bills of Exchange (4th ed.):— doubt expressed whether uttering of forged bills drawn on different persons could be given in evidence to prove guilty knowledge (referred to in Salt above).
76. R. v. Green (1852) 3 C. & K. 209.
77. This made evidence of the finding of other stolen property in the possession of the accused within the period of 12 months preceding the alleged receiving admissible to prove guilty knowledge.
78. See R. v. Drage (1879) 14 Cox 85 and R. v. Carter (1885) 15 Cox 448 (section held to

apply only where other stolen goods were actually found in the possession of the accused).

79. R. v. Roebuck (1856) 7 Cox 126, followed in R. v. Francis (1874) 12 Cox 612 (paste ring offered as diamond).
80. Parker v. Green (1862) 9 Cox 169.
81. R. v. Bailey (1847) 2 Cox 311.
82. R. v. Roden (1874) 12 Cox 630.
83. R. v. Waters & Ellis (1870) 72 C.C.C. Sess Pap. 544, and The Times, Sept. 22/3/4, 1870.
84. R. v. Gray (1866) 4 F. & F. 1102.
85. R. v. Geering (1849) 8 Cox 450n., (1849) 18 L.J.M.C. 215.
86. See e.g. Palmer's case 1856, Smethurst's case 1859, and Mrs Maybrick's case 1889 (all in Notable British Trials series).
87. R. v. Garner (1864) 3 F. & F. 681, & 4 F. & F. 346.
88. R. v. Cotton (1873) 12 Cox 400.
89. R. v. Heesom (1878) 14 Cox 40.
90. R. v. Flannagan & Higgins (1884) 15 Cox 403.
91. Makin v. A.G. for New South Wales [1894] A.C. 57.
92. R. v. Winslow (1860) 8 Cox 397.
93. R. v. Hall (1887) 5 N.Z.L.R. 93.
94. Herbert Stephen, Evidence in Criminal Cases of Similar but Unconnected Acts, (1888) 13 L.Q.R. 71.
95. R. v. Richardson (1861) 8 Cox 448 followed in R. v. Murphy (1864) 59 C.C.C. Sess. Pap. 77, R. v. Proud (1861) 9 Cox 22, R. v. Stephens (1888) 16 Cox 387.
96. See e.g. R. v. Waters & Ellis supra.
97. 1876 p. 139.
98. Blake v. Albion Life Insurance 1878 4 C.P.D.& P. 94 at 166 (Lindley J.), R. v. Rhodes (1898) 19 Cox 182 and Halsbury's Laws, 1st ed., Vol. 9, para. 742.

99. See also letter from Hawkins J. to Windeyer J., printed at 1893 14 L.R. (N.S.W.) 1, 'relevancy to the issue is all that is required to make evidence, not otherwise objectionable, admissible'. And see generally J. Stone, *The Rule of Exclusion of Similar Fact Evidence: England* (1933) 46 Harv.L.R. 954.
100. Categories :- to prove guilty knowledge, to rebut accident, to rebut mistake, to rebut alibi (R. v. Rooney (1836) 7 C.& P. 517, and R. v. Briggs (1839) 2 M. & R. 199); to prove intent; to corroborate the evidence of the prosecutor (R. v. Egerton supra, R. v. Neill Cream (1891) 116 C.C.C. Sess, Pap. 1451); as forming a single transaction or a continuous offence; to explain answers given by a witness in cross-examination (R. v. Chambers (1848) 3 Cox 92 (charge of unlawful knowledge; re-examination of complainant as to other acts of intercourse by Defendant allowed in order to explain answer given by her in cross-examination that the act charged did not cause pain); to prove motive, to prove that the death of the deceased was caused by poison; & as evidence of system.
101. See e.g. counsel in R. v. Winslow supra, Stephen's Digest, 1st ed., Taylor, 1878 ed., Archbold, 20th ed. (1886), pp. 245-50, and Roscoe's Criminal Evidence, 1898 ed., pp. 79-88.
102. Rolfe B. in R. v. Jackson (1848) 3 Cox 89n.
103. R. v. Dale (1889) 16 Cox 703.
104. R. v. Phillips (1848) 3 Cox 88. For an example of an attempt to get in similar fact evidence to prove guilty knowledge, where guilty knowledge could not possibly be an issue in the case, see R. v. Oriel (1845) 9 J.P. 170, 171.
105. For an example of counsel being invited not to press evidence see e.g. R. v. Martin & Collins (1830) 1 Lew. 104, and for a threat to reserve the point see R. v. Smith (1831) 4 C.& P. 411, and R. v. Phillips (1848) 3 Cox 88.

## CHAPTER 18

1. 7 & 8 Wm. III, c. 3, s. 2.
2. 1 Ed. VI, c. 12, s. 22.
3. R. v. Muscot (1713) 10 Mod. Rep. 192.
4. R. v. Champney (1836) 2 Lew. 258; Jordan v. Money (1854) 5 H.L.Cas. 185, & R. v. Braithwaite (1859) 8 Cox 254.
5. R. v. Mayhew (1834) 6 C. & P. 315.
6. R. v. Wheatland (1838) 8 C. & P. 238.
7. R. v. Parker (1842) Car. & M. 639.
8. See Radzinowicz, History, Vol. 2, chap. 2.
9. The most important of these statutes were 4 Wm. III, c. 8 (1692) (highway robbery); (repealed 7 Geo. IV, c. 64); 10 & 11 Wm. III, c. 23 (1699) and 5 Anne, c. 31 (1706) (burglary) (repealed by 7 & 8 Geo. IV, c. 21 and 7 Geo. IV, c. 64 respectively).
10. The 58 Geo. III, c. 70 (1818) made payment of statutory rewards a matter for the court's discretion.
11. For an example of an 1852 reward advertisement see R. v. Blackburn (1853) 6 Cox 333. The practice of the offering Home Office rewards was discontinued by Harcourt during his term as Home Secretary (1880-5) - see PRO: HO 45/9961/X6851.
12. See Langbein, Shaping the Eighteenth Century Criminal Trial, 50 Chicago L.R., p. 1 at pp. 83-9 and Beattie, op. cit., pp. 367-9.
13. See e.g. R. v. Sharpe, The Times, May 17, 1833.
14. For an example of an approach by a prisoner to be admitted approver see R. v. Read (1844) 1 Cox 65; see also C. Dickens, Oliver Twist, C. 50.
15. In strict law magistrates had no power to admit accomplices King's evidence (see Lord Mansfield in R. v. Rudd (1775) 1 Leach 121) but as Langbein puts it, op. cit., p. 96 they 'had total command of that power in practice'. Rudd had been admitted approver by a magistrate. See also Eagle, The Magistrates' Pocket Companion, 2nd ed. (1844), p. 42.

16. See Home Office letter cited by Radzinowicz, *op. cit.*, vol.2, p. 44 n. 42. See also The Times Police reports for July, 18, 1819 (the Clerkenwell murder).
17. *R. v. Dunne* (1852) 5 Cox 507.
18. *R. v. Kansley*, The Times, Jan. 14, 1823 and Stone's Justices Manual, 17th ed. (1874), p. 64. The warning was necessary in view of the fact that the magistrates' decision to admit did not bind the trial judge.
19. As to the desirability of remanding the accomplice in custody (to ensure that he did not abscond) see Chitty, *Crim. Law*, 2nd ed. (1828), Vol. 1, p. 83 & *R. v. Beardsmore* (1837) 7 C.& P. 497. To avoid the risk of collusion the accomplice would normally be committed to the Bridewell and the other prisoners to the County Gaol (Chitty, *ibid.*).
20. *R. v. Bernard* (1823) 1 C.& P. 87 (especially the footnotes to the report); and Walter Scott's case (1858) 2 Lew. 36.
21. See Phillipps, 10th ed. (1852), p. 91 'It is not a matter of course to admit a person charged with the commission of a crime as a witness against his associates even after he has been allowed to give evidence before the examining justices.' Following the cases of *R. v. Lee* (1818) R. & R. 361 and *R. v. Brunton* (1821) R. & R. 454 it became the practice of judges to refuse to admit prisoners against whom there were other indictments pending (see *R. v. Anon.* (1826) 2 C.& P. 411). Also not more than one accomplice would normally be admitted per case - see the Barnsley Rioters' Case (1830) 1 Leach 5 (but contrast Walter Scott's case *supra* where three were admitted).
22. The immunity of an approver depended upon his securing convictions (see *R. v. Rudd supra*). The right to a pardon under the statutes listed at n.1 above also depended upon convictions being secured, but the judges declined to extend the principle to accomplices - see an unreported decision of Gould J. cited with approval by Lord Mansfield in *Rudd supra*.
23. See Langbein, *op. cit.*, p. 94 & Beattie, *op. cit.*, p. 367. See also *R. v. England* (1796) 2 Leach 767, where a second in a duel, whom the prosecution wished to call, was told in open court that, if he gave evidence and was then prosecuted, the Attorney-General would enter a *nolle prosequi*. Nineteenth century material

seems to confirm Langbein's conclusion. A random search through the Circuit Letters (PRO: HO 6/5 (Circuit Letters for 1820) and the Home Office Criminal Entry Books (PRO: HO 13/55 and 13/75 for 1830 and 1839 respectively) for three years during the period 1820-40 failed to throw up a single case of an accomplice granted or recommended for a pardon. Turning to the second half of the century one finds in the Table in the Judicial Statistics, showing the disposal of prisoners committed for trial, the heading 'not prosecuted'. One suspects many of the persons whose cases are listed under this heading were accomplices. For the period 1893-1900 (for which the Judicial Statistics give detailed information as to the exercise of the royal prerogative) of 15 free pardons granted not one was granted to an accomplice.

24. See R v. Burley (1818) 2 Stark. Ev. 13, and R. v. Stokes (1837) 2 Lew. 37. For an example of a judge intervening to warn a temporising accomplice as to his conduct see Vaughan B. in R. v. Baker, The Times, Mar. 5, 1828:- 'You have offered yourself as King's evidence to come here and speak the truth; if you fail in that you will be placed at the bar where you ought to be'. See also R. v. Hinks (1845) 2 C. & K. 482, where Alderson B. referred to a case in which Wood B. had said he would pass sentence upon an accomplice who had pleaded guilty because of the way he fenced with questions.
25. Cited by Taylor, 7th ed. (1878), p. 811 n. 8.
26. Chitty, op. cit., Vol. 1, p. 601, R. v. Lyons (1840) 9 C. & P. 355 (the only alternative was to grant him a pardon, or for the judge to impose a nominal penalty (as in R. v. Noble, The Times, July 18, 1819 where a fine of 1/- was imposed upon an accused who had pleaded guilty in order to enable him to be used as an evidence against others; in R. v. Lyons supra the penalty imposed was 1 day's imprisonment).
27. See R. v. Jackson (1855) 6 Cox 525 (refusal to allow prisoner who had pleaded guilty to give evidence for co-accused until he had been sentenced) and Cockburn C.J. in R. v. Winsor (1865) 10 Cox 276.
28. See R. v. Storer, The Times, Sept. 8, 1813 (after the nolle prosequi had been entered but before he embarked upon his evidence, the accomplice asked the judge if he was safe).



29. See e.g. *R. v. Rowland* (1826) *Ry. & Moo.* 401; *R. v. Peacock* (1849) 13 *J.P.* 254.
30. *R. v. Owen Ellis & Thomas* (1839) 9 *C.& P.* 83.
31. *R. v. Winsor* (1865) 10 *Cox* 276.
32. See *R. v. Gerber* (1852) *T. & M.* 647 (A B C & D indicted together; after plea and before they were given in charge to the jury, the court allowed C to be removed from the dock and examined as a witness against his associates).
33. Joy, *On the Evidence of Accomplices*, p. 2; *R. v. Durham & Crowder* (1787) 1 *Leach* 464; *R. v. Thistlewood* (1820) 33 *How.S.T.* 681 at p. 921 per Abbott C.J..
34. *R. v. Tonge & others* (1662) 6 *S.T.* 225.
35. *R. v. Rudd supra*; *R. v. Atwood & Robins* (1788) 1 *Lea.* 464; *Jordaine v. Lashbrooke* (1798) 7 *T.R.* 601; *R. v. Jones* (1809) 2 *Camp.* 132; *R. v. Thistlewood supra*; *R. v. Hastings & Graves* (1835) 7 *C. & P.* 152; *R. v. Jarvis, Langdon & Stear* (1837) 2 *Moo. & R.* 40.
36. *P.* 3.
37. Langbein, *op. cit.*, p. 30 (Langbein's claim receives confirmation in Fielding's *Enquiry into the Recent Increase of Crime in London* (pub. 1751), in which he complained that the judges would not accept the uncorroborated evidence of confessed accomplices. Indeed Fielding indicates that in the 1750s corroboration was regarded as a mandatory requirement.
38. Chitty, *Crim. Law*, 2nd ed., Vol.1, p. 605; Archbold, 1st ed. (1822), p. 96; charge of Thomson C.B. to Grand Jury at the York Trials (1813) 31 *How. S.T.* 967 and 971; *R. v. Birkett* (1813) *Russ. & Ry.* 251.
39. *R. v. Swallow* (1813) 31 *How. S.T.* 971.
40. *R. v. Mellor* (1813) 31 *How.S.T.* 998; see also *R. v. Charnock King & Keys* (1698) 12 *S.T.* 1377, where Holt C.J. treated the confirmation by independent witnesses of the account one of the accomplices gave of the discovery of the plot to the Government as corroboration. In *R. v. Despard* (1803) 28 *How. S.T.* 998 Lord Ellenborough C.J. treated as corroboration evidence confirming that the accomplices were where they had said they were at a particular time. In *R. v. Carroll*, *The Times*, Jan. 2, 1823 the evidence of an accomplice at a

receiver's trial was held to be corroborated by a certificate of conviction of the person he named as thief for theft of the goods in question.

41. R. v. Jones supra, citing a recent unreported decision of the Twelve Judges (the case was almost certainly R. v. Fordham Hartford & Bridge (1803) 3 J.N. 154). See also Thomson C.B. in R. v. Swallow supra; Le Blanc J. in R. v. Haigh (1813) 31 How. S.T. 1094; and Bayley J. in R. v. Dawber (1821) 3 Stark 34.
42. R. v. Despard (1803) 28 How. S.T. 488 an observation taken up by Park, prosecuting counsel, in R. v. Swallow supra.
43. Referred to by Joy, op.cit., at p. 19.
44. R. v. Green (1825) 1 Craw. & D. 158.
45. R. v. Sheehan (1826) Jebb Cr. & P. Cas. 54.
46. Joy, op. cit., pp. 2 & 97 and p. 10-11 'the defect in an accomplice's evidence ... is the quality. What is required is something that will improve the quality of the proof which has been given by the accomplice, and that something may be anything which induces a rational belief in the minds of the jury that the narrative of the accomplice is in all respects a correct one.'
47. Williams J. in R. v. Webb (1834) 6 C.& P. 595; Patteson J. in R. v. Addis (1834) 6 C.& P. 388; Alderson B. in R. v. Wilkes & Edwards (1836) 7 C.& P. 272; Abinger L.C.B. in R. v. Farler (1837) 8 C.& P. 106; Gurney B. in R. v. Dyke (1838) 8 C.& P. 261; R. v. Birkett (1839) 8 C.& P. 732.
48. R. v. Moores & Spindlo (1836) 7 C.& P. 270 (Alderson B.); R. v. Jordan (1836) 7 C.& P. 433 (Gurney B.); R. v. Fletcher (1838) (cited 2 Lew. 45n.) (Alderson B.); R. v. King & Hancock, The Times, July 18, 1834 (Gurney B.); R. v. Jenkins (1845) 1 Cox 177 (Alderson B.).
49. Joy used this point as an argument in favour of the old rule - see op. cit., pp. 17-8 'if the rule was that corroboration was required against each accused, it would be the duty of the judge, as counsel for the prisoners, to direct that they should not join in their challenges and that in all cases prisoners should be tried separately, and that any judge who should omit to do so would take advantage of the ignorance of the prisoners to deprive them of a just and lawful defence'.

50. R. v. Noakes (1832) 5 C. & P. 326 (Littledale J.) followed by Blackburn J. in R. v. Bunscher, *The Times*, Jan. 7, 8, 10 & 12, 1863. The view of the Irish judges was different. They considered that one accomplice could corroborate another where, since their apprehension, they had been kept separate so as to avoid all possibility of collusion (The Wild Goose Lodge case, cited and followed in R. v. Aylmer & Behan (1839) 1 Craw. & D. 116; the same view was expressed some forty years later by Hawkins J. in R. v. Levy & others (1882) 74 L.T. 121; Joy, *op. cit.*, p. 102 also considered that one accomplice could corroborate another.
51. R. v. Jones (1835) 7 C. & P. 168; R. v. Neal & Taylor (1835) 7 C. & P. 368.
52. R. v. Curtis (1838) 1 Craw. & D. Abr.Cas. 265 (Doherty C.J.).
53. R. v. Andrews & Pryne (1845) 1 Cox 183.
54. R. v. Stubbs (1855) Dears 555.
55. For examples of summings up reminding juries of their right to convict see R. v. Jarvis (1837) 2 Moo. & R. 40, and R. v. Staunton & Others (Notable British Trials Series, p. 251). See also Stephen's Digest, 1st ed. (1876), Art. 231.
56. R. v. Wells Hudd & College (1829) Moo. & M. 326; R. v. Noakes *supra*; R. v. Kelsey (1838) 2 Lew. 45; R. v. Stubbs *supra*; R. v. Boyes 1861 1 D. & S. 311 (per Blackburn J.); R. v. Pratt (1865) 4 F. & F. 315; R. v. Webster & Wells [1880] 1 N.S.W.R. 333 at 337; R. v. Myles [1889] N.Z.L.R. 324; In Re Meunier [1894] 2 Q.B. 415 at 418; Phillips, 8th ed. (1838), p. 31; Taylor, 7th ed. (1878), p. 812; Roscoe, 12th ed. (1898), p. 114; Powell, 8th ed. (1904), p. 43.
57. Joy, *op. cit.*, p. 3. According to Langbein, *op. cit.*, p. 98 in Fielding's day it was the invariable practice to direct (not merely recommend) an acquittal where there was no corroboration.
58. R. v. Durham & Crowder (1787) 1 Leach 478.
59. R. v. Smith & Davis (1784) 1 Leach 479.
60. 2 J.N. 43.
61. R. v. Jones *supra*.

62. R. v. Jordan & Sullivan (1836) 7 C. & P. 432.
63. R. v. Keats (1843) 7 J.P. 484.
64. R. v. Skiller (1845) 9 JP 314.
65. R. v. Mellor (1833), R. v. Saunders (1842); R. v. Salt (1843) (all cited in Russell, 4th ed. (1865), Vol 3, p. 644) and R. v. Sparks (1858) 1 F. & F. 378.
66. R v. Cunnings 56 C.C.C. Sess. Pap. 378.
67. 7 Sol. Jo. 197.
68. R. v. Taylor, The Times, May 22, 1895.
69. The Times, May 30, 1895.
70. Roscoe, 12th ed. (1898), p. 118. For other examples of directed acquittals see R. v. Owen & Mitchell, The Times July 9, 1801; R. v. Fox Fisher Boar & Boar, The Times, Mar. 20, 1824; R. v. Huggins & Dutton, The Times, Mar. 5, 1847; R. v. Druce, The Times, July 7, 1847; R. v. Desmond & others, The Times, Apr. 28, 1868; R v. Winkel (1911) 76 J.P.191.
71. (1909) 73 J.P. 251.
72. Joy, op. cit., p. 47.
73. R. v. Robinson (1864) 4 F. & F. 43.
74. R. v. Boyes (1861) supra (unsuccessful attempt to move for a new trial in a misdemeanour case on ground of want of corroboration). See also Cave J. in In Re Meunier [1894] 2 Q.B. 415 at p. 418.
75. c.f. Wigmore. Treatise, 3rd ed., para. 2061: 'At Common Law the testimony of the prosecutrix or injured person in the trial of all offences against the chastity of women was alone sufficient evidence to support a conviction; neither a second witness nor corroborative circumstances were necessary'. As regards nineteenth century England, the accuracy of this observation is demonstrated by an absence of all reference to a corroboration requirement in sexual cases in contemporary practitioners' books.
76. Hale, 1 P.C., pp. 635-6.
77. Ibid. 633-4. In R v. Scallon, The Times, Dec. 13, 1825, Bayley J. neatly summarised the passage thus 'One looks more to the conduct

than the testimony of a party in cases of this description.'

78. They were repeated in Blackstone, Comm. (1825 ed.), Bk. 4, p. 213, Hawkins, 1 P.C., c. 70, s.3, East, 1 P.C., p. 445, Burns, Justice of the Peace (1805 ed.), sub nom. Rape, Chitty, Crim. Law, 1st ed. (1816), p. 810, in every nineteenth century edition of Archbold, Russell and Roscoe and in Greenleaf, The Law of Evidence in Criminal Cases (1883), pp. 201-2. Some nineteenth century textbooks on evidence were completely silent on the topic e.g. Starkie, Taylor and Stephen. Hale's cautionary words were still being quoted in practitioners' books in the early years of the present century - see e.g. Roscoe, 13th ed. (1908), Pritchard's Quarter Sessions Practice, 2nd ed. (1904), p. 109, and Halsbury's Laws, 1st ed. (1910), Vol. 1X, p. 613(k).
79. For examples of defence speeches praying in aid Hale see R. v. Mariner, The Times, Mar. 4, 1837; R. v. Osborn, The Times, Dec. 21, 1857; R. v. Osborn, The Times, July 14, 1864; R. v. Rudland, The Times, July 20, 1865; R. v. Hunter, The Times, Nov. 22-4 1865.
80. For examples of summings up containing borrowings from Hale see e.g. R. v. Lippincott, The Times, Apr. 21, 1810; R. v. Scallon n.3 supra; R. v. Anon., The Times, Mar. 18, 1827 (Burrough J.); R. v. Trenchard, The Times, Mar. 24, 1827 (Park J.); R. v. Malabar, The Times, Aug. 17, 1827, (Bayley J.); R. v. Vessey, The Times, Mar. 21, 1843 (per Alderson B. in an unsuccessful attempt to persuade a jury to acquit); R. v. Kelly, The Times, Dec. 9, 1861 (Channell B.); R. v. Osborn, The Times, July 14, 1864 (Erle C.J.); R. v. Lord St Leonards, The Times, May 24 1884 (Recorder).
81. See e.g. R. v. Chapman, The Times, Sept. 19, 1805, and R. v. Freeman, The Times, July 13, 1867 (jury merely directed to weigh evidence for prosecution against that called by defence); and R. v. Legg, The Times, Sept. 22, 1815, where Heath J. appears neither to have given any warning to the jury nor summed up the evidence.
82. See Phillipps, 8th ed. (1838), p. 204 n. 2 'the absence of recent complaint, unless explained by particular circumstances, is generally fatal to the prosecution.' See also R. v. Connor, The Times, Sept. 16, 1802 (case stopped by jury); R. v. Scallon, n. 3 supra (case stopped by Bayley J.); R. v. Webb, The

Times, Sept. 3, 1818 (a case of indecent assault) in which Garrow B. told the jury 'Had they been trying a rape, they must acquit, whatever their moral conviction, since the unhappy girl had concealed the circumstances so long' (two weeks)); R. v. Osborne, The Times, Mar. 22, 1827 (case abandoned by prosecuting counsel); R. v. White, The Times, May 30, 1829 (case stopped by judge); R. v. Page, The Times, July 12, 1853 (Alderson B. invited jury to stop case because of failure by prosecutrix to complain at first opportunity); R. v. Hales, The Times. Dec. 3, 1859 (strong warning against conviction from Byles J.); and R. v. Howard, The Times, Apr. 16, 1864 (strong warning against conviction by Common Serjeant). There are some grounds for supposing that the absence of fresh complaint was regarded as less critical in indecent assault than in rape (see e.g. R. v. Webb supra, and R. v. West, The Times, July 20, 1865 (another case of indecent assault) in which Kelly C.B. told the jury that he could not stop the case despite the lack of 'corroboration' since the case was not one of rape').

83. R. v. Woodward & others, The Times, Mar. 24, 1817 (a prosecution of a clergyman and his two daughters for conspiracy falsely the charge arising out of a failed rape prosecution).
84. S. 2 (procuring unlawful sexual intercourse, procuring a woman to become a common prostitute) and s. 3 (procuring sexual intercourse by threats or false pretences).
85. S. 4.
86. S. 5. The new offence of gross indecency created by s. 12 was also one, the proof of which might involve the calling of accomplice evidence (see e.g. R. v. Wilde, The Times, May 21, 1895). Prior to the Act, the question of an accomplice direction would occasionally arise in cases of buggery and unlawful carnal knowledge of a girl under twelve.
87. S. 20
88. 81 Yale Law Journal 1367, The Rape Corroboration Requirement (Note).
89. R. v. Graham (1910) 4 Cr.App.R. 218.
90. (1884-5) P.D. CCC, 914 (Home Secretary) and 918 (Attorney General). See also the question asked by Balfour at 915-6. It was also claimed by Hopwood at 915 that it was the

practice of the metropolitan stipendiary magistrates not to convict in cases of indecent exposure upon the evidence of a single witness.

91. See Sir Henry James, *ibid.*, 919, Staveley Hill, *ibid.*, 916, and also a letter published in *The Times* on June 2, 1882.
92. *R. v. Watts*, *The Times*, June 29, 1877.
93. *The Times*, May 27, 1889.
94. See e.g. *R. v. Osborn*, *The Times*, July 14, 1864, where Erle C.J. advised the jury to look for 'circumstances of corroboration'. A similar direction was given by the Recorder in *R. v. Lord St. Leonards*, *The Times*, May 24, 1884. It is possible that the Attorney General in the 1885 debate was using the word in this sense (see especially 918 'Corroboration did not mean that there should be another witness ... it might arise from a variety of circumstances'; see also 920 where Sir Henry James said he was unable to understand how there could be corroboration without a second witness). See further *R. v. Hedges*, (1909) 3 Cr.App.R. 262 (rape) at p. 265 'The complaint ... (and certain other matters) are all facts which the jury were entitled to take into consideration as being in some degree corroboration of the girl's story' (per Phillimore J.); *R. v. George*, (1909) 2 Cr.App.R. 282 where Jelf J.'s answer to counsel's assertion that there was no corroboration was 'A speedy complaint is part of the *res gestae* ...'; *R. v. May*, (1912) 8 Cr.App.R. 63 at p. 67 'Corroboration in the old writers such as Blackstone and East meant evidence of consistency of conduct or character' (per Phillimore J.); *R. v. Christie*, (1914) 10 Cr.App.R. 141 at 147 'the consistency of conduct shown by a complaint is corroboration' (per the Attorney-General *arguendo*), and *R. v. Lovell*, (1923) 129 L.T. 638 from which it is clear that even at this late date some judges were still apt to treat complaints as corroboration (see especially the helpful analysis of Crown counsel at pp. 638-9 and the judgment of Hewart L.C.J. at pp. 640-1)
95. See nn. 1 and 4 above. Even as near to events as 1925 the Report of Departmental Committee on Sexual offences against Young Persons 1925 (Cmd. 2561) was apparently unable to trace the rule back further than *R. v. Graham* - see p. 47 'Many people are puzzled as to how, if in law corroboration is not essential, it has

become in practice required. It is unnecessary to go back further than the case of *R. v. Graham* (1910) 4 Cr.App.R. 218'.

96. *Moore v. Bishop of Oxford* [1904] A.C. 283.
97. *R. v. Goulding*, (1908) 1 Cr.App.R. 121, *R. v. Baker*, (1909) 2 Cr.App.R. 249 and *R. v. George*, (1909) 2 Cr.App.R. 281.
98. See e.g. *R. v. Salman*, (1924) 18 Cr.App.R. 50; *R. v. Berry*, (1924) 18 Cr.App.R. 65, *R. v. Killick*, (1924) 18 Cr.App.R. 120 and *R. v. Jones*, (1925) 19 Cr. App.R. 40. Earlier cases had tended to use the 'oath against oath' approach adopted by the Court in *R. v. Graham* - see e.g. *R. v. Quinn*, (1911) 6 Cr.App.R. 269 where the L.C.J. referred to the direction in *Graham* as an approved direction, and see also the judgment of the L.C.J. in *R. v. Crocker*, (1922) 17 Cr.App.R. 46 (a case which is also noteworthy for the fact that Salter J., during the course of argument, asked counsel in terms 'Is corroboration necessary in a sexual case?')
99. For accomplice cases see e.g. *R. v. Brown*, (1910) 6 Cr.App.R. 24; *R. v. Stone*, (1910) 6 Cr. App.R. 89; *R. v. Dimes*, (1911) 7 Cr.App.R. 43; *R. v. Bloodworth*, (1913) 9 Cr.App.R. 80. For child witness cases see e.g. *R. v. Pitts*, (1912) 8 Cr.App.R. 126 'it is always wise for the judge to address some caution to the jury as to the possibility of such a young child (girl of 10) having a mistaken recollection' (per Ridley J.); *R. v. Cratchley*, (1913) 9 Cr.App.R. 232 (boys aged 12 and under 10); *R. v. Dossi*, (1918) 13 Cr.App.R. 158; *R. v. Warren*, (1919) 14 Cr.App.R. 4 (a sodomy case, where the court said that in addition to the age warning, an accomplice warning should have been given); and as to the importance of these lines of cases in the development of the rule see the citation of authority in the judgments in the Australian case of *Hargan v. R.*, (1924) 27 C.L.R. 13.
100. See *R. v. Clifford*, *The Times*, Aug. 2, 1826 in which a judge told a jury trying a rape case at Tralee Assizes that such charges were 'sometimes made by females in the hope of obtaining a match'; *R. v. Moloney*, *The Times*, Aug. 10, 1824 (Limerick Assizes) where, during the jury's retirement, the parties were married in the judge's room, and the jury then called back into court and directed to acquit, the judge observing that he had known the same procedure adopted in a case in Cork; *R. v. Callaghan*, *The Times*, Aug. 17, 1825, where



Pennefather B. refused to sanction a similar compromise; R. v. Baron, *The Times*, Mar. 27, 1828, where an abduction case at Waterford Assizes was so compromised with the judge's approval; R. v. Murphy, *The Times*, Apr. 21, 1829, an abduction case at Cork Assizes, where the prosecutrix was pressed both by counsel and judge as to whether she would prefer to marry the prisoner or have him hanged.

101. Poor Law Amendment Act, 1834, s. 72.
102. Report of Poor Law Commission (1834) P.P. (44) XXVII, 1 (at p.195 of the report); (1834) P.D. XXIII, 522 (Robinson); 528-9 (Buller); Grote (530); and especially 536-7 (Peters) 'the child was threatened to be sworn to a party, and by the threat money was extracted from the individuals sought to be charged. He knew instances where £10 and £20 had been so obtained in sums of 5/-, 10/- and pounds from the young men resident in the neighbourhood of the pregnant woman who eventually swore the child against a poor and perfectly innocent man from whom nothing could be recovered by the parish'. Also (1834) XXV, 603.
103. Vexatious Indictments Act, 1859.
104. See chapters 9 & 18. Hatch's was not the only case of wrong conviction from around this time. In 1866 the conviction of a man called Toomer for rape was the subject of a *Times* leader (Sept. 5, 1866); and in the 1870s a case which attracted considerable attention was that of Seth Evans (convicted of indecent assault at Salford Quarter Sessions on May 28, 1878, he prosecuted the complainant for perjury only to find the jury unable to agree despite two trials - R. v. Alice Adams, *The Times*, Nov. 1, 1878, and also (1878/9) P.D. CCXLIV, 401.
105. *The Times*, Oct. 11, 1864. The reference to a Society for the Protection of Men was prompted partly by the activities of the Society for the Protection of Women, and its role in such prosecutions (see also letters Oct. 12, 13, 14 and 16).
106. Lord Chelmsford (1868/9) P.D. CXCII, 674.
107. Cavendish Bentick (1884/5) P.D. CCC, 912-4.
108. Rawlinson (1908) P.D. CXLI, 280 and Staveley Hill, *ibid.* 282.
109. See article 81 *Yale Law Jo.* 1367 *supra*.

110. See *N. v. N* (1862) 3 Sw. & Tr. 234, where Sir Cresswell Cresswell referring to a charge of sodomy made in a divorce suit said 'The crime ... imputed is so heinous and so contrary to experience that it would be most unreasonable to find a verdict of guilty where there is simply oath against oath without any further evidence direct or circumstantial to support the charge'.
111. Some of the more notorious of the late eighteenth and the nineteenth century mistaken identity cases are described in Wills, *Circumstantial Evidence*, 6th ed., pp. 179-91.
112. 6 L.T., Feb. 21, 1846.
113. Report of the Lords' Select Committee on the Further Amendment of the Administration of the Criminal Law 1847/8 P.P. (523) XVI, 423 (at p. 51 of the report).
114. This was an attitude which was to persist until *R. v. Turnbull* (1976) 63 Cr.App.R. 132. See in particular *Arthurs v. A.G. for N. Ireland* (1970) 55 Cr.App.R. 161, where the House of Lords declined to follow the Irish decision of *People v. Casey* (No. 2) [1963] I.R. 33, Lord Morris saying at p. 170 'it would be undesirable to seek to lay down a rule of law that a warning in some specific form or in some partly defined terms must be given.'
115. See *R. v. Watson* (1817) 2 Stark. 116, and *R. v. De Berenger* cited Russell, 4th ed. (1865), p. 522.
116. See 8th Report of the Criminal Law Commissioners, 1845, App. A, No. 22.
117. *R. v. Brook* (1813) 31 S.T. 1124, and the cases cited in Wills, *op. cit.*, pp. 182-3.
118. 13 L.T. (1849) p. 55. In his summing up the Lord Chief Justice told the jury that in his view 'no evidence was more satisfactory.' See also *R. v. Howe & others*, *The Times*, Feb. 3, 1882 where Grove J., after listening to a defence speech about the dangers of mistaken identification, told the jury that he was not sure that mistakes often occurred, and that, even if they did, if the possibility of error was to be a reason for not convicting no one would ever be convicted.
119. *R. v. Martindale*, *The Times*, Sept. 25, 1800 where the judge warned the jury against convicting where the identification by the

identifying witnesses was made long after the event; R. v. Sweeper, *The Times*, Mar. 1, 1830 (a case of burglary where the evidence of identity was conflicting) where Bolland B. warned the jury of the risks of convicting upon evidence of identity exposed to such doubt, and said that, when at the bar, he had prosecuted a woman for child-stealing, tracing her buying ribbons and other articles at various places in London, and at last into a coach at Bishopsgate, by 11 witnesses whose evidence was contradicted by a host of other witnesses, and she was acquitted; and that he had afterwards prosecuted the very woman who really stole the child and traced her by 13 witnesses. 'These contradictions' he added 'make one tremble at the consequences of relying on evidence of this nature unsupported by other proof'; R. v. Sutcliffe, Crossley & Mallinson, *The Times*, Nov. 12, 1877 where Lush J. told a jury 'I now always approach with great anxiety the question of identification. I have myself in the course of a trial felt convinced of the identity of the parties on evidence laid before me and, on hearing further evidence, found that my conviction was wrong.'

120. See e.g. R. v. Dace, *The Times*, July 23, 1806 where Heath J., on successive trials of the accused on separate indictments, directed the jury to acquit because of the poor quality of the identification evidence.
121. PRO: HO 45/9386/30237. One certainly finds no trace of the practice in the early eighteenth century where it was common, upon the arrest of a criminal for an offence such as waggon theft, for victims of similar offences to be invited to come and view him to see if they could identify him - see report of arrest of Thomas Edwards in *Daily Courant* for Mar. 18, 1781 and the court order from 1724 cited in G.Howson, *Thief-Taker General*, p. 230.
122. Order of March 24, 1860 directing that the 'practice hitherto followed be carefully observed wherever practicable'; the order was issued following some remarks passed by the Assistant Judge at the Middlesex Sessions (it has not proved possible to trace the case).
123. R. v. Daly & Morgan, *The Times*, Feb. 22, 1860.
124. R. v. Blackburn (1853) 6 Cox 333 (Staffordshire); R. v. Cain and Rayne *The Times*, July 28, 1856 (and R.S. Lambert, 'When Justice Faltered', p.144-5) (Durham); in both

these cases the identification line up was held in prison.

125. R. v. Pook, The Times, May 15, 1871 and see J.W. Shepherd, H.D. Ellis, & G.M. Davies, Identification Evidence a Psychological Evaluation, (1982), p. 9.
126. Referred to in Commissioner's letter of Jan. 7, 1874 and in a report to the Commissioner from a police inspector included in the same Home Office file and dated Dec. 4, 1873 (PRO: HO 45/9386/30237).
127. Amendment to the Metropolitan Police General Orders, 1873 dated 20.1.74 - see PRO: MEP 8/3.
128. See order of 24 March, 1860 supra and General Orders, 1873 para. 65.
129. See amendment to General Orders referred to at n.117.
130. The Beck case - on the identification parade held in relation to the 1877 charges, only two of the men on the parade had grey hair like Beck, and only one bore any physical resemblance to him; on the identification parade held in relation to the 1895 charges all the other members of the parade were younger than Beck, and one witness claimed that Beck was the only person on the parade with a moustache (see Shepherd Ellis & Davies, op.cit., p.11).

The Sheppard case - Major Sheppard, arrested in 1923 upon suspicion of theft from a prostitute, was placed on a parade, only two of the members of which wore clothes of a cut and style comparable with his; in his words 'None of the others looked the least like an army officer and four of them were wearing chokers'; the Tribunal of Inquiry which investigated the case agreed with him that 'the process of identification ... was little more than a farce' - Report 1924-5 P.P. (Cmd. 2497) XV, 265. Following the report the Home Office issued new guidelines for the conduct of identification parades.

131. Metropolitan Police General Orders & Regulations, 1893 (PRO: MEP 8/4), Sect. XVII, para. 304.
132. In Beck's case one of the witnesses on the 1877 parade claimed she had been shown a photograph of Beck before the parade. Early Court of Criminal Appeal cases dealing with the subject include:- R. v. Bundy (1910) 5

Cr.App.R. 120 (police officer giving witness description of accused); R. v. Chadwick (1917) 12 Cr.App.R. 247; R. v. Goss (1923) 17 Cr.App.R. 196; R. v. Dwyer (1925) 18 Cr.App.R. 145 (showing witness photograph). See also R v. Chapman (1911) 28 T.L.R. 135 (witness asked by officer 'Is that the man?')

133. Committee on Methods of Identification of Criminals; Report 1900 (PRO: HO 144/566/A62042).

134. These consisted for most of the century of having prison officers and police officers inspecting remand prisoners for old faces. Other methods such as photography (developed at Bristol Gaol in the 1850s), the Habitual Criminals Register set up in 1869, and the use of a system combining anthropometric techniques with the Galton system of fingerprinting had proved of very limited value.

135. The identification of those with previous convictions was a matter of importance, given the policy of the Legislature, initiated by the Criminal Law Act, 1827, of visiting with heavier penalties offences committed by those with previous convictions.

136. R. v. Castleton (1909) 3 Cr.App.R 74; the attitude of some judges to fingerprints had initially been one of distrust (see e.g. R v. Chadwick (1908) (Wills, op.cit., p. 204) where Byles J. had advised a jury not to accept fingerprint evidence as enough by itself to sustain a conviction (the jury ignored his advice).

## CHAPTER 19

1. Chitty, Criminal Law, 1st ed. (1816), Vol. 1, pp. 654-8.
2. See Appendix 3.
3. A special verdict found in felony could, however, be removed to be argued in the King's Bench - R. v. Hazell (1785) 1 Leach 370 (murder).
4. 8th Report of the Criminal Law Commissioners, App. C. Grounds had to be shown before removal would be ordered. Local prejudice or legal or factual complexity were the grounds most commonly relied on. A defendant who secured removal of the indictment faced a potential penalty in costs: if convicted, he would be ordered to pay the prosecutor's costs. In the case of some misdemeanours (e.g. obtaining by false pretences) removal was prohibited by statute.
5. Chitty, op. cit., Vol. 1, p. 741 and 747.
6. The trial judge's rulings on evidence and directions on law were not entered on the record, which confined itself to stating the commission of the judges, the presentment of the grand jury, the indictment, the plea, the fact that the accused had placed himself on his country, the summons of the jury, the verdict and the judgment - Holdsworth H.E.L., i, 317.
7. S. 31.
8. Pre-nineteenth century precedents seemed to suggest that a bill of exceptions would lie in misdemeanour (The Lord Paget & the Bishop of Coventry's Case (1583) 1 Leon 5; R. v. Higgins (1683) 1 Vent. 366; R. v. Nutt (1728) 1 Barn. 307; R. v. Preston on the Hill (Inhab.) (1738) 2 Str. 1040) but not in felony or treason (Sir Henry Vane's case (1661) 1 Keb. 324).
9. Of the cases of error reported in Cox C.C between 1851 and 1900 11 out of 20 concerned indictment points.
10. See e.g. Eden, Principles, p. 181 repeating a complaint made by Hale 2 P.C. 193
11. See 7 Geo. IV., c. 64, s. 20, and 14 & 15 Vict., c. 100, ss. 24 and 25 and chapter 6.

12. H.C.L. (1883), i., 312. During the last six decades of the century the number of cases of error reported in Cox C.C. were:- 1845-49: 17; 1850-59 8; 1860-69 6; 1870-79 2; 1880-89 3; 1890-99 1.
13. In treason and felony grant of the fiat was in the Attorney-General's discretion. In misdemeanour the fiat was grantable ex debito justitiae where the error was probable, and, if in such a case the Attorney refused to grant it the court would order him to do so (Paty's case (1705) 1 Salk, 504), In Ireland it was in the mid-nineteenth century the practice of the Attorney-General to demand a fee for perusing the writ of error. The practice was in 1868 declared illegal (R. v. Costello (1868) 11 Cox 81) by which time it had been going on for at least thirty years.
14. The record had to be drawn up in a form which was both archaic and prolix, usually from very inadequate material ('short notes in a rough minute book kept by the clerk of the court' (Report of Criminal Code Commission, 1879 p. 39); 'a private ... book having no legal authority' (Stephen, H.C.L., i., 308). One of the changes proposed by Stephen's Criminal Code Bill of 1878 was that the court clerk should be required to keep a record of the proceedings in the form set out in a schedule to the Bill. If the accuracy of the record as drawn up was disputed a diminution of the record had to be alleged by the party aggrieved - 4 Bla. Comm. 390.
15. Stephen H.C.L., i., 217.
16. After 1830 the Fifteen Judges (see chapter 1).
17. Later at the Exchequer Chamber.
18. Where the point reserved was one which the trial judge was inclined to resolve in the prisoner's favour, reserving it would, if the Twelve Judges did not share his doubts, work to the prisoner's disadvantage - see e.g. R. v. Frost (1841) 2 Moo. C.C. 140 where the conduct of the three trial judges in overruling and reserving an objection, which two of them were inclined to resolve in favour of the accused, and which, if good, was fatal to the prosecution case, caused such an uproar both in Parliament and the press that the Judges were driven to write an explanatory letter to the Home Office. They claimed in the letter that what they had done was in accordance with long standing practice and that the practice was intended to prevent a

failure of justice (see (1840) P.D. CLI, 1080-96).

19. On this topic see generally Appendix 3.
20. The Welsh judges could not reserve cases directly, but had instead to petition the King who could then refer the case to the Twelve Judges - R. v. Harley (1830) 4 C. & P. 369.
21. The risk of error was at its greatest at county Quarter Sessions, the Chairmen of which were usually laymen. On the incompetence of many Chairmen in matters of law see chapter 4.
22. The Commission under which Quarter Sessions sat enjoined them in cases of difficulty not to give judgment thereon except in the presence of a judge of Assize. This procedure, wholly impractical in the case of jury trials, was apparently followed in appeal cases until the early eighteenth century (R. v. Chantrell (1875) 10 Q.B. 587). In 1837 a Bill was introduced proposing that Quarter Sessions should have the power to reserve questions of law for the opinion of the Assize judges but was lost. Although Quarter Sessions had no power to reserve cases, they were entitled to refer any case about which they felt doubt to the Home Secretary who would then refer it to the Law Officers for their opinion. If their opinion was in favour of the prisoner a pardon would issue. The procedure, however, seems to have been little used (Lord Wharncliffe told the Criminal Law Commissioners (2nd Report, Minutes of Evidence, p. 95) that he had not used it once in his twenty years as Chairman of West Riding Quarter Sessions).
23. Cases were considered at Serjeants' Inn after dinner. Since the judges when meeting to consider a reserved case did not constitute a court there was no official record of their proceedings. Until 1828 reserved cases and a brief note of the decision thereon was copied up in notebooks, but in 1828 even this procedure was abandoned in favour of releasing a copy of the case to the law reporters for them to report it (see the note at the front of the notebooks).
24. R. v. Lea (1837) 2 Moo. 9.
25. The refusal to allow jury verdicts to be challenged in criminal cases goes back many centuries. The writ of attain, which had been the medieval remedy against false verdicts, was never available in criminal cases, the



reason given being that the accused's guilt was 'affirmed by two inquests, the grand inquest who present the offence ... and the petty jury who agree with them' Hale 2 P.C., 310. An explanation offered for the refusal to extend to felony the successor remedy to attain, namely motion for a new trial, is that an illogical extension of the principle that a man should not be put in jeopardy twice - see Devlin, *Trial by Jury*, p. 77 and *U.S. v. Keen* 'The Constitution guarantees him the right of being hung to protect him from the danger of a second trial' (cited (1879) 150 Ed. Rev., 524 at 550).

26. Occasionally one finds judges reserving a point in a case in which the prisoner had no counsel (see e.g. *R. v. Brown* (1819) 5 J.N. 23; *R. v. Westwood* (1822) 6 J.N. 29; *R. v. Armstrong* (1824) 6 J.N. 55, & *R. v. Stock* (1825) 6 J.N. 160).
27. There is a case in 1846 of a prisoner suing out a writ of error in forma pauperis (*Ryalls v. R.* (1840) 2 Cox 80) but this appears to be an isolated case (c.f. *R. v. Stokes* (1848) 3 C.& K. 189 where Parke B. expressed doubt as to whether the in forma pauperis procedure could be used in such a case).
28. In the years 1818-28 the average number of cases reserved each year was 21 (6 J.N.). In the years 1820-22 the number of writs of error presented was 48, an average of 16 per year which figure includes writs of error in civil cases (1823 P.P. (447) XV, 1). Between 1824 and 1828 there were 20 motions for new trials in the King's Bench (see App. 3), an average of 4 per year. The percentage of success in applications for new trials was very high (90% during the period cited). Reserved cases by contrast showed a success rate for prisoners of only 25%.
29. In 1905 the Committee of Inquiry into the Beck case was told that the Home Office received approximately 5,000 petitions per year (1905 P.P. (Cmnd. 2315) LXII, 465, App. 40).
30. Report of the Royal Commission on Capital Punishment, 1866 (P.P.(3590) XXI, 1 (evidence of Walpole) and Beck Inquiry Report supra.
31. In 1858 in the case of Dr. Smethurst, convicted at the Old Bailey of murder by poisoning, the Home Office took the opinion of the Queen's surgeon on the reliability of the scientific evidence called by the prosecution

at the trial (Trial of Dr. Smethurst, Notable British Trials Series).

32. The trial judge's view of the case always carried great weight with the Home Office (Report of the Royal Commission on Capital Punishment supra). Indeed, it was always open to a judge who was dissatisfied with a jury's verdict to take the initiative and himself recommend the accused be pardoned without waiting for any petition from the accused himself (Chitty, op. cit., vol. 1, 654 and Brougham (Report of the 1848 Lords' Select Committee on Campbell's Criminal Law Administration Amendment Bill, 1847/8 (523) XVI, 423 - evidence of Brougham). An alternative was for him to impose a nominal penalty (see e.g. R. v. Stanton & Cummings, The Times, Sept. 13, 1822). From time to time one sees lawyers, whose clients had been convicted engaging in manoeuvres in open court designed to procure a favourable report from the trial judge (see e.g. R. v. Scott (The Times, Apr. 13, 1824) - evidence called after verdict with a view to showing that a Crown witness had perjured himself; R. v. Robinson (The Times, July 17, 21, and 27, 1824) - accused charged on seven indictments of robbery; defence to each charge mistaken identity; after being convicted on the second indictment, he insisted on being tried on the remaining indictments in order to demonstrate that the guilty verdict was mistaken).
33. In the period 1880-3 the number of persons convicted of serious crime set free by the Home Office was 12 per annum ((1883) P.D. CCLXXVII, 1183). Between 1898-1903 5 persons were pardoned and a further 90 had their sentences remitted (Beck Inquiry Report, App. 40).
34. See Beck Inquiry Report, App. 40. New evidence usually took the form of affidavits from witnesses who had not given evidence at the trial. Although such new evidence was often perjured not all was. Poverty often prevented witnesses for poor prisoners getting to court or getting there in time. The temptation to put in false affidavits was strong because the sanction of prosecution for perjury was absent. The exposure of perjury was made more difficult by the fact that it was not Home Office practice to test such evidence by cross-examination (see Greaves, Report on Criminal Procedure, 1856). Sometimes the affidavits would be sworn before the examining magistrate who had committed the accused for trial (see e.g. R.v. Ferris, The Times, Dec.

12, 1825), but this does not appear to have provided any real guarantee of reliability.

35. See the evidence of Edward Wilde to the Criminal Law Commissioners (2nd Report, 1835, App.1). Often a prisoner's best hope lay in having his case taken up by the press or by an M.P. Questions about the cases of individual convicts were a constant feature of Commons proceedings throughout the century. Indeed, in 1844 Fitzroy Kelly urged that one of the benefits which would follow from granting a right of criminal appeal would be that the Commons would no longer be made a Court of Appeal (1844) P.D. LXXIII, 24).
36. By the 25 Geo. II, c. 37, s. 3 murderers were to be executed on the day next but one after that on which sentence was passed, unless the same happened to be a Sunday. In practice murderers were usually sentenced on Friday to allow an extra day between sentence and execution ((1836) P.D. XXXIII, 466). In other capital cases there was a difference in practice between London and the rest of the country. Prisoners capitally convicted at the Old Bailey were not ordered for execution until the Recorder's report on their cases had been considered by the King in Council, which involved a delay which might run into weeks. Prisoners capitally convicted at Assizes and left for execution would normally be executed within a day or two of sentence, and in their cases shortness of time and the distance involved often made appeal to the Home Office impractical (c.f. anecdote 131 in Lord Eldon's Anecdote Book (ed. Lincoln & McEwen). In their 2nd Report the Criminal Law Commissioners criticised the short interval allowed between sentence and execution in murder cases, and the following year murder cases were by statute placed on the same footing as other capital cases, with the Government announcing that henceforth the interval would not be less than 14 nor more than 27 days. The practice of the King in Council considering the Recorder's report was abolished on the accession of Victoria, such cases being thenceforth considered by the Home Office alone.
37. In the debates on the 1847 and 1853 Bills (see *infra*) it was suggested that a Criminal Appeal Bill had been introduced by Romilly ((1847) P.D. XCV, 528 and (1853) P.D.CXXVII, 629. This however appears to be wrong.
38. The reformers' arguments are set out in full in Kelly's speech on the second reading debate of the 1844 Bill (P.D.LXXV, 11-25), and in the

evidence given by Greaves, Kelly and Pitt-Taylor to the 1848 Lords' Select Committee (Minutes of Evidence pp. 13-22, 25-30, and 37-40).

39. 1844 P.P. (376) I, 13.
40. (1844) P.D. LXXV, 1337-8.
41. 1845 P.P. (656) XIV, 161 the report described the law as 'very defective as regards the means afforded for the correction of errors in criminal proceedings'. It described wrongful convictions as not infrequent and by way of remedy urged a general extension of the right to move for a new trial.
42. (1847) P.D. XCV, 527-8.
43. Appeal in Criminal Cases Bill, 1848 (1847/8 P.P. (128) I, 193).
44. (1853) P.D. CXXVII, 969-70.
45. 1847/8 P.P. (523) XVI, 423
46. Minutes of Evidence of Select Committee - Parke B., p. 4; Alderson B., p. 9; Greaves, p. 22; Kelly, p. 32; Pitt-Taylor, p. 39; Denman C.J., pp. 45/6; Lyndhurst, p. 47; Patteson J., p. 51; only Maule J. at p. 56 saw little good in it.
47. Ibid. Kelly, p. 33; D'Oyley, p. 34, & Bathurst, p. 35, were in favour but Parke B., p. 7, Greaves, p. 23, Denman C.J., p. 43, Coleridge J., p. 52, Wightman J., p. 53, Coltman J., p. 55, Maule J., p. 56, Cresswell J., p. 57, and Rolfe B. were either hostile or doubtful. Quarter Sessions trials, it was argued, rarely involved difficult points of law and there was the risk that lay Chairmen would be pressed by ingenious counsel to send up hopeless points. Denman argued that, if there was a problem, a better solution would be to improve the court by appointing barristers as Chairmen. The proposal that Quarter Sessions cases should be reserved to the Assize judges was opposed on all sides (for the objections raised see Greaves, p. 27, Kelly, p. 33, Patteson J. at p. 51 and Wightman J. at p. 53).
48. See Appendix 3.
49. The only one prepared to give any countenance to it was Alderson B. who suggested at p. 9 that if change was to be made it ought to be made in capital cases.

50. Ibid. Parke B., pp. 4-5; Denman C.J., p. 44; Brougham, p. 49; Patteson J., p. 51 (although he acknowledged an occasional problem in identification cases); Wightman J., p. 53 and Coltman J., p. 55.
51. Ibid. Parke B., p. 5 (in civil cases a new trial would only be granted on the grounds that the verdict was against the evidence where the trial judges was dissatisfied with the jury's verdict; in criminal cases a judge dissatisfied with the jury's verdict recommended a pardon); Alderson B., p. 9 (The Home Office more for the benefit of average class of prisoner than a court of appeal would be); Patteson J., p. 51 (a court could not inquire into questions of mistake as completely as the Home Secretary could).
52. Ibid. Parke B., pp. 6 and 8; Alderson B., p. 9 (making the further point that the sanction of costs present in civil appeals would be absent in criminal cases).
53. Ibid. Parke B., p. 5 "the avoiding of an occasional and rare injustice would be purchased at too great a price".
54. Ibid. Parke B., p. 4 (he argued that the danger would be particularly great if the State paid for legal representation for poor appellants); Denman J., p. 44; Lyndhurst, p. 47; Brougham, p. 49 (more judges would be needed and he doubted if the bar could furnish the increase); Pollock L.C.B., p. 59 'it would stop not only all the criminal business of the country (or delay it not inconsiderably) but all the civil business of the country transacted at Westminster Hall'.
55. Ibid. Alderson B., p. 10; Parke B., p. 4 took the argument a stage further; if legal aid was given to defendants on appeals it would be difficult to resist giving it to them at trial.
56. Ibid. Denman C.J., p. 44; Lyndhurst, p. 47.
57. Ibid. Denman C.J., p. 45; Brougham, p. 50.
58. Ibid. Parke B., p. 4; Alderson B., p. 10; Brougham, p. 49 (a man found guilty of murder at York in the first fortnight in July who appealed could not be executed till mid-November).
59. Ibid. Denman C.J., p. 44 'witnesses dying, forgetting, tampered with, spirited away';

Lyndhurst, p. 47; Brougham, p. 49, Coltman J., p. 55.

60. Parke B., p. 6; Brougham, p. 50. To have given the Crown the right to move for a new trial where the accused had obtained his acquittal by keeping back witnesses or by other fraudulent means would, in fact, have been in accord with existing Queen's Bench practice in misdemeanour - Chitty, op. cit., vol. 1, p. 657.
61. (1848) P.D. C, 465-6; he was staunchly supported by Denman (466-7) and Brougham (467-8).
62. Before the Select Committee Greaves, Kelly and Pitt-Taylor were very unconvincing when pressed about the volume of work which a New Trials Act would generate (see their answers at pp. 18, 25-8, and 37 respectively). The answers of Greaves and Kelly (at pp. 18 and 27 respectively) to the argument that appeal would be a rich man's remedy were if anything weaker. Surprisingly none of them cited in answer to the judges' claim that wrong convictions were of rare occurrence the compelling and contrary evidence given by sheriff Wilde to the Criminal Law Commissioners in 1835.
63. Often called 'the Court of Criminal Appeal', see e.g. Cox's Criminal Cases.
64. New Trials in Criminal Cases Bill, 1853 (1852/3 P.P. (164) V, 215; debate (1852/3 P.D. CXXVII, 964-93). The Bill as drafted applied only to Ireland, but it was Butt's intention that, if it passed its second reading, it should be amended in committee to include England and Wales (P.D., 977).
65. Cl. 6 made the trial judge's certificate a pre-condition to the making of an application on the ground that the verdict was against the weight of the evidence.
66. Cl. 21-3 (appeals in capital cases to be heard out of term time by a Commission of five judges appointed by the Lord Chancellor).
67. E.g. rarity of wrong convictions (Napier 987); the 'floodgates' argument (Phillimore 978); jury's sense of responsibility diminished (Napier 987, Grey 992); the right of appeal give was 'one-sided' (Palmerston 982); perjury on second trials (Palmerston 982).
68. 1856 P.P. (456) L, 79.

69. 1857/8 P.P.(137) III, 587; debate (1857/8) P.D. CLI, 1051-64.
70. E.g. the 'floodgates' argument (Miles 1057); jury's sense of responsibility diminished (Fitzgerald 1053); delays in capital cases would make it difficult to maintain system of capital punishment (Fitzgerald 1053).
71. See e.g. Walpole 1052, Evans 1057, Hanley 1061.
72. Ibid. 1062 (the vote was 145 to 91).
73. Ibid. 1062-4.
74. Appeal in Criminal Cases Bill, 1859 (not printed).
75. (1859) P.D. CLII, 1112-3.
76. Appeal in Criminal Cases Bill, 1859 (P.P. (2575 Sess. 2) I, 17).
77. (1859) P.D. CLIV, 771-4.
78. Appeal in Criminal Cases Bill, 1860 (P.P.(I) I, 211). The principal modifications were cl. 2 infra, the inclusion of a clause making it clear that the Crown was to have no right of appeal, and the abandonment of the clause giving prisoners the right to tender bills of exceptions.
79. (1860) P.D. CLVI, 407-24.
80. Cl.2. The 1859 (Session 2) Bill also included this clause.
81. Lewis made specific reference to the figures for summary convictions and appeals in 1858 in three classes of case where there was a right of appeal to Quarter Sessions, conditional upon the accused entering into a recognisance with surety to pay such costs as Quarter Sessions should order him to pay, namely cases under the Vagrancy Act (i.e. the Act of 1824) where there were 18,630 convictions and 10 appeals, cases under the Game Laws (i.e. under the Night Poaching Act, 1828 and the Game Act, 1831) where there were 7,379 convictions and 14 appeals, and cases of malicious trespass and damage to property (i.e. under the 7 & 8 Geo.IV., c. 30 ) where there were 11,211 convictions and 2 appeals.
82. P.D. *ibid.*, 405.

83. New Trials in Criminal Cases Bill, 1861 (P.P. 61) III, 613).
84. (1861) P.D. CLXXVI, 2070. The second reading of the Bill was put off for six months.
85. Appeal in Criminal Cases Amendment Bill, 1864 (P.P. (121)I, 39; debate - (1864) P.D. CLXXVI, 1773-4.
86. See Appendix 3.
87. E.g. Hosiery Act, 1843, s. 29; Factories Act, 1844, s. 70; Public Health Act, 1848, s. 135; Cruelty to Animals Act, 1849, s. 25; Larceny Act, 1861, s. 110; Malicious Damage Act, 1861, s. 68; Poaching Act, 1862, s. 6.
88. Occasionally one finds judges adopting very questionable procedures to reverse wrong verdicts - see e.g. R. v. Holding, *The Times*, Feb. 7, 1857 (H. convicted of buggery of 15 year old boy; after verdict Bramwell B. directed a police officer to take the boy to two of the places he had mentioned in his evidence and make inquiries; after a short time the constable returned to court, saying that the boy had admitted to him that he had not told the truth in his evidence; Bramwell B. had H. brought back and told the jury to reconsider their verdict, whereupon they immediately returned a verdict of acquittal; since the jury's verdict had by then almost certainly been recorded it could not lawfully be altered).
89. R. v. Scaife (1851) 5 Cox 243.
90. It was followed in Australia, but in England it was always regarded as a case of doubtful authority (c.f. the preamble to the Criminal Appeal Bills of 1853/58/59 & 61). From the report it looks as though the decision was per incuriam, although, if it was, this is surprising given that the court was presided over by the Lord Chief Justice who had chaired the 1848 Select Committee). This was certainly the view taken by the Judicial Committee of the Privy Council in R. v. Bertrand (1867) 10 Cox 618 at p. 623.
91. R. v. Bertrand supra.
92. Unreported cited Archbold (16th ed.), p. 182.
93. R. v. Esdale (1858) 1 F. & F. 253.
94. R. v. Jelly (1867) 10 Cox 553 (this, notwithstanding that the Court for Crown Cases



- Reserved had the previous year declared that the remedy would not lie in criminal cases - Winsor v. R. (1866) 10 Cox 300).
95. Hatch had been convicted at the Old Bailey in December, 1859 and sentenced to two years' hard labour; the prosecution of the complainant girl came the following year (R. v. Plummer, The Times, May 10, 11, 12, 14 & 16, 1860)..
  96. It provoked both a Times leader and a letter from Pitt-Taylor (The Times, May 16th, 1860)
  97. R. v. Toomer, The Times, Sept. 5, 1866 (leader).
  98. Letter to The Times on the Toomer case (published Sept. 3, 1866) asking 'Where can the Defendant, a poor man, raise funds for the prosecution?'
  99. One finds occasional examples of its employment in The Times trial reports - see e.g. R. v. Kinnear, The Times, Aug. 27, 1872 and R. v. Alice Adams, The Times, Nov. 1, 1878.
  100. See Radzinowicz, History, Vol. 4, pp. 661-81.
  101. 1866 P.P. (3590) XXI, 1. In the same year as the Commission was appointed the Earl of Ellenborough had introduced a Sentences of Death Bill which proposed a reversion to the pre-1837 practice of having capital sentences considered by the Queen in Council (see (1864) P.D. CLXXV, 247-56.
  102. They did, however, acknowledge that the subject was one requiring investigation.
  103. Capital Sentences (Court of Appeal) Bill, 1870 (P.P. (85) I, 193); debate - (1870) P.D. CCII, 727-35.
  104. Ibid. 732.
  105. Ibid. 735.
  106. 1874 P.P. (315) IX, 471
  107. They included J.F. Stephen, Bramwell B. & Blackburn J.
  108. The Criminal Appeals Bill, 1878 (P.P.(92) II, 1).

109. Criminal Code (Indictable Offences) Bill, 1878 (P.P. (178) II, 5); debates (1878) P.D. CCXL, 1671-3 & 1881, and CCXLII, 2038-40.
110. Criminal Code Bill, 1879 (1878/9 P.P. (117) II, 175); debates (1879) P.D. CCXLV 310-47, & 1750-73; CCXLVI, 1238-9, 1719, & 1915; and CCXLVII, 953 & 1281.
111. Criminal Code Bill, 1880 (P.P.(2) II, 1); debates - (1880) P.D. CCL 244 & 1236; CCLI, 1014.
112. Criminal Code No. 2 Bill, 1880 (P.P.(47) II, 223).
113. Central to the Government Bill was the proposal to establish a Court of Criminal Appeal in which all appellate jurisdiction would be vested, including a limited jurisdiction to grant new trials. The No. 2 Bill concerned itself simply with the question of new trials, and proposed that trial judges should have the power to grant new trials on any of a number of specified grounds, with a right of appeal against refusal to the Divisional Court.
114. The Criminal Law Amendment Bill, 1882 (P.P. (15) II, 1 at p. 60); Criminal Procedure Bill, 1882 (P.P.(43) II, 81 at p. 119); Death Sentences Appeal Bill, 1882 (P.P. (81) II, 135).
115. Criminal Code (Indictable Offences Procedure) Bill, 1883 (P.P. (8) II, 249); Court of Criminal Appeal Bill, 1883 (P.P. (9) II, 211).
116. Assheton Cross ((1883) P.D. CCLXXVII, 1234; Sir Ed. Clarke *ibid.* 1219.
117. *Ibid.* Giffard 1197, Sir E. Clarke 1219.
118. *Ibid.* Giffard 1196, Gibson 1229, & 1231. The opponents of reform also brought up the familiar arguments about the jury's sense of responsibility, especially in capital cases, being diminished (Giffard 1197, Sir Ed. Clarke 1218, 1222 (to whom the fact that the conviction rate in 1880 and 1881 had been 50% in murder cases and 75% in other classes of case was evidence of the care which juries currently took over capital cases) and Gibson 1229); the lack of provision for legal aid for poor appellants (Assheton Cross 1228); & that the Bill would greatly encourage the practice of holding back evidence (Assheton Cross 1235-6). More original arguments included Grantham's claim (1205) that ordering a new

trial upon a prisoner's statement was, by a sidewind, to allow prisoners to give evidence.

119. Ibid, Waddy 1201; it was also criticised for failing to offer a remedy for 'the scandal of inequality of sentencing' - Clarke 1217, & Harcourt 1227.
120. Voting was 132-78 (majority 54).
121. The Bills were the Court of Criminal Appeal Bill, 1888 (P.P. (377) II, 391); the Court of Criminal Appeal Bill, 1890 (P.P. (83) I, 535) and the Criminal Cases Appeal Bill, 1892 (P.P. (163) II, 201). The 1890 Bill was said to have been prompted by the Maybrick case (a poisoning case where the Home Office commuted the death penalty because of doubts about the medical evidence) - see Lloyd Wharton (1897) P.D. XLVII, 1252.
122. 1894 P.P. (127) LXXI, 173.
123. Court of Criminal Appeal Bill, 1895 (P.P. (53 - Sess.1) I, 493); P.D. (1895) XXX, 316; XXXI, 521 & 1517; XXXII, 875; XXXIII, 1347, 1497, & 1672; XXXV, 54.
124. 1895 P.P. (351) VII, 499.
125. Court of Criminal Appeal Bill, 1896 (1896 P.P. (60) I, 443).
126. Court of Criminal Appeal Bill, 1897 (P.P. (17) I, 373); debates - debates P.D. XLV, 295, and XLVII, 1229-1282.
127. P.D. XLVII, 1261-7.
128. Ibid. 1276.
129. Ibid. Reid 1246; Ashcroft 1247; Lloyd Wharton 1250.
130. Ibid. Ambrose 1241; Lloyd Wharton, 1250; Sir Ed. Clarke 1269; Pickersgill in opening the debate had sought to anticipate this point arguing that the power to increase sentences would act as a check on frivolous appeals.
131. Ibid. Sir Ed. Clarke 1270. Pickersgill (1235) had acknowledged this point and expressed the hope that appeal against summary conviction could be brought more within the reach of poor defendants.
132. Ibid. Lloyd Wharton 1253. Hawkins J. (1893 8 New Review, 617) and Crackanthorpe (1893 34

Nineteenth Century, 614) had proposed a Royal Commission to report on the principles on which punishment should be based.

133. Ibid. Reid 1244; Howell 1271.
134. Ibid. Darling 1259.
135. Court of Criminal Appeal Bill, 1898 (P.P.(3) I, 413); debate P.D. LV, 5.
136. Home Secretary - P.D. LV, 55-62; Attorney General *ibid.* 72-5
137. Court of Criminal Appeal Bill, 1899 (P.P. (58) I, 305).
138. See Beck Inquiry Report *supra*.
139. See 1907 P.P. (Cmnd. 5066) LXII, 465.

## CHAPTER 20

1. Hawk., 2 P.C., c. 39, s. 2.
2. Staunford, Les Plees de Coron, f. 151.
3. Stephen, H.C.L., i, 442.
4. Cornish & Others, Crime & Law in Nineteenth Century Britain, p. 59.
5. See Appendix 1.
6. Legal Aid & Advice Act, 1949 not brought into force as regards criminal proceedings until 1963 (see Legal Aid & Advice Act, 1949 (Commencement No. 11) Order, 1963 (1963 No. 432 C. 4), and see generally R.M. Jackson, The Machinery of Justice in England & Wales, 4th ed., pp. 138-47.
7. Per Lawton L.J. in R. v. Turner (1975) 61 Cr.App.R. 67, at p. 77.
8. Criminal Justice Act, 1988, s. 34.
9. Criminal Justice Act, 1967, s. 4.
10. Police & Criminal Evidence Act, 1984, s. 81, and Crown Court (Advance Notice of Expert Evidence) Rules, 1987.
11. Criminal Justice Act, 1987, s. 9(5).
12. Criminal Evidence (Northern Ireland) Order, 1988

**APPENDIX 1**

**Representation by counsel in Old Bailey Trials  
1800-1900**

Year and Session	Total No. of Trials	Trials in which Counsel appeared for:-	
		the Crown	The Prisoner
1800 July	104	16 (15%)	25 (24%)
1805 July	80	19 (24%)	26 (32%)
1810 July	85	9 (11%)	15 (18%)
1815 June	88	1 (1%)	12 (14%)
1820 July	167	20 (12%)	28 (17%)
1825 July	158	13 (8%)	42 (27%)
1830 July	203	21 (10%)	61 (30%)
1835 July	75	9 (12%)	27 (36%)
1840 July	85	11 (13%)	16 (19%)
1845 July	74	24 (32%)	35 (47%)
1850 July	83	28 (34%)	40 (48%)
1855 July	36	32 (89%)	20 (55%)
1860 July	53	48 (91%)	32 (60%)
1865 July	55	51 (93%)	22 (40%)
1870 July	57	54 (95%)	29 (51%)
1875 July	53	50 (94%)	33 (62%)
1880 July	59	59 (100%)	27 (46%)
1885 July	53	51 (96%)	21 (40%)
1890 July	53	52 (98%)	31 (59%)
1895 July	49	46 (94%)	15 (31%)
1900 July	39	34 (87%)	17 (44%)

Source:- Central Criminal Court Sessions Papers

Where the Sessions Papers leave it doubtful whether a prisoner was represented he has been treated as unrepresented; in no year does the number of such

doubtful cases exceed 2 save for July 1820, 1845 and 1850, where the figures are respectively 5, 8 and 3.

## APPENDIX 2

### The Prisoners' Evidence Bills

**Protection of the accused against cross-examination as to credit, and comment upon his failure to give evidence.**

#### **(a) Cross-examination as to credit**

The earliest Prisoners' Evidence Bills gave no protection to the accused against cross-examination as to credit. Brougham's Bills of 1858 [1], 1859 [1] and 1860 [1] expressly provided that an accused who gave evidence should be subject to cross-examination in like manner as any other witness, whilst the Bills of 1863, 1864 and 1865 were silent on the point, as were the first clutch of Acts creating exceptions to the incompetency rule.

The first Bill to contain a clause restricting cross-examination as to credit was Ashley's Bill of 1877 [2], and such a provision was also a feature of most of the Bills introduced between 1877 and 1898 (the only ones which denied the prisoner protection were Bramwell's Bill of 1884 and the Government Bill of 1897).

Ashley's Bills of 1877 [2] and 1878 [2] prohibited cross-examination as to other offences, save where the accused had himself given evidence of good character. The Criminal Code Bills [3] sought to deal with the problem by giving the judge a discretion to limit cross-examination as to credit. But in its 1884 Bill [4] the Government reverted to Ashley's formula. In the Bill of 1885 [5] protection for the accused was increased. He was not to be questioned either as to other offences or as to his character, save where he had sought to hold himself out as being of good character, or where the proof that he had committed



another offence was admissible to prove his guilt of the offence charged. A clause in these terms also appeared in the Bills of 1888 [6], 1892 [6], 1893 [6] and 1895 [6]. The Bill of 1896 included a further exception to the prohibition, permitting cross-examination of an accused who had given evidence against a person charged with the same offence.

However, such clauses did not reflect existing English practice on the matter. None of the statutes which permitted accused persons to give evidence placed any restriction upon cross-examination. On the contrary, several of them declared in terms that he was to be liable to cross-examination to the same extent as an ordinary witness. And whilst it was true that there were judges who intervened to prevent defendants being cross-examined as to previous convictions, many did not. Indeed in Gawthrop [7] in 1893 the Lord Chief Justice had declared himself in favour of prisoners who gave evidence under the Criminal Law Amendment Act, 1885 being subject to cross-examination as to credit, and purported to lay this down as a rule of practice to be generally adopted thereafter.

United States and Colonial practice afforded no clear guidance on the point. Some American states disallowed cross-examination as to credit, but many permitted it. In New South Wales cross-examination of the accused as to his previous convictions required leave of the trial judge [8], but most Colonial statutes gave no protection in the matter.

**(b) Comment upon the prisoner's failure to give evidence**

The Criminal Evidence Bill of 1898, as originally drafted, was silent as to the matter of comment by the prosecution or judge on the failure of the accused to give evidence. In this respect, it mirrored existing law and practice. None of the existing statutes which allowed prisoners to give evidence contained such a provision, and, the habit of judges and counsel commenting upon the failure of the accused to give evidence, which the Law Journal had criticised during the first year of operation of the Criminal Law Amendment Act, 1885 had, in the intervening years, shown no sign of diminishing. Indeed, according to one correspondent to The Times [9], it was common practice in some courts for prosecuting counsel, in his opening speech, to point out that the case was one in which the prisoner could fortunately give his own evidence, adding the comment 'If he does so, I can again address you; if he does not, you will not need another speech from me'.

In this respect, English practice was far less favourable to the prisoner than that in the United States where, in a number of States, statutes, giving prisoners the right to testify, expressly provided that no adverse inference was to be drawn from the failure of the accused to testify, this provision in some cases (e.g. New Hampshire, and Pennsylvania) [10] being buttressed by a prohibition upon comment by prosecuting counsel upon such failure.

Colonial practice upon the point was mixed. The Canada Evidence Act of 1893 [11] had followed United States precedent, and outlawed all comment by either counsel or judge. This had also been the

stance adopted by the first Australian States to adopt the reform. The South Australia statute of 1882 [12] had followed the United States model by declaring that no presumption of guilt should be drawn from the failure of the accused to testify, whilst in the New Zealand Act of 1889 [13] this provision was buttressed by a prohibition upon comment. However, the New South Wales Act of 1891 was silent on the point. In Kops (1893) [14] the Judicial Committee of the Privy Council was called upon to construe the Act. The trial judge had told the jury that they might draw an inference from the failure of the accused to testify. The defendant was convicted and appealed on the ground that to allow such comment amounted to an indirect compulsion to testify, whereas the Act expressly declared that the accused was not compellable. This argument had failed before the State Appeal Court, where Windeyer C.J. spoke of the section of the South Australian Act which sought to safeguard the accused in this respect, as 'one of those futile legislative attempts to control thought, which are the outcome of timidity to accept the natural consequences of a great reform'. It fared no better before the Judicial Committee. Lord Morris pointed out that, prior to the Act, comment might have been made to the jury that the accused had offered no explanation of the evidence against him, whilst the Lord Chancellor contented himself with the observation that, though there might be cases where it would not further the ends of justice to make such a comment, there were cases (which he did not identify) in which such comment was both legitimate and necessary' [15]. After Kops, the tide in Australasia turned against protecting the accused from comment. When the New Zealand Act of 1889 was repealed and replaced by the Criminal Code Act of 1893, the latter dropped the safeguard. Nor was any

such safeguard included in the Western Australian statute of 1899.

So far as the pre-1898 English Criminal Evidence Bills were concerned, Ashley's Bills of 1877 and 1878 had contained a clause [16] (following the United States model), providing that the neglect or refusal of a prisoner to give evidence should not create any presumption against him, nor should any reference to or comment upon such neglect or refusal be made during the trial, but none of the succeeding Bills contained any comparable clause.

#### Notes

1. Cl. 2 (see 1858 22 J.P., p. 200, 1859 23 J.P., p. 193, & 1860 24 J.P., p. 426).
2. Cl. 6 (his 1876 Bill contained no such restriction but on the contrary expressly provided that an accused who gave evidence should be subject to cross-examination to the same extent as any other witness).
3. See 1879 Bill, cl. 523; 1880 Bill, cl. 471; 1883 Bill, cl. 100.
4. Cl. 1.
5. Cl. 2.
6. Cl. 1.
7. R. v. Gawthrop (1895) 59 J.P. 377.
8. Criminal Law & Evidence Amendment Act, 1891 (New South Wales, 55 Vict. No. 5), s. 6.
9. Letter to The Times, Apr. 17, 1897 from 'A Chairman of Quarter Sessions'.
10. See 1878 Ir. Law Times, pp. 575 & 593.
11. Canada Evidence Act (Canada: 56 Vict., c. 31), s. 4.
12. Evidence Amendment Act, 1882 (South Australia: 45 & 46 Vict., no. 245), s. 1.

13. Criminal Evidence Act, 1889 (New Zealand No. 16), s. 4.
14. R. v. Kops [1893] N.S.W.R. 150 at 173-4.
15. Kops v. R. [1894] A.C. 650.
16. Cl. 10.

## APPENDIX 3

### Appeals

#### (a) Motions for New Trial in Misdemeanour 1824-43

The number of prosecutions for misdemeanour in the King's Bench and the number of motions for new trial (in brackets) brought upon such prosecutions in the years 1824-43 were:-

1824	101	(12);	1831	60	(3);	1838	54	(2);
1825	115	(1);	1832	59	(3);	1839	37	(2);
1826	82	(2);	1833	71	(7);	1840	34	(4);
1827	114	(1);	1834	72	(11);	1841	41	(3);
1828	100	(4);	1835	52	(4);	1842	57	(2);
1829	123	(4);	1836	51	(3);	1843	43	(2).
1830	74	(1);	1837	43	(2);			

Source: 1844 P.P. (408) XXXVIII 681.

#### (b) The Discretion of the Trial Judge to Reserve cases

##### (i) The debate

Before the 1848 Lords' Select Committee on Lord Campbell's Criminal Law Administration Amendment Bill [1], the judges had brushed aside calls for prisoners to be given the right to require the trial judge to reserve a case to the Fifteen Judges. To grant such a right would they claimed lead to a flood of hopeless reserved cases. Nor was there any need for such a reform, since no judge ever in practice refused to reserve a point as to which there was real doubt. 'The error' said Parke B., 'was, if at all, in reserving cases for the advice of the judges in which their advice was hardly required'.

Fitzroy Kelly in his evidence to the Committee argued that the reality was less reassuring, citing

Russell [2], in which he had himself been counsel, and the very recent case of Serva [3], commonly known as 'The case of the Brazilian pirates'.

Russell was tried before Vaughan B. at Huntingdon Assizes in 1832 on a charge of murder. He had given a woman poison to procure her abortion; she took the poison in his absence and died from it. At his trial Kelly took the objection that he should have been indicted as an accessory and not as a principal. Vaughan B. overruled the objection and Russell was convicted. Kelly asked Vaughan to reserve the point but he refused. Five times he applied to the judge in private to change his mind. Shortly before Russell was due to be hanged, Kelly again visited Vaughan and implored him, if he would not reserve the point, at least to write to both the Lord Chief Justice and the Lord Chancellor and ask their opinion as to whether the point was good. After an hour Vaughan gave in and agreed to do so. Eight hours before Russell was due to hang replies were received recommending Vaughan to reserve the point which he then did. When it was argued the following term before eleven judges (including Vaughan himself) they unanimously held the objection valid and recommended a pardon.

In Serva, the accused and others were tried in 1845 at Exeter Assizes for murder on the high seas. Counsel for the prisoners took the point that the court had no jurisdiction to try the case. Platt B. overruled the objection and after the prisoners' conviction refused to reserve the point. Ultimately, he was prevailed upon to consult his brother judge of Assize, who advised that the case be reserved. When it came before the judges they held by a majority of 13 to 2 (Platt and Denman L.C.J. dissenting) that the objection was valid.

The reserving rates of judges (set out at (ii) below) provide strong confirmation of another claim made by Kelly, namely that judges varied enormously in their willingness to reserve points.

Kelly's arguments, however, left the judges unpersuaded. Only Lord Denman came out on his side saying that if the judge had made a mistake, it was against all principle to leave it upto him whether it should be reserved or not.

The final round in the argument came with a letter written to the Committee by Alderson B., supplementing the evidence he had already given. In it he argued that a judge's refusal to reserve did not leave a prisoner remediless at all; he could petition the Crown who would refer the matter to the Lord Chancellor, who, if he considered there was merit in the point, would refer the case to the judges, a procedure which he claimed had been followed in the cases of Wait [4] and Fautleroy [5]. In practice, whatever the theoretical availability of this procedure, it was one which was little known and seldom resorted to (between 1785 and 1828 only 5 out of 521 cases were reserved by the Lord Chancellor) [6]; and in murder cases the time between sentence and execution was so short as to render it impractical save in London cases.

When Campbell laid the evidence of the Select Committee before the House, he told them that he was not prepared to recommend that prisoners be given the right to require cases to be reserved. The Lords followed his advice and his 1848 Bill passed into law with the law on this point unaltered.



One matter which could have been (but was not) urged by the judges in support of their argument was that, in cases of any difficulty, it was the well nigh universal practice for trial judges to canvass the opinions of their brethren sitting in the same building as to the point raised, and as to whether the case should be reserved. Both at the Old Bailey and at Assizes it was a commonplace for a judge to rise during a case to confer with the judge(s) sitting in the adjoining court(s) upon points of law raised by counsel, and, having conferred, to announce the result of his discussions and his ruling in open court [7]. Alternatively, during long trials there might be discussion overnight [8], and occasionally a judge would write to a brother judge to take his opinion [9].

The Criminal Code Bills 1878-1883 all sought to give a prisoner a right of appeal on law in cases where the judge refused to reserve, although such appeal was to be brought only by the leave of the Attorney-General. Debate on the clause brought forth from Hardinge Gifford the familiar claim that judges never refused to reserve doubtful points, but many were not persuaded. The Code Bills however never became law and once again the matter dropped out of view.

It next resurfaced in the Report of the Committee of Inquiry into the Beck case, which laid the blame for Beck's being twice wrongfully convicted on the refusal of the Common Serjeant to reserve a point of admissibility raised by the defence at the first trial. The Committee recommended that prisoners be given a right of appeal on law, and in 1905 the Government introduced a Criminal Cases (Reservation of Points of Law) Bill to give effect to the recommendation.

In the end, the furore caused by the Edalji case led to the Bill being withdrawn in order to enable a more comprehensive measure to be brought in. It is, however, interesting to read what Lord Halsbury had to say about the Bill when he introduced it in the Lords:-

'It is very unusual, I may say almost unexampled, for any one of Her Majesty's Judges to refuse to reserve a question which is really a question that could properly be argued. Yet sometimes Judges, who are not of the status of her Majesty's Judges, are a little jealous of their decisions being made the subject of inquiry, and it has sometimes happened that a judge has refused to reserve a point' [10].

#### Notes

1. 1847/8 P.P. (523) XVI 423.
2. R. v. Russell (1832) 1 Moo. C.C. 356.
3. R. v. Serva (1845) 1 Cox 292.
4. R. v. Wait (1823) 11 Price 518
5. R. v. Fautleroy The Times, Nov. 1, 1824.
6. Vols. 2-6 J.N.
7. See e.g. R. v. Gibbons (1823) 1 C.& P. 97; R. v. Evans (1839) 8 C.& P. 765; R. v. Coley (1868) 10 Cox 536; R. v. Goddard (1882) 15 Cox 7; R. v. Hirst (1898) 18 Cox 374.
8. See e.g. R. v. Roden (1874) 12 Cox 630 (discussions pre-trial); R. v. Blackburn (1853) 6 Cox 377 (discussion at lodgings).
9. See e.g. R. v. Lynch (1848) 1 Cox 81.
10. (1905) P.D. CXLV, 1297-8.

**(ii) The number of cases reserved by individual puisne judges 1800 - 1850**

**Common pleas**

<b>Judge</b>	<b>No. of cases reserved</b>	<b>Years in office 1800-1850</b>
Bosanquet (1830-1844)	8	15
Burrough (1816-1829)	13	14
Chambre (1800-1815)	23	16
Coltman (1837-1849)	10	13
Cresswell (1842-1858)	5	9
Dallas (1813-1818)	2	6
Erskine (1839-1844)	3	6
Gaselee (1824-1837)	28	14
Gibbs (1812-1813)	1	2
Heath (1780-1816)	9	17
Park J.A. (1816-1838)	24	23
Richardson (1818-1824)	20	7
Rook (1793-1808)	4	9
Talfourd (1849-1854)	1	2
Vaughan Williams (1846-1865)	2	5

**King's/Queen's Bench**

Judge	No. of cases reserved	Years in office 1800-1850
Best (1818-1824)	9	7
Coleridge (1835-1858)	10	16
Dampier (1813-1816)	1	4
Grose (1787-1813)	4	14
Holroyd (1816-1828)	22	13
Le Blanc (1799-1816)	13	17
Littledale (1824-1841)	22	18
Patteson (1830-1852)	22	21
Taunton (1830-1835)	0	6
Wightman (1841-1863)	9	10

**Exchequer**

Judge	No. of cases reserved	Years in office 1800-1850
Bolland (1829-1839)	13	11
Garrow (1817-1832)	12	16
Graham (1832-1827)	33	27
Gurney (1832-1845)	10	14
Hotham (1775-1805)	0	6

Hullock (1823-1829)	8	7
Platt (1845-1856)	2	6
Richards (1814-1817)	5	4
Manners-Sutton (1805-1807)	2	3
Thomson (1787-1814)	9	15
Wood (1807-1823)	17	17

Hotham B. reserved only 2 cases in a judicial career stretching more than 30 years.

**Puisne judges holding office in more than 1 court**

<b>Judge</b>	<b>No. of cases reserved</b>	<b>Years in office 1800-1850</b>
Alderson (C.P. & Ex. 1830-34-57)	16	21
Bayley (K.B. & Ex. 1808-30-34)	62	23
Erle (C.P & Q.B. 1844-46-59)	2	7
Lawrence (K.B. & C.P. 1794-1808-12)	12	13
Maule (Ex. & C.P. 1839-39-54)	3	12
Parke (K.B. & Ex 1828-34-55)	17	28
Vaughan (Ex. & C.P. 1827-34-46)	5	13
Williams (Ex. & K.B. 1834-34-46)	11	11

(c) Number of cases reserved annually 1800-1899

1800-1828

An average of 14 per annum\*

1828-1849\*\*

1829	11	1836	11	1843	9
1830	11	1837	9	1844	15
1831	12	1838	17	1845	14
1832	21	1839	7	1846	12
1833	12	1840	13	1847	14
1834	10	1841	17	1848	19*+
1835	12	1842	11	1849	21*++

1850-1899+

Year	Total	By Q.S.	Year	Total	By Q.S.
1850	23	13	1875	9	4
1851	22	13	1876	10	4
1852	18	8	1877	21	15
1853	21	12	1878	15	13
1854	28	19	1879	19	17
1855	24	13	1880	12	8
1856	29	11	1881	12	5
1857	36	13	1882	16	14
1858	31	15	1883	12	3
1859	15	6	1884	19	11
1860	19	12	1885	8	7
1861	22	13	1886	14	7
1862	32	18	1887	12	8
1863	16	9	1888	11	9
1864	24	17	1889	19	4
1865	19	8	1890	18	8
1866	18	12	1891	6	3
1867	27	13	1892	12	6
1868	25	14	1893	16	10
1869	24	13	1894	12	11
1870	32	16	1895	8	2
1871	27	15	1896	7	4
1872	21	7	1897	5	4
1873	24	13	1898	11	9
1874	9	4	1899	3	2

\* This figure is based upon the number of reserved cases (376) entered in the Volumes 3-6 of the Judges' Notebooks which cover the period November 1801-1828.

\*\* The figures for these years are derived from the reports of Moody, Denison, Dearsly and Dearsly and Bell.

\*+ Of these 6 were cases reserved prior to the coming into force of the Criminal Law Administration Amendment Act 1848; of the 13

post-Act cases 8 were reserved by Quarter Sessions.

\*++ Of which 8 were reserved by Quarter Sessions

+ The figures for the years 1850-1855 are derived from the reports of Dearsley and Dearsley & Bell; the figures for the years 1856-1899 from the annual Judicial Statistics published in the Parliamentary Papers.

## APPENDIX 4

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| 1819 | Report of Select Committee on Criminal Law   | 1819 (585)<br>VII 1       |
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| 1834 | Report of the Poor Law Commissioners   | 1834 (44)<br>XXVII 1      |
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1823 Jurors' Qualification Bill	1823 (484) (523) II 603, 609
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1828 Prisoners' Counsel Bill	1828 (363) II 379
1833 Prisoners' Counsel Bill	1833 (154) (613) III 409, 413
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1837 Bill to authorise Courts of Sessions of the Peace to remove Points of Law in Criminal Cases	1837 (19)(166) (213) III 295, 297, 301
1844 Appeal in Criminal Cases Bill	1844 (376) I 13
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1853 Law of Evidence Amendment Bill	1852/3 (610) III, 337
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- 1353 27 Ed. III, st. 2, c. 8 (Ordinance of the Staple)
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- 1692 4 Wm. III, c. 8 (apprehension of highwaymen)
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- 1699 10 & 11 Wm. III, c. 23 (apprehension of felons)
- 1702 1 Anne st. 2, c. 9 (witnesses)
- 1706 5 Anne, c. 31 (apprehension of housebreakers)
- 1708 7 Anne c. 21 (treason)
- 1747 20 Geo. II, c. 30 (treason)
- 1752 25 Geo. II, c. 36 (disorderly houses)
- 1752 25 Geo. II, c. 37 (murder)
- 1754 27 Geo. II, c. 3 (conveyance of offenders)
- 1757 30 Geo. II, c. 24 (false pretences)
- 1772 12 Geo. III, c. 21 (felony & piracy)
- 1778 18 Geo. III, c. 19 (payment of charges of constables)
- 1790 30 Geo. III, c. 31 (Treason Act)

- 1800 39 & 40 Geo. III, c. 87 (depredations on the Thames).
- 1803 43 Geo. III, c. 58 (malicious shooting or stabbing) (Lord Ellenborough's Act)
- 1806 46 Geo. III, c. 37 (Witnesses Act)
- 1818 58 Geo. III, c. 70 (disorderly houses)
- 1819 59 Geo. III, c. 46 (appeals of murder)
- 1820 60 Geo. III & I Geo. IV, c. 4 (pleading in misdemeanour)
- 1820 1 Geo. IV, c. 57 (whipping)
- 1824 5 Geo. IV, c. 83 (Vagrancy Act)
- 1825 6 Geo. IV, c. 50 (Juries Act)
- 1826 7 Geo. IV, c. 64 (Criminal Law Act)
- 1827 7 & 8 Geo. IV, c. 28 (Criminal Law Act)
- 1827 7 & 8 Geo. IV, c. 30 (malicious injuries to property)
- 1828 9 Geo. IV, c. 15 (amendment of record)
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- 1828 9 Geo. IV, c. 32 (Civil Rights of Convicts Act)
- 1828 9 Geo. IV, c. 69 (Night Poaching Act)
- 1829 10 Geo. IV, c. 44 (Metropolitan Police Act)
- 1830 11 Geo. IV & I Wm. IV, c. 70 (Law Terms Act)
- 1831 1 & 2 Wm. IV, c. 32 (Game Act)
- 1833 3 & 4 Wm. IV, c. 42 (civil procedure)
- 1833 3 & 4 Wm. IV, c. 49 (Quakers & Moravians Act)
- 1834 4 & 5 Wm. IV, c. 36 (Central Criminal Court Act)
- 1834 4 & 5 Wm. IV, c. 76 (Poor Law Amendment Act)
- 1835 5 & 6 Wm. IV, c. 76 (Municipal Corporations Act)
- 1836 6 & 7 Wm. IV, c. 111 (Previous Convictions Act)

- 1836 6 & 7 Wm. IV, c. 114 (Prisoners' Counsel Act)
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- 1842 5 & 6 Vict., c. 38 (Quarter Sessions Act)
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- 1844 7 & 8 Vict., c. 71 (Middlesex Sessions Act)
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- 1848 11 & 12 Vict., c. 78 (Criminal Law Administration Amendment Act)
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- 1850 13 & 14 Vict., c. 37 (Larceny Act)
- 1851 14 & 15 Vict., c.19 (Prevention of Crime Act)
- 1851 14 & 15 Vict., c.55 (Criminal Justice Administration Act)
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- 1852 15 & 16 Vict., c. 76 (Common Law Procedure Act)
- 1853 16 & 17 Vict., c. 83 (Evidence Amendment Act)
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- 1854 17 & 18 Vict., c. 122 (customs)
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- 1857 20 & 21 Vict., c. 43 (Summary Jurisdiction Act)
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- 1859 22 Vict., c. 33 (Manslaughter Act)
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- 1869 32 & 33 Vict., c. 68 (Evidence Further Amendment Act)
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- 1883 46 Vict., c. 3 (Explosive Substances Act)
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- 1891 54 & 55 Vict., c. 77 (Public Health (London) Act)
- 1892 55 & 56 Vict., c. 4 (Betting & Infants Loans Act)
- 1894 57 & 58 Vict., c. 41 (Prevention of Cruelty to Children Act)
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- 1925 15 & 16 Geo. V, c. 86 (Criminal Justice Act)
- 1931 21 & 22 Geo. V, c. 24 (Sentence of Death (Expectant Mothers) Act)
- 1938 1 & 2 Geo. VI, c. 86 (Administration of Justice Miscellaneous Provisions) Act)
- 1948 11 & 12 Geo. VI, c. 58 (Criminal Justice Act)
- 1949 12 & 13 Geo. VI, c. 51 (Legal Aid & Advice Act)
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- 1872 Indian Evidence Act (Act No. 1 of 1872)
- 1882 Code of Criminal Procedure Act (India: Act No. X of 1882)
- Evidence Amendment Act (S. Australia: 45 & 46 Vict., No. 245)
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- 1883 Criminal Law Amendment Act (New South Wales: 46 Vict. No. 17)
- 1889 Criminal Evidence Act (New Zealand: No. 16)
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### List of Cases

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