THE PLACE OF JUDICIARY IN THE MODERN STATE, WITH SPECIAL REFERENCE TO THE ENGLISH JUDICIARY.

BY

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May, 1936.

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CONTAINS PULLOUTS

A short abstract of the Thesis entitled "The Place of Judiciary in the Modern State, with special reference to the English Judiciary."

This Thesis is a study of the working of the English Judiciary and some of its important problems. It consists of three parts. Part I deals with the civil courts: County Courts, Circuits, the High Court of Justice, the Court of Appeal and the House of Lords. Part II treats the criminal courts: Courts of Summary Jurisdiction, Courts of Quarter Sessions, the Assizes (including the Central Criminal Court), the King's Bench Division and the Court of Criminal Appeal. In Part III are discussed such problems as the jury, costs, legal aid to the poor and a ministry of justice.

The material is drawn primarily from laws, judicial decisions, parliamentary debates, reports of royal commissions and departmental committees, civil and criminal judicial statistics and secondarily from treatises of recognised authorities, books on special topics, pamphlets, periodicals, newspapers and interviews. Its collection, collation and presentation in the form of a thesis represent exclusively my own work.

At the end of the Thesis will be found a table of statutes and a full bibliography.

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Ching-Lien Chien LL.B.

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PART I

THE CIVIL COURTS.

CHAPTER I.

THE COUNTY COURTS. [1a.]

There are 432 County Courts grouped in 56 circuits under 56 judges,[1.] there being an extra judge at Liverpool. The Court in each district must be held at least once a month.[2.] But in the large towns the sittings are, of course, pretty nearly continuous.

The personnel of the Court are the judge, the Registrar, the clerks, the high bailiff. The judge must be a barrister of at least 7 years' standing and is appointed by the Lord Chancellor[3.] being removable for inability or misbehaviour.[4.]

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1. Civil Judicial Statistics, England & Wales, 1934, cmd. 4997, Table XXI. (1935) The number of districts in one circuit varies from one to 17, while one circuit stretches into several counties from 5 to 7. It is not the circuit, still less the county, but the district, that is the unit of the court. Thus County Court, though so called in name which is both inappropriate and misleading, has no necessary connection with the county. In each district, there is generally one place at which the court is held, but in some districts two or more "court towns."

1a. It may be observed that since their inception in 1846, the County Courts Acts were twice considerably consolidated, one in 1888 and the other in 1934. By the County Courts Act, 1888, twelve county courts Acts (i.e. Acts of 1849, 1850, 1852, 1856, 1857, 1858, 1865, 1866, 1867, 1875, 1882, 1887) were repealed. By the County Courts Act 1934, eight Acts {i.e. County Courts Acts of 1888, 1903, 1919}, the County Courts

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(Building) Act, 1870, The County Court Admiralty Administration Jurisdiction Act, 1868, the County Courts, Admiralty Jurisdiction Amendment Act, 1869, The County Court Judges retirement, pensions and deputies Act, 1919, the County Courts (Amendment) Act, 1934, were completely repealed and 12 others repealed so far as they relate to County Courts Acts, of.93, H.L. as. 559-560 (1933-34) also the County Courts Act 1934 First Schedule.

2. County Courts Act, 1934. (24 & 25 Geo.V.ch.53 s.35 (1) (herein referred to as Act of 1934) In September there is usually no sitting of the Court unless ordered to sit by the Lord Chancellor, County Court Act, 1865, s.14.

3. County Courts Act, 1846, s.16. Act of 1 34.s.5. In the Duchy of Lancaster, the Judges registrars, etc. are appointed by the Chancellor of the Duchy of Lancaster.

4. Act of 1934, s.7. (1) R.V.Owen (1880) 15 Q.B.476; Re. Leonard (1896 1 Q.B.473.

His salary is £1500 per annum with a fair degree of social consideration. He is usually selected from the class of K.C. or from members of the fairly capable and successful barristers. He must retire at the age of 72 or, if the Lord Chancellor considers his services would be in the public interest, at 75.[1] This is the only instance, as rare as it is important, in the English judiciary, where retiring age of judges is provided.

There are 256 Registrars[2] of whom 67 are also district registrars of the High Court, 103 are registrars of 2 or more courts and 11 courts have two Registrars for each.[3].

The registrar or the assistant registrar is appointed by the Lord Chancellor among solicitors of at least 7 years' standing.[4] His duties are partly judicial and partly administrative. He enters judgment in undefended cases and makes orders as to

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1. ibid. s. 7 (2)
2. 260 Registrars in Jan. 1935. Evidence taken before the Royal Commission on the despatch of Business at Common Law, p.338.
3. cmd. Civil Judicial Statistics (England & Wales, 1936 cmd.4997 pp.36-37 (1935)
4. County Courts Act, 1934, ss.18,27; County Courts Acts, 1924, 14 & 15 Geo.V. c.17 s.3. (1)(2)

terms of payment.[1] He also hears disputed cases when the claim does not exceed £10 and sometimes, by consent of the parties, cases in which the claim exceeds that figure.[2] There is a right of reference from the Registrar to the Judge. He has also either personally or through his clerks to prepare and issue processes, draw up judgments and orders, and keep the records, cash books and ledgers of the County Court. He is charged with the receipt and payment of all moneys passing through the court.

The registrar is paid such salary, either exclusive or inclusive of the remuneration of any officers of the court, and of any other expense of his office. Such salary is to be fixed by the Lord Chancellor with the concurrence of the Treasury.[3]

Most of the Registrars are full-time. Those who are part-time registrars are not debarred from or restricted in their private practice.

The office of High Bailiff has almost completely been united with that of the registrar

1. County Courts Act, 1846, s.27; also Yearly County Courts Practice Vol.I.pp.16-17 (1936)
2. Act of 1934. s.37.
3. County Courts Act 1934 s.20.
4. County Courts Act, 1934.s.3.

except a very few cases.

At present there are 1355 clerks, of whom 1332 are whole-time employees. They are appointed by the Lord Chancellor.[1.] They do all kinds of work incidental to the duties of the Registrar. There are 1172 Bailiffs, of whom 825 are whole-time employees.[2.]

The County Courts were established in 1846,[3.] for the purpose of enabling "the more easy recovery of small debts and demands in England"[4.] But a variety of jurisdiction has since been conferred upon them.[5.] Apart from 137 courts having Bankruptcy jurisdiction and 43 courts Admiralty jurisdiction, all county courts have the same kind of competence. Broadly speaking, a county court has, with not many exceptions, the same jurisdiction of any civil action as the High Court if only the subject-matter in litigation does not exceed a certain sum of money value.[6.]

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1. Civil Judicial Statistics, 1934, cmd. 4997, Table XVI (1935); County Courts Act, 1924 S. 3.
2. Civil Judicial Statistics, op. cit., table XIII
3. County Courts Act, 1846, 9 & 10 Viet. c.95); for a Brief history and development see Sir Thomas Snagge: The Evolution of the County Court, (1904; W.S. Holdsworth: A History of English Law, vol.I.p.187 et seq.
4. County Courts Act 1846 & its Preamble
5. The original jurisdiction has been extended by

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over 120 Acts of Parliament passed from time to time. cf. County Court Practice.

6. The Yearly County Court Practice vol.1. Ch.1. p.III (1936)

The exceptions are actions for, libel, slander, seduction, breach of promise to marry, divorce or judicial separation which are not cognizable in County Courts. The pecuniary limits are in an ordinary action for debt or damage of which the amount claimed not exceeding £1,000[1.] in equity, £500[2.] in Admiralty, £3,000[3.] in Company winding-up, £10,000 in Workmens' Compensation, £5,000, while there is no limit for action in Bankruptcy.

Reference to the extent of jurisdiction under certain enactments is set out in the Second Schedule of the County Courts Act, 1934. With respect to all actions assigned to the King's Bench Division of the High Court, if both parties agree by a memorandum signed by them or their respective solicitors, there is jurisdiction in County Court to try any such action.[4.] Proceedings may also be taken in County Courts under many special Acts, such as the Employer's Liability Act, 1880; the Workmens'

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1. County Courts Act, 1934, s.40.
2. ibid. s.52.
3. Act of 1934 ss. 55-56
4. ibid. s.43.

Compensation Act, 1926; and the Agricultural Holding Act, 1923 and in small bankruptcies (£50 or less) and so on."

The place of County Courts among the machinery of civil judicature can be clearly demonstrated by a comparative table showing the number of annual average civil proceedings commenced in various courts[2]. as follows:-

	Annual Average 1909-13	Annual Average 1914-18	Annual Average 1919-23	Annual Average 1924-28	Annual Average 1929-33	1934
Appellate Courts[3].	1474	1103	1260	1128	1053	1103
High Courts...	73532	54073	103910	108570	108357	96206
Other Courts[4].	32837	14694	38861	79028	84177	82410
County Courts...	1319506	795994	676014	995207	1237405	1226809
TOTAL ...	1426849	866469	816045	1184833	1430934	1406528

1. As to the jurisdiction of County Courts given by special statutes, it is convenient to group the various statutes under the following general heads with reference to their subject matter.
(1) statutes providing for the recovery of penalties
(2) " " " " " monies other than penalties.
(3) " providing special machinery for the settlement of disputes.
(4) " conferring an administrative jurisdiction.

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(5) Statutes authorising enquiries to be made in the public interest.

It would make a very long report to refer in detail to these statutes, but some idea of the great variety can be seen by selecting a few. In Group (1) there are 4 statutes, including the Customs Law Consolidation Act, 1876 which gives concurrent jurisdiction to the County Court for the recovery of penalties, which may be of large sums.

In group (2) there are 22 statutes which include the following:-

Public Health Act 1875) which give the right to recover
Private Street) ex enses incurred in abating
Works Act, 1901.) nuisances and expenses for making up of streets.
Tithe Act, 1891 (under which tithe for any amount can be recovered).
Factory & Workshops Act, 1901
Ecclesiastical Delapidations Measure, 1923.
Road Traffic Act, 1930 (with a jurisdiction up to £500 for recovery of expenses for damage to roads)

In group (3) there are 32 statutes which include:-

Succession Duty Act, 1853.
Court of Probate Act, 1857 (dealing with real and personal estate up to £[illegible])
Employers and Workmens' Act, 1875
Agricultural Holding Act, 1923 (with no limit as to any sum to be recovered).
National Health Insurance Act, 1924.
Finance Act, 1931 (dealing with matters not exceeding value of £500)

In group (4) there are 27 statutes including:-
Intestates Acts, 1873 to 1875 (with a present limitation up to £[illegible])
Married Women's Property Act, 1882.
Public Trustee Act, 1906 (dealing with estates up to £500 value)
Housing Act, 1925.
Settled Land Act, 1925 (jurisdiction up to £500)
Law of Property Act, 1925
Trustee Act, 1925 (Property up to £500 value)

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Adoption of Children Act, 1926.
Chancel Repairs Act, 1932 (no limit)

In group (5) there are 27 statutes which include the following:-

Rivers Pollution Act, 1893.
Lunacy Act, 1890 (property up to £200)
Merchant Shipping Act, 1906
Coal Mines Act, 1911.

of. Halsbury: The Laws of England vol.6.pp.XVI XIX
also: The Yearly County Court Practice, Vol. II 1936

2. England & Wales, 1909 - 1935.) Civil Judicial Statistics.
3. Judicial Committee of the Privy Council, House of Lords, Court of Appeal, High Court of Justice (Appeals and special cases from inferior courts)
4. Lords Chancellors Jurisdiction in Lunacy, Railway, and Canal Commission, Railway Rates Tribunal, Patents Appeal Tribunal, Palentine Chancery Courts (Lancaster, Durham) The Mayors and City of London Courts, Borough Courts of Record and other Inferior Civil Courts, Ecclesiastical Courts.

Figures seem to be dry and uninteresting but, when studied by comparison with other figures or in their connotation, become vivid and eloquent. Proceedings commenced in county courts constitute on the average about fro 82 to 92 per cent. of all proceedings in all courts.[1] In 1923, the County Court staff Committee concluded inter alia that: "The County Courts form an important and integral part of the machinery for the administration of justice, which is one of the highest functions of the Crown. More than two-thirds of the total civil litigation in the country is conducted at the present time in these Courts, which exercise jurisdiction in some cases collaterally with and in other cases exclusively of, the jurisdiction of the Supreme Court."[2] When the Committee reported, the business of county courts was at the period of their lowest ebb, constituting a little more than 82 per cent.of all civil proceedings. But in 1934 alone, out of a total of 1404 926 proceedings, the number of proceedings commenced in county courts is 1226809, constituting a little over 87 per cent., while that in all other

1. Out of all proceedings commenced in all courts, those commenced in county courts constitute from 1909 to 1913 a little over 92 per cent., from 1914 to 1918 a little less than 92 per cent., from 1919 to 1923 about

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83 per cent., from 1924 to 1928 about 84 per cent., from 1929 to 1933 a little over 86 per cent.

2. Report of Lord Chancellor's County Court Staff Committee. cmd. 1049, p.14. (1920)

courts 224342, constituting a little less than 13 per cent.[1].

If we compare the number of proceedings commenced in County Courts with that in other Courts, during the last three decades, it is from 6 to 18 times[2] more than that in the High Court; from 535 to 895 times more than that commenced in appellate courts;[3] from a little over 13 to 40 times more than that commenced in all other local courts of first instance put together.[4].

Compared with other courts, whether central or local, superior or inferior, the importance of the works of county courts on a quantitative basis is obvious. But the works of County Courts are not only of supreme importance in terms of comparative figures but have vital and close relation with the great majority of poor people.

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1. Civil Judicial statistics for the year 1934. cmd. 4997 pp.4-5 (1935)
2. The number of proceedings commenced in county courts was from 1909 to 1913, 18 times; from 1914 to 1918 about 14 times, from 1919 - 1923 a little over 6 times, from 1924 to 1928 a little over 8 times, from 1929 to 1933 over 11 times more than that in the High Court.
3. It is from 1909 to 1913 over 895 times, between 1927 & 1933 over 535 times ... more than that in appellate courts.
4. It is between 1909 and 1913 a little over 40 times, between 1919 to 1923 a little over 13 times more than that commenced in all other local courts.

Broadly speaking these courts have extended their energies along two different branches of business. Each Court has firstly become a huge debt-collecting machine for minor tradesmen and secondly developed into an important and trusted tribunal for deciding disputes between citizens. In the debt-collecting branch, the cases are, for the most part, undefended, the machine works automatically. These cases occupy, however, the overwhelming majority in the records of County Courts. Let figures speak on this point:

See table on page 14.

	Totnl No. of plaints.	plaints entered not exceeding £20.	% of plaints not exceeding £20.	% of plaints above £20.
1910	1286376	1270853	98	2
1911	1237060	1221656	98	2
1912	1194631	1179132	97	3
1913	1188162	1172189	98	2
1914	935703	921657	98	2
1915	734682	721000	98	2
1916	558740	547098	97	3
1917	435018	424619	97	3
1918	311589	301587	95	5
1919	326947	311986	95	5
1920	445973	414229	92	8
1921	553656	505759	91	9
1922	738379	683735	92	8
1923	884111	791129	89	11
1924	926664	839257	90.5	9.5
1925	926847	847826	91	9
1926	869769	792797	91	9
1927	1015755	937325	91	9
1928	1092478	1013242	92	8
1929	1105881	1021672	92	8
1930	1169048	1085377	92	8
1931	1211455	1128045	93	7
1932	1281003	1192367	93	7
1933	1277281	1192435	94	6
1934	553656	505759	91	9

From the foregoing figures of the last quarter of a century, some striking points may be noticed here.

(1) The annual average of plaints above £20 amounts to only about 6 per cent. of those not exceeding £20 nearly 94 per cent.

(2) The former has a tendency of increase, and the latter decrease since 1910.

In the other branch the cases are nearly all fought out and the vitality of the court depends almost entirely on the quality of the judicial work. It is scarcely necessary to point out that both these functions are important ones, but it is important to note that those people who are involved in actions not exceeding £20 are poor and form the great majority of the strata of modern society, and that the issues of these cases have a vital bearing upon the life of those people. Apart from these debt-collecting cases, there were 18514 proceedings in 1932 and 17259 proceedings in 1933 with relation to Workmens' Compensation Act[1], which again brought the County Courts into close contact with the lower strata of society. This fact is emphatically stated by Mr. Claud Mullins when he wrote that it is not

1. Ibid. p. and. 4456. p. and. 4715. p.37.

sufficiently realised today how greatly our County Courts enter into the lives of poor people. In the words of the County Court staff Committee, the works of County Courts "affect the rights and the well-being of the liegee in all relations of life."[1].

In discharging these important duties cast by one statute after another upon the County Court, the registrar shares not a little with His Honour ~~the~~ Judge, as the following figures of the last 25 years clearly indicate:

see Page 17 for Table.

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1. Report op.cit. cmd. 1049 p.14.

years	Total judgment on hearing	Before Registrar	Before Registrar	Before Judge
1909	439211	405080	92	8
1911	420390	385509	91	9
1912	401769	369366	91	9
1913	404561	373591	92	8
1914	317127	290925	91	9
1915	219414	196105	89	11
1916	172634	152804	88	12
1917	137189	119355	87	13
1918	99757	83308	83	17
1919	102586	80013	77	23
1920	138794	107111	77	23
1921	152589	116445	76	24
1922	202393	163961	89	21
1923	249149	203026	81	29
1924	79833	37101	46	54
1925	46165	14422	31	69
1926	39148	9548	24	76
1927	27272	8587	23	77
1928	34066	71150	20	80
1929	33153	6682	19	81
1930	33731	7402	21	79
1931	33449	7242	21	79
1932	33413	7391	22	78
1933	32563	7817	24	76
1934	31416	8040	25	75

A cursory review of this table will show that (1) the work of the registrar decreases from 92 per cent. at its highest to 19 per cent. at its lowest ebb and shrinks considerably since 1924. (2) The work of the Judge increases from 8 per cent. at its lowest to 81 per cent. at its peak, and jumps ever higher since 1924. (3) up to the present the registrar still disposes of about one-fourth of all county court cases.

From this division of work between the registrar and the Judge, let me turn to the geographical distribution of works among county courts. Here there is a great disparity of the volume of work performed in different courts. Let me produce the number of proceedings commenced during the year 1934 at five of the largest county courts and those commenced at five of the smallest in the following table[1]:-

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1. These figures I owe to the kindness of County Court Branch, Lord Chancellor's Department.

COUNTY COURTS.	Proceedings commenced during year 1934.
Westminster	60846
Birmingham	47819
Manchester	33994
Leeds	29806
Shoreditch	29535
Prestleigh	76
Northleach	66
Brampton	65
Haltwhistle & Alston	64
Pershore.	44

From the above figures, it may be observed that the disparity of work is so great that the number of proceedings commenced at the smallest court is incomparable to those at the largest. The total proceedings commenced in 1934 of the five smallest courts amounts to 314, being about 5 per thousand of one of the largest.

With regard to the works of county courts, it may be mentioned in another respect that many cases are comparatively simple, but others are just as complex and difficult as High Court cases. In 1928 an official committee on the rules for "poor persons", presided over by a High Court judge, stated in its report that "a large proportion of the cases in the County Court are simple in character, and the judge is well able to ascertain the facts,

so that it is neither necessary nor advantageous that there should be any legal assistance at all." whether or not there should have legal assistance for poor persons in the County Court is another question which I shall have occasion to discuss elsewhere,[1.] but the weightier side of the works of County Courts seemed to be overlooked by the Committee, at least the phrase of its report was not happily worded. It called forth the dissenting opinion from Sir Edward Parry. "The suggestion," he wrote truly and emphatically, and probably not a little indignantly, "that all a County Court Judge has to do in his day's work is to unravel a few simple facts, that he has no legal problems to trouble him, and that his work is intellectually of a lower order than that of the High Court Judge is another misconception of the obvious. A Judge of a County Court has a far wider range of civil law to master than any other judicial functionary in the Kingdom."[2.] This considered opinion of a County Court Judge for 34 years is endorsed by all who have had some experience of practising or presiding

1. Chap. XIV. Legal Aid to the Poor.
2. E. Parry: The Gospel and the Law p.274.(1928)

in County Courts. "In recent years County Court Judges," stated Mr. L.S. Holmes, secretary of the Associated Provincial Law Societies, before the Royal Commission on the Despatch of Business at Common Law, "have had assigned to them by statute matters of the greatest difficulty sometimes involving sums of money out of all proportion to their Common Law limit. I need only instance claims for compensation under the Landlord and Tenant Act, claims involving difficult points of law under the Workmen's Compensation Acts and Rent Restriction Acts, and Bankruptcy Motions."[1].

The works of County Courts are, important and exacting as they undoubtedly are, no less competently and admirably performed. In the opinion of Judge Chalmers, it may be taken as proof of the popularity and success of county courts as their jurisdiction grows with the session of Parliament. If the loads of statutes yearly passed adding one kind of jurisdiction after another to the county court were not conclusive evidence of its success or efficiency, the opinion of high authorities[2].

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1. Minutes of Evidence taken before the Royal Commission on the Despatch of Business at Common Law, p.317 ff County Court Jurisdiction and Procedure; also cf. Mr. F.E. Smith, President of the Assocn. of County Court Registrars, ibid. p.342 qs. 4630-4638.
2. "The record of the county courts in the last 50

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years is a very remarkable one. In the face of keen professional opposition, Parliament has given them yearly more important and onerous duties. There have been carried out in the main to the satisfaction of the business men in the business centres. It is because the urban county courts are live business concerns, carrying on their business to the satisfaction of the customers, that I believe it in future of County Courts." Sir Edward Parry; Judgment in vacation. p.187 also cf. p.7.

would, I think, have due weight. Lord Sankey as Lord Chancellor publicly expressed the hope that in the not too distant future County Court judges may receive belated recognition of their services from a not otherwise conspicuously economical state. "It seems probable," wrote Mr. A.C.H. Emor, "that if any thorough and impartial inquiry were made into it, whether by a British Royal Commissioner, or by a detached band of investigations from Mars, its findings in regard to these courts (County Courts) would, so far as the judges' part in them went, be extremely favourable."

On the 4th July, 1933, Lord Sankey said in the House of Lords [1] that both the efficiency of the County Court system and the conditions of employment of the staffs had been improved; salaries had been raised, promotion had been made easier, and the courts and offices had been modernised in no less than 177 cases. The courts were managed by a smaller staff of registrars - 300 instead of 450 - and the number of courts under the care of whole- time

1. 83 H.L.S.566 (1932-33)

registrars had been increased from 40 to 136. The administration expenditure in the last 7 years had been reduced from 12/6d per proceeding to 10/- a saving of about 20 per cent. This combination of efficiency and economy had been achieved by careful administration, attention to details, and the introduction of new methods.

Though extremely favourable is the record of the work of the County Court judges, the county court system viewed as a whole is, however, not without adverse criticisms.

In the first place, the present arrangement and distribution of the County Court Circuits, Districts and Court Centres are neither quite convenient nor economical. The original distribution of the districts of the County Courts was based upon the districts of the Superintendent Registrar of births, etc. In later Orders the Poor Law Unions were taken as the basis of the distribution. With the changes of circumstances, the distribution was found unsatisfactory one after the other. In 1916, a special committee was appointed "to consider and report on the existing arrangement and distribution of the County Court Circuit Districts, and Court

centres; with special reference to the necessity of providing convenient access to the courts for litigants and the desirability of effecting economy both in time and money in the administration of the courts."[1] This committee reached their recommendations for the arrangement of County Courts circuits, upon the considerations that (1) there should be some approximate equality in the amount of work thrown on the Judges; (2) each circuit will be worked by the Judge from some convenient centre and (3) each Court should be, so far as possible, administered exclusively by one Judge.[2] As to the select on of Court Centres and the constitution of the districts to be attached to them, the Committee were guided, not by the boundaries of local government or any other existing system, but mainly by the consideration of convenience of access.[3] But no great change was recommended by

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1. Report of Lord Chancellor's Committee on County Courts cmd. 431, p.1.
2. ibid pp.1-3 Par 1-3
3. ibid. par.4-6 p.3.

this committee. Since the county courts have been established by an Act of 1846, four of the original Circuits were absorbed in others. In fact there were only a few alterations of county court districts during the past 90 years, namely in 1858[1.], 1924[2.] and 1933[3.]. Apart from these changes, no drastic measure of re-distribution has/been made. But with the changes of the accessibility and importance of the various places intended to be served by the county court system due partly to the development of transit and partly to the shifting of the population, much inconvenience of travelling in reaching a court town is experienced by the litigants, much inequality in the amount of work falls upon the county court judges, much waste of time incurred both by the litigants and judges in unnecessary travel and much revision of the present districts and centres is required.

Apart from these considerations with regard to the distribution of circuits and districts

1. S.R.& O. 51 - 2 Vc. 43 s.4. (1858)
2. S.R.&.O. 14- 5 G 5 c. 173 9 (1) (2) (1924)
3. S.R & O. No. 503/113 and 875. pp.841, 843 (1933)

of County Courts, there is the problem of judicial administration of these Courts. As pointed out by the Royal Commission on the Civil Service, the original object of the legislature is not to divide the country into districts convenient for purposes of administration, but to bring justice to every man's door and to provide convenient centres for people regardless altogether of the amount of business to be drawn to these courts.[1] That the district and circuits are administratively inconvenient is no matter of wonder.

In the second place, there is the question of personnel of the court. To begin with, the power of appointing the county court judges vested in one person is dangerous and unsatisfactory. Again their appointment on the sole responsibility of the Lord Chancellor without being clothed even in name with the titular authority of Crown is not in line with the method of appointing the Judge in the High Court, borough session or even in some police courts. In the result, the county court judge is installed into his office without any ceremony, nor takes an oath. A trivial matter this undoubtedly is. But none the less while all

1. 6th Report of the Royal Commission on Civil Service cd. 7832. par. 14. p.41 (1918)

other judges except those of County Court attend a ceremony and take an oath on their appointment, it would unfortunately have the undesirable effect of signifying the less importance of the office of the latter than that of the former. No less important than the question of appointment is the problems of the remuneration of county court judges. It is generally admitted that their position is incomparably worse and their treatment more unjust than High Court judges.

As I have already observed county courts have very extensive jurisdiction, it follows that the judges have a wide field of law to master. In the words of the Law Journal, "so every county court judge is in effect required to have as much law as the whole House of Lords and many have to apply his knowledge, promptly and in various cases and categories, in the course of one anxious day's work. The jurisdiction includes cases of the same kind as those brought in the King's Bench Division and in the Court of Chancery. It includes jurisdiction in Probate, Admiralty, and matrimonial causes, in lunacy, and in some matters ecclesiastical. And not only this; but acts of Parliament, in ever-increasing

numbers and importance, have thrown upon the county court judges a growing burden of work and responsibility."

In spite of all this, their salary is only £1800 a year, namely less than one-third of that of the puisne judges of the High Court.

What is still inconceivable, this sum fixed more than half a century ago remains today[1]. while the duties and responsibilities imposed upon the county court judges continue to increase. The real values of the salary is not more than half that of the county court judge of the sixties and seventies of last century. The hardship and the grievance has been recognised by all. The ex-Lord Chancellor publicly declared it in 1933 and resolved to right the wrong at the earliest opportunity.

So long as the remuneration remains inadequate, lawyers of considerable repute and large practice will hesitate long before accepting the office[2] unless they are free from all economical

1. County Court Act, 1934.s.8.
2. Minutes of Evidence, op.cit. The Assoon. of British Chamber of Commerce. appendix No.41 p.50.

considerations. As to the retirement age of County Court judges between 72 and 75, the discretionary power of the Lord Chancellor is by no means desirable.[1] The system that part-time registrars are in private practice is objectionable. The tendency is now in favour of full-time Registrar and this is gradually being done. Up to 1933, the number of courts under the case of whole-time registrars had been increased from 40 to 106.[2] But the system of part-time registrars still remains.

It has long been recognised that a registrar should be a permanent full-time civil servant. The Irish county Courts have a permanent travelling registrar but in England the best course would be that all registrars are full-time officials and debarred from private practice. If the business of the courts in certain districts does not warrant having a full-time registrar, it would be better to have one registrar for a group of districts.

Thirdly, although originally founded purely as small case courts, the County Courts have

1. Minutes of Evidence, op.cit. p.63 qs. 1054-4--1055.
2. 176 The Law Times, p.40. (July 15, 1933)

of remarkably uneven degree.
now a jurisdiction in a variety of matters. To quote the report of the committee appointed in 1908-9 by the Lord Chancellor to inquire into certain matters of County Court procedure,[1.] "the jurisdiction is of very varying degrees; compare, for example, the jurisdiction in Admiralty cases, under the Workmens' Compensation Acts, and under the Bankruptcy Act outside London, where every kind of complication arises and the jurisdiction is unlimited, with the jurisdiction on an ordinary contract, such as a bill of exchange, where the jurisdiction is limited to £100."

It is difficult to discover any definite or consistent principle, in the allocation of jurisdiction/of fixing the limits.[2.] On the contrary, both regards the pecuniary limits and subject matter of jurisdiction the Legislature has indulged in the most eccentric freaks. As early as 1807, Judge Chalmers had this queer anomalies of jurisdiction antithetically tabulated in an article in the Law Quarter Review.[3.]

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1. Report No.71.
2. Minutes of Evidence, op.cit. J.W.Smith. p.341 qs.4599-4600. Dr. W.I.Jennings acutely advanced the theory that the distinction of the jurisdiction between the High Court and the County Courts is generally a class distinction. The Civil Courts. The Political Quarterly vol.5. No.1. p.76 (1934.)
3. The County Ct.System 3 L.Q.R.pp.1-13.

But down to the present the degree of the irregular and anomalous jurisdiction has ever been much aggravated. Now, some county court judges have, and others have not jurisdiction in admiralty cases, involving considerable amounts; also in bankruptcy, there it occasionally happens that the amount at stake is very considerable, and there is no limit to the jurisdiction. All county court judges have jurisdiction in Common Law cases up to £100, and in equity cases up to £500. In these days, it is by no means easy to distinguish between an equity and a common law action. This cannot be otherwise explained than that it is a relic of the time when courts of equity were distinct from courts of law.

It is also not easy to understand why the ordinary jurisdiction should arbitrarily be limited by a given amount of money. "The difficulty of a case," wrote Dr. W.I. Jennings, "does not depend upon the amount in issue ..... If it were suggested that big pictures should be painted by members of the Royal Academy, and little paintings by pavements artists, the suggestions would be recognised as absurd. It is just as absurd to say that judgments involving large sums

should be given by expensive judges in expensive courts, and judgments involving small sums by cheap judges using a cheap procedure." (The Civil Courts"; Essays in Law Reform, The Pol.Quarterly Vol.5. No.1. 1956.)

There seems no valid reason why a judge who is competent to deal with a case involving intricate questions of law and fact, where the amount at stake is £100, should not have power to decide when the claim is £101 and when there is, perhaps, no real difficulty of the law or of the facts. The effect of this arbitrary limitation is extraordinary as well as disastrous. If the sum claimed is £100, the ruling of the county court judge as to the facts is final and no appeal is possible, though the evidence of the case may be very conflicting, and its effect open to much doubt. On the other hand, if the amount litigated is £101, the decision of the High Court judge, be he a Lord Chief Justice or other judge of great experience is open to review, even though the result of the evidence may not be open to reasonable doubt. There is an unrestricted right of appeal from his decision not only to the Court of Appeal but with special

leave also further to the House of Lords. The unfortunate result of such dubious and arbitrary limits of jurisdiction is sometimes the fountain of hardship and trouble to the litigants. In De Vries -v- Smallbridge,[1] the question of jurisdiction was carried through the County Court, the High Court and the Court of Appeal to the disappointment of the plaintiff who must have been out of pocket by 2 or 3 times the amount of £100 deposit that was in dispute. Again, in a motor-car accident case the Plaintiff obtained a verdict for £230 damages, and his costs, exclusive of those incurred by the defendant, amounted to £105. As the defendant did not pay, the matter was taken before the County Court, where the defendant could be ordered to pay by instalments.

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1. 1928, 1.K.B., 482. In March, 1927, Mr. De Vries sued Mrs. Smallridge under an agreement of October, 1926, whereby Mrs. Smallridge had agreed to purchase a small house in Kensington for £750 and had paid £100 deposit. The dispute was about the right to this deposit when the sale fell through. Mr. De Vries asked the Bloomsbury County Court for a declaration that he was entitled to this sum. The County Court refused to hear the case, as the judge said that he had no jurisdiction to hear it. ~~xx~~ A legal battle thus began, not on the merits of the case, but about the jurisdiction of a County Court judge.

When the case came before the judge, he said, "Had the action been tried in the County Court, the costs would not have been one-third. It is perfectly scandalous that these cases should be taken to the High Court." The plaintiff had, however, no alternative, for the amount claimed was more than £100. These are only examples out of a mass. Nor is this all. Actions for libel, slander seduction or a breach of promise of marriage are excluded from the jurisdiction of the County Court.[1] What is the justification for withholding these actions from the County Courts?

Historically when County Courts were first established in 1846 certain causes of actions were excluded from them, namely: libel, slander, breach of promise, separation and divorce, ejectment, malicious prosecution, title to hereditaments, devises and bequests contained in Wills and settlements. At that time, there were conditions prevailing which would account for these provisors. But these have been repealed by the legislature one after another except the first 5 categories.

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1. County Courts Act, 1934. C.40 (c)

Why this exclusion? If it is suggested that those causes of action are beyond the knowledge and ability of the County Courts judges,[1] few or none will not discard the suggestion as preposterous. If it is argued that those actions take time because a jury may be called in them, the simple answer to given by Judge Sir H. Snagge,[2] "I would say that even if they do take time, time has got to be taken somewhere."

Should it be objected on the ground that it is an invasion of the exclusive right of audience enjoyed by barristers on such actions at the assizes, the answer and even remedy are prepared by Judge Sir A.A. Jones, K.C. "It must be remembered," he said, "that two-thirds of the members of the Junior Bar earn their living in the County Courts, and in my view the Junior Bar does not stand the least risk of its interests being adversely affected. I agree that the present restriction on the amount of the fees allowed to counsel in County Court actions should be removed."

Here it suggested that the result of extension

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1. Minutes of Evidence, op.cit. q. 2553.
2. Minutes of Evidence, op.cit. q.1711.

of those actions to county courts would be a great increase in certain actions, the blunt and negative answer is at once given by Judge T.A. Jones. "I would not agree with that view at all," he answered.[1] "As a matter of fact I tried a remitted action from the High Court. The Plaintiff had filed an affidavit to the effect that if it went there the defendant had not got the means of paying the costs of a High Court action, and therefore it was remitted to me. .... I do not think altering the jurisdiction of the County Court judge is likely to alter the nature of the actions."

Others would argue that though there is no logical reason, there might be a practical reason for such exclusion. If those actions could be brought in the County Court, there would be a great many such small actions which as with Lord Gorell's Committee and Lord Hanworth's Committee were better not brought.[2]

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1. Minutes of Evidence, op.cit. qs. 3033-3036.
2. Ibid qs. 1060-1060. Report of Lord Gorell's Committee, on certain matters of County Court procedure. H .71. (1909) Second Interim Report of the Business Courts Committee, par. 74,(1934.)

This argument has special reference to slander and libel actions. Once the County Court were given power to entertain such actions, it might encourage people in local districts to indulge in what some call back-chat or backyard quibble, with one another and litigate upon it,[1] "with the view of trying to get almost blackmailing damages."[2]

But according to Judge Hill Kelly a large part of the work at Assizes consisted of small slander actions, which could easily have been dealt with in the County Court.[3] If the convenience of the parties and the ease and expense with which the matter came to trial were given more consideration, the conclusion would be obvious.

On the other hand, it is maintained that such exclusion is not only logically unsound but practically unjust. If a man is slandered or libelled in a little country place, he has just as much right to clear his character as people in London. If he is denied the right to bring it in

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1. Ibid. q. 8193.
2. Minutes of Evidence, op.cit. 1066-1068.
3. Ibid q. 3080.

the County Court, he has to drop it at all for the simple reason that he can not able to afford to bring the action either at the assizes or the High Court at London.[1.] The immediate effect of the exclusion of libel and slander cases from county courts is that many poor men who are libelled or slandered are practically left without any remedy. But the spreading of malicious gossip inflicts equal, if not greater, misery to the poor as to the rich.

"It is a strange anomaly also," argued Mr. C.O.Jones,[2.] "that the county court Judge, while he deals with very difficult and intricate cases under the Workmens' Compensation Acts in which many hundreds of pounds are involved, is unable to deal with simple cases of breach of promise, or slander where the amount at issue may not be more than £50 or £100 at most."

Why, others ask, the lay and untrained magistrates in Summary Courts are given the power to try matrimonial cases, but the professional and legally trained judges of County Courts are debarred from hearing actions of breach of promise and separation?

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1. Evidence, op.cit. q. 4307.
2. Ibid. Appendix p.23.

"The extension of the County Court jurisdiction," wrote Mr. Clement Davies, K.C., M.P., member of Lord Peel's Commission,[1] "so as to include actions for libel, slander, breach of promise and seduction raises, in my opinion, different and most serious considerations of public policy." He after referring to Lord Gorell's Committee, Lord Hanworth's Committee and others to the effect that it was generally undesirable that the courts of this country should be opened to the litigation by poor persons of their backyard squabbles, Mr. C. Davies, continued, "I find myself, with very great respect to those substantial authorities, unable to concur in such a point of view."[2] I consider that such a proposition gives a long way to making a mockery of the principle of the British constitution that all men stand equal before the law. A village slander case can make life intolerable for the villager defamed. I do not find it without the realms of possibility that employers on occasion maliciously public libels regarding the characters of their servants. The daughters of poor people are sometimes seduced, sometimes callously treated by their

1. Memo. by Mr.E.Clement Davies, Report of the R.C. on the Despatch of Business at Common Law.par.54,p.182,cmd.5065,1936.
2. Report op.cit. ibid. para. 58 p.183.

actrotheo. In all such cases I find it difficult to believe that it is fair that the sufferers, although they are poor, but not poor enough perhaps, to come within the rules of the Poor Persons Committee of the High Court, should be obliged to start their actions in the High Court, which is bound to involve them in additional expenditure that they can ill afford."

The Council of the Judges of County Courts submitted a memorandum to the Lord Chancellor's Department in connection with the County Courts (Amendment) Bill, 1934, and also represented before Lord Peel's Commission in March, 1935. In their memorandum it is suggested, inter alia, that the County Courts should have jurisdiction to deal with actions of libel and slander and breach of promise and also malicious prosecution.

"There seems to be no logical reason," the memorandum said, "for excluding these actions from the County Courts. Many of these actions are much simpler to try and of less importance than actions which can now be tried in County Courts, e.g. arbitrations under the Workmens' Compensation Acts and claims under the Landlord and Tenant Act, 1927. The expense of trying these actions in the High Court operates

as a denial of justice to persons in a humble position."

This considered opinion of the council of the Judges of County Courts deserves careful and impartial consideration.

Turn now to divorce cases. The exclusion of such cases from County Courts makes humanitarian judges like Sir E. Parry indignant. "As long as Divorce," wrote Sir Edward Parry, "could only be obtained in London the Divorce Court Bar had a profitable, easily worked monopoly. Small Admiralty and Probate cases went to the County Courts, but not divorce cases. Divorce was still regarded as a luxury for the rich and to hinder the poor having access to the Divorce it was kept in London. The official excuse for this injustice was that a Divorce Court required some special kind of expert to preside and practise it, whereas, of course, the truth is that the issue to be tried is one of which the whole of adult mankind has equal knowledge, and the same issue, in the far more difficult form of affiliation cases, is tried every day before lay magistrates with the legal aid of local attorney, in county police courts - and let me add, tried with as much success as any

divorce cause in London."[1] Referring to divorce causes tried at some central Assize towns, Judge Barry commented thus: "This, as I have already shown, will not cut down the legal expenses, and though it will mitigate some of the cost of travelling and entertaining witnesses, it will still leave a very heavy burden to be borne by the poor."[2]

Judge J.B. Crawford is no less emphatic on this point. "A few years ago a belated effort was made," he wrote recently, "to secure the hearing of divorce causes nearer to the places where the parties and their witnesses lived. Divorce causes can now be tried by Judges of the King's Bench Division and by commissioners' Assizes at the Assizes. This much needed reform has diminished the cost of these proceedings by enabling cases to be tried at towns nearer to the residence of the parties than London. In my opinion it does not go far enough. Justice administered locally is as valuable in matrimonial dispute as in any other. As long as it was considered necessary for Divorce cases to be tried by

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1. The Gospel and the Law p.200 also cf. Ch.IX. Divorce pp. 210-25. (1920.
2. What the Judge thought. p.172.

the Judge of the Division to which they were assigned, the contention that all such cases ought to be tried in London may have been entitled to some weight, but as these cases can now be tried by Judges of the King's Bench Division or by Commissioners at the Assizes, this argument has lost whatever validity it ever possessed."

Sir George Lewis had the largest business knowledge of the working of divorce laws of any solicitor in England and his view of the effect of the divorce laws on the lives of the poorer citizens as being affirmed by numerous witnesses and in effect accepted by the Royal Commission on Divorce may be accepted as authoritative on the subject. "I think it is an insult," he said when giving evidence before the Commission, "to tell the County Court Judges they are not competent to try question of fact, whether adultery has been committed, or whether cruelty has been committed." He referred to the Summary Jurisdiction Act of 1895 which gave lay magistrates power to try these questions in relation to separation and maintenance orders and continued: "so that parliament has already given to those gentlemen who are not lawyers, who have no experience

in legal matters, the right to order judicial separations amongst the poor, and to give them the right to determine whether a woman has committed adultery or not. I say in face of that for anyone to come here and to argue that the county court Judges should not be entrusted with these duties is to me astonishing ..."

It has long been recognised that facilities should be given for the trial of matrimonial cases locally. The committee appointed by the Lord Chancellor to enquire into certain matters of County Court Procedure did, in fact, recommend that jurisdiction in such cases should be conferred upon the County Courts.[1] The Law Society and many eminent lawyers have upon more than one occasion reported in favour this course.

It is pertinent here to refer to the Memorandum of Mr. A.H. Coley and Mr. C. Goddard in the Report of Committee to enquire into poor persons Rules, 1919. "The County Courts," they wrote, "already possess jurisdiction in a very large number

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1. cf. Report of Lord Gorell's Committee No.71, 19th Feb. 1909, pp.322-6

of matters affecting the civil rights of the subject, and the tendency has been to increase their powers. There appears no good reason why matrimonial cases should be excluded from the jurisdiction of these Courts whilst their gravity to the parties must be admitted, the trial of such cases does not seem to involve greater knowledge, care or skill, than are needed in many of the matters that now come before the Courts."

There would, they argued, be less danger of collusion between the parties if the cases were tried locally. The parties would be known to many persons, and greater publicity would be given to the matter. Any enquiries of the King's Proctor would thereby be facilitated. The King's Proctor when giving evidence before the Royal Commission on Divorce raised no objection to the divorce jurisdiction being given to the County Courts.[1].

Moreover, if the cases were tried in the local County Court there would be a great reduction of the cost of a matrimonial case which is mainly due to the travelling expenses of the parties and their witnesses. In the opinion of Mr. L.S.

1. Minutes of Evidence taken before the R.Com: on Divorce & Matrimonial Causes. Vol.II.p.162.

Holmes,[1] the Honorary Secretary of the Associated Provincial Law Societies, the extension of Divorce jurisdiction to County Court s "would be a boon to numbers of persons who are just outside the limit of the Poor Person's Procedure but cannot afford to obtain a divorce which has to be conducted through the Principal Registry."

On the other hand, Others suggest that no one under the status of a High Court judge should try divorce causes.[2] Needless to say the logic of this contention is neither clear nor convincing. Still others raise objections to the extension of divorce causes to the County Court on the grounds that there is ~~County Court has~~ too great pressure upon the County Courts and that the judges have not time for such new work,[3] that the law applicable to matrimonial causes is of a special nature and that there would be danger of want of uniformity in its administration if jurisdiction were given to the County Courts, there would be so many judges exercising divorce jurisdiction,[4] and the County Court Registry is scarcely

1. Minutes of Evidence taken before Lord Peel's Com: op.cit. p.317).(1934-5)
2. Ibid. H. Latey, qs. 2191-3
3. Ibid. H.F.O. Norbury qs. 2383, 2389.
4. Ibid. q.2374.

s iable for the conduct of interlocutory proceedings in divorce in the town where the actual parties are residing.[1]

In the opinion of Sir J.Merriman, the President of Divorce Division, "if the suggestion is that they should be tried in the County Court, I should think that the disadvantage would outweigh the advantage of bringing justice to the door of the people - not because I think that the County Courts are any less capable than any other tribunal for trying divorce cases, but because I think that that is not what the County Courts are for. I spent the first 10 years of my life at the Bar going round the various County Courts, and I know that you very often have to go two or three times, if you have got a case of any length whatever, and I think that if you are going to clutter up the county court lists with divorce cases you will get into a hopeless mess."[2]

With all respects to high authorities, the reasons advanced against divorce cases to be tried in county courts do not appear to me convincing. It may firstly be observed that the state of business

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1. Minutes of Evidence op.cit. q.2370.
2. ibid. q.2420-2471

in county courts varies with each court. Some are perhaps overburdened,[1.] especially in industrial districts[2.] but others, especially in rural areas[3.] are not at all busy and have sufficient time to deal with extended cases.

The indiscriminate remark that if divorce cases were added to county courts, they would have no time to do so, is not only wide of the mark but overlooks the true remedy. The great disparity of the business in county courts should be levelled by proper re-organisation of districts. To uphold the business of courts as an objection to the extension of divorce cases affords but a poor excuse.

Further, the number of divorce cases, when spread over the whole country is by no means large, and as the great majority are undefended, the amount of time occupied in the trial of them is particularly small.

If there is not much force in the first objection to such extension, still less has the second. Divorce cases may be now tried at assizes by no less than 19 Judges. The ideal of concentrating divorce cases to a few judges has for some years been disapproved

1. Minutes of Evidence, op.cit. Beresford q.934,

footnotes cont'd from previous page.

Smagge, 1754, Atkin 3402, Finlay 4015, Roscoe p.291.

2. Ibid. Welsh Party 5274, 5354.

3. Ibid. Kennedy 1048, 1076.

and discarded by the demand of grim reality. No less an authority than Lord Atkin has said: "I venture to think that admiralty judges and common law people have found themselves all dealing with divorce cases without any great difficulty ... It comes to this that it is very simple work."

In the opinion of A.H. Coby and C. Goddard, "cases would fall to be decided under the same statutes and authorities as control the administration of the law in London, and a judge in the County Court district, closely in touch with the occupations and modes of the life of the suitors could, without doubt, be trusted to deal with such cases in a manner befitting their importance to the parties. If a new procedure had to be learned, the evidence afforded by the establishment of District Registries under the Judicature Act, and by the extension of jurisdiction in many important matters to the County Courts since their creation, shows that any such new procedure could be learned and applied with success by the officials of the courts and the legal profession."

It seems that there is not much truth in the mystery of divorce laws as advocated by divorce lawyers.

1. cf. ch. II. Circuits

The reason why the County Court Registry is not suitable for divorce interlocutary proceedings is not forthcoming. But it is to be recalled that 57 county court registrars are also the district registrars of the High Court. Turn now to the fourth objection. County Courts were established in 1846 primarily for the collection of small debts. But in the course of time, this has been changed and changed by the successive Acts of legislature to meet the demand of the people. If the people desired that divorce cases should be tried in county courts, the original purpose of county courts should be no bar to such demand, not to say that the original object has long been changed. That there is such demand on the part of litigants is to me clear, as the decentralisation of divorce work from London to circuits is a clear evidence on this point. The suggestion that divorce cases will clutter up county courts work is a generalisation difficult to support. The annual average number of divorce cases during the last decade is 1444 i.e. about 37 per cent. of all civil actions on circuits annual and the average of sittings on circuit for all civil business is about 391.4 days.[1.]

1. Chap. III Circuits.

on the average, some 340 days are devoted to the trial of divorce cases. If they were dispersed to county courts, each court would have spent about 6 or 7 days for divorce cases. Few, I think, will seriously argue that 6 or 7 days in a year will clutter up the business of the County court. This is, of course, only a rough and average estimation but even the less is sufficient to dispose of the argument against extension of divorce causes to county courts on this ground.

So far I have observed the limitation imposed upon the jurisdiction of County Courts both in amount and in kind, examined the reasons for such limitation and found them inadequate. Such limitations are not only anomalous, illogical, obsolete, but harmful to the people. I have not discussed the general problem for the extension of county court jurisdiction, of which more at a later stage. What is important to emphasise here is that the limitation of county court jurisdiction both in amount and kind is no longer justifiable in principle and in practice.

No one who has experience in County Courts and sees the working of the law in terms of

humanity can deny the fact that those restrictions are relics of the days before County Courts had established themselves in the good opinion of the public and the legal profession and that the present rules work untold hardship. Not only cruel wrongs have to go unpunished through fear of the heavy expense of the High Court, but the time of the powerful judge of the High Court is unduly wasted by actions of this class, however unimportant and trumpery.

One other point with regard to jurisdiction, which has vital consequence upon the life of the poor, deserves, however, scarcely more than a passing remark here. I refer to the debt collecting business of the County Courts. To discuss fully this point, it will be necessary to consider the whole question of imprisonment for debt, which is beyond my scope. What is to be pointed out here is that the only people to whom the system of imprisonment for debt is of any service and the County Court is of real value in this respect are those traders who can only carry on a business which relies upon the sanction of the shadow of prison. These traders, to use the words of Judge Parry, "issue their plaint in bundles, (they) take out judgment summonses in

batches (they) can afford to have a skilled clerk well versed in the procedure of the court to fill up the papers, and can run the machine which a complainant state puts at their disposal with very good results to themselves."[1]. We may well ask, as the benevolent judge asked, "why should the state keep Courts going for men of this class?"

The jurisdiction of the County Court registrar vies in absurdity with that of the judge. In cases where the registrar is, as very often happens, also district registrar of the High Court, he has practically far greater power than the judge of the county court, for he may order judgment to be given against a defendant for any amount of money. Again the work of the registrar of the County Court and the District Registrar of the High Court is, to use Judge Parry's words, " pure example of overlapping jurisdiction of the same class of work being done by one and the same official in different ways with different names for the same things, and under parallel procedures. It is, he continues, true that as you issue a writ in the High Court or an ordinary plaints or a default summonses in the

1. The Gospel and the Law pp. 88-90.

County Court, you proceed in one court or the other, and sometimes in both, to recover your debt: but these openings are like the gambits of chess, different ways of beginning the same game, and ought to be playable on the same board and with the same set of men and under the same rules.

In the fourth place, though County Courts are known as "poor man's Court," the initial costs therein are often as heavy as in the High Court, sometimes more heavy, [1] the reason being that the document that opens the action has to be served on the defendant by an official of the Court.

In order to draw a true and accurate picture of the cost of litigation in the County Court, I venture to reproduce a table given by a registrar of one of the London Courts to Mr. Cloud Mullins in the following:-

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1. Sir J. Hollams: "In the result there is well-founded complaint that the fees which the impecunious suitors in the County Courts have to pay are oppressively high and are, in fact, far higher in most cases than the fees payable in important cases in the High Court." Jottings of an old Solicitor, p. 96.

	CLAIM.	AMOUNT CLAIMED.	JUDGMENT FOR.	TAXED COSTS. Scale	TAXED COSTS. Amount.	REMARKS.
		£. s.d	£. s. d		£. s. d	
1.	Money lent.	100.0.0	100. 0. 0	C	55.11. 6	The Defendant did not appear at the trial.
2.	Damages by Negligence.	16.19.4	12. 8. 4	A	13. 4. 2	
3.	Do.	30.0.0	Defendant won.	B	30. 7. 4	
4.	Do.	82.0.0	82. 0. 0	C	47.10. 5	The Judge made a special order that costs should be paid on a higher scale.
5.	Possession of House.	-	Possession.	B	22. 7. 6	
6.	Do. & rent.	100.0.0	Do. & £100	C	44.10. 3	
7.	Rent. ...	16.13.4	16. 13. 4	A	10. 8. 8	
8.	School fees.	9.9.0	9. 9. 0	Lower	6. 2. 6	The Judge granted a certificate for the employment of Counsel.
9.	Dishonored Cheque...	30.0.0	20. 0. 0	A	10. 8.5	
10.	Damages for Negligence.	50.0.0	The Defndnt won.	C	28. 5.9	
11.	Work done.	40.17.3	25. 0. 0	B	24.14. 4	
12	Detention of goods.	29.7.1	Defendant won.	B	25. 4. 6	

"These figures," commented Mr. Mullins, "relate to the costs of the successful parties only, and it is reasonable to assume that the unsuccessful parties who had to pay these bills were liable for nearly as much again in respect of their own costs ... These are but a few glimpses into the actual cost of litigation, and in every case, it has to be remembered, the litigants have probably had to pay more than the "taxed costs," which are the items which the rules of court allows. It is rare in litigation that no other costs are incurred, though such extra costs cannot be recovered from the opponent."[1].

It is not too much to say that under the existing system costs are incurred that are as a rule out of proportion to the amounts at stake or to the financial standing of the parties.[2].

Costly as the proceedings in County Courts undoubtedly are, but compare the scale of costs in County Courts with that in the High Court, the verdict is still in favour of the former. "I cannot honestly commend the County Court," wrote one of the most experienced judges of County Court, "as a cheap

1. In quest of Justice, pp 208-210.
2. G.F. Harvey: Holdn, or the Price of Justice, pp.19-20; 173 The Law Times, p.394 (April 23, 1932)

entertainment for poor litigants, yet as compared with the High Court both for cost and speed it is much less exhausting to purse and temper.[1.]

Fifthly, the procedure in County Courts is too complex. County Courts were intended from the very beginning to be simple and inexpensive machinery for the adjudication of the simple disputes of poorer people.[2.] This aim has, unfortunately, never been realised. Since 1846 county courts have never been free from the kind of subtleties which always haunt English Courts of Justice. The yearly county Court practice for 1936 containing two volumes of 1765 and 888 pages each exclusive of 214 pages of indexes is, to use the words of Judge Parry, "absolutely incomprehensible except to the trained lawyer."[3.]

In the sixth place, jury trial in county courts is as few as it is objectionable. In the words of the departmental committee of 1913, "the number of cases tried with a jury in the County Courts is so small as to be almost negligible - the percentage of such cases was only 2.1 during the last four years."

1. "It may be stated as a general proposition, though it is no doubt subject to exceptions, that county court justice is cheaper and more rapid than High Court justice. The Civil Courts, Mr. E.J.Jennings, Pol.Quarterly, Vol.V. No.1. p.76
2. cf. The Preamble of the County Court Act, 1846.
3. The Law and the Poor, p. 186.

even in those rare jury cases, they cannot blind us to the defects of jury trial in civil cases. The problem of the jury system both in civil and criminal cases will be treated later on.[1] What is here to be stressed is the undesirability of jury in County Courts. To quote Judge Parry again, "After the first few years, we never had any jury cases and for myself I think juries in the County Court are generally a mistake. There is too little time and too many cases to try in the time, to deal with a jury case at proper length."[2]

Though the Court has scarcely enough time to be devoted to jury trial, still it is a great loss of time, inconvenience and expense to the jurors. In the opinion of the Council of the Judges of County Courts the loss of time, inconvenience and expense have not been sufficiently considered. In London and on circuit, they said, if the services of jurors are not required for one case they will be for another, but in many county Courts, they may and probably will be, only one case in which a jury is summoned; and if the action or matter is settled the day before the action is down for hearing, or on the day of hearing, the time of the jurors

1. Chapter XIV, The Jury.
2. What the Judge Saw. p.223.

summoned is wasted.

In the seventh place, there are serious drawbacks in Appeals from County Courts to superior Courts. To begin with the steps of appeals are but too many. A case involving a sum of £20 or more can be tried in three tribunals,i.e. actions commencing in the County Court can be appealed to the Court of Appeal and with leave to the House of Lords. That a case of £20 or more can be tried in three tribunals including 2 appeals is remarkable but wholly undesirable. It needs scarcely to be mentioned that many appeals involve great waste of time and money.

The accommodation and court buildings of the County Courts do not manifest some evidence of careful supervision or serious consideration. "The first time that I ever sat as a deputy judge," wrote Mr. Mullins from his personal experience,[1] "the only available law book was a 'County Court Practice'three years old, and that was not the property of the court. It is not generally realised in what circumstances County Court judges do their difficult and responsible work ..." Though it is rather favourably reported by The Business of Court's Committee

1. In Quest of Justice, p.304.

that "on the question of accommodation we were informed that in many courts the present accommodation is barely sufficient as it is....", but on the weight of evidence, the accommodations in County Courts are by no means sufficient. Referring to the London County Courts, Mr. John W. Morris, K.C.,[1] thus said before the Royal Commission on the Despatch of Business at Common Law: "I considered that the accommodation in some of the courts was quite deplorable..... Present conditions are, I think, so lamentable as to place a heavy strain on all concerned: nothing could be more calculated to reduce efficiency than these physical attributes of many County Courts buildings: nothing in my view could have a worse psychological effect. In many Courts there is no sort of accommodation for the holding of a conference: there are no waiting-rooms: the Courts are often crowded and stifling: the whole atmosphere is gloomy and out of date." This view is endorsed in effect by the London Chamber of Commerce, when they wrote that many of the County Court buildings are old dirty and inconvenient, e.g. Woolwich, Greenwich, Bow, Whitechapel and others." It is scarcely necessary to be mentioned that

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1. Minutes of Evidence, op.cit. p.271.

from my personal observations which I have been able to make, the question of Court building is not a localised feature in London, but with few exceptions is a general problem which is vital to the dignity and respect for the administration of justice and the convenience of those attending the Courts.

Judge J.D. Crawford after delineating the deplorable building and accommodation of some County Courts[1] expresses his pious hope in these words: "I hope," he writes,[2] "I am not guilty of lese-majesty or breach of some regulation of which I have never heard, if I express the opinion that if a fraction of the money which has been spent on turning our roads into tracks for motorists had been used to provide proper County Court accommodation, where it was urgently required, the public would have had better value for its money."

Having said what is against the County Courts, I should, to do them justice, mention some of their advantageous features. One of the most important contributions of the system is the facilities

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1. Reflections and Recollections, Ch.XI.pp.172-178.
2. Ibid. p.178.

provided for local justice. Since the mighty and long current of centralisation of justice from the time of the Norman Conquest down to the middle of the 19th Century, and even today, England has long been suffering for the want of facilities for the local administration of justice. In France there are nearly four hundred tribunals of the High Court covering the whole country. In Germany there are a local High Court for every 25,000 of the population. In Holland there are 23 local High Courts. But in England there was and is only one High Court at London. London has long been the seat of justice, hither the people must go in quest of it. This need for local justice in England has become an age-long demand. It has been partially but insufficiently supplied by the circuit system. With the advent of County Court system the problem of local justice here is largely solved.

There is a Council of County Court judges which has the purpose of considering whether there are any defects of procedure that are stifling litigation or the administration of law in County Courts. If such authority as this were in frequent session to examine and revise the code of rules and

make it complete, litigation would lose much of its terrors and be truly available to the general public.

Solicitors have audience in county courts on equal terms with barristers. When a solicitor is employed in a case in the County Court, the cost is much less than a barrister. This is undoubtedly beneficial to the litigant. Furthermore there are some eminently sensible rules in the county courts to avoid expense and delay.[1] If parties to the dispute and their lawyer had good will and these provisions were utilised, unnecessary expense might be saved and the costs kept low. Here, at least in theory, the rules help them considerable. But in practice goodwill on the part of both parties and their lawyers is, if any, not common. In some cases, even if one party seeks to be reasonable, still the rules become inoperative.

Having briefly surveyed the merits and demerits of the County Courts, let me examine the suggestions made to improve and reform them and venture some of my own.

The organisation of the Supreme Court in England has been the object of elaborated care and

1. In many classes of cases the litigants may agree

(see next page)

footnote from previous page cont'd.

(in writing) to give the local county court jurisdiction over their action which exceeds the limit of £100. This rule covers most of the ordinary actions brought in High Court and if made use of, enables the County Court to have jurisdiction over actions of any amount. Any party may by notice in writing before trial, call on any other party to admit any specific fact or facts mentioned in such notice, and thus save the expense of calling witnesses. Also the County Court judge has power to order that particular facts shall be proved by affidavit instead of by the calling of witnesses and so on. Again, parties to a dispute in County Courts may before trial agree (in writing) that the decision of the judge is final.

consideration but the whole of the system of provincial or local or inferior Courts are the result of intermittent and unsystematic legislation, which apparently has followed no consistent scheme but the spur and the convenience of the moment. The outcome of this haphazard legislation is undoubtedly unsatisfactory and the whole structure of inferior or local judiciary, civil and criminal, as I shall try to show elsewhere calls for urgent reform. But such is the irony of fate that much has been heard lately of reform in the High Court of Justice but little in the lower courts. I submit, however, that no part of English judiciary has more need of remodeling than the provincial courts and no portion of these has been more troublesome to design or construct than the County Court.

The importance of the reform of County Courts needs hardly to be mentioned. It is, so clearly made but by one of the most experienced and distinguished County Court judges that I can do no better than quote his words. "Why then do I commend the future of the county court," asked Sir Edward Parry, "to the attention of the legal reformer? Because I see in the County Court, and in that

Court only, a growing and popular tribunal favoured by the business men of the country. Because in that Court there is a crying abuse calling aloud for reform, namely, imprisonment for debt, which abuse, when abolished or mitigated, will release judges from odious duties, and give them time for more honourable services. Because in great urban centres there has long been a demand for continuous sittings, which the High Court has been unable to comply with, but which the county court already satisfies to some extent and with reasonable equipment could supply in full measure."[1].

As to the general principles on which County Courts should be organised there are generally three main currents of opinion. First of all, it is argued by a number of eminent authorities[2]. that the County Courts which were originally established by the Act of 1846 for the purpose of enabling the easy recovery of small debts and demands in England and Wales, were, still are, and should be in future small debt courts. The County Courts should be instituted, they maintain, on the same basis as they

1. Judgment in Vacation, p. 157.
2. The Committee appointed in 1908-9 by the Lord Chancellor to enquire into certain matters of County Court procedure. Report No.71; The Business of Courts Committee cmd.4471 par.72 pp.46-48.

have been and retained as they are in their present character. This view which is in favour with the maintenance of the status quo of County Courts has little contribution to their reform and may be omitted from further consideration here.

Another line of thinking sponsored by authorities equally experienced as the first, suggests that the County Court should be annexed to, and form part of, the High Court of Justice. Such is the opinion of the majority of the Judicial Commissioners 1872, of Sir John Dickinson, Sir John Hollams, Judge Parry, Mr. Claud Mullins and many others

What could be more interesting or important than the opinion of Lord Bramwell who was concerned in several of the Judicature Commission prior to 1873. His view was, in substance, that the County Courts should be made constituent branches of the High Court of Justice, and that as a consequence of this, the existing jurisdiction in Common Law should be unlimited, that is to say every action would commence in the County Court and be tried there unless the dependent choose to remove it to the High Court. It was pointed out that this would practically

mean giving to every district, local courts with full powers, and among other things that it would lead to the 'deterioration of the Bar.' Lord Bramwell objected to the phrase, and answered his opponents by saying that the then Attorney-General (Sir John Holker) and Mr. Gully and Mr. Pope and Mr. Higgins, one of Her Majesty's Counsel, have belonged to the local Bar, "and I think I may say of my knowledge, that the local Bar of Liverpool is as good as the London Bar." This is important testimony, inasmuch as any evolution towards the district Courts that will injure the assize system is surely to be opposed by those barristers - and there are many in Parliament - who are interested in the Assize system, and one argument will be that the client will be deprived of the advantage of London "silk" if his case is tried in the County Court. Lord Bramwell disposed of that argument very shortly. "If there is any disparagement and injury to the Bar for the benefit of the public, the Bar must undergo it; that is all."

"Every dispute," suggested by Sir John Dickinson in 1867 in his anonymous pamphlet on a "Thorough Reform of our Judicial System," shall be

commenced, heard and determined in the County Court within the limits of whose jurisdiction it has arisen."

The general principles, argued Judge Parry,[1] on which Courts of Justice should be managed are the same today as they were in the days of Lord Brougham and indeed, the same as they were in the day of Moses. You remember how Moses, he continued, like Lord Lyndhurst, attempted to run a centralised High Court with a centralised Bar and wanted to try all the cases himself. The result was, what it always has been, a muddle of injustice. When Jethro, Moses' father-in-law, came and found him cluttered up with arrears, he pointed out to him, as Brougham, pointed to Lyndhurst and his friends, the absurdity of his proceedings. "The thing thou doest is not good," he said, "thou will surely wear away, both thou and this people that is with thee, for this thing is too heavy for thee, thou are not able to prepare it thyself alone." Then Jethro explained the County Court system in detail to Moses, and Moses, like a sensible man, "did all that he had said." Indeed, there is not,

1. The Gospel and the Law pp. 70-71.

and never has been from a business point of view, anything more to be said about it, and any business organiser following the Jethro principle and applying it with sympathy and intelligence to the wants of both business men and the poor, could largely increase and multiply the value of County Court to the whole community.

The general lines of reform, therefore, he concluded, are obvious and well-known. Before long the County Court will become an integral part of the High Court of Justice and all cases will be commenced in the County Court and most of them will remain there by the choice of the parties.[1.]

If this proposal were carried into effect, it would be possible, he thought,[2.] that there should be only one Registry and one Registrar who would issue only a kind of process.

There is, Sir John Hollams suggests, no good reason for the County Courts being district tribunals from the High Court, instead of being branches

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1. The Gospel and the Law, p.71, 64-5
2. Sir Edward Parry: What the Judge Thought p.161.

of that Court. He ~~even goes so far as to~~ proposes that "in fact, it would seem to be desirable to abolish the office of County Court judges, to create district judges of the High Court to act in different centres with facility of access so as to meet the requirements of the districts. It would, doubtless, be necessary, in order to secure the services of really efficient judges, but it by no means follows that the aggregate expenditure would be increased. On the contrary, the reduction in the number of judges would greatly diminish it. If courts were thus constituted, they would be branches of the High Court, with no limit of jurisdiction and with the right of appeal as in other branches of the High Court ..."[1].

Some such proposals as the above, have their modern supporters. "London County Courts," wrote Mr. Mullins, "would probably have to be excluded from any such scheme, owing to their proximity to the High Court. Elsewhere the County Court would be the place where all civil actions would be commenced.

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1. The Jottings of an old Solicitor, pp. 99-104.

This would not mean that all provincial actions would be tried by the County Court judges, but that all the proceedings preliminary to trial (greatly simplified, as one may hope they would be) would be conducted by them in local County Court. On every County Court circuit there would be one or more courts at which the preliminary proceedings in the larger civil actions could be conducted, as in district registries today, and at which High Court judges or circuit would attend as necessity demanded. The County Court judge would be in charge of all preliminary work, thus deciding all problems that might arise in the preparation of civil actions for trial .... It might, perhaps, be provided that, in general, disputes up to £200 should everywhere be decided by the local county Court judges, unless both parties agreed that the dispute should be heard by a High Court judge. For disputes between £200 and £500 it might be provided that they should be tried by the local judge, unless either of the parties desired a trial by the High Court judge. But these arrangements could be adapted to the needs of the locality and freely amended as circumstances demanded."[1]

1. In Quest of Justice p.302.

If County Courts were so reorganised on along the lines suggested above, the advantages are, according to Mr. Mullins, threefold. First, both County Courts and the circuit system would be strengthened. There would be considerably more civil work to be performed by the High Court judge on circuit, and they the whole circuit system would be rejuvenated, because the decay of the circuit system is owing to the scarcity of business. There would, also be more work in County Courts and result in more frequent sittings of the local judge and thus the difficulties that arise from long intervals between the County Courts sittings would be lessened. Secondly, the pros and cons of further extending the jurisdiction of the County Courts would be put at an end. Such an extension has often been advocated either on the ground that today the £100 limit is too low or with a view to relieving the works of the High Court. Thirdly, it would be possible for the financial limit of actions that are to be tried by county court judges to vary according to the demands of local circumstances.[1]

1. In quest of Justice, pp. 301-303.

Some would even go so far as to suggest that County Courts should be abolished, each County Court giving place to a district registry, and each county court judge being given High Court rank. Rationalisation of this root-&-branch character would, they considered, bring to the humbler suitor the procedure of the High Court.[1.]

The suggestion and its advantages of amalgamating the County Courts as branches of the High Court, however admirable it may be, do not appeal to other writers.

"No advantage," wrote Mr. William H. Owen long ago, "it seems to me, can occur from the attempted transmutation of the High Court into County Courts or vice versa. A district court/could not be a High Court in a true sense whilst actions were liable to removal to courts of first instance with higher rank. Practitioners almost unanimously agree that powerful courts concerned only with the trial of causes of considerable magnitude are a necessity. Courts also are required when the interests of cases of less importance will not be

1. H.Wills Chandler: Decrease in the Cost of Litigation 172 The Law Times pp. 283-284 Oct.10, 1931.

altogether over-shadowed by those of the larger ones. As long as the distinction between higher and lower courts does exist the line of demarcation must of necessity be arbitrary."

At the same time he put forward a suggestion to the effect that the County Courts might "form an admirable basis upon which to construct a better system of provincial justice of a higher class" and that "this might be carried out by the amalgamation of the County Court system with that of the Quarter Sessions throughout the country, exclusive however of London.

The sittings at Quarter Session towns might, he suggested, form those centres at which (adapting a suggestion of Judge Chalmers) important causes could be tried, and to which the judge would have power to adjourn cases from the smaller courts in the circuit.

Great advantage would be obtained, he argued, by making the Quarter Sessions the Crown side of the County Court in providing all rural Quarter Sessions with an experienced lawyer as judge. On the other hand, criminal work as distinct from civil

would be an advantage to the County Court Judge. While giving variety to his duties, it is acknowledged to have advantage in a Judge's training; the important character of Quarter Sessions would also give increased dignity to his judicial position. Both the 2nd and 3rd suggestions are to me plausible but neither of them is satisfactory.

In France, there are 360 Tribunals of first instance having almost the same status in the French judiciary as the High Court here. In Germany there are 159 Regional Courts with nearly equal rank as the English High Court. With the facility of a high court in their district, the litigants in France and Germany are not unnecessarily dragged to the Metropolis as the English suitors. It can therefore be scarcely denied that England is far lagging behind in facilities for bringing cases rapidly, economically and locally. Such a concentrated system of justice in England is always explicitly or implicitly defended on the ground or almost the belief that central justice and central Bar are superior to local justice and local Bar. This ground or belief is, as I have tried to argue elsewhere, neither supported in theory nor has

foundation in practice. But the practical effect of this centralised system is not only uneconomical and highly inconvenient but amounting to substantial denial of justice. If justice is to be administered as one of the social services, same as gas, light, railway, if economy and convenience and benefit of the litigants are considered as prime importance in such administration, some such system as the district branch of the High Court or the extension of County Courts jurisdiction as virtually becoming district High Courts seem to be an urgent necessity.

On the other hand, the administration of civil and criminal jurisdiction in different and separate courts as obtained here is, as I have argued at another place, neither necessary nor economical. And the position of quarter sessions can hardly be seriously defended. The amalgamation of county courts and quarter sessions is perhaps a plausible avenue to reform.

But either to make the county courts as branches of the High Court or to amalgamate the county courts with quarter sessions alone is to my mind by no means a complete and wholly satisfactory reform of

the local administration of justice. If the provincial administration of justice is to be constructed de novo, district courts of first instance having jurisdiction to entertain all actions, civil and criminal, in different divisions of the same court are preferable.

Whether the county courts are being made branches of the High Court or amalgamated with quarter sessions, whether districts courts be established de novo, the districts and circuits of the reformed or suggested courts should be re-mapped out. Even County Courts remain as they are, their districts and circuits need to be re-distributed as the present arrangements are no longer satisfactory. As I have tried to show at an earlier stage, the works of the County Courts have been rather unevenly distributed. While there are not a few courts having not much business to do, the courts of London and the Midlands and the North are overcrowded. This diversity of court business in different places is always a difficulty in the way of any scheme of parcelling out districts or reforming those courts. These small places cling tenaciously,

of course, to their privilege of having a court. It will take a long time to persuade these small towns that it is desirable they should give up their small conveniences such as these to which they have been accustomed, for general good. But at any rate, the difficulties of dealing with smaller courts, if they exist, should not hinder the development of the larger circuits. The problem of providing adequate civil courts for central Wales and Norfolk is to me obviously not the same as the problem of providing similar tribunals for places like Manchester, Birmingham and Leeds and Liverpool. As statistics show, there are a large number of districts where the courts are increasing yearly in usefulness. It is therefore clear to me that there is a strong case that from the point of view of business circuits which are dealing with large amounts of work should be entitled to special consideration.

With regard to the personnel of the Courts the following suggestions may be made. The County Court Judges should be appointed, not by the Lord Chancellor or a minister of Justice alone, but assisted by an advisory Councellor such as the High Court Rule Committee of Judges, whose constitution

would be a guarantee for the merits of the appointees. As to the constitution of the Advisory Committee, I shall discuss it in a later chapter.[1] They should, moreover, be appointed in the name of the Crown, on the recommendation of the Lord Chancellor or a Minister with all the accompanying ceremonial on its acceptance. This seems to be quite a small point, but it might signify a belated recognition of the importance of the office. The remuneration of the judge should, of course, be increased. There should be a definite retiring age for judges and all court officials.

Next, all registrars should be full-time officials and debarred from private practice.[2] There should be a system of promotion of the registrars from smaller courts to larger ones.

The questions of reorganisation of jurisdiction and a rearrangement of circuits have often been mooted.[3] As to the latter, I have briefly touched upon in the foregoing discussion. A

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1. cf. for the arguments for and against the extension of County Courts the proceedings of a Norwood Commission on County Courts in 1875.
2. Minutes of Evidence, op.cit. Kennedy 1666; Jones 2646-9; Atkins 3400, Hildyard 3003-4.
3. Law Quarter Review iii 3; V 6-10 VI 350-353; IX 321-330; XXII 127 (1906) Edinburgh Review CCXXV 319

rearrangement of the circuits according to the latest census tables, facilities of communication and returns of county courts needs no further emphasis. With regard to the former, high authorities divide their opinions. The pros and cons on each side advanced reasons quite weighty if not equally cogent.[1.] But it is necessary, I submit, to take a survey of the subject from the wider point of view of the general principle and policy of the administration of law than to reach a conclusion based upon the recognised competency of the County Court judges to try cases now excluded from their jurisdiction or the obvious relief afforded to the High Court or upon the local conditions of some county courts. Among those who are against extensive increase, mention may be made of the Lord Gorell Committee, the Business of Courts Committee[2.] the Royal Commission on the despatch of the Business at Common Law[3.] the London Chamber of Commerce,[4.] many judges, barristers and solicitors.

1. Report of Lord Gorell's Committee, No.71 p.15
2. 2nd Interim Report of the Business of Courts Committee. cmd. 4471, par.77
3. Report of the Royal Commission on the despatch of Business at Common Law, paras 193-205.
4. Minutes of Evidence taken before the Royal Commission on the despatch of Business at Common Law, p.291 IV. County Court Jurisdiction and Procedure.

including such high authorities as Lord Atkin[1.] Lord Hewart,[2.] Justice Swift,[3.] Viscount Finlay and others.[4.] Their reasons may be summarised as something like the following:

1. County Courts are poor man's Courts. Some have enough to do, while others are quite busy. If jurisdiction were increased, they would devote more judicial time and thought to bigger cases to the neglect of smaller ones of poor people who would in the end have no proper court. The extended jurisdiction would hamper their present work and bring undue pressure on the busy courts which, unless with additional staff, could scarcely cope with the increase. On the whole, any increase of jurisdiction does not work in public

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1. Minutes of Evidence, op.cit. p.235, p.239: s.3402 et seq.
2. ibid. p.327; q.4463
3. ibid. p.269; q.3362
4. Mr. Ralph Sutton, K.C., op.cit. p.35q. 4827. Mr. J.D.Cassels, K.C., p.303 p.305, q.4158-60. Sir C. Atkinson op.cit. p.253, Judge Hildyard K.C. p.260 p.261 3 3650. Mr. W.K.L.V.Williams p.35-, q.4837. Solicitors' Managing Clerks' Assocn. op.cit. p.347; General Council of the Bar, 177th Law Time 51 (1934)

interest.

2. County Court judges are not as competent as High Court judges, nor enjoy the same degree of popular confidence as the latter, as to qualify them to deal with bigger cases. Actions of libel, slander, seduction and breach of promise to marriage form a class of themselves and are better dealt with by High Court judges than in the County Courts.

3. From the few number of cases applied s.64 of County Court Act, 1888, it is inferred, rightly or wrongly, that no need of extension of County Court jurisdiction is required.[1]

On the other hand, there are experienced distinguished judges and lawyers[2] who are in favour with the increase of the County Court jurisdiction.

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1. This is, on the other hand, explained that agreement is not easily reached and that a large number of the Common Law cases being "running-down" cases, their plaintiffs unfortunately seem to fall into the hands of a type of solicitors who look upon these cases as a means of their livelihood.
2. Judge T.H.Gregge. Mr. A.M.A.Napier of the Lord Chancellor's Office and Deputy Clerk of the Crown. Mr. C.M. Barry, the then President of the Law Society. Mr. L.S.Holmes ~~ex-solicitor of Liverpool~~, The Associated Provincial Law Societies.

Their reasons may, also be summed up as follows:

1. It is in the public interest as regards the cost and the speeding up of justice that the jurisdiction of County Court should be enlarged, because (a) it brings justice to every man's door and (b) litigation in County Courts is generally cheaper than in the High Court.[1.] Moreover the often-repeated argument that any extension of County Court jurisdiction will prejudice against small litigants is not at all well founded. It is completely refuted by those best qualified to speak, namely the Council of the Judges of County Courts and the county courts judges themselves.

The former recommended the extension of county court jurisdiction both in amount and in kind.[2.] The latter[3.] gave their considered opinion that the extension of county court work would not clog small actions of poorer people.

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1. Memorandum by Mr. W. Clement Davies, K.C., Report of Lord Peel's Commission para 80-2, cmd.5065 (1936) J.B.Crawford: Reflections and Recollections pp.230-231 (1936); 78 The Solicitors' Jnl, p.144 Mar.3.1934; Earl of Listowel, 93 H.L. s.978. Hansard 5th series (1933-4)
2. Minutes of Evidence, op.cit. p.60.
3. ibid. H.Kelly q. 1038, 1124. Hargreaves, 1040-7. Snagge 1703, 1707, 1726-27.

After quoting the evidence given by Judge H. Kelly, and Judge Sir A. Snagge, Mr. E. Clement Davies, Member of Lord Peel's Commission, said, "upon this and such similar evidence, I have come to the conclusion that there could be some extension of the Common law jurisdiction of the county courts without materially affecting either the interests of the poorer members of the community (whose interests I regard as paramount in this connection) without overcrowding these courts as a whole, and without any, or any considerable addition to the present number of county court judges, provided the judge pool their resources (which, we were informed, they today in fact do) and provided the compulsory jurisdiction of the county court registrars were extended from £5 to £10."[1.]

2. County Court Judges are quite competent and have sufficient time to deal with cases, if increased. They now competently dispose of very difficult cases. And the list of sittings of each court shows that except in the districts which include the largest courts, there are a considerable number of instances where only 12 to 15 sittings in

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1. Memorandum by Mr. E. Clement Davies, op.cit. par.44.

a month are fixed.[1] Moreover, proposals are now under consideration of the Rule Committee to adopt in connection with default summonses in the County Court a procedure somewhat similar to that prescribed by the High Court Order XIV. If this proposal is carried into effect, it would largely curtain the work of judges and registrars, even with any increased jurisdiction. If it was felt that in the very large courts the judge would find trouble in dealing with the work, there is no doubt extra help would be supplied by the Count Court Department. Failing extra judges being supplied, it is considered that there might reasonably be some reorganisation made in the present Courts Districts.

3. The suggested extension would bring the general limit of ordinary jurisdiction more into line with the large limits given by the various statutes now applicable to county courts.

These reasons of pros and cons, apparent as they are, only touch upon the fringe of the matter.

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1. cf. The Table of County Court Sittings, 81 The Law Journal, 26th April, 1930. p. XIII. No.3607.

The problem whether or not the jurisdiction of the county courts should be extended turns upon the still larger problem of the desirability of decentralisation of the administration of justice. The case is so aptly put by Mr. W.I.Jennings. "The only argument," writes Mr. Jennings," for centralisation is, I think, that High Court judges make law and the law must be uniform. The administration of uniform law may be exaggerated. In any case, it is hard that suitors should pay in order that law may be laid down for other people.

It is still harder that the cost should prevent people from taking proceedings, because, if they did, it might be necessary to make a rule for other people, provided that those other people could similarly pay through the nose for enforcing the rule. In truth, there is more fundamental objection. Very few causes in a court of first instance involve questions of law .... The essential judicial function is investigative and administrative. What is wanted in a judge, is not immense learning, but immense understanding. The "majority" of the High Court judges may impress a snobbishly

inclined criminal. It is a real defect in the administration of ordinary justice. All this suggests the decentralisation of English civil justice, the great extension of the jurisdiction of the county courts."

If district courts amalgamating the present quarter sessions, county courts and assize courts were not forthcoming, if justice should be administered from the standpoint of the ordinary consumer of judicial service, if the nature of judicial function made clear, the answer to the question of extending county court jurisdiction cannot be otherwise. There is no a priori reason why certain classes of actions should be kept away from the door of the people, while the slogan is to bring justice to every man's door. It is important to bear in mind when considering this question what is the practical result of the present financial limit put on certain actions and the exclusion of others from the County Courts upon litigants, especially poorer litigants, what does the prohibitive cost of the High Court really amount to and what is the practice and result of the judicial system in other countries.

It is hailed by some that the extension of county court jurisdiction is a boon to the people. If so it is, it may be well asked why so beneficial a design should be so much opposed. The answer is indignantly but quite frankly given by one of the beloved and experienced county court judges. "There is no doubt," wrote Sir Edward Parry, [1] "that if the business man had had his way the county court in urban centres would have long ago been a district court for all but cases of some peculiar public or legal importance. The great enemy to such an extension has always been the lawyer and the London lawyer in particular." [2]

Any suggestion of extending the county court jurisdiction should, of course, ~~take~~ have the convenience of the poorer people ~~into heart and give them first~~ as a first consideration

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1. Judgment in vacation, p.148.
2. The Bar Council and the Northern Circuit had sent him strongly worded protests against the proposed new system" - meaning the extension of the jurisdiction of the county courts jurisdiction - Lord Halsbury in the House of Lords. The Times, July 27, 1909.

consideration. To quote Judge Parry once more, "for the present, while endeavouring to do all the new duties that have been thrust upon me since 1893, and to give equal opportunities to all classes, I have, if anything, given precedence to my older customers - the poorer class of litigants - and whatever is done in future in the way of reform this right should not be encroached upon. There is danger that in the desire of business men to get facilities for the speedy trial of business actions they may shut out the humbler class of litigants, who seem to me to entitle first charge on the time and attention of the court. I do not mean to suggest that the matter is not one that could be fairly adjusted by a capable legal reformer, on the contrary, I think it could, but I think the lawyer and the business man is too apt to think that the sole business of a county court is to deal rapidly and effectively with minor commercial matter, whereas to my mind it has an equally important function in the domestic forum of the dwellers in back streets."[1].

1. 10 years' experience of the Manchester and Salford County Courts.

This is a necessary as well as important warning to legal reformers, especially to those who advocate the extension of County Courts jurisdiction. But none the less it is remarkable that Sir Parry thought that the necessity of the extension of the jurisdiction and the preference to the poorer litigants could be adjusted. He gave both the warning and the support to the legal reformer in this direction.

It is thirty years since the jurisdiction of County Court was last extended, and although various Acts of Parliament have been passed during this period adding new work to the county courts (e.g. the Landlord and Tenant Act, 1927) no attempt has been made to deal with the county courts in a comprehensive manner. Now it is time for the legal reformer to do this work.

Apart from the general problem of enlarging the County Court jurisdiction, there arises a collateral one of increasing the jurisdiction of the Registrar. As with all other questions, opinions, divide. On the one hand, it is suggested by distinguished lawyers[1] & professional bodies[2] that the jurisdiction of

1. Minutes of Evidence, op.cit. Kelly 1040, 1062, 1103, 113-20, Kennedy 1066; Snagge 1703,1716, Samuel 2890-2, 3087-9d; Holmes p.317,414-7.
2. The Law Society, The Council of the Judges of County

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2. e.g. The Council of the Judges of County

the Registrar may be increased absolutely up to £10 (not by consent of the parties as now) and by consent up to £20.[1].

The present practice of £10 with the consent of the parties is criticised by the Council of the Judges of County Courts. "It is," they wrote, "often found the parties do not consent; the defendant without much defence is very willing to postpone the time, and he elects to go before the judge, hoping that something will turn up."[2].

The suggestion of increasing the jurisdiction of registrar which is urgently needed in some Courts would give relief, it is argued, to a County Court judge in the busiest courts and provide him with greater freedom to devote his attention to the manifold cases requiring it.

To quote the considered opinion of those who are most qualified to speak on the subject and whose opinion is of course authoritative, "Having

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footnote con'd from previous page:
Courts.
1. Minutes of Evidence, op.cit. Sir Edmund Cook, C.B.E. on behalf of the Law Society. p.388. qs. 5145-1740.
2. ibid. Judge Hill Kelly, p.68.a.1061 (qs.5145-1740.

regard to the fact that the registrars of the County Courts have the confidence of both the legal profession and the public," the Council of the Judges of County Courts recommend "the jurisdiction of the registrars be substantially increased, as the present limit upon such jurisdiction debars them from trying many actions which do not involve any question of principle and which frequently involve questions of detail, taking up much of the Judges' time, which ought to be free to enable him to deal with others and more important matters and actions."[1].

It is again suggested that the jurisdiction of judgment summonses unless and until it is abolished be transferred to the registrar. The only question involved in judgment summonses is one of fact, namely the ability of the debtor to pay and where there are scattered courts with different registrars these registrars must have greater knowledge of local conditions than the judge. As the

1. Minutes of Evidence, op.cit. p.66. also cf. the opinion of Sir John Bellams, Jottings of an old Solicitor, p.100.

number of summonses is considerable[1] and therefore judicial time occupied by them enormous, such transfer could save much of the judges' time[2] in order to enable him to deal with the extended jurisdiction as above suggested. With this transfer, the court would be swept away of the motley crew of knaves and beggars from whom so many of the judges turn away with loathing and would remove a duty both trumpery and nauseating and the whole surroundings on judgment summonses days which calculated the lower the dignity of the court and spoil the temper of the judge.

If it is objected that no man should be sent to prison except by a fully qualified judge, it must be borne in mind that (a) lay untrained magistrates at petty sessions committed a vast majority of prisoners in prison and (2) only one per cent. of the summonses leads to imprisonment and (3) a registrar is a person of responsibility,

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1. The number of Judgment Summonses issued in 1932 was 279,906 and in 1933 285,236 while those heard in 1932 were 169,695 and in 1933, 170,127. Civil Judicial Statistics, cmds. 4710, p.37. Table XXI.
2. Minutes of Evidence, op.cit. Judge Hillyard op.cit. p.260 p.261 qs. 3653-3661. Sir T.Cook, p.366,q.5150.

and education. But on the other hand, the increase of the jurisdiction of the registrar is objected on the ground that (1) registrars are not chosen for their judicial qualification and therefore are not qualified to discharge judicial function.[1.] and (2) a decision by the registrar would not carry as much weight or receive as much respect as that of a judge.[2.]

Before the jurisdiction of the County Courts could be considerably extended as above suggested, there must be new equipment and machinery. One of the means of the new arrangement required is to be found in the person of the registrar who has in many cases most important jurisdiction as an officer of the High Court and who could doubtless be relied on to transact certain judicial business. Thus there seems no reason why the small cases where no questions of law or principle arise such as ordinary claims for recovery of debts (e.g. in the case of goods sold, work and labour done etc.) or actions

1. Minutes of Evidence, op.cit. Lord Atkin, op.cit. p.239 q.3404 Mr.R. .L.V.Hume K.C. op.cit. p.359.q.4637
2. ibid. also National Party. p.390.

for the recovery of tenements and small dwelling houses on the ground of non-payment of rent. These cases are seldom seriously contested, and when they are, they as usual become questions of amounts. No one acquainted with the working of the county courts would question the capacity of registrars to deal with such actions.

The Procedure of the County Courts should be simplified as much as possible.[1] The application of some method of summary judgment analogous to Order XIV of the High Court is a very necessary provision for the County Court and should be introduced. The trial by jury should be dispensed with[2]. The financial policy of the government with regard to the administration of justice in the County Courts should be drastically changed. The whole problem of the Court fee should be thoroughly investigated to the end that the court fees in the County Courts, be abolished or at least lowered as much as possible. Such anomaly as that a High Court writ for an unlimited amount can be issued for 30/-, but a County Court summons for £40 costs £2, though this includes service by the Court bailiff, should be removed. Another small point which may be

1. County Court Reform, 175 The Law Times 99, Feb.11.1933; Claud Mullins: The Schedules of Evidence 203 Quarterly

(next page.)

mentioned here, for instance, is that a definite scale should be prescribed regulating the conduct money to be paid to a judgement debtor for the purpose of securing his attendance on the hearing of a judgment summons. At present judges differ as to what is sufficient conduct money; some being satisfied with the payment of travelling expenses only, while others insist upon a full witness allowance in addition to travelling expenses. Many court buildings are either too old, dilapidated, uncomfortable or even deplorable. The time for a bold policy of rebuilding has long been overdue. The buildings should be situated as near as possible to some accessible traffic point. They should be fine, artistic, specimens and healthy buildings with due consideration for the comfort and convenience of those who, in various capacities, will use them. These buildings throughout the country should be under the supervision of the Rule Committee of the County Court Judges.

Footnotes from previous page cont'd.

Review 307 et.seq (1934)

2. Minutes of Evidence, op.cit. The suggestion made by the Court of the Judges of County Courts. op. cit. p.66.

CHAPTER II.

C I R C U I T S.

Assizes have both civil and criminal jurisdiction. What concerns us here is assizes as civil courts.

At the Summer and Winter assizes, civil business is taken on all circuits, while at the Autumn assize circuit, it is only taken at certain towns[1]. directed by the Lord Chief Justice with the sanction of the Lord Chancellor. At the Spring Assize, civil business is taken at Manchester, Liverpool and Leeds.[2]

The personnel of Assizes as civil courts are the same as those of Assizes acting as Criminal Courts which will be observed elsewhere.[3] It may, however, be mentioned that the associate attends as a rule only to the civil business. He sits with

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1. Bury or Ipswich, Chester, Newcastle, Leeds, Exeter, Bristol, Cardiff or Swansea, Lewes, Birmingham, Carlisle, Gloucester, Leicester, Maidstone, Nottingham, Shrewsbury, Winchester, Liverpool, Manchester and any other town directed by the Lord Chief Justice with the sanction of the Lord Chancellor.
2. S.R & O. of 1912, 1919 and 1933.
3. Chapter IX The Assizes.

the judge in court, swears the juries and gives the certificate of the result of the trial upon which judgment is entered.[1]

The civil jurisdiction of the assize comprises all actions which can be instituted in the High Court.[2] It has power to try matrimonial causes of any prescribed class prescribed by the Lord Chancellor by order made with the concurrence of the Lord Chief Justice and the President of the Probate Division.[3] The class of matrimonial causes which can now be tried at 36 out of the 66 towns on circuit includes (1) undefended divorce petitions, (2) defended petitions where the parties are "poor persons"[4] and (3) any matters arising out of or connected with any such causes.

The number of days devoted to civil

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1. Minutes of Evidence taken before the Royal Commission on Civil Service Disturnal: q. 47593 cd. 8130.
2. Supreme Court Judicature (Consolidation) Act, 1925 s.70 (1)
3. ibid.
4. The Matrimonial Causes at Assizes Order, 1922. S.R & O. 1922, No.757.

business on circuit during the last ten years may be shown by the following figures:

	1925.	1926.	1927.	1928.	1929.	1930.	1931	1932	1933	1934.
No. of days for Civil work ...	514	523	532	525	509	608	656	655	683	708
No. of days for criminal work.	537	565	486	450	494	516	553	518	590	638
Total no. of days or circuits	1051	1088	1018	975	1008	1124	1209	1173	1273	1346.

Thus, the number of days of sitting on Circuits for civil business is on the increase, the annual average being 591.4 days and constitutes a little over 52 per cent. of ~~total number of days on circuit~~.

The civil suits and causes, particularly matrimonial causes tried at assizes in the last ten years may be stated in terms of the following figures:

	1925.	1926.	1927.	1928.	1929.	1930.	1931.	1932.	1933.	1934.
Matrimonial Causes. ...	791	1125	1591	1639	1376	1500	1454	1614	1635	1716
Other actions ...	804	820	973	909	914	1074	1135	1334	1365	1400
Total.	1595	1945	2564	2548	2290	2574	2589	2948	3000	3116

From the above table, it shows that the total number of civil cases is on the increase from year to year with an annual average of 2526.9 causes. It shows again that the number of matrimonial causes is also increasing with an annual average of 1444.1 causes

and constitutes about 57 per cent. of all, while that of all other actions is on the average of 1092.8 causes per annum and forms only 43 per cent.

~~As will be fully discussed in a later~~ chapter, with regard to the merits and demerits of the existing circuits system, such as its merits claimed for the easy access to the High Court, economy of judicial expense, satisfaction of local and historical sentiments and the educative influence, as well as its demerits in respect of the personnels of the court, the unequal distribution of circuits, the inconvenience to prisoners and litigants, the waste of judicial time and strength, the insufficient time allotted to some places and the unfavourable reflex action upon London legal business, it is sufficient for me to emphasise that I propose to deal with these matters in a later chapter + they apply as well to the Assizes as civil courts. Again, the various proposals and suggestions for the reform of the present circuit system are with very few exceptions directed to it as a whole, whether it sits as a criminal or a civil court. But with regard to civil Assizes there are some outstanding problems which deserve special consideration. Among them I propose to discuss here only two questions, the

grouping of civil assizes and the matrimonial jurisdiction on circuits.

To begin with, it is noteworthy that there has been the tendency of the concentration of the civil business on circuits at a dozen large towns. This is also true to a certain extent in connection with criminal business at assizes, but is particularly prominent in the case of civil assizes.

The following figures will, I hope clearly bring out this fact:

	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934	TOTAL
Manchester..	316	333	440	458	391	379	510	535	509	569	4434
Leeds	285	318	380	407	298	329	345	345	366	373	3446
Birmingham	99	269	369	358	349	349	341	429	401	432	3536
Liverpool...	122	164	248	244	226	275	274	258	254	248	2313
Winchester...	19	41	113	198	109	158	119	140	156	160	1123
Newcastle ...	88	98	94	90	81	80	86	83	90	82	865
Bristol	12	50	103	100	87	113	97	103	95	91	851
Nottingham ..	18	97	96	107	99	73	92	73	88	88	831
Lewes	34	37	53	68	70	98	76	114	117	126	793
Swansea	51	109	63	95	49	77	46	74	54	87	705
Exeter	33	30	73	87	65	81	81	76	75	87	638
Cardiff	70	34	66	41	74	36	61	27	65	37	511
Total of the above 12 ks. towns	1151	1630	2098	2117	1898	2028	2127	2257	2270	2380	19948
44 other assized towns	235	315	466	431	650	547	562	691	723	736	5356
GRAND TOTAL	1386	1945	2564	2548	2548	2575	2689	2948	3000	3116	75198

From the above table some points may be noted and, if expressed in terms of per centage, will become

the clearer. First, the civil business disposed of at these 12 towns constitutes on the annual average from 1925 to 1934 about 79 per cent. of all civil work on circuits, while at 44 other assize towns only 21 per cent. Secondly, the total number of civil business dealt with at the first 5 towns alone within the last decade amounted to 14652, i.e. 58 per cent. of all civil work on circuit. Thirdly, the annual average of civil business tried at Manchester alone within the last ten years is about 443, while at 44 other assize towns put together only 535. The extent of centralisation of civil business at a few large towns is not only great but startling.

On the other hand, there is, upon examination of statistics, very little or not much civil business at a number of assize towns. Their records of civil cases during the last decade stand as follows:

(see Page 7 for table)

ASSIZE TOWN	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934	Total	Annual Average
Appleby	0	0	1	0	0	0	0	0	0	0	1	.1
Oakham	1	0	0	1	0	0	0	0	0	0	2	.2
Prestigen	0	0	0	1	0	0	0	0	0	1	1	.2
Dolgelley	0	1	0	0	1	0	0	1	0	0	3	.3
Rold	1	3	0	0	0	1	0	0	0	1	6	.6
Beaumaris	4	0	0	0	0	0	0	1	0	2	7	.7
Brecon	3	2	0	2	0	1	0	1	1	1	11	1.1
Ruthin	0	1	0	1	1	1	0	2	3	3	12	1.2
Welshpool & Newtown	5	3	0	2	0	1	0	1	0	1	13	1.3
Warwick	4	0	1	1	0	1	1	1	2	3	14	1.4
Lampeter	2	2	0	1	2	1	2	0	1	3	14	1.5
Huntingdon	2	0	0	0	1	4	2	3	3	1	16	1.6
Norwich City	1	2	4	2	1	2	1	1	2	2	18	1.8
Worcester	1	0	4	1	0	2	0	5	3	4	20	2.
Haverfordwest	2	1	0	2	1	1	2	4	6	9	28	2.8
Hereford	5	3	2	4	4	5	2	3	1	2	31	3.1
Bury St. Edmunds	5	2	4	2	4	2	2	2	5	5	33	3.3
Oxford	1	2	9	2	2	2	8	4	5	1	36	3.6
Dorchester	5	2	0	2	6	5	5	3	3	8	39	3.9
Lancaster	2	7	3	4	4	1	4	8	3	3	41	4.1
Devizes & Salisbury	6	5	0	9	7	5	2	2	4	2	42	4.2
Wells & Taunton	1	7	0	4	4	3	8	5	5	5	42	4.2
Aylesbury	1	1	7	4	7	5	2	7	6	8	48	4.8
Caernarvon	4	2	0	2	0	5	10	10	12	13	58	5.8
Reading	12	9	6	6	3	4	6	6	6	4	62	6.2
Hertford	3	7	22	6	3	5	5	4	4	8	67	6.7
Cambridge	3	12	4	7	1	6	5	6	10	13	67	6.7
Bedford	4	7	4	7	3	5	8	12	10	7	67	6.7
Carmarthen	5	5	0	6	5	8	7	10	11	11	68	6.8
Bodmin	4	2	0	4	2	15	15	11	15	10	78	7.8
Ipswich	4	4	2	5	2	14	5	22	6	16	80	8.
Stafford	2	5	15	8	6	6	10	8	12	11	81	8.1
Northampton	4	6	5	6	7	8	5	18	8	15	82	8.2

Upon examining the previous table some points strike one at once:

1. A great majority, 35 out of 61, of assize towns have only a few cases every year or even none at all.
2. These 35 assize towns with small amount of civil business may be classified according to their circuits:

   On South-eastern circuit, 6 towns, i.e. Hertford, Huntingdon, Cambridge, Bury St Edmunds, Norwich City and Ipswich.

   On Midland Circuit, 5 towns, i.e. Aylesbury, Bedford, Northampton, Oakham, Warwick.

   On Oxford circuit, 5 towns, i.e. Reading, Oxford, Worcester, Hereford, Stafford.

   On Northern circuit, 2 towns, i.e. Appleby and Lancaster.

   On Western Circuit 6 towns, i.e. Devizes, Salisbury, Dorchester, Bodmin, Wells and Taunton.

   On North and South Wales Circuit, 12 towns i.e.

   On North Wales Division 7 towns, Welshpool and Newtown, Dolgelley, Caernarvon, Beaumaris, Ruthin and Mold.

   On South Wales division 5 towns, Haverfordwest,

Lampeter, Carmarthen, Brecon and Prestigan.

3. Among those 36 towns, the annual average number of cases tried at the smallest within the last decade is only one-tenth of a case and even at the largest only a little over 8 cases.

4. The total number of cases tried at those 36 towns in the last ten years amounted to only 868, while at one of the largest towns, say Manchester, 4434, i.e. 5 times larger than the cases tried at 36 places put together.

Thus the disparity of civil business at different assize towns is exceedingly great, but it is no less so among different circuits. The following table will bear this out:-

Circuit	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934	TOTAL.
Northern ..	444	506	709	717	633	671	802	809	790	841	6922
Midland ..	168	451	618	570	570	596	624	738	728	761	5827
N.Eastern..	309	451	542	560	430	467	484	498	533	581	4855
Western ...	66	187	304	314	280	380	327	340	353	303	2914
S.Eastern..	94	116	154	163	170	230	198	271	296	306	1998
S.Wales ...	133	153	137	149	131	124	118	116	138	149	1347
Oxford	35	35	58	32	30	64	85	108	98	103	648
N.Wales ...	47	46	48	35	46	42	51	68	64	72	519
TOTAL	1366	1945	2564	2548	2290	2574	2689	2948	3000	3116	25040

The above table shows that the distribution of civil business on different circuits is surprisingly

uneven, even if North and South Wales were considered as one circuit. The Oxford circuit, for instance, has the smallest volume of business with an annual average of 51.6 cases, while the Northern circuit has the largest, with 698.2 cases as an annual average i.e. more than 13 times than that of the former.

The figures shown in the preceding tables demonstrate at least two things (1) the greatest majority of civil business is concentrated at only a few towns and (2) at more than half the assize towns the civil business is but too small or very inconsiderable. This state of affairs is obviously undesirable and uneconomical, as the trial of a few cases in so many places is productive of great inconvenience and waste of judicial time.

Had civil causes tried at present at so many assize towns grouped and tried at a comparatively few centres these would undoubtedly be a considerable saving of judicial time and a real advantage to local litigants. This was the majority view of the Judicature Commission whose work was productive of the Judicature Act. The same strong opinion was taken by the Council of Judges of the Supreme Court which reported in 1892 and proposed the plan of trying civil causes at 18 large places instead of at

56 places,[1] under the then existing practice. This view was again endorsed by the Royal Commission on the Delay in King's Bench Division which made a thorough examination of the circuit system.[2] Mr. Justice Swift's committee recommended in 1923 that the county basis for the arrangement of judicial business should be abandoned. Down to the present, the Business of Courts Committee were strongly of that opinion. "We have come to the same conclusion," the Committee reported in 1933, "as that reached by the St. Aldwyn Commission and by the Circuits Committee presided over by Mr. Justice Swift in 1923, that the right course is to proceed upon the lines laid down in the Acts which established the "Autumn" circuits; and to develop the system of grouping counties together in some cases, for civil business only."[3] The Committee suggested firstly the abolition of Assizes at Appleby.

1. "At present civil causes are tried at 56 circuit towns twice a year," the Council of judges reported. "Resolutions 8 & 9 show the average number of civil causes tried at each. At 40 of the 56 the average number is so small that the sending of a judge, or the keeping of a Judge there to try civil causes, is a waste of judicial time, which is injurious to the due administration of the law. Judges are thus employed unnecessarily in the country when their presence is imperatively required in London. The plan provides that the civil causes which are now tried at those 40 places should be tried at the 18 large places named in the resolutions above mentioned, the principle of allocation being convenience of access." "The Report of the Council of Judges", The Times, Aug.6,1892; cf. also "The Judges' Reforms" by a member of the Bench, The Times, Aug.9.1934. p.13.
2. The second and final report of the Royal Commission on

footnotes from previous page (contd)

the Delay in K.B.D. cd. 7177 pp. 19-20, par. 29.
3. The Second Interim Report of the Business of Courts Committee cmd. 4471, para. 56, p.37.

Huntingdon, Oakham,[1] Beaumaris, Mold, Brecon, Presteign and Newtown;[2] secondly the North and South Wales to be amalgamated and assizes to be held at Carnarvon, Ruthin, Chester, Carmarthen, Cardiff, and Swansea, with a periodic visit to Dolgelly, Welshpool, Lampeter or Haverfordwest, and thirdly, certain assize towns to be grouped for civil work and matrimonial causes as follows:

"On the Midland Circuit," recommended the Business of Courts Committee, "we think that the civil business should be taken at - (a) Aylesbury and Bedford alternatively; they are not more than 30 miles apart, and the connection between them by road is good. (b) Northampton & Leicester alternatively together with matrimonial causes. The distance between them is about 30 miles and the service by road is excellent, and by rail, good. And that no civil business should be taken at Warwick. On the Oxford Circuit, we propose that civil business should be taken at Reading and Oxford alternatively and together with matrimonial causes at Shrewsbury and Stafford alternatively; and that civil business should no longer be taken at Worcester,

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1. ibid. para, 58, p.38.
2. " " 59, pp. 38-39.

the needs of litigants in that neighbourhood being sufficiently met by the assizes at Gloucester and Birmingham. On the Western Circuit, we think that Wells need not be visited for civil business. The work that goes there could be done better at Bristol."[1].

These suggestions of the abolition of some assizes towns and the grouping for civil business of others are being criticised by different shades of opinions. It is firstly argued, as Mr. J.F. Wales, K.C. did, that "it is in the highest degree in the public interest that judges should visit every county in the country to try criminal matters," and that, if this is once conceded "there is no reason ... for any alteration in the arrangements for the civil work." "It would be," he continued, highly inconvenient and add materially to the expense, if suitors were compelled to travel long distances with their witnesses (some, perhaps, expensive professional witnesses, as for example, doctors) in order to have their actions tried.[2].

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1. ibid. para 59. pp.38-39.
2. Minutes of Evidence taken before the Royal Commission On the Despatch of Business at Common Law, p.271.

Secondly, referring to the grouping of certain assize towns, the Hon. S.R.W. Coventry, K.C., wrote on behalf of the Oxford Circuit, "we have been unable to see any real advantage to be gained, because the cases have to be tried somewhere, and the hardships entailed, the extra costs and inconvenience to litigants and others where cases are sent out of the county are serious matters compared to the possible saving of judicial time by eliminating one or two commission days. A suggestion has been made that no civil work should be tried at one circuit town, Worcester, and that other circuit towns (Reading and Oxford, Shrewsbury and Stafford) should be grouped for civil business only; but if the judge is already in the particular circuit town for criminal business, why should he not remain there on its completion to deal with civil work? ...."[1.]

Thirdly, it is argued that the mere grouping of civil business at certain places would not serve much useful purpose. In the opinion of Lord Justice Roche,[2.] Mr. G.F. Bancroft,[3.] Mr.R.Sutton, K.C.[4.]

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1. ibid. p. 314. cf. also the evidence given by Mr. R. Sutton K.C., op.cit. p.352, q.4753.
2. ibid. Roche q. 1619, 1630.
3. ibid. Bancroft pp. 363, q.4915.
4. ibid. Sutton p.352 q.4753.

this does not save time and expense.

On the other hand, the suggestions of the Business of Court Committee are criticised, in the words of Lord Wright, that "the revision proposed does not go far enough."[1].

Various arguments for and against the grouping of assizes may be adduced. But it is scarcely necessary to enlarge upon them, as reference has ~~already been made~~ will be fully discussed elsewhere. But it may be pointed out that whatever may be the truth in these arguments, I adduce them here not to endorse them but to show that the opposition is there[2]. even to such moderate and inadequate suggestions as put forward by the Committee. But I hasten to add that the mere grouping of civil assizes even on a larger scale than suggested by the Committee is by no means an adequate measure of reforming the Circuit system. More drastic and exhaustive reforms seem to be necessary. Some of the proposals for reform ~~have already been~~ will be discussed in another chapter, so they need not detain us here. But the proposal of transferring civil jurisdiction of assizes to county courts has special reference here and therefore some word may be added. After

1. The 2nd Interim Report of the Business of ~~the~~ Courts Committee Addendum I.p.52 cmd.5471.
2. Birkenhead: Points of View, p.40.

arguing the case for the abolition of circuit system, Dr. W.I. Jennings, wrote, [1] "In 1930, an average year, 3003 civil cases were set down for trial, and of the 2574 suits actually tried, 1500 were matrimonial cases, mainly undefended suits. The judge spent 131 days in travelling and preparatory business, though 'very frequently' three days were used for the completion of business at the preceding assize term. Prisoners were tried on 690 days, and 600 days were occupied in the hearing of civil causes. Thus, assuming county court judges take as long as High Court judges to hear cases, we reach the conclusion that the whole civil jurisdiction would have been covered if each of the 65 county court judges sat for 18 days longer. Since each judge sat for only 155 days in the average, this would be no hardship. The 131 Commission Days would be saved, as would most of the cost of travelling. In fact a calculation based on the High Court business for 1930 shows that had the assize jurisdiction been exercised in that year by the civil and criminal courts, no less than 7 High Court judges, costing £35000 a year, could have been dispensed with. To this must be added

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1. The Civil Courts, Essays in Legal Reform, Pol. Quarterly Nov. 1934, pp.81-88.

the saving in clerks and travelling expenses, and in addition, that expensive relic of the Middle Ages, the Clerk of Assizes, would go to the way of the master of the wardrobe and 'the petty bag'. Were the civil assizes ever merged in the County Courts, the expense of some High Court judges, the clerks of Assizes, other assize officials and their travelling expenses would no doubt have been saved. But the suggestion of amalgamating the jurisdiction of civil assizes with the county courts is opposed on the grounds (1) that such a transference would throw such additional burden upon the county court judge that his list would be congested (2) that the public would have less confidence in the county court than in the assize court and (3) that the civil work on circuit is beyond the capacity of county court judges.

With regard to (1), it may be said that circumstances vary in each county court district and the additional work, if civil assizes were merged in County Courts, upon the county court judges may not be evenly distributed among them. With full allowance of those circumstances, still the additional work is not considerable, as the

annual average of civil causes tried on the circuit within the last decade amounted to only 8504 proceedings. It will, moreover, be distributed and spread over the whole of the 55 county courts. At any rate, it will not cause the county court list being congested not to say that smaller work of the county court judges may be delegated to the registrars who are on the whole quite competent to do so.

There is, thus, little valid ground in the first objection. Still less is it in the second. If Parliament can be said to reflect certain shades of public opinion, full public confidence seems to be reposed in county courts. The history of parliamentary legislation in the last 50 years shows that Parliament has imposed every session upon the county court judges with powers and responsibilities to deal with numerous cases which are as important and vital to the community as those placed upon the judges of the High Court. Again, it is not to be forgotten to the credit of county courts that they competently and satisfactorily deal with every year, no less than 82 to 92 per cent. of the total civil business of the country.

The third objection is scarcely necessarily

to be seriously refuted. Civil suits and causes heard on circuit fall usually within the following categories (1) matrimonial causes (2) "damning down" cases (3) libel and slander (4) breach of promise (5) cases of contract where the damages exceed £100. The first and second kind of actions form a great majority of civil cases on circuit.[1] As I have already tried to show,[2] there is scarcely any valid reason why those actions cannot be tried in the county court. The withholding of those causes of action from the county court is without any justification and the assumption that the county court judges are incapable of dealing with them is preposterous.

Whatever be the truth in these arguments for and against the proposal, the vital consideration of the interests of the litigant public should always be kept in mind. Litigation in the county court is no doubt less costly than in the assize court. Again,

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1. Take for instance, 1932. There were 2048 civil causes tried on circuit. Among those, 1614 are matrimonial causes i.e. above 55 per cent. and 529 actions for personal injury i.e. nearly 18 per cent. cf. Civil Judicial statistics for 1932. Memorandum prepared by Mr. A.E. Napier for the Lord Chancellor in February, 1933 statistics as to personnel Injury Actions tried. Evidence before the Royal Commission on Business at Common Law, p.17, 73-421.
2. Chapter I. The County Courts.

the sittings of the county court, are more frequent and much nearer to the people than the assize court. This means the saving of cost and avoidance of delay in county courts. If the subject were approached impartially and mainly from the standpoint of the litigant ~~public~~, the method of solution could be left in no doubt.

Next is the problem of matrimonial jurisdiction on circuit. Before 1920 divorce jurisdiction was concentrated in the High Court at London. There was the seat of justice, and thither the group of unhappy people girdled with unhappy matrimonial ties went up. It thus put a disadvantage and imposed an increased expenditure upon those petitioners for a divorce in the provinces who were not so fortunate as, but no less entitled to relief than, those resident in or near the Metropolis. Such unfair and unwelcome differentiation could not last long. In the result, pressure of public opinion led to facilities being granted in 1920 for trying and determining at assizes of matrimonial causes of any prescribed class and any matters arising out of or connected with any such cause.[1]

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1. of Justice Act, 1920 (10 & 11 Geo.V.

At present, judges on circuit have to deal with a large number of divorce matrimonial causes, the proportion of which among civil business at assizes we have already seen. If we compare the number of matrimonial causes tried on circuit in the last decade with that of divorce causes in the Probate Division of the High Court during the same period, the result may be told from the following figures:

Matrimonial Causes ...	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934	TOTAL
On Circuit...	1505	1945	2564	2548	1376	1500	1554	1614	1636	1716	18047
In Probate Division.....	3826	3006	3950	3973	3575	3909	4189	4111	4153	4468	38160

Thus the matrimonial causes tried on circuit constitute on the annual average about 32 per cent., while those tried in London nearly 68 per cent. of all. These figures make it evident that the judges of the Kings Bench Division are called upon to take no small share of the work in matrimonial causes, about one-third of that of the Probate Court.

But the complaints which have been made about the trial of divorce in the provinces are numerous. It is said that divorce business at assize is so hurriedly disposed of that it is far from being satisfactorily

tried.[1] In a large assise town like Leeds or at Birmingham there are as many as 60 to 90 divorce cases and usually much more cases are tried in a day on the circuit than in Probate Division. What is still worse, judges should boast their [illegible] too quick speed of dealing with these important cases. "To read King's Bench judges," wrote W.N. Raburn KC "boasting that on circuit they try so many divorce cases in so many minutes is to my mind deplorable. It brings the entire system into disrepute."[2].

Needless to say, hurried trial of action is dangerous. Nothing short of a full consideration with regard to both facts and the law involved in a case can do full and satisfactory justice. But so long as not sufficient time is allotted to judged on circuit, so long as they are being pressed by business, it is difficult for them to solve this dilemma. Consequently, whatever may be the truth in the criticism, the central problem turns upon

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1. Evidence, op.cit. Mr. William Lately: In a big assise like Manchester, or Leeds 60 divorce cases were tried in a day, i.e. about one in 6 minutes. q.2146; The Hon. Sir T.G. Horridge testified that he disposed of 90 divorce cases in a day and a half on the circuit. q.1388; cf. also the evidence given by Mr. R.T. Bayford K.C. (q.2820) the Hon. Sir Boyd Merriman (q.2449) and Mr. G.P. Bancroft (q.4984-6)
2. ibid. p. xKC.

judicial strength and the circuit system as a whole, the full implication of which I shall attempt to discuss in a later chapter.[1]

Secondly, the discretion in divorce cases exercised by the judges on circuit is, it is argued, neither consistent nor with principle. As early as in 1923 Lord Merrivale adverted to the great increase of divorce cases tried now in many localities and also "to the lack of certainty in many cases on matters of facts and the absence of a standard of judgment observed in all areas of this jurisdiction upon which the King's Proctor might confidently act."[2]

In Apted v. Apted and Bliss[3] The Attorney-General emphasised the fact that, by reason of the trial of divorce cases on circuit a jurisdiction, which formerly was exercised in normal times by 2 judges in this Division both regularly engaged from time to time in hearing matrimonial causes, comes to be exercised under novel conditions

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1. Chapter [illegible]
2. Wilson v. Wilson (1923), 39 T.L.R. 91
3. (1930) 47 T.L.R. 436 (1930)

by Judges whose usual tasks are of a different kind.

Incidentally, too, the duties discharged here by officers of the Divorce Registry fall to be dealt with on circuit by circuit officers, or district registrars, without ready means of access to the ordinary sources of information as to matters of practice and procedure. "There is," the Attorney-General said, "a real danger that the discretion in question may become a roguish thing - variable," to quote an old adage, "as the length of a judge's foot".

In this case the President, of the Probate Division after examining a number of decisions from the early case of Morgan -v- Morgan and Porter[1] downwards said: "Reviewing the cases in question as a whole, these principles appear: - In every exercise of discretion the interest of the community at large in maintaining the sanctions of honest matrimony is a governing consideration; a strong affirmative case is necessary before a Judge is justified under the statutes in negativing their conditional prohibitions; it is manifestly contrary to law that a judicial discretion in favour of a litigant guilty of misconduct in the matters in question should be exercised where

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1. L.R. 1 P. & D. 644.

that course will probably encourage immorality. If it is not unlikely to do so, that is an argument against leniency.

"Every person familiar with legal procedure who reads the modern cases to which I have referred will find that the matters I have mentioned were actively present to the minds of the Judges concerned. The observation inevitably presented itself that problems such as those I have endeavoured to define are not on the face of things peculiarly fit for solution in the course of a busy day in an Assize Court. This is a difficulty inherent in the conditions under which the modern extended jurisdiction in Divorce becomes necessary. In the exercise of the jurisdiction here, however, cases are often adjourned for further consideration. Circuit cases in civil disputes, as everyone knows, are often so adjourned. When there is such adjournment the court can secure here the help of the King's Proctor, and if deception is practised there are 6 months before decree absolute, during which the truth may appear."[1]

With regard to the decision of this case the Law Quarterly Review[2] observed, the President in considering the question as to when the Court's discretion in

1. 46 T. L. R. 461-62 (1930)
2. 46 Law Quarterly Review (1930)

favour of a petitioner, who had himself committed adultery, should be exercised was not able to lay down any definite rules which would crystallise the principles on which the Court should act; his judgment was more in the nature of an appeal to the King's Bench judges not to be too liberal in the exercise of their discretion on circuit.

But the number of divorce cases in which discretion is exercised swells every year.

It is further argued that when all the divorce petitions were tried at first before one and later before one of two, and now the three judges of the divorce court in London some standard of judgment and some canons in the exercise of discretionary powers could be observed and retained. But now with so many judges on circuit called upon to exercise the discretion asked for by a petitioner in his favour, it is obvious that there will be greater diversity. To this argument, it may be answered, as with the editor of The Law Journal, that "as to uniformity in the exercise of discretion, it has not been very conspicuous in the Divorce Court of recent years."[1]

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1. The Law Journal, 198.

Nor is this all. It is thirdly stated that in cases in which discretion would undoubtedly be refused in the divorce court, the device has been resorted of taking them into the country, where less time and less cases are given to them.[1] Fourthly, "some of the judges of King's Bench Division," as reported by the Business of Courts Committee, "find this particular work distasteful," and as told by Sir W.N. Raeburn, K.C., "are not very much interested in that class of work and "would not again unnaturally feel quite the same responsibility for seeing that everything went smoothly and consistently."

Furthermore, as wrote Mr. Noel Middleton there are solicitors in the provinces who have little experience of the High Court and none of the Probate Division. Among these solicitors there is, he suggests, a great tendency to collusive agreements in such cases, whether poor persons cases or otherwise, the counsel engaged by them are often not fully conversant with the matrimonial law and the tendency is unchecked, while the judge of assize is quite unaware of anything objectionable. Such occurrence, he concludes, are due not to intentional bad faith or

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1. Minutes of Evidence, op.cit. p.244, q.3451.

corrupt design, but to ignorance of the law, and it is not to the interest of the state that any part of the administration or practice of the matrimonial law should be in the hands of those not conversant with it.[1.] With regard to the same point, Sir R.W. Poole said that the experience he had of the trial of divorce suits or assise has not been a reassuring one, either from the point of view of the proof of the evidence which was admitted to prove the case, or rather which was never insisted on, or from the point of view of the capacity of the local barrister to conduct the suit.[2.]

Whatever fragments of truth there may be in these criticisms, it is evident that divorce jurisdiction on circuit becomes a serious problem. There are two important but almost irreconcilable considerations. On the one hand, the demand for decentralisation of divorce jurisdiction is ever increasing, as the growing number of divorce cases on circuit clearly demonstrates. To use the words of Lord Peel's Commission,[3.] "There is no likelihood that the

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1. Ibid. p.218, p.221, q.324.
2. " p.218.
3. Report op cit. para. 121

present facilities for provincial petitions will be reduced. It is more likely that a demand, which has already been expressed, will become insistent that similar facilities should be granted at a large number of towns and in respect of all classes of petitions."

"On the other hand, it is argued that those divorce cases are better to be tried in the divorce court. The position is thus put by the President of the Probate Division."

"... It must be assumed that judges sitting continuously in this (divorce) jurisdiction, assisted by an experienced Bar, who are certainly not less aware than their colleagues elsewhere of the obligation of candour to the court, and not less faithful to that obligation in the presentation of cases the nature of which makes the utmost candour imperative, and having the advantage of regular contact with each other, with the Registry and with the King's Proctor, are in a better position to ensure that the necessary vigilance is observed, and to insist on a rigid standard in the presentation of cases, than can be judges however eminent, who only deal with divorce occasionally."[1].

1. Minutes of Evidence, op.cit. pp. 155-6.

Out of these contradictory considerations, what is the solution?

It is firstly suggested that all the divorce work should be done by the King's Bench Division. "This important desideratum," wrote the Business of Courts Committee, "seems possible of attainment only by co-ordinating all those who are charged with the trial of divorce cases, into one unity, wherein after consultation inter se all the judges may resolve upon a line of common action. Similar problems have often been presented themselves to the judges in the King's Bench Division and particularly in relation to criminal matters. There is every reason to hope that a standard would be set up and adhered to, if divorce work were to become an integral part of the work of the King's Bench Division, and not devided as now - some cases of a particular kind falling to the judges on circuit, while other judges in a separate Division do the heavier work in London."[1]

Whether it is desirable to merge divorce jurisdiction in the King's Bench Division as suggested

1. Second Interim Report, cmd. 4471. pp.12-13.

by the Business of Courts Committee, is a question which will be more properly discussed in a later chapter.[1]

It is, secondly, suggested that a commissioner of divorce should be appointed to try divorce cases on circuit.[2] But his visits on circuit should for the sake of convenience either immediately precede or follow the assize at any town to which he is going.[3]

The idea is approved by the Royal Commission on the Despatch of Business at Common Law. They are, to use their words, "strong of opinion that the status of the person entrusted with a task of such importance, not only to the individual but to the state, should not appear in any way inferior to that of a High Court judge."[4] But the suggestion is deprecated by Mr. E. Clement Davies, member of the Commission, and such authorities as Lord Atkin and Sir Raeburn.[5] In their opinion, the proposal is neither desirable nor practicable.

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3. Minutes of Evidence, op.cit. Latey p.103, Sir E. Hume-Williams. p.203 qs.3695-3725; Merriman 2447, 246-7 Sir R.W.Poole op.cit. p.212 q.3125, 3174-240.

1. Chapter IV. The High Court of Justice (2)
2. Minutes of Evidence, W. Latey, pp. 642-3.
4. Report of the Royal Commission on the Despatch of Business at Common Law para. 181 pp.68-63 cmd.5065. (1936).
5. Minutes of Evidence, op.cit. Atkin 3426; Raeburn, q.3480-508.

As has been observed, there is an ever-increasing and growing number of divorce cases on circuit. In face of this demand, it is doubtful whether such a judge or commissioner would be practicable to do all divorce work in the provinces. Nor is the system at all desirable. "I do not like the idea," said Lord Atkin,[1] "that the judge (meaning the divorce judge or commissioner) should go round, so to speak, on the tail of the judge of assizes trying this particular class of sitting by himself, causing the people in the county towns and the juries to be summoned for the purpose of hearing this work after they had already been summoned and had been engaged in the ordinary work of the assizes, and doing the work that a King's Bench judge is completely capable of doing when the barristers are all assembled at the assize towns. You would have to bring all the barristers together again for the purpose of dealing with these divorce cases and it is on the same footing that there is some special mystery attached to divorce cases which cannot be dealt with by the judges on circuit. That is the only reason for making the suggestion, but I venture to think that admiralty judges and common law people have found themselves all dealing with divorce cases without any great difficulty ... It comes to this,

that it is very simple work; that is all I care to suggest and I do not think that there is anything in the idea that King's Bench judges could not discover collusion cases just as well as they are required to discover collusion cases in other branches of law."

The opinion is endorsed and corroborated by Mr. Clement Davies, member of Lord Peel's Commission.[1]

It is thirdly suggested that one additional judge be appointed to the Probate, Divorce and Admiralty Division. With the appointment of a fourth judge, the puisne judges of this Division would be able to take turns to go to circuit to try matrimonial and probate cases, leaving the President and one other judge who is an expert in admiralty law to deal with the Admiralty cases in London. It is argued that by this arrangement unity and uniformity in dealing with divorce and probate cases throughout the country would be secured.[2] This proposal will, of

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1. Report, op.cit. Memorandum by Mr. F. Clement Davies, para. 21.
2. Minutes of Evidence, op.cit. Mr. Noel Middleton, p.[illegible]. Q. 3269. cf. the objection to this suggestion of Lord Atkin.

course, meet with the same objections and involve great difficulties as the second. And both suggestions appear to ignore the fact that the Probate Division as a whole is subject to serious criticism and its continuance as a separate Division in the High Court is open to question. This will be fully discussed in a later chapter.

Fourthly, matrimonial causes should be tried, it is suggested, in the County Courts subject to a control to be exercised by the divorce court in London.[1.] As this is fully discussed elsewhere,[2.] it is sufficient here to say that, if assizes were ever thought desirable to be wiped out of existence, there is no reason why matrimonial jurisdiction should not be entertained in the County Courts.

Lastly is the problem of the extent of matrimonial jurisdiction on circuit. The question is whether divorce jurisdiction on circuit should be extended to all defended cases no matter whether the parties are technically poor persons in law or not. Those who oppose to the increase of divorce jurisdiction on circuit are either on the ground that any such increase would break down the circuit with the additional work[3.] or that London is the convenient place of

1. op.cit. cmd. 4471.par.16 p.15. 2. Chapter I.The County Cts.
3. Evidence, op.cit. Sir R.W.E.L.Poole p.216. .3174. Sir W.H. Raeburn, Bart, K.C. p.257,q.34

trial in the majority of defended cases[1].

But both reasons are to me not convincing. Statistics do not show the total number of defended cases, if they were tried on circuit, would be so much as to congest other works. If circuit system retained but reformed, this objection falls on the ground. Again, it is a little inconceivable why London is more convenient to the parties and witnesses concerned than the place where they reside. I do not see why all kinds of defended divorce cases should not be tried on circuit, if not transferred to the County Courts.

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1. Ibid. Mr. Noel Middleton: p.223, q. 3244-3245.

CHAPTER III

THE HIGH COURT OF JUSTICE

1. THE KING'S BENCH DIVISION.

I now come to the Supreme[1] Court of Judicature which was created in 1875. It consists technically of two permanent divisions but in fact of two distinct tribunals, the High Court of Justice and the Court of Appeal.

Of the High Court there are now three divisions (1) the Chancery Division (2) the King's Bench Division and (3) the Probate, Divorce and Admiralty Division. The system of divisions is flexible, as they might be abolished without any Act of Parliament by an Order in Council made on the recommendation of the judges. The Common Pleas and Exchequer Division were so abolished in 1880[2]. Apart from some problems which are common to all Divisions, and will be treated at a later stage, let me discuss the King's Bench Division in this Chapter, the Chancery and the Probate Divorce and Admiralty Divisions in the next following.

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1. The name is, as with most of the titles, of the English Courts, not accurate, for it is not the Supreme Court.

2. By Order in Council of December 16th, 1880.

1) THE KING'S BENCH DIVISION.[1]

The King's Bench Division is the largest of the divisions in the High Court. It consists of the Lord Chief Justice of England and 19 puisne judges[2] or 20 in all, but the number may be maintained above 18 only with Parliamentary action.[3]

The Lord Chief Justice is appointed, in effect, by the Prime Minister from among the highest in Bar rank of his political followers. He must be a barrister of 15 years' standing or to have been a judge of the High Court.[4] He is the highest purely judicial officer in England, since many of the duties of the Lord Chancellor, who is technically the head of English Judiciary, are political and executive in character.

The puisne judges are appointed, in effect, by the Lord Chancellor from among barristers of ten years' standing.[5] They are paid by salaries[6]

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1. According to Order, Chancery Division stands foremost. For convenience, I treat the King's Bench first.
2. Act of 1925. (S.4. (1) (ii)) also Sup. Ct. of Jud. Act of Judicature (Consolidation) Act, 1925 - (15 & 16 Geo V c. 49)
3. Act of 1925 S.11 (1) 1935. (25 Geo.V. (2)
4. Ibid S.9. (2) (3)
5. Ibid S. 9. (1)
6. Ibid S. 13 (1) (2) (3)

charged on the consolidation fund. They hold office during good behaviour but may be removed on an address presented by both Houses of Parliament.[1]

Apart from the judges, the personnel of the Division consists of 8 Masters, one Master of Crown Office and a number of associates and clerks. The Masters are appointed by the Master of the Rolls and the Lord Chief Justice alternatively, or according to agreement[2] while the Master of Crown Office is appointed by the Lord Chief Justice alone.[3] They must be practising Barristers of 10 years' standing, an official referee, or a master in lunacy[4], and hold their office during good behaviour. Their duties comprise (1) the control and superintendence of the Central Office of the Supreme Court[5] (2) judicial work in Chambers[6] and (3) issuing directions in points of practice[7].

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1. Ibid S. 12 (1)
2. Supreme Court Judicature (consolidation) Act 1925.
3. Ibid S. 106 (2) R.106 (1) (Hereafter re-
4. Ibid S. 126 Sch.IV ferred to as Act of 1925)
5. Ibid S. 104 (2)
6. R. S.C. Ord. 5. R.6. Ord. 54 R.12.
7. Ibid Ord. 61 R.2.

The Master of Crown Office, apart from acting as Registrar of the Court of Criminal Appeal[1], has the onerous duty of arranging the lists[2] of the Divisions, and other exclusive duties[3]. The associates are appointed by the Master of Crown Office[4] from among clerks in the Central Office with the chief associate at the head. The Chief Associate being in control of the daily cause lists and responsible for jury arrangements and has to supervise the judgments and orders drawn by its junior associates and other duties[5]. The associates senior and junior, draw judgments and orders and make jury arrangements[6].

The civil jurisdiction of this Division consists in the great bulk of the trial by courts of first instance of suits, including divorce cases on circuit[7]. It also hears revenue cases[8]. There is again a small

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1. The Court of Criminal Appeal Act, 1908 S.3. (1((8 Edw. 7. c. 46)
2. Report of the Royal Commission on the Dispatch of Business on Common Law. Para. 62. p.28 cmd.5065 (1935)
3. Ibid
4. Evidence taken before the Royal Commission on the despatch of business at Common Law. R. Romer M.C. q. 811. 73-4-6.
5. Report. op. cit. par. 63. p.29. Evidence op. cit. Thomas Q (43-5)
6. Evidence op. cit. Thomas q.317-25. Romer q.829.
7. Act of 1925 S.56 (2)
8. Ibid

amount of miscellaneous appellate work.[1] The annual average number of civil proceedings in the King's Bench Division compared with that of the High Court and of all the Civil Courts stands as follows:

	Annual Average 1910-14	Annual Average 1915-19	Annual Average 1920-24	Annual Average 1925-29	Annual Average 1930-34
King's Bench Division	62,621	42,538	102,931	93,681	95,372
High Court of Justice.	72,149	53,182	115,861	105,238	107,227
All Courts	1,357,156	736,237	942,781	1,218,983	1,447,068

By keeping the above figures in percentages a more accurate idea is gained :-

	Annual Average 1910-14	Annual Average 1915-19	Annual Average 1920-24	Annual Average 1925-29	Annual Average 1930-34
% of K.B.D. proceedings in the High Court.	86.7	79.9	88.6	89.0	88.9
% of K.B.D. proceedings in all civil courts of 1st instance.	4.5	5.7	10.9	7.6	6.5

The above figures are self explanatory. The

1. Ibid. SS 31 (1) (g) (3) 62; S. 63 (1); R.S.C.Ord.59 R.1. (e); Order 54 R.22.A.

annual average of the number of proceedings in the King's Bench Division during the period of 1910 and 1934 constitutes about 84.6 per cent of the High Court and 7.2 per cent of all civil courts of first instance.

Apart from the business within its purview, the Division has to supply three judges for the Court of Criminal Appeal, one judge for the Central Criminal Court, and another for the Court of the Railway and Canal Commission.

As to the work of the Division, it may be treated under twelve heads, namely (1) circuit work, (2) the Special Jury List (3) the Common Jury List (4) the non-Jury List (5) th New Procedure List (6) the Commercial List (7) the Short Cause List (8) the Revenue List (9) Chamber business (10) the Crown Paper (11) the Civil paper and (12) the Special Paper.

1) CIRCUIT. As circuit work has already been examined elsewhere, it need not detain us long here. What is pertinent to observe is the incidence of circuit work upon this division. As the circuit work is not evenly spread over the year, so the number of judges withdrawn from London fluctuates between none and twelve. It takes over one-third of the time of the judges. But as the King's Bench Division is, in the words of Lord

Justice Scrutton[1] at present worked if not in theory, in practice, on the lines that circuit work takes precedence, so it not only has a highly irregular incidence upon, but became as one main cause of delay to, the work of the Division. To quote the Report of St. Aldwyn's Commission on the delay in the King's Bench Division,[2] "the primary cause of delay arises from the long continued struggle between London and the Provinces for the time of the judges, which has become keener in recent years from the centralising tendency in legal as well as in other business, and the consequent increase in a number of causes to be tried in London and the decrease of those to be tried in the smaller assize towns." In the opinion of Lord Handworth's Committee[3] it has long become a difficult problem to apportion the judicial time between London and circuit works of the Division. Herein lies, no doubt, the root cause of the difficulty of the Division. "Beyond question the more

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1. Evidence taken before St. Aldwyn's Commission q. 3047. cd 7177 (1913)
2. Report of St. Aldwyn's Commission par. 27. cd. 7177.
3. Report on the Business of Comm's. Committee. Cmd. 4471 Par. 47. p. 31 (1934)

onerous single complication with which the King's Bench has to contend" writes a leading article in the "Times", "and one peculiar to itself is that created by the circuits, which accounts for about one-third of its judicial time."[1]

2) THE ORDINARY LISTS. These cover the special jury, the Common Jury and Non-Jury lists. The bulk of ordinary civil actions are entered into those lists. Take, for instance, 1934, among 3107 cases tried in the Division, 1366 were entered in the ordinary lists, i.e., 43.9 per cent, the non-Jury list alone constituting 34.4 per cent. These lists together take about one-third of the judges' time.

According to the Judge's Note Book, a private book entirely for the use of the Judges, which consists of resolutions passed by the Judges themselves at various meetings, the Ordinary Lists are accorded special consideration. Among these resolutions is one in the following words: "That it is of the utmost importance for the purpose of avoiding unnecessary delay and expense in the administration of justice that there should be at least three courts sitting continuously throughout the legal year, one for special jury causes, one for common jury causes, and one for causes without juries, and that all other judicial business should

1. The Times. Jan. 31, 1936

be considered secondary to this."[1]

But it is not unfair to say that the reverse is true at present.

Ordinary lists seem now to be considered as secondary. So long as the present method of arrangements for the disposal of business in the Division prevails, the ordinary lists are only attended to after the needs of judges for other work have been satisfied. As a result regular and uniform progress with these lists is scarcely possible; and in the despatch of the work in this Division, delay and uncertainty with which it has been charged, are particularly noticeable in the Ordinary Lists. First as to delay. The number of cases pending in the special jury, common jury and non-jury lists at the first January stands as follows:

1932	1933	1934	1935	1936
937	945	580	1736	307

They had been standing in the lists for the following periods of time :-

	1932	1933	1934	1935	1936
For 3 months but not over 6 months	231	242	107	155	45
For above 6 months	301	303	92	175	28

1. Minutes of Evidence taken before Royal Commission on Delay in the Kings Bench Division. Appendix no 6. Cd. 7178 (1913)

Commenting upon these figures, the Royal Commission on the Despatch of Business at Common Law said[1]: "It appears, therefore, that in 1932 and 1933 the arrears were very large. The figures for 1934 and 1935 were much better, but by no means satisfactory. By the beginning of 1936 arrears, as compared with the average figure of the previous decade, has shrunk to remarkably small proportions.[2] The decline is, in the opinion of the commission, due mostly to the strengthening of the Bench by two additional appointments made at the beginning of 1935". It may also due to some extent the growing reluctance to resort to the courts partly because the popularity of arbitration, partly owing to an increase in expense but ~~recently~~ mainly become the uncertainties and inconveniences of litigation. Second, as to uncertainty. Of all uncertainties as to the dates of the trial of a case, the greatest is in the non-jury cases. At present, so far from fixing dates, it would be impossible even to fix approximate periods when litigants would know their cases would be taken in the (non-Jury) list.[3] ~~(The uncertain flow of business in the ordinary lists and especially to non-jury lists the non-jury is disturbing.)~~

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1. Report op.cit. [illegible] par. 35 p.21.
2. Ibid paras. 36, 68, 69, p.20-31
3. Thorner 418-21.

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In the words of Mr. Justice Goddard[1] "the languishing state of the ordinary non-juries in apparent, and is, I think, a source of resentment both to the Bar and to litigants. More particularly is this true of long cases. Over and over again you find long cases at the head of the week's list re-appearing week after week because there is no one to try them". These remarks, however, are corroborated by Mr. Justice Clauson who sat as a King's Bench Judge taking the non-jury list for a short period in 1935. The inconvenience of uncertain date of trial to litigants is obvious enough. It happens more often than not that a case cannot be begun on the day on which it appears in the list, thus all preparations such as the attendance of the parties solicitors, witnesses and so on for the case coming on trial were made in vain, and have to be repeated once, twice or even several times over again. In the words of Mr. J. O'Connor K.C.M.P. (now Solicitor General)

"A large number of witnesses some of whom come to England from abroad wasted days of valuable time and incurred expense in London which one or both of the parties had to bear.[2] Jurymen have been kept needlessly kicking their heels in the uncomfortable precincts of the Law Courts and have lost time and money.

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1. Evidence op. cit. Appendix 2.

2. Baring v Barker & Co. (Coachbuilders) Ltd; Rees v. Allied Suppliers Ltd. Minutes of Evidence, op. cit. p. 92

In each case important businesses were seriously and unnecessarily disorganised. A mass of witnesses and jurors as well as the parties, have concluded their experience with serious dissatisfaction at the arrangements for the administration of Justice and with a determination to suffer injustice or arbitrate rather than have recourse to the Courts themselves. Thus every case in which maladministration occurs deflects an unascertainable number of people from recourse to the Law and deepens the public disapproval of the administration.[1]

These deductions may be a little exaggerated, but the net result of no fixed date is at best what Lord Wright has said, "the very great source of annoyance confusion and waste of money."[2]

3. THE NEW PROCEDURE LIST. This procedure which was instituted in 1932 to shorten and control the preliminary proceedings, has been one of the most important reforms in the King's Bench Division. This List has been closely modelled on that of the Commercial Court.[3]

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1. Evidence op,cit. [illegible] pp. 91-92, cf. also J.W.Morris, ibid, p. 270; T.de la P. Beresford, q.1022-24; Lord Wright, Q.1194.
2. Evidence, op,cit, p.80, q.1194.
3. cf. Mr. Justice Roche; address before the Canadian Bar Association. The Times, Aug. 31, 1933.

But the number of cases entered in this list is out of all proportion to that in the Commercial Court where only a select class of case is taken. In London the number of cases entered in this list in 1934 reached 1207 out of a total of 3248, and a large proportion i.e. 60 to 75 per cent of the cases in this list were of road accidents. Cases in this list may either be tried by a jury or a judge alone. But in fact the list has been non-jury. In 1934 the list occupies two judges continuously with the required assistance of the Chamber judges and sometimes of other judges. Several distinctive advantageous features may be said of this list. First of all the fixing of a date for trial, to which the popularity and success of this procedure is mainly due[1]. The great advantage of this is, in the words of Justice T.G. Horridge[2] "that the parties being practically certain of the case being heard on the appointed day, are saved all the expense of the attendance from day to day of themselves and witnesses" .

Secondly, the judge at an early stage of the action

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1. Evidence appendix p.9. 16.
2. Evidence q.1253. q. 1091.

has the whole matter brought before him on one summons in a similar manner to that found most satisfactory in the practice in the Commercial Court. Thus a good deal of time and expense incurred on interlocutary application and very often appeals from the masters to a judge are saved. Moreover, not only has the judge a grasp of the case from its very beginning but his prestige has brought about a convention of reasonableness and give and take in interlocutory matter which is not always displayed by counsel and solicitor practising before the masters. This again saves a considerable amount of time and expense at the trial. Finally the continuity of the work of the judges taking the list is another feature of its great success.[1] But it may be remarked that a judge who takes interlocutory proceedings is not always a judge who conducts the trial.[2]

It is desirable that the same judge should deal both with the interlocutory proceedings and with the case when it comes to trial. It is also desirable that the New Procedure judge should be assigned the

1. Ibid. Roscoe q. 4047.
2. In the Michaelmas Sittings of 1934 out of 194 New Procedure actions only 111 were heard by a judge who gave the directions.

work for a longer period than is the practice at present.[1] On the other hand some things may be said against the list. The distinction between the New Procedure and the old Procedure in Non-Jury cases has been criticised as illogical. There is no guiding principle and the decision whether a case falls into one or other list depends mainly on the views of the solicitors engaged in the particular case.

The new Procedure rules[2] excludes certain classes of actions such as libel, slander, etc., or generally actions affecting character. There appears to be no cogent reason for such differentiation of actions in the preliminary proceedings.

Moreover, the procedure as has been pointed out by the London Chamber of Commerce, unduly favours plaintiffs who can get his evidence together and prepare his case before issuing the writ. A defendant may be unable to prepare his defence in the short time available and when he has a bona fide defence and properly asks for further time, is assumed and treated by the Bench as not doing so bona fide.[3]

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1. Ibid. Append. p.9. cf Morridge. q.1260.
2. R.S.C. Order 38 A.
3. Evidence op. cit. p.292

The most serious objection to the arrangement is that the success of the list in the opinions of Mr. Justice Goddard,[1] obtained at the expense of the Non-Jury List. It may be doubted whether the success is not bought at too high a price.

4) THE COMMERCIAL LIST. - The list was instituted in 1895[2], in accordance with the recommendation of the Council of Judges of 1892. Some would attribute the origin of the List to Mr. Justice Matthews, while others to Mr. Justice Gorell Barnes.[3] One

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1. Ibid appendix, p.4.
2. In February, 1895, there was issued the famous "Notices to Commercial Causes" which gave birth to the Commercial Court. This is also in the Red Book and the White Book; also in 39 Solicitors' Journal 245, Feb. 9, 1895.

3. See Law Quarterly Review, 873, (1893); F.S.Rosen: the Courts of English Law, Ldn. p. 185 and Sir F. Pollock. The Genius of the Common Law (N.Y. 1912) p.61. Lord Roche: address before the Canadian Bar Assoon. Aug. 31. The Times. 1933.

judge is designated to hear ~~criminal~~ cases,[1] he has been selected for some time past because of his acquaintance with commercial matters and familiarity with the form and effect of commercial documents. Cases can be entered in the list only by his leave. Once entered in that list, the case is given fixed dates of trial and the summons for directions and all interlocutory applications in the case are heard by the judge himself and not by a master.[2] The fundamental principle of the Court which is modelled upon by the New Procedure List has thus been evolved that a single judge should take control over cases from their beginning and all preliminary issues about procedure have to be decided by him. It has eliminated

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1. They are loosely defined as "causes arising out of the ordinary transactions of merchants and traders; amongst others, those relating to the construction of merc-antile documents, export or import of merchandise, affreightment, insurance, banking and commercial agency, and mercantile usages."

2. The history and practice of the ~~Criminal~~ Court are fully described in Practice of the Commercial Court (London, 1902) by Mr. Theobald Mathew, a son of Lord Justice Mathew, who was the first judge to take the list and who established the procedure for its efficiency. For a short account of the Court see Dr. T. Doty in ~~Criminal~~ Laws of the World. Vol.13, p.71.

unreasonable and unnecessary preliminary applications. The efficiency of the Court has long been well-known. In the words of St. Aldwyn's Commission,[1] "The result has been satisfactory to everyone. It has in its way affected a great reform and is beneficial to suitors." Mr. Theobald Mathews said ~~even went so far as to say~~: "The chief criticism to be heard is that which is contained in the complaint that it is a hardship that the ordinary suitor should not have the same advantage as the commercial litigant." Mr. C. Mullins even went so far as to say that "there is not a court in the World that works so quickly and cheaply as the Commercial Court of the High Court."[2]

The praise may be too high but what is certain is this - the commercial List provides in fact a court where a speedy decision can be obtained. This is one of its great merits.

Part of the success of the Commercial List and its reputation for speedy procedure is due to the

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1. Final Report of the Royal Commission on Delay in the King's Bench Division pa.49 cd. 7177 (1913)

2. In quest of Justice, p.179.

fact of comparatively few cases entered in it, as the records of cases set down, tried or disposed of and withdrawn during the period of 1895 and 1930 clearly shows in the following table:[1]

YEAR.	No.of cases set down.	No.of cases tried or other wise disposed of in court.	No. of cases withdrawn.
1895	168	125	30
1896	200	170	25
1900	273	205	62
1905	129	107	42
1910	168	94	66
1913	170	108	81
1916	258	124	88
1919	395	168	224
1921	618	271	338
1922	357	174	106
1925	108	77	49
1928	136	58	61
1930	115	61	46

Thus the annual average of cases tried or otherwise disposed of in the list amounts to only 134.7 cases. It is obvious that it is not phenomenal if one judge can keep the List free of arrears. If all the actions in the Division could enjoy the same privilege of a certain number of judges as the Commercial causes, there would also be no arrears in other Lists. Further the success of the Commercial List is the same as the New procedure list,[2] obtained at the

1. Minutes of Evidence Op cit, P107
2. Report, Op.cit. pa. 59, p.28.

expense of other lists.

It has long been admitted that the same judge who took interlocutory proceedings should try the cases in the List. This has not been fully adhered to lately, and in the opinion of those who are competent to speak,[1] should be literally followed.

It is remarkable to note here that in this court, the ordinary rules of procedure are not enforced. On the contrary, in a notice that is still printed in the Annual Practice relating to "the despatch of commercial business" in the commercial court, it is frankly said that the reason for creating this court was that "there was great delay, inconvenience and expense in the ordinary procedure." Consequently, the existence and the successful working of the Court affords an apt contrast to the inconvenience of ordinary procedure.

5) The REVENUE LIST. - The List deals with income-tax, stamp-duty and death-duty cases. In the last three years 1932-1934, there were heard 141 income-tax cases, 5 stamp-duty cases and 7 death-duty cases, the first class being predominant and constituting about 93 per cent. of all. The List is assigned to one judge

1. Evidence, Roscoe. q.4047.

who is selected for his special experience of the work. As he goes circuit and the convenience of the Law Officers who are always engaged on behalf of the Crown, has to be duly considered, the list can only be taken at certain periods.[1a] but it is always possible for the judge to sit according to a well-arranged time-table. When a date for taking the Revenue Paper has been fixed, the list is taken continuously.[1] There is consequently no delay as to this list.[2] In the opinion of high authorities, the present system is satisfactory.[3]

6. THE SHORT CAUSE LIST. - This consists of short cases where application has been made for summary judgment under Order XIV to avoid delay. They are normally heard within a month from the issue of the writ.[4] They are taken at all times whenever there is a judge who generally succeeds in disposing of the whole list.[5] The parties can know the

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1a. Evidence op.cit., Finlay, 3994, 4007-14.
1. Report, op.cit. pa.27.
2. Evidence op.cit. q 4013-4.
3. Ibid, Finlay, 3989, Hewart 4467
4. Report op.cit. paras. 35,50.
5. Ibid.

approximate date of trial, though not the exact date. The cases in this list are disposed of very rapidly, 5 or 10 minutes being the average. The immense value of the procedure is demonstrated by its wide use. The number of cases entered in this list is considerable. In 1934, for instance, out of a total of 15593 Summonses in the King's Bench Division, there were 8246 Summonses for directions before Masters in this list, more than 52 per cent. of all. Again there were 3989 Judgments about 17.5 per cent. under this Order out of a total of 22771 in 1934. The success of this practice is attested by many eminent writers. "Summary judgement procedure, in essence is nothing," wrote E.R. Sunderland:[1] "but a process in the prompt collection of debts ... Machinery for that purpose must provide a test to determine that the plaintiff has a debt and not a controverted claim, and a means for getting an immediate judgment without the expense and delay of a Trial. The English practice does both of these things with neatness and dispatch. In the words of Sir F. Pollock: "Remembering that in England

1. "An appraisal of English procedure," Reports of American bar Assoon. 1925, p.246.

at any rate, the majority of actions are undefended, we cannot doubt that Order XIV is among the most beneficial inventions of modern procedure."[1]. The success of the list shows that nothing will so completely take the heart out of the average defence in an action where the claim is for a liquidated amount as the prospect of an immediate trial. In more than half the cases in this list defendants, though entering appearance, have failed to apply for leave to defend. In the opinion of Master Baker and Lord Peel's Commission this list may be enlarged to try other cases where this method of trial is appropriate[2].

7. CHAMBER BUSINESS. - This consists of interlocutory matters which are under the supervision of the masters, who have most of the powers of a judge in chambers. It is a channel through which actions flow before reaching trial. A judge is always assigned to sit in chambers 2 days a week or more, if necessary. The work is normally disposed of within the day. The number of proceedings is rather considerable. In 1934, for example, there were 37588 interlocutory proceedings, apart from 51368 Summonses and

1. Genius of the Common Law. 1912. p.83.
2. Report op.cit. par. 256.

orders, among which 625 appeals from masters to a judge in chambers. There is congestion, though no delay in the chambers work, and thus resulting in inconvenience to the practitioners concerned. This is aggravated by the fact that all parties are now summoned for 10.30 but nobody knows at what time his appeal will be heard. In the opinion of Lord Peel's Commission[1] if the judge could sit daily in chamber and special times be fixed at suitable intervals for each case, the present inconvenience would be relieved. The rules of the High Court permit ~~summons~~ numerous lengthy and expensive preliminary battles "in Chamber" on points of procedure. Sometimes these "interlocutory" applications can and do in fact save considerable costs by making the proof of some essential factor unnecessary. But they also form one of the main causes of the expense of litigation.[2] It is significant to note that the success of the Commercial Court is due not a little to the fact that this preliminary skirmishing has to a large extent vanished.

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1. Report para. 259.

2. Mullins, In Quest of Justice, Ch.X. 170 et seq.

8. THE CROWN PAPER. The Divisional Court is divided into Crown and Civil Paper. As put by Lord Handsworth's Committee, "The line of demarcation between these two is not founded on any clear principle; the difference is largely historical, though it is roughly true to say that Crown Paper contains everything to do with prerogative Writs and all Appeals in which the decision of the Divisional Court is final... There are some rare proceedings such as those relating to elections which do not come either under the heading of Civil or Crown Paper."[1].

The work of the Crown Paper has a diminishing tendency as the following figures will show:

1894	84	1912	78
1895	77	1913	53
1896	84	1914	49
1897	56	1915	49
1898	77	1932	27
1899	82	1933	27
1900	52	1934	37

Magistrates and Quarter Session cases, which form the bulk of the residue of Crown Paper remain more or less the same from year to year.

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1. Second Interim Report of the Business of Courts Committee Cmd. 4471. Appendix B.p.66 (1934)

The proceedings of prerogative writs are never considerable. In 1934, for instance, the total writs applied for were 112 and 16 were issued.

This diminishing tendency is according to Master C. Rotter, due to "changing needs and fashions." That form of relief is not resorted to as it was formerly. Many Rating appeals do not happen now.[1] The paper is taken for a few weeks at the beginning and end of each term before a Divisional Court of three judges.

In the past there was considerable delay in dealing with this paper. But arrears have now disappeared.

9. THE CIVIL PAPER. The Civil Paper deals with miscellaneous appelleto work, such as appeals from a few inferior Civil Courts, special referees, from the judge in Chambers on matters which are not practice and procedure, and from arbitrators.

It is heard by a Divisional Court of two judges. The work in this paper, after the County Court appeals taken by the Court of Appeal since August 1934, is inconsiderable. But the civil paper work has long been criticised as being the least satisfactory of all the works in the High

1. Minutes of Evidence J. iii, q 872.

Court. The abolition of all Divisional Courts will be discussed in the next Chapter.

10. THE SPECIAL PAPER. - The cases in this List are very few and may be dismissed from consideration. The brief analysis so far as I have made of the business in the King's Bench Division will, I think, make clear its complicated and manifold nature.

Criticisms have from time to time been levelled against this Division for its delay and uncertainty. Since 1869, there were no less than eight inquiries[1] touched upon these criticisms. The defects are particularly noticeable in the Ordinary Lists in which the bulk of the ordinary civil litigation are entered. Needless to say want of method in the lists of witness actions necessarily cause more inconvenience to litigants than it would cause in the case of work of other kinds, it equally inconveniences jurymen and witnesses. Even the success obtained in the New Procedure and Commercial Lists are more apparent than real, because it is attained at the expense of other works. The convenience of the few is purchased at grave inconvenience to the many.

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1. Report, op.cit. para. 10.

The defects of delay and uncertainty has been so far-reaching that, in the opinion of high authorities, litigants turn away from the Courts of Justice.

It is significant to note, they argue, the number of cases which at present find their way into the King's Bench Division as compared, for example, with forty years ago, as shown in the following table:

	Pending at beginning of Year.	K.B.D. Entered for trial during year.	Tried during year.	Pending at end of year.
1889-90	1186	2403	1194	1064
1890-91	1310	2574	1517	990
1910	-	2249	1428	473
1930	1189	2828	1372	1253
1933	1253	5136	1748	1052

The table shows that the number of causes entered for trial has not sensibly increased, and that the arrears have remained about the same. But consider the insurance changes during this period. In 1891, the population of England and Wales are 29002525. In 1931, it was 39947931. Life has become in this period infinitely more complex without becoming more peaceful. The citizen had then fewer stimuli to contest Revenue and commercial claims than he has today. The number

s from road incidents which form

nearly 50 per cent. of all business in the Division had then not its beginning. The great network of the Social Services of today was no more than a mere skeleton in 1892, and the demand of decision in the Division of such disputes over pensions, unemployment and health hardly existed. As the natural and probable consequences of all these features of the development of the last forty years, each involving in justicable issues, the increase of civil causes entered for trial in the King's Bench Division would seem to be almost certain. This has not been the case, as the above figures clearly demonstrate. What has happened to those issues which might have been expected to be decided by the Division? The smaller works are transferred to the County Courts, while some have found their way into the Chancery Division under a series of Statutes, passed during the first half of the nineteenth century, notably the Chancery Amendment Act, 1858.[1] But a mass of issues is dealt with in ways which reflect dissatisfaction with the existing machinery of law. Many submit to the loss and damage they suffer by torts or breaches of con-tract rather than embark on litigation.

1. 21 & 22 Vict. C.271 Lord Cairns' Act.

Others settle their claims for inadequate compensation by agreement rather than face the delay and expense of litigation. Most business men and all insurance companies agree to have their disputes decided by an arbitrator or even insist on an arbitration clause in agreements. The present state of the King's Bench Division is again ominous. The List at the commencement of the Present (Hilary) terms shows considerable decrease in the number of actions set down for hearing, the figure being 543, as against 1018 for the corresponding term last year.[1] The decrease amounting to a little over 53 per cent. is most surprising, the more so when the numbers in the Chancery Division and the Probate, Divorce and Admiralty Division are increased. In the opinion of Lord Peel's Commission,[2] the decrease in the King's Bench Division is mostly due to "the strengthening of the Bench by the two additional appointments made at the beginning of 1935. But it may be that this decline is to some extent

1. For the number of cases in different Lists, see Times, Feb 6 & 7, 1936.
2. Report op.cit. pa. 36.

evidence of the growing reluctance to resort to the courts. There must be something seriously wrong with existing arrangements for the determination of disputes by action at law, when those cases which ought to find their way into the King's Bench Division are not taken there but are otherwise dealt with. The chief problems of the Division apart from the general questions of procedure and the excessive cost of litigation which are common to the High Court and even County Courts and cannot be treated here, may be observed under (1) the organisation; (2) the personnel and (3) the jurisdiction.

First, as to organisation. The importance of reorganisation is clearly pointed out by Lord Peel's Commission. "It is generally agreed that the administration of justice in the King's Bench Division has reached a very high level," the report says, "but we have to admit that the organisation of justice, which it has been our duty to examine, falls below this high standard of attainment. Improved method and system is the most pressing need of the King's Bench Division."

Let me state at once that the reform of the King's Bench Division is not an isolated problem,

Its complete solution can only be attained after the problems of the Reform of the division in the High Court, the circuit system, the central criminal Court, the Court of Criminal Appeal and the status of the County Courts have been fully and satisfactorily solved. The reorganisation of the Divisions in the High Court will be treated in the next Chapter following, while the other problems have already been discussed in the other previous Chapters. What is immediately concerned here is to examine some problems as to the arrangement of business in the Division. In this connection the minimum requirement of arrangement that should be obtained at all costs may be said in two respects. Firstly, dates for trial should be either definitely fixed or assigned within specified limits. One of the complaints often heard against the Division is not fixing dates of trial and the consequent increase in the cost of litigation. It is a calamity to litigants and witnesses to find that a case which is in the list for hearing on a certain day is not reached in that day.[1] The

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1. Evidence op.cit. Supra. p.271; Vaughan, q.4246.

vital importance and imperative demand for fixed dates for trial are so obvious that it needs no elaboration.[1] Its desirability has been emphasized by a number of high authorities such as Lord Atkins, Lord Green, Mr. Justice Horridge, Mr. Justice Branson, Mr. O'Connor and many others.[2] Its success has been demonstrated by the Commercial List and the New Procedure List in the King's Bench Division, by the Admiralty cases in Probate Divisions and by cases dealt with before official referees and arbitration. It will conduce to the certainty of litigation and save large expense to the litigants. So long as the chief object of fixed dates can be realised, the division of lists is a secondary matter.[3] But the difficulty of fixing dates should be carefully considered. As put by the Lord Chief Justice, "no human being can predict in a Jury case whether the case is going to be long or short. It is not

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1. Report , op.cit paras. 140-141.
2. Evidence, op.cit. cf.qs. 404, 983, 1017, 1392, 1856 3380, pp. 59,83,271,293,309,318,386,390.
3. Report op.cit. paras 143-146.

at all unusual for counsel when they have got their briefs, to settle the case."[1]. In fixing a day, as said by Lord Maugham,[2]., it is exactly like trying to do a jig-saw puzzle, with x pieces the size of which is constantly changing. A particular judge starts to fix cases in his particular list but he has only the vaguest idea as to how long the next 20 cases are going to last. There may suddenly turn up one which may last three times as long as counsel on both sides have estimated it would last especially in jury trials.[3] this is often the case Foreign experience also confirms this view. Mr. E.B. Wright, former legal adviser to the Disposal Board in France & Belgium told his experience of the working of fixed dates in both countries. To quote his words,[4]. "The Board had rather over 60 cases altogether coming before all sorts of Courts in Paris, Brussels, Liege, Douay, etc. Though these cases had special days fixed for their hearing, they always resulted in lengthy adjournments

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1. ibid q. 4451
2. ibid q.4241
3. Evidence appended p.16.
4. Letter to the Editor The times. Feb. 6. 1936

as the cases never finished in the days fixed. None of these adjournments were for less than a fortnight, for the courts had other fixtures and so had Counsel. Such adjournments were not unsatisfactory; arguments were interrupted; and one had always a feeling that the Court only half remembered both the facts and the arguments." In this opinion the practice which is found difficult in its working in France & Belgium, would become still more difficult in this country. In France and Belgium where there are practically no witness actions, the Disposals Board found the procedure neither cheap nor speedy. In England, where so many cases are witness actions, the system would be still more expensive owing to the expense and difficulty of keeping witnesses during adjournments. The difficulty of fixing dates is, however, not insurmountable. The essential condition precedent to its successful working depends upon having adequate reserve power of judges. This is the opinion of such high authorities as Lord Atkins[1] and Lord Maugham.[2] After referring to the difficulty

1. Evidence op.cit. p. 235.
2. ibid. p.310 q.4291-2.
3. Letter to the Times, Feb.3.1936.

of fixing dates, Mr. Wright said,[1] "of course, if the public would not insist on the Judges sitting every day and they allowed ample time or else more Judges were appointed, there is no reason why this suggestion should not work." In this respect Lord Peel's Commission has pointed out a right and desirable end, but failed to provide with adequate means in its attainment. Their proposal of a fixed code of judges in London does not seem to me adequate. Upon their own hypothesis, more judges appear to be required in order to insure its success.

In the second place, the defects of no fixed judge in charge of one kind of work or one list are obvious enough. In the words of Judge Bankes who said before the Royal Commission on Delay in the King's Bench Division,[2] "What we want to avoid and what we must avoid if we are to do the work properly, I think, is to avoid chopping and changing about from one thing to another when we are in London. Commenting upon

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1. Letter to the Times, Feb 9, 1936.
2. Evidence taken before the Royal Commission on Delay in the King's Bench Division q.5774 cd. 7178, (1913)

this the Commission reported.[1] "The effect of this 'chopping and changing about' is far-reaching. Not only does it make it impossible for litigants and their advisers to form the least idea when their cases are likely to be reached, not only are the unfortunate jurymen summoned to attend a particular court on a particular day only to find a notice in the paper that they are not required at all, or are required in another court, but, as several of the Judges have impressed on us, it prevents the Judge having that sense of individual responsibility for the progress of the work which is so valuable an incentive to all honourable men who are earnestly desirous of doing their duty."

These words written in 1913 apply with equal, if not greater, force to the conditions today.

Consequently, the need of a particular judge in charge of a list can scarcely be over-emphasized. It has been recommended both by St. Aldwyn's Commission[2] and Lord Peel's Commission.

1. Report of the Royal Commission on Delay in the King's Bench Division para.42, p.32.cd.7177.(1913)
2. ibid, p.44.

In the words of Lord Peel's Commission,[1] "There was an imposing weight of evidence in favour of the adoption of the practice (which has been applied with marked success in the Chancery Division and, in the King's Bench, to the Commercial and New Procedure Lists) of appointing individual judges to take charge for a defined period (say two terms, or better still, a year) of each of the nisi prius lists. Lord Wright, Lord Justice (now Lord) Roche, Mr. Justice Horridge and Mr. Justice Branson all warmly commended this proposal. It must be to the public advantage if a judge is associated with a particular list and is not frequently transferred from one class of business to another." Judges should therefore be appointed to take charge of different lists for a period of one year.

3. It is suggested[2] that "running down" and collision cases would be better heard by one or more special courts before the same body of judges. If so arranged, the other lists of the Division would be relieved and a great saving of time and money would be effected. This class of work may increase and is easy to separate from the remaining work. It would be an advantage to have cases tried before

1. Report op.cit., para. 167 P.52
2. Ldn. Chamberof Commerce, Third Report, 7th Mar/33; also Tristra, Beresford, Evidence op.cit. p.60.

one or more courts especially familiar with this class of case and to whom the solicitor, counsel and experts were known, as is the case in the Admiralty and Commercial Courts, and in references before the Admiralty Registrar. Apart from the expedition and saving of time and money to litigants and witnesses, this would also lead to many more cases being settled, as there would gradually grow up a standard of compensation which these courts awarded which would materially assist defendants, or rather their insurance companies, in deciding what was the correct sum to pay into Court and would influence plaintiff's advisers in counselling acceptance of the money.

This suggestion is, on the other hand, criticised by the Lord Chief Justice. 'I see no magic," he said, "in running down cases to entitle them to a special list. If in running down cases, why not, for example, in cases of defamation. It would be a dreadful thing to pin a judge to the trial of running-down cases. I should think he would go mad in the course of a month. ... The monotony of running down cases is always with us."

Monotonous it might be for the Court to try only "running-down" cases but they do not appear so uninteresting as they were thought to be. If those cases once concentrated in one special list could be dealt with much cheaper and more expeditious and would have the effect of relieving other lists, a strong case from the viewpoint of litigants and efficiency of court arrangement appears to be made out.

THE PROBLEM OF PERSONNEL.

With regard to the problem of the judicial strength required in the King's Bench Division, opinions of high authorities divide. Let me briefly examine the reasons advanced ~~by high authorities~~ on both sides.

Reasons for more judges. (1) A substantial addition to the number of judges of the King's Bench Division is one of the most important remedies for the existing unsatisfactory state of things. With a sufficient number of judges it would be possible to have certain judges in charge of separate lists, and to ensure continuous sittings and fixed dates of the trial of cases.

It would also be possible for the judge who was going to try an action to deal at an early stage in the action with all interlocutory applications and restrain unnecessary steps.

2. Adequate reserves are necessary not only for the purpose of maintaining a fixed programme and uniform progress as set forth in the previous argument, but for meeting with other contingencies such as illness, death and so on.

3. The growth of the population during the 19th and 20th centuries has greatly outpaced the increase in the number of King's Bench judges. Compared with the number of judges and the population of today, with that in 1831, i.e. just over 100 years ago, the result appears to be with the qualifications to be made presently that 20 common law judges are required to exercise the functions in respect of 40 millions which were exercised by twelve judges for fourteen millions. The work has, on the one hand, been diminished by the decrease in the number of indictable offences tried by the common law courts, by the transfer of the appellate work to the Court of Appeal, and the smaller work to the county Courts

and by the attraction to the Chancery Division of work formerly discharged by the common law courts and by the improvements in the procedure. But, on the other hand, the functions must have been added by the establishment of the Court of Criminal Appeal in 1907, and of the Railway and Canal Commission in 1888, by a great mass of social legislation which requires interpretation in the courts, by the vast growth of the documentary evidence in most cases and by increase in the number of criminal offences due to the Criminal Law Amendment Acts and to Motor traffic. Though the quantities of those functions, either diminishing or increasing, can hardly be accurately gauged and there are so many uncertain factors in the comparison that renders the equation between population and judicial strength difficult, if not impossible, the number of judges of the Division which now discharges the jurisdiction of the old three courts of Common Law at a figure only slightly in excess of the number in office before the Judicature Act is not only startling but responsible for the familiar and recurrent complaints against delay and arrears in this Division.

4. No other ~~civilised~~ modern country in the World has so meagre a supply of High Court judges as in England. If compared with the number of judges in the major States on the Continent, the English High Court judges are a mere handful. In France the Judges dealing with such matters as the English High Court judges, do, number between 1,000 and 2,000 and in Germany the number is even larger. If England and Wales are compared with Scotland where the needs for judicial strength are nearer to those of England, the number of judges of the Supreme Court is much less in proportion to the population than in Scotland. The Court of Session in Scotland consists of 13 judges with a population in 1931 of 4842354. England and Wales has only 35 judges with a population of 39947931. Thus England and Wales with a population of approximately over 8 times that of Scotland has less than 3 times as many judges. A comparison of population is only a rough method of ascertaining the relative requirements of judicial strength of the two countries, but still it is a rough test. If this criterion were to be adopted, the number of Judges in England and Wales should be considerably increased.

The disparity of the judicial strength between the two countries makes the result at once obvious. In Scotland there are sufficient judges to enable the cases to be tried promptly and conveniently. A fixed date is set aside by the Principal Clerk of Session for every ~~proof~~ cause or jury trial, and he generally consults the solicitors of the parties before fixing it. A fixed date is then peremptory there and adhered to.

Reasons against the increase of judges.

I. One of the most important arguments against the increase of judicial strength is put forward by the Royal Commission on Delay in the King's Bench Division. "No one will contend , the report said," that more judges should be appointed than are really necessary. It must be remembered that the field of selection is limited, the more judges appointed, the smaller it becomes, and therefore the less certainty of securing in those appointed the high level of ability, legal attainments, and mental and physical vigor, which are now necessary to maintain the prestige of the English Bench. The smaller the number of judges the higher

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I. Report , op.cit., para.63, p.30, cd. 7177.

will be the standard of efficiency and the greater the prize for those selected".

This opinion is endorsed by Lord Hanworth's Committee on the Business of Courts and Lord Peel's Commission on the Despatch of Business at Common Law. It is put in another way by Lord Sankey when moving the Resolution for the appointment of two additional judges in the House of Lords as follows:

"My reluctance proceeds on ~~wholly~~ wholly on different grounds. In the first place the duty of organising a staff of any kind increases with the size of the staff. ---- We must recognise the difficulties and necessities which must press upon any one who is responsible for the working of 19 judges. Beyond this difficulty of organisation organisation, lies one principle. The maintenance of the prestige of the judicial Bench is an essential feature of our jurisprudence. There is no parallel in the civilised world to the authority which a judge of the High Court possesses when sitting in his own court.---- But I cannot conceal from myself or from you, my Lords, my belief that the prestige of the

judges has been largely due to the smaller number of the Bench itself and to the very high standard which those who were responsible for advising on the appointment of judges have therefore been able to maintain upon the occurrence of each vacancy. Any increase of number must so far as it goes tend somewhat to lower the quality. -- There cannot be expected to be found at the Bar at any given moment an unlimited supply of the men of the right age, of the right experience, and possessing the other qualities which I have mentioned enumerated. The position is not rendered easier by the financial circumstances of the present time."

As warned by Lord Peel's Commission, "these are weighty objections and they must receive the frequent consideration in any examination of proposals for raising the judicial strength." Any one must feel bold when differing from such high authorities, but two points may be observed here. First, the difficulties of organisation as emphasised by Lord Sankey would be removed if the manager of lists as suggested by Lord Peel's Commission, were appointed. Second, I agree that the prestige of the judicial bench has been mainly due to the small number of the Bench itself. I agree that the more

judges appointed the smaller the field of selection becomes and the less certainty of securing the highest level of judicial appointment. I further agree that the fewer the judges the greater the prize for those selected, and the difficulty of making suitable judicial appointment. I cannot, however, agree that these are adequate reasons for refusing to increase the judicial strength as required, when it is manifestly insufficient, when there is delay and uncertainty owing to the lack of judges, when the arrangement of judicial business is strained due to the insufficient supply of judicial strength. I cannot agree that with a view to keeping as few number of judges as possible in order to maintain their prestige, it should involve the undesirable effect of ~~satisfying~~ sacrificing the efficient working of the judicial machinery or overlooking the ~~benefits~~ interests of the litigants and other persons concerned in the administration of justice. The prestige of the judiciary is no more than a means to the end of securing justice to the citizen. If justice is denied in effect because ~~[illegible]~~

it is delayed or uncertain or too expensive due to the insufficient judicial strength, the end would then be sacrificed to the means.

2. The argument of the expenditure involved in increasing the judicial strength has not much force. It is one of the fundamental concerns of a civilised state to provide a sufficient number of judges to discharge the work efficiently, and the fact that to make it reasonably efficient will cost a moderate sum does not appear to be a reasonable ground for saying that the necessary steps might not be taken to make it efficient. To quote the Report of Lord Peel's Commission:

"In our view, the expenditure involved in the appointment of an additional judge should not be a decisive factor."[1] Though the statement that a judge "pays for himself" does not borne out by facts,[2] law courts should not be expected to make profits for the relief of taxation and pay their way.

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1. Report op.cit. supra. pa. 289.

3. Another argument that existing accommodation is so limited as to make further appointments undesirable is still more superfluous than the second. Were accommodation insufficient, it should be supplied accordingly.

On the whole, the judicial strength should, as pointed out by Lord Peel's Commission, be varied from time to time to meet the changing needs of the administration of justice.[1] It follows that any given number of judges cannot be accepted as the right figure in all circumstances.

The crux of the matter is the circuit system. Were the Circuit System abolished, as has been suggested elsewhere, the judicial strength would be sufficient to deal with the present state of business. If the circuit system is not abolished or fundamentally reformed, as the purposes of Lord Peel's Commission undoubtedly are, the need of increasing the judicial strength is imperative and is even inevitable. To use the words of Lord Hanworth's Committee "if the circuit system is to be maintained as at present and no important and effective change made, the addition to the judicial strength required

1. Ibid. pa. 285.
2 Chapter IX

to overtake the present arrears and to prevent the accumulation once more must call for the appointment of not one but several additional judges."[1.] Commenting upon the Report of Lord Peel's Commission in his Memorandum, Mr. E.C. Davies, K.C., M.P., one member of the Commission, wrote:[2.] " My colleagues seem agreed that some addition to the King's Bench will probably prove necessary in the near future. They feel, however, that the reorganisation envisaged in their Report should be effected before one addition is made. I cannot subscribe to this view. I believe that the King's Bench should be enlarged before its reform is attempted. Indeed, it is my considered opinion that an increase in the number of King's Bench judges is itself a reform at least as essential as any we have urged. I think also that the reforms we have suggested would be found to be unworkable by the existing Bench and that any attempted extension of the fixed date principle in such circumstances would result in chaos and incalculable hardship to litigants as a whole.

1. The Second Interim Report, Cmd. 4471, pa. 49, p.33.
2. Report op.cit. Memorandum pa.70, p.128.

In the second place, were the proposals of fixed dates of trial and judges assigned to take charge of particular lists carried into effect, see post who is to arrange or manage the general composition of the lists? Not the judge, because his time is too valuable to be concerned with administrative details. Not those persons who are working the present arrangements because the Lord Chief Justice can exercise no more than a general surveillance, the Master of the Crown Office has too extensive duties to attend to his part-time surveillance of the ordinary lists and the Chief Associates,[1] anomalous quasi-responsibility and subordinate status cannot be expected to shoulder this impossible task. The arrangement and management of judicial time is a difficult and complicated task and will become more so if the fixing of dates for trial is to be carried out. Much loss of time and money to litigants, witnesses, barristers and solicitors is resulted if the court business does not work smoothly and punctually.[2] Consequently it is most desirable to entrust this task to a well-

1. Evidence, op.cit. supra. Maugham q. 4241.
2. London Chamber of Commerce: 1st Report pa.10 (h), (3); second Report, 1931, p.6.

paid whole-time officer with the duty to secure the economical and efficient use of judge - power in the interest of litigants, witnesses, practitioners and all persons concerned. The experience in the Court of Session in Scotland is illuminating on this point. There is an official called the Clerk of the Roll whose business it is to find a judge each day that a judge is required and if he cannot find a judge among the ordinary judges who is taking the work of first instance, he calls on one of the judges who is in the Inner House, or Court of Appeal and gets him to take the case.

The proposal has been received with mixed reception. In a leading article[1.] the Times is in its favour, while the Law Journal[2.] expresses its diffidence. It seems to me, however, a strong case is made out for the appointment of such an official.

Apart from these major problems of personnel, an official shorthand writer should be appointed; more of this in the next chapter.

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1. The Times, Jan.31, 1936; Feb 2, 1936.
2. 81 Law Journal, Feb 15, 1936 p.106, Feb 22.1936, p.124.

The proposal with regard to the transfer of the revenue cases to the Chancery Division and the amalgamation of the Commercial and Admiralty courts will be fully discussed when we come to the Probate, Divorce and Admiralty Division.

CHAPTER IV.

THE HIGH COURT OF JUSTICE (CONTINUED)

II. THE CHANCERY DIVISION.

Of the Chancery Division, there are 6 judges[1] besides its president the Lord Chancellor. The judges are appointed, remunerated and have the same status as the Judges of the King's Bench. The Lord Chancellor is, in effect, appointed by the Prime Minister usually,[2] from among the highest in Bar rank of his political followers, namely, the Law Officers (or the Ex-Law Officers) of his party's present or last government. He is nominally the president and a judge of, but in fact has no real work in, the Division.[3]

Apart from the judges, there are 8 masters and a staff of clerks, who are known collectively as the Chancery Chambers. There are 6 registrars and their clerks, who are known collectively as Chancery

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1. Supreme Court of Judicature (Cons) Act, 1925. (15 & 16 Geo.V.c.49) s.4 (1) (i) (hereinafter cited as Act of 1925.
2. Lord Sankey's case illustrates that a Lord Chancellor may be appointed from the Supreme Court judges.
3. Minutes of evidence taken before the Royal Commission on the Despatch of Business at Common Law, Q.2736.

Registrars. All of them are appointed by the Lord Chancellor. The masters must be solicitors of 10 years' practice, or a taxing master or official solicitor to the Supreme Court, if, in either case, he has practiced as a solicitor for ten years.[1] The registrars must be clerks to registrars. They are appointed by the Lord Chancellor subject to the concurrence of the Treasury.[2] The clerk to registrar must be a solicitor of two years' standing.[3]

The Masters have no independent jurisdiction as have those of the King's Bench Division. All their authority is derived from the judge to whom they are assigned. Their duties are to make investigations and take accounts, etc., under the direction of the judge.[4]

The duties of the Registrars are to attend the judges of the Chancery Division and the Court of Appeal upon the hearing of appeals from the Chancery Division to take notes of the order and

1. Act of 1925, s.126 Sched.IV.
2. Ibid. s.106 (3)
3. Act of 1925 s.126 (2)
4. R.S.C. Ord. 55 RR.15-18.

judgments given and to draw up and settle and pass them,[1] and to keep distinct lists.[2] The jurisdiction of this Division is determined partly by the fact that cases of a certain kind used to go to the Chancery[3] and partly by the existence in the Chancery Division of a machinery for taking accounts. It also deals with bankruptcy business[4] and the winding-up of companies.[5] A great deal of its business is not contentious litigation. It has become in part a large property office in charge of a vast amount of wealth and the various complicated trusts to which that wealth is subject. Thus, for instance, actions for the taking of partnership and other accounts, for the sale and distribution of the proceeds of property subject to any charge, for the partition of estates, for the execution of trusts are assigned to this Division.

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1. ibid. Order 62 R.r. I, I4.
2. ibid, R. I7.
3. Act of I925. s.56 (I) (a) To the Court of Chancery exclusive jurisdiction was given by a large number of Acts. see Yearly Practice and Daniell's Chancery Practice for the exclusive jurisdiction of the Division.
4. Bankruptcy Act, I9I4 (4 & 5 Geo.V.c59) s. 97. Bankruptcy business was dealt with in the King's Bench Division until I92I, when it was transferred to the Chancery Division. (S.R.&O. I92I No.I74I)
5. I9 & 20 Geo V. c. 23 s.I64.
6. Act of I925, s.56 (I)

A divisional court of this Division deals with appeals, from county courts, in a winding-up, under the Companies Act 1929,[1] from convictions for share-pushing[2] from ~~county courts in~~ bankruptcy matters,[3] and from the Commissioners under the Industrial Assurance Act 1923.[4]

In the cases which are specially entrusted to this Division, there is no trial by jury without the leave of the judge.

Broadly speaking, the working of the Division is this.[5] There are two sets of Chambers each set being attached to three judges known as Linked judges. The work consists of witness and non-witness actions. The Witness list is again divided into Long actions and short actions (i.e. those which the Plaintiff's Counsel certify they cannot reasonably be expected to take more than 10 hours). In each group of three judges, each judge takes, in rotation, sittings by sittings, non-witness, long witness and short witness' work. Until December,

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1. 19 & 20 Geo.5.c.23; also R.S.C. Ord 58 R 9a
2. Ibid. s.356 (8)
3. Bankruptcy Act, 1814 (4 & 5 Geo.5.c.59) s.108 (2) (R.S.C O 58, s.9A; s.R.& O.1921 No.174.
4. 13 & 14 Geo.5.c.8 ss.7 (2) 17 (3) 18 (1) 30 (1), 45 (2); R.S.C. ord. 55 B.W. 49-58.
5. Minutes of Evidence, op. cit. Clauson, pp. 184-5. q. 2785

1932, the two groups of judges had separate lists, but since then the witness lists of the two groups have been fused and there has been one long witness list and one short witness list, each taken by two judges, one from each group. By this means every suitor in the division ranks, so to speak, equally in his chance of getting his action on, irrespective of the group to which his action is assigned. In the result the work of the Division is enabled to proceed steadily without interruption and there are no arrears.[1.]

Thus in this Division, a definite number of courts with separate lists always sitting has worked admirably. The successful working of this arrangement was attested by numerous high authorities as Sir R. Finlay, Lord Haldane[2.] Sir H.H. Cozens-Hardy,[3.] and Lord Justice S.Eddy[4.] before St. Aldwyn's Commission Lord Wright[5.] and others before Lord Peel's Commission.

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1. Minutes of Evidence, op.cit. supra.q.1127.
2. Minutes of Evidence taken before the Royal Com. on Delay in the Kings B.Divn. Q. 4655.
3. ibid. Q.492
4. ibid. Q. 1313
5. ~~ibid. Wright. q.1127.~~ Minutes of Evidence taken before the Royal Commission on Despatch of Business at Common Law. Wright. q. 1127.

~~This system of arranging their work is in the opinion of Lord Wright, most admirable.~~ There are two factors contributing to the facility and success of this system. First, the Division consists of a small number of judges and has a comparatively restricted rangle of work. Secondly, the Chancery Judges have been relieved of their former duties to go circuit. These features present a striking contrast to the King's Bench Division with its large number of judges, an extraordinary complex set of works and the onerous duties on circuit.

The annual average number of the total proceedings commenced in the Chancery Division ~~and~~ also compared with that in other courts during the period from 191[illegible] to 1934 may be shown by the following figures:-

COURTS.	Annual Average 1910-14	Annual Average 1915-1929	Annual Average 1920-24	Annual Average 1925-29	Annual Average 1930-34.
Chancery Divn. ..	7623	6553	8308	6900	6590
High Ct.of Justice..	72,149	53182	115861	1052658	107224
Cts. of 1st instance ..1355,709		735166	941496	1217910	1446890

Thus the annual average number of proceedings in the Chancery division constitutes about from 6 to 10 per cent. of that in the High Court and from about 5 - 9 per thousand in all courts of first instance.

The general nature of the works of this division from 1910 to 1934 may be viewed from following table:-

COURTS.	Annual Average 1910-14	Annual Average 1915-19	Annual Average 1920-24	Annual Average 1925-29	Annual Average 1930-34.
Chancery Division...	5590	5493	5947	4922	4409
Companies Court	500	309	705	582	911
Bankruptcy Court	1533	751	1656	1396	1270
TOTAL	7623	6553	8308	6900	6590

Appeals from inferior courts and other courts to this Division are not many. In 1932, there were 25 appeals, in 1933, 35 and in 1934, 38. They were either appeals from bankruptcy matters in County Courts or Registrar of Trade Marks and Controller of Patents. The appeal from the Comptroller of Patents which was formerly dealt with by the Law Officer has recently been transferred to, and

substantially increased the work of the Chancery Division.

The above figures do not completely present the work of the Division for much of it is done by Summonses and other proceedings in Chambers. It may be mentioned that the originating summons procedure, which first introduced into the Rules of the Supreme Court in the revision of 1883,[1] has entirely revolutionised the Chancery work.[2] Those summonses involve the determination of a great many points of vital importance to a large number of litigants. The number in 1932 was 1764; in 1933, 1523 and in 1934, 1394.

It is again worth pointing out that the average action on the Chancery side involves not only the hearing of issues, with or without witnesses, by the judge sitting in open court, but a considerable amount of chamber work in the course of which all preliminary or interlocutory applications are disposed of and decrees worked out after they are handed down. It is

1. R.S.C. Ord.LV. Rules 3 - 11.
2. cf. S.Rosenbaum: Rule Making authority in the English Supreme Court p.100 et.seq; Stephen Commentaries on the Laws of England, revised by E. Jenks (1925) Vol.III.pp.595 et seq.

in Chambers, rather than in Court, that the distinctive machinery of the Chancery Division is seen in operation, performing the equitable administration and distribution of assests.

Having briefly examined the working of the Chancery Division, let me now observe some of its problems.

First of all, it has been said from time to time that one of the disadvantages of the Division, is without a real working head, as the Lord Chancellor is not concerned with the every-day work of the Division. The practice has thus grown up that the senior judge is in a sense primus inter pares. He has more responsibility than others. It has been suggested that if there were placed in the Division a head in name and in fact, things would be better than at present. This proposal is however deprecated by Mr. Justice C. Clauson, in these words:[1] "I do not think there would be any very great advantage in it. We should, it is quite true, have someone who would be under more responsibility than the others, but so long as

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1. Minutes of Evidence, op.cit. Q.2756.

we can all work together as we do now, I do not think any great purpose would be secured."[1]

It is, in the second place, suggested that it would be conducive to the despatch of business at Common Law if the following matters were dealt with exclusively by the Chancery Division:-

(1) Petitions for revocation of a patent under Section 25 of the Patents and Designs Acts, 1907 to 1932.

(2) Actions for infringement and all other causes and matters relating to Patents and designs not within Sec.92 (2) of the Patent Acts, 1927 to 1932.

(3) Actions for infringement of trade marks or copyrights.

(4) Appeals to the Court from decisions of the Registrar of Trade Marks or oppositions or applications for rectification or registrations of assignments, etc.

(5) Applications relating to custody of infants other than applications made in proceedings in the Probate Division.[2]

It is, in the third place, suggested that the revenue work of the King's Bench should be assigned to the Chancery Division and that the probate work of the Probate, Divorce and Admiralty

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1. Minutes of Evidence, op.cit. p.347.
2. Supreme Ct. of Judicature (Cons.)Act, 1925.s.193.

Division should also be so assigned.

The latter will be discussed at a later stage. As to the former, the question was much mooted before St. Aldwyn's Commission. Sir H. H. Cozens-Hardy, the then Master of Rolls, suggested to the Commission[1] that Revenue business of the King's Bench might be transferred to the Chancery Division, provided that, like other business, "it went in rotation to the Judges of the Division."[2] He considered a great part of the Revenue cases were analogous to the business of the Chancery Division than to the business of the King's Bench Division, especially cases connected with estate duty, legacy, duty and the Finance Acts, to which Lord Alverston[3] and Mr. Justice I.Joyce agreed.

The Commission was in favour of this suggestion. "We think," they reported[4] "that

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1. Minutes of Evidence taken before the Royal Commission on Delay in the King's Bench Divn, q.473 cd. 7178. (1913)
2. Ibid. q.476,479.
3. " q.197
4. The 2nd and Final Report of the Royal Commission on Delay in the King's Bench Divn. para 43, p.24. cd. 7177. (1913)

Revenue cases, of the kind named by the Master of the Rolls, would be more appropriately dealt with in the Chancery than in the King's Bench and could be dealt with by the existing Chancery judges in addition to their present work; and we therefore recommend that all proceedings referring to the assessment and recovery of duties (commonly known as Death duties) should be henceforth instituted in the Chancery division of the High Court.

In spite of this suggestion in 1913, revenue cases remain to be dealt with in the King's Bench Division. The transfer was also recommended by Lord Hanworth's Committee and much discussed lately before Lord Peel's Commission.

In the opinion of Lord Merriman, if it is desired that more work should be transferred to the Chancery Division, the obvious solution is to transfer the Revenue List from the King's Bench to the Chancery Division.[1] He argued[2] "much of the work is, in fact, Chancery work, involving the regular retainer of a Chancery junior counsel.

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1. Minutes of Evidence, op.cit. Merriman p.55. Wright 1161; Bayford p.5-7, 2918-9; Cohen, Appendix p.36.
2. ibid. p.155.

Practically none of it is Common Law work in the ordinary sence of the term. The Law Officers and the Revenue specialists at the Bar would be relieved of the inconvenience which arises when the Revenue Judge is on the circuit; and the King's Bench Division would gain so much judicial time." This view is shared by the Solicitors' Managing Clerks and others. The Association further maintained that Order L.V.R. 9.c. provides for application under Sec.14 (2) of the Finance Act, 1894, to be made by originating summons to the Chancery Division and there does not appear to be any reason why cases of death duties and stamp duties should not be similarly dealt with. If this is accepted the cases of taxes might also be dealt with by the same tribunal and in the same manner. But, on the other hand, the proposal is opposed for the following reasons:

1. The nature of the Revenue cases appear on the whole appropriate to be dealt with by a common law judge. As has been obser-ved, income tax cases constitute from 90 to 95 per cent. of all revenue cases.[1]

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1. cf. Revenue List in the King's B.Divn. Ch.III. The High Court of Justice (1)

In the opinion of Lord Finlay, those income tax cases depend upon facts and upon knowledge of business in a general way at ~~all~~ events. Consequently that is a matter with which a King's Bench judge is more familiar than a Chancery judge may be. The reverse may, however, be true with regard to the death duties. He further argued, "there are advantages probably in having one Revenue judge and one Revenue Paper. If so, they should remain in the King's Bench."

This argument is fortified by an analysis of the statistics of all taxation cases heard over the five years to the end of 1934. In this interval some 288 taxation cases came to a hearing before the Revenue Judge. Of these only 22 relate to the death duties and the stamp duty; and not more than 5 or 6 of the income tax, super-tax or surtax cases can be fairly said to turn on Chancery points. Of the balance of 260 cases a considerable number were decided on the ground that they raised no question of law at all (the challenged decisions being decisions of fact supported by evidence), and as to the rest, they raise questions of common or commercial law or pure income-tax law, or a mixture of such questions. The position, therefore,

is that as regards 90 per cent. of the Revenue cases there can be no valid argument for disturbing the present order of things.

Nor is this all. Those points of law arising in revenue cases are more often than not appropriate to be decided by the Common Law Judge. In the opinion of Mr. A.M.Latter, K.C., the ultimate question involved in income tax appeal is no doubt in general the construction of some section in the Income Tax Acts for which the judges of either King's Bench or Chancery division will be taken to be equally fitted; but the proper application of the section to the facts often involves the consideration of some general problems of law besides the construction of the particular section. Very frequently the point will be one depending on the law of contracts with reference to commercial transactions; or it may be as to the proper deductions to be made in arriving at the profits of a commercial concern. In other recent cases the real point in debate has turned on questions arising out of the law of landlord and tenants of the circumstances necessary to constitute occupation or of the rights of surface

mineral owners as to the letting down of the surface. None of these questions appear to be more suitable to the Chancery Division than to the King's Bench Division. "The variety and the nature of the points of law," he argued[1] "which come under discussion in the hearing of income tax appeals appears to me to afford a reason for retaining them in the King's Bench Division so that it should not come to pass that the work of that division as confined to cases in which questions of law seldom arise at the present time."

2. The present system, it is said, has worked admirably so that it is unnecessary to disturb the arrangement. This is substantially the view of Lord Finlay,[2] Lord Hewart,[3] the Board of Inland Revenue[4] and Lord Peel's Commission.[5] Moreover, the Revenue Paper has been heard for many years by a King's Bench judge chosen especially

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1. Minutes of Evidence op.cit. app.15, p.18.
2. ibid. Q. 3989
3. " 4461
4. " App. 35.
5. Report op.cit. pa. 184.

for the purpose by reason of his knowledge of the subject. As has been observed, an analysis of the divisions of 260 taxation cases, i.e. 90 per cent. of all in the last five years does not show solid argument for any transfer of this jurisdiction. It becomes interesting to see what was the fate of the decisions of the Revenue judge in the remaining 10 per cent. of cases in which he may be assumed to have been least at home, viz., the death duty and stamp duty cases.[1.] During the 5 years the death duty and stamp duty cases averaged 4 a year. In no case was the Revenue judge reversed or criticised in the Court of Appeal except in two cases in which he, but not the Court of Appeal, was bound by Decisions of other courts. The Revenue judge has thus shown a fine vision in this esoteric domain.

3. Historically, the Revenue work has for centuries been dealt with by one of the Courts of Common Law. The King's Bench Division has ever since done this work, as the successor of the Court of Exchequer. As urged by ~~Lord~~ Mr. Justice Finlay, though modern convenience should of course be the main consideration, it would

1. Minutes of Evidence, op.cit. cf.statement by Raymond W. Needham K.C. App. 16.p.19.

be well not to entirely ignore history.[1.]

4. At present revenue cases are now stated for the opinion of the King's Bench Division by General Commissioners and the Special Commissioners. Both Commissioners go to all parts of the provinces and hear cases there as well as in London. Consequently, juniors who practice on circuit and at quarter sessions are briefed in income tax appeals arising in the localities. If such appeals would not be heard by a King's Bench judge, solicitors would probably cease to instruct common law juniors on the circuit with the result that practically all the work in and familiarity with this class of case would become concentrated in London. As a consequence of this, it is argued,[1.] not only premature specialisation in the subject by practitioners would thereby be encouraged but it would lessen the public interest of having throughout the country as large a number as possible of members of the legal profession qualified to advise on this as on other subjects.

1. ibid. Appendix. A.M.Latter, K.C. p.17.

5. Moreover, it is to be recalled that under section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, death duty cases between the Crown and the subject can be brought before the Chancery Division, and this procedure has been occasionally followed.[1].

It is a debatable question whether the nature of the Revenue work is more suitable to the one or other of the Divisions. It varies with the points of issue involved in each case and with the judge in either Division. On this point general conclusion is difficult to draw. Consequently opinions divide and are even contradictory.[2]. In truth types of cases in the Revenue List vary with their nature and separate treatment would be more satisfactorily than general or wholesale transfer. But one other point deserves special notice.

As things now stand in England in every income tax appeal the tax payer is exposed to four hearings, the appeal before the Commissioners, the King's Bench Division, the Court of Appeal and the House of Lords, and in some cases, namely sur-tax on companies to five hearings, because in

1. Scott -v- Commissioners of Inland Revenue 1935. 1.ch.246.
2. Minutes of Evidence. Appen. 20.p.27.

such cases there is in addition the right to either party to claim the rehearing before the Board of Referees of an appeal which has been heard before the Special Commissioners. The practice of so many appeals in such cases is by no means desirable. The suggestions of transfer those appeals to the Court of Appeal merits careful consideration.[1].

Some even go so far as to argue that income tax and surtax appeals and any other revenue appeal that is brought by way of case stated should lie to the Court of Appeal direct from the decision or opinion of the Commissioners concerned except proceedings where there is a possibility of the judges having to hear oral evidence.[2].

In Scotland, income-tax and sur-tax appeals go direct from the Commissioners stating the case to the Court of Session. In this country appeals in Workmen's Compensation cases go direct from the county court to the Court of Appeal. There is little reason in such appeals for the interposition of a judge either of the King's Bench Division or of the Chancery Division.

1. cf. Minutes of Evidence, op.cit. appendix No 15.f.18.
2. ibid. Appendix. 20. pp.27-29.

It may be objected that the work of the Court of Appeal as at present constituted would be increased by the transfer of all Revenue appeals now heard in the King's Bench Division. But the answer is that the Court of Appeal will be reformed and enlarged as suggested elsewhere.[1] It may be further objected that the Lord Justices would not have the advantage of considering the judgment in the case in the Court below. This may be true but it is counter-balanced and even over-balanced by other considerations. From the point of the interests of the people litigating with the Revenue authorities, it would seem that there would be a very considerable saving of expense if appeals lay direct to the Court of Appeal. This would also be true as to costs incurred in the King's Bench Division and paid out of public funds where litigation by the Commissioners of Inland Revenue proves unsuccessful. At present there is serious duplication of expense of appeals which proves to be a very serious matter to the taxpayer and has on occasions prevented a decision by Commissioners being fully examined.

1. Chapter V. The Court of Appeal.

Finally the revision and simplification of procedure in the Chancery Division as well as in other Divisions of the High Court is a subject which can scarcely be over-emphasised. A passing remark may be made here. Some of the matters for instance which have now to go before the judge in Chancery might possibly be disposed of by the master before whom they must come in any case. At present there exist two procedures whereby applications can be made to the court to obtain moneys that have been lodged there for production in connection with wills, trusts, marriage settlements, etc., One is the procedure by summons, usually simple and inexpensive because it is dealt with by a Master "in Chambers". The other is the procedure by a petition, which is very expensive because it must be dealt with in court, including the supplying of numerous copies of all documents and the payments of fees to counsel. A precedent which established in 1886[1]. and refused to allow the use of the simpler procedure where the applicant was for more than £1,000 has resulted ever since in making such applications cumbrous and expensive, though the rule laid down in 1886 was somewhat restricted in 1888.[2]

footnotes from previous page.

1. In Re.Rhodes (1886) 31 Ch.D.499.

2. Bates -v- Moore (1888) 38 Ch.D.381.

III. THE PROBATE, DIVORCE & ADMIRALTY DIVISION

The smallest of the Divisions in the High Court is the Probate, Divorce & Admiralty Division which has only three judges, one of whom entitled president presides over it.[1] The President is in effect, appointed by the Prime Minister. He must be a barrister of not less than 15 years' standing or a Judge of the Court of Appeal.[2] In addition to his judicial functions, he has important and onerous administrative duties, including control of the Principal Probate Registry and of the provincial High Court registrar in so far as the matrimonial jurisdiction is concerned.[3]

The other two judges are appointed, paid and have the same status as other High Court judges.

Apart from the judges, there are in the Principal Probate Registry 4 registrars, an assistant registrar and a number of clerks.[4] The Registrar is appointed by the President.[5] He must be a practicising barrister or solicitor of 10 years'

1. Supreme Ct. of Judicature (Cons) Act 1925,s.4 (1)-(iii)
2. ibid.
3. R.S.C.Ord.30 V.A.
4. Minutes of Evidence, op.cit. Norbury p.151
5. Act of 1925 s.114.

standing, or to have served 10 years as a clerk in the principal Probate Registry. The Registrars do mixed Probate and Divorce work.[1] They have not only administrative but semi-judicial functions.[2]

There are now 19 District Probate Registries. The district Probate Registrar must be a practicing barrister or solicitor of 5 years' standing or a probate registrar, or to have served 10 years as a clerk in the principal or a district probate registry.[3]

In the Divorce Registry there is also a number of Clerks.[4]

The Admiralty Registry has a Registrar, an assistant registrar or marshal. Both must be a barrister or solicitor of 10 years' standing.[5]

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1. Minutes of Evidence. Norbury p.151. R.S.C.Ord.54 R.12.
2. R.S.C. Ord. 54 R. 12
3. Act of 1925 s.126 (3); Administration of Justices Act, 1928 (18 & 19 Geo.V.c.26.) s.1.(1)
4. Minutes of Evidence, Norbury p.151.
5. Act of 1925 s.126.(4)

As its name indicates, the jurisdiction of this Division consists of Probate, Divorce and Admiralty matters,[1] and of all causes and matters either assigned to the Division by statute[2] or within the jurisdiction of the High Court as a prize court. On the Admiralty side it has a jurisdiction over foreign vessels and those registered in the United Kingdom. Admiralty jurisdiction involves dealing with and applying technical rules. This Division alone among the Divisions of the High Court has a standing system for obtaining the assistance of assessors[3] in the Elder Brethren of the Trinity House who are summoned as of course to assist the judge in collision and salvage actions.

The annual average number of proceedings in this Division in the place of the High Court

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1. As to probate jurisdiction, see Supreme Court of Judicature (Consolidation) Act 1925, s.20; Administration of Justice Act, 1932 (22 & 23 Geo.5.c.55) s.2; Matrimonial causes and Legitimacy Declarations Act of 1925, s.21; Admiralty s.22.
2. Supreme Ct. of Judicature (Cons) Act, 1925, s.56 (3)
3. 31 32 Vict. c.71 s.26 Order XXXVI r.4.

and all courts of first instance may be shown by the following table:-

COURTS.	Annual Average 1910-14	Annual Average 1915-19	Annual Average 1920-24	Annual Average 1925-29	Annual Average 1930-34.
Probate, Divorce Admiralty Division..	1905	4091	4622	4657	5262
High Court of Justice.	72149	53182	115861	105,238	107224
Courts of 1st instance...	1357156	736237	942781	1218983	1447968

Thus the annual average number of proceedings in the Division constitutes the following percentage in all proceedings in the High Court

1910-14	1915-19	1920-24	1925-29	1930-34.
2.6	7.6	3.9	4.4.	4.9

The proportion of the proceedings in the Division among all courts of first instance may be explained in figures as follows:

1910-14	1915-19	1920-24	1925-29	1930-34
.0014	.0055	.0049	.003	.0037

The work of this division may be viewed from the following figures:-

	Annual Average 1910-14	Annual Average 1915-19	Annual Average 1920-24	Annual Average 1925-29	Annual Average. 1930-34.
Probate ..	186	168	156	169	166
Divorce ..	1151	2589	3602	3965	4754
Admiralty.	568	1334	864	523	342
TOTAL	1905	4091	4622	4657	5262

The heaviest part of the work is undoubtedly in divorce causes.

Appeals from inferior courts to this Division are not considerable. In 1933, there were 69 appeals for hearing, including 61 cases against separation or maintenance orders of the Courts of Summary Jurisdiction, 8 cases of Admiralty from County Courts. In 1934, there were 71 appeals for hearing including 68 against Separation or Maintenance Orders and 3 Admiralty appeals. By sec 106 of the County Courts Act, 1934 County Court appeals in admiralty cases will go direct to the Court of Appeal.

The above can scarcely be said as adequately presenting the work of the Division because much of it is done by summonses and by reference to the Registrars and Merchants. In 1934, there were 279

motions and summonses heard before a judge, while those heard before the Registrars reached the total of 421. Historically, the High Court of Admiralty was a court of great antiquity dating from the middle of the 14th century;[1] the Court of Probate was established by the Court of Probate Act, 1857;[2] and the Court for Divorce and Matrimonial Causes[3] was given birth in 1859.

These three separate courts were "united and consolidated together"[4] and constituted a separate Division[5] in the High Court in 1873. Thus three incompatibles have been married together in order to "facilitate the transition from the old system to the new." The anomaly of the Admiralty, Probate and Divorce jurisdictions being lumped together in the Division is explained by the fact that up to the

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1. Halesworth, History of English Law, vol.2. pp.526-573. Roscoe, Admiralty Practice 193, p.3. Carter: A History of the English Courts, p.102,109 (1927)
2. 20 & 21, Vict. cap.77. This Act came into force on the 11th Jan. 1858.
3. The Matrimonial Causes Act, 1857 (20 & 21 Vict. cap. 85)
4. The Supreme Ct. of Judicature Act. 1873
5. 36 & 37 Vict. cap. 36, sec.3.

time the same body of civilian lawyers concentrated at Doctors Commons had alone practised in these jurisdictions at Westminster Hall, that the Royal Commission (while grouped these three jurisdiction into one Division) were impressed by the convenience of placing these jurisdictions under one administration head because (1) in all three there was a great deal of administration business to be done of a peculiar kind and (2) there was at Somerset House an existing organisation for the administration of Probate and Divorce. It is further explained that the two subjects of Divorce and Probate have the closest possible kinship in the matter of legal history as the body of law upon which they are founded sprang from the same Ecclesiastical Courts down to a late period in English History. Whatever may be the explanation of legal history, they have not, however, proved to be happy by, or justified on valid reasons for the union. On the contrary, the maintenance of this as a composite Division of the High Court has been of late called into question. To quote the Report of Lord Peel's Commission,[1] "The work of the Division presents picturesque and challenging contrasts.

1. Report op.cit. 169, p.59.

"There is a certain historic connection between probate and divorce, inasmuch as both claims of work are the inheritance of the High Court from the old ecclesiastical Courts, and the practitioners in those courts came to have a knowledge of both subjects. There is no logical connection between them, and their connection with the Court of Admiralty is still more fortuitous and still more slender. There is no likeness between, on the one hand, a collision at sea or a salvage operation, and, on the other, a petition for the severance of the marriage tie or an examination into the state of mind of a testator." To use the words of Mr. N. Middleton, the public mind now regards the Division as a conglomerate anomaly and the official mind regards it as untidy excrescence and an offence against uniformity.[1.] Be it true or not, the grouping of the Probate Court with the Divorce and Admiralty courts, although it may have some historical justification in past times when circumstances were quite different, has now in practice become an anachronism with serious defects. Why?

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1. Minutes of Evidence, op.cit. p.219.

To begin with some of the judges of this Division are required at their appointment to have special skill in admiralty cases. But those who are experts in admiralty matters have had no experience in probate or divorce. The converse is also true. Those who are experts in divorce or probate have had no experience in the Admiralty. As a result the judges of the Division must be either men brought up in the general practice of the Bar, or men with special skill in Admiralty who have never acquainted with issues in divorce and probate cases before sitting on the Bench.

The fact that the judge if he is an expert must be expert in only one kind but not all three kinds of jurisdiction of this Division is little evil if it does not work detriment to the interest of the litigants. But the difficulty is this. Those judges of the Probate Court who while at the Bar practiced only in Admiralty and commercial courts have to take divorce cases, the kind of work that is entirely new to them. This is not all satisfactory. Moreover, those solicitors who practice exclusively or mainly in Admiralty with their cases to be tried by an expert

judge in Admiralty matters. Their expectation is sometimes gratified while at other times disappointed. Lest their case would not come before the Admiralty expert they are tempted to resort to a private arbitrator selected on account of his experience and skill in the matter with which they are concerned.

In the second place the present arrangement has not only an unfortunate result upon the litigants but also limits the field of selection of judges. "The fact that these judges of the Division," wrote the Business of Courts Committee,[1] "are confined exclusively to the trying of Admiralty Probate and Divorce greatly restricts the field from which judges of the Division can be chosen. Some members of the Bar who appeared to be well suited by experience for the trial of Admiralty causes have refused appointments to the Division on conscientious grounds. Others have refused on the ground that they were not prepared to pass their lives solely in the trial of these three classes of cases and to be cut off from the general administration of the law."[2]

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1. Second Interim Report of the Business of Courts Committee pa.19 p.14 cmd. 4471 (1934)

This view has been ~~confirmed~~ corroborated by Lord Peel's Commission.

Thirdly, the three classes of work segregated in one Division have tended to make them as occult mysteries, intelligible only to the select few. The divorce rules of the Division are peculiar to ~~itself~~ themselves and different from the rules governing ordinary work at nisi prius. Each of the three special classes of work of the Division has its separate and peculiar practice. There is certain mystery as to the use and making of certain orders. In the result only those barristers who often practice in it are familiar with its rules and procedure.

One of the most impressive arguments against the existing grouping of three conglomerate works in one Division is that its continuance results in unfair and substantial disadvantage in the matter of divorce facilities to the people living in the provinces as compared with those who live in and ~~around~~ near London.

As to the defects of the present severance of the Divorce work between the King's Bench Division and this Division, I have touched upon

elsewhere and will be treated at a later stage. It is sufficient here to emphasize that the existing dual system of divorce work alone renders the continuance of the Division unnecessary, anomalous and undesirable.

The remedies proposed by the Business of Courts Committee are as follows:-

"... (a) The Probate, Divorce and Admiralty Division should cease to exist as a separate Division of the High Court and the three judges who now sit in that Division should become judges of one or other of the other Divisions and available as such to take part in any of the work assigned to that Division whether in London or on circuit.

(b) The probate work of the Division should be assigned to the Chancery Division.

(c) The Divorce and Admiralty work should be dealt with as part of the King's Bench Division.

(d) As and when vacancies occur among the registrars and their staff of the Probate, Divorce and Admiralty Division the work should be distributed as part of the work of the other Divisions.

(e) The Commercial work of the King's Bench Division and the Admiralty work should be

closely associated."

These proposals were received with much adverse criticism. But in the opinion of Lord Peel's Commission, "It may well be that the ultimate solution of the difficulties and anomalies with which the High Court is now beset lies in this direction. In the words of Mr. Clement Davies, "It is upon this foundation alone that any really comprehensive and lasting scheme of reform can be instituted. At best, anything less would, in my humble opinion, be temporary patchwork." Let me examine the proposals a little more in detail.

The probate work, should be transferred to the Chancery Division for the following reasons:

First, there is, it is argued, a disadvantage in the present severance of the Chancery Division and the Probate Division with regard to probate work, because it is possible that one interpretation may be placed upon a will in the Probate Court which does not prevail ultimately when the rights of beneficiaries have to be conclusively determined in the administration of the estate by the Chancery Court. In the opinion of

the Bar Council, "None of the three branches of the administration of the law at present grouped together has any real ~~difficulty~~ affinity with either of the others, and the dissolution of the Probate work from the construction of wills and administration of estates by the Chancery Division not infrequently leads to embarrassing situations which might be avoided if the probate work were transferred as suggested by the Committee to the Chancery Division."[1]

There is another disadvantage through Probate and Divorce matters linked with Admiralty work in this Division. Attention has been drawn to the expense which is imposed upon litigants in Probate and Divorce matters while Admiralty work is so linked with this Division. Probate cases are often and repeatedly adjourned for Admiralty work, as, for instance, the Probate action Bryan -v- Brind set down for trial in June, 1934, was heard after and adjourned for Admiralty work no less than 5 times and concluded in Feb. 1935.[2]

1. Report on the 2nd Interim Report of the Business of ~~Courts~~ Committee pa.7, ~~Cmd. 4171~~ (1934.)
2. cf. The Daily Cause List set forth in the Minutes of Evidence taken before Lord Peel's Commission pp.346-7.

Secondly, the work of the Probate Court is more or less analogous or similar to that already transacted in the Chancery Division. The protection of estates *pendente lite*, the appointment of administrators or receivers, the protection of persons not sui juris or not before the court, the construction of testamentary documents might be exercised by the judges in the Chancery Division who have analogous duties to perform.

Thirdly, jury cases in Probate Division are rather few, while the larger number of cases are tried by judge alone. During the period between 1929 and 1932, there were 37 common and special jury cases in all. As compared with 357 cases of non-jury, the proportion being roughly 1 to 10. This mode of trial falls in line with that in the Chancery Division. If after transfer the parties in probate cases desire such issues to be tried before a jury, they may be remitted from the Chancery Division to the King's Bench Division. There is, consequently, no difficulty of transfer.

Fourthly, nor is the gravity of the probate issues sometimes at stake any cogent reason to continue the Probate Division as a separate entity.

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3. Manson of Evidence, op.cit.

During the last decade some of the most serious charges of fraud arising out of commercial misfortunes or disasters were tried and determined in the Chancery Division. The judges of the Chancery Division have great experience in the trial of actions involving as grave issues as any in Probate suits.

Now, each of the above reasons for transfer of Probate work to the Chancery Division has been hotly disputed.

With regard to the first point, it is observed that the Probate judge has very rarely been asked to deal with the construction of a will. The only question of construction which can arise in Probate Court is whether a residuary, or, in less frequent instances, a specific legacy is valid, and, if so, who is the legatee entitled to the grant. The possible area of conflicting interpretation of a will between the two Divisions is very limited. Consequently, the argument upon this ground for a transfer is, in the opinion of President Merriman,[1] "somewhat slender basis on which to propose a radical change, while in other respects would cause a good deal of inconvenience."

1. Minutes of Evidence, op.cit. Merriman, p.154. cf. also Noel Middleton, p.220.

As to the second point, it is argued that the contested Probate action is more akin to a Divorce suit, or even a Common Law action than to a chancery action. Issues of fact in a probate action are more appropriate for trial by jury[1]. and have to be decided of a kind which do not usually come within the ambit of Chancery practice."[2].

The third contention is mainly due to the different interpretation of figures. The jury cases in Probate, though not numerous, are said to be usually substantial. If transferred to the Chancery Division, parties would practically be almost precluded from having jury trial.[3]. The suggestion that Probate jury cases should be referred by the Chancery Division to the King's Bench Division is criticised as "unnecessarily cumbrous"[4]. and "involving delay to the litigant."[5].

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1. Ibid. p.154, also Hume-Williams, p.263.
2. " William Latey, p.142.
3. Minutes of Evidence op.cit. supra. p.220.
4. Ibid. Merriman, p.154.
5. Ibid. Byyford, p.197.

Finally, there is no advantage, it is urged to separate Probate and Divorce work by sending the former to the Chancery or the latter to the King's Bench. There are many reasons to the contrary. As said by Mr. Noel Middleton[1]. the matrimonial jurisdiction entirely and the Probate jurisdiction are largely statutory jurisdictions which has their root in the old ecclesiastical law. In his opinion, Continued and continuous experience on the Bench by daily study and contact with the ecclesiastical basis of these juriddictions and their traditional practice has led to a considerable enhancement of the value of judicial service. The transfer of the Probate and Matrimonial business to other Divisions would lead to so great a dispersal of this experience that that value of judicial service would be lost. Moreover, as probate matters involve many technicalities in the practice of the administration of deceased estates, their transfer would tend to make the Bench lean too heavily upon the registrars and officials at Somerset House for information as to the Practice.

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1. Ibid. pp. 219-20.

This is undesirable. The lack of specialised knowledge on the part of the Bench in probate action would lead to delay and prolongation of litigation.[1.] Apart from these judicial difficulties, it is argued there involve administrative disadvantages in the transfer. It would involve separating the Probate and Divorce Registry into two different registries; at present the work is done by the same staff. Such separation would involve a duplication of officials, at least a considerable increase of staff, and result in additional expenses. This administrative difficulty has been greatly stressed by more than one authority.[2.] Finally, it is feared that there would cease to be a Bar that specialises in Probate & Divorce, as the two matters when separated would cease to attract. Such Bar is claimed of considerable value to the judges in administering the law.[3.]

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1. Ibid. pp. 219-220

2. Ibid. Merriman, p.154; Middleton pp. 219-220; Norbury pp. 151-2, q.2311-20; Poole p.212.

3. Ibid, p.197; 177 The Law Times pp. 20-21 (Jan 13, 1934).

DIVORCE.

It is secondly suggested that the divorce jurisdiction of this division should be transferred to the King's Bench Division.

As has already been pointed out elsewhere, undefended matrimonial cases and cases brought or defended under the Rules of Supreme Court which relate to proceedings by or against poor persons can be tried at only 26 of the 61 towns at which assizes are held. While all kinds of divorce causes are triable in London. This state of affairs, while it is an improvement on the past system when all divorce business was concentrated in London, is logically unsound and practically always works hardship. It is logically unsound, because the system implies a discrimination of treatment to the suitors in London and in the provinces. Needless to say, when a petition for divorce is mistakenly or maliciously presented, the respondent should have all reasonable facilities to put forward his defence in the Court. Such facilities exist in London but not in the provinces.

The system practically works hardship in particular cases. As an instance, let me repro-

duce

a hypothetical case given by Mr. Clement Davies. "If the wife of a provincial bank clerk who is earning, say £250 per annum, petitions either mistakenly or maliciously for divorce, her husband, because he does not live in London and because he earns a few pounds per annum too many to be regarded as a poor person within the Rules, would be obliged to bear not only the heavy additional cost of stating his defence in London but also the inflated expenses incurred by his wife. If, as is likely, he finds himself unable to raise the money, he can but let the case go undefended to one of the 26 provincial centres ~~in~~ or to London, at grave peril to himself, his children, perhaps his wife, and certainly the community as a whole. Further, as has already been pointed out, the volume of divorce cases tried at assizes has so steadily increased that they outnumber other actions. This fact alone is sufficient to disprove the argument for preserving the Divorce Court as an entity.

In addition to this, there is the crying need of removing the difference of opportunity afforded to suitors in Divorce cases who live in and near London and these in the provinces. There is the urgent need

of uniformity in applying the principles and exercising discretionary powers in divorce cases. The judges who tried those cases should, in the words of Lord Govell, "be able to take counsel together and when necessary should preserve uniformity."[1] The existing dual system which decides divorce cases in London and on circuit augment the possibilities of diversity and aggravate the source of difficulties. The obvious way of establishing and maintaining uniformity in the exercise of the discretionary powers of the Court in this branch of the law is as suggested by Lord Hanworth's Committee to merge the Divorce Court in the King's Bench Division. In the words of their report,[2] "This important decideratum (meaning uniformity) seems possible of attainment only by co-ordinating all those who are charged with the trial of divorce cases, into one unity, wherein after consultation inter se all the judges may resolve upon a line of common action.

Similar problems have often presented themselves to the judges in the King's Bench Division and particularly

1. Second Interim Report of the Business of Courts Committee pa. 15 cmd. 4471 (1934)
2. Ibidi pa.17.

in relation to criminal matters. The e is every reason to hope that a standard would be set up and adhered to, if divorce work were to become an integral part of the work of the King's Bench Division, and not divided as now - some cases of a particular kind falling to the judges on circuit, while other judges in a separate division and segregated from the King's Bench Division do the heavier work in London."

Furthermore, the judges in the Probate Division have not the same opportunity of the more varied work as those in the King's Bench Division. With the exception of the comparatively small number of probate and admiralty cases, the judges in Probate Division deal with divorce cases only. Were divorce work transferred to the King's Bench Division, not only uniformity in exercising discretionary powers would be attained, but simplification of procedure and practice would be possible.

But, on the other hand, this proposal, has been much criticised.

In the opinion of Sir R.W.Poole, K.C.V.O., the issues involved in divorce work are quite unlike those issues which emerge in Common Law litigation.

In Common Law litigation the question is the issue. In Divorce work questions involving human relations are intimately concerned. At the present time three judges have to consider questions of discretion and have on occasions differed in their views. What would happen if a large number of judges had to deal with this matter? It is difficult to see how unanimity of view or concensus of opinion would ever be reached. The number of those who ought to try divorce cases should be limited, as Lord Gorell has argued in express terms. The Law Society is of the same opinion that the necessity for care and caution in the exercise of discretion and the necessity of preserving uniformity with regard to it outweighs any advantage which might ensue from the transfer of Divorce work to the King's Bench Division.[1] Commenting upon this point, the Law Journal remarked, "As to uniformity in the exercise of discretion, it has not been very conspicuous in the Divorce Court of recent years, and every King's Bench judge already tried divorce cases on circuit."

Secondly, one of the great advantages of the present system is that the same judges deal with

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1. Report of the Procedure Committee of the Law Society.

with the dissolution of marriage and consequences which arise from it. If it is suggested that while the Divorce Court should decide as to who is to have the custody of the children, the Chancery Court should settle any question of access by the spouse who has not the custidy, what possible advantage is to be gained, either finance or convenience, by the work which is at present done in the Division being split up and a portion of it handed over to another judge, in another Division. All questions of alimony should remain with the judge who deals with the custody of the children.

Thirdly, it is objected on the grounds that divorce judges should have the knowledge of ecclesiastical law, and that the transfer would have an unfavourable effect upon the Registry and Probate Bar.

It is scarcely necessary to examine the arguments point by point as the great demand of decentralisation of divorce jurisdiction has been fully discussed elsewhere. Once decentralisation of divorce business becomes the more imperative the claim for the continuance of the Divorce court the more untenable. As argued by the Law Journal,

the matter in truth should have been treated as settled when divorce work was inevitably sent on circuit. It is perpetuating another anomaly to continue the dual system of the administration of divorce law.

ADMIRALTY.

Turn now to the Admiralty work of the Division which, it is suggested, should be transferred to, and closely associated with the Commercial work in the King's Bench Division. The word "Admiralty" should be prominently retained in the name of the new court or sub-division thus created which should always be manned by sufficient judges experienced in admiralty and commercial work to assure prompt trial of admiralty and commercial cases. The Admiralty Registry and the Admiralty Marshall should be retained and be responsible to the Admiralty judge.

It may be said at once that there is no a priori reasons why the Admiralty court which is at present associated with the Probate, Divorce and Admiralty Division should not be associated with the Commercial court in the King's Bench Division. There are many reasons to the contrary.

First, there is great affinity, it is argued, between the businesses of the Admiralty and the Commercial Courts than there is between divorce and Admiralty matters. This is especially true in cases concerned with ships, such as the question of the navigation of a ship, her construction the perusal of ship's logs and so on. Again the Admiralty and the Commercual Courts have in all instances this in common, that they deal with cases in which the interests concerned are business interests. Secondly, there has always been a natural tendency for certain counsel to practice in both Admiralty and Commercial courts. The Bar engaged in Admiralty cases and who have special skill in them has far more in common with the Bar practising in Commercial matters than with the bar practising in the Divorce or in Probate issues.

Thirdly, if the Admiralty and Commercial courts were amalgamated in one Division or even grouped together, there is this advantage. If the list in one court became congested it could be assisted by the judge or judges sitting in the other court. It will be possible to make use of the judge who undertakes the work of the Commercial court to assist

in Admiralty cases.

This proposal is, however, deprecated on several grounds. First, the Admiralty court, it is maintained, should remain a separate court. It is an international court much used by foreigners. It has and for generations has had a world-wide prestige and the confidence of foreign ship-owners. It does its work efficiently and promptly. The litigants are at present certain of having their cases tried on a fixed date by a judge who is an expert in the Admiralty work. Moreover, it is the Prize Court of Great Britain. It is most important that a Prize Court should have a separate existence with the Admiralty Court apart from the King's Bench Division.

Secondly, Admiralty work as a rule has no particular connection with commercial work. The cases with which the Commercial Court deals are very various in character and often entirely unlike the ordinary Admiralty action. In fact the only connecting link between the two courts is that, in a certain proportion of the actions tridd in the Commercial Court, ships or their cargo are concerned either as being the subject matter of a marine in-

surance

policy or of a charter-party or a bill of lading, while there are certain types of action such as damage to cargo and the like which can be tried either in the Admiralty court and the Commercial court. A substantial proportion of the actions tried in the Commercial Court are, however, cases with which ships have nothing whatever to do.

Thirdly, the happy union of admiralty and divorce matters makes the trial of admiralty cases on a fixed date possible and convenient. "One important advantage of maintaining the Probate Division in its present form," argued Mr. Justice Langton,[1] "has been completely overlooked in all public discussions concerning this subject. From the point of view of the Admiralty litigant, it is of the first importance to secure a fixed date for the trial of his case. .... Hitherto it has always proved possible to maintain this advantage to litigants without undue disturbance of the other work of the Division. The reason for this lies in the flexibility of the Divorce work, a characteristic which it does not share with any other form of litigation of which I am aware. Consisting as it does of

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1. Minutes of Evidence, op.cit. p. 165.

both defended and undefended cases, it is always possiblw to arrange that an Admiralty judge should be supplied on the day before the trial of an Admiralty case with work which will not leave him with any part-heard case on the morrow."

Fourthly, it is feared that in the event of disruption or abolition of the Admiralty Court, its world-wide prestige would somewhat be lost. The suggested transfer would not result in any appropriate saving of judge's time,[1] nor conduce to greater efficiency nor economy. It would rather be prejudicial to the foreign connection which not only enhances the dignity of the court of England but is a source of income to the Treasury. Again, if the Courts were amalgamated the result would be that the new Court would be one in which for certain classes of case the Admiralty procedure would be applied, while for the other cases the Commercial Court procedure would be applied; this would be inconvenient and confusing.

These arguments against the amalgamation of the Admiralty Court and the Commercial Court are more prompted by over apprehension and misunderstanding[2] than were founded upon facts and reason.

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1. Minutes of Evidence op. cit. Holms. P317
2. Report of the Royal Com. on the Despatch of Business at Common Law. para. 179. cmd. 5065 (1936)

If the distinct name of Admiralty is to be preserved and labelled for this court while presided by a judge chosen for his expert knowledge, it is difficult to see why its international character/world prestige and distinctive features of procedure, will be lost.

So much for the arguments for and against the fusion of divisions in the High Court. In the opinion of Lord Peel's Commission, the ultimate solution of the difficulties and anomalies with which the High Court is now beset lies in the abolition of the Probate, Divorce and Admiralty division. It appears to me that there is scarcely any cogent reason why this division should continue as such. On the contrary, there is much to be said against its present form. But it may be observed that even if this division were abolished and its jurisdiction merged in other divisions of the High Court, it does not appear to be an ultimate solution. The great needs of the time are decentralisation and specialisation in the Judiciary. The proposed plan of fusion of divisions in the High Court only touches the fringe of the whole problem of the reform of civil courts.

In this respect much can be said in favour of what Dr. W.Jennings has suggested, on the distinction between general and special jurisdiction. "What is needed therefore," he writes,[1] "is not an artificial distinction into Common law, Chancery, and Probate Divorce and Admiralty, but a distinction between general jurisdiction and special jurisdiction. General jurisdiction would affect ordinary men in their ordinary relations. Special jurisdiction would apply to special classes of persons and special classes of acts. The one should be exercised by all civil courts, the latter in some courts only. In particular, there would be in London a separate commercial court and a separate administrative court, with possibly a separate family court. In the provinces separate courts should be established where there was enough specialised work to be undertaken. Where there was not, certain county courts could receive the special jurisdiction and exercise it over a wider area than the ordinary county court district, as is now done with Admiralty and bankruptcy work.

Such a scheme of decentralisation would leave the High Court as a large and important county

1. Civil Courts. Essays in Law Reform. Pol.qu. Nov.1934. p.79.

court for the London area, exercising, in particular, commercial jurisdiction over most of South-eastern England, for the commerce of that area centres upon London. Its other functions should disappear."

If this were carried into effect, it would not only satisfy the long-felt demand for decentralisation and specialisation of the English Judicature, but remove the illogical and unsatisfactory distinction of the present divisions in the High Court as well as the unnecessary line of demarcation between the County Courts and the High Court. It may be here observed that the distinction between the High Court and the County Courts is unnecessary and undesirable. The main scheme of those who were responsible for the legal reform of 1873 was simple in its general outline, i.e. the supreme court of Justice, comprising within itself all the courts of the country - original and appellate.

This original scheme was, however, not adopted. The Superior courts were then remodelled on comparatively simple lines but the county courts were left out of the main design to remain humble annexes to the Superior Courts.

From then until now two systems have been at work side by side, each striving to accomplish the common purpose, the administration of justice.

There have been two administrative machines with different name, design, officials, procedure and countless details. Each machine performs its allotted work with zeal, skill, care and speed so far as its intricate organisation permits.

But this dual system is neither reasonable nor efficient nor economical.

It is unreasonable. As Judge L.A.J. Jones wrote,[1] "this division of courts of first instance into inferior with their respective judges rests on no scientific principle. Judges of the High Court and the County Court have identical questions of law to solve and similar complications of fact to disentangle; but the vast majority of cases in both courts impose no excessive strain upon the ordinary intelligence and knowledge of a lawyer."

It is unjust to the people at large. Those who live in and near London have easy access to a superior court, while their brethren in the provinces have to wait for the circuit time, or repair to the

1. "Law Reform" 240 Edinburgh Review P 114 (1924).

seat of justice in the Metropolis at their own expense or forego their rights or suffer their wrong for lack of means in quest of justice. Nor is the dual system just to the county court judge. He may be and frequently is, as sound a lawyer as any in the country, has as onerous and difficult judicial functions to discharge as any High Court judge, but x still gets less than one-third of the salary of his brother judge in the High Court. He is denied all the embroideries of judicial life such as scarlet and ermine, the appellation of 'my Lord', the toast of 'His Majesty's Judge', the welcome of Sheriffs, chaplains or trumpeter and so on. More important still the dual system is neither efficient nor economical. Prima facie it would certainly appear improvident in principle and inefficient in practice to construct and run two machines for doing the work which one might be made to do and do well.

Now two sets of machines, the High Court and the County Court have been made distinct and that distinction maintained and emphasised in every way. Yet there is no co-ordination. There is, on the contrary, overlapping, friction, waste of time and labour. There are bewildering mass of statutues, rules, cases and numerous details which regulate the

working of each of these machines but which each set of worker has to master.

Why this dual system and double machinery? "The whole theory of the separation between the jurisdiction of the High Court and the County Courts," wrote the Times as early as 1897, "is formed on the assumption that there is a remarkable difference between the qualifications of the judges of the two tribunals - all the fine wheat being collected in London, the coarser grain sent to the provinces."

Since then things have been greatly changed. Few will now gainsay that county court judges, as a body, are no inferior in judicial qualities to many of their brethren of the High Court. Few will again contend that the demand for decentralisation of judicial administration is manifest in a hundred ways. The trial of divorce cases on circuits, the extension of jurisdiction to inferior courts, particularly the county courts, are only different manifestations and variations of the same theme.

It seems to be propitious and high time that this demand for decentralisation should be complied with either by levelling up the county courts or levelling down the High Court.

If this scheme were once carried out, the most important changes which would follow are clear.

Firstly, there would be one fountain of civil justice for high and low, rich and poor. Secondly, relics of by-gone times such as Palatine Courts, Bristol Tolzey Court, Liverpool Court of Passage, Norwich Guildhall Court, Oxford Chancellor's Court, Salford Hundred Court of Record, other borough courts of Record and inferior civil courts would be merged.

Thirdly, the distinction between 'Superior' and 'Inferior' Courts of Civil procedure would vanish away; the almost unnecessary learning connected with Certiorari, Prohibition, etc., and the eccentricities of local procedure would no longer waste legal worker's time and energy.

Fourthly, the anomalous distinction between "His Honour Judge" and "His Majesty's Judges" would cease. All Judges of first instance would be members of the same court, exercise the same jurisdiction and have the same status. A liberal provision of judicial power would soon be realised.

Finally, both the public and the Bar would be greatly benefitted by this change. The public would obtain speedy, cheap and convenient justice. The Business of the Court would greatly increase and the Bar would thereby be more profitable.

Having examined the divisions of the High Court separately, I shall try to discuss some problems common to all of them.

Foremost of all is the problem of the appointment of judicial officials. The High Court judge always sits alone, except in the Divisional Court. This practice of one judge for one court is a distinctive feature of the English judiciary and forms a remarkable contrast to the 'collegial principle' in other countries.

The working of the system of juge unique depends mainly upon the quality of the judges. "In the main they are the best men that the Bar of their day has produced," Mr. R.C.K. Ensor wrote. "The best are excellent, and the majority good of their kind; but these are not all. It is not proposed here to refer to living individuals, but anyone who was at the Bar 25 years ago will be aware that at that time there were at least three and arguably four, judges

on the Bench of the High Court whom no practising barrister thought fit for this position. These gentlemen illustrate the two chief loopholes through which incompetence may creep in - namely, politics and old age." Of the two loopholes, he continued, "politics now counts for much less than it did. At the same time the opening for political misappointments remains, and always must while the Government of the day has carte blanche to fill judicial vacancies as it pleases.

It does not seem to me desirable that every legal appointment of importance should be made by a political chieftain. Nor is it at all satisfactory that a fair proportion of them go to lawyers who have been active workers in politics. It may be observed that the man who goes into politics is not usually a man with strong judicial sense and political activity is the worst training for the bench. Even the appointment of successful lawyers to the judicial office is open to objection. As argued by Prof. Chorley,[1] "The qualities of the successful advocates, especially with juries on the other

1. "A Ministry of Justice and the Reform of Judicial Institutions" Essays in Law Reform Pol. Quarterly. (1934)

platform, are almost the exact opposite of those required in an impartial and scholarly judge. It is hardly to be wondered at that some judges appear to make up their minds before they have heard much of the evidence, and afterwards, as laymen have been heard to say, are the best barristers in the case. Habits formed over many years are not easily given up, and while a few great advocates have made excellent judges, more have made very moderate ones, while the almost accidental appointments of men like Lord Blackburn, who had failed to build up practices at the Bar, have often been the prelude to judicial work of the highest distinction." The obvious solution of this problem would be the genesis of a judicial profession as obtained in Continental countries.

If judicial appointment of successful advocates actively engaged in politics by a political chieftain is undesirable, no less so are other legal officials such as masters & registrars to be appointed by the heads of the Divisions in the High Court. Both the judges and legal officials should, as I shall discuss elsewhere,[1] be appointed by a minister responsible to

1. Chap. XV. Ministry of Justice.

Parliament and assisted by an Advisory committee.

Equally important as the problem of appointment is the problem of the retiring age of judges in the High Court. Old age, as Mr.Ensor argued, is another loophole through which incompetence may creep in. Though he did not refer to living individuals, but the problem of age remains. The possibility of loophole is still open. Thus the need of a retiring age for judges in the High Court as well as in other Courts is so obvious that it renders any elaboration unnecessary.

Suffice it to say, it has been rightly emphasised by St. Aldwyn's Commission and Lord Peel's Commission. The former recommended a retiring age of 72, subject to limited extension at the discretion of a committee consisting of the Lord Chancellor, the Lord Chief Justice and an ex-Lord Chancellor continuing to sit as a Lord of Appeal.[1] The latter recommended that a fixed age limit of 72 should be applied to the judges of the King's Bench Division.[2]

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1. Report of the Royal Commission on Delay in the Kings Bench Divn. cd. 7177 (1913)
2. Report of the Royal Com. on the Despatch of Business at Common Law. Ch.IX. pp. 88-92. also Memorandum by Clement Davies, pa. 74.

But there is no cogent reason why the same limit should not be equally applicable to all judges of the High Court.

In the second place, the Lord Chief Justice[1] and many other witnesses[2] suggested the appointment of a shorthand writer to take a note in every nisi pious case. Lord Peel's commission though pointed out the practical difficulties in putting the suggested system into operation found favour with it.[3] To my mind the need of a shorthand writer is felt not only in nisi puius cases but in all other cases. There is scarcely any cogent reason why such an official should not be supplied for every court.[4]

In the third place, the Divisional Court in the King's Bench Division, as observed

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1. Minutes of Evidence, op.cit. Qs. 4528-32,4457. The Law's Delay and Lord Hewart's remedy. The Times, Feb.2. 1935.
2. Minutes of Evidence, op.cit.pp.60,293,318 qa. 1454, 1494, 4350.
3. Report op.cit. paras. 254-255; Following upon the Report, the Lord Chancellor has appointed on a Committee an official shorthand notes in the Supreme Court with Mr. Justice Atkinson as Chairman. 81, The Law Journal, March4,1936.
4. Minutes of Evidence op.cit. Beresford p.60; O'Connor 1454, 1494; Roscoe p.293; Holmes p.318,4350.

above, has been subjected to much criticism. In the Chancery Division it is not customary to have Divisional Courts. In the Probate Division it is held wherever a little work accumulates for a Probate Divisional Court. There has always been a prejudice against the system of Divisional Courts, and their jurisdiction has been steadily reduced in favour of sending applications direct to the Court of Appeal. The Business of Courts Committee recommended that the Divisional Court in the King's Bench Division should be abolished entirely and its appellate jurisdiction transferred to the Court of Appeal.[1] This would have had several real advantages. It would, on the one hand, have had the advantages of making the Court of Appeal the great Court of Appeal of the country. On the other, it would have given the decisions of the Divisional Court where there is no appeal (e.g. cases stated in a criminal causes or matter) the same status as decisions of the Court of Appeal. Again, in matters where there is an appeal from the Divisional Court to the Court of Appeal (such as cases stated in non-criminal cases) it would have removed one appeal. In this respect the

1. Second Interim Report paras. 30-31, 39. Cmd 4474

the Administration of Justice (Appeals) Act, 1934 is but a half-hearted attempt to carry out the Committee's recommendations. To give effect to the whole recommendations of the Committee in this connection is still to be hoped. It may be observed that the recommendation of Lord Hanworth's Committee has special reference to the Divisional Court in the King's Bench Division. The same may be said to all Divisional Courts in the High Court. Moreover the system of division court as pointed out by M.D. Chalmers[1] gives rise to many anomalies. A Chancery Division judge, sitting alone, daily grants perpetual injunction, but a single judge in the King's Bench cannot grant a prerogative writ of mandamus. A single judge of the Chancery Division can issue a writ of prohibition[2] yet if the prohibition be applied for on the Crown side of the King's Bench Division the application must be made to a Divisional Court. When, as sometimes happens, three judges of a Divisional Court, one of whom is a member of the Court of Appeal, are overruled by three judges of the Court of Appeal, the two tribunals are too

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1 ~~201 H.C. 1537-8 Hansard 5th series (1933-34)~~ Office Lib & Bar Pollock

2. The procedure by Rule nisi is now obsolete by virtue of Ad. of J. (Miscellaneous) Act, 1933, s.5.

exactly of equivalent weight. The unsuccessful party is of necessity bound to appeal to the House of Lords.

"One of the advantages of abolishing the Divisional Court," said Sir G. Hurst in the House of Commons[1.] "is that judges will be able to deal with cases of first instance and not be diverted from their ordinary work." Sir Hurst is emphasising the stress of work on the High Court. But the abolition of Divisional Courts will have advantageous effect upon the method of appeal and the working of the inferior courts. In the words of Mr. D. Chalmers, "I think, too, that the abolition of Divisional Courts would have an effect beyond the mere saving of time. It would strengthen the position of Courts of first instance, that is to say, a judge sitting alone. It is of vital importance to the due administration of justice that the prestige and efficiency of the Courts of first instance should be kept up to the highest possible standard. I think it would tend towards this end if a greater degree of finality were introduced into their proceedings and if in matters where their decision was not final they were subject only to the control of the Court of Appeal."

1 291 H.C. cc 1517-38 Hansard 5th series (1932-33)

This ideal of Judge Chalmers in 1880 has largely been realised, since the county court appeals go direct to the Court of Appeal. But none the less the Divisional Courts still remain there. Their complete abolition brooks no delay.

Finally, one of the most important problems is the procedure in the High Court which should be drastically and completely simplified. When the Act of 1873 was before the House of Lords, Lord Selborne explained to the noble Lords that "it is desirable to provide as far as possible for cheapness, simplicity and uniformity of procedure."

But Lord Selborn's ideal in this respect was not carried out by the great reform of 1873 - 1875.[1] As early as in 1880, Sir Mackenzie Chalmers, in his open letter to Baron Pollock, frankly asserted that the changes made by the Judicature Acts of 1873 and 1875 increased and did not reduce, the expense of litigation. As admitted by Lord Peel's Commission, "we have received very many complaints on this point (meaning delay and length of trials) and on the resulting expense. The English procedure and rules of evidence

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1. Odgers and Others. A Century of Law Reform. Lectures VI + VII (1901)

are generally admitted to be effective for arriving at truth, or so much thereof as is legally relevant, but it cannot be denied that they result in lengthy and expensive trials. This has become increasingly true of recent years." If it is expensive, the procedure is far from being simple. No other conclusive evidence is required to support this contention than to consult either the White or the Red book. No less a learned and experienced lawyer than Mr. Theobald Mathew wrote in 1895:

> "The Annual Practice consists of two volumes of closely printed matter and contains references to over 7000 decisions, for the most part on points of practice, produced at the expense of litigants. They wished to recover property or debts due to them; they found themselves embarked in a long enquiry, with dubious results, into the meaning of rules more or less obscure."

Since the time of Mathew, things have become even worse. The "Annual Practice" for 1936, a rival publication to the 'Yearly Practice' is published in one huge volume consisting of 2750 pages exclusive 434 pages of index. The Table of cases occupies 371 pages and contains the names of cited cases at over 12500.

As obsolete and complicated rules of

procedure become one of the fundamental causes of dilatory and expensive litigation, so it is emphasized and I think rightly emphasized by the Business of Courts Committee[1.] and others[2.] that a new code of procedure is urgently needed.

"It has been pointed out on many occasions," said the Business of Courts Committee, "and with great force that the practice and procedure of the Courts is laid down in an unnecessary complicated form. We agreed that it does not seem either necessary or desirable that the rules of Court should, with the explanatory notes, be contained in a book of nearly 3,000 pages. A clear and consistent code of procedure seems to us to be urgently required to cheapen and facilitate the administration of justice, and we recommend that the Rule Committee should at the earliest opportunity appoint a small committee to redraft and simplify the rules of procedure."[3.]

More than ten years ago, Mr. E.R. Sunderland paid a high tribute to English procedure as "the mysterious efficiency of English Justice." After a brief presentation of three major divisions of

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1. 1st Interim Report of the Business of Courts Com. cmd. 4265 (1933) 2. The Report of the Ldn C.C. on Expense of litigation, April, 1931.
3. 1st Interim report of the Business of Cts.Com. par. 32. cd 4265 (1933)

the English procedural field, the preparation and docketing of cases for trial, the trial itself and the proceedings for review and deploring the timid effort of procedural reform in U.S.A. he asked: "Why has the English succeeded in developing a system of procedure so much superior to ours?" "The answer," he continued, "appears obvious. Although we in the U.S. have been so keenly interested in procedual reform as the English, they have been much bolder in the measures they have adopted."

Now, it is time again to adopt bold and drastic measure to completely reform the whole cobweb of complicated procedure in this land.

1. E.N. Sunderland; "An Appraisal of English Procedure. Report of American Bar Association, Vol. L. pp. 252-262. (1925)

CHAPTER V.

THE COURT OF APPEAL.

The present Court of Appeal was originally intended to be the final court of Appeal. But at present, it is n t the Court of Appeal but only a Court of Appeal.

It is constituted of ex-officio-judges and of 5 ordinary judges styled "Lord Justices of Appeal". The ex-officio-judges are the Lord Chancellor, ex-Lord Chancellor, Lords of Appeal in Ordinary, the Lord Chief Justice, the master of the Rolls and the president of the Probate, Divorce and Admiralty Division.[1] In practice the court is usually composed of the master of the Rolls and the 5 Lord Justices.

The Master of the Rolls, who is one of the three judges holding the highest specially entitled positions, is appointed by the Prime Minister after consultation with the Lord Chancellor, either direct from the membership of the Bar or from among the High Court judges. His position calls more exclusively for legal attainments than the other two titled

1. Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5 c.9 s.88 (5)

judges, the Lord Chancellor and the Lord Chief Justice, and therefore is commonly filled by promotion by one of the High Court Judges. The five Lord Justices are appointed in effect by the Prime Minister either from among barristers of 15 years' standing or Justices of the High Court for one year.[1.] Both the Master of the Rolls and the Lord Justices hold office during good behaviour and are only removable on an address by both Houses of Parliament. By the Supreme Court of Judicature (Amendment) Act, 1935,[2.] the Lord Chancellor shall be president of the Court of Appeal and may appoint to be vice-president of that court one of the Lords Justice of Appeal, who shall preside when sitting and acting in any division of that court if no ex-officio judge is sitting in the division.

The Courts sit in 2[3.] or 3 divisions,[4.] each of which is staffed in final matters by a trio of judges,[5.] and in interlocutory matters by two

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1. ibid. s. 9 (2)
2. 25 Geo. V. c.2., s.2 (1) The question of vice-president was hotly debated in the House of Lords cf. 95 H.L.Sp.222 et seq. &.390 et seq. (1934-5)
3. Supreme Court of Judicature (Cons.) Act, 1925 (15 & 16 Geo.J.c.9) s.9 (2)
4. ibid. s.68 (3)
5. " s.68 (1)

judges. Here we find the 'collegiate' principle in English Courts. But three is the smallest number of the bench in any Continental Court above the lowest local tribunal of all.

Its limited original jurisdiction apart[1] the Court has power to hear and determine civil appeals from any judgment or order of the High Court, whether sitting in the Royal Courts or on circuit and whether in a Divisional or at Nisi Prius, or at Judges' Chambers. It also hears appeals from the Palatine Courts of Lancaster and of Durham, the Liverpool Court of Passage, ~~Coventry~~ County Courts[2] and official referees from a decision on a point of law of the Court of Railway and Canal Commission and of the Mayors and City of London Court.

The work of the Court of Appeal in the place of civil courts may be shown in the following table:

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1. The Laws of England, vol.8, Pa. 1301, authorisation cited there p.691, 2nd ed. 1933.

2. Administration of Justice (Appeals) Act, 1934, s.2; County Courts Act, 1934, ss 55, 105; S.R. & O. 1934, No.840.

COURTS.	Annual Average 1909-13	Annual Average 1914-18	Annual Average 1919-23	Annual Average 1924-28	Annual Average 1929-33	Annual Average. 1909-33
Court of Appeal.	628	572	624	497	480	600.2
Other Appellate Courts.(1)	646	534	636	631	573	604
Courts of first instance. (2)	1,425,375	865361	814785	1183705	1429241	943675.4

(1.) Judicial Committee of the Privy Council, House of Lords and High Court of Justice (Appeals and Special Cases from inferior Courts.)

2.) High Court of Justice, Lord Chancellor's jurisdiction in Lunacy, Railway and Canal Commission, Railway Rates Tribunal, Palatine Chancery Courts of Lancaster and Durham, County Courts, the Mayor's and City of London Court, Borough Courts of Record and other Inferior Civil Courts and Ecclesiastical Courts.

Thus the annual average of cases of appeals disposed of by the Court of Appeal constitutes about 60 per cent. of all appeals. The rate of appeals from the decisions of the Court of first instance to the Court of Appeal is about a little over one in a thousand.

The number and disposal of Appeals in the Court

of Appeal within the last decade may be shown thus:-

	Appeals for Hearing.				Appeals Disposed of						
		Set down during yr.			Judgment or Order.						
Years	Pending at commencement of year	Final	Interlocutory	Total	Withdrawn or struck out without hearing	Affirmed	Varied	Reversed	Otherwise disposed of	Total	Appeals pending at end of year
1925	94	387	93	574	86	236	25	118	39	504	70
1926	70	435	103	608	68	264	27	119	28	506	102
1927	102	354	116	572	70	230	25	128	24	477	95
1928	95	383	104	582	66	270	19	129	29	513	69
1929	69	356	100	525	64	243	21	123	18	469	56
1930	56	353	90	499	61	225	28	109	25	448	51
1931	51	279	85	515	41	260	19	94	32	446	69
1932	69	433	83	585	58	240	18	133	25	474	111
1933	111	422	100	633	97	267	21	145	17	547	86
1934	159	485	97	741	83	283	25	152	24	567	174
TOTAL.	876	3887	971	5834	694	2518	228	1250	262	4951	883

The above table shows the following result of the annual average (from 1925 to 1934) of the number and disposal of appeals:

		per cent.
I.	Appeals for hearing	16
	Pending at commencement of year	15
	Set down for final matters	67
	" " " interlocutory matters ..	18
II.	Appeals disposed of	
	Withdrawn or struck out without hearing.	14
	Judgment or order affirmed	51
	" " " varied	4
	" " " reversed	25
	Otherwise disposed of	5

Thus a little over 50 per cent. of appeals failed, while about 30 per cent. were successful.

Such being the personnel, the jurisdiction and the working of the Court of Appeal, it behoves us to critically examine the Court as a whole. To begin with, the Court sits at present only at London. There is no localised appeal courts. This is one of the characteristics of the English judicature. It is almost unique in the judicial system of fairly large states. In France, the 27 Courts of Appeal are localised (26 in Mainland and another in Corsica), each confining itself to a particular area and to the appeals from a resort of Tribunals within it. The Court of Appeal of Paris, though enjoys a special metropolitan prestige over its provincial brethren, nevertheless, is only one among the 27 and confines to its local work like the rest. In Germany there are 27 Supreme Regional Courts (Oberlandesgerichte) corresponding to the 27 Courts of Appeal in France, each locally situated, and each with a number of courts of first instance attached to it, whose appeal it hears. Like the Court of Appeal of Paris, the Supreme Regional Court for the province of Brandenburg in Berlin, though with certain historic prestige in its own locality, certain precedence and some special powers, is, however, only one of the 27 and

exercises the territorial jurisdiction wit hin its allotted local sphere. Again in U.S.A. there are 9 Circuit Courts of Appeal, corresponding to the 9 great circuits into which the country is divided, each having the territorial jurisdiction over several states in each Circuit. As indicated by this title, these Courts sit only as Courts of review and their decisions are in many cases final, while in others a further appeal lies to the Supreme Court of ~~the~~ U.S.A. They were established in 1891 to facilitate the prompt disposal of cases and to relieve the Supreme Court from the burden of hearing all appeals. Since their establishment in 1891 insistent pressure for further sub-division has been made.

Thus the Court of Appeal has appellate jurisdiction in civil cases all over England and Wales, while in France, Germany, other Continental countries and Oriental countries such as China and Japan and to a certain extent in U.S.A., the Courts of Appeal are local or regional.

Of the nation wide jurisdiction[1] of the

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1. Except Scotland and Northern Ireland.

Court of Appeal, uniformity is claimed as its merit and advantage. This is, however, only a superficial advantage, obtained at a great and costly price to the litigants and counter-balanced with greater disadvantages to the people. Uniformity does not seem to depend wholly upon the system of centralised court of appeal. In France, U.S.A. and if not in Germany, at least in Prussia, which has a population about equal to England without Wales and in many other countries with localised appeal courts, there is as wide uniformity in substance as in England, notwithstanding many co-ordinate and localised courts of appeal. But the formal uniformity in England is obtained at the great expense of the litigant. English justice has long suffered the hardship of over-centralisation. This is especially the case in respect of appeals. The House of Lords, the Court of Appeal, the Court of Criminal Appeal, and the Divisional Court of the High Court which hears appeals from inferior tribunals, all sit only in London. In spite of the often-repeated slogan, "bring justice to the door of the people", all appeal tribunals

are concentrated at one place, hither the litigant whether in Plymouth or Bristol or Hull or Newcastle must go. The hardship, inconvenience and uneconomy of such a concentrated system of appeal courts to the litigant can never be over-estimated. "The holding of trials in London," wrote Mr. A.C.K nson, "is little hardship, if any, to the biggest litigants - great companies or combines which, even if their head office is not there, are sure to have an important London end.' But it presses more or less heavily on everybody else. Even an appeal case, without witnesses, involves substituting for the local solicitors, whom the client knows, a London firm, whom he does not know, and employing London barristers of whom his knowledge will be the merest hearsay. The costly, troublesome, and often deterrent inconvenience of time and place involved in personal attendance for consultations as well as hearing, and still more in the attendance of witnesses, scarcely need to be insisted on. Even where first instance justice is thoroughly localised, as in the County Courts, the prospect of being dragged to London, if there is an appeal,

must often be seriously weighed by the litigant."[1].

On the other hand, the appellants in France, Germany and almost all other countries, where the facilities of localised Appeal Courts are provided for, is neither dragged very far from his home or business, nor is he driven to the National Metropolis or subjected to numerous inconveniences and discouragements in his quest of justice as the unfortunate English Appellant is.

Compare the system of centralised court of appeal in England with that of localised courts of appeal and consider the practical effect upon the litigants as a whole. One who considers the judicial system as a means of public service is almost compelled to admit that the existing system of English centralised court of appeal at London lags far behind in providing with convenient and economical legal service for the public. It is sometimes suggested "that among the people most obviously benefited by the system are the few super-successful London barristers, whose names figure oftenest in the newspapers

1. Ensor, Courts & Judges in France, Germany & England. pp. 93-4.

for the provincial client, 'moving about in worlds not realised', feels flattered and reassured if one of three recognisable names is suggested to him for employment in his case." This suggestion might be made cynically but there is probably not without some truth in it.

In the second place, the present separation of civil and criminal courts of appeal is neither necessary nor desirable. This situation could scarcely be justified on any reasonable grounds. It may be explained that at the time of the establishment of the present court of Appeal the demand for a criminal court of Appeal had hardly made its appearance. The present Court of Criminal Appeal is a later product of time, more than thirty years younger than the Court of Appeal. It was rather the product of the haphazard method of meeting with a pressing demand than that of the carrying into effect of any systematic plan of the judicial structure.

It is disturbing to witness the unseemliness of the present Court of Appeal asserting its right not to follow the decisions of the Court of Criminal Appeal, provoking the comment from Lord Hewart that the only courts he recognised with power

to reverse the Court of Criminal Appeal was the House of Lords.

It may be excused that the Judges of the Court of Appeal may have no experience in deciding criminal cases. This is, however, ~~the~~ no justification for the separation of Appellate Courts for civil and criminal matters. Whatever may be the explanation such separation seems to me an unjustified anomaly. The Supreme Regional Courts of Germany deals with both civil and criminal appeals but in different chambers. The Courts of Appeal in France do civil business only but their judges act also as presidents of the Assize Courts. The Circuit Courts of Appeal in U.S.A. have both civil and criminal appellate jurisdiction. In most other modern states, the civil and criminal appellate jurisdictions are exercised in different chambers of the same court.

Thirdly, the two divisions and the quorum of three judges of each and the total number of judges, in the Court of Appeal was hardly sufficient. The more so, if the Court were made the final Court of Appeal as suggested. It may sit, if necessary, in three divisions.[1] But, as ~~said~~ by Lord

1. Supreme Court of Judicature (Cons) Act, 1925. 15 & 16 Geo.V.c.49 s.63 (3)

Sankey said in the House of Lords,[1] the Court is composed usually of two Divisions. One Division of the Court takes Chancery appeals, the other Common Law Appeals. In substance, one is the Chancery Appeal Court, the other the Common Law Appeal Court. In fact, the two Courts are from time to time constituted in such a way as to include one or more Lord Justices, who are specially conversant with the matter under discussion.

As the Court of Appeal has had cast upon itself much of the work done by the Divisional Court of the King's Bench Division, as appeals from official referees and county court judges now go direct to the Court of Appeal, it is fairly certain that a third division of the Court of Appeal will be required.

Upon the Second Reading of the Administration (Appeal) Bill in the House of Commons, many members expressed the view that if the County Court appeals were transferred to the Court of Appeal, it would involve increased work for the Court of Appeal, unless the Judicial Bench were increased in numbers.

1. 88 H.L.S 223, 5th series. 1934-6.

they urged, this would do more harm than good.[1]
In France, the number of chambers in the 27 Courts of Appeal varies considerably. There is the biggest court with 12 chambers, each of 7 judges and one president, such as the Paris Court of Appeal on the one end, while the smallest one with a single chamber of six councillors and one chamber president such as the Appeal Court of Augers on the other. In Prussia, the number of chambers in 13 Supreme Regional Courts also differs very much. On the one end the smallest one has only a single chamber and only 9 judges in all as the Supreme Regional Court at Marienwerder, while on the other the largest one has 32 Chambers with no less than 192 judges in all. The number of divisions in the English nation-wide Court of Appeal is incomparable with that of the localised Courts of Appeal in France and the Supreme Regional Court in Germany. Again the number of judges in the former is out of all proportion to the biggest of the latter and is no more than that of the smallest of the latter. The smaller number of divisions

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1. 291 H.C.S.11535 et seq. 1933-34.

as well as judges in the Court of Appeal is on the scale of the judicial system in the Continent most startling. In spite of the provisions of ex-officio judges of the Court, they rarely sit in it in fact, for all of them have duties to discharge elsewhere. With the annual average of nearly 600 appeals to be disposed of, the few Lord Justices have onerous duties to perform in view of the difficulty of appellate work and the amount of research involved. Experienced as they are, the work is but too heavy to be borne by the few judges. The effect is deplorable. When sickness has prevented one of the Lord Justices from sitting, considerable help has to be looked for and in fact obtained from the judges of the King's Bench Division which is itself too fully occupied and over-burdened with numerous business. Notwithstanding this help and admirable effort of the Lord Justices to cope with the situation, there are arrears.

"It is in most years," reported the Business of the Courts Committee in 1934, "fully engaged upon the cases that now are assigned to its jurisdiction ..... in the present year, in 1933, the appeals presented have been in number so many,

and in character so heavy, that arrears have accumulated. One case in Court I, a patent case, occupied its attention for 17 days, and another in Court II for 27 days."[1] What is still unfortunate is that hasty decisions were sometimes delivered by the Courts from unduly anxious desire to keep abreast of its work, as indicated by the proportion of the Court of Appeal's decision being reversed in the House of Lords. In a word, the present number of judges in the Court is by means sufficient to deal with the appellate work, even with a quorum of three judges which is definitely meagre in number.

Fourthly, the jurisdiction of the Court of Appeal in cases of workman's compensation has been much criticised. The intention of the Act of 1897 was simply, as Lord Halsbury said in the House of Lords, "that there should be compensation given to every workman in certain trades when an injury happened to him in the course of his employment." But the simplicity of the scheme of the Act was almost destroyed by two early cases. In the first case a boy who was employed in a pottery had the duty to make balls of clay and hand them to a woman working at a machine, but was forbidden to

1. Second Interim Report of the Business of Courts Committee, cmd. 447, par.81, p.21.

interfere in any way with the machinery. Being a boy he naturally thought he would like to clean the machine when the woman was absent. In so doing he was injured. In the second, a ticket collector got injured from the footboard of a train after it had started, not for any object of his employment but for his own purposes. In both cases the injured were probably guilty of contributory negligence which, as pointed out by Mr. Chamberlain the author of the Act did not debar a worker from benefit. But the Court of Appeal fastened upon the words "arising out of and in the course of his 'employment', and has the tendency of excluding workmen from the Act.

By such narrow interpretation of the Act, there were many cases on record which the Court of Appeal decided against the workmen but which were reversed by the House of Lords. Injustice was done in individual cases.

But in the Bevan case, the House of Lords itself has laid down an interpretation of the Act which will deprive hundreds of injured workmen of compensation in defiance of the intention of the Act.

The point is this that the Court of

Appeal is not suitable to exercise such jurisdiction as in cases of workmen's compensation. "I think the real misfortune of sending workmen's compensation Act appeals to the Court of Appeal," wrote Sir E. Parry who had great experience in such cases as a county court judge and consistently carried out the original purpose of the Act until he was over-ruled, "was that they went to a tribunal, the members of which had had no personal experience of any similar proceedings whilst they were at the Bar, and whose business in life had not brought them into direct touch with the working classes."

Law courts being what they are, the procedure in such cases is cumbrous, costly, protracted and vexatious. In Ontario the working of the system is entrusted to a special body called the Workmen's Compensation Board. This experiment of its administration by co-operation between the employers, the workers and the State has proved much more successful in Ontario and "get rid of the nuisance of litigation" than in England. "Can anyone who compares our system with that of Ontario," asked Prof. H.J. Laski, "doubt for a moment that, to serve the vested interest of

1. Justice & the Law : pp. 14-15. (London (1930)

lawyers, its retention does a grave injustice to the working men of this country."

In the fifth place, the present procedure of appeal is costly. According to the existing method, counsel who argue in open court and explore into all the intricacies of a trial requires, of course, substantial fees for their work. Copious documents are required to be furnished to the Court which is composed of two or more judges. To all this is added the expense involved in pursuit of justice at the centralised Court of Appeal in London.

Finally, the present rule of awarding cost is not only unreasonable, but also is an incentive of encouraging appeals. As a general rule the successful appellant will be awarded his costs which include the costs both of the appeal and of the original hearing. Thus a litigant who wins his action and loses the appeal is to pay both. With a view to making the other party pay all the costs he is tempted to institute a second appeal. The stake increases, of course, on every appeal, but there is always a chance of winning in the last appeal and thus getting an order for all the costs in the trial of the action in first instance

and on appeals. In this battle for costs, the merits of the original action are unfortunately and not infrequently overlooked and side-tracked. It is a very open question whether considerable hardship is not inflicted by this rule of awarding costs which, being applicable usually to Appeals in the Court of Appeal as well as to those in the House of Lords, is a great encouragement to appeal and introduces what may not improperly be called a gambling element into litigation. In the considered opinion of Sir John Hollams, the rule for paying costs on appeal is operating to the detriment of both litigants and the legal profession.[1]

With the Court centralised at London, separated from the Court of Criminal Appeal, deficient both in the number of divisions and judges and steeped in expensive procedure and unreasonable rule of costs, what reform should be made?

It is, firstly, suggested that local courts of appeal should be instituted in the provinces. This suggestion certainly meets the very requirement of the litigants. In the words of Mr. Ensor, "it is sometimes said that since appeals

1. Sir J. Hollams: The Jottings of an Old Solicitor pp. 66-7

are on points of law and do not involve calling witnesses, it does not much matter where they are held. But this is to ignore many other serious aspects of the clients' convenience." If the convenience of the litigants is the one and only consideration of the problem, the avenue of solution is left in no doubt and the establishment of local courts of appeal can scarcely be gainsaid. There is, however, the important consideration of the uniformity of law. On the evidence of French and German local Courts of Appeal, it is argued that there is substantially as wide uniformity there as in England and that uniformity does not solely depend upon the centralised appeal court alone. But none the less for the result of uniformity obtained in France and Prussia, there are other elements to be considered. For one thing, there is in force the code-system of law which is more susceptible to the uniformity of interpretation of law than the system of case law. For another, the judicial profession is a single one and judges are constantly being transferred from one locality to another. For a third thing, in France though the Courts of Appeal are local, the Court of Cassation has a nation-wide jurisdiction and is in fact

primary source of judicial uniformity. Again in Germany, notwithstanding 27 Supreme Regional Courts, the imperial Court (Reichsgericht) at Leipzig is a final Court of review for the whole country on the initiative of one of the parties in litigation. These elements contributing to uniformity of law in France and Prussia in spite of local appeal courts are not readily found in England. Consequently the suggestion of local courts of appeal is commendable but without at the same time providing some regulations as to the training of judicial profession, the constant tranofer of judges from one area to another, the codification of laws and, most important of all, some such institution as the French Court of Cassation for whole England, the hazard of uniformity is considerable.

It is, of course, ideal that local courts of appeal be instituted all over the country while the House of Lords as a tribunal is reformed as English Court of Cassation. But, if the institution of permanent local courts of appeal

all over the country remains an ideal of judicial reformers, two alternatives seem to me worthy of serious consideration. The one is advanced by Mr. W.I. Jennings. "The more debatable question," Dr. Jennings wrote,[1] "is whether appeals should go to a Court of Appeal in London or to a local Court of Appeal. Appeals involve points of law more frequently than do cases of first instance, and the desirability of uniformity may indicate a central court. I am inclined to suggest that normally appeals should come to London except where, as in Lancashire and Yorkshire, the business is sufficiently great and justify a local clerical staff. The judges of the provincial courts of appeal could then be nominated from among the local county court judges. In addition, the Attorney-General (or the Minister of Justice) should have power to transfer a case to London if in his opinion the appeal raised an important point of law."

The other is what I venture to hazard my opinion, the institution of a certain number of circuit courts of appeal. The country may be parcelled out into 5 or 6 circuits, the appeal courts

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1. The Civil Courts, Essays in Law Reform, The Political Quarterly, vol.5. no.1.Nov.1934, p.42.

being held 3 or 4 times a year at places where the business is sufficiently great. The judges of the Court of Appeal at London are, then, required to go on circuit to locally hear appeals.

Whatever plan of local courts of appeal is preferred, they should be final courts of appeal subject only to what French lawyers called the 'revision' by the House of Lords reformed as an all English Court of Cassation. The reason for this is obvious. The administration of Justice (Appeals) Act 1934, has made some way in restricting the right of appeal from the Court of Appeal to the House of Lords. But the House of Lords remain an extra and superficial court of last resort. The evils of double appeal may be somewhat lessened by the Act but unfortunately still remain. The system of double appeal, as is always the case, increases the delay in the final decision of those cases which are carried to the court of last resort, and in all such cases it increases by one the number of times that an action must be argued and adds to the expense of

litigation. The absurdity, the inconvenience and the expense of the system of double appeal are almost inevitable. They are rampant in England and in other countries adopting such as a system as U.S.A. The system has long been denounced by more than one authority.[1.]

There is little or no justification for the existence of the House of Lords as a double court of appeal, of which more elsewhere. What is pertinent here to urge is that Courts of Appeal should be final courts.

Whatever may be the fortune of the schemes or rather dreams of local facilities for appeal, in future, the reforms of the Court of Appeal can brook no delay. To begin with, it should be instituted as the Court of final appeal, as intended by the framers of the Supreme Court Judicature Acts of 1873. The appellate jurisdiction of the House of Lords should be merged in this Court. Secondly, the present Court of Criminal Appeal should be re-constituted as one of the divisions of it. This not only will give the Court of Criminal Appeal the status of the Court of Appeal, but also prevent a conflict of jurisdiction

1. Sir R. Palmer: Our Judicature System P. 13, 1867; Justice H. F. Stone: Lawsuits Administration P 126

between the two courts. The conflicting opinion of these two courts has clashed in cases like R.V. Denyer is not only unnormal but derogatory to the prestige of both. Again the enlarged court of Appeal should have as many divisions as may be necessary to deal with the work before it, as the present number of divisions is manifestly insufficient.[1.]

The question of judges of this court is more debatable. Some would retain the present office of Lord Justices but would increase their number. In July 1934, a motion urging the appointment of 3 new Lords of Justices of Appeal was handed in at the table of the House of Commons. Lord Justice A. Greer urged it in his letter to the Editor of the Times.[2.]

The Bar council agreed to the recommendation of Lord Handsworth's committee that county court appeals should go direct to the Court of Appeal but suggested that "it will be impossible for the Court of Appeal to cope with the increased quantity of work

1. cf. The Second Interim Report of the Business of Courts Committee, cmd. 4471, para.37, p.25 and par 38 p. 26.
2. Oct. 8, 1934.

with which it will in future have to deal unless there is such an increase in the number of appeal Judges as will enable 3 Courts to be constituted, instead of the two Courts possible at present. The Council is strongly of opinion that unless this is done there would inevitably be serious congestion in the appeal work, and great inconvenience and hardship would be caused."[1].

On the other hand, others suggest that all judges of the High Court shall be Judges of the Court of Appeal as and when required by the legal business that the responsibility for choosing the members of the Appellate Court from among the High Court Judges do rest with the Lord Chancellor with the consultation of the Lord Chief Justice and the Master of the Rolls and that vacancies among the Lord Justices should not be filled but that on each such vacancy the number of the High Court Judges should be increased by one. It is a disadvantage, they argued, that the work of the Court of Appeal has been completely differentiated

1. Report of the General Council of the Bar on the Second Interim Report of the Business of Courts Committee. para. 4.

from that of the judges of first instance. As a result, "on the purely civil side the Judges of the King's Bench Division have little opportunity of doing appellate work in civil cases," while "the judges sitting in the Court of Appeal and hearing appeals from the King's Bench Division never sit as judges of first instance, and it is said, lose touch with the difficulties that attach to those duties, and with the realities that belong to ordinary life."[1] The suggestion that the same judges did appellate work and also sat as judges of first instance was, they argued, a wholesome characteristic of the Common Law Procedure before the Judicature Acts and should be revived in some measure.[2] But this suggestion has been adversel criticised, on all sides. It has been firmly condemned by the Bar Council. If the Court of Appeal should be constituted of a body selected from among the whole number of puisne judges, the method of selection would be either by rotation or

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1. cf. The Second Interim Report of the Business of Courts Committee, cmd. 4471, pa.33, p.22.
2. ibid, par. 35, p.23.

nomination. Rotation means, the Council argued, that every judge, irrespective of his aptitude for appellate work, must sit from time to time in the Court of Appeal. Nomination, however performed, is invidious and unsatisfactory in operation. Moreover the work of an appellate tribunal, as the Council pointed out, differs in many respects from that of a court of first instance.

The present constitution is, in their opinion, decidedly superior to the proposed reform. To quote the Report of the Bar Council,[1] "the co-ordination and consistency so desirable in a Court of Appeal and especially in what is to be normally a final court of appeal, are but secured by a body of men specially selected for permanent employment in that way, permanently working together, and deliberately recognised as of a higher judicial rank and higher judicial authority than the judges whose decisions they are called on to review. The public will of

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1. Report of the General Council of the Bar on the Second Interim Report of the Business of Courts of Committee.

~~of~~ necessity regard such an appellate tribunal with more confidence than one constituted of judges of the same rank as the one from whom the appeal is laid, and might indeed be excused for regarding an appeal from one judge to three others of the same rank as an unnecessary duplication of expense and delay.'

In the opinion of the Law Society,[1] "it is unnecessary that Judges of the Court of Appeal shall sit as Judges of first instance. The Lord Justices do not lose touch with the difficulties of cases in the Court of first instance, nor the realities that belong to ordinary life. They have, as a rule, had varied experience as Judges of first instance, and have had long experience at the Bar. There is no advantage in doing appellate work and at the same time sitting as a Judge of first instance.

The London Chamber of Commerce considered that such change would be unsatisfactory. "From the point of view of business men, and indeed of most litigants," the Chamber reported, "a Judge

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1. Report of the Legal Procedure Committee, cf also 78 The Solicitors' Journal P 109 et. seq. Feb. 1934; 177 The Law Times P.77. Feb. 31, 1934

of the Court of Appeal should be and is considered to be a judge promoted from among the judges of first instance for his particular fitness for the position. Every unsuccessful appellant would feel that, if his appeal had been heard by a Judge whose only duty was in the Court of Appeal, the result might have been different. Judges who sit in the Appeal Courts of all countries, so far as we know, are specially appointed for their fitness as such and constitute a separate body above the Judges of first instance. We think it is only in accordance with human nature that litigants would prefer that their appeals should be heard by a superior Court consisting of Judges specially sitting as Appeal Judges."[1]. Again, the voice of criticism was raised in the House of Commons, Mr. Llewellin said in the debates upon the second reading of the administration of Justice (Appeal) Bill[2]. "The report of the Business of the Courts Committee, with regard to doing away with the Lords Justices

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1. Memorandum of the London Chamber of Commerce on the second interim report of the Business of Courts Committee, par. 4. p.6.
2. 291 H.C.J.1536 5th series, 1933-4.

Hansard

and recruiting the Court of Appeal from various judges of the King's Bench Division, has found very little favour among practising members of the Bar, and, I think, among those members of this House who have studied these questions. The Court of Appeal as at present constituted has a very high authority in this land, and we do not wish to see, by having a changing court, the decisions less uniform than they are at present through having the court always from the same personnel."

In the opinion of Mr. Justice Talbot, the suggestion of the Committee has two kinds of disadvantages. Firstly, the suggestion ensures no stability in the constitution of the Court of Appeal and consequently would result in the same great mischief of the present state of things, judges constantly shifting between appeal and trial work, and involve, apart from its injurious effect on the composition of the court, serious waste of time. Secondly, the recommendation would both weaken the Court of Appeal and aggravate the defects of the King's Bench Division, because sufficient experience of appeal work can only be secured for the judges who would normally be called to sit

in the appellate court by confining their number within fair limits, and also because the elasticity of personnel in the K.B.D. is responsible for its defects. Having commented upon the recommendation of the Committee, Justice Talbot made an alternative suggestion of his own. It is, in effect, that the Court of Appeal will be divided into 4 divisions, 3 of which shall hear appeals from the K.B.D., with 2 Lord Justices, and Lord Chief Justice as president of each and 5 and later 6 puisne judges of the King's Bench Division to sit as members thereof, while the 4th division shall hear appeals other than those from the K.B.D., with the Master of Rolls and 2 or 3 Lord Justices as members. In his opinion, the Court of Criminal Appeal remains as it is and further appeals to the House of Lords shall only be allowed by leave of the Court of Appeal.[1]

To my mind, the office of Lord Justices should be retained and the number so increased as to enable them to staff the various

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1. cf. The Second Interim Report of the Business of Courts Committee, cmd. 4471, Addendum, II pp.60-63.

divisions, and to have a reserve force. Further, I venture to suggest that each vacancy of the Lord Justice should be filled by promotion from judges of inferior Courts. This, apart from being part of the general plan of promoting judges from the lower rank t the highest, will substantially realise the purpose of having judges in the appellate court who are experienced in the works of courts of first instance.

With sufficient number of judges recruited by promotion upon merits in the Court, the judges should be so grouped as to have some of them permanently in charge of certain classes of appeals. By this arrangement, beneficial results would be obtained. If, for instance, appeals from County Court judges under the Workmen's Compensation Acts had been dealt with in this way, much uncertainty and difficulty would have been saved. It would be far better if the minds of several experienced judges were constantly applied to all the many difficult legal conundrums under them. Were this system being carried out, a great saving of time, expense and trouble and great efficiency and expedition of work would result.

The present quorum of 3 judges is, as observed, insufficient. If this is not enough for the present Court of Appeal, how much would it be if it were reformed as a final court of review. In Germany, each chamber of a Supreme Regional Court is composed of a Chamber-President and two ordinary judges, while that of the Imperial Court five judges. In France, each chamber of a Court of Appeal is staffed by 7 judges and that of the Court of Cassation 15 judges. If the English Court of Appeal were ever reconstituted as a final court, the quota of judges should to my mind be no less than 5 but no more than 7, as the strength of 3 judges is too meagre for a final court, while that of 15 definitely superfluous.

It is scarcely necessary to emphasise that the reformed Court of Appeal should have the jurisdiction now exercised by the House of Lords as an appellate tribunal, the Court of Criminal Appeal, the existing court of Appeal and the appellate jurisdiction of Courts of the High Court. There is at present no retiring age for judges of the Court of Appeal. The requirement of an age limit is so obvious that it makes elaboration unnecessary.

The question is what age-limit should be imposed. Some argued the same retiring age for all Judges. Others would make a distinction between Judges of first instance and of the Court of Appeal. Lord Atkin was strongly in favour of this distinction in these words;[1] " ... a judge of first instance has to take in facts straight away and . .. one's receptive faculties begin to diminish after a man gets a certain age; whereas, in the case of an appeal court judge, his function is rather more of a contemplative one, and he has the advantage of sitting with colleagues who can help him over the fence from time to time by putting a different point of view to him, and so forth." He suggested a limit of 72 for judges of first instance and of 75 for the Court of appeal.[2]

At present in hearing appeals from the County Court, the Court of Appeal will not upset the facts found in the court below but is confined to considering whether the judge below misdirected himself in law or wrongly included or excluded evidence. But appeals from the High Court to the Court of Appeal

~~Minutes of Evidence taken before the Royal Commission on the~~ Despatch of Business at Common Law

1. ~~Evidence op.cit.~~ q. 3430.
2. Ibid. qs.2429-30.

are by way of rehearing. In Weddel -v- Clarke, Lord Wright pointed out this divergence and said that it may be that the Court of Appeal should have the same power in County Court Appeal as it had in High Court Appeals. It may be remarked, however, that were such a power ever to be invested to the Court the expense in bringing up witnesses would be enormous and the congestion of the list inevitable.

With regard to the method of Appeal it should be reformed as simple and cheap as possible. One concrete suggestion by way of example may perhaps be made here. At present the risk of expense involved in the existing method of appeal with oral argument in open court by counsel is undoubtedly great. Where both parties agree to this method, there is little reason why the rule should be disturbed. But unfortunately when one party is unwilling to run the risk of this expensive procedure, there is no remedy for him under the existing practice. This is deplorable. If one party would not resort to this majestic but expensive method, there is no reason why he should not be permitted to state his case of an appeal in writing.

"where either party," suggested Mr. Claud Mullins, "declares before trial an unwillingness to submit the issue to an appeal by the ordinary method, another method should be available in many kinds of cases - namely, by a statement in writing of the facts and of the legal points in question, which statement could be adjudicated upon by the higher court without any oral hearing."[1]. Some such procedure of appeal, which is simple convenience and economical, should be seriously considered and carefully provided for.

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1. In quest of Justice, p.154.

CHAPTER VI.

THE HOUSE OF LORDS.

The highest tribunal of the land is the House of Lords. In theory the House sitting as a court of Law is composed of all peers.[1] But by usage the non-legal peers do not take part in its sitting as a court. In fact the only lords who now sit as judges are the Lords of Appeal. Those are (1) the Lord Chancellor (2) the paid Lords of Appeal in Ordinary, of whom there are now seven and (3) any peer who has held high judicial office. The Lord Chancellor, of whom I have had occasion to mention, is the foremost of those Lords of Appeal and usually presides in the House. But unlike his colleagues, he holds office nominally during the King's good pleasure practically to the well understood conventions which make the disapprobation of the House of Commons fatal to the office of ministers and ministries. The Lord of Appeal in ordinary is appointed in effect by the prime minister after consultation with the Lord

1. Since the case of O'Connell -v- the Queen (1844 11 Cl. & F p.155) no lay peer has taken an effective part in the judicial proceedings of the House; and indeed for many years before that date. The

footnote from previous page contd.

occasions upon which the right of the lay peers was so exercised were very few in number. The cases are collected at the close of the report of O'Connell -v- The Queen, at p.425.

~~the Lord~~ Chancellor. To be so appointed, he must have held one of certain high judicial offices, or practised for 15 years as a barrister in England or North Ireland, as an Advocate in Scotland. Among the 7 places, usually 2 sometimes 3 have to be kept for representative of the Scotch Bench and Bar, while the rest 4 drawn from the eligible memberships of the English Supreme Court and Bar. They hold their offices during good behaviour, but can be removed on an address presented by both Houses of Parliament. Among peers who have held high judicial office and take part as law lords in its proceedings are mostly and usually ex-Lord Chancellors.

Among these three kinds of Lords of Appeal, the core is formed by the 7 paid Law Lords in Ordinary.

The minimum quorum of a sitting of the Court is 3 Law Lords, including the Lord Chancellor.

Criminal jurisdiction apart, the House of Lords has appellate jurisdiction to hear appeals from the Court of Appeal in England with the leave of that Court or of the House of Lords.[1]

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1. The Administration of Justice (Appeals) Act, 1934, (24 & 25 Geo.5.c.40) s.1.

and the equivalent courts in Scotland and Northern Ireland.

Until 1876, the court only sat during the session of Parliament, but now it sits when Parliament is prorogued or even dissolved.

Its judicial work and its place in appellate courts may be viewed from the following figures:

	Annual Average 1909-13	Annual Average 1914-18	Annual Average 1919-23	Annual Average 1924-28	Annual Average 1929-33	Annual Average. 1909-33
House of Lords..	90	81	90	70	63	78.8
Court of Appeal..	828	572	624	497	400	600.2
High Ct. of Justice (Appeals)	435	312	393	413	384	387.4
Judicial Committee of the Privy C.	121	143	153	148	126	138.2
TOTAL..	1473	1108	1260	1128	1063	1204.6

From the above table, it appears that the volume of appellate business in the House of Lords is not large. But these figures were obtained before the passage of the Administration of Justice (Appeals)Act, 1934. Since then the right of appeal is more restricted and the appellate work is consequently still less than formerly.

But it is interesting to note the results of appeals to the House of Lords during the last three years:

	1932	%	1933	%	1934	%
Appeals withdrawn, dismissed before setting down	12	19	22	33	8	16
Appeals withdrawn, dismissed after setting down	5	8	-	-	3	6
Order or Interlocutor Affirmed:	23	37	28	41	28	56
Order or Interlocutor varied	2	3	-	-	-	-
" " " reversed....	18	29	15	22	9	18
Otherwise disposed of.....	2	3	2	3	2	4
TOTAL:	62		67		50	

Though the right of appeal is much more restricted than formerly, the House of Lords as a court of last resort still remains. It is a relic of the past and an anomaly at present. There is a duplication of appeals involved in the co-existence of the Court of Appeal and the House of Lords. The Law Lords who are the core of the judges of the latter are much

of the same stuff as the judges of the former, as they are drawn from the same source and selected by the same minister. The Law Lords are usually a little older than the Lords Justices, though the latter are never young.

This duplication of appellate tribunals is not a matter of small wonder. In fact being the result of an historical accident, it owes its origin purely to a political after-thought Lord Melborne who was one of those responsible for Judicature Acts had long held the policy of one appeal. He pleaded before the House of Commons that "we should, if possible, constitute a single court of final appeal, and we should at all events, permit only one appeal in any case decided by a superior court." He abolished altogether in the Judicature Act in 1873 the ancient appellate jurisdiction of the House and substituted the present Court of Appeal, placing it at the top of what is still officially, though now misleadingly, styled the Supreme Court of Judicature and intending it should be what its name connotes. By section 6 of the Act, the Lord Chancellor was to preside in the Court of Appeal, and Section 20 rules out any appeal to the House of Lords or Privy Council, but the operation of this provision was suspended for

some time, and it was ultimately repealed by the Appellate Jurisdiction Act of 1876.

The causes of this change of policy are worth noticing. It was partly due to the refusal of Scotland and Ireland to participate in the new scheme of appeals and to have their own decisions reviewed by a mere Court of Appeals in England, and partly to the opposition of a number of conservative peers who were jealous for the future of the House as a second Chamber, considered the change as a menace to its authority and took the opportunity of the refusal of Scotland and Ireland to foster a new force against the reform. This situation is well described in a leading article of the Times. "It must be admitted that the enemies whose consent to a substantial change has been secured by an apparent maintenance of old forms did not belong exclusively to their political party. Thus, they were found in Scotland and Ireland in quarters supposed to be freed from political passion, though apparently not emancipated from personal jealousies. The people of Scotland were quite content with a final Court of Appeal extra-parliamentary in form and substance, but the honour of some of the occupants of the Scotch bench was touched by the proposal. A similar feeling was

easily excited in Ireland. In England the Committee formed to defend the Appellate Jurisdiction of the House of Lords was reinforced by men whose presence upon it astonished all but those who have studied the power of lingering superstitions."[1]

To these causes it was unfortunately added a third one that in 1874 before the Act was in force, a conservative Government returned to office and struck the way of compromise to the reform of the House as a final tribunal. The result was neither a return to the old system nor the Court of Appeal a final tribunal but the creation of the Lords of Appeal in Ordinary and the retention of the House as the supremest court in a reconstituted form superimposed upon the so-called Supreme Court of Judicature.

The worst feature of the system of two appeals is obvious. It is possible that a litigant who obtained in his favour the unanimous decision of all judges in two successive courts lost his case in the House of Lords by 3 judges. It is no value to him at all for the judges who decided for him but

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1. A leading article published in the Times of the 13th June, 1876.

1891 A.C. 107 127

he is defeated by the 3 judges against him and bound to pay by the thousands.

This is, of course, an extreme hypothetical case and there were and still are cases which happened not infrequently and in which the number of judges in favour of the successful party has been less than the number in favour of the unsuccessful party. Vagliano -v- the Bank of England an action which excited considerable interest amongst bankers and others, was, out of the usual course, argued before the 6 judges of the Court of Appeal, and 5 of those judges were in favour of the plaintiff, and agreed with Mr. Justice Charles, who tried the case. But in the House of Lords 6 of the noble Lords were in favour of the defendants and 2 in favour of the plaintiff. Thus, in the result, the views of 7 judges prevailed over those of 8 judges, who were in favour of the plaintiff. This difference of opinion among the judges is not a matter of wonder, as Lord Selborne truly said, "you can never escape by going through any number of courts of appeal fro the risk of differences of opinion in each and every one of them, and from doubts arising as to whether the last court decided better than the one before it."

1. 1891 A.C. 107, 127

The fact that there are, however, such duplicate Courts of Appeal and dialectical powers exhibited therein by different judges with regard to the same question, is interesting to the lawyers but is wholly unnecessary to the litigants. The fact that the party who has the opinion of the majority of the judges (if Court heads from start to finish) on his side should lose his case and pay the entire taxed huge costs of successive courts is, of course, the logical conclusion of the legal rules but to him is worse than anomalous.

Not only is the duplication of appeal courts anomalous, but also the constitution of the House as a Court is not altogether satisfactory. Those highly paid and hugely experienced and legally learned judges are usually too far advanced in life. Not a few English judges during the present century have been allowed to take part in the work of the House of Lords when they are over 75 years of age. The maximum of age in any judiciary is to be found here, as the retiring age of the judges in the Imperial Court at Leipsic is 65, and those of the French Court of Cassation is 75. Again, the participation of men who are or have been cabinet ministers as the Lord

Chancellor who has considerable executive duties to perform and ex-Lord Chancellors who can thus justify their large pensions and the whole atmosphere of the House as a member of legislature have probably the tendencies of colouring the highest tribunal with a little too more political complexion.

To these defects it is added a still worse one, the expensive and dilatory procedure of the House. "My own shocking view," wrote Mr. E. . Spence, K.C., who had a very great experience of appeal work, "is that the House of Lords is an undesirable anomaly as a court of justice .... I do not object to the institution because it is anomalous, but for the reason that on the whole it works badly. It is dilatory and very costly."[1] Undoubtedly the House is an oracle of law. Undoubtedly also, its decisions are given only after the utmost deliberation, but unfortunately are obtained only after a long waiting and at a grotesque cost on the part of the litigants. Not to say the time and expense that must have been heaped up for decisions from court to court, and one appeal after another, the mere time occupied in a case in the House is enormous. This can be made

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1. Bar & Buskin.

clear by figures. In 1934 there remained in the House one case under three months, 10 for 3 months and under 6 months 21 for 6 months and under one year, 7 for one year and under 2 years.[1] But unfortunately justice delayed is justice denied. In spite of the brilliant decisions delivered, they are of not much value to the litigants. "The triumphs of pure logic," wrote Mr. C. P. Harvey, "which are won by the highest tribunal are no doubt gratifying to lawyers. To the lay public they are of very little significance. The civil law is administered by lawyers for the benefit of lawyers; and the feast of reason which is occasionally dished up by the House of Lords is served and relished exclusively in the Temple. The long delays and fascinating interlocutory contests of a leading case are of no interest to the public at all. The average litigant does not delight in spending 2 or 3 years and 2 or 3 thousand pounds in procuring a final decision, however harmonious the result may be with the obscurer doctrines of the Common Law. He is much more concerned to have his case decided quickly and cheaply than to have it decided so very rightly. Law, like medicine, is a service which should be placed within easy reach

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1. Civil Judicial tatistics cmd. 4997. (1935)

of all who need it. And a good and rapid service at popular prices is much more to be desired than a slightly better service at prohibitive prices and involving long delays."

As to the cost, the real nature of the luxury proceeding in the House can be seen at a glance in the "Directions for Agents" issued by the House. The bold statements leap to the eye are that "the appeal must be printed on parchment"[1]. that "Security of Costs is given by (a) a Recognizance to the amount of £500 (b) a Bond for £200. In lieu of the Bond payment may be made of £200 into the Security Fund Account of the House of Lords ..."[2]. The Appellant He then has to prepare his printed Case and the Appendix.[3] The Case being very similar to the pleadings in the early stages of the action is read by few or none, but is, of course, settled by Counsel at much expense. The Appendix is more important in which are collected together all the documents which are or may be material for their lordship to peruse and printed in book form on numbered pages. The Appellant's case, the Respondent's case, and the Appendix are bound together in a

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1. Directions for Agents, method of Procedure, p.5. par.1.(1935.) 2. Ibid. p.6. par.7.Standing Order V., and VIII.
3. Ibid. p.10, para. 24.

volume called the Record. No ~~other~~ less than 40 printed copies of the Record have to be submitted to the House in a case,[1] each of the Law Lords having one before him. It is, no doubt, convenient for the Law Lords but at staggering cost to the litigants. The preliminary expenses of an appeal run sometimes into several hundred pounds.[2] Almost every decision of the House involves one party or the other in expenses of more than £1,000. Speaking a few years ago to the Cambridge Law Students, Lord Justice Scrutton referred to a case then before the House of Lords, in which £4,000 worth of damage was involved but the cost of which had already exceeded £15,000. Such a figure is no doubt exceptional, but it is approached in a sufficient number of cases to support the aphorism attributed to Lord Darling that "the English law, like the Ritz Hotel is open to everybody." Such luxurious proceeding is doubtless beyond the means of most people.

What is still worse, the duplicate appeal work of the House is usually for the benefit

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1. S.O. VI; Direction for agents, para.32, p.12.
2. Mr. E.F. Spence tells us in his charming memories that in Pollard -v- Campbell the preparation of the Record cost £1,095.9.0d Bar & Buskin 1930 (Elkin Mathers & Marrot, Ltd.)

of rich litigants and the discouragement of poorer ones. Owing to the possibility of being dragged to the House of Lords the average litigant is deterred from fighting the most substantial claims, while the corporations tend to make litigation the virtual monopoly. To quote Mr. A.P.Harvey again, "the evil is steadily becoming worse, owing to the ever-increasing prominence of large corporations in every-day affairs. Commercial interests are continually shifting out of the hands of small owners into the hands of large and wealthy companies; and the disparity of means between opposing litigants tends to be much greater than it was half a century ago. The private individual whose rights are infringed will often find that the proposed defendant to his action enjoys a prescribed capital of a quarter of a million pounds, and is only too willing to ventilate the dispute in the House of Lords. But the law is quite out of touch with this position. .... Nevertheless, we are humourously deemed to be equal before the law. The House of Lords opens its doors to all at the same fee, and in so doing places a bludgeon in the hands of the wealthy and unscrupulous litigant. Suppose a small man owns a useful patent, which stands

in the way of a large corporation formed for the purpose of exploiting some commercial process. What is simpler than for the corporation to infringe the patent and announce in answer to his remonstrances that they are advised that there is some doubt as to its validity and are prepared to contest the point, if necessary, up to the House of Lords? In this way the complaint as to infringement is easily silenced - a convenient and unobtrusive method of robbery."[1.] The injustice is perhaps the most noticeable in revenue cases, where the revenue authorities, though admit the doubtful nature of their claim but insist upon their disinterested zeal for a solution, propose to carry the unfortunate individual to every court and seek a final decision, at his expense, in the House of Lords.

The recent legislation has perhaps only alleviated but not eliminated this kind of injustice. On the Second Reading of the Administration of Justice (Appeals) Bill, Lord Atkins[2.] said, "the

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1. op.cit. pp. 84-5
2. ~~ibid. 784.~~ 92 H.L. S. 790 Hansard 5th Series (1933-1934)
~~2. ibid. ss 796-97~~

great importance of this reform is this, that a rich corporation - or perhaps I might say a strong Government Department - will not for the future be able in any way to terrorise the person with whom they may have a dispute by a threat that the case will certainly be taken to the House of Lords."

This is undoubtedly tr e. But so long as there remains this right of appeal, restricted as it is, it is still possible to hold it, to use the words of Lord Sankey, "in terrorism over the heads of an intending litigant."[1]. It is a dangerous and undesirable possibility ~~which~~ in the hands of powerful litigants. As truly said by Lord Hanworth[2]. "the litigant before he has even gone to the Law Courts wants to know what the possibilities, what are the dangers in front of him." "The litigant wants to be reassured that under the procedure of the Courts this multiplicity of appeals may be overcome. That is a very important point because we want to make the judicial procedure of this country attractive to those who desire to seek its assistance."

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1. ~~Parliamentary Debates 92, (Lords) 790~~, fifth series (1933-34.)
2. Ibid, pp.796-97.

As things now stand, the litigants cannot be completely reassured that this multiplicity of appeals will be overcome, because there would be an opportunity of the Court of Appeal giving leave or, if a different opinion is asked for, leave can be asked for in the House of Lords. Something more than restriction of the right of double appeal is needed. Its complete abolition appears to be desirable. With regard to county court appeals, Lord Atkin observed:[1] "I am not quite certain that it is a wise thing to allow such appeals even to come to your Lordship's House, and even by leave .... The cases are, for the most part, trumpery cases. There is a right of appeal in any case where the claim is above £20."

To my mind, this observation is not only applicable to County Court appeals but to all appeals.

In the opinion of Mr R. Poole,[2] "the President of the Law Society, the reform of appeal is a pressing problem. It will, to a large extent, be effected if the proposal is adopted for abolition of Divisional Courts. It will be further carried

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1. Ibid, pp.794-5.
2. Presidential address given at the Annual Meeting of the Law Society at Oxford, 1933.

out if appeals to the House of Lords are restricted; still more if the House of Lords ceases to be an appeal tribunal if appeals stop at the Court of Appeal. "One appeal," he said, "should be sufficient in all cases. When you come to think of it, the most serious consideration in life is life itself. There is only an appeal open to a man convicted of murder. Why should there be any more than one in any other case?"

The first question, Mr. Ensor humorously suggests, which it might occur to the visitor from Mars to ask about this extremely exalted tribunal, is why it should exist at all. In fact, it does not wait for a visitor from Mars to ask this question. It was questioned over and over again for a long time. Not only its existence was called into question but its death sentence was announced as early as 1873 but unfortunately it has been pardoned ever since.

To my mind, this ancient, august, duplicate, dilatory and expensive tribunal is quite indefensible. As early as 1873, strong opinion against the House as a court was resounded in it by the criticisms of Lord Selborne, Lord Hathaley, Lord Chelmsford. But in the Commons, opinion was

no less emphatic. "No man," said Lord Coleridge, then Attorney General, "whatever might be his view of the constitutional position of the House of Lords, who had any knowledge of its practical working, could deny that a more indefensible institution as a judicial institution it was hardly possible to conceive .... those people who had enjoyed the luxury of an appeal to the House of Lords must be very few indeed. When they had got a great appeal decided by that august tribunal, and when they had the satisfaction of paying the highly deserving recipients whom they must pay for that luxury, both sides probably went away with a thankful feeling of relief, and with a hope that they would never hear of the House of Lords again in its judicial capacity ... For this part, he would say that if this Bill did nothing else but get rid of the House of Lords as a judicial tribunal it would be worth while to pass it."

Those words which represented the general feeling of the time are as truly now as they were then. But none the less there are modern arguments in favour of the retention of the appellate jurisdiction of the House.

It is,firstly, argued that 2 or more appeals are better than one. This is, ineffect the substance of the argument put forward by Lord Penzance[1] in 1875 against the Court of Appeal as the final Court. But this argument was then authoritatively answered by such high authorities as Lord Selborne,[2] Lord Hatherley[3] and Lord Chelmsford[4] and by modern writers. Not only the best-informed then and now could see no substantial reason in this argument, but it has completely refuted by the hard facts of the practice of one appeal in Germany, France, and other Continental countries. As I have already tried to discuss in the previous chapter, the advantages and desirability of one appeal, shall say no more here.

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1. The Act of 1873 ... contained one provision said Lord Penzance, "which he had always held to be most detrimental - namely, that one court in England hearing between 400 and 500 appeals a year, should pronounce judgments that were absolutely irreversible for all time, except through an Act of Parliament. A Court possessed of that power would have been capable of doing an inconceivable amount of harm to the judicature of this country."

2. "There is," said Lord Selbourne in the House of Lords in 1873, "generally a system of double appeal for the suitor. I never concealed my opinion that this is not a good system. Where you have got a good Court with sufficient judicial power to command the confidence of the country, it is better that there should be no double appeal ... My opinion is that if you establish an adequate Court, it is desirable for the parties and for the general interest of the country that the decision of that Court should be final, and that you should not multiply appeals. You can never escape by going through any number of Courts of Appeal fro the risk of difference of

<u>footnote continued from previous page.</u>

opinion in each and every one of them, and from doubts arising as to whether the last Court decided better than the one before it. What you want is to make as good a Court as possible, and to give it all the power and authority you can, and that, in my humble judgment, is best accomplished by making it final." (Hansard 21, 4 p.351). The same view was taken by such statesmen as Lord Salisbury, Disraeli, Sir W.J. Harcourt, Earl Grey, etc. ~~of~~ also Lord Selborne: "The Supreme appellate Jurisdiction" a speech delivered in the House of Lords on June 11. 1874

3. Lord Hatherley expressed his entire concurrence with the essential principles of the Bill from beginning to end."

4. Lord Chelmsford "had long been of opinion that it was quite impossible for their Lordships, with the feeling which existed on the subject in the public mind, to retain the appellate jurisdiction of their Lordships' House."

Secondly, it is argued that the House of Lords is more likely to decide rightly than the Court of Appeal, because the Law Lords having played a part in its legislative deliberations, are thereb brought into touch with current social problems and tendencies, and are thus able to take a broader and more perspicuous view of important legal problems than Lord Justices.

But this line of argument may be answered in two respects. On the one hand, it is doubtful whether the decisions of the Law Lords are more helpful or consistent than the Lord Justices. There have been, no doubt, great judges in the House of Lords, such as, to mention a few, Lord Watson, Lord Macnaughten, Lord Haldane and Lord Parker. But one would almost ask, as the Law Journal asked, "is the law of the House of Lords any better than the law of the Court of Appeal? It is a step up in the legal hierarchy, but what change comes over the Law Lord to make his law better than it was when he was Lord Justice, or perhaps in the days, not much more remote, when he was Mr. Justice. 'Do they suffer a sea-change into something rich and strange?'". If reading over the important judgments in the House of Lords during

the last half a century or a little more, there are ,no doubt, certain decisions of the House of Lords which are monument of learning and have helped to rationalise the law. But there are also a good many decisions which are far from being satisfactory. Here are some instances out of many. Sorrell -v- Smith have only emphasised the doubts by the House which they were invited to dispel.[1] Neville -v- London Express Newspaper, Ltd.[2] made the various department of the law of maintenance the more curious in the hands of Law Lords. Williams Brothers -v- Agius[3] was decided contrary to Hall -v- Pine Junion & Co.[4] and they have still to be reconciled by the House. Allen -v- Flood[5] and Quin -v- Leather[6] have only confused the law. Some pair of cases, such as Addie & Sons -v- Drumbreck[7] and

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1. 1925 A.C. 700. This case was carried to the House of Lords for the purpose of elucidating the rules of law with regard to commercial boycotting and conspiracy, which had been developed in obscurity by the previous decisions of the House. There was, however, no unanimity or general principles on the subject reached by their Lordships.
2. 1919 A.C. 368. This case dealt with the question of maintenance. A two-fold decision was rendered, the importance of the first was deprived by the second.
3. 1914 A.C. 510.
4. 33 Com.Cas. 324
5. cf. 1929 1 K.B. p.410.
6. 1898 A.C. 1; 62 J.P. 324
7. 1901 A.C. 495; 65 J.P. 708.
8. 1929 A.C. 358

Excelsior Wire Rope & Co -v- Callan,[1] Colls -v- Home & Colonial Stores[2] and Jolly -v- Kine[3], will perplex not a few lawyers and all layment. The decisions of other cases as, for instance Taff Vale Railway -v- Amalgamated Society of Railway Servants[4] by the House was immediately altered by the Legislature. The above cases as well as others of like nature, demonstrate that the House as a law court can hardly be defended on jurisdic grounds.

"The decision of the House of Lords," wrote Sir John Hollams,[5] "is undoubtedly the final view of the question, but it by no means follows that it is admittedly the right one. It is not uncommon for the noble lords to differ, and for the decision to be that of a bare majority, and to be contrary to the views of very eminent judges in the Courts below."

Some would point out the cases of Workmen's Compensation and others decided by the Court of Appeal and reversed in the House of Lords. They would say that the interpretation by the latter has been much more liberal and true to the will of the

1. 1930 A.C. 404.
2. 1904 A.C. 179.
3. 1907 A.C.1.
4. 1901 A.C. 420.
5. The Jottings of an old Solicitor, p.67 (1906)

Legislator than the former. This is, of course, true. But the ruling in Bevan case in which the House has laid down an interpretation of the Act of 1897 by a majority which will deprive hundreds of workmen's compensation in defiance of the intention of the Act.

Now even assume the argument of juristic superiority of the House to be correct, it may still well be doubted whether the results obtained are equal to the huge costs spent by the particular litigants and justify the annual bill of £50,000 paid by the public for the remuneration of the Law Lords. The answer even made by the most zealous champion of the tribunal would, I fear, be in the negative.

It is, thirdly, argued that the decisions of the House give the substantive law with a dignity and importance which inspired the respect of the administration of law. But this argument falls upon ground when we consider that the general public have always paid much respect to the decisions of the Court of Appeal and not less so to the Court of Criminal Appeal, the decision of which is very seldom carried to the House of Lords.

It is, fourthly, argued that Scotland

and Northern Ireland would not submit to any court of England less dignified than the House of Lords as a final tribunal. But since 1875 things have greatly changed. To the House of Lords Northern Ireland sent about 2 or 3 and Scotland about 10 or 20 appeals every year. They are not unwilling to submit their appeals to the English Court of Appeal which is, if necessary, reconstituted with additional Scotch and Irish judges. If they persist in their privilege of appeals in the House of Lords, it is questionable whether the link which connects the jurisprudence of three countries is now so cherished as it was in 1873 and whether it pays the English laymen to have his artificial symmetry of institutions at so dear a price when considering the number of appeals from Northern Ireland is so negligible and the law of Scotland differs greatly with English law.

The foregoing remarks prove clearly to me that the House of Lords as a final tribunal can no longer be defended.

Upon motion for the Second Reading of the Administration of Justice (Appeals) Bill, Lord Sankey, the then Lord Chancellor said,[1] "There are some who

1. 92 Parliamentary Debates 790 5th Series, 1933-34.

would like to lay the axe to the root and abolish either the Court of Appeal or your Lordship's House. Whatever the future may have in store for us, that method is not at the moment practical politics. It is not our way to make violent changes in the administration of the law. At present the Court of Appeal acts as a sieve for the House of Lords .... To abolish that Court of Appeal would throw such an amount of work on this House as would necessitate alterations too drastic to be carried out at one and the same time. With regard to the judicial side of your Lordships' House, may I be permitted to say that although I have received many deputations and suggestions with regard to legal reform, there were very few indeed who advocated that the appeal to your Lordships' House should be abolished." It may be observed that the suggestion to abolish the appellate jurisdiction of the House of Lords which reached the Lord Chancellor might be not "many" but those who advocated it are by no means "very few." To mention a few out of many during recent years; The Law Journal has urged it over and again - the President of the Law Society, Sir R. Poole, has advocated it before the Annual Meeting of the Law

Society, the Bar council has implicitly found in its favour in the remark on the Report of Lord Mandsworth's Committee on Courts Business.

The case for the abolition of the appellate jurisdiction of the House is, I think, overwhelming.

Many suggest that the appellate jurisdiction of the House of Lords is to be abolished and the Court of Appeal made the final appellate Court of the land. Lord Merivale observed,[1] "It has been proposed and proposed not all recklessly, that the Court of Appeal should be a final Court of Appeal. That is a matter which has had consideration and no doubt will have consideration from time to time." This was the original plan of the Judicature Act of 1873 and unfortunately became abortive before the Act came into operation. It would be desirable to revert to this plan. "Litigation should," wrote Mr. E.F.Spence, K.C., "end in the Court of Appeal, but the constitution and character of that institution, would require careful consideration and revision before it became the final court of Appellate."[2]

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1. 82 ~~Parliamentary~~ H. L. Debates (Lords), 1080 5th Series, (1930) 1933-34.
2. E. F. Spence: Bar & Bench

With the constitution of the new Court of Appeal I have already dealt in the previous chapter. But how about the House of Lords, after it ceased to be an appellate Court? It can be, some suggest, constituted as a new machinery in the judiciary hitherto lacking in this country. At present there is no system of vigilant supervision of English judicial machinery. The consequences are serious delay and unbearable expense of legal proceedings as well as uncertainty of law. This is surely bad in the public interest. So long as English law keeps its present form, there should have a permanent authority that should supplement and harmonise the works of the judges in litigation and their law-making functions and at the same time provide, improve and supervise the machinery for the administration of the law, as Parliament has now no time to do. This co-ordinating and supervising work is now imperatively needed. Were its appellate jurisdiction transferred to the Court of Appeal, the House of Lords could be made a new legal authority to take charge of the new work of judicial co-ordination and supervision acting, as now, solely through its properly qualified legal members. The new judicial functions which would fall

to the House would be manifold, some of which, as suggested by Mr. Mullins,[1] may be mentioned here. First, it could set on foot and supervise the gradual and progressive codification of the vast judge-made law and would have the obligation to issue in proper form, and to re-issue at intervals, the whole codified law. Secondly, it might be entrusted the responsibility of deciding which future decision of judges of the new Court of Appeal are to be accepted as authoritative. Having decided that a decision of the courts is to be a precedent, the house extracts its essence and issues a short and concise statement of the new point of law and include it in next issue of the code. Thirdly, it could be entrusted with the duty of declaring doubtful points of law on the initiative of the judges

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1. In Quest of Justice, Ch.12, pp. 217-231. Mr. Mullins has laid special emphasis upon the point of the administration of private law. But to me, the administration of criminal law, which is commonly classified as one branch of public law, requires no less reform than the private law and his suggestion of reconstituting the judicial functions of the House of Lords can be and indeed, should be, I think, extended to the whole sphere of the administration of law.

which would otherwise be likely to involve future litigants in litigation and appeals.

Fourthly, it could be given the unperformed duties of the annual council of judges[1] and the supervision of the work of the Rule Committees in the High Court and County Courts, so that these bodies would be encouraged to suggest all necessary improvements in the details of procedure. Fifthly, it could be entrusted with the work of improving the form of all the output of Parliament and later with the control over the drafting of Parliamentary Bills generally. The essence of the plan here enlisted is that new machinery should be created inside both Parliament and the present legal system. This is a fitting in of the new legal work with existing institutions in accordance with English history and English Constitutional traditions.

If some such system were put into operation, some advantages are, it is argued, obvious. First, it would retain the essential advantages of the system of judge-made law and yet avoid its main

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1. Under Section 210 of the Consolidating Act of 1925.

drawbacks. Second, it would put the law into convenient form. Third, it would clarify the law and put an end to the chaos of the present system of rules. Fourth, it would improve the administration of Justice.

So long as the English legal system remains as it is, a judicial machinery for codifying, co-ordinating and supervising all judicial works is desirable. But whether they are better to be entrusted to a Ministry of Justice or a reformed House of Lords will be discussed in a later chapter.[1]

Another suggestion of the kind is that the House of Lords as a judicial organ may be reformed and turned into an English Court of Cassation having the function, inter alia, of deciding the doubtful points of law left unsettled.[2] This measure would undoubtedly become the more necessary, if local courts of appeal were ever established all over the country.

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1. Chapter XV, A Ministry of Justice.
2. Ensor, Courts and Judges, p.44.

PART II

THE ORIGINAL COURTS.

CHAPTER VII.

COURTS OF SUMMARY JURISDICTION.

The lowest but most important criminal courts in England[1] are technically and generally entitled the Courts of Summary Jurisdiction.[2] They may conveniently be discussed[3] under:

(1) Lay Magistrates Courts
(2) the Stipendiary Courts -and-
(3) the Metropolitan Police Courts.

Lay Magistrates Courts are spaced out all over the country, numbering a little more than one thousand. They are either courts[4] in a county or a borough. The judges of these Courts in the county or borough consists of the Justices of the Peace who are men and women under the Commission of Peace for a borough or a county which, in the words of Maitland, is the most thoroughly English of English institutions. They are appointed, in effect, by the Lord Chancellor[5] on the

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1. In legal language, England now includes Wales, unless special exception is made. (Jenks, The Government of British Empire, p.49) It is so used here.
2. They are popularly known as Police Courts. This is an unfortunate and misleading name. Each sitting of the Courts of Summary Jurisdiction is called in law Petty Sessions.
3. For a general discussion of Magistrates, cf. 10, Halsbury's "The Laws of England", pp.[illegible]-666.

Footnotes from previous page (contd.)

4. Every county is divided into a number of petty sessional districts. cf. Petty Sessional Division Act, 1836 (6 & 7 Will. 4c. 18) + Petty Sessions Act 1849 (12 Vict. c. 18)

5. 11 & 12 Vict. c.43, s.11.

Omitted on page 1 from footnote (2). - The Report of the Departmental Committee on Imprisonment by Courts of Summary Jurisdiction in Default of payment of fines and other sums of money stated that there are 1044 courts of Summary Jurisdiction. ~~Cmd. 66 & 9, pa.9. cmd. 4649 (1934)~~

recommendation of the Local Advisory Committees.[1] No qualification, except residence, is required to hold the office.[2] They are usually of little or no legal training. They are appointed for life, but are removable by the Lord Chancellor for misconduct. They are unpaid for their service, a fact which has given rise to their playful appellation of the "Great Unpaid". But the office, though gratuitous, is considered as a kind of social honour and distinction, often sought after by country gentlemen and political aspirants and usually given as a reward for political service.

Those courts with amateur judges could scarcely cope with the volume of legal business in the more populous towns.[3] Hence in London and 15 of such populous places, the court of summary Jurisdiction is presided by the Stipendiary magistrate[4]. "for the purpose of the more speedy and effectual execution of the said office, the better protection of the persons and properties of the inhabitants and

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1. Cf. Report of Royal Commission on the Selection of Justices of the Peace. cd. 5250. (1911
2. Justices of the Peace Act, 1906, 6 Edw.VII.c.16,s.1.
3. Cf. The preamble of the Stipendiary Magistrates Act 1863 (26 & 27 Vict. c.97.)
4. The Council of a municipal borough or urban district with a population of 25,000 people may secure the appointment of a paid magistrate by petitioning the Home Secretary. Stipendiary Magistrates Act, 1863, (26 & 27 Vict. c.97) Municipal Corp.Act.1882.(45 & 46 Vict

and the advantage of the public.[1] But Grimsby and Pontypridd have stipendiary magistrates while Bristol and Sheffield have only lay justices. The stipendiary magistrate is appointed, in effect, by the Home Secretary. A Stipendiary magistrate in municipal boroughs is appointed under the Municipal Corporations Act of 1832, and in particular districts under the Stipendiary Magistrates Act, 1863, and special acts. He must be a barrister of at least 7 years' standing in the borough and 5 years experience in the urban districts.[2] He holds his office during the King's pleasure, technically an exception to the general rule of English judicial tenure of good behaviour, though in fact he is only removed for misconduct. He is paid by a fixed salary out of the funds of the borough or urban districts which procures his appointment, again an exception to the general practice that the remuneration of judges is paid out of consolidated fund. In the provincial towns where the stipendiary magistrate is appointed, he sits alone in court and does so in ten towns. But lay justices have a right to sit with him[3] and they

1. The Stipendiary Magistrates Act, 1863.
2. ibid c.97, s.3; Municipal Corps.Act, 1882, (45 & 46 Vict. c.50, s.161 (1)
3. cf. an unpublished ruling of the Law Officers of the Crown in 1885.

do so in seven towns.[1] Elsewhere lay justices and stipendiary share the work according to local arrangement and traditions. It is apparent there is no logic about the relations between lay and stipendiary magistrates.

In the Metropolis[2] there are in all 14 Courts of Summary Jurisdiction with 26 stipendiaries as judges. They are appointed by the Home Secretary, under the Metropolitan Police Courts Act of 1839.

They must have been a barrister for 7 years[3] or a stipendiary magistrate in a borough or urban district.[4] They are paid a fixed salary, varying from the lowest of £1,000 to £1,500 for the chief magistrate. They are required to retire at the age of 72.[5]

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1. The Magistrate, Jan & Feb. 1935.
2. In the city of London the Summary Court is composed of a single Alderman. Here municipal and judicial functions are discharged by one person. History alone can justify the continuation.
3. Metropolitan Police Act, 1839, 2 & 3 Vict. c.71. s.3.
4. Stipendiary Magistrates Act, 1858 (21 & 22 Vict) c. 73, s.14.
5. cf. the Metropolitan Police Courts Act, 1897; the Police Magistrates (Superannuation) Act, 190[illegible]

The stipendiary magistrate alone does the ordinary Summary Court work, and the lay justices do such work as the licensing, rating and attendance orders. But in some parts of London rate arrears come before a stipendiary and in other parts before lay justices. In the six juvenile courts, a magistrate as Chairman sits with two justices, one man and one woman. There is no uniformity in the division of work. The divisions of police courts in London again stimulate one to think. The last order in Council under the Metropolitan Police Courts Act of 1840 appeared in December, 1930, and left the police district divided into 14 divisions. Whoever refers to the Order will see certain Courts having comparatively too large an area in size and population. The effect of this is undesirable. There is far too much work heaped upon one or the other Court. In the words of the Law Journal, "The daily tide of small matters is so high that more important cases have to be adjourned from month to month."[1].

1. The courts of summary jurisdiction with stipendiaries whether in cities or urban districts

1. Law Journal 228, Oct. 12, 1935.

or the Metropolis form but a very small proportion to the overwhelming majority of courts with lay judges. The chief advantages of the system of stipendiaries, are claimed to have:

(1) a trained lawyer on the Bench,
(2) the regular attendance of the legal judges at the court house, while two lay magistrates are not always available and
(3) his power to act alone in all matters while ordinarily two lay justices are required.[1]

Apart from the lay justices or professional judge as the case may be, there is in every court of Summary Jurisdiction an officer called the justices' clerk whose duties are to prepare all documents, keep records and accounts. When the bench consists of lay justices, the clerk is expected to guide the Bench on points of law.[2] He must be a barrister of no less than 14 years' standing, a solicitor of the Supreme Court or a clerk to a stipendiary or metropolitan magistracy, with no less than 7 years experience.[3]

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1. Stipendiary Magistrates Act, 1858, (21 & 22 Vict. c.73, s.14)
2. cf. Albert Lieck, The Justice at Work (London 1922) p.6.
3. Justices Clerk Act, 1877 (40 & 41 Vict. c.43,52)

The clerks of the Metropolitan Police Courts are appointed by the Home Secretary through competitive examination. They are full-time officials and paid from the Metropolitan Police funds. They are pensionable officers and subject to an age-limit. All other clerks are appointed by the Justices of the Borough or of the Petty Sessional Division of the County. There are about 940 such Clerks, of whom only about 50 (i.e. 5.3 per cent.) are full-time officials.[1] The remainder,(i.e. more than 94 per cent.) are part-time clerks who are Solicitors in private practice. In country districts, it is not uncommon that a clerk serves more than one Court. There is no age-limit for such clerks except in seven of the large county boroughs where an age-limit of clerks is provided. The clerk is remunerated by a lump sum allowance which, according to the Criminal Justice Administration Act of 1851 shall include and be deemed the remuneration for all business which he may be called on to perform. The effect of the lump-sum system is that the more he spends on assistance and office expenditure, the less he has for himself. It

1. Report of the Departmental Committee on Imprisonment by Courts of Summary jurisdiction in default of payment of fines and other sums of money. par.14, cmd.4649 (1934). cf. also 307 H.C. 1090 (Dec.12,1935)

causes not a little inconvenience of adjustment for him. But in case of a full-time clerk, this provision does not cause practical inconvenience, because he incurs no expenditure for office accommodation.

The assistants of the Clerk are the personal employees of, and appointed by, the clerk who alone is responsible for this appointment and payment and for the manner in which they discharge their duties. Over the selection, qualifications or conditions of service of these assistants no public authority has any control. Much of the work done by the Clerk's assistant is of some importance. He may act for the Clerk when the latter is absent. He is to do the routine work connected with the keeping of accounts, the sending of notifications about arrears in payments and the preparation for signature of warrants for commitment to prison and so on. He may be employed in case the Clerk is a part-time officer, partly on Court work and partly on the other work of a solicitor's office.

Apart from the Clerk and his assistant there are probation officers or officers. At least one probation officer is now attached to every petty sessional Court but many Courts are served by part-

time officers receiving purely nominal salaries.[1] The probation officer is appointed by the Probation Committee of a Combined Area, or in a probation area which is not a Combined Area by the Justices acting in and for the petty sessional division.[2] In London, the probation officer is appointed by the Home Secretary.

The jurisdiction of the Courts of Summary Jurisdiction, apart from exercising executive functions with which I am not concerned here, may be said of two kinds. First, it has a civil or quasi-civil jurisdiction in such matters as attendance, affiliation, maintenance and separation orders, licencing and the like. This jurisdiction is extensive in nature and far-reaching in consequence. Second, apart from being an examining court[3] to find whether there is a prima facie case for committal to Quarter Sessions or Assizes, it has a criminal jurisdiction in dealing summarily with a very large number

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1. Report of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction para.122 Cmd.5122 (1936)
2. The Criminal Justice Act, 1925, s.2.
3. One justice of the Peace is competent to form the examining court. cf.

of criminal offences. Subject to certain conditions, it can deal with some indictable offences and this jurisdiction has been greatly expanded by the provisions of recent legislations.[1] Not only has the Criminal Justice Act of 1925 increased the powers of magistrates, in Quarter and Petty Sessions, giving jurisdiction which formerly was possessed by His Majesty Judges of Assizes only, but successive statutes like the Children's Act, the Guardianship of Infants Act, the Adoption of Children Act, the Poor Law Act, and the Road Traffic Act and many others, have added to the duties and increased the responsibilities of Justices of the Peace. One has only to look at the large Stone's Justice's Manual of 1936, with its 2474 pages, referring to about 8,300 cases, apart from the table of cases covering 140 pages, to realise how enormously the work of the magistracy has grown. It is impossible not to be impressed by the great amount of work which falls to be done by the magistrates today.

Of the works done by Summary Courts, the story may be partly told by the following table:-

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1. Stone's Justice Manual p.97 et seq. 68 ed. (1936)

COURTS OF SUMMARY JURISDICTION:

ANNUAL AVERAGE OR TOTAL FOR YEAR.

OFFENCES.	1900-04	1905-09	1910-14	1915-19	1920-24	1925-29	1930	1931	1932	1933
Indictable.	45635	50327	50937	51735	50363	56491	55682	58317	62103	61264
Non-Indictable...	726811	687756	647451	491314	558255	602851	609670	571922	540257	578431
Drunken-ness...	210424	205058	193354	76565	85160	68421	58609	46846	33058	30610
Motor-car.	2435	9330	18044	24898	38671	173485	191621	202165	197154	219779
TOTAL:	772446	738083	698419	543049	608618	659342	665352	630239	602360	639695

From the foregoing figures, it is obvious that the number of indictable offences dealt with in the Summary Courts has steadily increased. As to non-indictable offences, the change in the total number is not so striking as the change in the nature of offences. There has been a steady decline in drunkenness and a steady increase in motor car offences. The latter class of offence now constitutes well over a third of all non-indictable offences. In 1933, the other Non-indictable offences whose records were over 20,000 charges were revenue offences (32126) highway obstructions and nuisances (29016) and sundry tradings, etc. (3[illegible]095) and bicycles while those over 10,000 charges were common assaults (17169) betting and gaming (11872) malicious damage (10224) offences against local Acts & Byelaws (14071), while the rest varies below 9,800 and above 2 charges. With regard to non-indictable offences the striking fact is their variety, their list contains more than a hundred headings.

With this extensive jurisdiction, the importance of, and the part played by these Courts are obvious.

This again can be clearly demonstrated by figures in the following table: 1.

ANNUAL NO. OF PERSONS DEALT WITH.

COURTS.	Nature of Offences.	Annual Average 1900-04	Annual Average 1905-09	Annual Average 1910-14	Annual Average 1915-19	Annual Average 1920-24	Annual Average 1925-29	1930	1931	1932
Assizes & Qtr. Sessions	Indictable	11276	13111	12646	6079	8494	7510	8384	8667	10410
	"									
Courts of Summary Jurisdiction.	Indictable	45635	50327	50967	51735	50363	56491	55662	58317	62103
	Non-Indictable	772446	738083	688418	543049	606818	659342	655338	630239	602360
TOTAL:		829357	801521	768031	600863	667475	723343	719378	697223	674873

1933
9201
61264
638695
TOTAL: 718160

wh t do these figures indicate? They show how large a share of the criminal jurisdiction is exercised by the Courts of Summary Jurisdiction. Not to any other years which are evident from the foregoing Table, in 1933 alone, these courts not only dealt with over half a million non-indictable offences, but disposed of 88 per cent. of all persons found guilty of indictable offences, while only 12 per cent. of all were committed for trial. Apart from these convincing figures it has to be observed that the whole of this 12 per cent. of indictable cases tried by jury in Quarter Sessions, and Assizes and the Central Criminal Courts began in the Summary courts for preliminary examination.

Out of a total of 710180 persons found guilty of indictable and non-indictable offences, 700965 persons were tried in the Courts of Summary Jurisdictions, i.e. constituting over 98 per cent. while only 9,201 persons were tried both in Quarter Sessions and Assizes constituting a little less than 2 per cent.[1] Again in 1932 out of 39,354 persons

1. Cmd. 497 , Table A, Tables B & C.

received into prison on conviction for indictable and non-indictable offences, 32,982 or 84 per cent. were sent by the Courts of Summary Jurisdiction.[1]

Besides exercising this extensive criminal jurisdiction, those Courts deal with a considerable number of civil or quasi-civil matters. These include most of the matrimonial disputes of the poorer people. Every year, more than 20,000 cases between husband and wife, some 7,000 cases in which unmarried mothers obtain orders against the putative fathers of their children, about 8,000 orders dealing with unsound meat, nuisance and so on; more than 10,000 orders for possession of small tenements, to keep under control of dogs, custody of children, attendance and other miscellaneous matters are heard in Summary Courts.

Courts which are entrusted with more stupendous duties than those Summary Courts one could not find in the land.

Though the public is not always conscious of it, these Courts and the officials who conduct

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1. Cmd. 4608 VII (1934)

their works are the most important of all the tribunals and officials engaged in the administration of criminal justice. Although they are the lowest of criminal courts in the scale of dignity, but the amount of work done by them is so vast that they play a far more important part in the whole judiciary than some tribunals of much greater dignity and status. They are, in the words of a distinguished writer, "the bed-rock of English criminal system."[1] They are the points of contact with administration of justice of the overwhelming majority of the inhabitants who come into any contact with courts and court officials.[2] They are much closer to the ordinary people, where one person comes in contact with other courts of justice, ten are familiar with the police courts. In fact, the great bulk of the population receives its impression regarding the speed, certainty, fairness, and incorruptibility of justice are administered. They are, to use the phrase of Sir F. Pollock, "in modern times, to many citizens, the only visible and understood symbol of law and justice."[3] As a deterrent of

1. Spirit of our law, p.237.
2. "Through them," said Lord Brougham, "more than through any other agency (except the tax gatherer) are the people brought into contact with the government." Speeches III, 377.
3. The expansion of the Common Law p. 31, London, 1904.

crime, they are more important than any other institutions with the possible exception of the police force.

Important as they undoubtedly are, they are by no means free from defects. On the contrary, they have become the object of serious criticisms. They deserve careful consideration and call for urgent reforms. But let me state at once that over generalisations are dangerous here, because there is abundant evidence of variety of procedure, of attitude and of outlook upon the work as between the different petty sessional divisions. Bearing this in mind, let me observe: What are the defects and the criticisms?

From the viewpoint of the personnel of these courts, it is important to note that except 38 courts having professional judges out of a total of 1,044 courts, they are composed of unsalaried, untrained, legally inexpert, lay judges. If examination were made, the stipendiaries come out fairly well, as they are comparatively competent to deal with legal questions. One thing to be said here about the stipendiaries is that in appointing them,

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77 Law Journal, Jan. 1934.

legal qualification and experience must be considered in preference of political service of the candidates.

As to the lay judges, there is no doubt that they do an enormous amount of gratuitous work, of a difficult and disagreeable character, and devote much time and energy to the doing of it. But, in the words of the editor of the Law Journal,[1] "criticisms are constantly levelled at unpaid benches of justice. There is no doubt these justices do perform devoted and valuable services to the State. But there are also undoubted objections to the system." First of all, the appointment of Justices and the method of their selection have on several occasions been the cause of complaint and dissatisfaction which have found expression in debates in Parliament.[2] The objection used to be the magistrates were conservatives. Until 4/ years ago, Lord Herschell took up the task of redressing the balance by the introduction of

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1. 77 the Law Journal. Jan 1934.

2. Parliamentary Debate (Costs) Hansard, 3rd series, Vol. I 676 (1830); 3rd series, vol XIII 1270 (1836); 4th series Vol XXII, 2864 (1892); 4th series, vol.61 XII; 1362, (1907).

a proper proportion of Liberals. In 1910 came the Royal Commission. As to the dissatisfaction with existing methods of selection, the Commission said:[1]

> "Recognising as we do the important judicial and administrative duties to be discharged by Justices of the Peace, we entertain a strong opinion that their selection should be controlled and guided by considerations which will secure that the office shall be filled by men of sufficient ability of impartial judgment and high character. The present practice and system of selection frequently results in the absence or deficiency of those attributes. ....." ....

"These lists are prepared with the object of rewarding and encouraging political support and of assisting party-political interests. Naturally the chief qualification sought for is political service .... all political parties seek to take advantage of any available opportunity to demand and secure the appointment of justices; such demand proceeds from a desire to strengthen party interests ... thus it is that in many districts the selection of even competent Justices of the Peace is regarded as the result of party success, and the Justices themselves are regarded as the representatives of a political party or of a social class.

These evils the Commission condemned and

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1. Report of the Royal Commission on the Selection of Justices of the Peace, pp. 8-9, cd. 5250 (1911)

hoped to remedy by the institution of advisory committees to assist in making recommendations to the lord Chancellor for appointment. But none the less the evils remain at present and according to prevailing opinion, even become worse than before. In the words of lord Mainhead,"Today, the Advisory Committee normally represent the three political parties. As a result it may be difficult for a well-qualified man or woman to become a Magistrate who does not actively belong to one of the parties."[1]. The result of the change since 1910 has been to balance the predominence of Conservative politics on the Bench by the appointment of Liberal and Labor members. The political bias has thus been made tricolour and become all the more notorious. The consideration of political services plays too important and dominant a part in their appointment.[2]. The Justices appointed are usually of active political workers, and, as such, are most likely to have strong prejudices and to lack judicial qualities. They are usually appointed at an old age when they are losing sympathetic understanding and are incapable

1. The Times, Feb.2. 1935.
2. "At the present time the political views of all candidates are ascertained prior to nomination and in my opinion the anomalous practice should cease." Dr. A.F. Luff's Letter to the Editor. The Times, Jan 23, 1935.

of profiting by experience.[1]

Active work as a political partisan is probably the worst training for a judicial career, while the method of selection of bench on political grounds is undoubtedly undesirable.[2]

> "It is even more important that a candidate's political affiliation should cease to affect his appointment in any way ..." writes a leading article in the Times.[3] "It is necessary to make a complete breach with the notions that the first claim of a local bench to public confidence is a nice balance of political persuasion."

Under the existing method, there are magistrates on benches, empowered to deal by word of mouth with the liberty and property of the subject, who are not only devoid of the most elementary training in law or methods of jurisprudence, but who may (see next page)

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1. Dr. Gerland, of Jena: The English Legal System. Pleas for younger magistrates are often heard. Take, for instance, the National Union of County Officers. "The magistrates' benches are filled with middle-aged and elderly people," said Mrs. Brook of the National Union of County Officers. "There is a large proportion of younger people who could fill some of the places on those benches, and fill them very well indeed. Miss Edith H. Howse, who is a magistrate for Middlesex, expressed the view that not only young women but young men were wanted on the Bench. They needed people with a broader outlook and a greater understanding of present day conditions: Sunday Times, 2, 1936.
2. 80 Law Journal, p. 299, Nov.9, 1935.
3. Jan. 19, 1935.

be, and often are, steeped to the lips in prejudice of one kind or another. Now, a trained lawyer with strong prejudice is bad enough in all conscience, but he has at least this merit, that he can set his training and knowledge against his bias when he has to deal with cases in which he has an "interest of opinion." Far different is it in the other case, where the judge is prejudiced generally, and only possesses that amount of legal training which can be imbibed in the conduct of a successful provision dealers business.

Secondly, the number of justices in one county or one divisional court is often too many.[1] They have to sit by rota thus affording the litigants the opportunity of choosing a particular bench. Even on the bench the magistrates of some courts are so many as to cause them careless in trying cases and pay little attention to the proceedings in progress. A large number of benches necessitates frequent retirement to the magistrate's room to consider decisions and detracts from the dignity of the Bench.[2] "In my opinion," said Lord

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1. Mr. L. A. went in his letter to the Editor said: "it is quite common in this country to get an attendance at petty sessions up to 10 or 15 magistrates." Feb.2,1935.
2. cf. Dr. A.P.Luff's Letter to the Editor. The Times, Jan 23, 1935.

Sankey at the 10th Meeting of the Magistrates Association, "overcrowded Benches are not consistent with the dignity with which justice should be administered."[1]

Thirdly, being chosen mainly on political lines and having little or no legal training and judicial experience, they are, as might be expected, hardly competent to deal with difficult problems of law and scarcely able to solve legal problems with a judicial attitude. Mistakes are, as also might be expected, not infrequently made.

Among numerous criticisms levelled against them, the most serious are, to state summarily, that they not only lack legal knowledge and judicial spirit, but have a false idea of their duty or to think that their primary function is to convict and punish whomsoever brought before the court, that they are previously approached in connection with issues to be determined before them, that they not only question but also comment upon the answers of those persons who have not elected to

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1. The Magistrate, Vol. II. No.38, p.562. 1932.

give evidence that they use rather than keep out, local or personal knowledge of cases which are tried before them,[1] or inside information of previous conviction of the accused who is going to be tried before them, that they dislike defended cases, that they are often reluctant to grant bails and even refuse persons to bail in accordance with the opinions of the police,[2] that they have too much confidence in police evidence and even have a tendency or a principle to support the police and pass sentences upon the prosecution of the police as a matter of course.[3] The relation between the Police and the Summar, Courts is one of the most vital. In the opinion of an experienced magistrate,[4] there are two important impressions as to police Courts which exist widely in the minds of the working classes. One is that the policeman is both witness and prosecutor, and the other is that the magistrate is creative of the police.

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1. Church v. Church, 49 Times Law Reports 230, 1933.
2. cf. Cecil Chapman: "The Poor Man's Court of Justice," pp. 239-241, London, 1925.
3. Solicitor, English Justice, pp. 30-31.
4. H.T. Waddy: The Police Court and its Work, 1925, pp.56-57.

The combined effect of the two, he observed, is that a considerable number of defendants come to the police court persuaded that it is a place where the hand of every man from the policeman to the magistrate will be found to be against them, and where they are three parts condemned before their case is heard.

The consequence of this state of affairs is far-reaching. It will most probably undermine the confidence of the people in the administration of justice.

Further, many freak decisions of the lay magistrates as come out from time to time in appeals show their ignorance of human nature - probably a greater disqualification for the bench than ignorance of law. To the magistrates on the bench the defendant is merely "the usual man in the usual place," as Chesterton said, a creature as divorced from humanity as the economic man of 19th century professors. A little book entitled "psychology in Court" by a Doctor[1]. who has been a keen observer of various

1. 1934. William & Norgate, Ltd. A Doctor: Psychology in Court.

grades of Society and has studied the courts[1] for many years, is an eloquent comment of and a true indictment on, the ignorance of psychology and human nature upon the part of magistrates. Moreover the Justice of Peace is, in the opinion of Sir Edward A. Parry, particularly unreliable in cases involving political or social questions. They show a deep-rooted class prejudice.[2]

Irregularities such as these are rife in Summary Courts. But the result is most unfortunate. Innocent persons are not infrequently wrongly convicted. Injustice is done. But, as said by the author of 'Psycology in Court,' "no act of injustice, however unwitting, however unintentional, is ever a small matter. For, let it not be forgotten, to the poorer members of the community, the police court is a place to which they are compelled, often against their will, and of which they are exceedingly suspicious. They hope to get justice there, but they are not at all sure about it."[3]

The problem of punishment is as unsatisfactory as important in the lay ~~magistrates~~ Summary

1. Introduction to "Psychology in Court," by a Doctor. ibid. p.7.
2. E. Parry, The law and the Poor, p.304.
3. p.21.

courts. It is unsatisfactory because for the same offence sometimes sentences are too harsh and severe, while at other times too light, but both are not justified by the circumstances of the cases. It is, however, to be observed that in this respect the paid magistrate shows no better than the unpaid. To quote Prof. A.M. Carr-Saunders:[1] "All our judges from the dignitaries of the High Court to the unpaid magistrate, are ignorant of the subject of criminal psychology, of the progress of penological studies and of experiments in penological institutions. Indeed if the substitutions of lighter penalties for imprisonment, and ~~the~~ extended use of the Probation of Offenders' Act are evidence of enlightened methods of treatment, then the available figures tend to speak in favour of the unpaid system, surprising as this may be to those who lavish indiscriminating praise upon the paid system."

The question of punishment is particularly important in Summary Courts, because most students of criminology and penology seem to agree on the point that in the life-history of the criminal it is the first crime and its punishment which decide his

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1. "The Police Courts" Essays in Legal Reform political quarterly, Vol.5. No.1. p.85.

subsequent fate.[1] Sir Robert Wallace, K.C., said[2] that nearly seventeen years ago, he was appointed Chairman of the London Sessions, and had placed before him the Judges' Book, containing the records, clearly and fully set out, of the past lives of those coming before the court - long records of crime extending over 30, 40 and 50 years, with convictions running to 20, 30 or 40 in number. In almost every case, the first item entered was that of a young person sent to prison for a first offence, with the result that he or she became an habitual criminal. How grave is the responsibility of those who, except in a case of absolute necessity, send any person, youth, man or woman, to prison for the first time! But first crime is not necessarily serious, nor does it come usually before the higher courts. On the contrary, it is likely within the purview of Summary Courts. From the view-point of the modern requirements of criminal justice, the courts of Summary Jurisdiction, especially with laymen as judges, are far behind the time. That amateurs should preside in criminal courts is a

1. Fred E. Haynes: Criminology (1930) L.M.Rigby: The Making of the Criminal Ch.8., pp. 88 et seq.(1906)
2. An Address given at the Magistrates' Association on Oct.2, 1923.

thing unheard of ~~and ——~~ in major continental countries ~~as of ——————————~~, not even in Scotland.

An interesting dialogue took place in certain police courts between a solicitor and the Chairman of the Bench and ~~might be pardoned~~ I may permitted to reproduce it here:[1].

THE SOLICITOR: The Germans, whether they eat horses or dogs, have doctors of law to preside over their petty sessions. Here we have gentlemen who do their best but are not competent.

THE CHAIRMAN: We are not here to be insulted.

THE SOLICITOR: I won't be insulted here either. The unpaid magistracy are not fit to have the power of the lock and key over people.

THE CHAIRMAN: You are here to defend your client.

THE SOLICITOR: The Bench does not understand its business, unfortunately.

The incompetence and undesirability of lay magistrates as a system is beyond doubt. But the system is defended by some people on the ground that general confidence in the magistrate is felt.

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1. The dialogue took place on July 31st, 1910, in Birmingham Petty Sessions Court between Mr. Arthur Wright, a solicitor and the Chairman of the Bench, Mr. Phillips. (cf. Daily Mail of Sept.1.1910) I doubt whether the lay bench is now better than formerly.

because a number of accused select to be tried summarily. This reason is more apparent than real The defendants so select, hardly because confidence in the magistrates, but because, it is suggested,[1]

(1) everybody likes to get his trial over as soon as possible

(2) the cost of defending at quarter Sessions is three times more than that at Petty Sessions

(3) the defendant runs the risk of getting a heavier sentence for electing to be tried at Quarter Sessions,[2] -and-

(4) he might be, and often is, bullied by the bench and their clerk into consenting to be tried summarily, for saving the work to be done by the latter, if committed for trial to Quarter Sessions.

Sometimes, the unpaid system is defended on another ground. It is one of the many ways through which the citizens of this country are drawn into a position of responsibility and have to share the difficulty of maintaining an ordered society. This argument does not appear to be cogent. For one thing, judicial machinery is not established for the purpose of educating or training the citizen. For another, this participation

1. Week-end Review for Oct. 1930.
2. Solicitor, English Justice, pp. 51-53.

is only had by a small proportion of the population, and the nature of participation is for the most part not of a character greatly to increase respect for the manner in which justice is administered. Nor can it be of any great advantage to the participant whose work in this respect is limited or even less than a fortnight's sitting in the year. For a third thing, the system, even this merit be conceded, is full of anomalies and defects. One of the more impressive indictments of the lay magistrate is advanced by Prof. A.M. Carr-Saunders. After analysing the treatment in percentages of persons over 16 found guilty of indictable offences in a table, he thus inferred:

> "As the table shows, when the percentage of imprisonment is low, the use of the Probation Act is frequent. If it is true that the better form of treatment is the extensive use of the Probation Act and the minimum use of imprisonment, then the stipendiary system does not come out well."

But when one comes to see the real working of the probation system by the lay magistrates, he is driven to disappointment. One witness giving evidence before the Royal Commission on the despatch of Business

at Common Law, told a case in point. A sorter charged with stealing postal packets was bound over by the majority of the Bench after retiring to consider the sentence. The reason for so ruling is not clear. But a lady on the Bench said: "I do not see why, if they have passed an Act of Parliament, you should not use it." The Act she had in her mind was the Probation of Offenders Act which gives power to bind over an offender. The mere passing of an Act, can scarcely be sound reason to apply it without reference to its provisions and the circumstances of the particular case. The extensive use of probation is commendable but its reckless use or misuse undesirable and even dangerous.

At the 24th Annual Meeting held on May 6, 1936, of the National Association of Probation Officers, Mr. S.W. Harris, Assistant Under-Secretary of the Home Office who opened a discussion on the principles embodied in the report of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction, said that if ignorance was a sin, some magistrates were very sinful in the matter of probation. Some bound people over without putting them

on probation, and some put people on probation regardless of the circumstances, without making inquiries. The comparatively extensive use of the probation is at least no defence of the lay magistracy.

Some have argued that local knowledge of the justices of the peace is one of the merits of the lay magistracy. "Much of the confidence which the public feel in the summary courts," wrote the Law Journal[1] recently, "arises from the knowledge that they are made up of men of local experience, and we do not agree with the critics who say that local knowledge is a defect rather than a merit."

But there is other side of the picture. Justices who have local knowledge and acquire private information often think that it would be proper for them to take into account in arriving at their decision. Church -v- Church[2] is a case in point. In this case a wife took out a summons against her husband for his alleged failure to maintain her. On the husband's cross-examination

1. 81 Law Journal 264, April,11,1936.
2. 1937, 49 T.L.R. 200.

of his wife, the Chairman of the Bench stated that he knew all about the husband and did not believe a word of what he said. Again, after the husband had closed his case, the Chairman made comments on him admittedly based not on the evidence, but on personal information. The wife was accordingly granted the maximum order of £2 per week. The husband thereafter brought his appeal to the Divisional Court and in the result, the Order was quashed on the ground inter alia, that there had not been a fair hearing.

The moral of the case throws an illuminating light upon the merit or demerit of Justices' local knowledge.

Thus, it appears to me that those defences for the lay magistrate is neither adequate nor convincing. On the other hand, long ago, Bentham considered that permitting any class of man, not trained to the study of law and the weighing of evidence to administer justice was nothing better than a permission to one section of the community to sport with the property and liberty of all others.[1] "However much historical sentiment may cling round the unpaid magistracy," wrote Mr. R.C.K. Ensor, "and however

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1. Bentham's complete work, Vol.I. p.69.

many thousands of personnel interests and vanities may be wedded to its continuance, it is not easy, in relation to the modern requirements of crimin l justice, to regard it as anything but a complete anachronism."[1] "Modern research and reflection show the trial and sentencing of criminals (especially of incipient offenders)" he added, "to be a much less simple affair than our ancestors supposed. We are coming to see it as a task for special people with a special training .... To entrust such delicate tasks to amateurs at all, let alone to be mixed groups of local people, who have mostly obtained their nominations from political parties in order to gratify their social vanity, is in essentials just as absurd as it would be to assign to similar bodies the doctoring of the sick. Few who have made any study of the careers of English rec/divisl criminals, can doubt that immense mischief result from it."[2] Time and again Prof. Laski emphasized that the existence of lay magistrates untrained in the law whose appointment is mainly the reward of political service, has become quite indefensible.[3]

1. Moser: Courts & Judges, p.21.
2. Moser, ibid, pp. 67-68.
3. H.J.Laski, Labor Party and the Constitution p.23. Justice and Law in Russia.

~~Consequently the defence for the lay judges is neither adequate nor satisfactory.~~

While the lay judges become the target of adverse criticisms, their clerks are no less subjected to unfavourable comments. Firstly, the provisions of qualifications required of justices clerks seem to be anomalous. For one thing, the requirment of 14 years' standing as a barrister is more strigent than that required of stipendiary magistrates. For another, a solicitor of no experience whatever is eligible for appointment as a clerk, while it requires a much too longer years of experience as a barrister. Secondly, as the present lay judge system goes, the clerk is usually superior both in social standing and legal knowledge over the Bench. Generally he exercises a much too great influence upon the Bench and plays too important a role in the Court. "One knows from experience," said Hon. Judge Samuel, K.C., "the clerk to lay justices is really the power in the Court and lay justices do not commit except on the advice of their clerk, and in those circumstances he really is the committing authority at Petty Sessions."[1]

1. Evidence before the Royal Commission on the despatch of Business at Common Law, 73-4-15, p.209, q.3094.

Not only in the matters of committal but almost in everything the clerk is the ruling spirit of the Court, especially when the bench is incompetent. But the evil effect of this condition of affairs is that the Clerk exercised a considerable power without responsibility. To use the words of Lord Hewart[1] L.C.J. "All experience

> shows that nothing is more dangerous in public affairs than that nominal responsibility should belong to the person in whom real responsibility rests with another. Where that method or condition exists, the person who has the real authority is tempted from time to time to act in a way in which he certainly would not act if he had and was known to have, the public responsibility. On the other hand, the person who has the public responsibility is tempted from time to time, in haste or ignorance, or in a variety of other circumstances, to act in a way in which he would never think of acting if he had real authority, and afterwards to improvise excuses."

This state of affairs is simply undesirable. Thirdly, the relations between the clerk and the police is at present too close and so close that even magistrates sometimes imagine and the poor regard[2].

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1. The new Despotism, p.109. (1929)

2. 231 H.C. S. 1425. (1929-30)

them to be the same department. It is but natural that police officials not infrequently seek legal advice from the clerk and his associates, because the latter remain permanently with the same court. But the consequence is that as the clerk and his associates have once unofficially and previously advised the police, they naturally have the tendency to support the latter.

Nor is this all. Having a close connection with the police, the clerk and his associates are told sometimes about what the police suspect and can prove. Some of these hereways are sometimes unintentionally imparted by them to their justices. One of the worst aspects of this heresay knowledge is this: that if any mistake is inadvertently made, there is no chance of correcting it.

Fourthly, the system of part-time clerks is undesirable, as the clerk is allowed to and usually in private practice, he is not unusual the same solicitor who prosecutes for the police and far too often he is a clerk to the court in an adjourning district. He is, of course, neither permitted to practice in his court nor can legally sit in those cases in which he is or has been professionally

interested.[1] But those who appear before the magistrate he advises may be and often are, his own clients, as also may be those same magistrates. His natural desire to increase his practice is apt to conflict with the duty of perfect impartiality in advising his own bench. At least the suspicion of bias, to say no more, is inevitable. "Justice should not only be done but should manifestly and undoubtedly be seen to be done."[2] This is difficult under the system of part-time clerks. Moreover, the whole-time clerk tends to develop a devotion to his calling and even a professional tradition. It is unlikely that a part-time clerk will have the same conception of duty as the whole-time clerk. The importance of the clerk in the Summary Courts, especially in courts where lay judges preside, can scarcely be over-emphasised.

"The fact that the Courts - with such comparatively few exceptions - are conducted by lay Justices," said the Report of Sir J.F. Williams's Committee,[3] "most of them can give only a small

1. R.V.Hurst & Others, Sussex Justices. Ex parte McCarthy. L.R. 1924 K.B.D.256; 40 The Times Law Report 80 R.V. Sussex Justices, Exparte Perkin, L.R. 1927, K.B. D.475; Law Report ~~40 Times~~ p.415 et seq.
2. R.V.Hurst & others, Sussex Justices, per L.C.J. but in R.V. Sussex Justices - ex parte Perkins, Justice Avory said: "I think the Lord Chief Justice clearly meant to say "seem" not be seen as it appears in the Reports. cf.Lord Mainhead's letter to the

Footnote from previous page contd.

Editor. The Times, Feb.2, 1935.

3. Report of the Departmental Committee on Imprisonment by Courts of Summary Jurisdiction in default of payment of fines and other sums of money. para. 13, cmd. 4649, 1934.

portion of their time and thought to their judicial duties and cannot be expected to exercise continuous supervision over the day to day business of the court, places a special responsibility on the clerk."

Not only is the clerk placed in a position of special responsibility, but the whole tone of the court is, in the opinion of some, determined by his personality. In the debate on the second reading of Poor Prisoners Defence Bill, Mr. Nathan lay great emphasis upon the urgently needed reform of the Magistrate's clerk. "A good deal of injustice," he said,[1] may be entirely owing to the personality, or the lack of personality of the magistrate's clerk in a court. Where there is a good clerk things are done properly. In a loose court a great many irregularities occur ... With the guidance of a good clerk everything may go quite well in a court.... It all depends upon the personality of the clerk as to what that court is. If he is a man of strong personality, not only does he advise, but he frequently rules the bench. He

1. 231 H.C. S. 1424 (1929-30).

does the talking and all the examining and questioning of the persons concerned. In other courts, a clerk may merely be a taker of evidence, in a rather perfunctory way. The far-reaching effects of clerk's work perhaps begin to realise. But now becomes more apparent For instance, the standard of efficiency in the Clerk's office affects more closely the recovery of fines and other payments. Readers of the Departmental Committee on Imprisonment by Courts of Summary Jurisdiction in default of payment of fines and other sums of money and Dr. J.D.Unwin's illuminating treatise on the scandal of Imprisonment for Debt[1]. will leave this point in no doubt. This is, however, only one aspect of Clerk's work, the importance and effect of which remain to be explored.

The proceedings in some courts, especially those in large towns and Metropolis are charged with being too quick. One experienced Solicitor wrote that:

> "the speed at which proceedings are conducted in some courts is almost incredible. The London Courts provide the worst instances in this respect, but the provinces can show some almost as bad. In April,

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1. The Scandal of Imprisonment for Debt, (1935)

"1932 a certain provincial Court dealt with 39 motoring offences in 80 minutes."[1].

"Unfortunately," joined another writer, " as often as not, all the circumstances of each case are not considered carefully. It is there wherein lies the root of any mischief that may happen." A sympathetic hearing of the whole case with care will conduce to the doing of justice and allay suspicions on the part of defendants. But anything that savours of hurry, rush, callousness, lack of interest, starts a sore, which, as often as not, never heals. The requirement of full trial and the danger of hurried court proceedings are emphasised by the Howard League.[2]. "Even the most convinced believers in the right of sacrificing the culpable bird-in-the-hand to make a scarecrow for the attempted flutters in the bush will wish to be well assured of his guilt, not only in law but in ethics before making an example of him. And those also find the main justification of legal action in either the reclamation, or as

1. Solicitor: English Justice, p.45.
2. Howard Pamphlet, No.10, p.8 (1926).

a last resort, the segregation of the law-breaker, will be even more alive to the danger of an ill-informed Court.

"They will see to it to be essential for the Court which gives sentence to be aware of every fact which may serve as an index of the probability of the offender's repetition or indicate what kind of treatment is likely to check the evil. To them a hurried or superficial trial is not only a private, but a public danger.

It happens often that a judge in sending some life-long criminal to yet another term of penal servitude openly laments the merciless sentence which years ago made some small first offence the outset in a career of crime."

What is still worse, these courts with a view to clear up the docket dispose of cases at such a speed as to disregard rules of law. The clerk of one of the best-conducted courts frankly answered, when being pressed upon the point: "You know as well as I do that if we observed the law strictly we couldn't possibly get through the work."[1].

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1. Solicitor: English Justice, p.45.

One of the most serious drawbacks of the existing organisation is that it contributes as a cause responsible for the imprisonment for debt. The average annual number in 1929-32 of imprisonments for non-payment of fines was 11716, for arrears under wife maintenance orders 4041, for arrears under affiliation (bastardly) Orders, 2535, for non-payment of rates about 2541.

"Roughly, the responsibility for the position in which these unfortunate men found themselves," wrote Dr. J.D. Unwin,[1.] rested with three things: first, the law itself, which, being based on contradictory principles, often makes a man default, secondly, the manner in which the law is administered; thirdly, the way in which our Police Courts are organised."

The recent legislation may alleviate some of the defects in the law and its administration. But the organisation of the Summary Courts remains unsolved. In the opinion of Dr. Unwin, the manner in which Summary Courts are organised prevents the magistrates from obtaining much trustworthy evidence. They are at the mercy of untrustworthy

1. The Scandal of Imprisonment for Debt, p.60. 1935.

confused and imperfect evidence. There is no court officer whose duty is to ascertain, if so ordered by the Court, the means and circumstances of the parties to a case. In a large number of cases the magistrates simply have to guess. If they make a good guess all is well; but if not either of the parties in the case particularly in matrimonial cases, must suffer. There is little or no evidence that the defaulter is due to wilful fault or impossibility of means. His imprisonment is consequently due to the lack of necessary facilities for administering the law in Summary Courts.[1]

The present system of paying costs has serious defects and disastrous consequences. Magistrates often choose to convict or dismiss on payment of costs than to discharge or dismiss the case without costs, lest the police should have to pay them. Second, the costs as put by Judge Parry, "give the officials of the Court an [illegible] incentive to make the court a paying concern, and, what is worse, give every clerk and official in the police

1. ibid. pp. 72-73, 147, 153, 166, 84, 90, 147-148, 149, 150, 226.

court a direct pecuniary interest in convictions.[1]

Third, the police, tend to press unduly for a conviction, because, if they lost the case, the local authority who has to pay the costs might have bad odour with them. Fourth, it becomes a burden on the poor defendent.

In the past the law with regard to Appeals from Summary Courts was much criticised, because the conditions under which appeals could be made were such as practically to deny the right of appeals to persons in poor circumstances. Following upon the report of the Committee on such appeals,[2] the law has changed in several respects.

At present in the provinces[3] the appeal is from Justices in Petty Sessions to the appeal committee of Quarter Sessions, except in the case of Borough Quarter Sessions, where a Recorder presides. In London, the appeal is heard by a panel

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1. The Law and the Poor, pp. 222-23.
2. The Report of the Committee on Appeals from decisions of Courts of Summary Jurisdiction cmd. 4296 (1933) 75 L.J. 158, 417, 1933;
3. Summary Jurisdiction (Appeals) Act, 1933 (23 and 24 Geo.V.c.38) s.7; cf. also Stone's Justice's manuel pp. 153, 207 et seq. and cases cited there (1936)

of justices consisting of the paid Chairman and any paid deputy Chairman of quarter sessions and one nominated representative of each petty sessional Division.[1] Apart from the right of appeal to quarter sessions there is a right of appeal on points of law only to the King's Bench Division of the High Court.

How far the change is successful will be told in time. So far as the latest figures indicate, the number of appeals from petty sessions is startlingly small. In 1933 out of a total of 700959 persons found guilty of indictable and non-indictable offences in police courts, only 313 persons appealed to quarter sessions.[2] How insignificant is the number of appeals, ~~constituting about four in one ten thousand~~. But it is significant to note that among 313 persons appealing, 66 sentences were modified, 33 quashed. In other words, a little over 47 per cent. of all appeals were successful. One would be almost prompted to

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1. Summary Jurisdiction Act, 1933.s.6. (Appeals)
2. Criminal Statistics, England & Wales, 1933 and 1877 P.83, Table XIII. (1935).

think that among tens of thousands of decisions not appealed to, there are possibly mistakes in convictions or in sentences which remain unremedied because of expense and difficulties in the way of appeal. The number of appeals to the King's Bench Division is again small. In 1933 there were 75 appeals from Summary Courts entered or filed, 64 heard and 37 successful.

In 1934, there were 84 such appeals entered or filed and 63 heard and 40 successful. The percentage of successful appeals is obvious enough. Thus in 1933 there were 313 persons appealing to Quarter Sessions and 75 cases to the King's Bench Division out of 639695 offences decided in Summary Courts. Why the number of appeals is so infinitesimal Among other reasons, the cost of appeal is no less important.

"When it is remembered," wrote C.G. Alexander,[1] "that the overwhelming majority of those who are convicted summarily are very poor people, and that the minimum cost of an appeal to quarter sessions is £20, it will at once be seen

1. C.G. Alexander in Administration of Criminal Justice.

that the expense of such an appeal is practically prohibitive and we believe that in 99 cases out of 100 this right of appeal is purely illusory. Those who can possibly pay their fines do so. Those who cannot pay go to prison." Though the Summary Jurisdiction Appeal Act, 1933 had reduced to £5 the amount of recognisance which a litigant must find before he was allowed to appeal, the total expense of appeal is still larger than the poor can afford to defray. If the costs of an appeal to Quarter Sessions are unbearable to the poor, the more so are those cases to the King's Bench Division. One may argue that there is the benevolent provision of legal aid to the poor.[1] But when he glances at the figures of such aid, he has reason to withdraw his contention.

The problem of appeal from Summary courts is a very serious matter. Some recent cases are well worth careful consideration. On Nov. 14, 1935[2] reported in the King's Bench Division, an appeal by a factory inspector against a decision of the magistrates in favour of a company involved in the

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1. Summary Jurisdiction (Appeals) Act, 1933. (23 & 24 Geo.V.c.38) s.2.
2. The Herald & the Daily Telegraph, Nov. 14, 1935.

prosecution.

The inspector had alleged that the company had not fenced the end of a revolving shaft which projected into a polishing room in its factory. The clothing of a lad working in that room became entangled in the shaft and he died from injuries.

The magistrates dismissed the information, which charged the company with "not fencing the shaft or having it in such a position that it was equally as safe as if it were fenced."

> "It is difficult to speak with suitable moderation about a case which contains facts of this sort," said Lord Hewart. "It is really shocking."

"The justices found that they were bound to decide that this lad came by his death because his clothes became entangled with a shafting which was revolving at 150 revolutions a minute. It was not covered or boxed.

"The section provides that dangerous parts of machinery must be securely fenced or be in such a position or of such construction as to be equally as safe as it would have been had it been

fenced.

"It really is difficult to speak with patience about a frame of mind which permits itself at one and the same time to entertain propositions:

(1) That this dangerous part of the machinery was securely fenced;

(2) That it was not securely fenced, and

(3) That it was in such a position and of such construction as to be as equally safe as if it were fenced - that is to say, that it was equally safe fenced or unfenced.

"Of all the many cases under this Act with which I have had to deal this particular case reaches the high-water mark of contradiction."

Another case happened only yesterday. Mr. Kemeth Harold Reden, a builder, of Longford Road, Bognor, appealed against a decision of the magistrates who had bound him over and ordered him to pay 4/- costs on a charge of unlawfully resorting to a common gaming-house, contrary to the Unlawful Games Act, 1541. The Landlord invited him into the house for some refreshments. He had been there for no more than two minutes when the police arrived. He was taken with others on a lorry

to the police-station.

Lord Hewart, giving judgment, said the matter which came before them in that case was so outrageous that it was difficult to refer to it with the patience and restraint which was suitable in a court of law.

The solicitor for the prosecution read the head-note of a case decided in 1897 and told the magistrates that they were entitled to convict Mr. Roden and bind him over, notwithstanding the fact that he had established an innocent purpose, which was the only purpose for which he was on the premises. Thereupon the magistrates convicted.

> "Really," Lord Hewart continued, "if ever there was a case in which it is clear that a little learning is a dangerous thing, it is the present one. If anybody had taken the trouble to look beyond the head-note of that case he would have seen the ludicrous nature of the task which the magistrates were being invited to carry out.
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> "It is inconceivable how the justices, although satisfied that Mr. Roden was not on the premises for any unlawful game, could have convicted him and bound him over not to do again what he had never done - and which they found he was not doing.
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> "They were, in fact, convicting a man whom they had found was innocent. It is strange that it should be possible, in the

> year 1936, that such a shocking position could arise. It is perfectly obvious that Mr. Roden's innocence had been established to the satisfaction of the court, and it was an outrage to convict and bind him over in these circumstances."

Mr. Justice Goddard agreed with Lord Hewart that the proceeding was both an outrage and shocking, and added that the matter appeared to be one in which further and searching inquiries were necessary. Commenting upon this case, the editor of the Observer said;[1]

> "The Lord Chief Justice has before now become caustic in his review of magisterial decisions. But things just as tragi-comical will occur unfailingly so long as the magistracy remains unweeded of senility, deafness, and several other handicaps."

These are only a few examples out of a mass. It is important to note that these cases arose after the Summary Jurisdiction (Appeals) Act, 1933, has put in force for some time. Commenting upon the Summary Jurisdiction Appeal Act, 1933, the Law Journal wrote;[2] "The present act will, it is hoped, make the right of appeal a practical as well as theoretical remedy for all classes of the community." It is a pious hope. In truth the changes

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1. The Observer, May 4, 1930.
2. 76, Law Journal, p.308.

made by the Act appear considerable but they only touch the fringe of the problem. The problem can scarcely be satisfactorily solved without the fundamental overhaul of the lay magistracy.

Lastly, ~~but not least~~, much may be said against the accommodation of most of the Summary Courts. The physical structure of most courts is wrong, for the Bench should be horse-shoe in shape.[1] Moreover, there are in many courts not enough seats to provide comfortable accommodation for Justices.

Having briefly commented upon the courts of Summary Jurisdiction with regard to their personnel, jurisdiction, proceeding, cost and appeal, let me venture a few words of reform which is undoubtedly urged by different shades of opinion, and much mooted in recent times.[2]

First, with regard to general organisation, the ideal system is probably the creation of a single court for each geographical judicial division. This court will be vested full jurisdiction

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1. cf. Letter to the Editor. The Times, Jan. 1 & 8, 1935.
2. cf. The leading Article in the Times, Jan.7,1935; Letters to the Times, Jan. 1,8,15,23,1935; Feb.2, 5,11,14,1935; Quarterly Review, p.223, et seq. Oct.1935; The Penal Reform Vol I No.2 pp 4-6 Oct. 1926. & Vol II No 1 P.6. July, 1927.

to hear and determine all causes of first instance, civil and criminal, arising in the division, to be presided over by a chief justice having full powers to control its internal organisation to set up the divisions to be presided over by the associate judges for the handling of special classes of cases coming before it for adjudication, and to determine, subject to general provisions of law, the procedure to be followed in the several divisions. If the system of courts were to be made de novo, the court of first instance should, I suggest, be created on these lines. But this might be far from being practical politics today. If retaining the separation of civil and criminal courts as they are, some important reforms of Summary Courts at once suggest themselves. One of the foremost is the problem of Judges. On this point reformers may be grouped under two camps: those who advocate professional judges and those who are in favour of reforming the lay judges.

The reasons advanced by the former may be summarily stated as this. In the first place it is argued on the ground of the urgent needs of legal training and experience of a magistrate.

Those who give time to consider the businesses of Summary Courts would say unhesitatingly that they cannot be performed satisfactorily without legal training and experience. It is idle to argue that they cannot be performed without such training. Medicine can be practised by quackers. The lay judge is almost as much of an anachronism as a quacker. The magistrate is a judge, and legal training is at least as indispensable for his work as it is for the work of any other judge. Many high authorities are in support of this contention. It is unnecessary for me to quote the dictum, but it is important to give the reasons why legal training is necessary for the proper performance of the duties entrusted to lay magistrates.

(1) These duties are judicial in their nature, and legal training is generally conceded to be necessary for the discharge of judicial duties.

(2) The committing magistrate's decision whether the evidence warrants holding the accused for trial may be a question of considerable difficulty and may involve nice points of law, and its wise solution is important to the accused and to the community.

(3) In passing upon the non-indictable offences, great discrimination, based on legal knowledge, is necessary to prevent oppression without weakening the force of necessary rules.

(4) In trying and deciding indictable offences summarily, which involve very grave consequences to the prisoner, much knowledge of law, penology criminology and psychology is required in order to satisfactorily and effectively administer criminal justice.

(5) The problems involved in civil cases in Summary Courts are not less difficult than in other courts.

(6) For the lesser crimes and the small civil classes, it is desirable that the right of review be abolished or much limited and this can hardly be done under the number of incorrect decisions "below" is reduced to as far as is humanly possible.

In the second place, it is argued that there is not only the requirement of legal ~~training~~ knowledge of magistrates but the great importance of their having judicial habit of mind. By this is meant the ability to disentangle the essential from the unessential, to discover the real issue that is presented, to weigh the evidence presented in a detached way, to eliminate matters of sentiment, to be impervious to mere emotional appeals, and to make decisions conforming to the law and the facts as developed and their bearing on the controversy ascertained. It does not need the studies of psychologists to establish the fact that this special faculty usually described as the judicial

temperament is not a common possession, that it is one which is acquired only as the result of experience and by persistent self-drill in making action conform to such requirements. Such judicial outlook can be expected not from the lay justices but from professional judges.

In the words of Professor Carr-Saunders, "that which is claimed for the paid magistrate and claimed with justice, is the judicial habit of mind. This habit is not easy to acquire or to maintain .... And this lack of the judicial outlook on the part of lay magistrate is not just a matter of decorum and appearance; it goes to the root of the whole problem. Where the judicial outlook does not rule the community has no confidence in the Courts."

In the third place, persons entrusted with judicial duties not only should have judicial temperament but should be required to perform them under a system of continuing responsibility, where their standing in the community and in their profession if not their continuance in office, is dependent upon the honesty and ability with which they discharge their duties.

Such continued responsibility is difficult, if not impossible, to obtain under the present system of lay judges. It can only be secured by a system of professional judges.

In the fourth place, the tendency is away from lay justices. The office of justice of the peace and its cognizance is in effect the only exception, in countries under the sway of English law, to the rule that one who holds the judicial office must be trained in the law, and it is an exception which is fast disappearing. It is significant that London, New York, Buffalo, Chicago, Boston, San Francisco, Los Angeles, Detroit, Cleveland and many other cities both in England and U.S.A. have abolished the lay judges. Northern Ireland has but recently adopted the system of universal appointment of stipendiary magistrates.[1] The tendency has been progressively away from lay justice.

In the fourth place, the analogies in other countries point to the same demand of professional judges. In France & Germany those who

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1. Summary Jurisdiction & Criminal Justice Act. Sec. 2 & 3.

exercise similar jurisdiction as Summary Courts in this country are professional judges. In France, to use Mr. R.C.K. Ensor's words[1] "Though the name of the Juges de Paix was borrowed from the English Justices of the Peace, there is no real analogy in France to the Great unpaid. The cantonal judge has indeed a petty jurisdiction over contraventions, that is, over trifling breaches of the law which are dealt with summarily; but he can only inflict very small punishments." All other offences beyond the jurisdiction of the cantonal judges are tried by fully-trained judges. Even Juges de Paix are required to have a diplom of capacitaire en droit and a period in public service. These qualifications are small but none the less they are insisted on. But no qualification is required of lay magistrates here who exercise a much more important jurisdiction than the cantonal judges.

In Germany all contraventions and some delicts are tried summarily by the Office Judge (Amtsrichter) who is fully trained and qualified. Though he is a judge in the lowest court, he has passed the same stages in his entry to the judicial

1. Courts and Judges, p.38; also Raymond Poincare: How France is governed. pp.244-246 (5th Impression 1910)

profession as his brethren in the highest court namely:

(1) a three-year university course
(2) an examination.
(3) three years as a Referendar or student in the Courts -and-
(4) a big State examination.

The People's Courts in U.S.S.R. are presided over by a professional judge with two lay judges.[1] The former is usually a sound lawyer. The latter in common with their brethren in other courts of higher rank "attend courses of instruction especially devised for them, and, from amongst them, a considerable number have gone on to acquire the professional qualifications needed for permanent judicial work."[2] Even in Scotland, the Sheriffs Court which is perhaps the nearest to the Summary Court is presided over by the Sheriff Principal or substitute both of them must be lawyers of at least 5 years' standing.[3]

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1. Dr. Zelitch: The Soviet Administration of Criminal Law. (1928) D.N. Pritt, K.C. Twelve Studies in Soviet Russia. (1933)
2. H.J.Laski: Law & Justice in Soviet Russia, p.18. (1935)
3. Sheriff Courts Act, 1907 (7 Edw.VII c.51)

Compare the qualification, legal knowledge and training required of the judges in those Courts in other countries which are more or less similar to Summary Courts here. Where the justices of peace stand?

In countries under the sway of English law and the system of lay magistrates bearing the title of the Justice of Peace strikes root, there is none having such extensive and important criminal jurisdiction as lay magistrates here. In U.S.A., the justice of the peace has both civil[1.] and criminal jurisdiction.[2.] As to the latter he, apart from being a committing magistrate, conducts summary trials of minor offences and has authority to impose small fines and to imprison for short periods." He has far less power and duty than his English brethren. As pointed out by the Royal Commission on the Selection of Justices of the Peace,[3.] "the Powers and duties

1. C.N. Callendar: American Courts, pp. 32,35, 52-62; also Honeyman, "Justice of the Peace."
2. Ibid. pp. 32-3, 50-51 & 165. 167-174; also Binns, "Justice of the Peace; Thomas, "Procedure in Justice Cases.
3. The Summary Jurisdiction (Scotland) Act 1908 (8 Edw.VI, c.65) sect.8, gives a list of crimes, of a serious character, which cannot be tried except in the Sheriff Court.

of Justices of the Peace in Scotland are much less extensive than in England and Wales. In Scotland Justices of the Peace are empowered to deal with statutory offences under certain Acts, such as the Children's Act and Cruelty Act, and with small debt cases not exceeding £5. They possess certain administrative functions, for instance, licensing; and they are called upon to perform ministerial duties similar to those performed by English Justices. But their criminal jurisdiction is extremely limited.[1]

But the fact that the Justice of Peace in this country is par excellence among his special rank and wields an immense judicial power makes his lack of legal training the more unfit for his position and emphasises the need of professional judges in Summary Courts the more apparent and urgent necessary.

In the fifth place the drawbacks of lay judges as have been observed will, after the appointment of professional judges, be completely eliminated.

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1. The Summary Jurisdiction (Scotland) Act 1908. (8 Edw.VI c.65) Sect.8, gives a list of crimes of a serious character, which cannot be tried except in the Sheriffs Court.

Having briefly stated the reasons for the appointment of professional judges in Summary Courts, let me now turn to the arguments against such change.

(1) It is un-English to abolish an institution of 6 centuries of history.

(2) The proposal must inevitably be expensive.

> "It was also suggested that," said Lord Hailsham, L.C., in his presidential address to the Magistrates' Association,[1] "stipendiary magistrates should be appointed all over the country, but the bill for such a scheme would be one at which the Chancellor of the Exchequer would look several times before accepting it."

(3) Lay judges have more understanding of the people than professional lawyers and are consequently better in dealing with the work of Summary Courts which are becoming more and more social institutions as well as criminal courts. As put by Mr. C. Mullins,[2] "one

> of the most valuable qualities in the Police Court Bench is an understanding of the people, and it is desirable to face frankly the question whether on the whole professional lawyers are as likely to possess this quality as are men and women selected from all social classes

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1. The Times, Oct 24, 1935, p.11.
2. "Justices of the Peace: Abolition or Reform?" 265, Quarterly Review No. 256, p.227 ff, Oct.1935.

"and with experience of unlimited variety. The training of a lawyer is unfortunately a narrow one .... It can scarcely be claimed that the environment of the Inns of Court and the general atmosphere that surrounds practice at the Bar necessarily equip barristers with the training and experience necessary for dealing with the social aspects of judicial work .....

In the handling of crime, as in handling matrimonial cases, it is difficult to separate the legal from the social aspects and almost equally dangerous to ignore the latter. In Police Court criminal work the social and criminological factors are so constant and so important that to introduce now a universal system of trial by lawyers alone would be a retrograde step."

"It seems obvious, therefore," Mr. Mullins concluded, "that intelligent layment from varying walks of life with records of useful social work are as likely to be successful as the Police Court Bench, at least after verdict, as are men whose whole lives have been spent in the smallest narrowing confines of legal practice."[1].

(4) The professional judge is not, free from defects. As argued by Prof. Carr-Saunders, firstly, "it is always dangerous to have a single judge, however restricted the jurisdiction of the Court may be. It is not desirable that the Bench should be wholly official and thus dissociated from the public; there are advantages in bringing in the public to share in the task of dealing with offences." Secondly, it is of

1. Ibid. p. 299.

first importance that the Courts should hold the balance between police and public fairly, but it is not altogether easy for a paid magistrate to do so. He sits daily in Court; the police get to know how he likes cases presented; they become aware of his foibles and peculiarities and can adjust their behaviour accordingly. The paid magistrate tends to become part of the system. In his Court everyone is painfully familiar with the daily scene, except the defendant. Under the unpaid system the magistrates are just ordinary members of the public elevated for a few hours in the year into a special position. It is easier for them to mediate between police and public, and there should be less danger of the court becoming part of the mechanism by which the police ~~deceive~~ discipline the public.

These objections to professional judges in Summary Courts deserve careful consideration.

As an historical institution,[1] the burden of proof rests upon those advocating the abolition of the system of lay magistrates. Viewed from the standpoint

1. For the History of the Justice of Peace, cf. Sir W. Holdsworth. A History of English Law, vol.I. pp.299-307; C.Beard: The Office of the Justice of Peace in England, in its origin and development. Maitland: The Constitutional History of England pp.206-9, 218, 231-3, 235, 486-9, 493-9. (1913) Pollock & Maitland. History of English Law.

of its technical character, it is fair to say that the reverse is the case. If a people were starting anew, uninfluenced by historical attachments and sentimental considerations, free to devise that system for the administration of justice which it believed would give the best results in practice, it is hardly conceivable that it would deliberately create such an institution. Stated badly, the system of lay judges means that matters requiring adjudication, instead of being submitted to professional experts, trained in the performance of their duties and acting under a continuing responsibility, are handed over to a body of laymen, selected for his political services, regarding whose ability to perform the delicate function of weighing evidence free from sentimental and emotional influence nothing is known, and who perform their duties under no sense of continuing responsibility.

Moreover, it is a system which entails great defects as has been observed and the lack of legal knowledge, judicial temperament and continuity of responsibility ~~all of which are essential considerations in the pre-~~ is fatal to ~~blem of~~, the administration of justice ~~and must be met if it is to be satisfactorily solved.~~ A system which represents such a radical departure from normal or

accepted methods of adjudication and presents such disadvantages, is surely one, the retention of which should be supported by affirmative proof of merits that more than offset its failings. It is, however, difficult to produce such proof. Technically considered, therefore, the system of lay judges is defective enough and all the arguments from this viewpoint are in favour of the alternative system where complete responsibility for the determination of matters both of fact and the law and the rendering of the decision is vested in a permanent trained bench.

The historical argument appears to me merely of a priori validity and at best is sentimental. It can be rebutted by shown, as can be shown, that the institution in its present form, no matter what its past merits, no longer gives satisfactory results in practice; and that other countries secure the same ends without its use and and through institution and practice presenting none of the evils admitted to characterise the English system.

In bygone days, life was itself simple and the problem of legal relations not so difficult as beyond the capacities of the common-sense of the

amateur justices. "In the old village days of simple crimes and rough and ready tit-for-tat punishments a bench of local worthies could pass muster as a popular tribunal; though it would have shown fewer tendencies to class prejudice, had worthiness been less a class matter."[1] Again, at that time, the difficulties of communications were such that if justice was to be done in small cases, it had to be brought to the door of the parties. Down to the present time, life itself is more complex and the legal problems involved are also infinitely complicated. They required technical training and special knowledge to their solution. The people live to a considerable extent in urban centres and, when residing in rural districts, access to population centres is comparatively easy as the result of improved roads and the widespread use of the automobiles.

As a consequence of the changed conditions, the police Courts with lay judges, whatever may have been the historical sentiment attached to it, is now an archaic survival wholly unadaptable to present society. It seems to me evident that any suggestion of reform short of the abolition of lay judges is

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1. Ensor, op.cit., p.87.

hardly sufficient. If there is little substance in the first objection, still less is it in the second. By common consent, the administration of justice is one of the primary duties of the government. Failing to provide the necessary expense of administering justice is dereliet of primary duty. The expense of supplying the country with professional judges in Summary Courts should not weigh heavily in the scale of justice. Economy is essential but false economy is fatal. Further it is debatable whether the system of lay judges is economical in the long run. As argued by Mr. Cecil Chapman,[1] a metropolitan magistrate of long experience, "it would be an unqualified boon to the country to increase the number of stipendiaries, and I believe it would improve in the long run to be economical by diminishing the recidivist population, and increasing respect of the law.

The third argument is the most substantial of all but does not appeal to me very much. The claim of a variety of human experience on the part of lay magistracy is postulated upon having, as with the Law Journal,[2] "the right kind" of magistrates

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1. From the Bench, p.42, 1938, London.
2. 80, Law Journal, p.299, Nov.9. 1935.

or on condition, as with Lord Mainhead[1] "at its best," or as with Mr. Mullins, "men and women selected from all social classes" and "with records of useful social work." But such postulate and condition do not obtain in fact. Even Lord Mainhead has to admit that "but in practice many courts fall far short of this ideal."

I agree that generally speaking, legal education and training here is unfortunately a narrow one. But to argue, as Mr. Mullins argued, that a person who would otherwise qualify to be a lay judge will, on account of such narrow legal training, have less understanding of the people than ordinary lay judges is far-fetched. I also agree that in adjudicating both civil and criminal cases, it is difficult to separate the legal from the social aspects. But I can scarcely agree that the award of punishment is better for the lay magistrates who are claimed as can appreciate the real effect which the punishment will have. The lay magistrates have no more profound knowledge of criminology and penalogy and actual experience of penal institutions than the lawyers. The one does not appear better quali-

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1. Letter to the Editor, The Times, Feb.2, 1935.

fied in the discharge of such grave duty than the latter other. Both are equally competent or incompetent.

Even the advocates of the lay system are compelled to admit the indefensible position of the existing system and turn to the safe resort to reform. As to the fourth contention, it may be observed that police versus public is undesirable. At present the police are not only the prosecutors, but in a very large number of cases they are the only witnesses. The close affinity between the police and the magistrate and the clerk is, however, not limited to the paid system. On the contrary, this tendency is even more conspicuous under the unpaid system. In the opinion of Mr. Cecil Chapman,[1] "the harm done by mixing the police with the administration of justice, is specially marked in the ordinary courts of two Justices of the Peace. I have attended several of these where the police seemed to speak as if it were their privilege to decide the question of bail. In one or two cases the amount of bail demanded by the police, and fixed by the Justices accordingly, was prohibitive and led to the compulsory detention till the next Petty Sessions of a man presumed in law to

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1. Cf. Chapter ~~XV~~ a Ministry of Justice. pp

be innocent, who, if he had been rich, would have found bail and been released to consult his friends and prepare his defence."[1]

Even if the argument is true, the true remedy lies in the reform of the system of prosecution. It is scarcely a valid ground against the paid system.

Turn now to the proposals of reform, the more important of which may be briefly examined here.

One of the most interesting suggestions is put forward by Mr. R.C.K. Ensor.[2] He has drawn attention to the German system, under which two schoffen sit with a professional judge (Amtsrichte) in the lower criminal court (Schoffengericht) to try some delicts and some of the less serious crimes. The schoffen are lay-men, selected yearly by a special committee from a list furnished by the commune. They are required to serve and are allocated by rota to sit on certain days with the judges. It is suggested that the Justices of the Peace should become Schoffen. There would be stipendiaries in all courts, and with

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1. From the Bench, 1932.
2. Courts and Judges, pp. 91-98. (1933)

them would be associated two unpaid magistrates.

By this means, it is claimed, the difficulty of abolishing lay judges may be obviated, because the politicians having got the existing system within their grip would scarcely consent to let loose their hold without a desperate struggle. The historical sentiment will again be gratified. The danger and drawback of the paid system will be remedied. What is still more important, as some argued, it may serve as the basis of an ideal system.[1] In such a court, the paid magistrate is to conduct trials and ascertain guilt, while the lay judges deal with the convicted after verdict. Both the professional and lay judges would then exercise their powers at their best.

In the epitome of Mr. Mullins,[2] "this would be the ideal system. But as a practical man I do not see the necessity for either of the changes that the adoption of this ideal would require."

Another alternative of reform turns upon the method of appointment of the magistrates. They should be selected, it is suggested, from a

1. Justices of the Peace. op.cit. p.230.
2. Solicitor's English Justice p.82 (1932)

panel, to which nominations should be made by various bodies such as Chambers of Commerce and Agriculture, County Councils and local Law Societies. After selection by the representatives of those bodies, a further examination of the nominee's qualifications should be undertaken by trained officials.

This proposed method of selection is not only cumbersome but does not appear to achieve its object. Were the proposal put into effect and the best possible lay magistrates appointed, they would scarcely be qualified to solve the problems which confront them.

Some reformers are not content with the mere reform of the method of appointment, but go further to obtain "an all-round improvement by raising the standards through education and better selection. After maintaining that the key to reform seems to lie in the remodelling of the Advisory Committee, Mr. Mullins gave his concrete proposals inter alia as follows:

1. Advisory Committees might be re-constituted. A proportion of their members might be nominated by county and/or municipal councils. Local country court judges, recorders, stipendiary magistrates, etc., might be ex-officio members.

2. Advisory Committees could be bound to consider any names submitted by Local Chambers of Commerce, Trades Councils, etc., or by any twelve local

electors. Any such submission should set out fully the qualifications and experience of the person proposed.

3. The principle of selection for nomination could be that political or local government service shall neither qualify nor disqualify, but that the Committees shall be satisfied that the persons concerned have (a) independence and integrity of character, (b) judicial outlook and freedom from bias, and (c) ability and willingness to give the necessary time.

4. A distinction might be drawn between Justices of the Peace and Court Justices, only the latter being entitled to take part in judicial work.

5. Membership of any local authority (which need not include nominated membership of municipal Committees) might disqualify from acting as Court Justice during such membership.

6. It might be provided that no justice should be entitled to act as Court Justice until he or she has made a statutory declaration of having (a) attended a minimum number of sittings of Assizes, Quarter Sessions, and Police Courts, (b) read and studied a minimum list of books about judicial work, (c) ability to give the time necessary for regular attendance at court, and (d) joined the Magistrate's Association.

7. No Bench need be composed of more than five Court Justices, such members being the maxima, as now, for Juvenile Courts and possibly for the hearing of matrimonial cases.

8. No justices over 70 should be permitted to act as Court Justice.

These proposals merit serious consideration. They go some way towards reform, but have not gone far enough. Even if they were carried out to the fullest extent, the amateurs will still remain

unqualified to deal with the problems that beset them.

It would be better to abolish the existing system in its entirety and to appoint professional judges to all Summary Courts.

Such a step as this, sweeping as it is, would arouse no more opposition from vested interests and conservative inertia than the more timid and less valuable reforms proposed. It would achieve the objects desired; the legal knowledge, the judicial temperament, the continued responsibility of a competent and professional judge. It would succeed, at one stroke, in eliminating the evils which cluster round the lay system, the ignominious struggle of parties for a seat on the Bench, the consequent political influence of the magistrates, their laughable ignorance and disregard of law and procedure, their bad decisions and arbitrary conduct would all be cast into the limbo of the past. It would further remove the undue and improper influence of the clerk and of the police. The initial cost which should not be measured in the scale of justice would more or less be compensated by the diminution in the number of appeals and recidivist and would far more than overbalanced by justice properly administered.

1. 'Summary Justice' 75 the Solicitor Journal P.213 et. seq.

If professional judges are appointed to take the place of the lay system, they should be appointed by the Lord Chancellor or a Minister of Justice with the assistance of Advisory Committee as suggested elsewhere.[1]

The present practice of appointing stipendiary magistrates by the Home Secretary is open to objection. As argued by Mr. Cecil Chapman,[2] "it is obviously of great importance that any appointments to offices which require special qualifications should be made by persons who are well-versed in the subject to be dealt with and may be treated to be as little as possible affected by political or personal considerations.

The Home Secretary is seldom a lawyer and has no special qualifications nor distinguishing one barrister of 7 years' standing from another, and in times past appointments by him were looked upon as a privilege of the patronage order used to favour political or private friends. It would be invidious and distasteful to give examples of bad appointments in the past. There were many such,

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1. Chapter XV. A Ministry of Justice, p.
2. C.Chapman: From the Bench, 1932, London.

no doubt in every department, but there is no department in which a bad appointment can be more harmful, and from which all risk of it should, if possible, be more certainly removed, than that of justice .... If the appointment of Metropolitan Magistrates were transferred to the Lord Chancellor, there would be no interference whatever with any of the other duties, above described, assigned to the Home Office, but justice would be removed from Civil Service administration and any close connection with the police.

As to the clerk, he should be appointed, not by the magistrates as at present, but by the Lord Chancellor from among barristers or solicitors of experience. He should be a whole-time official[1]. paid with an adequate salary and given the status of a civil servant having a retiring age. He should, in no case, be allowed to private practice. He should not, as income-tax inspector, be allowed to remain too long in any one place in order to avoid undue intimacy with the police, local advocates and others. This would not only remove any undue connection between the clerk and other persons more or less connected

1. cf. The Report of Sir J.F.Williams' Committee, op,cit. para. 13. cmd. 4649 (1934)

with the administration of justice but incidentally do much to remove the difference in practice as between one division and another. But the difficulty of appointing all full-time clerks is that few Summary Courts have enough work for them to occupy a clerk for the whole of his time. A possible solution, as it is suggested, may be either to appoint full-time clerks for a group of adjacent Courts and so arrange the duties,[1] that he might, as it were, go on a circuit like a county court judge, or to enlarge the Petty Sessional Divisions under the Division of Counties Acts, 1828, and the Petty Sessional Divisions Act of 1836 and 1850.[2]

The conditions of service of Clerk's Assistant should be completely reformed.

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1. Law Journal, p.56, Jan. 1934.

2. Report of the Departmental Committee on Imprisonment by Courts of Summary Jurisdiction in default of payment of fines and other sums of money. par. 19, cmd. 4649, 1934.

The probation officer should be made whole-time and appointed by the Probation Committee. Other reforms as to probation in Summary Courts as suggested by the Report of the Departmental Committee on the social service in Courts of Summary Jurisdiction deserve careful consideration.

Having discussed the general problems of the Summary Courts, I shall attempt to briefly examine two other aspects of their work; first as juvenile courts and secondly in matrimonial cases. In the capacity of juvenile courts, the Summary Courts exercise a most important and delicate function. In the opinion of Lord Sankey,[1] "it is one of the most important of all the duties of a magistrate; for if the boy and girl offenders can be dealt with at the right time, and treatment can be

1. 304, H.L. 897, (1934-5)

had in the right way, it is more than probable that the amount of crime in the country will diminish."

The importance of Juvenile Courts can never be over-emphasised. In the words of Sir John Simon, "the Juvenile Court is really the first line of defence against crime." It may be observed that children have long been regarded from earliest times in Anglo-Saxon jurisprudence as the ward of the state, given special status and protection both in Common Law and the Courts of Equity and have since been jealously protected with the great development of the humanitarian spirit in the 19th and 20th centuries. The result of the studies of criminology and penology establishes two thesis:

(1) if crime is to be lessened, it must be attacked at one of its most important sources, the youthful offender, who is just entering upon his criminal course of conduct - and-

(2) other provisions must be made for the punishment of the juvenile delinquent than that of incarcerating him with the hardened adult criminal. The problem of juvenile delinquent becomes thus a special one, requiring special treatment of its solution.

The ordinary courts, acting through their ordinary methods of procedure, dealing with adult cases, are

unable to efficiently and satisfactorily handle juvenile cases. Hence the rise of juvenile courts.[1.]

There are now 671 courts of Summary jurisdiction acting as juvenile courts.[2.] In 1933, there were 14,849 cases of indictable offences and 11,952 cases of non-indictable offences dealt with in the juvenile courts.[3.] There were 13,634 boys and girls under 16 found guilty of indictable offences.[4.]

The Constitution of Juvenile Courts varies with locality. Outside the Metropolitan police court area and the city of London, a panel of justices specially qualified for dealing with juvenile cases must be formed in every petty sessional division and a chairman is elected from those justices.[5.]

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1. C.C.Hall, Children's Court, London, 1926 organisation of Juvenile Courts and the results attained thereto; League of Nations, 1935. M.V. Waters: Yough in Conflict, London (1926).
   L. Le Mesurier: Boys in Trouble, A study of adolescent crime and its punishment, London (1931)
   S. Glueck and E.T. Glueck: one thousand juvenile Delinquents, their treatment by Court and clinic Harvard 1934; Institutions for erring and delinquent Minors, League of Nations, Geneva, 1934.
2. Children & Young Persons, Act, 1933 (23 Geo.V.c.12)
3. Criminal Statistics, England & Wales, 1933. cmd.4977 (pp.84-87, Table IV. (1935)
4. ibid, p.VI.
5. Juvenile Courts (Constitution) Rules (S.R & O. 1933. No.647, and 1934 N. 1233)

In the Metropolitan police court, juvenile courts, consist of a Metropolitan police magistrate as chairman and 2 justices for the county of London, one of whom must be a woman, to be selected from a panel nominated by the Secretary of State who must have regard to the previous experience and qualification for dealing with juvenile cases of the persons available.

In the City of London, juvenile courts are constituted in such manner as the Court of the Lord Mayor and Alderman may determine. As far as possible, they are recommended by the Home Secretary to sit in some place other than the ordinary police courts, or, when that is not possible or convenient, they are advised to sit on days when adult offences are not being dealt with.

The object is that delinquent children shall be treated with sympathy and not with sentiment. In the case of youthful delinquents, the first consideration is to be his or her future welfare, whatever the nature of the offence which he or she may have committed.[2] To attain this object, the importance

~~1. The Juvenile (Metropolitan) Act, (Lost 11 Geo V c. 65)~~

2. A. Mellanby: Wayward Youth, London, 1936;

of the Bench in juvenile courts can never be too emphasised. The Departmental Committee reported that "the qualities which are needed in every magistrate who sits in a Juvenile Court are a love of young people, sympathy with their interests, and an imaginative instinct with their difficulties. The rest is largely commonsense."[1] Lord Hankey, ~~the~~ then Lord Chancellor, urged[2] that there should be selected for their knowledge and sympathetic understanding of young people and of young people in the walk of life to which those who were brought before them were likely to belong. And they must not be so old as to have forgotten they themselves once were young.

The Children and Young Persons Act, 1933[3] makes a large number of important changes in the administration of the law with regard to youthful delinquents. But the changes made in the law are not fundamental in their nature but are an expression of the principles which have applied for the last 25 years.[4]

1. The Report of the Departmental Committee in treatment of Young offenders, p.25, cmd. 2831, (1927)
2. Address at the meeting of the Magistrates Assoon. Oct.25, 1933.
3. 23 Geo V. c. 12
4. See circular of the Home Office to Magistrates, local authorities and the police forces.

The successful working of the Act is attested by no less an authority than the Home Secretary. "The Act of the Children and young Persons Act, 1933," said Sir J. Simon on 16 July, 1935,[1] "has now been in force for 18 months or thereabouts and from information which reaches the Home Office, it appears to be beyond all doubt that the new provisions are working well and the general result has been most valuable." He then referred particularly to the constitution of juvenile courts, importance of women justices and the valuable co-operation in this respect between the judicial and educational authorities." The Juvenile Courts are better than they were, but they are not nearly as good as Parliament intended them to be.

The figures of juvenile delinquency appear disturbing to the peace of mind. According to official statistics of the persons found guilty in 1933 of indictable offences, 43 per cent. were under the age of 21 - 23 per cent. being under the age of 16, and 20 per cent. between the age of 16 and 21.

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1. 304 H.C. 855, 891 (1934-5)

But, as observed by the Penal Reformer,[1] "Heaven forbid that one should claim anything like perfection for the Childrens Courts either of yesterday or today - but to blame the courts for the crime figures is barking up the wrong tree. The test of the Juvenile Court is not its efficacy in preventing first delinquencies among children by terrorising the infant or adolescent population, but its success in turning those with whom it deals into good citizens - or at the least in avoiding decisions which harden them in evil ways. .... there is a great mass of dishonesty, by theft, fraud and housebreaking, for which a comparatively few "professionals" are responsible. The trend of the criminal statistics suggests that there is a diminishing number and, if so, the Juvenile Court and its methods since 1908 deserve a share of the credit."

Such share of the credit may be given to the Juvenile Court. But much still remains to be done.

The arbitrary system of panels as is required for juvenile courts is not free from drawbacks.

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1. Vol.II, No. pp. 1 - 2

The method of punishment by flogging is unsatisfactory. In 1933, the Juvenile Courts ordered birching in 181 cases. This is a slight increase on the 1932 figure of 144. The figure of whipping is not given in the current statistics but is marked under the heading "Otherwise dealt with," of which it comprises more than two-thirds. Those who advocate birching for juvenile delinquents will be benefitted to consider the words of Mr. Lloyd who, replying for the Home Office to a question in Parliament on March 26th said that though this power was retained, "the practice in the most experienced juvenile courts shows that these courts rarely or never need to exercise it." (The italics are mine.) It never has, some argue,[1] the desired effect. On the contrary, it has a most demoralising effect on the boy when inflicted by the Court.

Some have argued that juvenile courts should be domestic in their nature, and when the importance of this new development of the preventive side of dealing with youthful delinquency has been

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1. Letter to the Editor of the Daily Telegraph, May 8, 1936.

properly realised, they will have buildings of their own, suggestive more of the home than of the police.

Moreover, apart from the judicial problem, there is the question of administration to be satisfactorily solved. As pointed out by the Times in the leading article: "The age of young persons coming within the jurisdiction of juvenile courts is now 17, instead of, as formerly, 16 years, and the practice of the Courts has been evolved and modified so that school life rather than prison life has become a chief means of preventing crime. Such reforms are,in the r essence, demands for increased accommodation without which they cannot be carried into effect."[1] Such accommodation as approved school is of supreme importance.

In U.S.A., the movement for juvenile courts resulted in taking away this jurisdiction from the Justices of the Peace, and the criminal courts.[2] The tendency is to merge the juvenile

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1. The Times, Jan. 7, 1935.
2. Distinctive features of the Juvenile courts, Annals of the American Academy of Political and Social Science, July, 1920, p.87.

Court in the court of domestic relation. Viewed the family as a unit, family matters cannot be adjusted intelligently and satisfactorily without considering them as a whole. They involve the security of the home and welfare of children. In many instances, they have a common right and each of them must be considered as a different aspect of the same problem.[1.] It is imperative that these matters should be handled by one court. The desirability of ~~centralizing~~ combining in one court all jurisdiction in children's cases and cases involving family problems has been discussed and approved by lawyers and social workers since the end of the first decade of the juvenile-court movement.[2.]

This may serve as a guide to the solution of the problem of juvenile delinquency in this country.

It may be observed that while juvenile courts if properly organized may do much to prevent adult time, they are inept machinery for preventing juvenile crime. Children have often been spoiled long

1. C.W.Hoffman: "Social aspects of the Family Court." Jour.Crim.Law.10: 409, Nov.1919.
2. T.D.Eliot, The Juvenile Court and the Community pp.155-172,especially 158-169

before they are brought before the juvenile court. Fundamental remedy should be ministered in the home or at birth or even before birth. "Wholesome family life," said a student of criminology,[1] "is unquestionably an important factor in preventing the appearance of criminals." The moral of the thesis has been supported by many eminent authorities.[2]

1. Albert Morris (Logsman) p.170

2. Sheldon & E.T. Glueck, One thousand Juvenile Delinquents, pp. 81 & 82; Cyril Burt, The Young Delinquents, pp. 53 & 187.

The part played by the Summary Courts in civil jurisdiction, which though it is not my immediate object to examine here deserves a passing notice, is considerable and not always fully appreciated.

Let me take the civil jurisdiction in the hearing of matrimonial cases which are of great social importance and make a considerable amount of work to these busy courts. In 1933 applications (i.e. summonses heard) were made by 13,603 persons and 9,718 orders were made. In the same year 3,150 orders (including orders made in a previous year) were enforced by imprisonment.[1] These figures, large as they appear to be do not give anything like a complete picture. As put by Mr. J.S. Harris's Committee on the Social Services in Courts of Summary Jurisdiction, "it may be safely affirmed that if all the applicants with legal grounds appeared before the court, the official figures would be greatly increased."[2]

It is to be observed that most of the applicants here are comparatively poor persons who do not as a rule go to the High Court for relief, notwithstanding the provisions of poor persons procedure. In 1933, there were 3,004 matrimonial suits in the Divorce

1. Criminal statistics (England & Wales) 1933, cmd.4977.
2. Report of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction, para 6, b, cmd.5122 (1936)

Division, of which 843 were begun under the Poor Persons Rules. In 1931, the numbers were 4,603 and 1,706 respectively, and in 1934, the numbers were 5,046 and 1931 respectively.[1] It is evident that even with the facilities given under the Poor Persons Rules, the number of poor persons who apply to the High Court is small compared with the number who resort to the Summary Court. Thus, the importance of this jurisdiction in the Summary Court can scarcely be over-emphasised. As to the handling of these cases, complaints against Summary Courts are loud and numerous. Much of the complaints appear to be due to laws which these courts have to administer and many points of which are very difficult to justify.

It has, however, often and again been observed and I think observed with truth that the Lay magistrates are ill-fitted to deal with matrimonial cases, partly because complex and difficult questions of law and fact often arise and perjury is very common in these cases, but chiefly because an understanding

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1. Civil Judicial Statistics, (England & Wales) 1931 & 1934

and investigation of the causes which have led to their occurrence are as important as difficult to attain. But what is still more serious is that the method of approach adopted by Summary Courts in handling those cases, has no essential difference with that in criminal cases or motoring offences.

In the words of Lord Merrivale[1] "these cases at present are brought before the magistrates Courts without any preparation on the part of the Court and with no notice of what is to come before them. They are mixed up with the ordinary criminal proceedings of the courts, and they are conducted in the same way as the criminal proceedings, although that is a thing which, by the publicity it gives and by the necessity which it causes for a public conflict between the parties is about as mischievous as can well be conceived."

The methods used in Summary Courts in matrimonial cases are criticised by the Earl of Listowel as barbarous and denounced by Mr. Mullins, as "now thoroughly old-fashioned" and "medieval".[2]

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1. Hansard, Lords. Jan 29, 1935. pp. 722-36. Mullins: Marriage, Children and God, p.196.
2. C. Mullins: Wife -v- Husband in the Courts, 1935, p.27.

Such machinery is described by Lord Merrivale as "out of date."[1]

Mr. Mullins made a number of suggestions with regard to matrimonial work of Summary Courts such as a small domestic court of no more than 6 members of young justices of both sexes who are open-minded free from any false modesty and bias, moral or otherwise, marriage summonses to be set apart from other works heard at definite times convenient to the parties, all cases of common assault, theft, etc. between husband and wife to be regarded as matrimonial, not criminal issues and heard among the marriage cases, - due but not complete privacy in proper cases to be observed.[2]

The Departmental Committee on the Social Services in Courts of Summary Jurisdiction has but recently reported with regard to matrimonial jurisdiction

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1. Hansard, Lords, Nov.7, 1934, p.175.
2. C. Mullins, Wife -v- Husband in the Courts, pp.40, 45, 47, 52, et seq (1935); cf. also his Marriage, Children and God (1934); ~~xxxxxxx~~ cf. Debates in the House of Lords on May 15, 1934 on the Second Reading of Summary Jurisdiction (Domestic Procedure) Bill; as to the drawbacks of not separating matrimonial from other work, cf. H.A. Cancellor; The Life of a London Beak, p.220.

of justices, the committee recommended ~~that~~ inter alia, that conciliation should be left to the discretion of the Courts and were to be conducted not by the Court but by probation officers for the purposes; matrimonial cases should be heard by at most three Justices, one of whom should be a man, and at special sessions, while applications for a summons should be heard in private; the procedure should be modified to enable the parties to tell their story and legal aid could be given with advantage[1].

While the Committee and others would retain but reform the matrimonial works in Summary Courts, some advocated the transfer of these cases to the jurisdiction of county courts. The latter view has received much favour[2]. Even with a stipendiary, the Summary Court is scarcely a fitting place to try such complicated issues as often arise in matrimonial causes. As put by Mr. H.T. Muddy, a London Magistrate of long experience, "in my judgment, no police court, either in the Metropolis or outside

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1. Report of the Departmental Committee on the Social Service in Courts of Summary Jurisdiction. Pt.I. cmd. 5122 (1936)

2. cf. The Magistrate. Vol I, No.13, p.644, Oct & Nov. 1932; Sir E.Parry, The Law and the Poor, p.220. H R P Gamon The London Police Court: Today & Tomorrow P S K 1907

of it, is the fitting place in which to try a delicate issue of adultery. The business of a police court has perforce to be transacted under pressure of time, and such a court cannot give an issue of this importance the continuous and laborious examination that it requires. Hurried justice is always dangerous; it should be impossible on issues which involve the life-long relations of husband and wife."[1.]

There may possibly be practitioners, he continued, in the Divorce court, who will be startled to learn that courts of Summary Jurisdiction have for more than a quarter of a century been adjudicating, unaided, upon matters as desertion, cruelty, alimony, custody of children, adultery, condonation, connivance, and conduct conducing to adultery. They may possibly agree that such issues are not appropriate for summary jurisdiction at all.[2.]

In my humble opinion, both Summary Courts and County Courts are not ideal tribunals to deal with matrimonial causes.

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1. The Police Court and its Work. p.95,(1926)
2. Ibid, p.93.

Recent years have witnessed the development of a system of special courts, especially in the U.S.A., known as "family courts" or "courts of domestic relations." Many matters having to do with the family or domestic relations have a special character which differentiated them markedly from the ordinary cases coming before the courts, civil or criminal. They are to a considerable extent non-contentious, or at least not contentious in the sense they call for the adjudication of rights between two parties; the object aimed at is often the adjustment of a social difficulty rather than the punishment or penalisation of the delinquent. In many cases the preferable form of action is the adjustment of the difficulty through methods of conciliation rather than the issuance of a formal decree or judgment. A condition precedent to the taking of proper action is more often than not the securing of information regarding the circumstances which have given rise to the difficulties that cannot easily be secured through formal action in court and can only be obtained through a personal and careful investigation by a trained official.

Finally, the decision reached can only be effectively carried out by providing a continuous oversight of its operation. Consequently, the ordinary courts, operating under the ordinary rules of procedure, are ill adapted to handling these classes of cases in a manner that is efficient and adapted to serve the ends desired.

The avenue to the solution of the problem has been sought as in U.S.A,[1.] by setting up special tribunals for the determination of cases connected with the family or domestic relations,[2.] including the juvenile cases, as observed above.

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1. J.W. Calhoun: "The Courts of Domestic Relations," St. Louis Law Review, 7: 152- 158 (1922) L.B. Day: "A unified Court dealing with Family Matters," Family 7: 151:153 (July 1926); Wade, F.E: "Courts of Domestic Relations," Natl. Probation Assoc. 1921, pp.59-70; Lundberg, F. V: "Standards of Juvenile & Domestic Relations Courts," ibid 1923, pp. 232-40.
2. O. Morrison: Courts of Domestic Relation, 172 Law Times, 303-5, Oct. 17, 1931.

CHAPTER VIII.

Courts of Quarter Sessions

Viewed from the character of the judges and the extent of territorial jurisdiction, the courts of Quarter Sessions[1] are of two varieties, the county Quarter Session[2] and the borough Quarter Session.

Technically all justices of the peace of a county are judges of county Quarter Sessions for their county. But to constitute a meeting of the court, the presence of at least two justices is necessary and sufficient. At present a much larger number of justices than two is ordinarily present.

The court may, if its business so requires, sit in two divisions. A chairman chosen by his colleagues presides over the court; a deputy chairman is also so appointed who presides in the second division, if there is one. The chairman or the deputy chairman, like their associates on the bench, need not be a lawyer. He is usually one of the oldest magistrates in point of service.

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1. They are so-called because the fact that their regular, or general, sittings take place quarterly, though special, or adjourned sessions may be held oftener, if need be, and often are. This name is, however, no longer indicative of the time of sitting.
2. County Quarter Sessions are now held at such time within the period of 21 days immediately preceding or immediately following March 25th, June 24th, Sept. 29th and Dec. 25th in each year as the Court of Quarter Sessions or the justices of the county assembled at a special meeting may from time to time fix. (Criminal Justice Act, 1925, (15 & 16 Geo.V. c.86) s.22.

He is, in the capacity of chairmanship, the ruling spirit of the court. He passes on disputed points of both substantive and adjective law, sums up, or charges the jury as to the law applicable to the case and otherwise directs the actions of the court.

Apart from those county Quarter Sessions, there are at present one hundred and sixteen boroughs[1]. having separate Quarter Sessions.[2]. The judge of borough Quarter Sessions is still styled a Recorder. He must be a barrister of not less than five years' standing[3]. and is appointed by the Crown on the recommendation of the Home Secretary. He holds his office during good behaviour and is a part-time judge. He is paid a fixed salary based to a large extent on the volume of work done by the court, and the importance of the City. Here we have nearly a system of wages according to the result of work applied, strangely

1. The local government Manual and Directory 1935, pp.977-1065.
2. Municipal Corporations Act (5 & 6 Will.IV. c.76) empowered the Crown, upon petition from a borough council to grant a special Court of Quarter Sessions for the municipality. This Act was later supplemented by the Municipal Corporations Act of 1882. (45 & 46 Vict. c.50) which consolidated the existing law on the subject.
3. The Recorders of large towns, such as Liverpool, Manchester, Birmingham, Leeds & Sheffield are all distinguished barristers, generally they are on the way to promotion, possibly to a judgeship of the High Court. G.G.Alexander, Administration of Justice in Criminal Matters, p.84.

enough, to a judicial official. But the salary is, to use the words of Maitland, "hardly than nominal, for the office is honourable and not very burdensome, nor does it prevent its holder from practicising as a barrister."[1]. The position is one of some eminence and possibly with some sentiment attached. It is rather a position of distinction than of actual importance.[2]. The Recorder is the sole judge of the Court, which the justices of the peace for the borough may be present on the Bench at the time of trial, but they cannot take part in the proceedings.

To this general picture of borough Quarter Sessions, there are two variations in London,[3]. just as the Metropolitan Police Courts to the Courts of Summary Jurisdiction all over the country. The one is the Court of the county of London Quarter Sessions while the other is Middlesex Sessions. The former is under the presidency of a salaried chairman and a deputy-chairman, both of whom are lawyers of at least 10 years' standing.[4].

1. Maitland, Justice & Police, p.95.
2. Minutes of evidence before the Royal Com. on the Despatch of Business at Common Law. qs. 4108-9.
3. The Court of Quarter Sessions for the City of London is held before the Lord Mayor, the Alderman and the Recorder. Since 1851 this Court has the same powers to try criminal offences as other Quarter Sessions, but as the Central Criminal Court has concurrent jurisdiction in the offences occurring in the city, such offences are practically tried at the Central Criminal Court.
4. Local Govt.Act.1888 (51 & 52 Vict., c.41) s.42 (1)

Unlike the borough Quarter Sessions which convened usually once every month, this Court sits 24 sessions each year.[1] It has jurisdiction in that part of the county of Middlesex, which is limited to the county of London. The latter court sits at Westminster once a month. It has jurisdiction in the County of Middlesex with the exception of the trial of offences committed within the purview of the former court.

The two special courts of quarter sessions in London and their frequent sittings are evidential of the rapid growth of London and necessary for the prompt disposal of the less serious types of offences arising in the county of Middlesex.

Every court of Quarter Sessions has a principal officer called the clerk of the peace, whose duty is to receive notices of appeal, prepare the indictments, call over the panels of jurors, swear the jury, and to arraign the prisoners. He is appointed and is removable by the court of Quarter Sessions for the county.[2] The clerk in borough is appointed by

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1. The first sessions in Jan. April, July and October being general Quarter Sessions and the remaining 20 being adjourned Quarter Sessions.
2. Local Govt. (Clerk) Act, 1931 (21 & 22. Geo.V.c.45 & 52 Vict. c.41) ss.1, 2. Till quite recently, the clerk of the peace, by statute, had to be the same man. This has all been altered by the Local Govt. (Clerks) Act, 1931 (21 & 22 Geo.V. c.45.) Now, whenever there is a

footnote contd from previous page.

vanancy, Quarter Sessions have the power to appoint their own clerk and they, obviously, ought to do so, because the two positions are quite distinct. One man may know all about local government, but not have the slightest knowledge of criminal work. Evidence op.cit. p.299 q. 4093; cf. also "The Magistrate" vol.V. No.36. p.541. The Clerk of the Peace 17/The Law Times, pp. 311-3, April 11, 1931.

the borough council[1] and he holds office during good behaviour.[2] He is usually the custodian of the records of the courts of Quarter Sessions of the borough. Any court of Quarter Sessions whether for a county or borough,[3] has an original and an appellate jurisdiction in both civil and criminal cases.[4] What concerned here is its criminal jurisdiction. "It is," says Prof. Maitland, "a court with high criminal jurisdiction." The original jurisdiction of the court is

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1. Municipal Corporations Act, 1882 (45 & 46 Vict.c.50) s.164 (4)
2. ibid. s. 164 (2)
3. The court of Quarter Sessions for the Soke of Peterborough is an exception.
4. Originally it had power to try all indictable offences except cases of difficulty which were referred to the assizes, but their jurisdiction was regulated and made uniform by the courts of Quarter Sessions Act 1842 (5 & 6 Vict. c.38 s.1) and later enactments defining new offences have sometimes specially exempted from the jurisdiction of Quarter Sessions (cf. Odgers, The Common Law of England 3rd ed. Ldn. 1927 Vol.2. p.343); 8. Halsbury Laws of England 617-622, 1933.

to hear and determine indictable offences committed within the county or borough with two important exceptions (1) treason, murder or any other felony punishable on a first conviction by death or penal servitude for life but except certain cases of burglary[1.] and (2) certain specified crimes which are likely to involve difficult questions of law and are mostly set forth in the Act of 1842[2.] and the Criminal Amendment Act of 1885.[3.]

In exercising original jurisdiction the court sits with a jury.

The criminal appellate jurisdiction of the court includes all appeals from convictions and orders of the courts of Summary Jurisdiction.[4.] Under the Act of 1933, such appeals are not now dealt with by the

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1. Larceny Act 1916 (6 & 7 Geo.V.c.50) s.38. Only those cases of burglary which are not grave or difficult may be and are tried at Quarter Sessions. In 1932, there were 3930 cases of burglary tried at Quarter Sessions i.e. 86 per cent. of all while only 930 cases at the Assizes. (cf.criminal statistics, England & Wales, cmd. 4608, pp.28, 32-38) In 1933, there were 3132 cases of burglary i.e. more than 82 per cent. were tried at Quarter Sessions and 658 cases at the Assizes. cmd. Criminal Statistics England and Wales, 4977, pp.27-34.
2. Such as abduction, bigamy, blasphemy, bribery, incest, libel and serious types of forgery and larceny.
3. 48 & 49 Vict. c.69. s.17.
4. Criminal Justice Administration Act, 1914 (4 & 5. Geo.V. c.58) s.37 (1) Criminal Justice Administration Act 1925. (15 & 16 Geo.V.c.86) s.25.

general courts of Quarter Sessions but are referred to an Appeal Committee in the provinces and a court constituted from a panel of justices in London.[1] In this capacity, the court sits without a jury. Its jurisdiction extends to both questions of fact and law. Every such appeal is, in effect, a rehearing, as witnesses are called before the court and the court may and often does hear fresh evidence not presented to the court below. In actual practice, the annual number of appeals from courts of Summary jurisdiction in proportion to the number of cases disposed of by the latter, is very small, as may be shown by the following table:

No. of Appeals.

1924 ...	312	1930 ...	267
1925 ...	297	1931 ...	289
1926 ...	482	1932 ...	289
1927 ...	240	1933 ...	313
1928 ...	228		
1929 ...	232		

Thus the annual average number of appeals from Courts of Summary Jurisdiction to Quarter Sessions amounts to only 294. Considering the enormous number of proceedings disposed of in former courts, the percentage of appeals appears infinitesimal.

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1. Summary Jurisdiction (Appeals) Act, 1933, 23 & 24 Geo. V.c.38) ss. 7,8;6p.cit p.174 s.2540. also Evidence.

The volume of work dealt with by Quarter Sessions may be partly explained by the following figures:

COURTS.	TOTAL NO. OF PERSONS CONVICTED.									
	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933.
Central Criminal Court ...	779	694	669	652	703	640	737	768	803	951
Assizes..	1857	1892	1932	1715	1657	1675	1901	1833	1921	2235
Quarter Sessions.	3743	3967	3748	3406	3659	3164	3283	4788	5035	5782
TOTAL:	6379	6639	6350	5773	6091	5879	6921	7389	7759	8968

Thus out of 68148 persons convicted at central Criminal Court, Assizes and Quarter Sessions during the last decade, 40975 persons i.e. about 66 per cent. were convicted at Quarter Sessions.

The number of cases tried at county and borough Quarter Sessions respectively may be shown in the following table:

Quarter Sessions	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933
County	2253	2310	2136	1920	1980	2001	2307	2473	2786	2534
Borough	1172	1195	1138	1051	1141	1124	1266	1302	1560	1388
TOTAL;	3425	3505	3274	2971	3121	3125	3573	3775	4346	3922

The above figures show that during the last decade out of a total of 35037 cases, 22700 namely over 64 per cent. were tried at County Quarter Sessions and 12337, i.e.

about 36 per cent. at borough Quarter Sessions.

In 1933, there were 5836 persons(including 3 limited companies) tried in Quarter Sessions.[1.] Of 62660 persons found guilty of indictable offences 8 per cent. were dealt with by the Courts of Quarter Sessions.[2.] The total number of cases disposed of by County Quarter Sessions were 3156 and by Borough Quarter Sessions 1876.

There were 313 appeals from Courts of Summary jurisdiction to Quarter Sessions in 1933, among them 20 were abandoned, 139 convictions or order affirmed without modification of sentence, 66 convictions or orders affirmed with modification of sentence and 88 convictions or orders quashed.[3.]

Having briefly described the personnel, the jurisdiction and the working of county and borough Quarter Sessions, let me examine some of their salient points. I shall first deal with borough Quarter Sessions. In borough Quarter Sessions justice is better

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Criminal Statistics England + Wales, 1933 Cmd. 4977

1. ~~Ibid.~~ pp. 31-34.
2. ibid. p.VI.
3. Ibid. p.83. Table VIII
4. ibid. pp. 46-55 Table VI.

administered by the recorder than the county quarter sessions though the recorders are on the whole far inferior to judges of the High Court or even the county courts. The Recorder must have had legal training. "But quite often a Recorder," wrote Mr. C. Mullins[1] "is practising in branches of the law that have no connection with Quarter Session work; often too he has long ceased to practice at all; on occasion he has been so elderly that he seldom sat and nominated a deputy when there was work to be done." There is no age-limit for him.

Recorders must sit once a quarter, or oftener if they think fit or the Secretary of State so directs[2]. Consequently recorders have considerable latitude in fixing the dates at which to hold their sessions. The recorder who is not very assiduous to do as much work as he should has only to fix his borough sessions the week after county quarter sessions and he will have very little work to do.[1] Some authority should be empowered to fix the various quarter sessions in county and borough in particular areas so that they might be more evenly spaced out. If they were evenly spaced out, all difficulties of delay to the disadvantage of a

1. Municipal Corporations Act, 1882, (45 & 46 Vict. c. 50) s.165.

1. "Justices of the Peace: Abolition or Reform" 265 Quarterly Review Oct. 1935 p 236

prisoner would be eliminated.

The number of cases tried at most of the borough quarter sessions are at present so small as to be negligible. "In the majority of boroughs (other than county boroughs) said Mr. Cecil Whiteley, K.C., "the average number of prisoners committed for trial to quarter sessions is very small. It sometimes happens that only one prisoner has been committed for trial and that he pleaded guilty before the justices. The recorder of the borough, the clerk of the peace, a barrister to prosecute and a jury (in case the prisoner pleads not guilty at the trial) have to attend before that prisoner can be tried or sentenced."[1] These words of Mr. Whiteley were sufficiently borne out by figures. In 1933, there were 10 borough quarter sessions with no case at all, 14 with one, 12 with 2, 10 with 3, 5 with 4, 5 with 5, 6 with 6, 8 with 7, 2 with 8, 2 with 9, 5 with 10, 3 with 11, 2 with 12, 1 with 13, 2 with 15 one with 16, 2 with 17, one with 18, 20, 23, 26, 28 & 37.[2]

With so small dockets, it is doubtful whether it is worth while to have separate quarter sessions at

1. Evidence taken before the Royal Commission on the Despatch of Business at Common Law. ~~Criminal Statistics~~ p.297, 298; q.4079.
2. Criminal Statistics. cmd. 4977, pp.46-55, Table VI. (1935)

those boroughs at all.

With regard to county quarter sessions the lay judges are to begin with as incompetent to sit in appeals as in Summary Courts. All the disadvantages of, and the objections to, lay magistrates suggested in the previous chapter apply equally well, or even with greater force, to the bench as of quarter sessions, because the latter have powers greater than those in the Courts of Summary Jurisdiction. It is no doubt expressly provided that in constituting the committee of appeals the court in appointing members thereof shall, so far as practicable, select justices having special qualifications for the hearing of appeals.[1] But in practice, appeals from police courts to quarter sessions are sometimes nothing better than a farce, because certain magistrates presided in the former may happen to be the chairman of the latter. Though the magistrate does not, of course, sit for the appeal from himself, it is nevertheless disposed of by his colleagues who are no better than he. An appeal sometimes means no more than the rehearing of a case from one set of incompetent magistrates to another equally incompetent.

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1. The Summary Jurisdiction (Appeals) Act, 1933 (23 & 24 Geo.V. c.38) s.7.

At present the number of justices are too numerous at some quarter sessions. In some counties the number of magistrates are sometimes so large that not the same magistrates could possibly attend. A rota is arranged every year and so many magistrates put their names down to attend particular sessions. It thus works through the whole number of justices. But still the number of each bench is so unwieldy that sometimes there was a Bench of 30 or 40 magistrates, just as members of the county council. The difficulty in connection with so numerous a bench is seen at its worst when discussing a decision. The Chairman discussed as best he could with this group of gentlemen the sentence which should be passed upon the accused. Most of them seemed to have different views about it. It took a long time to arrive at a decision and it involved retiring and discussing and compromising.

In the second place there are at present 67 chairman of quarter sessions of whom 48 are legally qualified and 69 deputy chairmen, of whom 55 are legally qualified. In other words, of a total of 136 chairmen and deputy chairmen of quarter sessions throughout the counties of England + Wales with the exception of the County of London, 103 are ~~members~~ legally trained of the Bar, i.e. more

than 75 per cent. of all. They are unpaid, except Lancashire, and Middlesex have now paid Chairmen.[1] As vacancies occurred, the tendency is, as Lord Hanworth said, to put in a trained lawyer as Chairman.[2] Among these legally trained chairmen, there are not a few of eminent lawyers, distinguished judges and even Law Lords.[3]

The importance of chairmen needs no emphasis from me. The quality of justice in county quarter sessions depends mainly upon the Chairman.[4] If he happens to be an eminent lawyer of strong personality, the court is as good as any borough quarter sessions. On the other hand, if the chairman is an amateur as his associate brothers, inadequately controlled by his clerk, the court doles out justice of very inferior quality.

In spite of the fact that there are many eminent lawyers serving as chairmen, and the tendency is to choose legally trained to be chairman, there is, however, no statutory requirement and it is only

1. Evidence, op.cit. pp. 334-5.
2. ibid. p.81. Q.1220. The Society of Clerks of the Peace of Counties made the statement that "In bygone times ... the county chose as their chairman a distinguished justice who was a member of the Inns of Court ... Courts of quarter sessions today when selecting a new chairman ... almost invariably look to a member of the legal profession, generally a member of the Bar.

footnote continued from previous page.

In practice it is found that lay justices prefer that the court should be presided over by one experienced in administering legal principles and in applying the rules of evidence which present patent difficulties to many lay members of the Bench." ibid. p.241.

3. Among them, mention may be made, for instance, Lord Justice Fry who after he retired, was chairman in Somerset for a great many years, Lord Justice Roche, chairman in Oxfordshire, Mr. Lloyd George, chairman of quarter sessions at Caenarvon, L.J. Bankes, chairman at Flint, Mr. Powell, a member of the Bar, chairman at Hertfordshire and Sir Francis Taylor, a former leader of the Northern Circuit, now chairman in Shropshire.

4. Statement submitted by Mr. Justice Goddard, Appendix to Minutes of Evidence, p.4.

left to the voluntary action of the magistrates. Among those lay chairmen, there are some who do excellent work but there have been chairmen who have nothing to recommend them but their venerable old age. Some of them reached the dotage of 80 or more and unfortunately, are, at best inefficient and incapable to do legal work.[1] It is a prevailing opinion, that lay chairmen are incompetent and unsatisfactory.[2]

But, the county justices are very jealous, said one experienced Chairman, of their right to appoint a chairman,[3] who holds an exalted position in the county, next after only to the Lord Lieutenant and the High Sheriff. Naturally the Justices of the peace would like to preserve their vested right. They are unwilling to give up their authority of choosing their own chairman.[4] Nevertheless lay chairman is defended by some eminent authority as Sir A. Bodkin. ~~says~~ "As to Chairmen of quarter sessions being lawyers or having legal training," said Sir Bodkin, "I do not think that there is much to be said .... I have no

1. Evidence, op.cit. p.254, q. 3556.
2. ibid. R.E.L.N.Williams.
3. ibid. p.298 q.4088
4. ibid. p.299,q.4106

statistics to which to refer but if the criminal appeal records are a criterion, the cases in which errors have been discovered in trials before laymen may not be disproportionate to those tried before lawyers. A chairman always has his clerk of the peace with whom to consult, the Bar have their responsibilities, and are always ready to deal with any legal question which may arise, and the Chairman himself feels the responsibility of his position and 'looks up' the law beforehand."[1]

With all respect to Sir A. H.Bodkin, his reasons in favour of lay chairmen are neither convincing nor satisfactory to me. First, the criminal appeal records may be a criterion but not the only criterion, as many cases may be wrongly decided but never come to the stage of appeal. Second, his reasoning is not based upon the firm ground of statistics but upon the assumption of "may" for he frankly admits that he has no statistics. Even suppose the lay chairman come out very well in the court of criminal appeals reports, the answer is that the cases that go to the Court of Criminal Appeal are, as regards the much larger number of them, difficult cases and cases

1. ibid. p.134, and qs. 2085-2089.

which required a skilled man in the chair. Third, the lay chairman has undoubtedly always his clerk to consult. But he consults his clerk so often as to make the latter the chairman in fact and himself the chairman in name. The clerk thus wields a power without responsibility which is simply undesirable and very dangerous. Fourth, the mere fact that the chairman knows his responsibility and looks up the law beforehand is not sufficient. Nothing is so harmful as a little learning in law which may do more harm than good. "Modern research and reflection,[1.] wrote Mr. Ensor, "show the trial and sentencing of criminals (especially of incipient offenders) to be a much less simple affair than our ancestors supposed, we are coming to see it as a task for special people with "special training."[1.]

Before making conclusions for or against the system of lay chairmen, let us go a little deeper to the problem. It is a difficult task to preside at quarter sessions. How a lay chairman can possibly and competently discharge his duty is inconceivable. So high an authority as Lord Atkin remarked that, "I

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1. Ensor, Courts and Judges, p.87.

thoroughly disbelieve in having a lay chairman exercising criminal jurisdiction ... As a matter of fact, it is a very responsible and difficult job to preside at any criminal court. I think it is much the more important work that any judicial person ever has to perform. Some of the cases that quarter sessions have to consider now are very difficult to try. How a lay chairman ever manages to try a case of obtaining money by false pretences - involving all the facts which constitute a jury action of deceit - I cannot think. I think he only gets through that by the mercy of heaven and because most of the persons are guilty and so guilty that the Chairman cannot spoil the case which is brought against the accused. Although there has been no substantial miscarriage of justice, still it is a very serious problem."[1] Mr. W. Eden Hooper even went so far as to say,[2] "it may be noted that my strictures are especially levelled against paid and unpaid magistrates and Recorders and Chairmen of Sessions. Many of these persons ought never to be sitting in judgment at all. Their minds are warped, their tendencies cruel and unmerciful, and their outlook narrow and local. Political and social favoritism is too often the only consideration behind the selection

1. Evidence op.cit. p.241, q.3414-3415.
2. ~~ibid. p.298: q. 4011.~~ W.E. Hooper: The History of Newgate & the Old Bailey Foreword p viii (1935)

of magistrates, Recorders and Chairmen."

In the third place, there is the serious question of the awarding of punishments at quarter sessions. "To my mind," said the Lord of Appeal, "punishment ought not to be awarded by anybody except an experienced criminal judge. It is the greatest responsibility that a man can have thrown upon him. Of course practice varies, as I understand at quarter sessions ... If you can imagine a worse system of awarding punishment than that - I would find it very difficult myself to do so ... I think it is very, very bad... it requires quite a careful study of the whole system of awarding punishments and I am quite certain it should not be in the hands of a majority of magistrates sitting at quarter sessions."[1.]

In the words of W. Eden Hooper,[2.] "whilst the paid and unpaid magistracy have only reduced powers of punishment (though even these are sufficient to ruin lives and cause untold distress) the powers of Recorders and Chairman of Sessions are terrified, and are too often abused. At sitting after sitting of the Court of Criminal Appeal, many, but far from sufficient, of these gross sentences come up for revision or even for quashing. Sentences of years of penal servitude are constantly being reduced to a few months' hard labour, and often the prisoner is

1. ibid. p. 298, q. 4177
2. W. Eden Hooper: The History of Newgate and the Old Bailey. Foreword pp. Vii-Viii, London, 1935.

at once released. Some of the judges of the Appeal Court have had some caustic remarks to make on these occasions." In giving judgment in the Court of Criminal Appeal reducing to 9 months' imprisonment with hard labour a sentence of five years' penal servitude passed at Staffordshire Quarter Sessions on a prisoner who had been previously convicted six times and had pleaded "guilty" to obtaining by false pretences several small sums of money, amounting in the aggregate to £5.0.6d, the Lord Chief Justice (Lord Hewart) observed: "We have said again and again, and we now repeat, that in sentencing a prisoner regard must be had to the intrinsic nature of the offence. It is all wrong to send a man to a long term of penal servitude because at some other time for some other offence he has received heavy punishment."[1] A proper sentence is no less important as a proper trial. But neither of them could normally be expected at quarter sessions presided by a lay chairman or even the Recorder. At present the verdict is the verdict of the court. The Chairman invites his brother magistrates to retire into a room,

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1. The Magistrate, vol.IX. No.23. p.333.

and they discuss there what the sentence should be. Then they come out and the Chairman pronounces the sentence. If there should be an appeal the Court of Criminal Appeal may find cause to criticise the sentence which the Chairman of quarter sessions has passed. It may be that he was passing a sentence which was not his at all, but was the result of the joint opinion of the assembled magistrates. It is therefore very difficult at present to say who is responsible for passing a wrong sentence.[1]

In 1933, Assizes and Quarter Sessions were responsible for 44 sentences of flogging, 42 for robbery, one for procuration and one passed on an "incorrigible rogue" committed to Quarter Sessions for sentence under the Vagrancy Act of 1824. It all reads like a relic of an earlier and more barbaric age.

In the fourth place, not a few accused persons who should be found guilty are acquitted before the amateur chairman. Mr. Cecil Whiteley, Common Sergeant, who has great experience at quarter sessions, said that one effect of having a chairman of quarter sessions who has never had any experience at all in

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1. ibid. p.305, qq. 4161-3. p.306: 4163.

addressing a jury, or in summing up a case and who only has an elementary knowledge of the rules of evidence is that quite a large number of prisoners are acquitted who ought to be convicted. Ask any counsel, he continued, who defends a prisoner, he will tell you that he would be more likely to get an acquittal in a court presided over by a chairman without any experience than he would in a court which is presided over by a trained lawyer.[1.]

In the fifth place, the incompetency of lay chairmen necessitates the occasion of the intervention by the clerk of the peace. The Society of Clerks of the Peace of counties made a very frank statement. Instances have been known, they said, in which it has been necessary for a clerk of the peace at the end of summing up by a lay chairman to draw his attention to legal points of critical importance in the case which have been overlooked in the summing up. Such intervention is, of course, necessary to prevent the mistakes of the amateur chairman. But the bad effect of the practice is that when there is an incompetent chairman the clerk becomes the soul of the court.

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1. ibid. ~~73-4-20~~ p.298, q.4077.

In the emphatic words of Justice Hildyard, "where you have not got a competent chairman anything is done by the clerk of the peace, who runs the court entirely ..... one cannot help knowing that there are many quarter sessions where the clerk of the peace is everything."[1] The clerk thus wields a power without responsibility.

In the sixth place, consequent upon bad effects of incompetent lay chairman, more cases are improperly sent to Assizes. To quote the Hon. Judge Hildyard, K.C., again, "There is a feeling with solicitors that quarter sessions is not a very satisfactory tribunal and they rather send things to Assizes .... they have got into the way of saying, 'if you are going to be tried by a jury let us go to Assizes."[2] Alleged offenders are thus sometimes sent for trial to assizes mainly by reason of the endeavour of the counsel or solicitors at petty sessions. There is, unfortunately a belief prevalent that fairer trial can be had at Assizes than at county quarter sessions.[3]

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1. Evidence, op.cit. p.262, qq 3674-76.
2. ibid, p.262 qq. 3675-3671 cf. p.254 q.3556.
3. ibid. p.203. The Hon. Sir Cyril Atkinson said: "The solicitors and counsel mistrust some of those old chairmen, who are about 80 and very bad at their work, and ask for the case to be sent to Assizes."

footnote cont'd from previous page.

Op.cit. p.254, q.3556. The bad impression of the work of lay chairman ~~made~~ one of the fundamental causes for sending cases not to quarter sessions as they should but to Assizes.

It is no doubt that some lay chairmen had performed and still perform excellent service. But it is also no doubt that lay chairmen as a system is no longer defensible as the test and the requirements of a Chairman are changed now. "In the old days," said Hon. Judge Thomas A. Jones, K.C., "there were some very remarkable men (Chairmen), they had extraordinary commonsense and they did their work very well, but the moment the Court of Appeal was established it was bound to go. The test you applied in the old days was whether the fellow had commonsense, whether he was fair and so on. It was a very good working test at that period, but the moment you had the case taken to the Court of Criminal Appeal that system was bound to break down. Nowadays in the court of Criminal Appeal the test is whether the rules of evidence have been observed and whether the judge correctly interpreted the law and expounded it to the jury."[2].

In the seventh place, the dividing line of jurisdiction between quarter sessions and assise and police courts, is but arbitrary. The result is that quarter sessions and assizes could hardly work

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11 Ibid. p.178, q.2638.

in with one another. Quarter Sessions cases are sometimes sent to Assizes and occupy the time of Assize judges who expresses strong views about that, especially when he has a long list. On the other hand, there is no definite principle with regard to cases to be tried by the courts of summary jurisdiction and the Quarter Sessions respectively. For instance, the most trifling cases of housebreaking have to go to quarter sessions, while theft can be dealt with summarily by consent.

In the eighth place, even the courts sit generally as well as special sessions, there is delay in trial caused by the infrequent sittings. At present a man committed for trial will be kept waiting his trial for two or three months, although he may be admitted on bail.[1] "It is," says Lord Atkin, "a very great hardship on the accused, on the prosecution and on the witnesses that a prosecution should be standing over for a month or two months and sometimes three months."[2]

At present Quarter Sessions have to be summoned and held within the times mentioned in the Act of 1925.[3] If it is necessary to keep the

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1. ibid. p.207, q. 3048.
2. " p.241, q. 3419.
3. s.22.

Sessions alive, they have to be adjourned to a specified date. "If there is no adjournment," said Archbold,[1] the Sessions are at an end, and the Justice cannot afterwards legally proceed with the business." This is highly inconvenient. There is scarcely any valid reason why quarter Sessions should not be continuous Courts.

In the ninth place, the cost of the proceedings in quarter sessions is too expensive. The necessary cost of briefing counsel (because solicitors have, as a rule, no right of audience at quarter sessions) and of obtaining notes from the magistrates clerk; the expense of transporting witnesses to the place where the court is held and of keeping them there while waiting for trial, and the fee of keeping the solicitor who has to wait there ~~as well~~ are too formidable to the litigants and almost insurmountable to the poor. Generally speaking, an appeal from the police courts to quarter sessions costs from eight to ten times as much as the first hearing, while the cost of an appeal in civil cases from the County Courts to the Court of Appeal and is about a fifth of that of the original trial. Since in the former

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1. Archbold: quarter sessions.

case personal liberty, and in the latter the property only, is concerned, that is obviously wrong. In fact the cost is out of all proportion to the usefulness of the court.

On the whole courts of quarter sessions with so many disadvantages are undoubtedly and necessarily on the defence. Their very existence is called into question. The volume of business of borough quarter sessions is small indeed, but that of courts of quarter sessions is not much greater. The personnel of the former is no better than the stipendiary courts, while that of the latter is, at best, same as police courts. The line of demarcation of jurisdiction between the quarter sessions and police courts is arbitrary. The costs of proceedings are expensive. The sessions are infrequent. The quality of justice is inferior. Thus quarter sessions form an unnecessarily and undesirable step in the hierarchy of criminal courts.

First, with regard to borough quarter sessions, it is suggested by such eminent lawyer of great experience at quarter sessions as Mr. Cecil Whiteley that non-county borough quarter sessions may be well abolished on the ground of economy and

utility. The steps to be taken are, he suggests, these. The office of recorder and clerk of the peace in all boroughs, other than county coroughs, to be abolished. On the death or retirement of the present recorder, no new appointment to be made. Until then the recorder is to continue to try cases arising within the boroughs. On the death or retirement of the present clerk of the peace for a borough, the new one to be appointed only for the term of office of the present recorder.[1] After the borough quarter sessions abolished, all indictable offences committed in the county, and in the borough situate in the county (other than county boroughs) to be sent for trial to the court of quarter sessions of the county.[2]

This suggestion, is, unfortunately, not acceptable to these boroughs. As Mr. J.D. Cassels, K.C. argued, the cost of paying a recorder is the borough. It does not amount to a great deal and the saving would only be to the benefit of the borough. Boroughs are very jealous of their own court of quarter sessions and support it accordingly. When

1. op.cit. p.297.
2. ibid. p.297.

the court assembled the mayor turns out in his robes and the clerk of peace appears, the justices have the advantage of seeing how justice is administered there.

To my mind, it is anomalous that in a county there should have a separate quarter sessions for the borough.[1] Historically municipal courts of quarter sessions owe their origin to the fact that during the latter middle ages the Crown in order to curb the power of the nobles and give the boroughs a special legal status, granted them charters of incorporation containing authority to set up courts. Some of the largest modern

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1. "The system," wrote Sir J. Hollams, which involves the appointment, in every small corporate town, of a recorder with jurisdiction limited to the borders of the particular borough, is a manifest absurdity. At Maidstone and at many other towns the recorder holds his Court in a building distant only a few yards from the building in which the quarter sessions and assizes are held, and it frequently happens that the recorder who has travelled from London to the town of which he is recorder, which he does four times a year, finds that there is nothing whatever to do. He receives the proverbial white gloves and straightway goes back to London." (Sir J. Hollams; The Jottings of an old Solicitor. p.92. 1906.)

boroughs such as Manchester and Birmingham, cities which had never been incorporated, have a greater volume of criminal work than unpaid lay magistrates can possibly and successfully do. Separate quarter sessions have also been granted to these modern boroughs.

But the criminal works at ~~little~~ small boroughs are too small to entitle them to have separate quarter sessions, while the historical reason for their existence had long passed away.

To quote Sir J. Hollams, "Not only is there no need of a recorder at a vast number of places which are visited by such an official, but where there is such need it will generally be found that in an adjacent building there is a County Court judge with his time not fully occupied, who would, in the most cases, be at least as competent to deal with the borough business as the Recorder, and who is on the spot, and often with plenty of spare time on his hands. Referring by way of illustration to one very limited district, different recorders go, or are supposed to go four times a year to hold sessions at Sandwich, Deal, Dover, Folkestone and Hythe. Sandwich is distant about 4 miles from Deal; Deal is about 8 miles from Dover; Dover is about 8

miles from Folkestone; Folkestone is about 4 miles from Hythe. And yet the whole paraphernalia of separate Courts with a different judge is provided 4 times a year at each of these places. It would be interesting to have a return of the business transacted at these respective boroughs sessions. It is hardly necessary to say there is direct railway service between each of the above places, and that thus they are within a few minutes from each other."[1].

These words were written by Sir Hollams in 1906. They are as true at present as they were 30 years ago. They are even more true nowadays because, apart from the convenience of the modern means of communication which renders the separate borough sessions the more unnecessary, the return of the business transacted at those sessions is the most adverse to their existence.

On the evidence of statistics, there were 1560 cases in 1932 tried at 116 borough sessions. The average is nearly 13.8 cases disposed of at each borough sessions in a year or about 3.6 cases at each time. Again in 1933 there were 1388 cases tried at

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1. Hollams: The Jottings of an old Solicitor, pp.93-94.

those sessions. On the average about 12 cases were tried at each borough session in a year or 3 cases at each time.

The fact that each borough quarter sessions tried on the average 3 or 4 cases at each time can hardly be depended as a valid justification for its existence or continuance, not to say that there is a county session with a legal chairman near at hand or not far away. Still less can it be justified for the existence or continuance of these 10 borough sessions with no cases at all or of those 69 borough sessions having the total number of cases tried there below 10 in 1933. On the contrary, it seems to me far more economical and beneficial to abolish them.

The county quarter sessions have often been criticised as being obsolete, because the jurisdiction of petty sessions has extended to such an extent as to largely reduce the necessities of sending cases to quarter sessions,[1.] while cases which should be dealt with by quarter sessions are often sent to Assizes for general distrust of quarter sessions.

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The Criminal Justice Act 1925, appears to extend considerably the jurisdiction of quarter sessions, (Section 18 & 1st Schedule). But quarter sessions have less business as there is a great increase in the number of indictable offences dealt with summarily. As a court of 1st instance, the critics maintain, quarter sessions become more and more inconsiderable. As an appeal court, it has not many cases. But on the other hand, it is maintained that work at quarter sessions is at present increasing. In the words of Mr. R. Burows, K.C.[1] "The recent alteration in the law relating to appeal, has lead in certain areas to a great increase in the number of appeals and I anticipate that, as soon as the small pecuniary risk run by appellants comes to be generally appreciated, the number of appeals will increase still more." In fact, as the figures of persons convicted and cases dealt with at county quarter sessions have shown, the business ~~of quarter sessions~~ has an increasing tendency. In this respect, the criticism levelled against quarter sessions does not appear to be borne out by fact. But on the whole, the position of quarter sessions with so many drawbacks as set forth above, can scarcely be seriously defended. With

1. Minutes of Evidence op cit, Appendix p 22. (1935)

regard to the reform of quarter sessions there are to my mind four kinds of alternative suggestions.

In the first place, it is suggested that the jurisdiction of quarter sessions might be taken over by the Assizes. If this proposal were adopted, there would, of course, be an experienced judge on the bench but the disadvantages are obvious. There would most probably result in more delay and expensive apart from causing congestion of criminal works to an already overburdened assise.

It is secondly suggested that quarter sessions should be amalgamated with county courts. The merits of this scheme, are, it is argued, these. First, justice will be better administrated because county court judges are, on the one hand, more competent to deal with legal problems than lay magistrates. On the other hand, county court judges who are familiar with the customs and manners of the locality where the injured and most probably the accused stay have this advantage over judges on circuit. Second, if civil and criminal justice could be administered, as it is administered in the Continental countries, in different divisions of the same

court, it would undoubtedly be more economical and convenient.

Third, criminal cases could be heard much sooner than at quarter sessions because county courts sit much oftener than the former. The difficulty of this suggestion is to meet the probable congestion of business on county courts, if the jurisdiction of quarter sessions were superimposed upon them.

It is thirdly suggested that quarter sessions might be well amalgamated with the reformed petty sessions as suggested in the previous chapter. With this amalgamation of courts, one story in the hierarchy of legal edifice is removed.

In the fourth place; it is suggested that county criminal courts on the line of Central Criminal Court be established to take the place of quarter sessions. As early as in 1897, the General Council of the Bar passed a resolution, "that the institution of a County Criminal Court for each county, on the lines suggested by Sir Henry Poland, is desirable." This would mean, as the Bar Council

explained, "a Criminal Court like the Central Criminal Court, to be held at regular intervals of two or three months, and at which judges of the second rank should try, all except the most important cases, these last only being reserved for trial by His Majesty's Judges." As to the organisation of such court, it is suggested that justices of the peace may still sit on the bench. But it is desirable that number of justices attending the Court should be limited. They should be elected annually by each of the petty sessional divisions in the county, and no other justices are entitled to sit and adjudicate at court.

The Chairman and the deputy chairman must be legally trained persons.[1] The Law Times was three-quarters of a century ago vigorous in its championship of legislative provision whereby Chairman of Quarter Sessions must needs be trained lawyers.[2] The desirability of having legal chairman can never be over-emphasised and is almost endorsed by a consensus of opinion.[3] The Royal

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1. 175. The Law Times, 182, March 11, 1933.
2. Report of the Royal Commission on the despatch of Business at common Law, Par. 208, cmd. 5065. 1936.
3. ~~The Summary Jurisdiction (Appeals) Act, 1936. 23 & 24 Geo.V. c.38, s.7.~~

Commission on the despatch of Business at Common Law[1] are, in their words, "very strongly of opinion that all chairmen of quarter sessions should possess legal qualifications." But in the opinion of the Royal Commission, whether legal chairmen should be appointed or not is to be left to counties.[2] If the county is desirous to do so, the appointments should be made by the Lord Chancellor.[3]

The advantages of a legal chairman are self-evident and need scarcely be mentioned here. The question is what kind of persons are preferred. Some suggested that county court judges of whom many have already acted as chairman at present might act as the Chairman of quarter sessions. This is advocated by some eminent lawyers including county court judges themselves. "As a proposition," says Judge Mordaunt Snagge, "I think it is right that county Court judges should be - may I put it - very strongly in the running for such

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1. Report, para. 209, p.71.
2. ibid. para. 212.
3. ibid. 213.

an appointment as being qualified and experienced people and able to deal with the class of work that is likely to come before the quarter sessions Afterall it takes some time to train a judge and the county court judge sits day in and day out." But this suggestion is not shared by Lord Atkin, when he said, "as a general practice it is not workable that the county court judges should be bound to the Chairman. It would depend on local circumstances. In many districts, the county court judge is willing to become chairman of the Bench, while in some circuits the county court judge finds that to take on the chairmanship of the Bench is too much for him. Some county court judge had his former practice entirely at the Chancery Bar and would certainly not take the chairmanship while others are of Common Law men and would be glad to take the Chair."[1].

In the opinion of Sir A.H. Boulkin, the suggestion that the county court judge should be ex-officio chairman of quarter sessions is neither necessary or would be acceptable to the justices,

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1. Evidence, op.cit. p. 307, q. 4577.

who take care to select the most suitable person to be Chairman.[1.]

On the other hand, it is suggested that the chairman and deputy chairman should be appointed by the Lord Chancellor[2.] from among barristers of at least 10 years' practice. They are to be paid a fixed salary and to hold office during good behaviour. They should have the sole power and responsibility to decide sentence. The Chairman might discuss the matter with his brother justices who might mark, learn, and see how justice is administered by him, but the ultimate power of determining the sentence should rest with him.[3.]

Others went still further, and suggested the chairman to be placed in the same position as the recorder of a borough, with sole responsibility for conduct of the trial and the passing of sentence. This idea was deprecated by the Commission on the ground that the justices sitting

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1: Minutes of Evidence, Op. cit., qs. 2066, 2070
2. Ibid. p.337 q.4573. cf. qs.3875-3878
3. Evidence, op, cit. p.241 q.3418.

at quarter sessions obtain in this manner experience which is of great value to them in discharging their functions at petty sessions.[1.] But their reason presupposes the continuance of the lay magistracy in Summary Courts. If they were reformed by appointing professional judges, the reason goes with the lay magistracy.

On the other hand the idea was fully approved by Mr. C. Davies, one of the members of the Commission, who suggested inter alia that:-[2.]

(a) The court of quarter sessions in every county should be the Central Criminal Court of that county.

(b) The chairman of each of these Central Criminal Courts should be the recorder of the county in which it is situate.

(c) The deputy-chairman or chairman of the second court of the Central Criminal Courts should be a county justice appointed annually by the justices themselves.

(d) The justices attending the Court should be a limited number of justices elected annually by each of the petty sessional divisions in the county. They sit with the Recorder in cases of first instance and in appeals. In these appeals the recorder should be the sole judge on all questions of law.

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1. ibid. para. 209. cf. also statement by the Justice Goddard. appendix to Evidence p.4.
2. ibid. memorandum by Mr. F. Clement Davies, para. 65.

(e) The Court is to try all indictable offences committed for trial except in judges cases which can be tried only by judges at Assizes.

By this arrangement, it is argued, three advantages will result:-[1] that (1) a prisoner will be tried within a month except in judges' cases, (2) the administration will conform more to a common standard and (3) the time of judges of assize will not be occupied in trying minor cases and will be utilised to try all civil cases on circuit.

This suggestion has cogent reasons to recommend itself. But neither the attendance in the case of justices annually selected nor the reservation of "judges" cases is necessary. Both may be dispensed with or altogether.

The clerk of the peace should be a whole-time offidial and has the status of a civil servant.

With regard to the jurisdiction of quarter sessions high authorities divide their

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1. ibid. paras. 64-65.

opinions. The Business of Courts Committee[1] and some eminent lawyers[2] recommend no extension of the jurisdiction of quarter sessions while distinguished authorities[5] such as Lord Atkin, Sir A. Bodkin, and others[6] are in favour of its extension. Lord Peel's commission suggested extension of the the/jurisdiction of quarter sessions in certain cases as set forth in Appendix V. of their report but on condition legal chairman being appointed.[7]

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1. The second interim report. cmd. 4471, para.65, pp.42-43.
2. cf. the statements of Mr. J.D. Cassels, p.35 q.4205 Mr. R.E.C.V.Williams 24 8.360 q.4838 Sir C. Atkinson p.258,q.3612)
3. Evidence op.cit. p.240, q.3409.
4. op.cit. pp. 139-140, qs. 2079-81.
5. Mr. W.C. Whiteley, p.299 Mr. R. Sutton, p.354 q.4801 Sir T.H.Jones, p.178 qs.2640-1.
6. The Business of Courts Committee recommended an adjourned quarter session (cmd.4471.p.41.pa.63) Mr. L.S. Holms(p.318).Lord Atkin(p.241,q.3419, p.256, q.3587) Solicitor's Managing Clerk's Assocn. p.347,V) Sir T.H.Jones.K.C. ~~73-4~~(p.172) Sir A.M. Bodkin. (p.136, q.1973) Mr. J.D.Cassels (p.303,p.306 q.4166 q. 4172-77) Society of Clerks of the Peace of Counties.(p.336,q.4550.) Mr. C. Whiteley are in favour of more frequent sittings, while Lord Justice Roche and Mr. C.M. Pittman, K.C.(p.196) are against it.
7. Report ibid. paras. 214-5.

Some suggested an adjourned sessions or intermediate session, while others monthly sessions.[1.] The advantages of frequent sittings are obvious. "To my mind," said Lord Atkin, "the question that quarter sessions has more sittings than now has is not merely a matter of relieving the congestion and work of assize, but a boon to all concerned."[2.]

In the words of Sir A. Bodkin, "it would be beneficial if courts of quarter sessions were required to hold intermediate sessions midway between the ordinary dates of quarter sessions proper. Such intermediate sessions having all the powers of quarter sessions so far as the trial of offenders is concerned - having the administrative business of quarter sessions to be transacted at present. The effect of this would be to reduce delay in trying offenders for offences committed in the county or borough to about a month or five weeks."[3.] Where there was no criminal work to be done, provisions could be made for not holding such additional sessions.[4.]

1: Evidence, op.cit. p.241.
2. op.cit. p.134.
3: Assize of Quarter Sessions Act 1908.
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CHAPTER IX.

THE ASSIZES AND THE CENTRAL CRIMINAL COURT.

1. THE ASSIZES.

The assizes as civil courts I have already discussed.[1] In this chapter, I shall discuss assizes as criminal courts. But some features such as merits and demerits of the system, the proposals of reform, are generally common to assizes both as criminal and civil tribunals. For the sake of convenience, these points are commonly treated here.

The 52 counties of England and Wales are grouped under 7 circuits.[2] Assizes are held at 61 towns dn the circuits. The population of these towns is surprisingly unequal, varying from 1,102 persons at the smallest to 10,235 at the largest.[3]

At the principal assize towns assizes are held ordinarily three times and in some cases four

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1. Chapt.II Circuits.
2. The Northern, North-Eastern, Midland, Oxford, South-Eastern, Western, North and South Wales Circuits.
3. According to 1931 Census.

times a year, while at a few places, where the amount of criminal business is not great, only two assizes are held.

These four assizes are called after the Seasons.[1] The main ones are Winter[1] and Summer[2] Assizes under which the Judges visit all the assize towns. This practice of visiting every county twice a year comes down to the present from time immemorial, and becomes almost a constitutional dogma, if no more. In addition there is one popularly known as Autumn Assize[3] which was primarily designed, except civil business taken at some places, to effect a gaol delivery, and another called Spring Assizes[4] under which assizes are held at Manchester, Liverpool and Leeds.

The Judges of Assizes consist of royal commissioners under three separate authorities, namely, the commission of oyez and terminer, the commission of general gaol and the commission of assizes. Technically they may be composed of any judge or judges of the High Court or other persons ordinarily named in the Commission by the Crown. In fact, the trials on circuit

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1. The Winter Assize starts at the commencement of the Hilary term Jan.11th and continues until all towns have been visited, that is throughout the whole space of time until Easter.
2. The Summer Assize begins in Trinity term and lasts throughout May, June & July.
3. The Autumn Assize starts about the beginning of Michaelmas Term (Oct.11th). It is referred to in the Winter Assizes Acts 1876 & 1877 as the Winter Assize,/

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are presided over ordinarily by the Judges of the King's Bench Division of the High Court of Justice, but when their services are unavailable, the Crown appoints for the purpose, a County Court Judge, King's Counsel, or other suitable person.

Apart from the Judge or Commissioner normally there are for each circuit one clerk of assize[1], two subordinate officers termed Associate and Clerk of Indictments and a Bailiff. The Clerk must have been for three years before his appointment, a Barrister, a Solicitor, or a subordinate officer of the Assize.[2] There is no statutory qualification for the subordinate officers.

The duties of the clerk are varied. The whole of the administration business of the criminal and nisi prius courts on circuit is vested in him. He is responsible for putting the machinery in motion, and for its correct working at every stage. He may personally perform

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/ but is commonly, and should be always, called the Autumn Assize (39 & 40 Vict. c.57; 40 & 41 Vict.c.46; 42 & 43 Vict. c.1.)

4. Under the Spring Assize Act 1879 (42 & 43 Vict. c.1.) Assizes can be held in March, April and May. Theoperations of the Act are more limited.

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1. In the North and South Wales, there are two clerks, one for each division.

2. The Clerks of Assize Act, 1869, 32 and 33 Vict. c.89.

any part of the duties of his office which he sees fit to undertake, and either attend as associate in the civil court, sit as clerk of arraigners in the crown court or devote his time to the taxation of costs.

The usual salary of the clerk is £800. except on the Northern Circuit, where it is £1,000 and on the Welsh Circuit where it is £500, while the Associate and Clerk of Indictments are paid respectively on the scale £200 - 20 L - £300 and a Bailiff at £100. per annum.

The clerk and his officers are appointed by the Judge who happens to be the senior judge going on the Winter or Summer Circuit preceding the date of the vacancy. The clerk may not practice as a counsel in his own court, but neither he nor his staff are restricted from other private practice.

The Assizes constitute branches of the High Court, and have criminal jurisdiction to try any indictable offence[1], but it is the practice wherever possible, to send the less serious cases to quarter sessions and to reserve for the assizes only the graver and more difficult matters.

In 1932 there were 2,822 cases tried at the Assizes[2] including 806 cases at the Central Criminal Court.

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1. They have the criminal and civil jurisdiction capable of being exercised by the High Court of Justice (Consolidation) Act 1925 (15 & 16 Geo V c. 49) S.18 (2) & S. 70. making the assize courts a branch of the High Court.
2. Criminal Statistics, England & Wales 1932. Cands. 4608

5. Of a total of 64,959 persons found guilty of indictable offences, five per cent were dealt with at Assizes and the Central Criminal Court (i.e. 3⅓ per cent were tried at Assizes and 1⅔ per cent at the Central Criminal Court). In 1935, there were 1,832 cases tried on Assizes constituting about a little less than 3 per cent of all persons guilty of indictable offences.[1]

Although there are 61 assize towns the business is concentrated at 6 places. These six towns took two-thirds of the whole assize work as shown in the following table of sittings :-

Years	Manchester	Leeds	Liverpool	Cardiff	Birmingham	Winchester	Total of 6 places	Total of other places	Grand Total
1919–1923	138.4	102.6	93.6	73.2	68	35.	510.8	512.6	1023.4
1924–1928	126.8	106.6	86.8	82.8	64.2	29.2	496.4	526.8	1023.2
1929–1933	160.4	122.6	121.8	65.	70.4	49.4	609.6	546.8	1156.4
1934	220	140	129	80	76	74	701	645	1346.
Total from 1919–1934	727.6	471.8	431.2	301.0	278.6	187.6	2317.8	2231.2	4549.

The average days Judges sit on circuits between 1919 and 1923 were 1023.4; between 1924 and 1928, 1023.2 between 1929 and 1933, 1156.4 and in 1934, 1346. Thus,

1. Criminal Statistics for England and Wales 1933. Cmd 4977 pp.46-55 Table VI & P.VI (1935)

the average number of days judges sat at assizes constituted from 39 to 40 per cent of judges days of the King's Bench Division.

As to the number of judges required on circuits every year it was 17.2 judges from 1919 to 1923; 17.4 judges from 1924 to 1928; 17.5 from 1928 to 1933 and 17.4 judges in 1934.

With regard to the personnel of the Assizes it may be said that the appointment of persons other than the judges are commissioners of assizes is not very satisfactory as suspicion of impartiality is inevitable. Take, for instance, a King's Counsel who is counsel or possible counsel to one of the parties one day and appointed as commissioner the next day.

It is very difficult for a commissioner to be— at any rate for people to think he is, absolutely impartial if there are clients of his own engaged in the case, or possible clients. This is especially objectionable in London because the difficulty can be avoided in the Provinces by sending the commissioner on a circuit who does not belong to that circuit, but in London every Solicitor is a possible client.[1] The appointment of a commissioner ad hoc is a source of resentment to the

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1. Minutes of Evidence. L.S. Holmes. op. cit p.320 qs 4359-61

circuits[1] and of disappointment to a prisoner.[2]

The appointment of the clerk of assize and his subordinates by the judge is undesirable. The fact that the clerks are in private practice also gives rise to criticism. Their duties are very light except during the circuits and just before and after them.

This fact has suggested that some more economical arrangement than the present could be devised. Some thought that the work might be discharged by the staff of the Crown office and of the Associates Department,[3] while others recommended that there might be some interchange of assistance between the Assize officers and the Associates Department.[4]

With regard to the organisation of Assizes, it may be observed that in the first place ~~there~~ the county basis of assizes is one of the most objectionable

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1. Ibid p.257 q.3609

2. Ibid. G.P. Bencroft. p.367. q.4988. Mr. L.S. Holmes p.318 ~~Vol.XIII~~ ; Herauk p 330 q. 5202

3. Report of the Legal Departments Commission of 1874 p.22. Parliamentary Paper Vol. xx 1874

4. The Report of Legal Offices Committee of 1878 p.10.

features. The law, prima facie, is quite clear that an offence is locally justiciable and the unit of the Assizes ~~has, broadly speaking,~~ is based upon County. Subject to certain modifications by later legislations, county still is central idea of the present arrangement. Thus, every area which has the status of a county had a commission of assize. It is for this reason that some of the ancient counties such as Bristol Canterbury, Chester, Exeter, Gloucester, Lichfield, Lincoln, Norwich, Worcester and York have a separate commission of assize for their own area.[1]

But the boundary of a county as a judicial unit, however convenient it was in olden days and still may be in some cases, is by no means the best basis for determining the place where assizes should be held. When there was lack of means of communication, when the county was the unit of feudal England or when local geographical county claimed equal rights and should have the same facilities, it was not unnatural that two judges of the Common Law Courts went twice a year to each county.

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1. "The places at which the assizes were held originally the chief county towns, there being at least one such place in every county at every assize, and apparently not more than one. Report of Mr. Justice Swift's Committee Cmd 1851. p.8. (1923)
"Throughout England and Wales" wrote the Judicature Commission in 1859, "the extent of the venue depends entirely upon ancient accidental divisions. All counties, including towns & cities which are counties of themselves form separate venue.

But since the introduction of railway and omnibus the facilities of communication have no necessary connection with the county boundary, nor depend upon the position of the town, but rather on the means of access to it, and in many instances the assize towns are by no means easily accessible even for purely local business.

The absurdity of the system is made the more striking when actions are tried in counties with which the subject of litigation has no kind of connection, simply because there is not the opportunity of trying the case where the cause of action arises, or because it is more convenient or expeditious to try it elsewhere. There is no sound foundation for the suggestion that it would be necessarily unjust to a prisoner to have to take his witnesses over the border of the county in which he and they dwell. The Central criminal court is a complete answer and sufficient refutation to this suggestion.

It is easiest for witnesses from Clapham to come to London than it would be to go to Guildford, and for witnesses from Greenwich to come to London than to go to Maidstone. It may, I think, be safely asserted, that the geographical boundaries of counties are not necessarily a safe and true guide as to convenience. Both as regards criminal and civil business, it is to a large

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/ of themselves form separate venue."

extent a question of the facilities of communication and the borders of the county have nothing whatever to do with it.

Something has undoubtedly been done in the most glaring instances to lessen, but not wholly to remove, this absurdity of geographical tie. But there remain the disadvantages of this stereotyped system which were pointed out more than half a century ago. "The necessity of holding assize in every county" wrote the Judicature Commission in 1869, "without regard to the extent of the business to be transacted in each county leads, in our judgment, to a great waste of judicial strength, and a great loss of time in going from one circuit town to another, and causes much unnecessary cost and inconvenience to those whose attendance is necessary or customary at the assizes"[1] These words are true now as they were in 1869. The Swift Commission in 1923 reached the conclusion that judicial business of the county should no longer be arranged and distributed according to the divisions of counties. Thus, the boundary of a county used as the unit of the asseizes is doubtless absurd. In the second place, the fixing of a particular place as an assize town for all times to come, no matter what change of circumstances such as population and facilities

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1. First Report of the Judicature Commission p.17 4130
25 Parliamentary Paper 1868-69.

of communication will be still more ludicrous.

"It is", wrote the Earl of Birkenhead, "no doubt very desirable that in every important centre of population the dignity and majesty of the law should be made apparent. But in such matters we must strike a balance in relation to modern conditions..... It is, on the face of it, ludicrous to suppose that we have stereotyped for all times those centres of population which are entitled to hold assize. It would have been as reasonable to admit stereotyped pocket boroughs. Populations have moved. The importance of one place has declined, of another has grown. It may be stated as a general proposition, though it is subject to exceptions, that civil business will arise where there are large commercial operations, and criminal business is generally to a large extent in proportion to the population. The allocation of the seat of justice should conform to these requirements. But such is not the case with the ~~assize~~ circuit system. The case will be made the clearer, if comparison is made between the population of assize towns and some non-assize towns, as shown in the appended tables[1] at the end of the chapter. Any cursory review of the tables will doubtless reveal the absurdity of the present system. There are 34 towns over 100,000 inhabitants and 27 towns

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1. Appended Tables A & B. Also cf Minutes of Evidence op.cit. Sir Arthur Greet q.5191 p.393

over 50,000 inhabitants without assize courts, while 18 towns below 7000, 12 below 30,000, 7 below 50,000 and 10 below 100,000 inhabitants with assize courts. Thus there are at least 61 populous towns where the civil and criminal cases are tried not at their own towns, but at other smaller towns. What is still worse is that most of the extensive and important towns in England which are not assize towns are in fact considerable distances from the assize towns at which their actions are disposed of. A few instances may be noticed out of many. Plymouth and Devonport which are practically one town - much the largest and most important in Devon - yet a long journey from Exeter; Preston - idem from either Liverpool or Manchester; Hull - third port in England, idem from Leeds or York; Sheffield - great centre of industry, idem from Leeds or York; Boston; Grimsby - idem from Lincoln; Southampton; Portsmouth - great shipping and industrial centre, each infinitely more important than Winchester to which place cases have to go.

Nor is this all. An examination of criminal statistics at certain places presents still more uneasy pictures to the mind, the more so, when considering the judge with his following and many persons have to visit each of these small towns twice a year for just trying a few cases or the judge has to communicate each time

with the Lord Chief Justice in order to cancel, if there is no case, the particular assize at the insignificant town. Here is a table showing the number of cases tried at some assize towns :-

	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933	Total
Rutland	0	2	0	0	1	0	0	0	0	0	3
Radnor	2	3	0	4	1	0	0	1	0	0	11
Merioneth	1	0	0	2	1	2	1	0	3	0	10
Cardigan	1	3	3	0	2	2	1	5	3	3	23
Westmoreland	0	7	0	3	4	4	1	4	6	4	33
Anglesey	2	1	6	2	4	5	6	2	2	4	34
Montgomery	6	4	3	3	4	2	1	3	5	3	34
Brecon	8	7	5	6	5	4	6	0	3	2	47
Huntingdon	4	3	6	7	5	4	10	2	5	1	47
Flint	5	3	2	12	3	5	5	8	3	6	52
Southampton	107	110	107	68	92	109	121	120	124	100	1,058
Glamorgan	124	136	149	125	101	84	95	81	98	106	1,099
Liverpool	99	106	92	122	107	134	140	128	137	100	1,165
Manchester	159	177	172	160	142	179	177	182	206	176	1,730
York, West Riding Division	213	198	182	197	220	193	224	219	260	217	2,123

The total number of cases tried at the first ten places within the last decade amounted to only 294, while that of the last five places 7175.

The cases tried at West Riding Division of York alone

during this period were seven times that of the first ten places put together. Apart from the Central Criminal Court which there were in 1932 and 1933 both average years will be treated at a later stage, 2016 and 1832 cases tried at 54 towns (excluding Rutland and Randor where there were no prisoners tried) Thus, in 1932 and 1933 there were on the average 35.5 and 34 cases tried respectively at each place, about 17 cases tried at each assize town each time, if we take two assizes in a year. In 1933 there were 15 places where the cases tried were under 10; 11 between 11 and 20; 9 between 21 and 30; 9 between 31 & 50, 5 between 51 & 70; and 5 above 100. The large number of places where only a few cases were tried is srtatling. But the Red Judges have to go to spend their precious judicial time at those small places for trying only a couple of cases each time.

It is well said by the Royal Commission in 1869: "
"The distribution of a small amount of business among a large number of circuit towns is the cause of serious evil to the suitors. From the impossibility of ascertaining beforehand with accuracy the business likely to arise, the time alloted to some towns often proves insufficient, and complaints arise that the trial of causes is hurried, or that the parties are driven to dispose of their cases by reference, or otherwise, unless they submit to the loss

and inconvenience of having their causes postponed until the next Assizes. The expense and trouble of bringing together judges, sheriffs and grand jurors, and time occupied in the preliminaries of an assize are the same at a small place, where there is but little business, as at a large one."[1]

In the third place, from the viewpoint of the means of communication and accommodation of prison the present system is also at serious disadvantages. As has been observed, it is not always the county town which is the most convenient even for cases which arise in that particular county.[2] Take for instance a case tried at Leicester, although it is committed in, and the witness may come from some part of Leicestershire which is in fact nearer to Derby. It is conceivably to be the case that it may be difficult to go from Leicestershire to Leicester. There has been an ever increasing development of the means of transit. Travelling from one place to another has become rapid and economical to an extent

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1. First Report of the Judicature Commission p. 4130 25 Parliamentary Paper (1868-69)

2. Minutes of Evidence taken before the Royal Commission on the Despatch of Business at Common Law. R. Burrow appendix 17. p.20; P.366 qs.4957-60.

undreamed of 100 years ago, or even 70 years ago. But the development of the facilities of transit is on the one hand quite independent of county boundaries and on the other has no necessary reference of Assize Towns. On the contrary, access to some of the assize towns which are not centres of communication is by no means more convenient than places without an assize. Gateshead, for instance, a populous town separated from Newcastle-Tyne by the River Tyne has to go for assize business to Durham instead of to Newcastle, while Birkenhead separated from Liverpool by River Mersey hat connected with Liverpool by the Mersey Tunnel, has to resort to Chester instead of Liverpool. Moreover, the prison accommodation has been greatly changed. Most local prisons were closed. They are now centralised at a few places and may be still more centralised quite irrespective of the places where assizes are held. This fact has an important bearing upon the question of assize. A cursory review of the prison facilities reveals that (1) at 26 assize towns there are prisons including 4 for both male and female, 19 for males only, and 3 for females only and (2) at 42 assize towns there are no prisons at all.[1] It follows that prisoners, male and female, are taken long distances[2]

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2. Cf. Report of the Committee on national expenditure Ch.4 Para.6. Report of the Royal Commission on the Despatch of business at Common Law. Para.89 Cmd 5065 (1936)

1. Appendix to Minutes of Evidence taken before the Royal Commission on the Despatch of Business at Com.Law.

to the place of trial [2] ~~(Ref. previous page)~~

With the constitutional dogma of holding assize at least twice a year in every county, with the big towns without an assize, with the allocation of assize towns without reference to the means of communication or the convenience of prison, much inconvenience and hardship must have been experienced, much time and expense, both private and public, undoubtedly and inevitably wasted. This is especially the case with the waste of judicial time and strength.

"It must be plainly admitted" wrote Lord Birkenhead "by any candid Lawyer that there is much judicial time wasted on circuit..... With full knowledge of the facts I affirm that the present arrangements of the circuit business involve the most flagrant waste of judicial time..... It is, in fact, no exaggeration to say that in the smaller circuit towns fifty per cent of the time of our judges is uselessly squandered". [3]

This deplorable condition of affairs is not a new one. In 1899 the General Council of the Bar reported: "The Council are of opinion that the criminal business at Assizes under the present circuit system is carried on at a great waste of judicial time and energy, and at an extravagant cost to the country." As a practical illustration of the waste of time on

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3. Law, Life and Letters.

circuit, I may be pardoned to reproduce here a passage of the published life of Lord Russell of Killowen[1], the Lord Chief Justice of England.

5th July, 1900 - The Chief Justice left London for the North Wales Circuit.

6th " The Commission was opened at Newtown. There was no business of any kind, and the Judge received a pair of white gloves.

7th " Sunday.

8th " No Court.

9th " At Dolgelly there was no business and the Judge was presented with a pair of white gloves.

10th " No Court.

11th & 12th Sat in Court at Carnarvon.

13th & 14th No Court.

15th July Sunday

16th " At Beaumaris - no business - Judge had white gloves.

17th " No Court

18th " Sat in Court at Ruthin for 4½ hours.

19th " Sat in Court for 5 hours.

20th " No Court.

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1. R. Barry O'Brien. The Life of Lord Russell of Killowen 1901 Ch.XIX pp 366-82

21st July Sat in Court for about 3 hours at Mold.

22nd " Sunday

23rd " No Court

24th " Sat in Court at Chester

25th " Sat in Court until one o'clock and returned to London.

There was scarcely a more energetic judge than the distinguished Lord Chief Justice. He was by no means responsible for this waste of judicial time, for as long as assizes are held at so many places, especially insignificant towns with little business, it is almost beyond the control of judges to save their valuable time and strength. It is, I think, not beyond mark to say that the waste of judicial time and strength is almost inherent in the present system of assizes. This may be account for two reasons. First, time is necessarily taken up for travelling from one place to another. And at some small places the time required for travelling is much more than that consumed for sittings. "It is important to bear in mind" wrote the Business of Courts Committee[1] " that each visit to another town involves an expenditure of hours far beyond those consumed by the sittings in court. In the case of small towns, the time required for travelling and ceremonial bears a far larger

1. Second Interim Report of the Business of Courts Committee. Cmd 4471 P.35 Par.53 (1934)

proportion to the time occupied in trying cases, than it does when a large centre of population is visited, and the disproportion grows as the series of small towns increase. We have been told by more than one judge from his own experience that he has travelled to a town, opened the commission, and received the attendance of the sheriff and of the many others involved at an Assize Court, only to receive a pair of white gloves or to deal with a single prisoner who pleaded guilty. The cost to the county and to all concerned is an important feature which has also to be cast up and reckoned". Secondly there is the Commission Day on which according to the Rule of Statistics no sitting is held. The average number of commission days from 1919 to 1933 are as follows :-

1919 to 1923	138.8 days
1924 to 1928	145.8 "
1929 to 1933	138 "

Though opinions differ as to whether there is sitting on Commission Days[1] it seems fairly certain that there is some waste of judicial time on those days.

The judicial time and strength thus wasted are not only the consideration. When the assize begins to open its veil, some 40 or 50 gentlemen have to be summoned at the assize town, whether there is any business to be done or not, to serve on the Common Jury or on a special jury, if

1. Minutes of Evidence op.cit A.J.A. Napier p.5 q.73; W.F. Horridge qs 1364-68; L.S. Holmes p 319 qs. 4341-4343.

they should be required, either in a civil court or for the trial of prisoners. To this group of gentlemen are added the numerous officials and employers in attendance of the court and all the paraphenalia incident to an imposing Court of Justice.

The presence of these imposing personages is justified and necessary if there is business to be done. But unfortunately, on more than one occasion the presentation of a pair of white gloves to the learned judge is the sole business of the Court. The periodical visiting by the distinguished judge with pompous paraphenalia and numerous jurymen may satisfy somehow the local pride of the assize town. It may be a grand sight for the amusement of those who have nothing else to do. It may also bring some money to the town. It is, however, to be borne in mind that this satisfaction of local pride and amusement and the small profit to the business of the town are obtained at the great expense of the distinguished judge who is paid out of the Consolidated fund and whose presence is urgently required elsewhere for the disposal of imprtant cases, the officials and employers who are remunerated with substantial salary as well as the jurymen who come at their own expense and without any remuneration to, in some cases, a town at a considerable distance and have to neglect their ordinary occupation for the purpose.

In spite of the fact that considerable judicial time constituting about 40 per cent is thus occupied at assizes, still there is a fairly general complaint in the country that the time allowed for assizes, at least at the big centres, is not sufficient. According to Mr. L.S. Holmes, Secretary of the Associated Provincial Law Society there were at the last Liverpool Assizes 73 causes entered of which 41 were stttled, 3 stood over to the next assize, and only 29 were tried. If there had not been so many settlements the time allotted would have been quite inadequate. Newcastle/Tyne Solicitors in particular are always complaining that allotted assize time is inadequate with the result that their cases are either rushed through or stand over to Durham, or are tried by Commissioners which cause them to resort wherever possible to trial in London at considerably increased cost and inconvenience to litigants and witnesses[1].

These are only instances of many[2] but are sufficient, I think, to point out the evil effects of insufficient time allotted.

The problem of insufficient time allotted and its consequent unfortunate results have long been a serious drawback of the circuit system. As early as 1869 the

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1. Minutes of Evidence op.cit p. 316. I.
2. Minutes of Evidence taken before the Royal Commission on Delay in the King's Bench Division. Scrutton q. 3057 Appendix No 2. Cd. 7177.

the Commission reported "From the impossibility of ascertaining beforehand with accuracy the business likely to arise, the time allotted to some towns often proves insuffici ent and complaints arise that the trial of cases is hurried, or that the parties are driven to dispose of their cases by reference or otherwise, unless they submit to the loss and inconvenience of having their causes postponed until the next Assizes". This was also clearly corroborated by Sir J. Hollows who had great experience of assizes.[1]

In spite of the fact that there are complaints about insufficient judicial time allotted to the provinces, there is considerable delay between the setting down and the hearing of causes in London, because The King's Bench Division is at present worked, if not in theory, in practice, on the lines that circuit work takes precedence.

1. "The business at most Assize Towns has" wrote Sir Hollows, "from a variety of causes, greatly decreased. This decrease arises partly from the greater facility for trying cases in London, and partly from the extension of the jurisdiction of the county courts. There is, moreover, an indisposition to try causes at the assizes consequent on insuperable difficulty of allowing adequate time for the trial of cases at a small assize town where it often happens that if one case has taken longer than anticipated, others are unduly hurried or postponed. On the other hand, if a case supposed to be one which will take considerable time, collapses, much time is inevitably wasted." Jottings of an Old Solicitor. p.81.

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At present a considerable number of the judges of the King's Bench Division spend a large proportion of each Term on Circuit. During that time their respective Courts in London are closed and cases accumulate. Considerable delay and arrears are thus resulted. Moreover, the present system, which by sending from about 8 to 11 judges away upon circuit 3 times a year for as long as 8 or 9 weeks in the Winter and Summer assizes, is criticised as preventing both the institution and the observance of that methodical arrangement of business in London which is essential for the proper conduct of litigation.[1]

"The demands of circuit" reported the Royal Commission on the Despatch of Business at Common Law, "in addition to being heavy in amount, are highly irregular in their incidence. The work is not spread evenly over the year, but is mainly concentrated in certain parts of it (January to March and May to July) further, during the circuits the number of judges employed is constantly changing, varying from a maximum of 12 down to 4 or even 2

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1. Second and Final Report of the Royal Commission on Delay in the King's Bench Division. Cd.7177 Para. 27.; Also Report of the Royal Commission on the Despatch of Business at Common Law. Paras. 18, 44, 46, 49, 76, 77 Cmd 5065 (1936)

In these circumstances regular and uniform with London work is scarcely possible. In the opinion of St. Aldwyn's Commission and Lord Peel's Commission the radical difficulty in making any satisfactory arrangement of the works in the King's Bench Division is the uneven incidence of circuit demands.

With this view, the time[1] is in complete accord. For the inequality in the incidence of work the Commission are surely justified in holding mainly answerable the priority enjoyed by circuit work and by what they call the 'preferred list'; a priority indulged at the expense of the King's Bench 'ordinary lists' - Special Jury, Common Jury, and Non-Jury. The circuits do not wait on the pleasure of London. London waits on theirs. Their cases are polished off, almost without remands before the Judges return to the Strand." Thus the reflex action of circuit work upon London judicial business is disastrous. In the opinion of the London Chamber of Commerce, it is not in the interests of the Community as a whole that the London area should be starved of judges for the benefit of the provinces.

In spite of the assumption that judges are supposed to meet and decide upon a common policy, "the sentence inflicted" wrote Mr. C. Mullins "by different

1. The Times. January 31st, 1936.

judges for precisely similar cases differ to such a degree as to present an obvious injustice.[1]

Moreover, as observed elsewhere the criminal jurisdiction between assizes and quarter sessions is arbitrarily determined and divided. The effect is that many cases are improperly sent to assizes.

Another point which is adverse to the circuit system is the rise of Local Bar. With large local Bars at Manchester, Liverpool, Birmingham, and many other centres the circuit system has lost most of its usefulness. The necessity of a tied house system for legal advice and advocacy was necessary to attract lawyers to out-of-way places where travelling was expensive and hazardous. Nowadays it is as out of date as turnpikes and highwaymen, and as a matter of fact barristers do not "go circuit" in the old sense at all, but go to such places as they have briefs on the expectation thereof. It is evident that when central legal districts are formed the Courts will be as open to the Bar of England as the House of Lords and the County Courts of all the country.

Having briefly reviewed the defects of the Assizes, let me turn now to the merits claimed. It is in the first place, argued that "this bringing of justice to the door of the subject has become a recognised prin-

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1. In Quest of Justice . p.24.

ciple of the constitution and every member of the community wherever he may reside is entitled to free, convenient and ready access to the King's Superior Courts and every person charged with a crime has the right to be tried by a jury taken as far as is reasonably possible from the locality in which he is alleged to have offended. It is by the circuit system that these high constitutional rights are preserved.[1] But it may be observed that the system does not seem to have fulfilled the purpose of bringing justice to the door of the people. The territorial division of the assizes are far too wide for effective judicial administration. Nor is it very convenient to the people. Second, the importance of every person charged with a crime having the right to be tried by a jury taken from the locality of the offence is based on the assumption that the jury knows the facts from his knowledge. This is, however, hardly the case at present. It therefore looses much of its importance. Third, these so called high constitutional rights can be preserved by other systems much more convenient, effective and economical than by the ~~assize~~ circuit system.

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1. The Report of the Commission appointed to consider what re-arrangement of the circuit can be effected so as to promote economy and the greater despatch of the business of the High Court. pp. 3-4 Cmd 1831 (1923)

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In the second place it is claimed that the sittings of a "Red Judge" throughout the country have an educative influence upon the police and those who have to conduct the business of inferior tribunals, and may it be respectfully suggested, upon the Judges themselves. Further the visits of the Judges undoubtedly have a great though largely unconscious influence upon the population of the county in producing respect for the law and its observance and also upon the administration of the law"[1]

"It is" wrote Mr. Claud Mullins "all to the good that for both criminals and civil work judges of the High Court shall periodically sit in local courts. Not only is local patriotism thereby satisfied, but knowledge is spread as to the way in which justice is administered. The assizes have a valuable educative influence".[2]

Educative value the ~~assize~~ circuit system might have. But this educative benefit is highly over-estimated, and the sentiment of "Red Judge" grossly exaggerated. As frankly put by Justice T.A. Jones, K.C.B. the picturesque

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1. Report of Circuit Committee pp.14-15 Cmd 1831 (1923) Cf also Master ~~xx~~ St. J. Micklethwaite, K.C. "The Circuit System" 74. The Solicitor Journal pp.447-450 (1930)

2. ~~Minutes of Evidence Op.cit.~~ In quest of Justice p. 295 T.A. Jones. q. 25-54.

description of the "Red Judge" is not relevant to the position as it is today. I have heard High Court judge talk about it, but I never hear any other section of thepublic speak of it. What really determines the estimation in which the legal system is held in the minds of the people is the quality of the justice that is administered ..... The circuit procession, the judge in a red cloak and all the trappings is then nonsense. I have no doubt that in days gone by when you had an illiterate democracy, it was effective, but it is not so today."[1] The same view is endorsed by the London Chamber of Commerce. In their opinion the alleged importance of a "red judge" coming to a town with considerable pomp in order to show the people that the King's Courts come to their doors is nowadays exaggerated. The power of the law, they continued, is typified to local inhabitants by the police rather than by judges (or commissioners) who appear two or three times a year.[2]

1. Minutes of Evidence, op.cit. T.A.Jones, q.2534.
2. Minutes of Evidence, op.cit,p.290 II. circuits.

Thirdly it is maintained that the present system is economical, because it saves the establishment of local courts which are more expensive and only a few judges are engaged in circuit work. But viewed the system as a whole it is by no means economical. As Jeremy Bentham points out, "one thing the argument forgets: that what you save in judges, you spend ten times over in counsel and attorney. Another thing the argument forgets: that circuits keep defendants in criminal cases in jail, a long time before trial.

In truth, it may be said that the circuit system had its meritorious services in the administration of the law in the past. As Professor William Holdsworth wrote: "The maintenance both of uniformity and impartiality in the administration of the law were the two great legal advantages which resulted from the circuit system. Its chief political advantage was that it provided the central government with a means of controlling the conduct of the local government, which was exercised by judicial officers and to a large extent under judicial forms."[1]

1. A History of English Law, I.p.284; also cf. Ensor, Courts & Judges, p.84.

But notwithstanding its legal and political advantages in the past, the system has long been the object of adverse criticism and become a serious problem. The problem is, of course, as difficult as it is old.

It is difficult, because historically it has deeply and firmly rooted in English judicial system for 7 or 8 hundred years. The people often look at it, like all old institutions which have rendered meritorious services in the past but which are now on their defence rather with admiration and even idolatry than scrutinise it by reason and fact. Historical sentiment often enters into the consideration with undue weight. To this historical sentiment is added local pride, patriotism and prejudice. Any suggestion of reform, not to say, of abolition is sure to meet with opposition which is, as frankly and truly reported by the St. Aldwyn's Commission "partly due to private interests and mainly to a strong and universal sentimental of county or municipal patriotism."

The problem is also an old one and has eluded the efforts of many reformers. The famous commission

of 1869 whose work was productive of the Supreme Court of Judicature, the Council of the Judges, which made very moderate proposal for grouping in 1892, the General Council of the Bar, which made their report in 1906 suggesting groupings, etc. St. Aldwyn Commission of 1913, which made a thorough examination of the circuit system, the Swift's committee of 1919 which had the rearrangement of the circuits as its special mission and the Business of Courts Committee and Lord Peel's Commission, all tackled the problem with effort and made their suggestions with care. Again, repeated measures to modify or reform the system were made from time to time, by legislative acts, such as 3 & 4 William IV (Ch.71), the Judicature Act, 1875 (sec.23) the Winter Assizes Acts, 876 & 1877, the Spring Assize Act, 1879 and the Assize and Quarter Sessions Act, 1908. But unfortunately, these recommendations and legislative acts achieved only partial and temporary success.

As early as 1863, Frederick Lawrence wrote an admirable paper on Circuit reform. The problem as he stated it is still a judicial problem of today i this country.

quarter "The England of today," he writes, "it is

obvious at theoutset, differs very widely indeed from the England for which our present circuit system was devised and for which it continued for a long period well adapted. It would be marvellous indeed if a plan which satisfied the necessities of more primitive times - which sufficed for the days of the Plantagenets, the Tudors and the Stuarts showed work equally well in a widely different and more complex state of society. Not only have we to provide for a densely populated commercial and manufacturing nation inplace of a thinly populated agricultural country, but improved methods of locomotion now render results attainable which, however desirable, must have appeared impracticable to the early lawyer and legislator."

If this was true in 1863, how much more true it is in 1936. This great economical change cannot be too much emphasised when considering the proposals of reform. Bearing this in mind, let me examine some of the important suggestions with regard to circuit reform. They may be grouped and treated in the order of (1) the appointment of more judges or commissioners (2) the devolution of more work to quarter sessions and county courts (3) the extention of

the circuit system (4) the grouping of assizes into some big centres and (5) the establishment of district courts.

It is, firstly, suggested that more judges should be appointed in order to relieve the arrears in King's Bench Division and to give sufficient time to assize towns. This suggestion, as pointed out by the Courts of Business Committee, meets with two difficulties. First, the legislature is reluctant to increase the number of judges of the High Court for some such reason as that "the field of selection is limited, the more judges appointed it becomes, and therefore, the less certainty of securing in those appointed the high level of ability, legal attainments and mental and physical vigour, which are necessary to maintain the prestige of the English Bench."[1] Secondly, if the circuit system is to be maintained as it is, the addition to the judicial strength required to overtake the present arrears in the King's Bench Division and to prevent their accumulation once more must call for

1. Second and Final Rpt. of the Royal Commission on Delay in the King's Bench Division par.63, p.39. Cd.7177 (1913)

the appointment of not one but several additional judges."[1].

Another suggestion of the kind is made by the London Chamber of Commerce. They recommend "the creation of a permanent panel of commissioners in order to be ready to deal with arrears of work on any circuit which the judge on that circuit is unable to overtake..... The alternative would be to increase the number of judges, but the appointment of commissioners would be less expansive than the creation of additional judges for this purpose."[2]. Whatever may be the truth in these arguments it is sufficient to emphasise that the appointment of more judges or commissioners is by no means a satisfactory and complete solution to the problem. It merely deals with one aspect of the personnel of assizes but leaves the whole system with its many defects as they are. The result of the proposal, if adopted, would at best be only temporary.

It is secondly proposed that the jurisdiction of county courts can be so enlarged or extended as to take some kinds of civil cases now dealt with at

1. Second Interim Report of the Business of Courts Committee. par.49, p.33. cmd. 4471.(1934)
2. Minutes of Evidence, op.cit p. 290.

assizes, while part of the criminal jurisdiction of assizes transferred to quarter sessions. As reference has already been made to such suggestions elsewhere, it need not detain us here. Such patchwork of devolution is at best a palliative. The fundamental difficulty and various defects of the system will again remain untouched.

In the third place, more decentralisation of justice by extending the ~~assize~~ circuit system is suggested. "We venture to suggest " to quote the statement made by Sir R.W. Coventry, K.C. on behalf of the Oxford Circuit, (1) an extension rather than a diminution of circuit work i.e. the trial of cases in the locality in which the witnesses reside and (2) that civil actions be tried at every circuit town at the autumn assizes."[1].

The circuit system, he argued, could be extended to the more populous towns which have developed in the counties during the passage of the years.[2]. Lord Atkin, also appears in favour of extension. "I think," he said, "there are some places where it might be done reasonably. From time to time they have been extended.... as places developed I do not see why they

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1. Minutes of Evidence, op.cit. p.314.
2. ibid. p.307, qs. 4190-97.

should not have their assizes. If they can provide a reasonable list I do not see why they should not have those facilities. It would save a great deal of the time of the people in the neighbourhood."[1].

There is, some would argue, a demand for the extension of the existing circuits. There are 37 towns of over 100,000 inhabitants without an assize. Although it is defended that it has been a tradition of English history that the King's judges should attend the county town and conduct the county assizes, it is paradoxical that they are sent to the County town but not to the bigger towns. It is impossible that a visitor will not be struck by the divergence between these numerous little places which the judges have to go and this mass of great towns which have arisen in the last 60 years but which have not yet their assizes.[2].

But on the other hand this suggestion is disapproved by others. "When one looks into the complaints," said Lord Hewart, "one finds it is no great hardship for the witnesses in particular cases to travel the distances which they have to travel.

1. ibid. op.cit. p.239: q.2441.
2. ibid. p.282, q.3965.

The assizes are usually held in towns which have a history. They are towns which are prominent in the county - usually the county towns. It may be that industry and commerce have progressed, other localities have come to be of higher rateable value, and, in various ways, more important in the county, and yet the feeling which attaches to the county town remains. I am not aware of sufficient material which would enable you to form an opinion that it is desirable to substract from any existing arrears, or centres, a certain volume of work and transfer it to some other town or city in the neighbourhood."[1.] This proposal of decentralisation appears logically consistent with the fundamental principle of bringing justice to the door of the people but practically will meet with the same, or even more, difficulties and disadvantages as now experienced.

In the fourth place, the grouping of the existing assize towns is recommended. The Judicature Commission made a comparatively sweeping recommendation

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1. Minutes of Evidence. op.cit. Hewart, p.335, q.4453.

to the effect that the judicial business of the county should no l nger be arranged and distributed according to the accidental division of counties; but that the venue for trial should be enlarged, and that several counties should be consolidated into districts of a convenient size - that such districts should for all purposes of trial at the assizes, both in civil and criminal cases, be treated as one venue or county, and that all counties or towns or cities, should for the purpose of such districts be included in an adjacent district or county."[1.]

In 1877, John Day, K.C. afterwards the well-known Judge, suggested that circuit judges should only sit "at certain great centres, such as Newcastle, Manchester, Liverpool, York, Birmingham, Peterborough, Bristol, Swansea and Exeter." At our time, Lord Wright, proposed a general reconstitution of the Circuits. "I think," wrote he, "the solution of the problem propounded as long ago as 1869 by the Report of the Royal Commission .... must eventually be adopted, that is to hold Assizes normally both for civil and criminal causes at certain central towns. I say normally because the Lord Chancellor has and can still

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1. First Report of the Judicature Commission, 1869. 4130. 25 Parliamentary Paper (1868-9.)

retain his power to fix a special Assize at any place for the trial of any civil or criminal case of sufficient magnitude."[1] Any scheme," he added, "centralisation must be of one of two classes, or may combine the features of both. The scheme may be that of grouping counties or of forming new districts each of which may take more than one county. Thus to give a single illustration of the latter method which to me seems the more advantageous, Bristol might be the Assize Town for North Wilts, South Gloucestershire, East Somerset: in fact at a Bristol Assize nowadays there may appear causes from one or all of these regions. The Commission of 1869 seem to have favoured this method. I do not wish to indicate save in general terms what the central Assize Towns should be: that problem could only be finally solved after careful detailed enquiry, which has not been undertaken by this Committee .... In any case the districts would not be watertight compartments, since justices might be empowered as they now are to commit to any Assize on grounds of expedition or convenience ....

"The success of centralising assize work

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1. Second Interim Report of the Business of Courts Committee Addendum I Memorandum by Lord Wright p.53. cmd.4471. (1934)

at big centres has been conclusively established by the experience of the Liverpool and Manchester Assizes. A list of causes, civil and criminal, can be prepared and completed at such Assizes, without either waste of time or excessive haste, evils, one or the other, inseparable from holding Assizes at a number of small places."[1]. Moreover the closing of many local prisoners also tells in favour of centralisation of assizes. To this consideration is added the great improvement in cross country travelling facilities of recent years which makes any proposal for limiting the number of assize towns far more practicable.

This suggestion is supported by the London Chamber of Commerce and many others. In the opinion of the Chamber of Commerce, communication between the larger towns and the surrounding country, is now so easy and rapid that the grouping of assizes in certain large centres, as advocated by Lord Wright, would lead to much saving of judicial time, and it is believed would be equivalent to the creation of one or more additional judges.[2].

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1. ibid. pp. 55-56
2. Minutes of Evidence, op.cit. p.290 II Rearrangement of the Circuit Areas; also appendix No.17 p.20.

Though this proposal of extensive grouping has long been advocated, ~~why is it nothing is achieved? The answer is frankly put by~~ so far little has been done in this direction. the matter is summed up in the Report of St. Aldwyn Commission: "though some such adjustment of Criminal business has been frequently urged from the time of the Judicature Commission until now, no satisfactory answer has been given to it, but there has always been so much opposition to it, partly due to private interests, but mainly to a strong and universal sentiment of county or municipal patriotism that it has never been carried into effect."[1].

Even up to the present many distinguished judges and bodies deprecate the idea of extensive grouping of assizes. Their reasons are much on the same line as advanced by the Minority Report of Justice Swift's Committee which after enumerating 15 items of matters to consider concluded thus: "we think any extensive grouping of the counties for assize purposes would produce great inconvenience and increased expense to jurors and witnesses, would be unfair to prisoners. It would cause considerable inconvenience in the police arrangements of the

1. Second & Final Report, dpcit. p.54.cmd.4471 (1913)

counties and probably in many counties necessitates an increase in the police establishment. We think further any scheme of grouping would materially increase the cost of prosecutions .... Any grouping would certainly disarrange the finances of the counties and would necessitate contributions by one county to another towards the cost of providing assize accommodation."[1]. The Royal Commission on the Despatch of Business at Common Law, after finding that, so far as criminal work is concerned, there is a recent development which tells in favour of centralisation,[2]. was compelled by the force of conservatism to discard the suggestion of grouping. To quote their report, "The great bulk of our evidence has, however, strongly supported the retention of the county as the judicial unit. We are not equally impressed by all the arguments put forward in favour of it, but we recognise there is substantial ground for keeping the area which is a unit for administration generally as the unit for the administration of justice. We certainly do not

1. Report of the Circuits Committee, pp.16-18. cmd.1831 (1923) also Report of the Royal Commission on the Despatch of Business at Common Law, paras. 90, 95, cmd.5065. (1936).
2. Report of the Royal Com. on the Despatch of Business at Common Law. par.89, cmd. 5065 (1936)

think that the present circuit towns should necessarily remain the same (indeed we make a suggestion later for their revision): but we are convinced that a county basis of the circuits must be retained. As we have shown, moreover, there has been for over 65 years a series of proposals by succession of commissions and committees for the abandonment of the county basis and for a reduction of the number of places at which assizes are held. Except in the case of the autumn assize, little has been done to give practical effect to the proposals, and it is clear that there must be good ground for this reluctance of the authorities. It would therefore be hardly worth while, even if we were convinced of their wisdom, to make further recommendations of this kind, which would no doubt likewise be consigned to respectful oblivion; and we have sought for an alternative method of dispensing with assizes at places where there is no substantial business to be transacted.[1].

With all respect to high authorities, I am far from being convinced either by their logic or their conclusion. It is no more than a fatalistic view and a gesture before the conservative

1. ibid. paras. 95-96.

force.

In the fifth place, district courts with locally resident High Court judges have long been propounded. There is some hint of district courts in the report of the Commissioners of 1869. In 1871, Sir William Harcourt recommended that circuits be discontinued and replaced by provincial courts with local resident of judges of High Court standing, the County Courts being a subordinate part of the provincial courts system, while appeals from County Courts should be taken to the provincial judges, whose judgment shouldbe final, unless he certified the appeal to be fit for hearing in London. [1]

In 1873, Lord Romilly, son of the great Sir Samuel Romilly spoke in the House of Lords debate on the Judicature Bill. "As to circuit, he should propose to put an end to them, seeing that they led to great expense. There ought instead to be a series of district courts within the reach of everyone, with a speedy and inexpensive procedure." [2]

1. Plan for the Amendment of the Law.
2. 214 Parliamentary Debates, Hansard 3rd Series, 1725 (1873)

Down to the present, it has been suggested in some quarters[1] that the present Assize system should be abolished, and that England and Wales should be divided into certain provincial districts to which permanent judges of the High Court should be attached.

Another suggestion of the kind, was made by Mr. Cecil B. Barrington in 1907.[2] In his opinion new county Criminal Court should be established in every county on the lines of the central Criminal Court with modifications to suit local requirements. Those courts will be presided by a new order of judges appointed for their legal experience in criminal trials with equal position and dignity as the High Court judges and paid £3,000 a year. These Courts need not sit more than six times a year and it would be possible for one judge by making a circuit to preside at a number of these in succession. It is advisable to concentrate in the new court the entire criminal business now discharged at assizes and quarter sessions. If this is impracticable, the new court should have the criminal jurisdiction of the assize as well as the county

1. see for instance report of the Newcastle-Tyne Incorporated Bar Society
2. 23, Law Quarterly Review, 1907.

quarter sessions. It should have, also an exclusive, if possible, or concurrent criminal jurisdiction of the borough quarter sessions.

Judge E.A.Parry seems to be also in favour with the establishment of district High Court at large towns providing continuous legal service to the public. Thus he write, "Assuming, therefore, that there existed a Minister of Law with power to co-ordinate and arrange the business of the courts of the county in the interests solely of the community and without interference from vested interests, the first task before him would, I think, be to provide the same legal facilities for the trial of actions in the North and West and Midlands that already exist in London and the South. He would, I think, in looking at the statistics find out that there was a large centre of legal business at Manchester and Liverpool; at Birmingham, at Leeds, at Cardiff and Swansea and at Bristol. These are all natural centres of litigations for their different districts, and in each of these centres he would seek to give the inhabitants similar legal services of the High Court to those that are obtained in London. The High Court judges should

be relieved from visiting the smaller towns as they do now, but they should give such continuous service in the great centres as is required to put the North and the West and the Midlands on an equality with the South."[1]

But on the other hand, the proposal of district courts to replace the assize is criticised by others, notably by Lord Wright and Lord Peel's Commission. In the opinion of Lord Wright "it is entirely contrary to the whole system on which English justice has been conducted from the earliest times" and "would be most disastrous to the quality of English justice." Because the whole idea of the circuit system, he argued,[2] has been to have one body of judges in touch with each other and inspired by a common tradition, all taking their turns of London work. On the other hand, if there were merely district judges, they would be cut off from associations with the main body of the London Bench. They would tend to become localised and parochialised and it would not be possible to keep

1. What the Judge Thought. P.168.
2. Evidence, op.cit. Horridge, q.1256, pp.83-4.

up the same judicial standard, because it is easier to obtain the more limited number of the London Bench than those benches in the provinces. This view is endorsed by the London Chamber of Commerce. They maintained that (1) it is important that the judges be in touch with each other, which could hardly take place if they became district Judges. (2) The hardship on a litigant in a provincial town of having to bring witnesses to London is no greater than for a London litigant to bring witnesses to a provincial town for a trial at the Assizes. (3) It is just as expensive and just as great a hardship for one of the litigants to have to bring his witnesses from his place of business or residence to another part of England.

There would be few supporters today for "the idea of abolishing circuits," wrote Mr. Mullins, "and substituting judges in the provinces of High Court standing, as visualised by Lord Westbury and recommended by Sir William Harcourt. One factor to be considered, and it is important, is that, while the centralised system has been costly to litigants, the

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1. Memorandum of the London Chamber of Commerce on the Second Interim report of the Business of Courts Committee p.5.

development of our law has been benefitted from it. Our law has been free from the lack of harmony that resulted in France & Germany, for instance, where there used to be no centralised system. The constitution of local High Court would not be favourable to the harmonious development of the law in the future."[1]. In the opinion of Lord Peel's Commission district courts would be contrary to the public interest. They argued that judges must act in the closest touch with one another and be concentrated in London, the greatest centre of population and of litigation.[2].

As an alternative, Lord Peel's Commission made a number of minor suggestions - that the Circuits should begin at different dates, that two judge towns should be "spaced", that the Judges should freely exercise the discretion (now vested in the Lord Chancellor and the Lord Chief Justice) to cancel Assizes at which there is little or no business, that the opening date of the Circuit alone should be fixed in the first instance, and that the North and South Wales circuits should be

1. In quest of Justice p 300
2. Report of the Royal Commission on the Despatch of Business at Common Law, par.78-79 cmd.5065 (1936)

fused.[1] These proposals are rather a temporary cure for a more even spread and spacing of available Judge power over London and circuit ~~and~~ business than a permanent reform of the circuit system. They might have gone much further than these palliatives. It may be observed that the suggestion of District court to replace the assizes is offensive to the widespread belief that justice is best administered by judges who have close contact with each other but go to provincial towns when works call for them. But this assumption does not seem to me well-founded. The success of county courts appears to be a sufficient demonstration of the falsity of this belief. On the whole the assize system is no longer indispensable for the purposes which it was originally designed to serve.[2] In the days of slowness and scantiness of local communications, it is difficult to imagine a better instrument to harmonise the laws and institutions of the country than the circuit system. It thus secured the nation-wide uniformity of English law and English institutions.

1. Ibid. paras. 27-138.pp.40-50. Following upon the Report, the Lord Chancellor has appointed a Committee on circuits of which Mr. Justice Finlay is to be Chairman. They are to advise as to the abolition and omission of Assize town. In the opinion of the Law Journal, the work of the Committee is 'cabin'd, cribb'd, confined

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by the instruction that the county is to be retained as the judicial unit. (81 The Law Journal, Mar.14.1936.)

2. The Second and Final Report of the Royal Commission on the Delay in the King's Bench Division p.15. cd. 7177. (1913)

But with steamers, railways, motor-cars, aeroplanes, telegraphs, telephones and radios, daily newspapers and reports, there is little cogent reason to maintain that one local judge would be parochialised or cut off from association with another. If all judges form one body of public servants fairly subject to transfer from one place to another throughout the country, there is no apprehension of their segregation into local groups and local traditions. On the evidence of the court system in continental countries, especially France and Prussia, where courts are confined to particular local areas with only a single revising body at the pinnacle but where a nation-wide legal uniformity is as well secured there as here, there is little ground for the apprehension of the harmonious development of law after the establishment of district courts.

Commenting upon the report of Lord Peel's Commission, the Sunday Times said in a leading article: "One of the main complications is the circuit system. The most drastic remedy would be to abolish circuits and substitute localised courts, in conformity with other judicature in Europe. The Commissioners dismissed the idea, and most historically-minded

persons may rejoice that they did. Nevertheless, on the working merits there is much to be said for it, especially now that the Bar which does the work at Assizes has become so largely - on some circuits almost exclusively - a localised Bar.[1] In the considered opinion of Mr. H.C.K. Ensor,[2] if a programme of decentralising the rest of the higher judicial work rendered the abandonment of the circuit system desirable, there might be several public gains in doing so, and little, if any, public loss, save in point of historic sentiment.

The only appendage of the circuit system that requires urgent reform is the division of the Bar into circuits. At present every barrister at the outset of his career binds himself to practice on only one circuit. This sort of Covenant in restraint of trade, if I may so put it, is not the result of any legal rule, but the relic of the ancient circuit system sanctioned by the professional practice.

It was, perhaps justifiable or even natural in former days when all means of communications and accommodation, such as railways, omnibuses, telephone telegraph and even hotel and restaurant

1. The Sunday Times, Feb.2. 1936.
2. Coutts & Judges. p.26.

were either unknown or lacking, when judges, counsels and attendants all travelled circuits together for safety and convenience, when the whole Bar resided and concentrated in London, when practice on more than one circuit was a matter almost impossible. But this practice has not only ceased to have any raison d'ete but also antiquated, inconvenient and works hardship at present, when there are local Bars all over the country, easy means of communication and every facility for accommodation. In Scotland, every circuit is open to all counsels who are allowed to practice where they like. This shows the absurdity and futility of the division of the English Bar into circuits. Its abolition will be advantageous both to the profession and to the litigants.

II. THE CENTRAL CRIMINAL COURT.

The Central Criminal Court is a special tribunal created in 1834 and serves at once as a court of Quarter Sessions for the city of London proper[1] and a Court of Assize for the Metropolitan district.[2]

1. The Jurisdiction of the Central Criminal Court has in practice superceded the criminal jurisdiction of the Quarter Sessions for the city of London and of those for the borough of Southwark, and all indictments found in the City and borough are tried at the Old Bailey.
2. For a short history of the Court, cf. A.Crew, [illegible] next

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Old Bailey, Ch.I. (1933); C.D. Roberts: The Old Bailey (1929; R.Sharpe: Memorials of Newgate Goal and the Sessions House (1907.

The judges, or commissioners, as they are called, of this Court consist technically of the Lord Chancellor, the judges of the High Court, the dean of Arches, the Lord Mayor, the Aldermen, the Recorder and the Common Serjeant of the City of London Court, any person who has been Lord Chancellor or a judge of the High Court and such others as the King may from time to time appoint.[1.] Thus it is clearly composed of a medley of prominent persons numbering some forty or fifty, but in fact the greatest majority of them do not exercise judicial functions there.[2.] The Lord Mayor, Aldermen and other commissioners do not, for example, take part in the trials, though one of them must be present at the opening of the Court to form a quorum, when only one judicial commissioner is sitting.[3.]

The permanent judges who actually and regularly sit each session are the Recorder of the City

1. Central Criminal Court Act, 1834, (4 & 5. Vict.IV. cap. 36)
2. Minutes of Evidence taken before the Royal Commission on Delay in the King's Bench Divn. Haldane 4663-6
3. Central Criminal Court Act, 1834. 4 & 5. Vict.c.36.s.2. This Act reconstituted the tribunal which for generations had administered justice at the Old Bailey, Sessions House.

London, the Common Sergeant and the judges of the City of London Court, while the judges of the King's Bench Division attending according to a rota to try the more important and serious offences called 'Judges' cases".[1].

That the judge should try the serious crimes is a mere matter of usage. "There is no statutory authority for it at all," observes Common Sergeant Cecil Whiteley, K.C., "but every month the judge comes down to the Old Bailey, and he takes murder, manslaughter, attempted murder, arson, rape, burglary, carnal knowledge of young children, incest, fraudulent conversion by solicitors, abortion, infanticide and any other cases which the judge may select from the calendar."[2].

The Recorder is appointed by the Corporation but he cannot exercise any judicial function in this court unless he is appointed by the Crown for that purpose.[3]. There is no statutory qualification required of the recordership, but for a long period it has been fulfilled by barristers.[4]. The

1. The Second Interim Report of the Business of Courts Committee cmd. 4271 par.42, p.28. 2. Minutes of Evidence taken before the Royal Commission on Despatch of Business at Common Law. op.cit. p.298.q.4089.
3. The Local Govt. Act. 1888, provide that No Recorder shall exercise any judicial functions unless he is appointed by Her Majesty to exercise such functions.
4. Halsbury: 2 Laws of England p.383; cf.78 The Law Jnl

The Common Sergeant and the Judge of the City of London Court must be duly qualified barristers and are appointed by the Crown.[1]

Apart from the judges, the officers of the Court are composed of the Clerk of the Court, the Clerk of Arraigns and the Clerk of Indictments and their deputies.

The court exercises similar powers to those held by His Majesty's Judges when they go under Royal Commission on circuit. Like other assize courts, it has no appellate jurisdiction and forms a branch of the High Court.[2] Neither Mandamus nor certiorari would lie to bring up a matter from this Court to the High Court.[3] But unlike other assize courts, it has no civil jurisdiction and usually sits at least twelve sessions in each year at dates fixed by four judges of the King's Bench Division. Its territorial jurisdiction

1. It was made so by the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. 66 ss.16,29) which is repealed and re-enacted by the Supreme Court of Judicature (Cons) Act. 1925 (15 & 16 Geo.V.c.49) ss.18,70; R.V.Parke (1903) 2.K.B. 432, 439; R.V. Central Crim. Ct. Justice, Ex Parte London C.C. (1925) 2.K.B.43.
2. R.V.Justices of the Central Criminal Court (1925) 1 K.B.D. 479; R.v.Justice of the Central Crim.Ct. (1925) 2.K.B.D. 43.
3. Central Criminal Court Act, 1834. (4 & 5. Will.IV. c.36.)

is much wider and extensive than other assize Courts. It extends firstly to the trials of indictable offences arising within the city of London, the Counties of London and Middlesex and certain specified portions of the counties of Essex Kent and Surrey.[1.]

The area thus covered is somewhat smaller than that of the Metropolitan Police District. Nevertheless, it serves a population approximating 8 millions. It gives relief pro tanto to the several counties concerned in an increasing degree. Secondly, the Court can try offences committed on the high seas or those within the jurisdiction of the Admiralty,[2.] and all murderers or manslaughterers of persons subject to military law, alleged to have been committed by persons who are also subject to such law. Thirdly, it is also competent to try indictable offences committed beyond its jurisdiction which have been sent by the King's Bench Division of the High Court to be tried here.[3.] Fourthly, the

1. Central Crim. Court Act 1834. (4 & 5. Will.IV.c.36)
2. 4 & 5 Will IV. c.36 s.22. See also 7 & 8 Vict.c.2.
3. Palmer's Act, 19 & 20 Vict. c.16 ss.1-3.

Crown may, by order in Council, direct that the jurisdiction of this court for the sessions of September, October, November, December, January, March, April & May shall extend to any adjoining county or part of a county mentioned in the order, and to the same extent as if such adjoining territory were included within the statutory jurisdiction of the court.[1].

Apart from the above-mentioned areas, cases from places outside the ordinary range of the court, for instances from Newport and Cardiff, can be and are, at present, sent and add considerably to its work. That the country justices are not hesitant about committing cases for trial at the Central Criminal Court is shown by the following comment in a legal periodical, on the remarks of a justice of the King's Bench Division with respect to the large calendars at the Central Criminal Court during the winter of 1927-28.

Mr. Justice Humphreys, who must know more about it than most people, is reported to have criticised the working of the Criminal Justice Act, 1925, as having caused congestion at the Central

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1. Supreme Ct. of Judicature (Cons) Act, 15 & 16 Geo.V.c. 48 s.73 (1).

Criminal Court, while affording relief at County Assizes. The occasion was a calendar in which were a number of cases from outside the Metropolis. We appreciate the fact that section 14 of the Statute, _iving power to justices to commit for trial to convenient Assizes or Quarter Sessions with a view to expedition, may result in considerable extra work at the Central Criminal Court, which sits frequently instead of at long intervals like other courts of assizes. So long, however, as the work does not become unmanageable, it is to be hoped that learned judges will endure the inconve-nience for the sake of the speedy trial afforded to defendants who might otherwise, have a long period of anxious waiting.[1.]

This practice offers the advantage of an early trial and avoids the delay involved in waiting for the assizes of the counties.[2.] There has, however, been some complaint that too many cases are sent by magistrates to be tried at this Court.[3.]

1. Justice of the Peace, Vol.92.p.238 (1928)
2. Minutes of Evidence taken before the Royal Commission on the Despatch of Business at Common Law p.89. qs. 1350-51.
3. Ibid. Bodkin: 1997; Horridge; 1350.

So wide and extensive being its jurisdiction, the docket of the court is necessarily heavy. All the important and difficult cases arising in metropolitan area, and those attracting the greatest newspaper attention, are disposed of at sittings of this court.[1.]

The working and the place of the Court among assize courts may be briefly shown in the following two tables:

	1924.	1925.	1926.	1927.	1928	1929	1930	1931	1932	1933	Grand Total	Annual Average
Central Criminal Court....	732	660	627	610	651	614	682	688	806	663	6143	674.3
Assizes..	1976	2073	1843	1709	1729	1759	1924	1833	2016	1832	18694	1869.4

From the above table we may say that the annual average number of cases tried at the Central Criminal Court between 1924 and 1933 constituted a little over 36 per cent. of all cases tried at Assizes and over 26 per cent. of all cases tried both at the Central Criminal Court and Assizes put together.

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1. For Notable trials at the Central Criminal Court during the 20th century, see A.Crew: The Old Bailey, pt.V. pp. 105-259, Filson Young: Trial of Eyvaters & Thompson (1923); Trial of the Seddons, (1912); Trial of Hanley H. Crippen (1910); E.R. Watson, Trial of G.J. Smith (1922); W. Teignmouth, Trial of Browne & Kennedy, (1928)

	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933	Grand Total	Annual Average.
Central Criminal Court...	946	854	826	813	831	786	924	913	1129	933	8955	895.5
Assizes.	2351	2592	2580	2264	2127	2110	2400	2267	2695	2372	23758	2375.8

The above table shows that the number of persons tried at the Central Criminal Court during the period of 1924 and 1933 constituted about 38 per cent. of all persons tried at Assizes and 28 per cent. of all persons tried both at the Central Criminal Court and Assizes put together.

Broadly speaking, this large percentage of criminal work is performed by the Court with success.[1.] But during recent times, the Court is too heavily burdened with both so-called "home" and "foreign" cases that delay of trials are occasioned. The Recorder who arranged the cases to be tried each day in the Court has endeavoured to meet the difficulty by means of a "warned list". But this measure

1. On the Celebration of the Centenary of the Old Bailey on Nov.1.1934, Lord Sankey, ~~the~~ then Lord Chancellor said: "In no spirit of vainglory can we trustfully assert that the judges who have presided, the advocates who have pleaded, and the officials of the Court, have given to it a world-wide reputation as a model criminal Court." 81, The Law Jnl.p.16.Jan.4.1936.

is only partially effective. The speedy trial of cases is still to be aimed at. For this purpose, it is suggested, the hours and durations of the sittings of the Court should be the same as those in the High Court. The territorial jurisdiction of the Court needs also to be re-defined. As urged by Mr. R.Burrow, K.C.[1] before the Royal Commission on the Despatch of Business at Common Law, "I should like to point out that since the Central Criminal Court was established in 1834, no change has been made as to its area, and to suggest that reconsideration of that area is overdue. I would suggest that Surrey should be placed on the same footing as Middlesex and that greater area in Kent and Essex should be included in the district of the Central Criminal Court and possibly certain parts of Herts, Bucks and Berks."

As to the judges of the Court, it does not seem necessary to include those dignified personages such as the Lord Chancellor,[2] the Dean of

1. Evidence taken before the Royal Commission on the Despatch of Business at Common Law. Appendix No.17. p.20. (1935)
2. The Lord Chancellor is unable to sit through pressure of work elsewhere Haldane q.4665-6 Minutes of Evidence taken before the Royal Commission on Delay in the King's Bench Division cd. 7178.(1913)

of Arches, the Lord Mayor, the Aldermen who do not in fact discharge judicial functions here.[1] Nor is it to me the best system of having judges acting concurrently in this Court as well as in the King's Bench Division and the City of London Court. There appears little valid reason why a fixed number of judges as required by judicial business should not be appointed exclusively for this court.

Again, the finance of the Court should also be simplified. At present it appears a little intricate. The fees of the officers and ushers of the Court are settled by a Committee of the Judges,[2] and paid by several counties interested according to an order decreed by the Judges.[3]

There is no provision or superannuation

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1. The Central Criminal Court Commission, 406. The Law Times, p.406, May 27, 1933.
2. In practice a Committee of the Aldermen presided over by a High Court Judge settle the fees of the Court officers. The Central Criminal Court Act, 1884, s.14.
3. Local Government Act, 1888, s.89 (1) 40 and 100 under an order so made and dated 16th May, 1889, the London County Council pay seven-eights, Middlesex and Essex one-twentieth each and Surrey one fortieth of the cost of paying the salaries of the officers and ushers of the court.

scheme for those officers. The City Corporation pay the salaries of the Judges, the cost of the upkeep of the building and in addition a fixed charge of £15,000 for 60 years.[1.] On the whole, the general satisfaction is seeming to be felt in the functioning of the Court. It has more then once become the favourite prototype in the hands of English Judicial reformers for suggesting the institution of the county Central Criminal Courts[2.] all over the country to replace the much criticised courts of Quarter Sessions or Assizes.

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1. The City of London (Central Criminal Court House) Act, 1904. (4 Edw.VII. cap Mciii) The burden of these payments falls as to some £10,000 upon the London County Council, and as to some £30,000 upon the city of London.

2. Minutes of Evidence taken before the Royal Commission on the Delay of King's Bench Division. Ch. 7178 (1915) Mr. Justice Channell Q.2151
" Sherman, K.C. .....Q. 449
Sir H.Poland Q.2151
Mr. Disturnal,K.C. Q.8121

TABLE A.

POPULATION OF ASSIZE TOWNS

Assize Town	Population	Assize Town	Population
Prestign	1,102	Aylesbury	13,387
Appleby	1,618	Warwick	13,459
Beaumaris	1,708	Durham	16,234
Lampeter	1,813	Bury-St.Edmunds	16,708
Dolgelly	2,261	Winchester	24,969
Ruthin	2,960	Hereford	24,159
Huntingdon	4,108	Taunton	25,177
Wells	4,833	Chelmsford	25,537
Monmouth	5,110	Salisbury	26,456
Mold	5,133	Stafford	29,485
Newtown	5,176	Guildford	30,754
Brecon	5,332	Shrewsbury	32,370
Bodmin	5,556	Bedford	40,573
Welshpool	5,637	Maidstone	42,259
Devizes	6,058	Lancaster	43,396
Haverford West	6,113	Chester	41,438
Oakham	6,144	Worcester	50,497
Carnarvon	8,469	Gloucester	52,937
Dorchester	10,051	Carlisle	57,304
Camarthon	10,310	Exter	66,039
Lewes	10,875	Lincoln	66,243
Hertford	11,376	Cambridge	66,789
		Oxford	80,540
		York	84,813
		Ipswich	87,357
		Northampton	92,341
		Reading	97,153

TABLE B.

POPULATION OF SOME NON-ASSIZE TOWNS.

Town	Population	Town	Population
Dewsbury	54,302	West Bromwich	81,303
Great Yarmouth	56,771	Smethwick	84,406
Stratford	56,791	Wigan	85,357
Poole	57,221	Rochdale	90,263
Eastbourne	57,435	Grimsby	92,458
Wakefield	59,122	Halifax	98,185
Dudley	59,583	Blackpool	101,553
Gillingham	61,536	Walsall	103,659
Doncaster	63,316	St. Helens	106,789
Chesterfield	64,160	South Shields	113,455
Wrexham	64,737	Huddersfield	113,475
Tynemouth	64,922	Preston	119,001
Hastings	65,207	Bournemouth	116,797
Stockton-on-Tees	67,722	Southend-on-Sea	120,115
West Hartlepool	68,135	Blackburn	122,697
Luton	68,523	Gateshead	122,447
Darlington	72,086	Stockport	125,490
Rotherham	69,691	Leyton	128,313
Merthyr Tidvil	71,108	Ilford	131,061
Southport	78,923	Wolverhampton	133,212
Warrington	79,317	Walthamstow	132,972
Middlesborough	138,274	~~Oakham~~ Oakham	138,274
Rhondda	141,346	East Borough	140,334
Brighton	147,427	Birkenhead	147,813
Coventry	167,083	Southampton	176,607
Sunderland	185,824	Bolton	177,250
Plymouth	208,182	Salford	223,438
Croydon	233,032	Portsmouth	249,283
Stoke-on-Trent	276,639	West Ham	294,279
Bradford	298,041	Kingston-on-Hill	313,544
Sheffield	511,757		

CHAPTER X.

THE KING'S BENCH DIVISION.

Having treated the Assizes, I shall discuss the King's Bench Division of the High Court of Justice as a superior criminal court.

The King's Bench Division now represents the three historic courts of King's Bench, Common Pleas and Exchequer, to which reference has already been made elsewhere.[1] It is now the principal tribunal of criminal jurisdiction in England and in this respect it exercises the powers of the ancient Curia Regis.[2]

As has been observed, the Lord Chief Justice of England presides over it and there are at present 19 puisne judges associated with him. Though the Lord Chancellor is technically the head of English judiciary, it is the Lord Chief Justice of England who, in his capacity as the president of the King's Bench Division, exercises supreme control over the administration of criminal justice.

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1. Chap. III. The High Court of Justice (1)
2. Sir W.R. Anson; The Law & Custom of the Constitution (3rd ed. London, 1908) Vol II.c.V.s.1.

As has been said above the Judges of the Division have a variety of duties. In exercising their judicial functions in criminal cases they not only sit in this Division as criminal judges but also in the Central Criminal Court and the Court of Criminal Appeal in London. On the whole, the English judiciary does not favour with the idea of having judges who exercise exclusive criminal jurisdiction. But as a matter of fact, there are at least 3 or 4 judges in the King's Bench Division who are experts in criminal law and procedure.

With regard to the criminal jurisdiction, this Division acts both as a court of first instance and as an appellate tribunal.[1] As a court of first instance, it deals with indictments preferred in or removed to this Division, and "criminal information."

Such indictments are of three kinds. First, indictments under the statutes set out in the first Schedule of the 1933 Administration of Justice (Miscellaneous Provisions) Act, 1933.[2] Broadly speaking, those indictments deal with treasons committed abroad

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1. Stephen's commentaries of the Laws of England, 19th ed. Revised and rewritten by G.C. Chilshire vol.I. pp. 130 et seq. (1928)
2. 23 & 24 Geo.V.c.36.

and with offences committed by Colonial Governors and other Colonial officials. If the indictment which is preferred before a Grand Jury of Middlesex is found by them, the trial takes place in the King's Bench Division[1] is invariably a trial "at bar". The trials "at bar" of Colonial Lynch[2] in 1903 and of Sir Roger Casement in 1916[3] are the best remembered examples of this procedure. But the whole procedure of a trial at the bar is costly and is consequently resorted to only in very exceptional cases.

Secondly, any indictable offence committed in London Middlesex may in theory, though it never is in practice, still be tried in this Division.

Thirdly, any indictable offence committed in any part of the country, for which an indictment has been found in some other court but has since been removed into this Division by certiorari. The grounds for such transfer which are set out in Crown Office Rule 13 are thus:-

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1. The administration of Justice (Miscellaneous Provisions) Act 1933 S.1.(4)
2. R.V. Lynch, 19 T.L.R. 163 (1903) 1 K.B. 444.
3. R.V. Casement 32, T.L.R. 661,667.

(a) that a fair and impartial trial of the case cannot be had in the court below or

(b) that some question of law of more than usual difficulty and importance is likely to arise upon the trial or

(c) that a view of the premises in respect whereof any indictment is preferred or

(d) a special jury may be required for a satisfactory trial of the same.

As to (a), there is a demand for a change of venue. This is now obtained by removing the case in question into the Division and after so removed, sending it to be tried at the Central Criminal Court or some other Assizes. Such a roundabout and clumsy procedure does not seem to be necessary. It would be much simpler and economical, if such cases were removed by order of the court, direct from the court where they would otherwise be tried to another appropriate court.

With regard to (b), it appears a plausible ground for granting a trial at bar. But such cases are very rare.[1]

The third ground for removing a case to be tried in the King's Bench Division is scarcely justifiable at present. In the words of Lord Hanworth's

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1. Removal of Trial into High Court, cf.172. The Law Times, pp. 1-2, July 4, 1931.

Committee, "it is difficult to believe that in these days of motor transport and photography, any trial is defective for want of a view of premises; moreover, the procedure for obtaining a view appears to be cumbersome and unsatisfactory, and has not been employed for a great many years. We feel confident that in any case where it is desirable for the jury to view any premises, this can be done without practical difficulty."[1].

With regard to (d), the law is highly unsatisfactory. With a view to removing the case into the King's Bench Division, a special jury can be obtained in the case of a misdemeanour but not in the case of a felony. Such differentiation between different classes of crime is undesirable.

Apart from these indictable offences, the King's Bench Division has criminal jurisdiction over any misdemeanour committed in any part of England, but for which a criminal information has been filed either (1) by the Attorney-General ex officio, or (2) by the Master of the Crown Office at the instance of a private prosecution.

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1. Third & Final Report of the Business of Courts Committee para 16, cmd. 5066 (1936)

The criminal proceeding by an ex- officio information is extremely rare, the case of Rex -v- Mylins[1] in respect of a libel on the sovereign being one of the rare instances. Further, since the abolition of Grand juries in 1933, proceedings by information has lost the most substantial advantage over indictment, which is always an alternative in such cases.

Criminal informations by the Master of the Crown Office were once not uncommon in cases of criminal libel. But this practice was discouraged and rightly so in R v. the World[2] by Cockburn L.C.J. that the Court will not sanction applications for Criminal Information in cases of alleged libel if resorted to for the purpose of extorting an apology. Moreover, such cases have been very rare in fact.

The appellate jurisdiction of the Court is exercised by what is called a Divisional Court which is composed of three judges, usually the Lord Chief Justice, the next ~~session~~ judge and one other. In this capacity the Court exercises its jurisdiction in two ways. In the first place, it reviews and, if

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1. The Times, Feb. 2, 1911.
2. 13 Cox cc. p. 305 (1876)

necessary, quashes for error of law the proceedings of quarter Sessions or other inferior courts which are brought before it by a writ of certiorari. Secondly, it decides any question of law upon cases stated by Justices of Peace at Petty Sessions[1.] or by Justices at Quarter Sessions[2.] in appeals to them from Petty Sessions.

Apart from exercising original and appellate jurisdiction, the Court also intervenes to compel the Justice of Peace to perform their duties by means of Mandamus, or rule, that is, requiring them to hear and determine a charge, or issue a summons, if they have improperly refused to do so.

As a criminal court of first instance, the King's Bench Division tries very few cases. During the last twelve years, there were only five cases tried.[3.] The cases most frequently heard here are libel, assault, perjury, conspiracy, and nuisance, all misdemenours at Common Law. The appellate jurisdiction of the Courts is much more actively exercised,[4.] than its original jurisdiction.

1. Summary Jurisdiction Act 1837 and 1879.
2. The Criminal Justice Act 1925 (15 & 16 Geo.V. c.86.s.20)
3. These tried 4 criminal cases in 1922, none in 1923, 1924, and 1925, one in 1926, none from 1927-1933.
4. cf. Table B. King's Bench Division Appeals and special

footnote cont'd from previous page.

cases from inferior courts and other Tribunals. Evidence taken before the Royal Commission on the Despatch of Business at Common Law, p.11.

It may be observed that this Division is not only rarely put into motion as a criminal court of first instance but its proceedings are expensive and more or less cumbrous. It may be suggested that the jurisdiction of the King's Bench Division in indictable offences should be wholly abolished. As reported by Lord Hanworth's Committee, "we have considered the possibility of abolishing altogether the trial of indictments in the King's Bench Division. There is a strong case to be made out for taking such a course. It may be said that there is no practical reason why all criminal cases should not be tried by the ordinary criminal courts of the country, and indeed many practical reasons why they should; that is so far as a trial in the King's Bench Division may provide special facilities which are desirable in certain cases, e.g. a trial at bar or a trial by a special jury, these facilities could be made available at assizes or the central criminal court by an amendment of criminal procedure."

In spite of these findings, the Committee do not go to the length of advising that indictments in the King's Bench Division should be completely abolished, but recommend their retention in two, and

only two cases - namely (a) where the indictment belongs to the first of the three categories mentioned above - indictable offences committed by Colonial Governors, and Colonial Officers [1.] and (b) when it belongs to the third species and the ground is that a difficult point of law is likely to arise upon the trial.[2.]

As to Criminal Informations the Committee recommend that these be not filed except by the Attorney-General ex-officio. These are preserved, the Committee suggest, as an appropriate procedure in the rare event of libel on the sovereign, Judges, or other high officers of State, where preliminary proceedings before Magistrates may be embarrasing.[3.]

With regard to the retained indictments and informations, the Committee propose a simplified procedure, conforming, if possible, with the ordinary practice at an assize trial, and embodied in a separate set of rules.[4.] This is of course, highly desirable.

One word more about organisation. In early days the Divisional Court was composed of 2 judges. In the opinion of Sir A.H. Bodkin, former director of

1. Report op.cit. para. 14.
2. ibid. para. 15.
3. ibid. para 19.
4. ibid. para 24.

Public Prosecutions, this old practice should be reverted to. "At present, so far as I have noticed," he stated before the Royal Commission on the Despatch of the Business at Common Law,[1] "instances are very rare in which there is any difference of opinion in the Court of three judges, and, having regard to the nature of the large majority of cases in the Crown Paper, it seems that a decision of two concurring judges should suffice, and carry equal respect as does a concurring opinion of three. It would not seem impossible to determine before cases are listed whether a case should be regarded as of exceptional character to be argued before three judges."

These proposals, if adopted, would go some way to improve the Division as a criminal court, though they might have gone further.

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1. Evidence taken before the Royal Commission on the Despatch of Business at Common Law, p.133.

CHAPTER XI.

THE COURT OF CRIMINAL APPEAL AND THE HOUSE OF LORDS AS A CRIMINAL COURT.

I. THE COURT OF CRIMINAL APPEAL.

The Court of Criminal Appeal has been created since 1907 [1], following an agitation which lasted some three-quarters of a century. [2] Before the establishment of this court there was no direct appeal from the verdict of a jury on the merits of a case, and not even on a point of law unless the judge of the trial court saw fit to state a case. But the judge who could thus state a case on a point of law only could not be compelled to state if he did not wish to do so. Moreover, such an appeal could be taken, not by the Crown, but by the defendant only. With the establishment of the Court of Criminal Appeal, the whole procedure of

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1. Criminal Appeal Act, 1907. 7.Edw.VII.c.23; N.W. Sibley: Criminal Appeal and Evidence (1908).
2. 172 P.D.§§1008-1011; 174 P.D. 282,285-6.
   175 P.D.§§177-8, 190-5, 181, 198,201, 213-219,223-227 233. 187-190.
   178. P.D.§§1050 - 1054.
   179. P.D.§§587, 617-630, 631-633, 639-644, 659-662. 683-686, 607-610, 1472.
   180 P.D.§§235, 242-246, 253-262.
   181 P.D.§§307, 308-314.
   if also Montagu Williams: Leaves of a Life London 1890. Vol I p 335 Vol II 65

criminal appeal has been materially altered. A new method of reviewing convictions on indictment, criminal information or coroner's inquisition has born.

The judges of this court find the same persons as the King's Bench Division. It consists of the Lord Chief Justice of England and all the puisne judges. But a minimum of 3 judges is required to constitute a sitting of the Court. The court may be composed of a score of judges but unless the case is of unusual importance, only 3 judges are in practice present at the hearing.[1] Since the court was created, there were only some 30 or 40 cases in which more than 3 judges sat, but in one case, it consisted of 13 judges. The Lord Chief Justice of England and one of the senior judges always sit, if possible[2]. When the Lord Chief Justice sits, he presides.

Apart from the judges, the Criminal

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1. Minutes of Evidence taken before the Royal Commission on the Delay in the King's Bench Division. Sir S. Rowlatt, q.3427
2. Report of the Royal Commission on the Despatch of Business at Common Law para 47. cmd. 5 (1936)

Appeal office[1] consists of the following persons: One Registrar, which office is combined[2] with that of the Master of Crown Office in the King's Bench Division and paid £1500 a year;[3] One assistant Registrar who must be a Master of the King's Bench Division or a practising barrister of 7 years' standing and paid from £800 to £1000[4] and 6 clerks. The Registrar[5] and the Assistant Registrar[6] are appointed by the Lord Chief Justice, while the Clerks[7] by the Lord Chancellor.

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1. Minutes of Evidence taken before the Royal Commission on the Civil Service. Mr. L.W. Kersham, Q.53301-2. Lord K.S.M. Mackenzie: The Criminal Appeal Office is one of the outside offices and technically not part of the Central office of the Supreme Court. cd. 8130 q. 44254.
2. Court of Criminal Appeal Act, 1908 s.2.(1) (8 Edw. 7. c.46)
3. Minutes of Evidence taken before the Royal Commission on Civil Service. Sir K.A.M. Mackenzie. Q.44255. cd. 8130
4. ibid.
5. Supreme Court of Judicature (Officers) Act, 1819 S.9.(2)(42 and 43 Vict. c.78) as applied by Court of Criminal Appeal Act, 1908, s.2. (1) (8 Edw. 7c.46)
6. Court of Criminal Appeal Act, 1908 S.2 (2) 8 Edw. VII c.46.
7. Court of Criminal Appeal Act, 1907 s.2. (2) 7 Edw.VII. c.23.

It is the duty of the Registrar to obtain and lay before the Court all documents, exhibits and other things relating to the proceedings in the court of trial which appeared necessary for the proper determination of the appeal or application.[1]

The Court practically sits every Monday and the work frequently extends into Tuesday. It hears appeals by way of case stated on questions of law from inferior criminal tribunals. Thus it has appellate jurisdiction over all criminal cases tried at quarter sessions, the assizes, the Central Criminal Court and in the King's Bench Division[2]. So far as the judges of the Assizes, the King's Bench Division and the court of Criminal Appeal are concerned, criminal appeals are, contrary to the prevailing practice in the Continental countries, heard and determined by the same group of judges, though it is, of course, arranged that the same judge who tried the case in the first instance does not sit in the appeal case. Whatever the number of judges above three may sit in a particular case, it must be uneven and the decision of the majority prevails. This may serve as a reminder that the provisions of the Criminal Appeal Act

1. Minutes of Evidence taken before the Royal Commission on Civil Service, cf. Mr. L.M.Kershaw: q.53290-7

implicitly adopt the Procedure of the Judicial Committee of the Privy Council in the case of criminal appeals from the Colonies, since the decisions of the Committee is that of majority and it is pronounced by only one member of it.

I am not primarily concerned here with the grounds of appeal on which a defendant convicted of an indictable offence may appeal.[1] Nor shall I deal with the grounds upon which the Court of Criminal Appeal shall allow an appeal against conviction.[2] But it may be broadly stated

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footnote from previous page:

2. Court of Criminal Appeal Act, 1907, s.20; cf.also 8 Halsbury's Laws of England p.626 et seq. (1933)

1. He may appeal against his conviction in the following cases: (1) on any ground, involving a question of law alone, whether the question was raised by the defendant in the court below or not; (2) on any ground involving a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be suificient, either by leave of the Court of Criminal Appeal or upon a certificate of the judge who tried the action that it is a case for appeal and (3) against the sentence imposed upon the defendant by the Court of trial, but only upan obtaining leave from the Court of Criminal Appeal, and only if the sentence is not one fixed by law.
2. It shall allow an appeal against conviction if it thinks the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported by the evidence or resulted from a wrong decision on any question of law, or if it thinkes that on any ground there was a miscarriage of justice.

that leave to appeal will be given in all cases where a prima facie case for further inquiry is made out. A single judge, who does not sit in open court, has power to grant or refuse such leave and to deal with other subsidiary applications. If his application is refused, the appellant is entitled to have his petition heard by the full court, though this is rarely the case in practice.

If the court allows the appeal, it can quash the conviction and direct a judgment of acquittal, affirm the sentence passed, substitute another sentence,[1] shorten the sentence,[2] or inflict a more severe penalty. But the power to

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1. The Court may substitute another sentence under the following circumstances:-
(A) Where the appellant, though not properly convicted on one count of an indictment, has been properly convicted on some other count.
(B) Where the defendant was improperly convicted of an offence and the jury could, under the indictment, have found him guilty of some other offence and it appears to the court that the jury, on their findings, must have been satisfied that the evidence proved him guilty of that other offence the court can substitute for the verdict found by the jury, a judgment of guilty of that other offence and pass sentence accordingly, provided the sentence is not of greater severity.
2. If the court thinks that the sentence is too severe, it can shorten it.

increase sentences, though given to the Court in order to discourage frivolous appeals and to correct undue severity or unwise leniency in the sentence appealed from, has been but infrequently exercised. "During the past 19 years," said Lord Chief Justice Hewart in 1927, "sentences have not, I think, been increased in more than fourteen cases. And in every case of increase of sentence, an appellant has always been expressly warned by the court beforehand of its power, and the appellant has therefore had the opportunity of abandoning his appeal."[1]

On the other hand, the court may dismiss the appeal if it thinks proper or merely on the ground that "no substantial miscarriage of justice has been occurred," even though it considers that the point raised might be decided in favour of the appellant. Before the Court has dealt with the case, appellants have the absolute right to abandon their appeals or applications. An appeal is sometimes abandoned before the case is considered at all, either by a single Judge or by the court, while at other times it is abandoned after the single Judge has refused to appeal.

1. Address by Lord Hewart at the Canadian Bar Association Aug. 1927.

In 1932, among 674 applications for leave to appeal, 91 appellants abandoned their applications for leave to appeal, constituting about 13 per cent. of all but none abandoned their appeals after leave granted;[1]. In 1933, out of 521 applications for leave to appeal, 70 appellants i.e. again about 13 per cent. abandoned their applications, while 3 appellants abandoned their appeals.[2].

The court is empowered in a proper case, to hear fresh evidence, but except the trial of an appellant has been a nullity[3], it has no power to order a new trial.[4] As reported by Lord Peel's Commission, appeals to the Court of Criminal Appeal are disposed of on the average within five weeks of the receipt of the notice of appeal . As the Court sits at regular (almost weekly intervals) every requirement of due despatch is satisfied.[5].

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1. Criminal Statistics (England & Wales 1932) Table VIII pp.59-6, cmd. 5608 (1934)
2. Criminal Statistics (England & Wales, 1933) Table VIII, pp. 59-6 cmd. 4977.(1934.)
3. R.-v- Crane (1921) 14 Cr. App. Rep. 183, 85 J.P. 245.
4. The Act provides that "writs of error and the powers and practice now existing in the High Court in respect of motions for new trials or the granting thereof in criminal cases, are hereby abolished (s.20 (1))
5. Report of the Royal Commission on the Despatch Business at Common Law para. 35 (1) 1936; cf. also the address by Lord Hewart before the Canadian Bar Association. And information from the clerk of the Court of Criminal Appeal.

But during the time the prisoner remains in prison and cannot obtain a certificate of reasonable doubt or be admitted to bail. This is a problem worthy of serious consideration.

There is, however, no delay incidental to the preparation of lengthy printed memoran-dum or briefs on appeal. The record on appeal consists merely of the transcription of the stenographic records and documents of the trial. Printed arguments based on this stenographic record are not in use because they are considered to be a waste of time and energy. It is, of course, an advantageous feature.

No official shorthand note is, however, taken of the proceedings or judgments of the Court itself. Such a note is, in fact, never taken unless a shorthand writer is instructed by some person interested in some particular case.

Only one judgment is rendered except where, in the opinion of the court the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the court.[1] This affords an excep-

1. J. 1 (6)

tion to the general practice of the English High Court which publishes dissenting opinions of judgment. Most judgments of the Court are very short, rarely more than two or three typewritten pages in length and there is rarely any attempt in them to display legal erudition. They are customarily rendered orally by the presiding judge immediately at the conclusion of the arguments of opposing counsel.

The Court sits on an average about 40 days each year.[1] Though the days of sittings are not many, still it interferes somewhat with the business of the King's Bench Division.[2]

The number and results of applications for leave to appeal as well as of appeals heard or otherwise disposed of in the last 10 years may be tabulated in the following table:

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1. Minutes of Evidence taken before the Royal Commission on the Despatch of Business at Common Law op.cit. p.43.
2. Minutes of Evidence p.43; Report op.cit. para.47

	Application for Leave to Appeal.							Appeals heard or otherwise disposed of.										
	Number				Results			Number					Results					
	Total	Against conviction	Against Sentence	Against Conviction & Sentence	Abandoned	Refused	Granted	Total	After leave granted	On grounds involving questions of law.	With Certificate of Judge at trial	Against Conviction of Pre-ventive Detention	Abandoned	Conviction affirmed	Conviction quashed, conviction of some other offence substituted	Conviction quashed	Sentence affirmed	Sentence quashed, some other sentence substituted	Sentence quashed
1924	460	93	191	176	70	321	69	102	69	4	9	20	-	15	1	34	21	28	3
1925	461	124	142	195	48	349	64	82	64	2	1	15	-	19	-	26	19	16	2
1926	401	90	163	148	58	278	65	85	65	5	3	12	-	9	2	23	24	24	3
1927	383	94	147	142	45	277	61	104	61	14	6	23	2	17	-	25	29	29	2
1928	404	102	166	136	61	290	53	71	53	3	3	12	1	11	2	20	15	22	-
1929	335	70	161	104	69	209	57	77	57	-	3	17	1	4	-	12	24	36	-
1930	442	106	179	157	60	312	70	89	70	-	1	18	-	9	-	23	29	26	2
1931	513	124	212	177	75	359	79	95	79	7	-	9	-	12	-	30	18	34	1
1932	674	111	335	228	91	480	103	132	103	13	1	15	-	15	-	25	22	65	5
1933	521	106	228	187	70	372	79	106	79	10	7	10	3	11	-	31	23	38	-
Grand Total	4594	1020	1924	1650	647	3247	700	943	700	58	34	151	7	122	5	249	224	318	18

From the above table, the following points may be noticed:

I. Number of applications for leave to appeal against
conviction ..... 22 per cent.
Against sentence ..... 42 " "
" conviction and sentence ..... 36 " "

II. Results of applications for leave to appeal:
Abandoned ..... 14 " "
Refused ..... 71 " "
Granted ..... 15 " "

III. Number of Appeals heard:
After leave granted ..... 74 " "
On grounds involving questions of law... 6 " "
With certificate of judge at trial ..... 4 " "
Against sentence of preventive detention 16 " "

IV. Results of appeals heard or disposed of:
Abandoned ..... .007
Conviction affirmed ..... .129
" quashed, conviction of some other offence substituted. .005
Conviction quashed ..... .264
Sentence affirmed ..... .237
Sentence quashed, some other sentence substituted ..... .337
" quashed ..... .019

It is significant to note that (1) only 15 per cent. of applications for leave to appeal were granted, while 71 per cent. refused; (2) 37 per cent. of conviction and sentence were affirmed 62 per cent quashed (including about 34 per cent. other sentence substituted).

Again, the annual average rate of successful

appeals in this Court is much higher than that in the Court of Appeal, where only 30 per cent. appeals were successful.[1.]

Out of the total number of persons convicted and sentenced, the percentage of those who appealed to the Court of Criminal Appeal may be told thus:[2.]

YEAR.	No. of persons convicted & sentenced.	No. of Appeals.	percentage.
1930	7340	462	6.1
1931	7793	529	6.7
1932	9410	703	7.4
1933	8100	548	6.7

"The number of appellants," said Lord Hewart,[3.] "that is, persons who have been convicted and desire to appeal under the Criminal Appeal Act is barely 7 per cent. of the total number of convicted persons who have the right of appeal. The highest number of appellants was, I think, in the year 1910, when there were 712 appellants. An examination of the records shows that the numbers of appellants has ranged from 712 to 420 or thereabouts in a year, with the annual

1. Chap. V. The Court of Appeal.
2. Minutes of Evidence taken before the Royal Commission on the despatch of Business at Common Law, p.52.

average of something like 520, while the number of cases in which the conviction was quashed has ranged from 39 to 14, and the number of cases in which the sentence was reduced has ranged from 47 to 17 in a year."[1].

The Court has now been in existence nearly thirty years. It is designed for two purposes (1) to ensure that no innocent person shall be convicted and (2) to revise unsuitable sentences. The importance of the former calls for no explanation. The demand of the latter is obvious. Penal treatment is as we know think to fit the Criminal rather than punishment to fit the crime. Consequently what shall be done to and with the convicted offender after prosecution must be left largely to the discretion of someone. Even if we sought to make the punishment fit the crime the impossibility of a mathematically constructed system of penalties became manifest, and sentences, within wide limits, was a matter for the discretion of the Trial Judge. But at present as in the past notorious inequalities in sentences bear constant witness to the liability of unfettered discretion to abuse. To meet this particular danger

1. Address by Lord Hewart, op.cit.

the Court of Criminal Appeal, is relied upon in its power to review sentences.

How far the Court of Criminal Appeal has fulfilled both of these purposes? In the opinion of Mr. Ensor, the first of these objects is secured already about as far as is humanly possible by the English law of criminal evidence. The second is much more necessary, because the English judge, while an expert in conducting a trial, is usually quite an amateur in passing sentences. But it is scarcely plausible that an assembly of this same class of judges should be much wiser than the individuals composing it; and in fact the Court of Criminal Appeal has laid itself open to very considerable criticism under this head."[1] But, on the other hand, the Business of Courts Committee found no fault with the working of the Court which, in their judgment, has proved successful in fulfilling the purpose for which it was constituted. They even went so far as to think that it would be a mistake to suggest any alteration in its system.[2]

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1. Courts & Judges. p.22.
2. The Second Interim Report of the Business of Courts Committee. para. 38, p.26. cmd. 447 (1934); cf. also Report of the General Council of the Bar on the second Interim Report of the Business of Courts Committee.

Though it is difficult to completely agree with the findings of the Committee, still the Court of Criminal Appeal appears to serve both purposes with some credit. Notwithstanding the rules of criminal evidence, the Wallace case indicates an instance where a man would have been hanged by the verdict of a jury had it not been for the Court of Criminal Appeal.

Whatever may be the opinion of the critics of the Court, the results of its work have undoubtedly been far-reaching. "To begin with," wrote Lord Birkenhead, "the existence of the Court of Criminal Appeal has in its most salutary manner, increased the carefulness of Judges sitting in courts of first instance. I have found the clear conclusion that prosecutions are more deliberately and more thoroughly conducted now than they were before the right of appeal in criminal cases was established."[1]

Apart from what may be said in favour of the Court, much more, however, remains to be done.

It is suggested by the Business of Courts Committee that the Court of Criminal Appeal should

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1. Law, Life and Letters, Vol.I. p.101.

be reorganised as one of the divisions of the Court of Appeal because they thought it would be of advantage to give the former the authority of a court of appeal. The Lord Chief Justice of England should, they suggest, continue to preside over this division of the Court of Appeal and the Court, as now, be summoned in accordance with his directions.[1.]

As has already been observed, the separation of the Court of Criminal Appeal from the Court of Appeal sometimes becomes the origin of difficulties. With this separation there arose the anomalous conditions of conflicting rulings of the two courts upon some points of dispute. In the case R -v- Denyer, the Court of Criminal Appeal decided that a letter from the Superintendent of the stop-list of the Motor Trades' Association intimating that a Motor Trader would be put on the stop-list unless he paid £250, was uttering a letter demanding money with menaces and without reasonable and probable cause. Thus in fact the accused was convicted of a grave offence. When the same point was raised in a civil case, Hardie Lane -v- Chilston,

1. The 2nd Interim Report of the Business of Courts Committee Para. 37-38, cmd. 4471.

the Court of Appeal decided that the letter from the Motor Trades' Association was not illegal, and therefore the money paid was not paid under duress. The Court of Appeal even went so far as to comment adversely upon the decision of R -v- Denyer being wrong. This called forth the emphatic reply of the Lord Chief Justice that, "It may be well to make it clear for the purpose of the administration of the Criminal law that unless and until the decision in Rex -v- -Denyer in this Court is reversed by the only competent tribunal (the House of Lords) it is binding upon, and will be enforced by this Court." Thus, it is argued that the amalgamation of the Court of Criminal Appeal with the Court of Appeal will not only give the former the status of the latter but also prevent A conflicting decisions of the two courts. But, on the other hand, it is objected on the ground that the Judges of the Court of Appeal may have no experience in criminal cases. And this is vital. As said by C.J. Longmore[1] "The Court of Criminal Appeal has been a very great success. In my opinion one of the greatest

1. Minutes of Evidence taken before the Royal Commission on Delay in the King's Bench Divn. q. 976 p.61.

reasons for that success is that the Court is composed of Judges who have themselves had considerable experience in trying cases, both small and large, throughout the country, and therefore have formed valuable opinion, not only with regard to the sentences to be passed upon the various classes of offenders, but also with regard to all questions in which evidence is involved." This deserves careful consideration.

As to the judges of this appellate criminal division of the enlarged Court of Appeal, the Business of Courts Committee suggested that in future no more Lord Justices should be appointed and the Court be manned by puisne judges who were thus to have both original and appellate functions. This proposal has not met with any great approval by any of the professional bodies which have to consider it. The constitution of the reformed court of appeal I have already tried to discuss in a previous chapter. With regard to other officials of the Court it may be suggested that the office of Registrar is best to be separated from that of the Master of Crown office. As pointed out by L. W. Kershaw,[1] the

1. Minutes of Evidence taken before the Royal Comm., on the Civil Service, Appendix to 6th Report of the Commissioners qs. 53296-98. cd. 8130 (1915)

registrar has extensive duties and "real responsibility". And it is not considered as right arrangement to combine the registrarship with the mastership of the Crown Office. On the contrary, the Registrarship ought to be a separate office in order to enable the Registrar to devote the whole of his time to the court of Criminal Appeal.

Again, the lack of an official shorthand writer is a source of much hardship. The appointment of a shorthand typist would be, it is suggested, not only most useful but a great saving of time, as copies of the documents in every case have to be made for the judges.[1]

Whether the Court should have the power to order a new trial is a debatable question. The judges of the Court have on many occasions expressed their strong regret that the Court has no power to order a new trial. They were compelled to quash the conviction in all cases where they decided that it had been wrongfully obtained, even though the wrong were only technical. The guilty was thus enabled to escape the punishment by appeal against a conviction on a technicality. It is, of course,

1. ibid. L.M.Kershaw, qs. 5330d-12.

true that as a general rule second trials in criminals cases are objectionable. But none the less there may have been a substantial miscarriage of justice owing to misdirection or misreception of evidence or otherwise, so that the conviction cannot stand, while at the same time there may have been on the evidence other good grounds why, on a proper direction, there ought to have been a conviction. Had the Court the power to order a new trial, the dilemma arising where prisoner is convicted on the merits, but there was a wrong direction in law at court of trial would have been solved. Such a power in many cases is very desirable.

In the considered opinion of the Royal Commission on the Delay in the King's Bench Division,[1] "we think that it would tend to limit frivolous appeals, and prevent miscarriage of justice on purely technical grounds, if the Court, like the Court of Appeal in civil actions, had power to order a new trial." Crown Paper work of the King's Bench Division might be transferred to the Court of Criminal Appeal.[2] The simplifying and cheapening of the

1. 1st report of the Royal Com. on the delay in the K.B.D. para. 45 p.25. cmd. 7177. 1913.
2. Report of the Gen. Council of the Bar on the 2nd Interim Report of the Business of Courts Committee, para.7. (1934)

criminal appeal procedural law appears to be an urgent problem. As we have already observed many gross decisions and sentences come up to the Court of Criminal Appeal for revision or even for quashing from lower criminal courts. Often the prisoner is released and many sentences of long years of imprisonment are being reduced to a short period of few months. So far - good! But it is not far enough. Apart from what has been done so much remains to be done and so many wrongs remain to be righted. Unless the Court of Criminal Appeal were made more easily approachable, hundreds of convictions and sentences of an unjust and vicious nature would never get down for review at all.

II. THE HOUSE OF LORDS AS A CRIMINAL COURT.

Apart from being the final court in civil matters which I have already treated elsewhere,[1] the House of Lords has original and appellate jurisdiction in criminal cases. As a criminal court of first instance its jurisdiction extends to trials of

1. Chap. VI. The House of Lords.

impeachments and trials of peers for indictable offences. A peer may be impeached for any cause; a commoner for "high misdemeanour"[1]. and probably for treason or felony.[2]. But since the last impeachment of Lord Melville in 1805, impeachment has fallen into disuse[3]. and probably will cast into the limbo of oblivion, mainly because the House of Commons is able to exercise a more direct and effective control over executive officials through the ordinary working of parliamentary government. The process of impeachment is cumbersome expensive and obsolete. "Though it is a fine ceremony," said Lord Macaulay, "and though it may have been useful in the 17th century, it is not a proceeding from which much good can now be expected.[4].

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1. They include political offences not specifically punishable by the ordinary processes of the criminal law.
2. W.R. Anson, The Law and Custom of the Constitution Vol.I., c.IX s.2. (5th ed. 1922)
3. W.S. Holdsworth; A History of English Law vol.I. pp.379-385 Sir ~~Fitz~~ James Stephen, Hist. of Criminal Law vol.I. Ch.5. (1883); T.E.May: Parliamentary Practice, Ch. 25.
"Trial by peers, The History of a Privilege," The Times, Oct. 16, 1935, pp. 15-16.
4. Essay on Warren Hastings.

In the case of any peer who is indicted for treason or felony or the misprison of either, the cause is removed into the House of Lords by a writ of certiorari. When Parliament is dissolved or in recess the accused peer is tried by the Court of the Lord High Steward who summons not less than 23 temporal peers, of whom at least 12 must concur in the verdict.

If the House is in session the trial takes place before the whole body of peers, presided by the Lord High Steward. Since the end of the reign of George II there had been six such trials. Since the beginning of this century, ~~such trials were very rare~~, the cases of Earl Russell in 1901 and Lord Clifford in 1935 were known to all.

As a Court of Appeal in criminal matters it hears all appeals from the Court of Criminal Appeal, which may, however, take place only when the Attorney-General certifies that there is a point of law involved in the case which is of such exceptional public importance that the decision of the highest court of the land is desirable.[1.]

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1. Criminal Appeal Act, 1907 (7 Edw.VII c.23) s.1 (6)

The certificate may be obtained at the instance of either the defence or the prosecution from the Attorney-General. The House when sitting as a Court of Appeal in criminal matters is constituted the same as when sitting as a Court of Appeal in civil matters.

So much for the criminal jurisdiction of the House of lords. It may be observed that trial of peers in cases of treason and felony is contrary to ordinary principle.

A peer, whatever his grade is no more and no less a citizen who should stand equal before the law with any other citi zen. It follows that in the administration of justice a peer is entitled to no other consideration than that which was proper to any other citizen. Needless to say ordinary criminal courts are competent to try any peer as to try any common citizen.

Next there is the arbitrary and anomalous distinction between felony and misdemeanour. If a peer was accused for bigamy, he would be tried at the House of lords, and if for perjury, at the Central Criminal Court or Assizes; if for child-stealing at the former and for abduction at the latter. If he stole a silver match-box worth

50/- he would be tried at the House of Lords; and if swindled the public out of hundreds of thousands of pounds, at the Central Criminal Court. A more technical and illogical distinction than this is difficult to find.

Thirdly the system of trial by peers is obsolete. Such trial had undoubtedly a long history.[1] Owing to the serious penalities which in the past were suffered by peers convicted of treason or felony the peers insisted that the trial of one of their number for either offence should be held before themselves. But the risk of trial before hostile officials, and the disastrous consequences to property which followed upon conviction for such offences had been removed. From the viewpoint of the peer, such procedure of trial has outlived its usefulness. It is not only of no use to the peer to have this peculiar trial but may be disadvantageous to him, because the same facts in the case might point either to felony or misdemeanour. If he were acquitted in the House of felony,

1. Sir W. Holdsworth: A History of English Law, Vol.I. Ch.IV. pp. 357-394. 4th ed. (1927); Hale, Jurisdiction of the House of Lords; F. Stephen: Hist. of Criminal Law, Vol.I.ch.V.

he might later have to stand his trial on a charge of misdemeanour. Thus he might run the risk of double trial and the double expense of two trials.

Fourthly, there is the serious disadvantage of having a large number and fluctuating body of judges in such trials.[1] "From the judicial point of view," said Lord Atkin,[2] "the objection was that the tribunal consisted of a large and fluctuating body of 700 or 800. Nobody could suppose that all the peers would appear for any one trial, but nobody knew what peers might be present on any occasion." The trial, in the words of the Earl of Cork, becomes "an exhibition of a steam hammer cracking a walnut."

Fifthly, the consequent expense of such trial is again a matter of serious consideration.[3] Though it was tried with great expedition, the cost of the trial of Lord de Clifford's case was estimated to be £700, not to mention the time

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1. The attendances at the trials of Lord Ferrers (1776) Lord Byron (1765) and the Duchess of Kingston (1776) ranged between 115 and 120. (At the trial of Lord Cardigan (1841) about 130 peers attended. The attendances of peers at the trial of Lord Russell were according to the Law Reports about 160 and the Times about 200. In the last trial of Lord de Clifford, some 85 peers sat to try.

2. 99 H.L. S.467 (1935-36)

3. The costs of Lord Cardigan's trial amounted to £1289 D.s.Davies' letter to the Times, Oct.22, 1935 p.12.

occupied by the Judges. If it was tried at the Central Criminal Court, it would, in the opinion of Lord Sankey,[1] probably have cost £35.

But more important still is the dislocation of the work of the courts during such trial, which consumes an enormous expenditure of judicial time.[2] "Where a peer is tried in the House of Lords, there can be no other judicial sitting in the House, in the Judicial Committee of the Privy Council, in the Court of Appeal, or in other courts of any of the Judges who either are summoned to advise or are members of the House. The trial may take one day but it may also last for days and weeks.

What does this mean? "When a peer is tried in the House," said Lord Sankey,[3] "hundreds of their fellow subjects are waiting for their cases in the ordinary courts. Some of them might have waited for months ... One is tempted to ask 'Was it fair to our fellow-subjects who had been waiting for their cases to come on in the Courts?'"

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1. The Times, Feb.2. 1936.
2. In the trial of Lord de Clifford, 14 judges were summoned to the House for advice.
3. The Times, Feb.2. 1936.

Thus, the criminal jurisdiction of the House of Lords in peer trials is obsolete, expensive and anomalous. It is completely indefensible and should be swept away. The Second Reading of the trial of Peers (abolition of Privilege) Bill which abolishes the privilege of the peerage in relation to criminal proceedings was recentl y carried in the House of Lords. The anachronism of trial by peers will soon reach its destined end.

As the final court in criminal cases, the House is as unnecessary as in civil cases which I have already attempted to discuss elsewhere.[1]

Suffice it to say here, the criminal jurisdiction, original and appellate, of the House of Lords might be well abolished.

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1. Chapter VI. House of Lords as a civil Court.

PART III.

SOME PROBLEMS IN THE ENGLISH JUDICIARY.

CHAPTER

COSTS.

Of all questions of procedure that of cost of litigation is the most vital. Its importance in English law may be viewed in several respects. It occupies a large space in the law reports. In Porther & Wortham's Guide to costs,[1.] published in 1932, a leading practice book, there are more than 2400 cases listed in the table of cases.[2.]

As early as 1793 when Mullock published his "The Law of Costs", the table of cases included over a 1,000 references. Costs is the most important subject in the White Book of 1936. Twenty pages of the index deals with it alone, though any other topic does not occupy more than 13 pages. Order 65 of the Rules of the Supreme Court which is the chief, though not the sole Order concerned with costs takes with its annotations about 140 pages, but not more than 21 pages

1. A.W.Porther & F.G. Wortham: Guide to the Preparation, Delivery and Taxation of Bills of Costs. 13th Ed, 1932. (London) pp. 13 & 3.

2. pp. ix - xlvii.

are needed for an average Order.

To the average litigant the question of costs looms large in ~~their~~ his mind. Mention of some recent cases will be sufficient. ~~The~~ In the Chrysler case last year the costs totalled nearly £60,000. In the famous "Sunshine Roof" Motor case, which ended in the House of Lords early last year, counsel's fees alone amounted to between £65000 and £70,000. The total cost of the hearing, at the Old Bailey of the Pepper case this year amounted to £25,000.[1.] Often times the question of costs is a major consideration in bringing actions. Many actions of this nature can be found in the lists of the Chancery and the King's Bench Divisions. The incidence of costs upon litigants is so vital, particularly upon poor litigants, that it has more often than not become one of the most outstanding problems in the administration of justice in this and other countries. It reaches such dimensions in the existing defects of the administration of justice in this country that it becomes, in

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1. Daily Telegraph, Feb. 21, 1936.)

the opinion of authorities, the aim and centre of legal reform.

Important and urgent the problem of costs undoubtedly is, it has not, however, received in the hands of legal reformers its due attention and emphasis. In fact it has, more oftch than not, been neglected in discussing the problems of the administration of law.

Such paradox is, perhaps, natural, because the average barrister, no less than the average judge, is unaccustomed to work out the cost of administrating law in terms of pounds, shillings and pence, while the unfortunate litigant who has a heavy bill of costs to pay is beyond his or her capacity and leisure to understand its details and items. Thus though the problem of expense of litigation and its consequent injustice may from time to time become a current topic and even a subject of protest against the judicial machinery, the real nature and intrinsic defects of the existing system of costs as well as its incidence upon the litigant have not been fully scrutinised. This will be the subject of discussion in this chapter.

It is a mistake to assume that costs have existed so long as there have been judicial institutions. On the contrary, no system of costs existed in Early English law.[1] Costs are not the product of Common Law but the entire creature of Statute.[2] The statute of Gloucester[3] was the first statute which gave the Plaintiff his costs and upon which the whole law on the subject was based until 1875. This statute, though referred only to "the costs of his (plaintiff's) writ purchased," was so liberally interpreted that, in the words of Lord Cooke, "it extended to all the legal cost of the suit, but not to the costs and expenses of his travel and loss of time."[4] Since 1697 a plaintiff was awarded full costs, when and if defendant's trespass was wilful and malicious.[5]

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1. John Hullock: Law of Costs, London 1796 2-4; P & M., H.E.L. Vol.I. 41 2 ed. 1925.
2. P & M. II, 527
3. 6 Edw. I. Chap.I.
4. Coke, 2 ed. Inst. 288. Here is express mention made but of the costs of his writ, but the latter and prevailing view was that this statute applied in cases where damages were given by a statute subsequent to the statute of Gloucester where no damages were formerly recoverable. See Hullock, N.12, p.6.
5. 8 & 9. William III c.11, p.4 1697.

Apart from isolated instances, the law giving costs to the successful defendant developed at a later period ~~then~~ than awarding costs to the plaintiff.[1.] Since 1531, a defendant was given costs in certain prescribed actions.[2.] It was not until 1607 that a defendant might recover costs in all cases in which the plaintiff would have had them if he had recovered.[3.] No important change in principle as to Common law costs took place until the Judicature Acts, 1873-1875. By Order 65, of the Rules of Court attached to the Act of 1875, it was provided that, with certain exceptions, "the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court," whereas in previous statutes costs had followed the event. This Order, greatly expanded and substantially rewritten in 1883, with certain amendments and additions remains in force today. In the rules of the Court are to be found

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1. The Statute of Marlborough, 1267, 52 Hen III. c.6 1267
2. Such as trespass, case, debt, contract, covenant detinue and account 23 Hen.VIII, c.15, 1531.
3. 4 Jac I c.3. 1607

the general principles of costs, though there are also a great number of other statutes containing particular provisions as to costs.

The principle of costs in Equity was different from that of the Common Law.[1.] "The giving of costs in Equity," said Lord Hardwicke in Jones -v- Coxeter,[2.] is entirely discretionary, and is not at all comparable to the Rule at law."[3.] In equity costs were in the discretion of the Court, while at Common Law, they followed the event. The 1875 Rules of Court, though placed equity costs on the statutory basis, made no change of principle in them as they did in Common Law costs.

The whole subject of costs is so technical that it is difficult for any one who is not a practioner to understand it. Nor is it easy to present it with any conciseness, because not only are the

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1. See Guardian Trust Co. -v- Kansas City Southern Railway, 28 F.(2d) [redacted], [redacted]. 233 C.C.A. 4th, 1928)
2. 2 Atk. 400 1742
3. The better view seems to be that the power was inherent. (Andrew -v- Barnes 39 Ch. D.133 (1888) Corporation of Burford -v- Lenthall, 2 Atk.551 (1743)) rather than based on statute. (7 Rich.II. c. 6 (1394)

items innumerable but they differ in different courts and even in different proceedings. In fact costs are a peculiar English institution and form one of the essential features of the English procedural system. They differ from costs as usually understood in other countries. Three characteristics may be observed. First, they include remunerations of solicitor and counsel, thus being a real compensation to the party obtaining them. Second, they are itemised to show the charge made for every separate act done, pleading drawn or paper copied. Thus it is a material penalty if a party or even a solicitor is ordered to pay the cost of any particular step, in the action in which he has been remiss.[1] Third, there is not only a wide difference in the remuneration of solicitors and barristers, but the principle upon which solicitors are paid is peculiar. In the words of Master King, "Costs are a peculiarly British institution. No other country pays its lawyer in the same fashion,

1. A winning party may himself be ordered to pay any cost which has been unnecessarily incurred, though he may obtain the general costs of the action from his defeated opponent. Even solicitors are sometimes ordered to pay costs out of their own pockets, if they are incurred in bad faith, simply to increase the bill.

and in particular no other country has such an extraordinary difference in modes of payment between the men who think and the men who talk, between the men whom suitors see and whom the judges listen. Nor is this distinction the only peculiarity in our mode of legal remuneration. Under it, from various causes, but principally from an inordinate maxim via trita via tuta, solicitors are largely dependent for their living under allowances which are framed upon the paradoxical principle of paying them for things they don't do by way of compensation for not paying them for things they must do."[1]

The rules on which the subject of costs differ a good deal in civil & criminal cases

Let me briefly examine the system of costs in criminal cases first.[2] Until comparatively recent times the costs of criminal proceedings were borne by private complainants rather than the State. In Common Law there is in fact no power

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1. George Anthony King: Costs in the High Court Scale Preface (London 1920)

2. cf.9. Halsbury's Laws of England. Criminal Law and Procedure Pt.IV. pp. 283 et seq. (Hailsham ed. 1933)

to render judgment for costs in criminal prosecutions, either out of public funds or, as between the parties, in favour of either the prosecutor or the accused. This disability has, however, been gradually removed[1] by several statutes enacted between the latter half of the 18th[2] and the early part of the 19th Century,[3] and ultimately by comparatively modern legislation. The latest statute consolidating the existing law on the subject is the costs in Criminal Cases Act of 1908.[4] Under this law the court usually makes an order at the end of the Trial that if costs of the prosecution shall be paid out of the funds of the county or county borough in which the offence was alleged to have been committed.[5] In all cases of indictable offences or in some non-indictable offences as, for instance, commercial fraud cases, the Court may

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1. J. Chitty, Treatise on Criminal Law (Ldn.1816) Vol.I.pp. 820-4.
2. 25 Geo.II.c.36 (1752; 27 Geo II. c.3. (1757); 18 Geo.III,c.19 (1778)
3. 58 Geo.IV. c.70 (1818)
4. 8 Edw.VII c.15.
5. Ibid. ss.1-4.

if it sees fit, order a convicted prisoner to pay the costs of the prosecution.[1] In certain cases,[2] a prisoner who has been acquitted can obtain an order from the court that the prosecutor shall pay the costs of the defence.[3] The costs of the defence will be paid out of public funds in one case only - where the prisoner has been granted a defence certificate or legal aid certificate under the Poor Prisoners' Defence Act, 1930.[4]

Costs in criminal cases ordered and taxed by the Court usually include the travelling and personal expenses of witnesses, all allowances to the solicitor or allowance (or both) and any other miscellaneous expenses which have been contracted in

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1. Ibid. s. 6(1); Summary Jurisdiction Act, 1848. 11 & 12 Vict. c 43. s.8.
2. These cases are (A) a person is acquitted on an indictment or information by a private prosecutor; (1) Indictments or information for libel (22 & 23 Vict.17); (2) Offences under the Common Practices Prosecution Acts, 1850 (Corrupt Practice Prevention Act 1854, 17 & 18 Vict. c.102) (3) Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c.51); (4) Offences against the Merchandise Marks Acts, 1887-1894 (50 & 51 Vict.c.28; 54 & 55 Vict. c. 15; 57 & 58 Vict.c.19. (B. the persons indicted but acquitted under the Vexations Indictments Act, 1859 (22 & 23. Vict c.17)
3. 8 Edw.VII c.15, s.6 (2) (3)
4. 20 & 21 Geo.V. c.32.

accordance with the regulation. The ~~side~~ scale settling the allowances payable to prosecutors and witnesses is fixed by the Home Secretary.[1] But no specific provision for the fees to be paid to solicitors and barristers for the prosecution has been prescribed by Home Office regulations. Except in the Quarter Sessions of some counties and boroughs, where a definite scale of allowances has been adopted, they are determined, subject to the control of the court, by the discretion of the clerk of the court or the taxing officer under him. In those quarter sessions where the criminal cases are few, the fees allowed to *counsel* are criticised as being insufficient to make it worth while for barristers to attend after travelling considerable distances. Nor is the scale of costs refused to the private prosecutor out of the public funds considered adequate.[3]

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1. See St. R.&O. (1908) No.1001. p.234;
St. R.&O. (1920) No.I. No 354. p.446

2.

3. cf. F. Howard; Criminal Justice in England.

So much for the costs in criminal cases. Let me observe the system of costs in civil cases. Costs usually mean that sum of money which the Court or a judge orders one party to pay to another.[1] They should be distinguished from fees paid to the Court.[2] But to a litigant both costs and fees constitute his total expenses of litigation. "A litigant" reported the London Chamber of Commerce on Expenses of Litigation," does not distinguish between the Various items which go to make up the total of his expenses, but looks at the whole only."[3] When thus viewed, the elements constituting the total expense of litigation will include (1) court fees (2) lawyers (solicitor's and barrister's) fees and

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1. W.B.Ordgen & B.A. Borward-Ordgen: the Pleading & Practice 11th ed. Ch.22. p.363, (1934); Bouvier, Law Dictionary Baldwin ed. 1926 239 under costs.

2. Bovier, Law Dictionary. They are distinguished from fees in being an allowance to a party for expenses which he has incurred in its litigation; whereas fees are a compensation to an officer for advice rendered in the progress of the cause. Masser -v- Good 11 S. & R. 248, pa.1824.

3. Report on Expenses of Litigation pa.3 p.2. April 1930, cf. also Law Society: Memorandum on costs pp. 1-2 (Dec.5, 1930.)

(3) the expenses of evidence, testimonial and circumstantial.[1] Let me examine each in the order put mainly with regard to both county and High Courts.

First, as to court fees. In the county court the two important fees are the Plaint fee and the Hearing fee. Both are calculated upon an ad valorum scale based on the amount in dispute. The fees are thus proportionate to the amount claimed. Where the claim is for an amount over £100 the fees are actually higher than those of the High Court.[1] Those of the High Court are practically the same in all cases; hence the proportionate scale works higher in the County Court as against the cost of a writ in the High Court which is £1.10.0d . The hearing fee is also proportionate to the amount claimed, so that if the case is disposed of in one day the court fees in the County Court are higher. But it may be pointed out that fees in the county court are not comparable with fees in the High Court because many things, such as the service of documents are done by county court officials which, in the High Court have to be done by the party or his solicitor.

1. John Wigmore - Evidence
2. Cf. Evidence taken before the Royal Commission on the Despatch of Business at Common Law, Mr. L.S. Holmes p. 318. (1935)

It is, however, significant to note the total amount of fees on all proceedings received in the last decade in the county courts as follows:-

Year.	Total amount of fees.
1925	£ 709223
1926	672807
1927	744084
1928	741812
1929	791936
1930	807497
1931	822908
1932	859451
1933	826846
1934.	798197

Considerable ~~This~~ the total amount of fees on all proceedings received every year in county courts, must appear to be considerable, but this sum does not include Bankruptcy and Companies fees. If all were included, and compared with the total amount of expenditure during the period of the last ten years, the proportion of the fees received is undoubtedly large as the following table will show:

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	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934.
Expenditure.	865498	878257	887954	908423	967961	981761	949397	960809	971181	1007499
Receipts ...	749500	709197	781479	778624	847470	866563	879373	919728	883576	851343
% of ~~receipts in~~ Expenditure provided by receipts	86.5	80.8	88.0	85.7	87.5	88.2	92.6	95.6	90.9	84.5

These figures speak for themselves. It may be noticed that the annual average of the county courts fees received during the period from 1925 to 1934 ~~constitutes~~ provided about 88 per cent. ~~in their~~ of the total expenditure. It follows that the state paid only 12 per cent. for the maintenance of these costs per annum. In the Supreme Court of Judicature, court fees and stamps are regulated by the Supreme Court fees Order, 1930.[1] There are 36 items of fees payable in every division of the High Court. There are, however, other items of fees payable

1. Dated 29th July, 1930.
2. Supreme Court fees order 1930. Schedule of fees. Sch.1.

respectively in the three divisions of the High Court,[1.] in the Court of Appeal,[2.] in the Pay Office,[3.] on references to an official referee[4.] on proceedings under the Companies Act, 1929, on proceedings for the reciprocal Enforcement of Judgments,[4.] on the taxation of costs,[5.] on filing, searches for and inspection of, documents and for copies of documents,[6.] and for other miscellaneous fees...[7.] Those fees have to be paid to the court by the parties at every stage of litigation, as, for instance, it costs 30/- to issue a writ in the High Court and 2/6d for the defendant to "enter an appearance." There are fees paid to the Court for commencement of causes, entering and settling down case for trial, interlocutory application on entering a judgment, etc.

According to the existing scale, the minimum courts fees which can come to in an action

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1. Ibid Set. II-IV.
2. " " VI.
3. " " VIII
4. " " V.
5. " " XI
6. " " XII
7. " " IX.

in the High Court, that is tried out, is £6/14/-. If there are any interlocutory proceedings, which is usually the case, the average amount would be no less than £30.

The receipts and expenditure in the Supreme Court of Judicature during the last decade are scheduled as follows:-

	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933
Expenditure ..	853288	947903	926122	928925	910403	902497	923755	866818	814890	824412
Receipts	733380	756705	760960	739350	734053	728450	727924	775914	835238	837738
% of receipts on expenditure. provided by receipts	76.9	79.8	81.9	79.4	80.6	80.7	78.8	89.5	102.4	101.6

From the above table, it appears that the annual average of receipts during the period of last decade provided about 86.16 per cent. of the total expenditure of the Supreme Court of Judicature. It follows that the state pays only 14 per cent. for its maintenance. Those figures may not be exact but are fairly approximate.

For a closer analysis of the amount of

courts fees received in the Supreme Court, let me examine an Account of Receipts and Expenditure of the High Court and Court of Appeal for the financial year 1934-35 ended 31st March, 1935.[1] "The form of the Account and the particulars included in it" as the Note to the Account states, "have been selected so as to show as accurately as possible how much of the cost of civil justice in England and Wales, so far as it is administered by the Supreme Court, is covered by Court fees."[2]

According to the Account the total receipts amount to £902,610, of which the different items of fees being as follows:

	£
Court fees taken in stamps	529,789
" " " " cash	235,897
" " payable out of Funds in Court	34,500
Total court fees ...	800,196
Other fees such as Brokerage, etc. Fees, fees for arbitration rooms, etc., official solicitors' costs.	33,471
Credits (allied services)	16,415
Appropriated in aid of the vote for miscellaneous expenses and credit	52,628
Total receipts..	902,610

Thus court fees alone amount to £800,196.

On the side of expenditure, it amounts to

1. un-numbered state paper H.M.S.O. (1936)
2. Ibid, p.2.

£741,949 including Judges' salaries and Pensions, vote for Supreme Court of Judicature and allied services, but excluding estimated proportion attributable to criminal business and salary of Lord Chancellor and pensions of Lord Chancellors. Not so say the total receipts, the item of Court fees alone is not only sufficient to defray the total expenditure but there is a remainder of £ £58,147.

Thus the amount of Court fees received both in the county court and its Supreme Court is very considerable, it forms the largest proportion of the total receipts of the courts of Justice and constitutes the largest percentage in drfraying their expenditure. The reason adduced in support of this system of court fees may be said in three respects: first, as a source of public revenue, second, as a deterrent to unnecessary litigation and third, as a return for the benefit received. Let me examine each in turn. Firstly, it is argued that court fees are a source of revenue to defray the charge of the administration of justice.

As argued by Adam Smith[1] "the whole expense of justice too might easily be defrayed by the fees of court;" and without exposing the administration of justice to any real hazard of corruption, the public revenue might thus be entirely discharged from a certain though perhaps but a small incumbrance. ... These fees, without occasioning any considerable increase in the expense of a lawsuit, might be rendered fully sufficient for defraying the whole expense of justice. But not being paid to the judges till the process was determined, they might be some incitement to the diligence of the court in examining and deciding it.

In his opinion,[2] a stamp duty, upon the law proceedings of each particular court, to be levied by that court, and applied towards the maintenance of the judges and other officers belonging to it, might, in the same manner, afford a revenue sufficient for defraying the expense of the

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1. Wealth of Nations. Bk.V. Ch.1. Pt.V. Of the expenses of Justice, p.323. (New Ed. Edinburgh 1870.)
2. ibid. p. 324.

administration of justice, without bringing any burden upon the general revenue of the society.

This opinion does not, however, appeal to me. One of the most fundamental duties of a government is to see that justice is done to all its citizens. There is no more reason why it should make the performance of this duty dependent upon the payment of fees than it should charge for its services in other fields of activities. Most work done by government is, at present, freely performed without any direct charge upon the citizens. It represents the return for which taxes are paid. The government freely furnishes school facilities, including free text books, public playgrounds and recreation facilities and defrays other charges out of public funds. It would seem that the government should, in like manner, meet all of the expenses involved in the maintenance and operation of its judicial machinery.

Even under the theory that a charge should be made for judicial services, there has been no attempt to make the system of charges consistent with the theory. The fees charged are arbitrary in the extreme and bear no accurate relation to the

value of the services rendered or to the expenses to which the government is put in performing them. Being a burden to the litigant, they represent, in the aggregate, quite a considerable part of the total expense involved in the maintenance and operation of the courts. If it is proper that the government should meet part of the expense of the administration of justice out of its general funds, there is no logical reason why it should not meet all of such expenses.

The whole expense of the administration of justice, even if defrayed by the government, would add but a negligible amount to the present total of governmental expenses. The argument that the government needs this comparatively slight addition to its income has but little force and can be dismissed from consideration.

Though the fees charged do not appear to be any considerable increase in the expense of a lawsuit,[1.] they do in fact represent a large proportion of the amount in controversy in small cases. They bear heavily upon the poorer litigants for

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1. (see next page)

footnote from previous page.

A table of itemised costs which is taken at random from actual party & party taxed bills shows its percentage of court fees to the whole costs in different courts as follows:

Courts.	Court Fees.	Total Disbursements.	%age of Solicitors costs to the whole costs.
	£. s. d.	£. s. d.	
Chancery action.	29. 1. 3d	500. 6. 2	5.8
King's Bench Divn.	21.14. 3	283. 7. 5	7.4
K.B. Commercial Court.	18. 8. 6	425.16. 8	3.7
P.D & A.Divn. (Divorse, Petitioner's costs to contested case.	13. 0. 0	429.18. 9	3.0
Court of Appeal	5.14. 0	109.15. 5	4.5
House of Lords.	36. 0. 0	464. 7.10	7.7
Privy Council.	26.10. 0	590. 8. 6	4.4

From the Table it will be observed that on the average the total court fees amount to about 6.1% of the total costs.

for whom the payment of these fees is more often than not beyond their means. The Poor Person rules which, being applicable only to certain class of the poor litigants, as will be fully discussed elsewhere, relieve only those within the prescribed limit, rather emphasise than eliminate the burden of court fees upon the poor suitors as a whole.

In fact, the present system of court fees is not due to any deliberate action on the part of the government. It exists merely as a survival of old practices which arose at a time when the administration of justice was taken as a source of revenue to the Courts. But it can scarcely be justified on this ground at present.

If the first argument is not convincing, still less is the second, that court fees act as a deterrent to litigation. This has been fully examined by Jeremy Bentham in his "protest against Law Taxes showing its peculiar mischievousness of all such imposition."[1]

In cases where litigation expresses the irreproachable exercise of an essential right of

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1. This essay was privately printed in 1793 and first published in 1795.

of prosecuting or defending a suit, an avowed desire of checking litigation would be tantamount to an avowed desire of denying justice. Were proceedings at law attended with no expense nor other inconvenience till the suit were heard and at an end, the Plaintiff and or the defendant would lose the incentive to pursue any suit which the one or both knew it to be groundless. Either party would hardly take the trouble to sue or defend the action because the one could do the other no harm ~~by so doing~~. Only where proceedings are attended with expenses, the direct tendency and sure effect is not a check to litigation but to promote it; the heavier that expense, the greater of course is the mischief which a man who has no merits is enabled to do. Malice has a sharper weapon and oppression a more coersive instrument in their hands.

In cases which the parties do not know groundless, court fees may operate as a check to litigation but that operates as well on the side where it is well founded as on that where it is groundless and in the same degree. "Prevent him,"

to use the words of Bentham, "who is in the right from instituting a suit, you prevent him who is in the wrong from defending one. But neither is litigation prevented, any further than as justice is denied. So far then as this case extends, it is still but the other side of the same effect, the denial of justice."[1].

If it is argued that court fees serve to check trivial litigation, it may be at once answered that triviality is a relative matter according to the circumstances of each person. What to the man is trivial, to another may be of high importance. If the same trivial act is ~~permitted to repeat~~ repeated constantly, its cumulative effects nobody can tell. Even assuming that the case is trivial and to such a degree as to render ~~its~~ litigation blamable, the court fees apply a check where there ~~is a~~ blame may be attributed, but at the same time afford protection and encouragement where there is still greater blame. If trivial litigation is in need of a check, there are natural checks in abundance, the pains of disappointment,

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1. J. Bentham: County Courts: a protest against law taxes showing the peculiar mischievousness of all such impositions. 2nd ed. 1830, p.84.

unavoidable expenses, consumption of time and soon.

Thus court fees as a check to litigation can scarcely be expected to fulfil ~~its~~ their purpose. Even if ~~it is~~ they are effective at all, a deterrent to litigation will and does in fact encourage the violation of rights, and, conversely, facilities of resource to the courts discourage such violation. If violation of rights were ever thought worthy of discouragement at all costs and upon a proper balancing of the results, one would almost favour all deterring factors.

It therefore appears to me that court fees as a check to litigation ~~is~~ neither absolutely sound in principle nor completely effective or beneficial in practice. The system, as it exists, operates chiefly against the poor. If at all effective and desirable, the deterrent operates blindly, effecting meritorious cases equally with those of little or no merit. This fact alone is sufficient to discharge the argument and justification for the imposition of court fees even though conceding that there is some need for detering litigation.

Turn now to the third contention for the court fees that the burthen of an establishment

ought to lie on those who are benefitted by it. It has long been argued by Adam Smith. It is supported by modern writers. "I can see no reason," wrote C. Mullins[1], "why free justice should be regarded as any man's right, seeing that free justice means merely that the community has to pay for private disputes. Those who need the decisions of our courts of law, and not the general public, should pay for them in proportion to the benefit they derive."

The principle appears incontrovertible but the matter of fact supposed by the application of it is scarcely true. The notion of a connexity in this case between the benefit and the burthen is more or less a mere matter of illusion. It has been so forcibly refuted by Jeremy Bentham that I can scarcely resist the quoting him at full length:

> "The persons on whom the whole of the burthen is cast, are precisely those who have the least enjoyment of its benefit: the security which other people enjoy for nothing, without interruption, and every moment of their lives, they who are so unfortunate as to be obliged to go to law for it, are forced to purchase at an expense of time and trouble, in addition to what pecuniary expense may be naturally unavoidable. Meantime, which is of most value? which most worth paying for? - a possession thus cruelly disturbed, or the

1. In quest of Justice p. 199 (1931)

"some possession free from all disturbances? .....
To throw upon the suitor the expense of administering justice and in addition to the trouble and the risk of saving for it, is as if in case of an invasion, you were to take the inhabitants of the frontier and force them, not only to serve nothing, but to defray of themselves the whole expenditure of the War."[1].

He even went on to say[2]. that ~~so far from~~ instead of being made ~~thus wantonly~~ to pay an extra price, a man who stands in this unfortunate predicament and is forced to defend his right by recourse to litigation ought rather to receive an indemnification at the public expense, for his time and trouble, and the danger of insidious or collusive contests, in the view of obtaining such an indemnity, is the only objection, though perhaps a conclusive one, against the granting of it.

The Lord Haldane Chancellor said before the Royal Commission on the delay in the King's Bench Division;

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1. Ibid. pp. 21-22
2. Ibid. p. 22.

"If you take into account the interest upon the suitor's money, a good deal of which is unclaimed, and the various odds and ends which come in, I think the judicial establishments are self-supporting."[1]

In the opinion of Sir Henry Pritchard,[2] president of the Law Society, whether litigation should be self-supporting, or whether the State should maintain the courts as being for the benefit of the whole community, is under the existing system a question on which the Chancellor of the Exchequer has the last word. He pointed out that not only has the court been supported by the litigants but it makes a profit as well. He said "that is all wrong." "This machinery is provided, for the benefit of the whole community and should be paid for by them and not by the litigants."[2]

It is doubtful whether courts make a profit but it is undeniable that the ~~inarticulate major premise behind the~~ principle of economy of the administration of

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1. Evidence taken before the Royal Commission on Delay in the King's Bench Division (1918) Cd. 7178 Q. 4743 P. 193

2. In his address on the occasion of the Provincial Meeting of the Law Society. ~~Law Journal 1932-1934~~

justice is to make justice self-supporting.[1] Hence the fees were raised in 1922 and 1924 and 1932[2].

The figures given above show that the policy of making justice self-supporting has largely succeeded; but it is open to doubt if it has not succeeded by at the same time preventing persons in quest of justice. It is ominous to notice that the number of cases in the High Court have diminished steadily since 1924. In 1925 they decreased by 6.6 per cent. from those of the previous year; in 1926 there was a decrease of 416 per cent.; in 1927 a further diminution of 2.7 per cent.; in 1928 another 4.3 per cent.; in 1929 there were in total 120,042 cases in the High Court; in 1928 only 99,761. In 1932 the total were 12,481 cases, but it was diminished to 101,270 in 1933, i.e. 9.7 per cent. It was further decreased by 5 per cent. in 1934.

There may be other causes responsible for this diminution of cases in the High Court, but the

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1. Evidence taken before the Royal Commission on Civil Service (1914-1919) q. 43944-37.
2. Total in any Bill of Costs of fees prescribed by O.65 after Oct. 1932, shall be increased by 25 per cent. The fees are minima and cannot be reduced.

principle of making justice self-supporting is certainly unsound and the system of court fees unjustifiable. Over a century ago Bentham eloquently argued that taxes on justice could be defended on no principle. He denounced all court fees as the most iniquitous of taxes. Free justice was the lofty ideal of Lord Brougham. In the middle of the last century, the Master of the Rolls of the day said: "It is, in my opinion, the duty of the country to provide for the administration of justice without the slightest expense to the suitors. In this respect I go to the full extent of the speculations of Mr. Jeremy Bentham." Judge Edward Parry had on more than one occasion emphasized the importance of free justice.[1.]

Thus the principles upon which the court fees are based can scarcely be seriously defended, still less are the details of the scale. It is not proposed here to go into its full details, but two points may be mentioned. First, as already referred to, the court fee in the High Court is not proportionate to the amount in dispute as it is in the

1. E.A.Parry. Judgment in Vacation p. 222, also the Gospel and the Law.

County Court. The uniformity of the fees is one of the great defects. They are at a flat rate. There is no relation whatever between the amount at stake and the amount of the fees.

The cost of a writ to commence an action, for instance, is 30/- and is the same whether the claim is for £300 or £3,000. Again for setting down a case for trial the fee is £2 and the amount is the same on a judgment; in both cases the fee has no reference to the amount awarded or to the importance of the case. They are, moreover, payable in successive amounts. This means the attendance of a solicitor's clerk is required for the payment of a court fee, thus increasing the amount of the bill.

Secondly, the scale of court fees in the High Court is too high, especially for smaller amounts of claim. The court fees in France, Germany and Belgium are much lower than here. They try to

make this up by charging upon the execution of a judgment; this percentage is, of course, added to the judgment.

So much for court fees. Let me now turn to the second element of the costs of litigation, the solicitors and barristers' fees. Public attention has from time to time been aroused to the excessive fees of a few fashionable barristers. But in fact they do not represent the earnings of the majority of the legal profession, still less the average income of its members.[1] It is estimated that the average income of a barrister does not reach over the amount of £200 a year. On the whole, barristers' fees, considerable and even excessive as they appear to be in some exceptional cases, have not increased in the same proportion as the charges of some

1. General Council of the Bar: Report on the Expense of litigation, para. 5. p. May, 1931.

other technical professions such as physicians, surgeons, engineers. This consideration moves the London Chamber of Commerce to say in their first report on ~~the~~ Expense of Litigation:[1]

> "In our experience all professional men, whether Doctors, Accountants or Solicitors who are moderately successful by middle age, earn about the same amount of net income. It cannot be expected that a Solicitor or Barrister will accept a lower standard of life than a Doctor or an Accountant, nor would it be to the advantage of the public that they should. So far as our experience goes, the average Solicitor or Barrister (we do not refer to special cases but to the average) does not earn a larger income than the average doctor or Accountant. It may be noticed that the average Barrister or Solicitor when he dies, unless he has private means, seldom leaves a considerable estate, which seems to corroborate our experience."

It is, therefore, not too much to say that the general impression as to the excessive remuneration of barristers is not well-founded.[2]

The principle underlying counsels' remuneration is different to that governing Solicitors' remuneration, but is more in accordance with the American system. When retained by the Solicitor, the counsel receives a sum of fee marked on the brief which is determined by such considerations as his

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1. p. 3. par. 8.
2. of 175 Law Times p 61 Jan. 28, 1933

standing is legal profession, the nature of the case and soon.

The most serious drawback of the system of Counsels' remuneration is the so-called two-thirds rule that a junior should be paid two-thirds if the amount of his leader's fee is up to 150 guineas, though it has been judicially approved, this practice of the Bar is neither logical nor can be justified. The leader's fee is first fixed by the process of bargaining known to barristers and solicitors clerks, and then the junior gets the proportion. If the former is paid a fee which is regarded as being his worth, it is difficult to explain why the fee to the latter should not be fixed on the same principle. What is still more absurd, if the leader is an eminent or fashionable "silk" who commands a very high fee the brief fee of the junior automatically increases, although his responsibility on the trial may be decreased in fact. On the other hand, though the junior might have taken the case alone and thereby have had much more work and responsibility, he could not receive more than two-thirds of the (C's fee.[1]

1. Cf. Report of the London Chamber of Commerce on Expenses of Litigation pa.8 (b) p.4. also par.16 (e) p.8.

Another defect of the system is that there is no scale of counsel fees proportionate to the amount of the claim, as it is in other countries. In Germany the lawyer's fees are proportionate to the amount in dispute. Upon a claim or "Object" of RM. 7,000, for instance, the fees amount to RM. 175 in the court of first instance, but usually this fee comes twice into account, namely as a process fee (Prozessgebuhr), or a fee for the general conduct of the action and another for the hearing (or Termine), of which there may be several, and it will come into consideration a third time if evidence is taken; therefore the total fee upon an "object" of R.M.7000 - may total R.M.625 and will be R.M.350 almost for a certainty. In the court of second instance the lawyer's fee amounts to R.M.227,50 which may be payable three times as in the first instance. In the third instance the lawyer's fee is likewise R.M.227.50 but as evidence is never taken in the Reichsgericht the fee will only come twice into question. Thus it is evident that the lawyer's fee in Germany is not only proportionate to the Objekt

but much more less and certain than that in England.

One of the bad consequences of the ~~English~~ lack of a scale is that the fees of some fashionable counsel are excessively high. The figures in one of slander case may speak eloquently on this point. "In De Audia Yrarrazaval -v- Williams & Reuderdale,[1] the solicitors for one defendant estimated the costs as follows:-

Discovery	£5.10.0
Interrogatories....	10. 0.0
Costs of trial, including instructions on brief...	60. 0.0
Brief fee for one leader	80. 0.0
Brief fee for junior counsel....	53. 0.0

In the case of the other defendant the largest of the figures were;

Leading counsel ...	£100. 0. 0
Junior "	70. 0. 0
Instructions on brief	75. 0. 0

Commenting on the counsel's fee, Lord Justice Scrutton went so far as to condemn: "It is

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1. Law Report July 30, Court of Appeal, Times, July 31, 1929, p.5.

perfectly preposterous to say that in English courts the proper fee for leading counsel in such a case is £100. There may be leaders so good that clients will pay £100 for them. But to say that you cannot come into court without paying £120 to counsel and £20 to solicitor is outrageous. In giving judgment, he further commented upon the counsel's fee in these words:

> "If that were the standard of legal remuneration in a small slander action (1) the Law Courts would close at a very early stage because the costs of litigation set up by the legal profession would be so extravagant that ordinary people could not get justice in the Law Courts. Those figures were not the standard allowed by the Taxing Master. If they were, the sooner the practice was altered the better."

These opinions of Lord Justice Scrutton compel consideration. Some recent examples will be illuminating. As already referred to, in the famous "Sunshine Roof" motor case last year, counsels fees amounted to between £55,000 and £60,000. In the famous Pepper case the briefs of two counsels are both marked at £1,500 guineas each, with a daily refresher of 200 guineas each.[2]

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(1) Italics are mine.
2. Daily Telegraph, Feb. 21, 1936.

(footnote (2) from previous page cont'd.)

Thus not only the brief fees are often too excessive, but refresher fees are too high. "We are of opinion," the memorandum on cost of litigation of the Law Society runs, "that when an adequate fee has been marked on the brief, moderate refresher fees in respect of subsequent days should be considered sufficient." (op.cit. pp.4-5)

1. op. cit. pp. 4-5 cf. also "Counsel's refresher fees" 76 The solicitors' journal pp. 537-8. (1932)

But it may be observed, such cases, though not often ~~happen~~ rare, are by no means uncommon. Even if they were exceptional, the system ~~admitting~~ permitting them deserves condemnation. Another anomalous thing deserving passing notice is that the clerks fees of the counsel are paid not by the counsel but by the litigants.[1] The effect of this is obvious. "The system of bargaining with counsel's clerk about fees on briefs," reports the London Chamber of Commerce, "and the payment of clerks fees not by their employers but by the litigants on a scale varying according to the brief fee, is one calculated to enhance costs for inexperienced solicitor and occasional litigants." (1st report p.4 (f))

So much for counsel's remuneration. Let me now turn to solicitors' fees. The amount for various items of solicitors' fees is fixed by statute except the item of "Instructions for Brief" which is discretionary. Consequently when taxing the bill, the taxing master is concerned not with solicitors' charges for the items but with the various steps taken by the solicitor. At present the solicitor with any volume of litigation has to keep a large highly skilled staff for marshalling

1. The mode of paying the clerk has nothing but tradition to justify it .... Nor we need alter that because the practice has got itself enshrined in the R.S.C. & O. LXII R.27 (5) prescribes the fees which are to be allowed to counsel's clerk on taxation. 79 A Law Journal P.69. (Feb. 9, 1935)

and sifting a mass of evidence, examination of witnesses and their evidence, in this country and sometimes abroad; much copying and rendering of minutely itemised accounts, together with high rents, keep overhead charges high. Approximately 50 to 75 per cent. of the fees of a solicitor usually go in overhead expenses.

A table of itemised costs which is taken at random from actual party and party taxed bills shows the percent. of solicitors costs to the whole costs in different courts as follows:

Court	Percentage of Solicitors' cost to the whole costs.
Chancery Action	32
King's Bench Action	34
K.B.Commercial Court	28
Probate, Divorce & Admiralty Division (Divorce) Petitions costs in contested case.	24
Court of Appeal	18
House of Lords	19
Privy Council	21

It will be observed that on the average the total Solicitors' charges amount to only 25.1 per cent. of the total costs. In the words of the Law Society: "the amount of the solicitors' profit

charge is but a small percentage of the whole costs and when the amounts of their overhead establishment expenses are taken into consideration, the remuneration is by no means excessive; in fact, many Solicitors of experience consider that there is very little profit at all to be had out of pure litigation." But the system of the charges of Solicitors' is far from being equitable, professional or reasonable. It is not equitable in the sense that it is not proportionate to the nature of service rendered. An attendance that may involve great responsibility and require the exercise of considerable powers on the part of the solicitor for the safeguarding of his client's interests is charged at the same rate as one which may have been little more than a perfunctory duty. No matter whether the work is responsible or not, the payment is uniform made according to a system of 6 & 8 pence and 3 & 4 pence, namely the solicitor is bound to make out an itemised bill, charging each attendance at 6/8d, each letter at 3/4d and so on for other items. The often-told story is that a solicitor once

put in his bill an item: "to lying awake thinking of your case." If it is not true, it is as well invented as well meant, because it points out the ~~time~~ fact that time spent in thought has no place in the bill, though time spent in reading, in writing and other clerical works are remunerated. It also points out the sad truth that no distinction is made between important and unimportant matters.

The unfortunate and undesirable consequence of such a system may well be that a solicitor of ability who takes pains to discover and holds fast the real point at issue and concentrates his energies and wins his client's case upon that essential issue will sometimes even be worse paid than his inefficient brother who pursues the way of 'muddling through'.

Take the familiar example of the drafting of a brief. One solicitor may give a long and confused commentary on the issues and the evidence, which may be of little value or even worse than useless. Another may devote much time and thought in making concise and logical observations so as to help the counsel 'get up' the case quickly and without reading

of confusing document. The former is of much more value to the solicitors' fees than the latter. The latter is much more useful to the client, who pays less for it, than the former.

It is not professional, because many ways may be so explored by an unconscientious and unscrupulous solicitor as to increase a bill of costs, though it is doubtful whether the additional items relate to the services which are of real value. Were the solicitor inclined to pursue such an unprofessional course of conduct as to write as many letters and to make as many separate attendances as he could, it would be to his pecuniary advantage. If this could be considered as performed within the range and in furtherance of the action, it would be difficult for a taxing master to tax them off as unnecessary. Such unprofessional solicitors might be, it is expected, very few, but none the less the possibility of abuses is there.

What is still unreasonable, a solicitor should even be better remunerated for a case in the county court, if he briefs counsel than if he conduct the case himself, merely because the clerical expenses of copying. What could be more anomalous

and unreasonable than this that by doing less of the work himself and doing able to delegate all that work to an assistant the solicitor can earn greater fees. As the occasions on which this practice occur are rather frequent, so it works more unfavourably upon clients than does the two-third rule of the Bar.

The remuneration of a solicitor for his professional labour depends primarily upon the length of proceedings in which he is engaged. He is thus inevitably induced to not avoid, but to multiply, difficulties. What is still more significant, should a solicitor venture to act upon his own opinion in the conduct of a case, he would run the risk of an action for negligence. But, on the other hand, if he asks counsels opinion at the cost of his client, he is in safety and will be free from all responsibility. The result is that the more he employs counsel, and the more counsel he employs, the lighter become his responsibilities and the more his fees. It follows that owing to the present anomalous system, the possibility is always there that a solicitor's remuneration does not necessarily

correspond with the real services he renders,[1] but may even have little relation to them.

The most anomalous situation arises, however, from the fact that the same services may be remunerated by different sums which are calculated not according to their nature or importance, but to the court in which the services are rendered. Between the scales adopted by various courts there is indeed a general correspondence. But it can scarcely be justified why some work im different courts is not charged according to the same scale. There seems to be little cogent reason why the same uniform method of fixing a solicitor's fee should not be used in every court and in all proceedings save the most exceptional cases.

Why the system of solicitors' remuneration is so anomalous, unreasonable and unprofessional? It may be explained that the fundamental principles underlying the practice were settled at a period when solicitors, with few exceptions, were treated no more than clerks. Thus, the important conception underlying the system of remuneration is that it is the reward of services of a person skilled in the details

1. E.T. Spence - Bar & Bushin - p 157 (1930)

and clerical work of law suits. That conception is no longer true. In the course of the 19th century, more especially the last seventy years or so, the status of solicitors was so changed that their work and social standing have greatly improved. Even at the time of Lord Campbell, "the attorney is," to use his words in his Life of Lord Chancellor Loughborough, "is often a gentleman as well born, as well educated, and as well mannered as the barrister." But in spite of this change of his status, the fundamental principle of rules governing solicitors' remuneration settled a century ago remains unchanged. Consequently, the system formed under conditions which were immeasurably different with the present, becomes in the course of time, antiquated and ceases to be reasonable and equitable. On the whole, the payment of lawyers is necessarily expensive to the litigants under the English system where the legal profession is divided into two branches. So long as there are such divisions, there is more or less duplication of services which have to be paid twice over. In his paper on "the High

Cost of Litigation in England, its causes and remedies," read at Annual Provincial Meeting of the Law Society in Oct. 1932,[1] Mr. A.C. Hillier analysed the figures of a bill of costs, discussed them and commented on these words: "It really means that almost every item of work is duplicated, and it comes to this, that the present system entails the employment of two or more men to do the work of one. Now that state of affairs is surely undesirable in the highest degree. (It is) an effete and wasteful and obsolete system .... Counsel's fees themselves I have always found reasonable, but it is the wicked other wasteful expenditure ... which occasion the excessive cost."

Come now to the evidence expenses which may be treated in two respects. First, the witnesses expenses, include both travelling and living expenses and a sum representing compensation for loss of time. The existing procedure requires that all documents and all facts should be proved by the oral evidence of parties and witnesses present in

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1. 74 Law Journal, p. 276 et seq. 1932.

court, unless the parties have reached special arrangements which are rarely possible. All necessary expenses of the witnesses who come from a distance and wait long for the case to come on trial are thus made, under the existing rules of evidence, to amount to a substantial sum. This is more so in cases where cautious or over-cautious Counsel often require a witness to remain in Court after he has given his evidence so that he can give, if necessary, some explanation of any questions as to his evidence.

The necessary fees of expert witnesses, if they are called, may include not merely compensation for the loss of time but also for the time spent in qualifying to give evidence. In cases where scientific or technical questions are involved, as in the Chancery and Probate Division, expert witnesses fees often constitute a substantial sum in the bill.[1]

~~On the whole~~, The amount of witnesses fees varies according to the number of witnesses summoned, the complicity of the questions involved and the length of the trial.

Secondly, all other necessary expenses incurred in the preparation and ~~prevention~~ presentation of the case,

1. 171 Law Times pp. 433-4 May 23, 1931

such as plans, medals, photographs, copies of documents, translations, shorthand notes and so on.

Having examined the various elements constituting the total expense of litigation, one naturally asks what costs will be allowed. This question is as important as it is difficult to give a concise answer. Important because herein lies the full significance and fundamental importance of costs in English Procedure. Difficult to present in a concise way, because not only different courts have more or less different rules of costs, but even in the Supreme Court Order 65, though entitled costs, gives only part of the rules of costs while some important provisions are scattered here and there in other Orders and Statutes.

Broadly speaking, apart from special cases involving the Crown, "costs follow the events" except that the court has the discretion to deprive a successful party of his costs. The general rule becomes almost obsolete in cases decided by the verdict of a jury. The jury may decide some issues in favour of the plaintiff and others of the defendant

and the burden of costs will be shared between them accordingly. Thus the court exercises much more discretion in cases decided by a judge or judges alone.[1.]

The costs which the judge has power to order are generally the taxed costs as party and party, but in special circumstances costs between solicitor and client may be awarded. The costs which are allowed and awarded to a successful litigant are the reasonable costs of the proceedings of such party in the action, including the costs incurred in the obtaining the assistance of solicitor and counsel, the expenses of the various steps in the action, of any introductory proceeding, of the trial itself, and of the proceedings up to the signing of judgment. All such costs, charges and expenses are to be allowed by the taxing master as appear to him necessary or proper for the attainment of justice or for defending the

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1. Order 65 R.I. See also the head note to Reid, Hewitt & Co. -v- Joseph. 1918, H.C. 717.

rights of any party.

The costs of an appeal include the costs of a shorthand writer's notes of the judgment of the court below, but not of the evidence except in very special circumstances.[1]

Let me now turn to the system of taxation of costs and examine how it works in practice. The beginning of the system of taxation of costs may be ~~formed~~ found in a statute passed in 1605 which was intended to protect clients from being preyed upon and charged with excessive fees and other unnecessary demands by dishonest lawyers. In respect of those abuses the client had thus a right to protest. From this simple beginning the modern practice of taxation has struck root. Something may be said in favour of the purpose of the system, aiming that the losing party should be protected from excessive charges and that the winning party should receive from his opponent all his reasonable costs. But the admirable aspect and the laudable motive of the principle should not blind us to its failure and defects in practice. To begin with, the system of taxation of costs involved

1. Order L VIII, v.12.

and complicated. There are different scales in different courts. ~~Even in the same court, there are, as with~~ Both in the county court and the Supreme Court, we find two scales in operation. ~~more than one scale.~~ In the County Courts, all costs and charges between solicitor and client must on the application either of the solicitor or client, be taxed by the Registrar of the court in which they were incurred. On the other hand, all costs and charges between party and party must be taxed. In the taxation of party and party costs, there are two scales of costs, the lower and the higher. The lower scale applies where the amount recovered exceeds £2 and does not exceed £10, except where the judge orders some scale to apply or except as between solicitor and client. For the amount recovered above £10 applies the higher scale which is divided into three columns (A. B & C.) which varies with and applies respectively to the amount of the subject matter or the sum recovered.

In the Supreme Court,[1.] there are two

1. R.S.C. 1883, appendix. N.

scales, a higher and a lower, in the taxation of party and party costs. Costs taxed are generally on the lower scale, but on special ground out of the nature and importance or difficulty or emergency of the case, costs on the higher scale may be allowed.

In bankruptcy all costs allowed must be taxed by the taxing master in the High Court or the registrar in the County Court. The items which are allowable for costs are fixed by a different scale.[1]

The bill of costs which is prepared by the Solicitor for the successful party and in which every taxable item of expense is incurred may run into hundreds of pages. As ~~such are~~ it is involved and complicated, no client would have the patience and energy to know the nature of the process except the vaguest idea of what is being done. But none the less the amount of his liability is ascertained by this open sesame.

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1. R.S.C. 1887. Appendix N. Part II.

Apart from that costs in the Probate, Divorce and Admiralty Division are taxed by the registrars and the clerks in the Principal Probate and Registry and the Admiralty Registry, costs in the Supreme Court are taxed by the taxing masters who provides a hearing at which any of the items may be objected to by a solicitor for the opposing party. The Master is given a wide discretion.[1] But as regards both questions of law and of fact, an appeal lies from the master's decision to the judge at Chamber[2] but no further appeal lies unless with the judges' leave, to the Court of Appeal on questions of costs only.[3]

The Taxation of Costs as between party and party has now become so technical and in regard to

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1. Ogilvie -v- Massey, 1910, p.243; Smith -v- Butter, L.R. 19, Eq. 473, 474 (1875).

2. Order 65, R.27, Reg. 41.

3. The Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo.V. C.49 Sec.31(1) b; cf. ~~(1927)~~ R.S.C. Order 65 R.1.; Order 58 R.4. The annual practice pp. 1255, 1835 (1936)

what are called discretionary charges so uncertain that they run counter with the notions of laymen. Let me examine the annual sums of costs taxed off in the Supreme Court Taxing Office during the last decade in the following table:[1.]

	Brought in at £	Allowed at £	Taxed off £	% of costs taxed off.
1925	1,297,463	1,041,393	256,070	19.7
1926	1,413,233	1,115,125	298,108	21.0
1927	1,184,687	960,227	224,460	18.9
1928	1,304,517	1,184,687	119,830	9.1
1929	1,250,337	978,785	271,552	21.7
1930	1,175,286	922,567	252,719	21.5
1931	1,095,492	885,559	209,933	19.1
1932	1,179,531	907,578	271,953	23.0
1933	1,232,697	971,379	261,318	21.1
1934	1,329,692	1,018,401	311,291	23.4

From the above figures, it may be noticed that in the last decade the total amount of costs taxed off comes to £2,477,234 with £119,830 in 1928 at the lowest and £311,291 in 1934 at the highest. In terms of percentage, the annual average of costs taxed off in the last decade is 19.8 Those sums so taxed off had to be paid out of the pocket of the successful party.[2.] Probably some part of these

1. Total for Chancery & King's Bench Divn. cf. Civil Judicial Statistics from 1925 to 1934. cmd.
2. ~~W. Durran Lawyers p. 525 et seq. cf. also the Justice of Peace and Local Government of 4th July, 1931.~~

might be said to be unreasonable or excessive charges, but the rest would be regarded from the viewpoint of laymen as reasonable and necessary expense. Further, the fact that there is another more liberal scale known as taxation between solicitor and client is not only a reflection upon but even a proof of the failure of the scale called taxation as between party and party doing full justice.[1]

In the second place, some existing practice of taxation is nothing less than unjust and unreasonable. It would, of course, be both impossible and undesirable to go into details, but one example or two may serve to clarify my point. A fee for a retainer, for instance, is not allowable in a taxation between party and party cost, but is allowable at the discretion of the taxing master in a solicitor and client taxation. It is not clear why it is not allowed in the former case. It is reasonable to retain a particular counsel and to pay the usual fee if a litigant desires to have his services. Few can seriously contend that such a fee shall in no case be just or reasonable as part of the costs

1. W. Durran: Lawyers p. 525 et. seq., cf. also the Justice of Peace + Local Government Jan. 4, 1931

of a successful party. Another instance of a different character is that a bill of costs which is brought in for taxation can only commence with the issue of the writ, except that a 'letter before action' is allowable.[1] This limitation is, again, inconceivable to the man in the street because there are always some preliminary consultations and letters between the parties or between the party and the lawyer before the issue of a writ in an action. No lawsuit begins, in fact, with the issue of a writ. Why should the taxation, the layman asks, not include these preliminaries as part of the expenses if the successful litigant, apart from the costs from and after the issue of the writ, if he were really and wholly to be indemnified at all? Moreover it gives rise to undesirable consequences, because this rule of taxation becomes, in effect, incentive to litigants to set down the causes two or three months before they are ready for trial.[2]

In the third place, it increases the expense of litigation and is susceptible of delay.

T. C. (Party & Party Costs) 77 The Solicitor Journal p 807 et seq (1934)

1. Evidence taken before the Royal Commissioner on Delay in the King's Bench Division. qs.204-206.

The taxing fee payable to the court amounts to 2.5 per cent. on the bill as taxed. If there is no taxation, this fee is saved. "It is probably true," said Sir George A. Bonner, Senior Master of the King's Bench Division, "that the preparation, delivery and taxation of a bill of costs adds at least 1/8th to the total, all of which falls upon the party who has to pay. The mere fact that busy solicitors have to employ a considerable proportion of the staff occupied in making out the bills - the lengths of items in the bills - the cost of copies and the time occupied by taxation - to which must be added the fees and costs of taxation, accounts for a considerable proportion of the total which is allowed, and this proportion is absolutely wasted."[1]

As pointed out by the London Chamber of Commerce, "the end of a case for litigant is when it is completely finished by the conclusion of taxation and not merely when it is tried."[2] In the

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1. Evidence before Lord Peel's commission on Business of Courts. p. 53.
2. Statement submitted by Mr. T. G. Roscoe on behalf of the London Chamber of Commerce. Evidence taken before Lord Peel's Commission on Business of Common Law Courts, p. 292.

words of Mr. F. G. Roscoe, "it has been sometimes said that speed in trial is the be-all and end-all of litigation, but the Chamber has pointed out that that is not the end of litigation - that there is taxation and that taxation may take a considerable time."[1.] Upon taking the average of the times that cases have actually taken in taxation and comparing the time that taxation takes in the Central office with that in the Admiralty Division,[2.] the result is that in the former costs are taxed in a month as to commercial action, whereas in the latter it takes under a week.[3.] The Chamber does not suggest that there is any avoidable delay having regard to the present number of masters and the system in the Central Taxing Office, but simply that the procedure imposed upon the taxing masters is such as to prevent the existing staff of taxing masters being able to deal with taxations as expeditiously as might be the case if the number of taxing

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1. Ibid, Mr. Roscoe, q. 4057, p. 296
2. " q. 4057, p. 296
3. " q. 4037, p. 294

masters were increased.[1] It is undeniable that whether taxation of costs takes less or more time, it contributes, as one of the elements, to add more time before a case is completely finished. ~~Speedly~~ Speed taxation is, of course, a matter of vital importance, especially the party is in financial difficulties.

As a consequence of these unreasonable and complicated rules of taxation, a successful party, though awarded costs by a judgment, does not receive them in full. This fact rankles in his mind, serves as an object of complaint and finally creates a sense of injustice. The net results of this system, not only adds complexity and expense to litigation but takes more time to finish a case.

Having examined the elements of the expense of litigation and observed the system of taxation of costs in working, I shall proceed to evaluate the system of costs as a whole, its merits and demerits, especially its effects upon litigation

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1. Ibid. p. 292.

and litigants and to suggest methods of reform.

What is the merit, if any? The only point which can be said in its favour is that by lodging the power of awarding costs in the hands of the court or the judge, ~~they have~~ the system has a restraining force upon the conduct of an action. In the county court, all the costs of any action or matter, not otherwise provided for by the County Courts Act, 1888,[1] must be paid or apportioned between its parties in such manner as the Court shall think just, and in default of any provision must abide the event of the cause or matter.[2] This gives the judge the fullest power to direct one or the other side shall pay the costs or to apportion them as justice shall direct. In the High Court the very important matter of costs is completely in the control of the Rule Committee and, as has already been referred to, they are regulated by the Rules of the Supreme Court. But subject to the rules costs are entirely in the discretion of the trial judge, who "shall have

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1. 51 & 52 Vict. c. 43.
2. The Judicature Act, 1875, s.17 (3)

full power to determine by whom and to what extent such costs are to be paid."[1]. Costs in the Court of Appeal as a rule follow the event. But the Court has full discretion over the costs of an appeal, and can make such order as to the whole or any part of them as may be just.[2]. The House of Lords awards costs on appeal. Such costs are intended as an indemnity.[3].

This complete power gives the various courts over costs enables them to exercise a most useful control over the proper conduct of an action at all points. The practitioner thus has ever before him the risk of being ordered to pay his opponent's costs for unnecessary or unfair obstables raised. Thus it serves as a means of discerning unfair and unnecessary litigation that costs have proved so efficacious in England. Nor is this all. They may be of even greater use in controlling each

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1. The Judicature Act, 1890, s.5.
2. Order L. VIV. Q.4; Judicature Act, 1925, s.50; North London & Co. -v- May 1918. 2 K.B. 439.
3. Bowen -v- Snand 1877, 2 App. case 455 per Lord Blackburn, p. 485.

step of the case from summons to final appeal, such as the prevention of prolixity[1.] scandalous matter,[2.] delay,[3.] and misjoinder of parties,[4.] action and interpleader, the demand for the production of undisputed evidence,[5.] the taking of appeals,[6.] as a matter of course, the penalising of the abuse of summary procedure,[7.] the regulation of interrogatories,[8.] Estate and Probate actions,[9.] Discontinuance,[10.] the payment into court,[11.] the liability of solicitors[12] and the encouragement of all cases involving sums less than £100 tried in the County Court,[13.] etc.[14.]

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1. Order 2 R.2; 0.19.v.2.
2. 0.19 R.27 as to pleading; 0.38. R.11 as to affidavits.
3. 0.36 R.34; 6.65.R.5.
4. 0.6 R.1; 0 16 R.4 & 7; cf. Rosenbaum op.cit. supre. p.52 R.2; 0.16 R.48 as to 3rd party procedure; 0.16 R.54; 0.57 R.1, 15 & 17, 0.18.R.1.
5. 0.21 R.9; 0.32 R. 2 & 4.
6. 0.58 R.4, the Court of Appeal has wide discretion.
7. 0.14 R.9.
8. 0.31 R.1,3 & 26
9. 0.65 R.14A warns trustees and executives against needless litigation R.14-B. is self-explanatory. R.21 R.18 as amended in 1888, the judge may order him to pay the costs if there were no reasonable grounds for opposing the bill. 0.65 R.14-c x 14-D.etc. as to probate costs.
10. D.26 R.1. Rules of costs prevent persons from commencing or defending a suit without any real intention of bringing it to trial.
11. Rules favour as far as possible the settlement of actions before trial O.22 R.6. cf. also Rosenbaum op.cit. supre. N.2 at p.96 0.22 R.7.
12. 0.65 R.11 A Solicitor may have to bear the costs of litigation unreasonably commenced.

(see next page)

footnotes from previous page (contd)

13. County Courts Acts 1914, 14 & 15 Geo V. c. 23 ~~1928 (see new act)~~ ss. 47, 69

14. As, for instance, the Public Authorities Protection Act, 1893 (56 & 57 Vict. c.61) provides, inter alia, judgment for defendant carries costs between solicitor and client.

To quote Dr. A. L. Goodhart,[1] "The English law is essentially practical and is based on the pessimistic assumption that some litigants will resort to all possible technicalities and sharp practices to gain their ends if they are not prevented from doing so ..... It is true that under the English system a party is still free to raise a number of technical objections, refuse to admit anything, and force his opponent to prove facts which are not in dispute, but if he does so he will have to pay and pay heavily. Substantial costs make it expensive for the party who adopts such tactics. These costs are an additional weapon of offence for the plaintiff with a just claim to present, and a shield to the defendant who has been unfairly brought into Court." In his opinion, the English system of costs is of advantage to the poor litigant. To begin with ~~in his opinion~~, the wealthy defendant suffers because if he loses he will have to pay the plaintiff's costs, while if he wins he will not be able to collect his own from his unsuccessful and impecunious adversary. Secondly, to guard against the disadvantage

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1. Costs. 38 Yale Law Jnl. v.8. 7.p.862.

or denial of justice to ~~its~~ poor owing to the requirement of the security for costs, it is provided by the specific rule, which the courts are strict in enforcing even in cases in which the plaintiff's claim appears to be a hopeless and unjustifiable one,[1] that security of costs shall never be required in the court of first instance on the ground of his poverty.[2] Thirdly, a defendant, even a wealthy defendant, will scarcely refuse to pay a just claim, because he knows his uncertain defence and the danger of incurring heavy costs and also because the courts are not clogged, as in the U.S.A. with cases of meritless claims and spurious defences. It was primarily on this ground that the Massachussetts Judicial Council in its 1925 Report favoured the English system of substantial costs: "The possibility of having to pay the lawyer's bills of both parties to the action makes a plaintiff think twice before he sues on a writ and a defendant think twice before he defends an action which might not be defended, and that is a direct deterrent on the number of cases put or kept in Trial."[3].

1. Knight v. Ponsonby (1925) 1 K.B. 545. ~~The only exception to the general rule is found in 51 & 52 Vict. c. 43. s.6 (1888)~~
2. Order 65 R.6.
3. Report pp.63-64.

The system of substantial costs as a means of lessening unfair and unnecessary litigation is advantageous. However, there are other things to be considered. There are several serious defects which will become clear after a brief examination.

First of all, what has been called the "apothecary bill" of costs is open to serious objection. It has long been attacked by Lord Bramwell, "There is something wrong somewhere," he said, "the thing has got into a wrong groove. The system is wrong ... The obvious tendency of this practice is to multiply items and augment costs."[1]. On this point the Solicitors' Journal also remarked: "The apothecary's bill kind of system which at present prevails is a most miserable and unsatisfactory system, but it is difficult to suggest any wholly satisfactory principle."[2].

Such itemising bill is, of course, difficult to understand. To use Bentham's words, "it is a heap of items among which no vulgar eye can

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1. In a letter to the Times and it was reprinted in 25 Solicitor Jnl 341 (March 5, 1881.)
2. 25 Solicitors Jnl. 503 (May 7,1881.)

ever hope to discriminate: an object on which investigation would be thrown away, as comprehension is impossible." It is archaic and cumbrous. It becomes the most criticised part of the English system.[1.]

Next, the system is too complicated. As has been observed, though Order 65 is the mainspring of the Rules of Costs in the Supreme Court, there are others scattered among various orders and floating in different statutes. There are, again, different scales of costs in the County Court, Police Courts, and so on. Confining ourselves to the Supreme Court, it is illuminating to notice, as pointed out elsewhere, that the Order in costs[2.] in the Rules of the Supreme Court is by far the longest Order of the whole 72. These rules embody a practice which is for the most part unsuited to modern conditions. It is again interesting to notice the number of precedents of Bills of Costs found in books for practitioners. In Porther & Wortham's Guide to Costs, for

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1. Birkenhead. Costs : 60 Law Journal, 89, 1925.
2. Order XV.

instance, there are 102 precedents for the Chancery Division cases,[1.] 54 for the King's Bench,[2.] 31 for Probate,[3.] 12 for Divorce,[4.] 12 for Admiralty,[5.] 19 for Lunacy,[6.] 28 for bankruptcy,[7.] 11 for companies winding up,[8.] and so on.[9.]

In the third place, the distinction between Party & Party and Solicitor & Client costs in the High Court is not only arbitrary but occasions

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1. Porther & Wortham pp. 7-160
2. ibid. pp. 160-230
3. " 17 for non-continuous pp.319-377) and 14 for continuous business.
4. Ibid. pp. 394-412
5. " pp. 418-440
6. " pp. 449-467
7. " pp. 472-535
8. " pp. 557-574.
9. Precedents for other courts.

injustice to the litigant.

As a general rule, party and party costs are those that the successful party who obtains a judgment with costs can recover from the other side, but he usually cannot recover solicitor and client costs, though the matters to which they relate may have been in fact indispensable in order to help him to win the case. Consequently to establish his right a successful litigant has to pay the penalty of the solicitor and client costs.

In exceptional circumstances, costs between solicitor and client may be awarded, such as, for example, in matters of equitable jurisdiction, or under express statutory provisions or obligation to indemnify or contribute.[1] Again in actions brought against a public authority, judgment for the defendant, if the latter is successful, is given costs between solicitor and client.

But apart from these exceptions, only costs between party & party are normally awarded.

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1. cf. 23 Halsbury's Laws of England ~~1111~~ practice and Procedure p. 183 cases cited there.

As has already been referred to, it draws a not very intelligible nor reasonable distinction between party & party costs and solicitor and client costs and allows the successful plaintiff to recover only the former from his opponent, while he must bear the difference himself. This hardship has long been complained of and the practice condemned.[1] But what is still more important, is the ~~defects~~ effect of the existing system of costs upon the litigants.

First of all, the amount of costs is too uncertain. 'Which of you, intending to build a tower, sitteth not down first and ~~counteth~~ the cost?' This golden rule is almost impossible to observe in undertaking a lawsuit under the present system, because the uncertainty of the cost probably outweighs all others. What the action will cost both the lawyers and the client can hardly count with certainty. Commenting upon and protesting against law taxes, Jeremy Bentham observed: "For were the list of law taxes ever so familiar, and ever so easy to be understood

1. Moimen: It is not business. Commons Sense -v- Party & Party Costs, London, Law Tracts 1889-1895.

it is impossible for a man to know beforehand, whether he has wherewithal to pay the bill, because it is impossible for him to know what incidents may intervene to lengthen it."[1]. If the intervening incidents in a lawsuit, are uncertain, still more uncertain are the costs of civil action. It is one of the most serious defects condemned by Lord Birkenhead in unequivocal terms.[2]. "The greatest defect of the present system," he wrote in 1927, "is its uncertainty in connection with litigation. To some extent uncertainty is unavoidable, but it is a matter of grave concern that no prudent man can count the cost of contemplative litigation with any reasonable degree of accuracy. In conveyancing practically in every case the exact figure can be given; in Police Court proceedings a sum can, as a rule, be named to cover the whole cost, and this is generally true of all criminal trials.

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1. op.cit. supra. p.19.
2. Law, Life & letters vol. I. Ch.IV. Laws and the Public pp. 113-114.

In civil proceedings, even in county court where the procedure is simpler, an accurate estimate is practically impossible." Uncertainty of the costs of litigation is bad because it brings in very undesirable effects.

In the opinion of Lord Birkenhead, uncertainty breeds reluctance to proceed and a desire to adopt other means, if such exist, to accomplish the result, especially in view of the fact that it is quite possible for a plaintiff to win his case and to recover both the sum claimed and the amount of the taxed cost and yet out-of-pocket at the end, is worse off than if he had waived the claim.[1.]

What is still more serious, it is, in the second place, by far too expensive and unreasonable. Expense has long been the curse of litigation in England. "The courts of justice," observed Horne Tooke, "are open to every man in this country, so is the London Tavern; but if one cannot afford the expense, it is as useless for him to look

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1. Ibid. p.

for justice in the one as for the means of satisfying his ~~anger~~ hunger in the other."

In the course of a speech delivered in the House of Commons on February 7th, 1828, Lord Brougham observed: "Perhaps the greatest evil of our system, as at present constituted, is the excess of the costs which a party succeeding is obliged to pay over and above what he can recover from his antagonist. This is so certain and so considerable that a man shall in vain ask me to recommend him either to bring forward a rightful claim or to resist an unjust demand for any such sum as £20 or even £30. I shall presently declare to him that he had much better say nothing in the one case and pay the money a second time in the other, provided his adversary were a rich and oppressive man, resolved to take all the advantages the law gives him." Few will seriously dispute that his observations upon this point have but too modern a flavour and are almost as true today as they were a hundred years ago. In fact opinion on all sides is now unanimous that litigation is excessively expensive. It has been pointed out,

emphasised and criticised by many authorities such as royal commissions, department committees, judges, solicitors, barristers, chamber of commerce and other bodies and confirmed by numerous litigants themselves. After so much has been said by competent authorities and referred to elsewhere by me, it is unnecessary to elaborate the point here. But what is important is to examine the exact nature of expensive litigations in various courts, the effects of the costs of litigation upon the administration of justice, and the causes of expensiveness and the proposals of reform.

It is difficult to essay the actual costs of litigation in different courts, as they vary with each case and no statistics are available. Some of the examples given here are merely to illustrate and clarify the point. Some specimen of costs in the County Courts have already been referred to elsewhere.[1] The expensive nature of costs will undoubtedly appeal to the mind at once, after a cursory review of the table there. This has been

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1. Ch. on the County Courts.

corroborated by Mr. A. C. Hillier. In his words, "I have selected those county court cases from my files utterly at random, except that I took the trouble to select cases which prevented no particular difficulty and where the issue was perfectly clear. The total amount in dispute on the three cases amounted to £144.10.0d and the legal costs involved in settling these comparatively trivial disputes amounted to no less formidable a figure than £326.7.6d."[1].

Compare the county courts with the police courts in point of costs. The former are far from being, while the latter are in fact, poor mens' courts. Recently one county court judge has made several protests against the cost of county court proceedings. "With regard to the police court," he said, "that is a poor man's court, but the county court has lost that character ... It cannot be deemed the poor man's court today."[2].

This view is corroborated by another

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1. 74 Law Journal, p. 276 et seq. 1932.
2. cf. The Times, April 14 & 25, 1932.

county court Judge who has written that certain classes of appeals from county courts are a disgrace to our legal system.[1]

If county courts make no good showing on this heading, still worse is the circuit courts. Before the Royal Commission, Mr. Dendy, the District Registrar of the High Court and Registrar of the County Court at Newcastle-on-Tyne, handed in some interesting tables of actual costs. He had taxed the bills in 77 assize actions in the Newcastle District Registry. The average amount of costs in these was £108.5.10d. Since 1903, he had taxed the costs in 447 actions tried in the county court under the extended jurisdiction from £50 to £500. The average costs were £30 as against the £108 in the High Court. He emphasised the value of the figures by saying: "I would like to point out the curious result that not only is the average just under one-third, but the highest is just one-third and the lowest is just one-third - the highest was £106 as against £326 and the lowest was

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1. Law Journal, February 20th, 1932.

£8.14.6d. as against £36.2.8d. - and therefore I think you may say from my experiences in that particular district the cost of an extended jurisdiction action in the county court is just one third of an Assize action.[1.]

As put by Judge Parry, "I cannot honestly recommend the county court as a cheap entertainment for poor litigants, yet as compared with the High Court both for cost and speed it is much less exhausting to pursue ~~a~~ temper."[2.] Judge Sir T.A.Jones in his evidence before the Royal Commission on the Despatch of Business at Common Law told that the costs of an action tried on circuit of contract with damages at £150 was £187,[3.] and that another case about the detention of an insurance policy and damages of £180 in all had to pay costs of £174.[4.]

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1. Judge T. Parry. What the Judge Thought, pp.164-5
2. Ibid. p. 164 ; also evidence op.cit; L.S. Holmes q. 4398-9.
3. Evidence statement pp.171-172 also q. 2661
4. Ibid, pp. 171-2. q. 2604 p. 173.

He further stated that the cost of an action relating to an estate of £10,000 was so heavy that at the end only £600 was left for distribution amongst the beneficiaries.[1.]

In the opinion of Mr. W. H. Thompson,[2.] a plaintiff who employs a junior counsel in a lawsuit without the slightest complication or difficulty must expect an expense of at least £100 to £150 in the simplest case in the High Court. "It will be seen," he concluded "from the foregoing that not only is there great expense and delay, but that it is not only poor people who are placed in difficulty. Apart from the Poor Persons Rules and lawyers who are prepared to undertake the work on a speculative basis, no person, even in the middle class, can contemplate taking an action without at the same time contemplating that he may be ruined in the process."[3.] This view is corroborated by the figures adduced and the considered opinions of many authorities and the bitter experience of a host of litigants. Compare the English

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1. Ibid. pp. 171-2 q. 2654 p. 178
2. "Expense and delay," The Pol. quarterly vol.V. No.2. Essay in Legal Reform pp. 209-220.
3. Ibid. p.215.

system with other countries in this respect. Justice in no country in the world, with the probable exception of the U.S.A., is so expensive as in England. Upon this point continental writers and lawyers spare no severe comments.

The above figures as well as those I have discussed elsewhere show, not only that actual costs of litigation mean but the comparative degree of expensive costs of civil litigation in some of the most important courts, and it is out of all proportion to the benefit ~~of the outcome~~ obtained by means of litigation.

The effects of ~~these~~ expensive costs of litigation are obvious. Mr. M.D. Chalmers in his open letter on the Cost of Litigation to Baron Pollock, said in 1880:

> "It is said, and I believe with truth, that the expense and delays of law, especially in the Common Law Divisions, have much increased since the introduction of the new system of procedure under the Judicature Acts. It is further said, that this increase of expense and delay has been so considerable that many just claims are abandoned or compromised as a preferable alternative to enforcing them by legal process, and that men of business especially are growing more and more afraid of prosecuting their just rights in a court of Law. If this be really so, it amounts to a positive denial of law and consequently (from a lawyer's point of view) of justice to the public."[1]

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1. p. 3. Law Tracts. 1825-1831

These words of Chalmers in 1830 have but too modern a flavour to our peace of mind. Expensive costs of litigation works not only as a denial of justice in many instances, but also it is to be feared, as a means of oppression in the hands of the rich and powerful in some cases. Were evidence necessary, they would leap to our view. The decrease of the total number of proceedings in courts, the frequent resort to arbitration, the waive of a part of a claim in order to bring it within the jurisduction of the county court, the protests on all sides, the compromise between parties,[1] are but various manifestations of the same theme, the denial of justice. "How many modern lawyers," asked Mr. C.H.S. Fipoot," would honestly encourage a litigant of slender means to pursue a promising, let alone a doubtful case, against an adversary rich enough to brief eminent counsel and ready to fight the action through the whole hierarchy of courts? It is notorious that the first consideration of every respectful solicitor is to keep his client's affair out of the courts, unless he is fortunate enough to represent a public corporation,

1. Cf. Mr. A.M. Ingleden; expense of trial, ~~statement to peel Commission.~~ Appendix to Minutes of Evidence ~~p.31.~~ taken before Lord Peel's commission p.31

a limited company, or an association. To take a familiar example, how many taxpayers would dare to fight the Inland Revenue to the point of litigation even on an issue which appeared to be subject to no reasonable doubt? In truth and in fact the expense of legal proceedings does result, in a very large number of cases, in a denial of access to the courts." Judge J.D. Crawford wrote recently:

> "Our boast of the purity of our justice becomes almost a mockery if the cost is so great as to make men and women submit to an injustice rather than face a bill of costs which may spell ruin."[1].

After his long experience at the Bar for thirty years, he says bluntly that the cost of litigation has appalled him; that it amounts to a denial of justice.

It remains for me to diagnose as briefly as possible the many causes contributing to the uncertainty and exorbitant expense of litigation.[2] First is the law-making by litigation. Not only are legal principles established by decisions in individual cases at the expense of the parties, but

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1. Reflections and Recollections, London, 1936. P.227.
2. cf 174 The Law Times pp 278, 290, 249 1932

trivial details of legal procedure are also settled in this way. Minute cases between very humble people may result in big and very expensive causes celèbres, either on points of law or on procedure.

Thus mountains may be made out of molehills by the courts but unfortunately at the cost of litigants. Disputes arising under Rent Restriction Acts the evolution of the law of Workmen's Compensation and many other cases are eloquent commentaries upon this point.

There are and always will be, clear gaps in law, both statute and judge made. At present, as has been in the past, the whole burden of filling up these gaps is put upon litigants and this often involves more than one appeal owing to difference of judicial opinions. What is worse under the existing system, it often happens that people are compelled to spend profusely in obtaining a ruling on some other point of judicial procedure than the main question of dispute ~~in litigation~~. It is hard for a litigant to understand why he should have to pay the costs of having the Court of Appeal interpret rules apparently made by the judges for their own guidance.

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The second cause is due to the various provisions of procedure. Mr. C. Mullins[1] after stating that the cost of litigation in the Police Courts is much cheaper than that in the County Court is of the opinion that the cause of this difference lies in procedure. In the former, procedure is cheap and simple. In the latter, it is still a modified edition of the clumsy and verbose Common Law Procedure. In his opinion, "so long as the County Court procedure is but an abridgation of the High Court procedure, and so long as traditional methods are there observed, no big reduction can be hoped for in the cost of the County Court proceedings."[2] In the High Court the parties must in practically all cases deliver pleadings of considerable length, must produce to each other the whole of the correspondence, documents and accounts relating to the matter in issue and must be prepared to prove minutely all documents and facts by personal testimony of the parties and of witnesses and, except

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1. ~~Ibid. p. 217-218.~~ The Poor Man's Court of Justice 113 Nineteenth Century p 207 et. seq., 1933
2. Ibid pp 217-218

in very small cases, to instruct both a leading counsel and a junior. This involves the supply of several sets of copies of often a large mass of documents for the counsel and the judge. Apart from that, there are during the progress of the case, usually numerous introductory proceedings. Technical witnesses, if necessary, have to be called. There are, again, the tendency of the courts to go into matters of detail, the modern practice of affidavits of a formal character which have necessarily to be sworn and filed. All these complicated rules of procedure add and increase exorbitant expense of litigation.

Thirdly, trial by jury is undoubtedly much more expensive than trial by a judge alone. This has long been pointed out by Mr. D. Chalmers.[1] As estimated ~~by the lord chancellor and~~ by Lord Hanworths Committee, a case heard before a jury takes at least twice and possible three times as long to decide as a case heard by a judge alone. This expenditure of time means a corresponding expenditure of money. Counsels are often briefed owing to their reputation for eloquence or to their

1. Open Letter to Baron Pollock

powers of attacking & dazzling the jury. The fees swell accordingly. The presence of the jury often produces a series of dilatory and expensive appeals. In the result excessive cost of litigation is put on another premium.

Fourthly the length of trial makes litigation more expensive. In the opinion of Lord A. Greer, there has been an increase in the length of cases tried in the High Court. This is mainly due to the increasing use of shorthand and the typewriter, which has greatly added to the quantity and content of the documents that must be disclosed and read in Court.[1] In the words of the London Chamber of Commerce:

> "There is no doubt that the modern tendency is for trials to last much longer than 20 or 30 years ago. We do not wish to appear to criticise the Bench but there is no doubt that Judges nowadays do, in the opinion of the instructed public, allow cases to last longer than they should ..."[2]

Whatever may be the cause of this tendency of lengthy trial, it means undoubtedly the corresponding increase of costs. Every hour occupied by a trial may mean a much greater burden of cost to a litigant.

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1. Letter to The Times. Oct. 8. 1934
2. Report p. 5. (d)

Fifthly, the arrangement of court business has at times become a serious ~~crime~~ cause of increasing the costs. Owing to uncertainty and delay about the day or time at which the proceedings are to begin, parties, witnesses, and lawyers have to wait about, from day to day in some cases for the action to come on trial. The parties are thus put to great inconvenience and expense.[1.]

Sixthly, as stated by the Trade Union Congress General Council, "Solicitors' charges, Counsels' and witnesses' fees account for the major part of the whole cost of actions, from a table of itemised costs of actions in Chancery, King's Bench, King's Bench Commercial, Appeal Courts, contested divorce actions, House of lords and Privy Council actions, the percentages being:

Solicitors	26 per cent
counsel	49 "
witnesses	14 "

These three items, therefore, accounted for 89 per cent. of the whole cost of the actions instanced.[2.] The lawyers' fees are made the more expensive, as already referred to by the division of the legal profession

1. Statement of the Manchester Chamber of Commerce, Appendix to Minutes of Evidence, Royal Commission on Business at Common Law, p.51.
2. Appendix to Minutes of Evidence taken before the Royal Commissioner on business at Common Law. p.40.

into two branches.

The retaining of fashionable counsel is another. This, as pointed out by high authorities, may be due to the fault of the litigants themselves. In the words of Lord Birkenhead, "the expense of retaining fashionable counsels by litigants is unnecessary," while the Editor of the Law Journal put it in these words: "there are competent members of the Bar who are content to accept moderate fees and the advantage of employing counsel of the front rank may be exaggerated." These words are undoubtedly true. But under the existing system the psychological effect is there that fashionable lawyers loom large in the minds of litigants. Apart from this, there is probable practical advantage too. "There is no doubt," the Chamber of Commerce report runs, "that the party who instructs counsel frequently and who has a leading counsel of eminence at the trial has an advantage." The root of the vanity and folly of the litigants to retain fashionable counsel is, to the last analysis, due fundamentally to the existence of what Mr. Hillier called "an antiquated, effete and unsatisfactory system."

It is sometimes argued that the high cost is occasioned by witnesses' fees. In cases where a large number of witnesses are required, the witnesses' fees amount inevitably to a considerable sum.[1.] Such cases may be exceptional As argued by Mr. A.C. Hillier, the witnesses' expenses in average cases tried in the County Court amounted to 10.2 per cent. of the total taxed costs. He said, "Now these percentages do not appear to me to be very excessive." If the expenses of ordinary witnesses do not appear to be excessive, certainly they are in cases of expert witnesses.[2.]

In face of these defects, what is the remedy? There is much agreement that the cost of litigation is too expensive and the existing system defective. When it comes to determining the causes of the expensive costs and defects, there is, however, less agreement. When the appropriate remedy comes to be discussed, they not only quot homines tot sententiae, but there is very little constructive

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1. Cf. Sir William Jenkins Q.5306 et seq. Evidence taken before Lord Peel's Commission p. 400 also statement by the Trade Union Congress General Council. Appendix to Minutes of evidence taken before Lord Peel's Commission, p.43
2. John Mellam's: Jottings of an Old Solicitor, p.72, et.seq.

schemes.

Needless to say, every system of costs should achieve the purpose that the incidence of costs should be as inexpensive, certain, and reasonable as possible. It seems to me clear that much cost, delay and uncertainty would be avoided if some such reform of courts, as suggested in previous chapters were carried out. Again if the present method of charging costs was completely scrutinised and overhauled, a more equitable apportionment might be made according to the amount in dispute in an action.

Let me hazard some suggestions by way of reform. To begin with, the ideal of the administration of justice, as with Bentham and others, should be presented gratis, if this can be done without preponderent mischief. To carry out this ideal to the logical conclusion, not only court fees should be abolished but the state should provide with all expenses of litigation. This ideal, lofty as it is, is far from being present day politics. But at least, the imposition of court fees which, as agreed, cannot be justified on any ground whatever and results in

bad consequences, should be abolished altogether. The subject is, of course, one of difficulty, because the interest of the public in general and litigants in particular, is not in full accord with that of the Treasury so far as this point is concerned. But if they are in conflict, the former should, I submit, prevail upon the latter.

If this is still not practicable the revision of the scale of fees to suit modern conditions is urgently needed. "On the revenue side the question of the fees to be taken in the courts," wrote Lord Birkenhead,[1] "has not received attention for many years, and it is imperative that the scale should be adjusted to modern conditions and in particular to recent changes in the value of money."

The revision, the details of which I cannot discuss here, should have at least two main purposes in mind. First, these fees should be greatly reduced to a minimum with a view to making them as little burdensome as possible to the litigant. It should be based not upon the demands of revenue or self-supporting of the courts but upon the

1. Points of View, Vol.II. pp. 55-56.

economical power of the litigant. Second, court fees should be so fixed as to bear equitable and reasonable relation between the amount in dispute and the amount of fees. This, ~~as above referred to~~, has long been the settled practice in nearly all ~~other~~ modern states. If the judgment of a case could not be converted into money value, as, for instance, an injunction in the Chancery Division of the High Court, some division of fees to cover both classes of cases might have been devised.

In the second place, not only should the court fees be made proportional to the amount of the claim, but the same principle should be applied to the method of remuneration to lawyers ~~and the payment of evidence.~~ At present, most professional men such as architects, surveyors, auctioneers, house agents, etc., are remunerated according to a scale of charge which varies with the amount of money involved in the particular business. Even solicitors are paid now for the greater part of their conveyancing business upon this principle. But not so is the method of remunderation as to ~~Solicitors~~ litigation. It is based upon mechanical items of payment, the amount

of which is fixed by statute. The evil consequences of such an archaic system as have already been pointed out, are ~~full of~~ anomalous, uncertain, immoral, unprofessional, expensive and unreasonable. Nor can the method of remuneration of barristers based upon status and bargains struck by clerks be completely justified. Apart from the fusion of the two branches of legal profession which, as will be discussed later, has an important effect upon the cost of litigation, it is imperative here to urge that lawyers should be remunerated by a fixed sliding scale of costs in all actions in which a fixed sum of money is claimed, the scale varying in proportion to the amount. It follows that the two-third rules should, of course, be abolished.[1] The right of the lawyer to make a special arrangement with the client in exceptional cases such as in "test cases" may under strict limitations and conditions be reserved. The obvious advantages which such a system would result in are the practical abolition of taxation and the long itemised bill of costs, a nuisance alike to the

1. cf. the first Report of the London Chamber of Commerce and the Report of the General Council of the Bar on The Expense of Litigation.

solicitor and the client, and the predicable certainty and decrease of the total cost of an action. It would indirectly ~~hamper~~ benefit the legal profession as the result of such reform will largely increase the amount of litigation.

This was suggested by Mr. H. J. Randall in 1903.[1] It has now been advocated by many modern authorities. The Chamber of Commerce put forward this proposal as follows:

> "As regards smaller cases involving less than say £1,000 while we do not favour payment by results we think that if solicitors and counsels fees could be fixed on a sliding scale according to the amount involved, it would be to the benefit of litigants. Lost people, as has been pointed out are accustomed to working on a scale. It is recognised in the County Court and is the basis of Solicitors fees in conveyancing. If a lump sum fee could be fixed ad valorem it would enable litigants in smaller cases to know what an action would cost more easily than at present and would save many taxations of costs so that eventually the Treasury might be enabled to reduce the taxing staff..."

This suggestion, if carried into effect, will have important effects. There is, however, little cogent reason why the scale should not be equally applicable

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1. Cost of a Law Suit, 19 Law Quarterly Review, p. 430 et seq. (1903)

to big cases as to smaller cases. In this respect, the proposal of the Chamber has not gone far enough. This suggestion, moderate as it is, has not received the support of the Law Society".

"If an ad valorem scale of costs were fixed," the memorandum of the Law Society said[1], "the result would be to deter a Plaintiff from proceeding in the Courts of Justice. He might claim, say, £1,000, and the party and party scale costs on that amount might be satisfactory, but he might be awarded only £600, and the party and party scale on that amount would not satisfy his own Solicitor's costs. Unless a litigant sees a chance of the party and party costs being a fair indemnity if he wins the action, he will prefer a rough and ready arbitration."

But, on the other hand, this proposal has been favourably received by the General Council

1. The Law Society: Memorandum in reply to the request of the Lord Chancellor for the Observations of the Council on the possibility of Reducing the Cost of Litigation. (adopted by the Council on Friday, the 5th December, 1930) p.2. ; cf also 75 The Solicitor's Journal pp. 433-4 471 (1931)

of the Bar. With regard to sliding scale of costs dependent on the amount involved, "The Council thinks that this proposal deserves very careful consideration, but that it should, in its opinion, only apply to the taxed costs which a successful litigant could recover. The scale, that is to say, would involve a maximum limit for the taxed costs recoverable, varying for the defendant with the amount claimed and for the plaintiff with the amount recovered. Such a scale would enable a litigant to know the limit of his liability in costs to the other side and would have a salutary effect in keeping down costs."[1].

It may be observed that the apprehension of the Law Society that a fixing scale of costs for cases would deter a plaintiff from proceeding in the Courts of Justice does not seem to be well founded. The contrary would appear to be the effect, because he could know beforehand what would be the amount of costs. Nor has the example advanced by the Law Society much truth. The amount involved is clearly the amount claimed which would, if no defence was made,

1. General Council of the Bar: Report on the Expense of Litigation. May 16th, 1931. par. 12.

be recovered by default. Further, a scale should of course be so fixed as to promote justice and to have regard to costs of living and overhead expenses in England.

As to the opinion of the Bar Council, it does not seem necessary that there should be a variation for a plaintiff and a defendant. To quote the Report of the Chamber of Commerce, "the amount involved would, it seems to us in the great majority of cases, be the amount of the claim which if proceedings were not defended would be recovered by default, but we see no reason why there should be a variation from this in the case of a plaintiff."[1] As well put by Lord Birkenhead, "the great desiderata of any system of payment for services are reasonableness and certainty." The present system is neither reasonable nor certain. Remuneration according to a sliding scale of costs dependent on the amount involved would at least have the merits of being reasonableness and certainty to recommend itself. Nor is this all. It would simpliiy the method of counting

1. Memorandum on the Reports of the General Council of the Bar and the Law Society. 3rd July, 1931, Page 7.

costs, render the preparation of bills by a number of clerks and the system of taxation unnecessary, reduce the overhead expenses of lawyers and, most important of all, have the effect of cheapening the costs of litigation. In the words of Sir G.A.Bonner, Senior Master of the Kings Bench Division,[1.] "it would be of great benefit both to the public (the litigants) and to the legal profession, if a system of assessing the costs at a lump sum could be adopted, so as to avoid the great expense of the preparation and delivery of a bill of costs and of taxation ... I suggest that it is possible to arrive at a fair method of assessing the costs at a lump sum by requiring from the solicitor an account of all out-of-pocket expenses, including fees paid to counsel, and copies of documents, and allowances to witnesses, and then to add to those expenses a fair sum to the solicitor taking into consideration the time employed and the experience devoted to the preparation of the briefs and proofs of witnesses, for the general advice given,

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1. Evidence taken before Lord Peel's Committee on the Despatch of Business at Common Law ~~Courts~~, p. 53 B. costs. cf. also Roscoe, p. 292.

and for conduct of proceedings, including attendance at consultation with Counsel, and at Court. What the fair profit costs should be would be a matter of discretion in each case, depending upon the nature and length of proceedings, and also to some extent upon the amount in dispute or recovered."

The main objection taken to the proposal is that it in doubtful if anyone could be found capable of assessing costs in a satisfactory manner. The answer is that the taxing master already shows his capability when he fixes the allowance for preparation of briefs and so on.

On the evidence of the practice of lump sum costs in other countries, the proposal deserves to be fully considered and adopted with benefit.

In the third place, even with the introduction of a sliding scale of lawyers' remuneration according to the amount involved, the work of reform is only at its beginning. So long as the legal profession is divided into two branches, the work is necessarily more or less overlapped and duplicated, as has already been shown, and the consequent costs

of litigation to the parties must be more expensive. From the viewpoint of the public, the distinction between solicitor and barrister is not only unnecessary but also expensive. The fusion of the two branches of legal profession is, however, a debatable question. This is scarcely the appropriate place to go into the full length of the question. It will be examined only in so far as it bears upon the question of costs. It is, on the one hand, doubted whether fusion will lessen any expenses of litigation. "It is not the case," wrote Lord Birkenhead,[1] "that the client would be paying one set of lawyers instead of two at present; it is indeed doubtful whether amalgamation would, in the long run, save expense. Lawyers in the U.S. seem to earn more, both individually and as a class, than their brethren do here. It may well be that such a change would enable the future lawyer to quote an inclusive fee for an action."

On the other hand, such fusion, it is maintained, will greatly save the expense to litigants.

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1. Law, Life and Letters, Vol.I. p.122.

In a spirited letter C., describing himself as a solicitor in active practice for forty years, says:[1.] "The sooner the now entirely needless distinction between counsel and solicitor, and their dual incumbrance to the suitor, cease, so much the better it will be, not only for the public, to whom it would be a great boon, but to lawyers themselves of either class." The London Chamber of Commerce is no less emphatic on this point. "We think the present separation of the two sides of the legal profession should be ended as this would undoubtedly considerably lessen the expenses caused by the present double representation of litigants with a consequent saving both to counsels fees and copying of documents and would enable lawyers to deal more flexibly with costs."[2.] This view is corroborated by some members of the legal profession. Mr.Hillier thought that the employment of counsel raises the cost of litigation to 50 per cent. and that fusion will be advantageous to the public.[3.] In the opinion

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1. 72 Law Times, 321. (March 4, 1882)
2. Report (1930) pa.14 p.7.
3. 74 Law Journal p. 276 et seq. 1932.
cf. also Sergeant Ballatine: The old world & the new p. 80 London 1884

of Mr. Mullion, the employment of both barrister and solicitor must inevitably increase the cost of litigation, and, of course, the additional cost falls heavily in proportion to the smallness of the case.[1]

From the consideration of the expense of litigation the case for fusion leaves no doubt. There are, of course, other considerations such as the division of labour, effect upon the independence and integrity of the Bar, relation with the clients and so on, all of which deserve careful consideration but with which I am not here immediately concerned. If, however, the main test is the interest of the public and economy to the litigants, fusion would be an unanswerable proposition. Lord Birkenhead's doubt as to save of expense by fusion does not seem to me well-grounded. In the County Court a case represented by a barrister must cost much more than a solicitor. The barrister's monopoly of the right of audience in the High Court has the effect of increasing the expenses. As fusion will save much duplication of work and documents, so it will lessen

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1. Mullion: In Quest of Justice. p. 414.

the expense of litigation.

I come now to the expense of evidence. The unnecessary detaining of witnesses after giving evidence on the part of over-cautious lawyers should be discouraged. The practice of calling expert witnesses should be reformed. Formal and expert witnesses, whose real testimony, with its attendant expense, ought to be avoided as far as possible. The calling, for instance, of a surveyor who merely says, quite unchallenged, "I prepared this plan and it is accurate," at a charge or 3 to 5 guineas or of a meteorologist, who comes to say, "it is actually the meteorological report of such and such an observatory," or of the writer of a letter who authenticates his letter, does not appear to be necessary. Some such witnesses and all formal evidence ought to be settled by the parties long before the hearing. Rule 32 provides for these matters, but it is discretionary and ought to be made compulsory or more stringent. Further, ~~sight of~~ the conflicting expert evidence is not only a pathetic sight in court, but a necessary or even unnecessary evil to the litigants.

In France the Tribunal nominates an impartial and competent expert chosen from a list which is always at the disposal of the President of the Court and this expert makes a written report which is deposited with the Court. When the case is a heavy one the Tribunal sometimes nominates three experts. On the other hand, under the ~~Belgian~~ English system each party has their own technical experts and they come before the judge and say exactly the contrary to each other.

The Chamber of Commerce suggests that an Assessor should sit with the Judge in certain cases. The Bar Council recommends that ~~its~~ the desired reduction of the present expense of expert witnesses would be best attained by giving the Master or Judge power to limit the number of experts and furnishing to the other party before trial a copy of ~~its~~ the expert report. It seems to me that the French practice is commendable.

Here is food for thought and hints for reform.

All documentary evidence should be admitted in evidence without formal proof unless challenged and demanded, in which case the challenger should have to pay the costs of the oral proof unless

the Court ordered otherwise. The taking of affidavits, or documents in evidence and of written evidence should be made compulsory unless the Courts otherwise direct, and consequently the wording of Order 37 R.I. should be changed accordingly.

In the fifth place, one of the most important and fundamental reform in order to reduce the cost of litigation lies in procedure. This I have touched upon in the foregoing discussion but it cannot be too over-emphasised.[1.]

To quote the Report of the Royal Commission or the Business at Common Law;[2.] "In our opinion, one of the most hopeful methods of reducing delays and securing despatch in the Courts lies in cutting down the lengths of trials. We have received very much emphasis on this point and on the resulting expense. The English procedure and rules of evidence are generally admitted to be effective for arriving at truth, or so much thereof as is legally relevant, but

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1. Mullins, In Quest of Justice, p. 281, et.seq. Ch.13.
2. Cmd. 5065 pa. 226 pp.77 (1936)

it cannot be denied that they result in lengthy and expensive trials. This has become increasingly true of recent years."

Not only is the procedure in the High Court costly but the same is true in the County Court. If the present procedures remain as such, the cost of litigation can hardly be materially reduced.[1.] The Chief means[2.] of reduction both of expense and of time employed, appear to be a restriction of the issues to those seriously contested, some relaxation in the rules of evidence, a restriction of the material produced as evidence and so on. The details of the reform of procedure with which I am not here concerned have been touched upon by the Royal Commission on the Despatch of Business at Common Law,[3.] and Lord Handsworth's Committee on the Business of Courts,[4.] the London Chamber of Commerce,[5.] the Bar Council,[6.]

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1. London Chamber of Commerce: Report on the Expense of Litigation, par.10, p.5. Mullins: The poor man's Court of Justice 113 Nineteenth Century p.218 (1933)
2. Report by Lord Peel's Commission cmd. 5065, p.77 et seq. (1936)
3. Ibid. Ch. VIII. Reform in Procedure and Jurisdiction,
4. First, Second and Final Reports
5. Expense of Litigation, 1st Report (April 1930) 2nd Report (July, 1931) 3rd Report (March, 1933)
6. Report on the Expense of Litigation. (May 1931.)

the Law Society,[1.] and others[2.] deserve to be carefully considered.

The abolition of the jury trial, which I shall deal with at another place,[3.] would, it is believed, reduce much expense of litigation.

The system of taxation of costs should be abolished or at least completely reformed.

Lastly, ~~not by any means least,~~ the gaps, uncertainties and ambiguities in law should be completely overhauled and reformed by revision and modification of the law ~~and~~ together with a scientific drafting of legislation, all of which will be discussed in a later chapter.

Were all these reforms carried into effect it ~~is believed~~ seems probable that litigation ~~will~~ might become much ~~cheaper~~ less expensive than at present.

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1. Memorandum on the Costs of litigation (Dec.1930)
2. Many articles in Law Journal, Solicitor's Journal, Law Times, etc.
3. cf. ch. on Jury.

CHAPTER. X

LEGAL AID TO THE POOR.

In the preceding chapter I have attempted to examine the present system of the expense of litigation, its causes and its effects upon the administration of justice in general and suggested possible methods of reform. It remains for me to consider the incidence of costs upon the poor and the existing system provided for removing this difficulty.

Let me state at once that even with the total abolition of court fees, the expense of lawyers remains an insurmountable barrier to the poor in quest of justice in the Courts of Law. As put by R.M.Smith[1] "The expense of counsel is a fundamental difficulty because the attorney is an integral part of the administration of justice."

Justice is, in fact, more often than not denied to the poor through their lack of means to use the judicial machinery.[2]

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1. R.M.Smith, Justice and the Poor, p. 31 (1934)
2. Ibid., Ch. VI. the third Defect - Expense of Counsel (1920)

Sometimes they are looking for legal advice. At other times they are in need of legal representation in courts. But without free legal assistance they are unable to get either for the simple reason that they can afford to pay neither. Consequently all free legal assistance is centred round two problems (1) legal advice and (2) legal aid in the conduct of legal proceedings, civil or criminal.

I propose first to deal with the question of legal advice. In England the central and the local authorities make no provision for giving legal advice to the poor. This demand of the poor is benevolently supplied by voluntary efforts of individuals or association of individuals - the system of legal aid thus appears to be extra-judicial in character. But its importance is so great and so obvious that it can scarcely be lightly dismissed from any discussion of the working of the judiciary.

In England legal advice is given under the auspices of religious institutions, the settlements, the provincial law societies, trade unions, political parties, the charity organisation societies, individual lawyers and magistrates of Police Courts. The

greater bulk of free legal advice to the poor in England is, it is believed, given indirectly by the religious denominations. After the religious denominations, the provincial law societies are probably giving the largest quantity of free legal advice. Next in importance come perhaps the settlements both in London and the provinces, which are organisations of social workers often being university men and women. The volume of legal advice given by trade unions is considerable, but it is confined to the members of the union only. Three major political parties also give legal advices legal aid in certain constituencies.

Those organisations or individuals giving legal advice to the poor bear different names but they are commonly known as Poor Man's Lawyer Centres[1]. They are concerned, not with the conduct of litigation, but ~~with the giving of advice in the legal difficulties~~ to provide free advice on legal questions which not infrequently beset the life of the poor.

Apart from slight difference in details which are unimportant for the present purpose, the broad lines of the working of these meetings are almost the same. They have the same object, namely to provide legal advice for those who are unable to pay for it. The advice is given by the Poor Man's

1. H.W. Prichard: "Poor Men's Lawyers" 150 The Law Times. pp 235-237

lawyer, who is usually a young barrister or solicitor willing to devote an evening a week to this form of benevolent work. A note is kept of those solicitors or barristers who have consented to attend on particular evenings at the Poor Man's Lawyer Centre which is usually open on one or more evenings in the week. Inquiry as to the means of the person seeking advice is firstly made. Then advice follows. In an over-whelming majority of cases, advice alone is required and the matter of course ends with the giving of advice. If in certain cases where litigation appears proper and necessary, the name of a reliable solicitor who is likely, willing and able to take the case is given to the person seeking advice who is, however, free to make arrangements with the solicitor. Such cases are comparatively very few in number.

The services thus rendered by those agencies of legal advice are obviously meritorious. In the words of the Committee on Legal Aid to the Poor under the Chairmanship of Mr. Justice Finlay:

> "Their work (meaning legal advice) is of inestimable value and must often for the barristers and solicitors engaged, be of an exacting character. We would here express our admiration of the way in which these members of the profession devote

"so many evenings to assisting those who otherwise might have to go without advice."[1]

The voluntary effort of those altruistic lawyers is no doubt highly admirable and the benefit to the poor inestimable. The help, the comfort, ease of mind and Relief from worry to the poor at these meetings is incalculable. The bright happy faces of many of those as they leave is sufficient indication of relief.

But, I fear, our satisfaction and admiration have to stop here. If we examine the facilities provided for giving legal advice, the accommodation and organisation of those meetings, the quality of the advice given, the method and results attained, we can hardly remain satisfied. If a comparative view is taken of the legal aid system in this and other countries, we are even compelled to feel much dissatisfaction with the existing system here.

It is scarcely necessary to criticise the working of each of these agencies than to scrutinise

1. Committee on Legal Aid for the Poor. Final Report pa.8. cmd. 3016. (1928)

their common features and drawbacks.

In the first place, the genesis and growth of those legal advice agencies are local, haphazard and chaotic. They usually are the bye-products of other institutions, be they religious, social or political. Legal advice to them is nothing more or less than a side issue.

In some cases, legal advice is given through the enthusiasm of a particular lawyer. The work grows and develops with the enthusiasm of the individual. When he gives it up or dies, the meeting also vanishes. In other cases, legal advise is given out of the ignominious motive of some lawyers who use it as a bait for his business and defames the glorious name of legal aid society in this country.

Legal advice, at its best, is a mere matter of charity or at its worst, a gift for courting political favour in the constituencies or a bait used by less altruistic lawyers for obtaining legal business. All these agencies of legal advice have not yet passed over the stage of localised organisation. The meetings were started at various places by local groups acting independently. If there are no such group, no meeting was established, and if

the group failed or dispersed, the meeting went with it. In the second place, there is lack of lawyers and finances. In their annual report 1934-35, the Bentham Committee observed that apart from the difficulty referred to in finding an adequate number of conducting solicitors, the Committee labours under the handicap of an insufficient subscription list to ensure the modest sum required to meet its administrative expense, as well as the court fees. Needless to say, this is not an isolated example but a common phenomenon. The accommodations at such meetings are not only too simple but highly inadequate. They are more often than not held in mission halls, at vestries, slums or in small rooms. In some cases, two or three tables are placed in one room in which four or five lawyers give advice all at the same time. Deafening voices of the advisers and the clients in the room is almost inevitable unless they have learnt the art of voice modulation. There is usually no clerk to do the clerical work

which is much needed.[1] There are few or no law books for reference. Nor is there any fund, at least the advice part is concerned. There is sometimes even without a porter or some person to usher the clients in. Nor is there any record kept.[2] The work is quite unorganised. Even at the headquarters of the same religious denomination, various meetings do not know each other. One meeting has very little or no knowledge of what is being done in the way of legal advice given at even its own mission halls and vestries. As to the Poor Man's Lawyer Meetings held at Settlements, each settlement meeting is different to any other in its procedure, and methods. Again the trade union does not know what other trade unions are doing in the way of giving legal advice. Nor does the Central Association or headquarter of any political party know the legal advice work done locally. The Head office of the Charity Organisation Society has no knowledge of what its local

1. At Mansfield House University Settlement there are excellent lay secretary and at least two other lay helpers.

2. The Meetings at Settlements keep records.

branches are doing of a really useful piece of work in connection with legal advice to the poor.

If there is little organisation, still less is there any co-operation or coordination among various meetings belonging to different categories or even to the same denominations. Nor are they in any sense federated or united. Each meeting is carried on in a different way to any other. Each perhaps thinks its own particular way the best, little benefitted by the experience of the other. There has never been, as there is not now, any central agency in a position of leadership. There is no centralised authority or responsibility. The legal advice work has not yet become a co-ordinating national undertaking.

In the third place, the quality of the advice given is, with a few notable exceptions, scarcely deep but generally superficial and ad hoc. The tendency is to advice, that there is no case where a legal point is difficult to solve or too involved to be dealt with within the space of very limited time. Partly because there is no adequate and sufficient means of reference at hand, partly because most of the lawyers are green hands,

partly because they are tired men after perhaps a hard days' work in their ordinary professional business when they come to give advice in the evening, but chiefly because the time allotted to each case is too short, five minutes being the average time given to each client at some meetings, as there are far too many poor persons coming for advice than could be disposed of in one evening.

Fourthly, the practice of conciliation out of court after the American method, or after the somewhat weaker method adopted by the Edinburgh Legal Dispensary, is scarcely attempted or even almost unknown, or ignored. Partly because there is lack of time to attempt this, partly because there is want of personnel, as it is impossible to bring about conciliation without the service of clerks and an office, partly because members of the Bar are not used to the work of conciliation out of Court unless they have learnt a solicitor's business, but chiefly because there is little time for the poor man's

lawyer to bring about conciliation. It is much simpler and quicker to give ad hoc legal advice than to make conciliation. But conciliation out of court should be the main object to be attained.

Fifthly, the facilities of legal advice are not only limited but highly inadequate. The legal advice given by trade unions is confined to their members. All other agencies giving legal advice are very much limited in time. Most of the Poor Man's Lawyer Meetings are only available in one or two evenings of a week. Often there are more poor persons than can be dealt with in the same evening. Some of them, after waiting two or three hours are compelled to go away without obtaining any advice and have to come again. But those who meet with such difficulties and inconvenience in quest of legal advice are considered by their brethren living in the country, as the more fortunate for living in London or large provincial centres where Poor Man's Lawyers Meetings are being held. People who live in the country,

especially rural districts have no legal advice at all.

"It must be admitted," wrote the report of Mr. Justice Finlay's Committee,[1] "that in purely rural areas the situation presents difficulties, but there are many important centres where there is at present no Poor Man's Lawyer in existence." In the words of the Minority Report of the Committee, "the voluntary system has not, in our view, been more than partially successful, and even in some large industrial areas as well as in the rural area of the country, the Poor Man's Lawyer is unknown and no provision of any kind exists to help the poor person in need of legal advice."[2]

Turn now to the subject of legal aid which naturally falls into two divisions, civil and criminal. Let me take legal aid in criminal cases first.

It is scarcely necessary for me to emphasise the fact that the poor prisoner can

1. Report of the Committee on legal Aid to the Poor, cmd. 3016, par.9, p.5.
2. Final Report, op.cit. p.12.

hardly defend himself.

When moved for the Second Reading of the Poor Prisoners Defence Bill in the House of Lords, Lord Hankey put the position of the accused in graphic words[1]. "The accused finds himself in a public place standing alone in the middle of a crowded court, the observed of all observers, unfamiliar with the practice and the procedure of a court of justice. In such surroundings how can he properly place his case beforethe Court. He cannot."

The poor prisoner can neither defend himself nor engage a lawyer to defend him. The urgent need of legal aid to the poor in criminal cases is thus obvious enough. In the words of the Report or Poor Prisoner Defence Bill, 1903, "a prisoner who is without means ought to be in no worse position to establish his innocence than a prisoner who is able to pay for legal assistance, and the assistance of solicitor and counsel is of great importance for this purpose."[2].

1. Parliamentary Debates (Lords) 77: 1213, (1930) also Parliamentary Debates (Commons) 231: 1415 et seq; T.R. Bridgwater: "Poor Prisoners Defence Act.
2. Parliamentary Paper, vol. VII 1903.

The efforts to aid the poor accused in criminal cases to obtain equal justice in the administration of criminal law was first crystalised in the Poor Prisoners Defence Act, 1903[1]. which was the first legislative measure in England to make provision for free legal aid being given to poor prisoners. This was undoubtedly a step in the right direction of humanising the administration of criminal justice. But there were defects, serious defects in the Act. Briefly stated, the Act did not apply to the Police Courts; nor did it give assistance to a prisoner unless he disclosed defence; it only gave assistance as a matter of privilege and not as a matter of right; it only gave assistance when it was often too late; it gave no assistance to a person committed to a higher court upon a coroner's warrant; it allowed for a scale of costs which seriously limited what counsel and solicitor could be engaged.[2].

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1. 3 Edw. III. c.38
2. ~~cf. Parliamentary Debates (commons) vol.~~ 231, H. C. Ss.1418 et.seq. 1929-30; ~~Parliamentary Debates~~ (Hansard) ~~vol~~ 77, Ss.1214-15. (1930)

Some of these defects were removed by the Poor Prisoners' Defence Act, 1930[1] and the rules made under the Act.[2]

As the law now stands, justices are required to grant a legal aid certificate to any poor person where it appears to be in the interests of justice that he should have free legal aid, either by reason of the gravity of the charge or of exceptional circumstances. This applies to all cases, where they are to be finally disposed of by the justices or to be the subject of committal for trial by jury. When a legal certificate is granted, the accused is entitled to have a solicitor assigned him. If he be charged with murder, justice may also assign counsel. The law further provided that a defence certificate shall be granted to a poor person who is committed for trial upon a charge of murder. It may be granted to a poor person committed on any other charge, if, having regard to all the circumstances, it is considered desirable

1. 20 & 21 Geo. V. c.32.
2. Costs of Poor Prisoners Defence Regulations dated Dec.18, 1930, S.R & O. 1930 No.1066; Poor Prisoners (Counsel & Solicitor) Rules, dated Dec. 17, 1930. (S & P.R. 1930).

in the interests of justice that he should have legal aid in the preparation and conduct of his defence at the Trial. The defence certificate entitles the accused to have solicitor and counsel assigned to him. In all cases where either a legal aid or defence certificate is granted, the costs of defence, according to scale prescribed, are to be defrayed out of public funds, on an order under the Costs in Criminal Cases Act, 1908.

The working of the Act since its inception may be viewed from several angles. First the annual number of legal aids given during the last three years may be shown by the following figures:-

	Applied for by prisoner.		Offered by Court without application by prisoner.	
YEAR.	Granted.	Refused.	Accepted.	Declined.
1931	1580	602	242	19
1932	1976	1024	219	49
1933	1999	954	255	8
TOTAL:	5555	2580	716	76

It may be observed that the number of applications for legal aid refused is considerable,

namely, over 28 per cent. in 1931, 34 per cent in 1932, 32 per cent in 1933.

It may also be noticed that the total number of legal aids given every year appears insignificant when considering the enormous number of proceedings dealt with in all criminal courts.

One striking fact emerging from the figures is that the number of legal aids offered by Court without application and accepted by prisoner is substantial. It constitutes over 15 per cent. of all legal aids applied and granted in 1931, more than 11 per cent. in 1932 and about 13 per cent. in 1933. This fact is, I think, due to the ignorance of the accused of the system.

Second, the annual record of legal aid and defence certificates stands as follows:-

YEAR	Legal Aid Certificates.		Defence Certificates.	
	Granted*	Refused	Granted*	Refused
1931	501	125	1321	487
1932	632	199	1563	825
1933	645	225	1589	729
TOTAL:	1778	649	4473	2041

* including legal aid & defence certificates applied for by prisoner and offered by Court without application by prisoner.

From the foregoing figures, it will be observed that the number of legal aid certificates granted is much smaller than that of defence certificates, constituting about 28 per cent. of all. When considering the overwhelming majority of criminal cases dealt with in the Courts of Summary Jurisdiction as has been examined elsewhere,[1.] the number of legal aid certificates granted therein appears to be so insignificant as almost infinitesimal.

If viewed from the authorities who certify legal aid and defence certificates, the following figures appear:

YEAR	Legal Aid Certificates.				Defence Certificates.					
	Courts of Summary Jurisdiction.		Examining Justices.		Committing Justices.		Cts of Quarter Sessions.		Courts of Assizes.	
	Granted	Refus:	Gtd.	Rfd.	Gtd.	Rfd	Gtd.	Rfsd.	Gtd.	Rfsd.
1931	179	66	321	89	690	132	291	223	339	122
1932	258	88	374	111	867	289	400	345	312	191
1933	233	105	422	130	940	242	385	279	264	208
TOTAL:	670	259	1117	290	2497	673	1076	847	915	521

* Abbreviations: Gtd = Granted; Rfd = Refused.

1. cf. Chapter. VII the Courts of Summary Jurisdiction.

It is interesting to note from the above table that according to the number of legal aid and certificates granted, the order of different certifying authorities ranks as this: committing Justices, examining justices, courts of Quarter Session, Courts of Assizes and Courts of Summary Jurisdiction. If, on the other hand, according to the number of legal aid and defence certificates refused, the order of different authorities is this: Courts of Quarter Sessions, committing Justices, courts of assizes, Examining Justices, and Courts of Summary Jurisdiction.

The striking fact is that the number of legal aid granted by the judges is substantial.

The working of the Act is decidedly better than its predecessor but it is far from being ideal.

First of all, the Act gives no one, except in cases of murder where the means of the accused appears to be insufficient to enable him to obtain legal aid, a right to have legal aid; absolute discretion is left to the Court as to whether the interests of justice demand it.[1.]

1. Poor Prisoners Defence Act, 1930, s.3. (a) (b)

Commenting upon this, Mr. Atkinson remarked:[1].

"If a man is charged with murder, he can ask for a certificate and gets it without more ado, but in the case of any other offence, however serious, he has to show that there are some special circumstances, and even then it is left to the discretion of the justices or the judge as to whether a certificate shall be granted. It seems to me that there are other serious offences which ought to be placed on the same level as murder."

In the opinion of Mr. Grace, "In serious charges like manslaughter, rape, robbing with violence, all those charges where the gravest possible consequences may result to the convicted person, it is unfair if the accused cannot afford to provide his own legal aid, that there should be any discretion. In those cases it should be a matter of right and not a matter of discretion on the part of the court to grant legal aid. "My own experience," he observed,[2]. "is that magistrates, judges & recorders under the present law are rather diffident about granting public money for free legal aid.. Very rarely does one find in real justice, where there is just a faint possibility of defending counsel, by some ingenious means, putting up a plausible defence, a defence that possibly the learned judge or the learned recorder has not discovered in looking at the depositions, that discretion being exercised in favour of these people."

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1. ~~Parliamentary Debates (Commons) 236:~~ 5553, (1929-30) 238 H.C.
2. Ibid. 238: 560

That this discretion has been strictly exercised can be told by the percentage of the number of applications refused. As has already been observed, out of the total of 8135 applications during 1931 to 1933, no less than 2500 were refused, namely a little over 30.4 per cent.

In the second place, there is no one under any obligation to explain to the accused what the law upon the matter is or even that such a law exists. Certainly a large number of those who might be included within its beneficient scope are entirely ignorant of it, particularly those who are first offenders. The fact that during the last three years more than 13 per cent. of legal aids were offered by courts without applications by the accused leaves this in no doubt.

It is true that the provisions of the Act are usually printed upon cell cards in police

courts and in prisons, but the habit of reading, and the power of understanding, notices couched in official language are not universal gifts among the less educated. A verbal explanation at an early stage of the trial, or better still, before the trial begins, would greatly increase the value of the Act. It is scarcely necessary to emphasise that should the law be not extended, at least it should be more freely used, every prisoner should be made acquainted with its provisions. It follows that every person upon summons and arrest should be informed in clear language of the conditions

governing applications for legal aid.

Finally, another point deserves to be carefully noticed. Reference has already been made that a large number of legal aids were granted not by the committing justices but by the justices in the Quarter Sessions and Judges of Assizes. It is desirable that the granting of legal aid should be made as early as possible. The importance of this has been called to special attention by more than one authority. "We are further of opinion that it is better in the interests of justice that where legal aid is desirable," The Committee on Legal Aid reported,[1] "it should as far as possible be granted by the committing justices and should not be left to the judge at the trial. We would recommend that a circular should be issued to justices calling their attention to the provisions of the Act and suggesting that it would be desirable for them on committing a case where in their opinion legal aid under the Act is necessary, to ask the person about to be committed whether he desires to apply for legal

1. First Report of the committee on Legal aid for the poor para. 13. p. 7. Cmd 2638 (1926)

aid, and if he does so desire, to deal with the matter then." These weighty words of the Committee have equal, if not greater, force today as they were written ten years ago.

In the opinion of Mr. Llewellyn Jones, it is at the very start of a criminal prosecution that it is essential that a person should have legal aid. "The defendant may have evidence," he said in the House of Commons, "which should be placed before the Court, and he may have witnesses who should be approached so that they may be called before the Court. Unless this step is taken at the very earliest moment, there is a possibility that he may suffer injustice. He referred to a case where no legal aid was given to a person being charged for assault and attempt to rob on the highway, and convicted at Assizes and after a lengthy enquiry made by the Home Office that his defence of alibi was an absolutely reliable one, was released within two or three weeks after his conviction from a term of penal servitude. If legal aid were given at the very beginning of the case, Mr. Llewellyn

Jones inferred, "the result would probably have taken in that case, the whole of the evidence would have been brought before the examining justices, and instead of the man being sent to the Assizes, the case would have been dismissed. Apart from anything else, a large amount of cost which was thrown upon the country, would have been obviated." He even went so far as to suggest that in the Rules under the Act a provision may be made so that no step will be taken in the prosecution which comes within the scope of the Act without the defendant having an opportunity from the very outset of consulting a legal adviser, with a view to placing his case before him.[1.] Having reviewed the system of legal aid in criminal cases, I shall now proceed to examine it in civil cases. The solicitude for the poor litigant has a long history in English law. Some would read into section 40 of Magna Charta the modern humanitarian principle of legal assistance to the poor.[2.] Others[3.] have told the long history

1. O. Champion: Justice & Poor in England, p.2.
2. John MacArthur Maguire: "Poverty and Civil Litigation" 26 Harvard Law Review pp. 361-404; E.R.Cook: "poor Persons Procedure" The Bell Yard, No.IX (1932)

I. 23 | : 2. H.C.S. 1427 (1929-1930)

of past efforts made from time to time to mete out justice to the poor, how the royal prerogative became the early source of poor man's justice whether it was directly exercised or indirectly dispensed through the General Eyre, the early Chancery Practice or other aspects of the King's Council, such as the Star Chamber, and the Courts of Requests, how the epoch-making provisions enacted in 1495 of suits in forma pauperis held sway for nearly 4 centuries, hedged round by the Procurtean test of poverty, finally repealed in 1883 and replaced by the Rules of the Supreme Court; how the rules of 1883 failed and was replaced by those in 1914 which was again found inadequate and succeeded by the rules of 1925. This long and interesting History of development in the direction of legal assistance to the poor needs scarcely detain us here.

The present system of legal aid in civil cases which has begun its life since 1925 provides for the work being done under the supervision of the Law Society, and the Provincial Law Society by committees to be appointed by those

societies and approved by the Lord Chancellor, such committees[1] to have power to certify who shall be admitted as poor persons to nominate conducting solicitors and to exercise a general supervision over the conduct of the proceedings. It provides also an annual government grant in aid of administrative expenses to the Law Society.

Before a Poor Person's certificate can be granted the applicant must satisfy the following conditions:

(1) he is not worth a sum exceeding £40 (excluding wearing apparel, etc.) or in special circumstances £100;

(2) his usual income does not exceed £2 per week, or in special cases £4 per week.

(3) he has reasonable ground for taking proceedings.[2]

With regard to matrimonial cases and other ancillory provisions, there are certain special provisions aimed at preventing abuse.[3] Upon the certificate being granted the person may proceed in the courts without payment of Court fees and

1. At present there are 91 Committees in all. Poor persons Procedure Report Law Society, 1930.
2. R.S.C. Ord. 16.R. 22 & 23.
3. Ibid., Ord. 16, R.23. (3)

and without paying his solicitor and counsel. The solicitor and counsel are not entitled to make any charge against him except for out-of-pocket expenses, but will be under a liability to conduct the proceedings on his behalf.

The activities of the Poor Persons' Committee during each year are set out in a report which is appended to the annual report of the Council of the Law Society.

The number of applications received and granted steadily increases every year as follows:-

YEAR.	LONDON. No. of Applications.		PROVINCIAL. No. of Applications.	
	Received.	Granted.	Received.	Granted.
1925	3226	1499	30	9
1926	1166	477	2133	827
1927	1540	769	2590	1290
1928	1784	742	2719	1358
1929	1921	864	2896	1451
1930	1974	889	3114	1569
1931	2275	1037	3331	1779
1932	2372	1048	3596	2004
1933	2531	1117	3835	2114
1934	2655	1112	4074	2205

In 1935 there were in London 2792 applications received and 1166 granted, while the complete provincial figures are not yet available.

The results of proceedings by poor persons may be shown by the following table:

	Poor Persons Successful...	Poor Persons unsuccessful.	Proceedings abandoned, struck out, etc.	Total Cases disposed of.....
1925	542	53	208	803
1926	883	55	147	1085
1927	1527	56	130	1713
1928	1548	67	49	1664
1929	1238	43	58	1339
1930	1504	59	97	1660
1931	1530	61	186	1777
1932	1761	80	133	1974
1933	1771	83	179	2033
1934	1848	94	211	2153
TOTAL:	14152	651	1395	16191

From the above table it may be observed that the annual average cases in which the poor persons were successful constitute a little more than 86 per cent, those in which the poor persons were unsuccessful, over 4 per cent. while those proceedings abandoned, struck out, etc. about 9 per cent.

The vast majority of Poor Persons Proceedings disposed of every year are matrimonial cases. The number of matrimonial and other cases may be shown by the following figures:

Matrimonial Suits & Other cases.

	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934.
matrimonial cases	688	955	1612	1572	1217	1501	1625	1824	1875	1880
other cases	115	130	99	92	118	152	152	150	158	273
TOTAL:	803	1085	1713	1664	1339	1653	1777	1974	2033	2153

During the last decade the number of matrimonial cases amounting to 14755 out of the total of 16194. Poor Persons proceedings. On the average, matrimonial cases occupy about 91 per cent. of all.

Having reviewed the works done under Poor Persons Rules during the last decade, I shall attempt to evaluate the system as a whole. It may be said at once that within its limits the system works fairly well and the gratuitous service of both branches of legal profession is highly admirable. As pointed out by a leading article in the Times on February 8th, 1936, "one measure of the success of the system is the large number of applications for assistance. Both in London and in the Provinces the figures have arisen considerably since 1924, and from 1926 the Committees have considered a total of some 50,000 applications, while

16,000 actions have been conducted, in the great majority of cases to a successful issue. In London the last year about £17,000 was recovered in judgments and settlements. Matrimonial disputes still dominate, though the report (~~concerning~~ the Report of the Law Society) gives details of many cases of interest in other branches of the law. Many are still under the false impression that the profession is in some way paid for its services by the State. Yet the work of both branches of the legal profession under the Poor Persons Procedure is a consistent record of voluntary public service which has wrought inestimable benefits to thousands who, without it, would have been too poor to establish their claims."

The Law Society is indulgent in no exaggeration when the report says,[1] "This is a record of which the Profession may be proud. Not merely has the work been conducted promptly and successfully from the initiation of the scheme, but it has continued to be dealt with without interruption in spite of a regular annual increase in its volume and complexity."

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1. Poor Persons Procedure, Report, 1936.

But the voluntary and admirable effort of the workers should not blind us to the drawbacks of the system itself. Viewed as a whole, many things may be said against it.

To begin with the test of a "poor person" is neither in touch with the prevailing practice of modern states nor in strict accord with modern economic conditions in this country. In most countries the poor person has to pass two tests before he can be admitted to the benefit of legal aid, namely:

(1) a poverty test -and-

(2) a probabilis causa litigandi test.

With regard to the latter test, it is only necessary that a prima facie case should be made out. As to the former, there is no rigid poverty test in most civilised countries, the test usually is whether legal aid, in whole or in part, is necessary, because of poverty in the particular case under consideration, to insure that the poor person gets justice. With the exception of Spain, England is the only country that has a rigid poverty test as a condition precedent of granting legal aid. The fixed and rigid poverty limit prescribed in the Poor Person Rules of 1924 has been, on the recommendation

of Mr. Justice P.O. Lawrence Committee,[1] made still more rigid, by the addition of an income test to the previous existing capital test. In matrimonial cases where a wife is the poor person, the poverty test appears more rigid than other cases.[2] These chains and shackles remain today. But the consequence is unfortunate. Because of the low limit of means prescribed in the Rules before a litigant can qualify as a poor person many persons who could not contemplate the provision of even £100 are deprived of justice. Such border-line cases are particularly noticeable in matrimonial causes. As pointed out by the Law Society in its annual report of 1934 and 1935, there are a number of applicants to the Poor Persons Committees who desire to petition for divorce to whom a certificate cannot be granted because their income exceeds the limit slightly. Such persons are practically deprived of the opportunity of taking proceedings because those proceedings must be taken in London. Cases like those not only point out the fact that it would be in the public interest if the jurisdiction of the District Registries were extended gradually until all the District Registries are available but also demonstrate

1. Report of committee to enquire into poor persons Rules, 1919. para. 14
2. R.S.C. order 16. R.23.

the fundamental defect of a rigid poverty — test in Poor Persons cases. As a result the number of poor persons who are fortunate enough to come within the beneficient scope of the Rules are scarcely considerable. On the evidence of the Report of the Law Society, a total of some 52,000 applications have been considered and 16000 actions conducted during the last decade, with the annual average of some 5,200 applications considered and 1600 actions conducted. Though the number of applications and proceedings steadily increase, it appears but too small when the total number of proceedings in Civil Courts and the mass of population in England and Wales are considered. The number of Poor Person's proceedings in 1934, for instance, constitutes about .0026 in terms of all court proceedings or one in 375. Some even went so far as to say that "less than 10 per cent. of the legal needs of the poor are assisted by the government, the other 90 per cent. of the need is provided for only by chaos or charity."[1].

Whatever may be the truth in this statement, the present rigid test under the English system

1. C. Champion. Justice and the Poor in England, p.78.

is undesirable. A more liberal and elastic test has been the practice of major countries in the World. With regard to the poverty test in former pauperis proceedings in different countries, the report of the League of Nations records in these words: "In some of the systems described below, an absolute standard is still maintained - if a man has property of a specified value, then, regardless of his burdens, he cannot obtain legal aid. In the majority, however, a more elastic criterion is employed; legal aid is granted to anyone who proves, generally by official certificate, that he is unable to pay the costs of advice or litigation without depriving himself of resources necessary for his own maintenance and that of his family. The latter standard has the advantage of taking into account circumstances which may well make any fixed sum less than adequate for ordinary support."[1].

1. League of Nations, introduction, Geneva, 1927, p.9. This report falls into three parts: Part I consists of the laws, regulations and treaties provisions regulating legal aid in certain countries. Part II, gives the substances of the governments' replies with regard to legal aid institutions operating in their territories. Part III is a list of persons or authorities designed as prepared to answer enquiries.

In this respect the majority practice of an elastic poverty-test in forma pauperis proceedings appears to be decidedly better.

Not only does the rigid poverty test preclude many persons from obtaining justice, but inability of the poor to provide the out-of-pocket expenses for the solicitor to conduct his case is another obstacle in the way to the Court of Law. The sum required varies according to the means of the litigant and is, in fact, scarcely adequate to cover the "out-of-pocket expenses" of his case. In London it cannot be more on the average than £3, and in the provinces probably less."[1].

This sum appears small on the average but looms large in particular cases and certainly is unbearable to the poorest of the poor. The very poor, whose means though fall within the four corners of the Poor Persons Rules, are nevertheless not in a position to enjoy the benefits of the system, because they cannot provide the required deposit of "out-of-pocket expenses" That this is the case is no more matter of imagination but sober facts of

1. Report of the Law Society, 1936.

reality. The Yorkshire Law Society states in their report of December 12th, 1935 that some of their applicants recently have been practically without means and unable to find the deposit. The deposit in these cases was found by the conducting solicitors. Were the public spirit of the solicitors a little less than those self-sacrificing and altruistic solicitors at Yorkshire, the poor applicants would not have obtained justice. Such conduct is, of course, highly admirable but by no means always reliable. Here is a gap in the existing system which needs to be adequately filled up. Unless it is reformed, any poor persons must suffer wrong without remedy for being unable to make the required deposit.

As early as in 1919, the Report of Mr. Justice Laurence's Committee stated their findings with regard to Out-of-pocket Expenses in matrimonial cases as this:

> "The conclusion to be drawn from those facts is that it is futile for a Poor Person to attempt under present conditions to get a divorce unless such person is prepared to find at least £10 in an ordinary case and £25 in a nullity case ..... unless a fund is constituted out of which the expenses of the Poor Persons case be defrayed, the really poor or quite destitute persons have no chance of availing themselves of the Rules to obtain a divorce."

1. Report of Committee to enquire into the Poor Persons Rules. Cmd ~~Paper~~ 430. para.10 (1919)

The important and urgent need of such a fund is obvious but has not been constituted to the present, notwithstanding the finding of the Committee seventeen years ago.

Thirdly, the office hours of the committee and of the lawyers who work for the system are not always convenient to a working-man who usually hesitates to advertise his misfortunes to his employer by asking for time away from work. No matter how efficient a system of legal aid for poor persons may be, it must fail, to some extent, to fulfil its object unless those for whose benefit it is intended have convenient access to it.

Fourthly, among the drawbacks of the present working of the system, not the least is due to the fact that so little is known. If it is not brought to their notice, the poor persons are shut out of its beneficient doors. But there is very few references to the rules in non-legal quarters; the only one I have ever seen consists of an excellent notice exhibited in the casualty wards of some of the hospitals advising injured persons not to entrust their cases to those who "tout" for them, and suggesting the local Poor Person's Committee as the appropriate

alternative.

In the fifth place, unless the court or justice shall otherwise order no poor person shall be liable to pay costs to any other party or be entitled to receive from any other party any profit costs or charges.[1.] But following upon the recommendations of Lord Merriman's Committee on poor persons procedure,[2.] it has been provided that where it appears that any party has acted unreasonably in bringing proceedings against a Poor Person, or in defending proceedings brought by a Poor Person, or when it appears that the special circumstances of the case require it, the Court may order payment of the costs of the Poor Person including profit costs or a proportion of profits, or a sum of money in respect of costs.[3.] The new Rules provide also that where the proceedings are of such length or difficulty as to throw an unusual burden on the solicitors acting for the Poor Person, the Court may order the other party to the action to pay the Poor Person's solicitor,

1. Ord. 16 R.28 (1)
2. cf. Report of the Poor Persons Procedure Committee 39-9099 (1934)
3. Order 16, R.31A.B.

in addition to out-of-pocket expenses, such sum as the Court or Judge thinks fit in respect of such unusual burden.[1] These innovations are no doubt in the right direction. But they have not gone far enough. There appear scarcely any valid reason why a successful Poor Person cannot recover costs like any ordinary litigant. First, it is difficult to see why a party should not pay the costs, which he would have to pay if his opponent party had not been a poor person. Secondly, there is little cogent reason why a Poor Person, if unsuccessful, should not be liable for the costs like any other litigant. The liability for costs can do him little harm for one cannot get blood from a stone. At any rate, the relief from liability does not in any way counterbalance his deprivation of the right to recover costs when successful. Thirdly, at present even the Poor Person is successful, the state is deprived of Court fees and therefore loses revenue. Fourthly, before the Judicature Acts of 1873-5 a successful

1. Ibid, R. 31 B (3)

poor litigant in the Chancery Court received costs as an ordinary litigant but in the King's Bench Division, he was not allowed costs. The present rule is unknown in other countries. Nor is this obtained in Scotland, where the successful poor litigant is awarded costs.

On the other hand, if the ordinary rule of costs were adopted in Poor Persons Proceedings, it is so obvious that many advantages would follow that no elaboration on this point is necessary.[1.]

It may, however, be noticed here that the main difficulty of any change in this regard is the attitude of the legal profession to the system of legal aid. Any cursory review of the arguments for and against awarding of profit costs as given in the Report of the Poor Persons Procedure Committee 1934 will, I think, leave one in no doubt. The Report after enumerating seven joints of arguments in favour of the awarding of profit costs set forth eight items of arguments against the change, no less than five or six of which are based upon the probable effects upon the legal profession.[2.]

1. G. Champion, op.cit. p.64.
2. Report of the Poor Persons Procedure Committee 39-9999 (1934) paras. 13-14, pp.4-5.

The Committee wisely took the via media and recommended the awarding of costs under certain specified circumstances. It is only due to the professional attitude adopted by the Committee[1] that no radical change in this respect has been recommended and made. ~~The problem of legal aid turns upon how it can best be given in civil cases in the County Court.~~

In the sixth place, one of the most serious difficulties often ~~confronted with in~~ arise under the present system is lack of altruistic lawyers willing to give their gratuitous service. This want demand feels particularly acute at London and some other places. As set forth in the annual report of 1935 of the Law Society, the honorary secretaries of 11 out of 91 Committees point out that if a few more solicitors in these areas would volunteer assistance, the burden of those others who are willing to offer their services would be relieved. In London the smallness of percentage of solicitors undertaking legal aid work is obvious from the figures. Out of approximately 5378 practising solicitors, only 1675 have placed their names on the role of conducting solicitors. In the opinion of the Law Society there would

1. Ibid. paras. 18-23, pp.6-9

seem to be a possibility that the London Committees may have to meet even more frequently and if this should happen it will become difficult to allocate cases promptly for conduct and delays will occur. "The time, therefore, has arrived," the Report[1.] says,"for making a special appeal to London Solicitors whose names are not already on the Rota." It is therefore apparent that even within the limited scope of the existing rules the lack of adequate numbers of volunteers has always been a source of difficulty. How much would it be, if the present system were extended to other courts?

It may, however, be observed that such difficulty as has been experienced is inherent in, and almost inevitable under, the present system of legal aid on voluntary basis.

Finally, one of the most serious drawbacks of the present system of legal aid in civil cases lies in its limited scope to the High Court only. This procedure therefore only touches the fringe of the problem which has yet to be dealt with. There is no legal aid in County Courts and Police Courts with the only exception of remitted cases from the High Court to the County Court. As has been pointed

out elsewhere about 90 per cent. of all civil proceedings in England and Wales are yearly dealt with in County Courts, which are professedly and manifestly poor mens courts resorted to mostly by the poor, the lack of legal aid here is ironical, anomalous and much criticised.

In the words of Bentham Committee: "a big gap is thus left, as the County Courts and Police Courts are obviously the Courts to which poor people have recourse for the settlement of the vast majority of their disputes."

The question of free legal assistance in county courts and the remission of court fees was considered by the Departmental Committee on Legal Aid for the Poor under the Chairmanship of Mr. Justice Finlay. The Committee reported in 1928 against the system of legal aid in County Courts except the remitted cases from the High Court in which legal aid should be continued and the court fees remitted. "As regards free legal assistance in the County Court," the report[1.] says: "We have not been convinced that there is any considerable number of cases in which a litigant possessing a good case is unable to pursue his remedy by reason of a failure to

1. Final Report of the Committee on Legal Aid for the Poor, para. 13, pp.7-8, cmd. 3016 (1928)

secure legal assistance. It must be remembered that a large proportion of the cases in the county court are simple in character, and the Judge is well able to entertain the facts so that it is neither necessary not advantageous that there should be any legal assistance at all .... It is undoubtedly desirable to encourage the giving of good legal advice to the poor; it is not desirable, speaking generally, to encourage litigation. There are many cases where, though there may be some violation of a legal right, it is neither prudent nor advisable to litigate, and we believe that any scheme which might tend to make people more litigious should be deprecated.

Lastly, it is extremely difficult to see how such a system, apart from some scheme of State or Municipal lawyers, which we discuss below, could be worked. Its success would depend on the co-operation of the solicitor's branch of the legal profession. In this connection we think it relevant to observe that the evidence before us shows that a serious amount of work has been imposed upon this branch of the profession by the recent provisions of the Poor Persons Rules in the High Court. We should hesitate long before we recommended so onerous an addition to that

work as would be involved in the application to the county courts of the High Court rules .... If it were established that injustice was being done to the poor by the absence of any provision for legal aid in the county court, the above considerations might well be thought inadequate to justify a refusal to provide such legal aid. But we are satisfied that the cases where the failure to provide legal assistance amounts to a denial of justice are very few indeed, having regard especially to the assistance given to the poor by Trade Unions, by friends or philanthropic agencies and by solicitors who, if they think that there is a real grievance, are often most generously prepared to take up cases."

These arguments from the pen of such high authorities deserve all respect and careful consideration. They are, however, by no means convincing to me. To begin with, it is to my mind both necessary and advantageous that there should be a system of legal aid in county courts. The assumption that a large proportion of the cases in the county court are simple in character is open to question and disputed by those who are acquainted with the subject and competent to speak.

"And the suggestion that all a County Court Judge has to do in his day's work is to unravel a few simple facts," wrote Judge Parry[1]. "that he has no legal problems to trouble him and that his work is intellectually of a lower order than that of the High Court Judge, is another misconception of the obvious. ... Take as two examples of the sweet simplicity of legal matters in a County Court, which no High Court Judge is entrusted with, the Workmen's Compensation Act and the Rent Restriction Act. Is legal advice as to these matters, which may bring relief or ruin into the homes of the poor, a matter which lawyers in honour to their profession can wash their hands of? .... And though the evidence is not published, one can hardly suppose that the County Court Judges who were asked to advise the Committee, can have told them of the simplicity of the Rent Restriction Acts. These statutes, though used in the main for the protection of the poor, have by their intricacy and uncertainty ruined many poor persons". Even this assumption held by the committee is valid, still the argument is not adequate to refuse legal aid there. Not to say those cases which being not simple, should

1. The Gospel and the Law pp. 274-277. (1923)

have legal aid on the admission of the Committee, the unrepresented poor have great difficulty even in simple cases. They cannot properly bring out the vital point at issue, but get astray in a multitude of details and irrelevant matters. They are, moreover, unable by cross-examination, to test the truth of the evidence of the other side. Secondly, to assume that any system of legal aid in County Courts would tend to encourage litigation, as the Committee appears to so assume, is not only illogical and untrue but to ignore the real nature of the case. Were this true, the Poor Persons Procedure should be abolished root and branch. The danger of vexatious litigation under the legal aid system can be and is, in fact, eliminated by the preliminary examination of the application through poverty test and the probabilis causa litigandi test. Spurious or litigious cases cannot undergo such examinations and are surely to be ruled out. To help the poor to obtain justice by legal aid system and to encourage litigation are two entirely different things. Thirdly, the reason that, if legal aid were given in county courts, it would add an unbearable burden upon the already burdened legal profession is, of course, a poor excuse but by no

means a strong justification for the refusal to help the poor in quest of justice. On the contrary, it is a reflection upon the existing system and goes to the very root of the principle whether legal aid to the poor should be conducted by the legal profession and not by the State. Finally, on the admission of the Committee, if it were established that injustice was being done to the poor under the existing system, legal aid should be provided. Such cases of injustice, I submit, are not wanting.[1.] Under the Rent Restriction Acts,[2.] for instance, landlords of certain classes of houses are restricted in their rights as to obtaining possession of their houses as to the amount of rent they may charge. Claims to possession under the Act are very common in the County Court. The Acts and the decisions under the Acts have produced so complicated a part of English law that practically few member of the public and not many lawyers understand it. The landlord frequently has professional assistance. But

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1. cf. G. Champion, op.cit. supra. p.36
2. A series of enactments c.f. 20 Halsbury's Laws of England (2nd ed.) Landlord and Tenant, p.312 et.seq. 1936)

the tenant is as a rule unrepresented[1] because he belongs to the most impoverished class of the community. Except, apart from the assistance which he has the fortune to obtain from the Bench he is usually helpless. Even with that assistance he does not know Court procedure, nor what witnesses are required, still less what legal defences are open to him. In the result, he is ordered to give up possession of his house and to pay the costs. Ruined he is. Were there legal assistance for him, he would be in a much better position. "And why should not we have legal hospitals and out-patient departments attached to the County Court," asked Sir Edward Parry, "where the house physician is the young man who has taken the best degrees in law and the visiting surgeon is the great leader of the legal profession?"[2].

Fourthly, on their own admission, the Committee recognised that there are cases where the failure to provide legal aid amounts to a denial of

1. ~~Parliamentary Debates (Commons)~~ 231: 1453 1929-30
2. The Law and the Poor, p.176. (1914) London.

justice but in their opinion such cases are "very few" or they have not been convinced that there is any considerable number of (such) cases."

This is, I think, an amusing touch! It seems to argue as some have argued when they speak of the sum total of human suffering. They appear to think that hundreds of thousands of people must have suffered injustice before any reasonable ground can be shown for reform. The problem, however, can scarcely be viewed and judged in this way. Whether there are a few cases or a thousand do/es not affect the principle at all. It would be far better and much nobler, even though it might cost something, that we should take the utmost care to ensure that not one single case should suffer injustice ~~than we should allow injustice to run riot.~~ In this connection, England appears to me lagging behind other modern nations. "In some countries assistance in litigation is not available in all the courts." The Report[2] made to the League of Nations as to international arrangements for legal assistance for the Poor thus wrote: "It has, for example, been a frequent matter of criticism that in the English procedure there is no arrangement for assistance to the

1. Sir J.J. Withers: "Legal aid for the poor" The Magistrate No 22. p 311.

2. Report made in Aug. 1924.

poor before the county courts i.e. those tribunals which deal with cases involving small interests. On the other hand, the development in some countries of special subordinate courts dealing with minor interests, or the establishment of a special procedure for settling disputes connected with wages and conditions of work, workmen's compensations, rent, etc. may, in itself, be of great value to the poor. For example, under a Spanish law of 1912, justice is administered gratuitously in the industrial tribunals, and the provisions of the ordinary law as to free legal assistance also apply."

In Italy, France, Belgium, Germany, Poland, Estonia and Norway, legal assistance may be requested in civil cases in all courts. The point which appears to be of particular interest is the number of countries for which provision is made in the Courts of first instance. The principle of legal aid appears to be more fully recognised as part of the system of justice in such countries than in England.

In this connection it is worthy to note what is being done in the U.S.A. As said by Mr. J.S. Broadway, member of Standing Committee on Legal Aid

work of the American Bar Association, "unorganised legal aid work is done in every law office in the U.S, and has been from the very beginning. Organised legal aid work was begun in New York City in 1876.... At present there are some 80 legal aid organisations throughout the county. Each year now they handle upwards of 300,000 cases."[1.]

Not only are there in the U.S. many old-standing associations for giving Legal Aid to the Poor, but since 1923, there has been a Central Organisation of Legal Aid Societies with a permanent secretary which holds annual meetings of delegates from various States to discuss problems of principle and procedure.

The development and volume of work of legal aid in U.S.A. may be summarily given in the following table:

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1. Reports of American Bar Association, Vol.59, p.102 - 104 (1934)

YEAR.	No. of New Cases.	Amounts collected for clients.	Operating Expenses.
1920	96,034	£ 339,855	£226,079
1921	111,404	456,160	282,359
1922	130,585	499,684	328,651
1923	150,234	498,841	331,326
1924	121,177	662,675	348,290
1925	143,653	675,994	408,576
1926	152,214	645,991	369,264
1927	142,535	719,643	387,331
1928	165,817	645,435	461,557
1929	171,961	802,328	464,420
1930	217,643	816,447	548,803
1931	227,471	674,122	538,129
1932	307,673	815,440	596,941
1933	371,970	727,499	481,756

Mark Twain once read the figures of legal aid work in U.S.A. and said: "It conducts its affairs so quietly and so unostentatiously that I did not know how extensive is the work it is doing. It stirs one's blood and compels one's deep homage to read the great figures." Where does the legal aid work stand in England? As has already been said, during the period of 1926 to 1935, there were only 16,000 actions conducted under the Poor Persons Procedure with an annual average of 1600 actions; in the last three years only 6,261 cases under the Poor Prisoners Defence Act, i.e. about 2100 cases a year; while there is no available statistics as to the number of cases dealt with by the Poor Man's Lawyers in England. According to the report of the Bentham Committee there were about 20,000 cases year-ly

dealt with by 43 local Poor Man's Lawyer Centres in London affiliated to the Committee.

Though the complete figures of legal aid work in England are not available, it is generally believed that in this respect the records of the New World ~~beat~~ purpass those of the Old.

Viewed from whatever points, the volume of legal aid work, its finance, organisation, methods, etc. the New World has set an example for the Old.

Having now briefly surveyed the system of legal advice and aid to the poor, both in civil and criminal cases and noticed its drawbacks and shortcomings, let me add a word of reform. First, as to legal advice, there have been several alternative proposals. Some suggest that provision should be made for legal advice being given to all persons insured under the National Insurance Acts. There is an analogy, they argue, between medical advice in a case of sickness or accident and legal advice. But in the opinion of Mr. Justice Finlay's committee, the application of the Acts to legal advice would undoubtedly be attended with much difficulty and there was lack of reliable data upon which the

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finance of such a plan could be computed.

In the opinion of others, the proposal would bring into law the medical penal system, with all its defects, and not the medical hospital system, which has raised the tone and status of the medical profession, while the panel system has lowered that tone. Even if it is practicable, the proposal would not meet the legal difficulty, partly because it would not enable legal aid to be given to all - including the poorest of the poor and partly because the medical need, being more or less constant, can scarcely be compared with the legal need, which apart from legal advice, would only arise on comparatively rare occasions when it would be comparatively very expensive to meet.

Others suggest that a state subsidy to meet the expenses of Poor Men's lawyers would be the easiest and simplest method of solution. But two things may be observed here. First, poor finance is, no doubt, one of the greatest difficulties experienced by almost every Poor Man's Lawyer[1] Contra. If the suggested state subsidy were carried out, it would, somewhat meet the financial difficulty. But finance

1. Justice and the Poor, pp 193-4.
R.H. Smith:

is, though one of the most serious difficulties, by no means the only difficulty.

Secondly, the state would scarcely consent to grant a subsidy without some provision for inspection and supervision. The system of State supervision, more or less, would be instituted. This, however is opposed to even by the proposers of state subsidy.

The third alternative is that there should be organised, either by Municipalities or by the state, a system by which poor persons could obtain legal advice ~~give~~, and, if necessary, legal aid im the conduct of proceedings, from lawyers specially retained by the Municipality or the State. The Minority Report of Mr. Justice Finlay's Committee on Legal Aid is specific on this point. "We suggest," the Report says,[1] "that the only effective remedy is the provision of legal advice by the Local Authority. Local Authorities, either singly or in co-operation, should be empowered to employ a qualified person to give legal advice. As in the case of the Medical Officer of Health the salary should be paid out of local revenue, and a grant-in-aid should be contributed by the Exchequer. The State would, of course, lay down the

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1. Final Report op.cit. p.12.

terms and conditions governing the appointment and duties of public legal advisers." Prof. H.J. Laski is in favour with the idea of organising bureaux of consultation by the local authorities but maintains that payment for this service should be according to means.[1]

This suggestion, which will be examined presently, brings us to the second part of the whole problem, namely legal assistance in civil and criminal cases.

On the criminal side, it is suggested that there should be created the office of public defender to undertake the defence, in all suitable cases, of poor persons accused of major crimes. The idea is by no means a new one, nor is it an untried experiment. Jeremy Bentham ~~has~~ more than once elaborated the institution of defender general. In several countries, the office of a public defender has long been an established practice and proved to be successful. Whether the public defender is preferable to secure equal justice to poor persons accused of crimes depend upon the answers given to the questions:

(1) Is the existing system of defence for poor prisoners adequate and satisfactory, ~~and~~ if

1. Law & Justice in Soviet Russia p.43 Day to Day Pamphlets No.23. 1935.

not, is the defender a better system than the present one?

The answer to the first question has partly been given above. As to the results of those proceedings defended under the Poor Persons Defence Act, 1930, there is at present no available statistics upon which to draw conclusions or generalisations. But apart from those drawbacks of the existing system which has already been examined, it is pertinent to observe some of the general tendencies under the assignment system. It has been argued that with a few notable exceptions the assignment of lawyers has been generally successful in murder cases but the outcome in all other cases does not admit to be optimistic. The reason is not far to seek. Lawyers assigned in murder cases work with the more enthusiasm. The life of the accusdd hanging precariously in the scale of justice has naturally the tendency of moving and spurring the lawyer on. The publicity in the newspapers of a murder trial gives the lawyer the best advertising he can ever have and the best occasion of exhibiting his ability. He generally earns a greater fee than the State pays and expends more than he

is reimbursed. Thus the lawyer's self-interest and the best traditions of his profession appeals to him strongly in murder cases.

But the circumstances are different in all other cases. The crime of which the accused is charged may arouse no sympathy and even may be revolting. The lawyer assigned, however desirous of performing his professional obligations, is not in a position of giving a thorough defence. Though the costs of defence, such as the fees of solicitor or counsel or other expense necessarily incurred in carrying on the defence are paid out of local funds,[1] they are nevertheless under strict limitations and often not adequate.

As argued by Judge E. Parry,[2] Solicitors and Counsel acting for poor prisoners, who come into cases when the indictment is before the Court, with little hope of proper remuneration and, what is worse, no adequate funds to investigate points for the defence, are not properly equipped for the contest. More important, such assignments fall more often than not to young and inexperienced lawyers who are more willing to serve for the sake of experience. Whatever

1. ~~Evidence taken before Select Committee on~~ Poor Prisoners Defence ~~Bill~~, 1939, ~~864 q.136, 149-50~~. A. 3 (1) 4 (2)
2. "Justice and Humanity." The Gospel and the Law Ch.X. pp. 264-266. (1926)

spasmodic efforts Courts may have made to whip the assignment system into shape by enlisting the leaders of the bar, the attempts have not proved successful. But the inexperienced lawyer is not much more qualified to defend than the accused is to conduct his own defence. As put by Sir H. Polland[1.] before Select Committee on Poor Prisoners' defence Bill, 1903, "To give a prisoner an inexperienced solicitor to get up his case, or an inexperienced counsel of only three years' standing at the Bar, even though he may get the advice of an old counsel, is to my mind worse than useless. He is far better off in the hands of the jury and the Judge."

Whatever fragments of truth may be in the ~~generalis-tion~~ indictment against the assignment system, it is incomparable with the system of a public defender. The essential underlying ideas in the proposal are two:

(1) that the lawyer or official responsible for the defence of indigent accused should be an experienced person who is adequately paid and equipped with all necessary elements of defence;

(2) that all the work should be centralised in the hands of one official or organisation rather than having counsel change from case to case.

1. Minutes of Evidence taken before Select Committee on Poor Prisoners Defence Bill 1903 HC qq. 136, 148-50.

In these two directions much progress has been made in other countries. In Scotland there has for centuries been an arrangement whereby the bar associations (both of advocates and solicitors) each year designate certain members to act for the poor, and to this group all assignments are made, thus securing responsibility and more or less centralisation. In Rome, there is a Society for the Gratuitous Defence of Accused Persons, comprised of Counsellor and attorneys, which was licensed as a charitable corporation in 1904 and represents the scheme of a legal aid society for criminal cases.[1.] In Denmark, the courts appoint for each case a prosecutor and defender both being selected from a list of public attorneys appointed by the King.[2.] In the Argentine Republic, the defence is entrusted to counsel appointed by the Supreme Court for life at a monthly salary.[3.] In the U.S.A. a public defender has been provided in Los Angeles County[4.] since 1914 in the municipal court in Portland, Oregon[5.] in the superior Courts in Omaha[6.]

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1. Chicago Legal Aid Review, vol. V. No.3. Oct. 1908.p.7.
2. Goldman: The Public Defender spp.9-13
3. Ibid
4. Los Angeles County Charter, sec. 23
5. City of Portland, Ord. No.3. & 107 of. 1925.
6. Proceedings of fourth conference of Legal Aid Soc. p.135.

since 1915; in the municipal Court in the city of Columbia since 1916.

Apart from the experience obtained in other countries the office of a defender has been advocated on several grounds. In the opinion of Judge Parry[1]. "The accused will never be on the same plane as the Crown until he is taken out of the dock, where as a presumably innocent man he has the right to be, and placed in a position to instruct a Public Defender, who should have the same access to all the known facts of the case as the Public Prosecutor. The two offices should be of equal honour, for what greater career can a man have than the power and opportunity to insist upon justice being done to the poor? Only, too, in this way can the prisoner be allowed to have discovery of all the facts and papers in the hands of the Crown and not merely those that the prosecution thinks fit to produce. I agree that there are cases where it would not be reasonable to put the defence, as now conducted, into possession of every police report. But when you have a Public Defender all the materials of the prosecution should be shown him, for he and the Prosecutor will both be engaged on the same purpose, which is not the conviction or acquittal

1. "Justice & Humanity." The Gospel and the Law. Ch.X. page 265

of an individual but an inquest of truth. We have seen in recent trials the inconveniences that arise from the inadequacy of a defence, and the public discontent that follows certain verdicts ..... But seeing that this is one of the many terrible alternatives that may befall anyone accused of crime, such a person ought to have the same assistance td uphold his innocence that the State has to prove his guilt. A rich man, of course, can have an equality of legal aid. The poor man has only a very inferior article."

Secondly the office of the public defender, it is argued, performs an essential function in the administration of justice more efficiently than the assignment system.

All other factors being the same or even, the lawyer who devotes all his time and efforts to criminal work would naturally be more familiar with intricate points of law and details of procedure than the lawyer who is occasionally assigned a case. He is in daily contact with the easiest method of conducting the work, knows the proper authorities to consult as doubtful points arise and develops his own staff of investigators. Centralisation of work makes specialisation possible and easy. The defender be-

comes

a specialist in criminal law and procedure. All this would result in great and increased efficiency.

Thirdly the office of the defender appears to be more economical than assigned lawyers. On the evidence of the experience obtained in U.S.A. this argument is well borne out by figures. Under the defender system in Los Angeles, the average cost of defence amounts to $21.87 per case.[1.] Under the assigned system in Milwaukee, there is an average cost per case of $40.86.[2.]

It is apparent that the system of assigned counsel is twice as expensive as the defender system.

Again on the evidence of American experience, the defender conducts his cases with greater despatch by trying his cases on their merits without resort to technical objections, unnecessarily formal or interlocutory proceedings taken chiefly for purposes of delay. This course saves enormous time and expense to the State without prejudice to the defendants.[3.] Finally, the office of defender will bring in train better results than any other system.

1. The Reports of Mr. Wood to the ~~Ed.~~ Board of Supervisors of Los Angeles, 1916.
2. Wood: The Place of the Public Defender in the Administration of Justice. (Milwaukee Bar Assocn.) p.18.
3. Mr. Wood, the defender of Los Angeles County,

(see page 65a

footnote from previous page (contd.)

reported in 1916 to the Board of Supervisors that his department saved Los Angeles County, over and above expenses, a sum of about two thousand dollars each year. 8 Journal of Crime L. 230,597.

The Defender will advise prisoners as to their legal rights, give them honest representation at the trial and submit to the Court the facts by which a just sentence may be fixed. Thus the whole tone of criminal trials has been raised. Nor is this all. As the system of public defender becomes successful, the evil and mischief of speculative lawyers are eliminated.[1] What is more important, the defender will be able to accumulate in criminal cases a mine of data and experience which will complement that gathered by probation officers, judges and others, all of which will be invaluable service in improving the administration of justice.[2]

On the whole, all argument for and experience obtained from the defender system point out the fact that the proposal, in last ayalysis, is nothing more revolutionary,[3] than a plea for the extension of what is best in the assignment system and

1. Wood: The Plan of the Public Defender in the Administration of Justice, p.14; 7, Journal of Crim.L.595
2. Train: The prisoner at the Bar, see introduction by John Wigmore, p.XVII.
3. It is by no means a new idea. Jeremy Bentham had on more than one occasion elaborated the establishment of defender general. cf. Constitutional Code, Work Vol.9. a draught of judicial

for reform on ~~other~~ modern lines of efficiency and economy. It is a better, if not complete, solution of the difficulties in the administration of the criminal law which has placed the poor prisoner at a serious disadvantage. It attains the desired end more efficiently, more economically and with better results than any other system. It secures freedom and equality of justice to the poor.

Such a benevolent and better system as well as tried experiment with success would most likely be received without diffidence in this country. Not so, however, is the case. The idea was deprecated by the Departmental Committee[1] on Legal Aid for the Poor in these words: "Any such scheme would, we are satisfied, be exceedingly expensive and difficult to work. We are clearly of opinion that no case at all has been made out for the scheme, because among many reasons the cases to be dealt with are far too few to justify it."

Moreover, in the opinion of others,[2] a

1. First Report of the Committee on Legal Aid for the Poor. Cmd 2638 (1926) pa.21. p.10.
2. Counsel for the Defence. An Enquiry into the question of Legal Aid for Poor Prisoners. Howard League Pamphlets (New Series) No.10.pp.16-17.

public defender would tend to fall into a routine performance of his duties. Again, it is argued, the vesting of an official with this function is at variance with the whole constitution of the two great branches of the legal profession upon whose good will and co-operation it is essential to rely.

These objections can scarcely bear close analysis. But they are completely refuted by the experience of the system obtained in America, that renders their further examination unnecessary.

On motion for Second Reading of Poor Prisoners' Defence Bill in the House of Commons, Mr. Turton concluded[1] "I would say, finally, that this Bill is a first instalment. Many of us would wish to go further, but I understand the Bill is the least common multiple of agreement.... The 1903 Act brought in justice, neglected as it was, out of the cold and gave her a small room in which to live. Now she has grown up and her children have grown up and they want the accommodation provided by a house. This Bill which I present is a house. Some of us may want a palace, but I ask hon. members to accept this house and to regard it as one step in our

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1. Parliamentary Debates (Commons) 231 H.C. 1 s1419. 1929-30.

progressive sense of justice." If the assignment system could be compared with a house, the defender system might not be inappropriately considered a palace But even with the establishment of the office of a public defender, the problem of legal aid has not been completely solved yet. There remains the question of legal aid in civil cases. It is suggested that the existing system of Poor Persons Rules should be extended to the county courts. In the opinion of the Council of County Court Judges the Registrar of the county courts should be empowered to remit court fees - wholly or in part - and to provide free legal assistance, if he were satisfied that the case was one in which the applicant should properly receive such assistance, and was unable to pay for it. The minority report of Mr. Justice Finlay's Committee endorsed the suggestion but would extend it to civil cases in Courts of Summary Jurisdiction.[1] It is, no doubt, desirable that legal aid in civil cases should be extended to all civil courts. But any extension of the existing system is scarcely workable for the simple reason that it is beyond what the legal profession can possibly bear the whole burden gratuitously. Even if it is practicable, it appears to me debatable whether

1. Cf. also the Report of the Departmental Committee on Social Services in Courts of Summary Jurisdiction paras. 47 & 51 Cmd 5122 (1936); 75 The Solicitors' Journal pp 20-6.

the problem of legal assistance to the poor as to legal advice and legal representation both in civil and criminal cases should be solved in this separate ways.

Such proposals as bureaux of legal advice, public defender and the extension of Poor Persons Rules to all Civil courts will no doubt do much good and useful work. But any such attempt to deal with each aspect of the problem of legal assistance to the poor separately and in a piecemeal way will cost in money much more than one organisation to solve the whole problem in all its aspects. Moreover, there is the possibility and even danger of clashing, overlapping and waste.

At the head of proposals for reform, I, therefore, place the following:

1. With due regard to economy, efficiency and permanency, the proper solution of the problem of legal aid to the poor should consider the whole problem in all its different aspects and provide one and the same organisation which shall be national as well as local, for controlling and administering the whole of the legal aid given to the poor.

2. Whether the organisation is by the State, or voluntary controlled by the legal profession the basis or foundation of the organisation for administering legal aid, whether civil, ~~individual~~ criminal, or as to advice, should be a properly constituted bureaux or offices established in proper districts with a whole-time properly paid lawyers and staff, and that such bureaux should be linked or associated together through some central organisation.

3. Poor persons who cannot afford in whole or in part to be parties to civil or criminal proceedings, should be given such legal aid, in whole or in part, as will enable them to have ordinary and reasonable facilities for securing justice.

4. All legal aid should be given as a matter of right. In defence in criminal matters the only test should be as to poverty and in civil matters there should be a further test as to there being a reasonable cause of action but all rigid poverty test limit and all unreasonable prohibitions of conciliation and settlement should be abolished.

5. All legal advice should be free and its ultimate object should be conciliation out of court.

Much may be said of State organisation for such a herculean task of legal assistance to the poor in all its aspects. If it is argued that the most pressing need of economy at present rules out any official organisation, the answer is that false economy is fatal, though economy is essential. If proper legal aid is to be given to all the poor, it is obvious that the government should not shirk its responsibility to pay the expense.

CHAPTER XVI.

THE JURY.

The origin of the Jury system and its long history of development in England,[1] I shall not discuss here. What I shall attempt to examine in this chapter is the present tendency of the petty jury in English Civil and criminal courts,[2] some points of jury law and practice, its actual working at present as well as the reasons for and against the system.

In the words of Blackstone,[3] "the trial by jury ever has been and I trust ever will be looked upon as the glory of the English law ... and the most transcendent privilege which any subject can enjoy or wish for." But, in the course of last sixty years, this privilege has been continuously waived by many persons and discouraged and narrowed down both in civil and criminal cases.

Since the latter part of the last century, the wheel of legislation and practice has run against jury trial. At Common Law all actions

1. Sir W.S. Holdsworth: History of English Law Vol.I. pp.297-350; vol ; Thayer: "Preliminary Treatise on Evidence (1898); Moschizisker, Trial by Jury (1922);

footnotes from previous page (contd)

For a select bibliography see Julia E. Johnson: Jury System, (1928)

2. For the purposes for which a jury may be called together, see 19 Halsbury's Law of England pp.281-82 (2nd.ed. 1934.)

3. Commentaries, Bk.III. p.379.

were tried by jury.[1] The new rules under the schedule to the Judicature Act of 1875, though set no limitation upon the right to have a jury and introduced trial by a judge only into the Common law courts, made it incumbent on one party or the other to ask explicitly either for a jury or a non-jury trial.[2] By the revised rules of 1883, Order 36 was recast[3] as to make it more evident that the normal mode of trial was that without a jury. Except in actions for slander, libel, or other attacks upon reputation an absolute right to have a jury was preserved, a special application for a jury in all other cases should be made and would ordinarily be granted unless cases involving prolonged or scientific investigation of facts, accounts or documents and for issues which properly belong in the Chancery Division. As a further incentive to the parties to avoid jury

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1. The Common Law Procedure Act, 1854 (s.1.) allowed the trial of issues of fact by a judge without a jury if both parties consented in writing, but such consent was not often given.
2. R.S.C. Order 36.
3. cf. S.Rosenbaum: The Rule-Making authority in the English Supreme Court Ch.VI. "The Revision of 1883." (1917)

trial, separate lists for jury and non-jury actions were created. The latter were always disposed of more quickly than the former. Thus trial by a judge alone was considered the most favoured form of trial. But none the less Order 36, Rule 6, was still the main source of trial by jury on the Common Law side. This rule which let in the flood of jury cases was in the words of Lord Justice Lindlay,[1] "a supplementary to rule 2, and was necessary in order to preserve the right to trial by jury in all pure common law actions besides those mentioned in Rule 2."

But now the pendulum of the mode of trial swings further away from that of jury trial. Section 6 of the Administration of Justice (Miscellaneous Provision) Act of 1933, limited, to very substantial extent, the previously existing right to trial with a jury in civil actions in the King's Bench Division. Shortly stated, " the Court or a Judge" may order any such action to be tried with or without a jury, but when there is a charge of fraud or the claim is in respect of libel, slander

1. Jenkins -v- Buckby (1891) 1.Ch.490.

malicious prosecution, false imprisonment, seduction or breach of promise, the action is to be tried with a jury unless the trial will require any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.

At present not only is the right to jury trial not absolute even in those specified cases but in all other cases it is wholly left to the discretion of the "court or Judge" i.e. in practice the master. This discretion, according to the view of the Court of Appeal in a recent case,[1] should usually be exercised against having a jury.

Legislation in this respect is in accord with public opinion and meets the requirement of litigants. For the last fifty years public opinion has not been in favour with jury trial in civil cases. Nor are the litigants themselves altogether satisfied with it. This can be witnessed from the system introduced under the New Procedure which has

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1. Keeling -v- Cook. 78 Law Jnl. p.300 1934. This case has not been reported.

been in force for more than three years. No one goes to the New Procedure Rules except on his own volition. He goes there with the consciousness that he will get a speedy trial, and also with the knowledge that, inasmuch as the Rules are intended to secure a speedy trial, the mode of trial as a rule is by the Judge alone. Out of the total of 2032 cases during 1933 and 1934 brought under this system, only in 5 cases trial by jury was asked.[1]

This seems to indicate that in a great number of cases the parties are ready to go before the Judge alone. But one of the most impressive and conclusive evidence of this tendency is demonstrated by figures. Statistics are proverbially dry, but there are times when figures tell a story which, to responsive minds, is more vivid than any which even the strongest adjectives can depict. During the last quarter of a century, the number of jury trials decreases conspicuously, as shown in the following tables:

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1. Ibid p.17. The Royal Commission on the Despatch of Business at Common Law reported: "There is power to try cases in this list (The New Procedure list) with a jury, but it has become in practise a special list of non-jury cases" (there was only one jury case in 1934) Cmd.5062 (1936)

TABLE I. - Actions tried with a jury and without a Jury and actions tried before special and Com on Juries in the King's Bench Division, on circuit, in the Probate and Divorce Division and in County Courts.

See Table on page 774-777

	Annual average number of actions, etc., tried.				Annual average number of Actions, etc., tried with Jury.		
	With a Jury	Without a Jury.	Total	% Tried with a Jury.	Common Juries	Special Juries	% of Special Juries.
1896 - 1900							
K. B. D.	767	1,020	1,787	42.9	383	384	50.1
On Circuit	545	314	860	63.4	306	239	43.9
Probate	48	96	144	33.3	24	24	50.0
Divorce	79	526	605	13.6	62	17	21.5
County Courts	1,153	48,305	49,458	2.4	-	-	-
1901 - 1905							
K. B. D.	666	704	1,370	48.6	346	320	48.0
On Circuit	558	235	793	70.4	290	268	48.0
Probate	59	84	143	41.3	28	31	52.5
Divorce	100	653	752	13.3	71	29	29.0
County Courts	954	42,949	43,903	2.2	-	-	-
1906 - 1910							
K. B. D.	640	637	1,277	50.1	328	312	48.8
On Circuit	458	183	641	71.5	238	220	48.0
Probate	52	78	130	40.0	21	31	59.6
Divorce	82	710	792	10.4	61	21	25.6
County Courts	833	38,195	39,028	2.2	-	-	-

1911 - 1915							
K. B. D.	674	618	1,274	52.3	375	300	44.3
On Circuit	409	228	637	63.9	203	206	48.9
Probate	45	76	121	36.5	19	26	57.7
Divorce	76	927	1,003	7.3	56	21	27.8
County Courts	697	29,716	30,213	2.3	-	-	-
1916 - 1920							
K. B. D.	316	843	1,559	30.2	174	142	42.6
On Circuit	185	348	533	38.9	114	71	36.2
Probate	18	92	113	14.7	8	10	64.5
Divorce	64	2,065	2,129	4.5	54	10	23.7
County Courts	209	21,812	22,041	1.05	-	-	-
1921 - 1925							
K. B. D.	250	1,377	1,629	17.0	149	106	40.8
On Circuit	120	990	1,110	10.8	97	23	19.1
Probate	8	93	101	8.1	2	6	73. 0
Divorce	58	3,135	3,249	1.9	47	11	24.9
County Courts	150	38,994	38,994	.5	-	-	-
1926 - 1930							
K. B. D.	402	787	1,192	36.0	265	139	34.1
Probate	13	81	94	14.1	4	9	70.0

Divorce	113	3,766	3,683	3.2	100	17	14.5
County Courts	362	27,319	27,679	1.3	-	-	-
1931 - 1934							
K. B. D.	463	923	1,389	33.3	291	172	38.3
Probate	5	100	105	5.1	2	4	74.2
Divorce	108	4,123	4,230	2.5	93	16	14.4
County Courts	479	24,609	25,112	1.9	-	-	-

The foregoing figures are, I think, eloquent enough. Compare the annual average number of actions, etc., tried with a jury between the period of 1896-1901 and that of 1931-1934. The per cent. of jury trials in all courts shows considerable decrease, particularly in Probate and Divorce Courts. Thus 42.9 in the King's Bench Division was reduced to 33.3; 33.3 in Probate Court to 5.1; 13.6 in Divorce Court to 2.5; 2.4 in county courts to 1.9. The percent. of common and special juries fell correspondingly.

If we compare the annual average number of jury trials in each court, the same results obtain. In the King's Bench Division there revealed an increase from 1896 to 1915, a sudden decrease between 1916 and 1920 and reached its lowest point between 1921 to 1925. There was a little increase between 1926 and 1930. But since 1931 it again fell.

In the circuit courts, the per cent. of jury trials occupied the foremost position among all courts between 1896 and 1920. But since 1921, it descended to a second place.

In the Probate Court, the per cent. of jury trials jumped from 33.3 between 1896 to 1901

to 41.3 between 1901 to 1905. It has decreased rapidly since 1916.

In the Divorce Court, the per centage of jury trials was almost regular between 1896 to 1910. But since 1911 it has become continuously decreasing.

In the County Courts, the jury trial has never thrived there. The percentage of jury trials has never been over 2.5. One passing remark which may be made here is this: that jury trials were often said to be almost extinct during the time of the Great War. A cursory review of figures does not, however, support this. Jury trial seems to reach its lowest ebb after the Great War.

But, on the whole, it is safe to say that jury trial has shown a marked tendency of decrease in all cases during the last forty years. From now on, I think it may be safely predicted that in consequence of the new legislation and the general tendency, the number of jury trials will tend to further ~~diminish~~ decrease.

It may be pointed out that the percentage of jury trials shown in the above table and the tables in the appendix is obtained through comparison

made only between the jury trials and trials by the judge alone. If we take into account the total number of proceedings dealt with in various courts whether by the judge alone or masters in the High Court, or by the judge or registrars in the County Courts, or otherwise disposed of, the percentage of jury trials will further reduce to insignificant point. If jury trials are greatly restricted and diminishing in civil cases, no less so are they in criminal cases. The Abolition of the Grand Jury is, of course, an obvious example.[1.] But what is still more significant is the modern legislative tendency in England to enlarge the competence of courts of Summary Jurisdiction to hear and determine indictable offences summarily. This movement has, since 1847[2.] been slowly and steadily pushed forward under a series of parliamentary enactments,[3.] accelerated by war-time[4.]

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1. Administration of Justice (Misc.) Prov.) Act, 1933.s.1.(23 & 24 Geo.5.c.36); cf. first interim report of the Business of court's Committee,cmd 4265 pars.52-77; also Albert Lieck: abolition of the Grand Jury in England. The Jnl. of Criminal Law & Criminology) vol.25,No.4. pp.623-625 (1934)
2. Prior to 1847 courts of Summary Jurisdiction could try only petty, or non-indictable offences. In that year the Juvenile Offenders Act (1847) gave them jurisdiction to try summarily persons, with their consent, not more than 14 years of age charged with certain forms of theft.

3 & 4 on next page.

footnotes from previous page (contd)

3. Summary Jurisdiction Act, 1879 (42 & 43 Vict. c 49 ss.10-11; Summary Jurisdiction Act 1899 (62 & 63 Vict. c.22.s.2); The Childrens Act 1908, (8 Edw.VII. c.67 ss.102-10); The Criminal Justice Administrative Act, 1914 (4 & 5 Geo.V. c.58 ss.10-11)

4. The treasonable offence of trading with the enemy for example, along with certain prosecutions under the Defence of the Realms Act, could be dealt with summarily.

and emergency legislation[1] and culminated in the Criminal Justice Act of 1925.[2] Courts of Summary Jurisdiction may, now, with the consent of the accused hear and determine summarily not only many newly enacted offences of a serious nature which forty or fifty years ago would unquestionably have been reserved for trial by jury, but also some of the most common of the old indictable offences which were formerly triable before juries. "The history of the development of the Summary Jurisdiction of justices over indictable offences," wrote Sir Archibald Bodkin, the former Director of Public Prosecutions, "shows with what trepidation Parliament at first substituted a bench of justices for a jury, and how as experience produced confidence in that tribunal, summary jurisdiction was from time to time

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1. The Emergency Powers Act, 1920 (10 & 11 Geo.V.c.55 ss 1-3) which was passed during the period of industrial unrest followed the World War indicates the same tendency. See the Proclamation of April 30, 1926; the 1926 Code of Emergency Regulations and various subsidiary directions and orders in force during this period of emergency, printed in S.R. & O 1926 p.48

2. 15 & 16 Geo.V.c.86 This Act set up a new and enlarged schedule of indictable offences triable summarily.

extended."[1.]

One consequence of this unprecedented movement is unmistakable. To an ever-increasingly large extent the functions of the jury in the administration of criminal law has thus been subjected to the slow and steady curtailment in the legislative hands.

Compare the number of jury trials in criminal cases with that without jury and the result is obvious. As has already been observed,[2.] 55140 defendants charged in 1933 with indictable offences i.e. about 88 per cent. of the total were dealt with without jury, leaving only 7520 prisoners to be committed for jury trial at the higher courts. If the large number of defendants who plead guilty when their cases were tried at assizes and Quarter Sessions were taken into account, it would be most probably that not over ten per cent. of the indictable cases were actually tried before jurors. Thus current statistics clearly demonstrate the fact that the criminal jury has followed the same fate as civil jury and become an almost obsolescent institution. In the opinion of those most

1. Albert Lieck and A.C.L. Morrison, The Criminal Justice Act, 1925 (London 1926) forwards by Sir Archibald Bodkin p.XXV.
2. Chap.VII Courts of Summary Jurisdiction.

experienced observers of the situation, it is only a question of time that the jurisdiction of summary courts will be further enlarged. Some even go so far as to think that the ancient institution of trial by jury will in time be almost wholly supplanted by the new procedure. Referring to the New law, the Law Times observed it as "simply another long step on the road toward the replacement of the jury by the justice."[1].

Thus, it seems to me unmistakable that both in civil and criminal cases, the deeply rooted institution of jury trial becomes day by day obsolete. Not only are the jurors losing ground in the quantity of cases they sat, but also their function in trial has constantly been of diminishing importance. The laymen are overwhelmingly overshadowed and even over-powered by experts in courts. This will be fully discussed at a later stage. It is sufficient here to emphasise that the Jury has become a shadow of its former self.

1. Vol.161.p.91. (1926) This view seems to be substantiated by the recommendation of the Departmental Committee on Summary Offences against Young Persons. cf. Parliamentary Papers (1924-1925) vol.15 cmd. 2561 p.905 et seq.

What is pertinent to ask is why so ancient and once much beloved institution should lose its importance and public favour. To answer this question we have to observe some salient points of the Jury law and practice, the merits and demerits of the system, as well as the reasons for and against its continuance.

To begin with, let me examine some important aspects of the existing jury law and practice with regard to the qualification, exemption, remuneration and verdict of the jury.

The most serious defect of the qualification of common jurors is by ratable value of property.[1] The net result of this qualification is that juries represent the middle class and especially the commercial class. The consequence is undesirable. Many persons who live in lodgings or hotels,[2] or occupy flats for which the landlord pays the rates[3] or who are not householders[4] or are not beneficially

1. Juries Act, 1825 (6 Geo.4.c.50) S.1.as amended by the Local Government Act, 1929 (19 Geo.V.c.17) S.79 (1) applied to the County of London by the Local Government Act, 1888 (51 & 52 Vict. c.41) s 69. (2)
2. Minutes of Evidence taken before the Departmental Committee on Jury law and Practice cd. 6762 Channel q.1698-9; Coles-Webb, 819-84 1194; Simry 1930; Willand 710-4; Appendix No.10 c.1. (1913)
3. Ibid. Channell, 1698-9; Coles Webb, 869-78 1169, 1300-7, Wieland 687-708 Appendix No.10.c.1.
4. Juries Act, 1825 (6 Geo.IV c.50) s.1.; Juries Act, 1870 (33 & 34 Vict. c.77) s.7.

possessed of real estate or rent-charge or leaseholds to the prescribed value are now not legally liable for jury service. They would otherwise be suitable jurors if they were not excluded by this property qualification. What is still more unfortunate is the fact that by the limitation of this qualification a great body of working classes are excluded from the juror books. As pointed out by the Minority Report of the Departmental Committee on Jury law and Practice under the Chairmanship of Lord Mersey, "We are quite aware of the objections which can be urged against a proposal to make jury service practically universal, but the disadvantages and dangers of any restricted qualifications are far more serious. The greater diffusion of knowledge has widened the area from which intelligent jurors may be drawn, and the increasing desire among the working classes to take their part in all public duties and responsibilities has made it a matter of necessity that they should have no grievance on the ground that they are excluded from juries, who, in a large measure, are concerned with the trial of their class. Whether it be well founded or not, the belief is widespread among the working class that the

present jury system does not give a fair chance to their class."[1] These words written in 1913 apply with equal force to the present conditions.

The effect of property qualification for jurors upon women is still more undesirable. On motion for the Second Reading of Juries (Amendment) Bill in the House of lords on March 26, 1935, the Earl of Listowel observed,[2] that most of women eligible for jury service are elderly spinsters or widows because they have this particular property qualification. This state of affairs is, he argued, responsible for many practical disadvantages. "The first is," he said, "that women are, in fact debarred from sitting on juries during the prime of life - that is to say, at a period when their faculties would be best adapted to giving a considered judgment on the cases before them. It means, besides, that the existing law is often inoperative because it is impossible to procure the full quota

1. Report of the Departmental Com. on Jury Law & Practice Minority Report p.54 cd. 6817, (1913)
2. 96 H.L. s.c. 334-35 Hansard 5th series (1934-35)

of women who should sit on a particular jury in a particular court." As pointed out by Sir R. Poole, the president of the Law Society, there is another disadvantage of the property qualification. In his presidential address in 1933,[1] he said, "again, take the composition of juries themselves. So long as the present means qualification fixed years and years ago, remaining, and the personnel of a jury is purely a matter of chance, you may find a case tried involving considerations which are wholly outside the scope of the intelligence of the jury which is summoned to try it. Some of these cases are highly technical, some are concerned with social conditions utterly dissimilar to those of the jurymen in the box."

It seems to be an accepted principle of the jury system that jurors should be selected from all classes in the community and not from certain social or economical groups. "Juries are called upon," Dr. C.N. Callendar argued, "to pass on matters involving every class in society, on disputes between rich and poor, between employers and employees,

1. 76 The Law Journal 188 (1933)

between corporations and individuals, between property owners and wage earners, between white and coloured; between Jew and Gentile. If they are to function impartially and render justice to all classes they ought not to be composed of a predominating number of any particular group. All classes ought to be represented."

If this principle were sound, the rateable qualification of the common jurors and the consequent exclusion of many classes of people from the jury service would be manifestly wrong. What could be said against the property qualification of common jurors applies, a fortiori, with even greater force to that required of special jurors.[1.] It may be objected in several respects. The terms "esquire, merchant, banker" are highly vague[2.] and not a little difficult to define.[3.]

As the test of any system is the quality of the

1. For the qualification of special jurors, see "Juries" in 19 Halsbury's Law of England (2nd ed. p.319.sec.663, 1935) and authorities there cited.
2. Minutes of Evidence op.cit. q.2909.
3. ibid. q.845. There is much dispute as to who are legally entitled to be called esquires. Ten classes are mentioned by the writer of the article on "Esquires" in the Encyclopaedia Britannica. For the discussion of the term "merchant, see Josselyn -v- Parson (1872) L.R. 7 Exch. 127 per Bramwell,B., at p.129; 30 Digest, 262, 654; Hammond -v- Jeffries (1611 2 Browne 97; Fairman -v- Ives (1819) Chit.85; 30 Digest 262, and also Times, Dec.8, 1908 in

footnote con'td from previous page.

connection with the claims of exemptions from special jury service in a case at a special sessions at the Guildhall. also Evidence, op.cit. Q.2809.

personnel which it produces, the system of special jury cannot stand this test. Even in the words of the majority of Lord Mersey's Committee who were in favour of the retention of the special jury, the appraisal is by no means high. In their considered opinion, the quality of special jurors has shown "a marked tendency to deteriorate" "more particularly in the special juries that appear at the High Court in London."[1]. The special jurors emerge out of the examination of the minority of the Committee still worse. "The special jury is a class jury," they wrote, "chosen by reason of the wealth of its members, and for our part we are not satisfied that it is possible accurately to express intelligence in terms of rateable value. Indeed, we think the evidence of the witnesses called before us goes a long way to substantiate the opposite view."[2]. After quoting the evidence of Mr. Justice Channell, Master Chitty, Mr. Hayes, Sir John Macdonald, Mr. Winfry, Mr. W.J.Davies, and Mr. Justice Scrutton, emphasising no difference in intelligence between common and special juries and no advantage of, and reason for, the distinction and pointing out the high degree of class

1. Report op.cit., pa 178, p.29.
2. ibid. p.52.

prejudice of the special juries, they concluded: "The special jury is a class institution which is very obnoxious to the working classes. Its retention is hardly defended by anyone except for commercial cases, and these are now largely tried by judges alone. It is, in our opinion, opposed to the whole idea of the jury system, namely, trial by a body representing the public and opposed also to the general democratic tendencies of the times."[1.]

After these strong opinions expressed a quarter of a century ago by such authority, one might expect that the special jury had wiped out of its existence or at least their qualification has been considerably altered. So remarkable or even startling is, however, the fact that not only the special jury exists as before but also its legal qualification remains almost the same now as more than half a century ago, notwithstanding criticised by many distinguished witnesses and the report of the committee as well as bombarded by many eminent lawyers.[2.]

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1. ibid. pp. 52-53.
2. Sir John Hollams: Jottings of an old Soliciter p. - Sir Edward Parry: The Law and the Gospel. pp. 50-52.

If the qualification of the juries is heaped with anomalies, the list of exemptions from jury service is not free from defects. The reasons for exempting several of the important vocations from jury service might be sound. But this can scarcely be said to the whole list of 32 kinds of persons, who are thus exempt, from peers at its top to women of certain religious order at the end.[1] To use the words of the Committee, "there are several instances in which we are by no means satisfied that the privilege is justifiable." Strangely to say, there is an exemption for members of the Council of the municipal corporation of any borough, but that is not the case with members of a county council. Similarly, though the town clerk is exempted it does not extend to the clerk of the peace or clerk of the county council. Oddly enough, "pharmaceutical chemist" is allowed exemption from service on juries but "pharmacist" is liable to jury service.[2] In spite of the recommendations of the committee,[3]

1. For a full list, see 19 Halsbury's Laws of England, pp.284-287 and authorities there cited.
2. cf. an article on "Poison sellers and Jury Service" 80 Law Journal p.397, Dec.14, 1935.
3. Report, op.cit. para. 273-276.

some of the privileged classes such as "certified conveyancers and special pleaders, the members of the Mersey Docks and Harbour Board, registered pharmaceutical chemists, commissioners of customs and Excise Officers, clerks and so on remain on the list as before.

Into the details of the matter I shall not enter to discuss. But one important point should be noticed here is the fact that too many intelligent classes of the community are relieved from the duty of jury service at present. Still many of them are excused when called upon to serve. Whatever may be the reasons, historical or practical, public or individual, the accumulating consequences of exemption and excuse leaves, with a few remarkable exceptions, not much superior character or quality to form the panel.

The existing practices of remuneration and accommodation for the jury are again full of anomalies. First as to the question of remuneration. There is no remuneration in criminal cases. Nor is a fee paid in civil cases when a jury has failed to agree upon a verdict and asked to be discharged. But common jurors are accustomed to receive for each case a fee varying from one shilling to twopence

with the Court in which they sit.[1] This pittance which is often put into the poor box as gift by the jury amounts in fact to no remuneration at all. They may have a special fee upon a view held. The special jurors receive one guinea for each case and a further fee of one guinea where a view is held. Even on a protracted trial, the court has no power to order a larger payment, though pressure is frequently brought by the special jurors upon the parties to agree to make the payment of a guinea a daily one.[2] This has long been condemned by Sir John Hollams in unequivocal terms.[3] Although it is argued that as the privilege of being a citizen, the jurymen should receive no remuneration for the public duty of jury service, it is, however, hard for them to defray travelling and out of pocket expenses from their own pocket in addition to suffering inconvenience, spending time and quitting their own business. Distinction should therefore be made between remuneration for the service and payment of the out-of-pocket expenses which the performance of the service may entail.

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1. 19 Halsbury and Law of England Juries pp. 322-3 The Practice varies with locality. Minutes of Evidence, op.cit. qs. 1744-5, 1777, 1078-83, 2499-522; 3204-9, 3247-51, 3261, 92-99.
2. Minutes of Evidence op.cit.
3. Jottings of an Old Solicitor, pp. 57-58.

There is no reason why these latter expenses ought not to be provided for by the state and paid to all jurymen summoned according to scales.[1] No juryman probably ever reckons on the amount he is likely to receive in payment for his services, but all very naturally expect and often ask for their daily or out-of-pocket expenses.[2]

From this point of view, the payment of common jurors is neither just nor sufficient.[3] There is, again, no valid reason why the fee should be different in different courts. The present system of the remuneration of jurors by which a special juryman trying several cases in one day should be remunerated with as many guineas as cases opened before him, while a common juror or other jurors, serving even many days on one case should receive only one shilling or less or practically nothing whatever, seems quite anomalous.

Another question of equal importance to the jurymen is the accommodation accorded to them in courts and the period of time in a year available

1. Report, op.cit. par. 206-8; 281-3.
2. See the letter of a Juror to the Editor of the Daily Telegraph on March 4, 1936.
3. 96 H.L. s.340. Hansard 5th Series (1934-35)

of their service. Complaints of the insufficient accommodation provided for them in courts are heard from time to time.[1].

One of the still more serious defects exists in the fact that little attempt is made to accommodate jurors with respect to the time in the year when they may serve with least inconvenience to their private or business interests.[2]

Questions of remuneration and accommodation seem to be of trivial importance; but more consideration is given to them, the better would be the service. Were satisfactory arrangements made, the burden of jury service would be less onerous and more persons who are now virtually exempt or excused would be available for the service at the period of time convenient to them.

A far more important question which goes deeper into the whole subject than that of remuneration and accommodation is the requirement of unanimity verdict.[3]. Unanimity was not at first

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1. Minutes of Evidence. op.cit. James. 4837-40. cf. also Appendices Nos. 17 &21.
2. Report op.cit. 198. Evidence q.3271-308.3320-8, 3340-74, 3375-7.
3. (on next page)

necessary. It appears in the second half of the 14th century that 12 must agree.[1.] This requirement is, in the words of Hallam "preposterous relic of barbarism" and long ago systematised as "repugnant to all experiences of human conduct, passions and understanding."[2.] It is considered in the opinion of Sir F. Pollock as one of the archism in modern law,[3.] and bombarded with adverse criticism by a host of eminent writers. The objections to unanimity are many, and as advanced by Bentham[4.] and others, may be summarised as to consist: in the absence of any reasonable security in unanimity, which is not well afforded by a majority; in the diminution of public confidence in the administration of justice, owing to the probability that jurors will disagree and trials thus be abortive, and in involving the application of

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3. In civil cases, the parties may consent to a majority verdict but such consent is rare in practice. Again a notable exception to this principle existed where as person criminally indicted was one of the Lords temporal. Unanimity is not requisite but a majority (which must, however, consist of at least 12 persons) may render a determination.

1. Y.B. 41 Ed. IV. 31,36, s.c.41, Ass.11 Carter: A History of the English Courts p.141, 6th ed. 1935; Sir W.S.Holdsworth: A History of English law Vol.I. pp.324 et seq.

2. Christian's Blackstone p.375 Note.

3. Essays in Law ch. Archaism in Modern Law

4. Judicial Evidence.

the jury

coercion to force conviction on the minds of the jurors[1] in increasing the cost of litigation in civil cases--such sham agreements of unconvinced minds endangering, morever, an element of indifference to veracity in the community at large.[2]

On the other hand, the rule of unanimity is, however, defended by high authorities as an essential and redeeming feature of the system, which ought to be preserved so long as it exists. It serves, they argue, in criminal cases as a protection of innocence. But the popular notion that it is better that a guilty man should escape than that an innocent man should be wrohgly convicted has already and probably adequate force on the minds of jurors for giving the accused the benefit of the doubt and secubity. It is again argued that the rule gives each individual juror to be heard and leads to the fullest discussion between the dissentient sections of the jury. But this could be equally well attained by requiring a majority say three-fourths to render a valid verdict after ~~a definite~~

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1. Forsyth remarked: "The truth is, that verdicts are often the result of the surrender or compromise of individual opinions". (P.247) & Pope sarcastically sings of how--"The hungry judges scorn sentence sigh, and wretches hang that jurymen may dine." Rape of the Lock, canto III.
2. The modern juror is fortunately spared the horrors of solitary and unrefreshed confinement. The Act of 1870 permitted a juror to provide himself at his own expense with reasonable sustenance, and the Act of 1897 to separate at the end of the day in all cases save those of murder and treason.

~~period of~~ due deliberation, thus allowing the minority opportunity ~~to end~~ to convince the others by argument, but preventing it from nullifying the will of the major part by an absolute veto power, which stands quite anomalous in a government based on the rule of majority.

The highest court in the country decide the fate of millions by a majority of one . The sovereignty of Parliament which Dicey forcibly elaborated into a principle passes its bills by a mere majority. If mere majorities may pass laws and mere majorities construe their meaning and even set aside the jury's verdict, why then should the will of one obstinate be able to prevent a verdict by the eleven other jurors?

The foregoing observations serve merely to show some defects and anomalies in the existing jury law and practice. They rather assume than question the validity of the system itself. What is, then, the place of the jury system in the administration of law? The arguments for and against the civil and criminal jury are sometimes indiscriminately made. It seems to me more appropriate to discuss them separately, though some of them may apply

to both. Let me start with the jury in civil cases. It may be said that since the recent legislation has restricted the use of the civil jury generally under the discretion of the judge and specifically in certain prescribed classes, it has lost much of its importance. But none the less the system remains there and its effects run through the whole fabric of civil procedure. It still merits a fuller and impartial examination.

It has been favourably received in the hands of a long line of eminent authorities from Fortescue to Coke and from Blackstone to Sirm Holdsworth in England, from the framers of American national and state constitutions to Judge Story and from Justice Miller to Judge Choate in the U.S.A. The names of many other distinguished advocates of the system may be mentioned. But their opinions seem to run as this.

In the first place, "trial by jury" to use the words of Blackstone, "is the best criterion for investigating the truth of facts that was ever established in any country." There is, they argue, an intellectual superiority in the judgment of "plain common sense" for the ascertainment of truth on the questions of fact, as compared with conclusions reached

by the "artificial and technical methods of proof to which the legal mind is prone.

This argument does not seem to me admitting careful analysis. To begin with, the true, but not the legal essentials of a competent juryman considering his actual functions, are the ability and willingness to exercise close and continuous attention, to obtain clear perception, to remember testimony, to weigh evidence, to understand instructions upon the law, to argue and give heed to argument, to suspend premature and hasty judgment, to have a strong character, and to unite in pronouncing a reasoned verdict, applying law as instructed to facts as ascertained. Each and all jurymen are presumed to have a fair degree of these qualities with which they are ~~more~~ nor often ~~than not~~ endowed by nature or obtained by training. But such requirements would be deemed to call for training and experience in any other occupation. These require for their efficient exercise, a high degree of mental development, involving attention, memory, observation, reflection, apprehension, understanding, judgment and reason.

These are, however, not required of the jury in any Act of Parliament. Nor are they often possessed of. Apart from the deficiency of these faculties essential for the ascertainment of facts and reaching a correct verdict in a case, the jury are more or less warped by every kind of unfavourable circumstances, such as the tricks of advocates, prepossessing and prejudice which I shall discuss at a later stage. Suffice it to say here that the jury is by no means an efficient machinery for the ascertainment of facts in a case, and still less than the judge. As put by Henry Sidgwick,[1] "where, however the right conclusion has to be drawn from a more or less conflicting testimony of witnesses of all degrees of trustworthiness, supported by a web of inferences, often necessarily subtle and complex, from circumstances of all degrees of evidential relevancy and importance, it would seem that in such processes the skill derived from special training and experience will be an advantage difficult to counterbalance. A competent judge will normally

1. The Elements of Politics. pp. 493-5

be, through practice, an expert in the performance of these processes, as well as in the more technical reasonings by which the legal rules applicable to any given cases are determined: nor do I see any ground to suppose that his practice in the latter kind of inference will interfere with the empirical skill gained by his practice in the former." The superiority of plain commonsense in the jury than the judge in determining issues of facts is difficult to maintain.

Nor is this all. When a case is tried by a jury, especially in an intricate case, the through considerations which it requires both to facts and to the law become oftentimes difficult. Being confronted by a large mass of conflicting testimony and urged by plausible reasons and persuasive rhetoric of contending advocates, the jurors must depend upon their own memory of what they have heard and come to their decision in one hurried conference of perhaps one or two hours. Or if the case take longer time to try, the more vague will be their memory about its facts. If they take more time to deliberate over their verdict, the result at times depends more upon a contest of physical endurance

than the cogency of reason. Comprehensive consideration of the facts is therefore not likely. On the other hand, the judge is placed under every possible disadvantages in jury trial. Many difficult points of law are pressed upon him for decision towards the end of a trial. On the spur of the moment, he has then little time for quite thought, still less for the consultation of authorities. Even with every rule of law at his finger's ends he is at great hazard and possibility of committing slight misstatement of the law applicable to the case in hand. From this hurried oral statement the jury is supposed to obtain a sufficient knowledge of the legal principles involved in the case, to master which the judge has taken the study and practice of long years. In jury trials, there is less likely to have the same thorough consideration of facts and the law than in non-jury trials.

In the second place, it is claimed on the ground of moral qualification necessary for the administration of justice that ad hoc jurors have greater possibility of incorruptibility than the permanent professional magistrate. This contention

seems to me far from the truth. If persons are corruptible at all, jurors do not seem to be subject to less inducement of receiving bribe or otherwise than the judge. On the contrary, the safeguards of adequate payment, social honour, professional esteem and tradition as well as independent and exalted position, all that contribute to become a stronger line of defence against this kind of danger are in favour of the judge than the jurors. The weakness of this argument needs scarcely more refutation than pointing out the facts of the high integrity of the English judge.

It is, thirdly, contended that for the protection of individual rights and the promotion of the public welfare, it is neither satisfactory nor safe to have cases to be tried by the judge alone. This contention has particular force in the jury trial of criminal cases and will be fully treated at a later stage. But it is sufficient to point out here so far as civil cases are concerned that non-jury trials operate safely and successfully in many classes of civil litigation in the County courts and Chancery Division of the High Court in

this country and in all civil cases in France and Germany and many other countries.

Few persons will question the valuable services rendered in the past by the jury to the individual in preserving his security for the enjoyment of life, liberty and property. The whole problem of securing individual liberty has, however, undergone radical change. The government has now become the agent of people who may control it through means provided by constitution. Other and more effective means have been developed which renders the need for the jury as an institution on this ground no longer necessary. The civil jury has enlisted the gratitude of the English people in the past by checking any tendency in judges to be subservient to the Crown. There is, however, no fear at present of judicial subserviance to the Crown or to the civil servants of the government. To use the words of Mr.C.H.C.Pifoot, "Today the judges provide the most effective bulwark against executive tyranny: it was left to the Lord Chief Justice to publish a warning against the 'New Despotism,' which in the guise of administrative regulation, is consciously or unconsciously threat-

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the liberty of the subject. Even if the Bench were tempted to forsake its control and acknowledged impartiality, the existence of a vigilant and powerful press would prevent a return to the more doubtful precedents of the 17th century."[1.]

In the fourth place, some advocates of the jury system though do not press jury trial in all cases maintain that some cases such as fraud, libel, slander and others where the question of personal character and reputation is in issue are better to be tried by the jury. This seems to be the underlying principles of the recent legislation in England, and advocated by a long line of distinguished lawyers.[2.] It commands our close examination. "There are undoubtedly certain classes of cases," said Mr. Justice M.D. Chalmers[3.] "in which juries are much better than in others. Anyone who is much in courts of justice must acknowledge that where the issue in which party has been guilty of a fraud there is no tribunal like a jury. They seem to scent out a fraud by an unerring instinct. The current legal explanation

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1. The Decline of Jury System 1934. The Fortnightly Review. pp. 85-86. 1934.
2. Trial by Jury in Civil Cases 7 Law Quarterly Review
3. (p.17 (1891)

of the phenomenon is that, however novel a fraud may seem to the unsophisticated lawyers in the case, there is always some one on the jury who has either committed or attempted a similar fraud himself. Personally I have an alternative theory. In doubtful cases, I know that one's decision is often determined by some almost impalpable incident. Something in the demeanour of a witness just turns the balance. Sometimes one sees a witness looking for inspiration to the back of the court, or something of that kind. Juries have better opportunities of observation than the judge. They have twelve pairs of eyes to his one pair, and while he is engaged in taking down the evidence they can use their eyes and compare notes afterwards. I think between them they generally hammer out the truth."

The need of a jury trial in such cases is explained on other grounds by Lord Atkin. "The reason, I conceive," he said, "is that there are questions which involve an attack on the character of the litigant and the litigant is entitled to say 'I wish to have my character vindicated before twelve men who more or less know the kind of circumstances in which I live and who are likely to be far the better judges of whether or not what I have done is

reasonably honest, being much the better judges of the ordinary conditions in which the ordinary man lives." If that is accepted in regard to questions of libel and slander, similar issues arise in many other actions. Take an action for wrongful dismissal where the man says he has been wrongfully dismissed and the employer says the man has been guilty of some act of dishonesty - taken a bribe, or stolen his property or whatever it may be. The issues are the same as in libel and slander. They are questions concerning the man's conduct which, I submit, he is entitled to have determined - to use what is in this connection rather a slang expression - by a jury of his peers, of people in the same circumstances of life who are able to form a reasonable judgment whether he has been guilty of dishonourable conduct or not."[1]

On the other hand, the contention has been refuted by authorities equally eminent for

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1. 87 H.L. ss. 1054-55. 1932-1930.

reasons equally cogent. "As regards questions of personal character and fraud," said Lord Loreburn[1] before the royal commission on the Delays in the King's Bench Division, "quite as many I should think are tried in the court of Chancery by one judge, and with complete satisfaction to the mercantile community as are tried before a judge."

Upon the question raised by Lord Snell in the debate over the Administration of Justice (Miscellaneous Provisions) Bill with regard to the jury trial in cases of fraud, Lord Sankey, then Lord Chancellor, said: "Might I tell the noble Lord quite categorically the reasons why we did not put that (fraud) in. First of all, as has been pointed out, questions of fraud are tried by Chancery Judges every day. Some of the biggest cases which we try are those of misfeasance summonses against company directors, and these trials are conducted with great ability and great satisfaction by Judges of the

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1. Minutes of Evidence, op.cit. q.4316.

Chancery Division. The next reason is this, that hundreds of County Court Judges up and down the country have to try cases of fraud daily. The third point is that if it were a serious case of fraud, I can hardly imagine any judge of the King's Bench Division not saying in his discretion that there ought to be a jury in such a case. On the other hand, supposing there were a case - it is a hypothetical case - where someone preferred a charge of fraud in order to get a trial by jury, and then, when the case came on, said: 'I am not going to pursue the charge of fraud,' his only object being to get a jury. That is a case which is pure imagination, but it is a matter which has to be taken into consideration."[1].

But it may be argued that the cases of fraud tried in the Chancery Division are different with those in the King's Bench Division in two respects. First, as pointed out by Lord Atkin, "they are nearly always cases of fraud in connection with property. They are not cases where the ordinary life of the ordinary

1. cf. also the argument of Viscount Buckmaster and Lord Handworth. 87 ~~Parliamentary Debates (Lords)~~ pp.125-6 pp.104 (1932-33)

subject comes into issue at all."[1] Second, as suggested by Lord Sankey, they are usually of the most complicated character.[2]

In the result, cases of fraud are classified under the same catagories such as libel, slander and other cases of personal character and enjoy the privilege of jury trial under the Act. As criticised by the editor of the Law Journal, "it is perhaps a little illogical that a party to a simple case of fraud may demand trial with a jury, but a party to a complicated case of fraud has no such right."[3]

Nor is this all. Though it is important in cases where fraud is a leading element that there should be a public standard with regard to what conduct amounts to such fraud, the actual decision must depend lagely upon the question as to what conduct falls within the recognised decisions on legal fraud. Is so, surely the decision of a judge, familiar with the law and with a daily experience of witnesses as to facts would at least of equal weight as the abrupt verdict of a jury given without reasons, and behind which

1. 88, H.L.S.132) (1932-33)
2. ibid. p.132.
3. 78, Law Journal, p.297. Nov. 1934.

prejudice, compromise, or inability to weigh the value of evidence may lurk. "An appeal was brought in a case at Assizes in some Midland town," Lord Handworth M.R. stated a recent case of fraud,[1] "but somehow or another the jury had quite run away unfairly and they had ultimately found fraud against the defendant on flimsy materials governed by prejudice. The Court of Appeal unanimously set aside that conviction on the ground that the jury had undoubtedly misinterpreted and misrepresented the facts of the case, and happily by the Court of Appeal the man was set free from this charge, although twelve jurors had found him guilty of fraud."

Other cases of unfortunate finding by the jury like this may be cited. But it seems difficult to maintain that cases of fraud are better ~~to be~~ tried by a jury.

If there were any truth in the suggestion that the judge who is immersed in taking notes of the case has less time of observing parties and

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1. 83. M.L. R. S.124. (1932-33)

witnesses, the remedy would be to relieve this work of note-taking by providing an official shorthand writer in every case. It is an argument for mending, but not for continuing the jury trial in these cases.

Again, the assumption that cases involving the issue of personal character are better, or should be entitled, to be tried by twelve ordinary and reasonable men and women who more or less know the kind of circumstances in which the parties live does not seem to be based on the safer ground of sober facts, because the jury, as ~~it is~~ at present composed, is not necessarily of the same class, economical, vocational or otherwise, as the parties.

If the argument for jury trial in cases involving questions of personal character is not strong. Still less is it in cases of breach of promise of marriage. In matrimonial causes or man -ve woman cases, the jury is admittedly more susceptible to emotion and prejudice. "I must, however, except one class of cases, " wrote Sergeant Lallatine after praising and advocating jurors generally, "in which I

have seen very grave errors committed by jurors, and I fear that many innocent people have suffered. I allude to charges preferred by women against the opposite sex. Juries in many of these instances seem to bid adieu to commonsense."[1] This opinion has been corroborated by other high authorities.[2] If juries are apt to be emotional and prejudiced in those cases, could it be said that cases of breach of promise of marriage should be tried by a jury?

In the fifth place, the jury system, as some argued, implicitly or explicitly, has been an historical and essential part of the English constitutional institution no change would be necessary. The argument seems to assume that old institutions are useful at all times and cannot be improved upon. But any institution which has been well devised to successfully meet the then existing conditions and proved to be most useful in bygone times might lose its importance and fail to be of much use at present when conditions and problems to be met are radically different. This is what happens to the jury system. Nevertheless the maintenance of all institutions as they long have been may possibly be justified if they operate

1. Some Experiences of a Barrister's Life p. 70. London. 1880.

satisfactorily at present. How is the jury system today? In its working there are many defects and undesirable consequences which will be more fully dealt with later. It suffices me here to emphasise that whatever may be its merits and value in the past, the system does not yield satisfactory results today. Consequently change is not only desirable but has long been overdue.

In the sixth place, some advocates of the jury system urge that jury dispense justice without making bad law and bring the law into touch with facts of ordinary life. Professor Sir William Holdsworth seems to me to be of this opinion, when he wrote juries "findings create no precedent. They can decide hard cases equitably without making bad law ... The jury system tends to make the law intelligible. It tends to keep it in touch with the common facts of life."

Mr. Claud Mullins[1] records his dissenting opinion after quoting the above words of Prof. Holdsworth. "Some legal historians," he wrote, "have taken the view that the civil jury did simplify the law ... but I cannot see where there is any evidence

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1. C. Mullins: In quest of Justice. p.263.

that the civil jury modified the harsh doctrines of the old Common law or improved the cumbrous machinery of the old civil procedure ... But it seems to me that here, as so often happens, the virtues of the criminal jury were being attributed to the civil jury. The criminal jury could, and can, always visit its dissatisfaction, either with the law or its administration, by bringing in a verdict for the defence. Injustice inflicted on the Crown does not mater. But the civil jury has no such method of expressing itself. It has to decide against one party and that party will have to pay the costs of the trial."

With all respect, Mr. Mullins seems to me misunderstanding Prof. Holdsworth's point here. In the quotation there is nothing said by Prof. Holdsworth that the civil jury did simplify the law. What Prof. Holdsworth urged seems to be more or less the same as reported by the Common Law Commissions in 1853 and argued by Judge Chalmers in 1891. The Report of the Commission runs: "the tendency, natural to the professional judge, to look

only to the strict letter of the law, is corrected and tempered by the opposite tendency of the jury to take a more enlarged and liberal view, according to the morality and equity of the case." Judge Chalmers was still more explicit on this point. "A judge is always embarrassed," he said, "by the feeling that his decision more or less creates a precedent. He hankers after consistency. The ghosts of past decisions rise up before his mind and cases yet to come cast their shadows before them. The jury are haunted by no such spectres.. They meet together once for all to do justice to the particular parties in a particular case."[1] He concluded: "Taking the verdicts of juries as a whole, I think they do a vast amount of illogical justice or righteous injustice which could not be attained by any other machinery."[2]

Not only did Mr. Mullins miss the point but his reputations are scarcely convincing to me. It is questionable whether "injustice inflicted on the Crown does not matter" in the long run. It is

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1: The Trial by Jury. 7 Law Quarterly Review.p.16.
2. ibid. p.18 also pp.20-21.

difficult to maintain that the civil jury has no such method of expressing itself. The question of cost is wholly a different matter.

But dissenting with Mr. Mullins is far from comfirming the arguments of Prof. Holdsworth, Judge Chalmers and the Commissioner as sufficient reasons for retaining the civil jury. Their argument, if valid at all, is based upon particular and exceptional cases which will by no means bulk large in total cases. If such being the case, it is not sufficient reason to uphold or defend the jury system not to say that its occasional uncertain and chance value is overwhelmingly counterbalanced by its manifold and serious drawbacks, more of which hereafter. Trial by ordeal or battle may at times do, in Chalmer's phrase, "illogical justice " or righteous injustice." But who can seriously advocate or defend such methods at present?

The argument that it "tends to make the law intelligible by keeping it in touch with the common facts of life,"[1] seems to imply that the judges are

1. Sir W.S. Holdsworth: The Common Law's Contribution to Political Theory, in Some Lessons from our Legal History. p.92. (1928)

removed from the contact with everyday life. This does not seem to me true. A life devoted in examining disputed and complicated issues of fact and used to every facet of human ingenuity does not seem to make the judge a bit less capable than twelve untrained and bewildered layment in keeping touch with ordinary life. Lord Justice Scrutton expressed his doubt. "I do not know," he remarked, "if a judge is allowed to know of the Duchess who made an income by vowing that her complexion derives its perfection from somebody's soap, which it doesn't or to know that Gilbert would not have written those lines if less exalted through more prominent people than Duchesses did not receive payment for allowing their names to be used as advertisements of goods. It is difficult to know what judges are allowed to know, though they are ridiculed if they pretend not to know.[1]" Commenting upon this point, Prof. Allen said: "whether or not strict legal theory openly allows it, it is certain that our common law would have to stand still if judges had not behaved as men of the world."

1. Jolly -v- J.S.Fry & Sons, Ltd. (1930) 1 K.B.467 also cf. XLVII Law Qterly. Review. pp.23, 326, 1931.

In the seventh place, the jury system, it is argued, tends to diminish the number of judges and this is held to be a beneficial feature. First, the more judges there are, the more vacancies there will be. In seeking to fill the vacancy, judges would inevitably sacrifice their independence. This is detrimental to the administration of justices. Secondly, the more judgships there are, the lower their quality would be and the less capable would they be in discharging their functions. It is better to "submit the decision of a case to ignorant jurors directed by a skilful judge than to judges the majority of whom are imperfectly acquainted with jurisprudence and with the laws." This is, in effect, the contention of Mr. Tocqueville[1] who in reaching this conclusion might be more preoccupied in mind by the judicial system then existing in France and ~~the~~ U.S.A. than to state a universal truth. These contentions have barely to be stated to be rejected. The validity of the arguments is determined by the method of judicial appointment, the remuneration and security of judicial office,

1. Democracy in America Vol 2 p. 360. (1899)

the judicial tradition as well as the general condition of legal education obtained in a particular country. The proportion of jury trials in English County Courts is almost infinitesimal. The absence of the jury there does not tend to increase the number of judges. On the other hand, if jury trial takes more time than trial by a judge alone, as this will prove to be the case at a later stage, more judicial time and strength will undoubtedly be required to have all cases with a jury trial. It follows that given the same volume of judicial business to be tried with the same degree of despatch, jury trial will require more judges than non-jury trial. Consequently the jury system does not necessarily diminish the number of judges.

I do not dispute the proposition that more judges there are, the more limited is the scope of selection, the lower will be their average quality, as emphatically declared by the Royal Commission on the delays in the King's Bench Division as well as by the Royal Committion on the Despatch of Business at Common Law. But I do not think a case will be better tried by twelve ordinary

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and reasonable men and women directed by a skilful judge than by a skilful judge alone. The contrary would seem to be the case. What then is the justification for the civil jury?

It is claimed to be justified, as with some of its advocates, on the ground of its being a political institution. To quote Tocqueville, "It would be a very narrow view to look upon the jury as a mere judicial institution; for, however great its influence may be upon the decisions of the Courts, it is still greater on the destinies of society at large. The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated."[1].

As I am immediately concerned with the jury as a judicial machinery, so it is scarcely my business to discuss it as a political institution but for the fact that arguments for the jury system often entrench upon the ground of its political value and that even these arguments are by no means very strong.

1. Democracy in America vol. I pp 360, 363.

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In the opinion of Tocqueville, the jury, especially the civil jury, "exercised a powerful influence upon the national character." It fosters judicial spirit, notion of right, practice of equity, responsibility of action, manly confidence, sense of duty in the minds of the people who thus take a share in government.[1] Secondly, he argues, it educates the people, as "it may be regarded as a gratuitous public school" and this "is its greatest advantage."[2] Thirdly, it tends in his opinion to establish the influence of the magistrates, and to extend the legal spirit among the people.[3]

To take his first point, how much truth there is, it is difficult to say. But when one compare the national character of countries having civil jury such as England and U.S.A. with ~~x~~ that without civil jury such as Germany and France, the answer is obvious. As to admit the people a share in government and maintain their wholesome interest in the

1. ibid. pp. 363-4.
2. " pp. 364-5
3. " pp.366-7

administration of justice, the argument is more founded upon sentiment than reason. If it is valid at all, all proposals for the direct participation of citizens in government would logically be sound. The same contention can be and has been advocated for the election by the people of almost all offices of the government, even the more petty officers. But what is the position of this contention? In truth the interest of the people in the direct participation of the administration of justice is no more necessary than that of all other branches of government. Assuming it is more necessary in this field, only a very small proportion of the people share this participation, which is rather distasteful than welcomed, while the nature of the participation for the most part does not even increase respect to the administration of justice.

The educational value of the jury system was doubtful in the past and is still more questionable at present. The average citizen is unlikely to profit substantially by his occasional and reluctant participation in the administration of law. The advance

of compulsory and universal education has further weakened the argument.

Even if there is any educational value, it is bought at too costly a price. Most jurors have to be educated ad hoc at a great waste of energy and time, particularly in complicated and difficult cases. They have to quit their own business and suffer inconvenience, while the parties' costs of litigation stagger high and become unbearable.

Conceding that the jurors do receive a certain amount of education which at best is uncertain and haphazard, and that it is obtained without great cost, the jury system can by no means be defended on this ground. The immediate interest of litigation is for the contending parties but not for the jurors. Whatever may be the value to the persons operating the judicial machinery, it can by no means be justified if it results in evils and miscarriage of justice.

So far I have examined the reasons for the jury system mainly in civil cases. They cannot in candid be admitted as satisfactory. They have fallen far short of establishing a prima

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facie case for civil jury. But inorder to be fair to both sides, let me examine the arguments against the civil jury. They may be briefly treated.

To begin with jury system is neither a competent nor satisfactory judicial machine. It is not competent, as has been touched upon, to be a fact-finding body. But the matter does not stop there. As an impartial analysis of the problem of the administration of justice will show, certain essential consideration are indispensable to any satisfactory judicial system. First of all is the judicial temperament which is a very special faculty to be acquired only by persistent training and long experience. The second is that persons entrusted with the duty of proper adjudication of controversies should be in a position of continuing responsibility. Thirdly, the work should be performed as cheap, quick and efficiently and convenient as possible. Judged from these points, the jury system does not seem to meet these requirements.

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The jury had its origin in comparative primitive society when courts of justice merely decided simple questions of fact. Such an institution finds no easy task to adapt itself to the demands of a highly civilised community where the mutual relations of persons are multiplied to a surprising and complicated extent. No doubt the average English jury selected at random shows considerable commonsense. But the issue of civil cases are often complicated to the trained lawyer and judge. A fortiori, they prove to be hopeless embarrassing to the jurors. Take, for instance, the often-raised question of contributory negligence in running down cases, the largest class of case for which juries were in the past employed has become so fruitful a source of legal enigma that both the Court of Appeal and the House of Lords have been unable to decide the manner of its presentment to the jury. In Hargrove -v- Burn,[1.] the law of "contributory negligence" was explained by the Lord Chief Justice to the jury in great detail, reciting many old decisions. In spite of the utmost

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care of the learned judge, the jury found it impossible to arrive at any unanimous verdict. In Spalding -v- Cooper,[1.] the House of Lords fully discussed the proper method of putting this kind of case before a jury. Running down cases are merely one of the examples of the difficulties experienced by jury trial in civil cases. In cases where the matter depends largely on documentary evidence or involve a mass of technical detail, the juries are particularly at a proportionate disadvantage.[2.] In this respect the opinions of high authorities are almost unanimous. Mr. Justice Channell said that "commercial cases, and cases of very complicated nature that arise out of modern business, it is perfectly impossible to try with jury." On the fitness of ordinary civil jury in solving questions put before them, the strong Departmental Committee on jury reported: "We desire to point out at once that on the jury's ability satisfactorily to understand and follow every kind

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2. Minutes of Evidence taken before the Royal Comn., on Delay in the K.B.D. The Rt.Hon.Sir H.H.Cozens-Hardy said: "To try before a Jury a case involving a great pile of correspondence or many documents, which the Jury cannot see and which they have no copy, strikes me as almost hopeless." q.518 p.34. (cd.6762) 1913.

of civil case grave doubts have been expressed. But some of those most competent to speak the ordinary jury is, in fact, regarded as by no means equal to the task of dealing with certain actions of a somewhat special character."

One of the consequences of this state of affairs is obvious. The less the jury is capable of handling questions of fact, the more are they in the control of the judge. This has long ago been pointed out by Blackstone. In discussing the frequency with which juries are called upon to decide questions of vital importance, he remarked: "And the general incapacity, even our best juries to do this with any tolerable propriety, has debased their authority and has unavoidably thrown more power into the hands of the judges, to direct, control and even reverse their verdicts than perhaps the constitution intended." This state of affairs may be lamented by the advocates of the jury system but in the nature of modern civil cases, it would seem to be almost inevitable. If the constitution of the jury in civil proceedings in England

were carefully examined, it would be readily clear that the jurors are overwhelmingly under the immediate control of the judge at present. Although the verdict of the jury both in civil and criminal cases comprises the questions of fact and of law in the same reply but the opinion of the jury is not of the same force in civil as it is in criminal cases. If the judge is of the opinion that their verdict has made a wrong application of the law, he may refuse to receive it and send back the jury to consider again. Even if the verdict passed undisturbed through his hands, the case can scarcely be looked upon as finally determined. The court may be asked to set aside the verdict and order a new trial before another jury. The court would of course be most scrupulous in distrubing the verdict of the jury, but the possibility is there and such cases are not wanting.

The power exercised by the judge over the jury in civil proceedings becomes so great that a jury simply becomes clay in the hands of the judge. This happens in most jury cases but may be exemplified by one. The Bank of Montreal was

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was sued in 1914 by a customer for negligence and breach of duty in giving advice as to investments. As told by Lord Justice Scrutton[1] the case was tried before the Lord Chief Justice of England and a special jury. There were over two hundred closely printed folio pages of commission evidence, besides oral evidence. The defendants submitted there was no evidence of duty or authority; the Lord Chief Justice left the matter to the jury in a very careful and exhaustive summing-up occupying 72 pages of the short-hand notes. The jury considered the matter for 4 hours, and then disagreed on the question of negligence. The case was set down for trial again, and came on before Mr. Justice Darling and a special jury. It took 3 and a half days to try. The judge's summing-up was less than one-quarter of the length of that of the Lord Chief Justice, and the jury answered ten questions in twenty minutes." Judgment was entered for the customer to recover £25,000 and costs. The bank appealed, especially on the ground that the judge had misdirected the jury. This was confirmed by Lord Justice Scrutton in his words: "I am clear that the jury were not

1. Banbury -v- Bank of ~~England~~ Montreal, 1918. a.c. 626

properly directed." The jury's verdict was set aside by the Court of Appeal.

Such cases must prove to be disastrous to parties. Champions of the jury might well resent at this insidious but substantial encroachment upon the prerogative of the jury. But owing to the incapability of the jury, it is not only natural but highly desirable in some cases in order to protect the parties against an ignorant and prejudiced jury. In Scammell -v- Hurley in 1929, the jury, sensitive of the inconvenience of the General Strike, proceeded without too laborious an examination of the evidence, to find such malice, and the defendants had to rely upon the impartiality of the Court of Appeal to reverse the verdict.[1.] In Greenland -v- Wilmshurst, the jury out of sympathy and prejudice against the defendant's conduct awarded the plaintiff £1,000 damages. Lord Summer, afterwards expressed the interesting but ludicrous mental process of the jury's award, decided that "the verdict is excessive and cannot stand."[2.]

1. 1 K.B. 419 (1929)
2. 3 K.B. p.532 (1913)

This brings me to another defect of the jurors. It is their bias and prejudice. None will dispute that neither youth nor age, sex, wealth, nor health nor any kind of status should move the scale of fraction of a hair when Justice weigh the fact before the law. But they lack that clear perception which should restrain the promptings of the heart. This is by no means the only kind of bias they have. Many pernicious forms of prejudice abound in their bosom. Sometimes it is inspired by certain kinds of suits, a claim happened to be quite distasteful to the jury because the law which gives the right has not their approval or a crime so abhorrent to them that they will raise the sword to strike upon a mere suspected without waiting for any evidence.

Sometimes bias may spring from politics or any social status, either with religion for its fountain head, or learning as the object of its hate. In fact so various are the kinds of bias which find a lodgment in the minds of jurors that to any list or catalogue we must soon add some fresh and startling cause of prejudice. That such being the case is no more imagination but sober reality

to be found by careful observers almost in a great majority of jury cases and testified by many authorities. In many trade union official cases a jury is more often than not biased against them. Scammell -v- Hurley is an example in point. Mosley -v- Marchbank is another witnessed only the other day. "We have met more than once," reported the Departmental Committee on Jury, "with indications of a belief that a jury is biased against labour organisations and against persons holding different political opinions from their own." 1. Some explain it on the ground of class bias 2. others the Englishman's inherent dislike of all interference with personal relationships between individuals or personal liberty. Whatever may be the true explanation, that bias exists is no doubt. But jury's bias is not limited to such trade union cases. It abounds in accident cases. The Departmental Committee made the following statement which particularly applies to accident cases: "Several of the witnesses have given it as their

1. Report op.cit. pa.180, p.29.
2. Minority Report of the Departmental Committee on Jury, also Mr. Bernard Shaw in his Intelligent Womens' Guide to Socialism and Capitalism said: "No labourer is ever tried by a jury of his peers; he is tried by a jury of rate-payers, who have a very strong class prejudice against him because they have larger incomes."

belief that not uncommonly applications for a jury is only made because of the parties, knowing the weakness of his case, hopes to derive an unfair advantage from some prejudice in his favour which he has reason to believe the jury will display."[1].

Upon being questioned whether there are certain definite prejudices among Juries which are not to be observed in Judges, Sir H.H.Cozens-Hardy replied. "Yes, in Railway and Carriers' Case."[2]. In his opinion, there is a distict inclination now and a growing tendency among Juries in cases where people are sued for negligence-damaged by some accident such as a motor car accident - for them to find for the plaintiff, because they know that the defendant is pretty sure to be insured, thus the plaintiff obtains a verdict more easily.[3].

As hinted upon elsewhere, in cases of men -v- women juries often show a strong bias and is susceptible to all sentimental appeals by or on

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1. Report op.cit. pa.181.p.30.
2. Minutes of Evidence, op.cit. cd. 6762 q.519, p.34.
3. Ibid. qs. 523-535.

behalf of women. The Majority Report of the Divorce Commission of 1912 openly admitted this kind of bias, and recommended that all matrimonial causes should be heard and decided by a judge alone. Lord Gorell, the Chairman of the Commission recorded his opinion, after many years' experience as judge in the Divorce court that in sex cases a jury was more ready than a judge to respond to appeals to emotions."

These are only some examples out of many in which the Jury becomes slaves of their own prejudice. But what is true in those cases is also more or less true in many other kinds of causes.

It may be argued that judges are not free from prejudice and even recognised by distinguished authorities. But it is no doubt that the jury runs much greater risk, and is subject to more extraneous influence of prejudice than the Judge. The bias of the former is neither curtailed by training nor subdued by experience. It is rather fanned, conspired and flattered by the suggestive tone of wily advocates who appeal to their emotion, stir their blood and at last find them an easy prey. The prejudice of the latter has constantly been checked

by training and subjected to elimination in practice. He is an old hand at the advocates tricks. His prejudice is more susceptible of discovery, because he has to set out the reasons for his decision, on which an appeal may be based whether for his faulty law or his decision of fact being against the weight of evidence, or such as no reasonable man could possibly come to. But the jury is not required to give reasons for its verdict and unless on clear evidence the court will be reluctant to overrule it.

Jury has been preferred by many plaintiffs or defendants because they have weak cases[1]. or jurymen are considered as likely to be more generous than a judge. Does not it mean a jury will be more likely to believe some doubtful witnesses, or to be prejudiced against the position or character of the other party, or to be carried away by Mr. Plausible's eloquence than a judge would be?"

This again brings me to another defect of the juries, namely, they are too sensitive to,

1. Minutes of Evidence op.cit. cd. 6762, qs.343-8.

and influenced by, the arts of advocacy. Readers of Charles Kingston's "Dramatic Days at the Old Bailey," will remember what influence exercised by the oratory of Montague Williams. O'Brien [1] tells us how Sir Charles Russell advised the lady client to wear "a perfectly plain dress of a soft grey colour, fitting closely to the figure, without any trimming, and a big black hat, also as simple as possible" and won a verdict for £10,000. Those who read Judge E.A. Parry's "Seven Lamps of Advocacy" will realise what part can be played by the lawyer upon the jury. The juries were said to "go mad" by such able advocates as Carson and Marshall-Hall.

The party who commands the greater wealth of professional eloquence has thus an unfair and undue advantage. It may be argued that such eloquent lawyers might be rare, the extent to which juries are carried by rhetoric might be exaggerated, and the judge might be well able in his summing up to discount any meretricious effect thus produced, but none the less juries are more or less influenced by advocates.

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1. O'Brien R.B.: The Life of Lord Russell of Killowen.

"It is almost invariably the case, I can safely say," Francis L.Wellman wrote after thirty years at the Bar,[1] "that, in any protracted trial, the interest of the jury becomes more and more focused upon the lawyers in the case. They become attracted to or repulsed by their personality. The advocates gradually become the principal actors in the drama, much as if they were playing leading roles on the stage. The litigants - plaintiff and defendant - find themselves receding into the background, and the trial, as it nears its end, becomes largely a battle of lawyers. Even the merits of the controversy seem to take shape and colour, in no small measure, according to the juror's estimate of the fairness, integrity and charm of the respective lawyers."

Being well experienced with the nature of jury trials, he put out his warning: "There is an infinite variety in the methods used by lawyers to obtain these results (verdicts not strictly justified by the evidence in the case) and no ordinary citizen can hope to become a competent

1. Gentlemen of the Jury. Reminiscences of 30 years at the Bar. 1924. p.93.

juror unless he has at least some slight acquaintance with that genus homo known as a skilful trial lawyer."[1].

Thus being lacking in judicial temperament, having no continuous responsibility, confronted with complicated and often difficult issues of fact enslaved by various bias and prejudice and captivated and ensnared by the tricks of advocacy, the Juror~~s~~ can add little credit to the administration of justice.

In the second place the consequences of such a clumsy and archaic institution upon the litigants, the jurors themselves, the development of the law and the character of lawyers are neither desirable nor satisfactory.

The chief defects of the civil jury upon litigant may be said in two respects. First, its ~~causes~~ breeds delay and uncertainty. It causes delay, because it takes more time than a case tried by a judge alone.[2]. In the words of Lord Sankey: "When the case is tried with a jury it takes possibly two or times as long to try, which is a serious matter."[3].

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1. ibid. p.92.
2. Minutes of Evidence, op.cit. q.34 3.
3. 87 H.L. s.1050 (1932-33)

Compare the length of the opening address by counsel, as necessitated for the presentation of a case to a jury of laymen, to the concise statement of the issues in dispute which is all that a judge requires. The prolonged examination, cross-examination and generally useless re-examination of a witness are largely owing to the need of getting facts hammered into minds unaccustomed to sift and weigh evidence or to make clear distinction between essential and non-essential points.

On the other hand, the prolonged opening of a defendant's case is still more tedious, as the lines of defence are perfectly clear from the previously prolonged cross-examination. Nevertheless, it is the duty of the defendant's counsel that every note in the eye of any one of the chance jurymen should be removed. There is, again, the final rhetorical struggle of counsel in summing up their respective cases in reply, and finally the prolonged and carefully worded summing-up of the judge, all of these proceedings are almost entirely due to the gentlemen in the jury box. In the opinion of Master T.W. Chitty, there is no

doubt that a trial by jury takes longer time than a trial without a jury. In his words, "because the Judge can tell you what is going on in his mind, but you cannot tell what is in the Jury's mind. That is one of the reasons for it. You cannot tell what the Jury are thinking, whereas if a Judge has made up his mind he will say at once, 'I do not want more evidence.' The Jury do not know that they can do that even if they were disposed to."[1].

Jury trial is uncertain. "What are the three reproaches against our administration of the law today?" said Lord Buckmaster. "First, that it is uncertain. Secondly, that it is tedious. Thirdly, that it is costly. Those are the three charges made, and there are no others against our system, and the whole of these are to be magnified in the jury

1. Minutes of Evidence, op.cit. q. 343 p.25. cd.6762 also Lord Buckmaster said, "And as for delay, any one familiar with the trial of actions in the King's Bench Division will realise at once how immeasurably the jury cases block the lists and prevent you getting your other work through quickly." also 88 H.L.S. 125, 1932-33.

system. Why, it is because the uncertainty that the juries are asked for over and over again. A man asks for a jury because he knows that if he goes before a judge he will not have a chance."[1].

The result of a jury trial is, also, more uncertain than if the case is tried before a Judge.[2]. It is, however, argued by some that jury trial has the advantage of superior finality. The appellate courts are rightly very loath to disturb the findings of a jury. Unless the verdict is obviously perverse, it finally settles the issues of fact. This is in one sense true, but the argument fails to see other contingencies of a jury trial. There is the danger of disagreement among the jurors. There is, again, the not uncommon fate of new trial. As pointed out by the Royal Commission on Delay in the King's Bench Division: "It has also been argued with much force that the result of a trial with a jury is more uncertain than that of trial by judge alone ... That there is serious risk of disagreement which may lead to a new trial entailing heavy expenses.

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1. 33 H.L.S.125 (1932-33)
2. Minutes of Evidence, op.cit. q.344, p.25 Cd.6761.

There is also the risk that the Judge may misdirect the Jury, in which case, after an appeal with its attendant cost, there is a new trial."[1].

Secondly, intimately connected or rather resulted from the previous defects of delay and uncertainty, jury trial makes litigation more expensive.[2]. As has been said above, jury trial takes more time than non-jury trial. Needless to say, the longer the time of trial, the more expensive will become the costs of litigation. About thirty years ago, Sir John Hollams thus recorded his opinion: "Probably few judges realise the cost of jury trials. I have on several occasions estimated that the cost amounted to one pound per minute. This, no doubt, is exceptional, but I don't think ten shillings is so, and yet time is not infrequently taken up by discussion of some other case or other arrangements."[3]. As already pointed out, disagreement and new trial contribute

1. Report p.25
2. Minutes of Evidence T.W.Chitty, op.cit. q.346.
3. The Jottings of an old Solicitor, pp. 62-63

to delay and uncertainty of litigation but they also swell the amount of costs. Every penny spent by the parties has to be spent again in cases of disagreement or new trial. It is on this question of expense that the present system of jury trial is most open to attack; "one advantage of trial by judge alone," wrote Mr. Harvey,[1] "is that a decision of some sort must be reached. The judge cannot disagree with himself and refuse to make up his mind. But juries can and do; and the more conscientious they are in scrutinising the case, the more likely does a disagreement become. Judges are sometimes heard imploring juries to agree if it is ~~humbly~~ humanly possible, and pointing out the disastrous consequences of their failing to do so. Disastrous they are indeed, since the whole expense of the trial has been thrown away, and must all be incurred again if the parties wish to proceed. In a case of any magnitude this total loss may easily amount to £500 and may be quite sufficient to deter the parties from any further attempt to settle their dispute. Probably disagreements only occur in a small percentage of cases, yet they are regrettably frequent and bring with them

1. Labour or the price of Justice p. p.59.

a weird sense of futility."

In the third place, the jury system has been a burden upon the community. As pointed out by the Departmental Committee on Jury, there are four kinds of genuine grievances, the financial loss and interference with business, the frequency of summons, the waste of time and the unfavourable conditions of service.[1]

This burden is, however, defended on the ground of public policy. Ordinary citizen, some argue, should be compelled occasionally to take a responsible part in the administration of Justice. It is, they urge, the best guarantee we can have for the preservation of public confidence in the administration of the law. The function of the jury, they contend, is to bring positive law into line with positive morality. These arguments do not seem to me convincing. As I have tried to show above, the contention of the requirement of direct participation of the people in the administration of justice is untenable. The confidence of the people in the administration of law depends not upon the jury but

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1. Report, op.cit. para.196-208, cd. 6817 pp.32-34; 96 H.L. 342 Hansard, 5th Series, (1934-35)

upon the judge, as current history in England and other countries clearly demonstrates. The instilling by jury of positive morality in the life of the law is difficult to maintain. If there is any such requirement, why the judge is not able to do so? The judge does not live a secluded life nor move in a different world. There is, at least, as much sense of positive morality in the heart of the judge as in the jury.

Further, on what ground of public policy can it be defended that jury is required for settling private disputes between individuals.

"When you come to think of it," said Lord Sankey, "it is a strange power that the ordinary litigant possesses of being able to compel a large number of busy citizens to leave their avocations, practically without recompense, and to compel the selection of twelve of them to hear the facts of a private dispute when there are Judges there whose business it is to hear such disputes when called upon to do so. If it were proposed to confer such a power now for the first time, it is doubtful if your Lordships would allow

the measure to pass. But, for historical reasons, the power exists, and the question is whether the burden cannot be somewhat eased by leaving it to the Judge to decide in what cases a jury should be summoned."[1]. The burden is under present conditions somewhat relieved, but it is still a burden upon the people.[2] To quote Lord Buckmaster again, "I do not know whether people have ever thought of the immeasurable inconvenience that is caused to the jurymen summoned in numbers into the court, hanging about, and then, when they meet, often told to go away and come next morning. They can never know when they are safe, and when they got on to a case they may be detained indefinitely, although their business is often of such a character that it needs their personal attention."[3].

In the fourth place, the jury system has produced an unfavourable and undesirable influence

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1. 87 H.L. ss. 1050-1059 (1932-33)
2. In 1934, 56324 petty Jurors were summoned, including 12346 Petty Jurors summoned by Clerks of the Peace for Boroughs. Civil Judicial statistics 1934. cmd. 4997 (1935)
3. 88 H.L. s.125 (1932-1933)

upon the development of the law. To begin with, the progress of law has more or less been arrested by the presence of the jury. In endeavouring to assimilate new materials for settling disputes, judges have to adapt it to the capacity of the jurymen. Questions which would naturally fall into the categories of facts and be decided by juries have to be artificially withdrawn from their consideration owing to their incapacity to understand and appreciate a subtle issue. Consequently lawyer's definition of a fact differs considerably from that of the lay~~yers~~. It is almost an embarrassment even to lawyers as to the consequent multiplication of decisions on the line of demarcation between law and fact. Even ~~then~~ there arises a question of fact, recognised as such by the lawyer, the jury are not forthwith necessarily entitled to decide it.[1] It remains to be decided by the judge whether there is sufficient evidence to go to the jury.

The law thus abounds with subtle and

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1. See the cases of Langridge -v- Levy (1837) 4 M & W. 377; Blacker -v- Lake and Elliott (1912) 106 L.T. 533 and Bates -x- Batey (1913) 3 K.B. 351.

technical distinctions which result in considerable practical inconvenience. The question of liability for damages caused by dangerous goods is one of the examples in point. According to law goods are distinguished into those dangerous per se from those which are considered as innocuous. Upon a natural interpretation of the antithesis between law and fact, such distinction might have been thought as a question of fact for the jury. The court has, however, declared it to be a question of law.[1].

Further, it may be most probably due to the distrust of the jury that scientific knowledge might prove too recondite for the popular mind, judges have expressed their hesitation to utilise scientific knowledge. So late as 1888 damages still could not be recovered for injury to the nervous system.[2].

The same distrust of jury might explain

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1. Stephen: Dig. Law of Evidence p.246.
2. Victoria's Railway Commissioners -v- Coultas 13 A.C. 222 (1888) Compare Coyle -v- Watson (1915) A.C. It was until 1925 to be finally admitted that a plaintiff might sustain an action for nervous shock, provided only that the shock had subsequently resulted in physical injury. (Hambrook -v- Stokes (1925) 1 K.B. 148.

certain rules of evidence. Under English law, evidence of previous offences cannot be admitted on the trial of a prisoner. Nor heresay evidence is admissible. Both kinds of evidence are not safe in the hands of jurymen who are scarcely able to discriminate their value and weight and to relegate them to their proper places. But both of these rules could be dispansed, as in Continental countries, to an experienced judge who could receive such evidences and gave them proper weight.

Thus jury trial not only is a brake upon the rate of the progress of law, but has the effect on procedure to render the form of trial more formal and the rules of evidence more elaborate.

In the fifth place, the jury system debases somewhat the advocates. In the opinion of Mr.Foote, K.C., "there is probably nothing which has done so much to debase the style of modern advocacy ~~to debase the style of modern advocacy~~ as the introduction of non-jury causes."[1] The contrary seems, however, to be the truth. It is maintained by good authorities that the tone and

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1..J.A.Foote, K.C.: Pie Powder.

character of a speaker is often more or less fashioned by the audience. This applies equally true to advocacy. When addressing a jury, the lawyer knows well the power of appeals to bias and sentiment and, in struggling for success, is induced to employ every artifice and prejudice wherever and whenever he legitimately can. "In this way does the jury shape the lawyer's cause;" wrote Mr. Willcox, "he crooks his knees and twists to win their favour, he strikes to take advantage of their faults that he may win a verdict for his client. If he appeals to motives that are base, he deems the jury governed by such motives, thus indirectly is the bar debased. All methods urged for better ethics at the bar will fall far short, while juries are composed of men whose minds are swayed by vicious pleas ... Nor until the jury box is purged of minds unstained and subject to such pleas, will there be hope to purify the bar."[1].

Lastly, but not leastly, foreign experience throws light upon this subject. The jury system was transplanted by the Pilgrim Fathers to the U.S.A.

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1. The Frailties of the Jury, p.101.

where it was guaranteed in all criminal cases and in all civil cases in which the amount at stake exceeded 20 dollars by the Constitution. But during the last quarter of a century loud criticism of the jury system there was audible enough. The movement has been undoubtedly away from jury trial. It was introduced into France in 1791 and has since been adopted by most Continental countries. But no civil jury has ever been in existence in France & Germany where the judication of civil cases has been competently and satisfactorily carried out by the Judge.

All things considered, a strong case is, I think, made out for the wholesale abolition of civil jury. This is strengthened by the fact that civil jury is not the prevailing but the exceptional mode of trial among the modern states of the world. With the exception of Great Britain, its dominions and dependencies, and ~~the~~ U.S.A. it has found no need therefor elsewhere. Nor any new nation, uninfluenced by historical attachments and sentimental considerations, free to devise that system for the administration of justice which it believed would give the best results in practise,

would deliberately create such an institution. It is further strengthened by the advantages which will result in its abolition. First of all, cases would be disposed of more expeditiously[1] - the impanelling and deliberation of the jury alone, and the ad captandum arguments addressed to it by counsel, consuming in the aggregate many days at each term of court. Secondly, there would never be disagreement, new trials and mistrials would be obsolescent, and the delay incident to re-trials disappeared.[2] Thirdly, the expense of litigation would materially decrease. Fourthly, in the words of Sir James Stephen,[3] "The securities which can be taken for justice in the case of a trial by a judge without a jury are infinitely greater than those which can be taken for a trial by a judge and jury." For one thing, the judge is a known and responsible individual, the jurors are twelve unknown quantities. For another, judges generally

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1. Minutes of Evidence, op.cit. Loreburn q.4318 Lord Haldane q.4318 T.Chitty q.343 Hamilton q.1755-6 Cobbett q. 2836. Lady q.1338-9.
2. Ibid. Loreburn q. 4435.
3. Hist.Crim.Law.I.ch. 15, pp. 567-569. (1883)

give reasons for their decision, and this being in itself "a security for the highest value for the justice of a decision." For a third, there are more unjust verdicts of the jury than the decisions of the judge.

Fifthly, lawyers would lose the incentive for mere argumentatum ad honorium the indulgence in intemperate and unprofessional discussion of the testimony and improper devices of conducting the trial itself so as to influence the minds of the jurors. Lastly, it would be possible to abrogate the greater part of the existing law of evidence.

It now remains for me to examine the arguments for and against the criminal jury. As to their merits and demerits in history, two camps of school divided their opinions. On the one hand, it is argued that jury performed valuable services in the past. First, jury trial achieved a great advance over the primitive methods of trial such as ordeal and battle.[1] Second, it humanised to a certain extent the English criminal law by refusing to convict when

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1. Ch.I. pp.

it deemed the penalty excessive.[1] Third, it became a safeguard of the people against the bias of a judiciary influenced by the executive or the tyranny of the Executive.[2] Thus, it has preserved several popular rights, such as the freedom of the Press,[3] the rights of Petition, of political association[4] of free speech and of Public Meeting.

But this opinion is not wholly concurred on the other hand by others. To quote Sir James Stephen, "the cases commonly referred to as those which reflect the highest honour upon juries are - the trial of the seven bishops in 1688, the trials for libel in the last century, and the trials for treason in 1794. As to the trial of the seven bishops, their acquittal was, no doubt, right; but their conviction would have done no great harm, it would have merely hastened the Revolution, and given them a little martyrdom. Besides, if they had been tried by the presiding judges, they could not have been convicted, for the judges were two to two. In the case of libel, I think there can be no doubt that the

1. John Liburn's case, 4 State trials, 1379.
2. See the trials of the Seven Bishops, also Hector B. Murdock. Jury Justice, Juridical Review. op.cit1908.
3. See the trials of Woodfall Miller & others in F.

alteration of a bad law was to some extent caused by the unwillingness of juries to enforce it, though (as will appear in a subsequent chapter) they were extremely capricious in their verdicts, and though the amendment of the law was due, after all, rather to Parliament than to the juries. In the case of the trials for treason in 1794, the case turned, not upon the law, but upon the evidence. I do not think that the prisoners would have been convicted if they had been tried by a judge without a jury. Chief Justice Eyre's summing up was scrupulously fair, and cannot be said to have been calculated to procure a conviction ... I think that as a matter of history trial by jury has been less of a bulwark against oppressive punishments than many of the popular commonplaces about it imply."[1] He observed elsewhere,[2] "Under the Plantagenets, and down to the establishment of the Court of Star Chamber, trial by jury was so weak in England as to cause something of a general paralysis of the administration of justice.

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footnotes from previous page (contd) Erskine

3. See the trials of Woodfall Miller & others in Evidence May.
4. Ibid.

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1. Hist.Crim. Law I.p.510.
2. Ibid. p.569.

Under Charles II it was a blind and cruel system. During part of the reign of George III, it was, to say the least, quite as severe as the severest judge without a jury could have been. The Revolutionary tribunal during the Reign of Terror tried by a jury."

With this conflicting opinions about the value of jury trial in the past, it seems safe to say that it was not an unmixed blessing in history. But whatever its past merits or demerits, an old institution has to justify its continuance and existence by the results of its present working. What are then, the arguments for and against the criminal jury at present? Some of those contentions on both sides for the civil jury are equally applicable to the criminal jury. As has already been set forth above, it scarcely requires any more mention than to call special attention to such arguments in its favour as better instrument for ascertaining facts, increasing respect for law and its administration, and sharing the administration of justice, or to such contentions against its use as inexpert and inefficient for deciding facts, susceptible to various prejudice and influence as

well as undesirable and unfavourable effects upon jurors, law and lawyers. There are, however, some arguments which having special reference to, or weight in, criminal cases, deserve to be briefly discussed here.

In the first place, criminal jury is claimed as a buffer between the State and the accused. In criminal cases, where the life and liberty of a fellow citizen is at stake, and where officialdom under the name of the Crown appears as prosecutor, the accused individual cannot be too carefully safeguarded. Even with the right of appeal, the power of punishment vested in the hands of a single judge presents possibilities of danger. The requirement that guilt should be established in the minds of twelve ordinary men and women according to law has been proved and will still prove, to be a safe-guard of the prisoner.[1]

It may, however, be argued that the instinctive distrust of magistrates which is the assumption of the foregoing contention is no longer warranted today. With a vigilant popular press and public opinion as well as

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1. cf. Stephen, op.cit. I.p.572.

copious right of appeal, executive tyrant and judicial perversity in criminal trials are not likely to appear nor will be tolerated.

As clearly shown by Sir James Stephen, "Trial by a judge without a jury may, I think, be made, practically speaking, completely just in almost every case. At all events, the securities which can be taken for justice in the case of a trial by a judge without a jury are infinitely greater than those which can be taken for trial by a judge and jury." The weighty opinion of such an authority compels full consideration.

In the second place, criminal jury, it is argued, is essential in a prosecution, for otherwise it would be unfair for the judge to bear alone the odium of conviction. This odium, it is feared, may from time to time accumulate to an intense degree of unpopularity with the judge in the popular mind until it develops to the point of general discontent with the administration of law. On the other hand, if the burden of conviction is shared by the jury, there will be less discontent, and, of course, still less public danger. The judges are thus relieved from the

discharge of unpleasant responsibilities.

In the opinion of a modern writer, if it is not true in civil cases, it is true in criminal cases. In his words,[1.] "when computation and not punishment is the issue, it is not too much to expect these responsibilities (the finding of the facts and the application of the law) to be borne by the same judicial mind. The judge is not likely to be worried out of his character as lawyer by any undue searching of conscience. But the strain of a criminal trial is more intense, and it may well be that the retention of the jury as a body upon whom, under proper direction, the responsibility of life and death, of freedom and incarceration, may be cast, will free the judge for a concentration upon these legal issues which he alone is competent to appreciate."

The judge will,of course, be but too glad to relieve such an odious responsibility.[2.] But to my mind the apprehension that the sparks of odium will in time become a spreading flame is a little exaggerated. On the evidence of other countries where criminal jury is not in use, such

1. C.H.S. Fifoot; the Jury System 129 Fortnightly Review. p.21.
2. cf. Sir J. Stephens. Hist. Crim.Law I.p.513.

odium, if any, is rare and the judge bravely and satisfactorily bears the full responsibility of conviction.

It is doubtful whether for the purpose of relieving judges' responsibilities people at large should be subject to the inconvenience and loss owing to the jury service as above said.

In the third place, "the principle of the jury system," as argued by Bluntschil,[1] "is that no one shall suffer punishment for an offence unless his guilt has been made clear to the public understanding and natural sense of justice of men taken from the people at large." If this means that the cogency of deduction by which the law is applied should be made generally intelligible, the demand, though it may often be impossible to satisfy it fully, should of course be satisfied as far as possible. If it means that the justice of general rule be applied, this demand is satisfied by the power of the jury to give a "general verdict" of guilty or not guilty. The jury is thus enabled to apply consciously or unconsciously not the actual law which they could

1. Allgemeines Stantsrecht. Bk.V. Chap.IV.

scarcely claim to know better than the judge but what to them the law ought to have been. But such irregular and irresponsible rectification of law by a small causal group of citizens is undoubtedly undesirable.

On the other hand, "natural sentiment of justice" to be exercised by the hands of "plain men" will inevitably incline them to dangerous indulgence.

A somewhat different tune is sometimes given to the argument just quoted. Jury trial, it is suggested, makes the administration of criminal justice more consonent with common ~~decency~~ of the man in the street. "Our civilisation has decided," wrote Mr. G.K.Chesterton, "and very justly decided that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but also can feel the things that I feel in the jury."[1]. He proceeded to attack the advocates of specialists. "The trend of our epoch up to this time has been consistently towards

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1. 'The Twelve men' in his Tremendous Trifles p.68, 1909.

specialism and professionalism ... The principle has been applied to law and politics by innumerable modern writers. Many Fabians have insisted that a greater part of our political work should be performed by experts. Many legalists have declared that the untrained jury should be altogether supplanted by the trained judge." After arguing that the more expert he is in one thing, the less the expert seems its significance, he launched his general attack. "And the terrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen is not that they are stupid (several of them are quite intelligent) it is simply that they have got used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop. Therefore, the instinct of Christian civilisation has most wisely declared that into their judgments there shall upon every occasion be imposed fresh blood and fresh thoughts from the streets."[1].

It is not my business to deal with the

1. ibid.pp. 65-68.

charges made by Chesterton against the Fabian advocates of experts, as readers of Prof. Laski's illuminating paper on the limitations of the expert[1] will realise the real nature of the issue. Nor is my concern to pass upon his criticism of legal officials and others. The point I should briefly made is this. Illogical justice is sometimes ~~hatched~~ handed upon by the jury. But this is an exception rather than the rule. On the whole, "fresh blood and fresh thought" of twelve ordinary men and women do not seem to dole out any better justice than a trained judge. The considered opinion of Sir James Stephens compels attention. "I think that as far as skill and intelligence go it would be impossible to have a stronger tribunal than a jury of educated gentlemen presided over by a competent judge. I cannot, however, say much for the intelligence of small shopkeepers, and petty farmers, and whatever the fashion of the times may say to the contrary, I think that the great bulk of the working classes are altogether unfit to discharge judicial duties, nor do I believe

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1. Fabian Tract. No.235.

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that, rare exceptions excepted, a man who has to work hard all day long at a mechanical trade will ever have either the memory, or the mental power, or the habits of thought necessary to retain, analyse, and arrange in his mind the evidence of, say, twenty witnesses to a number of minute facts given perhaps on two different days."

Not only are the jury lacking in legal education and judicial experience so as to enable them to undertake the difficult task of judging but they know far less of the terrible consequences of punishment and prison than the judge. The mysterious conception of common sense does not appeal to me any better than the science and art of adjudication.

In the foregoing no attempt has been made to set forth and employ as arguments against the criminal jury the evils which are seen in its practical operation.

First of all, in cases of political crimes, the jury simply reflect the prevailing current of political opinion. It seems doubtful whether there is any better chance of impartiality in the hands of a jury. On the contrary, party feeling is likely to run high in such cases. It

will be very difficult to find a jury who is not strongly biased either for or against the government. The partiality of juries in political trials seems to be almost inevitable.

Apart from those political cases, sometimes some crime may stir public rage. In such a case, the jurors take the first suspected as an object lesson, and if he cannot show an alibi in proof so clear that none can find the spot to place suspicion on, they will seize him in the whirlwind of their wrath and send him to prison. Under such circumstances, no fair trial could be expected, because the jurors sense the feelings in the air and recognise no curbs to make them wait for proof.

Putting aside these unusual cases, let us observe the common run of criminal trials. As pointed out elsewhere the jurymen are not infrequently misled by the appearances of the prisoner and the witnesses,[1] swayed by the distinguished titles and special qualifications of expert witnesses[2] and influenced by the tricks

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1. A Solicitor: English Justice p.161 et seq.
2. ibid. p.162-5.

and rhetoric of advocates.[1] In the result the innocent is sometimes wrongly convicted and the guilty often times acquitted.[2]

There are great differences in juries. It is familiar to practising lawyer that there are acquitting juries and convicting juries. Taking them all round, English juries do show fairness and commonsense and reflect to some extent on the average feeling of the community. Nevertheless after fully examining the essentials necessary for discharging judicial functions in the modern state, careful consideration of the reasons both for and against the jury, and impartial balancing its merits and demerits, I am not convinced that the jury ~~system~~ should retain.

Such is, however, the irony fortune of judicial reformers in England that no sweeping change in this reppect will probably be made in the near future. As abolition of the jury is not likely to come, so measures of reform become urgent. Many proposals for such reform have been made. It is scarcely my concern to discuss them here. But it may be emphasized that reform is called for not only in one direction but in many

1. Ibid. p.157 et. seq. 2. ibid. p.166.

ways, such as qualifications, remuneration, accomodation, exemptions, challenging verdicts and so on. In this connection the report of the Departmental Committee on Jury[1]. may still be read with benefit, while the suggestions put forward from time to time by many writers[2]. and experience of jury reform in other countries[3]. serves either as green or red light.

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1. Report of the Departmental Committee on Jury Law and Practice. cd. 6817. (1913)
2. Mr. Napier, Murder by Jury; Solicitor's English Justice,
3. Morris Ploscowe: Jury Reform in Italy 25 Jnl. of Criminal Law and criminology p.519 et seq (1934-5)

TABLE

ACTIONS TRIED WITH A JURY & WITHOUT A JURY AND ACTIONS TRIED BEFORE SPECIAL AND COMMON JURIES IN THE KING'S BENCH DIVISION.

Year.	Number of Actions, etc. tried			Actions, etc., tried with Jurt.			
	With a Jury	Without a Jury.	Total	% Tried with a Jury	Common Juries	Special Juries	% of Special Juries.
1911	758	629	1,387	54.6	412	346	45.6
1912	645	616	1,261	51.1	357	288	44.6
1913	828	784	1,612	51.3	460	368	44.4
1914	571	466	1,037	55.0	336	235	41.1
1915	570	603	1,173	49.4	309	261	45.7
Annual Average 1911 - 1915	674	618	1,274	52.3	375	300	44.3
1916	513	563	1,076	47.6	285	228	44.4
1917	524	553	1,077	48.6	257	267	50.9
1918	249	529	778	32.0	154	95	38.1
1919	164	908	1,072	15.3	88	76	46.3
1920	132	1,661	1,793	07.3	88	44	33.3
Annual Average 1916 - 1920	316	843	1,559	30.2	174	142	42.6
1921	173	1,788	1,961	08.8	89	84	48.5
1922	183	2,021	2,204	8.3	107	76	41.5
1923	267	1,155	1,422	18.7	192	75	27.1
1924	267	881	1,148	23.2	156	111	41.5
1925	361	1,050	1,411	26.2	199	162	45.4
Annual Average 1921 - 1925	250	1,377	1,629	17.0	149	106	40.8

1926	440	758	1,198	36.7	273	167	37.9
1927	369	724	1,093	33.7	238	131	35.5
1928	454	749	1,203	37.2	283	171	37.7
1929	419	1,043	1,462	38.7	287	132	31.4
1930	340	661	1,001	33.8	245	95	27.9
Annual Average 1926 - 1930	402	787	1,192	36.0	265	139	34.1
1931	397	674	1,071	37.0	261	136	34.2
1932	550	822	1,372	40. 0	350	200	40.0
1933	611	1,137	1,748	34.8	383	228	37.3
1934	296	1,070	1,366	21.6	172	124	41.8
Annual Average 1931 - 1934	463	923	1,389	33.3	291	172	38.3

TABLE II. IN PROBATE.

1911	40	34	74	54.0	14	26	65.0
1912	40	83	123	32.5	14	26	65.0
1913	48	82	130	36.9	22	26	54.1
1914	57	81	138	41.3	26	31	54.3
1915	39	100	139	28.0	19	20	51.2
Annual Average 1911 - 1915	45	76	121	36.5	19	26	57.7
1916	23	62	105	21.9	10	13	56.5
1917	29	120	149	19.4	14	15	51.7
1918	19	97	116	16.3	12	7	36.8
1919	9	97	106	8.4	2	7	77.7
1920	7	84	91	7.6	0	7	100.0
Annual Average 1916 - 1920	18	92	113	14.7	8	10	64.5

1921	4	111	115	3.5	1	3	75.0
1922	5	82	87	5.7	2	3	60.0
1923	9	104	113	7.9	3	6	66.6
1924	12	79	91	13.1	2	10	83.3
1925	10	89	99	10.1	2	8	80.0
Annual Average 1921 - 1925	8	93	101	8.1	2	6	73.0
1926	21	74	95	22.1	9	12	57.1
1927	11	102	113	9.7	5	6	54.5
1928	12	76	88	13.6	3	9	75.0
1929	10	77	88	11.3	2	8	80.0
1930	12	75	87	13.7	2	10	83.3
Annual Average 1926. - 1930	13	81	94	14.1	4	9	70.0
1931	6	103	109	5.5	4	2	33.3
1932	9	101	110	8.1	1	8	88.8
1933	4	82	86	4.3	1	3	75.0
1934	3	113	116	2.5	0	3	100.0
Annual Average 1931 - 1934	5	100	105	5.1	2	4	74.2

TABLE IV - ON CIRCUIT ø

1911	475	205	680	69.5	233	242	50.7
1912	485	198	683	71.0	235	250	51.5
1913	393	201	594	66.1	197	196	43.2
1914	347	191	538	62.6	177	170	48.9
1915	344	344	688	50.3	172	172	50.0x
Annual Average 1911 - 1915.	409	228	637	63.9	203	206	48.9
1916	277	194	471	58.8	147	130	46.9
1917	236	172	408	57.8	144	92	38.9
1918	183	233	416	43.9	115	68	37.1
1919	112	487	599	18.7	78	34	30.3
1920	118	655	773	15.2	85	33	27.9
Annual Average 1916 - 1920.	185	348	533	38.9	114	71	36.2
1921	120	990	1,110	10.8	97	23	19.1

ø Since 1922 to the present, no Statistics as to the number of Actions, etc., tried with a Jury or without a Jury are available.

x Only a total of 688 Actions tried was given in the Statistics.

TABLE IV - DIVORCE.

1911	66	693	759	8.7	51	15	22.7
1912	83	833	916	9.0	55	28	33.7
1913	72	1,043	1,115	6.4	47	25	34.7
1914	64	833	897	7.1	45	19	29.6
1915	97	1,232	1,329	7.3	80	17	17.5
Annual Aver. 1911-1915.	76	927	1,003	7.3	56	21	27.8
1916	66	817	883	7.4	60	6	9.0
1917	86	1,142	1,228	6.9	71	15	17.4
1918	156	1,610	1,746	7.7	118	18	13.2
1919	18	3,134	3,152	.6	10	8	44.4
1920	14	3,620	3,634	.3	9	5	35.7
Annual Aver. 1916-1920.	64	2,065	2,129	4.5	54	10	25.7
1921	10	4,755	4,765	.2	5	5	50.0
1922	25	3,058	3,083	.8	19	6	24.0
1923	69	2,927	2,996	2.3	62	7	10.1.
1924	89	2,550	2,639	3.0	73	16	17.9
1925	96	2,635	2,741	3.2	74	22	22.9
Annual Aver. 1921 - 1925.	58	3,185	3,249	1.9	47	11	24.9
1926	118	2,888	3,006	3.9	104	14	11.8
1927	126	3,824	3,950	3.1	110	16	12.6
1928	106	3,867	3,973	2.6	86	20	18.9
1929	119	3,457	3,576	3.3	102	17	14.2
1930	114	3,795	3,909	2.9	97	17	14.9
Annual Aver. 1926 - 1930	117	3,766	3,883	3.2	100	17	14.8
1931	104	4,085	4,189	2.4	84	20	19.2
1932	105	4,006	4,111	2.4	89	16	15.1
1933	107	4,046	4,153	2.5	92	15	14.0
1934	116	4,352	4,468	2.5	105	11	9.4
Annual Aver. 1931 - 1934	108	4,123	4,230	2.5	93	16	14.4

TABLE V. - JURY CASES.

Year.	Number of Actions, etc. tried. Without a Jury.	With a Jury.	Total.	Percent. with a Jury.
1911	772	24,107	24,879	2.2
1912	789	23,479	24,268	2.3
1913	776	31,087	31,863	2.4
1914	604	26,547	26,151	2.3
1915	546	23,359	23,905	2.2
Annual Aver. 1911-1915	697	29,716	30,213	2.3
1916	495	19,825	20,320	2.4
1917	326	17,824	18,250	1.7
1918	174	16,591	16,765	1.0
1919	15	22,849	22,864	.06
1920	36	31,971	32,007	.1
Annual Aver. 1916 - 1920	209	21,812	22,041	1.05

1921		38	36,652	36,690	.1
1922		0	38,432	38,432	0
1923		0	46,123	46,123	0
1924		396	42,336	42,732	.9
1925		317	31,426	31,743	.9
	Annual Aver. 1921 - 1925	150	38,994	38,994	.59
1926		301	29,299	29,600	1.0
1927		292	28,293	28,685	1.4
1928		362	26,589	26,951	1.3
1929		323	26,508	26,831	1.2
1930		432	25,896	26,328	1.6
	Annual Aver. 1926 - 1930	362	27,319	27,679	1.3
1931		486	25,721	26,207	1.8
1932		570	25,452	26,022	2.2
1933		491	24,255	24,746	1.9
1934		367	23,009	23,476	1.5
	Annual Aver. 1931 - 1934	479	24,609	25,192	1.9

CHAPTER

A Ministry of Justice.

In the previous chapters I have discussed examined the personnel and organisation of civil and criminal courts and discussed the particular problems of costs and jury & legal aid in the English judiciary. What is the organisation behind the judiciary which supervises its working and coordinates the whole machinery of the administration of justice and regulates its relations with the legislature and the Executive? Where is, in short, the Ministry of Justice in the Continental sense? This we cannot find in England. This constitutes one of the characteristics of English judiciary. This has, therefore, become the favourable thesis of English judicial reformersfor nearly two centuries. Thus the idea of a Ministry of Justice is by no means a new one. It can be traced up to Bentham's time. He elaborates a Justice Minister in his draft of a Constitutional Code.[1] In 1836 Lord Cottenham L.C.introduced in the House of Lords a Bill which proposed to divide the office of the Lord Chancellor into two, one as a permanent judge in the

1. Bentham's Work. Vol. 9 Constitutional Code. p.591. et seq. ch. 24 (Bowrings ed.)

Court of Chancery and the other as political officer of the Ministry. This Bill had the support of Lord Dedman L.C.J. and the Attorney General (Sir John Campbell, afterwards Lord Campbell and Lord Chancellor) but was defeated on Second Reading.[1]

Lord Brougham also advocated the formation of a department of Justice.[2] Lord Langdale made the same suggestion in a speech delivered in 1836 and again in 1857 which he addressed to the House of Lords when he used the fact of the establishment of the local jurisdiction of the County Court as a still further argument in favour of taking steps by the establishment of a central authority, whether which in a ministry or a Board, to bring the law in harmony with common sense. In 1859 the establishment of a seperate department was made the subject of a motion in the Commons by Sir R.H.J.Napier[3] but was opposed by the Attorney General, Sir Bethell. In 1873 Lord Bryce suggested the establishment of a legal department[4]. In the following year, the Royal Commission on legal departments recommended the establishment of a

1. Life of Lord Campbell vol. 11 p.82

2. In law magazine and Review p.113 (1806.- 1807)

3. Parliamentary Debates vol. 144 (1857) p.589, 575.

4. The organisation of a Legal Department of Government. Fortinghtly Review. March 1. 1873.

Ministry of Justice.[1] This was strongly proposed by the majority of the Commission, notably Childers and Stansfield but Lord Bigge[2] put forward his dissenting opinions. After this it was advocated from time to time as, in 1892, by a writer in the Solicitor Journal and in 1900 by Thomas Skew[3], the editor of the Annual Practice. In 1915 the idea was put forward by Lord Haldam before the Royal Commission on the Civil Service.[4] In 1917 ~~the Committee on~~ the Machinery of Government Committee reviewed the administration of legal business, found the present system highly inadequate and unsatisfactory and strongly recommended a Ministry of Justice.[5] It was opposed by Lord Birkenhead, Lord Hewart and others. But on the other hand, many distinguished lawyers[6] and learned scholars[7] have advocated the establishment of such a ministry.

1. Parliamentary Papers vol. 24 pp.104-5. 1814
2. Ibid pp.109-14
3. 8 Law Quarterly Review pp.P.129 et seq.
4. Sixth Report (1915) Cd. 1832. Evidence Cd.8130.
5. Report Cd.9230 (1918)
6. Samuel Garrett, President of the Law Society (1918) J.D.Botherell, President of the Law Society (1921) F.A.Parry, Judge A.Jones, Judge J.D.Crawford & others.
7. Haldane Club; Prof.H.J.Laski; Prof.R.S.T.Chorley & others

It is significant to notice that notwithstanding the recommendation of the royal commission and the departmental committee, the suggestion of distinguished jurists and lawyers from time to time during the course of more than one century, England still has not a ministry of Justice. This serves another example of its kind that how difficult is the task of legal reform and how strong is the inertia and conservatism of the legal world. This again serves a fertile subject which deserves to be fully and impartially examined in the light of the principles of administration, of many problems confronting the administration of justice as well as the experience of the other members of the British Commonwealth and other countries, because this is a master machine and key remedy by means of which all proposals of legal reform will be, and can be, translated into the realm of reality. As put by Prof.Cherley "Without the use of such an instrument the conservative reformer will find that two new problems grow up while he is achieving a partial solution of one old one. Without the active co-operation of such a department a

socialist administration must fail in a field which its statesmen have perhaps explored too little, but which would repay development more fully than they are aware." Why, it may be asked, a ministry of justice is so important and so required? The exponents of this legal edifice give many reasons which may be briefly examined.

To begin with, it is desirable that the various branches of each service should be concentrated as far as possible in the hands of a single authority. This is a principle fully emphasised by the Machinery of Government Committee. After advocating the principle of allocation of functions between departments according to the particular services which it renders to the community as a whole,[1] and concluding that any nationalised service would be best to form the sphere of a separate Ministry or Ministers,[2] the report of the Committee runs: "We suggest that, if this were done, all decisions to concentrate functions in particular departments should, subject to the main principle of allocation by services, be governed by the

1. Report of the Machinery of Government Committee pa.19 Cd.9230. (1918)

2. Ibid pa.22

extent to which particular fimctions conduce to the primary end of that Department's administration." [1]

If this principle is correct, the existing system of legal administration ~~in direct contravention of this principle~~ is undoubtedly wrong. The responsibility for the subject of justice is not concentrated upon into one single responsible authority but falls on several divided authorities. It is shared between the Lord Chancellor, the Home Secretary, the Attorney General, the Chancellor of the Luchy of Lancaster and some others.[2] Not only is the responsibility thus scattered about, but there is a wide field of legal administration under only nominal control or no control at all. The justice's clerk is appointed by the justices without any control or supervision. The works of the Coroner are not in practice subjected to much supervision. There is also no supervision of the work of Clerks of Assizes. The Masters in the King's Bench and Chancery Divisions and the Registrars in the Chancery and Probate and Admiralty Divisions have important judicial and administrative

1. Ibid pa. 26

2. Ibid Ch.X pa. 1. p.63

functions but do their work without supervision. Nor is the administrative work of more than ten hundred of the Courts of Summary Jurisdiction up and down the country under any better supervision.[1.]

There is no unified or co-ordinated control over many disjointed legal administrative offices, such as the Crown Office in the King's Bench and Chancery Divisions and the Central Office of the High Court.[2.]

There is unscientific Division of labour in the departments of the High Court, as for instance, the Crown Office and the Central Office in the High Court and the departments of the Chancery Registrars and Masters.[3.]

There are many minor but important judicial or quasi-judicial functions which are now exercised by several government departments such as the Home Office with regard to the legal status of citizens and the Board of Education.[4.]

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1. Report of the Departmental Committee on Imprisonment by Courts of Summary Jurisdiction in Default of Payment of fines and other sums of money, cmd. 4649, pa.9 (1934)
2. 6th Report of the Commission on the Civil Service cd. 7832.
3. ibid.
4. Report of the Machinery of Government Committee, cd. 9230, p.62, pa. 1.

Viewed from whatever points, whether from the plurality of appointing or supervising authorities or from the division of work or the organisation of legal departments, the existing system or no system can scarcely be seriously defended.

This would become obvious if a brief survey of the existing conditions of legal administration with regard to criminal and civil Justice were made. But it is scarcely necessary, as has already been well done by a Committee of the Haldane Club[1] ~~and other writers~~[2] on the subject.

After a brief analysis of the actual position of the administration of criminal justice, the committee recorded their considered opinion in these emphatic words:- "It will be seen, therefore, that three political officers, more or less responsible to Parliament, have greater or less control between them of the administration of criminal justice: that large sections of it are under little, if any control; and that there is no machinery of coordination."[3]

1. A Ministry of Justice prepared by a Committee of the Haldane Club. The New ~~Fabian~~ Research Bureau No.6.
2. Ibid. P. 10.
3. ~~A Ministry of Justice~~

If their evaluation of the administrative part of the criminal law is discouraging enough, it is no more cheerful, with regard to the administration of civil justice ~~on the civil side~~. To quote their conclusion in this report "The above survey of the administration of the civil law is not complete,- other minor satellite floating about in a greater or lesser state of independance could be discovered by a more careful examination ---- It is clear, however, that the administration of the law presents an astonishing whelter of different departments and controls, the existence of which it is difficult to justify in the twentieth century. The mere description of this system sufficiently proves the need for a single coordinating authority." [1]

To make the matter still worse, the Lord Chancellor who is technically the head of English judicature and, in fact, to use Maitland's words[2] "the Minister of Civil Justice" has neither sufficient time nor an adequate machinery[3] to exercise effective control over the field under his charge. His duty is so multifarious and important that some will inaptly compare it with the office of the President of U.S.A. Its nature is so diverse that while

1. Ibid p.15

2. Justice & Police p. 68

3. Machinery of Government Report p.64

it includes functions of a judicial, an administrative and a legislative character, it does not readily lend itself to a rigid classification under these separate heads.[1] It is so onerous that Lord Hershall stated forty years ago the office was two men's work, and Lord Haldane doubted whether two men could do it.[2]

Having enumerated the duties of the Lord Chancellor under no less than 17 items,[3] the Haldane Committee recorded the conclusion: "It will be obvious that the extent and variety of the duties thus assigned to the Lord Chancellor, which we have endeavoured to describe, as briefly as possible, must make it impracticable for him to exercise a close personal supervision over the details of the work involved."[4]

1. Report op. cit. pa. 22

2. Lord Loreburn and Lord Haldane gave evidence before the Royal Commission on the Civil Service and the commission said that both these Lord Chancellors had stated that the burden of public work laid upon the Lord Chancellor was more than it was possible for one man to bear. (The 6th Report. Nov. 1915. Cmd. 7832)
The intolerable burden of this office is vividly described by Lord Hershall in an address to certain Justices of the Peace in the Times of November 1893. Lord Haldane tells the same story in his autobiograph (p.265) speaking especially of the pre-war part of 1914, "the burden of these days was almost overwhelming."

3. Report op.cit. paras.4-21. pp.64-70.
For a summary of his duties see A Ministry of Justice by a Committee of the Haldane Club pp.16-18.

4. Report op.cit. par.22

11.

Such duties would tax to the utmost the energies of all strenuous and robust of men, even if assisted with a large and powerful department. But he is not so assisted.

For the discharge of these manifold duties the Lord Chancellor is provided with a small office consisting from a permanent secretary to a Trainbearer of not more than a dozen persons[1] at a cost of about £13,400 a year.[2] In fact, the Lord Chancellor's Department being a small and semi-developed office, is more like a personal secretariat for the Chancellor himself than a great department of state entrusted with the great task of the administration of law. This office is, moreover, amalgamated in fact, though distinctly in theory, with the Crown Office which is entrusted with certain peculiar functions.[3]

With such assistance as this no official can hope to discharge these multifarious and most important duties either to his own satisfaction or to the public satisfaction.

1. The Lord Chancellor's Department consists of the following staff:
   1 Permanent Secretary, 1 Assistant Secretary
   1 Secretary for Ecclesiastical patronage
   1 " of Commissions of the Peace
   1 Superintentant of County Courts
   1 Private Secretary
   1 Chief Clerk
   5 Clerks
   1 Trainbearer

2. In 1932 £13285, in 1933 £13498 c.f. Civil Estimates for the year ending 31st March 1934 (1933 53 - 111)

3. Report up.cit. para 26-29.

But even his office were fully developed into a government department, the Lord Chancellor with his various and manifold and anomalous duties is hardly in a position to effectively undertake the work of the administration of justice.

"It is perfectly obvious," said Lord Haldane[1] before the Royal Commission on Civil Services after enumerating the duties of the Lord Chancellor "That if that is so it is impossible for him to be a proper head of a great administrative department. Moreover, there is another difficulty. With the functions he has to perform he must be at the House of Lords, and that must be the place where his office is; that is remote from the courts and remote from the departments which he is administering, and my experience is that you cannot administer a great department unless you are on the spot."

It is thus obvious that the administration of law is not only many-headed and uncoordinated, not only costly, overlapping, waste of energy and lack of efficiency, but also the chief nominally responsible officer has neither time not adequate machinery to enable him to fully carry out his duties. All these point to the need for a

1. Evidence of 60907 p.651 (Cd.8130)

co-ordinating authority, a Ministry of Justice.[1] In the considered opinion of Lord Haldane's Committee, "As regards the general subject, We are impressed by the representations made by men of great experience, such as the President of the Incorporated Law Society, as to the difficulty of getting the attention of the Government to legal reform, and as to the want of contact between those who are responsible for the administration of the work of the Commercial Courts and the uncharitable community, and by the evidence adduced that the latter are, in consequence and progressively, withdrawing their disputes from the Jurisdiction of these Courts. We are no less impressed with the total inadequacy of the organisation which controls the general administration of the very large staffs, with the voluminous business, required to give effect to the decrees of the Courts of Justice throughout the country." [2]

Thus viewed from the general subject of the administration of justice alone, the need of a Ministry of Justice is not only obvious, bub urgent, it is called for not only in the name of logical administration but by the demand of economy.

1. Report op. cit. Ch. x pa. 2 p.63

2. Report op. cit. par. 2 pp.63-4

14.

In the second place, one of the more impressive arguments urged in favour of the creation of this new ministry is the difficulty under the present system of holding the attention of the government to legal reform. In the course of the 19th century, reforms were achieved in procedure and judicial organisation and some important essays in codification were also effected, such as the fusion of law and equity, the reform of the law and evidence, the law of succession, the law of husband and wife and the law of real property. Since the beginning of this century the Companies Act of 1908[1], the Post War Property legislation[2], the family law,[3] the law of contract,[4] the law of Torts[5],

1. 9. Edw. 7. c. 49

2. ~~The various law of Property Acts such as~~ The Law of Property Act 1922, the Law of Property (Postponement) Act 1924 (15 Ge. V.c.4), the Law of Property (Amendment) Act 1924 (15 Ge. V. c.5) The Law of Property Act 1925, etc. the Settled Land Act, the Administration of Estates Act, the Land Registration Act, the Trustee Act and the Land Charges Act, the Rights of Way Act of 1932 (22 and 20 Geo.V.c.45)

3. The Guardianship of Infacts Act 1925 (15 & 16 Geo.V. c45) The Adoption of Children Act 1926 (16 & 17 Ge.V.c.29) Legitimacy Act 1926 (16 & 17 Geo.V.c.60), The Age of Marriage Act 1927, the Marriage (Prohibited Degrees) Act 1931 (21 & 22 Ge.V.c.31. s.1); the British National & States of Aliens Act 1933 (23 & 24 Geo.V.c.49)

4. The Carriage by Air Act 1932 (22 & 23 Ge.V.c.36); the Children and Young Persons Act 1932 (22 & 23 Geo.V.c.46) A Third Parties (Rights against Insurance) Act 1934 (20 & 21 Geo.V.c.25)

5. The Road Traffic Act 1930 (20 and 21 Geo.V.c.437 The Law Reform and Miscellaneous Provisions) Act 1934 (24 & 25 Geo.V.c.41. s.1)

the Criminal law[1], and the law of procedure[2] have probably been some of the mast considerable work of revision. But there is lack of provision for the ~~study~~ steady and continuous effort in this direction. Consequently much remains untouched and need to be wholly overhauled. There are large fields of substantive law which should be recast and codified. There is a larger portion of procedure law, especially the laws of evidence, should be simplified, rationalized or abolished. There are other fields, known to all lawyers, where the workers in the law are handicapped by rules and systems which are not only outworn but unjust. Instances are so many that will leap to view and so well known that renders enumeration unnecessary.

1. The Army and Air Force Act 1928 (18 Geo.V. c.7 s.4) and 1930 (20 Geo.V.c.22 s 5/23) the Infant Life (Preservation) Act 1929 (19 & 20 Geo.V. c.34 s.1) The Scrutiny of Sentence of Death (Expectant Mothers) Act 1931 (21 & 22 Ge.V. c.24 s.1) The Poor Prisioners Defence Act 1930 (20 and 21 Geo.V. c.32) the Childrens and Young Persons Act 1932 (22 and 23 Geo.V. c.46).

2. The administration of Justice (Miscellaneous Provisions) Act 1933 (23 and 24 Geo. V. c.36) The Summary Jurisdiction (Appeals) Act 1933 (23 and 24 Geo.V.c.38) The Administration of Justice (Appeals) Act 1934 (24 and 25 Geo.V.c.40)

Apart from these problems which have often been discussed, ~~particular~~ special attention should, I think, be directed to some such modern problems of legal administration as how to adapt the law to the growth of social and economic life of the community and how to evolve a new technique and probably create some tribunals for the application of social and economic legislation,[1] and how to reform a number of administrative Tribunals.[2]

On the other hand, the need and importance of judicial reform require no further emphasis from me here, as so much has been written about it. Nor is it necessary for me to elaborate here the outstanding problems and methods of judicial reform as I have full examined them in the previous chapters.

It is sufficient to say that the judicial system should be complete reorganised and reformed with regard to structure and personnel. There remain two watertight systems, the Supreme Court and the County Courts

1. Cf. Prof. D.H.Perry: "Modern Problems and Methods of Law Reforms" The Journal of the Society of Public Teachers of Law. 1934 p.10 et est seq.

2. Dr. R.W.A.Robson. Justice and Administration Law (1928); C. Vo.Allen: Bureaucracy Triumphant (1931)

with overlapping and unnecessary division of juridictions. There remain the cumbrous, archaic and expensive circuits There again remain a number of anomalies and archaic local courts in several parts of the country. There still remain the question of costs, of legal aid, of the jury system, of public defender and of other matters related to the administration of law partly or unsatisfactorily solved or wholly unsolved.

These and other major problems of legal and judicial reforms have each and all been, more or less, examined and advocated for many years and by different hands. But it is remarkable that when so much has been urged, so little should have been accomplished. Why? The reason is not far to seek. First, let me observe why some reforms in the past have been and could be achieved. Broadly speaking those reforms which had the fortune of success at all were either championed by the successive efforts of enthusiastic law reformers in the persons of Lord Chancellors, or espoused by great governmental departments or upheld by powerful and influential bodies or loudly protested cried by the public goaded to desperation. Unless sponsored by one of these bodies the chances of successful law reforms would be long and far between. As an example

of the first, let me observe how the reform of the land laws had been the ambition and enthusiasm of most of the Lord Chancellors for some fifty years and how it was succeeded with much difficulty even in such able hands as the late Lord Birkenhead. In the words of Lord Haldane "This reform (of English Land Laws) illustrated the opinion (which I have expressed before) that it is only by a co-operation of successive Lord Chancellors that great reforms of the law can be accomplished. For the sooner was the Bill passed than it became evident that to preface the necessary changes several Acts would be required."[1] But when considering how numerous and onerous are the duties of a Lord Chancellor (and what little time is left to him to do reform work), the chances of having enthusiastic legal reformers on the Woolsack to carry on and co-operate with what the predecessors have left unfinished must be very rare. It is, therefore, not difficult to explain why great reforms of law is a thing not often seen in this country.

As examples of the second, let me take criminal law & local governmental laws. Much of the criminal law, which largely comes under the control of the Home

[1]. R.B.Haldane - autobiography ch.8 p.251.

Office has already been codified. Local governments, sanitation, town planning and other matters which fall to the province of the Ministry of Health have been harnessed in almost complete and systematic codes of law. Not only are these laws more or less codified but an amending statute will almost be surely and quickly followed if any point should be overlooked or a ruling of court adverse to the departmental policy be given. As an instance of the third, take the case of commercial law. The Bills of Exchange Act 1882, was first drafted privately under the auspices of the Institute of Bankers and later introduced into the House of Commons by the then president of the Institute and finally pushed through Parliament by the strong support of banking and business interests.

The fourth example is the reform in divorce as recommended by the Divorce Commission. This has been the outcome of the outcry of a society goaded to desperation with the unsatisfactory condition evidence of existing laws.

On the other hand, how about the law of contract and torts? Notwithstanding that these branches of law vitally affect the every day lives of every citizen, there have

been and remain to the present day as part and parcel of these laws many archaic and obsolete decisions given in the dark ages or even comparatively modern decisions delivered possibly under some error as to proper social policy. It is significent to ask why these branches of law remain untouched by the hands of modern men, though they have intimate relation with the largest number of people. Why other reforms equally urgent and important as these have been mentioned, though have long been urged do not come forth? There may be other reasons, but it is chiefly due to the fact that there is no authority charged with the duty of legal reform and equipped with the machinery to undertake this great task.

"I have contrasted" wrote Mr. Justice Cardozo "the quick response whenever the interest affected by a ruling untoward in results had some accredited representative, especially some public office, through whom its needs were rendered vocal. A case involving, let me say, the construction of the Workmen's Compensation Law exhibits a defect in the statutory scheme. We find the Attorney General at once before the legislature with the request for an amendment. ..... That is because in these departments of the law there is a public officer whose duty prompts

him to criticism and action. Seeing these things I have marvelled and lamented that the great fields of private law, where justice is distributed by men and man should be left without a caretaker. A word would bring relief. There is nobody to speek it" [1] pp.457. These words which were written with reference to the state of affairs in U.S.A. apply equally well to the situation here. Not until there is a Ministry of Justice legal reform, in many respects is not likely to come. The public scarcely take great interest in legal reform ~~or in the machinery of the law which, in itself being difficult to understand, makes little appeal to the popular imagination.~~ Nor are the lawyers and judges on the whole any more interested in legal reform than the people at large. On the contrary, they rather have a tendency adverse and abhoring to any change. In the words of Judge L.A.Atherley-Jones "the general public is heedless of individual injury unless it be of a flagrant character. Such changes and amendments in our laws as have been effected were for the most part due to some particular exigency or dictated in the interest and through the pressure of some section of the community. Nor can reliance be placed on the Bench or the Bar to initiate or even countenance change. Judges and barristers

1. "A ministry of Justice." Law & Literature pp.45-46

22.

have administered the law as they found it with implicit confidence and even veneration. These feelings unite in them with all the obvious instinctive motive for abhoring change. What has satisfied mankind so long, they are satisfied, should remain during their lives."

Thus there[1] in the opinion of the same writer, legal reform on any comprehensible scale can be effected only on the initiation of the government and the government is only likely to be moved thereto on the instigation of a powerful ministry, as pressure of public opinion is not likely on this point.[2] But where is the powerful minister for legal reform? As is well known, parliamentary time, indispensable to carry out any legal reform, is so pressed with other matters that unless upheld by a minister there is little or no parliamentary time left for measures of legal reform. This has been trenchantly brought out by Lord Birkenhead. "The chief obstacle in passing measures of legal reform lies," he wrote, "and always has lain, not in the conservatism of lawyers, but in the congestion of Parliamentary business. From time to time some wave of popular interest, having its origin in some notorious case of admitted hardship, which may or may not be of first importance, sweeps over the public mind, and under

1. "Law Reform" 240 Edinburgh Review pp 112 et seq. 1924
2. J. D. Crawford: "A Ministry of Justice" 18 th Nineteenth Century & After pp 620 et seq. 1925.

its influence some advance is made. But for the most part the public take but little interest in the machinery of the law, which is in itself difficult to understand and makes but small appeal to the popular imagination. Legal reforms, if they are to come at all, must come through the conviction of the general body of both professions and through the persistent efforts of the leaders of both professions, first to educate their professional colleagues, and then to convince their colleagues in the Cabinet." [1]

"There would be" he continued to ask, "the position of a Ministry of Justice in the face of this task?"

It is doubtful, or at least, debatable whether conservatism of lawyers has not in the past been one of the causes in preventing or delaying legal reform. "From time to time we find small reforms forced by the general body of citizens upon the lawyers" wrote Judge Parry, [2] "for hitherto such work has always been done in the teeth of professional opposition. It would be interesting to dwell on the pagan mysteries of special pleading and the religious enthusiasm with which lawyers fought in the defence".

1. Points of View Vol. 1.

2. Concerning Legal Reform in What the Judge thought, pp.151-2 (192) also Economy in Law by an Anonymous Writer in 225 Edinburgh Review pp.320-321 (1917). This Essay seems to be written by Judge Parry as so much of it has been incorporated in his "What the Judge Thought".

Whatever may be the part played by lawyers in legal reform, Lord Birkenhead seems to me right in maintaining that the vital cause of the difficulty of law reform is due to the pressure of parliamentary time. But he has not gone further enough to ask why there is lack of parliamentary time for legal reform in general and why there is time for particular branches of legal reform under the charge of the Home Secretary or Minister of Health. Having diagnosed one of the true causes of the ~~society~~ existing defects, he failed to minister the true remedy but wholly misunderstood the true position of a Minister of Justice in regard to legal reform. He seemed failing to realise that there would have been greater possibilities of obtaining parliamentary time for the cause of legal reform if there were a minister of Justice who, being responsible to the Parliament for the administration of law, would necessarily be anxious of getting whatever parliamentary time is obtainable to serve the purpose of law reform.

The difficulty of the lack of a ~~new~~ responsible minister in the House of Commons in carrying through measures of legal administration ~~in the House of Commons~~ has been particularly emphasised by Sir A.H.M.Mackenzie

In his evidence before the Royal Commission on the Civil Service, he considered some of the Bills were neglected in consequence of having no representation in the House of Commons.[1] "Our only chance of getting it dealt with," he said,[2] "was the law officers of the Crown having time to deal with it. They actually give preference to the Bill that each of them is more directly concerned in, or those Bills, as is the case nowadays, that the law officers of the Crown take a very prominent part in - the Finance Bills - before the House of Commons."

What is true twenty or more years ago applies with still more force to the present. Parliamentary time is more pressing today. To quote Dr. W.J.Jennings," There is at present insufficient time for the passing of more than a fraction of the Bills which the Government for the time being wishes to propose .... There is real competition for parliamentary time, a competition in which

1. Evidence before the Royal Commission on the Civil Service. Appendix to 6th Report of the Commissioners, cd. 8130, p.269, 4433 and 43898.
2. Ibid, q.44335, p.26.

the personality of a Cabinet Minister counts more for success than the urgency of the problem"[1] What would, then, be the chance of legal Bills which without a whole-hearted and fully responsible competitor in the battle race of Parliamentary time in the House of Commons?

Now, as then, whenever a question of legal reform is much mooted, it becomes necessary owing to the lack of a responsible and permanent authority, to appoint an ad hoc royal commission or departmental committee to enquiry into the matter, examine a number of witnesses, obtain files of documents and collect information about the subject from various quarters. After the report has been made and evidence printed there is no responsible officer of state or governmental department to consider and weigh the result and in a decade or generation the whole thing is often discussed all over again. Then royal commission after royal commission, departmental committee after departmental committee, have to a large or less extent reiterated sectionated these findings and recommendations. With a few exceptions their practical results are

1. Parliamentary Reform pp. 31-32 (1934)

insignificant when compared with the time and labour and expense involved. Many of their proposals found doubtless their way to their appropriate pigeon holes, where they lie dead and buried in dust. Why? Not because these proposals which were thrashed out and put forward by distinguished witnesses and commissioners were unworthy of realisation but because there is nobody's duty to carry them out.

What is still more significant to notice is that not infrequently questions of first rate importance which were raised and discussed by several distinguished witnesses in the course of giving evidence and which should, in fact, be considered and settled before anything else was held by the Committee or Committee as the case may be, to be beyond its reference and consequently discarded from further consideration. To take one example out of many,[1] we may refer to the very question of a ministry of Justice. This was discussed by the Royal Commission on Legal Departments which reported

[1]. The question of the inclusion of women in the Jury List was ruled out by the Departmental Committee on its constitution, qualifications, selection, summoning of jury, etc. on the ground of limited scope of Reference c.f. Report of the Committee cd.6817. p.7. ps.56 (1913) Many such instances could be adduced but are unnecessary.

in 1874 but the verdict was that "question of a ministry of Justice is beyond the scope of the commission". This was again brought forward before the Royal Commission on the Civil Service between 1914 and 1919 and the same verdict was given. It was also considered by the Royal Commission on the Despatch of Business of Common Law Courts but was again ruled out as beyond its terms of reference. Were there a ministry of Justice such things would scarcely happen and many ad hoc commissions and committees would almost be unnecessary, thus saving considerable expense. Or, if they were necessary, their proposals would be considered and weighed by the responsible officer and carried into effect in due time.

It may be argued that works of revision and codification of law may be committed by the Lord Chancellor to special committees or commissions. But they would scarcely have the same authority, or work with such efficiency or meet the requirements of the situation as under the care of a Ministry of Justice. This has long been urged as early as the time of Lord Brougham. In the Report by the Statute Law Committee of the Law Amendment Society as to the best means of consolidating the statutes, the following

opinion was given:[1] "Having now given our reasons at length for withdrawing our confidence, both from the Board and from the Commission, it remains for us to state shortly, first, by whom, and next in what manner, the consolidation of the statutes can, in our opinion, be best effected. As to the persons who should be entrusted with the work, we are clearly of opinion, that the cause of consolidation would be most effectively promoted by the appointment of a Minister of Justice or Secretary of State for law. One of the principal duties which would devolve on such an officer would be the reduction of the written law into an intelligible and manageable form. He would be aided by a permanent official staff, whose energies, in common with his own, would be sustained by a sense of responsibility, and be stimulated by a feeling of honourable ambition. He would have leisure to attend to the task; he would feel proud of performing it well; and what the Lord Chancellor has taken up as a mere labour

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1. Law Magazine and Review, Vol.L.V.1856, pp.150, et seq.

of love, would with him be a labour of duty, on the efficient performance of which he would know that his character was staked ..." Moreover, with laws once revised and codified, the Ministry could scarcely be at rest. The work of codification could not be completed once for all. The Ministry should upon the model of Massachusetts prepare the revisions of the existing codes for re-enactment at regular intervals of a certain number of years.

From what has been said, it seems to me clear that all efforts to achieve legal and judicial reforms are unlikely to prove successful unless they have the driving force and command of parliamentary

time possessed by a great officer of state with a properly constituted department.

The position is clearly stated by D.N.Pritt, M.C. when he writes "that a Ministry of Justice, its establishment of which is advocated by many persons on other grounds, might find it less difficult to embark on reform than the office of Lord Chancellor as at present constituted."

Lord Bryce is ~~much~~ even more emphatic on this point. After referring to that department of law with regard to procedure, the doctrine of judicial evidence, the details of the law of property, he concluded: "In all these subjects, improvements in the law must come from the lawyer; and it is a reproach to our system of government that nothing should have been done to provide a permanent legal body for considering such improvements, reporting on them, and suggesting the mode in which they ought to be carried out. Till the necessity of this is recognised, till the responsibility of preparing and introducing reforms in the law is definitely fixed upon some office or functionary, instead of being left to the chance ardour of a private member, or the morsels of leisure which the law officers can snatch from their other work, the great enterprise of our laws and the completest expression of the nation's practical intelligence,

the most active promoter of its development and well-being, must advance but slowly and imperfectly."[1]

Something more than a Bentham every generation is needed to secure that continuity of creative change which is the essence of successful reform. A Ministry of Justice is of the fundamental machinery by which a steady and continuous improvement in the substance and administration of the law can be assured.

In the third place, the argument for a Ministry of Justice on the ground of legal reform brings one to the consideration of the problem of drafting of legislation. This again ~~leads one~~ points out + to emphasize the requirement of a Ministry of Justice. The drafting of legislation may be observed in two respects. First, the drafting of Government Bills is done by the Parliamentary Council who has a small office nominally under the Treasury. The Counsel and barristers are selected for that office and by long training therein acquiring the skill as draftsmen. ~~Skill of drafting as they haven~~ But the work of Bill drafting may sometimes suffer there from the pressure or urgency of Cabinet demands. Moreover the sphere of this office as pointed out by Lord Bryce, is very limited. In his works, "It is merely the handmaid of the other departments,

1. Op. cit. Supra. p.323.

1. ~~The Report of the Committee on Ministerial powers sec.11 para iv. p. 49 cmd. 4060 (1932)~~

33. which apply to it when they want a Bill drawn, it has no power to originate a bill itself, even one so obviously desirable as a mere consolidation Act, nor any right to insist that a bill which has suffered from the storms of committee shall be reduced into proper technical language before it receives the royal assent."[1]

Thus, under the existing practice, two weighty functions remain to be fulfilled. There is, firstly, no machinery for securing that when a bill passes into law its arrangement and expression shall be rational, intelligible and self-consistent. There is, secondly, no person or office specially charged with the improvement of the law, when it does not touch questions of politics or administration.

Nor is this all. As emphasised by the Haldane Club[2], "The Parliamentary Draftsman, important as his work is, is concerned only with the correct legal shape of statutes, not with their relation to the general body of law, nor to the social policy of the state,

1. The Organisation of a legal Department, op.cit. supra. p.320

2. A Ministry of Justice op.cit.supra.p.21

Yet these aspects of legislation are important, and will become vital in a socialist Commonwealth. Only as a department in a Ministry of Justice concerned with legislation in all its aspects and bringing to bear upon it not only legal acumen, but a wide knowledge of political science, and under a responsible minister playing his part in the formation of social policy, will the draftsman's work achieve its full value and significance."

Thus, the present system of Bill drafting is unsatisfactory. But Secondly, the drafting of regulations is still more unsatisfactory at present. In some cases it is done by or under the supervision of Parliamentary Counsel, as, for instance, regulation made by the Treasury. In others it is executed by the various Departments usually but not invariably by their legal officers. In the words of the Committee on Ministers' Powers,[1] the work is there, "largely in the hands of persons who, however able and experienced in their own work, do not possess the very special drafting experience of the Parliamentary Counsel....." As things stand, under the existing procedure of leaving the drafting of regulations to the Departments the work is uneven - some is good and some is bad. Regulations on the whole tend to be somewhat less well drafted than

1. Report of the Committee on Ministers' Powers ~~Report, op. cit.~~ para. 10 p.49. cmd. 4060 (1932)

Government Bills as originally presented to Parliament which are all drawn in the Office of Parliamentary Counsel." In the opinion of the Committee the risk of such drafting of regulations is not that it is being less thoroughly drafted or less clearly expressed than Government Bills but that there is an absence of the safeguards afforded by the special skill, training and position of the Parliamentary Counsel, with the inevitable consequence of the minister assuming to himself, in the terms of the regulations he made, powers more extensive than those conferred by the Act.

The drafting of regulations neglected, moreover, has resulted in making the regulations ~~useless~~ or order in some cases, the principle that without express authorisation from Parliament delegated powers conferred on His Majesty in Council or the Minister cannot be passed on to any body or person.

The existing practice of drafting regulations is consequently not only unsatisfactory and dangerous but also expensive and uneconimical in consequence.

To quote the Report of the Committee:[1] "We feel that the existing system of Departmental drafting does not

1. ibid., para 10. P. 50
~~Parliamentary Report pp.31-5 Louden 1934.~~

fully ensure that the standard shall in all cases be up to that of the best draftsmanship - or even satisfy a lower test. Prevention is both better and less expensive than cure. If ten cases of ultra vires regulations occur today, and nine of them would be avoided by a general improvement in the standard of drafting, it is obvious that an important public advantage would be achieved, and one peculiarly relevant to the object of our reference. If we assume that legal proceedings result in two or three of the ten cases, the saving of expense direct and indirect which would result is in itself a public economy. But the value of good drafting is not limited to the avoidance of illegalities. In the ordinary life of the community what is above all important is that legislation, whether delegated or original, should be expressed in clear language."

Whatever may be the parliamentary reform in future, the importance of good drafting

can scarcely be over-estimated. The existing practice is, however, highly unsatisfactory. The creation of a unified and central drafting office is not only desirable, but would be of immense value to secure uniformity of practice and to apply a wider general experience to the detailed parts of the work and to attain the highest possible ideal of good drafting. This new drafting office should form an integral part of a Ministry of Justice, have a much wider range of activity and draft or settle all public state documents of a legal nature, such as Orders in Council, statutory Rules and Orders, private bill legislation and so on.

There is, fourthly, the paramount need of responsibility to, and representation in Parliament, especially the House of Commons, for the administration of justice. The importance of parliamentary scrutiny and representation as to the administration of law needs no emphasis from me.

With regard to parliamentary scrutiny, Prof. R.S.T. Chorley thus wrote, "the value of parliamentary

as a preventive of unfair dealing by officials and as a spur to efficiency is not perhaps generally realised, but one can hardly doubt that, for example, cases of high-handed action by the police would be far more prevalent were it not for such parliamentary action as that in the Savidge and Kirkpatrick cases. The judiciary should certainly be independent, but true independence can survive scrutiny, while abuses of it should be brought out into the light of day or it will lead to arrogate to itself an unscrupulous use of power."

Though such need is imperative, the present condition is anomalous. The Home Secretary and the Attorney-General are, of course, answerable to Parliament. The Lord Chancellor, having a constitutionally peculiar position, is no doubt prepared to answer if he is able to do so. He,is, however, not represented in the House of Commons. Some of the consequences of this position are obvious but highly undesirable. First, the Lord Chancellor cannot readily be made responsible to criticism ~~in~~ the House of Commons, to which every minister should be and is, in practice, responsible. The office of Lord Chancellor is thus constituted one solitary and anomalous exception. Second there is nobody in the House of Commons

whose duty it is to answer questions. This is inconvenient both to the Lord Chancellor and to the members of House. There is nobody whom the Lord Chancellor can be said to instruct for the purpose[1] while the members of Parliament find it not a little difficult to ask the question and to the proper person. At present questions relating to the department are usually dealt with by one of the law officers.[2] In such cases the Law Officer and the Lord Chancellor, in the words of Sir Mackenzie, "probably agree as to what they should say, but the Lord Chancellor cannot say to the Attorney-General: "You are to say so and so". As urged by Sir Mackenzie We want somebody who is more in that position. There is a material difference between the man whom you can ask 'Would you mind saying so and so; that is what I should like you to say', and having a subordinate who comes and says: 'Please sir what am I to say?'[3] Moreover When the Estimates of the Lord Chancellor's department are discussed in the House, "there is nobody who is really familiar with them, or whose duty it is to answer about them, or who would be in

1. Evidence op cit. q.43896. ed.8130 p.1.
2. Ibid q. 43896
3. ibid Evidence 1 op.cit., q.44459.

a position to answer anything that was like a critical question about them."[1]

Third, with regard to legislation, especially Legal Bills, there is nobody to take charge of them, with the consequence, as already referred to, that they have not passed in the House.[2]

What is still more unsatisfactory is that over considerable fields of legal administration nobody can at present now be made to answer to Parliament, as, for instance, when a Judge appoints his son to an office which is within his right and gift.[3] On this point the Report of the Commission on the Civil Service is explicit: "The Judges have no such responsibility in the ordinary sense of the word. Their salaries are not voted, and their actions cannot be criticised in the House of Commons except by a formal procedure which can only be set in motion in cases of grave incapacity or misconduct."[3] In so far as responsibility exists under the present system, it is not without some difficulty for the Members of Parliament to ascertain

1. Ibid q. 43898
2. Ibid q. 43898
3. 6th Report, pa.7 p.15 ed. 6732

~~to ascertain~~ which is the appropriate minister to whom questions can be asked. The present condition is, therefore, not only inconvenient, unsatisfactory, but highly undesirable.[1]

Were there a ministry of Justice which would be responsible to the Parliament, not only complaints and grievances of the administration of law could be ventilated ~~mutilated~~ in the National political arena and the scandalous inefficiency and even corruption as revealed in the Report[2] of the Civil Service Commission, and in the evidence[3] would get rid of, but legal Bills would be properly taken care of.

There is, in the fifth place, the desirability of connection between the legislation and the judicature. This connection is now wanting but can be attained supplied by the creation of a Ministry of Justice. But the Courts and the legislature now work in proud separation and silent isolation. "The penalty is paid" to use the words of B.N.Cardozo of the Supreme Court of the U.S.A. "both in the wasted effort of production and in the lowered quality of the product. On the one side, the judges,

1. cf. Evidence op.cit., qs.43295-8, 44314, 44327,-55 44358, 44456-63.

2. ed.7832

3. ed. 8130

left to fight against anachronism and injustice by the methods of judge made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labours bears the tokens of the strain. On the other side, the legislature, is informed only casually and intermittently of the news and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often where it would mend." These words which were written with special reference to American situation apply with equal force to this Country.[1]

There is a further reason which makes the works of mediation more urgent. I have argued the importance of the work of codification through the continuous and concentrated effort of a Ministry of Justice. But it is a measure taking years to achieve. Codification is necessarily a slow and toilsome process, which, if hurried, will do more harm than good. There is

1. "The legislation will give its formal sanction" wrote Dean R.Pound. "But some one must do the preliminary study, must perceive the task to be stopped, must discover the anomaly to be pruned away, must find the directly advantageous practice to be extracted, the conflicts to be abated, and inconsistencies to be reconciled. So long as this is everybody's business it is nobody's business." Juristic Problem of National Progress 22 Com.Jour.of Sociology p.731 (1917)

consequently something which is more urgent and immediate than codification, the need of immediate changes of certain rules of law by statute. Those who know best the nature of the judicial process and its history of judge-made law know best how easy it is to arrive at an impasse and brings judges to a stand that they would be glad to abandon if an outlet could be obtained. But sometimes it gradually reaches a point that nothing short of a statute can bring home a fresh start. In the interests of justice the relief is so urgently needed that it cannot afford to wait upon the lagging years of codification. The requirement of the moment is something less ambitious. An Act of Parliament or a dozen lines or less from the legislature will serve the purpose of stimulating and freeing the forces through which judge-made law develops. A new point of departure is thus possible, a new impetus and direction is thus given and its judicial process is to be set in motion again. "For there are times", in the words of Judge Cardozo, "when deliverance, if we are to have it - at least, if we are to have it with reasonable speed - must come to us not from within, but from without."[1]

1. Op. cit., p.46

But the statute will not come out, or come out too late or inadequately without an agency or a ministry of Justice charged with the duty of mediation between Parliament and judiciary, watching machinery or output, notifying the master of the works when there is need of repair or replacement and carrying the tidings of distress to the rescue of the miner. Because there is no one whose business it is to give warning that help is needed, the Courts are at present not helped as they could and ought to be in the adaption of law to justice.

Further, even if a code has been completed, the work of mediation between legislature and courts cannot afford to dispense with, partly because however complete it may be, it can never cover all kinds of contingencies, partly because it is followed by commentaries and commentaries by revision and thus the task is hardly finished. As has long been pointed out by a master hand, "As in other sciences, so in politics, it is impossible that all things be precisely set down in writing; for exactments must be universal, but actions are concerned with particulars." [1]

1. Aristotle: Politics Bk.II (Jowett's Translation)

45.

Some such agency as a Ministry of Justice must, therefore, be found in order to mediate between the legislature and the Courts, and to give the signal of help when required, to watch the law in action, to observe the manner of its functioning and to report the changes needed when function is deranged.

In the sixth place, the guidance of the executive in legal questions is not now given by one authority but by several and separate authorities. The Cabinet is advised as regards questions of general policy by the Lord Chancellor and the Law Officers. But points of legal question, whether international, constitutional, municipal, or foreign, are constantly arising in respect of actions contemplated or done by, or rights and duties of, all government departments, commissions acting under particular statutes and local authorities. They constantly require legal advice and guidance. This primarily falls upon the legal officers who are "the legal advisers of the Crown; the ministry and the departments of government."[1] But, as argued by Lord Bryce, it is open to question whether the Law Officers

1. Anson: Law and Custom of the Constitution. Vol.II. The Crown pt. 1 pp.207-8 2 ed. (1907)

46.

are in a position to give the Cabinet and all the departments of the Executive the opinion as to what the law is. The legal questions upon which they have to give their opinions "are extremely varied and intricate, and often need further solution and minute special knowledge of history, or of commercial usage or of foreign or international law - a knowledge which the Attorney and Solicitor-General related, ex hypothesis, chiefly because they are party members and good political speakers, cannot be expected to possess. Moreover, the judicial faculty of putting the right construction on a statute, or discerning the true conclusion to be drawn from a certain set of facts, is not necessarily nor even usually associated with the power of parliamentary advocacy. From time to time there has been notable instances of those who were not in the Ministry and not perhaps in Parliament at all, and who would possibly never have been shown these, but whose opinion was by the Common consent of the profession entitled to more weight than that of the advisers of the Crown for the time being ..... Now it is an evil

that the crown should be debarred from having the best possible advice, and should run the risk, when its two officers have advised it erroneously, if finding a legal battery of heavier metal prepared to open fire upon it in the Courts."[1]

In order to obtain the best possible advice he urged the establishment in the proposed Ministry of Justice of an advisory division by placing at its head the best lawyer who can be found with the assistance of a sufficient number of men selected especially for their attainments in various fields of law.

There is, moreover, another consideration to the matter. This advisory work, though in theory is the duty of the law officers, is far too large and multifarious for any two men to do. Their heavy burden is necessarily and to a large extent relieved by the legal under-secretaries or standing counsel attached to each department. We find such legal office, whether called "the solicitor department", "solicitor office" or "legal department" in the Treasury, the Board of Trade, the Board of Inland Revenue, the Ministry of Labour and in Ecclesiastical and Church Estates Commissioners. We again find such legal

1. James Bryce. The organisation of a Legal Department of Government. 13 Fortnightly Review. (New Series) March 1, 1873. p.324.

advisers whether entitled "legal advisers" or "assistant legal advisers", "solicitor" or "assistant solicitor" in the Home Office, the Foreign Office, the War Office, the Colonial and Dominion Offices, the Ministry of Health, the Ministry of Agriculture and Fisheries, the Board of Education, the Civil Service Commission, the Department of Agriculture for Scotland, the Land Registry and the Friendly Societies Registry.

The legal office or advisers in various government departments act independently of, and do not in practice, communicate regularly with, one another and the Law Officers. The view of the law of the adviser to one department is not necessarily the same of any other. Difference and even conflict of opinion is as inevitable as it is undesirable. If means and ways of communication and coordination among those legal advisers were devised, it would undoubtedly be of great advantage. If all legal advisers to different departments were concentrated in one legal department, it would not only obviate the conflict of opinions but greatly contribute to convenience and economy. The current of events has pointed to such a direction. In the words of Sir Thomas C.Heath, "the legal business of Government Departments have of late years been

generally concentrated."[1] But it is concentrated only partly and in the Treasury.[2] It would be far better and logical if it is concentrated in a Ministry of Justice.

Seventhly, the consideration of the present prosecuting system in England also brings out the demand of a Ministry of Justice. English system of prosecution is grounded upon the theory of having the prosecution in the hands of private individuals, the person injured or his kinsman or friends.[3] This was considered as wholly inadequate and resulted in an uncertain, ineffective and cumbersome administration of criminal justice.[4] A movement for a national system of public prosecution started in the middle of the last century. Since then, and for a quarter of a century, no less than seven different bills were introduced in the House of Commons providing for the institution of public prosecution through the agency

1. The Treasury p.186. Whitehall series.

2. Ibid. The Treasury Solicitor also acts for the Attorney General.

3. Sir T.Dunning: "Discretion in Prosecution," The Police Journal Vol. 1 p.41, (1928); Stephen. A History of the Criminal Law in England, Vol.1 p.495 (Louden (1883)

4. Eighth Report of the Criminal Law Commissioner. Part.Paper 1845 Vol.14 No.656.

of officials under the control of the central government. During the same time, several commissions and committees reported and proposed schemes of reform.[1] But all efforts failed and failed signally. The only success if it can be so called, has been attained ~~from this movement~~ in creating the Office of Directors of public prosecutions. In the result, there are three different types of prosecutions throughout the country. There is the public prosecution, instituted or taken over by the Director or by certain other public authorities, the type ordinarily referred to as the "Police prosecution" since it is undertaken and carried out by this agency, and the case which is still prosecuted by private individuals, called the private prosecution. To leave the prosecution of crime in the hands of private prosecutor is the least satisfactory ~~system~~ of all. He

1. Cf. Parliamentary papers (1854-5) Vol.12. No.431, (1856) Vol 7 No.206; (1874) Vol.24 C-1090 (1875) Vol.~~L~~ XI C.1319; (1884) Vol. 23 C.-4016;
Cf.also Parliamentary Debates 3rd Series. Vol. 130 (1854) p.665 et seq; Vol.131 (1854) p.587; Vol.132 (1854) p.1169; Vol.136 (1854-5) p.1651 et seq; Vol. 138 (1855) p.697 et seq; Vol.144 (1857) p.743; Vol.201 (1870) pp.240 et. seq., 266 et seq.; vol 203 (1870) p.408; Vol.205 (1871) p.1744 et seq; Vol.206 (1871) p.1667; vol.209 (1872) p.587 et seq; vol 211 (1872) p.1950 et seq.; vol.215 (1873) pp.1045; Vol. 244 (1879) p.966 et seq.; Vol.245 (1879) pp.1721, 1773; Vol. 246 (1879) p.1336 et seq.; Vol.247 (1819) p.134 et seq.

may be loath to take up the case. He may be, and usually is a person of limited means and is charry about incurring expenditure which stands chances of being disallowed at the trial court. In fact, the inadequacy of the allowance made by the courts to prosecutions, witnesses and counsel, has been a frequent source of complaint.[1]

Nor is there much to be said in favour of the system of police prosecution. At present the police, in addition to carrying the full burden of the police prosecution, render valuable assistance in the others, whether they are "public or private", in the getting and sifting of evidence, the rounding up of witnesses and the general work of preparation. But to leave the burden of prosecution upon their shoulders is undesirable and sometimes not without dangers. From the earliest stages of cases, criminal proceedings often need to be considered and directed by persons far more learned and competent to deal with legal questions than one can expect the heads of the police to do. The efforts and achievements made by the police in this direction may be much to their credit, but as a system of prosecution

1. Cf. Sir Archibald Bodkin "The Prosecution of Offenders" English Practice. The Police Journal Vol 1, pp.384-5 (1928)

it can scarcely be considered as the best. The Director of Public Prosecution, and his principal assistants, are appointed by the Home Secretary. Regulations concerning the conduct of his office, while drawn up by the Attorney General, are subject to the approval of the Home Office and the Lord Chancellor.[1] It is evidente that there is divided authority. Without the harmonious co-operation of the three officials, the Director could scarcely carry on his work and administrative paralysis would result, though Departmental Co-operation has ~~been usually there.~~ obtained.

The number of prosecutions, grave and important as they were, undertaken by the Director is comparatively small.[2] In fact the importance of a Director lies not so much in the number of cases he prosecutes as in the general importance and in the powerful restraining influence which he exercises over the activities of both private and police prosecutions. This is, however,

1. Troup, Home Office. p. 75 (Whitehall series)

2. Cf. Criminal Statistics, England & Wales, Table XX cmd 4608 (1934); cmd 4977 (1935)

far from being the ideal of a national system of prosecution. Moreover, according to Sir Eddard Troup, the Home Secretary has "always been the authority who in consultation with the Law Officers of the Crown and the Director of Prosecutions, settles whether a prosecution in the nature of a political prosecution should be undertaken."[1] To leave such matters of political question in the hands of a political officer leaves too much possibilities of danger.

When all things considered the existing system or systems of prosecution leaves much to be improved upon. A national system of public prosecution throughout the country under the central administration of a Ministry of Justice has much to recommend itself. Much expense as well as many failures of justice might then be avoided. There would be few or no needless prosecutions of innocent person or persons against whom the evidence is plainly insufficient. It would turn out to be more satisfactory to the public and even to the defendants themselves if prosecutions had not been left to private or police prosecutors.

1. Troup op.Cit; supra. p.76.

In the eighth place, legal education is given in England by Universities and both branches of legal profession.[1] The legal curricular in many English Universities are certainly not uniform. But the curriculum, "as reported by the Committee on Legal Education," is drawn with regard to, though not slavishly following, the corresponding stages of the professional examinations"[2] It appears that political science, economics, sociology, criminology, philosophy of law and so on have received little or at least insufficient attention and emphasis in the part of legal education whether given in the Universities or by both branches of legal profession. Nevertheless, these subjects should shall form, in the considered opinion of good authorities,[3] "part and parcel of a legal education". In Continental Europe there has been far more of serious attempt to make the law a scientific study rather than a haphazard way

1. For a brief description of the two legal professions. cf. E.Jenks. The Book of English Law. ch. VI (1928)

2. Report of the Committee on Legal Education para.7 p.5. Cmd.4863 (1934).

3. H.J.Laski: "The technique of Judicial appointment" in Studies in Law and Politics. pp.178-181.
John Bradley Winslow: Some essentials of a modern lega education in Wigmore Celebration, Legal Essays PT III legal education.
William Brown Hale. A theory of Legal Education 32 Yale Law Journal pp.353 et seq.
In Institute of Soviet Law in U.S.S.R. long and thoroug courses cover, not merely specially legal subjects, but al many others, such as political economy, sociology and foreign languages. D.N.Fritt: The Russian Legal System. 12 Studies in Soviet Russia VII p.165 et seq. (1933)

of studying rules of decisions. Students of law on the Continent are required to make long and careful study of works devoted to the philosophy of the law, the springs of human action and the theories of human responsibility as well as of treatises in concrete legal principles and instruction in the actual practice.

If the carriculum of legal education is not adequate,[1] its separation in between two branches of legal profession is undesirable. If all lawyers shared a common education, went through a common apprenticeship and were under a common professional discipline, the legal profession would benefit. In 1867, Lord Selborne took a prominent part in a movement for improving legal education and he adhered to the view that the same legal education "should be open to those who were preparing themselves for either branch of the legal profession." There is no valid reason why the two branches of legal professions should be separated by airtight bulkheads. A fortiori, still less is there any strong ground why separate education should be given to each. The idea of a National School of law has long been advocated. "It is nothing less than a scandal," said Samuel Gerrett in his address at the Special

1. H.J.Laski: Justice and the Law p.17 et seq. (London, 1930).

General Meeting of the Law Society in 1918, "that no National School of Law exists in this country. The means are not wanting .....Through such a school all law students, for whichever branch destined, should pass. There should in the early stages be no differentiation between the education of a student destined for the Bar and one destined for one branch of the profession. The arrangements should be such that a young man need not decide till a late period of his legal education whether he should select the Bar or one branch as his profession. At present he has to make his selection before he really knows for which branch his natural aptitude specially fits him, and his election is in most cases practically final."[1]

Not only a common education for both branches of legal professions is advisable, but it seems essential for each barrister to have some training in a solicitor's office and for a Solicitor to have some experience in a barrister's chambers. At least, a period of training in a barrister's chambers should be made an essential qualification for a barrister.[2]

1. A Ministry of Justice and its task p.8 (1918)

2. Report of the Legal Education Committee Addendurn. p.16 para. 3. Cmd. 4663 (1934)

At present, there is overlapping in the legal education given by Universities and professional law schools. Between them there is, again, little co-operation and still less co-ordination.[2]

Another problem of still more importance and greater consequence to the legal education in the long run is legal research and advanced legal studies. Here as elsewhere England is far behind the time. To quote the Report of the Committee, "(But) much remains to be done in the domain of legal research in its wider sense. In particular the full importance of the case for the advancement of Comparative Legal Research has not yet been realised in England, with the result that in this respect we lag behind many of the Continental countries."

Not only is England incomparable to the work of legal research in many of the Continental countries but it is far behind U.S.S.R.[1] U.S.A., and even many of the great professions in this country.[3] In the opinion of the editor of Law Journal this poverty of legal research

1. Ibid pa.9 p.6.

2. H.J.Laski: Law and Justice in Soviet Russia pp.30-35.

3. Report of the Legal Education Committee Addendum para. 4 pp.16-17 (1934)

in England is due to the lack of inducement.[1] Whatever may be the cause, the indubitable fact is that so little legal research has been achieved and even the subject of law libraries has been neglected for many years in this country.[2]

Some of the defects and problems of legal education might be solved if the general recommendations of Lord Atkin's Committee such as the establishment of a permanent advisory committee on legal education, an Institute of advanced legal studies and the formation of a central catalogue of the contents of the London Law Libraries as a first step to the completion of a large central library were fully carried out.[3]

But it is interesting to note the pleas made by the Committee: "We hope"that the Lord Chancellor would take steps to bring the proposed Committee (the Advisory Committee on legal education) into existence." [4]

1. Law Journal
2. Report op. cit. pa. 6 p.14
3. Ibid paras A 14-21, B. paras 1-7
4. Report op.cit. pa.15 p.9.

and "we hope, as a result of these recommendations, that some body representative of the legal profession and the University may take up definitely the initiative for the establishment of such an Institute (of Legal Research)" [1] So long as the Lord Chancellor in office takes great interest in legal education, so long as the body representatives of the legal profession and the University is enthusiastic in promoting legal research, the pious hope of the committee would be materialised.

It is, however, significant to notice that reform of legal education is by no means a new subject. In 1846 the House of Commons appointed a Committee on Legal Education. In 1855 a Royal Commission on the same question was appointed. In 1869 a general system of legal education for both barristers and attorney was advocated.[2] In 1870 the legal education association formed with the purpose of improving legal teaching and in 1871 Sir Romdell Palmer consented to bring the whole subject before the House of Commons.[3] During the seventies of the last

1. Ibid B. para 5 p.13
2. 26 Law Magazine and Law Review pp.297 et seq.
3. The Legal Education Association. 30 Law Magazine and Review pp.126-140 (1870-1871)

century, the question of legal education was much mooted.[1] At the beginning of this century it again became the topic of the day.[2] Progress in legal education has undoubtedly been made, but made slowly, fitfully, and without much plan as a whole. Why? Because it depends upon the effort and enthusiasm of an individual or a group of persons and it has never been made the duty of a governmental department. Needless to say, individual efforts, however great, are insufficient.

The history of general education in this country shows that short of a central responsible department the development of education would at best be haphazard and anomalous.[3]

What is true to education in general is also true to legal education in particular.

What is still more important education is not commonly admitted as the business of the state.

1. cf. Codification and legal education. 3 Law Magazine and Review (4th Series) (1877-8); The Legal Education question. 1 Law Magazine and Review New Series p.7 et seq.; Legal education. 2 Law Magazine and Review New Series p.62 et seq. p.197 et seq. (1873); Universities and legal education. (Law Magazine and Review 4th Series pp.499 et seq. (1875); Legal Education Lord Shelborne. Ibid. pp.671-688.

2. E.Jenks, Polsibilities in Legal Education. 23 Law Quarterly Review pp.266-281 (1907); T.Raleigh's address on Legal Education in London.

3. Sir Lewis A.Selby - Bigge: The Board of Education 2 ed. 1934.

There is little cogent reason why legal education should be partly left to the close corporations, like Inns of Court or Legal Society. Legal as well as other education should be a public concern and subject to public control and supervision. Thus legal education is properly the function of a government department, whether the Board of Education or a Ministry of Justice. Probably it is better entrusted to the latter, because legal education involves special problems different from any other branches of education and has close relation with other questions of the administration of law. Experience in other countries again points to the same direction.[1]

There is much need of reform and improvement in legal education and legal researches here. There are, again, many problems, such as a National School of Law, a Central Law Library, an Institute of Legal

1. In Germany, judicial education and education of jurists in foreign countries belong to Division I and II of the Ministry of Justice (F.F.Blachly and M.E. Oatman: The Government and Administration of Germany pp.168-9)

In U.S.S.R. the legal education is given, not in the general universities, but in a number of specially established "Institute of Soviet Law" under the supervision of the Ministry of Justice. D.N.Pritt: The Russian Legal System. 12 Studies in Soviet Russia VII. p.165 et seq. (1933).

studies and researches, and so on which can scarcely be completely and satisfactorily solved by either Universities or professional bodies or even both together. Short of a Ministry of Justice having the statutory responsibility and expert staff to organise, coordinate and improve the system of legal education and research, its progress will probably be very limited. In the considered opinion of Prof. H.J.Laski, "A Ministry of Justice is an urgent requirement with adequate facilities for clinical research in the law" (Law and Justice in Soviet Russia p.442 (iv) (1935).)

Lastly ~~but not least~~, many analogies point out and emphasise the need of a Ministry of Justice. Mr.R.C.K.Ensor[2] used the analogies of Education and Health services to the legal services, compared the teachers and professors on the one hand and doctors on the other with lawyers and judges, emphasised how inefficiently and overlapping were the education and Health services before the departments established and pointed out what efficiency and coordination

1. In 1857 Mr.Napier moved in the Commons for a department of Public Justice said "They had lately found it necessary to have a separate Minister for Public education, and had previously experienced the necessity for separate departments for trade, war, and public health. Let the experience which had succeeded in those departments be tried with respect to Justice." Hansard's Debates p.542. Vol 144 p 1142

2. Courts and Judges pp.97-99.

in both services have been achieved after and due to the creation of the Board of Education [1] and the Ministry of Health[2]. "These examples", he concluded[3] "are adduced, not merely to support flights of fancy about what, in the sphere of English judicial administration, might be but to indicate what actually exists in the spheres of German and French."

In ~~French~~ truth, apart from Education and Health services, many other analogies, more or less close, such as the Agriculture and Local Government, may be adduced in support of the argument for a Ministry of Justice. With a view to coordinating the services of Army, Navy and Air Force, a Minister of Defence has but recently been created. The organisation of Defence Service is, of course, incomparable with that of judicial service. But none the less the administration of justice is much in need of coordination,

1. It is interesting to note that Mr.Lisgar, the Chairman of the Royal Commission on Legal Departments used the case of Education by quoting Mr.Lowe ~~in~~ an analogy for disapproving the establishment of a Ministry of Justice. This emphasises the fact that of all governmental services, legal administration alone lags behind without having a systematic and national organisation.

2. Ensor, Courts and Judges p.99

3. Ensor op. cit. pp. 99-100.

organisation, and preparedness.[1]

On the whole it is significant to notice that all services of the state, with the only exception of judicial service, are now provided with and under the supervision of, a machinery, more or less adequate and efficient, by means of which these services are carried out. The miniature of a government department with regard to legal services may be the Lord Chancellor's office which is, as has been pointed out, not only small and inadequately staffed but without a representative in the House of Commons. Nothing is more helpless than a department which has neither an official department in the national arena of politics nor an adequate national organisation and personnel. Both are indispensable to an efficient and responsible department of state. The country has always recognised the necessity of such equipments and has yearly provided liberal sums for support of different departments.

1. Historically War and the administration of justice are the two great and important functions of the state. Systematic, organised, continuous preparation is demanded for the latter no less than the former, and will be no less fruitful of results in the one case than in the other. The military analogy is interestingly used by Dean Pound of Harvard University in his plea for a Ministry of Justice. "To pursue our military analogy," he wrote, "let us have a juristic general staff. As it is, it is no one's duty to keep us juristically prepared. We have no juristic aerial scouting service, no juristic seige trains prepared in advance, and no preparation for any considerable drain upon our juristic munitions." These words written with reference to conditions in U.S.A. apply equally well to this country (op.cit. p.729)

If we look beyond the government departments of England and notice the machinery of the administration of law in other members of the British Commonwealth, the analogies are again in favour of a Ministry of Justice. We find it in the Irish Free State,[1] the Dominion of Canada, the Australian Commonwealth, and the Union of South Africa.

If we again look beyond the British Empire, we shall find that in nearly all civilized countries of the world a Ministry of Justice has long been in the realm of settled practice.

It has been argued by high authorities that because of the difference of legal systems in this and other countries, so a Ministry of Justice is not required here. But the cases of the other members of the British Commonwealth (and the case of the U.S.A.) having a Ministry of Justice but not under dissimilar judicial system as in England seems to me sufficient to answer the argument.

So much for the arguments in favour of a Ministry of Justice.

It has been advocated by a line of eminent authorities

[1]. Nicholas Mansergh. The Irish Free State, its Government and Politics (1934) The Ministry of Justice pp.201-305.

on many cogent grounds, such as the concentrating in one authority the present inefficient, anomalous and unsatisfactory system of many-headed and divided control, and in certain cases of non-control over the administration of justice, the need of an adequate and permanent machinery for ~~law~~ legal reform, for codification and revision of law, for legal education and for scientific drafting of Bills and regulations, the requirement of responsibility to and representation in, the House of Commons with regard to the administration of Justice, the advisability of concentrating all legal branches of different departments in one department for advising, ~~advocating and defending~~ the measures manner undertaken by different departments, and the analogies of government departments in England, in the Members of British Commonwealth and in other countries.

But, on the other hand, the idea of a Ministry of Justice, has been disapproved and even decried by authorities equally prominent for reasons entitled to careful and impartial consideration.

First of all, it is maintained that the office of Lord Chancellor has positive advantages and should be preserved. From this it is inferred that a Ministry of Justice is

unnecessary and even undesirable. This position is held on five grounds. To begin with the office of Lord Chancellor is argued as a connecting link or, to use Bagshot's words, "a hyphen and a buckle" between the execution and the judiciary. "In every democracy" wrote Lord Birkenhead, "there arise from time to time occasions of jealousy and difficulty between the judiciary and the executive. Our present system, under which the head of the judicary is also a prominent member of the executive Government, has its disadvantages. But it has this great advantage - that it provides a link between the two sets of institutions; if they are totally severed there will disappear with them any controlling or suggestive force exterior to the judges themselves, and it is difficult to believe that there is no necessity for the existence of such a personality, inbued dn the one hand with legal ideas and habits of thought, and aware on the other of the problems which engage the attention of the Executive Government. In the absence of such a person the judiciary and executive are likely enough to drift asunder to the point of a violent and disastrous collision."

[1]. Points of View. Vol. 1 pp.112-3

Secondly, it is an office of antiquity and carries with it a degree of respect, authority and distinction. In the words of Haldane Committee,[1] the office of Lord Chancellor is one deeply rooted in the traditions of the nation. The Lord Chancellor is the eldest in standing of the Ministers of the Crown. He has kept the Great Seal ever since there was a Great Seal to keep. He has, until quite recently, been a member of the Cabinet ever since there was a Cabinet, and he has combined the functions of the principal legal and constitutional adviser of the Crown with those of the Head of the Judiciary."

In the opinion of Lord Birkenhead, "these advantages (as the office of Lord Chancellor has) must disappear with the transference of its functions to the new Minister." He could not help seeing such an historical office being swept away and warned the reformer in these words,[2] "to uproot an institution so deeply planted in history, and to replant it in new ground, must cause deep anxiety to any student of constitutional development, and must involve consequences

1. Report, op cit. para 22. p.72.

2. Points of View 1. p.126. cf. also the Report of the Haldane Committee para. 32 p.72.

and relations which cannot be foreseen." Thirdly, Lord Chancellor is a valuable legal adviser to the Government. Owing to the fact that political centre of gravity has shifted to the House of Commons, the Lord Chancellor's intervention is more rare than in the past. "But the very rarity of the occasions on which it is required renders it more weighty when it comes." Apart from the advice of the law officers, "it must be of benefit to a Government to have a hand, when they think fit, to take advantage of it, the counsel of another lawyer who is akin to them in political sympathy, and who has the same interests as they in the issue of the actual conflict, but who is to some extent removed from the forefront of the battle."[1] The view is corroborated by the Haldane Committee. In these words "Yet it seems to be of high importance that the Cabinet should have an adviser of the type of which the Lord Chancellor would be, provided that he had the opportunity and the leisure to investigate beforehand the matters on which he would have to advise in Council."[2]

1. Ibid pp.126-7

2. Report op.cit. para 34 p.23

Fourthly, in the appointment of judges and judicial officers, the Lord Chancellor is less likely to be influenced by politics than a Minister of Justice. This was, in substance, the apprehension of Lord Selborne and Lord Lisgar against a Minister of Justice when advocated by the majority of the commission on legal Departments.[1]

In the opinion of Lord Birkenhead, "the very fact that the Lord Chancellor is not a member of the House of Commons, is neither subjected to the daily pressure of the personal and political intimacies found in that House, nor swayed by necessity of conciliating any one at the critical stage of a critical Bill, enables him to take a broader view.

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1. Second Report of the Legal Departments Commission 1874, pp. 109-110.

"It may be questioned whether the minister of Justice will have the same freedom .... But it is safe to say that he (the Lord Chancellor) is in a far better position to resist than the Minister of Justice would be, and that, in the past, Lord Chancellors have from time to time been subjected to such pressure and have withstood it."[1.]

Not only is the Lord Chancellor less influenced by the political pressure and consideration, but he has the positive qualification for exercising the patronage of judicial appointments. As put by Lord Hewart,[2.] L.C.J. "And it is upon this eminent lawyer, matured and trained in law, and in the tradition of this Bar with which he has long been and honourably associated, that the critical task from time to time devolves of selecting the member of the Bar whom he is to recommend for appointment by the

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1. Points of View, Vol.I. pp. 118-119.
2. The New Despotism, p. 104, (1929)

King to a vacant seat on the Bench in the Supreme Court of Judicature. For that high duty he has every qualification, and he performs that duty not only with the utmost conscientious care but also with the utmost intimate knowledge of those who come within the field of choice, and with the deepest respect for the spirit, the traditions and the duties of the Bar."

Fifthly, it is thought that the present condition is not unworkable. To quote Mr. C.Mullins "In matters constitutional, as in so many other fields, we English people never have paid attention to symmetry and logic, and probably we never shall. The only test that Englishmen will ever seriously apply to the supervision of justice is whether that supervision is adequate."[1] After arguing that Lord Chancellor, being usually a first class lawyer and thus superior to a politician minister of Justice, is able to carry out law reform if he is freed from other duties and that there requires the close cooperation of Home Office and Lord Chancellor in legal administration, he added: "We are not likely to acquire a United Ministry of Justice until we are taught by experience that the present division of functions

1. In quest of Justice p.420

necessarily works detrimentally to our interests."[1]

Having fully set forth these arguments, let me now hazard a few words of comment. The whole contention appears to be based on the assumption that the office of Lord Chancellor is necessarily inconsistent or incapable of co-existence with the Minister of Justice. This is, however, not necessarily the case. It depends upon what the arrangements are going to be. The proposals of the Haldane Committee are sufficient to dispose of the whole ~~final~~ texture of the arguments. According to their proposal, the Lord Chancellor remains as before except such administrative functions of justice as transferred to a Minister of Justice. The Lord Chancellor remains to be the nominal head of the Supreme Court, the adviser of the Government & appoints judges. Thus the first, second, third and fourth ~~points~~ of contention fall on the ground.

Thus, assuming these contentions are valid, they are beside the mark.

But when analysed, point by point, they do not seem to be valid at all. The first argument is scarcely convincing. The Minister of Justice is as much a link between the executive and the Judiciary as the Lord Chancellor. The minister is the head of the judiciary

1. Ibid p.427.

and will, of course, be a member of the Cabinet. Nor is the second argument based on any cogent reason. The office of Lord Chancellor is undoubtedly an interesting and picturesque anachorism. It is a pure matter of history, of the history of England that the thing has grown gradually up in earlier and earlier times, and in the casual, haphazard, adventatious way so characteristic of English institutions. By the process of time he is not overburdened with such a mass of heterogeneous duties, judicial, ministerial unitiated and executive.[1] Probably on the same day as his role of Speaker of House of Lords, or Cabinet Minister, or platform orator, he speaks as a party politician upon those very same matters upon which as judge he is presumed prepared to exercise rigid judicial impartiality. That such heterogeneous duties should be imposed on the office, whatever its historical explanation is as illogical as it is undesirable.

[1]. Discussion of this time-honoured political and judicial dignitary, who occupies such a unique position in the English constitutional system, recalls Mr. Walter Bagshot's trenchant observation that "the whole office of Lord Chancellor is a heap of anomalies; he is a judge, and it is contrary to obvious principle that any part of administration should be entrusted to a judge; it is of very great moment that the administration of justice should be kept clear of any sinister temptation. Yet the Lord Chancellor, as chief Judge, sits in the Cabinet, and makes party speeches in the House of Lords" (The English Constitution 2nd ed. London 1872) pp.213-14.

The state recognises that this is so in respect of all other judges, even to the extent of excluding them from seats in the House of Commons;[1] but the Lord Chancellor is permitted to sit in final judgment in cases which involve the policy of his party and the interests of the government of which he is a prominent member.

Appointment to the office is obtained not by legal, but political services, and political consideration brings to its end. On its termination, the Ex-Chancellor has a pension of £5000 a year for life. In more than one case in the past, the term of office had been measured by months. There were laborious Chancellors like Selborne[2] and Cairns;[3] there were and now are others who, apart from being party leaders and platform speakers and distinguished judges, have done conspicuous and distinguished services buth as chancellors and ex-chancellors. Individual cases as they have been, the system itself seems to me neithor sound nor justified.

If the holders of the office have performed, as they undoubtedly have, good service and prevented a complete

1. cf. Lord Birkenhead. ~~Judges and Politics~~ Points of View Vol. 11 ch.17 pp.147-192

2. J.B.Atlay; The Victorian Chancellors. Vol II chs. 18-20

3. Ibid. Chs. 14-16.

collapse, it is not due to the virtue of the office as such, but only to the effort and energy of the Chief and his staff.

With regard to the third argument, it may be observed that if the Lord Chancellor remains to advise the government, after the creation of a ministry of Justice, nothing will affect his position to the government in this connection. If he is gone, it is not difficult to provide in a ministry of Justice the most competent and profound advisers on points, legal, constitutional or otherwise, to advise the government. This is, in fact, what some advocates of a ministry of Justice have suggested.

(to be continued on next page.)

collapse, it is not due to the virtue of the office as such, nor to the means at their disposal, but only to the effort and energy of the Chief and his staff.

The third argument is undoubtedly true. But as to the fourth contention if the Lord Chancellor is now much influenced by the pressure of the Bench and Bar in his exercise of judicial patronage, the same will most probably bring to bear upon a Minister of Justice. "The public opinion of a highly organised profession, which is both learned and honest in the most healthy influence which could be brought to bear upon the dispenser of patronage, as it is the firmest support of him who, in his endeavour to discharge it rightly." These words of Lord Birkenhead might be used to lessen, if not completely discard, the apprehension of any improper exercise of judicial patronage by a political Minister. Should this safeguard, if it can be so called, adequate to ensure the proper exercise of judicial patronage by the Lord Chancellor, become inadequate in the case of a Minister of Justice, there are other checks at hand, and other means to adopt. For Any miscarriage in the exercise of his judicial patronage, the Minister of Justice is sure to receive the bombardment of comments and even censure in the House of Commons as well as the outrage of public opinion at large.

If this is still considered not adequate, there are other methods, which may be resorted to, either, as suggested by the Haldane Committee, to remain the power of judicial appointment still in the hands of the Lord Chancellor, or to place it on the shoulder of the Minister of Justice with the safeguard of an advisory committee, more of which hereafter.

Now come to the last contention. That the present system is neither satisfactory nor workable, as has already been pointed out by high authority and demonstrated by sober facts, needs scarcely to be seriously contested. As to the suggestion of relieving the Lord Chancellor's judicial and other duties and leaving him adequate time to be devoted to legal reform, the idea is commendable, but its substance is not very strong.

Even the Lord Chancellor is relieved of his multifold duties to a minimum, he is not in a better position to achieve great legal reform, or administer the judicial machinery in an effective and efficient way. For one thing, as a natural and probable consequence of divided authority, as at present, there would inevitably

result in overlapping and confusion. Again, the arguments as put forward by Mr. Mullins, postulate upon the close cooperation between the Home Secretary and the Lord Chancellor in order to achieve legal reform. This close cooperation, however, can hardly be relied upon as a matter of course. For another, the Lord Chancellor's ~~secretariat~~ Department, though efficient and tending to develop of recent years, is only a small department not comparable and staffed with such staff of great departments as to enable it to undertake the great task of the administration of law and legal reform. For a third thing, this office has no representation in the House of Commons which is indispensible to conduct and defend the measures of either the administration of law or legal reform and to ensure their success.

In the second place, they argue, it is difficult, if a Ministry of Justice is created, to find a suitable person as the Minister. As regards training, experience or position, Lord Chancellor would, as predicted by Lord Birkenhead and others, most probably be superior to that of the Minister. "The objection", Mr. Mullins raised, "to the whole idea of a Minister of Justice seems to me to be that we should be exchanging a first-class lawyer for a

man who is not at all likely ever to be equal in standing or ability to our Lord Chancellor." Why? The answer seems to me can be found and has been fully set forth in Lord Birkenhead's essay.

A Minister of Justice might either be a lawyer or a layman. But because his income must necessarily be less than that of the position of Attorney-General and Solicitor General, and his office could not form the avenue to any great permanent judicial appointments, which are generally looked for as the Crown of a successful career at the Bar, the most distinguished lawyers of the time would be unlikely to prefer the office of a Minister of Justice.

"It would seem to follow," to use the words of Birkenhead, "that the Minister of Justice, if a barrister, must be a barrister who has ceased to look for professional or judicial advancement, and who will, therefore, not carry into the office any of that great prestige among his fellows which results from success in advocacy, or learning in jurisprudence."[1]

It would again follow the Minister of Justice, whether in Government or in Cabinet, would unlikely be

1. Points of View. Vol. 1 p.110.

able to play a prominent part, because he would most probably be overshadowed either as a legal and constitutional adviser or as regards expert opinion on legal questions, by the Attorney General, an officer of great legal experience. Outside the Cabinet and in the circle of the Judiciary, such a Minister "cannot hold such a position of influence as the Lord Chancellor usually has, nor can his opinion on legal mathers carry very great weight.

What is, again, his future proppect? No matter whether or not he is a lawyer of higher distinction, he will, speaking generally, have nothing but a political career before him in the future. As he has been a Privy Councillor or has had the patronage of the Judicial Bench, so he would scarcely return to practice at the Bar. He will have neither the pension which is attached to the office of Lord Chancellor nor the emoluments and prospects which are attractive to the Law Officers. Once a Minister, he must cease thenceforward to be a lawyer and become a politician. When all things considered, it is perhaps not easy to readily find a competent and distinguished man willing to accept the position.

In the third place, given the position of a Minister of Justice, there will be no greater prospect of legal

reform than under the Lord Chancellor. "A total reconstruction at the top of our judicial system" wrote Mr. Mullins, "seems undesirable if, as I believe, we can secure law reform without it ... It is difficult to see that better reforms are likely to come from a political Ministry of Justice, and a number of legal bureaucrats than from Lord Chancellors who are lawyers of outstanding eminence and first-rate ability."

Though lawyers of outstanding eminence and first-rate ability, Lord Chancellors usually are, the records of legal reform in the past can tell what achievements have been made under their hands. Even given the greatest possible time to the Lord Chancellor to be devoted to legal reform, the difficulties of without representation in the House of Commons and, as a consequence, of obtaining parliamentary time for carrying through reform measures are still great.

In the fourth place, it is argued that a Minister of Justice will undermine the independence of the Judiciary. This ppint has been so fully and eloquently expounded by Lord Hewart L.C.J., that it deserves careful consideration. After having stated the close connection between the independence of Judges and the

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1. ~~Before the Legal Departments Commission of 1874.~~

93.

office of Lord Chancellor who is qualified to appoint and does carefully appoint judges, and the transference of this judicial appointing authority to a Minister of Justice, he predicts the natural and probable consequence of such a Ministry, if it were ever established, as this

~~In his opinion~~ [1] "appointments to the Judicial Bench would be in the hands of an ordinary political Minister, a stranger to legal training, and having little knowledge of contemporary members of the Bar except by accident or hearsay. Does anybody fail to perceive what, in ~~this~~ long run, would be likely to happen? From time to time, as every lawyer knows, the Judicial Bench, even as things stand, has suffered the disadvantage of political appointments. No doubt the pressure of Whips and the claims of meritorious political lieutenants have very often been resisted. But nobody who is at all aware of the inner working of the political machine can be ignorant that pressure of this ~~view~~ kind is frequently and forcibly employed. It is resisted and can with firmness be resisted by a Lord Chancellor whose knowledge of the Bar is personal and intimate, and who has every inclination and intention to maintain the highest standard of judicial competence."

1. The New Despotism p.106.

84.

In his opinion, the results under the two systems would be widely different.[1] With the Lord Chancellor at the head, there is a strong guarantee and advantage not only of independent personal knowledge and professional equipment but also of something like continuity of such knowledge and equipment when one Lord Chancellor succeeds another ~~Lord Chancellor~~. Consequently, there is never a time when a judicial vacancy cannot be filled by the exercise of the direct personal choice of a highly qualified lawyer, relying absolutely upon his own independent knowledge and authority. Under the system of a Minister of Justice, "layman would succeed layman, with no more than a layman's knowledge of the Bar. He would not have the opportunity, even if he had the capacity, to test the merit of members of the Bar by personal observation, for the reason that he would not, as he could not, adjudicate in any Court. When, then, would the real authority come to reside? Where, if anywhere, would be the reservoir of accumulated experience to which recourse must be had

1. Ibid pp.107-8.

whenever the duty of making a judicial appointment had to be discharged? The answer is perfectly obvious? The experience, such as it might be, would be found and the decisive authority would undoubtedly rest, in the permanent officials who surrounded the Minister."[1]

Following this, Lord Hewart points out two main dangers under the latter system.

First, nominal responsibility would belong to the minister of Justice, while real authority rests with the permanent officials of the Ministry. Nothing is more dangerous than this in public affairs. Secondly, the appointment of the Judiciary would, in effect, be held in the unfettered hands of the Bureaucracy itself. Apart from other mischiefs it follows that the standing and calibre of members of the Bar who were ready and willing to accept judicial office would gradually be transformed; and the status and the position of the judges would certainly undergo a disastrous change.[2]

Shortly stated, his thesis[3] is this: The independence of the judiary is most intimately connected

1. Ibid P.108
2. Ibid pp.109-110.
3. The same view was put forward by Lord Hewart in the debates in the House of Lords upon the Supreme Court of Judicature Bill 2nd. reading of the 95 Parliamentary Debates (Lords) pp.236-8, 418-9 (1934-1935). 95 H.L. Ss. 236-38, 418-19 (1934-35.)

with the position of the Lord Chancellor who is qualified in every way to appoint, and does scrupulously appoint, judges. The Minister of Justice will most probably be a mere politician and, when exercising the appointing power, will be greatly influenced by political considerations and under the substantial sway of the permanent officials thus resulting in the danger of power divorced from responsibility and the deterioration of the Bar and the Bench. This view is shared by some writers.[1]

With all respect to high authorities, these arguments do not appear to me convincing. Take the first argument. It ~~may be true~~ is doubted that the independence of the Judiciary ~~has~~ is closely connected with the office of the Lord Chancellor. ~~But~~ Two ~~other~~ points may be observed. First, every legal appointment of importance is now made not by the Lord Chancellor but by the Prime Minister, as I have already observed elsewhere. Even Lord Chancellor has not free from political considerations in exercising his patronage of judicial appointments. When these points are impartially considered, the force of the argument seems to be very weak. Secondly, as the argument

1. cf. Birkenhead: Points of View: A Minister of Justice pp.99-13; 77 Law Journal pp.222-3. July 7, 1934.

seems to imply that it is due to the appointing power that the independence of the Judiciary is maintained or at least closely connected with the Lord Chancellor. But it seems to me neither of these assumptions is wholly true. Appointing power is, of course, an important consideration of independence. Something more is, however, needed. "The security of tenure" wrote Dr.W.A.Robson, "which the judge enjoys is at bottom the most essential fact underlying the principle of independence. It results in a recognition by the general public that the judge has nothing to lose by doing what is right and nothing to gain by doing what is wrong; and is founded on the belief that a man cannot be relied upon to act rightly regardless of the personal consequences."[1]

Apart from this the independent position of the judges in England seems to me due to some other considerations, such as small number, adequate remuneration, national tradition and the vigilence of a learned profession as well as public opinion, which is at once jealous and enlightened.[2]

Turn now to the second point. Judicial appointment

1. Justice and the Administrative Law p.48 (1928)

2. R.M.Dawson: The principle of Official Independence (1922) Ch2. The Judge pp.28-73.

on purely political reasons is undoubtedly the last ground upon which a person should be made a judge. If political consideration in judicial appointment is to be condemned at all, the English system which has been highly praised by the supporters, can scarcely be expected to be free from adverse comments and will perhaps be the first to be condemned. It can hardly be denied that judicial appointment has not been wholly free from political influence and consideration. ~~The contrary appears to be the sober facts.~~

Upon an analysis of 139 English judges appointed in the period from 1832 to 1906, it shows that, in the words of Prof. H.J.Laski, "the number of high judicial posts filled by members of the Government in England has been continuous, and to be exceptionally large."[1] Commenting upon this, he said,[2] "the statistics here summarized seem to make it probable that political influence has been a factor to which undue influence has been attached in the selection of English judges. It has been, in some degree, a reward for political services, and it will, I think, be a common ground that this is undesirable."

1. The Technique of Judicial Appointment. Studies in Law and Politics. Pp.163-180.

2. Ibid.

89.

This is by no means a mere matter of history, but still a living fact. To use Prof. Chorley's words, "It is in this country every legal appointment of importance ~~and~~ is made by a political chieftain, and a fair proportion of them go to lawyers who have been actively engaged in politics." Hundreds and thousands of ~~the~~ Justices of the Peace who manned the Courts of Summary Jurisdiction up and down the country, ~~Courts of foremost importance~~, are mainly appointed on political grounds.

In the face of these facts, it is difficult to oppose the Ministry of Justice on this ground. It ~~may~~ might be argued that a Minister of Justice is more susceptible of political influence and pressure, and it follows that judicial appointments will, under him, become from bad to worse, and independence thereby endangered. ~~The incomplete assumption that independence depends upon the appointing power chosen has already been pointed out.~~ Assuming this is the case, the Ministry of Justice is not necessarily empowered with the appointing authority. Nor is he necessarily more influenced by, or pressed with, political consideration in judicial appointments than the Lord Chancellor. Considering ~~these~~ all this, comes out to be true as predicted, the abuse of appointing power may be avoided. It would not be difficult

to provide for a system of safeguards to assist a Minister of Justice, if it were thought not safe enough to trust him alone, in the appointment of judges, as, for instance, ~~is done~~ obtained in the U.S.A. with regard to appointments to the Supreme Court or better still, as suggested by Prof. Laski, as advisory committee of at most seven judges selected by judges themselves for some such term as from three to five years.[1]

Thus the fear that a Ministry of Justice would endanger judicial independence does not appear to be well founded. As England has never had any experience of a Ministry of Justice, the practical effect of such a Ministry upon the question of independence is at best a mere matter of supposition.

Some light may probably be thrown on this point from the experience of other countries, allowing the different problems and conditions in different countries. The problem which has given rise to much comment in France is, as Mr. ~~Fraser~~ Fuson has pointed out, one of promotion rather than appointment.

Under the French judicial system where ~~lies~~ lies essential

1. Technique of Judicial Appointments. Studies in Law and Politics. pp.141-201 London (1932)

need is not security but promotion, a judge's prospects of promotion and increased emoluments are controlled by a minster of Justice upon whom considerable pressure are being exercised by lawyer politicians in the Chamber of Deputies. This is charged by critics as to give these lawyers undue advantages in handling cases before the judge. In Germany where the problem of promotion is also vital to judges, such scandal as seen in France has not so far been appeared, though Parliamentary government had only a short life there. Thus in both countries which have each a ministry of justice and the same vital problem of promotion, the result is, however, quite different.

In the country judges once appointed have in fact little or no chance of further promotion. The question of ~~problem~~ promotion is not likely to raise itself at present even if a Ministry of Justice were established. Had it ever become a question when conditions changed radically or a judicial profession established in England, it could be solved along the lines of safeguard as adopted in France and Germany to eliminate the bad consequence of promotion.

~~Because the premises are different in each country, one has to hesitate long before drawing any conclusion of~~

value from the practice of other countries.

As regards the nightmare of bureaucracy in undermining the judicial independence owing to the establishment of a Ministry of Justice, foreign experience whether in France or Germany or the U.S.A., U.S.S.R., or China does not seem to warrant such bold conclusion. Were there any such possibilities of danger, means of safeguards are not wanting. Both in France and Germany, the higher personnel of the Ministry of Justice is recruited from the judicial office. "That means" Mr R.C.K. Ensor infers[1] "that the men responsible for the service on its administration side are men who have been judges, and normally will be again. Consequently, they will not lack consideration for the profession's point of view, nor be liable to flout its traditional standards." It is a beneficial and efficient safeguard for a profession, for whose work independence is more essential than for that of any other.

So much for the probable effect of a Ministry of Justice upon the independence of the Judges.

1. Courts and Judges p.100.

The broad conclusion arrived from the foregoing discussion seems to me obvious. First, the present system or no system of the administration of justice spells divided control overlapping ineffid ency and uneconomy ~~and unsatisfactory~~.

Second, the demand of and a case for a Ministry of Justice is fully and strongly made out.

The need of a co-ordinating and logical administration of law alone is sufficient to call for radical reform and justify the genesis of a Ministry of Justice. It is, however, augmented by other problems such as legal reform, legal education, the drafting of Bills and regulations, legal advice to different departments and so on, all pointing out and emphasising the imperative demand of a Ministry of Justice. Without such a Ministry, these problems can hardly be adequately, comprehensively and satisfactorily solved. Third, the arguments against a Ministry of Justice are either weak enough or not well founded, while the danger of such a Ministry can be fully eliminated or safeguarded.

Fourth, the advantages of a Ministry of Justice once established, are numerous. To mention a few, it would enable the existing system to be simplified, cheapened, co-ordinated, and rationalised. It would stimulate and provide the incentive of new legal planning on various problems which I have discussed in ~~this and~~ other chapters. Above all, it would exercise a tremendous and continuous force in the direction of legal reforms in hundreds of ways. In the result, the administration of law would not only become efficient and economical but systematic and scientific.

It is interesting to note what forces delayed for so long a time the obvious and beneficial expedient of a Ministry of Justice in the administration of justice. Partly it is due to the well-known conservative inclination of the legal profession as a whole which has always looked upon the proposal with scepticism. Partly it is because the mass of vested interests bound up in the present system. Partly it is owing to the English distrust or even fear of bureaucracy[1] and adoration of

1. Ramsay Muir. Bureaucracy in England. Peers and Bureaucrats. Two.
2. Problems of English Government, pp. 1-94 (1920)

95d institutions.

Whatever may be the difficulties which has unduly prevented the birth of a department, the demand for which has been recognised by eminent authorities for nearly two centuries on many cogent grounds and the advantages of which has been clearly and unmistakably demonstrated by the experience of all civilized countries, difficulties only exist in order to be overcome.

Were they one day being overcome who should be the ~~master~~ minister, what should be the activities of the Ministry and how should it be constituted? Let us briefly answer these questions in the order put.

Who should be the minister? There are possibly 6 alternative suggestions. First the Home Secretary. The Home Office should, it is suggested, be reorganised as a Ministry of Justice by retaining such of its present functions as pertaining to the administration of law, transferring the rest to other departments and adding those functions of legal administration as now under the Lord Chancellor, while the Lord Chancellor ceasing to be the Speaker of the House of Lords, should confine himself to his high judicial function as the adviser of the Government and nominal head of the Supreme Court and has

the power of appointing judges with an advisory committee. This seems to be the proposal of the Royal Commission on legal departments and more recently and specifically, of the Haldane Committee on the Machinery of Government. If the reorganisation of the existing departments to form such a Ministry is the solution chosen, the Home Office appears to have its merits to recommend itself.

The second alternative is the converse of the first. The Lord Chancellor should be relieved of the judicial functions in the House of Lords and the Judicial Committee of the Privy Council, the performance of which to be entrusted to a newly created judicial office. The Lord Chancellor should have the rest of his present power and duties except the speakership in the House of Lords and, in addition, to such functions which may be thought desirable to transfer from the Home Secretary, as, for instance, the prerogative of mercy, the appointment of stipendiaries, Recorders, etc. He should, and could, retain the Presidency of the Supreme Court of Judicature and probably also of the Chancery Division. Neither of these two offices would make any great call on his time in fact

but both of them would enable him to be kept in close touch with the Bench and to have a proper locus standi for controlling the administrative Departments of the Supreme Court. The latter duty could only be performed with great difficulty by a Minister who did not hold any judicial office. He should have a subordinate Parliamentary Minister with a seat in the House of Commons to assist him in the control of his department. This direct representation by a minister of subordinate rank in the House of Commons would obviate the inconvenience of the present system, under which, as above referred to, questions relating to the Lord Chancellor's department are dealt with by one of the Law Officers; and it would also go some way towards the objections that the Lord Chancellor cannot readily be made amenable to criticism in the Commons. It would probably be desirable that this functionary should be a lawyer, but it is doubtful if it would be always necessary unless, of course, he were also entrusted with the duties of the law officer.

The third alternative is akin to the second but with a little modification of the powers and duties of the Lord Chancellor who should, it is suggested, be the

Minister of Justice. He should, however, continue to sit as a judge, because this practice tends to emphasise the fact, sometimes forgotten on the Continent, that the first business of a Ministry of Justice is, after all, to secure the proper discharge of the judicial office in individual cases. There may appear to be objections to comprising in one office the functions of the head of a big government department, of a superior judge, and of the President of the House of Lords. It is undesirable it is argued, that any of these functions should be omitted from the attribution of the Minister of Justice. If he ceases to preside over the House of Lords, he will not inherit the prestige of the Chancellorship.

This suggestion is, in effect, to reform the office of Lord Chancellor as a Ministry of Justice. It is more influenced by the considerations of history and existing practice than to plan a logical administration of justice. No provision is made as to the representation in the House of Commons. Nor the duties of the Lord Chancellor be relieved to any extent which has been so emphatically emphasized by the Haldane Committee. It does not seem to me necessary or desirable that one of the attributions of a Minister of Justice should be the

exercise of judicial functions. To secure the proper discharge of the judicial office in individual cases is undoubtedly the first concern of a Ministry of Justice in so far as it concerns with the administration side, but it by no means follows that the Minister himself must discharge judicial functions.

The fourth is suggested on the model of the U.S.A., that the Attorney-General may be made a Minister of Justice. But it is doubtful whether the choice of a Minister should be confined to a lawyer. This would be the case if Attorney General should be made a Minister of Justice, as he is now primarily appointed for his ability as an advocate. It is also questionable whether the existing department of the Attorney General forms a well chosen basis for a new great department. Further, the work of a law officer in the Courts can hardly be concurrently carried on with the heavy responsibility of a department of Justice. In a result, he is compelled either to give up, as this proves to be the case in U.S.A., practically all work in Court and ceased to be a law officer as such, or to entrust the administrative duties of a minister to subordinates. Either alternative seems to be undesirable and unsatisfactory.

The fifth alternative is, as suggested by Judge C.N.Cardozo, a board of at least five Ministers, two or even three being the representatives of the faculties of law or political science in institutions of learning, one representative of the Bench and one representative of the Bar. The demand of such a board is obvious. In the words of Judge Cardozo[1]: "a task so delicate exacts the scholar and philosopher, and scholarship and philosophy find precarious and doubtful nurture in the contentions of the bar. Even these qualities, however, inadequate unless reinforced by others. These must go with their experience of life and knowledge of affairs. No one man is likely to combine in himself attainments so diverse. We shall reach the best results if we lodge power in a group, when there may be interchange of views, and where different types of thought and training will have a chance to have their say."

Lastly, it is suggested that a new Ministry of Justice should be created with a Minister at its head who should have a seat in the House of Commons. The Chairman of the Supreme Appellet tribune, who might also be chief legal adviser to the Government, remain to be termed the Lord Chancellor.

1. "A ministry of Justice" Op cit PP. 63-64 ~~Ibid p.66~~

101.

As to the activities of the Ministry of Justice, it is not necessary for me to discuss in detail, partly because some of them have already been touched upon in the foregoing discussion, chiefly because a full list of activities has been outlined by the Haldane Committee.[1] With regard to the list, two things may however be observed. The organisation and control of the police should be independent of the administration of Justice, and might be entrusted to the Home Office if it continues to exist. These questions broadly concerning the legal status of the cotizen, such as registration, its conduct of election, etc. should or should not be entrusted to the Ministry of Justice remains to be carefully considered.

Broadly speaking, the activities of the Ministry may be thus summarised. All the work of the Home Secretary in relation to criminal Justice and prison should be transferred to the new Ministry of Justice. All the administrative functions of the Lord Chancellor, except non-legal patronage and the supervision of lunacy matters as well as such administrative functions as the Attorney General possesses, should also be transferred.

The Minister of Justice should have the power of judicial appointment now exercised by the Lord Chancellor, the Prime Minister, judges in the Supreme Court and the Chancellor of the Duchy of Lancaster, with the assistance of an advisory

1. Report. Op. cit., para. 43 et. seq.

Committee consisting of judges and others in a position to estimate personal qualifications. He should be responsible for the whole administrative machinery in all ~~the~~ Courts. The Ministry of Justice should have the duties of legal reform, legal education, and other matters as discussed above, and of supervision and advice ~~over~~ to all ~~the~~ Courts as to these administrative functions.

But what is still more important, the Ministry should, in the words of Judge C.N.Cardozo,[1] "not only observe, for itself the workings of the law as administered day by day. It would enlighten itself constantly through all available sources of guidance and instruction; through consultation with scholars; through study of the law reviews, the journal of social science, the publications of the learned generally; also through investigations of remedies and methods in other jurisdictions, foreign and domestic." It is ~~the~~ its duty to work constantly and continuously for legal improvement, it is again its duty to keep an eye on the legal system as a whole and all its parts to see what is working well, and what is not, to study the why in either case and to devise means and ways of reform. It should be, in a

1. Op. cit. supra. S 64

word, charged with the duty of creative and continuous effort to make the law effective, economical and satisfactory for its purpose.

Whether a ministry of Justice is established by ~~recognising~~ reorganising from the nucleus of the existing departments or it is created a new one, the precise form it should take or such questions as to the divisions into which it should be divided, its relation to the other departments of the administration, its selection or ~~title~~ title or salaries of its officials are secondary matters and should not complicate the really important issue of its general desirability or urgent necessity.

In this connection, experience has obtained in other countries,[1] or ~~even from the~~ in other members of the British Commonwealth,[2] may be something of value, and suggestions advanced by high authorities[3] will be illuminating. This is, however, not the place for me to examine the full ~~implication~~ details of the problem. A

1. See F.T.Blachly and M.E.Oatman: The Government and Administration of Germany cit. Vl pp.168-170 also chs.13 and 14. ~~That if French Ministry of Justice see~~ A.Langeluttig: The Dept.of Justice of the United States (1927)

2. Justice in Irish Free State - see N.Mansergh: The Irish Free State op. cit.

3. James Bryce: The organisation of a Legal Department op cit.
The Report of the Machinery of Government op.cit.

brief indication of the outlines will suffice my purpose. It may from my point of view be divided into the following divisions. The first is primarily concerned with the administration of criminal law and is to be entrusted with such matters as organisation of the criminal Courts, criminal process and prosecution, execution, fees and costs in criminal cases, law of Extradition, statistics of crime, penal records, remission of fines and penalties, etc.

The second is primarily concerned with the administration of civil law and is in charge of such questions as the organisation of civil Courts, civil process, judicial execution, cost and fees in civil cases, judicial statistics and so on. The third has the duty of giving legal advice and opinion as to what the law is to the government, to all departments and local government bodies. The fourth is to deal with revision and codification of law. The fifth has the charge of drafting of Bills and regulations. The sixth is concerned with legal reforms, legal education and research.

It is thus obvious that the activities of this

Ministry is rather extensive and its task most difficult and important. It is necessary for the success of the new Ministry that it should have men of profoundest learning, and the keenest acumen, authority and open-mindeness at its disposal. But such men are difficult to be recruited.

It is deemed advisable and important that the Minister should be assisted above all divisions by a council of 7 to 9 members consisting of representatives of the ~~Board~~ Bench and Bar, learned bodies and other vocational associations.

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A tolerably complete bibliography of the English Judiciary would require a volume. This is obviously not the place for it. The best that can be done is to indicate those works which are of special value to me in preparation of this Thesis.

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