

# CELEBRATED, CULTIVATED BUT UNDERRATED?

## W S GILBERT AS A LEGAL SATIRIST

By J Neville Turner\*

The operettas of W S Gilbert and Arthur Sullivan form a delightful part of the repertoire of light operatic groups and schools throughout the English-speaking world. The vivacity of Sullivan's tunes and the playful good humour of Gilbert's lyrics have ensured a lasting popularity of this essentially Victorian, and peculiarly English, form of entertainment.

What is perhaps not appreciated by the many devotees of Gilbert and Sullivan as they mouth the familiar choruses is that these works contain perspicacious observations on the institutions and foibles of Victorian society that make them rich material for social historians.

Gilbert's satire was rarely biting. It is meant to be enjoyed rather than to cause revolutions. Although a great admirer of Dickens (Gilbert dramatized *Great Expectations*), he never saw himself as a reformer or missionary. His satire is without rancour.

Nevertheless, he can be perceived as a keen observer of the foibles and follies of the society in which he lived. And this is particularly true of the law, an institution which he knew intimately. He practised, unsuccessfully, as a barrister for three years. Unlike Dickens, Gilbert made no searing attack on the legal profession. It has been said that his characters 'reach out after any system - political, social, military or aesthetic - which promises stability, then find the demands of the system oppressive'.<sup>1</sup>

But he who reads Gilbert carefully will find an almost Kafkaesque mockery of both procedural and substantive law, much of which has relevance today.

In this essay, the two operettas in which law features most prominently (*Trial by Jury* and *Iolanthe*) will be examined for their legal content. Citations from other operettas will also be made, so as to verify the thesis that the Gilbert and Sullivan operettas furnish a rich mine of material for the social critic of the law, and incidentally, provide excellent teaching material for students of the legal process and legal institutions.<sup>2</sup>

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<sup>1</sup> T G Head, 'Rank and Value in the Plays of W S Gilbert' in ed J Helyar, *Papers at the International Conference on Gilbert and Sullivan 77* (University of Kansas libraries, 1970)

<sup>2</sup> Cf J Neville Turner, 'Teaching Law through Literature'. 14 *University of Queensland Law Journal* 61 (1985).

## TRIAL BY JURY

*Trial by Jury* was the first major success of the Gilbert and Sullivan team.<sup>3</sup>

The action takes place entirely in a court. It is the only one of the Gilbert and Sullivan operettas that is *durchkomponiert*. There are no recitatives, and no speech. It is sung throughout.

It concerns an action which was notoriously vulnerable to satire - the breach of promise to marry. Dickens had lampooned aspects of this action in *Pickwick Papers*. The action, almost invariably brought by a woman, was for breach of a contract. The consideration for the promise to marry was generally perceived to be the promisee's own reciprocated promise, though usually a gift, such as an engagement ring, was made by the man. The nature of this gift sometimes gave rise to juridical dispute. Was it an absolute gift, or a gift on condition that the marriage took place? This might depend on the construction of the particular contract. Generally, however, the gift was returnable if the woman unjustly refused to marry the man.<sup>4</sup>

The action had many defects, as will be seen, but it survived well into the twentieth century. Indeed it was not abolished in Australia until 1976! It gave rise to many salacious and entertaining cases, and was dream material for journalists. Almost all the essential flaws in the action were perceived by Gilbert and brilliantly lampooned.

### THE CASE BEGINS

The curtain rises on the court as it opens its proceedings at 10 am. The flavour of the bustle of the court is captured in the opening words:

Hearts with anxious fears are bounding;  
Halls of Justice crowds surrounding,  
Breathing hope and fear.

We are told that the defendant, Edwin, is shortly to appear, 'summoned by a stern subpoena' (conveniently rhyming with the name of the plaintiff, 'Angelina').

<sup>3</sup> Their first joint venture, an 'Operatic Extravaganza' (1871) called *Thespis*, was a failure.

<sup>4</sup> *Cohen v Sellar* [1926] 1 KB 536.

The usher calls for silence in court, and then gives the jury a homily about being free from bias. He does, however, add a few words of sympathy for the female plaintiff and denigrates the defendant, even before they appear.

Oh; listen to the plaintiff's case;  
Observe the features of her face ...  
Condole with her distress of mind.

And when ...  
The ruffianly defendant speaks ...  
What he may say you needn't mind.

Gilbert here has drawn attention to the fact that breach of promise actions were invariably brought by women, who played on the sympathy of the male jury. It is true that loss of a marriage meant much more to a woman in the days before the *Married Women's Property Act* 1882 emancipated women to some extent. The loss of a 'good catch', especially if it had been accompanied by a seduction by means of the promise, was regarded as a compensable loss. Moreover, although the action was for breach of contract, much of it sounded in tort, for both aggravated and punitive damages were awardable.<sup>5</sup> The point is made by many contemporary commentators that the action was difficult to defend by men - it was, to some extent a 'gold-digger's charter'.<sup>6</sup>

The action was tried by a judge and jury, and Gilbert is thus acute in having the jurymen sing:-

Monster, dread our damages.  
We're the jury.  
Dread our fury!

The defendant understandably is put out by this pre-judging of his case, for, as he sings:-

On the merits of my pleadings,  
You're at present in the dark.

The jury then hears his defence, which in effect consists of the argument that just as it is human nature, after one has consumed one's breakfast, to turn one's attention to dinner, so it is natural, when one has tired of one love affair, to turn attention to another. This hardly sounds meritorious, but it aroused some sympathy in the middle aged jurymen, who confess that they had similar feelings when young.

<sup>5</sup> *Berry v Da Costa* (1866) LR ICP 331.

<sup>6</sup> See N P Feinsinger, 'Legislative Attack on "Heart Balm"', in *Selected Essays on Family Law* (Foundation Press, Inc, NY, 1950), p 750.

Oh, I was like that when a lad!  
A shocking young scamp of a rover,

Now, however, they are 'respectable chaps' and have no sympathy with the defendant.

Gilbert is here mocking Victorian hypocrisy by having the jury assume a Pharisical attitude when called to adjudicate as members of the jury. It has been said that this 'moral uncertainty' well typified Victorian attitudes.<sup>7</sup>

### THE JUDGE'S ENTRANCE

The entry of the judge is greeted with the obsequiousness characteristic to common law countries, where it is customary for all those present in court to stand and, in the usher's words,

In due submission bend.

The chorus then mouths one of the most brilliantly funny stanzas of the whole of the Gilbert *corpus*, given a most appropriate polyphonic, Handelian setting by Sullivan.

May each decrec  
As statute rank  
And never be  
Reversed in banc.

This stanza highlights the primacy of legislation over judicial decisions in English law (where, of course, no court can declare a statute void or unconstitutional). The reference to '*banc*' (or *banco*) is a useful reminder of the correct title for a Full Bench, exercising appellate jurisdiction.

The judge then sings a type of song that features in almost every Gilbert and Sullivan operetta - an aria in which an eminent personage traces his career. Perhaps the most famous of these songs is 'The Master of the Queen's Navee' in *H M S Pinafore*, a direct lampoon on the then Lord of the Admiralty, Mr W H Smith, the bookseller whom Disraeli had appointed despite the fact that he 'had never been to sea'. Gilbert just escaped a defamation action over this song, but it is said that it lost him favour with 'the Establishment', which delayed his knighthood! Invariably, the holder of the great office has achieved eminence through manoeuvre rather than skill or aptitude.

<sup>7</sup> Hesketh Pearson, *Gilbert and Sullivan* (London, 1935), pp 37 *et seq.*

The judge's song in *Trial by Jury* is so replete with legal wit that it merits citation in full.

SONG

*Judge*

When, I good friends, was called to the bar,  
I'd an appetite fresh and hearty,  
But I was, as many young barristers are,  
An impecunious party.  
I'd swallow-tail coat of a beautiful blue -  
A brief which I bought of a booby -  
A couple of shirts and a collar or two,  
And a ring that looked like a ruby.

*Chorus*

A couple of shirts, etc.

*Judge*

In Westminster Hall I danced a dance,  
Like a semi-despondent fury,  
For I thought I should never hit on a chance  
Of addressing a British Jury -  
But I soon got tired of third-class journeys,  
And dinners of bread and water;  
So I fell in love with a rich attorney's  
Elderly, ugly daughter.

*Chorus*

So he fell in love, etc.

*Judge*

The rich attorney, he jumped with joy,  
And replied to my fond professions:  
'You shall reap the reward of your pluck, my boy  
At the Bailey and Middlesex Sessions.  
You'll soon get used to her looks', said he,  
And a very nice girl you'll find her!  
She may very well pass for forty-three  
In the dark, with a light behind her!

*Chorus*

She may very well, etc.

*Judge*

The rich attorney was good as his word;  
 The briefs came trooping gaily,  
 And every day my voice was heard  
 At the Sessions or Ancient Bailey.  
 All thieves who could my fees afford  
 Relied on my orations,  
 And many a burglar I've restored  
 To his friends and his relations.

*Chorus*

And many a burglar, etc.

*Judge*

At length I became as rich as the Gurneys -  
 An incubus then I thought her,  
 So I threw over that rich attorney's  
 Elderly, ugly daughter.  
 The rich attorney my character high  
 Tried vainly to disparage -  
 And now, if you please, I'm ready to try  
 This Breach of Promise of Marriage!

That song contains several biting observations and terminological quirks that are perhaps capable of being fully appreciated only by a lawyer.

In the first place, it emphasizes the difference that obtains in England and most British Commonwealth countries between barristers and solicitors, who used to be known as *attorneys*. Attorneys were traditionally rather a disreputable profession, and far removed from the honourable and distinguished class of *barristers*, who were generally drawn from the upper-classes. Even today, it is virtually impossible for a solicitor to become a judge. But although barristers believe themselves to be the superior branch of the profession, they cannot ignore solicitors, because it is from them that they get their work. In other words, the solicitor is the *client* of the barrister, and it is useful for a barrister to know a few solicitors, and even to be related to one, for a supply of his *briefs*. Of course, there are serious professional dangers in this, so that even today there are strict rules forbidding fraternization with solicitors.

At the outset of a legal career, barristers are usually 'impecunious parties', which is simply lawyers' jargon for 'poor persons'. One can well imagine Gilbert himself hanging around courts in London, such as Westminster Hall, where the Courts of King's Bench and Exchequer are situated. [This breach of promise case takes place there. It was abolished in 1875, and became part of the Supreme court of Judicature.]<sup>8</sup> The reference to the Bailey is the Old Bailey, ie the Central Criminal court in London. So he would have thought it an excellent plan to marry into an attorney's family.

The cutting lines beginning 'All thieves who could my fees afford', are an acute commentary on the ability in Victorian times of only the rich to obtain adequate representation. This theme, incidentally, was taken up seriously by John Galsworthy in *The Silver Box* and other plays.

After this soliloquy, the chorus praise the judge, and the judge readily accepts their praise, with these words:-

Though all my law is fudge,  
Yet I'll never, never budge,  
But I'll live and die a Judge.

This, of course, is a humorous comment on the security of tenure that judges still enjoy, despite any incompetence. Only for 'judicial misbehaviour' might then, and may now, a judge be impeached, as observers of the recent proceedings involving the late Mr. Justice Murphy will be well aware!

## THE ISSUES

The plaintiff, Angelina, now presents her case, preceded by her bridesmaids who lament her fate. Her beauty is favourably commented on by the judge. Counsel for the plaintiff then gives an account of the idyllic courtship of Edwin and Angelina, in lines of exceptional wit:

Camberwell became a bower  
Peckham an Arcadian Vale,  
Breathing concentrated otto!  
An existence a la Watteau.

[It should be noted that Camberwell and Peckham were particularly unpleasant, working-class suburbs of London.]

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<sup>8</sup> *Judicature Acts*, 1873 and 1875.

Then counsel relates how the defendant deserted the plaintiff, adding that this was ...

Doubly criminal to do so,  
For the maid had brought her trousseau!

This is a reference to the *special* damages recoverable, according to the prevailing jurisprudence, for loss of trousseau.<sup>9</sup>

The plaintiff could also sue for aggravated damages, and indeed punitive damages - which is rare, if not impossible, in normal contract actions<sup>10</sup>, though it is possible in some tort actions. These included damage to wounded feelings, loss of a good catch, and damages for seduction effected under a spurious promise to marry.<sup>11</sup> It was an action typical of what now appears to us as Victorian hypocrisy. But there were certain defences. Thus it was a defence that the plaintiff was herself immoral or tainted by an infectious disease, justifying the repudiation of the contract by the defendant.<sup>12</sup> And it was possible for the defendant to *mitigate* his damages by proving that he was not such a good catch after all. In *Finlay v Chimey*<sup>13</sup>, Lord Esher MR states: 'Evidence of the conduct of both parties is allowed to be given in mitigation or aggravation'.

So, paradoxically, the defendant had to show that he did the right thing by breaking the engagement, because it was for the plaintiff's good. Thus he had to prove his own worthlessness. The flavour of this extraordinary action is thus conveyed in these declarations of the plaintiff and defendant.

#### DUET - PLAINTIFF AND DEFENDANT.

*Plaintiff (embracing him rapturously)*

I love him - I love him - with fervour unceasing  
I worship and madly adore;  
My blind adoration is always increasing,  
My loss I shall ever deplore.  
Oh, see what a blessing, what love and caressing  
I've lost, and remember it, pray,  
When you I'm addressing, are busy assessing  
The damages Edwin must pay!

<sup>9</sup> In some later cases, such as *Mills v Harris* [1963] WAR 145, the cost of the trousseau was not allowed on the sensible ground that the woman could still wear it as an everyday garment.

<sup>10</sup> *Addis v Gramophone Co Ltd* [1909] AC 488.

<sup>11</sup> See, eg *Smith v Woodfine* (1857) 1 CBNS 660.

<sup>12</sup> *Millington v Loring* (1880) 6 QBD 190.

<sup>13</sup> (1888) 20 QBD 494.



*Defendant (repelling her furiously)*

I smoke like a furnace - I'm always in liquor,  
A ruffian - a bully - a sot;  
I'm sure I should thrash her, perhaps I should kick her,  
I'm such a very bad lot!  
I'm not prepossessing, as you may be guessing,  
She couldn't endure me a day;  
Recall my professing, when you are assessing  
The damages Edwin must pay!

The defendant does, however, offer to solve the dilemma by marrying Angelina one day, and his new girl-friend the following day. This, however, is not acceptable to the plaintiff's counsel, who states:-

But I submit, my Lord, with all submission

[Note incidentally, the double use of this word, so over-used by barristers]

To marry two at once is Burglarec!

To back up his submission, counsel invokes judicial precedent - and here Gilbert satirizes the fondness of the legal profession for precedents of ancient vintage.

In the reign of James the Second,  
It was generally reckoned  
As a very serious crime  
To marry two wives at one time.

[Counsel hands the law book to the judge]

Despite the absurdity of the proposition that that amounted to burglary, the jury is suitably impressed.

Oh, man of learning!

Here, Gilbert satirizes obsequious respect for barristers.

The case is resolved by the willingness of the judge to marry the plaintiff himself, an offer which is accepted with alacrity by Angelina, who reveals herself indeed as something of a hypocrite. For, despite her profession of modesty and moral outrage, she is happy indeed at the prospect of living 'with wealth surrounded'! Was she merely a gold-digger after all?

### 'TRIAL BY JURY' ASSESSED

Although Gilbert's satire is good-humoured, and he did not set out to sting, he has made some telling criticisms of both the procedural and the substantive law in *Trial by Jury*. The wit is enhanced by the verisimilitude of the setting. Unlike, say, Offenbach, who set his operettas in fabulous places, Gilbert invariably placed his action in a realistic setting.

Indeed, 'the rigorous reality of the setting gives a special piquancy to the extravagant behaviour which takes place in it'.<sup>14</sup>

This is the topsy-turvy world of Gilbert. Rigorous criticism just misses turning into vicious satire, softened as it is by Sullivan's deliciously melodious music. Nevertheless, there is sufficient perspicacity in Gilbert's observations to justify one commentator in saying:-

The weakness of the law, according to Gilbert, lies in the conflict which its machine-like nature causes with the ordinary humanity of its practitioners.<sup>15</sup>

### IOLANTHE

In *Iolanthe*, Gilbert sets out to satirize political conventions. The House of Lords comes in for some acute lampooning, comprising as it did, and still does, legislators chosen for 'blue blood' rather than ability. When Strephon, the fairy son of Iolanthe, makes it his platform to change this, and require Lords to submit to 'competitive examination', he is regarded with horror.

During the course of history, as the sentry tells, the House of Lords 'did nothing in particular, but did it very well'. And the admirable sentry finds it difficult to understand the two-party system - how ...

The Lord did contrive  
That everyone born into this world alive  
Is either a little Liberal or else a little Conservative.

<sup>14</sup> Audrey Williamson, *Gilbert and Sullivan Opera* (London, 1953), p 27.

<sup>15</sup> H T E Perry, 'The Victorianism of W S Gilbert', in ed J B Jones, *A Century of Scholarship and Commentary* 151 NYU Press, NY, 1970).

There is one major character in *Iolanthe* whose primary role is legal, rather than political. The Lord Chancellor, indeed, embodies an amalgam of legislative and judicial functions, giving a lie to the rather facile exposition of the separation of powers made almost contemporaneously by A V Dicey.<sup>16</sup>

The modern Lord Chancellor is the descendant of the Chancellor who dispensed equity to those citizens who petitioned him, complaining of the inappropriate rigour of the common law's writ system. Apart from sitting on the 'woolsack', in the House of Lords, he also inherited the sovereign's role as *parens* the realm. He was (up till 1971 in England), the guardian of 'wards of court'. This anomalous jurisdiction of the Lord Chancellor is the object of the legal satire of Gilbert in *Iolanthe*.

### SONG

#### *Lord Chancellor*

The Law is the true embodiment  
Of everything that's excellent.  
It has no kind of fault or flaw,  
And I, my Lord, embody the Law.  
The constitutional guardian I  
Of pretty young Wards in Chancery,  
All very agreeable girls - and none  
Are over the age of twenty-one.  
A pleasant occupation for  
A rather susceptible Chancellor

*All*

A pleasant, etc.

He also, however, takes swipes at the conservatism of the law. The first four lines of that stanza are a superb echo of many a narcissistic judge and practitioner!

More legal wit is displayed in yet another song describing the Lord Chancellor's rise to the top of the legal profession. This song contains so much of interest that it must be set out in full.

<sup>16</sup> A V Dicey, *Law of the Constitution* (1st edition, 1885).

When I went to the Bar as a very young man,  
 (Said I to myself - said I),  
 I'll work on a new and original plan  
 (Said I to myself - said I)  
 I'll never assume that a rogue or a thief  
 Is a gentleman worthy of implicit belief,  
 Because his attorney has sent me a brief  
 (Said I to myself - said I!)

Ere I go into court I will read my brief through  
 (Said I to myself - said I).  
 And I'll never take work I'm unable to do  
 (Said I to myself - said I),  
 My learned profession I'll never disgrace  
 By taking a fee with a grin on my face,  
 When I haven't been there to attend to the case  
 (Said I to myself - said I!)

I'll never throw dust in a juryman's eyes  
 (Said I to myself - said I),  
 Or hoodwink a judge who is not over-wise  
 (Said I to myself - said I),  
 Or assume that the witnesses summoned in force  
 In Exchequer, Queen's Bench, Common Pleas, or  
 Divorce,  
 Have perjured themselves as a matter of course  
 (Said I to myself - said I!).

In other professions in which men engage  
 (Said I to myself - said I)  
 The Army, the Navy, the Church and the Stage  
 (Said I to myself - said I),  
 Professional licence, if carried too far,  
 Your chance of promotion will certainly mar -  
 And I fancy the rule might apply to the Bar  
 (Said I to myself - said I!).

The satire in the first stanza is a reference to the way a barrister is a 'hired mouthpiece'. It is even today not unknown for a barrister to adopt a sanctimonious attitude to a solicitor, at least to his face! Counsel is still expected to display a crusader's belief in the innocence of his criminal client. It is still true that many barristers take on too many cases and go into court under-prepared, and also mark a brief (ie charge for their services) when they have passed it on to someone else. The honourable profession of the law supposedly demands that the lawyer be first and foremost an officer of the court, present to assist in a disinterested enquiry into truth. But everyone knows that the way to succeed is to treat one's client's interest as paramount, and by fair means or foul win a verdict for

him! Exchequer, Queen's Bench, Common Pleas and Divorce were all separate Courts before Judicature Act 1875. Common Pleas, Queen's Bench and Exchequer then merged to form the new Queen's Bench Division of the High court of Justice.

The reference to the witnesses is an allusion to the practice of barristers of fiercely cross-examining witnesses called by their opponents. This song is in effect an attack, and really quite a rational one, on the adversary system.

The chief humour of this delightful song consists in the Lord Chancellor's observation that by complying with honourable practice he has 'hit on a new and original plan'!

It really is rather a cruel gibe at the legal profession, but its effect is mitigated by its wit.

#### OTHER LEGAL ALLUSIONS

There are many *obiter dicta* in Gilbert which are only appreciated by lawyers.

In *Iolanthe*, for instance, Strephon, the fairy suitor of Phyllis, has pursued his claim despite the fact that Phyllis is a ward of court. The following exchange takes place between the Lord Chancellor and Strephon.

*Lord Ch.* Now Sir, what excuse have you to offer for having disobeyed an order of the Court of Chancery?

*Streph.* My Lord, I know no Courts of Chancery; I go by Nature's Acts of Parliament. The bees - the breeze - the seas - the rooks - the brooks - the gates - the vales - the fountains and the mountains cry, 'You love this maiden - take her, we command you!' 'Tis writ in heaven by the bright barbed dart that leaps forth into lurid light from each grim thundercloud. The very rain pours forth her sad and sodden sympathy! When chorused Nature bids me take my love, shall I reply, 'Nay, but a certain Chancellors forbids it?' Sir, you are England's Lord High Chancellor, but are you Chancellor of birds and trees, King of the winds and Prince of thunderclouds?

*Lord Ch.* No. It's a nice point. I don't know that I ever met it before. But my difficulty is that at present there's no evidence before the Court that chorused Nature has interested herself in the matter.

*Stroph.* No evidence! You have my word for it. I tell you that she bade me take my love.

*Lord Ch.* Ah! but, my good sir, you mustn't tell us what she told you - it's not evidence. Now an affidavit from a thunderstorm, or a few words on oath from a heavy shower, would meet with all the attention they deserve.

*Stroph.* And have you the heart to apply the prosaic rules of evidence to a case which bubbles over with poetical emotion?

*Lord Ch.* Distinctly. I have always kept my duty strictly before my eyes, and it is to that fact that I owe my advancement to my present distinguished position.

The delicious allusion to the hearsay rule is most apposite. But essentially, again, this is a telling commentary on the ludicrous position of the Lord Chancellor, who is called on to take jurisdiction over the love life of his wards!

Much of *The Mikado* may be construed as a satire on absolute power, and its capricious exercise. The theme is not uncommon in literature, Shakespeare's *Measure for Measure* being an outstanding example.

There is some fun at the expense of criminologists. As today, there was much debate in Victorian times on the purpose of punishment. Stephen's *History of the Criminal Law* had recently been published. Perennial debates on the morality and effectiveness of capital punishment were no doubt enlivened by this gory depiction of the prisoner's lot.

To sit in solemn silence in a dull, dark, dock,  
In a pestilential prison, with a life-long lock,  
Awaiting the sensation of a short, sharp shock,  
From a cheap and chippy chopper on a big, black block.

The alliteration in this stanza is almost sinister, and the description to 'pestilential prison' would not be entirely out of place to describe conditions in many a jail of the late twentieth century!

Capital punishment as the sanction for flirting may seem a little 'topsy-turvy', but there is, I fear, an offence of 'close proximity' in modern Islamic states, as I know full well from a recent visit to Malaysia!

In both *The Gondoliers* and *Utopia Ltd* Gilbert satirizes the legal liability company. The famous House of Lords case, *Salomon v Salomon*<sup>17</sup>, emphasized the immunity from suit of the individuals who comprise the membership of an incorporated organization on the basis that this is a separate legal entity.

Gilbert satirizes the capacity of the corporate liability laws to enable an abdication of personal responsibility.<sup>18</sup>

## CONCLUSION

A close reading of the libretti of the Savoy Operas will reveal many other legal allusions. Very little of the legal wit of Gilbert is barbed or aggressive. But there is sufficient irony and truth in it for W S Gilbert properly to be classed as one of the greatest of legal satirists.

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<sup>17</sup> [1897] AC 22.

<sup>18</sup> See T G Head. *op cit* 82.