THE DECLINE OF JURY TRIAL AND THE LAW OF EVIDENCE.

By Professor JULIUS STONE, D.C.L. (Oxon.), Professor of Jurisprudence and Public International Law in the University of Sydney.

The most characteristic parts of our law of evidence sprang from the exigencies of protecting lay jurymen from dangers of confusion and prejudice. They represented the judges' evaluation of the mental calibre of the jury. To some extent this evaluation was excessively low, and presented unnecessary obstacles for the free exercise of their common sense : but broadly speaking, it was sound psychological analysis, saving more of truth (in the long run) than it destroyed. The student may well ask, however, why, if these rules owe their origin to the limitations of a lay jury, they are today applied to all trials whether before a jury or before a judge alone ? And indeed the question would be well put, for in the last century there has been continual increase in the cases both civil and criminal which are tried by a judge alone. In this article it is proposed to sketch an answer to the question in terms of the English practice and the English law of evidence.

At the close of a century of shrinking importance of the jury in the English administration of justice, a learned writer portrayed the place of the English jury somewhat as follows.[1]

In criminal cases a series of measures beginning in the middle of the nineteenth century, has permitted all but the gravest indictable offences, at the option of the accused, to be tried summarily without a jury before inferior courts of summary jurisdiction. Notable landmarks in this trend were the *Juvenile Offenders Act*, 1847, allowing children under fourteen to be so tried for simple larceny ; the *Criminal Justice Act*, 1855, allowing minor types of larceny to be so tried ; the *Summary Jurisdiction Act* 1879, extending the device to trial of children for most offences other than homicide, and to trial of adults for more serious types of larceny ; the *Summary Jurisdiction Act*, 1899, extending to the trial of adults for minor types of false pretences and malicious damage, as well as larceny ; the *Criminal Justice Act*, 1915, again increasing the seriousness of offences by adults so triable, and finally, the *Criminal Justice Act*, 1925, which extended to trial of adults for many other offences besides larceny, false pretences and malicious damage. Because, on summary trial under these statutes, the maximum sentence is less than in trial on indictment, and in addition, the period of awaiting trial is eliminated, there has been a tremendous growth in the number of non-jury trials for indictable offences. The average annual number between 1930 and 1934 was 60,480 ; a startling figure when contrasted with the paltry annual 9,067 during the same period of trials on indictment.

In civil cases, before the Judicature Acts, the tendency was to extend the use of the jury in civil cases rather than to restrict it, as when the *Matrimonial Causes Act*, 1857, established the right to trial by jury in the new courts thereby established. Mr. Jackson estimated that at least ninety per cent of civil cases were then still tried by jury. The first step in the other direction was taken in the Rules of the Supreme Court, 1883,[2]

1. 1 Mod. L.R. (1937) 132. Jackson, *The Incidence of Jury Trials during the Past Century*, to which the writer is much indebted.
2. Order XXXVI.

made under the authority of the *Judicature Acts.* These allowed the court in its discretion to order trial with or without a jury in all matters formerly dealt with without a jury in the Chancery and the Admiralty, and in any matter requiring investigation of a kind which a jury could not conveniently make. This resulted in a drop in the proportion of jury trials to about fifty per cent. There was no further substantial diminution of jury trial until the *Juries Acts*, 1918 to 1925, in view of the shortage of man-power, ordered all civil trials, with certain exceptions, to be before a judge alone, unless the court otherwise ordered.

A permanent restriction of jury trial, however, had long been contemplated,[3] and was finally achieved in the *Administration of Justice (Miscellaneous Provisions) Act*, 1933, which placed it within the Court's discretion in matters arising in the King's Bench Division, whether it would order a trial by jury, except in cases involving fraud, or cases of libel, slander, malicious prosecution, seduction or breach of promise. These changes resulted in a steep drop in the number of civil cases tried by jury to only about twelve per cent. The decline in probate and divorce matters has been equally striking since 1926. In the County Courts, the jury, though provided for by the *County Courts Act*, 1888, never took hold, it having never been used in more than 1.69% of the cases decided. And, as a result of the restrictions on jury trial by the *County Courts Act*, 1934, it has practically ceased to exist.

Our question then is a pointed one. In that vast majority of cases which are now heard and decided by a judge without a jury, is the judge still bound by the rules of evidence established for the guidance of jurors? And if so, why? The answer to the first part is simple and definite—yes. The decline of the jury has not involved the automatic relegation of large parts of the law of evidence to the shelf of obsolescence. The rules are as alive and as rigidly enforced as ever. The answer to the second part of the question is neither simple nor definite. Two suggestions may be ventured, one historical, one functional.

Historically, the idea that rules of evidence originating in jury trials might not be applicable in trials before a judge alone, was long ago dealt a deadly blow. For the old Court of Chancery adopted and applied most of the rules in spite of the fact that juries had no place in Chancery proceedings, and indeed, in spite of the fact that the taking of evidence in Chancery resembled the private interrogation of witnesses characteristic of the canon and civil law, rather than the public examination and cross-examination of witnesses of the common law.[4] Nevertheless, probably due in part to the maxim that equity follows the law, it was clearly established by the middle of the eighteenth century that "the rules of evidence are the same in equity as at law,"[5] and this has remained so to modern times. As a result, the modern restriction of jury trial in all civil and criminal cases has not seemed to involve any necessary concomitant change in the law of evidence.

Functionally it may perhaps be said that, though it was with an eye on the weaknesses of the lay jury that the rules of evidence were

3. It was proposed as early as 1913 in a Report of a Departmental Committee of Jurists. Cmd. 6817, 1913, para. 288; see also *Business of the Courts Committee*, Interim Report, Mch. 1933.
4. See 9 Holdsworth, *History of English Law* (1926), 353-358, for a fuller account.
5. Lord Hardwicke in *Manning v. Leelmere*, (1737) 1 Atk. 453.

built up, those weaknesses were in a degree the weakness of all human judgment, whether lay or professional. The judges who had erected them were tainted, albeit to a less degree, with similar tendencies to generalise from former instances, to give a man a bad name and hang him, to wander from the real issues, to give too much credit to hearsay. Consequently it may be no mere incongruity for the judges, by a too little appreciated self-denying ordinance, to surround themselves with the same protective devices that they had created for the jury. It was the greater need of the jury which called the devices into being : once in being, however, their usefulness might not be limited to the jury, but might extend equally to all modes of trial. If, therefore, they continue to be applied even where the jury has been discarded as a mode of trial, that may not be merely an anachronism, but (at least in some degree) another example of the power of the common law to adapt its accumulated experience to changing circumstances.

This path of the common law of evidence is the more striking, if we contrast it briefly with the path followed by continental systems. With us evidential safeguards were erected to hedge about the jury mode of trial. With due modifications and qualifications these safeguards remain to hedge about the trial by judge alone, as trial by jury recedes. In France, on the other hand, the trial of cases was from the first in the sole charge of experienced lawyers ; no need was felt, therefore, for such safeguards on any comparable scale. In their place resort was had to a semi-mechanical quantitative mode of using evidence. The judge could consider everything offered in evidence, but he could only form a decision if the " proofs " on the value assigned to them in his table of values totalled a " full proof." And though this mechanical calculation of " proofs " is no longer used, its effect in preventing the growth of a law of evidence comparable to our own, still remains.

The most spectacular manifestation of this contrast is, of course, to be found in the application of the rules of evidence to criminal justice. It is still often said that a great difference between the English and the French administration of the criminal law is that the English law presumes an accused to be innocent until the prosecution proves him guilty, while the French law does not. With all deference to this view, it must be said that it is far too simple, even apart from its reflection on the good sense and fairness of our colleagues abroad. Frenchmen are as earnest in their zeal for justice, and as awake to the fact that innocent men are often accused, as any other people. The burden is upon a French prosecutor, as it is upon an English prosecutor, to establish the accused's guilt.

The differences which strike English observers are indeed present, but they spring from sources much more subtle, much less self-evidently good or bad than this " presumption of innocence theory " would indicate. They spring from the fact that the French law does not generally exclude from the consideration of the tribunal any relevant evidence, even though such evidence may tend to weight the scales disproportionately to its relevance, or to confuse the issues. French law follows out logically the principle that nothing that is relevant ought to be excluded from the consideration of the tribunal whose task is to ascertain the truth. It

does not admit that a human tribunal is incapable of keeping within due limits the influence of certain kinds of facts which are likely to confuse, mislead, or bias.

On the other hand, the common law declines to follow to its logical conclusion this idea that man is guided by reason and that a trial is a rational inquiry. The common law, paradoxically, cuts short rational inquiry at a point where it believes that the human tribunal will, because of the ordinary infirmities of human reason, become irrational. This is well brought out in a great American judgment.[6]

> "Suppose the general character of one charged with crime is infamous and degraded to the last degree: that his life has been nothing but a succession of crimes of the most atrocious and revolting sort: does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he has added the particular crime for which he is being tried to the list of those that have gone before? Why then should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt? The answer to all these questions is plain and decisive. The law is otherwise[7] . . . it is the law, that his bad character shall not be shown by the State until he has put that matter in issue by attempting to show good character for himself: it is the law that the credit of a witness shall not be impeached by showing specific instances of falsehood against him: and it is the law that evidence of the commission of another offence is not admissible when there is no connection between the two . . .
>
> The rule which we apply in the trial of a wretch who has ravished and killed an innocent girl, and then with the incarnate spirit of a fiend, torn and cut and mutilated her body in a way that causes the blood to curdle and the heart to rise in almost uncontrollable rage, is the same rule which we must apply in the trial of the innocent victim of a wicked and audacious conspiracy, or of one who, without fault, has become entangled in a mesh of circumstances which threaten an innocent life."

Seen in its true light, therefore, the contrast between French and English criminal trials, is not an isolated difference between the respective attitudes towards criminals. It is but one manifestation of a divergence which runs in a less spectacular manner throughout the respective system of evidence in all cases, civil as well as criminal. Moreover, it is not a divergence primarily in ethical approach: it is a divergence rather in two views of the practical limitations of rational human inquiry. One view is that the truth should be sought along any path where a perfect human reason might find it: the other, that at certain points the human reason generally becomes imperfect, and that at such points it is preferable to stop the search rather than risk the errors produced by such imperfections.

6. Rapallo J. in *State v. Lapage*, (1876) 57 N.H. 245, 298-99, 300-301.
7. Here the learned judge inserted the traditional phrase that the prisoner should be presumed innocent until his guilt is proved. The coherence of his statement with this proposition omitted indicates its superfluity.

In conclusion, a *caveat* must be lodged against the main point of this article. Recognition that the rules of evidence, primarily developed as a check on lay juries, may continue to serve essential purposes in trials by judge alone, does not justify complacency. Even if the rules of evidence were ever *perfectly* adapted to the psychology of jurymen (which they were not) they certainly cannot be said to be perfectly adapted to the psychology of a judge sitting alone. Indeed, the overhaul of the rules, in the light of changing methods of trial, as well as in the light of advances in psychological knowledge, and modern technological devices, may be regarded as the major task of our century in this branch of the law.