

THE HAMLYN LECTURES

EIGHTEENTH SERIES

OTHER PEOPLE'S LAW

AUSTRALIA

**The Law Book Company Ltd.
Sydney : Melbourne : Brisbane**

CANADA AND U.S.A.

**The Carswell Company Ltd.
Toronto**

INDIA

**N. M. Tripathi Private Ltd.
Bombay**

ISRAEL

**Steimatzky's Agency Ltd.
Jerusalem : Tel Aviv : Haifa**

NEW ZEALAND

**Sweet & Maxwell (N.Z.) Ltd.
Wellington**

PAKISTAN

**Pakistan Law House
Karachi**

OTHER PEOPLE'S LAW

BY

The Hon. LORD KILBRANDON, LL.D.

*One of the Senators of Her Majesty's College of Justice
in Scotland. Chairman, Scottish Law Commission*

*Published under the auspices of
THE HAMLYN TRUST*

LONDON
STEVENS & SONS
1966

*Published in 1966 by
Stevens & Sons Limited
of 11 New Fetter Lane in
the City of London and
printed in Great Britain by
The Eastern Press Ltd.
of London and Reading*

©

Lord Kilbrandon

1966

CONTENTS

<i>The Hamlyn Trust</i>	<i>page</i> ix
INTRODUCTION	1

PART I

THE CIVIL LAW

LECTURE ONE	8
LECTURE TWO	30

PART II

THE CRIMINAL LAW

LECTURE THREE	58
LECTURE FOUR	88

HAMLIN LECTURERS

- 1949 The Right Hon. Sir Alfred Denning
1950 Richard O'Sullivan, Q.C.
1951 F. H. Lawson, D.C.L.
1952 A. L. Goodhart, K.B.E., Q.C., F.B.A.
1953 Sir Carleton Kemp Allen, Q.C., F.B.A.
1954 C. J. Hamson, M.A., LL.M.
1955 Glanville Williams, LL.D.
1956 The Hon. Sir Patrick Devlin
1957 The Right Hon. Lord MacDermott
1958 Sir David Hughes Parry, Q.C., M.A., LL.D., D.C.L.
1959 C. H. S. Fifoot, M.A., F.B.A.
1960 M. C. Setalvad, Padma Vibhufhan
1961 T. B. Smith, Q.C., D.C.L., LL.D., F.B.A.
1962 R. E. Megarry, Q.C., M.A., LL.D.
1963 The Baroness Wootton of Abinger,
M.A., (HON.)LL.D.
1964 Erwin N. Griswold, M.A., LL.D., S.J.D.
1965 The Right Hon. Lord Tingley, K.B.E., LL.D.
1966 The Hon. Lord Kilbrandon, LL.D.

To R. C. S.

THE HAMLYN TRUST

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

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

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

may recognise the responsibilities and obligations attaching to them.”

The Trustees under the Scheme number nine, *viz.*:

- (a) Mr. S. K. COLERIDGE
(executor of Miss Hamlyn's Will),
- (b) Representatives of the Universities of London, Wales, Leeds, Glasgow and Belfast, *viz.*:
 - Professor J. N. D. ANDERSON
 - Professor D. J. LI. DAVIES
 - Professor P. S. JAMES
 - Professor F. H. NEWARK
 - Professor D. M. WALKER
 - Professor K. W. WEDDERBURN,
- (c) The Vice-Chancellor of the University of Exeter,
ex officio, Dr. F. J. LLEWELLYN,
- (d) The Hon. Mr. Justice EDMUND DAVIES.

From the first the Trustees decided to organise courses of lectures of outstanding interest and quality by persons of eminence, under the auspices of co-operating Universities or other bodies, with a view to the lectures being made available in book form to a wide public.

The Eighteenth Series of Hamlyn Lectures was delivered in November, 1966, by the Hon. Lord Kilbrandon in the Library of the Royal Faculty of Procurators in Glasgow and in the University of Glasgow.

J. N. D. ANDERSON,
Chairman of the Trustees.

November 1966.

INTRODUCTION

THE title I have given to these lectures is, "Other People's Law"; I feel that a word or two is due in explanation, and perhaps I owe some apologies as well. What I propose to do in these lectures is to take some aspects of the law as we know it in Britain, examine them critically, and ask you to look at the law of some other countries by way of comparison with ours. These aspects are grouped under two main heads, one dealing with civil rights and obligations, the other with the enforcement of the criminal law. There are three things I want to say before I begin.

First, I have been guilty already of suggesting that there is something called British law, whereas of course in Great Britain there flourish two independent systems of law, the Scots and the English. My education and qualifications extend only to the former, and if I do any violence to the latter I must offer this extenuating circumstance: I am not purporting to produce a textbook of either system; I am only trying to draw some conclusions upon topics which, as a citizen, I have come to regard as of burning and urgent importance. It is to the consequences which flow from these conclusions that I hope an examination of foreign systems may be relevant.

Secondly, I am Chairman of the Scottish Law Commission. I was accorded the great honour of delivering these lectures, I had decided on the scope of them, and they were in rough outline long before the Law Commissions Act 1965 was ever introduced to Parliament. So it must be clearly

understood that these lectures in no way express the views of the Commissioners, who may for all I know violently disagree with them; there is no reason whatever to suppose that changes along lines I may suggest will be recommended by the Commission, or on the other hand that they will not.

Thirdly, and it is perhaps here that some explanation is most loudly called for, it will be objected that these lectures seem to hold themselves out as a work on comparative law, a department for the specialist scholar alone, and that I have no qualifications at all which entitle me to enter that field. At first sight there is no answer to this charge, because I am nothing but a working practitioner, but I think I can find exculpation in the terms of Miss Hamlyn's charity themselves. The principal object is reproduced in the first page of this book. From it you can see that what is called for is not a lawyers' or students' textbook, but something which so far as may be is a popular work for the appreciation of everyone. It has not been altogether possible to avoid technical terms, but I hope they mostly explain themselves. The footnotes are very slight, because the lawyer is unlikely to be looking here for authority. I think if I were to generalise about the kind of audience, other than lawyers, I am aiming at I would say that it includes all professional men and women, and also those very many people who enjoy reading the daily law reports in *The Times* and *The Guardian*. The last thing that I would claim to have produced is a work of scholarship in the science of jurisprudence. And if some of my conclusions seem to favour the systems from which I draw comparisons, I hope I may not be deemed to be in breach of Miss Hamlyn's Trust.

The topics I deal with have not been selected at random. They are not the most "popular" of subjects which might have been put forward for the entertainment and enlightenment of a non-legal public, but they do have this significance: they deal with matters of great intrinsic importance. It will always be found that matters which are of great intrinsic importance to the lawyers, and are debated among them at inordinate length and in an esoteric vocabulary, do, strangely enough, turn out, when you look at them non-technically, to touch the man in the street very closely indeed. And the topics are not less, but more, interesting to the ordinary citizen, in the sense that they vitally affect his welfare, because they deal with what might be called professional matters. You would be surprised how often the just society, the good life, human happiness, call it what you will, is pushed out of our reach, not by the malevolence of some people, usually referred to as "they," who are consciously depriving us of it, or by the inertia of those to whom we entrust the duty of provision, but by some technical inadequacy. The meaning of the lines, apparently cynical if read out of context,

"How small, of all that human hearts endure,

That part which laws or kings can cause or cure,"

could be turned to this, that quite often what we really want would be readily attainable without calling for a revolutionary change, say, from Monarchy to Marxism, or from a feudal to a mercantile system: it is not so much a constitutional or moral upheaval that we are awaiting, as rather a little quiet reconsideration of our administrative machinery. This is true of Parliament, of our legal procedures, and of our ancient prejudices in Church and State. The ship is well designed,

fundamentally sound, and is for most of the time on a correct course; what is wanted is an overhaul and modernisation of the navigational instruments, so that she is more easily kept on that course. And some of the officers are getting a bit elderly—this will always be true.

I will give one example, which is quite unrelated to the actual subject-matter which follows, but has always fascinated me; I should dearly like some day to see a study of it made. There must be something very peculiar and utterly immature about British local administration and finance, that is, the machine we have designed, or rather tolerate, for the good order and government of our cities. I make this assertion not as a consequence of any study, adequate or inadequate, that I as a lawyer have made of the constitution of local government. I make it, as I am entitled to do, as an ordinary citizen, after the most superficial examination of the fruits of the tree, and especially after looking over other people's garden walls. In the City of London, twenty years after the catastrophe, you could still see areas of vacant ground, some of the most valuable commercial property in the world, complacently described as "bombed sites," as if they had been bombed the year before. In Edinburgh, there have stood for many years, one near each end of Princes Street, the blackened shells of two places of public entertainment, while sites for housing, and even car-parking, are an urgent need. These phenomena are consequences of gross administrative incompetence—not incompetence of the administrators themselves, but of the systems they are impotently trying to operate. And it is probable that some small reform, such as of the incidence of local taxation, would stop the nonsense.

We are certainly confirmed in this impatience when we look over the wall at Rotterdam and Hamburg.

So in both the civil and the criminal parts of my lectures I have tried to see whether social objectives, in themselves not very complicated and whose virtues are not really the subject of controversy, are being in any way frustrated by some inadequacy of method or of procedure or by legal doctrines no longer efficacious in a changed society. One of the most obvious ways of finding an answer to that question is to consider how similar problems are dealt with in countries which have fundamentally the same social objectives in view, whether they make a better shot at attaining them than we do, and whether their legal systems have anything in them which we might usefully adopt ourselves. Conversely and incidentally, one thing will become quite plain: world civilisation owes to England—and as a Scotsman I am very ready to acknowledge this in some of the particular fields I am dealing with—a debt of gratitude if not for originating, then certainly for fostering and distributing, the idealism which all now recognise under the term “The Rule of Law.”

You will see one thread running through nearly all the topics I have to deal with. It is the element of the competition, the tug-of-war, the dichotomy between two mutually antagonistic elements in the same problem. We are going to begin by looking at the question of compensation for loss arising from personal injury. Here we shall see on one hand the legal concept of liability limited by fault, which concept stands no less on a moral or ethical footing than the social demand for compensation for the victims of accidental injury: this we shall see standing on the other hand. Within this quarrel there will be minor dissensions, for example,

between the duty of statutory undertakers to prosecute their purposes as laid down by Parliament and the consequences which ensue when other people suffer from these purposes. The impact of modern techniques upon laws geared to an older system has given rise, also, to conflicts which are yet to be resolved.

It is the same in the area of the criminal law. Here we see embattled the state (as representing the affronted victim of a breach of the criminal law) and the citizen, namely, the individual upon whom the state proposes to lay responsibility for the breach together with its attendant punishment. In each phase of criminal procedure divergence between these two antagonisms calls for control by careful checks and balances. These conflicts are common to all civilised legal systems, and I hope it may be found that, from time to time, the correctness of our own conclusions can be confirmed, or some ideas for improvements may be discerned, by looking at other people's law.

PART I

THE CIVIL LAW

I

LIABILITY BASED ON FAULT—A STUDY IN ORSOLESCENCE

MRS. SCOTT and Mrs. Brown are neighbours in a local authority housing estate. Both are widows and each has young children. Their children are of school age, and Mrs. Scott goes out to part-time work only, so that she can devote the rest of her time to looking after them. She is able to do this because she has a small but comfortable private income derived from invested capital. The family is also supported by a trust fund which has been set up, by the investment of capital, in favour of the children, and this will come in very useful for helping with their higher education and with what is called in the ante-nuptial marriage contracts of the well-to-do, their "advancement in life."

Mrs. Brown's lot is less happy. She goes out to work all day, because a combination of part-time work and National Assistance would not enable her to bring up her children as she wishes to, and as her husband would have liked. This, although the neighbours are very kind and keep a bit of an eye on the children when they come out of school, is not altogether satisfactory. There are already indications that the children, from lack of a full home life, are inclined to be at a loose end, and to get into company which their mother rather views askance. Life is hard for Mrs. Brown, and as for her children—well, we can only hope for the best.

There is this fortuitous similarity between Mrs. Scott and Mrs. Brown: each lost her husband in a road accident. Mr.

Scott was walking on the pavement when he was struck by a motor-car which, being driven a little too fast on a slippery surface, got out of the driver's control. Mr. Scott was killed instantly. Mr. Brown was travelling in a bus on a suburban road, when suddenly an elm tree fell on to the roof of the bus and injured Mr. Brown so severely that he died after many months of painful incapacity. "The day was fine, there was nothing exceptional about the wind, but it was blowing in strong squally gusts from time to time. The tree was a large, well-grown elm, between 120 and 130 years old. After it fell it was found that three of its roots were badly affected by a disease known as elm butt rot . . . the disease was of long standing . . . There was nothing to indicate by external examination that the tree was in any way diseased, and even if the trunk had been bored it was very unlikely that the existence of the disease would have been discovered."¹

The driver of the car which killed Mr. Scott, although not criminally liable, had no answer to a civil action of damages against him, and his insurance underwriters settled with Mrs. Scott for a substantial sum in name of *solatium* (or compensation for her grief) and future loss of support, while payments were also made by the insurers, in respect of the children's claim under the same heads, to a guardian, who holds the sums in trust on their behalf. Mrs. Brown, however, was advised that, in accordance with a well-known House of Lords decision,¹ no action would lie against the occupiers of the land on which the tree had stood; they had neglected no precaution which could be expected from a reasonable and prudent landowner, "because there was

¹ *Caminer and Anr. v. Northern & London Investment Trust Ltd.* [1951] A.C. 88, 92, 99.

nothing dangerous in the appearance of the tree, no sign of disease, advanced age, disproportion of crown to stem, or rising roots.”¹ It was obvious that the bus driver was in no way to blame for Mr. Brown’s death, and accordingly there was no source to which Mrs. Brown could look for compensation for the loss of her husband.

This little piece of imaginary social anthropology occasions no surprise whatever to a lawyer.² The lawyer, indeed would be ready with even more subtle instances. Mr. Scott and Mr. Brown would have been miners; Mr. Scott would have been killed by the momentary forgetfulness of a machineman in the pit, while Mr. Brown, at the end of a long and exhausting shift, would have inadvertently stepped in front of a moving hutch; whether or not he was to blame himself, certainly no one else was. Or the two men would have been shipmates in a British ship, both killed by the carelessness of the bosun, Scott in the port of Glasgow, Brown in the port of Takoradi, where, at least until long after it was abandoned in Britain, the doctrine of fellow-servant still flourished.³ In both these instances, the respective situations of Mrs. Scott and Mrs. Brown would be the same as they were in mine.

It is not that the welfare of persons who suffer damage or a bereavement is of no interest to lawyers in general. On the contrary, questions of this character, as we all know, occupy a great part of the time of solicitors, advocates and judges. The rights of an injured party, the extent to which those rights have been invaded, and the rough calculation of

² Lawyers are referred to Professor Jolowicz’s paper, “Liability for Accidents: A Suggestion for Reform,” presented to the Commonwealth Bar Association, Sydney, 1965.

³ See *infra*, p. 35.

the sum which will provide compensation for that invasion, so that the victim shall be restored *ad integrum*, are all subjects of anxious consultation, skilful presentation, and conscientious decision. But observe that all depends upon the identification and evaluation of "rights," the right of the injured party to compensation upon the emergence of a proved dereliction of a duty, namely, a duty which the law has imposed upon the person who has caused the loss. And since, in our law, the rule of evidence is that the burden of establishing a noxious invasion of the pursuer's rights lies upon the pursuer, one is entitled to say that the law is looking primarily to the protection of the defender from claims which are unjustifiable, that is, claims which are not founded upon some breach by him of a positive duty which he owed to the party complaining. The defender goes free, as he would in a criminal prosecution, unless the pursuer can discharge the burden of bringing home to him a breach of duty owed by one to the other; this must involve in at least some degree a presumption that if A is injured by an act caused by B, B is *prima facie* not answerable to A for the consequences, since such liability is contingent upon the proof by A of facts and circumstances additional to mere causation and authorship.

It is no more than putting the same proposition in a different way if one says that, primarily and as far as concerns original principles at least, the whole of the law of reparation, like so much else in our law, depends for its intellectual content upon some kind of ethical consideration. The concept is one of an obligation to indemnify depending upon a moral duty. He who unlawfully causes injury to his innocent neighbour *ought* to recompense him, and the use of this

expression involves an admission that there is some code of behaviour to which the injurer can be expected to conform. This code consists, however, not in an obligation to relieve distress, but in an obligation to make good the consequences of wrongdoing, which is narrower than the mere causation of loss. I injure my neighbour when I open a rival shop next door; when I, a Sheriff's Officer, seize his goods in execution; when I give to his prospective employer an accurate account of his bad character. In none of these acts do I do wrong, and the moral code does not oblige me to make compensation in order to restore him to his former condition.⁴ The code begins by laying down a minimum of behaviour which can be expected of me, namely, that I will take reasonable care to abstain from unlawful acts or omissions which may be expected to harm my neighbour in the widest sense of that word; the lawfulness or otherwise of such conduct will depend, for the most part, upon whether the activity which may cause damage is one which could be carried out in such a way, if the operator took reasonable trouble to do so, that it would not cause that damage. And an act which if done in the exercise of a right or the discharge of a duty would be lawful, if done for the purpose of injuring one's neighbour becomes unlawful, since the injury is consequent neither on the exercise of a legitimate self-interest, nor on the promotion of the legitimate interests of others, nor is it one which is unavoidable even by the taking of proper care. Thus in Scotland what would be a lawful use of my property

⁴ In 1737 Allan Ramsay's Playhouse in Carrubber's Close was "Banned by the Kirk and interdicted by the magistrates. He had recourse to law, but received only the puzzling and comfortless verdict that though he had been damaged, he had not been injured."—*Old Edinburgh Club*, Vol. XI, p. 163.

becomes unlawful if it is dictated by a desire to damage my neighbour rather than to benefit myself; I am, for example, entitled to extract the water under my land for my own requirements, but not in order to spite my neighbour by drying up his well.⁵ The law as to this is otherwise in England, though in that country also, as I suppose in most others, certainly in Scotland, the doctrine is at the bottom of much of the law of defamation. I am not called upon to compensate my neighbour for the untruth I tell about him if I told it in the legitimate interest of myself or of others; on the other hand if the lie is motivated by a desire to injure him, which motive the law calls "malice," I am liable for the damage of his reputation.

The use of the word "malice," like the use of the word "fault," is incompatible with moral neutralism. It is an ugly word, and in some systems means the guilty mind which is the essential feature of crime properly so called; in the same way the ordinary use of language does not permit us to say of an act, "It was his fault that he did that," simultaneously with, "What he did was lawful." Negligence, too, in the sense of neglect of duty, is an attribute of a wrongdoer; the man who by his neglect of duty causes injury to another has done something to be ashamed of. The relationship, as it was understood in the nineteenth century, has been clearly put by an English judge as follows: "It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law

⁵ This involves respectful disagreement with an *obiter dictum* of Lord Watson in *Mayor of Bradford v. Pickles* [1895] A.C. 587. See Kames, *Equity*, 4th ed., p. 42, and Smith, *Short Commentary on the Law of Scotland*, p. 530.

of that which is a moral obligation without legal enforcement. . . .”⁶

At this point we are obliged to record a distasteful fact, namely, that by our law there is no positive duty of giving assistance in time of need, even where so to do would involve us in no measurable risk. (I exclude the special relationships of parent and child, schoolmaster and pupil, and so on.) The classic presentation is this, that an able-bodied man, seeing an infant drowning in a puddle six inches deep, is under no legal duty to come to the rescue. That he is under a moral duty has been made plain at least in Scotland; when a boy was injured in trying to stop a runaway truck from striking his companion, it was held that the defender through whose fault the truck broke loose was liable to him in damages, since he ought to have foreseen that the boy would obey his moral obligation to come to the rescue.⁷ In France, however, a better view is taken, and the spectator of the drowning child could be held to have committed the “*délit de non-assistance a une personne en peril.*”⁸ This involves a criminal liability, it is true, but, as we shall see later on, a person civilly damaged is entitled to intervene in a prosecution arising from the damaging act in order to obtain reparation.

Much controversy surrounds the question, important only to legal historians, whether, and if so in what sense, there ever was a rule of absolute liability for injury consequential upon the activities which a man carries on, sometimes described as the doctrine of “a man acts at his peril.” Although, as we shall see later, this concept was to some extent re-introduced in the last century, as the common activities of

⁶ *The Queen v. Instan* [1893] 1 Q.B. 450, per Coleridge L.C.J. at p. 453.

⁷ *Wilkinson v. Kinneil Coal Co.* (1897) 24 R. 1001.

⁸ *Code Pénal*, Art. 63 (1954).

the common man, especially his part in industry and transportation, began to involve risks to others which were higher than in less complicated times, this is not a matter which need detain us now. It is, however, perhaps worth observing that, paradoxically, there is a certain callous or ruthless feature in what, at first sight, would appear to be the doctrine more in favour of potential victims. The doctrine, "a man acts at his peril," has in a sense a lower moral content than the doctrine of "no liability without fault"; the former may imply a licence to carry on your activities in any way most convenient or profitable to yourself, provided that you don't mind paying for the consequences. The damage which you incidentally cause to your neighbour becomes, as it were, part of the cost of production. On the other hand, under the doctrine of "no liability without fault" the injurer must be supposed to concede a duty to avoid committing the moral wrong of damaging his neighbour, and his conscience, for he must be supposed to have one, prohibits his merely adding the compensation payable by him to his overheads. If he *has* done his best, always supposing that to amount to taking reasonable care, no compensation is payable at all. Virtue has not only been its own reward, but has been commercially advantageous.

This contrast is not, of course, a clear one. The employer of industrial labour, or the driver of a motor-car, is neither moral nor immoral all the time, being just like other humans. Sometimes he does not do what he ought, and his fault is committed because it is worth his while. His prospects of a larger profit, or his being in a great hurry, coupled with his invariable practice of covering himself by insurance, will induce him to take risks, the prize being substantial, and the

loss at stake being no more than a poorer financial relationship with his underwriters. Against this, the common class of man, society has made additional provision through the sanction of the criminal law, so that the temptation to ignore the moral code becomes easier to resist. This is in practice especially true of road traffic cases, but only in an illusory degree of breaches of the Factories Acts, the penalties for which are scarcely deterrent. But the principle is interesting. Society is saying, "In certain circumstances, and because breaches of the code of moral duty to one's neighbour are so lucrative or so tempting, your failure to observe the code will be treated as something involving more than the liability to recompense those you injure." It is only in this way, too, that preventive measures can be enforced, and potential victims protected *ab ante*.

There are many ways in which the principle of no liability without fault has been relaxed or modified or supplemented, as we shall see, but that it remains fundamentally unchallenged in Britain as the basis upon which the right to reparation and the corresponding duty to compensate are founded can be demonstrated by two authoritative pronouncements, one by the House of Lords in a Scots appeal, and the other by the Privy Council: "The liability for negligence, whether you style it as such or treat it as in other systems as a species of *culpa*, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay."⁹ "If some limitation must be imposed upon the consequences for which the negligent actor is to be held responsible—and all are agreed that some limitation there must be—why should that test (reasonable foreseeability), be rejected which, since

⁹ *Donoghue v. Stevenson*, 1932 S.C.(H.L.) 1, *per* Lord Atkin at p. 44.

he is judged by what the reasonable man ought to foresee, corresponds with the common conscience of mankind?"¹⁰

The latter of these observations leads us to look at one respect in which the moral basis of liability has been found to be inadequate, and has therefore been modified. "The common conscience of mankind" would not tolerate a man being blamed for what he cannot help. Let us suppose that reasonable attention to the safety of the public demands that a certain door on a man's property be kept shut at night. The man is in the habit, as a routine, of closing it at 6 p.m. One evening everything goes wrong for him. He is suffering from influenza, with a high temperature, he has experienced a disastrous business loss that day, his wife has run off with another man, he is not a very adequate personality anyway, and the cumulative effect of these misfortunes is that he forgets to shut the door, so that a passer-by suffers injury. The moral code would not condemn him, because forgetfulness would not be blameworthy in that particular man in that particular condition. But this is not satisfactory to the law, and indeed it would not be possible to do justice in actions between man and man if at the root of the question there lay a subjective investigation into personalities. An arbitrary or average standard of performance is therefore laid down with relation to the requirements of this particular gate, and attached to an imaginary figure, the "reasonable man." The omission of the inadequate proprietor is then measured against the average standard, and he is blamed or acquitted according not to his own abilities but to those of the average man. But his failure to satisfy the test will involve him in no moral criticism at all. And the point becomes even clearer

¹⁰ *The Wagon Mound* [1961] A.C. 388, 423.

when the issue is, as it so often is, whether the consequences of an act or an omission would have been foreseeable by a reasonable man: "How can a man be morally to blame for failing to have the prescience of a brighter intellect than his own?"¹¹

Let me give another example. I employ a man to drive my delivery van. One day, while on the job, he drinks too much and by his culpable negligence injures a pedestrian. The moral blame upon him is clear, and so is the civil liability to compensate his victim, but since the common experience is that he has no money, that will not be of much value. In accordance with most systems of law, therefore, I also am found liable to the victim, under a rule which is proverbially stated as "*Respondeat superior*" or "*Qui facit per alium facit per se*," and is no doubt traceable to the days when a man was held responsible for what was done by his slave. The second of the proverbs I have quoted seems hardly applicable, since it is not reasonable to say that I, through another, had too much to drink and drove on the pavement. All that I did through another was to make delivery of my goods. It is quite certain, at all events, that there is no conceivable moral code which could suggest that I have done anything to be ashamed of. A striking instance is that of the dishonest servant who cheats his master's customers to serve his own ends, which are not only not coincident with those of the master, but are actually detrimental to them. If the cheating is in a matter which it is within the servant's scope to deal with, the master is liable.¹²

¹¹ Ehrenzweig, "Negligence without Fault," University of California, 1951.

¹² *Lloyd v. Grace, Smith & Co.* [1912] A.C. 716.

This point is very well illustrated by a glance at the German Civil Code, Article 831, which is as follows: "A person who employs another to do any work is bound to compensate for any damage which the other unlawfully causes to a third party in the performance of his work. The duty to compensate does not arise if the employer has exercised ordinary care in the selection of the employee, and, where he has to supply appliances or implements or to superintend the work, he also exercised ordinary care as regards such supply or superintendence or if the damage would have arisen notwithstanding the exercise of such care." This provision, which is said to be unique in European codes at least,¹³ is interesting as an assertion that no moral culpability, and therefore no liability, attaches to a man merely because he is ill-served by his employees. It is otherwise, however, if he exhibits blame in failing to use ordinary care in their selection, equipment or supervision. It is rather curious that the liability for the actings of a servant is laid upon the employer subject to one exception, as if to show that the proper discharge of the duty of care to select is regarded as necessary to negative an otherwise existing liability for the consequences of mere employment, looked at from the point of view of ownership and control. Thus absolute liability is laid upon an owner to compensate for any damage his animal may do, and at one time this even extended to damage done by game belonging to a defender if it was done on land over which he did not have the sporting rights.¹⁴ The logic of all this is compatible with an ethical approach to negligence.

¹³ *Netherlands International Law Review* (1963), Vol. X, p. 146.

¹⁴ B.G.B. 833, 835.

though it is not surprising that in most other codes logic has been forced to make way for provisions more humane.

The proviso to Article 831 has been subjected to a good deal of criticism, and, without going into details, it is enough to say that "The courts have made it progressively more difficult for the employer to invoke this defence successfully."¹⁵ It is interesting, in passing, to notice how a codified law, which one might have been excused for thinking displayed the qualities which are its principal attraction, namely, relative immutability and a precise formulation, becomes in a comparatively short time unintelligible without reference to the mass of judicial interpretation to which it has given rise. This is perhaps even more so of the French than of the German codes, but in both instances their simple straightforward statements of principle may be as sybilline as the words "arising out of and in the course of the employment," of blessed memory. The point I am making, however, is that inevitable pressure on the courts has had the effect of modifying the logic of the doctrine of liability for fault in the moral sense. I must also emphasise, what I shall later deal with, that this doctrine does not in Germany give rise to liability in the employer to compensate for the actings of a badly selected or unsupervised worker if the victim of them is another employee. Damage of that kind is dealt with in a different way.

French law seems to handle this question by regulatory rules of evidence, yet the results are said to be justifiable on grounds of moral principle. There were originally four instances in which one person was liable for the actings of

¹⁵ Von Mehren. *Civil Law System*, p. 435.

another: parents for their minor children living with them, school-teachers for their pupils while under their care, artisans for their apprentices and masters for their servants. The liability of school-teachers has now been superseded, but it proceeded on the same basis as that of parents and artisans, namely, that the children's wrongdoing must be ascribed to fault consisting of failure in upbringing and correction. In all these cases, however, the fault is only a rebuttable presumption, and it is a good defence that the guardian could not have prevented the damage. This is not so in the case of master and man, where the presumption is irrebuttable. Once fault is found in the servant the master has no defence. When it is attempted to justify this position in relation to the conventional view of fault, the reasoning is not convincing. It is suggested, first, that the rule will cause masters to look after their servants better, but the unreality of this notion will be obvious to anyone who has had experience in cases of vicarious liability. Secondly, it is said that "the person who stands to profit by the servants' activities should bear the losses occasioned by those activities."¹⁶ There is something in this, as I shall try to show later, but the proposition is crude or even fallacious as a justification for imputing to a master liability for his servant's fault. The benefits of a successful undertaking are by no means confined to the proprietors. Conspicuously in the case of public activities, and in fact in the case of every lawful enterprise, society stands to gain. Above all, the servants themselves are vitally interested in the profitability of the business, more so indeed, in the case of a limited liability company, than many of the shareholders; to one

¹⁶ Amos and Walton, *Introduction to French Law*, 2nd ed., p. 227.

class, profit means livelihood, to the other, rise or fall in the value of a single investment in a portfolio. The idea that the cost of compensating the victims of industrial accidents, or accidents caused by persons carrying on business for gain, should be a charge against the cost of production is unsupportable unless as a recognition that losses should fall on those best able to bear them, regardless of any considerations of what, at the risk of begging the question, I will call justice.

That the law continues to grope about for some hard standing on a moral foundation in this aspect can be observed from the development of the Soviet conception of fault. Paragraph 403 of the Soviet Civil Code was interpreted by a commentator in 1924 as follows: "The plaintiff must show that the injury was caused by the defendant. Beyond that he need not show anything."¹⁷ The whole idea of allowing a defendant to escape liability by showing that he was not at fault, as of course our requirement that the onus of proving fault lies on the plaintiff, was dismissed on the perfectly intelligible ground that "the innocent injured is still more innocent than the innocent injurer." This appears not to be the interpretation favoured today. "Section 403 absolves the person causing the injury if he proves that he could not prevent the injury. But if he could prevent the injury and did not do so, it means that he either caused the danger on purpose (malice), or did not display sufficient care to avert it (negligence)."¹⁸ Apart from an inversion of the *onus probandi* as compared with our system, the Soviet

¹⁷ Goikhburg and Koblents, *Commentary on Civil Code*, 1924, p. 87.

¹⁸ Argarkor and Gankin on *Civil Law*, 1943, Vol. 1, p. 325.

code appears to be based upon the same philosophic foundation as that of other civil and common law jurisdictions.

So far we have noticed some instances in which the inadequacy of the obligation of the injurer to compensate, in so far as it is based on the classical view of negligence, has been recognised, with the consequence that the law has extended the protection given to the injured persons by enlarging the scope of the injurer's liability far beyond the boundaries of moral fault. In the same way, but in this instance for the protection of the injurer from the crippling consequences of his wrongdoing, in a certain conspicuous mercantile respect the full rigour of the doctrine has been relaxed. From an early date on the Continent and since 1733 in British Admiralty proceedings, the shipowner's liability for loss of cargo by the theft of the master or crew was limited to the value of the ship and freight, and in 1813 this limitation was further applied to damages arising out of collisions at sea. These values were afterwards fixed at conventional sums,¹⁹ calculated upon the tonnage of the vessel at fault, in order to avoid the expense of disputes about them; the motive underlying the legislation was never concealed. It had long been recognised on the Continent that a merchant could not afford to trade if he were under an unlimited liability in respect of his ship, extending to his whole fortune, and once the doctrine of limitation was recognised by her commercial rivals, the shipowners of Britain, who remained under unlimited liability at common law, were at a serious disadvantage. Here again, therefore, the application of legal principle was forced to give way to what are political or social requirements.

¹⁹ Sums which now require upward revision.

The eighteenth century also saw the development of the Industrial Revolution, or as it might in this context be more appropriately called, the Engineering Revolution. This inevitably gave rise to a weakening of the doctrine of liability as a consequence of negligence, because it became necessary to provide for a more equitable or socially desirable distribution of risks connected with the new works. Most of the great civil engineering works were in any case irreconcilable with the private law of relationship between a man and his neighbour. I am not entitled to insist on buying my neighbour's orchard because it grows better fruit than mine, and at common law neither am I entitled to do so because I want to turn it into a railway embankment. But it was universally recognised, as is obviously the case, that the works were going to do much more than make profits for the undertaker; they were going to contribute in a wonderful degree to the national prosperity. This, at least, was the comfortable utilitarian doctrine, and to this day one is hardly permitted to dispute that it is in the National Interest to turn the whole countryside into a Dagenham or a Detroit. For the exercise of compulsory powers Parliamentary authority was required, and since in the granting of these powers the legislature was consciously trying to strike a fair balance between conflicting private interests, it was natural that great inroads should be made into the existing law. In so doing the answers of the old law to the question, "Who should pay for A's hurt?" were not always acceptable, and there was no reason why fresh solutions should not be adopted. We will look at some of these solutions, and the attitude the courts took up to them, because it is obvious that we are right now in an era of

technical revolution, so we must not be surprised if right now we ought to be critically examining the old common law answers all over again.

The first example is one in which Parliament conferred on the undertakers of works certain privileges for the protection of those works which the law would not otherwise have afforded them. By section 74 of the Harbours, Docks and Piers Clauses Act 1847 the owner of a vessel doing damage to a harbour is responsible to the harbour authority for the damage, whether caused by negligence or not. This old statute, being a Clauses Act, was designed to form a code for the regulation of the legal rights of all harbour undertakers, who, when they obtained their own local Acts, would incorporate in them the provisions of the code. In December 1872 the s.s. *Natalian* ran into bad weather near the mouth of the Wear. She went ashore at the entrance to Sunderland docks at low water, and the whole crew was taken off by rocket apparatus. As the tide rose, the unmanned vessel refloated, canted round, and struck the pier, doing damage to it. The harbour authority sued the shipowners for the cost of repair, maintaining that the Clauses Act laid upon them an "absolute liability without proof of negligence." In the end the House of Lords²⁰ rejected this claim, upon various grounds not easy to reconcile, the Scottish member of the House, Lord Gordon, dissenting. It is not necessary for me to weary you with an attempt to find a *ratio decidendi*; this exercise occupied much of their Lordships' time in another case I am going to refer you to. It is enough for me to point, I hope not

²⁰ *River Wear Commissioners v. Adamson* (1877) 2 App.Cas. 743.

unfairly or disrespectfully, to what I am persuaded was the motive, whatever the reason, for the decision, and you can find it in the speech of Lord Cairns: "It would be difficult to suppose that by means of ordinary and routine clauses inserted in private or local Acts the legislature . . . could intend to create a new right and a new liability to damages unknown to the Common Law." This I think is the raising of an august standard of revolt; the conscience of the nineteenth-century common lawyer would not readily allow of a statutory obligation to pay damages being imposed upon someone who, so far from being morally to blame, was a sharer with his adversary in a common misfortune.

You can find another example—the facts are of no importance—in the judgment of Brett J. in *Hammond v. Vestry of St. Pancras*²¹: "It would seem to me to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate." This view could not possibly be held today. It is very close to that expressed by Lord Hermand, nearly 100 years earlier, when his *bête noire*, Lord Meadowbank, had quoted a statute whose terms were inimical to the view Hermand had formed. "A statute!" he exclaimed. "What's a statute? Words. Mere words! and am I to be tied down by words? No, my Laards, I go by the law of right reason."²²

But times change, and the—to the layman—very plain statutory provisions of the Harbours Clauses Act came once more before their Lordships. On a wild night in 1923, the s.s. *Mostyn* was shifting her berth in the Swansea Docks.

²¹ (1874) L.R. 9 C.P. 316, 322.

²² Cockburn, *Memorials*.

The master, for good seamanlike reasons as all the courts so found, was moving with an anchor down, and in the course of doing this he dredged up and fractured some electric cables belonging to the dock undertakers. The House of Lords,²³ by a majority of three to two, held that the owners of the ship were liable to make good the damage although in the absence of any negligence on the part of the master. This pair of cases, *Adamson* and *The Mostyn*, is of unique interest to those whose duty or inclination it is to consider the doctrine of judicial precedent, with special reference to the rule of *stare decisis* as it used to be applied in the House of Lords, and so I dare say they give rise to a good deal of sardonic amusement on the part of my friend and colleague Professor T. B. Smith. I will only say this, that by 1928 the House was no longer troubled by the need to admit that the legislature had abrogated the common law; all that was required was the intellectual athleticism of coming to a right conclusion in face of an apparently irreconcilable yet binding decision of the House in the opposite sense.

I will round off this point by referring to a later case dealing with an even earlier statute. The Peak Forest Canal Act 1794 provides that if any damage be done to any land by the breach of any of the waterworks of the particular navigation, "or from any other accident," full compensation should be made to the owner and occupier. In 1943 the Court of Appeal had no difficulty in deciding that the undertakers must pay for damage done by the collapse of an embankment caused by a violent storm, even though the storm was such as to amount to an "act of God." By that

²³ *Great Western Railway Co. v. Owners of s.s. Mostyn* [1928] A.C. 57.

is meant that the flooding "was so unprecedented and unexpected that human agency would not reasonably anticipate it, or be bound to take any steps to meet it."²⁴ This definition may be taken to represent also the law of Scotland.²⁵ And it may be worth incidentally observing that it appears also, from a House of Lords decision, to be the law that no rain, of whatever intensity, can be accepted as an act of God, if it fall in the Burgh of Greenock.²⁶ The *Peak Forest Canal* case is another instance, of a slightly different order, of public policy demanding that Parliament impose strict liability without proof of negligence, this time upon the owners of public works in favour of adjoining proprietors; they are deprived by the legislature even of the defence of Act of God, which would have been available at common law to the keeper of a wild animal which escaped out of his control.

All this is commonplace to the professional lawyer, but my present audience I am sure will appreciate that I quote these cases in order to indicate the weaknesses in the doctrine of no liability without fault. These are not weaknesses in the moral position which lies behind it; the point is that for, say, two hundred years, society, through the acts of the legislature, has from time to time been forced to admit that an ethically unassailable doctrine may have to be modified for public ends, of which examples are the convenience of commerce, the security of property and the avoidance of injustice to the poor.

²⁴ *J. J. Makin Ltd. v. L.N.E. Railway Co.* [1942] 1 K.B. 467, 470.

²⁵ *Roths, Countess of v. Kirkcaldy & Dysart Water-Works Co.* (1882) 9 R.(H.L.) 108; 7 App.Cas. 694.

²⁶ *Caledonian Railway Co. v. Corporation of Greenock*, 1917 S.C.(H.L.) 56; [1917] A.C. 556.

Of course in the business sense these variations upon legal themes are of less practical than philosophical importance. The burden of an accident of the kind we have been looking at does not fall catastrophically upon a ruined shipowner or upon a bankrupted canal proprietor. Risks like this are spread by insurance. But when we come, as we are about to do, to look at this aspect more closely, we must bear in mind that the community has a stake in these undertakings—that is why they succeeded in getting Parliamentary powers—so that if some of the burden of insurance should fall on the community as a whole, there will be nothing unjust about that. Nor ought we to forget that the problem we set out to solve was that of Mrs. Brown and her family. Nothing we have discussed so far has been any help to them.

II

PRACTICAL REMEDIES TO REPLACE LEGAL DOCTRINES

THERE is no judge, no practising lawyer and no intelligent member of the public who is prepared to accept the soundness and approve the efficacy of all the doctrines of the law current at any particular time. We need not, as lawyers, be surprised at this or feel ashamed of it. Law must always lag behind a bit, because one of the first things we demand of our system is that we must know where we stand. We want to be able to plan our relationships with our partners, our customers, our wives, the Inland Revenue and the police on the basis of a body of law which is stable rather than ephemeral. So change takes time, and therefore at any given moment a lot of the law is, ideally, out of date. How long it takes to effect a change could make, in relation to any specific problem, an interesting study for a legal historian, as he traced the course from the first mutterings of discontent, through the gathering movement for reform, up to the final triumph of amendment—for the time being. On that footing, let us look at our own problem again. We began by noticing what appeared to be inequitable consequences attending two respective incidents, each producing its own victims, and we noticed that the consequences to the victims were quite dissimilar, although looked at purely physically the incidents had a good deal in common. We considered the legal explanations for these differences and noticed that in most countries at some time or other it had been found necessary to modify, if not to abandon, the doctrines of the

law which underlay the results, at least in their full logical vigour.

We are now to look at some more advanced proposals for distributing a more even-handed social justice. Some have been implemented, and a few of these I will cite as examples. Some are still in the air; I do not know when they were first ventilated, but I have been struck by the following quotation¹: “The report leaves little doubt in the reader’s mind that the present methods of dealing with the problem of automobile accidents not only fail in most cases to provide proper compensation when compensation is due, but are productive of other results which are socially undesirable. . . . The Commission favors the adoption of a plan of compensation with limited right of recovery and without regard to fault, analogous to that provided by workmen’s compensation legislation, to be guaranteed by insurance and administered by a commission. . . . The striking similarities with respect to the natures of the problems, the social results thereby produced, and the solutions proposed, cause one to wonder whether this report . . . foreshadows an impending development in the law looking towards a more scientific distribution of inevitable risks which are incident to an important and necessary activity in modern society.”

The Report referred to was prepared by a Committee to Study Compensation for Automobile Accidents set up by the Columbia University Council for Research into the Social Sciences, and the first thing to which I draw attention is that it was prepared in 1932. So a generation ago proposals were being made to replace, in some degree at least, com-

¹ *Columbia Law Review*, Vol. xxxii, p. 786.

pensation limited to damages arising from negligence by payments out of a publicly administered insurance fund.

The second point of interest is the analogy which was then drawn between the automobile proposals and the existing law as to workmen's compensation; this in its turn was regarded as being merely a special case of "scientific distribution of *inevitable* risks which are incident to an important and *necessary* activity in modern society." The use of the words I have italicised firmly excludes the attaching of any relevance to the idea of fault; he whose *necessary* actions *inevitably* cause injury cannot be blamed for the injury they cause, and society cannot ask him, consistently with what we call justice, to be at the sole expense of indemnifying the victims. The extent to which he can be directed to contribute will depend upon other factors, in which might be included, first, the special profit he enjoys or the individual convenience he extracts from the "necessary activity," such as owning a factory or driving a car; and, secondly, the general benefit that he derives, as a member of the public, from the additional amenities which the activity promotes to the advantage of all. On this view there can be no resting place at road accidents or industrial injuries. If inevitable risks are to be scientifically distributed, this is probably going to mean taking care of all those who suffer from them by the most obvious method of distributing risks, that is, insuring all who are exposed to them.

Nor will it be satisfactory to stop there; we shall at once be asked the question, "Why is relief to be afforded only in cases where A has suffered in consequence of, or in connection with, some activity of B?" What, in fact, are we going to do about Mrs. Brown? We cannot say that

there is an automobile accident when a tree falls on a motor-vehicle and crushes the passengers. The accident is in principle indistinguishable from a tree falling upon someone walking on the pavement, or upon a dwelling-house. And we can hardly say that the passive owner of a tree, which is apparently in perfectly good health, is engaged in an activity which causes injury. It is beginning to look as if we have on our hands, once we start talking about the "scientific distribution" of the risk of being injured through no fault of one's own, a search for some kind of acknowledgment by society that one of the costs of living, the overheads of community life, is the relief of distress in these cases, amounting in sum to the same kind of indemnification as the law now provides when the innocent victim is damaged by the fault of another.

But already I can sense the objection of the attentive listener—"Why does he use the expression 'through no fault of his own' or 'innocent victim'? Surely, if this kind of relief is a general obligation on society, we have no right to divide the victims into sheep and goats, reserving the benefits to the uses of those whose conduct we approve, and consigning the others to penury. We have stopped looking round for a morally blameworthy causative agent. Have we still got to make ethical judgments about the complainer?" This question is not an easy one. Until fairly recently (1945) the law in both England and Scotland was that if a pursuer was himself guilty of negligence which was "itself jointly causative of the accident along with the negligence of the defender,"² the pursuer was altogether precluded from recovering damages from the defender. It is not

² *Robinson v. Hamilton (Motors)*, 1923 S.C. 838.

necessary to make any attempt to rationalise this doctrine, which led to manifest injustice. The odd thing is that it has never been tolerated in Admiralty; if two ships collided, through the negligence of both, the degree of blame has always been apportioned by the court to each, and the damage arising adjusted accordingly. This is now the rule in ordinary actions of reparation. One can easily see the basis of this rule if the defender is to be found liable in consequence of his fault; no one could justify finding him wholly liable for something which the court has found was not his fault alone, but at least in part that of the complainer. But if fault of the defender is not to be the basis of compensation, what on earth has the fault of the complainer, partial or even entire, to do with it either?

So to help us to answer these questions we will look at the progress of the ideas behind them, not only in this country but also abroad. To begin with, I will quickly recapitulate some of the respects in which we noticed earlier the doctrine of "no liability without fault" as having been departed from: (a) the objective comparison of him who caused the injury with "the reasonable man"; (b) the liability of an innocent employer for the negligent acts of his servants; (c) the protection given to works carried out under parliamentary powers; (d) the obligation of certain undertakers of such works to compensate without proof of negligence. Going on from that point, we observe that the technical developments of the new age caused the doctrine to become more and more obsolescent; new inventions brought new dangers, and mechanical contrivances could make the consequences of accident, at least on land, more disastrous than ever before. It is not surprising that there was a demand

for protection for injured persons which would be more certain and less limited in scope than was available under the old doctrines of no liability without fault, even where the burden of exoneration lay upon the defender. In many countries, therefore, that rule suffered erosion. It is perhaps worth mentioning a sad exception, Scotland, into whose jurisprudence was introduced by the House of Lords in 1858 the English common law rule invented a few years earlier in England that an employer was not liable in damages for the injury caused to one of his employees by the negligence of another.³

It was in Germany that the most remarkable developments took place. "In the various parts of 19th century Germany three major systems of law were in force: French law, based on the *Code Civil*, the Prussian codification of 1794 (*Allgemeine Landrecht*), and the *Gemeine Recht*, an adaptation, largely carried forward by scholars, of Roman law to modern conditions."⁴ In all these systems the rule was "no liability without fault." In two of the kingdoms, Prussia in 1838 and Bavaria in 1861, the doctrine was found to be inadequate to the new technology, and it was therefore provided, either by legislation or by judicial decision, that broadly speaking, railway operators were absolutely liable for the damage they caused. The Prussian law simply ignored the issue of fault,⁵ while the Bavarian *Oberste Landgericht* felt themselves able to decide that "the operation of a locomotive on a railroad automatically and necessarily

³ *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. 266.

⁴ Von Mehren, *op. cit.*, pp. 415, 416.

⁵ *Preussisches Gesetz über die Eisenbahnenunternehmungen*, November 3, 1838.

entails culpable behaviour.”⁶ The question, however, was dealt with on a federal basis by the *Reichshaftpflichtgesetz* of June 7, 1871, which was wider in scope than mere railway legislation. Article 1 provided that if in the conduct of a railway a human being is killed or suffers bodily injury, the undertaker is liable for the damage arising therefrom except in so far as he proves that the accident was caused by *force majeure*, or by the fault of the deceased or injured person. This article has since been extended to cover electricity and gas undertakings, where the only defence open is that the installation meets the recognised standards of engineering and is intact. A somewhat similar liability has been imposed upon the drivers of motor-vehicles. “If through the use of a motor-vehicle a person is killed or the body or health of a person is injured or property damaged, the holder of the vehicle⁷ is liable to the injured person for damages arising therefrom.”⁸ The only defence, substantially, is that the accident was due to an unavoidable event that is caused neither by a defect in the condition of the vehicle nor by failure in its mechanism. It will be observed that the liability under this law is more severe than that upon the railway operator, because it provides for injury to things as well as persons, which the railway law does not.

There are some specialties about this law: (i) the liability is limited to a certain sum, but a plaintiff can also sue under the ordinary provisions of the Civil Code, when of course he would have to prove fault; (ii) persons who are employed in connection with or are transported in the vehicle are excluded from this law, and must prove negligence if they

⁶ Von Mehren, *op. cit.*, pp. 415, 416.

⁷ A technical term of wide meaning including the owner.

⁸ *Gesetz über den Verkehr mit Kraftfahrzeuge*, May 3, 1909.

are to substantiate a claim; (iii) the driver is not bound by this law in so far as he may exculpate himself by showing he was not negligent.

How the law was changed in order to meet new needs can be seen from that relating to liability arising out of the operation of aircraft. In 1908 a Zeppelin made a forced landing; it got out of control on the ground (as to which no special point was taken), and the plaintiff was seriously injured. He sued Count Zeppelin for damages, but was unsuccessful in the absence of proof of fault. This decision was adversely criticised, and the question is now regulated by statute,⁹ based upon the motor-vehicle law, but more stringent, inasmuch as the operator is deprived even of the defence of *force majeure*, and is faced with what amounts to an absolute liability. His liability to passengers, and its relationship with the Warsaw Convention, is of course outside the scope of this lecture.

After dealing with the liability of railway undertakers, the *Reichshaftpflichtgesetz* provided by Article 2 that "Anyone who operates a mine, quarry, pit or factory, is, if an authorised agent or representative or anyone employed in the direction or supervision of the undertaking or of the workmen causes, by a fault in the carrying out of the service arrangements, death or bodily injury to a human being, liable for the damage arising therefrom." This Article is more limited in scope than might appear. First, the burden of proof is not shifted to the undertaker. Secondly, the liability of the owner is only for failure in duty, and that on the part of a certain class of servant; the effect is really to extend the definition of

⁹ *Luftverkehrsgesetz*, 1922, 1936, 1943.

undertaker to include representatives in a supervisory capacity, so that the faults of management are to be imputed to the operator. Thirdly, it is again to be emphasised that the Article confers no general right upon a workman to sue his master in respect of the negligence of a co-employee.¹⁰ This is dealt with in an entirely different way, having been excluded from the law relating to rights and duties altogether, and I shall be referring to this matter in a moment. In the meantime I will just suggest that we may find that exclusion could be beneficial, in the interests both of practical remedies and of rationalisation of legal doctrines, were it replaced by a system of sufficiently wide application unconnected with the law of delict.

In France, after a good deal of controversy and contradictory decisions upon the interpretation of the relevant articles of the *Code Civil*, the law stands at present upon the basis that "fault is a necessary condition of civil liability."¹¹ I understand, however, that consideration is being given to legislation which would impose an absolute liability upon the driver of an automobile which causes accidental damage¹²; if this is passed, it will not be unique. To lawyers, probably the best known example is to be found in the province of Saskatchewan.¹³ The basis of the scheme is the setting up of an insurance fund, financed by premiums paid by the owners of vehicles and by the holders of driving licences. The premium income is used to indemnify not only everyone,

¹⁰ Von Mehren, *op. cit.*, p. 424.

¹¹ Amos and Walton, *op. cit.*, p. 203.

¹² For French professional opinion on this subject see *Gazette du Palais*, September 15, 1965, reporting the Congress of the *Association Nationale des Avocats*, especially the statement of Professor Tunc.

¹³ See *Journal of the Society of Comparative Legislation*, Vol. 31, p. 39 and 13 C.L.P. 100.

including drivers, passengers and pedestrians from the consequences of injury in an automobile accident, but also owners of vehicles from losses arising from collision, fire and theft. The features of the scheme are (a) flat rates of premium (but varying according to the class of vehicle), (b) a limit to the benefits payable, *e.g.*, (in 1960) to \$10,000 for one person and \$25 a week for a maximum period of two years in case of total incapacity, and (c) no exclusion of the common law right to sue for damages arising from negligence. In fact, as regards the last point, the position is the same as in Great Britain, where the law demands that a driver be insured against common law claims. The consequence of the limitation of benefit is that actions at common law, in supplement of the statutory insurance benefits, are of constant occurrence. Thus, while compensation to some degree at least is the absolute right of anyone injured by an automobile, which is not the case with us, at the same time, as under our law, you are better off if you can ascribe your accident to negligence than if you cannot. There seems to be no doubt that the scheme is effective, and it is certainly not costly. We are told that the proportion of premium income swallowed by administrative expenses is 17 per cent. in Saskatchewan, 30–40 per cent. in Britain and 50 per cent. in the U.S.A.¹⁴

It is not surprising that the Saskatchewan system—which I will not examine or criticise in any greater detail—has been very carefully studied elsewhere. A Committee examined the question in New Zealand in 1963; it was extensively discussed at the Commonwealth Bar Association Conference in 1965. The Lord Chief Justice of England made it the subject of his Presidential Address to the Bentham Club in 1965; there are

¹⁴ 13 C.L.P. 104.

some striking points in that address.¹⁵ For example, of every ten persons injured in road accidents, only three are compensated. This, of course, is one of the consequences of compensation being tied to negligence, since many accidents, probably far too many, are classified as "unavoidable." But an even more powerful reason is the difficulty, if not impossibility, of proving, after the elapse of what may be months or years, that on a balance of probabilities the defender was to blame. This will depend on the evidence of witnesses as to what exactly they saw, perhaps in a split second of time, long, long ago. Especially in Scotland, with its uniquely rigorous insistence on corroboration, the burden on the pursuer is hard to discharge. Again, the variations in the sums awarded make it all a bit of a lottery. England is better off here than most of us. Lord Parker is critical of judicial awards; most "common law" countries have to put up with the inscrutable and oracular jury. Finally, the tribunal is supposed to make an estimate, on a lump-sum basis, of future and perhaps permanent loss of function or earnings; this estimate can never be much more than a guess.

Let us suppose, then, that it were determined that there should be a universal insurance against the damage done by motor-vehicles, both to persons and property, which would provide indemnity without reference to liability under any existing doctrine of law. Granted that the automobile accident, being the most obvious and spectacular of the disasters to which the "uninsuring" part of the population is most likely to suffer, why in fact should compulsory public insurance be confined to this type of risk? Why should it not cover the even commoner and sometimes more tragic kind of

¹⁵ 18 C.L.P. 1.

accident, the accident at work? It may perhaps be answered that such insurance has in fact been compulsory in Britain at all events since the end of last century, first in the form of Workmen's Compensation, and presently in the shape of Industrial Injury Benefit. There is this difference between them, and I think to the advantage of the former, that the limited compensation was geared to wage-rates, whereas that under the latter it is not. Not that the old Workmen's Compensation provided full relief; like it the present arrangements provide no more than a minimum basic subsistence. They make no attempt to achieve the object which is pursued by a court assessing damages in a claim based on negligence, that is, to restore the sufferer to the same financial standing as he or she would, but for the accident, have enjoyed, and in most cases to make some payment in recognition of pain, disfigurement, shortening of the prospects of life and so on.

I do not know of any system of compulsory industrial insurance which provides for this "*restitutio ad integrum*." We copied our early provisions from the Germans, who were pioneers in this field, and when we look at the German model we are brought right back into the legal difficulty which formed the introduction to this study, namely, how to reconcile, in any rational way, the rights against others which the law has had to confer, in a developing society, on people who are injured by accident, when those "others" have really performed all the moral duties incumbent on *them*, and so in no ethical sense can be said to be "to blame" for the accident. You will recollect that I pointed to Germany as unique in this, that a man is not liable for the act of a properly chosen, trained and equipped servant who by his negligence causes damage to another, and is in no case liable for

the damage one ordinary servant's negligence may cause to another. These doctrines can no doubt be explained by an inclination to strict adherence to formal reasoning, but the second of them has had to be evaded by alternative statutory provisions, while the first is now under heavy fire.

The problem of compensation for a workman injured otherwise than by a "management" fault, which would have entitled him to damages under the *Reichshaftpflichtgesetz*, was dealt with by a compulsory insurance scheme which dates back to 1884.¹⁶ It appears that it was part of what would now be called a "package deal"; as Bismark put it, "the cure of social evils will have to be sought not only in the repression of Social Democratic excesses, but also equally in the positive promotion of the welfare of the worker."¹⁷ Be that as it may, there existed in Germany, and was a model which was to a large extent copied in Britain between 1897 and 1911, a comprehensive protective insurance scheme covering industrial accidents as well as sickness and old age, and as far as industry is concerned financed by contributions from masters and men. The principles have been stated as follows: "The federal legislation is based on the idea that the entrepreneur who employs workers . . . not only owes them the wages agreed upon, but also has to bear the risk of accidents connected with the work. . . . The workers or their next-of-kin receive the amounts due to them from an institution upon which the duty of protection is incumbent; this institution has no private-law relationship with the beneficiaries, but . . . it performs a public administrative function. Accordingly, the obligation of the entrepreneur to

¹⁶ *Unfallversicherungsgesetz*, July 6, 1884.

¹⁷ Von Mehren, *op. cit.*, p. 425.

make payments of indemnity is not a legal obligation towards the worker, but a public charge imposed on the operation of an industry 'subject to insurance' like a public tax. . . . By this financial obligation under public law, the entrepreneur is freed from the private-law liability for accidents towards his workers so far as such a liability is based on statutory provisions. The only exception is the case when by the judgment of a criminal court it has been found that the entrepreneur caused the accident intentionally. In that case the injured party can demand from the entrepreneur the difference between his (private-law) claim for compensation and his (public-law) claim for accident indemnity."¹⁸ This system, then, has the same features which have characterised all others, namely, a provision by insurance which amounts to less than the indemnity which the Civil Code would confer, and reservation to the injured party of what we would call his "common law" rights, albeit these are, in Germany, restricted to what must be the very rare case of intentional injury.

But, as I say, the rigidity of the German adherence to the doctrine of no liability without fault, which has caused the rejection of vicarious liability as incompatible with moral blameworthiness, is undergoing criticism, and when a system is being criticised that is just the time to look at it, because then you can see the struggle going on between the contradictory elements in such problems as this, which I told you we were especially looking out for. I may refer to a critical article on "Liability and Warranty in the New German Doctrine of Unlawful Acts," by Professor Joseph Esser, of

¹⁸ Laband, *Das Staatsrecht des Deutschen Reiches* (1890), p. 264.

Mainz.¹⁹ Professor Esser examines the evolutionary trends in the matter of civil liability and classifies them as revolutionary and counter-revolutionary, the first being "reforms which have tended to develop the rules of the Code relating to unlawful acts in the direction of a warranty becoming gradually more and more absolute," and the second being "a move towards re-establishment of principles of individual responsibility, subject to a closer control of the general considerations which make an act unlawful." One extension of the law, indeed, and an interesting one, is of a constitutional nature, and I think one may safely suppose it to be consequent upon the public acknowledgement of the outrages which had been committed by the German Sovereign in the name of Government between 1933 and 1945. The global rights of the individual to personal dignity and individuality which are to be found in Articles 1 and 2 of the Federal Constitution of Bonn have been recognised by the *Bundesgerichtshof* as conferring rights, for example, to protection against the invasion of privacy or commercial exploitation, which are said to have been refused in the past by the *Reichsgericht*. I do not want to go into details about this; I will mention just two reforms which in 1961 were being proposed. The first is the abrogation of the exoneration of the master for the negligence of his servant under Article 823, which I have already referred to. The second is inspired by the discussions as to the proper way of dealing with multiple damage done by, say, a nuclear catastrophe, and it suggests that all commercially dangerous enterprises should be under a strict liability resembling that relating to motor-vehicles and aircraft, on the footing of "the liability of the person in control for the risks arising from the

¹⁹ *Revue Internationale de Droit Comparé* (1961), Vol. xiii, p. 401.

safety of things which he has introduced into industry, or which he has made available to the public.”

On the other hand, the counter-revolutionary element, of which I suspect the learned author forms part, is dissatisfied with the empirical nature of a doctrine which has thrown away the objective standard of reasonable care in favour of the rule that “conduct is unlawful when it passes the bounds of what is termed ‘*Sozialadaequates Verhalten*,’ or socially adequate behaviour.” “This expression,” says Professor Esser, “has had a great success, in conformity with Faust’s epigram: ‘*Denn eben wo Begriffe fehlen, da stellt ein Wort zu rechten Zeit sich ein.*’”²⁰

Let us return to England, and to the conflict between the competing elements which has forced law to admit its own social inadequacy. My next, and last, instance is from outside the realm of personal injury, and is in the first place intended to illustrate the irrelevance of the concept of fault as a guide to the just decision of a dispute arising out of a commercial relationship. In the second place, although we shall not have time to go into any details of finance or administration, I believe that the commercial principles we are about to see in operation, looked at along with the imperfect remedies we have been studying, may give us a clue to the reconciliation of a rational system of law with an acceptable social equity.

In the case of *Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd.*,²¹ meat belonging to the plaintiffs had been shipped in the defendants’ ship under bills of lading subject to the Australian Sea Carriage of Goods Act 1924. By that

²⁰ “It is just where ideas are awanting that a word comes in handy.”

²¹ [1961] A.C. 807.

Act and the Hague Rules to which it gives force, the shipowner is liable for damage arising from unseaworthiness only if caused by want of due diligence on the part of the shipowner to make the ship seaworthy, as to which the burden of proof is on the shipowner. Just before the voyage the ship had been subject to a load-line survey, and for that purpose entrusted to Stephen of Linthouse, ship-repairers of the highest repute. A marine superintendent employed by the shipowners' managers had insisted on an unusually stringent survey. This involved removing all the storm valves. They were put back by a skilled fitter employed by Stephen. This is in accordance with ordinary and prudent practice. The fitter was negligent, one of the storm valves leaked, and that caused damage to the cargo. The question was, the ship being undoubtedly unseaworthy, had the shipowners exercised due diligence? I refer to the speech of Lord Radcliffe: "Now, I am quite satisfied that, treating the carriers as a legal person, a limited company whose mind, will and actions are determined by its officers and servants, they did nothing but what they should have done as responsible and careful persons in the carrying business. . . . I see no ground, therefore, for saying that the carriers themselves were negligent in anything that they did. . . . But there is, on the other hand, a way of looking at the intrinsic nature of the obligation that is materially different from this. It is to ask the question, when there has been damage to cargo and that damage is traceable to unseaworthiness of the vessel, whether that unseaworthiness is due to any lack of diligence in those who have been implicated by the carriers in the work of keeping or making the vessel seaworthy. Such persons are then agents whose diligence or lack of it is attributable to the

carriers. . . . The carriers must answer for anything that has been done amiss in the work.” After elaborating this, Lord Radcliffe goes on: “If one had to choose between these two alternatives without any background in the way of previous authority or opinion with regard to the interpretation of this section of the Hague Rules, I think it would be very difficult to know which way one ought to turn. . . . What I think should determine this appeal, however, is what we know of the history of these words ‘due diligence to make the ship seaworthy’ in connection with sea carriage of goods, and what I regard as the settled interpretation of their significance. . . .”

This implies a very interesting, and, for my purposes important, attitude to the proof of negligence. On the one hand, the carriers had taken every precaution that anyone could suggest prudent carriers ought to take; on the other it was alleged that they had failed to exercise due diligence inasmuch as, having delegated the mechanical and surveying part of the duty—and shipowners are not ship-repairers, so can do no other—they are liable for the negligence of those to whom they delegated. Were they to blame or not? Moral fault is out of the question, and Lord Radcliffe did not find it necessary to attach some kind of notional fault, which would have been, as he indicates, a matter of great difficulty if principles are to be kept to. He did not ask the question, “What duty did the carriers owe to the shippers, their neighbours to whom they owed a duty to exercise reasonable care and did they fail in it?” but, “What promises did the carriers make to their customers, and did they keep them?” The question moves out of negligence and into contract, out of the realm of a moral duty to take care of a neighbour, and

into that of the prudent businessman voluntarily entering into onerous commercial agreements.

In all transactions proceeding upon such agreements, there is risk of loss by accident to one party or another, and the prudent businessman covers the possibility of loss by insurance. He will often make his contract in such a way as to indicate what losses he is to insure against and what are to be left for the other party to cover. Thus, to pursue the *Riverstone* example, if the contract provides for the ship-owner being liable only for losses arising out of unseaworthiness consequent on his own lack of diligence, that means that it is against those losses alone that he will insure, leaving all other risks of the adventure to be covered by the shippers of cargo. These matters are arranged on a purely business basis, which may be nonetheless just and fair for having no moral content. For example, you may hear a motorist whose car is under comprehensive insurance complaining of a garage which displays a notice "Cars garaged at owners' risk": "Unfair," he says, "that I should be the sufferer for the negligence of the proprietor and his servants." This, of course, is not so. He garages in a public garage perhaps once a month, and that fact will make no difference to his premium. On the other hand the garage proprietor, if he accepts liability, will have to insure against the risk of fire caused by a small electrical fault destroying 100 cars on any of 365 nights of the year. Business economy dictates who shall cover the risk. This misunderstanding caused some rumblings of discontent on the Bench in a case in which the right of an internal airline to exclude their ordinary liability as carriers was being discussed.²² While it is

²² *McKay v. Scottish Airways*, 1948 S.C. 254.

generally agreed that the consumer is entitled to more effective protection than he now enjoys from the contractor who forces him to sign what is called a "standard form contract," that is a contract the terms of which have been settled by the contractor himself on a "take it or leave it" basis—the consumer must sign it or forgo what may be an essential service—in many cases the form of the contract reflects customary insurance arrangements which the parties have voluntarily entered into. It is, of course, easy to criticise the almost universal condition which the operators of ferries include in their contracts of carriage, namely, that the passenger is at his own risk, on the ground that a ferry is only, to the passenger, a portion of highway of a peculiar kind, and that, since it is notorious that no-one ever looks at the conditions of carriage, the consequence is that on this portion the passenger is left unprotected. But what is he unprotected against? Not the risk of accidental injury or death. In Britain these will not entitle him, at common law and apart from contractual stipulations, to reparation. The only thing that will entitle him or his estate to be restored to the pre-accident position is the carrier's negligence. If negligence were not the basis of reparation, the condition of carriage would be of no importance. It is true that the passenger can insure against the consequences of the carrier's negligence, as he can against loss from any other cause, but the simple soul does not do so. If there were universal provision for insurance, not against the consequences of negligence but against the risk of any accidental injury, the whole creaking, ramshackle, unworkable machine which is represented by the common law of delict, tort or reparation could be abandoned without regrets.

In its place, I suggest that we think over a system based on business realities rather than on legal doctrines. This means facing the fact that some people, manual workers especially, are more exposed to injury by accident than others, and that if the risk of injury to one of them is to be spread, so that it is not he and his family that suffer catastrophe, it should be spread not over his fellow-workers but over us all. Since some industries are more dangerous than others, and all are more dangerous than non-industrial employment, it is right that employers should contribute to the insurance fund, possibly in different degrees according to the class of industry. And since, of course, the whole community benefits from industry, a contribution could fairly be levied on the general tax revenue. There is nothing original about this; in fact it closely resembles the present system. But let us extend it so as to include all injury by accident, however caused, and see how we stand. In the first place, we shall see that it will be possible so to arrange matters as to make actions of damages for negligence unnecessary, and therefore to make our present insurances, such as motor insurance and employers' liability insurance, largely irrelevant. What we might propose would be a universal compulsory comprehensive insurance—no contracting out allowed—which would insure a potential victim against loss instead of only a potential wrongdoer against claims. While civil actions for negligence would disappear, there would be much to be said for taking a severer view of faults such as dangerous driving or breaches of the regulations under the Factories Acts. These matters would probably be dealt with in the criminal courts, although it might be better to set up special courts to deal with such cases. We have already seen that quite often,

especially in industrial accidents, no moral blame attaches to him whom the law finds liable in damages; nevertheless the imposition of severe monetary penalties would have a salutary effect on prevention, which is after all better than compensation. There is, so far as I can see, no reason why people should not insure against this liability, as in fact they do today against the civil consequences of their fault. The important thing is that any penalties inflicted should be paid into the insurance fund, and not to the sufferer. Whether there should be separate funds, *e.g.*, an industrial fund, an automobile fund and a general fund is a fiscal, administrative or perhaps actuarial question which we need not here pursue.

But if we are going to abolish the civil right to damages for negligence, obviously we will have to put in its place something which effects in all cases of accidental loss what the old system used to do in a few cases, namely, restoration of the sufferer, so far as money can do it, to his pre-accident position. There is no technical difficulty in that. You gear a man's contribution (and also his employer's and the state's contribution) to his average income, and you pay out on the same sort of basis. Here again there are innumerable administrative questions which obviously we cannot go into here. Whether or not you are prepared to be overwhelmed by administrative difficulties, or terrorised by financial considerations, raises really a question of priorities. What is required in the first place—and this of course raises political, not legal questions—is a realisation that the social waste and unhappiness caused by all serious personal accidents ought so far as possible to be made good, and not only

in the cases in which someone other than the victim was to blame. For some reason or other, however, it has so far been acceptable that such provisions for sickness or industrial injury benefit should be ineffective, for most people, above a bare subsistence level. If under our present arrangements you want to live something like the life which you and your family enjoyed before you were struck down, you must either effect a private insurance, if you can afford it, or you must arrange to be struck down through the fault of someone who is either insured or well-to-do. The reparation which would be payable under a comprehensive insurance should surely be measured by the amount of the loss, and by nothing else. Clearly this would involve a contribution to the premium fund in respect of each person covered which would vary in accordance with his potential loss; that in its turn would bear relation to his pre-accident wages and to his post-accident prospects.

I would expect that the scheme would cover every eventuality except, probably, injuries deliberately self-inflicted. Should not the drunk man falling into a ditch on his way home receive compensation on the same footing as the man who loses a hand through the failure of his employer to fence a machine in his factory? Since "fault" is irrelevant, there is no room for the idea of contributory negligence. And since fault is irrelevant, the whole content of the law of civil negligence, delict, tort, vanishes overnight in so far as it affects personal injury. I will leave to others the idea of compulsory insurance against damage by defamation, as also the interesting question of how a visiting foreigner is to stand when he is injured in a road accident.

It is essential that the compensation paid take the form of periodical and not lump-sum payments. There would be an end to the degrading form of bingo-session which we now describe as a civil jury trial, in which the tribunal is invited to guess how long the present disability is to last, and to capitalise the value of it by multiplying by some figure—any figure, except, as the judge will always direct, such as could be justified on actuarial principles. If complete recompense, or something like it, is to be guaranteed by reliance on a public fund, it is hard to see much justification for providing further for damages in respect of pain and suffering, or shortening of life. These always had rather the air of penal damages about them, that is, an insistence that he who is negligent should be liable to the uttermost farthing. But even cases of negligence are accidents; we are all liable to accidents, and I suggest we might grin and bear the peripheral consequences, in so far as we are not out of pocket by them. And most of us would be glad to see the end of the really horrible spectacle so popular in Scotland, and in other countries too, of grief-stricken parents asking juries for cash payments in lieu of their dead children. The loss of a child of tender years would, of course, involve no payment out of the fund except for funeral expenses.

In another "common law" country, the imminent breakdown of the concept of negligence as a useful regulator of the lives and interests of persons exposed to an industrial civilisation has been recognised. I have been much indebted to an article by Dr. Ehrenzweig entitled "Negligence without Fault" published by the University of California, 1951. The learned author emphasises the exceptions and the extensions

to the doctrine of no liability without fault which are necessary in order to make it viable in modern society. I do not find myself able to go the whole way with him in his conclusions, probably because at my age one wastes too much time in studying an expression like "negligence without fault," and trying to evaluate it according to the logic of the system in which one has been educated. Nevertheless, the conclusions are impressive, and I can best summarise them by quoting an imaginary judge's charge which the author suggests as appropriate in an action of damages under his proposals; the first part is orthodox, the second is decidedly not. "The defendant is liable for morally negligent causation of the harm if (a) he is guilty of conduct which a reasonable man would have been expected to avoid, and (b) if he could have reasonably foreseen that harm of the type actually caused would result from such conduct. The defendant is liable for negligence without fault, (a) if the harm was caused by an innocently negligent (quasi-negligent) activity, *i.e.*, an activity initially negligent but legalised because of its social value (certain activities such as the operation of railroads or automobiles being quasi-negligent in that sense as matter of law) and (b) if the harm was of a kind which could have been calculated (and therefore insured against), as typical for the particular enterprise."

When damage is caused by a defendant he is either insured or he is not. If he is, then he must fail because that means he calculated the risk as typical. If he is not, then the dispute will be whether he ought to have been; if he loses on that issue, the plaintiff will be awarded damages, but will probably be unable to recover them. Or indeed the dispute may be whether the defendant is covered by insurance against

the particular happening or not. That will involve a construction of his contract with the underwriters. If he loses on that issue, and it is found he is not covered, then the plaintiff will probably not succeed; the harm was not covered because it was not calculated. If it had been, it would have been covered. In that issue the defendant and the underwriters have the same interest, *i.e.*, to demonstrate that there is no cover, while the plaintiff, who will find it hard to qualify a right or title to intervene in the dispute, will be maintaining that the defendant *is* covered. I see very great difficulties in attempting to run liability for negligence and indemnification by insurance in double harness. I have asked you to consider the abrogation of civil rights in this matter; it is not that a man should be found liable in accordance with his duty to foresee his duty or interest to insure against the consequences of his acts or omissions, but that an effective insurance machine should be set up and maintained for the cover of the potential victim. We would relieve the "operator" of the trouble of deciding on his insurances, except in a question of his own commercial risks. We would see to it that his victims were covered, and render to him an account for a proportion of the premium. On the other hand the author clearly recognises, what seems entirely acceptable, that one is on a much sounder footing if one deals with the problem as a business man would, by leaving each several risk to be covered by the appropriate insurance, rather than if one tries to fit the exigencies of a modern industrial and mechanised society to the procrustean bed of the common law doctrine of no liability without fault.

Of course these tentative proposals of mine leave many questions unanswered. Somewhere into any scheme for the

relief of accidental damage on an indemnity basis there would have to be fitted the socially comparable situation of the sick and the naturally bereaved. I freely admit that my rough ideas, which are inspired far more by an obvious and long-standing break-up of accepted legal principles, causing serious grievance and want, than by any capacity of mine to sketch a viable administrative scheme, are open to a score of objections. One of them is that any system such as I have outlined is wide open to the malingerer. The answer to that is, I think, twofold. First, the malingerer, like the criminal, is but a small proportion of the population.²³ Secondly, the absence of lump sum compensation would make it convenient and necessary to pay the periodical sums subject to regular and strict medical examination. Anyway, if a few lead-swingers slip through the net, we may comfort ourselves by the thought that the cost of maintaining them will be less than that of negotiating disputed claims. Also, the reproaches of Mrs. Brown and her children, whose sad story I began by relating, will have been silenced.

²³ See Dawson, *Social Insurance in Germany*.

PART II

THE CRIMINAL LAW

III

FREEDOM AND ORDER

“ ‘My dear,’ said the eldest Miss Prettyman to poor Grace Crawley, ‘In England, where the laws are good, no gentleman is ever made out to be guilty when he is innocent; and your papa, of course, is innocent. Therefore you should not trouble yourself.’ ‘It will break papa’s heart,’ Grace had said, and she did trouble herself.”¹

We may reasonably acquit Trollope of an intentional sarcasm. He is not asking us to contrast the position of the “gentleman” in the dock with the prospects of one of the “lower orders,” although such a sarcasm is not one from which he would necessarily have shrunk. Miss Prettyman is pronouncing a panegyric upon the laws of England, and inferentially upon the English way of life. She was largely justified in so doing. “There are some things,” she says, “that cannot happen in England, whatever may go on in other countries, as to which I know, and prefer to know, nothing.” Such an attitude is, of course, rather irritating to the Scots, although I fancy that in other parts of the world it is more likely to excite laughter. If Miss Prettyman, who was a very sensible and charitable woman, had been asked whether she was prepared to extend her encomium to Scotland, she would first have asked what the arrangements were north of the Border, and would then have accepted them if,

¹ *The Last Chronicle of Barset*, Chap. 5.

and only inasmuch as, they coincided with what she understood went on at the Barchester Assizes. This, I think, is as far as she would have been prepared to pursue her comparative researches; I do not rate highly the chances of anyone who tried to get her to take an open-minded view of the procedure, in other types of jurisdiction, for the pursuit and punishment of the criminal and the prevention of crime, especially if that had involved considering a system typical of the continent of Europe. After all, she was speaking at a date not much further removed from the death of Napoleon than we are now from the Russian Revolution, about which event many sensible and charitable old ladies hold strong views to this day.

Nevertheless, I propose to ask for a reconsideration of some of the assumptions which lie beneath that procedure which is in principle common to England, the U.S.A., the Commonwealth and, in a slightly lesser degree, Scotland. This will involve looking at what face other systems present to crime—one of the few attributes common to all men and women wherever they are to be found, regardless of race, colour, climate, religious beliefs or political persuasions, so far as I know peculiar to human among all living creatures, an inevitable consequence of an essential part of the human make-up, everywhere detested yet everywhere increasing, and leading in sum if not in detail to nothing but misery. It is not likely that, if crime is a manifestation of such universality, the means of dealing with it can safely be studied under a geographical limitation.

The wider study I propose is not really an academic exercise; it has extremely practical applications. Two

indispensable social concepts seem at first sight to be in competition here—freedom and order. Societies go through phases in which first one then the other of these concepts becomes temporarily the master.² It is probably inevitable that this should be so; each is supported, in the waning as in the waxing phase, by a powerful section of public opinion, and the problem is to achieve a just and equal balance. Man won his liberty under the law after a struggle lasting the whole life-time of humanity, and it might have appeared, about the year 1929, as though, for the greater part of the world, the libertarian phase would soon set in for good. How wrong was that estimate was seen almost overnight. The horrors of the concentration camps were primarily ascribable to human cruelty, but behind them lay the twisted legal philosophy of the *Sondergerichte* (the special courts) and the *gesundes Volksempfinden* (the “healthy sentiment of the people”), as opposed to the constitutional courts and the general criminal code. The requirements of a corrupt demand for order were incompatible with free institutions. Today, by contrast, you will hear on every hand complaints of a rising tide of crime, especially those of violence and lust, together with clamourings for sterner measures by way of remedy. This is understandable, but it is vital to acknowledge that that remedy must be of a kind which can legitimately be used by a free people. If the law is less effective than it ought to be, the unacceptable answer is that

² “Un système de procédure pénale, pour être satisfaisant, doit se montrer à la fois efficace, efficient, et libéral. Il n'en est pas moins vrai que cet équilibre idéal paraît difficile à réaliser et que les institutions pénales d'un pays comme la France ont oscillé, au cours de son histoire, sous l'influence d'une tendance libérale et d'une tendance autoritaire dominant tout à tour.” Professor Robert Vouin. See Coutts, *The Accused*, Chap. 15.

our humane standards be relaxed, and the constitutional safeguards of the individual overthrown. Let us first look at the system of law itself, whether it is the fairest and most effective that can be devised, and in answering that question we shall find ourselves going for advice to the experience of neighbouring jurisdictions.

THE PRESUMPTION OF INNOCENCE

The little difference of opinion between Miss Prettyman and Grace Crawley contains a reminder of something that the lawyer is liable to overlook. Miss Prettyman was emphasising that an innocent man need never fear conviction, Miss Crawley that he may leave the court acquitted but irretrievably ruined—with a broken heart, she called it. It can be put as strongly as this—that almost every verdict of acquittal manifests a miscarriage of justice. Either a guilty man has escaped, and the machinery of crime prevention has in that instance broken down, or an innocent man has been wrongly arraigned, to his grievous and undeserved injury. It is possible to figure a case where an accused has only himself to thank for his predicament, for example by making a false confession which he afterwards retracts; but this case must be so rare as to be negligible.

The reason why the acquitted man suffers grievous injury is also illuminating; it exposes the fallacy of a notion much beloved of lawyers but correctly recognised by everyone else as nonsense. "Every man charged with crime," it is said, "is presumed to be innocent of the offence alleged against him until he is shown beyond reasonable doubt to be guilty." This does not make sense to the layman, although he has been taught, incidentally erroneously, to rejoice in the

fact that this remarkable bulwark of individual freedom is denied to the citizens of less fortunate countries such as France. That the burden of proof should be on the prosecution is one thing, but that does not explain what a man who is presumed to be innocent is doing in the dock. Once the *corpus delicti*³ has been proved, then, the layman may say, since everyone who is *not* in the dock must even more strongly be presumed to be innocent, we have the remarkable concept of a crime committed, along with a presumption that no-one committed it; or to put the matter a little less fallaciously, along with a presumption of innocence available to anyone in the world who may be charged with committing that crime. The public, accordingly, takes the view that, so far from there being a presumption of innocence, the man in the dock has been put there because he is believed to be guilty, and if the public is not right, then the public ought to be right. To say that a man who is believed to be guilty is presumed to be innocent is a sophistry. To put on trial a man who is not believed to be guilty is an outrage.⁴

If this be so, several crucial questions demand an answer. First, upon whose belief in the guilt of the accused is the action of placing him before a court to be taken, that is to say, who is to prosecute? Secondly, what are the steps which ought to be taken in order to gain the information which will justify action on that belief, that is to say, what

³ The fact that the crime has been committed.

⁴ It could be argued that in the Law of Scotland there is no room for the presumption of innocence, since it is irreconcilable with our curious verdict of "not proven," recently given a certificate of good character in *McNichol v. H.M. Advocate*, 1964 J.C. 25. The presumption must either be displaced by the verdict or not displaced by the verdict. If it is not, the accused remains innocent; an innocent man is entitled to a verdict of "not guilty." See Willock, *The Jury in Scotland*, Stair Society, Vol. 23, p. 222.

pre-trial procedure will have the effect of bringing the guilty and only the guilty to trial? ⁵ Thirdly, what are the proper methods to be employed at the point where the decision has once and for all to be made whether the accused committed the crime with which he is charged; that is, what kind of trial will best ascertain the truth? And over and above all these questions are certain grand requirements, which are of the essence of civil liberties and the Rule of Law. No citizen may be molested in any way except as is allowed by law. If the state take action against him he must, even at the expense of handicapping the state in its proper function of the suppression and punishment of crime, be afforded the most ample opportunity and assistance in meeting the charges against him. There are no exigencies of law and order which take precedence over the duty of ensuring that no innocent man be convicted of crime.

THE PROSECUTOR

I propose to begin answering the first question by taking a brief look at the English law as to the prosecution of offences, and this I do because so far as I can see it exhibits some features to which it is not easy to find a parallel in other systems. I also believe that these unique features go some way to explain, even if only historically, some of the characteristics of England's subsequent criminal procedure which have puzzled some of her neighbours. The law of England has been stated as follows: "Any citizen can, as a

⁵ The "task of criminal proceedings" is "that not a single innocent person shall be criminally *prosecuted* or convicted." Code of Criminal Procedure of U.S.S.R. Art. 2: *Bulletin of International Commission of Jurists*, No. 26, p. 40.

general rule and in the absence of some provision to the contrary, bring a criminal prosecution, whether or not he has suffered any special harm over and above other members of the public. As a member of the public he has an interest in the enforcement of the criminal law. O steals P's watch. P may prosecute him—so may Q, R, S, T or any other citizen. In practice, of course, the vast majority of prosecutions are carried on by police or other public officers who have no personal interest in the outcome.”⁶ The “public officers” include the nearest approach I can find in England to a public prosecutor, the Director of Public Prosecutions. He institutes and carries on proceedings in the case of any offence punishable with death, in certain cases referred by government departments, and in cases which appear to him to require his intervention. Regulations provide for chief officers of police reporting to the Director of Public Prosecutions cases of certain classes, and the chief officer of police is always entitled to ask for the advice or assistance of the Director. It does not appear, from any regulations which had been made up to January 1966, that it is now incumbent on the police to report murder cases, these being no longer capital.

It seems, therefore, that in England the “public prosecutor” is involved in few cases, important though these may be, in comparison with the huge majority in which the prosecutor is a police officer. The police officer is nominally prosecuting as a private individual—being the Q, R, S or T referred to above—although his uniform may tend to disguise this. To take the commonest form of crime, motoring offences, I suppose there is nothing to prevent the Englishman

⁶ Smith & Hogan, *Criminal Law* (1965), p. 15.

who observes a breach of the Road Traffic Act from prosecuting the alleged offender in a criminal court (whether or not he has begun by reporting the affair to the police, and they have declined to take action themselves) although he would find some formidable obstacles in his way. He is, in theory, doing no more and no less than the police constable, who not only acts as prosecutor but also gives evidence before the magistrate as to the commission of an offence by which he himself personally has been prejudiced in no way at all, but which he, as a member of the public having an interest in the criminal law, is entitled to bring to the notice of a court of justice, so that the law may be vindicated. But however that may be, our first question was, upon whose belief in the guilt of the accused does his being brought before a court depend? The answer is, in England, for all but a small minority of serious crimes, the police.

Let us now examine a widely contrasting system of criminal procedure. In Scotland, subject to some exceptions unimportant in principle, there is no private prosecution. The prosecution of crime is in the hands of a Minister of the Crown, Her Majesty's Advocate, commonly called the Lord Advocate. He and the Solicitor-General are the Law Officers of the Crown. His office has a certain affinity with that of the Attorney-General, but in relation to criminal matters his responsibility is much wider. Under him are the Crown Counsel, five in number, who form his staff in Edinburgh, and conduct prosecutions in the High Court, where counsel have exclusive right of audience. In each county in Scotland there is a sheriff court, staffed by full-time professional judges, the sheriffs: I do not have to elaborate

the details of the office and the jurisdiction.⁷ It may be enough to say that all criminal cases of any consequence come before the sheriff—sometimes *en route* to the High Court—and that he exercises by far the widest criminal jurisdiction in the country. Some criminal jurisdiction is enjoyed by the burgh magistrates and county justices, but it is of an insignificant quality. For the purposes of this part of my lecture, the important thing is that to each sheriff court is attached a public prosecutor, the procurator fiscal, and he exercises his office as local representative of the Lord Advocate. In cases which are tried in the sheriff court, he conducts the prosecution himself or by his deputies; in cases from his district which have to go to the High Court, he takes instructions from and prepares the cases for the Crown Counsel who actually conduct them.

I said that there were some exceptions to the rule of public prosecution in Scotland. If you trespass on the railway line, you will face a prosecution conducted by a solicitor instructed by the British Transport Board under powers as old as the statutes incorporating the old railway companies. If you wilfully take “unclean or unseasonable salmon,” or are found in possession of salmon in the close season, you will be prosecuted at the instance of The Wardens and Commonalty of the Mystery of the Fishmongers of the City of London. But if you commit the commoner kind of offence, from the most serious down to most of the contraventions of the Road Traffic Act, you will be prosecuted at the instance of either Her Majesty’s Advocate or the local procurator fiscal representing him. Even if the offence be of the trifling kind which is appropriated to magistrates

⁷ See Coutts, *The Accused*, Chap. 5.

and justices of the peace, the case against you will be conducted by an official solicitor appointed by the magistrates or justices as prosecutor. Whatever happens, whatever you have done, and wherever you are tried, you will never be prosecuted either by or on behalf of the police.

Another exception, of some constitutional but less practical importance, is this. The refusal of the Lord Advocate to institute or authorise a prosecution is not an absolute bar to proceedings being taken. There is an almost obsolete, but still competent, form of private prosecution, not by indictment, but by Criminal Letters, which may be instituted at the instance of a private citizen subject to the Lord Advocate's concurrence. Even, however, if the Lord Advocate should withhold his concurrence, the High Court may order the trial to proceed without it. In 1909 a commercial company claimed that it had been defrauded by a coal-merchant. The Crown steadfastly, and from what at the time many people thought were unworthy motives, refused either to prosecute or to concur in a prosecution. The company presented to the High Court a Bill for Criminal Letters. The court declined to order the Lord Advocate's concurrence, but authorised the trial to proceed without it, and a conviction followed.⁸ In 1961 a Glasgow chartered accountant formed the view that a book called *Lady Chatterley's Lover* was obscene, and that the distribution of copies was a common law offence. The Lord Advocate, after giving the matter careful thought, decided that a prosecution ought not to be brought. Thereafter the complainer, relying on the authority of the case I have just described, presented a Bill to the High Court. The court

⁸ *J. & P. Coats Ltd. v. Brown*, 1909 S.C.(J.) 29.

refused the Bill, and in the course of his opinion the Lord Justice-General said: "Although we cannot review the exercise of the Lord Advocate's discretion nor his reasons for exercising it in the way he did, this Court can permit, and on rare occasions has permitted, a private prosecutor to proceed without the Lord Advocate's concurrence. But to entitle a private prosecutor to do so, he must be able to show some special personal interest in the matter. . . . *Hume on Crimes*, Vol. ii, at p. 119, puts it thus: . . . 'an interest arising out of some injury which he, beyond others, has suffered on the occasion libelled, and at which he is entitled to feel more than the ordinary indignation, with which his fellow citizens will regard it. It is not therefore sufficient, that he has some feeble and remote concern in the issue, or one of a general nature, in common with a whole neighbourhood, or with all of the same order or class of society.'"⁹

In early times in Scotland private prosecutions, but always with the concurrence of the Lord Advocate, were common. I do not want to go into antiquarian matters, but it may be of interest to compare an ancient practice in Scotland with a jurisdiction which exists in France and Germany to this day, that is, the opportunity given to persons to whom pecuniary loss has been occasioned by criminal conduct to intervene in the prosecution in order to secure their right to compensation. Speaking of the Justiciar, as forerunner of the High Court of Justiciary, Erskine says¹⁰: "After the institution of the College of Justice¹¹ the Justiciar never judged in civil matters. He still continued, however, to be the supreme

⁹ *McBain v. Crichton*, 1961 J.C. 25.

¹⁰ *Institutes*, I. iii.24.

¹¹ In 1532.

criminal judge, and in that capacity not only determined the punishment to be inflicted on the criminal, but condemned him in the damage claimed by the party injured; in which last he had a cumulative jurisdiction with the Court of Session." An early attempt to maintain a kind of converse plea, that the Lord Advocate could not prosecute a homicide without the concurrence of the deceased's relatives, was met by the successful answer: "Seeing the Prince wantis ane subject be the fact committit, the Kingis Advocat has verie guid interest to perseu"; nor did any better success attend an attempt to avoid a Crown prosecution by producing a receipt for a sum of damages paid by an alleged murderer.¹²

By the French Code of Criminal Procedure¹³ it is provided that prosecutions for the imposition of punishments shall be initiated and conducted by the magistrates and officials in whom that power is confided by law. Public prosecution is the rule in France, as in Scotland. Nevertheless, under the conditions prescribed by the Code, such action may also be initiated by an injured party who has personally suffered the harm directly caused by the offence. "A civil action may be pursued at the same time and before the same court as the prosecution. It may include all heads of damages, material as well as bodily or moral, which flow from the acts which are the object of the prosecution." Unless, however, the law expressly provides for the contrary, renunciation of civil action does not terminate or suspend the prosecution. The civil party to a criminal action has his place in the procedural rules throughout the investigation and trial; so provision is made (Article 114) for his being assisted

¹² Hume, ii.133.

¹³ Professor Kock's translation.

by counsel from the outset. Thus the shape of a French trial in which there is a civil party will be utterly different from any English equivalent, and perhaps nearer to the now obsolete Scottish System.

In Germany, "Gradually the idea took root that the prosecution of criminals was a matter for the state, and finally this conviction was embodied in sections 151 and 152 of the *Strafprozessordnung* [1879] which provide that criminal proceedings cannot be opened until a charge has been filed, and that it is the duty of the prosecutor to file such public charge. This gives the prosecution a monopoly." He is, however, "bound to initiate and conduct an investigation into any complaint, and where an offence appears to have been committed, to bring a charge."¹⁴ As in France, the Code provides that in certain cases the person injured by a crime may take the place of the public prosecutor in a *Privatklage*, a private charge, or may act along with him in a *Nebenklage*, an accessory charge. This applies to such offences as libel, personal injury, or damage to property.¹⁵

In the United States, the general rule is the same. "In America, generally speaking, private prosecutions are not permitted. The criminal trial is conducted by a state-paid professional."¹⁶ We are therefore entitled to conclude that a system which permits prosecution by anyone, including the private citizen, on the ground that he "has an interest in the enforcement of the criminal law," or that he is moved by the spectacle of a criminal act to what Hume called "ordinary indignation," is at least unusual. And it is not, I think.

¹⁴ Manual of German Law (H.M.S.O.), Vol. II, p. 140.

¹⁵ Arts. 374, 395.

¹⁶ Poulsen & Kadish, *Criminal Law and its Processes*, p. 917.

satisfactory to equiparate the police to the public prosecutor on the ground that the police are, to repeat the phrase from Smith and Hogan which I quoted earlier, "police officers who have no interest in the outcome." The public will never believe, and they would be wrong to believe, that the police have no interest in the outcome of the cases which come into court as a result of their investigations. To say that is not at all to question the integrity of the police, as police. It is merely to state the obvious: those who have conducted the inquiries, whose reputations will to some extent depend on their bringing some person to book for every crime reported to them, and who will almost certainly have to give evidence in support of their conclusions, cannot, on this side of the Kingdom of Heaven, be expected to preserve that calm and impartial indifference to the decision of the court which should characterise the professional advocate responsible for conducting a prosecutor's case. In many summary cases in England it seems that the person conducting the presentation of the case before the magistrate may find himself also giving evidence of fact; in Scotland, at any rate, such a procedure is prohibited.¹⁷

When it comes to the question of actual advocacy in the cause of a contested criminal suit there is a criticism which has been heard against the prosecution being in the hands of a salaried official, as is the case in all the countries I have mentioned except England. It is said that there are advantages to be derived from having counsel instructed specially to prosecute a particular case, because in, say, the immediately preceding and immediately succeeding case in the same list he may have been instructed for the defence.

¹⁷ *Graham v. McLennan*, 1911 S.C.(J.) 16.

I can see the *a priori* case here, but I do not have the experience to evaluate it. I would certainly agree that it would greatly improve the professional ethics of Mr. Perry Mason if he had, occasionally, to act as District Attorney.

The question we are looking at at the moment, who can bring an accused before the court, needs a little clarification in the light of what has been said. Thus, although, as I have said, the police in England may be in nearly all cases the prosecutors, that does not mean that they have power of their own authority to bring a man before a court other than a court of summary jurisdiction. We shall be looking next at the procedure for getting someone tried by jury. So, in Scotland, if a man is arrested by the police one evening and charged with a serious crime, he will make a formal appearance in court next morning, although nominally at the instance of the public prosecutor, yet in practice necessarily on the initiative of the police. Substantially, however, and subject to the exceptions we have noticed, it can be reasonably said that in England a prosecution may be initiated by anyone; in Scotland by an official public prosecutor; in France and Germany by an official public prosecutor with whom may be associated a directly injured private party.

THE COMMITTAL FOR TRIAL

At the beginning of this lecture I suggested that Grace Crawley, in emphasising the damage which was being done to her innocent father, a clergyman charged with stealing a cheque, by the mere fact of his arraignment, whether or not he was convicted, was on good ground. One of the inevitable consequences of that is that there has to be some machinery for preventing innocent people from being put on trial, and

I should think that there can be no doubt that this protective engine is more especially required in any system where private prosecution is the rule, or is even permitted. It is, however, not in such countries alone that the necessity is realised; it is also true that in general the function of sifting the cases which ought to go to trial from those which ought not is recognised as a judicial function, exercisable impartially by a judge who is independent of the prosecutor. In the case of serious crime, this principle can be observed in operation, as we shall see, in many countries. But we do well to remember that serious crime forms, in a modern developed civilisation, but a very small proportion of the infractions of the criminal law with which the courts have to deal. The place where the great majority of criminals, like ourselves, meet our judges is in a summary court which is in substance the final arbiter, at least as far as the ascertainment of facts and the assessment of punishment go, in the class of offence of which we are likely to be guilty. This is important today, because "respectable" people are much more likely to find themselves charged with crime than ever before, and defects in the summary side of the jurisdiction, while productive of miscarriages less violent than a superior court could give rise to, are just the defects which hit the largest number of people, and may in the end mark the most conspicuous blemishes on the face of the system as a whole. The time could come, though we hope it won't, that a large number of people felt that they had been unjustly or unfairly treated in the summary courts, so that, by simple transference, they imputed oppression and injustice to the superior courts, and the country consequently lost confidence in the handling of cases of real importance.

Now we must beware of taking sledge-hammers to crack nuts. No one is going to suggest that, if a man plead not guilty to a charge of driving a vehicle without due care and attention, a judicial inquiry is to be mounted for the purpose of deciding whether the evidence against him warrants his being put on trial. Most jurisdictions would permit the prosecutor to lay his proof directly before the magistrate, after such adjournment as might be necessary for the assembly of the witnesses on either side. It is one of the satisfactory features of prosecutions being exclusively in the hands of a public official that it ought to be possible to trust him to take for himself the responsibility of such a step. He has, after all, no conceivable interest to present other than a genuine case adequately supported by evidence. Furthermore, in Scotland, at any rate, the procurator fiscal is answerable, on complaint being made against him, to the Lord Advocate, and the Lord Advocate in his turn is answerable, like any other minister, to Parliament. This is the ultimate sanction, if sanction be required.

It may be, however, that the matter is not so clear where, as in England, the accused may have been, and probably has been, brought before the magistrate by a private prosecutor. In theory, at least, it could be intolerable that a man might be actually put on trial, albeit for a perhaps not very serious offence, upon the malicious complaint of a neighbour. Of course, as we have seen, most of the private prosecutors are police officers. I do not want to repeat the substance of what I have already said, but just as there is a good deal against police conducting cases, so there may be a legitimate objection to the decision to bring a case being in police hands. It would not be necessary, in order to substantiate

this objection, to point to instances, which must be rare, in which the police power had definitely been abused, and injustice had flowed from that abuse. It would be enough to say that the system itself does not engender confidence, so that a single wrongful exercise of this particular power, although it might have had origin in a mere error of judgment, could have very unfortunate consequences upon the public image of the prosecutor. If, and only if, a system is right in principle, an occasional breakdown will be accepted as inevitable; this, of course, is the force behind the doctrine that justice must not only be done but be “manifestly and undoubtedly seen to be done.” We may observe with complacency the mistakes which are made by an authority subject, ultimately, to parliamentary challenge, and regard them as exceptional lapses caused by ordinary human frailty, while we readily suppose error, if it be committed by an arbitrary authority, to be the rule rather than the exception, and we may invest it with more sinister characteristics.

With the observation, accordingly, that the summary class of case is the common class of case, requiring for that reason to be handled with a care and integrity which the subject-matter might have been thought hardly to warrant, I will turn to the consideration of the steps which are taken to ensure that no man be put on trial for a serious crime unless there be *prima facie* evidence tending to show that he is guilty: we shall see that many jurisdictions insist that the making of an assessment in this sense is properly the function of a judge.

In beginning with England, I would wish to emphasise what I made clear at the outset, namely, that I am not a qualified English lawyer, and that I am not attempting to give

a textbook description of English criminal procedure. I am only looking at some features of what is a problem common to all civilised states, that is the handling, by the tribunals lawfully constituted for the purpose, of breaches of criminal law, and this I do for the purpose of seeing how various states achieve a solution. I propose, therefore, to ignore such topics as informations *ex officio*, presentments by coroner's juries (although broad-minded people might be found to describe such verdicts as judicial decisions), and the historical position of grand juries (although these still have a vestigial importance in some states of the U.S.A.). It may be that historically the grand jury is one of the institutions which was explicable by the existence of right of private prosecution. I will make bold to say that in England, for present purposes, all persons who appear before juries for criminal trial have been committed by justices, or magistrates, who have satisfied themselves judicially, after hearing evidence, that the accused has a *prima facie* case to answer, and I propose to look at this procedure for the purpose of comparing it with preliminary investigations, having the same object, carried on in different parts of the world. The first aspect I am going to deal with is whether the proceedings before the committing judge are in public or in private. This will inevitably raise the whole question of pre-trial publicity.

PUBLICITY OF COMMITTAL PROCEEDINGS

The rule in England, in common with most other countries, is that criminal trials take place in public. There are some obviously exceptional cases, such as those concerning the security of the nation; many countries also pay attention to

the interests of decency or the protection of witnesses from unnecessary and cruel embarrassment, but with this we need not trouble. But as regards committal proceedings the law now is, "Examining justices shall not be obliged to sit in open court"—Magistrates' Courts Act 1952, s. 4 (2). We ought to be entitled to suppose that this was the rule before the Act was passed, since the Act appears from its preamble to be a consolidating statute, that is to say, to be a mere compendium of previous enactments upon the same topic. It is far from clear that we would be right to do so. According to the Tucker Report,¹⁸ the power of the justices to exclude the public was confirmed by the Indictable Offences Act 1848, s. 19; the opinion however seems to have been widely held that the power was taken away by section 20 of the Summary Jurisdiction Act 1879, as subsequently interpreted. However that may be, while the law is now as stated in the 1952 Act, the Report contains some strongly worded judicial opinions by Mr. Justice Park¹⁹ in 1823 and Lord Chief Justice Ellenborough in 1811 to the effect that publicity ought not to be given to committal proceedings. Indeed at one time there were cases "where a criminal information for libel was successfully laid against the printers or publishers of reports of committal proceedings." Today, when the court is open to the public, it is also open to the press, who are at liberty to publish a fair and accurate report of what took place at the hearing. If the justices so decide, they may exclude both press and public. They do so only very rarely.

¹⁸ 1958 Cmnd. 479.

¹⁹ The learned judge was against even the accused being present or seeing the depositions, because then he "would know everything that was to be produced in evidence against him—an advantage which it was never intended should be extended towards him." We have, happily, moved a long way from that position.

I presume that if in such a case a newspaper were to publish the evidence adduced, proceedings could be taken in the High Court for contempt of court even though the case was still before the committing magistrates.²⁰ Of the proceedings themselves, it is only necessary to say that they may consist of an opening speech by the prosecutor, followed by the examination and cross-examination of his witnesses. The accused is asked if he wants to make a statement, whether he wants to give sworn evidence, and whether he wants to call evidence. He or his advocate is entitled to address the court. The court then decides on whether the evidence is such that the accused ought to be committed for trial; if that is decided affirmatively then in all but exceptional cases the court proceeds to consider bail.

Thus in England the committal proceedings are usually in public, and I will look by way of comparison at a country where they are always in public—the U.S.A. The procedure, so far as I need to go into it, is remarkably similar to the English—here again I propose to leave the grand jury out of consideration—and the nature and purpose of it is well described in a passage from Puttkammer, *Criminal Law Enforcement*.^{20a} “A person is arrested. It may very well be that even the most superficial look at the facts would at once show that he could not possibly be guilty of the offence charged. It is nothing more than obvious fairness to him, then, that he should be discharged at the earliest possible moment. Accordingly, promptly after an arrest the arrested person is entitled to be

²⁰ *R. v. Parker* [1903] 2 K.B. 432.

^{20a} U. of Chi.L.Sch. Papers 1941.

brought before . . . a magistrate so that the latter may decide whether, if the state's evidence is true, it presents a strong enough case to warrant holding our man for further proceedings, or whether the showing is so weak that there is no chance of conviction. If the former is the case then it is the magistrate's duty to set the bail. If the latter, then the accused is entitled to his immediate liberty" The effect of publicity on these proceedings is vividly brought out in an article on "Problems of a Criminal Defense."²¹ The article takes the form of a dialogue: "*Question*—Do you use the preliminary examination as a way to get information about the state's case? By refusing to waive the preliminary examination the defense counsel can force the prosecution to make proof of probable cause in advance of trial, can it not? *Answer*—Theoretically, yes; actually, not, in most cases. In certain cases, it may be well to make the prosecution show what they have, in a preliminary hearing, and even to cross-examine, to a certain extent, to pin a witness down. In many other cases, however, the advantages are illusory, while the disadvantages may be real. Consider the following: The publicity may be vastly increased, by getting morbid details into the hands of the press. So that it is harder to get a jury. . . ." I suppose the concluding words may be translated—get an impartial jury who have not made up their minds before the trial begins.

That this is true of England also admits of hardly any doubt. The Tucker Report cites the case of Dr. John Bodkin Adams, acquitted in 1957 of murdering one of his patients. At the committal proceedings evidence, which was not given at the trial, was led about the deaths of two other

²¹ Steinberg & Poulsen (1961) 7 *Prac.Law*, 25, 30, quoted in Poulsen & Kadish, *op cit.*

patients. At the trial the presiding judge had to go out of his way to warn the jurors to pay no attention to evidence which, though not given in court, they were almost certain to have read in the newspapers. In 1965, in an island off the west coast of Scotland, I heard two sensible and fairminded citizens, potentially admirable jurymen, talking about a sensational English murder case in such a way as to show quite clearly that they, having read the committal proceedings in a newspaper, had made up their minds on the guilt of the accused, as yet untried. In recognition of the likelihood of prejudice the *venue* had been changed from one assize town to another; it would have done the accused no good, as it seems, even had the trial been held in an alien jurisdiction 300 miles distant from the court of committal. Injustice may also have been done when the magistrate, after a public hearing refuses to commit for trial. This means that the public have had the opportunity of hearing evidence accusatory of an innocent man, whereas the judge has found that there was not even a *prima facie* case for him to answer. Again it is possible that the insistence on public committal proceedings may have had some connection with the system of private prosecution.

In Scotland the whole preliminary proceedings, up to the opening of the trial itself, take place in private. What happens is this. A crime is reported by the police to the procurator fiscal; it is most likely, in the case of a serious crime, that the police will themselves have taken an accused person into custody under their general powers of arrest, which are roughly similar to the corresponding powers in England. In such a case, the prosecutor will at once do what in other cases he might have done before the arrest; he

will apply to the sheriff for a warrant. This warrant asks substantially for powers to take four steps, (1) to arrest the accused and bring him before the sheriff for examination, (2) to search his person and premises, (3) to cite witnesses so that the prosecutor may examine them, and (4) after examination to commit the accused, in custody or on bail, for further procedure to take place. The first striking feature of this procedure is that the accused, at the earliest possible moment, can be subjected to judicial examination, and this similarity with the continental inquisitorial system I shall have occasion to notice a little later. The next purpose of the warrant which is of present importance is that the prosecutor seeks power at his own hand to examine the witnesses, and to take a statement from them, which he terms a precognition. The statements may be, but commonly are not, taken on oath. It is upon these statements, taken by him in private, that the prosecutor asks the sheriff to commit the accused for trial. A third feature is that until lately the committal order proceeded on the narrative that the sheriff had examined the precognition. For some time that statement had been erroneous, and it has been deleted from the form. This appears to me to be a serious defect in our Scottish procedure, inasmuch as committal without inquiry on an *ex parte* motion cannot seriously be regarded as a judicial decision, and indeed partakes more of the nature of an administrative *lettre de cachet*. No public complaints have arisen from this, and I am willing to suppose that there have been no abuses, but the procedure is formally objectionable, and the older discipline seems preferable. Nevertheless, the principle is sound enough, that of investigation by an impartial official and the presentation by him of the fruits of his inquiries to

a judicial authority, in order that the latter may be satisfied upon them before he sends the accused for public trial.

It is interesting that there should be available for study within the British Isles a system which, though now altered—perhaps for the worse—probably through close contact with a more powerful neighbour, shows quite clearly that it has affinities with the administrative side of the criminal law as it flourishes to this day in continental countries. The most interesting contrast here is not between England and Scotland, but between Scotland and the United States. Each of these countries operates a system derived in comparatively recent times from a parent source. The United States look to the common law of England for the principles which they as a sovereign state have modified to suit their proper exigencies. The viability of those principles, in a foreign land which has twice been at war with the country of their origin, and which has for more than 100 years kept “open house” to immigrants from European states where other and quite different systems flourished, must be a powerful tribute to their inherent virtues. Scotland in turn looks to the traditions of the civil law. Scotland, however, is not a sovereign state, having no independent legislature, and her old principles are therefore vulnerable to adulteration by Parliament steeped in the notions of English common law. That so much of the tradition has remained may be accounted for by the fact that in criminal matters, unlike civil, there is no appeal from the supreme Scottish court to the House of Lords; on the other hand, it would be absurd to expect that a neighbouring system, with the strong virtues the Americans appreciate, should not have had its influence, and indeed an influence for good. It will, accordingly, be worth remembering the

outlines of the Scottish system as we take a quick look at the French pre-trial procedure, treating it as typical of a whole legal civilisation.

FRENCH PROCEDURE

A detailed account of French procedure has been published by Professor Anton, of Glasgow University, who is equipped, from personal experience, as an expert on the topic, in an article entitled "*L'instruction criminelle.*"²² A general view of the system is given as follows: "*L'instruction criminelle* has always been one of the characteristic features of French criminal procedure. In the past it would perhaps have sufficed to describe it as a method of assembling the elements of proof against an accused person, to permit of the court being adequately informed (*instruit*) of these before the public trial. The emphasis was upon the investigation of the crime in the general interests of society that the guilty should not go unpunished. Today, such a description would be inadequate, since the process finds its justification also in the safeguards it offers to the accused. The purely investigatory functions of the *juge d'instruction* could be taken over by the police; but the police are not quite free from the suspicion of being too anxious to secure convictions, and it is felt that investigation by a person of judicial status may shield innocent persons from the risk of being exposed to over-zealous police interrogation. The device of *instruction* also ensures that an accused is not arraigned upon a serious charge in open court with all the attendant publicity unless and until a magistrate, after carefully and impartially investigating the facts, is prepared in effect to say that there is a

²² (1960) *American Journal of Comparative Law*, Vol. 9, p. 441.

sustainable case against him. But these are oversimplifications, and in this matter the nuances are important and the context critical."

POLICE INVESTIGATIONS

The resemblances to what we are accustomed to in the purposes behind the English and the Scottish systems are most striking, as are also the contrasts. For instance, it is interesting to see how, in widely differing systems, the same problem, partly practical and partly dialectical, arises. This is yet another example of the familiar conflict between two opposed requirements, both good and necessary in themselves. It is necessary for the police, when apprised of a crime, to make wide-spread inquiries rapidly, thoroughly and without respect of person. Otherwise they cannot do their work. In the course of their investigations it is almost certain that they will find themselves questioning the person who is ultimately charged with committing the crime, and this they must be allowed to do. On the other hand, it has always been recognised as no less important that the police do not interrogate a person they have decided to charge for the purpose of trying to elicit damaging admissions. One good reason is that subsequently, when it is sought to prove the admissions at the trial, disputes break out as to what really passed at the interrogation, and in any such dispute the accused lies under a heavy handicap. Rules have accordingly been formulated by the English judges to the effect that "as soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or

cause him to be cautioned before putting to him any questions, or further questions, relating to that offence . . . in the following terms: 'You are not obliged to say anything unless you wish to do so but what you say may be put in writing and given in evidence.'"²³ In Scotland the provision is similar but stricter. "When a person is under suspicion of a crime, it is not proper to put questions, and receive answers, except before a magistrate"²⁴; "A criminal officer is not entitled to examine a person suspected of a crime in order to obtain confessions or admissions from the criminal."²⁵ "Once a man has been charged and is in the hands of the police—and even more clearly perhaps when he has only been apprehended—it is recognised as incompetent for the police to attempt to elicit evidence from him."²⁶

Obviously in both countries the critical question is, at what stage do the rights of the suspect to a caution or to the cessation of questioning emerge? The decision must lie in the hands of the interrogating officer, since it depends subjectively upon his state of mind as to the weight of the evidence against the questioned. In France exactly the same difficulty presents itself. Although nominally the investigation of crime is for the *juge d'instruction*, yet it is necessary, in order that he may overtake his work, for him to delegate some part of his duties, not including the examination of an accused person, to the police and others under a *commission rogatoire*. In every case there must come a point at which one of the witnesses who is being examined begins to take on the apparent character of an accused. At this point he must be

²³ Judges Rules and Administrative Directions to the Police, Home Office Circular No. 31/1964.

²⁴ *Hay*, 1858, 3 Irv. 181 at 184.

²⁵ *Hodgson v. Macpherson*, 1913 S.C.(J.) 68 at 74.

²⁶ *Morrison v. Burrell*, 1947 J.C. 47, per Lord Moncrieff at p. 49.

charged, and can only be examined thereafter by the *juge d'instruction*, who must advise him of his right to counsel. The temptation is only too plain, and it is the same as confronts British police officers; the French Code accordingly provides, "The examining magistrate . . . as also magistrates or police officers acting under a *commission rogatoire* may not, with the object of defeating the rights of the defence, examine as witnesses persons against whom serious and consistent evidence of guilt exists."²⁷ This rule is commonly evaded by the police. According to Anton, "In practice, however, the police will merely advise such a person of his right to be brought before the *juge d'instruction*, and will ask him whether he consents to waive this right. Very often the suspect will agree to this, and it is not uncommon to find in the minutes of the interrogation some such formula as the following: "To unburden my conscience and so that due notice may be taken of my frankness, I consent to tell you spontaneously the whole truth. I do not wish to be brought before the *juge d'instruction* until I have concluded my deposition." While it is possible to argue that this practice is within the letter of the new Code, it hardly seems within its spirit."²⁸

This problem apart, what I would emphasise in the French procedure is (a) the privacy of the proceedings, (b) the essential role of the independent judge, (c) the careful separation of duties between the police, the prosecutor and the examining magistrate. The same is true of German and of other continental systems. That there are weaknesses I have pointed out. On the other hand these are probably more of an administrative than an organic kind, in so far as our look

²⁷ *Code de procédure pénale*, Art. 105.

²⁸ Anton *op. cit.*, p. 447.

at other people's law has gone. A strict judicial control, and more than that the opportunity of strict parliamentary control, is the best answer to official delinquencies. The third of the matters I said I was to deal with, that is the procedure after committal has been authorised, will involve looking at foreign solutions much more sharply different from our own than these adopted for the more preliminary stages I have just been dealing with. We shall apply to them the same test, that is, whether they help us to find a system which ideally shall ensure us a high degree of crime prevention, the protection of the innocent, not only in their persons and property but also in their reputations, and such vindication of criminal justice as shall command the confidence of the public.

IV

THE SEARCH FOR TRUTH

THE scene is laid in a first-class compartment of a railway train going from Edinburgh to Glasgow. Two passengers are in conversation. One is clearly a foreigner, very civil and polite, keenly interested in the institutions and customs of the country he is passing through, but obviously not knowing very much about them. The other turns out to be a junior member of the Scottish Bar, on his way to practise his profession by acting as defending counsel at the Glasgow Circuit. Until 1954 he would have been travelling entirely at his own expense and until 1964 with no expectation of receiving a fee, because his client has no money. One reason he has no money is that wages in prison, where he has spent most of his life, are very low. At the time we are speaking about, however, reasonable fees to his solicitor and counsel are very properly provided by the state. Advocates are not usually garrulous with strangers, but this one is an exception, and has been giving his chance acquaintance a brief sketch of the Scottish legal system, complete with the usual allowance of humorous anecdotes about the judges. As the exposition proceeds, so does the demeanour of the foreign gentleman become more and more respectful, until at last he interjects: "Yours is an honourable profession, and one deserving of the approbation of all good men, assisting as you are, in a matter of great importance to the individual and to the state, in the process of ascertaining the truth." "Good heavens,"

replies learned counsel, “you entirely misunderstand me. My whole purpose in going to Glasgow at the public expense is to try to stop the truth coming out; it would be fatal to my client.”

THE ADVOCACY SYSTEM

The polite foreigner's hasty revisal of the social value of the Bar is, of course, unjustified; but one does after all require a rather special appreciation of our institutions before one can come to his help. One would, perhaps, have to begin by mystifying him still further. He will hear with incredulity, which gradually gives way to indignation, that an individual called the Leader of the Opposition is actually paid a substantial salary by the state out of public funds for preventing, if he can, the machinery of government from functioning properly.¹ You and I, of course, don't require an explanation for what is not to us a paradox. One way of arriving at the truth of an accusation brought by A against B, for the arbitrament of C, is to let A and B lay before C their respective proofs and submissions, leaving C to make the best judgment he can, exclusively upon the matter which has been selected by A and B for his reception. The interested parties institute a debate before an impartial adjudicator, each confining himself to the aspects which are most likely to interest the adjudicator and persuade him to come down on the right side. This is the principle which inspires British, American and Commonwealth criminal procedure, and there is nothing, accordingly, other than completely honourable in the conduct of a party's advocate who makes it as difficult as he can, by obstruction, non-co-operation or concealment, for the

¹ Ministers of the Crown Act 1937, as amended.

opposing party to win his case; always provided that he stick to the recognised rules of the game. The honour of the advocate, which we all so much admire, is seen in that he *does* stick to those rules, however strongly his client's interests may tempt him to depart from them, or even to evade them in minor particulars which are not likely to lead to discovery. It is not his duty to criticise these rules. He may even perhaps not approve of them: he is not called upon to do so. He is called upon to obey them, and he does.

I have been brought up to venerate the traditions of the Bar. The ethics of advocacy are perhaps, of all professional codes, at once the strictest and the best observed; it is certain that they operate, in the course of a hotly contested trial, under a greater strain than do the rules of conduct of any other body. So you will not imagine that I am belittling them, or reflecting on their efficacy, in any way. I am looking a little deeper than that. These professional ethics are a by-product of a particular system. If the system were different, the code of conduct would have to be changed too, just as surely as, if the code were not honourably observed, the system could not survive for a day. Even now some strange exceptions, which are not easy to fit into a reasoned apologetic, have been admitted, and there is also evidence of some waning of public confidence. Perhaps the latter point might be better described as a more forcefully vocal expression of what must have been for long a criticism below the surface.

If the truth is best disclosed by having the kind of party competition I have described, why is it that in criminal trials it has long been accepted, nay it is a rule of conduct, that the prosecutor shall behave rather differently from the

defender? For the latter—to use a vulgar expression—no holds are barred so they be within the ethical code. For the former, many holds are barred. He is said to be in some kind of responsible ministerial employment, not expected to press every point he can lay his hands on against the accused, but substantially to place the facts before the tribunal, and temperately to submit that they speak for themselves. It is something more than a difference of emphasis. I have no doubt that it would be agreed by English and Scottish Bars alike that the rights and obligations of prosecuting counsel in pressing home his case differ in kind from the rights and privileges of defending counsel.² Why should this be? In former times the answer may have been that the situation of our accused, deprived even of counsel in England till 1838, and in Scotland, if he were impecunious, relegated to the experimental sciences of junior “counsel for the poor,” was such that Christian charity must temper the storm of the prosecution case, prepared and presented regardless of expense by Crown Counsel, the procurator fiscal, and the police. That is an attractive theory, but I would venture to ask whether, assuming criminal legal aid as we now have it, and assuming unlimited access by accused persons to the apparatus of criminal detection such as scientific and forensic medicine laboratories, as we ought to have it, and the accused put as regards facilities on precisely the same footing as the Crown, would the rule then be abrogated? I think that it would not. I am sure it is rooted in some deeper soil than a

² “The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence.” *Per* Lord Denning M.R. in *Dallison v. Caffery* [1964] 2 All E.R. 610, 618.

mere utilitarianism. I expect that, in England at least, there are still some vestiges of the sporting spirit to be taken account of, and that, no doubt quite incidentally, it is an occasion for quiet satisfaction when the citizen, whatever crimes he may have been, on the best possible ground, charged with, receives an acquittal. There will be some pressure to retain this easy-going acquiescence in the little man defeating the establishment, even a democratically elected establishment, but I cannot say how long this will survive the growing feeling that the war against crime is being lost, and that it is time something was done about it.

I referred to the waning of public confidence as being something of long standing, and so it is. For me the last word has been spoken by C. P. Harvey, Q.C., in his book *The Advocate's Devil*. He points out that down the centuries the profession of the advocate has been suspected by the laity. His willingness to take up the causes of those who he is privately and professionally convinced are in the wrong, and his uncritical acceptance of standards of conduct which are austere but at the same time possibly anti-social—these charges have been regularly and brilliantly refuted, but still they continue to be brought, just as if the refutation had been ineffectual. Now if the ethos of the "British" advocate is an inevitable and indispensable concomitant of our system of criminal procedure, and if the general public have never been able to understand that ethos or to adapt it to their own ideas of morality, but if nevertheless they accept the advocate as an honourable and admirable public servant—as I believe they do—then it looks as if we must suspect the system itself as being unacceptable today. And such a suspicion should clearly lead us to look for comparison and reflection at other

people's law, not, of course, uncritically, but still without prejudice. W. S. Gilbert, whose lyrics I personally tend to admire more for their technique than for their sentiments, warned us about

“ The idiot who praises, with enthusiastic tone,

All centuries but this, and every country but his own.”

Nothing could be more fatal than for me to take that attitude in looking at systems I but imperfectly understand, and in comparing them with ours which have stood so strongly and for so long. Nor will grave defects, mostly I think administrative, in foreign procedures be difficult to discern. On the other hand, I fear we must reluctantly reject the robust attitude of Dr. Johnson. Boswell reports him as follows: “ His unjust contempt for foreigners was, indeed, extreme. One evening at old Slaughter's Coffee-house, when a number of them were talking loud about little matters, he said, ‘ Does this not confirm old Meynell's observation, *For anything I can see, foreigners are fools?*’ ”

SOCIETY AND THE INDIVIDUAL

Whenever any citizen of any country begins to look critically at his national system of criminal police, jurisprudence and disposal he must inevitably find himself distracted by two opposing, though not necessarily irreconcilable, requirements. First, he demands of the law what the law exists to provide, that is, protection against law-breakers. Secondly, he is not prepared to give *carte blanche* to his protectors, so that they be authorised to supply a first-class article at an outrageous price. He, the citizen, is a potential victim of the law-breakers, but it will not help him if he become a potential

victim, instead, of the protective machine. Security without liberty is as unacceptable as liberty without security is fallacious. It has been strongly put by a French scholar, whom I have already quoted, as follows: "Certainly there is no doubt that individual liberty is under continuous threat from lawlessness, which can amount to anarchy, fostered by an excessive weakening of the power of repression. On the other hand, it is equally true that a system of justice which does not guarantee the protection of individual liberty is always in danger, insecure, and contrary to the public interest. A system of criminal procedure, to be adequate, must exhibit simultaneously effectiveness, efficiency and humanity. . . . May I suggest that criminal procedure is wrongous unless it guarantees that the rights of the accused will be respected, but that it is just as bad if it sacrifices the defence of society to an excessive desire to protect the liberty of the individual."³ I am not sure that I would go as far as this, because Professor Vouin seems to regard the two attributes of criminal justice as being of equivalent priority; I think most of us, in accordance with the dictates of our own historical traditions, would insist on the ultimate liberty of the individual at all costs, preferring anarchy to authoritarianism. But all this need not prevent us from holding, when we have completed an examination of our own system, that the "constitutional guarantees" have been overdone, and that individual liberty and personal rights could still be kept in high regard simultaneously with the placing of modern weapons in the hands of those who, on our behalf are fighting the war against crime.

³ Professor Robert Vouin, *Intérêt public et droits de la défense dans la procédure criminelle française*, Birmingham, 1964. See Coutts, *The Accused*, Chap. 15.

THE CRIME WAR

There are at least three fronts upon which this war is fought, and I am concerned with only one of them. They all interlock, but they are all separate. The prevention and detection of crime is the duty of the police, but the first part of their objective is also that of those fighting on the third front, in the prison service. There the main objective also is crime prevention, both in the individuals committed into care, and also in those to whom the existence of a prison system is a standing deterrent. With these two fronts I am not directly concerned. In between them, however, is deployed the legal system, which is intended, subject to all the individual guarantees I have emphasised, to transmit those who have been detected committing crime, and only those, to the "disposals branch" for the appropriate treatment to be applied to them. This link is vital. You will sometimes hear it said that the best deterrent of crime is the certainty of detection—that if the police were 100 per cent. efficient, no sane man would be foolish enough to commit crimes. But this is not so; it is not the certainty of detection, but the certainty of conviction, which deters the criminal, at all events the kind of criminal who is more or less indifferent to public opinion. In the same way, we need not trouble to discuss up-to-date methods for the beneficial treatment of convicted persons except in relation to those persons who are presented for treatment; the smaller be that number in proportion to those detected, the more futile becomes the whole science of penology. This is what makes it imperative for us, the lawyers, to look anxiously at our own system, lest by any faults in it we should be stultifying the work of the other Arms of the Service. And, since

we also are public servants, the public is entitled to attend the inquest.

JURIES AT WORK

The public do not attend this inquest in the purely passive role of spectators. In the very first aspect I propose to examine, the man in the street has not only a legitimate interest but also a personal responsibility.

Suppose a person to have been selected for prosecution, to have been charged and to have pleaded "not guilty." The following disturbing passage is taken from Dr. Nigel Walker's *Crime and Punishment in Britain*,⁴ p. 16: "The accused's chances of acquittal vary according to the type of court before which he is tried. In English courts with juries, he is acquitted in rather more than a third of the cases; in summary cases his chances are less than one in twenty-five. . . . Since magistrates' courts must try over 100,000 pleas of 'not guilty' every year, and must be rejecting over 90,000 of them, it can be assumed that if the percentage of wrongly convicted persons were substantial, the volume of protest would be formidable. It is much more likely that juries, in acquitting over a third of accused persons, are operating with a larger factor of error." For my part I would go further than that. I would say that if anything like 35 per cent. of those who were acquitted were other than guilty, there would be a public outcry, which would not be stilled, at the gross outrage of so many innocent people having to stand their trial. Later research, by the Association of Chief Police Officers of England and Wales, shows that the figure given

⁴ Oxford, 1965.

by Dr. Walker is not growing less, and discloses an astonishing state of affairs. The national average is 39 per cent., which happens also to be the figure for the Metropolitan Police District. Some of the more sensational returns (the total number tried by jury are given in brackets) come from the City of London (52) 56 per cent., Kent (218) 58 per cent., Dorset (63) 78 per cent., Coventry (32) 84 per cent., Monmouthshire (23) 91 per cent. Would it be too severe to say that in areas like these criminal justice is breaking down? ⁵

In Scotland, the figures are not easy to come by, because of the confusing way in which our criminal statistics are at present compiled. I am authoritatively informed, however, that the equivalent figure may be taken at 20 per cent.⁶ This, though better than England, is bad enough. The reasons for the discrepancy are not far to seek. The first, and possibly the least important, is that in Scotland a jury may return a verdict by a majority, so that, even though there are fifteen jurymen on a Scottish jury, a smaller number of votes for "guilty" is required than in England, and a large minority in favour of acquittal need not deflect the majority from their course. It may seem strange at first sight that you can say the Crown has proved its case beyond reasonable doubt by a majority of eight to seven, but the position is logically unassailable, and I have heard no complaint about it although there is a case for amendment. The second, and to me convincing, reason for the discrepancy is that in Scotland no accused person has the right to demand trial by jury. The choice of *forum* is the prerogative of the prosecutor, and is based, partly on the nature of the crime, but mainly on the

⁵ *New Law Journal*, 1966, Vol. 116, p. 928.

⁶ *Ex rel.* Scottish Home and Health Department.

prosecutor's view of what would constitute an adequate punishment. If he decides that a suitable punishment would be a fine or a short term of imprisonment (up to three or in some cases six months), or if the offence is declared by statute to be triable only summarily, the prosecutor will order a summary prosecution before a sheriff—I ignore for this purpose the limited summary jurisdiction of the lay magistrates. If he conclude that the offence merits a sentence of imprisonment of up to two years, he may send the case for trial by the sheriff with a jury. If a heavier sentence than that be demanded, or if the case be one of a class so appropriated by the law, the case must go to the High Court of Justiciary, where the jurisdiction is unlimited, and the trial is by jury. So you will see that in Scotland there is none of this comfortable practice of persons charged with drunken driving demanding a jury trial in the sure and certain hope of over-indulgent treatment from sympathetic fellow-motorists, possibly with similar propensities. In Scotland, such cases are tried by the sheriff, unless there are aggravations, such as death having been caused, which might mean sending the case to a jury. And that this type of case is most influential in swelling the percentages of acquittals receives confirmation from an authoritative sources. In 1964, for the related offences of driving while unfit to drive through drink or drugs and being in charge of a vehicle while so unfit, there were charged in the magistrates' courts of England and Wales 9,541 persons. After deducting the number committed for trial, we find that 419 persons, or say 5 per cent., were acquitted. Of those committed for trial and tried by jury, 606, or 37 per cent., were acquitted.⁷ We must beware of

⁷ Offences relating to Motor Vehicles, 1965, H.M.S.O.

drawing crude conclusions from these figures—it is, for example, probable that a majority of the innocent were committed for trial—but the statistics seem to go far to support Dr. Walker's conclusions.

Nevertheless, you would be wrong to assume that the blame for wrongful acquittals is to be automatically laid at the door of recalcitrant juries. We lawyers made, for the most part, and we exclusively administer, the rules according to which criminal cases are conducted, and, in particular, the laws governing the selection of evidence which juries are permitted to hear. A familiar spectacle to a presiding judge is the half-concealed indignation on the faces of the members of a jury who have just been instructed as matter of law, no doubt correctly as the law now stands, to return a verdict of not guilty, which they proceed loyally to do while convinced, in their own minds, and no doubt rightly on the real facts as *they* actually stand, that they are conniving at a miscarriage of justice. So you see, miscarriages may sometimes be the fault of the jury, and sometimes the fault of the system; but be that as it may, they undoubtedly promote that lawlessness, which, according to M. Vouin, is a continuous threat to individual liberty, and I expect we shall find that the pendulum could be allowed to swing much further in the direction of supporting the public interest before any danger could arise of oppressing the innocent.

DUE PROCESS AND THE FREEDOM OF THE PRESS

But there are some directions in which we should not be prepared to run any risk. There are some human rights which we cherish in Britain because they have been fought hardly for; rights as much of human dignity and decency as

of constitutional entitlement, and that we ought never to allow, from any view of public interest or public policy, to be whittled down in any way. I have already touched in these lectures on the necessity for ensuring the impartiality of juries, and went so far as to suggest that even authorised judicial proceedings ought not to be made public if this essential safeguard might thereby be compromised. In Britain, and perhaps nowhere else, we go a good deal further than that, and it is quite instructive to look at what can happen in the United States, in spite of the ancestry of their legal institutions. "England," said Mr. Justice Clark, "from whom the western world has largely taken its concept of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. . . . In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."⁸ Unfortunately, these high principles have come into conflict with other equally elevated sentiments, originating with the same testator, and in some respects the former have been forced to yield. "'The liberty of the press,' wrote Blackstone, 'consists in laying no previous restraints upon publication.' In declaring the invalidity of an official censorship he was stating a principle which had become established in England by 1695, and in the colonies by 1725. The issue had thus been closed for decades by the time the First Amendment was adopted."⁹ The official censorship whose invalidity had been declared

⁸ *Irvin v. Dond*, 366 U.S. 717.

⁹ Pritchett, *The American Constitution*, p. 398.

was of course directed against newspapers which criticised the Crown and the ministers; it was fundamentally a political censorship, and obnoxious to any true state of liberty. But the First Amendment has now been interpreted as rendering unlawful restraints of a very different kind. In *Near v. Minnesota*¹⁰ a majority of the Supreme Court declared unconstitutional a statute which provided for the abating, as a public nuisance, of "malicious, scandalous and defamatory newspapers" by injunction in the courts. An even larger claim, which has incurred scathing judicial censure, but which cannot apparently be repudiated, has been made for the freedom of the press in criminal matters. The point in the case of *Irvine v. Dond*, from which I have already quoted, is made plain by the following extract from the judgment of Mr. Justice Frankfurter: "More than one student of society has expressed the view that not the least significant test of a civilisation is its treatment of those charged with crime, particularly with offences which arouse the passions of a community. . . . Not a Term passes without this Court being importuned to review convictions . . . in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration—exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. . . . Again and again such disregard of fundamental fairness is so flagrant that the Court is compelled, as it was only a week ago, to set aside a conviction in which prejudicial newspaper intrusion had

¹⁰ (1931) 283 U.S. 697.

poisoned the outcome. This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be set aside and miscarriages of justices result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.”

The most interesting feature of this situation is that we have here a conflict similar to the larger one between the public interest and individual liberty. A country without a free press is a slave state—but what if the state be enslaved by the press? This could, perhaps, be said to be on its way when the Supreme Court judges acknowledge that the press are interfering with the constitutional guarantee of due process of law, that the judges are forced into miscarriages by way of quashing convictions, but that they are unable to avoid such interference because of another constitutional guarantee, that of freedom of the press. This must be said in justice to our own systems, that for the protection of what Mr. Justice Clark called the “concept of individual liberty and of the dignity and worth of every man,” if newspaper editors and proprietors did in England or Scotland what their colleagues in Indiana did in *Irvin's* case, they would find themselves in prison in short order, enjoying the company of the prosecutor who had collaborated with them.

THE LIMITS OF INVESTIGATION—PRELIMINARY

When an accused person has been charged, and it has been decided to institute and carry on proceedings against him, obviously the first requirement is a careful and thorough

investigation into the facts, for the two purposes, as we noticed earlier, first of being sure that an innocent man is not being unjustly accused, and second of making certain that the tribunal of inquiry will have before it enough evidence to enable it to pronounce a finding of guilt. On general principles, where should that inquiry begin? Conditioned as we are by our age-old rules of practice, we shall probably say, "Well, you interview the man whose house was broken into, you look for the goods which have been stolen, searching especially the accused's repositories, you go round the suspected receivers, and so on." This has all to be done sometime, it is true, but are we not overlooking the obvious? We have already decided, by arresting and charging him, that the accused knows as much about this affair as anyone. Why don't we begin by questioning *him*? You may remember that that was just what was provided for in the old Scots system; the first warrant which the prosecutor asked for included power to apprehend the accused and bring him for examination. You will also remember that after arrest interrogation by the police becomes unlawful; I do not understand that to be so in England, as appears from the "Judges' Rules" (1964), III (b). But this judicial examination in fact never takes place. The accused is not obliged to submit to examination, and it is not permissible to refer in court at his trial to his refusal to do so.

Suppose these rules were to be altered? The sequence of events after an arrest would then be something as follows: At once a defending solicitor, if necessary from a stand-by panel, would be obtained. The accused would then be brought before the duty magistrate (I am supposing the arrest to have taken place in a large centre of population

and in the middle of the night), and interrogated. This could quite properly be done by the police or prosecutor; only a person who is acquainted with the subject-matter can direct his questions to the relevant topics, especially when a witness is reluctant or evasive. The interrogation would be recorded verbatim, preferably electrically. The refusal to answer any question would be noted, and could be founded on at the trial. The accused's solicitor would have no right to take any part in the proceedings, which are purely for the purpose of according to the prosecution the opportunity of ascertaining the facts. He is there to see that proceedings are carried out in accordance with the rules. If any unfair questioning took place, this would be recorded with the rest of the evidence, and it could if necessary be excluded by the judge at the trial. There is no reason why such interrogations should not take place as often as the prosecutor desires them, up to the time at least of the service of the indictment. All would be subject to the same safeguards.

THE LIMITS OF INVESTIGATION—IN COURT

I will take this matter of the interrogation of the accused a little further. Supposing, what can hardly be denied, that in most cases the testimony of the accused is an indispensable part of the information required by the court for the purpose of arriving at the truth, why should the accused be entitled to withhold that information? It may be that the time is ripe for a revolutionary change such as that which was made in 1898, when for the first time accused persons in Britain became competent witnesses even on their own behalf. The grounds upon which that change in the law was opposed are instructive. Apart from the rather archaic objection that the

new law would encourage perjury, the main one was that it took away from a (guilty) accused the privilege of being able to say, through his advocate, "Ah, if only I had been allowed by law to give evidence, the whole thing could have been satisfactorily explained, and my innocence established." Those who took that line were persisting in the notion, not uncommon to this day, that a criminal trial is a combination of ceremonial ritual and sporting event, in which it is a pity to stop up all the loopholes, because that spoils the fun. We can see clearly that the reforming statute itself contains vestiges of this idea, inasmuch as the prosecutor is forbidden to comment on the accused's absence from the witness box. The judge can, but if he does so he runs the risk of a rough passage in the Court of Criminal Appeal. In America the practice is altogether forbidden: "for comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege."¹¹ But the inquisitorial process has been constantly reformed since the date of the outlawry. This decision would not be accepted here.

SELF-INCRIMINATION

No doubt this reluctance to allow of an accused being questioned by the prosecution at his trial is a product of the idea that a man should not be called upon to incriminate himself. It is not easy to see how an innocent man could incriminate himself by giving evidence; in fact, innocent men almost always do give evidence, and are cross-examined

¹¹ *Griffin v. California* 380 U.S. 609.

by the prosecutor. The dislike of compulsory self-incrimination is of course very strong in the United States: this is developed in a most interesting way in relation to "discovery" in criminal causes by Professor Louisell in 53 *California Law Review*, p. 89. The American Law Institute's Model Code of Evidence, rule 201 (1), is as follows: "Every person has a privilege not to be called as a witness and not to testify in any criminal action in which he is an accused." The comment made by the Institute begins, "This is law everywhere." Pausing there, while the observation is no doubt universally true of the United States, I may venture the rash speculation that it might be correct to change the comment to read, "This is law nowhere, except in the U.S.A., Great Britain and those countries whose laws derive from England." However, that speculation need not be indulged in, in view of the next passage in the Comments: "It is entirely impracticable at this time, if not unwise, to attempt to abolish this privilege. If we assume the continuance of trial by an impartial jury before a competent judge in public, it is difficult to understand how an accused represented by competent counsel can be unfairly treated by being required to testify. He may need protection against police and prosecutor but he can hardly need protection against judge and jury whose action is subject to review by an appellate court." The commentators, accordingly, do no more than indicate helplessness in face of a logically indefensible rule which cannot be changed because public opinion would not tolerate change. For my part I am not at all sure that public opinion would not tolerate it, if it were demonstrated to them, (a) that an alteration in the law, so that an accused becomes a compellable witness for the prosecution, could not possibly

prejudice an innocent person, and (b) that it is expedient in the interest of the suppression of crime that the change be made. Again we have to look at the conflict between public interest and individual liberty; we do right to promote the former unless it can be shown that we are doing so at the expense of the latter. We must fairly ask ourselves should the accused be entitled by law to conceal relevant evidence by refusing to testify; his evidence being relevant, should it not be both competent and compellable?

THE RELEVANCE OF THE PREVIOUS RECORD

The same question can be asked, in a rather different form, in relation to other evidence which is now incompetent but may well be relevant. The most anxious care is taken to see that, until after conviction, the previous criminal record of an accused is concealed, not only from the jury, lest they be affected by it, but also from the judge, on the—rather insulting—view that his capacity for impartiality will be vitiated by his being in possession of the facts. Now, no one is going to maintain that a man's long record of house-breaking demonstrates his guilt of the particular house-breaking with which he is charged. Of course it does not—such an attitude is just giving a dog a bad name and hanging him. But this is not to say that his long record of housebreaking is irrelevant to the question of his present guilt. The jury does not think it is irrelevant; it is only the lawyers who do, and conceal from the jury facts they would be very pleased to know about. It is sometimes said that you must hide a man's record from the jury because a jury is incapable of appreciating that that record is no more than a piece of evidence, but will be inclined to accept it as

conclusive. I doubt the truth of that, but even if it were so, you would only be saying that the jury, as we know it, is an incompetent kind of tribunal, and would be opening up the present system to even wider suggestions for alteration. There are, however, three considerations which seem to me to be very much against the validity of the present rule. First, there are in fact circumstances in which the accused's bad record *is* admissible in evidence, for example, if he himself has attacked the character of a prosecution witness. Not only does this rule lead to excessive refinements of judicial opinion,¹² but it seems illogical to hold that if the accused take a certain line in his defence, then, as a kind of punishment, cogent evidence, which would otherwise have been excluded, will instead be admitted. Secondly, the accused's good character has always been admissible, and juries have to be warned as to its limited weight, just as they would have to be were evidence of bad character admitted. Indeed there are some crimes, such as the great company and commercial frauds, which can only be committed by people of hitherto blameless reputation.¹³ Thirdly, in Scotland at least a curious doctrine of corroboration cuts deeply into the rule. If a man be charged with a series of offences which are sufficiently interrelated in time, place and circumstances, then the evidence of a single witness as to one of the series may be taken as corroborative of the evidence of a single witness to another. It was put picturesquely by Lord Sands, "If a man were accused of having on two separate occasions obtained food and lodging without payment on the narrative that he was Mr. George Bernard Shaw,

¹² e.g., *R. v. Flynn* [1963] 1 Q.B. 729; *O'Hara v. H.M. Advocate*, 1948 J.C. 90.

¹³ *Trial of the City of Glasgow Bank Directors*, p. 353.

and of having on each occasion absconded in the morning with the family Bible, then . . . no reasonable man could resist the conclusion that identification of the accused as the man who committed the one offence was corroboration of his identification as the man who had committed the other.”¹⁴ Observe that the man is only *charged* with “the other”; had he been convicted in the recent past of a number of such idiosyncratic offences, evidence to that effect, although overwhelming to the ordinary man, would be absolutely excluded.

The conventional objection to evidence of this kind is eloquently stated by Dr. Glanville Williams in his *Proof of Guilt*¹⁵ where he speaks of “. . . the exaggerated importance that a jury consisting of persons without legal experience may attach to this kind of evidence; for they may argue, ‘This man is charged with crime, and the police think he did it, and he is clearly of criminal habits; therefore he must be guilty.’” That there is danger here, and that careful direction by the judge, if such evidence is to be admitted, would be required, all may agree. But put the imaginary argument a little differently, and more, I venture to think, as it would appeal to the ordinary jurymen, and see whether there is much objection to it: “This man is charged with crime because the public prosecutor, after careful inquiry, thinks he did it, and a judge has decided that there is a *prima facie* case against him; he is clearly of criminal habits, and that matter, while by no means conclusive, is not irrelevant to the question of his guilt.”

Relevance is surely the ultimate test. There is, as I understand it, a refinement of English law which is absent

¹⁴ *Moorov v. H.M. Advocate*, 1930 J.C. 68 at p. 88.

¹⁵ 3rd ed., p. 214.

from Scottish practice. There are a number of cases¹⁶ in which the English courts have held that evidence which is competent and relevant has to be excluded because of the extremely prejudicial effect it will have against the accused. There is much to be said for the view that the duty of the prosecuting counsel is to lay before the court evidence which is prejudicial to the accused, and the more prejudicial the better, always provided that it is not inadmissible under any identifiable rule of law. This is perfectly compatible with an equally important balancing duty upon the prosecutor, that is, to lay before the court, or at all events to make available to the defence, any circumstances which may seem to favour the defendant. But he ought not to be obliged to suppress lawful relevant evidence because it is so damaging. Such an obligation may, perhaps, be another example of the survival of sporting instincts.

TWO SYSTEMS OF TRIAL

So far we have been discussing matters preliminary to or incidentally connected with criminal proceedings rather than examining the actual framework of a criminal trial. Many of these matters are handled differently, in the various countries we have looked at, from what we are accustomed to in our own; nevertheless that does not in itself mean that the systems as a whole are distinct. It would be perfectly possible to adopt into, for example, the English organisation many if not all of the expedients which, as we have noticed, are now excluded from it, without altering that organisation in kind. I am now coming to the trial itself, and in this field there is

¹⁶ See *R. v. Herron* [1966] 3 W.L.R. 374.

scarcely any room for compromise between two completely opposed concepts. As a matter of record, these concepts have been respectively termed "inquisitorial" and "accusatorial," but I do not find these expressions particularly helpful. With the second, the English/U.S.A./Scottish system, we are all familiar, and I have already noticed how it is based on the presentation, by advocates retained for the prosecution on one hand and for the defence on the other, of such evidence as in their judgment is relevant to the only question before the court, namely, did A do X? This they do in such a way as they calculate will be most likely to persuade the tribunal, be it judge or jury, that their side is right. And the contest is presided over and controlled by an impartial judge, who takes no part in the proceedings other than supervisory, until the time comes when he has either to declare his decision or to give instruction to the jury who have to do so. His total aloofness in Scotland is emphasised by the fact that, when he takes his seat on the Bench to try a criminal case with a jury, his acquaintance with the matter in hand is confined to possession of a copy of the indictment (plus medical, etc., reports, if any). He knows as little, at the outset, as do the jurors. And even the assistance of an opening speech by counsel for the prosecution is, properly as I think, denied.

In order to understand the inquisitorial or continental system, it is necessary to go back a little in the sequence of proceedings. You may remember that I described the preliminary stages of the French procedure, with special reference to the point where police work gives way to judicial control. I propose to go on from there in a brief description of the German system, chosen because there are two excellent books in which it can be studied. The first is a translation of

the *German Code of Criminal Procedure*, with an introduction by Professor Eberhard Schmidt of Heidelberg,¹⁷ the second is *The Faces of Justice*, by Sybille Bedford.¹⁸ The latter is a popular description of court scenes in many countries, and the best of them takes us to a trial in the *Landgericht*, or court of first instance with unlimited jurisdiction, at Karlsruhe. It brilliantly evokes the atmosphere of the inquisitorial trial, with its informal, humane, thorough and leisurely investigation carried out, of course, by the presiding judge. I would not, from my limited experience, expect necessarily to find these adjectives appropriate to the conduct of a trial in France.¹⁹

The key to the German system, as I see it, is the division of the legal profession into three distinct parts, represented by the judge, the public prosecutor (*Staatsanwalt*) and attorney (*Rechtsanwalt*), and the functions of these parts can be very briefly described. The prosecutor is an independent²⁰ and impartial official whose duty it is to present to the judicial authority those whom he believes to be guilty of crime and to supply the judge with the materials for an investigation.

There are certain features of the public prosecutor, some perhaps common to his office in all countries, but certainly all conspicuous in Germany, which call for special comment. When a crime is reported to him, he is empowered to conduct an investigation of his own, including the examination of a person under accusation, in order to decide whether further

¹⁷ Sweet & Maxwell, 1965.

¹⁸ Collins, 1961.

¹⁹ See, for the black side of French criminal procedure, *The Trial of Marie Bresnard*, Heinemann, 1963.

²⁰ See *Strafgesetzbuch*, § 344, 348.

procedure shall take place. If he does so decide, or if he wishes to have the accused confined, or if he wishes witnesses to be examined on oath, he must hand over to an examining magistrate (*Untersuchungsrichter*) for a preliminary investigation to be conducted by him. Thus it is not only that the accused is by now under judicial protection, and secure from committal for trial except on a judicial warrant of *prima facie* sufficiency of evidence; it is also true that what has been set on foot is not so much an inquiry, "Did A do X?," which as we have seen is characteristic of our own procedure, but rather a search for evidence which is uninhibited and unrestricted, since impartial, and is directed more to the question, "Who did X?" You may remember that it was the narrowness of the scope of inquiry into the minimum of facts necessary to bring home guilty to Hanratty that was the main criticism of our procedure as disclosed in what was called the "A6 murder." This would have been just as true of Scotland, or the U.S.A., as it was of England.

The duty of the judge is to investigate, both at preliminary inquiries and at public trials, the facts relating to the trial, and to take his part, according to his findings, in verdict and sentence. The attorney attends to the interests of the accused from the earliest stages. Since December 1964 his functions have been greatly enlarged, especially in those early stages; he ensures "that the defendant is not deprived of any procedural opportunity."²¹ He will urge the reception of supplementary exonerating evidence, and he will sum up the whole case as defending counsel here will do. While the prosecutor, the attorney and the accused himself may ask supplementary questions of the witnesses, they do not

²¹ Schmidt, *Introduction to C.C.P.*, p. 21.

examine witnesses in any sense that we would understand. That is done by the presiding judge. He may, it is true, allow cross-examination, but only on joint motion of the parties, which is never made. "Cross-examination does not comport with the German system of criminal procedure. The genuine cross-examination, as it is known in Anglo-American procedure, presupposes an antagonism of the parties. . . . In Germany, as already mentioned,²² prosecutor and defendant (or his counsel) do *not* just oppose each other as parties; they do not engage in battle before the court, they do not introduce the evidence to the court, they do not necessarily even represent opposing interests." The proceedings would indeed be unrecognisable to us. In the Karlsruhe trial to which I referred, the authoress came in during the early part of the proceedings, and found the presiding judge in the course of his interrogation of the accused. This involves the eliciting of any previous criminal record.

This pattern of criminal trial is familiar, with local variations, over a great part of the civilised world. It had its origins, we are told, in France, and was a manifestation of the liberalising ideals of the French Revolution. In the German states of the eighteenth century, and in other European countries, the system in operation was inquisitorial in a quite primitive sense, since alleged crimes were investigated in secret by the judge, who thereafter proceeded, also in secret, to trial and sentence. It may be true to say, therefore, that the eighteenth century reformers were tentatively introducing some of the accusatorial features of the traditional English mode, and this is undoubtedly true of the German reforms of 1964 which I have mentioned. Here

²² *Ibid.* p. 21.

we may see, perhaps, another example of the conflict, or competition, between contrasting concepts, in the reconciliation of which may lie the true goal of the law-maker. We know certainly of directions in which we might properly call for alterations in our own system, but we would make a great mistake if that were to lead us into an uncritical acceptance of other people's.

THE TIME ELEMENT

One glaring defect is seen in the continental systems: delay. Of France in 1960 it was said, "Hitherto a period of arrest awaiting trial for eighteen months or more would not have been unusual in the case of a serious crime. The Code does make provision for release on bail, but this is very rarely granted."²³ This would be utterly unacceptable here. In Scotland, when the accused is in custody, his trial must be completed, unless the Crown can show that the delay was no fault of theirs, within 110 days; after that time he must be set at liberty, and cannot be charged again. In England it is thought that the delay may be even less. And in Germany, although *Untersuchungshaft* (preliminary detention) is only permitted on certain specified grounds, yet all the preliminary stages are open to appeal by way of *Beschwerde* to a higher court. Delays can be very bad indeed; a case is quoted of a man who, having spent four and a half years in prison awaiting trial, was sentenced to ten years hard labour for murder.²⁴ This sort of thing seems to be inherent in the ideology. If you lay great emphasis on the meticulous preparation of the case to be presented, you are demanding

²³ Anton, *op. cit.*, p. 454.

²⁴ *Faces of Justice*, p. 128.

a time-consuming process, and since the evidence at the trial may become perhaps less important than the evidence in the dossier,²⁵ the dimming of the recollection of the witnesses by the passage of time may become the less objectionable. Professor Anton faces the facts quite squarely. "The French trial in open court is contrasted unfavourably with the more spectacular trial which is a feature of systems based on English law. But the antithesis is false unless the preliminaries to the two types of trial are taken into account. The immensely careful preliminary investigations of the *juge d'instruction* makes it unlikely that persons who in France are sent for trial are guiltless. While they are still in law presumed to be innocent, a common-sense appreciation of the situation suggests that they are in fact more likely than not to be guilty. That in France acquittals do from time to time take place" (remember the English average of 39 per cent.) "seems to be more a reflection of the French jurymen's traditional generosity of sentiment and suspicion of authority than a reproach to the quality of the *juge d'instruction*."²⁶ This almost makes the trial itself into a public formal acknowledgment of the justice of a conclusion which has already been reached by a private administrative process. While in such circumstances delay is of the less consequence, yet I do not feel we are here in the realm of what is, or ought to be, acceptable to our own public opinion.

THE JUDICIAL OFFICE

The element which must always distinguish the accusatorial from the inquisitorial system is the standing of the judge in

²⁵ German C.C.P., § 253.

²⁶ Anton, *op. cit.*, p. 456.

the respective jurisdictions. I do not think it is possible for a judge, if he take into his own hands the conduct of a criminal trial, by which I mean the public ascertainment of facts by the questioning of witnesses, to achieve that image of impartiality upon which our cultures insist. In fact it is something much more than impartiality. It is to the judge that the community looks for the protection of the prisoner, who is just a member of the community, from the arbitrary power of the state. This is an ideal which, in history, has sometimes failed; many years ago the judges sometimes “ganged up” with the state for the suppression of the individual. Today I would say that what is more than ever required is an insistence by the community, looked at as a front of individuals, on the vigour and efficacy of their defenders, the judges, against the might of the state, looked at as a bureaucratic engine. It is curious that although in Britain and the U.S.A. this function is, in the criminal field, taken for granted, yet in Britain at least, in the field of civil rights, the people’s freedom is not as well supported. On the other hand, in continental countries the judges consist of a hierarchy of civil servants under the authority of a Minister of Justice, enjoying no little respect, yet having a public standing quite different from ours, and therefore much less potent as controllers of official pretensions. But in the civil world, when the individual requires the protection of his rights against the administrative octopus, he has powerful judicial allies in the *Conseil d’Etat* and the *Verwaltungsgericht*, in comparison with which an Ombudsman is a pale shadow. So here are irreconcilable ideas. Whatever may be the law of the thing, in fact he who conducts the trial descends to the forum. This our system does not tolerate

as a judicial function, but insists that the Queen's judges watch over the conducting of the trial by the parties immediately concerned or their advocates, and see to it that the Queen's subjects come by no injustice.

SOMETHING TO THINK ABOUT

Nevertheless, while we must decline to accept the continental judicial apparatus as a whole, since it is not in accord with a philosophy which we value, that is not to say that we have nothing to learn from it, or to deny that there are features of it which could usefully and properly be adopted by us without changing our principles. I am convinced of the rightness of a system of exclusive public prosecution; it is already a feature of many "accusatorial" countries, in fact it is the rule rather than the exception. It might well be worth pursuing, however, the idea of joining with the prosecutor, in suitable cases, private persons seeking damages for loss arising out of the crime. In no circumstances ought prosecutions to be conducted by the police. This is to confuse two totally separate functions, with bad effects on both. After the police have made up their minds that a charge should be brought against an accused, they should be forbidden to question him unless they bring him before a magistrate. There is no objection to the police, or the prosecutor, questioning an accused before a magistrate. Refusals to answer should be noted, in order that in due time the proper conclusion might be drawn from the refusal. After the prosecutor has taken over the case, he should be entitled to bring the accused before a magistrate for interrogation at any time. The prosecutor, or the defending counsel, or the

accused, or in an emergency the police, ought to be empowered to bring any lawfully compellable witness before the magistrate for interrogation on oath. All interrogations should take place in private, but in the presence of the prosecutor, the accused and his defending counsel. The whole records of all interrogations ought to be made available to the accused as soon as they have been transcribed. If it is proposed to call a witness who has not been formally interrogated, a summary of his expected evidence should be supplied to the defence in good time. At the trial, the accused ought to be a compellable witness for the Crown. The whole life history, family circumstances, and personal character of an accused (including his previous convictions) ought to be laid before the judge and jury before verdict, subject to the judge explaining to the jury the limitations on their significance. Verdicts by a majority (not necessarily a narrow majority) should be permitted.

These are not intended as prolegomena to a code of criminal procedure. Still less am I representing the opinions or impending proposals of the Scottish Law Commission. It is just an indication of some of the lines along which the general public might be thinking. For my own part, I have no doubt that if any of the suggestions I make were to be adopted, we could still substantiate the claim that, in our British systems, where the proper security needs of the community find themselves in conflict with the ideal of justice and humanity to an accused, the latter must prevail. And I think the foreign gentleman in the railway carriage might begin to believe that we took crime seriously.

