ON THE SEGREGATION OF JURORS

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I

AT A TIME when, as the historian Arnold J. Toynbee foresees, the future of mankind is likely to be markedly influenced by the widening of the gulf "between democratic form and bureaucratic fact",[1] perhaps it would not be a merely antiquarian pursuit to devote attention to the growth and influence of the system of trial by jury. Radzinowicz[2] considers that in the gradual process of building up the rights of the subject a most potent influence was exercised by the jury, and he quotes Holdsworth's statement[3] that the legal and political import of the jury system has been greater even than that of the writ of Habeas Corpus. Blackstone's eulogy of trial by jury takes on a sharper meaning in modern times.[4]

The objects of this article are, however, much less ambitious; my purpose is to present as briefly as may be the way in which the law has developed so that jurors, once rigorously enclosed from the time when they entered upon their duties[5] until they gave their verdict, may now separate during the course of the trial unless the presiding judge considers that the proper administration of justice requires that they should be segregated, and to ascertain the present legal position in Victoria relating to the separation of jurors.

In ancient times, as will be shown, once a prisoner was "in charge"

[1] *Time*, 17 Nov. 1952, p. 18.
[2] *History of English Criminal Law*, vol. 1, p. 25.
[3] *Some Lessons from Our Legal History* (1928), p. 75.
[4] *Commentaries*, vol. 4, pp. 343-4. The passage is set out in *R. v. Brown and Brian* [1948] V.L.R. at p. 183.
[5] In Victoria, the jurors' oath is prescribed by the Juries Act 1928, s. 65 and 9th Schedule. It runs, "You and each of you swear by Almighty God that you will well and truly try and true deliverance make between Our Sovereign Lord the King (or Our Sovereign Lady the Queen) and all persons whom you or any of you shall have in charge and a true verdict give according to the evidence." This oath is administered to the jurors before trials commence. Where a prisoner has pleaded "Not guilty", and the jury of twelve has been impanelled (s. 67) the associate says to the jury, "Gentlemen, the prisoner stands charged with [naming the offence]. To that charge he has pleaded not guilty and for his trial he has placed himself on God and his country, which country you are. Your duty, therefore, is to enquire whether he is guilty or not guilty. Hearken to the evidence." He then says, "Gentlemen, please choose your foreman." When the jury signify they have chosen their foreman, the associate announces the foreman's name, and says, "Mr Prosecutor, the prisoner is in charge." From that time the prisoner is in charge of the jury and remains so until verdict is given or the jury discharged. *(Syme v. Swinburne* (1909) 10 C.L.R. at p. 80.) In a civil case, the jurors are charged with the issues of fact. Cf., Juries Act 1928, 9th Schedule, *Syme v. Swinburne (supra)* at p. 80.

of a jury, the jurors were not permitted to separate nor could they mix with the outside world. In the middle period of development, legal systems tend to express legal principles in procedural rules, and in medieval law procedure predominated.[6] In 1367 it was finally settled that the verdict of the jury must be unanimous,[7] and this requirement of unanimity, said by Stephen[8] to have arisen "because they were witnesses, and the rule was that twelve witnesses, or persons taken as witnesses, must swear to the prisoner's guilt before he could be convicted," led to what was, by present standards, strange and oppressive treatment of jurors. Side by side with this requirement, and perhaps resulting from it, was the rule that the jury, once they entered upon their duties, could not separate until they returned a verdict.

Coke states, "By the law of England a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drinke, fire or candle, which some bookes call an imprisonment, and without speech with any, unlesse it be the bailife, and with him onely if they be agreed. After they be agreed they may in causes between party and party give a verdict, and if the court be risen, give a privy verdict before any of the judges of the court, and then they may eat and drinke, and the next morning in open court they may either affirme or alter their privy verdict, and that which is given in court shall stand. But in criminall cases of life or member, the jury can give no privy verdict, but they must give it openly in court."[9]

Describing the development of the jury as a tribunal, Holdsworth observes[10] that "the quasi-corporate character of this band of judges must be maintained till they have discharged their duty; and to hasten their deliberations it was the law that they could neither eat nor drink till they had given their verdict. It was only very gradually that these rules were relaxed in civil cases; and they have been only very partially relaxed in criminal cases." Indeed, the stipulation in s. 23 of the English Juries Act 1870, adopted in Victoria in the modified form found in s. 82 of the Juries Act 1928, that jurors may have refreshment at their own expense, is probably a statutory recognition of the old law, for, as Holdsworth notes,[11] "it seems to have been agreed Y.B. 20 Hy. VII Mich. pl. 8 that if the jury ate and drank together at their own expense the verdict would stand."

The rule that the jury could not separate had as an apparently inevitable consequence that the Court could not adjourn the trial. It is difficult for us to conceive that there could ever have been an

[6] Allen, *Legal Duties*, p. 108; Paton, *Jurisprudence* (2nd ed.) at p. 39.
[7] Holdsworth, *Hist. Eng. Law*, vol. 1, p. 318.
[8] *Hist. Crim. Law*, vol. 1, p. 304.
[9] First Institute, 227b.
[10] H.E.L. 1, pp. 318-9.
[11] H.E.L. 1, 319.

attitude different from that expressed by Blackburn J. in *The Queen v. Castro*,[12] where he said, "It was then contended that the adjournment of the Court vitiated the whole proceedings. It is scarcely possible to suppose that this objection was seriously made. . . . It is incident to a trial that the Court may, for sufficient reason, adjourn it . . ."[13] But in the seventeenth and eighteenth centuries the judges did not see the matter in so clear a light. Henry Lord Delamere was tried in 1686 in the Court of the Lord High Steward for high treason. Jeffreys was the Lord High Steward, and is said to have desired the conviction of the prisoner. When the time came to make the defence, the prisoner asked that as a great part of the day was spent, he should have until the next day to review his notes. Jeffreys doubted whether by law he could adjourn the trial and, expecting that they would say there was no power to do so, he summoned the judges to give their opinion. In the course of doing so, Lord Chief Justice Herbert said, "where the trial is by a jury there the law is clear, the jury once charged can never be discharged till they have given their verdict, this is clear; and the reason of that is, for fear of corruption and tampering with the jury. An officer is sworn to keep the jury together without permitting them to separate, or any one to converse with them; for no man knows what may happen, for (though the law requires honest men should be returned upon juries, and without a known objection they are presumed to be *probi et legales homines*, yet) they are weak men, and perhaps may be wrought upon by undue applications."[14] But to Jeffreys' annoyance, beyond saying that these reasons did not seem to apply to a trial by the peers, the judges abstained from giving an opinion concerning the powers of the Court of the Lord High Steward. In disregard of the desire of the peers, Jeffreys said decidedly that it was his Court and that he could not and would not adjourn. Nevertheless, Lord Delamere was acquitted.

The trial of Elizabeth Canning[15] for wilful and corrupt perjury

[12](1874) L.R. 9 Q.B. 350, at p. 356.

[13]The case concerned the trial of the Tichborne claimant for the misdemeanour of perjury, which was commenced on 23 April 1873 and with various interruptions, concluded on 28 February 1874. Cf. *Reg. v. Hall* (1890) 16 V.L.R. 650, where the Victorian Full Court said the Court has power to adjourn a criminal trial from day to day, and discussing the former practice, said, "The practice has been determined partly by a rule which formerly prevailed, and which went to the extent of not allowing the jury to leave the box until the finish of the trial. That practice was silently altered with regard to prolonged cases."

[14]11 How., *St. Tr.* 561-2; cf. Campbell, *Lives of Chief Justices*, vol. 2, pp. 84-5.

[15](1754) 19 How., *St. Tr.* 283.

is still instructive reading for those concerned with the administration of the law, for it is an enduring and salutary warning against a too-ready acceptance of strange tales told by attractive and apparently inexperienced young women. It has an interest in connection with the present subject, however, because after her conviction her friends (and she still had many, even when her audacious duplicity had been plainly established) obtained the opinion of Sollom Emlyn, the editor of Hale's *Pleas of the Crown,* upon certain questions. The trial had lasted fifteen days, and the jury had separated each night.[16] The second question and Emlyn's answer were as follows: "Is it agreeable to law, that a jury, once charged with the evidence, may be permitted to go at large, before they have delivered in their verdict? A. I am of opinion, that though a jury once charged, may, by consent of parties, be discharged wholly from trying the cause; yet I do not apprehend that the law will allow them to go at large, in a criminal case, while the trial is depending: for though in a long trial such a confinement may be inconvenient, yet I cannot find that the law has provided any remedy for it; it being in the eye of the law a less inconvenience, than exposing the jury to be tampered with before they have brought in their verdict; yet I see not but that they may take refreshment, and retire to rest in a place provided for them, provided that they be guarded by a sworn officer, that nobody be admitted to speak to them."[17]

The trial in ejectment between Campbell Craig, lessee of James Annesley, and Richard Earl of Anglesea came before the Court of Exchequer in Ireland in November 1743. The question of fact for the jury was short, whether Lord Altham had a son, but the trial lasted fifteen days. On the first day the Court sat until 11 p.m. when "the Court observed to the counsel, that as there was a great number of witnesses more to be examined on both sides, so it would be impossible for them, or the jury, to continue hearing the cause through, without an adjournment; and therefore recommended it to the parties to consent to such adjournment: Accordingly both parties readily expressed their consent, and the same being reduced to writing, and signed by the attornies on both sides, the Court adjourned till 9 o'clock the next morning. The Lord Chief Baron made a compliment to the jury, and expressed his sense of their honour and integrity; that the nature of the thing required an adjournment, though there was but one precedent of adjourning a jury on a trial of that kind; but as they were gentlemen of such strict honour, any confidence might

[16]See 1 Chitty's Rep., at p. 410; 2 B. & Ald., at p. 463.
[17]19 How., *St. Tr.* 670-1.

be reposed in them, without danger of any prejudice resulting from it."[18] Thereafter at the end of each day's sitting a consent in writing to the adjournment was signed. By this period in Ireland, therefore, it was recognized that there could be an adjournment of a civil trial with the consent of the parties, and that the jury could separate during the adjournment. It may have been a contributing factor that in this case that, according to the report, the jurors "were gentlemen of the greatest property in Ireland and almost all members of parliament."

In England, however, the judges were still constrained by the old law that the jury could not separate and the trial could not be adjourned. When Thomas Hardy was brought for trial for high treason in 1794, Eyre L.C.J. revealed his perplexity. "I am not satisfied", he said, "that, in strict law, there is a clear distinction between the case of allowing a jury to separate in a misdemeanour and in a capital case. I believe the rule of law is the same; and I am inclined to think that the strict rule was, that, *even in a civil case,* the jury could not separate after the case was once gone into."[19] But though His Lordship had no doubt of the general rule, he had to recognize the limitations of the flesh, and he observed that where it appeared that the length of the case would be such that the jury's attention "cannot be kept alive to it throughout, without the assistance of some refreshment, and where, from that length, they cannot have that assistance from the Court, which by law they are entitled to have" necessity requires a departure from the strict rule. But the "necessity of public justice . . . will only justify that departure as far as the necessity goes",[20] and as the sheriffs were able to furnish the jury with accommodation, the necessity did "not carry them through the whole case of being allowed to separate" and go to their own homes. From 29 October 1794, therefore, to 5 November, when they acquitted Hardy, the jury were kept in custody attended by the proper officers of the Court. When the jury were about to retire, the Lord Chief Justice said to them, "Gentlemen, I must apprize you, that after you have withdrawn there can be no refreshment given to you—Do you wish to take any moderate refreshment before you withdraw?", and one of the jurors answered "My Lord, we thank you, we shall not have need of any." A perusal of the state trials in the last decade of the eighteenth century leaves one amazed by the extraordinary capacity, mental and physical, of the persons—judges, counsel, jurors, prisoners and reporters—engaged in them. The reporters must have been

[18] 17 How., *St. Tr.* 1139, at p. 1163-4.
[19] 24 How., *St. Tr.* 415. (My emphasis.)
[20] *ibid.* 414, 418.

well versed in the law as well as adept in shorthand to have furnished us with the vivid and complete transcripts contained in Howell's *State Trials*. In Hardy's case the court sat daily, usually from 9 a.m. until nearly midnight.[21]

When that remarkable man John Horne Tooke was also tried for high treason in the same year, the question was again discussed. Eyre L.C.J. was of the same mind as he was during Hardy's trial, and he said that "there may arise a necessity so urgent that all those principles of justice, which originally demanded that there be no adjournment, would loudly call for an adjournment." Lord Chief Baron Macdonald gave it as his considered opinion that "if the rule of law cannot be preserved consistent with physical necessity, it seems to me that the Court is justified in deviating from the particular mode that has obtained, taking care that the jury do continue inaccessible".[22] The Court then determined to sit from 9 a.m. to 9 p.m., with an interval of one quarter of an hour for refreshment!

In 1796 William Stone was tried in the Court of King's Bench for high treason, Lord Kenyon L.C.J. presiding over a Court consisting of four judges and a jury. On the first day the Court sat from 9 a.m. to 10 p.m. without interruption or refreshment. Some of the jury were by then "exhausted and incapable as they declared of keeping up their attention much longer." The Lord Chief Justice pithily observed that "necessity justified what it compelled. And that though it was left to modern times to bring forward cases of such extraordinary length, yet no rule could compel the Court to continue longer sitting than their natural powers would enable them to do the business of it." The report records: "The jury retired to an adjoining tavern where accommodations were prepared for them, and the bailiffs were sworn well and truly to keep the jury, and neither to speak to them themselves, nor suffer any other person to speak to them touching any matter relative to this trial."[23]

In 1819 the Court of King's Bench had to decide whether upon the trial of an indictment for a misdemeanour which continued for more than one day, the separation of the jury at night with-

[21]The Scottish Courts also sat long hours without interruption. The trial of Deacon Brodie began at 9 a.m. on 27 August 1788. The proceedings continued all that day and at 1 a.m. on the next day, Thursday, 28th, counsels' addresses began. At 4.30 a.m. the Lord Justice-Clerk (Lord Braxfield) commenced his charge to the jury, which he finished at 6 a.m. The jury were enclosed, and the Court met again at 1 p.m. on the 28th, when a verdict of guilty was returned. From the opening of the case to the retiring of the jury was thus twenty-one hours, during which, it is said, Braxfield never left the Bench (*Trial of Deacon Brodie, Notable Scottish Trials*, p. 60).

[22]25 How., *St. Tr.* 130, 131.

[23]25 How., *St. Tr.* 1295n.

out the consent or knowledge of the defendants vitiated a verdict of guilty. There had been no suggestion that there had been any improper communication with the jury. The case is reported *sub nom., The King v. Kinnear and others,* in 2 B. and Ald. 462, and more fully, with extensive notes, *sub nom., The King v. Woolf and others,* in 1 Chitty's Rep. 401. The Court, consisting of Abbott C.J., Bayley, Holroyd and Best JJ., was unanimous in holding that the verdict must stand. Best J. said that "the true rule is that it is left to the discretion of the judge to say whether the jury are to be permitted to separate or not; of course, if in his judgment that separation is likely to be detrimental to the ends of justice, he will not permit it to take place."[24] Abbott C.J. considered that the consent of the prisoner to the separation is unnecessary and that he ought not to be asked to give it. He said that he founded his opinion on "the admitted fact, that there are many instances of late years, in which juries upon trials for misdemeanours have dispersed and gone to their abodes during the night for which the adjournment took place; and I consider every instance in which that has been done, to be proof that it may be lawfully done."[25]

In England, Parliament concerned itself with the question and in 1897 the Juries Detention Act[26] was passed, by which it was enacted, "Upon the trial of any person for a felony other than murder, treason, or treason felony, the Court may, if it see fit, at any time before the jury consider their verdict, permit the jury to separate in the same way as the jury upon the trial of any person for misdemeanour are now permitted to separate." Darling J. said of this legislation that "the Legislature has deliberately allowed [the juries] to separate and go out in cases of felony . . . although in the whole course of English history down to 1897 they had been locked up."[27]

In *R. v. Crippen*[28] an attempt was made to set aside a conviction for murder on the ground that a juror who had been taken ill suddenly was taken by the medical practitioner called to attend him from the jury box into the open air. The Court of Criminal Appeal considered that a mere physical separation by one juror from the rest occasioned by such an emergency did not constitute a "separation" within the rule.

The King v. Ketteridge[29] arose for decision in 1914, and the English Court of Criminal Appeal held that if a juror separates

[24] 2 B. & Ald., at p. 467.
[25] 1 Chitty's Rep., at p 420.
[26] 60 & 61 Vic. c. 18 s. 1.
[27] *R. v. Twiss* [1918] 2 K.B., at p. 858. I have corrected by omitting "treason and treason felony" an obvious error in the passage.
[28] [1911] 1 K.B. 149
[29] [1915] 1 K.B. 149

himself from the other jurors after the judge has summed up in a criminal trial and, whilst not under the control of the Court, converses, or is in a position to converse, with other persons, an irregularity has occurred which renders the whole proceedings abortive. The Court, (Darling, Lush and Atkin JJ.) considered that it was not necessary or relevant to consider whether the irregularity had in fact prejudiced the prisoner. In *Rex v. Twiss*[27] the Court of Criminal Appeal (Darling, Avory and Lush JJ.) accepted Ketteridge's case as correct, but distinguished it as having no application to a state of affairs where a juror, before the summing up, spoke to witnesses during the adjournment, the Court being satisfied that the prisoner had not been prejudiced.

The exigencies of war led to a relaxation of the old rules in England in 1940 under the authority of wartime regulations,[30] with, apparently, no harmful consequences, for the Criminal Justice Act 1948[31] repealed the Juries Detention Act 1897, and by s. 45 (4) enacted that, "upon the trial of any person for an offence on indictment the Court may, if it thinks fit, at any time before the jury consider their verdict, permit them to separate." The section was considered by the Court of Criminal Appeal in *Rex v. Neal*.[32] It appeared that after the jury had retired to consider their verdict, they sent a message to the recorder asking permission to leave the Court to obtain luncheon. The permission was granted, and the jury went into the town unaccompanied by the bailiff who had been sworn to keep them in some private and convenient place. After having had their luncheon, the jury came back to the Court and returned a verdict of guilty on some of the counts of the indictment. The Court of Criminal Appeal (Lord Goddard C.J., Oliver and Stable JJ.) held that this was so serious an irregularity and departure from the procedure recognized by law that the Court had no option but to quash the conviction. "Certainly no member of this Court", said Lord Goddard, "has ever heard of a jury being allowed to leave the building or to depart from the custody of the bailiff once they have been enclosed for the purpose of considering their verdict. In fact, it is well-known that to avoid juries being kept locked up without refreshment it is a common practice for the presiding judge to break off his summing up, maybe quite near the end, to allow the jury to obtain their luncheon or other refreshment, and afterwards to complete his charge, and there is no case to be found in the books where a jury once given in charge of the bailiff have been allowed to leave the building for

[30] S.R. & O. 1940, No. 1869. [31] 11 & 12 Geo. 6 c. 58.
[32] [1949] 2 K.B. 590, cf. *Reg. v. Murphy* (1867-9) L.R. 2 P.C. 535.

any purpose whatever."[33] The latter observation requires qualification, for it happens not infrequently that after retiring to consider their verdict the jurors go in charge of court officials to view the scene of the alleged crime.

The English Court of Criminal Appeal has no statutory power to direct a new trial if it quashes a conviction,[34] and the Court went on to consider if a new trial could be ordered by means of a writ of *venire facias de novo juratores*. As the circumstances that resulted in a mistrial were not such as to render the trial a nullity from the outset it was held that the writ could not be granted.

The whole subject was reviewed by the Court of Criminal Appeal of Northern Ireland in *R. v. Taylor*.[35] There is a provision in Northern Ireland legislation almost identical with the English Juries Detention Act 1897, s. 1, but there is no enactment similar to s. 35 (4) of the Criminal Justice Act 1948. The prisoner was convicted of murder. The facts are conveniently summarized in the headnote of the report. A jury impanelled in a lengthy trial for murder were lodged each evening in the courthouse. On the third day of the trial the jury sought and obtained the permission of the trial judge to go for an evening drive in a private omnibus for the purpose of fresh air and exercise. The permission was given on condition that the jurors should be in charge of four constables sworn as jury keepers, two of whom were to precede and the other two to follow the jurors during their exercise. In the course of the drive the omnibus stopped at a seaside town where the jurors split into three groups, one of which went into a private room in an hotel for drinks, and each of the other two went for a walk in the course of which they entered a café for refreshments. Each group was accompanied by at least one jury keeper, and the evidence of the jury keepers was that none of the jurors conversed with any member of the public except for the purpose of ordering refreshment.

On the following evening, without any further permission from the trial judge, nine of the jurors accompanied by three jury keepers went for a drive in a private omnibus to a neighbouring town. The remaining jurors stayed in the courthouse with the other jury keeper. The nine jurors, on arriving at their destination, split into three groups each accompanied by a jury keeper. One went into a private room in an hotel for drinks. A second group of three jurors went into a shop, where one juror spoke to the shopkeeper who was an acquaintance, while the other jurors engaged

[33] *ibid.* at p. 594.
[34] Cf. 68 L.Q.R. 327; *R. v. Dyson* [1908] 2 K.B. 454.
[35] [1951] N.I.L.R. 57.

in general conversation with customers in the shop. The jury keeper in charge of this group deposed that no reference to the trial was made by any person. After leaving the shop this second group went for a walk and then returned to the lounge bar of an hotel where members of the public were present, but the jurors spoke to no one except when ordering drinks. The third group went for a walk and then entered a café where they had coffee: though members of the public were present in the café the jurors spoke to no one except when ordering coffee.

On the return journey on this second evening the driver of the omnibus, at the request of the foreman, made a detour in order to pass a road junction near the scene of the crime which had been referred to in the course of the trial.

None of these facts was known to the trial judge or counsel until after conviction and sentence.

The Court of Criminal Appeal (Porter and Black L.JJ.) held (i) that the foregoing facts showed such irregularities in the established procedure relating to the separation of jurors as to vitiate the verdict; (ii) that a substantial deviation from the established rules of procedure is itself a miscarriage of justice, and it was irrelevant to consider whether the accused had in fact been prejudiced by these irregularities; (iii) that as the trial was not such a mistrial as to be a nullity from the outset there was no power in the Court of Criminal Appeal to order a *venire de novo*, and that accordingly the conviction must be quashed. In their Lordships' opinion, the common law rules relating to the separation of juries in cases of felony in the period before the summing up, though less strict than those which apply after summing up, require the segregation of the jurors from the general public, with whom they may not have any communication except in case of necessity or emergency. A judge may, however, in his discretion allow a jury to have an outing for fresh air and exercise, but in such a case they must be kept together as a body.

The judgment of the Court was delivered by Porter L.J., and it contains a valuable survey of the common law and the later decisions. Referring to the practice in Northern Ireland, Porter L.J. observed that until the Criminal Justice Act (Northern Ireland) 1945, which in substance enacted s. 1 of the English Juries Detention Act 1897, "if a trial for treason or felony did not conclude in one day the jury, to use the common phrase, was 'locked up' for the night."[36]

[36]p. 68. Porter L. J. also said that "in practice, of course, it has rarely been found necessary in our jurisdiction in recent years to lock up juries overnight except in capital cases. *It has almost always been possible to conclude the trial of other felonies in a single day.*" (My emphasis.)

The Tasmanian case of *R. v. Langmaid*[37] may be contrasted with the decision of the Court of Criminal Appeal of Northern Ireland. The Tasmanian legislation was in substance the same as that considered in *R. v. Taylor*,[38] for the Jury Separation Act 1906 of Tasmania contained a provision (s. 2) modelled on the English Juries Detention Act 1897, s. 1. On the trial at Launceston of the prisoner Langmaid for murder a number of curious incidents occurred. The jury had been placed in charge of constables who were for the purpose deemed to be officers of the Court, and on a Sunday during the trial eleven jurors went for a drive under escort, and the other went to his home. He attended to some affairs there, but had no communication with anyone except in the presence of an officer of the Court. On different occasions other jurors went under escort to the barber's saloon and some jurors used the telephone. These incidents were not brought to the trial judge's notice until after conviction. The trial judge, McIntyre J., refused a new trial, taking the view that there had been no breach of the rule against separation, which he considered meant only that jurors "must not separate or disperse so as to get from under the control and observation of the officers of the Crown". The view taken by the Northern Ireland Court seems to be preferable, and, on the face of it, it is more likely that the aphorism that not only should justice be done but that it should manifestly and undoubtedly be seen to be done[39] would have been observed had McIntyre J. acceded to the application for a new trial.

Writing in 1883, Sir James Fitzjames Stephen observed,[40] "It is a remarkable illustration of the vagueness of the criminal law upon points which one would have thought could not have remained undecided, that till very modern times indeed it was impossible to say what was the law as to cases in which the jury could not agree, and it was possible to maintain that it was the duty of the presiding judge to confine them without food or fire till they did agree. It was, however, solemnly determined in 1866 in the case of *Winsor v. R.*[41] that in any case regarded by the judge as case of necessity the jury may be discharged and the prisoner committed and tried a second time, and that a judge is justified in regarding a case in which the jury are unable to agree after a considerable length of time as a case of necessity. One result of this decision has

[37](1910) 6 Tas. L.R. 10. [38]*supra*.

[39]*R. v. Sussex Justices, Ex p. McCarthy* [1924] 1 K.B. 256, at p. 259.

[40]*Hist. Crim. Law*, vol. 1, pp. 305-6.

[41]L.R.I. Q.B. 289. In Victoria, the possibility of bias or partiality discovered after the jury has been impanelled affords no ground for discharging a jury. *R. v. Loader* 22 V.L.R. 254, and cf. *R. v. Cadley* [1918] V.L.R. 162.

practically been to obviate the objections usually made to the rule requiring unanimity in jurors, all of which turned on the notion that the law required the jury to be starved into giving a verdict. Every authority bearing on the subject is referred to in the argument."[42]

Incidentally, Stephen thought "trial by jury has both merits and defects, but that the unanimity required of the jurors is essential to it. . . . If the rule as to unanimity is to be relaxed at all, I would relax it only to the extent of allowing a large majority to acquit after a certain time."[43]

It was decided in 1916 that, whatever the position may have been in ancient times, civil trials are outside the strictness of the rules that govern criminal trials. In *Fanshaw v. Knowles*[44] it appeared that the jury had retired to consider their verdict and arrived at agreement on two of the three questions submitted to them. When they returned into Court, the judge was not present, and they informed the associate of the position they had reached. The associate told them to return the next morning when the judge would be available. They did so, and after discussion with the trial judge, they returned a verdict upon which judgment was entered. It was contended that the fact that the jury had separated after retiring to consider their verdict, and before returning a verdict in a form on which judgment could be based, invalidated the verdict. Lord Reading C.J. examined the history of the law relating to the separation of juries, and whilst deprecating what had happened, concluded that such a separation in a civil trial did not invalidate the verdict. Warrington L.J. said that "the bare question which is asked here, namely, whether in a civil action after the jury have been charged they can be allowed to separate without avoiding their verdict, must be answered in the affirmative". Scrutton J. made some characteristic observations about the duty of the trial judge to remain available whilst the jury was deliberating on their verdict. All members of the Court emphasized that the decision had no relation to the rules applicable to criminal trials, but Lord Reading C.J. expressly stated that he saw no reason for departing from the decision of the Court of Criminal Appeal in *R. v. Ketteridge*.[45]

[42]It is said that Lord Wensleydale was of opinion that Coke correctly stated the law when he said "a jury sworn and charged in a case of life or member cannot be discharged by the Court or any other, but they ought to give a verdict" (First Institute 227b), and that his intervention with Sir George Grey, the Home Secretary, led to the sentence being respited to enable a writ of error to be sought. See R. S. Lambert, *When Justice Faltered*, p. 102.

[43]*Hist. Crim. Law*, vol. 1, p. 305; cf. Forsyth, *History of Trial by Jury* (1852), at p. 254.

[44][1916] 2 K.B. 538.

[45][1915] 1 K.B. 467. It was held by the High Court of Australia in the Vic-

II

We now come to consider the position in Victoria. Section 82 of the Juries Act 1928 provides:

> Jurors after having been sworn may in the discretion of the judge be allowed at any time before giving their verdict the use of a fire when out of Court, and may be permitted to have reasonable refreshment, such refreshment to be procured (except in capital cases or where on other criminal inquests the jurors are detained for one or more nights) at their own expense.

This section is very similar to s. 23 of the English Juries Act 1870, but the words in parenthesis do not appear in the English statute. The provision appears to have been enacted in Victoria for the first time in the Juries Statute 1876 (No. 560), where it appeared as s. 76. The words then in parenthesis read "(except where on criminal inquests the jurors are detained for one or more nights)". These same words appeared in the Juries Act 1890, but they were altered to their present form in the Juries Act 1915 (Act 2674) s. 82. In the explanatory paper of the 1915 Consolidated Statutes it is said "the reference to 'capital cases' in accordance with the existing practice is added."[46] The Juries Act 1928, s. 3, (as did the Juries Act 1915) defines "criminal inquest" as meaning "trial before a court of criminal jurisdiction of any issue joined upon an indictment presentment or information for any indictable offence." Capital cases would thus have been within the expression "criminal inquests" used in the section in its original form. A literal reading of the section as it was originally expressed would have resulted in the jurors' having to bear the expense of their refreshment until they had been detained for at least one night. The section is the authority to the Sheriff of the Supreme Court to expend public moneys upon refreshments for the jury, and it may have been felt that where a jury was impanelled in a capital case, and not thereafter permitted to separate, there was doubt whether the Sheriff could pay for their luncheon if the trial did not extend beyond one day. The words now in parenthesis authorize the payment for jurors' refreshment (i) in capital cases, whatever their duration, and (ii) in other criminal trials when the jurors are detained for more than one night. The section could with advantage be re-drawn, so as to empower the

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torian case of *Syme v. Swinburne* (1909) 10 C.L.R. 43 that in a civil action a conversation between a juror and one of the parties or his representative during the trial is not itself a ground for a new trial unless there is reasonable ground for believing that the course of justice has been, or was likely to be affected, and a Court of Appeal is loth to interfere with the trial judge's discretion in not discharging the jury.

[46] 1915 Statutes, vol. 1, p. xxxii.

Court to direct the Sheriff to pay from public funds the cost of refreshment for jurors both in civil and criminal trials, where they are not allowed to separate when the meal-time arrives. This happens in civil trials only when the jury have retired to consider their verdict, but in any criminal trial the judge may order at any stage of the proceedings that the jury should not be allowed to separate. Whenever the judge does so, it seems only reasonable, particularly in view of the inadequate fees paid to jurors, that the State should bear the cost of their meals during the time they are locked up.

In Victoria the practice has been for many years to allow juries to separate in trials for felonies, other than murder, as well as for misdemeanours, except where from the nature of the case or for reasons brought to his notice the trial judge considers that it is necessary for the proper administration of justice to segregate them. Since the Crimes Act 1949 (No. 5379) came into force on 1 November 1949, the only offences punishable by death are treason and murder, but previously those two crimes, certain acts done with intent to commit murder (Crimes Act 1928, sections 8 (1), (10)), rape (s. 40 (1)), carnal knowledge of a girl under ten (s. 42), buggery with a person under fourteen or with violence (s. 65 (1)), robbery with wounding (s. 113), burglary with wounding (s. 124), setting fire to an occupied house (s. 187), were capital offences. It was then unusual for juries to be locked up on trials for capital offences other than murder, and even where murder was charged, though it was usual, it was not the invariable practice to segregate the jury. Indeed, where the trial takes place in a country town and the accommodation available is not likely to ensure effective segregation it is probably better not to lock the jury up, and I have followed that course in a trial for murder at Wangaratta. The disregard or relaxation of the common law rules seems to have begun a long time ago, for in *R. v. Jeffers*[47] Hood J. allowed jurors who had commenced their deliberations to separate and go to their homes for the night. According to the report, Hood J. said "that he felt some doubt in letting the jury go to their homes instead of being locked up for the night. He would accede to the wish of the jury as the same course had been adopted by other judges, but he felt he was taking a great responsibility in adopting such a practice in the present case." The prisoner was charged with carnal knowledge of a girl under sixteen years of age, which was (and is, Crimes Act 1928, s. 44) a felony. Soon afterwards, on the authority of *Jeffers'* case, Holroyd J. on a trial for shooting with intent to murder, which is said in the report to have been a capital offence, allowed the jury to separate to go to their homes at night during the trial.[48]

[47](1895) 1 A.L.R. 71.

[48](1897) 3 A.L.R. (C.N.) 50.

I do not think that the course adopted by Hood J. is permissible, although that taken by Holroyd J. is. Quite apart from the considerations mentioned in *R. v. Neal*,[49] s. 78[50] of the Juries Act 1928 deals with the period that must elapse before jurors who cannot agree may be discharged, and having regard to the state of the law when the prototype of the section was enacted in 1876, that section, and s. 475 of the Crimes Act 1928 dealing with procedure on disagreement, plainly contemplate that during the period of their deliberations they shall not be permitted to separate. The dangers of separation at that stage are obviously greater than during the trial, and after retirement a spearation seems, in the phrase of Darling J. in *R. v Twiss*,[37] to violate the whole solemn procedure of the law. Separation during the trial and before the jurors embark on their deliberations is quite another matter, however, and the reasoning of the majority of the New York Court of Appeals in 1859 in *Stephens v. The People*[52] is a persuasive authority that might well be applied if the question ever arose in this State. The prisoner was convicted of the murder of his wife, and the question for the Court was whether the conviction was vitiated by the separation of the jury during the trial, that separation having taken place with the prisoner's consent and the express permission of the Court. As is the position at present in Victoria, there was no statute authorizing the trial judge to permit the jury to separate. The Court consisted of eight judges, but the only judgment reported is that of S. B. Strong J., and it is worth reading for its vigour, its learning, and its lucidity. Strong J. was of the opinion that the Court on its own volition had power to permit the separation of the jury on a trial for murder, irrespective of the prisoner's consent, and three of the

[49][1949] 2 K.B. 590.

[50]Sec. 78 is as follows: "In any criminal inquest where the jurors after six hours' deliberation are unable to agree on their verdict they may be discharged from giving a verdict; and in any civil inquest where all the jurors after three hours' deliberation are unable to agree on their verdict the decision of three-fourths in the case of a jury of twelve or of five-sixths in the case of a jury of six may be taken as the verdict of all; and if after six hours' deliberation three-fourths or five-sixths (as the case may be) are unable to agree on their verdict such jurors may be discharged from giving a verdict; and proceedings may thereupon be taken anew as if no trial had been commenced, provided that another trial in any such criminal or civil inquest may be commenced forthwith or during the same sittings, assizes or sessions as the court discharging such jury thinks fit to order."

This section is found as s. 71 of the Victorian Juries Statute 1876, but I have not come across any similar English provision. See also Crimes Act 1928, section 475, which was first enacted in the Crimes Act 1915, as embodying existing practice (Explanatory Paper, 1915 Statutes, vol. 1, p. xxiii).

[51][1918] 2 K.B. at p. 859.

[52](1859) 5 New York Rep. (Ct. of App.) (Smith) 549. A discussion of the American authorities will be found in Proffat on *Jury Trial* (1877) at para. 394 *et seqq*.

other judges concurred in this view. He held also that had the separation been irregular, the unsolicited consent of the prisoner would have cured the defect, and five of the other judges agreed with that opinion. Two of the eight judges considered that the separation of the jurors constituted an error in law, but their reasons for that opinion are not reported. Strong J.[53] said, "In the early stages of the legal history of England many of the rules regulating the conduct of the Court and jury on trials were very strict. Among others there could be no adjournment on trials for felonies; the jurors were excluded from all communication with others than members and officers of the Court, during the trial, and they were not permitted to separate, after they had been charged by the Court, until they had rendered a verdict. The last mentioned rule was carried so far that, if the jury failed to agree during the sessions of the Court in the county where the trial was had, they were conveyed into the county where the presiding judge next held his Court, and were held in confinement until they rendered a verdict. There were reasons for those rules at an early day which do not now exist. The jurors were then comparatively ignorant, subject to the control of their superiors, and easily led astray. They had but faint notions of popular rights, and submitted to restrictions which would not now be tolerated." He considered that if, as *Woolf's* case[54] established, "there is a power in the Courts to abolish or retain the old rules in cases of misdemeanour, it must extend to all criminal cases. I know of no limitation, nor of any reason why there should be one. Whether it should be extended to trials for capital offences is simply a question of expediency and justice – not of power." Strong J. concluded his elaborate discussion of the question by observing, "Rules, restrictive of the freedom of human action, and especially such as subject the innocent and the unsuspected of crime to confinement, can only be justified by the most urgent necessity; and certainly such necessity cannot be inferred from the mere possibility that a juror may be improperly approached and misled, if allowed his liberty occasionally during during the progress of a long trial."[55]

Strong J.'s observations upon the oppressiveness of confining jurors during a trial may be compared with Chitty's note on *The King v. Woolf*,[56] that "some consideration also seems due to the jury; who are in general men of active lives and regular habits, and

[53] *ibid.* at p. 553. Archbold doubts that it was ever the law or practice that jurors were conveyed from county to county. *(Criminal Pleading, Evidence and Practice,* 26th ed., p. 221.)

[54] 1 Chitty's Rep. 401.

[55] 5 N.Y. Ct. of App. (Smith) 567.

[56] 1 Chitty's Rep. at p. 405, n.

are therefore likely to sustain great inconvenience by being totally prevented during the continuance of a very long protracted trial from any attention to their affairs, however urgent."

In Victoria, therefore, it seems that although there has been no statutory relaxation of the common law rules the Supreme Court has developed its own practice of treating the question whether the jury should be segregated or may separate before the conclusion of the summing up as a matter within the discretion of the trial judge. The practice has been so long-standing and general that it must now be taken that no objection would be entertained to a conviction merely on the ground that the jury had been allowed to separate. Both in *The King v. Woolf (supra)* and *The People v. Stephens (supra)* the judges invoked their knowledge of the existing practice of permitting jurors to separate to justify their rejection of the contention that the convictions were vitiated by the separation of the jurors. If it were shown that the separation resulted in a tampering with the jury so as to bring about a conviction, doubtless the Full Court would be bound to allow an appeal under s. 594 of the Crimes Act 1928 as a matter involving a miscarriage of justice, but it would be the interference with the jury, and not the separation, that would be the occasion of the Full Court's intervention.

Whatever may have been the position when Hood J. decided *Jeffers'* case, it has for long been the practice in Victoria not to allow jurors to separate after they have retired to consider their verdict, and it is thought that, as a general rule, any departure from it would involve probably a disregard of s. 78 of the Juries Act 1928, and at the least, an irregularity of so serious a kind that it would result in a mistrial. In such an event, however, the Full Court, unlike the Court of Criminal Appeal in England and Northern Ireland in *Neal's* case[57] and *Taylor's* case[58] respectively, would have the power by virtue of the Crimes Act 1928, s. 594 (2), to direct a new trial. It would seem, therefore, that in Victoria –

(i) it is within the discretion of the trial judge in any criminal trial to allow the jury to separate up to the stage when the summing-up is concluded and they retire to consider their verdict;

(ii) if the judge orders that the jury be segregated it is unlawful for them to separate. If a separation does occur before the conclusion of the summing-up, a conviction would not necessarily be invalidated, but the juror or jurors disregarding the order may be punished as for contempt of Court;[59]

[57] [1949] 2 K.B. [58] [1951] N.I.L.R. 57.
[59] *The King v. Woolf*, 1 Chitty's Rep. at pp. 421, 423. Cf. Crimes Act 1928,

(iii) the discretion of the judge, if he permits the trial to proceed, will not be reviewed without very substantial reason;[60]

(iv) if the jurors unlawfully separate after retiring to consider their verdict, a verdict of guilty by them is bad and a conviction based upon it must be quashed. What constitutes a separation is a question of fact to be decided in each case as it arises;[61]

(v) where a conviction is quashed because of an unlawful separation, the Full Court, whether the matter comes before it under s. 477 and s. 478 of the Crimes Act 1928, as a crown case reserved, or as an application for leave to appeal under Part V of the Crimes Act 1928, may order a new trial.

Where it is practicable to do so, and the inconvenience imposed upon them is not unduly heavy, there are considerable advantages in segregating jurors in criminal cases that have excited public feeling. The jurors are thereby protected from uninformed discussion and the harmful effects of misguided prejudice, and the trial is, on the whole, likely to be fairer to the accused. Embracery – the common law misdemeanour of attempting improperly to influence a juror[62] – is not common, and by and large juries have been shown to be trustworthy, but in important trials it is as well to avoid the possibility of improper influence.[16*] It cannot be disguised, however, that the lot of jurors impanelled and locked up in a difficult murder or other criminal trial is not a happy one, and where the trial lasts for nearly a fortnight, as has happened during recent years in Victoria, jury service becomes very burdensome, and jurors who are segregated from their families and business affairs in such circumstances deserve every consideration. Moreover, power should be given to the trial judge to excuse jurors who have served upon such a trial for such period as he thinks fit. Without statutory authority it

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s. 450:— The Court may in any case if it thinks fit at any time before the jury have given their verdict direct that they shall view any place or thing which the Court thinks it desirable that they should see and may give any directions necessary for that purpose. The validity of the proceedings shall not be affected by disobedience to any such directions, but if the fact is discovered before the verdict is given the court may if it thinks fit discharge the jury and direct that a new trial shall take place during the same sitting or may postpone the trial as provided by section three hundred and ninety-four.

[60] cf. *Syme v. Swinburne*, 10 C.L.R. 43; *R. v. Hall* (1890) 16 V.L.R. 650.

[61] This seems to accord with American practice when Proffat on *Jury Trials* was published (1877). See Proffat *(op. cit.)* at para. 397.

[61*] Jurors are allowed newspapers when locked up, but all reports of and references to the trial are excised. Cf. *Reg. v. Murphy* (1867-9) L.R. 2 P.C. 535 at pp. 539-40, 551, which was an appeal to the Privy Council from the Supreme Court of N.S.W.

[62] Cf. Juries Act 1928, s. 91; *In re Dunn* [1906] V.L.R. 493, per Cussen J. at p. 502.

is at least doubtful whether a judge may lawfully do so,[63] and legislation to confer such power on the trial judge, and also the power to order payment from public funds for the jurors' meals when they are locked up, should excite no political controversy and could well be enacted without delay.

It may be suggested that the number of days of a trial may be lessened by longer daily sessions. Experience shows, however, that the proper administration of justice is not likely to be assisted by sitting the long hours that were once customary. In Victoria, it is now usual in a long criminal trial to sit from 10 a.m. to 5 or 5.30 p.m. when evidence is being taken, and on the final day for such time as will enable the judge to complete his charge. I have on occasions kept the Court in session to hear evidence in the evening, but I am disposed to think that it is not satisfactory to do so. Even those who are habituated to it by long practice find it difficult to be attentive and to concentrate on the evidence for longer than five and a half or six hours daily, and it is too much to expect that jurors should do so. Furthermore, the difficulties involved in sitting long hours are not always understood, but, though they may not be apparent, nevertheless they are very real. A criminal trial of any magnitude involves assembling a considerable number of persons – lawyers, police, witnesses (lay and expert), shorthand writers and court attendants. Some time must be given each day to the preparation of the material to be adduced on the following day, and to do this counsel and instructing solicitors and clerks must have some time available out of court. Shorthand writers must have their notes transcribed, and their very exacting task exposes them to fatigue which makes long sittings impracticable. The burden on the trial judge is greater now than in former times, for the modern appellate system leads to a careful scrutiny of the transcript and the reversal of convictions if there has been any significant error in the conduct of the proceedings. Those who have taken part in a heavy criminal trial, whether as judge or counsel or jurors, will readily admit that it is an exhausting experience when undertaken during the hours of sitting at present followed, and, all things considered, it is my opinion that adherence to the present hours is in the best interests of the administration of justice.

Earlier I have referred to Sir James Fitzjames Stephen's observations on the way in which it became established that a trial judge has the power for substantial cause to discharge the jury in a criminal trial. Trial judges in Victoria exercise this power fairly freely, and do so whenever there appears any reason to think that the fairness of the trial has been endangered. If, for example, the trial

[63] cf. Hals., 2nd edn. p. 324, para. 620, note (m).

judge is creditably told that a juror has been seen conversing with the accused or someone connected with the accused, it is the usual practice to discharge the jury and remand the prisoner for a new trial. Similarly, if some event happens during the trial that is likely to have such an effect upon the jury that their ability to try the case fairly is likely to have been adversely affected, it is not uncommon to discharge the jury so that there may be another trial.

In *Rex v. Bradshaw*[64] it appeared that one of the jurors had told a police constable that he "would never bring in any man guilty." When asked by the Judge the juror did not disavow that attitude. On the application of the Crown, Sholl J. discharged the jury, observing that "the Court, as representing the community, should intervene if it feels judicially doubtful whether a jury can return a verdict in which the public will have confidence." This decision should be compared with *Reg. v. Loader*[65] where Holroyd J., rejecting an application for the discharge of a jury after the trial had begun, gave it as the opinion of the judges that "it is, to say the least, excessively doubtful whether the Court has any power at this stage of the proceedings to discharge the jury on the ground of the supposed or alleged partiality and bias of the jurymen; and if such power existed we think we should be establishing a most dangerous precedent in exercising it in the present instance and on facts such as have been put before us. . . . At the most they could only have amounted to ground for challenge for favour."

In November 1952 at Melbourne Herring C.J. discharged a jury on an application of the Crown based upon the speech of prisoner's counsel. Counsel was said to have misstated the effect of the evidence and made other erroneous statements and it was contended that these happenings had rendered it impossible for the case to be tried properly, and that their prejudicial effect could not be removed by a direction from the trial judge.[66]

The determination of questions such as these as they arise is a matter for the trial judge. Where a prisoner, despite warnings in the absence of the jury, deliberately brought his bad character before the jury with the purpose, as the trial judge thought, of causing a mistrial, and the trial was allowed to proceed, the Full Court refused to interfere with a conviction.[67] Smith J. observed, "It is of course clear that [evidence of bad character] should so far

[64][1951] A.L.R. (C.N.) 1051. [65](1896) 22 V.L.R. 254, at pp. 255-6.

[66]*Reg. v. Cinamond*, 27 November 1952. In this connection, cf. *Syme v. Swinburne* (1909) 10 C.L.R., at p. 55, where Griffith CJ. said of a civil trial, "I never heard that misconduct on the part of counsel in relation to things which were said in open Court could amount to a mistrial." For the effect of misconduct by the prosecutor, see *R. v. Bathgate* (1946) 46 S.R., N.S.W. 282; *Berger v. U.S.* 295, U.S. 78; 79 Law. Ed. 1320.

[67]*The Queen v. Francis John Coman*, 2 October 1952.

as practicable, be kept from the jury in a criminal case, but no strict rule can possibly be laid down that the jury must be discharged if such evidence is given. It is a matter for discretion, a matter to be decided by the trial judge, and, in the special circumstances of this case, having regard to the terms of the learned judge's report, I think it is quite impossible for the Court to reject his view of the matter, based as it was upon personal observation of the witnesses and the accused, their actions, gestures and expressions; and, seeing that it is not open to this Court to reject his view that the evidence was deliberately introduced, I think that it follows that this Court cannot be satisfied that there was any miscarriage of justice." Obviously, juries should not be discharged without very substantial cause,[68] and this extreme step should be taken only when no satisfactory corrective measures are available to the trial judge and the interests of justice undoubtedly and inescapably require a trial by another jury.

[68]Cf. *Rex. v. Bugg* [1951] A.L.R. (C.N.) 1057, where in a capital case it was necessary to discharge the jury because of the death of the mother of a juror. In Victoria, the statutory provisions relating to the discharge of juries seem to be Juries Act 1928, s. 78; Crimes Act 1928, sections 405 and 475, and by implication in trials for capital offences, Juries Act 1928, s. 76. For an instance from New South Wales where the trial judge became aware of the death of a juror's son after the jury had commenced its deliberations, and did not tell the juror until after verdict, see the article *R. v. Dean*, by C. K. Allen (1941) 57 L.Q.R. 85, at p. 110.