For my friend "Johnson"

(see pg 8 et seq)

Very sincerely—

Joseph N. Ullman

N.B. "Johnson's" real name is Calvin E. Cohen and I have expressed my real feelings about him on page 9.

J. N. U.

October 10. 1935.

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A JUDGE TAKES THE STAND

A Judge Takes the Stand

by

JOSEPH N. ULMAN

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TO

E. G. U.

PREFACE

The text that follows is extremely informal and perhaps unduly personal. It is so by design. I contend that principles of law are of little consequence except as they are translated into action. To be translated into action they must first find human expression. In order to emphasize the human and fallible content of law as a working social force, not only have I written in the first person, but I have offended willfully the usual canons of literary good taste. I hope that this conscious fault may find justification in a portrayal of law-in-action which is measurably close to truth.

Without this explanation I should hesitate to thank here those who have read and criticized my manuscript. Some of them disapproved and still disapprove the form and tone that characterize the whole book. The book is what it is because I do not agree with them. Yet, each has given me unstintingly of his time, each has made many important suggestions which have been adopted. Therefore even as I thank them for their help I must absolve them fully from responsibility for my mode of presentation.

My colleague the Honorable Charles F. Stein, Associate Judge of the Supreme Bench of Baltimore, Mr. Sidney L. Nyburg and Mr. Huntington Cairns of the Baltimore bar, and Mr. M. Leon Radoff of the Johns Hopkins University are among those to whom I am especially indebted. Mr. Geoffrey May, of the Institute of Law of the Johns Hopkins University, has done much to supplement my own inadequate scholarship. Mr. Cairns has supplied the appended bibliography and reading

lists; and Mr. Horace E. Flack, Director of the Maryland Department of Legislative Reference, has prepared the index. I am quite unable to express the depth of my gratitude to these generous friends.

JOSEPH N. ULMAN

November, 1932.

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Chapter One

INTRODUCTORY

I've never had a case in court. I've never been a witness. I've never served on a jury. I wouldn't go in the Court House, even to look at the pictures on the walls." Thus John Smith.

Everybody is not so fortunate. In this day of parking tags and traffic regulations, most of us even have criminal records. All of us, whether we realize it or not, are surrounded by the law as by the air which we breathe. When we take a job or rent a house or buy a suit of clothes, we make a contract. When we jostle somebody on the street we may be guilty of a tort. When we die, no matter how few our possessions, the law regulates their disposition.

Law is not merely a body of abstract principles printed in a book. It is something far more complex than that. It includes "the laws" passed by Congress, State Legislatures, and City Councils, and also the decisions of judges upon cases in court. Behind all these sources of law is the common sense of the community. In some subtle way, this tells legislators what laws to pass and creates, from time to time, a sense of justice which leads judges to their decisions of cases, when those cases present questions not exactly answered by the laws made by legislators.

The purpose of this book is a modest one. A brilliant host of thinkers and writers has said more than I can hope to say about the philosophy and the history of law. Austin and Pollock, Pound and Wigmore, and a long list of others have devoted their lives to the study of what law is, how it came to be what it is, and what it ought to be. Scholarly works of great learning

are available to the student and investigator. From the bench have come epoch-making decisions, supported by profound judicial opinions, which are both mile-posts and direction signs on the path of the progress of the law. More particularly Holmes and Cardozo, combining in themselves those qualities that make both the man of action and the philosopher, have helped to make the law and, at the same time, have written essays and books which throw a broad beam of searching light upon its complex, living organism. Recently Jerome Frank, in his *Law and the Modern Mind,* has added a fresh point of view which emphasizes the human element in the judicial law-maker and brings to bear upon the subject the latest and therefore still controversial thought of modern psychology.

I shall not try to compete in this field. This book is merely an effort to draw a picture in broad outline of law as it is, of "law in action" as observed by a judge in a lower court. John Smith, taxpayer, not only lives in a world of law but he pays for the up-keep of the law's machinery. It is not merely when he goes to the polls on election day to cast his ballot for legislators and judges that he ought to have an interest in the processes that go into the making of the law. It is not only when he has to sue somebody or has to defend a suit brought against him that the law affects his life. Every day and all day he lives with his neighbors in a society governed by law. It ought to be a matter of first concern to him to know the nature of this force which is as essential to his well-being as the clothes he wears or the food he eats. John Smith, taxpayer, can not be expected to read the treatises of Holmes and Cardozo. These masterpieces of philosophical content and lucid style are too difficult for the reader who does not bring to them a background of history and philosophy.

Every intelligent man and woman wants to know something about law, wants to know especially what actually happens when cases are tried in court. Readers who are not concerned with the niceties of shading between Beale's conception of law

and Pound's conception of law, readers to whom Blackstone is no more than a great name and Holmes a living legend, are nevertheless entitled to know what effect the thinking and the writing of these men has upon their daily lives. In a democracy every man is, in some sense, a law-maker. Therefore it is the more important that every man who thinks, even though he be so caught up in the business of living that he has neither time nor inclination for profound study of the law, shall nevertheless have made available to him a statement of its nature and purpose, its effects upon him and his neighbors, the way it works and its manner of growth.

Jurisprudence is a formidable word. Perhaps it is presumption for me to apply it to a work so unscholarly as mine. But I am reminded of the student of rhetoric who was amazed to discover that he had been talking prose all his life without knowing it. The man who forms an opinion when he reads in the newspaper that the Supreme Court has declared unconstitutional a law regulating the hours of labor for men although it has upheld a law regulating the hours of labor for women is forming an opinion upon a profound question of jurisprudence. It is a question that can be answered only by considering fundamental principles of government, economics, sociology, history, medicine, law, and philosophy. Jurisprudence is made up of all of these and more besides; and yet mere laymen rush in where angels fear to tread, never hesitating to set up their judgments alongside those of greatly skilled and deeply learned scholars on or off the bench. Nor should they hesitate. For the touch-stone that makes law and legal systems workable tools of society is that pliability which fits them to the changing needs of each new generation. There must be always an inter-play between the thing which acts and the thing acted upon. Judges and legislators have the same need to know what John Smith thinks about their laws as John Smith has to know what their laws are.

In this book I shall try to answer John Smith's questions. I

shall try to answer them as the answer has come to me from a perfectly usual, undistinguished, work-a-day experience. For twenty-four years after coming to the bar I was engaged in the general practice of law. Like most lawyers in our larger American cities I was a specialist only to the extent that my practice almost never took me into the criminal court. In later years, contrary to my preference, most of my activities did not even bring me to the Court House. The modern "business lawyer," as he matures in his profession, is likely to spend most of his time in a type of activity in which the trial of cases in court becomes less and less part of his daily life.

For the last eight years I have been one of the eleven judges comprising the court of first resort for all but minor cases in a city of eight hundred thousand people. Every kind of civil controversy involving more than one hundred dollars, every kind of criminal prosecution too grave to be disposed of in the police court, comes for its first hearing to one or the other of the courts which together make up the Supreme Bench of Baltimore City. Our judges, by custom and rule, move each year into a new court. For five of my eight years I have presided in one or the other of our civil common-law courts. One year was spent in an equity court. Two years, probably the most fruitful to me, were in the criminal court. This range of experience has given me an opportunity to see the working law from many sides.

As I sit at my desk there faces me from the bottom shelf of my book-case a row of twenty-two note books covering the cases that have been heard before me during my eight years on the bench. Each volume contains five hundred pages of closely written memoranda. They are the record of what has been to me a long series of dramatic experiences. The trial of every case, be it a "big case" that gets into the newspapers or an ordinary run-of-the-mine case, represents a culminating moment in the life of somebody concerned in that case. Through the court room, day after day, there passes in review a kaleido-

scopic procession of men and women who reveal their thoughts and their passions far more candidly than they intend. They come into court to find out what is the law as it affects and controls them and their behavior. Some of them come willingly; some are forced to come. All of them go out again with the course of their lives altered in greater or less degree, in accordance with the dictates of this mysterious something which we call the law.

In the pages that are to follow I want to let my note books do most of the talking. My object will be to gather together, in as logical and purposeful a manner as I can, their record of what happens to men when they come into court, whether as witnesses, lawyers, or litigants. Not only what happens but, so far as I may, why it happens. I am sure that the material is in the note books. It went into them vibrant with life, typical of a living jurisprudence. My task is to get it out again with some part of its inherent spirit still alive.

Chapter Two

COMMON LAW AND STATUTE LAW

Gentlemen of the Jury, the case which you are about to hear is a very simple one. My client, the young gentleman sitting over there, on the 8th of last August was driving his automobile east on Springdale Avenue where it crosses Forrest Avenue. Probably some of you are familiar with that neighborhood. His wife was with him and they were on their way to a card party at the home of some friends about four blocks away from the point of the accident. They were due to get there at 9:00 p.m. The accident happened at five minutes before nine. So you see they weren't in any hurry. They were ahead of time.

"My client was driving at about sixteen or eighteen miles an hour. When he reached the corner of Forrest Avenue he slowed down to look both ways. He saw another car approaching from his right at about the same speed. That car turned out to be the defendant's.

"My client had plenty of time to cross in front of the other car and he kept right on. When he reached a point about in the center of the intersection, the other car suddenly increased its speed, spurted ahead, and hit my client's car on its right side near the rear wheel. It was hit so hard that it turned completely around and was thrown over on its side.

"These are the facts which we expect to show by our witnesses. We shall also show you that my client suffered severe injuries and that his car was badly damaged.

"If we show you these facts, we shall, at the proper time, under the instructions of the court, expect a substantial verdict for the plaintiff."

The plaintiff's lawyer had made his opening statement and taken his seat at the trial table. The defendant's lawyer hesitated a moment, rose, and announced to the court that he would reserve his opening statement until the close of the plaintiff's testimony. The trial of the case of *Johnson vs. Robinson* was under way.

"Just another automobile case." It did not promise anything of special human interest. Except one thing. Looking at Johnson, the plaintiff, I thought I recognized him. As he turned to say a word to his lawyer, I did recognize him. He was a young member of the bar whom I had seen about the courts for the past two or three years. There was nothing striking about him except that he was more than usually earnest and had a very pleasant personality. He always gave the impression of perfect honesty. I became a partisan when I saw him before me in the rôle of litigant. However, I settled back in my chair determined to hear the testimony and to direct the progress of the trial without allowing my personal interest in the plaintiff to affect my judicial attitude toward his case. That is something judges have to do every day. At least they have to try to do it. Never forget that judges are human beings and that they can not put aside their human emotions when they put on their black silk robes.

The first witness called was young Johnson. His testimony, given in a quiet, unobtrusive manner, bore out the simple statement of facts made by his attorney. He remembered that he and his wife had left their home at half-past eight. When they reached a corner one block from where the accident happened, he looked at his wrist-watch and found they were so early for their engagement that they stopped and went into a drug store, partly to make some purchases but primarily to consume a little time so they would not arrive at the home of their friends too

early. After leaving the drug store, they got into their automobile and drove very slowly down the street, still purposely killing time.

The accident happened at exactly 8:55 p.m. Johnson knew this because his wrist-watch was broken and stopped at just that minute. It registered that when he next looked at it in the hospital.

This testimony was given in such a quiet and restrained manner that I began to wonder whether this particular case would be the unusual case, entirely devoid of drama. Then came this question: "You say you were taken to the hospital; what was the nature of your injuries"? Answer: "Well, I was not rendered unconscious by the accident. In some way, my left hand was very badly cut. Of course I wore my watch on my left wrist. After I had been helped out of my overturned car, somebody tied a handkerchief around my hand to stop the bleeding. Then somebody took me to the office of a doctor in the neighborhood who gave me first aid. From there I was taken to the hospital where I remained four weeks. They operated on my hand twice while I was in the hospital; and another operation still needs to be done. My hand is not much use to me now."

As he finished this answer, the plaintiff took his left hand out of his coat-pocket and showed it to the jury. Up to that moment, I had not noticed that he had been keeping his hand in his pocket. At that same moment, I suddenly realized that he had been in my chambers about two months before to have a paper signed, and that he had kept his left hand in his pocket the whole time he was there.

Now the jury had a chance to see that hand and so did I. It was not a pretty sight. Later in the course of the trial, the attending surgeon told the jury the technical details of the operations he had performed. He told about the removal of the first and second fingers and the gangrene that afterwards set in, necessitating a second operation which removed nearly one-third of the hand itself. He told how he had then moved the

thumb over and tried to construct a new hand, one with a thumb and a ring finger. He explained that the object of doing that was to give the patient a hand with a grasp, however defective. But he explained also that the operation was so extensive and resulted in the formation of so much scar tissue that the hand is now quite stiff and practically useless. However, he expressed the belief that by a long continued process of baking and massage the hand might become more active, and that an additional, comparatively slight, operation might prove helpful.

The surgeon's testimony consumed not over ten minutes. He was obviously both a skillful surgeon and an honest witness. Very wisely, counsel for the defendant did not cross-examine him. But the surgeon's testimony was hardly necessary. That remnant of hand, held up before the eyes of the jury, was the eloquent witness of the plaintiff's injury. The hospital nurse described the plaintiff's sufferings while his wound was gangrenous and his arm had to be immersed in a continuous bath, day and night, but that added little to the story. The records of the hospital, showing that the plaintiff had been kept under the influence of opiates for nearly two weeks because his pain was so great, the fact that he had lost eighteen pounds while in the hospital, all of these bits of testimony were scarcely required. That wrecked hand, so incongruous on the arm of an upstanding, athletic looking young man, told its own story and needed no embellishment. And everybody knew now why young Johnson's wrist-watch recorded so accurately the precise time of the accident.

Then Robinson's lawyer made his opening statement to the jury and Robinson gave his testimony. His version of the accident was that he, too, was driving with his wife as sole passenger and was on his way to his home. He said that when they neared the corner, he saw the other car approaching from his left. He was going at a moderate rate of speed and continued ahead " because he had the right of way." But, said Robinson, " the man in the other car speeded up, tried to cut me off, veered

to his left when he saw that was not possible, and turned his car over by his own sheer recklessness. The two cars barely came into contact with one another." Mrs. Robinson's testimony was much like that of her husband.

The remaining witnesses threw very little light upon the occurrence. None of them saw the collision nor did any see either automobile just before they struck. They were people living in the neighborhood who were attracted by the noise and came up afterward. They described the positions of the two automobiles in the street after they had come to rest. Strangely enough, but not so strangely to one who is accustomed to the inaccuracies of observation and memory of witnesses, two of them differed radically regarding the position they assigned to the plaintiff's automobile as it lay on its side in the street. One remembered that it lay pointing south-west; the other was equally positive that it pointed north-east.

So the jury was duly instructed upon the law governing the case, counsel made their arguments and the jury retired to consider its verdict. At that stage, I did what I always do when hearing a case with a jury. I considered carefully the whole of the evidence and made up my mind what my own verdict would be if I were hearing the case without a jury. Of course I made an effort to reach a verdict founded upon both a judicious analysis of the testimony and a proper application of the points of law. Then I wrote down my verdict at the foot of my notes of the trial, leaving a space in a parallel column for the verdict of the jury. In a later chapter I shall have more to say about the results of this practice which I have followed often enough to afford a basis of comparison between jury trials and trials by at least one judge.

This time, I wrote: "My Verdict — Plaintiff $15,000." But when the jury came in I had to write in the parallel column: "Jury — Verdict for Defendant." And that was the end of the case of *Johnson vs. Robinson.*

I have chosen this case because it is so simple. Yet when we

come to analyze it, we shall find compressed within it a large part of our subject of inquiry. It is a tort case. "Tort" means wrong; and, in the law, a tort case is a case in which a plaintiff sues a defendant to recover money damages for an injury done to the plaintiff by way of invasion of the plaintiff's personal or general rights as a member of civilized society. In this it differs from a "contract case," in which a plaintiff sues a defendant for breach of a contract they have made with one another. That contract has created specific rights and duties as between that particular plaintiff and that particular defendant. But everybody has personal rights and everybody else is capable of invading them. At any moment, therefore, anybody is liable to find himself in a situation which may make him either a plaintiff or a defendant in a tort case. It is like the liability to catch cold.

Off-hand then, one would expect the law of torts to be one of the most ancient branches of the law. As a matter of fact, it is not so at all; it is a comparatively modern development. The law of torts, with its various subdivisions of negligence, nuisance, libel, slander, malicious prosecution, false arrest, and so on, is the basis of an enormous part of modern litigation. Negligence law, alone, has become one of the great continents in the geography of modern law. Seven hundred years ago it wasn't even a small island. Likewise, at that time, the modern law of contracts had hardly begun to take form. On the other hand, there was already a very respectable body of law concerning land; "the law of real property" had already developed along lines which became so firmly intrenched that the real estate lawyer of today can not know his subject thoroughly unless he delves back into the even remoter past.

Does that mean that people did not have personal rights seven hundred years ago? Or that they respected each other's personal rights so fully that they did not have to "go to law" about them? The answer is that the law of torts, like every other branch of the law, has grown and changed and is still

changing and still growing in response to man's needs; as social institutions change, as habits of living alter, new kinds of law must come into being and old legal rules must change. And they do change though sometimes very slowly.

Seven hundred years is a short time in the history of human institutions. However, the England of the thirteenth century was very different from the England or America of today. It had a civilization, a social order, and a literature. But man's mode of life was so different then that the conditions had not arisen which make our law of torts, and particularly our law of negligence, so essential now. Crimes were punished, though in that field too, the differences from present practice were profound. As a side-issue in the punishment of crime we find the germ of the modern law of torts. Wrongs done by one person to another which did not involve breach of the King's peace either were redressed by the strong right arm of the victim, if he had a strong right arm, or they went unredressed and unrecompensed. It is true that in the minor local courts there seem to have been actions for damages with a fixed scale of prices — five shillings for a slap, eighteen for a knock-down blow, thirty-six for a wound; but it wasn't considered "sporting" to make claims of this kind. The social ground was not ready for the growth of the modern law of torts or of negligence.

To find in the literature of the law much information about the principles and rules that entered into the decision of the case of *Johnson vs. Robinson* in the year 1931, we have to skip three or four hundred years and come down to the latter part of the seventeenth century. By that time, courts had come to be much what they are today, with judges passing on law and juries passing on fact. By that time, it had become nearly good form to sue for damages when someone injured you — although for another hundred years or so it was more gentlemanly to challenge your opponent to a duel and to fight it out with him on "the field of honor." Think how much of the congestion in our courts could be relieved by a revival of duelling!

As tort cases became more common, judges began to formulate rules for their decision. That is to say, some judge decided a specific case and wrote an opinion explaining why he decided it that way. Or he just spoke an opinion from the bench and some industrious lawyer took down a memorandum of what the judge said. If he happened to have the gift of clear and forceful expression, his words were quoted when similar cases came to be tried before him or before other judges. Gradually, words used by one judge in deciding one case achieved a general currency — they became traditional, at least among judges and lawyers.

Now these word combinations usually took the form of generalized statement. A judge didn't just say "I decide this case in favor of Smith and against Brown because Brown was careless in the way he drove his gig and it was wrong of him to run down Smith in the street"; but instead, "the owner and user of personal property is bound in his use of it to pay reasonable regard to the rights of his fellow-man. If he invades those rights he must respond in damages. The defendant was negligent. He did not observe that degree of care and skill which are to be expected of a reasonably prudent man under all of the surrounding circumstances." And more to the same effect — and often far less simply.

Thereupon the case of *Smith vs. Brown,* reported in such and such a volume of the opinions of such and such a court, became a precedent, an authority telling future generations of lawyers *why* the judge who decided that Brown had to pay Smith £50 decided the case that way.

There you have in very simple form the whole story of common law, or judge-made-law, as distinguished from statutory law. Modern research has shown that royal decree and early legislation are also sources of common law as the term is now used by scholars. For the purposes of this simplified statement, however, that may be disregarded; and I shall use the term as referring to the judge-made part of our law. Judges do not

make laws in the same way that legislatures make laws, and they never did. But judges did make the common law. They made it by deciding actual cases that came before them and by stating reasons for their decisions. Obviously those reasons had to satisfy some inner conviction of right, some sense of justice, in the judge who pronounced them. Obviously they had to and they did express the common or general sense of right and wrong in the community. If they had not done this, we may be sure that the decisions would not have been accepted. Something would have burst — just what I do not pretend to say. Perhaps the court.

The common law thus originated has become in time just as definite, as binding, and as important a part of our legal system as the laws made by legislatures. The two kinds of law go hand in hand, two kinds only in their point of origin, but one kind in their force and effect. And both kinds are apt to enter into the decision of almost every case.

Return now to the case of young Johnson, the lawyer with the maimed hand. When that case was ready to be submitted to the jury, the common-law principles underlying it were found in the law of negligence. I have already discussed the historical origin of this branch of the law. It needs but little imagination to realize that a scattered population of farmers in the country and of handicraftsmen in small cities would have relatively few incidents in their lives such as now crowd our court dockets with cases growing out of the uses of machinery, the running of railroads, and the driving of fast automobiles in crowded city streets. I am dwelling on these historical and economic and social changes as influences in the development of the law of the past into the law of the present because in later chapters I shall have occasion frequently to discuss trends toward the law of the future and reasons for those trends.

The common law of young Johnson's case was very simple indeed. It was the defendant's duty, not merely to Johnson but

to everybody on the street, to use reasonable care in running his automobile. It was Johnson's duty to use a like degree of care, both for his own safety and for the safety of others. If the defendant was negligent, that is if he didn't use reasonable care, and if Johnson was free from negligence, then Robinson had to pay Johnson a proper amount to compensate him for his injuries. Note that Johnson himself had to be quite free from negligence. If he was also at fault, even slightly so, then he was not entitled to recover, though the defendant was guilty of the grossest recklessness. That is the doctrine of contributory negligence of which I shall have more to say in another connection.

Now all of that is common law. That is to say, you can look through the acts of the Maryland legislature from beginning to end and you won't find a single law, a single statute, that says a word about any of it. It is, however, the law of the land in the State of Maryland because Maryland judges have said that it is the law.

But there was also some very important statutory law which affected young Johnson's right to recover damages. The legislature, when automobile traffic began to become general, passed a law establishing rights of way and rules of the road. When a legislature passes a law, it is not deciding a case but is making rules for future cases. Those rules may or may not involve a question of right and justice and morals. Whether they do or do not, depends upon their subject matter. Obviously there is no sort of moral question in a rule of the road. It is immaterial, morally, whether vehicles approaching from the right or from the left shall have the right of way. But it is highly desirable that there shall be a rule upon the subject, so that drivers will know what to expect of one another. Therefore the legislature has passed a law giving the right of way to vehicles approaching from the right.

But when a legislature passes a law, that is not the whole story. Statutes are usually brief and general in their terms. Then

a case arises which involves the application of those statutes, and courts have to decide precisely what the statutes mean and whether or not they fit the facts of the case in hand. That is what is called statutory construction. In fact, it is a beginning all over again of the process of common-law-making. The judicial construction of statutes puts meat on bare bones; and the statute elaborated by judicial construction is a legislature *plus* judge-made-law rather than either a legislature-made-law or a judge-made-law.

Take the right-of-way rule, for example. The legislature simply says that the vehicle approaching from the right shall have the right of way. This establishes a rule of conduct. It follows that it is not reasonably careful and prudent to violate that rule; hence violation of the rule constitutes negligence. Then it would follow that if a collision results, the man who has violated the right-of-way rule is in the wrong and ought to pay damages to the other man.

That would have ended young Johnson's case at once. The defendant Robinson had the right of way. Instead of Johnson suing Robinson for the loss of his hand, Robinson ought to have sued Johnson for the damage to Robinson's automobile.

But the right-of-way rule had been made by the Maryland legislature back in 1910. Since then hundreds of automobile cases had been tried, and judges had been compelled to construe and to pass upon the meaning and application of this statutory rule. By 1931 they had elaborated it considerably. They had decided that it was not an absolute rule but a relative rule. They had said that it did not mean that when a driver came to a corner he had to stop and wait while everything approaching from his right passed by. Very sensibly they had said that if that was what the rule meant, it would slow up traffic to such an extent that there wouldn't be any traffic. Therefore they limited the absolute application of the rule to situations in which both cars were approaching the intersection at such a time and at such a speed that if both went on without change

of speed there would be a collision. Only in such a case, the judges said, was the car approaching from the left bound absolutely to stop and let the other pass. If, however, the driver from the left was already in the intersection and the car on his right was far enough away to make him believe, as a reasonably prudent man, that he had ample time to pass he might go on through without regard to the right-of-way rule.

If that sounds a little complicated it isn't altogether my fault. I am trying to indicate what the legislature *plus* judge-made-law of right of way had become when the case of *Johnson vs. Robinson* was tried. If you boil it down it isn't so very different from the ordinary law of negligence, as developed by the judges without assistance from the legislature. For in all but a combination of circumstances relatively unlikely to occur, it has worked back to a rule that requires both parties to exercise reasonable care under all the surrounding circumstances.

At all events, those were the main principles of law that had to be applied in order to decide whether Johnson should win his case. Now how account for the fact that the judge was sure that he should win and would have given him a substantial verdict while the jury decided the other way round?

At once a number of answers occur to one's mind. Perhaps the jury was wrong. But perhaps the judge was wrong and the jury was right. Remember, the judge has already confessed that he knew the plaintiff and respected him as an honest man. After all, the plaintiff's and the defendant's testimony was diametrically opposed on the main issues of fact. If the defendant told the truth, his victory was deserved.

This was a case like so many, in which it really would not do to suggest that either plaintiff or defendant was consciously untruthful. Both were biased by self-interest of course. We all know that even honest men remember things in the way most advantageous to themselves. Moreover, driving accidents happen quickly; and, quite apart from any question either of honesty or of memory, our own experience tells us that by the

time participants in such accidents become witnesses in court, they seldom know exactly what happened. And most of them never did know.

However, I regard the verdict in this case as having a bearing upon the development of my subject which is much more important than any mere consideration of the credibility of witnesses. Before attempting to indicate that bearing, I must discuss first the larger question of the parts played by judge and by jury in the trial of a case and after giving some attention to that problem I shall return to the case of *Johnson vs. Robinson.*

Chapter Three

JUDGE AND JURY

And now, gentlemen of the jury, just a few words more and I shall close. I want to thank you for the patient and attentive hearing you have given my efforts to touch upon and remind you of the high spots of the evidence. In this case, a just verdict means a verdict for the plaintiff. We have established the case we set out to prove, as I outlined it to you in my opening statement. It is indeed fortunate that the final decision rests in your hands—in the hands of an American jury. The jury is the great protector of our rights and of our liberties. It is a cross-section of the community. You are a group of business men, accustomed to affairs. You are especially qualified by your experience and by your sense of fairness to deal with this very important case. Unless your analysis of the facts of the case convinces you of the justice of our claim, we do not want your verdict. We do not appeal to your emotions but to your judgment. And we leave our case with you, in full confidence that your verdict will be a verdict for the plaintiff for the full amount of his claim."

How often do we hear a speech ending about like that! In fact, that ending is a very tame one. It is the restrained utterance of a metropolitan lawyer who thinks of himself as a very canny person. He has graduated from the class of those who orate, who use highflown metaphors, quote poetry, and attempt an obvious appeal to the emotions of the jury. He has made a very sober speech, unravelling the tangled skein of the evidence and explaining the application to it of the rules of law as laid down

in the judge's instructions. Who shall blame him if he slips in a word or two of sincere compliment to the jury, just at the end? Certainly not the jurymen.

The jury retires to consider the case. It is four o'clock and no other case will be taken up today. Counsel on both sides come back into chambers with me to smoke and chat while we wait for the verdict.

Somebody expresses curiosity about the probable outcome of the case. At once the conversation becomes animated. "You never can tell what a jury will do—except that it is very likely to do the wrong thing!" This from the lawyer who has just finished the speech to the jury quoted above. "You're too mild," says opposing counsel, "juries aren't 'likely' to do the wrong thing. They're never right. Not even accidentally!" And so on. Finally I say: "Well, I'm not so sure. For my part I think I'd rather trust juries than judges. Maybe that's because I know judges so well—one judge, anyhow. Perhaps it will surprise you to know that, by actual count, jury verdicts are practically identical with the verdicts I should reach in over seventy-five per cent of the cases I hear. Of course, that may prove two things. I'll have to let you choose." When that bit of mild judicial humor sinks in (for this is an often repeated conversation) somebody always laughs louder than the quality of the joke merits and expresses amazement and surprise. Lawyers do not confine their more or less subtle flattery to the gentlemen of the jury.

I know of no subject which provokes more vigorous differences of opinion among both lawyers and laymen than this question of the value of the jury as part of our system of the administration of justice. Not only in the court room, where the disinterestedness of their motives may be questioned, but also in conversation and in public addresses, many lawyers of large practical experience favor enthusiastically the jury and the jury system. Their eyes flash when they say that "the jury is the great palladium of our liberties." By the way, I wonder whether

they all know exactly what a palladium is. I didn't, until I had already written that last sentence.

On the other hand, critics of the jury system are to be found on all sides. In the popular magazines as well as in the law journals we discover article after article calling for reform. The proposals of reform range all the way from mild suggestions for greater care in the selection of jurymen to out-and-out demands for the abolition of jury trials in all civil cases and in all but a small group of the most serious criminal cases.

Certainly, in a controversial matter of this kind, we should pause for a moment to consider just what it is that is being debated. What part does the jury play in the trial of a case? Has the jury any part in the making and development of the law? As an institution of human society, how does the jury work? Is it a force making for social welfare or against it?

Let me take up the first of these questions: What part does the jury play in the trial of a case? I shall begin my answer to that question by repeating what I say to each new panel of jurymen who come into my court for a three weeks' period of service. I tell them that the kind of court in which they are serving is a court made up of a judge and a jury, each with an entirely different job to do but both working together toward the same end. I explain that the job of the judge is to decide the law of each case while the job of the jury is to decide the facts, and that the judge and the jury have to do team-work if the case is to be decided in accordance with the law of the land as well as in accordance with right and justice.

Essentially, that is all I say to them. But it takes me about an hour to say it and I consider the time well spent. For I elaborate the statement in a real effort to explain in detail just how that team-work between judge and jury ought to be done. I tell them why lawyers object to questions and how the judge acts as a sieve or filter, letting through to the jury legally admissible evidence and keeping out offers of evidence that are legally inadmissible. I stress the fact that they are to disregard, as jurors,

impressions they might form from questions asked by counsel, if the judge rules that the questions may not be answered. And, most of all, I try to impress upon them the great importance of understanding and of following the instructions of the judge with respect to questions of law. I tell them that, through his instructions, the judge in effect goes into the jury room while the jurors debate their verdict, sitting with them there in friendly and co-operative counsel, explaining the legal points and helping to apply these to the disentanglement of the disputed facts of the case.

I always enjoy this talk of mine to a new jury. I tell myself that it does have the effect it is intended to have; that it does take some of the emotion and guess out of the jury and substitutes a spirit of cold analysis and a desire to understand and to apply the rules of law to the cases they are about to hear.

And then, sometimes, I wonder whether I am not fooling myself. I wonder if it isn't a little absurd to imagine that twenty-five prospective jurors who sit and listen to me talking generalities for an hour will remember any of it or be affected by it at all for more than another hour. It hurts me a little to write this down. Every confirmed speech-maker will sympathize with me.

Sometimes I go further; I wonder if it would be wholly desirable if I could impress upon jurors effectively that they *must* be guided by the judge's instructions upon propositions of law. That doubt, I know, is the rankest heresy. But sometimes a facing of facts leads to heresy; and I am trying to face facts no matter where they lead.

I have tried to show, in the last chapter, what we mean by common law, and how it came into being. I have said that judges made it and that they are still making it. Possibly I have given the impression that it is a very flexible sort of thing, a fluid body, changing with changed social needs, keeping pace day by day, year by year, with current beliefs and practices. If so, I have given a very wrong impression. In fact the common law is extremely inflexible. It does change, but the changes

come slowly and painfully. I have indicated how a judge's opinion in one case was followed in other similar cases until a generalized statement, applicable to a line of cases, became a fixed doctrine. An especially well reasoned and well expressed opinion became what the lawyers call a "leading case," an "authority." The lawyer's search for the law has become very largely a looking backward among the printed opinions of the past for authorities, or precedents. And judges of each generation tend toward a state of mind in which obedience to authority, in that sense of the word, makes them think at least as much about conformity to an announced principle as about the right and justice and social utility of the case they are about to decide.

Now that is important, and I do not decry it. For practical reasons, if for nothing else, the law ought to be definite and, in one sense, fixed. A man about to embark upon an enterprise often needs to know whether it is a legal or an illegal enterprise. Moreover, if the law is not definite and fixed, if there are no underlying principles and doctrines, there really isn't any law. Take away entirely statute and precedent, and instead of law and courts of law, you will have left only the traditional idea of the Cadi at the gate, deciding cases by his whim, or worse, by partiality and by favor. Mr. Justice Cardozo sums it up in this definition: "a principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged, . . . is a principle or rule of law." It is essential that there be underlying principles of law and that cases shall be decided by them, whether the parties to the case be rich or poor, of high degree or low. Make a new rule for each case, based upon the individual judge's sense of what is right and what is wrong for that case and upon nothing else, and instead of a society governed by law, you have a society governed by caprice. None of us would be happy, none of us would be safe in such a society.

On the other hand, if a man has eyes only in the back of his

head, he is likely to become more familiar with the landscape behind his back than with the views and prospects that stretch away before his face. That is, relative to the rest of the world, the strange anatomy of the lawyer and the judge. The lawyer who wants to give safe advice to his client, no less than the judge who decides cases, has formed the habit of looking backward for a precedent in order that he may abide by a rule or principle of law. Thus the legal profession has developed a backward-looking habit of mind. Call it the "conservatism of the law," and it is accepted as a compliment. Call it a vicious drag on progress, call it the dead hand of the past throttling the present and killing the unborn future, and you write yourself down a Bolshevik and an agitator, a disgrace to your profession.

I am not now concerned with the characterization of this fact. The law is conservative, it does move slowly. Its flow has been likened to that of a glacier rather than that of a river, and I am by no means sure that this is undesirable. New social concepts have to beat down the crystallized resistance of the legally trained mind before they are accepted into the law. When at last they are accepted, we observe a truly progressive movement, wiser and better than if the law had yielded to each variable pressure.

Although Holdsworth, the great historian of our law, recognizes the jury as an important factor in its growth, many lesser writers overlook the point. That is probably due to the circumstance that they are men far removed from the court room of the lower courts where juries function. In consequence they see and they describe only the law-in-the-law-books. The law-in-action is often very different. You and I are concerned with the law-in-action. We want to know what really happens in court, not what is supposed to happen there. One of the things that happens is that juries make law no less than legislatures and judges make law. When you consult your lawyer, you want him to tell you, if he can, what is the legislature *plus* judge *plus* jury-made-law which will lead to a decision of your case. This

is not always easy to do because the subject has not yet been studied adequately and in detail from this point of view.

Let us return now to the case of *Johnson vs. Robinson,* left somewhat in the air at the close of the last chapter. I have said that the jury decided it for the defendant and that I should have decided it for the plaintiff. I have intimated that I see in that decision of the jury something more important than the mere fact that they believed one witness while I believed another. What is that more important something?

If that case stood by itself, I could not tell you. In fact I should not even suspect that there was anything to tell. But the case of *Johnson vs. Robinson* is just one of many cases in which this same thing has happened. As I thumb through my note books, time after time I find that the jury has not agreed with me in cases presenting a situation like that in the case of *Johnson vs. Robinson.* You may remember that Robinson, the defendant, who won the case, had the right of way. You may remember, too, that the jury was instructed that the driver who has the right of way is nevertheless bound to proceed with caution, and that he may not lawfully run down anybody who happens to be in the intersection ahead of him. That is the law-in-the-law-books. The Court of Appeals has said so in unmistakable language. Therefore as a judge trained in the law, with my mind fastened upon legal precedent and authority, when I consider a case of that kind, I analyze the evidence with great care and try to determine which party, under all the circumstances, failed to exercise reasonable care and caution. The mere fact that one of them happened to be approaching from the right becomes often a minor factor in my reasoning. When I reason in that way, I apply to the facts of the case as precisely as I can the law-in-the-law-books. I write down my verdict. And again and again, the jury's verdict is just the reverse.

What has happened, and why has it happened? For answer you must go to a court lower than mine, the Traffic Court. Probably you have been there; most jurors have been, I'm sure.

In a Traffic Court the criminal side of the traffic laws is enforced. In Baltimore, the Traffic Court is a very busy place; thousands of cases are heard there each year. They are heard and they are disposed of with amazing rapidity. The magistrate in the Traffic Court has not the time to conduct a thoroughgoing investigation into the niceties and the details of every case. There has been a collision between two automobiles at a street intersection. The driver from the left is charged with the "crime" of failure to give the right of way. One witness, possibly a policeman, testifies that the defendant was coming from the left. "Guilty. Fine $5.00 and costs. Next case." The Traffic Court is not concerned with nicely balanced questions of relative right and wrong. It is a piece of social machinery set up to curb the reckless tendencies of a speed-crazed populace. A liberal distribution of fines imposed upon everybody who violates the letter of the statute law may do some good. Judging from results, it hasn't accomplished very much, but as yet nobody has suggested anything which is sure to be more effective.

However, this Traffic Court practice has done one thing. It has forced into the minds of the whole community the notion that there is something essentially wicked about colliding with another car when that car has the right of way. In our larger American cities you can hardly find a jury of twelve men of whom at least half have not had an actual experience with this piece of law. Either they have paid a fine for "failure to give right of way," or they have stood by and watched the other fellow pay such a fine. Here is one rule or principle of conduct which, in their own experience before they were sworn as jurors, they have seen to be so established that they themselves could predict, with reasonable certainty, that it would be enforced by a court when its authority was challenged. True, the court was only the Traffic Court. True, the highest court of the State, the Court of Appeals, has said that the rule should not be applied in the simple and direct way that the Traffic Court

applies it. True, the judge on the bench has instructed the jury in the negligence case on trial, in accordance with the law-in-the-law-books—the law as expressed by the Court of Appeals. But that doesn't worry the jury. They know all about this particular law, and they don't need any help from a judge. Moreover, his instructions on the point are wordy and hard to understand. It is much simpler to decide the case on what you might call the naked right-of-way rule. That was good enough for Magistrate Smith in the Traffic Court and it had to be good enough for the foreman of the jury when he paid his fine of $5.00 and costs last week. So that's the way the case is decided.

The result is that the jury has made law. Not only has it made law, it has done so in direct conflict with the law as laid down by the highest law-making authority of the state. If this happened once, you would simply say that the jury had decided a particular case wrongly. When it happens regularly, however, when you can analyze a long line of cases involving the same legal question and discover that in most of them the jury has disregarded the law-in-the-law-books, as it is announced by the presiding judge, then you can conclude only one thing. The jury has substituted its own notion of law for that which the law-books say *is* the law.

This is extremely important. It cost young Johnson $15,000. For I am convinced that the controlling factor in the decision of *Johnson vs. Robinson* was that Robinson had the right of way, by the Traffic Court rule of right of way; and the jury rule of right of way is the Traffic Court rule. I am equally convinced that by the rule of the law-books, the rule of the high Court of Appeals, the question of right of way should have had little or nothing to do with the proper, or judicial, decision of that case. In my abridged statement of its facts I omitted, of necessity, many details of the testimony which led me to that conclusion. You will have to take them on faith or we shall never get away from this one case, to which perhaps too much space has already been given. Suffice it to say that my note books

are full of examples of this identical proposition. In one collision case after another, I have found the factor that had conclusive weight with the jury was the bare rule of right of way, unaffected by any and all evidence of surrounding circumstances, untouched by the qualifications and limitations that the judges have said should be imposed upon the application of the rule.

One great drawback to this making of law by juries is that there is no systematic or authentic record of it. When judges decide cases, particularly in the higher, or appellate, courts, they write opinions. These are duly published. The reports of them are the source-books of the judge-made part of the common law. No record is kept of what juries do—that is to say, no record which can be analyzed accurately, no record from which the principles that determine their action may be discovered. All I can say with certainty is that in my own court and from my own note books, I have seen a large enough number of cases illustrating this point to make me believe that my generalization is correct.

There is a closely related point about which I think there will be less likelihood of difference of opinion. I have spoken before of the rule relating to contributory negligence. Somebody has been hurt in an accident. He sues another, charging that the accident was caused by that other's negligence. He proves conclusively that the defendant was negligent. But, if the evidence shows that the plaintiff was negligent too, and that the accident would not have happened except for the negligence of both plaintiff and defendant, then, according to the law-in-the-law-books, the verdict of the jury *must* be for the defendant. The judge gives the jury that instruction, and he adds that it does not make any difference whose negligence was the greater. If the plaintiff was careless to ever so slight a degree, and if the defendant was absolutely reckless, still the verdict *must* be for the defendant.

That is the law-in-the-law-books. It has been the law ever since 1809 when an English judge said so, in what has become

a great leading case. Most American lawyers, I feel sure, think of this as not merely "the law," but as something essentially right and just and philosophically inevitable. That is the effect upon their thought processes of having eyes in the back of their heads. Do not blame the lawyers for this peculiar anatomical change that they have suffered. They have to wear their eyes that way if they are to be successful in finding the precedents and in telling you the law-in-the-law-books when you go to them for advice.

Sometimes, however, the effect is disastrous. For example, don't let any lawyer tell you that the law of contributory negligence is what I have just said it is. At least, don't let him tell you that this is the law of contributory negligence as it really works in the court room, and as it will affect your rights or your liabilities in a real case. Probably he will not even think of telling you so because even trained lawyers have observed that juries have knocked this theoretical law of contributory negligence into a cocked hat. For many years, juries have been deciding cases just as though there was no such rule of law. And all the time judges have been going on saying gravely that there is. Anyone with open eyes directed either to the front or to the rear, can plainly see that, on this point at least, the living law is jury-made far more truly than it is judge-made.

My note books leave me in no doubt about it. Still keeping to the field of traffic cases, I find one after another in which the suit is for damage to an automobile. The amount of such damage is perfectly definite. Nobody disputes the fact that it cost, say two hundred dollars, to repair the damaged automobile in each of three cases. In one case, the jury brings in a verdict for one hundred dollars. In the next, the verdict is for one hundred and fifty dollars. In the third, it is for twenty-five dollars. Does that mean that the three juries have been shaking dice or tossing coins to reach their verdicts? Not at all. Examine carefully the evidence in each case, and you will find that in the first the evidence showed that plaintiff and defendant were about equally

careless. In the second, both were at fault, but the defendant was almost wholly responsible for the collision. In the third, the plaintiff was very careless, but the defendant was just a shade worse than the plaintiff.

Those are three supposed cases, but they are typical. More often the case is one in which very substantial damages have been proved, but damages not exactly measurable in money. The plaintiff has suffered for weeks or months as a result of an accident. The jury gives him a verdict that barely covers his bills from the doctor. Examine the evidence carefully and you find that both parties were careless. The jury has balanced the carelessness of one against the carelessness of the other and expressed the result in a small verdict.

What has the jury done, then, to the law of contributory negligence? It has simply *remade* it in a way that strikes jurors as being more sensible than the way it was *made* by a judge in 1809 and followed and elaborated by other judges during the one hundred and twenty-three years since that time. The strange part of it is that in the classical law-books you will not find a single word even hinting that the law of contributory negligence is what it has become by this habitual action of juries. This is because the men who write these law-books have not troubled themselves to look at the law as a living organism, as it actually works in the court room. They, like the other members of the legal profession, have riveted their eyes upon the past, and upon the printed page. When they do notice the jury, it is usually only to criticize it as something which works unscientifically and unpredictably. The jury gets in the way of their neat formulae, and messes up their rules and doctrines. So they do not like it.

It is not my present purpose to pass judgment upon the matter. I wish merely to point out that juries do play a part, and a very active part, in *making* the law. Juries as well as judges bring to bear upon the decision of individual cases their sense of what is fair and just and socially advantageous. Juries do not, however, write opinions. Therefore jury-made-law is neither

so definite nor so readily ascertainable as is judge-made law, and it is only by close observation and analytical study of long series of jury decisions that the jury is found to have made law at all. This type of scientific observation and study is now being undertaken and recorded by investigators connected with some of our schools of law and doubtless will lead in time to a revision of the law-book statement of many legal doctrines.

Another interesting thing about this jury-made law of contributory negligence is that, without knowing it, juries have a very good precedent for what they have done. Accidents happen on the high seas as well as on land. When they do, the suits that follow are tried in other courts, called Admiralty Courts. There they are decided by admiralty law instead of by common law. And in admiralty, the rule of law controlling contributory negligence is exactly the rule which juries seem to prefer in common-law courts. That is to say, in an admiralty court the judge-made law is that plaintiff's negligence shall be weighed against defendant's negligence and a balance shall be struck between them. So you see that reasonable minds can differ on the subject, even if they are legally trained reasonable minds.

This much can be said about the jury's contribution to the body of the law: it is really flexible. Since it is not imprisoned in the set phrase and the formulated dogma, it operates just so long as society wants it to operate, and in just those cases in which society, as represented by the next jury, thinks it is appropriate. Obviously that does not make for certainty any more than it makes for fixity. Perhaps, however, it is a social safety-valve which helps to keep the engine of the legal machine from blowing up.

Finally, jury-made law is important because, in the huge majority of cases, what happens in the lower court, where the jury makes law, is the last thing that ever does happen to the cases. An appeal to a higher court is too expensive to be considered in the great run of cases; and as we shall see when we take up the question of appeals, the higher court has no power, in most in-

stances, to change or even to review the significant result of this law-making action of the jury in the court below. If then my analysis is correct, we must regard the jury as a distinct factor in the growth of the law and not merely as an incidental part of the mechanism for the trial of cases. Because I so regard it I have devoted much space to an examination of the jury as a working body, and I shall have occasion from time to time in these pages to give it even further attention.

Chapter Four

SOME VERDICTS

If, in the last chapter, I have given the impression that I am a blind worshipper of the jury system and regard it as the fountain-head of wisdom, let me hasten to correct that impression. I want merely to point out the unquestionable fact that juries make law as well as mistakes. They do make mistakes; but so do judges. I have sat in court and heard the foreman of a jury announce a verdict that struck me as being perfectly absurd. Unhappily, I have also sat at my desk and read decisions of the Maryland Court of Appeals, reversing my own decisions, from which it appeared that the learned judges of that court did not regard me as quite infallible. Juries, lower court judges, appellate judges, even Supreme Court justices, all are human beings. We expect perfection of linotype machines and Ford automobiles. We must not expect perfection of human beings. If we do, we are sure to be disappointed.

In this chapter, I shall run through some of my note books and take a look at a few jury verdicts, to see whether any general trends are to be discovered from them. I cannot pretend to have employed the laboratory method as it is known to the student of social science. That method, applied to several thousand verdicts, would throw a flood of light upon the actual workings of the legal machine. I have not even applied the analytical method thoroughly to the several hundred verdicts in cases tried before me. General impressions, rather than scientific investigation, will form the basis for such tentative conclusions as are here expressed.

In the first place, do juries give adequate damages? Or do they "soak the rich" and give plaintiffs more than they are entitled to get? Obviously, the only answer I can give to that question is to compare jury verdicts with what my own verdicts would be in the same cases. My own verdicts might be quite different from those of any other judge, past or present; but I do not know how to check up on that.

For years I have been impressed, day by day, with the surprising extent to which jury verdicts agreed with my own. That, of course, has been a general impression, not reinforced by careful statistical comparison. Today I have gone over the cases tried before me during the past four and a half months. There were forty-two trials fully completed to the point of verdict. The aggregate amount of damages awarded by the juries was $118,042.90. In the same forty-two cases, my own award of damages would have aggregated $100,207.64. Of the forty-two cases, there were eight in which my verdict would have been for the plaintiff, but in which the jury decided for the defendant. There were seven the other way round.

Obviously, in a comparison limited to such a small group of cases, two or three outstanding variations will play havoc with averages. It happens that among these cases there were three extraordinary ones. In one, I should have given the plaintiff a verdict for $15,000.00; the jury found for the defendant. In another, I should have decided for the defendant; the jury gave the plaintiff a verdict for $72,619.00. In the third, my verdict would have been for the plaintiff for $75,000.00; the jury gave him $35,000.00. Eliminating these three cases, the aggregate amount of damages I should have awarded in the remaining thirty-nine was $10,207.64. In those same thirty-nine cases, juries awarded $10,423.90.

In looking at any group of cases for the purposes of this kind of comparison, my first interest is in those in which the jury and I disagreed outright. In this classification there were fifteen cases. I have purposely limited this tabulation to cases tried very

recently, because I wanted to be able to supplement my notes with a fresh recollection of each case. During these four and one half months, my notes cover six hundred and eighty-seven pages, comprising approximately 165,000 words. So I do not have to trust my memory unduly.

Considering first, then, the fifteen cases in which the jury and I disagreed entirely, I find that there was not a single one of them in which I can say that I think the jury was utterly wrong. By utterly wrong, I mean a verdict which is not supportable by what seems to me a rational view of the evidence. In other words, I can not say, upon reflection and after analysis, that any of these verdicts was necessarily the result of passion or prejudice or outright misunderstanding of either the facts or the law of the case, and I am quite willing to concede that it is very likely that the jury was as nearly right as I should have been.

When I examine jury verdicts which run flatly counter to my own conclusions, I find nearly always that the strongest reason for the difference is that the jury and I did not believe the same witnesses. I am not willing to assume that I am more often right in this respect than the juries are—not very often, anyhow. I know that writers in the legal journals are prone to say that this is one of the great weaknesses of jury trials. They speak of the experienced judge as a person peculiarly able to detect falsehood in witnesses and to weigh the probabilities of truth in their testimony. It may be so. For myself, after eight years of experience, I have less confidence in my own ability in this regard than I had at the beginning. Daily on the bench I hear a witness testify whose every word convinces me that he is constitutionally unable to tell a lie. Then a witness on the other side testifies to the exact reverse. And he seems to me to be the soul of honor. Somewhere, in the mass of conflicts, my mind seizes upon a little point which seems to solve the puzzle, and I reach a conclusion. But, often and often, I wish there were twelve of me instead of just one, so that I might thresh out the question in the friendly debate of a jury room, hear what the

other eleven of me have to say about it, and perhaps reach precisely the opposite conclusion.

What I am trying to drive home is the thought that in the trial of cases we are not dealing with mathematically or with scientifically demonstrable propositions. On the contrary, our concern is with matters about which certainty is usually quite impossible. The witness who swears to tell the truth, the whole truth, and nothing but the truth, and actually tries to do it, nine times out of ten simply cannot do it. Test yourself today. Only yesterday my wife and I observed an incident that nearly resulted in a traffic accident. We had stopped at an appointed place in the country to meet some friends who were to walk with us. Our friends drove up, saw us, swerved to the left side of the road and stopped their car suddenly. Another automobile was driving close behind them. It pulled quickly to the right, and a collision was averted by inches. The driver of the last car was annoyed, both visibly and audibly; but he drove on. Then my friend and his wife, my wife and I, tried to appraise the blame. I was quite sure I had seen my friend put out his hand in warning before he swerved and stopped. The two ladies weren't so sure whether he did or not. But my friend settled that question decisively by admitting that he had not done it. Then there remained the questions of the distance separating the automobiles, their respective rates of speed, whether the one in the rear was in the right or left or center of the road, and whether it caught up to our friends' car before or after that one stopped moving. On not one of these points did all four of us agree. No two of us had seen the same things happen. Yet all of us were right there and were looking; and no accident actually took place, so there wasn't any great excitement to disturb our powers of observation.

How much simpler that situation was than a trial in court! We compared our impressions immediately after the occurrence of the event. Two of us were disinterested witnesses. We were of the same level of intelligence. There was not the unfamiliar

and alarming effect of the court room, which so often bewilders and intimidates the inexperienced witness. Yet the four of us could not agree about precisely what had happened, though with our own eyes we had seen it happen just a few minutes before. In a court trial, the judge or the jury has to get everything at second hand. The information comes from witnesses who themselves do not *know* what they are talking about. Yet a court proceeding demands that the facts be determined with accuracy as a basis for the decision of the case in accordance with the law. Obviously, there is no conceivable tribunal which can do that every time. The reason I believe that juries *may* do it quite as well as judges is that each of several persons hearing the same testimony brings to bear upon it his own particular slant of understanding; and, when they put their heads together, each may throw some light on the problem. At all events, the results I have observed have not given me any great sense of superiority as against the juries in my court.

Returning, now, to the fifteen cases in which the juries flatly disagreed with me, let me indicate briefly what a careful study of my notes reveals. Two were cases in which I felt quite sure of my own ground. I definitely believed one set of witnesses, the jury another. There was a similar conflict in nine of the remaining cases, but in these nine it was a toss-up, and very likely the juries' opinions were quite as good as my own. Two others were striking examples of what I have called the jury-made law of contributory negligence. As a legalist, I should have felt myself under a compulsion to decide both of these cases for the defendants. The evidence convinced me that the plaintiffs were not 100 per cent free from fault — not even 99 44/100 per cent. But the evidence was conflicting, and they were clearly cases in which a verdict either way was legally justifiable. In one, the proved damages were at least $750. The jury's verdict awarded the plaintiff $100. In the other, the verdict was $250. The plaintiff's expenses and loss of wages amounted to a little more than that; and a very moderate al-

lowance for his pain and suffering would have supported a verdict for $500. In both these cases, I am convinced that the verdicts came closer to justice than any possible decision of mine, hampered by a strict adherence to the law-in-the-law-books.

The remaining two cases were illustrations of the jury-made law of right of way. One of these was the case of *Johnson vs. Robinson* analyzed above; the other a case in which I should have given the plaintiff a verdict for $250, and the jury decided for the defendant. Four of the nine cases which turned on credibility of witnesses were contract cases. They were all quite simple so far as concerned the legal questions involved in them, and it would be presumptuous for me to suggest that they were decided wrongly because I should have decided them differently.

One of the two cases in which I thought the jury was really wrong demands a special word. That was the case in which the plaintiff was awarded over $72,000. The trial lasted two weeks, and was full of dramatic incidents. Unfortunately, as this is written, it is still pending on appeal; and, for special reasons, I do not feel free to comment upon it at this time. Its importance in this discussion is that the amount involved in it affects so violently the mathematics of the comparison between my own verdicts and jury verdicts.

Another case must be mentioned for the same reason, and for other reasons as well. That is the case in which I should have rendered a verdict for $75,000, whereas the jury awarded only $35,000. That difference is on the side where it is not usually expected. Most lawyers think they will get larger damages in personal injury cases from a jury than from a judge. Here, again, I can speak for only one judge. My note books show that it is no unusual thing for me to award damages (on paper only, it is true) far in excess of the amounts actually assessed by juries. In these days of the psychology of the subconscious mind, when I observe in myself a tendency of that

kind, I go on a search through my past life to try to find a reason for it. You might expect to learn that before I went on the bench I was a plaintiff's lawyer; and that now I am impelled by a sub-conscious desire to see awarded to others the large verdicts which I failed to get for my own unfortunate clients of long ago. Well, I can acquit myself of that charge. For many years practically all of my trial work was on the other side. Especially as counsel for insurance companies, it was my task to put the plaintiff out of court with no damages at all, or with as small damages as possible. Of course I know, however, that once started on this quest of the sub-conscious, one can keep going round and round and fetch up wherever one pleases. It might be argued, for example, that I now want to give plaintiffs large verdicts so as to demonstrate to the puny lawyers who defend cases today how much better we did those things in the past, when nobody ever got a very large verdict against us.

What I really believe on this subject can be expressed without seeking anything in the sub-conscious at all. It is that in many cases, certainly here in conservative Baltimore, juries award absurdly low damages simply because they are composed of persons whose range of experience does not enable them to comprehend the loss which the plaintiff has suffered. In the case under consideration, for example, the plaintiff was a professional man in the early prime of his career. His account books showed a steadily and progressively mounting income, which had reached an annual rate of nearly $12,000 before his accident. His injuries were severe and permanent. I am sure they are of a nature which will constitute a serious handicap to him professionally for the rest of his life. His expenses and losses directly traceable to the accident had amounted already to well over $10,000. I thought and still think that $75,000 would have been a moderate verdict.

After the jury came in, I caused some inquiry to be made regarding its method of arriving at its verdict of $35,000. I learned that one juror wanted to award $150,000, and two others

wanted to give $100,000. Most of them were in favor of sums ranging from $40,000 to $70,000. But there was one man on the jury who said that $10,000 was the most he had ever heard of anybody getting out of a lawsuit, and "that was more money than *he* could think of all at once anyhow." This one juryman threatened to stay out all night; and the others were forced by him to compromise on $35,000, though they thought it entirely inadequate. I mention this circumstance because it is a very usual one, the result of the nearly universal rule requiring that verdicts of juries shall be unanimous. Time and again, when jury verdicts have been conspicuously lower than my own, I have found upon inquiry that one juror was responsible for that fact. It is likely that many verdicts would be far greater than they are but for this veto power of the lone stubborn juror.

Here again, it would be valuable if we could have a laboratory-like study of what actually happens in several thousand cases, not only in the court room but also in the jury room. Those who are active in urging a reform of the jury system often declare that the unanimous verdict rule is an obvious fault. These critics usually come from that section of the legal profession identified with the financially substantial part of the community. They are "defendants' lawyers" more often than they are "plaintiffs' lawyers." My guess is that they would be shocked by the result of this particular reform if it were adopted.

There remain two other cases in this group which call for mention because they are typical. Both were personal injury cases. In one, a woman of about fifty was the plaintiff. Her injuries were superficial — a sprained neck and a blow on the head that caused a slight swelling. But her sufferings were out of all proportion to her injuries. The accident had occurred eleven months before the case was tried. The lady testified that her pain had been continuous and severe throughout the whole eleven months. She described it as affecting one side of her face and all of her teeth. She was confined to bed for several weeks after the accident and had not been able to sleep without seda-

tive drugs during a single night for nearly a year. She was a witness who compelled belief in her honesty and sincerity.

Her medical witness was one of our leading physicians. He detailed his treatment of his patient and said that there was no doubt in his mind about the reality of her sufferings. On the other hand, he admitted freely that her bruises and sprains had healed in a few weeks, and that afterwards, he could discover no objective evidence of disease. The other case was essentially similar in its facts; but the plaintiff's sufferings did not last so long, though they were equally severe.

These cases were examples of what the doctors call traumatic neurosis; and that is something which juries generally do not seem to take very seriously. In each of these cases the verdict was barely enough to pay for the doctors, nurses, and drugs. Yet in each case the jury was instructed that the plaintiff was entitled to be paid a reasonable amount to compensate her for pain and suffering. It was apparent from the verdicts that the juries regarded such pain and suffering as not being worth anything at all in dollars and cents. Now from my own point of view that was absurd. A person who thinks he has a pain in his head or in his tooth or in any part of his anatomy, without any observable cause for that pain, suffers as much as though he had a pain for which a physical cause is apparent. In both of the cases under consideration there could be no question of faking, even of purposeful exaggeration. The plaintiffs were women of evident refinement and of good standing in the community; they were not in any sense the kind of people who would press a claim fraudulently. I should have given them both substantial verdicts.

This concludes my unscientific analysis of forty-two verdicts. A case recently tried before me affords a striking contrast to the last two discussed. In this case, the plaintiff was a somewhat younger woman. She, too, had suffered an injury to her head, but she was lucky enough to fracture her skull. I say "lucky," because she got over it almost entirely in a few months. When

she came into court, she was as well as before the accident, except for a slight disturbance of vision; and that, according to her oculist, was rapidly clearing up. But a fractured skull is something which can be observed; and, what is more important, it can be observed in a way that is peculiarly impressive to the layman. X-ray photographs of a fractured skull make striking exhibits. There sat the plaintiff, on a front bench in the court room. She was a dainty, pretty young person, with a soft, round face. And there, before the jury, stood her doctor, holding up to the light an X-ray picture of a grinning skull. The doctor pointed out a thin dark line running down the side of it, and explained in technical language that this dark line was the line of the fracture. While he did so, I was looking at certain white spots in the teeth, indicating fillings. It had occurred to me that they were probably quite as important as the line of fracture in the skull; for the doctor had stated that the healing process was going along perfectly well, and that in due time this part of the skull would be just as strong as any other part. So it amused me to look at the fillings in the teeth and to wonder whether one of them might develop an abscess and thus prove more detrimental to the young woman's future health than her broken skull ever would be.

Then I looked at the jury. They were simply fascinated. Apparently, most of them had never before seen an X-ray picture. I caught them stealing glances from the Death's head held up before their eyes to the fresh-looking young woman on the front bench. I could almost feel them shudder. They were seeing something that seemed to them real and terrifying, and I knew there would be a big verdict. Counsel for the defense did not tell the jury the obvious fact, that everybody has a skeleton inside his body and a skull inside his head. I am not sure it would have made any difference if he had. Those X-ray pictures had done their work. The real plaintiff was no longer the healthy looking young woman on the front bench; it was a grinning skull, with fillings in its teeth, and a thin black line

running down one side. Verdict: $5000. Moral: When you bump your head, be sure to crack your skull.

Traumatic neurosis, I have said, is not likely to get very far with most juries. That medical term simply means a nervous condition following an injury. Of course it must be distinguished carefully from pretended illness, or malingering; and, in my experience, juries are much more likely to err on the side of skeptical unbelief than of too great credulity, in cases of this nature. They are hard-boiled about them and can be convinced easily that the plaintiff (often a woman) who shows no organic cause for her suffering really has not suffered at all. Perhaps too many jurors have nervous wives.

However, there was one case of this kind tried before me which proved a striking exception to this generalization. True, it was a case in which the plaintiff did not look exactly healthy when she came into court; but her own doctors agreed with the defendant's experts in saying that she had nothing wrong with her from the strictly physical point of view.

The plaintiff was an actress, known on the vaudeville and concert stage as "The Sweet Singer of the South." In January, 1928, she played an engagement in a Baltimore theatre. An unusual accident occurred while she was on the stage. It seems that there is a device known as a scrim-drop used in the theatre for the purpose of giving a softened effect to stage-pictures. It is a curtain made of tightly stretched gauze; and it must be large enough to cover the whole proscenium arch. I had seen them often; but until this case was tried before me, I had never stopped to consider how this tremendous piece of thin, filmy material is made to hang straight and perfectly smooth, so that it becomes almost invisible to the audience. This is accomplished by weighting it at the bottom with a heavy and continuous weight, made of lengths of iron pipe, screwed together and slipped into a long pocket stretching across the bottom of the curtain.

At the Wednesday matinee "they had trouble with the scrim-

drop"; in June, 1929, nearly eighteen months later, the jury and I heard all about it from the stage hands. We learned then some of the mysteries and difficulties surrounding so simple a matter as raising and lowering the curtain in a theatre. We learned that over this particular stage hung more than thirty-five "drops" and that a very special technique was necessary for their manipulation. At each side of the stage there should have been stationed a man known as a "clearer," whose duty it was to see that a drop going up or a drop coming down should not foul one another nor any of the other thirty-three drops. It all sounded very important and very complicated and made the work of the actors and actresses seem a matter of only minor consequence.

On this occasion, the scrim-drop did assume a major role, at least so far as concerned "The Sweet Singer of the South." She was standing at the right of the stage, just after finishing a song. The scrim-drop was being raised. Somehow, it fouled. The clearer either wasn't there, or he failed to clear it. One side of the drop went up; the other side was caught and held down. Suddenly something began to rip. Out of the pocket at the bottom of the drop slid a long piece of iron pipe. It fell end-wise on the stage; and they brought into court, to prove the weight and force of its fall, a plaster-cast of the dent it made in the Georgia-pine flooring. Then this long iron pipe began to topple over toward the young woman who finally became the plaintiff. It must have been very heavy. The actor who caught its weight on his arm, and almost succeeded in warding it off from the plaintiff, had a heavy welt to show for it. But he was not entirely successful in his effort to protect the young singer. As the upper end of the pipe fell to the floor, it brushed by the back of her head and neck; and it certainly struck her on one ankle. No witness, except the plaintiff herself, was perfectly sure that the pipe actually did strike her head.

But everybody on the stage knew what next happened. The young woman staggered, almost fell, and had to be carried off

the stage into a dressing room where she remained unconscious for nearly half an hour. From there she was taken to her hotel and put to bed. A physician examined her at the theatre and more thoroughly at the hotel. He could find absolutely no evidence that she had been struck either on the head or on the neck. But she was extremely nervous, and complained of great pain in those regions. The doctor saw her daily until the end of the week, when she left to go to New York.

From that time forward, her story is like a bad dream. By the time she reached her New York hotel she had fever. On the Monday morning following this slight accident, her aunt, who lived in New York, was sent for and found her in her hotel room with a temperature of 103 degrees. For the next ten days she was dangerously ill. The doctors in attendance testified that they feared for her life during this period. Then, as her fever abated, other symptoms began to appear. She lost her ability to speak; and when she was well enough to get out of bed, her entire right side was paralyzed. After a few weeks, she was taken to the railroad station in an ambulance and was sent to her home in Alabama. There she was completely bed-ridden for two months. After that, she was able to get about on crutches. She was in every sense an invalid.

Such was her condition down to the date of the trial — a trial no less unusual than the accident that preceded it. The plaintiff's lawyers had a fine sense of the dramatic and built up their case most effectively. The last witness they put on the stand was the plaintiff herself. For two whole days she had sat in court, not at the trial table with her counsel, but on a front bench near the jury box, between the aunt from New York and her father. He was a Southern gentleman, a judge from Alabama. He had been one of the most effective of the plaintiff's many witnesses, as he told of her girlhood in Alabama, her education at school and college, and her vocal studies in New York. It was while he was on the stand that there were introduced in evidence photographs of the plaintiff, taken before the accident.

Not stage-pictures of an actress, but ordinary Kodak pictures of a wholesome-looking girl, photographed under the trees on the lawn of her Southern home. Other witnesses had told of her vocal studies and of her professional success. Bit by bit the mosaic had been fitted together; and by the time the plaintiff came to the witness stand the jury had a picture of a beautiful young woman, with a lovely voice, a great career in concert and opera opening before her, and an assured income of about twelve thousand dollars a year.

At last she was called. With difficulty she rose from her seat. Her dignified, elderly father held her on one side, her aunt on the other. They placed her crutches beneath her arms. With their help she walked slowly across the court room, dragging her right leg, and sank, exhausted, into the witness chair.

Her testimony, so far as it concerned the development of the facts of the case, did little more than corroborate that of other witnesses. Of course it was extremely important. Her very appearance on the witness stand spoke volumes to the jury. They heard her refined and lovely voice; and they heard it fade away almost to a whisper whenever she tried to speak more than a few words at a time. When that occurred they saw a very strange thing indeed. For each time the plaintiff found her voice dying out, her left hand moved gently to the right side of her throat, and she pressed against it firmly as though to move some obstruction inside. Then she paused for a moment; and when she began again to speak, her voice was strong and vibrant. But only for a few seconds; and the painful cycle was repeated. Among other things, she told the jury about the phonograph records she had made and sold to one of the great companies that market them.

It was a little, sick, old woman, with a faintly lined, but still young face, who testified. With the greatest difficulty could one bring himself to believe that eighteen months before she had been a youthful, gay figure, singing her way into the hearts of an audience. At last her whole story was told. She was cross-

examined, very gently, by the skillful lawyer for the defendant. There followed a brief re-direct examination, in which were brought out some further details about the making of the phonograph records.

Thereupon plaintiff's counsel asked for a conference with the judge, out of the hearing of the jury. The lawyers gathered round the bench; and plaintiff's counsel stated that he wanted a ruling on his right to play, before the jury, one of the phonograph records made by his client. Counsel for the defendant objected; but, after a brief discussion, I decided that it was properly admissible evidence. Counsel returned to the trial table. An assistant went into an ante-room and brought out a small phonograph. The record was duly identified. The phonograph was placed on the table and wound up. The song began.

I was never more surprised. The selection was a sentimental ballad of the music halls. The phonograph was a cheap one. I expected to hear that half throaty, half nasal voice which one associates with the vaudeville stage. Instead, the softer parts of the song were produced in a sweet, round voice, full of gentle sentiment; and the high notes were sung *bravura* in a manner that would reflect credit upon some of the best song recitalists I have ever heard. The court room was tense. As the notes of the song rang out full and clear, the plaintiff sat huddled in the witness chair with her handkerchief to her eyes, weeping silently.

Then she left the stand on her crutches, dragging her right leg. She was still weeping when she took her seat on the front bench beside her dignified old father from Alabama.

A good piece of acting? I thought so at first, despite the testimony of the eminent neurologist who had assured us that her ailments were all perfectly real although he could find no physical basis for them. In fact it was the testimony of the defendant's medical experts, called after the plaintiff's dramatic testimony had been given, that made me realize the stark reality of the young woman's suffering. Those experts told in detail of

the complete physical, neurological, and mental tests they had made. They demonstrated with what amounted to virtual certainty that there wasn't a thing in the world the matter with the plaintiff. Her heart was all right, and every organ in her body was perfectly normal. Her throat was free from the slightest defect. Her right side was not paralyzed. But, they said, she believed quite sincerely that all the distressing symptoms she exhibited were due to actual physical disease. So far as she could tell it was actual physical disease. They admitted freely that they did not entertain the slightest suspicion that she was pretending or faking. Everything about her was perfectly normal, but she did not and could not believe it to be so.

That in effect was about the same thing the plaintiff's medical witnesses had said. The only substantial difference was in their predictions for the future. The doctors who had testified for the plaintiff had expressed the opinion that she would, in time, get perfectly well. They had admitted that the most important factor bearing upon her recovery was the termination of this very litigation; that a verdict in her favor would go far toward effecting a cure. But, they said, they were doubtful whether she would ever be able to face an audience and sing from a stage, particularly a stage in a theatre with a curtain and drops that might recall to her memory the accident in Baltimore. The defense doctors, on the other hand, were more hopeful. They said they saw no reason why she should not get well enough to continue her career as though nothing had ever happened to interrupt it. They differed also in their estimate of the time it would take for the cure to be complete. The plaintiff's experts thought it might be a year, or even two or three years. The principal expert who testified for the defense said three months, or six months, or perhaps a year.

That was, in outline, the evidence upon which the jury had to base its award of damages. When the case was tried, the plaintiff had lost already about eighteen months from her work. Before the accident she had earned about $1000 a month. Her

medical and nursing expenses had amounted to nearly $2000. So that was about $20,000 to start on. And the jury was instructed that it might allow for that vague something called pain and suffering and for its estimate of the losses which the plaintiff might continue to endure as a result of the accident.

This time, the jury was a little more liberal than I should have been. Their verdict was $50,000. My own would have been $40,000; but I had written in my note book that I should have regarded anything up to $75,000 as not excessive.

That verdict was rendered on June 7, 1929. I am told that within a month afterward, the appeal which had been entered by the defense was dismissed and the case was settled for a sum not far from the $40,000, which would have been my own verdict. That was in July, 1929.

An extract from a college magazine published in Alabama in February, 1930. "Huntsville friends and music lovers were given a rare treat in January, when Elinor Standish sang for the Art League at the Federation Club House. Music critics have pronounced Miss Standish's voice richer and better than ever, following the long rest she has had since an accident on an Eastern stage, when a curtain drop fell and seriously injured her. For the summer of 1930 she plans to go to Europe to continue her studies under famous continental teachers. Her charming personality as well as her lovely voice, make many friends for her. She is one of the most popular and sought-for singers of the time, and justly so."

Chapter Five

ON TAKING A CASE FROM THE JURY

Saturday, June 4, 1932. It happens that the question I want to discuss at this point is illustrated by a case the trial of which began yesterday morning. When court adjourned in the afternoon, to convene again on Monday, the trial had progressed to a stage which makes my judicial task at this moment the consideration of the very matter about which I want to write in this chapter. Therefore I can write about it today before it is decided. On Monday I shall be able to announce my decision in court and also to tell about it in this book. By following this plan, I shall at the same time furnish a personal, and therefore only partial, answer to the question asked by Mr. Jerome Frank, and other recent writers for the technical journals of the law: How do judges think?

The case is that of *Paul Lacotti vs. The Pennsylvania Railroad Company.* Lacotti owns a little truck farm a few miles from Baltimore. He is sixty-eight years old, and though he has been in America nearly twenty-five years, he knows practically no English. That makes it necessary to conduct his examination through an interpreter, which, of course, slows up the case. But nobody minds very much because this old man has a magnetic personality, which breaks through the tedium of the procedure just as his frequent smiles and his eloquent gestures break through the barriers which his lack of English would otherwise set up.

On Taking a Case from the Jury

The work done by a court interpreter is always interesting. Our official interpreter in Baltimore knows eight or nine languages. More than that, though, he seems to know eight or nine foreign temperaments. Unfortunately Lacotti is an Italian from Sicily, so he doesn't speak Italian. The Sicilian dialect which he does speak, happens to be one language which our official interpreter does not know. Therefore it has been necessary to swear in a young law student as a special interpreter for this case. He knows Sicilian and he knows English perfectly but he lacks the professional touch of our skilled court officer.

For example, one of the introductory questions asked of the plaintiff is a very simple question which can be answered by an obvious "yes" or "no." When Lacotti hears it he frowns. Then he smiles. Then he launches into a long speech with many gestures. He becomes so excited that he gets up from the witness chair and sits down again three times before he finishes his answer. I am tempted at this point to suggest that perhaps the witness has said either "yes" or "no," and that the interpreter shall confine his rendition of the answer to one or the other of those words. But I am glad that I restrain myself; for the interpreter looks at me and reports, "He says he does not understand the question." So it has to be asked and answered all over again.

The suit grows out of a collision between a fast passenger train and a wagon loaded with manure and driven by the plaintiff. One of the early questions put to the plaintiff is, "What part of your wagon was struck?" Again a long and excited answer, and again the interpreter tells me the witness does not understand the question. When the question is repeated, I catch two words of it. The question was, "What part of your wagon was struck?" The young interpreter, in a perfectly honest effort to make the witness understand, adds "the right side or the left side?" That particular addition did not do a bit of harm. It was perfectly obvious that it was the right side which must have been struck; and the purpose of the question was to bring out the fact

that the right rear wheel was the point of impact. Finally the witness catches the point and gives the desired information.

This incident, however, affords me an opportunity to assure myself that the interpreter will do his work as it ought to be done. I call him and counsel up to the bench, so that I may speak to them out of the jury's hearing. I tell them that I have observed that the interpreter has added something to the question. I explain to him, very firmly, that as interpreter he must confine himself to interpreting; and that he has no right to add anything either to questions or to answers. But I do not tell him that the words "right" and "left" are the only Italian words I have understood all morning and that I am not likely to understand another.

By yesterday afternoon the plaintiff's witnesses had all testified and had developed the following facts. The plaintiff, driving his wagon loaded with manure, came to a point where the road crossed the railroad tracks. It was a grade crossing without safety gates or watchman, but it was guarded by the usual prominent "Stop, Look, and Listen" signs, and by blinker-lights. These are large red lights, automatically operated by electric current, and so devised that they burn alternately and conspicuously while a train is within the block approaching the crossing either from the north or from the south. The plaintiff said the lights were blinking when he approached the crossing, so he drew up his horse and waited. While he was waiting, an automobile pulled up beside him. After a few moments a train approached and passed from the north, running on the south bound track, which was the track nearer to which the plaintiff was standing. After this train passed, the lights stopped blinking. The automobile started off, crossed the tracks in safety, and was about one hundred yards down the road before anything happened. The plaintiff could not get under way so quickly, because his loaded wagon was heavy for the one horse which was drawing it. However, he did get started; and as he passed beneath the blinker-lights, he looked up and saw that

they were not blinking. They are very close to the tracks, and the plaintiff went on. When his horse's feet were between the rails of the second, or north-bound, track he looked to his right, and there was a train coming. "How far away was the train when you first saw it? How many feet away?" "It was close. So close the locomotive looked to me big like a mountain." The interpreter did not spoil that graphic touch.

In this emergency the plaintiff whipped his horse, and all but the last foot or two of his wagon cleared the track. The wagon was demolished, the manure fertilized the wrong field, and the plaintiff was toppled to the ground. When he got up, he had a badly injured knee. His doctor testified that his injuries are permanent. He himself testified that he has not been able to work at all since the accident whereas before he had worked his little farm practically without assistance and had made about five hundred dollars a year net profit. His expectation of life, as shown by life insurance tables, is about nine years. Therefore, if he wins his case, he may get four or five thousand dollars, perhaps even more.

What concerns me today, however, is not any question of the amount of verdict. It is something very much more serious than that, serious both to the plaintiff and to me. It is whether or not I, as judge, shall allow the case to go on and permit the plaintiff to ask the jury for any verdict at all. In other words, shall I, or shall I not, "take the case from the jury"? If you do not know anything about the law and court proceedings, and I am assuming that you do not, I shall not blame you if at this point you feel both puzzled and indignant. Have I not said in an earlier chapter that the jury's job is to pass on the facts, and the judge's to pass on the law? By what right then, you may ask, do I as judge propose to brush aside the jury in this case and to decide it myself in favor of the defendant? If I do that, what becomes of the vaunted right to trial by jury?

Nevertheless, that is precisely what I may decide to do. I won't know until Monday morning. So you must be patient for a few

pages while I try to tell you and Mr. Jerome Frank how a judge thinks and what he has to think about in a situation of this kind.

As far back as the 15th century, English judges had begun to control cases in a manner quite similar to that which I am now contemplating. The legal form was different, but it amounted to the same thing. In modern times, when we talk about a judge taking a case from the jury, what we really mean is that the judge, at the request of the defendant, grants a binding instruction, telling the jury that it *must,* upon the evidence, find a verdict in favor of the defendant. He doesn't take the case away from the jury so much as he takes the jury away from the case. He takes away from the case the privilege of the jury to exercise any independent judgment upon it and tells the jury what verdict it must hand down. There is a record of an early English case in which the judge did this, but the jury rebelled. Directed to find a verdict for the defendant, the jury nevertheless found for the plaintiff. They were admonished by the judge and sent back to reconsider and bring in a proper verdict in accordance with the judge's instructions. A second time the jury took the bit in its teeth and announced that it had decided the case in favor of the plaintiff. This time the judge asserted his authority. He sent for the sheriff, directed him to load the members of the jury into a cart, drive them into the country, and dump them into the nearest ditch.

I have never had to do anything like that. But I have seen jurors look at me, when I directed them to find a verdict, as though they wished they had the right to express their disapproval of me in some such vigorous and direct manner.

What, then, is the legal theory behind this ancient practice? Why does a judge sometimes direct a certain verdict? Why is it, under some circumstances, his legal duty to do so? Let me try to answer that question by a very simple illustration. Plaintiff sues Defendant on a promissory note. He produces the note in court and swears that Defendant signed it and gave it to him in exchange for a loan of $100. Plaintiff is then cross-examined

by Defendant's lawyer. He breaks down and admits that he never lent Defendant $100 nor any other sum of money and that Defendant never gave him the note sued on. Pressed still harder, he admits that he himself wrote the note, signed Defendant's name to it, and that it is a forgery.

Obviously, that ought to be the end of Plaintiff's case. There is no reason to put Defendant to the trouble of offering any evidence. The legal proposition is as simple as are the facts of the case. Defendant is not liable, as a matter of law, upon a piece of paper that looks as though it might be his promissory note but actually is merely a piece of paper on which somebody else has forged his name. That is the law of the case, to be decided by the judge. The facts of the case are to be decided, under our system, by the jury. But there is no room for any question about the facts. Plaintiff has admitted enough to force the jury to decide the facts against him. There is only one rational conclusion which the jury can reach, and that is a conclusion against Plaintiff. Therefore, the judge will grant a binding instruction, directing the jury that under the evidence it *must* find a verdict in favor of the Defendant. The rendition of the verdict by the jury becomes a mere form, necessary only in order to complete the ceremonial record of the case.

An extreme case like that does not call for any further explanation. Nobody is likely to object very seriously to what the judge has done. Plaintiff has tried to perpetrate a gross fraud. He ought to be thrown out of court, and nobody cares whether he is thrown out of the front door, the back door, or through the window. In fact he should be prosecuted for his crime, in addition to being thrown out of the civil court. The form of his ejection is by means of a directed verdict in favor of the defendant. The substance of it is a judicial declaration that he has no legal right to recover on the strength of the evidence as presented. Bound up in that judicial declaration is the assertion that there is only one rational view to take of the evidence. And, in this simple case, it is perfectly plain that this is so.

Now come back to my problem with the Lacotti case. What is the law of that case? I shall state it as simply as I can. Lacotti was injured at a railroad crossing. I have said before that, at each side of the crossing, were the familiar "Stop, Look, and Listen" signs. Probably comparatively few travellers know why those particular words are on these signs. They are there because, in this instance, a rule of judge-made-law has become a tradition not only for lawyers and judges, but for railroad presidents as well. In a case decided many years ago when railroads were in their infancy, a judge said that it was dangerous to cross a railroad track and that a prudent man would "stop, look, and listen" before he did so. That was good, snappy English. It didn't take long for other judges to begin repeating it. Soon it was a generally recognized rule of law; and it followed that if a man went on the tracks without stopping, looking, and listening, he was not a prudent man. Then, if he got hurt, it was his own fault, and the railroad did not have to pay him anything. In other words, he was guilty of contributory negligence; and the verdict of the jury, according to the law-in-the-law-books, *had to be* a verdict for the defendant. Railroad presidents like this rule of law; and for many years they have been painting it in large black letters on white sign-boards at every grade-crossing. It has become so common that if it weren't there, you probably would not believe that the tracks you see are real tracks for real trains to run on.

Like many rules of law, however, this one started out very simply and then became more complicated as cases arose the facts of which did not fit exactly into the pattern. Take my Lacotti case, for example. The Pennsylvania Railroad Company, at this particular crossing, made a definite effort to protect persons travelling on the highway. It did not station a watchman there nor put up safety-gates. The crossing was not used enough to make that seem worth while. But it did put up those conspicuous red blinker-lights. When they worked as they are supposed to work, they were a great help. People got used to look-

ing for the blink. If the lights were blinking, it would be a very careless man indeed who deliberately went on the tracks, fully expecting a train to rush down on him at any moment.

But suppose the blinkers should fail to blink when they ought to blink. Lacotti said that is exactly what happened when he started across the track. Therefore, said his lawyer, this elaborate electrical device, installed to protect the traveller on the highway, had become an actual source of additional danger. A blinker-light that fails to blink is a lure and a trap. Surely Lacotti ought to win his case.

Now I have sketched in only the very high spots of the evidence; and I shall, for purposes of simplicity, add as few details as possible. A plat made by a competent surveyor has been offered in evidence. It shows the slight curvature of the railroad track, the near-by railroad station, the location of the blinker-lights, and of every tree and every telegraph pole and every road and house for several hundred feet on each side of the crossing. Photographs have been introduced, showing the view up and down the tracks from several accurately marked points on the highway. The plaintiff's son has testified to measurements he has made showing precisely how far down the track he could see as he stood at various points beginning twenty-five feet away from the track and then moving up by five-foot intervals and measuring again. From all this evidence and more of like nature, I have discovered that the view down the track in the direction from which the train came is obscured from certain points by the little railroad station. When I look at the surveyor's plat, I observe that the plaintiff's son seems to have made fairly accurate measurements, but they do not appear to be perfect. The testimony has also informed me that the train was running at sixty miles an hour and that the blinker-lights were supposed to be set in operation automatically when it passed a point a little over three thousand feet from the crossing. Therefore, they should have been blinking for a full half minute before the train arrived at the crossing. Yet the plaintiff has

testified that they were not blinking when he passed beneath them, about fifty feet away from the point which he had reached when his right rear wheel was struck by the locomotive. How long did it take the plaintiff to travel those fifty feet? If he was going at the rate of three miles per hour, it took him about eleven seconds. Well then, he certainly was trapped. The lights ought to have blinked for over thirty seconds; they did not blink for even eleven seconds. Another witness has testified that the lights were not blinking properly three days before the accident. Therefore the company ought to have known they were out of order.

But yesterday afternoon, the defendant's lawyers referred me to a number of important precedents. They gave me a list of cases decided by the Maryland Court of Appeals and by other courts, in which the law of railroad crossing accidents has been applied and developed. After court adjourned, I read a considerable number of these cases. In a general way, perhaps I was familiar with them before; but yesterday I read them carefully and with special reference to the facts of the Lacotti case. And I find that I am faced with a real problem. I find that our Court of Appeals holds very strongly to the stop, look, and listen rule. I find there are cases in which it has decided that a person is not relieved of his obligation to stop, look, and listen, merely because the railroad company has installed safety devices for his protection. It appears that he must still make use of his senses for his own protection, even though a safety device out of order has given him a sense of false security. In one of the cases cited, an automatic bell failed to ring; in another a watchman did not put down the safety gates. In both these cases the Court of Appeals has said that the traveller was nevertheless guilty of contributory negligence if he did not look before he left a place of safety. It has also said in many cases, that if a man says he looked and did not see a dangerous object which was there, he is bound just as though he admits that he did not look at all.

I find this very puzzling. That is one of the troubles about

judge-made law. In each case the judge who wrote the opinion used general language, expressing general rules and principles, in words that might apply to any case. But when you want to find out exactly what he meant and just how far his decision is an authority which it is your duty to follow, you have to study the facts of the particular case in which his opinion was written and to try to determine whether the facts of the case with which you are wrestling are sufficiently similar to make the reasons and principles of his opinion applicable to your case.

I shall assume that you will not be interested in many more details of my legal puzzle. Let it suffice to say that yesterday, while studying the authorities, I had what Joseph C. Hutcheson, a great judge and learned writer upon the law, has called a hunch. I suddenly made up my mind that my decision in this case was going to hinge upon the question of how far down the track Mr. Lacotti could see when he was twelve feet away from the nearest rail. I selected that point as being approximately where he was just before his horse's nose reached the tracks. At that moment, Lacotti was still in a place of absolute safety. If, looking southward from that point, he could have seen far enough to observe a train, coming at the rate of sixty miles an hour, that would reach the crossing before he got over it, then he ought to have stopped and let the train pass. In reaching that decision, I have given Lacotti a considerable advantage growing out of his being deceived by the bad blinker-lights. For the Court of Appeals has decided also that a man does not comply with the stop, look, and listen rule by looking before he gets on either track. He has to keep on looking as he proceeds across the tracks; and there is no doubt that Lacotti had a clear view down the north-bound track to the south for several thousand feet when he had reached the south-bound track.

So that was my hunch. How far down the track could Lacotti see when he was twelve feet from the very first rail? I looked over my notes, and found that his son had testified that, from that point, the track on which the train came was visible for

only about three hundred feet. If that was accurate, the mile-a-minute train, moving eighty-eight feet per second, was visible from that point for only four seconds before it reached the crossing. But I was by no means satisfied with the accuracy of young Lacotti's measurements. He was not an engineer. Therefore, I examined the plat and the photographs which were in evidence. I grew more dissatisfied. Counting telegraph poles on one of the photographs, a photograph taken from the very spot twelve feet from the track which was my hunch spot, seemed to indicate visibility of the north-bound track for about a thousand feet. But I do not trust photographs for that kind of information — I've seen too many mistakes made that way. So I took the surveyor's plat and tried to measure it off on that. Then I got stuck. I did not have a ruler long enough to enable me to mark off the line I needed to draw, without shifting the ruler. When I tried to shift it, I found that the slightest inaccuracy made a difference of two or three hundred feet in my apparent results. At that point I became discouraged and went home to dinner.

This morning I sent for the lawyers for plaintiff and defendant and told them what I want to know. They have promised to have their expert engineers make accurate measurements on the plat and report to me on Monday morning. I did not tell the lawyers why I wanted to know this measurement nor what effect it would have on my decision. Thus I have left the way open to change my mind if I should get a new hunch between now and Monday. Now, having brought this "true confession" down to date, I'm going to read some more authorities on the case and then go for a swim.

Monday, June 6, 1932. The engineers reported this morning — one for the plaintiff, one for the defendant. They agreed almost exactly. From my twelve-foot point, the north-bound track is visible for about seven hundred feet. Incidentally, one of the lawyers told me how to avoid the trouble I had with a

shifting ruler. His engineer had told him you put a pin in the plat at the point from which you want to measure, tie a piece of thread to the pin, and then stretch the thread along the line which you want to locate. Next time I'll know how to do that myself.

Very well, then. The mile-a-minute train was about eight seconds away when it first came into the sight of a person at my hunch point. I had calculated that the distance from that point to the first rail of the north-bound track is twenty-seven feet. At three miles an hour, it would take Lacotti about six seconds to cover those twenty-seven feet. Therefore it looked very much as though Lacotti had already passed my hunch point before the train came into sight from that point. If so, Lacotti has the edge.

But at the last moment, I hesitate. I recall that nobody has testified that Lacotti crossed the tracks at three miles an hour. That was just an assumption on my part. I know that when I walk at three and a half miles an hour, I go slightly faster than a cart-load of manure. I've done it often. Have I a right, though, to allow this assumption based on my own experience, to take the place of testimony?

These are some of the thoughts that are passing through my mind while counsel make their last minute arguments before me in chambers, out of the presence of the jury. If I am not paying very close attention to what they say, at all events I am thinking about the case; so my conscience is clear. Besides, I have already read and re-read the cases which counsel are citing and have made up my mind just what they mean. Therefore I go on in the mental pursuit of my hunch and say nothing until they get through talking. Just as counsel are about to conclude, I drive my hunch into a corner; or it drives me into a corner, I don't know which. All at once, I find that I have decided; and, from that moment, I wonder why I ever was in the slightest doubt.

My decision was, to let the case go to the jury. That is, to

refuse to grant an instruction directing the jury that its decision *must* be for the defendant. Therefore the defendant has had to go on with the presentation of its defense. Today we have been listening to the defendant's witnesses. They finished at adjournment time. Tomorrow morning the case will be argued, and the jury will decide it. Meanwhile, let me try to explain finally why I did not take it from the jury.

Can you recall what I said in connection with my very simple illustration, a few pages back, of the case of the suit on a promissory note that turned out to be a forgery? I said when the judge took that case from the jury, there was bound up in his judicial declaration the assertion that there was only one rational view to take of the evidence. In that case it was perfectly obvious that there was only one rational conclusion the jury could reach, and that was a conclusion against the plaintiff. Therefore, as a matter of law, the judge directed a verdict for the defendant.

Now, according to the law-in-the-law-books, that is always the basis for a directed verdict. Whenever a judge takes a case from the jury, he does it because, in his opinion as a lawyer (or better, as a law-knower) the jury would be doing something absurd, unreasonable, and irrational, if it decided for the plaintiff. Apply that test to the Lacotti case. If the evidence showed that before his horse got on the first track, Lacotti was in a position from which he could have seen the on-coming train, then he certainly ought to have stopped and let the train pass. If he did not look, and if he did not stop, he was not merely negligent, he was reckless. If he was reckless, then there was only one rational conclusion which the jury could reach. If that were so, then there was no need for the defendant to go on with its side of the case. The whole matter should be settled by an instruction from the judge that the jury *must* decide for the defendant. In short, it was a perfectly clear case exactly like the case of the forged promissory note.

On the other hand, if the evidence showed that Lacotti could

not see the on-coming train from that point, or that it was doubtful whether he could or not, then maybe he was careless and maybe he wasn't. It became a matter of judgment. There was more than one reasonable way to look at it. It was precisely the kind of question, a doubtful question of fact, that juries are supposed to deal with and to decide.

Perhaps now you will see the hunch that I had, and why I call the point twelve feet from the first rail my hunch point. I wanted to know definitely what was visible from that point because, as I reasoned upon the law, that would enable me to decide whether there was only one, or more than one rational, and at the same time legal, conclusion to be drawn from the evidence. When I got that bit of information precisely, I concluded that there was more than one rational way of deciding the case. Instead of a dead open and shut question, it was an open question, with a plausible and quite rational argument to be made on either side. Therefore I have let the case go to the jury. Tomorrow we shall see what the jury does with it.

Tuesday, June 7, 1932. 11:30 a. m. The argument of the Lacotti case has been finished. The jury has retired. I have made this entry in my note book, at the end of my notes of the case.

My Verdict	*Jury*
Defendant	?

N. B.—In this case, the evidence of contributory negligence is so strong that I nearly took it from the jury. Moreover there ought to be a verdict for defendant on other grounds. Defendant's witnesses have convinced me that the blinker-light never was out of order and that Lacotti probably did not look at it when he passed beneath it. Plaintiff's injuries would entitle him to a verdict of at least $5000. I anticipate a verdict in his favor for much less than that. It is a case in which the jury probably will apply the jury-made-law-of-contributory-negligence, and, by a small verdict, will apportion the blame.

I also anticipate that my decision may be reversed by the

Court of Appeals if there is an appeal. I am sure of the soundness of it; but the point is a close one.

Tuesday, June 7, 1932. 1:00 p. m. The jury is in with a verdict for the plaintiff for $1200. . . .

A few words more about taking cases from the jury. I wonder whether you have caught the grim humor of the practice. A judge takes a case from the jury, that is, he grants a binding instruction which compels the jury to decide for the defendant because that is the only *rational* decision that can be made. The lawyers for the defendant work like Turks to convince the judge that he ought to take the case from the jury because they anticipate that if the jury gets the case, it will decide for the plaintiff. In fact, not only the defendant's lawyers, but the plaintiff's lawyers, the clerk of the court, the bailiffs, and the judge himself all seem to believe that such will be the result.

In other words, everybody in the court room seems to believe that the jury is not rational! Is that what they actually believe? Well, I for one, do not. In the next chapter I shall approach the same question from a slightly different angle.

Chapter Six

THE THIRTEENTH JUROR

No doubt you are convinced that taking a case from the jury is something that the judge who is writing this book does not do lightly. It is usually a final and irremediable act. Plaintiffs are apt to be poor people, who cannot afford to appeal from decisions against them. Therefore, a judge in a lower court must feel very sure of himself before he renders a decision which, in all likelihood, will put an end to a case forever. If he is not quite certain, if the legal point is not perfectly clear, if its application to the evidence in the case on trial is at all doubtful, he will do very much better to let the case go to the jury. The jury may decide for the defendant; or, if the jury decides for the plaintiff, the defendant more often than the plaintiff can afford to take an appeal. On appeal, the error of the lower court, if the court made an error, will be corrected.

This seems to be the point at which I must discuss a somewhat delicate question. I am trying to paint a true picture of the law-in-action, the law as it actually will affect your rights and determine your liabilities if you become a party to a lawsuit. Have I not indicated already that one of the most important factors is the personality of the judge before whom your case may happen to be tried?

Judges *are* human beings. They come on the bench, usually in middle life, with a full set of experiences, capabilities, emotions, and prejudices. They do their day's work on the bench. On some days they are keen and vigorous and wide-awake; they can give to the case on trial the very best that is in them.

On other days they are tired, or worried, or simply in a bad humor; the quality of their intellectual product is bound to suffer. Each judge is actually many different men on many different days. He likes certain kinds of cases and they spur him on to put forth the best powers of his mind. Other kinds of cases bewilder him. Try as he may, he can find in them nothing but dry-as-dust legal formulae, which he never did understand very well even when he studied them in his law-school days. If your case happens to involve points of law that the judge does not understand, points in which he is not particularly interested, you may get a sound and a wise decision. Then again, you may not. It will depend very largely upon nothing more profound than chance. The judge does his conscientious best, but it isn't very good. There have been many occasions when I realized that Justice in my court room was blind in a sense that did not make me especially proud of her.

If the individual judge varies from day to day and from case to case, how much greater must be the variation among a number of judges! In Baltimore our bench has eleven members. We differ widely in age. No two of us have exactly the same intellectual or social background. Each of us before he became a judge had a type of law practice which differed from that of each of the others. Some of us practiced in the criminal courts, as well as in the civil courts. Some were prosecuting officers of the state; others hardly knew that criminal courts existed. Some were active trial lawyers; some did all of their work in their offices and seldom even visited the courthouse. Some habitually represented poor clients, had large practices built up of many small units; others were corporation lawyers, closely affiliated with the powerful financial interests which control the economic life of the community. I might go on enumerating these differences of background and of experience indefinitely. No doubt they are typical of any group of judges in any city.

Furthermore, no two minds work the same way, on the bench or off it. One man receives impressions by what he sees, an-

other by what he hears. Some minds work quickly, others slowly. Some persons are full of prejudices, know that they are, fight against them, and possibly lean backward in their efforts to overcome them. Others are even more easily influenced by similar or by different prejudices and not only do not know it, but are perfectly certain that they are machine-like thinkers impervious to anything but reason.

When Blackstone said one hundred and fifty years ago that judges were but "living oracles" of the law, merely "the mouth which pronounces the law, which was always present and certain before the judge discovered and pronounced it," he was speaking in an age of abstract philosophy. Today we are living in an age of science. Modern scientific methods of inquiry are invoked in every field to try to discover what things are and how they work. Scientific training is not needed, however, to learn that the law as laid down in one court, by one judge, on one certain day, is apt to be quite different from the law as laid down by another judge, in another court, on the same day or on any other day. We may, if we choose, wish that the law were always uniform; but wishing will not make it so. The very most we can hope for is that each judge will do his level best every day, and that he will be always quite honest. We must expect and accept differences of mental capacity and of essential point of view.

What I have said above is not in any sense new or startling. My reason for insisting upon it here is because of its special application to the matter of taking a case from the jury. Ask any lawyer, and he will tell you that some judges are known as plaintiffs' judges, others as defendants' judges. That is another way of saying that some judges seldom take cases from the jury and other judges do it frequently. Therefore if you are a plaintiff whose case involves a close question of law, it will make all the difference in the world to you whether it is tried before one judge or another.

This is not said in a spirit of criticism or of fault-finding. For

example, I myself am either a plaintiffs' judge or a defendants' judge. Strangely enough, I do not know which I am. I do know that I go through a hard siege of self-doubt and self-analysis every time I take a case from the jury and oftentimes when I refuse to do so, as well. The Lacotti case was analyzed at length in the last chapter not because there was anything striking or unusual about it, but because of its typical and illustrative character. Every judge has to make similar decisions continually. I have checked through my note books covering a full year of service in a court conducting jury trials. During that year jury verdicts were rendered in 132 cases and I took 28 cases away from the jury. Whether that is a large or a small proportion compared with what other judges would have done, I do not know. This is another of the many sides of law-in-action about which people make general statements based on a plentiful lack of knowledge. It would be interesting, and it would be important, for someone to make a systematic study of this practice. If the records, in this regard, of a large number of judges were studied and the results tabulated, no doubt certain averages or norms of performance would be discovered. An individual judge might profit by the results of such a tabulation. I take from the jury 17½ per cent of all the cases tried before me; if I should learn that the other judges in Baltimore, administering the same system of law, habitually make similar rulings in 5 per cent or in 30 per cent of their cases, I might be expected to try to mend my ways. For I believe very earnestly that, so far as practicably obtainable, there should be uniformity in the administration of a legal system. The inescapable differences growing out of the different personalities of individual judges ought to be minimized. Students of the law as a working system need to give greater attention to this problem than they have done in the past. They must deal with the law-in-action, not merely with the law-in-the-law-books. The judges in the lower courts need to have the facts of their own idiosyncracies exhibited to them. If one of them is conspicuously out of step,

he is the last person to find it out; a new kind of legal reporting needs to be developed, which will tell him so.

I have entitled this chapter *The Thirteenth Juror.* By that I mean the judge who is too sure of himself and believes that it is his duty to substitute himself for the jury on every possible occasion. He can do that in three outstanding ways.

First, he can take cases from the jury freely and frequently — I mean too freely and too frequently. It is quite possible to do this without violating the established formulae. The rule is that the jury must be left to decide unless only one decision is possible within the bounds of reason. There are judges who believe quite conscientiously that anyone who disagrees with them must be utterly unreasonable. Such infallible people are to be found not only on the bench but in other walks of life as well. In a way I envy the man who has that sort of mind. Life is very simple for him. He knows that he is right and that everybody else is wrong. Everything is black or it is white; there are no shadows; there are no grays. If he is a judge, he hears the evidence in a case and he knows exactly what that evidence means. He *knows* that the plaintiff has failed to prove his case. He knows it so well that he is sure no reasonable person can have another opinion about it. Therefore he unhesitatingly takes the case away from the jury lest twelve unreasonable persons may disagree with him.

Do I hear you say that my argument goes too far? If I have the degree of confidence in jury wisdom that I have intimated should I not allow *every* case to go to the jury and refuse always to grant an instruction binding the jury to find for the defendant? The first answer is an obvious one. As a judge I am part of a system which I must do my part to uphold, though I may entertain my private doubts about its final wisdom. I am recreant to the trust reposed in me if I allow those doubts to sway me from applying the rules merely because I am not sure they are the best possible rules. But the rule on this point is that a case shall be taken from the jury only when the judge believes that,

under the law and facts of the case, reasonable minds cannot differ concerning the rightness of a decision for the defendant. The rule is not that it shall be done every time the judge himself thinks that the defendant ought to win. There is a tremendous difference between those two propositions. In the vernacular, it is the difference between being sure and being absolutely sure. It is not too much to ask the latter of a conscientious judge. Nor is it too much to ask of him that he shall search his spirit for hidden motives at the same time that he exercises his powers of reason in his attack upon this often recurring problem. If he happens to be of an aloof turn of mind, a cloistered person of the intellect, a man prone to look down upon and to despise the mentality of others, there is all the greater reason to hold himself severely in check. That judge, of all others, must say to himself, "I am *not* a Thirteenth Juror, with a right and duty to brush aside the other twelve. I am a man as they are men. I have an opinion. I am sure I am right. But is mine the only possible opinion that meets the test of reasonableness? May not there be another reasonable way of looking at this case?"

If his answer be "no," delivered in that humility of spirit which characterizes the sincere thinker, he will not hesitate. He will take the case from the jury, he will turn away the plaintiff unrecompensed, though his heart may bleed for the doing of it. His comfort will be that he has done his duty as he saw it to be done.

Still I have not answered your question. Why should this ever be a duty and a necessity? If juries are as wise as judges, or, if that be too much to suggest, if juries are made up of reasonable men, why assume that they will render unreasonable verdicts if *every* case be left to them for determination? Here I must call upon history for the first part of my answer. I have said before that judges have been exercising this kind of control over cases under our system for over four hundred years. To many, that would be a complete and a sufficient answer. To most members

of my profession I feel sure that it is. To me it is an important part of an answer. Any human institution, any custom, which has endured so long without change in a changing world must have had an element of social utility, and may have it still. A rule of the English common law that was practiced in the days of Queen Elizabeth, that was brought to America by the colonists, that has spread over all of our forty-eight states and is still practiced in this age of radios and airplanes, is not likely to be wholly unwise. On the other hand, reverence for the past does not demand that we refrain entirely from questioning the present validity of its heritages. I am not able to say to my own satisfaction whether this particular legal practice is wise or unwise, socially useful or socially useless, today. Nor can anyone else answer the question and be sure that he is right. To do that, it would be necessary to perform a very difficult experiment. It would be necessary to set up two courts in the same locality, dealing with the same kinds of cases, served by the same types of jurors. In the one, the present system would be followed; in the other, the judge would let every case go to the jury. At the end of a year, or two, or three years, the results would be compared. Only then could we know with certainty whether twentieth-century juries need to be held in check by twentieth-century judges.

Perhaps a further word is needed in explanation of the reason that lies behind this exercise of judicial control over juries. I have said that, according to the law-in-the-law-books, a case is taken from the jury when only one reasonable verdict is possible, upon the bitterly humorous assumption that the jury almost certainly will render an impossible and unreasonable verdict. That is to say, difficult questions, doubtful questions, about which reasonable minds may differ, are left to the jury; easy questions, so simple that there is only one possible answer to them, are withdrawn from the jury's consideration. Put the latter way, it looks as though the jury is held in such immense respect that judges do not want it to be bothered with a

case that does not present a problem worthy of its profound deliberations.

I think, however, I am safe in saying that excessive respect for juries is not the reason for judicial control over them. It must be obvious that the reason given in the law-books is not the real reason at all. Judges are neither so humorous nor so illogical as to base their actions upon so foolish a reason as that. Clearly, this practice is based upon the assumption that juries are swayed by emotion rather than moved by reason and the further assumption that a judge's decision is the result of pure reason. The latter assumption rests upon a concept of the workings of the judicial mind that has been abandoned for over one hundred years. The mind is not a series of unconnected boxes, some containing reason, others containing emotion. Thought is not accomplished and judgment is not attained by reaching into a box and taking out of it pure reason unaffected by emotion. Judges can no more do this than juries can. Thought is a complex affair in which reason and emotion are inextricably bound together; and the assumption that a decision by a judge is a decision untouched by emotion is a fundamentally false assumption.

The real reason, then, for taking a case from the jury is the fear that emotions peculiar to the jury will control its action to the undue advantage of the plaintiff and against the interest and the legal rights of the defendant. It is the fear that the too-human jury will regard a plaintiff's human rights as superior to a defendant's money rights and will decide for the plaintiff, regardless of fact and of law. But is it not fair to say that, by and large, the judiciary consists of men whose sympathies are enlisted perhaps more easily upon the side of property than upon the side of humanity? Most judges have been successful lawyers. Successful lawyers are tied closely into the world of vested property interests. They have emotions just as juries have, but they are emotions which drive in another direction. Can we be perfectly sure that, when they differ, judges are always right and juries are always wrong? When I ask that question, I use the

words *right* and *wrong* in the sense of socially helpful and socially hurtful, not in any sense of abstract morality and certainly not in any sense of right and wrong according to the technical, or law-book, rules of law.

So I come back to my concededly impossible demand for what the scientists call a controlled experiment, namely, two courts operating side by side, our present system to be continued in one, in the other, all cases to go to the jury. Short of that experiment, your guess is as good as mine. No, not quite as good. Again I turn to my note books. For five years I have sat in courts with juries. Time and time again I have listened to the most urgent appeals to take certain cases from the jury and I have determined finally to let those cases go to the jury for its verdict. Many, many times I have been sure that, under the law and under the facts, the decision should be for the defendant. But I have not been absolutely sure. So I have let the jury decide. And, in almost every such instance, the decision of the jury was for the defendant. There have been cases where the defendant was a colored man represented by a lawyer of mediocre talents, the plaintiff, a white man with a better lawyer. And the Negro defendant has won his case. There have been cases in which the defendant was a powerful corporation, the plaintiff, a beautiful young woman, or a poor widow with a large family. The jury has decided in favor of the corporation. Fear of juries, I think, is in large part a conventional bug-a-boo. I have said before and I say again most emphatically: juries do make mistakes. I have seen them make mistakes that to me seemed ghastly. And for every such mistake made by a jury, I can recall one made by a judge.

Finally, it needs to be recognized that one of the strong cravings of the human mind is for a system of law that is definite, certain, and fixed. As pointed out above, judge-made law embodied in written and published opinions, partly satisfies this craving. Jury-made law, unless and until there be devised some means of recording it, reaches the extreme of apparent uncer-

tainty and changeability. Thus there is a perfectly natural tendency for judges to attempt to control it, to curb its growth, and to limit the opportunities for its development. Taking a case from the jury is a manifestation of this tendency and as such it may be wise. At this time, and in the light of my present knowledge, I am willing to go only this far: twelve jurors are quite enough; and a Thirteenth Juror on the bench ought to use his veto power only when he is very, very sure indeed.

A second, and closely related, manner in which a judge can substitute his judgment for that of the jury is in his action upon a motion for a new trial. Many laymen think that the regular procedure upon the completion of every trial calls for the losing party to make a motion with the object of having the case tried all over again. This is one of the reasons why laymen so often criticize our whole system of the administration of the law. They see in it only a complicated machine, designed to befog simple issues and to delay the attainment of justice. So far as this charge rests upon the delays obtained by the motion for a new trial, speaking for our practice in the city of Baltimore, the only practice of which I have intimate knowledge, I can say without hesitation that the complaint has little foundation. A motion for a new trial is disposed of promptly; and it has undoubted value.

There are three usual grounds for such a motion. First: that during the course of the trial something occurred that interfered with the due and orderly and honest conduct of the proceedings. Second: that the judge made erroneous rulings of law. Third: that the verdict of the jury is not supportable under the evidence.

While it is easy to imagine many possible instances of misconduct during the trial of a case, as a matter of fact, in five years' experience with jury trials I have had only one case before me in which any such charge was made. That was a case in which it is very possible that stupidity was the only sin of which anybody was guilty.

During the mid-day recess, a juror was seen to remain in the court room and to engage in conversation with the mother of a little girl who was the plaintiff in the pending case. The child had suffered an injury to one of her legs; and the mother took occasion to point out the scars to the juror. It was all done openly and without attempt at concealment; but it happened that neither the defendant's lawyers nor I knew anything about the incident until after the jury had returned a substantial verdict in favor of the plaintiff. I granted a new trial almost as a matter of course when the facts were brought to my attention.

The second usual type of motion for a new trial is, as I regard it, by far the most important. In the course of a trial, particularly if it be a long one, a judge has numerous opportunities to make serious mistakes. He has to act often, and he has to act quickly. Not infrequently, his instructions to the jury are given late in the afternoon, when he is weary and not very wide-awake. A motion for a new trial gives him an opportunity to correct his errors with a minimum of expense to the litigants. Another trial costs less in time and in money than an appeal. Every judge welcomes the opportunity given him by such a motion to review his own actions and to correct any manifest error that may be pointed out to him.

The third type of motion, however, is the one I want to discuss in connection with the Thirteenth Juror. The form of the motion in use in Maryland on this point is, " that the verdict is against the evidence," or " that it is against the weight of the evidence." It is in regard to the action of a judge upon this motion that great differences of practice arise, differences resting primarily in the personality and the basic mental outlook of the individual judge. The same type of judge that allows himself to be a Thirteenth Juror and too freely grants instructed verdicts for the defendant will use too freely his power to set aside verdicts already rendered. Here again a nice sense of balance is called for. A judge ought to be a man sure of his own mind but respectful of the opinions of others. He acts unwisely

and in a manner contrary to the spirit of our institutions if he grants a new trial simply because he does not agree with the jury's verdict. His business is to see that the case is presented fairly and that the jury is instructed properly upon the law. Whether or not he likes the jury's verdict is not his business, in any judicial sense. Of course, if a verdict be so manifestly contrary to the judge's sense of justice as to "shock his conscience," to employ the old legal phrase, then he ought to set it aside. If a verdict be such that it rests obviously upon passion or prejudice and cannot be justified upon any ground of reason, a judge who lets it stand is not worthy the name of judge.

Yesterday, in my court, was "law-docket day." In many courts it is called "motion day." The jury was not present, and I was engaged in hearing various technical matters the details of which have no place in a book of this kind. Among them were no less than seven motions for new trials in cases in which verdicts had been rendered by juries within the preceding fourteen days. In each case counsel made no point of any question of law but sought to have me grant a new trial merely because they hoped I might regard the several verdicts as so repugnant to reason that I would set them aside as being "against the weight of the evidence." As a matter of fact, my note book showed that in six of the seven cases my own verdict would have been the same as the jury's. In the seventh I should have decided the other way. But that case was a very close one and its decision depended entirely upon which witnesses were to be believed. The jury believed the defendant; I did not. The case involved a question of liability under a lease. It was the kind of case in which my law-practice-trained mind, my mind prejudiced in favor of property — in other words, my judge's mind — may very possibly have been impelled by emotion toward the landlord's side. That emotional drive, if it was there, may have been the real and substantial reason why I chose to believe the landlord's witnesses and to disbelieve the tenant. On the other

hand, I may guess that a similar emotional drive in the opposite direction was the substantial reason that led the jury to believe the tenant. The jury was composed of twelve human beings; I recognized myself as one other human being. I might assume readily enough that the twelve men of the jury weighed the evidence and added to the defendant's balance a heaping measure of what we call human sympathy. But calm reflection forced me also to assume the likelihood that I had weighted the balances with an equal measure of anti-sympathy, of what, for want of a better term, I may call " legalistic emotion." Perhaps the jury was too human; on the other hand, perhaps I wasn't humane enough. At all events, it did not take me long to decide the motion for a new trial. I overruled it and felt no temptation to be a Thirteenth Juror.

Finally, the third manifestation of this Thirteenth Juror impulse is exhibited when judges freely grant new trials because they disagree with the jury's estimate of damages. In most jurisdictions the rule is that, though the jury fixes the amount of damages, the judge may upon motion grant a new trial if he regards the verdict as either unreasonably high or unreasonably low. If the verdict is larger than the judge approves he grants a new trial, unless the plaintiff consents to the judge's award of smaller damages. The practical effect of this is that in most cases the judge cuts down the verdict; for usually a plaintiff cannot afford the delay, the expense, and the uncertainty of trying his case again.

On the other hand, when the judge thinks the verdict too small his sole power is to order a new trial, and he cannot make this order conditional upon the payment by defendant of a larger amount. This is a fine-spun distinction. For example, when a jury has awarded $5000 damages, this amount includes any smaller sum, so that if the judge cuts the verdict to $3000 it is still considered the jury's award. But a verdict of $3000 rendered by a jury fixes that sum as outside limit. If the judge thinks it too small he does not have the power to increase it to

$5000, for then the damages would be determined by the judge and not by the jury.

Of course sometimes a conscientious judge blessed with a logical mind must cut down verdicts, particularly in contract cases. The evidence may show that the plaintiff is entitled to recover exactly $1000 or that there should be a verdict for the defendant. If the jury brings in a verdict for the plaintiff for $2000, then, quite obviously, the judge must cut it down. I have said that this type of situation may arise, and I have heard of cases in which it has arisen. However, during my own five years with juries, I have never had such a case. I have had many cases in which the shoe was on the other foot, cases in which I would have given a larger verdict than the jury actually gave. But upon analyzing the evidence, I have found nearly always that the jury's verdict could be explained and justified upon rational grounds. Usually it was merely a question of credibility of witnesses. The cases in which juries cut down damages by their application of what I have called the jury-made-law of contributory negligence were among those which I found it hardest to justify upon any ground of law or of logic; but I have never felt any very strong inclination to disturb such verdicts. In these cases the jury has forced the parties to settle their differences upon a basis of compromise; and, if the parties had been wise, they probably would have done that upon their own initiative without ever coming into court.

The cases in which judges most often interfere with the amounts of jury verdicts are not such as I have been discussing. They are personal injury cases in which the judge thinks that the jury has awarded too much. A plaintiff has lost his right arm. The verdict is $25,000. The judge cuts it down to $20,000. Another plaintiff has suffered a broken leg; he has been unable to work for four months; he has a permanent limp, but it is slight. The jury gives him $2500. The judge cuts it down to $2000. Still another plaintiff has been made nervous and ill, has lain awake night after night suffering with pain; but no bones

have been broken, and no objective cause for his illness can be found by the doctors. The jury gives him $5000. The judge cuts it down to $1000.

Those things actually do happen in court. They happen in cases in which the judge has instructed the jury that in estimating damages it may take into consideration the pain and suffering, both physical and mental, sustained by the plaintiff as a result of the accident that laid him low. In some courts and among some judges the jury's verdict in personal injury cases is treated almost regularly as a base from which the judge may begin to perform major or minor surgery upon the amount of damages fixed by the jury. A judge that habitually exercises his discretion in this manner may very probably resent my designation of him as a Thirteenth Juror. I hasten to say that I do not intend the term to be an offensive one. My purpose is to present a picture of the actual working of the legal rules. In some courts it happens frequently that the jury's verdict is cut down by the judge. In other courts, particularly in respect of cases in which an element of damage is something scarcely susceptible of measurement in dollars and cents, something as real but as intangible as pain and suffering for example, the judge takes the position that the estimate made by the twelve men on the jury is as likely to be fair and just as any estimate that he himself might make and substitute for it. The final result is very different in the one court from the final result in the other court; and it is the final result which counts for the litigant. Both judges are equally able, both are equally honest; but the fundamental approach to life of each of them is radically different from that of the other. Each may claim quite honestly and quite truly that he is simply applying the rules as he finds them in the law-books. Those rules give him the right to order a reduction in the jury's verdict if its amount be so great as to shock his judicial conscience. But on the bench, as elsewhere, some persons are shocked more easily than others.

Essentially this is a matter of the emotions rather than of the

intellect. The judge who seldom interferes with the jury's estimate of damages is a man who believes in the workability of democratic institutions and recognizes in the jury a small cross-section of human society organized for direct action. The other judge, the Thirteenth Juror, feels himself and his judicial office to be a bulwark against the onslaughts of those who are seeking to use the processes of the law for what he regards as an unwarranted attack upon property and its lawful possessors. Probably neither judge has ever thought the matter through for himself. Probably each has acted and will continue to act in obedience to a set of emotional commands that spring from the inmost depths of his being and never come into the realm of his conscious, thinking mind. Therefore I say again, the law-in-action is and always will be less uniform than the law-in-the-law-books. It has to be so until a way is found to administer it by machines instead of by men.

At this point it occurred to me that it would be interesting to get a picture of a jury. As Alice said, " What is the use of a book without pictures? " The great weakness of many studies of social institutions is that people talk about words, and argue about them too, without troubling to find out what those words stand for. When I talk about judges, I suppose the truth of the matter is that I am talking about myself; or, at least, about myself as I should like myself to be. When I talk about juries, I am talking about those juries I have observed and worked with in the courts of Baltimore. Possibly they are very different from juries elsewhere. Very possibly I have not observed them accurately, even here. After all, I have based my opinions almost entirely upon the verdicts handed down by them, and I pretend to no first-hand information concerning the methods by which they reached those verdicts. So I determined to make an effort to find out something about at least one panel of jurors.

Twenty-four jurymen are now serving in my court. They have been on duty for nearly three weeks, and their term of

service will expire in a few days. Yesterday, after all of the preceding part of this chapter had been written, my bailiff delivered to each of these men a very simple questionnaire. With it I sent a personal letter as follows:

My Dear Mr. Rigger—

This letter will be handed to you by my bailiff; and if you do not understand it perfectly he will be glad to explain it to you further.

In connection with a piece of work that I am doing, I want to get some information from you and from each of the jurors on the present panel in my court. Enclosed herewith you will find certain questions, written on sheets of paper with spaces left for your answers. It will be a great favor to me if, on or before Wednesday of next week, you will fill out your answers to these questions and give them to one of my bailiffs. I should prefer that you do *not* sign your name to the answers which you turn in, because I want you to feel perfectly free to write whatever you honestly think. Ordinarily, of course, anonymous communications are not worth reading. But, in this instance, I think that both you and I will probably feel more comfortable if your answers are anonymous.

Assuring you in advance of my great appreciation of what you are going to do, and trusting that you will not mind doing it, I remain

Very sincerely yours,

The questions I asked are few in number; and manifestly the answers to an inquiry addressed to only twenty-four individuals can yield no information of general sociological value. However, I tried to frame questions of such a kind that the answers will reveal something of what passes in the minds of the small group of men who answer them. For years I have been impressed with the great earnestness that characterizes the work of most jurors. Often at the end of a long day, I am abashed to observe how intently jurors follow the proceedings after my interest has begun to flag. This brief questionnaire is the first ef-

fort I have made to find out, in part at least, what is going on in the minds of my co-seekers for justice.

The first question called for a simple "yes" or "no." I did not expect to learn much from it but asked it merely to establish a personal contact between myself and my twenty-four anonymous correspondents. The question was:

1. Was the talk I gave to the whole panel of jurors at the beginning of your term of service of any help to you?

Twenty-two answered "yes." None answered "no." I was duly flattered. On the other hand, I was annoyed somewhat by the fact that two jurors failed to hand in any answers at all; but that is significant too.

The second question was:

2. If your answer to question No. 1 was "yes" state very briefly what help you think you got out of my talk.

Purposely I left a space of only five lines for the answer, hoping to induce condensed and terse replies. The replies received may be summarized as follows:

Ten answered with vague generality. In effect, they said it "helped because it helped." Five emphasized the fact that they were new jurors, without previous court room experience; all of these indicated that they were assisted greatly by my explanation of their duties. One of these five used the expression "it keeps a juror from going beyond his function." One, who had answered the first question "yes," failed to answer the second. Five others handed in really thoughtful answers reasonably well expressed, as follows:

a. "Without it, I would not have known which was my part of the work."
b. "Helped us to keep from injecting our personal likes and dislikes of lawyers, witnesses, etc. In other words, keeps before us what we are there for."
c. "What you said about opening statements of counsel was very helpful."
d. "Judge rules on the law. Jury considers the evidence.

Opening statements by counsel are not to be considered as evidence, but merely what counsel expect to prove."

e. "It explained quite clearly that I should follow instructions from judge on law; and why lawyers object to evidence."

The twenty-second man answered this question cryptically and with unconscious humor — "It helped to cultivate my mind."

The third question was:

3. Do the instructions granted at the end of a case actually help you to understand the case and to reach a verdict?

This question called for a "yes" or "no" only, because I thought it would be unwise to call for anything in the nature of a discussion of points of law. Twenty-one answered "yes." One answered "no."

These answers I find particularly interesting. In Maryland the judge makes no oral charge to the jury at the end of a case and is not permitted to comment upon the evidence or the credibility of the witnesses. Instead, written instructions, prepared by counsel and approved by the judge, are handed to the jury and taken into the jury room when the jury retires to make up its verdict. There is current at the Baltimore bar a widespread conviction that jurors pay little or no attention to these instructions. I have always thought otherwise; and this panel of jurors by an overwhelming vote confirmed my own belief. I wish I could be perfectly sure that these answers were candid and honest and that they represent a typical condition. My doubt grows out of two circumstances. First, the vote was so overwhelmingly the way I hoped it would be, that I am skeptical about it on general principles; that is to say, it seems too good to be true. Secondly, it may very well be that a jury panel in my court is not typical in this regard, because, in my talk to them at the beginning of their term of service, I emphasize the importance of this point with all possible vigor. Some judges do not give any talk whatever to a new jury; others, I feel sure, do not emphasize so vigorously the point in question.

Before leaving this item of the questionnaire, I would have you observe that the jurors were not asked merely whether they do or do not read the instructions of the court, but whether they are helped by them. If the twenty-one men who answered "yes" meant what they said and knew what they were saying, these answers are extremely significant. At all events, by calling for anonymous replies, I eliminated any possible motive on the part of individual jurors to curry favor or to win judicial approval. In this connection, too, it is interesting to note that the one man who answered "no" handed in a very intelligently conceived and well worded set of answers. It would be interesting to talk to him and find out just why he finds the judge's instructions so useless; but I do not know who he is.

The fourth question was phrased thus:

4. When the judge sustains an objection and does not allow a witness to answer a question, do you feel that the jury is being deprived of an opportunity to hear something that would help it to decide the case properly?

Put a check mark opposite the word below which expresses your answer to this question:

Yes ————————
No ————————
Sometimes ————————

It was followed by question number five, and for the answer to this I left a space of five lines.

5. If you care to do so, explain briefly your answer to question No. 4.

The answers to these two questions will be discussed at length in Chapter VIII, in which I shall take up the subject of evidence and the rules of evidence. At this point I shall report merely that in answer to question No. 4 two men answered "yes," seventeen answered "no," and three answered "sometimes."

The sixth question was this:

6. Do the arguments made by the lawyers at the end of a

case help you to decide it, or do you generally make up your mind before you hear the arguments?

After this question I left a tempting space of three lines, hoping to receive some interesting information, and I was not disappointed. Six men simply indicated without explanatory comment that the arguments of counsel do help them to decide; four indicated the reverse; three said that in some cases it does and in other cases it does not. One said very emphatically that the arguments help him; but he gave no reasons for saying so. That accounts for fourteen of my twenty-two sets of replies. The answers to this question handed in by the remaining eight men seem to me to deserve individual quotation. They are as follows:

a. "Prefer to hear the arguments." Standing by itself, that seems to be an answer without a reason; but read in connection with the whole questionnaire as returned by this juror, it is obviously a skeptical and elliptic reply indicating that the writer wants to hear the arguments but is not sure they will affect his decision.

b. "Usually I make up my mind during the conduct of the case. The arguments tend to clarify some of the testimony."

c. "The arguments help, for each side groups or stresses the outstanding points in their respective cases."

d. "We largely form our impressions before the arguments are made, but they help as a review of the evidence."

e. "Yes, they are a sort of brief recapitulation of what has been brought out during the trial."

f. "My mind is practically made up by weighing the evidence on both sides. The lawyers help by recapitulating it."

g. "My mind is usually made up before arguments, but frequently arguments clear up certain points and refresh the memory, especially in a case of long duration."

h. "The case having been properly presented, the jury is seldom swayed by a verbal spray — and the endless references to our intelligence are disgusting."

The seventh, eighth and ninth questions were as follows:

7. If you should have to sue somebody, that is, if you should have a case of your own in which you are the plaintiff, would you prefer to have it tried before a judge without a jury, or before a jury?

8. If you should be sued, that is, if you should have a case of your own in which you are the defendant, would you prefer to have it tried before a judge without a jury, or before a jury?

9. State briefly your reasons for your answers to questions No. 7 and No. 8.

These three questions elicited the most interesting replies of all. In answer to question No. 7, eleven men said that as plaintiff they would prefer a jury trial; nine said they would prefer a trial by judge without a jury; one did not answer the question; and one said that it would depend upon the kind of case he had. In answer to question No. 8, twelve men said that if sued, they would prefer a jury trial; eight said they would prefer a judge without a jury; and two failed to answer the question. These figures, standing by themselves, are very striking. Most of us are in the habit of thinking that the right to have a case heard by a jury is one of the most jealously guarded rights of the American public and that any proposal to limit it will be vigorously opposed. Furthermore, the men who were answering these questions were themselves jurors at the time; and it might well be supposed that their minds were attuned to an exaggerated idea of the importance of the service rendered by a juryman. Therefore I was greatly surprised to find that nearly half of them answered that they would prefer to have their cases tried by a judge, without a jury, whether they were plaintiff or defendant.

Almost every juror answered the ninth question, giving his reason for his answers to the seventh and eighth questions. Only

a few of these answers were so trivial or thoughtless that I regard them as unworthy of quotation. The following answers indicate that the men who made them tried to think about the problem and to discuss it intelligently:

a. "I favor jury trials with the usual instructions from the court."
b. "I believe that a jury of twelve discuss and try to do justice to both parties."
c. "Because of my service on various cases, I have found that juries do carefully go over the facts in the case, and honestly strive to give a just verdict."
d. "Jury trial has the additional advantage of the human element being considered (not meaning of course that Your Honor is not human) whereas the judge must render a verdict in strict accordance with the evidence and the law."
e. "In the jury I find that some want to be too liberal, and others not enough, and will mostly come to a fair verdict."
f. "I believe twelve men will come nearer to bringing in a fair and impartial verdict than one man, even though a judge, could hope to do."

Those are the reasons given by six of the men who favored the jury rather than the judge. The following six answers were given by men who voted for trial by judge rather than by judge and jury:

a. "My reason for having my case tried before a judge without a jury is that I would feel better satisfied whatever way the judge might decide."
b. "I feel that with the experience he has, a judge is more thorough and capable than a jury."
c. "My first reason is that a judge is versed very well in law; and the second reason is a judge will not show any sympathy to either the plaintiff or the defendant."
d. "My reason is that I feel that I could get better judgment

from a man experienced in handling many cases, as a judge."

e. "Sometimes you will find one or two on the jury who are always obstinate."

f. "My answer to question No. 7 is upon the assumption that I had a just claim, and to question No. 8 upon the assumption that I had a just and good defense. In other words I think a good lawyer might cause a jury to bring in a verdict not in keeping with the evidence."

There were five sets of answers in which a differentiation was made regarding the desirability of judge trial or jury trial according to whether the supposed litigant was a plaintiff or a defendant. Three said that as plaintiffs they would prefer a jury, but that they would prefer a judge without a jury if they were defendants. They gave the following reasons:

a. "If I was wealthy, I think a jury would render a verdict against me. At least I found it so on the few cases in which I served."

b. "If you are the plaintiff, you feel that the jury is somewhat biased in their opinion, and most times will give the plaintiff a verdict."

c. "I feel that a judge would be less influenced by sentiment. Therefore, his position would be unaffected by pity or any irrelevant factors. Points of law and justice would predominate."

One of those who made a differentiation said he would prefer a jury should he be defendant but a judge without a jury should he be plaintiff. The reasons he gave are unusual:

"I would not sue unless I had a clear case which I believe a good judge would understand better than a jury. Usually when sued there is some ground for suit; but if the plaintiff has a flaw in his case, I believe the sympathy of the jury is often with the defendant."

The last set of answers which I wish to quote are from the juryman who said that, if plaintiff, his answer would depend

upon the kind of case he had, but that if defendant he would prefer a jury trial. His explanation in full was as follows:

> "If I had a case 100 per cent law I might select a judge, but still could not see any advantage, as I would get the same result from jury. If I were sued, I have faith in the judgment of men and would be willing to trust my faith to the jury."

The tenth question was a dragnet, which I hoped might bring in some general information worth having, though I feared it would prove entirely valueless. It was:

10. Fill up the rest of this page, or so much of it as you care to fill up, with any general remarks you may care to make regarding jury service.

Nine men seemed to think this question was too vague and general to be answered, so that I received only thirteen replies to it. Four of the answers emphasized the jurors' feelings of responsibility and their desire to render fair and just verdicts. Eight, on the other hand, dwelt upon the value of the service to the jurors themselves, stressing its interest and its educational quality. One of these expressed himself simply and enthusiastically in these words: "I think jury service is wonderful. It is educating and very interesting; it helps a man to think well before he speaks on any question." Another said, "As a whole, I think jury service is educational and interesting. I was also well impressed by the type of man the average juror is."

One only, of the entire twenty-two, voiced a complaint, and that was a qualified complaint. He said that jury service involved for him a financial sacrifice; and he raised the question whether, particularly in bad times, the service could not be rendered better by men out of work.

So much for my questionnaire. A reading of these answers has helped me considerably toward an understanding of my feeling about juries. For one thing, it has reinforced my belief in the earnestness with which they approach their task. Here

was a group of men ranging in age from twenty-six to sixty-three years. Three were under thirty, five were between thirty and forty, five in their forties, ten were between fifty and sixty, one was over sixty. By occupation they represented a fair cross-section of the community. Five were heads of business enterprises, five were salesmen. Seven were men who work with their hands, including a steam-fitter, a carpenter, and a clothing cutter. The remaining seven were white-collar workers of various kinds—two accountants, a furniture designer, a draftsman, and a musician among their number. This information I obtained from our jury clerk, who keeps a card-index of all jurors in our courts.

This group of men, assembled for a short term of service, brought to its performance an interest and an enthusiasm due in part to the novelty of their temporary occupation. Some of them undoubtedly are very stupid men; others are highly intelligent. That is to say, they are the same kind of men who march to the polls on election day and vote for a president and senators and representatives, and for judges too. There is this difference in favor of their intelligence as jurors: in the jury box they are not affiliated with any party; and they do try to think for themselves. Probably the less intelligent members of the group are led and directed by those of greater intelligence, the weak are dominated by the strong. That fact, I think, and operation of the law of averages make jury verdicts what they are. As I have observed them, they are not examples of perfect wisdom, nor are they extremely foolish. They are very human judgments with all the faults and all the virtues to be expected from their human origin. Prejudices enter into them, emotion affects the reason behind them. But the prejudices are not those of a single person; and in all likelihood one prejudice operates to balance and to counteract another. Likewise the emotions of a mixed group of men may be a composite of many kinds of emotion, less likely to run to extremes than are the emotions of any one of them or of any one other man.

The jury undoubtedly does bring to the performance of its task earnestness and vigor and a salty tang redolent of the life and thought, the customs and the habits, the desires and the longings of the community of which it is a part. This effort I have made to pierce beneath the outer shell, and to find out what a jury believes and why it forms its judgments, has strengthened my own conviction that, when a case has been presented fairly to the twelve men who form a jury, there is usually little excuse for a Thirteenth Juror on the bench.

Chapter Seven

SUBSTITUTES FOR COURT TRIALS

The courts of a community mirror the social and economic life which surrounds them; but they do not reflect everything that happens in the community, and what they do reflect is likely to be considerably distorted. Lawsuits are sore spots, eruptions on the skin of the social body. If not symptoms of serious disease, at least they are indications of something other than perfect health. If a visitor to a city, wanting to know what kinds of people live in that city and how they order their lives, should seek to answer his questions by visiting the courthouse, he would come away with a most unfair impression. He would report that the people of the city are quarrelsome and dishonest; that they make contracts with one another only to try to get out of them if they turn out to be burdensome; that they go about injuring one another by violent means ranging from the reckless driving of high-powered motor-cars to the use of deadly weapons; that they steal each other's property or try to circumvent one another by fraud and deceit; and that they have been compelled to set up a cumbersome, expensive, and awkward social machine to hold one another in check. As far as it goes, that would be a true report; but it would be out of all perspective.

For every contract that men make and break and fight over in court, other men make a hundred contracts that are duly carried out and never lead to litigation. While the violent man

or the careless man is infringing the rights of his neighbor, thousands of other men are conducting themselves with gentleness and care, so that they and their neighbors never come into court at all. For the most part, obedience to those rules of social conduct which are embodied in the law characterizes the lives of the citizens. To appraise the behavior of the people of the city by what you observe in its courts would be like appraising its health by what you find in its hospitals. People go to hospitals because they are sick; they go into court, or they are brought into court, because of something which is out of proper adjustment in their relationships with one another or with the state. The court is like a hospital, in that it has nothing to offer to the man who has no broken bones and is suffering from no disease. The broken bones and the diseases treated in court are personal or social maladjustments of one kind or another; and the court is society's machinery for setting them straight when home-remedies have failed to do the trick.

I have said that this piece of machinery which society has set up is elaborate, awkward, and expensive. Some go much farther and assert that it is inefficient and cumbersome to such a degree that the time has come for scrapping it. Good lawyers are heard to advise their clients that there is no such thing as winning a lawsuit, that "even when you win, you lose." The delay, the uncertainty, and the expense are said to outweigh the advantages of victory; and on all sides men are seeking substitutes for the processes of litigation. Especially in the world of business do we hear complaint about the delays and the technicalities of the law. Business men impatiently and bitterly demand some better way to determine their controversies than the courts afford.

It is true that court proceedings are normally slow and that a skillful lawyer can make them slower. I remember a case in my own practice. My client was a developer of real estate. He made a contract with a builder for the erection of a row of houses and obtained a bond from a bonding company to guar-

antee performance of the builder's contract. The builder failed, and my client was forced to borrow money with which to finish the houses at his own expense. Then he brought suit against the bonding company on its bond. Numberless technical defenses were interposed, and the trial of the case on its merits was delayed for month after month. When, after more than two years, it was reached for trial, the bonding company won the case. But that was primarily because my client, the plaintiff, was not able to come into court and testify in his own behalf. Overburdened with the debt and discouraged by the delays, three weeks before the case was tried he had put a bullet through his brain.

What happened in that case probably could not happen in our Baltimore courts today. The judges of our bench have made a determined effort to cut down the time between the institution and the trial of cases. As a rule, especially if counsel on both sides want it to be so, a case is sure to be tried within less than a year from the date of bringing suit. I have heard lawyers complain that cases involving personal injury are tried in our courts before the doctors have had a chance to find out how serious or how trivial are the physical consequences of the plaintiff's injury.

Furthermore, a reasonable waiting period between the institution of suit and the date of trial frequently has great psychological value. Two men quarrel over a business deal. They are too civilized to fight with their fists, so each rushes off to a lawyer and a suit is started. Were the case to come on for trial the next day or the next week, there would be in the court room a renewal of the quarrel which led to the institution of the suit. Here the quarrel would be carried on by proxy, the lawyers being the principals, the clients their seconds; and the fight would be governed by rules and ceremonies of an elaborate nature. Just the same, though, it would be a fight, with hot blood on each side, and nobody concerned very much with right and wrong and justice. But the case does not come

on for trial the next day. Instead, the plaintiff has filed his complaint, the defendant has had thirty days time within which to file his answer. Then there have been one or more preliminary motions, or demurrers, or whatnots of a technical nature; and six or eight or ten months have elapsed before the parties come into court to continue their dispute. Meanwhile, both have cooled down. Each has had time to realize that perhaps he himself was partly wrong; their lawyers hold a conference, and the case is entered "Agreed and Settled." A truce is often more than a mere opportunity to catch breath for a renewal of conflict.

Still the fact remains that the elaborate and artificial rules of court procedure are in growing disfavor for the determination of business disputes. Any observer must be impressed with the smaller and smaller proportion of business cases which come into court for actual trial. Probably negotiation and settlement between lawyers, in their offices, dispose of the largest number of them without formal proceedings of any kind whatever. In many communities, and in some occupations and trades in all communities, arbitration, in one form or another, has taken the place of the courts to an astonishingly large degree. Stockbrokers, for example, are bound to have misunderstandings and disputes in the conduct of their fevered affairs; but each stock exchange has its rules and its standing committee to decide disputes between its members; and stockbrokers do not sue one another in court. So in the silk trade and the cotton trade and in numerous other fields, business men have set up a machinery of their own whereby they are enabled to iron out their differences to their mutual satisfaction at less cost and, they maintain, with less delay and better understanding of the problem than is possible in any court. They say that a committee of three merchants understands the evidence, knows the customs of the trade, and can render a just and fair decision after a short and informal hearing, untrammelled by fine points of law and unhampered by mysterious and artificial rules of evidence. I have

heard them refer to both judges and juries in language not flattering to the intelligence of either.

Of course this is a challenge to the courts. It would be extremely difficult, if not entirely impracticable, so to organize public courts as to embody in them all the advantages which are easy to obtain from a committee of experts. For example, there was tried recently in my court a case between the owner of a yacht and a boat builder who had installed a new device by which the captain might steer the yacht by moving a lever, instead of signalling to another man in charge of the rudder. One of the questions to be decided was whether or not the work had been done "in a good and workmanlike manner." The yacht is eighty feet long; my court room measures forty by forty. That was one good reason why the yacht could not be brought into court for inspection. The case involved only four or five hundred dollars—and "a matter of principle." It might have been possible for the twelve men on the jury and for me to go down to the harbor and inspect the yacht, but she was in Norfolk on the day the case was tried; and I, for one, should have known no more after looking at her than before. Mechanical appliances are greater mysteries to me than are rules of evidence to any yacht builder. So instead of looking at the yacht, the jury and I sat in the court room, watched a marine engineer put a drawing on the blackboard, heard him describe the differences between "direct mechanical control" and "indirect transmission of force by the use of pulleys and cables," tried to understand just why the interposition of a turn-buckle could not be relied upon to take up the unavoidable slack or stretch in a cable, and more of the same sort of thing. It might not have been so bad, except that when this witness had finished, another marine engineer, testifying for the other side, turned the blackboard around, made another drawing, and explained the whole matter quite differently. One of the things that impressed me was that the second engineer made a better drawing than the first one did. He used red and blue and white chalk, and the circles

he drew to represent pulleys were almost round. Of course I could not be sure that this superiority impressed the jury with the same force that it exerted upon me. The jury did not have a trained, legal mind.

Now that was an absurdly simple case of its kind. Compared with some cases in which I have participated, as judge or as counsel, it presented no difficulties at all. Let a really complicated situation arise, let a case involve nice questions of engineering practice, elaborate problems of accounting, or even comparatively simple business customs and practices within a given trade, and it is hard to imagine a less efficient way to deal with it than by a trial in court. Especially is this so if the case be such that its trial lasts for more than a day or two. Judge and jury alike, forced to deal with facts in a field which is new to them, forced often to attempt to acquire within a few days the whole technique of an art entirely unfamiliar to them, are likely to come out of the ordeal confused and bewildered. If their decision of the case is wise and just, no doubt that is due primarily to the circumstance that there were only two ways in which to decide it, and they had an even chance. It is partly because business men realize these difficulties that so many of them prefer to arbitrate. Any honest boat builder could have looked at that yacht for ten minutes and found out more about the way the steering gear was put in than the jury and the judge were able to discover in court in five and one-half hours.

Perhaps, in time, some plan will be worked out by which courts may be organized so that specialists will be called in to decide cases within the scope of their specialties. We go nowadays to an oculist for our eyes, to a surgeon for broken bones, to a dentist for our teeth. There was a time, not so far off, when the family doctor attended to all three — unless he sent us to the barber to have our teeth pulled. No doubt we shall have to begin soon to consider whether it is not a social duty to set up public courts especially equipped and organized to deal with the special kinds of cases which business men now take into

private tribunals of their own devising. In England there is a special branch of the High Court to deal with complicated commercial questions. In Hamburg, Germany, commercial cases are tried before a court composed of a judge and two experienced business men. Such a tribunal combines within itself many of the advantages both of private arbitration and of the public court. A further development of the same thought may be expected to suggest special tribunals, better fitted to deal with cases involving engineering problems or medical problems or problems within any specialized field, than is the conventional court of judge and jury which we have today.

In some American cities, also, an important experiment has been made, though in a slightly different direction. There have been established Conciliation Courts, in which a judge is assigned to deal informally and summarily with those cases in which the parties consent to an informal hearing before him, instead of proceeding by the regular mode of trial. The published reports concerning this experiment are such as to encourage the belief that it will work well. Nothing of the kind has been attempted in Baltimore; but an experiment of my own may be worth recording. Having observed the frequency with which cases were settled and compromised at the last moment, often after the jury had been sworn and the trial actually begun, I soon formed the habit of calling counsel to the bench, when they announced that they were ready to proceed with the trial of the case, to inquire about the possibility of settlement. The next step was an effort to bring about such settlements. I was surprised, one day in the fall of 1929, to receive an inquiry from a research worker at the Johns Hopkins Institute of Law concerning the method I employed in bringing about so many settlements. Until the question was asked, I had not realized that there was anything unusual about my practice in this regard, so naturally had it developed. I could not answer the question then; but I determined to try to do so.

During the whole of the year 1930, I burdened my note books

with a new set of memoranda. I made a careful record during that year of every case in which my own intervention, and negotiations in which I participated, were successful in averting or in shortening the trial of a case. Before setting out the results of this study, I feel that I ought to say two things. First, I do not claim any special merit in this respect. Many judges, I am sure, follow the same practice, though probably they make no record of it. Secondly, it is quite possible that with my attention focussed upon the problem during the year 1930, I may have intervened more frequently and with greater vigor during that year than I otherwise should have done. Therefore, perhaps the figures I am about to state are misleading.

Altogether there were fifty-one cases so disposed of during the year. By that I mean fifty-one cases in which counsel had announced definitely that they were ready for trial and had no hope of adjusting their differences except by trial and verdict. Respecting each such case I made an effort to determine how many hours would have been consumed in its trial. Manifestly, I had to be satisfied with estimates in this regard; but inquiry about the number of proposed witnesses and experience with the trial of similar cases satisfies me that my estimates are fairly accurate. My notes indicate a saving of about two hundred hours, or forty court days of five hours each. The value of that time must be reckoned in terms of that number of hours for the twenty-five jurors attached to the court, for the court officials, the witnesses, the lawyers, and the litigants. The total number of hours of man-time, reckoned that way, was worth a good deal in 1930. Even in 1932 it would not be entirely without value.

Grouping these cases according to the nature of the problems they presented, I find that one was a case in which the disclosure by defendant's counsel of the strength of his defense led plaintiff to accept a purely nominal sum in settlement. Three were cases in which the defendant had what appeared to be an almost impregnable defense; but the plaintiff was obviously in

hard luck, and the defendant was willing to give him an appreciable amount as an act of mercy. Eight grew out of complicated mercantile transactions in which I inquired into the facts and acted as an informal arbitrator. Eleven were really quite trivial matters. Both sides had cooled off, and the suggestion of a small settlement seemed welcome when the parties faced long drawn-out trials entirely disproportionate with the matter in issue. That leaves twenty-eight cases, the largest single group, comprising more than half of the total. These were all settled by the application of what I tell counsel is the most profound doctrine of jurisprudence developed by the mind of man. It is the use of the magical formula known as "splitting the difference." The parties have negotiated, perhaps for months, before they come into court for trial. They started out miles apart; but they have come closer together and reached a point where fifty dollars, or perhaps five thousand dollars, still stand between them. Without making the slightest effort to learn anything about the merits of the case, often not knowing even its subject-matter, I suggest that they split the difference and settle for an amount mid-way between the respective figures which each has announced as positively and absolutely final. They did that twenty-eight times in 1930; and almost every time both lawyers came to see me afterward to thank me for the exercise of my great judicial wisdom. Not a Daniel, but a Solomon come to judgment!

One of the most difficult cases had a different aftermath. The parties were immigrants, and for many years had been business partners as well as intimate friends. Then had come a disagreement, a violent altercation, and this lawsuit. The trial was begun; and, after an hour or so, it was apparent that it would last for two or three days and would involve an examination and an analysis of very complicated and badly kept books of account. I called counsel into chambers for a consultation. They assured me that they thought the case ought to be settled, but that they could do nothing with their clients; and they urged me to see what I might accomplish. So I interviewed the cli-

ents, first separately, then together. After half an hour or so, the defendant agreed to pay four hundred and fifty dollars; and the plaintiff said he would be satisfied with that amount. I was delighted and returned to the court room to take up the next case. When I saw the parties to the case just settled standing in the back of the room engaged in apparently friendly conversation, I was even more gratified. A few moments later a young lawyer came forward and asked if I should like to know what they had been saying to one another. Of course I was eager to hear it. The young lawyer had been standing beside them; and he had overheard this, from the defendant: "Well, I am going to pay you the four hundred and fifty dollars the judge said I must pay you, because he said I must do it; and do you know what luck I hope the money will bring you?" Then followed an amazing curse of truly oriental ferocity, the kind you read in books of Eastern folk-lore! If that curse had power, my responsibility was greater than I like to contemplate.

This series of cases, in which so many satisfactory compromises were brought about without any special machinery being set up for the purpose, seems to me convincing evidence of the wisdom and social utility of the Conciliation Court idea. It can be developed informally and in most jurisdictions without the need of legislative sanction. It is required only that the judges shall believe the true function of the courts is to serve the social needs of the community; and, acting upon that belief, they can readily make provision for this special type of service.

There is nothing unusual about the suggestion that conventional court procedure may not be the best possible way by which to determine every kind of controversy. In one very large and important field, not only procedure but a whole body of law has been wiped out completely and an entirely new system has been substituted for it. This change has come about within the short space of time since the year 1911; and it is so striking that it requires a somewhat extended statement.

You may recall the references in former chapters to the rules

of law concerning contributory negligence. We meet those rules today most often in connection with traffic accident cases; and these cases form the largest single group of cases tried in our courts. In 1881, when Holmes wrote his great book on the Common Law, cases of this sort were comparatively few in number. Collisions between two horse-drawn vehicles, or between one such vehicle and a pedestrian, were infrequent, and were not productive of much litigation. Instead, at that time, the case which Holmes mentioned as clogging the dockets of the courts was the case in which an employer was the defendant and an injured employee was the plaintiff. That was the special contribution which the age of machine industry had made to the litigation of the period; and the judge-made law had developed very definite rules by which to decide such cases.

Take a look at the law books of the end of the nineteenth century and you will find much space given to rules of law in this field with which the young lawyer who has come to the bar within the past fifteen years does not have even a speaking acquaintance. Negligence he knows; and he knows contributory negligence; but "the fellow-servant rule" and the rule of "assumption of the risk of the employment" are to him archaic forms of words which carry only a hazy historical meaning. But that I have had the pleasure of living through the period when they were thrown into the discard, I could wish they had never meant more than that to me. Without going into the niceties and refinements of these old legal rules, I may say of them that their effect was to announce to an employee injured while at his work that he was a very unfortunate man, but that usually the law gave him no remedy. An injured employee, when he sued his employer, first had to satisfy the court that his employer was guilty of some act of negligence. Furthermore, he could not recover damages if the accident had been caused wholly or partly by his own negligence; this is the familiar rule of contributory negligence, still so important in the negligence case of today. But he could not recover anything,

even though he had been ever so careful, if the accident was caused by the negligence of his "fellow servant." As for "assumption of risk," that is a doctrine closely related to contributory negligence and sometimes confused with it; here it calls for no special comment except to say that if the unfortunate plaintiff was not impaled upon one of the other three prongs of the fork, he was liable to be caught on that one and pitched out of court by it. For the law of negligence then prevailing as between master and servant was a powerful four-pronged fork, cunningly devised to eject injured employees from court and to protect their "masters" and their masters' pocket-books.

Do not gather from this bitter statement that I am accusing the judges who "made" those rules of law of any purposeful plan to be harsh and oppressive. In all likelihood, they were kindly gentlemen with the best possible impulses and a strong desire to serve humanity. But a thing had happened to them and to the rules of law they had made which nobody could have foreseen. The rules of law had come into existence early in the era of machine industry. When an employer had one or two employees only, when it was appropriate to call the employer the master and the employees his servants, these rules probably worked no great hardship upon anybody. Accidents were few, and a friendly, personal relationship between the master and his servants, to use the old terms, probably led to the extension of assistance to the injured servant in many cases quite without regard to legal rules. However, the law remained fixed and rigid while factories grew in size and number. Rules expounded in the beginning of an era, appropriate to its life and reasonably fair to both parties in its controversies, became totally inappropriate as the era came to its maturity; and a savage cruelty was found to have taken the place of what began as something reasonably fair and just. Meanwhile, the judges who made it so were good men and kind men; but they did wear their eyes in the backs of their heads, as all lawyers must do; and they allowed their own precedents, their own leading cases and

authorities, to strangle and to kill any impulse they may have had to make the law fit better into the needs of the modern machine age.

I recall the last case I tried under those rules of law. A laborer in a quarry was engaged in tamping charges of dynamite into holes drilled eighteen feet deep into the rock. Something went wrong, a charge of dynamite exploded while he was tamping; and the laborer was picked up a bleeding mass of flesh and broken bones. Unfortunately for him, there was a hospital nearby and his life was saved; but his right arm was crippled permanently, and he walked with a bad limp. He sued the owner of the quarry. I represented the defendant; and, in the lower court, the plaintiff got a verdict for four thousand dollars, enough to take him back to Italy and support him there in his crippled condition for the rest of his life. Of course we took an appeal, for we had contended that the judge should have taken the case from the jury. The Maryland Court of Appeals meets in Annapolis, thirty miles from Baltimore; and, in those days, my office had an arrangement with the clerk of the court by which it was understood that when we lost a case, he would notify us by letter, but when we won, he would send us a telegram. This time we received a telegram.

Ordinarily my memory is not very good; but I remember as though it had happened yesterday my sensations when I read that telegram, in June, 1913. In imagination, I saw Alisandro Boncore, the plaintiff, limping out of the court room with his withered right arm hanging at his side. I saw his look of blank despair when his lawyer told him he was not going to get his four thousand dollars, nor even forty cents; and I heard his muttered expressions of bewilderment as he tried to understand what it all meant and tried to find out how he was to go on living if he could not work. Winning that kind of case might flatter a desire for intellectual achievement; it might gratify a sense of loyalty to a client; but it was utterly repugnant to my sense of ordinary decency.

I have had to look up the printed report of the case to refresh my memory concerning the precise points of law which controlled its decision. I have found that the Court of Appeals decided that the plaintiff failed to prove negligence on the part of his employer. As a matter of fact, this was not our main contention; we were relying upon the doctrine of assumption of risk. But the court said it was not necessary to consider that question. Any one of the four prongs of the fork, was, by itself, an implement of sufficient strength to throw the hapless plaintiff out of court.

This is not, in any sense, an over-drawn picture. The common law, within this field, had become a monstrous thing, merely because industrial life had changed completely within a comparatively short time, and the law had not changed with it. The rules in question had been laid down in England in 1837, when machine industry was in its infancy; and they carried over into this country almost at once. Similar legal rules developed at about the same time throughout the whole Western world; but America retained them much longer than did any other country. By 1884 Germany had led the way out of this morass with the first Accident Insurance law. Austria followed suit three years later; Great Britain in 1897; and, by 1910, practically every European country, including even Russia under the Czars, had wiped out its whole former system of negligence law as between employer and employee and substituted for it what we now call Workmen's Compensation Insurance.

In this country the rigors of the common law rules were abated somewhat by legislation in a number of states between 1885 and 1900; but the system, as a whole, remained unchanged for a generation after some European nations had wiped it out completely. Sporadic efforts in this direction were made in a few states, but it was not until about 1902 that American legislatures began to give the question serious consideration, at least to the extent of appointing commissions to study and report upon it. Then, in 1908, President Theodore Roosevelt,

in a special message to Congress, sounded a clarion call to action. This message dealt with a peculiarly vicious situation. Ordinary employees, working for private employers, were in a condition deplorable enough. Employees of the Federal government, men working in the postal service or in the government shipyards, for example, were in an even worse plight. The government, a sovereign body, was not subject to suit at all; therefore, when these men were injured, they did not have a chance even to run the gauntlet of the common-law defenses enumerated above. President Roosevelt's message read as follows:

> "I also very urgently advise that a comprehensive act be passed providing for compensation by the government to all employees injured in government service. Under the present law an injured workman in the employment of the government has no remedy and the entire burden of the accident falls on the helpless man, his wife, and his young children. This is an outrage. It is a matter of humiliation to the nation that there should not be in our statute books provision to meet and partially to atone for cruel misfortune when it comes upon a man through no fault of his own while faithfully serving the public. In no other prominent industrial country in the world could such gross injustice occur; for almost all civilized nations have enacted legislation embodying the principle which places the entire trade risk for industrial accidents (excluding of course, accidents due to wilful misconduct by the employee) on the industry as represented by the employer, which in this case is the government. . . .
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> The same broad principle which should apply to the government should also be made applicable to all private employers. Where the nation has the power it should enact laws to this effect. Where the states alone have the power they should enact the laws."

In 1912 a more conservative president, William Howard Taft, in another message to Congress, summarized some of the

injustices and inconveniences of the common-law rules in the following language:

> "The old rules of liability under the common law were adapted to a different age and condition and were evidently drawn by men imbued with the importance of preserving the employers from burdensome or unjust liability. It was treated as a personal matter of each employee, and the employer and employee were put on a level of dealing which, however it may have been in the past, certainly creates injustice to the employee under the present conditions."

Soon after this, things began to happen. One legislature after another, all over the country, began to enact Workmen's Compensation Laws; and today the old system has virtually disappeared. In place of it, we have a system of insurance, under which injured employees are paid a weekly indemnity during the period of their disability, entirely regardless of whether the accident was caused by the employer's negligence or not. The three common-law defenses, of contributory negligence, assumption of risk, and negligence of a fellow servant have likewise disappeared from these cases; and, most important of all, the cases are no longer the subject of cumbersome and expensive suits in a court of law, but are dealt with expeditiously and inexpensively by an administrative body, usually designated as an Industrial Accident Commission, or as a Workmen's Compensation Commission, which makes its awards almost automatically and with a minimum of red tape and legal procedure. For example, in Maryland, which is not one of the great industrial states, the report of the Commission for the year ending October 31, 1930, shows that during that year the Commission received 14,339 claims; 629 were carried over from the preceding year, making an aggregate of 14,968 claims before the Commission. Of this aggregate, 14,276 were disposed of before the end of the year. Of these, 13,406 were allowed; and the allowances aggregated the sum of $2,452,829.63. The most

striking fact in regard to this showing, however, is that of this very large number of claims, all but 1704 were disposed of by the Commission without the formality of a hearing of any kind. The injured man notifies his employer of the accident and files a claim. In the great run of cases, that is all he has to do; for, by appropriate administrative action, the Commission causes the case to be investigated and awards compensation or refuses it, as the facts of the case may require, without any procedure which resembles even remotely the trial of a conventional lawsuit.

I have gone somewhat fully into this piece of legal history for several reasons. In the first place, it justifies, I think, my observation in a former chapter relative to the class bias of the judiciary. Of course there are liberal and progressive judges, just as there are liberal and progressive men in every walk of life; but it would be idle to deny that, upon the whole, judges are an extremely conservative and property-conscious group. President Taft said this in so many words; and he certainly was not unduly radical. During the period when publicists were expressing their discontent with the common-law rules here under consideration, judges all over the land were applying them and even extending their scope; and in only a few exceptional cases do we find a judicial utterance which questions their ultimate wisdom.

In the second place, this example is important if you are to understand fully certain limitations upon the growth of the law as well as the way in which it grows. I have pointed out that this branch of the law, in its original form, was altogether judge-made-law. Now there can be no doubt that judges can un-make laws which they have made if they want hard enough to do so. Occasionally it happens that a court decides a certain case and, in deciding it, gives clear expression to a definite rule of law; and subsequently, when another case comes before the same court, presenting the same legal problem, the court decides it flatly the other way, announcing that it has reconsidered

its former action and determined to overrule its former decision. This calls for the exercise of both courage and wisdom; and, when it is done, it is a fine exhibition of intellectual honesty of the highest type. On the other hand, this sometimes becomes practically impossible. The law, the judge-made part of the law, can become so rigidly crystallized by virtue of a long line of decisions repeating the same legal doctrine, that it becomes quite unthinkable to the judicial mind that it can be un-made by the same judicial body which made it in the first instance. A legal doctrine which has grown up inch by inch has to be knocked down by the foot. So it was with the law of negligence as between employer and employee. It took shape in about the year 1840. Thousands of cases were decided during the next twenty-five or fifty years, all following or extending the principles laid down in the first leading case. Meanwhile industrial conditions were changing rapidly, and the law was becoming daily less and less well fitted to the changed life of the community. But it was too late for judges to un-make the law which they had made. A principle known by the technical term, *stare decisis,* the often very real and necessary duty of courts to abide by a long line of precedents, had got mixed up in the problem; and, by 1900, the only way to meet the situation was for the legislatures to step in and pass legislature-made-laws designed to cure what had become an intolerable evil.

My third reason for this brief delving into legal history is to see if it holds for us any suggestion for the future. So frequently, in these pages, have I seen fit to illustrate my points by references to cases involving traffic accidents, that you may have gained the impression that no other kinds of cases are tried before me, or that I am interested in no other kind. Of course that would be a false impression. For example, of the latest ten cases tried in my court, one was for breach of a contract of agency, one was for false arrest, one was a will contest, and one was an appeal from a decision of our State Industrial Accident Commission. The remaining six, though, were all traffic acci-

dent cases; and in our common-law courts, especially in the larger American cities, that is probably not far from the usual proportion. Therefore it is natural for a judge presiding in such a court to become somewhat preoccupied with this branch of the law. The proposition which I wish to submit, or rather the question I wish to ask, is whether we ought to be looking about us to see if our present method of dealing with this large mass of traffic-accident litigation is the best method which can be devised for the purpose. Forty years ago American public men were beginning to ask a similar question about master-and-servant negligence cases. That question has been answered in a way that leaves no one in doubt that the old method was bad and that the new method is far better. Social utility ought to be a primary goal for any system of law and legal administration. A comprehensive survey of the results of our lawsuit method of dealing with traffic accidents would, I believe, yield convincing proof that something better is needed.

What that something better may be, I am not prepared to say. I do say, however, that the present method leaves much to be desired. Injured persons are put to the expense of employing lawyers and are subjected to the delays and uncertainties of litigation. Traffic hazards have become a normal part of urban life as industrial accidents are a normal part of machine industry. American ingenuity ought to be employed in an effort to devise some plan by which the certainty of indemnity insurance for the risks of injury in such accidents will be made to replace the uncertainty of our present suits for damages. The difficulties standing in the way of such a plan are many and I do not intend to minimize them. This is not the place either to discuss the problem in detail or to suggest exact remedies, even if I had such remedies in mind. My purpose in this discussion of the problem is to illustrate concretely a phase of the living law and of the nature of its life and growth. I have told about the legislative reform of the law of negligence as between master and servant because legislation is the only practicable method by

which a fully organized body of law such as this can be changed. I have not meant to indicate that I regard the analogy as a complete one, nor that the remedy, if remedy be needed, necessarily must follow the same or even a similar line. Possibly nothing at all is needed. Possibly conventional court trials are the very best way in which to deal with these cases. For my own part, I doubt it; and I venture the prophecy that, before another forty years have passed, our present procedure will seem as lacking in social utility, in wisdom, and in justice as the "fellow-servant rule" and the doctrine of "assumption of risk of employment" seem to us today.

In 1930 only two hundred and thirty-two cases out of a total of 14,339 cases heard by the Industrial Accident Commission were appealed to the courts. In this connection it is interesting to observe what the Maryland legislature said in the year 1914, when the present law was put upon the statute books. The following preamble was enacted as an integral part of the law:

> "Whereas, The State of Maryland recognizes that the prosecution of various industrial enterprises which must be relied upon to create and preserve the wealth and prosperity of the State involves injury to large numbers of workmen, resulting in their partial or total incapacity or death, and that under the rules of the common law and the provisions of the statutes now in force an unequal burden is cast upon its citizens, and that in determining the responsibility of the employer on account of injuries sustained by his workmen, great and unnecessary cost is now incurred in litigation, which cost is borne by the workmen, the employers, and the taxpayers, in part, in the maintenance of courts and juries to determine the question of responsibility under the law as it now exists; and
>
> Whereas, in addition thereto, the State and its taxpayers are subjected to a heavy burden in providing care and support for such injured workmen and their dependents, which burden should, in so far as may be consistent with the rights and obligations of the people of the State, be more fairly distributed as in this Act provided; and

Whereas, the common law system governing the remedy of workmen against employers for injuries received in extra-hazardous work is inconsistent with modern industrial conditions; and injuries in such work, formerly occasional, have now become frequent and inevitable.

Now, therefore, The State of Maryland, exercising herein its police and sovereign power, declares that all phases of extra-hazardous employments be, and they are hereby withdrawn from private controversy, and sure and certain relief for workmen injured in extra-hazardous employments and their families and dependents are hereby provided for, regardless of questions of fault and to the exclusion of every other remedy, except as provided in this Act."

Furthermore, throughout the body of the legislative enactment, there appear numerous injunctions that the procedure before the Commission shall be informal, and that the Act shall be applied and construed liberally so as to effectuate its profound social purposes. Nevertheless, in an informed opinion delivered in the year 1932, a judge of the Maryland Court of Appeals felt constrained to employ the following trenchant language relative to this law and to the treatment it has received in the courts:

" Notwithstanding its clear and simple mandates, as the result of more than one hundred cases in which its provisions have been construed by this court a substantial body of substantive and procedural law relating to it has come into existence, with a growing tendency to make the administration of the Act more technical and the relief it was intended to give less certain. When therefore its provisions come under review, they should be considered not only in the light of that result but also in connection with the legislative injunction that the Article be so interpreted and construed as to effectuate its general purpose."

What interests me particularly is that this language was used by a great, liberal judge who was writing a *dissenting* opinion. That is to say, he did not agree with the majority of

the court in its decision of the particular case; and he thought his disagreement to be so fundamental that he ought to put on record his reasons for it. Those reasons, as I apprehend them, point an accusing finger at the whole legal profession. It does seem to be true, or at least partly true, that lawyers and judges alike are not fully awake to their social responsibilities. Too often we concern ourselves with niceties and abstractions, forgetting that the law ought to be the servant of society, not its master. A form of legal procedure which is not brimful of present-day social utility is a form of legal procedure whose validity ought to be questioned. I do not say that it ought to be thrown overboard, certainly not before a thorough and painstaking study of it has been made. But it ought to be questioned; and it ought not to be accepted as the best merely because it has been in use for a long time.

Therefore, I bring this chapter to a close with a proposal that may seem to be totally at variance with everything which has preceded it. If I have said anything clearly, I have said that I tend strongly to believe in trial by jury. My observations have led me to a faith that the results of jury trials are usually just, even though I do not always agree with them. Nevertheless, I am not prepared to say that trial by jury, in its present form, is certainly the best way to try all kinds of cases. I plead for an open mind and a spirit of scientific investigation. If some types of disputes can be determined better by the use of substitutes for court trials rather than by court trials as we now conduct them, let us be ready and willing to take the next step, whatever it may be and wherever it may lead. The law must grow and it must change; that is true of all of life. Let our care be, not to stifle its growth but to direct it wisely. This we should be prepared to do, even if, in respect of some kinds of cases, the path of orderly progress leads to change so drastic as to mean the abandonment, in its present form, of the whole conventional mode of trial, and the substitution for both judge and jury of some new mechanism better adapted to present social needs.

Chapter Eight

"I OBJECT."

What's the matter with you judges and lawyers anyhow? Are you interested in trying to find out the truth or do you want to play a game? It seems to me you'd do better to stick to bridge or poker and let people try your cases who know how to undertake an investigation and want to do it honestly and fairly!"

He went on for ten minutes with growing indignation. The speaker was one of the most brilliant men I know. He is a doctor, a specialist in internal medicine; but he is also one of those rare persons whose interests include much outside his own profession. He is at home with all the sciences, and once I heard him expound Einstein's theory of relativity so clearly that while he was talking I thought I understood it myself. Philosophy is one of his hobbies, and he holds his own in friendly dispute with men who occupy chairs in that subject at the University. Therefore the little group of lawyers gathered round his dinner-table were not inclined to dismiss lightly his strictures upon their own subject. They realized that his criticism deserved careful attention.

His complaint grew out of a recent experience he had had as a witness in court. As he put it, "I was asked a few introductory questions, and then Harvey asked me to tell the judge and jury all about the case. And I knew all about the case, too. I had been treating the man for six months, and I knew exactly what was the matter with him and what causes led to his present condition. So I started to answer Harvey's question;

but I hadn't said ten words before John said 'I object.' Then Harvey and John and the judge all began to talk at once; and I never heard three grown men talk such nonsense. I sat listening to them, wondering whether any one of them wanted really to know and to let the jury know the truth about the case. I could understand John and Harvey. They were partisans and they made no bones about showing it. But I was really amazed at the judge! I thought the object of a court proceeding was to bring out the actual facts, so the case might be decided in accordance with them; but Judge Cypher sat there, apparently absorbed in the rules of some abstruse game, and not caring at all about the discovery of the truth. When he said 'objection sustained,' I was on the point of asking him why he wanted to hide the facts from the jury; but I thought he might resent that, so I just kept quiet. You judges," he added, turning to me, "you judges ought to be ashamed of yourselves!"

Of course I knew that he was overstating his case in order to provoke spirited reply. That is one of his little tricks of conversation, one of the reasons why an evening with him is never dull. Also, that is one of his ways of setting a trap for his conversational antagonist, for conversation with him is apt always to lead into a contest of wits. Meet one of his overstatements with a reply in kind, and you are lost; he seizes upon your careless answer and drives you into a corner from which there is no escape without loss of intellectual dignity. Therefore I chose to wait patiently until he had finished. Then I tried patiently to explain to his satisfaction the purpose and the wisdom of some of our rules of evidence. It was not easy to do; I am sure the doctor was not convinced; and in some particulars I was not fully convinced myself. Summing it up afterward in my own mind I was forced to the conclusion that, in this respect as in others, the law has developed rules that often work well, probably in the great majority of instances, but sometimes defeat their own end; that sometimes the rules and obedience to the rules become a fetich whose worship obscures the truth

instead of helping to bring it out into the open. That, however, is only a way of saying that the law of evidence is a human institution and therefore is not perfect. If it works well usually, we have no right to expect much more of it; if, in some respects, it works badly, we should concern ourselves with improving it, rather than condemn it utterly.

I do not propose here to discuss the niceties and the refinements of this important branch of the law. It is important because, under our system, it has an intimate relationship with all the other branches. Cases are tried by the method of contest upon the theory that if each side puts forward its best foot, if each side brings out that aspect of the facts most favorable to its contention, somewhere between these extremes the judge and the jury will find the mean of truth. As a method it is entirely different from the patient search and the controlled experiment of the worker in the scientific laboratory.

We have seen that the trial of a case begins with an opening statement from counsel, outlining what they expect to prove. Then witnesses are called and sworn to tell the truth, the whole truth, and nothing but the truth. We know how hard this is to do, that often it is quite impossible. And, if we have ever been in a court room, we know it happens not infrequently that just as a witness seems to be on the point of saying something that will reveal the truth of the matter of inquiry, an objection is made, and the judge does not permit the witness to go on. No doubt it often does seem to the listener that some sort of game is being played by the lawyers on each side, with the judge as umpire enforcing rules out of a rule-book, and without any special reference to right and justice or even to the circumstances of the particular case. Furthermore it is astonishing to observe how frequently, in some trials, the judge is called on to do this kind of umpiring.

In a case tried before me recently, one side or the other objected to eight hundred and thirty questions. It is true the case was a long one, lasting for nearly twenty-three court days.

However, not more than ninety hours in all were spent in the actual examination of witnesses; so that on the average, about nine times an hour, or once every six and two-thirds minutes, I had to make a ruling on a point of evidence. During one stage of the proceedings, for more than half a day counsel for the defendants thought it necessary to object to every question asked by the other side. This was not at all a fanciful thought, and there was a logical reason for everything that occurred as a result of it. Yet, what did occur must have seemed absurd to the onlooker; and if my friend the doctor had been there, he would have obtained fresh ammunition for his attack upon legal procedure.

The defendants were represented by six lawyers, three doing the active trial work with the remaining three as advisers. All six sat in a row at the front of the trial table. When the legal situation to which I refer arose, one of them shifted his place to the end of the table with a free space on each side of him, so that his attention would not be distracted by the whispered conferences of his associates. Then for almost three hours, he listened carefully to each question asked by opposing counsel, and at its close, before the witnesses could answer, he would say " I object." There would follow various events of a nature too technical to be of interest here, but events of very substantial importance in the trial of the case. The lawyer chosen to do the objecting, who was shifted to the end of the table, did suggest a coach on the side-lines; and the other five, when they quite literally put their heads together for whispered conferences, were not unlike a foot-ball team in a huddle. For my own part, I can assure you that no umpire was ever more hard pressed. I was called upon to match my wits and such technical skill as I possess against those of six of the ablest men at our bar; and every ruling that I made necessitated close, hard thought. The only thing needed to complete the picture of an athletic contest was the water-boy with his bucket and sponge; and I could have used them to good advantage.

Let us admit, then, that sometimes a trial looks like nothing but a game. Is it a game, or is it a well ordered and systematic approach toward ascertaining truth? If it is the latter, are the rules of evidence a help or a hindrance? It is not easy to state within a brief compass the guiding principles, the working philosophy, which lie behind the rules of evidence. One of the best *short* books on Evidence consists of 1161 pages, many of them closely printed in fine type, and the index alone is 42 pages long. As I said above, the whole body of the law is shot through with the law of evidence, and in every trial, whatever the nature of the case, the judge has to guide its development in accordance with both rules of general application to all cases and rules of special application to the particular type of case on trial. Thus Evidence seems to be a very complicated subject with innumerable by-paths and highly technical ramifications.

These technical rules however, are based upon a few comparatively simple principles. For my present purpose the following are all that need be considered: (1) that to be legally admissible, evidence must be relevant; (2) that it must be "the best" evidence procurable; and (3) that the questions which seek to bring it out must conform to certain formal standards shown by experience to assist in the attainment of the two ends first mentioned. These simple principles are the gist of the law of evidence. They and their elaborations form the mesh of the sieve through which an offer of evidence must pass in order that it may meet the test of admissibility. The judge is that sieve; and throughout the trial his mind must be forever active not alone in listening to the testimony but in keeping ready to decide at any moment whether or not to permit each question to be answered. Every time a lawyer objects to a question, he throws out a challenge to the judge, saying to him in effect: "Now, your Honor, it is time for *you* to get busy. I call on you to do *your* part in the trial of this case. You must decide a point of law. Until you shall have decided it, I demand that these proceedings be brought to a halt. According to my understand-

ing of the law, the question is improper for the following reasons; and, if you agree with me, you will sustain my objection." Then may follow reasons of a purely formal nature or reasons which go to the heart of the legal theory of the whole case, reasons of a complexity that may tax to the utmost the learning and skill of the trial judge. All of this is included in those two simple words, "I object." Each time counsel speak them, the judge has to do something more than sit on the bench and look dignified. The spectator may think it is only a game; but, for the judge, it is very serious business indeed.

I have said that three cardinal principles lie behind the whole law of evidence. The first of these is that admissible evidence must be relevant evidence. Very properly you may ask, "Why should anybody try to introduce evidence which is not relevant? If, in the trial of a case, each side is trying to put forward its best foot, why waste time and effort with the production of irrelevant testimony?" The answer is simple, and the key to it is the specialized sense in which the word *relevant* is used. Relevant means legally relevant, that is, having a direct and legal bearing upon the precise question at issue in the case. Oftentimes, measured by psychological standards or by emotional standards, matter may be extremely relevant, and counsel may be very eager to get it into the case, yet from the standpoint of both law and logic, it may be totally irrelevant. Let me illustrate.

A few years ago when the State Bank Examiner made his periodical examination of one of our smaller Baltimore banks, he found a startling shortage. Over two hundred thousand dollars was missing, enough practically to wreck this small bank. Investigation followed promptly, and the whole shortage was traced to the manipulations of a young teller in the bank, who, over a period of several months, had taken hundreds and sometimes thousands of dollars each day and concealed his theft by making false entries very cleverly in the books of the bank. He was arrested, tried, and sentenced to twelve years in the penitentiary. Naturally, the prosecuting officers of the state tried to

find out what had become of the two hundred thousand dollars. The young teller had none of it. He was only twenty-four years old and was of exemplary habits. His father was the janitor of the bank. He lived at home with his parents. At first it seemed impossible that he had made away with so large a sum of money in so short a time. Then another teller in the bank told about a visitor, who had come between ten and eleven each morning to see the young embezzler. This visitor was an older man, described as somewhat "flashy" or "sporty" in appearance. He was not a depositor in the bank and seemed to have no business there except with this young man. Each morning he would come and seek him out; then they would go together into the Directors' Room, if no one was in it, or to a restaurant near the bank, where they remained for a few moments, after which the visitor left without stating to anyone else the purpose of his visit.

By this clue the mystery was solved readily. The flashy stranger was a race-track follower, now turned professional book-maker. The young teller had invested the whole two hundred thousand dollars of the bank's money in futile efforts to back the winning horse. His bad luck and his bad judgment were almost ludicrous. During the first thirty days of his enterprise, he did win a few times; after that he lost steadily. It was as though when he bet on a horse it was enough to make that horse lose. All the time Mr. Book-maker was calling daily at the bank and daily collecting large sums of money from a young teller, whose salary was $18.00 per week and whose father was the janitor of the bank. Toward the last, just before the examination and the crash, the tribute was sometimes as much as six thousand dollars in a single day.

Possessed of this information, the state caused Mr. Book-maker to be indicted on the charge of obtaining stolen goods. In order to convict him, the state had to convince a jury, not only that the money paid to Mr. Book-maker was money stolen from the bank, but that Mr. Book-maker knew that it was

stolen money, or that, as a reasonably prudent and intelligent man, he ought, under the circumstances, to have known that it was. Perhaps that may seem to you to be a simple thing to do; perhaps you may think it was a case sure to result in conviction. If so, you are wrong. The case had been tried twice before, each trial ending with a "hung" jury. Then a third trial was begun before me and a third jury; and while it was going on, I fully expected the acquittal of Mr. Book-maker. After all, he himself had stolen nothing; and he told a fairly plausible story to the effect that the young teller had represented himself as the agent of a somewhat mysterious "syndicate" of bettors, who furnished the funds for his ill-starred enterprise. The state had to convince the jury that Mr. Book-maker lied about his belief in the existence of this syndicate and knew or ought to have known that when he made his daily collections at the bank, he was taking away with him money that belonged to the bank. Naturally, the state's strongest witness was the young teller himself; but he was brought over from the penitentiary to testify and was not very impressive. It was easy for defense counsel to argue that he was motivated by spite and that, himself a convicted thief, he was entirely unworthy of belief.

Thus far we are considering elements of the case provable by perfectly relevant testimony. But Mr. Book-maker's counsel had another trump card to play. Early in the development of his defense, he put a witness on the stand and asked him a question, harmless enough on its face, yet designed very skillfully to bring into the case an entirely new line of defense. At once the state's attorney objected, on the ground that the question and its probable answer were irrelevant. The question was so phrased that I, as well as the state's attorney, caught an inkling of the direction in which it was leading. It would not do to discuss in the presence of the jury the matter of the admissibility of the proposed testimony, for that could not be done without disclosing its nature and its content. Therefore

I announced a short recess and invited counsel into chambers that the matter might be discussed freely and fully among us. That discussion showed at once that I had guessed rightly about the attempted line of defense. It was that the whole bank was honeycombed with the race-track gambling evil; that not only the convicted teller but various higher officers of the bank were tarred with the same stick, so that Mr. Book-maker's daily visits to the bank were visits to an institution peculiarly hospitable to a man of his profession.

Counsel for the defendant, pressed to explain the relevancy of this proposed testimony, asserted vehemently that it was the "heart" of his defense, that its exclusion would "ruin" his case. I think he was quite right about that. This testimony, if admitted, would have furnished a most aromatic red herring. In his argument before the jury, defense counsel would have been able to launch into a bitter attack upon the bank and its officers. He would have described the convicted teller as a victim of a rotten system, a young weakling who merely followed the example of his superior officers in the bank; and he would have argued that they, and not Mr. Book-maker, ought to be the defendants on trial, that they were the persons responsible for the wrecking of the bank. I know he would have said this because he admitted that he had said it to the juries in the two previous trials and because he said it to me so vigorously during our discussion that morning in chambers. He could not explain to me, though, what this had to do with the issue in the case. That issue was, did Mr. Book-maker, or did he not, knowingly take stolen money? Legally, it made not a picayune of difference if the money was stolen from a virtuous bank or from a wicked bank. That circumstance was totally irrelevant from any legal point of view. Practically, however, practically and emotionally, it made all the difference in the world. Irrelevant though it was, if that testimony had been admitted, a false issue would have been presented, an atmosphere would have been created; and Mr. Book-maker might not now be serving

a long term in the penitentiary as an example to other enterprising members of his calling. So you see it is important, and it is not simply a rule of a game, that testimony to be admissible must be relevant testimony.

Examples of the working of this rule might be multiplied easily and at great length. The same principle is at the bottom of a number of related rules. For example, a suit is brought upon the breach of a written contract. According to the well-known law of contracts, once an agreement has been reduced to written form, it is final in that form. Preliminary negotiations between the parties, things they may have said to one another that vary or contradict their written contract must (subject to certain exceptions) be eliminated from the evidence. In the interest of certainty and of fair dealing, their written agreement must speak for them and for itself. If, therefore, in the trial of the suit, one party to such a written contract offers testimony which tends to contradict the written instrument, such testimony is ruled out. Though a different specific reason may be given for the ruling, this is actually another example of the requirement for the legal relevancy of testimony. Ignore this rule, permit irrelevant testimony concerning preliminary negotiations, for example, to be introduced, and it becomes possible to befog the real issue, to create atmosphere, and to permit an outcome of the case entirely at variance with the legal principles that ought to control its decision. In passing, I should observe that this provision of the law of contracts has become modified by so many exceptions and limitations upon its applicability that even a partial statement of it, in its modern form, might be as long as this whole chapter; and I realize that this example hits only the high spots of this branch of contract law.

The second great group of rules of evidence grows out of the legal requirement that the evidence proffered shall be that which is "the best" procurable under all the circumstances. By *the best* is meant that evidence which is founded upon the actual knowledge, or at least upon the actual observation, of the

person who testifies, so that the examination and the cross-examination of that person may test to the utmost the accuracy of his statements. By *the best* is meant, too, in many cases, testimony in regard to the things which the witness has seen or experienced, rather than his opinions about those things or his inferences from them. My statement of this general principle has, I know, the vice of over-simplification. As a statement of a rule it is misleading, because there are so many real and apparent exceptions to it that the rule is often buried almost out of sight beneath the exceptions. But, in spite of the exceptions, the principle is there; and I have stated it in this over-simplified form so that I may indicate that, faulty and artificial though the applications of it may often appear to be, it is based upon sound sense and upon an effort to apply workable psychological methods to the processes of court-room investigation of facts.

Although I cannot hope to condense into a few pages the myriad manifestations of this principle and of the exceptions to it, let me give a few illustrations. It is desired to prove the contents of a letter. The witness on the stand has seen the letter and read it; in the course of his testimony he begins to repeat his recollection of it. At once an objection is made, and the production of the original letter is called for. If it is in existence and procurable, it must be produced and read to the jury. Manifestly, that is much better than to allow the witness to say what he thinks are the contents of the letter. Perhaps he never did read it carefully; certainly he may have forgotten some of its language. His attempted reproduction of it from memory may be extremely misleading and unfair, however honest his effort to repeat it accurately. Therefore the judge sustains the objection. But if it turns out that the original letter is lost or has been destroyed, a copy of it, properly identified, may be offered in lieu of the original, provided due notice has been given to the other side. Suppose, though, that both original and copy have been destroyed. Shall it follow then that no testimony at all may be offered regarding what appeared in the letter?

Logically, one might very well reach that conclusion; but the law tries to be practical rather than merely logical. Accordingly, the rule in such a situation is that the contents of the letter *may* be shown by the testimony of some one who has read it and says that he remembers it and knows the hand-writing of the sender. That is not as good proof, it has not the same probative value, as the letter itself or as a copy of it; but it is the best that can be obtained under the circumstances; and what appears at first to be an exception to the general rule actually is an example of its strict application.

In practice, however, before that simple result is attained the things which happen in the court room often may give the impression that the legal process of investigation is both clumsy and absurd. The witness who started to say what he read in the letter is told that he may not do so, that the letter must speak for itself. Thereupon, the lawyer who is examining the witness, says that the letter can no longer speak for itself, because it has been lost or destroyed, perhaps purposely. The lawyer on the other side becomes angry and excited and shouts a protest against this statement of counsel, as a reflection upon the good faith of his client. The judge raps his gavel to restore order and tells the jury to pay no attention to the remarks of counsel, since the lawyers are not sworn witnesses in the case. Then, perhaps, the judge permits the lawyers to argue the point in open court, standing at their respective sides of the trial table, in the full hearing of the jury. If so, and if the lawyers are reasonably skillful and not too scrupulous, the one who wants the jury to hear the alleged content of the letter will manage to repeat it and to repeat it in language favorable to his side of the case. Thereafter it may develop that the letter actually was not lost at all; but, when it turns up and is delivered to the judge for his inspection, he may find that it is not admissible in evidence after all because in reality it is a very different letter from what both witness and lawyer said it was, and its admission would involve a violation of some other rule of evidence

about which everybody concerned in the trial agrees perfectly. Meanwhile, however, the jury has heard the argument and has heard from counsel a vigorous statement of what the letter contains. This has made an impression on the minds of the jurymen, stronger perhaps than would have been made by the reading of the letter itself. The net result, so far as we can appraise it, is that the rules of the game have been obeyed in form and violated utterly in substance.

On the other hand, the judge may have followed a more modern practice. At the first sign of trouble, when the lawyers began to shout at each other and to show a desire to make side remarks for the benefit of the jury, he may have called them up to the bench for a conference out of the jury's hearing. If the point is a simple one, such a conference may last for only a few moments. If it is more complicated, the judge may find it necessary to discharge the jury for five or ten minutes, or even much longer, while he and counsel together examine documents, discuss points of law, and work out a mode of procedure that will permit the trial to proceed, following such rulings on the evidence as the judge thinks proper but without an unseemly wrangle in the court room and without the indirect disclosure to the jury of the very evidence meant to be excluded. So far as possible, I try always to follow this practice, although during my first year or two on the bench I had trouble, sometimes, in enforcing it. Members of the bar objected to the frequent trips between trial table and bench and resented the fact that it deprived them of many opportunities for grand-stand plays before the jury.

As a former trial lawyer, I could and did sympathize with their point of view. Thirty years ago, in Baltimore at least, judges did not conceive it to be a part of their duty so to control what went on in the court room as to make the rules of evidence actually work. Often they permitted lawyers to do and to say in the presence of the jury things that practically nullified the effect of the court's rulings upon evidence. That is the school

of practice in which I grew up; and, but for the fact that I did only what customarily was permitted, I should be heartily ashamed of many of my own exploits. Undoubtedly any lawyer that attempted to try a case before me in the way that I myself tried cases years ago would find himself in serious trouble and be dealt with summarily.

At best, however, and following the modern practice, the procedure is clumsy. Let us return to the example of the proof of the content of a lost letter. Before a witness may be permitted to testify about his recollection of it, other witnesses must be called and examined in order to prove that such a letter was written and received, that it actually is lost, that diligent search has been made for it, and that it cannot be found. This takes time and distracts attention from the main issue in the case. Each witness, and there may be several, is sworn, is examined, and is cross-examined. Sometimes I have taken an hour or longer to deal with a simple situation of this kind, and, at the end of the hour, I have ruled that the original witness might not answer the question first put to him, because some necessary element of preliminary proof could not be or was not produced.

If my friend the critical doctor whose remarks opened this chapter ever observed that kind of situation I can imagine his impatience; and I concede freely that, in some instances, he might be right. On the other hand, in the very case upon which he based his generalization, he may have been entirely wrong. What he failed to realize, what many lay critics of the law fail to realize, is that the so-called technicalities of the law actually are *technical* in a sense quite different from that in which they use the word. The law has its techniques, its established practices based upon experience and found by experience to work well generally. It is the same with medicine or any other applied science. I visit a physician because I have a persistent pain in my right shoulder. He glances at my shoulder, asks me to raise my right arm once or twice, and then appears to lose interest in that part of my body. Instead of applying himself to

an intensive study of my shoulder, he puts a stethoscope to my heart, asks numerous questions about my diet, examines my tonsils, has my teeth X-rayed, and sends me to a psychiatrist who questions me at great length about my infantile relationship with my mother's maiden sister. Perhaps the doctor might have prescribed the use of a liniment and cured my aching shoulder in short order. But shall I take it on myself to condemn out of hand his technique, or shall I assume that he knows better than I do what methods produce successful results in the great run of cases? So it is, I believe, with the technique of the law, especially the technique, or the technicality if you will, of the legal rules of evidence. Sometimes they do unnecessarily complicate a simple situation; far more often they promote the attainment of justice by establishing a sound method for the discovery and the presentation of the actual facts of the case.

Another example or two may not be amiss; and these will be examples of rules that are, or that I think ought to be, in process of development and change. A witness is testifying to his recollection of the facts of an accident. Very naturally, and unaware that he is breaking a rule, he expresses his own opinion on the question of the defendant's fault or negligence. At once an objection is made; and the judge rules that the witness had no right to express such an opinion, that this is the very question the jury has to consider, that the jury can and must reach its conclusion from evidence of the facts and not from evidence of the witness' opinions about those facts.

That is the well-nigh universal rule in such cases. Yet in a far more debatable field, as I look at it, the rule is precisely the reverse. In the case of a contested will, involving a question of the mental competency of a deceased person, witnesses are allowed to express their opinions on this very delicate question, a question whose answer depends at least as much upon the mental equipment of the person answering it as upon that of the dead man of whom it is spoken. I do not mean merely that

expert psychiatrists may express such opinions or that trained physicians may express them. Anybody, wise or foolish, interested in the outcome of the case or disinterested, intelligent or stupid, may say to the jury that, in his opinion, the man that made the will was capable or was not capable of so doing. The only limitation is that the witness who is not an expert must first testify to an acquaintance with the deceased and to specific incidents during that acquaintance that form the basis for his opinion; and the judge will not permit him to express such an opinion unless a factual basis for it has been established by proper preliminary testimony.

It must be obvious that, in two particulars, this rule represents an extreme invasion of what I have stated to be a general principle. First, the witness does express his opinion upon the very question which the jury has to decide. Secondly, he is permitted to do this in a question calling for the exercise of judgment on a very difficult and very technical point, in spite of the fact that he has no technical, no professional knowledge as a basis for that opinion. Mental capacity, soundness of mind, however tested, measured by whatever standard, is one of those intangible, fugitive conceptions that call for the nicest discrimination and the most scientific standards of judgment. Nevertheless, under the rules of evidence, a shoemaker may express an opinion about it, provided he knew the man who made the will, had a sufficient number of contacts with him, and bases his opinion upon observed peculiarities of words and conduct, not common to ordinary persons. On the other hand, a man who sees two automobiles collide may tell what he saw, may say even how fast each car was going, provided he indicates that he is familiar with speeds and is capable of judging them; but he may not say that in his opinion one of the drivers was prudent, the other reckless. The contrast between these rulings is striking; and I pause to consider which of them is the wiser.

In the first place, how do they work? A number of will

contests have been tried before me, one of them within the past few weeks. I confess that in every such case I have been almost shocked by the glib way in which ignorant and stupid persons, persons whose judgment I should not accept upon the simplest affairs of life, go upon the witness stand and swear that a testator was not of sound mind. They base their opinions upon peculiarities of behavior that they have observed, upon lapses of memory, eccentricities of conduct of one kind or another; and, especially when the witnesses have an interest in the outcome of the case, they announce as opinions mere wish-fulfillments of the most patent sort. For example, two disappointed nieces, in the case most recently heard by me, assured the jury that their aged aunt, the testatrix, was mentally unsound and incapable of executing a valid deed or contract, because she said on a number of occasions when they brought her home after a drive, "Where are we going now?", and because frequently when she addressed them she would confuse their names. Once or twice, also, she referred to incidents involving a nephew who had died many years ago as though she thought of him as still living. These statements, coupled with a few others of similar nature, constrained me to permit the witnesses to express to the jury their opinion that their aunt was of unsound mind. But, on the other hand, the evidence of the same and other witnesses showed that the old lady worked regularly until the date of her last illness a few months before her death, did her work capably exercising both memory and judgment, saved her money, invested it, and carried on her simple business affairs with at least ordinary wisdom. It was obvious to me that these nieces had searched their memories to rake up recollections of words and actions that might enable them to put into the form of an expression of opinion what their own self-interest made them want to say. They really meant that they did not like the contents of her will, because it expressed her preference for certain other nephews and nieces to whom she left the bulk of her estate. That was obvious to me; and it was equally obvious

to the jury, for the will was sustained by a verdict quickly rendered. In other words, the jury valued these so-called opinions at exactly nothing.

That case was not exceptional in my experience both on the bench and as a practicing lawyer. As counsel I have been called upon to defend wills as well as to attack them. Usually I have found that assertions of opinion made by such witnesses did not carry much weight unless they were based upon facts and circumstances much more than trivial in their nature. However, some courts will not allow non-experts to testify at all in this field. In Maine and Massachusetts, and to a limited extent in New York, such testimony is held inadmissible. I mention this particularly because it illustrates a very important point which has not before been stated. The law, the common law laid down by judges as well as the statutory law made by legislatures, is not the same all over our country. That is so not only in relation to the law of evidence, which we are considering in this chapter, but in relation to *every* branch of the law. Walk across any state line, and you find yourself in a foreign country, so far as the law is concerned. The same system of law prevails, the broad general principles are the same; but in literally countless matters of detail, each sovereign state has applied those general principles and has developed them as the judges of that state deemed wise, for the most part without regard to what has been done in the other states of the union. Here I refer to the circumstance only in order to indicate that there is room for difference of considered, judicial opinion upon this particular point in the law of evidence.

My own view is that the rule followed by our Maryland courts, as well as by those of most of the other states, is a sensible rule. Foolish people as well as wise people do form opinions about the mental capacity of those with whom they have contacts. A judge and a jury want to know all that can be told them in order that they may decide about the mental capacity of somebody already dead. They have to get their in-

formation at second-hand as they get their information about nearly everything they are called upon to decide. It seems to me that they are helped toward the ascertainment of truth if the witnesses are allowed to express their opinions as well as to narrate what they call facts.

Psychology teaches us that every so-called narration of fact has bound up in it something of the narrator's judgment or opinion. Every observer sees, to some extent, what he wants to see; and, whether he does or does not say so in words, he tells us what he thinks, he tells us his opinion, when he purports to tell us what he saw. Therefore, I believe it is better to permit him to express outright his opinion, even though he is no expert and even though his opinion is one upon the precise issue in the case. Oftentimes, in the direct expression of his opinion more than in any other way, the witness reveals his own bias and so helps the judge and jury to assign due and proper weight to the whole of his testimony. In the will case under consideration, for example, the first niece who testified about her aunt's eccentricities of behavior impressed me as a very fair and persuasive witness until she was asked for her opinion. When she answered that question, the undue emphasis and the bitterness in her answer let the cat out of the bag; and I realized at once that cupidity and disappointment had made the witness an unscrupulous person whose testimony was quite worthless. Partly for that reason, and partly because I think we fool ourselves when we refuse to allow a witness to express opinions in his testimony, I incline to the belief that it might be a better rule to throw down the bars and freely to permit witnesses to say what they "think" about occurrences as well as what those occurrences were. Therefore, I should be in favor of letting witnesses in negligence cases express their opinions if they think somebody has been negligent. At present, the law does not permit this.

My purpose in making this somewhat extended excursion into the field of applied psychology has been to indicate some

of the difficulties that beset the lawyer and the judge in their efforts to devise a system entitled to respect, as a mechanism for the ascertainment of truth. Neither the scientist nor the philosopher should scoff at us. The truth we are seeking is not only as elusive as the object of their quest, but it is full of variable and varying factors even after we think we have found it. The scientist in his laboratory counts his time well spent if he works for months or for years, performing hundreds of elaborate experiments, discarding result after result as worthless because it has not been subjected to adequate control. If, after long toil, he succeeds in isolating a hitherto unfound substance in the blood-stream or in compounding a new drug useful in the war upon disease, he receives, and he deserves the praise and the thanks of the world. Nobody blames him then for the errors he has made; nobody criticizes him because he took so long to finish his task. The rules he has followed, the technique of his profession, these are lauded as the fine tools which his trained mind has devised for the doing of a difficult work. So, too, the philosopher spends years pursuing a single thought and trying to embody it in words. He is not hurried and he is not criticized because he proceeds slowly. The thing he seeks is fixed and it is certain; or, at least, he hopes it is so. When he finds it and expresses it, he takes his sabbatical year of rest.

Every time a case is tried in court, judge and jury, and lawyers too, are joined in a search for right and justice and for truth. But the truth they are seeking is not abstract truth, which may be certain, nor is it concrete truth, which can be demonstrated in the laboratory. It is truth as related to human beings and their human behavior toward one another. That means that at best it is and must be uncertain and doubtful. Moreover, the exigencies of public business require that it be sought quickly, and quickly found. An imperfect method has been devised which leads sometimes to error or at the most to a qualified form of truth. It is a method of applied psy-

chology, not always quite up-to-date; but I am convinced that it is by no means the contemptible method that my friend, the learned doctor, said he thinks it is. That part of the law which we call the law of evidence, which leads to the interposing of objections by lawyers and the making of rulings upon evidence by judges, is a technique of our profession, very likely to seem to others less reasonable than it actually is.

The examples I have discussed, though they involve special principles and though special legal reasons are given for the rules regulating them, actually are examples of the application of the broad general rule that admissible evidence must be the best procurable evidence. I have contrasted the admissibility in evidence of the opinions of witnesses in two different kinds of cases; and I have expressed a doubt whether the distinction pointed out is psychologically and logically sound. As far as I can see, there is no justification for the difference made in the two cases. It exists, and that is all there is to say about it.

If we should trace carefully the beginnings of any two such contrasting rules, perhaps we might find that the difference grew out of some historical reason, some sociological reason, some reason of tradition or of custom. Perhaps, however, we might find merely that it grew out of differing psychological points of view in the judges who first made common law in the respective fields. Often differences of this nature exist in the body of the law for no reason other than that one rule came into existence at one period of time, another rule at another period of time, each rule representing the law's application and crystallization of the generally accepted way of thinking about the subject when the rule first was laid down. We have seen in other connections how the crystallized law tends to persist, how precedent and authority stand in the way of change though change may seem desirable. Therefore we must never be surprised to find in-

consistencies in the rules of law. This is true especially in the law of evidence; and especially in this field do the laws of the various states differ from one another.

Another example of this general principle demanding the best procurable evidence is the following. When a merchant sues a customer for the price of goods sold to him, very often the entries in his own books of account, showing the details of the transaction, are the most persuasive evidence the plaintiff can produce. Of course such books can be fabricated for the purpose of giving color to a false claim; but in most instances attempted frauds of this kind can be unmasked successfully. I shall not attempt to elaborate fully the requirements of the common law for the production in evidence of such books of account. To mention only one or two of these requirements, the books must be identified as books actually kept by the merchant and the entries in them as original entries made contemporaneously with the transactions. More important still, the handwriting of the clerk who made the entries must be identified, and he must testify in person respecting them unless it is shown that he has died or left the state.

These rules of a highly technical nature, and many more, came into existence long before business was organized as it is today, at a time when modern accounting methods were entirely unknown. Undoubtedly they were good rules, well adapted to their purpose, at the time they were laid down. They made it hard for a dishonest merchant to bolster up his claim by false evidence; but an honest merchant found no difficulty in complying with them. They became in time hard and fast rules supported by long lines of precedents, an integral part of the common law of evidence, definitely unchangeable by judicial action.

Meanwhile accounting practices among merchants were revolutionized. I recall a case tried before me about four years ago, in which the owner of a large department store was

the plaintiff. The account sued on covered nearly a hundred purchases made over a period of two and a half years. The plaintiff produced in court a series of ledger cards containing the customer's account. The entries upon these cards had been made by means of a bookkeeping machine, a kind of combined typewriter and adding machine. During the two and a half years, at least six different persons had operated the machine, and there was no way to tell which operator had made any specific entry. Nor were any of the entries "original entries," as the law defines original entries. They were based upon charge slips made by the clerks in the various departments of the store when each individual purchase was made. The head of the plaintiff's accounting department was offered as a witness to explain its accounting methods. He stated that these original charge slips, each bearing the initials of the clerk who made it out, were placed on file, retained for a period of several months, and then destroyed. Therefore, at the time of the trial, there was no possible way in which to identify the many clerks who had made most of the sales entering into the account sued upon; and the original entries of those sales were no longer in existence.

Those are only some of the reasons that made the plaintiff's records inadmissible in evidence under the existing rules. In whatever direction plaintiff's counsel sought to turn, he was brought up standing. Without the ledger cards, there simply was no definite proof at all. Defendant's counsel merely sat at the trial table and objected to every offer of proof made by the plaintiff; and almost every objection he made was sustained. Plaintiff's lawyer might have called the defendant herself as a witness and tried to get her to admit some, at least, of the items of the account; but, for reasons which were not disclosed to me, he did not do so and abandoned his case. Possibly he had had other dealings with the defendant and thought the truth was not in her.

Obviously that was a case in which the rules of the law of evi-

dence worked very badly. By applying them strictly I deprived the plaintiff of his rights and helped the defendant to perpetrate a wrong. The case was pre-eminently one that might have justified my friend the doctor. It certainly was a case in which the established rules were hopelessly out of date, in which the law had failed to keep pace with changed business methods. As a matter of fact, the plaintiff's ledger cards, made as they were made, explained as the head of the accounting department explained them, probably were a perfectly accurate record of the transactions in question. Certainly the ends of justice would have been served by admitting them in evidence as *prima facie* proof of the plaintiff's claim, and by requiring the defendant to go upon the stand to refute them. Such book entries, which are often the only kind made by modern business men, are generally held inadmissible as evidence; yet they are likely to be better evidence, judged by realistic standards, than book entries of a more primitive kind, which can be proved under the common-law rules of evidence.

I have told about this case in some detail not only because it exemplifies an imperfection of the law, but also because it illustrates how the law changes and how judges can help to make it change. For a long time I, and many others, had been critical of this phase of the law of evidence. We had looked upon it as an anachronism, a survival without present utility, often actually subversive of justice. Not only merchants' account books but other records of indubitable correctness were continually kept out of evidence because of out-dated rules for their authentication and proof. Hospital records, for example, had to be identified by the physicians in whose hand-writing they were made. Sometimes a single patient was seen and treated by five or six doctors, and all made entries upon the record of his case. To prove that record, it was necessary to bring each doctor into court, swear him as a witness, have him identify his own hand-writing and read his own entries to the jury. If one or more of the doctors had died or had left the state, it was neces-

sary to find a witness who would swear that he knew and recognized the doctor's hand-writing. At the best, this resulted in the presentation of the record to the jury in disjointed, piece-meal fashion, tending to confusion and attended by unnecessary delay. At the worst, and this was not infrequently the case, the record, or some important parts of it, could not be proved at all; and, in every case, the hospital and its staff were subjected to annoyances that sometimes were very serious. Internes and house physicians were taken away from the performance of their duties and kept waiting for hours in court only to say that they had made certain entries of a routine character, regarding which they knew nothing except that they had made them. They left the court room swearing at the lawyers and convinced as Dickens puts it that "the law is a ass."

Now it happened that the lawyer who represented the department store, in the case above referred to, was a very influential man in our state. He was counsel for an association of department store owners, and one of his associates was a member of the state legislature. Therefore, when I ruled against his every effort to prove his case, I accompanied my rulings with brief remarks intended to indicate that though I felt myself bound by the existing rules of evidence, I was by no means sympathetic with those rules. At the end of the case, I delivered a short oral opinion in which I vigorously criticized the law that controlled me and suggested that the remedy lay with the legislature then in session.

That hint was scarcely needed. Backed by aroused sentiment in the business community, the legislature promptly passed a bill already pending, which made admissible in evidence books and records shown to be books regularly kept and purporting to record the facts set out in them, without requiring the preliminary proof of hand-writing, etc., formerly insisted upon. Under this law, the merchant who keeps his records in a modern manner can offer them in evidence without difficulty, the records of a hospital can be proved without disorganizing the

work of the hospital. Each of our larger Baltimore hospitals now has an employee known as a custodian of records, who brings its records into court when required and swears that they are regularly kept records of the hospital. This is the only preliminary proof required; and the record is then read to the jury as part of the evidence in the case. The law of evidence in Maryland has become, in this regard, the law of common sense; it has caught up with modern business and professional practice. That is always the tendency of the law, and the objective of its better practitioners. Sometimes the best way to bring it about is to adhere strictly and apparently unreasonably to those of its rules which have become inappropriate to the conditions of modern life, thus forcing the issue and expediting the desired modifications. Often that is the only course open to a judge upon the bench, whose duty it is to apply the law as he finds it already made for him, either by legislative enactment or by line of judge-made authority and precedent.

The third great group of objections to evidence may be dealt with more briefly. These are objections to the form of questions, rather than to the substance of the proposed testimony. The "leading question" is the most familiar example. The purpose of the rule is to prevent a skillful lawyer from substituting his own testimony for that of the witness. As a matter of fact, leading questions are quite desirable, in their proper place. Each witness needs to be introduced into the unfolding picture of the case. When he is called, it expedites matters and does no harm to begin his examination by asking him a series of questions so phrased that his mere assent to them is a sufficient answer. But when the examination gets down to the meat of the inquiry, the questions should be so worded as to be actual questions, not mere suggestions of desired answers. The problem is largely one of professional skill on the part of the trial lawyer. When the lawyers on both sides are experienced and skillful practitioners, relatively few objections are made that go only to the form of the question. The questioner knows how to frame his questions

so as to avoid offense against the rule; his opponent knows when it is not worth while to insist that the letter of the rule be adhered to.

I cannot pass this branch of the subject without indicating the difference between the form of questions permitted in the direct examination of a witness and the form permitted when he is under cross-examination. A witness is placed upon the stand by a lawyer who expects from him testimony favorable to his side of the case. The lawyer has talked to the witness beforehand and knows the substance of his proposed testimony. Therefore he must frame his questions in a way that will require the witness to tell his story in his own words and in his own manner. The lawyer has no right to tell the story himself and then ask the witness merely to say "yes." Cross-examination, however, is a very different matter. The purpose of cross-examination is to test the accuracy, the memory, and the truthfulness of the witness who has already testified on direct examination. Upon cross-examination the leading question is permitted as well as other forms of questions which would be improper during the direct examination of the witness.

There is no part of trial practice more interesting to the layman than this subject of cross-examination. It furnishes a large part of the drama of the court room; and for me, it furnishes also quite the largest part of its boredom. That is because so many lawyers who try cases have not the remotest conception of the proper way to cross-examine a witness. They think they need only take him over the ground of his direct examination and make him repeat it at length; frequently, they try to do this not once but several times. As a result they weary judge and jury to the point of exasperation and give the witness an opportunity to strengthen and enforce his original statements. I am greatly tempted to enlarge upon this theme and to devote a long chapter of this book to the subject of cross-examination. Instead, I shall say only that the subject has been fully developed for layman and lawyer alike in a truly delightful book, *The*

Art of Cross-Examination, by Francis L. Wellman. Himself a trial lawyer of wide experience, Wellman enforces his statement of theories and principles by numerous verbatim reports of unusually interesting testimony in actual cases.

To return once again to my friend the doctor, I had him in mind when I prepared my questionnaire to the jury, referred to in Chapter VI. You may recall that the fourth question asked the jurymen was, "When the judge sustains an objection and does not allow a witness to answer a question, do you feel that the jury is being deprived of an opportunity to hear something that would help it to decide the case properly?" and that two men answered this question "yes," seventeen answered it "no," and three answered it "sometimes." These answers indicate that the operation of the rules of evidence impresses some of those who observe it, and, in a sense, participate in it, as not altogether foolish. These men had been serving as jurors for some weeks. They sat in the jury box while witnesses were being examined, heard objections made, heard the rulings of the court upon those objections. Very frequently objections had been sustained, and witnesses had not been permitted to answer questions. If the practice was of no apparent use, if its ostensible effect was to prevent the introduction of evidence covering the facts of the case fully, if it seemed to reduce the trial process to a mere game, I should think that jurymen would be the first persons to say so. Their interest is to hear the facts, their desire, to have all the facts presented to them. They approach the task of finding and deciding facts in a perfectly direct manner, controlled by no kind of tradition, not tied to any formal or technical point of view. They, of all others, may be expected to be impatient of any technique that seems to stand between them and the object of their quest; and seventeen out of twenty-two who answered my questionnaire found no fault with the existing system.

Only one of the two men who thought that rejected testimony might help him, and one of the three who thought that

it might help "sometimes," gave reasons for their answers. These reasons were respectively, "It may help with the juror," and, "Sometimes the witness may answer a question that would help me to decide more better." These reasons do not add a great deal to the bare answers. Fifteen of the seventeen who expressed satisfaction with the system gave the following reasons for their answers:

1. "I, as one, do not think that it deprives me of deciding a case properly."
2. "The objection of a question being sustained, may not have any bearing on the case."
3. "Don't think that one question more or less has much bearing on the jury's verdict."
4. "I simply dismiss the question from my mind. I usually hear enough without that testimony."
5. "If the question were proper, the judge would not sustain an objection. If the question is important, counsel usually get the question in proper form for witness to answer."
6. "It may have some weight on a juror who is inclined to be obstinate."
7. "Personally, I feel that the judge should be and usually is competent to decide as to opposing lawyers injecting irrelevant matters."
8. "Judges are not just ordinary lawyers, therefore when placed upon the bench have proven their superior knowledge of law. For the layman to question any objections sustained by the court is beyond my understanding."
9. "Because when the judge sustains an objection it is because the point in question is not admissible as evidence and since not evidence, is of no interest to Jury."
10. "I feel that if you think we should not hear it in arriving at a just decision, we should not hear it."
11. "When your Honor, as Judge, sustains an objection, I do not think it is done to keep anything from the jurors.

I think it is done for the good of both plaintiff and defendant."

12. "My implicit faith in the judge to function honestly is my feeling."
13. " The question not being relative to the case or the answer to such would not help to render a verdict. I think when the Judge sustains an objection, the average juror can fully understand why same was so ruled."
14. "The judge to sustain an objection raised by either side must believe question is misleading and calculated to confuse the witness and not necessary to bring out facts or some legal point. Jury should be governed thereby and better able to act fairly."
15. "I did feel that I was being deprived of certain detail— but I can see now these objections are necessary to keep irrelevant and hearsay testimony out of the records."

There is nothing profound about these reasons given by jurymen for their belief that the rules of evidence are not arbitrary and obstructive. In effect, they seem to think the rules accomplish what they are intended to accomplish. Possibly the jurymen place too high a value upon judicial wisdom and fairness; certainly they seem to respect judges far more than did my friend the doctor. Perhaps this attitude, which seems characteristic of jurors in Baltimore, accounts for the bias in favor of juries that I may have betrayed in earlier chapters of this book.

A consideration of the law of evidence and the working of its rules leads naturally to a closely related subject, which I shall discuss briefly. That is, the function of the lawyer in our system and the interplay of the activities of lawyer and judge in the trial of a case. Lawyers are frankly partisan; that is their right and it is their duty. In the development of the facts of a case on trial, the lawyer on each side is supposed to do his utmost, within the bounds of law and fair-dealing, to bring out and to emphasize those facts, and those aspects of facts, most favorable to the interest of his client. The duty of the judge, on the other hand,

is to see that the rules of evidence are obeyed and that neither lawyer shall permit his zeal to lead him into transgressions against the rules. Is this the whole of the judge's duty? Many American lawyers think it is; and many American judges govern themselves accordingly. The Canons of Judicial Ethics adopted by the American Bar Association reflect, to some degree at least, this attitude. Article 15 of these Canons reads as follows:

"He may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on his part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto."

You will observe the purely negative tone of this pronouncement. A judge should "bear in mind that his undue . . . participation in the examination of witnesses . . . may tend to prevent . . . the ascertainment of truth, etc." The questions remain, what is *undue* participation, and when *ought* the judge to interrogate a witness?

Those questions are answered, in practice, very differently by different judges. In England the judge customarily takes an active part in the examination of witnesses. He seems to regard the trial of a case as a real effort to discover the facts, and he looks upon himself as an integral part of the fact-finding machinery. In America many judges go to the opposite extreme. They think of themselves as umpires only and leave the bringing out of the facts almost entirely to the lawyers for the respective parties. My own view is that a judge ought to be more than a mere umpire. The trial of every case involves not two only, but three distinct elements. First, the relevant facts must be ascertained; second, disputed questions of fact must be decided; third, the appropriate legal principles must be applied to

the facts so ascertained and decided. No case can be rightly decided unless the tribunal that decides it knows all there is to know about the facts, whether that tribunal is a judge or a jury or both. Sometimes it is bound to happen that the lawyers, actuated either by poor judgment or by partisanship, will close both the examination and the cross-examination of a witness without asking certain admissible questions, which, if answered, would throw important light upon the subject of inquiry. It is then, I believe, the clear duty of the judge to ask those unasked questions. The lawyer on each side may have refrained from asking them because each lawyer feared that the answers might be detrimental to the interest of his client. The lawyers may have forgotten to ask them, or they may prefer that the matter be left in uncertainty so that inferences may be drawn either way. Whatever their motives, the judge has only one—that the case shall be rightly and legally decided; and he knows that this can occur only when *all* of the relevant facts have been presented.

Another important duty of the judge is to protect witnesses from over-zealous counsel. One of the primary rules in the cross-examination of a witness is that a question which purports to quote his testimony on direct examination shall quote it accurately. Nothing can be more disconcerting to an honest witness than to be asked to explain why he said something that he actually never did say. Very slight changes of phraseology, the transposition of a single word, may so alter the meaning of what purports to be a quotation as to reverse or greatly to modify its significance. It is for the judge to see that this does not happen as the result either of accident or of design. Not infrequently he must intervene, sometimes he must admonish cross-examining counsel not to put words into the mouth of a witness which the witness never put there himself.

Similarly, the judge must protect witnesses against being made to seem foolish or to be lacking in candor because of their inability to answer unanswerable questions. Time and again in

the trial of traffic accident cases I hear a witness pressed to say just exactly how many feet down an intersecting street he could see when the front of the vehicle in which he was riding was opposite the building line of that street. An honest man can not answer that kind of question; but many an honest witness does answer it and by so doing makes himself appear to be a liar or a fool. The next time you are driving in your automobile, try it out for yourself. The vehicle does not move by jerks, stopping every five or ten feet so that the occupants may take an observation; it goes on continuously. The driver, or even passengers riding in it, do not look to the right, let us say, at a definite moment during its progress and, while looking to the right, make a mental photograph of what is seen in that direction, shutting out all other impressions. The mind does not work that way. Yet lawyers ask questions, and often witnesses answer them, as though human powers of perception had all the accuracy and precision of the most delicately constructed scientific instruments. When a clever cross-examiner has trapped a witness into making such an answer, I conceive it to be a part of the judge's duty to afford the witness an opportunity to explain or to modify his answer, so that it may not be used as the basis of a specious argument in some later stage of the case. Better still, if the judge perceives that an examination is being conducted in such manner as to make it likely that the witness will be trapped unless he be warned of impending danger, I think it is entirely proper for the judge to caution the witness that he shall answer questions if he is able to do so, but that he shall say he does not know, in reply to a question that he cannot answer except by guessing.

On the other hand, the fault is not always on the part of the lawyer. Often a witness obviously evades giving direct answers to questions that are fair and perfectly clear. The witness knows, but he does not want to tell what he knows. Frequently, when this occurs, the judge can force the witness to answer by the simple expedient of interrupting the examination and request-

ing the court stenographer to repeat to the witness the question which he has dodged. Most witnesses, even though they may be willing to equivocate and to evade direct answers to questions proceeding from counsel, fear to follow the same tactics when they realize that the judge is taking a hand in the proceedings. And the judge can do so very quietly and very unobtrusively, but none the less effectively.

In conclusion, I may say that as a trial lawyer I have tried cases before judges who almost ignored the rules of evidence and allowed practically everything to "go in" and to go on; and I have tried cases before judges who enforced the rules strictly. For my own part, on the bench, I have enforced the existing rules to the best of my ability in accordance with my understanding of them. I have done so because I believe that, far more often than not, such enforcement tends toward an orderly and logical development of the fact-finding phase of trial procedure. Occasionally, no doubt, it results in suppression of the truth; but the truth can usually be brought to light without too much delay and more convincingly if the rules of evidence are used to guide and to control the mechanics of courtroom investigation. "I object," as I have observed procedure in court for many years, are words that help and do not hinder a judge who heeds them wisely. They help him and help the jury toward the ascertainment of those essential facts which must be the basis of a decision in accordance with the law of the land.

Chapter Nine

LAW AND EQUITY

One January afternoon a year or two ago I was sitting in my office, or chambers, adjoining the court room of the Baltimore City Court. This is one of the courts where civil, common-law cases are tried in Baltimore, one of the courts over which members of the Supreme Bench of Baltimore assign themselves to preside from time to time. I had been acting as judge in that particular court for only about two weeks. Before that, during the whole of the preceding year, I had been assigned to another court, the Circuit Court, which sits in the same building, only a hundred feet or so away and on the same floor of the Court House. During that preceding year, I had been concerned with a kind of cases and a method of dealing with them which differed radically from those which now came before me. Technically, during that year I had not been a judge at all; I had been a chancellor. The Circuit Court of Baltimore, where for a year I had been chancellor, is not a law court, but an equity court; and much of what I have said in earlier chapters—all I have said about juries, for example—has no bearing at all upon equity and its administration. That is to say, in the city of Baltimore we have two separate and distinct systems of law and legal administration, operating side by side, presided over by the same men, functioning in the same courthouse, but differing widely in their history, their present form of organization, the subject matter of the cases they decide, and the remedies they afford to litigants who invoke their aid.

For example, that January afternoon there came into my

office a lawyer with a paper which he asked me to sign. I read it and learned that its purpose was to prevent a grievous wrong. The paper was what lawyers call a petition; and it recited that the petitioner, the client of the lawyer who presented the petition to me, was about to have his little corner grocery-store sold over his head as the result of a gross fraud which had been practiced upon him. He had borrowed fifteen hundred dollars and given the lender a judgment-note. A judgment-note is something like an ordinary promissory note, but contains additional provisions which enable the holder of it to apply to a law court and to obtain from that court a judgment for the amount of the note without first going through the usual process of summoning the defendant—the man who signed the note—and giving him an opportunity to present his defense, if he has any. When a man signs that kind of note, he runs certain risks. The petition went on to say that the grocer had repaid in instalments the entire fifteen hundred dollars with interest, and that the holder of the note had promised repeatedly to mark it "Paid" and to return it to him; "but," continued the petition, "in utter disregard of said assurance, and falsely and wrongfully concealing from this court the receipt by him of said payments which aggregated the full amount of said note with interest as aforesaid, the said John Smith, the holder thereof, did on the 10th day of December, 1929, bring the said note into court and did wrongfully obtain the judgment of this court against your petitioner thereon." Worse than that, the petition further asserted that in pursuance of this judgment, Smith had caused to be issued an execution; and that even now the sheriff was in possession of the petitioner's little store and stock of groceries and was about to sell them at public auction in order to satisfy Smith's false claim.

If those statements were true, something had to be done about it, and quickly, too. The lawyer asked me to sign an order setting aside the judgment thus wrongfully obtained against his client and ordering the sheriff to go no further with his pro-

posed sale. Furthermore, he wanted me to order Smith to cancel the note and to return it to the grocer. I explained that I could not do all of that simply because he requested it; that, on its face, the judgment which Smith had obtained was entirely regular. Perhaps the grocer actually had not made the payments as stated in his petition; perhaps it was he and not Smith who was attempting to deceive the court. I said that I could sign an order holding up the sale until an inquiry was made; and thereafter, if the facts were as alleged in the petition, the judgment would be stricken out. That, however, was as far as I could go; I had no power to order the cancellation and return of the note. "But," said the lawyer, "that will not be enough. That man Smith has shown that he is a rascal. I *must* put a stop to this sale of my client's property, which is advertised for day after tomorrow; but I want to get back that note, too. There's no telling what further rascality Smith will attempt so long as he has possession of the note."

Obviously, there was good sense in that. But, as a judge of the Baltimore City Court, I could not give him all the help he needed. The grocer's lawyer wanted a temporary injunction, an order of court commanding the sheriff to wait while the validity of Smith's judgment was being inquired into; and, if that judgment should be found to be the result of a fraud, as alleged by the grocer, he wanted it stricken out. He wanted, also, a "permanent and mandatory" injunction commanding Smith to do what an honest man in his position would do without being compelled to do it: that is, to give the note back to the grocer who had paid it. I could not do all that he asked because I was now a judge in a law court, and the kind of relief he needed was "equitable" relief. To obtain this fully, in the city of Baltimore, he has to go into an equity court. Had he come to me three weeks earlier, when I was the chancellor of the Circuit Court, I could have done what he asked. But when he did come, I was no longer a chancellor in equity; I had become a judge in a law court. Therefore, I was compelled to

send him down the hall into the chambers which had been mine three weeks before, where my colleague who had succeeded me as chancellor signed a hurriedly prepared paper drawn in a form different from that which had been presented to me. Thereupon, an equity action was started; and in due course of time, the grocer got back his note and was relieved of all further anxiety regarding it.

Perhaps it strikes you as absurd that there should be any such complications. You may say, and with considerable show of reason, that if I was a chancellor and could deal with this case fully in December, I ought to have been able to do the same thing in January; you may think it was nonsense to send the grocer's lawyer down the hall to get another judge to do it—a judge who had became a chancellor in equity when I stopped being one and became a judge of a law court, as I had been before the year when I was a chancellor in equity. The truth is that when I go to see the *Mikado* I am always a little self-conscious about the changeful career of Pooh-Bah. However, if this incident seems absurd to you, what I am about to add will doubtless seem even more so. Baltimore is a part of the State of Maryland; and in that state there are twenty-three counties. Now, had that same case arisen in any one of those twenty-three counties but outside the city of Baltimore, there would have been no such complication; because, except in Baltimore City, every Maryland judge acts at all times both as a common-law judge and as an equity chancellor. That is to say, in the counties of the state, law is law and equity is equity; but law court and equity court are the same court; and one man, one judge, is both common-law judge and equity chancellor, ready to act in the one capacity or the other as from time to time the need may arise. This difference of practice in Baltimore City and in the counties illustrates, within the geographical limits of a single state, two of the three variations of practice which survive at the present time in the United States in the administration of these once entirely separate and distinct legal systems. That is to say,

in five states law courts and equity courts are conducted as separate courts, as in Baltimore City; while in twenty-odd other states and in the Federal Courts, law and equity are administered in the same courts, though there is one form of procedure for law cases and an entirely different form of procedure for equity cases. On the other hand, in the remaining states of this country and in England since 1873, the distinction between law and equity has been wiped out, and there has been an almost complete fusion of the two systems.

Such being the case, I might perhaps ignore the distinction and not trouble you with any further reference to it. If you happen to live in New York or in any of the other fourteen states in which the two systems have been fused, a discussion in any detail of the difference between them will have no especial interest for you because it will not picture anything that exists in your own state courts. Nevertheless I think it proper to give the matter further consideration, because, as I apprehend it, the history of the origin, the development, and also in some jurisdictions of the abolition of equity as a separate and distinct system with its own chancellors and its own courts, operating alongside the law courts, supplementing their action, cooperating with them, sometimes apparently controlling and interfering with them, is a phenomenon of great interest and of supreme importance. Nothing in the history of our legal system speaks more eloquently for the principle of growth and change; nothing so emphatically justifies the modern view that our law always has been changing, as social needs demanded change, and that it must continue to grow and to change in the present and in the future as it has done in the past. There still are lawyers and judges, many of them, I fear, who are loath to adopt this attitude of mind. To them, the law as it is today is a completed work of art. It is a picture which would be spoiled by one additional stroke of the brush, a statue hewn from solid granite, signed by the sculptor, and finished. Their eyes, looking backward for precedent and authority, are blind to the

social needs of today and do not see the promise of tomorrow. I am amazed that these same judges and lawyers can be oblivious to the true lesson of that past which they revere. Its history is one of continuous, dynamic growth and change, as is all else in the history of human institutions; its lesson is the reverse of that which they draw from it.

Before the Norman Conquest (I take it for granted that you remember, with me, that the Battle of Hastings occurred in 1066 A.D. — the only date in English history I am willing to write down without careful verification), the roots of the common law of today might be found in England. It was not, however, until much later that anything developed resembling closely the forms of courts and the legal system we now have. The word "court" is itself significant; that word now has two distinct meanings. The court of law, including the equity court, is of course the only kind of court we have in America; in England the word signifies also the king and his personal retinue. In earlier times, this distinction did not exist. The king and his courtiers constituted the court, in both of the present senses of the word. The king was the head of the state as its supreme administrative officer; he was also law-maker and supreme judicial officer. The present separation of the legislative, administrative, and judicial functions of government, which we in America guarantee by our written constitutions, which we regard as so fundamental that we tend to think of it as something which always has been and must always continue to be, is of comparatively modern origin for our English speaking peoples. It would go beyond my purpose to trace here the growth of Parliament as a law-making body and as the precursor of our legislatures and our Federal Congress. But the beginnings of courts, in our American sense of the word, should be considered briefly.

At first the king was quite literally the fountain-head of justice, the court to which suitors took their grievances in person. It is true that earlier forms of courts of limited and local

jurisdiction continued to function in England after the Norman Conquest; but, as the country grew more unified under its new rulers, these local courts decayed and finally disappeared. Meanwhile the business of settling civil disputes and of enforcing the early laws against crime or breach of the King's peace, very soon got to be an undertaking too burdensome for the king personally to perform all of it. At first, no doubt he formed the habit of appealing for advice to certain individuals among his noble friends and followers. Later, he began to delegate to them the performance of first one and then another part of his judicial duties. Thus, step by step, inch by inch, we might almost say, certain individuals, certain courtiers of the king's court, got to be specialists within this field; probably they were judges before there were any regularly organized courts, in our American sense of the word, over which they might preside.

Thereupon that craving for certainty and for the statement of broad general principles applicable to any set of circumstances, that craving which is one of the primary characteristics of the human mind, which has created the authority of religions and is at the bottom of all systems of philosophy, operated to cause judges to enunciate general rules of law and to cause the people to respect them, if not always to obey them. These early law courts went to extremes in their development of regularity and formalism which seem strange to the modern mind. They developed a legal system so rigid, often so divorced from actual social needs and from principles of common right and justice, that they needed reforming almost before they were fully formed.

At the same time another legal system, with its own courts and judges, was operating alongside the king's courts, the early common-law courts, whose origin and early development I have so briefly sketched. These were the ecclesiastical courts, courts which derived their authority from the Pope, courts in which prelates of the church administered canon law, a system based

upon the Roman civil law. They claimed jurisdiction not only over the clergy, but over the laity as well in matters of religious opinion and of morals. As a separate system, these courts were so repugnant to the spirit of England, that they were soon deprived of a large part of their jurisdiction over the laity; but meanwhile they exercised a great influence upon the third form of court which finally came into existence, namely the court of equity.

Historians of the law differ greatly in their efforts to fix a date for the beginning of equity as a legal system and of equity courts as separate courts in England. For my present purpose, the precise date is not important. The fact is important that nearly all of the early chancellors, the men who placed upon this newly-forming institution the seal of their intellects and of their personalities, were ecclesiastics. In the year 1530 Cardinal Wolsey was succeeded in the office of Chancellor by Sir Thomas More, a lawyer and not a priest; and since that time the office has been held almost always by lawyers. But before that, for some hundreds of years, the chancellors, almost without exception, had been priests of the church. In order to grasp fully the significance of this fact, we must remind ourselves of the place of the church in the civilization and the society of that period. It was the period of emergence from the low depths to which the general cultural level of society had sunk during the Dark Ages. Throughout those many lean years, it was the church and the priests of the church who, above all others, kept alight the torch of classical learning. The law of Rome in the years of her greatness was a highly developed institution, one of the major accomplishments of man's mind during historical time. This thoroughly organized product of human knowledge and experience, the Civil Law of Rome, was an achievement of the older civilization which was preserved for modern times by the church and its priests.

Now the court of equity, and the body of law known as equity or as equity jurisprudence, grew out of principles an-

nounced by chancellors, to whom early English kings had delegated a part of their judicial duties. Hence it followed inevitably that the legal system enunciated by these chancellors took its tone from the kind of men they were — namely priests of the church, learned in the Roman law, many of them actually experienced in administering it in their own ecclesiastical courts. They brought into the English system of law an infusion of ethical concepts, appropriate to the churchman's attitude of mind; and they brought into it forms of procedure, borrowed from the Roman law, which were needed in order to supplement the extremely limited and overtechnical forms which the common law had developed.

This account of the historical origin of equity as an institution has, I trust, served to show that it is an institution which came into being because men needed it. The common law, its judges and its courts, were not meeting fully man's needs in a society which was beginning to take on what we call a modern form. Life was becoming less simple, man's relationships with his fellow-man were growing complicated, so that recourse to the courts for aid in the settlement of disputes was becoming more frequent. But when men sought such aid from the common-law courts, very frequently they could not get what they wanted and what they needed. Those courts were not able to help them, because their machinery was all of one pattern and did not seem to be properly geared. It was good enough machinery in its way, but it could not turn out the product that society demanded.

What, then, were some of the deficiencies of the common-law system which equity was called upon to supply? First of all, the common-law courts limited themselves almost exclusively to the rendition of a judgment for money damages in favor of a plaintiff against an unsuccessful defendant. The common-law judges did not assume to themselves the right to order people to do things or to refrain from doing things, the right to issue what we know as injunctions. In any complete legal system,

there is need for a mechanism by which courts may prevent the perpetration of wrongs, instead of standing by idly until after the wrongful acts have been done and then rendering a judgment for money damages. As good an example as any is afforded by the incident recounted at the beginning of this chapter. The grocer's lawyer who came to me that afternoon in January might have told his client to fold his hands and allow the sheriff to sell his little grocery-store. Thereafter, if he could prove that the original judgment against the grocer had been obtained by fraud, he could bring a suit for damages and, in his turn, recover a judgment by means of which the grocer, theoretically at least, would be recompensed in money for the losses caused by the wrongful sale of his property. It takes very little imagination, however, to see how inadequate such a remedy would be. The period of delay during which the grocer and his family might have had to live upon alms while this second lawsuit was making its way through the courts — that consideration alone is enough to prove the superiority of a mechanism by means of which the sheriff's sale could be held up and stopped altogether if the grocer could prove the fraud which he alleged. In such a case — and it is but one of countless possible examples — the remedy of injunction, a form of remedy originated by the chancellors in their equity courts, is essential if the law of the land is to meet fully the needs of society. Courts which limit themselves to the rendition of judgments for money damages always have to tell plaintiffs to wait until they have been hurt. Such courts are equipped to deal with contentions only after wrongs have been perpetrated fully; then it is often too late to right those wrongs. That was one of the striking weaknesses of the common-law courts.

Moreover, for some kinds of wrong-doing, money damages never can afford an adequate remedy. An example which may not seem entirely convincing today is that of breach of a contract for the sale of land. It is obvious that no two pieces of land can be exactly identical. Even in the case of two adjoining

lots in a modern American city, where desire for uniformity and standardization has done its worst to stamp out individuality, even in such an extreme case, one of those lots of ground lies, perhaps, farther to the east than does the other and so is nearer to the rising sun. In the England of the beginning of equity jurisdiction there was no such standardization. A man made a contract to purchase a certain farm because he wanted to acquire that particular portion of the surface of the earth; and he did not want anything else. Money could not repay his disappointment if he did not get that very farm. To understand that frame of mind we must recall that England of that time had been only recently the England of feudalism, when the whole social organization was bound up with the land and the tenure of the land. The heart of man as well as his home was in the land in those days. Equity courts took cognizance of this emotional need of the times. If the vendor of land refused to carry out his bargain, an equity court ordered him to do so; it passed what is known as a "decree for specific performance" of the contract. All that a law court could do, with the machinery its judges had developed, was to award money damages to the disappointed purchaser, as though the thing he had tried in vain to acquire were a horse or a cow or some other ordinary object for the loss of which mere money could compensate him.

It would unnecessarily prolong this account to give other examples of the insufficiency of the common-law system. Suffice it to say that all of them grew out of the undue technicality of its procedure and its failure to embody the moral or the ethical concepts of the period. These moral concepts were developed into rules of law, or rather into principles of equity, by the ecclesiastical chancellors; and the jurisprudence of the equity courts came to be an embodiment of the current morality of the day. The chancellor was referred to as the "King's conscience"; equity became a system for the enforcement of principles of right and justice which the law courts did not recognize; and equity enforced those principles by methods and procedure of

its own devising, which were far more elastic and pliable than were the technical writs of the law courts. The very word "equity" came to have a secondary or popular meaning, signifying informal justice, which persists until today.

Only one more outstanding difference between law and equity need be mentioned. The chancellor, in his equity court, did not call in a jury to assist him as a trier of disputed matters of fact. He acted alone, passing both upon the facts and upon the application to them of the equitable rules and maxims which made up the body of law which he administered. That difference still exists. Whether equity is administered in a court separate from the law courts, as in Baltimore, or in a court which administers now the one and now the other system, as in Maryland outside of Baltimore, or in a court wherein the two systems have been fused into one, as in New York, cases calling for the application of equitable rather than of legal doctrine are usually heard and determined by a judge without a jury. This difference, growing solely out of the historical origin of these two systems of law which together constitute the law of our land, produces results which are little understood outside the legal profession. The American layman is accustomed to think of the right to trial by jury as a basic and fundamental right, characteristic of every form of legal controversy. It is not so at all.

There are many kinds of cases, some of them of tremendous importance, in which there is not now and never has been under our system, any right whatever to a jury trial. Cases that, either from the nature of their subject matter or from the nature of the relief sought, are equity cases rather than law cases, are heard and decided by a judge, the historical successor of the King's chancellor of the sixteenth century and earlier. He passes upon both law and fact, combining within himself the functions that, in a law court, are divided between judge and jury. Therefore, it is entirely erroneous to think of the right to jury trial as an absolute and a general right. It is so in respect of crime; and it is so in respect of cases heard and decided in law

courts. It is not so in respect of equally important cases if they are modern descendants of the early equity case.

I need add only a little more regarding present-day resemblances and differences between law and equity as co-ordinate branches of the law of the land. Both are judge-made, both are legislature-made, both are legislature *plus* judge-made; for legislative enactment has played its part in the development of equity as in the development of law, and equity judges have construed such legislation even as law judges have construed legislation affecting their branch of our legal system. In these respects, equity has come to resemble law like a twin-brother; and only the absence of the jury and the lack of the jury's influence as a source of development, serve to distinguish equity from law so far as concerns the mechanics of its operation and its growth. Furthermore, equitable doctrines have become crystallized into their own fixed forms, while legal procedure has relaxed much of its earlier formalism; so that, today, it would be false to characterize the one as either conspicuously more moral or as markedly less flexible than the other. It can now be said of them that they are two systems of jurisprudence, each supplementing the other, neither complete in itself, each with its own sphere of usefulness, each with its own procedural methods and its own technique. Together they make up the law of the land; separate, neither would constitute the complete legal machine upon which society has come to depend. Hence, those jurisdictions which have brought about a complete fusion of the two have done so in the interest of simplicity and to prevent confusion and delay. In New York the grocer's lawyer would have been in no doubt whether he should go into a law court or into an equity court; there would have been only one court to which he could go.

Even in those jurisdictions where law and equity remain separate systems, law has borrowed from equity and adopted some of its machinery. As you may recall, I told the grocer's lawyer that, as a law judge, I could give him some but not all

the relief his client needed. I could have enjoined the sale of the grocery-store pending the investigation of the alleged fraudulent character of the judgment; but if that were shown, I could not take the next and final step ordering Smith to cancel the note and return it to the grocer. Thus to secure a complete remedy, the plaintiff was forced to go into an equity court and to abandon the petition that he first presented to me as a judge in a law court. Wherever the historical distinction between law and equity courts is maintained, it happens sometimes that uncertainty concerning which court will afford more nearly adequate relief leads to an erroneous choice on the part of counsel and to needless expense, delay, and even disaster for the client. Though I like our local bifurcated system as an embodiment of certain dramatic pages of institutional history, I am forced to concede the practical good sense of those reformers of the law in other states who have discarded similar systems, ordaining that law and equity shall be merged in a complete union which preserves the values of both. This has been accomplished without loss, except loss of needless complexity; and I mention it as another example of the ever-changing forms assumed by law and legal systems as time goes on.

A few examples of cases heard by me in our Baltimore equity court will serve to illustrate the modern jurisdiction. You will observe that each of these is a case in which the form of the relief sought and granted, or refused, was the circumstance which made an equity court, rather than a law court, the appropriate tribunal for the disposition of the case.

The first is a case in which a certain Joseph Henderson wanted an injunction against one Andrew Green. For many years Henderson and Green had been partners in a furniture business, which they conducted under the name of The H. G. Furniture Company, H. and G. being the initials of their respective names. Finally they had separated, agreeing that Henderson might continue the business at the old stand and under the old name. Thereupon Green rented a store in the next block,

and proceeded to open up a furniture business of his own. He called himself "The A. G. Furniture Company," using his own initials, A. for Andrew, G. for Green, as the basis for that name. Henderson complained of the similarity of this trade-name to the one that he was permitted to use under the agreement for the dissolution of the partnership. In addition he produced a photograph of the sign which Green had put up over his new store and showed that the sign-painter had painted upon it an A which looked very much indeed like an H. Henderson insisted that this was not accidental, and that Green was trading under a name that both sounded and looked like the one which he, Henderson, had the sole right to use. Some witnesses were produced who testified that they had been misled by this deception; they had read Henderson's advertisements and had gone to Green's store mistaking it for Henderson's.

Of course Green denied any intention to deceive anybody. He insisted that he was simply using his own initials and that he had a perfect right to do so. I shall spare you the great mass of very technical legal (or equitable) lore which was involved in this comparatively simple case. My disposition of it was to enter a decree (the judgment rendered by an equity court is called a decree) requiring Green at once to indicate plainly upon his signs, his advertisements, and his stationery, the fact that Andrew Green was the proprietor of the A. G. Furniture Company. He was further required, at the end of six months, to give up altogether the use of those initial letters, A and G, in the name of his business and to call it something which could not be confused at all with "The H. G. Furniture Company."

Technically that decree went very far, possibly too far. Green undoubtedly had the right to use his own name and his own initials, as long as he did so fairly. But the parties and their lawyers actually consented to this decree after the case had been heard. They all recognized that Green ought to be circumvented in what was shown to be a deliberate attempt at unfair

competition, and that the extreme form of decree which I suggested was warranted by the circumstances of the case. Manifestly, what was done by the court was something which could not have been done by a court whose process leads only to a judgment for money damages, as does that of a law court. Thus, the case was one for equity.

Very similar in principle was the case of a laundry company against one of its former drivers who filched a list of its customers and solicited their business for his new employer. A suit for money damages against the driver would have been entirely unavailing; a judgment against him would have been worthless. Equity enjoined him against continuing his improper activities. Had he persisted, he would have rendered himself liable to arrest for contempt of court.

It is this latter power of equity to enforce its decrees by ordering the arrest of those who violate them which has led to the extremely effective use of the equitable procedure in connection with controversies between employers and their employees on strike. The employer alleges that the strikers are interfering unwarrantably with the conduct of his business and that they threaten to destroy his property. Thereupon an equity court, or a judge exercising the powers of equity jurisdiction, issues an injunction directing the strikers to abide by certain rules and regulations specified in the decree. If they do not do so, they are in contempt of court and may be arrested and imprisoned.

Nothing in the history of the American law has been productive of such bitter controversy as has this practice. Its alleged abuse on the part of judges said to be closely allied in spirit and in sympathy with the ruling economic group has led to repeated demands for legislation aimed to prevent altogether the use of the injunction in labor disputes, or at least to provide that no such injunctions shall be issued except after a full and formal hearing afforded to both parties to the controversy. Furthermore, it is demanded that persons accused of violating

such injunctions shall be given the opportunity to have the rightfulness of the accusations against them determined by a jury rather than by the judge who issued the injunction. It would go far beyond the limits of this book to attempt to discuss this problem or even to illustrate it by example. Moreover, it happens that no such case came before me during the single year in which I presided in an equity court, so that my talkative note books have nothing to say about it. I shall do no more than refer the interested reader to the partial bibliography at the end of this book.

Another type of case which an equity court can deal with more effectively than can a court of law was one in which there were twenty-two plaintiffs and only one defendant. The plaintiffs all lived in a certain residential neighborhood, and they were making common cause against a cleaning and dyeing establishment which, they claimed, polluted the air and made their homes unfit places for human habitation. They wanted an injunction; and they got it, after a hearing which lasted for several days. The injunction I granted did not compel the business to shut up shop and move away; but it did require the company to install certain devices designed to prevent the emission of noxious fumes from the vent-pipes in the roof of its plant. Moreover, the court was able to "retain jurisdiction" in the case. This is a technical term meaning that the case did not come to an end when the injunction order was signed, but that the court retained the power to see that its terms were carried out. As a matter of fact, six months later the attorney for the plaintiffs came to me and said that, though the defendant had removed certain vent-pipes, the noxious fumes were still escaping almost as objectionably as before. This time I was able to dispose of the case in short order. The testimony had shown conclusively that it was possible and economically practicable so to operate the cleaning establishment as to prevent altogether the evil complained of. Therefore, I warned the attorney for the defendant that the court would tolerate no further evasion and

that, unless the fumes were promptly and completely eliminated, the injunction would be modified so as to compel the closing up of the establishment.

That was nearly five years ago. Only last week I was in that neighborhood. The cleaning establishment is still there, and so are the twenty-two plaintiffs. The nuisance has been abated, however; and the air of the neighborhood seems now to be as pure and clean as are the clothes and dresses which the cleaning company delivers to its happy and satisfied customers. Score another for equity and the extraordinary powers of the chancellor.

Two more cases may be referred to briefly. Both were cases in which persons who had signed written contracts appealed to the court to have these contracts "reformed." That is to say, they claimed that they had signed the contracts under the impression that their meaning and legal effect were different from what they actually were. One of these plaintiffs could neither read nor write. The other was an aged man who was ill when he signed the contract. An equity court does have the power to inquire into cases of this nature and to afford relief by ordering the reformation of the contract if the proof shows that one party to it has taken advantage of the infirmity of the other and led him to put his name to something contrary to his actual intention. In both of the cases mentioned, however, I refused to grant any relief, for the reason that the proof failed to convince me that any wrong had been done. On the contrary, a careful consideration of the evidence offered by both sides led me to the conviction that the respective plaintiffs were, each of them, trying to pull the wool over my eyes and were trading upon their apparent infirmities in an endeavor to get out of contracts fairly made and thoroughly understood by them when signed. A judge has to learn to be reasonably hard-boiled in cases of this nature. Too often persons who cannot read and write, or who are not entirely familiar with the English language, try to escape their legal obligations by claiming that they did not know what

they were doing. When, as in the cases above, reputable witnesses testify that the contracts were read aloud and carefully explained before the parties signed them, the court should, of course, refuse to modify them or to set them aside.

In addition to acting in controversial matters such as those illustrated above, courts of equity perform an important function of a partly administrative nature. Their machinery is such that they are particularly well equipped to supervise the administration of trust estates and the winding up of defunct business enterprises through the medium of receiverships. It is necessary only to refer to these features of equity jurisdiction and to add that equity practice in these respects differs radically from anything which arises in a court limited to the hearing of cases at common law.

I have left to the last that activity of the equity court which actually consumes most of the time of a judge assigned to that court in the city of Baltimore. This is the matter of divorce. In the common-law court of today it is the traffic-accident case that clogs the docket, as a result of society's demand for speed in the operation of its automobiles. In the equity court, in Baltimore at any rate, it is the divorce case that makes the judge a very busy man.

I shall refrain as far as possible from thoughtful comment upon this phenomenon, because I am trying to write about law as an institution of society and not about the many other social institutions which, at one point or another, come into contact with law. A book about the law might be expanded very readily into a book about the whole of human relationships. However, it is not possible to write about divorce practice at all without saying something about marriage as an institution and about society's attitude toward the dissolution of marriage. I am old enough to remember when divorce was a rare happening and when divorced persons were looked down upon, regarded almost as social outcasts. In recent years, in Baltimore, we have had almost one quarter as many divorce cases in our courts as

we have had marriages at our altars. As I have said elsewhere, "whether we like it or not, it is paradoxically true that, in America, divorce has become an integral part of marriage." Those words were written as part of a Foreword to a book on divorce in the courts of Maryland, a book which is the fruit of an elaborate sociological and legal study conducted by the Institute of Law of The Johns Hopkins University. Leon C. Marshall and Geoffrey May, the joint authors of the book, have analyzed over three thousand divorce cases, all that were instituted in Maryland in the year 1929. The actual operation of the Maryland law of divorce is portrayed with precision; and the law as it works in practice is shown to be quite different, in many respects, from legal theory. I shall refer to just one or two of the interesting results of the study made by these authors.

In the first place, they prove that, to use their words, "there is no blinking the fact that, in practice, when two parties both desire a divorce, they will sooner or later secure one, almost automatically. They have only to secure a lawyer who knows how to perform the rituals properly." Perhaps that statement does not surprise you. It should not unless you know something of the history of divorce and of the theory of American divorce law. Common though it is today, divorce in America is an institution of surprisingly recent origin. Until almost the beginning of the nineteenth century, no divorce had ever been granted in Maryland. In England the ecclesiastical courts granted limited divorces, but these did not permit either party to remarry. To accomplish that end, a special Act of Parliament was required; and, in Maryland also, the earliest form of divorce was by special Act of the State Legislature. It was not until 1842 that the law of Maryland made provision for divorce proceedings in a court; and, while this was somewhat later than in the other states, judicial divorce in America may be said to have begun generally in the nineteenth century and to have had no proper ancestry either in the common-law or the equity jurisprudence of England.

The theory which has been enacted into all of our American laws for the granting of divorces is the theory of a contentious lawsuit. The plaintiff is supposed to have a grievance against the defendant and to want to punish him, or her, by getting a divorce. The defendant is supposed to resist and to prevent this. If a plaintiff sues a defendant for five thousand dollars the defendant does want the plaintiff to lose his case. The defendant himself wants to win and to keep his five thousand dollars. But when a husband sues his wife for divorce, or *vice versa,* as the case may be, far more often than not the defendant wants the plaintiff to win and would be distressed beyond words if the case were lost. Nevertheless, the only procedure which the law recognizes is that of a suit by one against the other, following, in form at least, the steps of the ordinary contentious suit in which the respective parties actually do fight against one another for single victory. More than that, it is part of the theory of the law of divorce that the state as such has an interest in the preservation of the married relationship of the contesting husband and wife. Therefore, while their marriage may have gone hopelessly upon the rocks and both of them may long for a divorce, while there may be no doubt upon grounds of social wisdom that they ought to separate, they must take care that their case is presented to the court as though one of them wants a divorce and the other opposes it. Otherwise, the court may have to refuse the divorce because of "collusion" or "connivance." Finally, and this leads sometimes to what seems to me a cruel situation, if both parties are shown by the evidence to be "guilty," neither may secure a divorce from the other.

Those are some of the theories. The practice, speaking generally, sets them at naught. The theories, only too often, are used as mere subterfuges to block the granting of a divorce except upon certain desired terms respecting alimony or custody of children. In still other cases, what has appeared to me to be pure spitefulness and down-right cussedness have prompted an actual contest which took the form of an appeal to the majesty of the

law and to the sacredness of the marriage vows. I said before that I do not intend to permit myself to discuss the general subject of marriage or the grounds for its dissolution. Without violating the terms of that self-imposed limitation, I can say this much. The administration of divorce laws — at least of our Maryland divorce laws — is thoroughly distasteful to me. They are founded on social hypocrisy and administered in conscious deceit. The only pages of my note books which I find completely uninteresting deal with divorce cases. Manifestly that is not because the subject is not one of intense human interest. It is because the great majority of the cases, if contested at all, are so utterly unreal. They are like shadow-boxing, in which an imaginary antagonist is pounded all round the ring by a fighter who knows he cannot lose.

Without taking sides in the debate between those who advocate greater freedom of divorce and those who want more restrictions, I do plead for greater honesty in divorce law. If it be the will of society that married people who want to be divorced may be divorced, why not say so? The present form of procedure reduces everyone who takes part in it to the necessity of acting a lie, if he does not tell one in words. Personally, I resent this and see no reason why society should fear to make its laws conform to its practices.

It is true there is great diversity of legal rule in America respecting what constitutes ground for divorce. In Maryland, for example, the grounds for absolute divorce which account for over 99 per cent of the cases are adultery, and abandonment for three or more years. Cruelty or a shorter period of abandonment is sufficient basis for a limited, or partial, divorce, which does not permit the parties to remarry. In New York the only ground for absolute divorce is adultery, while in some Western states cruelty or even "mental cruelty" is a legally sufficient reason for the complete severance of the marriage tie. These are the types of difference, all created by statute, that distinguish the law of those states which, by their public

policy, favor easy divorce from the law of those states which make divorces hard to obtain. Common to all these variants is the legal theory of contest. In every state, whatever the grounds of divorce, one party has to be plaintiff, the other defendant; and the plaintiff has to go through the form of proving the defendant guilty of whatever it is that the statute has declared to be an offense sufficient to warrant the granting of a divorce. In every state, also, not only must the plaintiff establish the guilt of the defendant, but the defendant can block the efforts of the plaintiff by proof that the plaintiff is equally guilty; and in no state will a divorce be granted if connivance or collusion be apparent on the face of the proceedings. In other words, everywhere in America, if both husband and wife actually want to be separated, they dare not let it appear to the court that this is so.

Moreover, it is usually not possible for them to secure a divorce unless one of them goes through the form of besmirching the character of the other. Every practicing lawyer knows the married couple, husband and wife each a sensitive and refined person, who have made heroic efforts to live together and to find happiness and peace in their home. They have young children, and they believe very earnestly that those children ought to live in a normal home, where there are both a father and a mother to influence their lives. And yet, after years of effort, they find that their ideal cannot be realized. Some subtle cause, resting perhaps in sexual maladjustment, perhaps in temperamental difference which defies analysis, drives the husband and wife farther apart, however they may struggle to overcome it. At last, sorrowfully and even affectionately, they decide that divorce is inevitable. Thereupon, one must accuse the other of adultery or of cruelty and must prove it. Lawyers know that the accusation is a legal fiction, that neither husband nor wife is a wicked person and that neither believes the other to be so. Nevertheless, the ugly charge has to be made, the case has to be proved by legally sufficient evidence; and then the press

chronicles the scandalous news that Mrs. Evans has "won" her divorce suit against her husband because of his "excessively vicious and cruel conduct." Everyone who knows Evans knows that he is a kindly gentleman who would not harm a soul. His children adore him as their friend and playmate; and, if they are old enough to read, they too learn from the newspapers that he has been cruel to their mother. Excessive viciousness and cruelty have been present — not in Evans, the defendant, but in a form of legal procedure founded upon a concept of marriage which society has discarded long ago, both in its thinking and in its practice.

In its laws, and there in form only, society attempts to perpetuate a theory which honest men, unafraid of facts, know to be false. In the administration of those laws, fiction is heaped upon fiction, hypocrisy and cant are bolstered by subterfuge, men are forced either to do acts repugnant to their instincts of decency or to pretend that they have done such acts — all because the legislatures which make our laws allow an obsolete social philosophy to give form and tone to legal definition.

The study of divorce law in action made by The Johns Hopkins Institute of Law affords striking confirmation of the views I have expressed. One great value of that study, as I apprehend it, is that it tears away the veil of unreality and reveals this segment of the law for what it is, a tool of society which actually works much better than one has a right to expect of it. That is because modern judges have imitated an ancient practice which has served frequently throughout the centuries as a means to develop our legal system. They have shut their eyes in some directions, while in other directions they have been astute to see the invisible. In that way judges have created a legal fiction, by means of which a legal tool carves out socially desirable products, secures those results which society demands, without seeming to do so, sometimes pretending even that it does not do so.

Maryland law-makers pride themselves upon the rigidity of

their divorce laws. Should one suggest to a Maryland legislature that the time has come when legal recognition should be given to the fact that the best possible reason for granting a divorce is that both husband and wife want it, that it is nonsensical to force such persons to pretend to have a bitter contest with one another, to call one another ugly names, and to titillate the public with a spicy story of scandal in the newspapers — should someone make this suggestion, no doubt he would be assailed as an enemy of the home and of religion, a dangerous radical fit only for instant deportation. Yet, though the forms of law remain essentially what they were in 1842, when they doubtless expressed the current social concepts, judicial administration of them has found a way to make them do what society wants them to do in 1932. A legal fiction, in the truth of which no one believes, the very existence of which some will deny, has taken the place of courageous modification of the letter of the law.

As a result, scientific investigators are able to report that in only two and one half per cent of all the divorce cases which go through the Maryland courts is there any actual contest over the granting of the decree. In the other ninety-seven cases out of every hundred, the court, by its decree of divorce, simply registers in legal form the fact that the parties have agreed to disagree. To quote again from the Johns Hopkins study, "for the great mass of divorce litigation there is, in effect, something not greatly different from formal registration of divorce, except for the elaborate ritual of procedure, fees, and costs." To that I would add, there is also, tied up in that very ritual, an unreality and a mummery which make the judicious grieve. Though history shows that the growth of the law by the process of the legal fiction has been one of its characteristic modes of growth, I question whether it is a mode appropriate to the twentieth century. Where, as in divorce litigation, legal theory is allowed to depart so widely from social practice, a hypocritical society may get the law it wants without putting itself on record as wanting it; but the price it pays is a weakened respect for its own

law and the loss of moral fiber that always goes with self-deception.

Another important lesson may be drawn from this realistic study made by the Institute of Law. For a long time many lawyers have been extremely critical of the circumstance that the law of divorce differs so greatly as one moves from state to state. An effort has been made to bring about uniformity throughout the Union; a model divorce statute has been prepared and recommended to the several state legislatures. I think it would be extremely unfortunate if this effort should succeed. The scientific investigators of The Johns Hopkins University have shown that we know very little about the actual workings of the laws we already have. Their study has been limited to two states, Maryland and Ohio; and, as this is written, the results of their work in the latter state have not yet been given to the public. Moreover, divorce is incidental to marriage; and he would be a bold man indeed who would announce today that society has said its final word upon marriage as an institution. Biologists and psychologists, students of sociology and of sex, agree only in their disagreements. Man is seeking and he is groping; he is thinking earnestly but not dogmatically, and he needs freedom for the full play and development of his thought. Here in America, we are fortunate in having forty-eight separate laboratories for our experimentation. Each state has its own problems, the people of each state have their own method of approach to those problems. When the question is one of such vast complexity as the legal regulation of marriage and the means of dissolving marriage, we should rejoice that each of forty-eight separate states is free to answer in its own way. My hope is that some day there will be found an answer that is both socially advantageous and reasonably honest.

Chapter Ten

"IT IS UNCONSTITUTIONAL."

James Truslow Adams, in his *Epic of America,* records an event of Jefferson's administration which, as we shall see, was of great moment in the legal history of America. Chief Justice Marshall, in delivering his opinion in the case of *Marbury vs. Madison,* "quietly laid down the principle that 'a legislative act contrary to the Constitution is not law . . . that a law repugnant to the Constitution is void.' The Supreme Court thus placed the corner stone of its power of legislative review. Congress was not, like Parliament, to express the legislative will of the people. The veto of the elected President could be overridden if desired, but not the judicial veto of a majority of our nine judges appointed for life if their verdict should be 'Unconstitutional.'"

This opinion of the great chief justice was indeed an event of supreme importance. It was delivered on February 24, 1803, when the young Republic was still in its institutional swaddling clothes. Fourteen years earlier a federal constitution had been adopted, and each state had its own written constitution as well. These instruments, embodying certain fundamental legal doctrines, setting up a framework of government, providing for the separation of its legislative, administrative, and judicial functions, charting the paths within which newly formed and still forming institutions might be permitted to develop, represented something novel in the experience of English speaking peoples. When England spoke of her constitution she meant something far less definite, far less rigid. The English Constitu-

tion was then and is still merely that body of laws and customs which Englishmen choose to regard as not easily alterable. Parliament is essentially supreme; and no court has the power to declare an act of Parliament void because it is unconstitutional. In the United States that great power does reside in the courts, with respect both to acts of Congress and to laws made by state legislatures. In consequence law in this country occupies a position which is almost unique and judges possess a power which their English predecessors never had.

It would go far beyond the limits of this book to attempt to analyze fully either the causes which led to this peculiar power of the American courts or the history of its development. As we look backward, it seems to have been an almost inevitable outgrowth of our federal form of government. Thirteen sovereign states had agreed to cede to a central government certain specified portions of their sovereignty. This was accomplished by the adoption of the Constitution of the United States. Meanwhile each state had adopted its own written constitution, modelled more or less closely upon the royal charter of its earlier, colonial form of government. These several constitutions differed in many particulars, were alike, or similar, in others. A bloody Civil War was needed to determine whether the ultimate sovereignty of the nation rested in the states or in the federal government. Equally uncertain, but happily determinable without war, was a question whose answer we regard now as axiomatic. In which branch of government should rest the power to construe these written constitutions and to decide whether laws made by legislatures and Congress were constitutional? It is the habit of historians to credit to Chief Justice Marshall the answer to this question; and many refer to his opinion in the case of *Marbury vs. Madison* as if it were an inspired utterance, built upon no foundation save its own wisdom. It is far more interesting as well as more enlightening to study the history of the troubled events which brought that case into court, and to speculate upon the strange brew of conflicting political philoso-

phies, personal antagonisms, and legal lore which probably went into the decision of it. President Jefferson seemed to think that the opinion was a direct slap at himself; and, as late as the year 1823, when he had had twenty years in which to cool down, he still wrote about it as something "very censurable." The details of the case and the public reception given to the decision are discussed at length in the first volume of *The Supreme Court in United States History* by Charles Warren, who asserts that even before Chief Justice Marshall wrote this opinion many other American courts had claimed the right to pass upon the constitutionality of statutes made by the legislative branch of government: "By Judges of the State courts, the power to declare State statutes invalid had been asserted or exercised in over twenty cases in eleven out of the fifteen States during the years between 1789 and 1802." (Vol. 1, pp. 262, 3.) I quote this not as in any sense tending to diminish the credit due to Marshall. On the contrary, in so far as his decision flowed in the current of the stream of contemporary legal thinking, its impersonal and non-political aspects are emphasized, and his stature appears the greater.

For our present purpose we need trouble ourselves no further with these historical considerations. However it came to be so, it is true that in this country judges have the final word respecting what laws may be made by legislatures. This has been recognized generally ever since Marshall's opinion in 1803. As put by the late Senator Beveridge in his *Life of Marshall:* "This principle is wholly and exclusively American. It is America's original contribution to the science of law." I would add, it is an imperative reason why every voting American should want to inform himself about his courts and the laws which they administer.

Again because of our federal system, with its division of powers between the states and the central government, we run into complications when we undertake this investigation. You may recall that in Chapter VIII, I referred in passing to the fact that the law of our land is not uniform from coast to coast, but

is subject to variations as one steps across state boundary lines. This same characteristic was noted in my discussion of the law of Divorce, in Chapter IX. This is at once the most essential and the most unsatisfactory characteristic of American law. It is essential because in a country so large in extent and composed of so many kinds of people, it is difficult to frame laws which meet the needs and the views of the whole country. It is unsatisfactory in that our many conflicting legal rules and doctrines bring confusion and uncertainty into a field where clarity and definiteness are often primary requisites. Modern big business knows no state lines. But its managers are forced to know and to be bound by the laws of many states, and these laws are apt to differ widely one from another.

Stated in its simplest terms, our system is about as follows. In each state we have a group of state courts developing and administering the civil and the criminal law of that state. This system of law, so far as concerns the great bulk of cases in the state courts, is a system complete within itself, as though the state in question were a nation cut off from all the other states and from all the other nations of the earth. For example, in the law of negligence, suppose the judges of the Court of Appeals of Maryland or the members of its legislature should make up their minds that the long-established rule making contributory negligence a complete defense is not a wise rule. They could say so and abolish the rule, for the State of Maryland. Just across the line in Virginia the rule would persist; in Maryland only would it have disappeared. Maryland and Virginia, in respect of that type of law, are like two foreign countries bound no more to follow the same legal rules than are France and Germany. In practice, the courts of one state do tend to look with respect upon the decisions of the courts of other states; but respect is as far as they need go and each is quite independent of all the others. The result is that upon nearly every subject, and upon countless points within every subject, it is possible to find conflicting rules of American law, each rule good law in that

state or in those states which follow it, but bad law, or rather not law at all, in those states which do not follow it.

A classical example is afforded in the branch of the law governing sales of goods. Whether a contract to have a wagon built to order is a contract for the sale of goods, governed by that branch of the law, or a contract for the performance of work and labor governed by another branch of the law with quite different rules, is a question to which American state courts have given three distinct answers. In one group of states there was adopted an answer made by the English courts; and those states were said to follow the English Rule. But when the same question was presented to the Court of Appeals of New York that court answered it differently. Its answer was thought a wise one by the courts in a number of other states, was adopted by them and came to be known as the New York Rule. In Massachusetts, on the other hand, the Supreme Judicial Court of that state answered the question in still a third way; and the group of states whose courts liked that answer were said to follow the Massachusetts Rule.

My present purpose is not to dwell upon the advantages or the disadvantages of the complicated situation created by this particular example. Obviously it is not an example of that kind of legal question mixed up with questions of right and wrong, or of social welfare, or of public policy, regarding which there may be reasons for any one state to insist upon a rule of its own, expressive of the peculiar moral sense of its people. On the contrary it is a purely technical question. As a matter of fact, within the past several years, in an effort to attain uniformity the legislatures of most of the states have adopted a comprehensive statute covering the whole subject of Sales and creating within this field uniformity of law instead of the confusion which I have described and illustrated.

In this and similar branches of the law each state may do almost what it chooses. Subject to certain limitations which I shall indicate, each state is "sovereign" in regard to its whole

legal system; neither any other state nor the United States has the right or power to control it. The decision of the highest court in the State of Maryland upon ninety-nine cases out of a hundred is the end of that case.

In addition to the forty-eight systems of state courts, developing and administering the forty-eight legal systems in the several states, we have also our system of United States Courts, or federal courts. These form a pyramid whose base consists of the District Courts, scattered throughout the country, whose apex is the Supreme Court of the United States. In these courts are heard those cases involving what lawyers call "federal questions." The Constitution of the United States makes provision for the organization of this system of federal courts and prescribes the kind of cases to be tried in them. Stated generally and not in full they are cases arising under the federal constitution and under laws and treaties made by the federal government. The federal courts may also hear ordinary civil controversies between citizens of different states, provided the amount involved in such controversies exceeds a sum which now has been fixed by Congress at $3000.

Altogether, engaged in the administration of these forty-eight separate systems of state courts plus the country-wide system of federal courts, we have a small army of judges. Every one of these judges, whether he be the judge of a lower or inferior court in a state, or a justice of the Supreme Court of the United States, swears when he assumes office to administer the law in accordance with the Constitution of the United States. If he be a state judge he swears also that he will pay like regard to the constitution of his own state. The effect is, under our unique American system, to give to every one of this army of judges the astonishing power, within the range of his judicial activities, to set aside and to nullify acts of state legislatures. Both state and federal judges can do this; federal judges have a like power with respect to acts of Congress. The theory upon which this extraordinary power rests is perfectly logical. If a judge is to

administer law in accordance with the constitution, the law so to be administered must itself accord with the constitution. Hence, if the law in question is a statute, a judge before whom a case is tried in which one side or the other relies upon that statute must be satisfied that the legislative body which enacted it had a constitutional right to do so. In consequence the nine justices of the Supreme Court of the United States, forming the apex of the pyramid which, in a sense, includes the whole of the American judiciary, both state and federal, are very nearly the ultimate rulers of our country. They can not make its statutory laws, but they can say that laws made by Congress and by state legislatures are not laws at all because they are unconstitutional; and when the justices of the Supreme Court, or any five of them constituting a majority of that court, have said this, only a constitutional amendment adopted by the people can make it otherwise. When we recall the delays and the difficulties which we have seen fit to impose upon ourselves as prerequisite to the alteration of our constitutions, both federal and state, it is apparent that the extent of this power of judicial veto upon legislation is really enormous.

Of course this power can not be exercised arbitrarily. Courts may not say that a statute is unconstitutional simply because they do not approve of its provisions. Nevertheless the nature of certain sections of the federal constitution, and more particularly of certain of its amendments, has led to the exercise of this judicial veto power in cases where the layman sees merely a question of governmental policy. In point of fact even the trained lawyer, with his predilections in favor of the existing system, must admit that in many of these cases the constitutionality of a statute in the last analysis depends upon the political point of view of the court or of the judges composing the court. Here I am using the word "political" not in the narrow sense of partisan politics, but in the broad sense signifying the public policy of the state.

It is not to be thought that this power of the American courts

to impose their veto power on legislation has never been questioned. I have said that the practice began almost simultaneously with the beginning of our national existence. From the very start judges asserted the right to say that legislative bodies had gone beyond their constitutional rights when they passed certain laws, or had passed them in a form and manner prohibited by the fundamental law as expressed in the constitution. In the beginning there were those who doubted the right of any court to make such a ruling. These critics of the courts took the position that when a legislative body enacted a statute, this very action involved a legislative decision that the enactment was properly within the terms of the fundamental law and that this legislative decision was final. Those who took this position had in mind the powers of the British Parliament with whose unassailable action they were familiar. But in the early days of the republic great emphasis was placed upon the theory of governmental checks and balances. The people did not place very much reliance in any of the governmental agencies which they themselves had created. They feared oppression from a strong executive, even as they sensed danger of aggressive control proceeding from their own legislative assemblies. The Revolutionary War had been fought to free the colonies from the oppressive laws enacted by Parliament; and George III was the hated symbol of executive domination. Although the new nation had to have government, the framers of the constitution feared to place the full power of government in any one department of the elaborate mechanism which their wise ingenuity labored to create.

Accordingly there was devised that complex system of governmental checks and balances which we today take for granted. It does not seem remarkable to us that the power of legislation should be divided between two chambers, or Houses, each chosen upon an electoral basis of its own. For that the makers of the constitution had a model, though of somewhat different character, in the two Houses of Parliament. The veto

power of the President; the qualified power of Congress to pass a law over his veto; the similar checks and balances in the relationship of state legislatures and governors; the grant to the central government of some portions of sovereignty, the reservation of other portions to the states; all these and many similar common-places of today were the subject of heated debate in the Constitutional Convention and of innumerable discussions, in and out of print, throughout the colonies. Running through all the discussion was the ever present fear that some one department, some one man or group of men, would become the controlling factor in the governmental machine, and that control would be exercised despotically.

When finally the machine was built and its wheels set in motion, it was found that part of the problem was still unsolved. To be valid, a law enacted by the new state legislatures or the new Congress had to be framed within the terms of the powers which the new constitutions had reserved or granted to the enacting legislative body. If so framed the new law was constitutional, if otherwise it was unconstitutional. Was it the one or the other? Neither the state constitutions nor that of the nation empowered any specified department of government to answer this inescapable question. The courts assumed the right: the people acquiesced: the right so assumed became a fully recognized power. The structure of the new government was complete; and Chief Justice Marshall's opinion in *Marbury vs. Madison* was the keystone of its arch.

Not only in the beginning, when the mechanism and the conception which lay behind it were new, but at recurrent periods in our history there have been those who criticized sharply this exercise of judicial power. While many saw in it a safeguard against legislative unwisdom or executive tyranny, others asserted that the courts themselves had become the tyrants. At times in our history the spirit of revolt against the courts, particularly the federal courts, was so strong that Congress passed acts designed to cripple them. The passions of the

period just before the Civil War produced the latest legislation of this character. After that time acquiescence became more general; but during the presidency of Theodore Roosevelt discontent again became pronounced, leading that vigorous writer of presidential messages to an advocacy of what he termed "the recall of judicial decisions." This proposal was itself a compromise with the extreme views of those who were urging the adoption of measures for the recall into private life of those judges whose opinions were thought offensive to the progressive spirit of the time. The suggested recall of judicial decisions was a plan to provide a popular referendum by means of which the voters might override a court decision that had nullified a statute. Nothing directly came of the suggestion; but the present almost universal contentment with the operation of the judicial veto power may justify the assertion sometimes heard that the courts have become more attentive to the public will. Perhaps, however, the present acquiescence of the public is merely a symptom of the amazing conservatism which has characterized the American people during the past dozen years. Our present temper is certainly such as would be naturally hospitable to a government held in check by a council of judicial elders.

Laymen are now thoroughly accustomed to the proposition that courts have the power to declare a statute unconstitutional; and I gather that many think of this declaration as a repeal of the statute, the court acting as the repealing agency. That is not precisely what happens. The court merely declares that, because the statute is unconstitutional, the court refuses to recognize it as a part of the law bearing upon the particular case to be decided. When the court taking this position is the Supreme Court the effect is the same as if the justices had repealed the statute; for every court in the land is bound by its decision, and a statute so invalidated by the Supreme Court is forever after a nullity in every other court. But it is not only the Supreme Court which has this power to declare a statute unconstitutional. On the contrary it is the duty of a lower court to do so, if that be the opin-

ion of the judge. Thereupon the statute has no force or effect; but this is so only in respect of the specific case in which such lower court judge has spoken. At that stage in another case, presenting the same question to another judge in another jurisdiction there may be a decision which recognizes the same statute as valid. It is not until one of such cases has been appealed and until a court beyond which there is no possibility of further appeal has declared the statute unconstitutional, that the judicial veto power has the practical effect of repealing the statute. Meanwhile it has occurred frequently, by virtue of conflicting decisions of lower courts, that a statute was at the same time constitutional and valid in one part of the country, unconstitutional and invalid in another. This confusing situation is almost certain to last only a short time, that is until an appealed case can be decided by a court whose word is final.

If the constitutional question is one affecting the constitutionality of a statute as determined by a state constitution, in contra-distinction to the Constitution of the United States, the court which says that final word is ordinarily the highest court of the state in question. But if the question grows out of the relationship between the statute and the federal constitution, although the case in which the question arises may be one which begins in a state court and goes through to the highest court of the state there may be a still further appeal directly to the Supreme Court of the United States. You will often hear a disappointed litigant, against whom the highest court of his state has decided a case, say angrily that he intends to keep on fighting and to carry his fight to the Supreme Court. Usually he can do no such thing. He can do it only if the case presents a federal question; the alleged unconstitutionality under the federal constitution of some statute involved in the case is such a question.

The instances in which statutes are declared unconstitutional because they violate state constitutions are apt to be less interesting than are those involving the federal constitution. Gener-

ally such cases require the judicial determination of formal questions presenting no broad problem of public policy and having no special interest for the layman. However, such cases may affect, even though indirectly, the public policy of the state and may control the will of its electorate as well as of its legislature. A case in my own experience before going on the bench will serve as an illustration. It is a case which harks back to the Dark Ages when the control of the liquor industry was regarded as a matter of local concern long before a certain national experiment had been undertaken.

In 1896 the Maryland legislature passed a Local Option law applicable to specified counties and election districts of the state. Under this law the right was given to the voters of those counties and districts to determine for themselves whether or not they desired the issuance of licenses for the sale of liquor within their own territory. The mechanism provided by the law called for the filing of a petition signed by a majority of the qualified voters of the county or district, whereupon the election officials were required to permit the local electorate to vote that county or district "dry" at the next election should they so desire. In the absence of a majority vote against licenses the general state licensing law would be in effect and the district would remain "wet." In those distant days the liquor question was full of "politics"; and, probably in order to insure at least one fair and non-political step in the procedure, the law provided that the county judges should count the names on the initial petition and determine that they were the names of a majority of the qualified voters of the county or district. In pursuance of this statute, an election was held in a certain district in Wicomico County; and the people of the district voted against the issuance of licenses.

Before that election was held, however, a case had been instituted in the courts, raising the question of the constitutionality of the legislative act upon the authority of which the election was proposed to be held. This constitutional point had not the

slightest connection with the liquor question nor with the right of the legislature to refer that or any other matter to the voters for final action. Both of those are propositions of broad general interest, the kind of propositions which come into the mind of the layman when he thinks of constitutional law. In this case, however, the constitutional question was quite different, and highly technical. It was simply that the counting and verification of voters' names on the petition submitted to the county judges was not a judicial act. The Maryland Constitution contains clauses providing for the separation of the executive, legislative, and judicial branches of government, and specifically forbidding one branch to interfere in the activities of the others. Therefore the lawyers for the "wicked liquor interests," who wanted to prevent the holding of this election, tried to persuade the court to declare the law unconstitutional upon this narrow ground. They contended that the counting of names on a petition was something that could be done by anyone able to read and to count, that it did not call for the wisdom of a judge learned in the law. This view the county court refused to accept, and the voters of the district were permitted to abolish the saloon.

Meanwhile the case had been carried to the Court of Appeals. My own connection with it began at that stage, and the brief which I wrote was my first essay in the domain of constitutional law. As a very young lawyer, I felt honored by the opportunity given me to take part in the oral argument before the highest court of the state; and I recall only a sense of triumph when that court upheld our views, deciding that the original act of the legislature was invalid and that the election held under it was a nullity. This decision vetoed not only an act of the legislature but also the will of the people as expressed at the polls. There was no federal question in this case, and the decision of the highest state court was final. It is true that the next session of the legislature found a way to overcome these results; but, in the meanwhile, the power of the judiciary had

thwarted the desires of the local community for over two years.

In spite of the present general public acquiescence in this extraordinary phase of judicial power in the United States, there remain a few publicists who object to it. The strength of their position grows out of a number of cases in which the power has been invoked by interested persons to bring about results similar to those illustrated in the case last described. These objectors point to such cases as causes of what they call an unfortunate time-lag between the formation of new social concepts and their effective expression in law in this country. For example, the substitution of Workmen's Compensation for master-and-servant negligence law in the United States was delayed appreciably by court decisions declaring the earlier statutes upon that subject unconstitutional; and other examples might be given. Upon this controversial question I shall express no opinion.

That phase of constitutional law about which the layman hears most often, and in which extremely important questions of public policy come under judicial review, has to do with the constitutionality under the federal constitution of laws passed by state legislatures and by Congress. In our time most of these cases have arisen out of the construction and application of the Fourteenth Amendment of the Constitution of the United States. Adopted after the Civil War as one of the group of amendments designed to express and to enforce those limitations upon states' rights settled by that conflict, it was not until many years later that certain clauses of this amendment were discovered to be of profound importance in connection with various economic doctrines and policies which state legislatures attempted to enact into law. The clause which has been invoked most often is that which forbids any state to deprive a citizen of life, liberty, or property "without due process of law." Between 1888 and 1918 the Supreme Court decided about 725 cases involving this constitutional question; and similar cases con-

tinue to reach that tribunal for its decision every year. The constitutional question in these cases is a delicate one, presenting always a nice problem in the balancing of conflicting legal doctrines. Again, decision frequently is determined not by law in the ordinary sense, but by public policy.

Stated with as little technicality as possible, in most of these and related cases the court has to decide whether a statute adopted by a state legislature or by Congress is valid as a legitimate exercise of "the police power" or whether it is invalid as an illegitimate attempt to extend that police power so as to deprive a citizen of his life, liberty, or property without due process of law. The police power of the states is their inherent right to make laws regulating public health, safety, and morals. In its more recent opinions, the Supreme Court has added "public welfare" to this category, thereby, in theory at least, greatly extending the scope of this state power. A similar police power has been recognized in the national government, under the Commerce Clauses of the federal constitution.

To trace the successive steps by which the Supreme Court has reached its present position in these fields would go beyond my intended limits. The reader whose interest lies in that direction is referred again to Warren's *The Supreme Court in the History of the United States.* He will find that since 1877, when the so-called Granger cases were decided, there has been a succession of decisions in which the policy of the court has changed markedly from time to time. The point I wish to make is that in nearly all these cases we confront questions of economic or sociological policy rather than questions of law as the word law has been used from time immemorial. Because of the broad power of the American courts to declare a statute unconstitutional, and largely because of the striking provisions of the Fourteenth Amendment, referred to generally as the Due Process Clause, the Supreme Court of the United States has come to have its present broad dominion over the economic and sociological policies of the nation. Judicial interpretation and appli-

cation of other clauses of the Fourteenth Amendment, of the provisions of the Fifth, Thirteenth and Fifteenth Amendments, and of what are called the Commerce Clauses of the federal constitution proper, also have played an important part in this extraordinary development.

A partial list of the types of questions presented in the several hundred cases decided by the Supreme Court under these constitutional provisions will serve to indicate the wide extent of the present power of judicial control over questions of governmental policy. The court has considered the validity of statutes respecting monopoly in certain businesses, the right of a woman to practice law, the taxation of corporations upon a basis different from the taxation of individuals, the operation of state prohibition laws, the regulation of the hours of labor for men and for women, the supervision and control of the fire insurance business, discrimination by employers against union labor, picketing by union laborers, the civil and political rights of Negroes, and the regulation of child labor. State legislatures and Congress adopt statutes regulating these and kindred subjects. But not until the Supreme Court has spoken does the state or the nation know whether those statutes are laws or scraps of paper. In every such case, the court's decision depends primarily upon its opinion regarding some question of public policy. Outside the United States such questions are decided finally by the legislative branch of government; in this country only, for the reasons which have been indicated, is there any power of judicial review over what the legislative branch has so decided.

Finally, in addition to passing upon these and other problems of like nature, the Supreme Court has, by gradual steps, acquired the right to control the financial policies of railroads, street railways, bridges, and turnpikes, and of corporations engaged in the sale and distribution to the public of water, gas, electricity, and telephone service. All these are known as public service corporations; and my statement that the Supreme Court

controls them requires amplification. I do not mean that by its decree the court fixes the rates which such corporations may charge for their services. State legislatures do that, either directly or through the medium of Public Service Commissions. This is a well recognized exercise by the state of its police power. Thereupon, however, if the corporation affected by this action of a state is dissatisfied, it goes into court claiming that the rate fixed is confiscatory, and amounts to a taking by the state of the corporation's property without due process of law. It then becomes the duty of the court to study the whole business and financial structure of the corporation, its costs of operation, its earnings or its lack of earnings, its position in the industry, its relation to the public, its needs for new capital, and the need of the community for its services — everything, in short, that affects its continued existence as a going concern — and to decide whether the rates fixed by the state are or are not reasonable and proper. That determination when made by the Supreme Court is final. Hence it follows that, in the last analysis, the Supreme Court controls, if it does not dictate, the financial policy and practice of public-service corporations. This is an enormous power, the exercise of which has played and continues to play a major role in the business affairs of the nation.

It is hard to imagine anything more unlike an ordinary lawsuit than is a proceeding leading to this unique exercise of judicial power. Ordinarily we think of a case in court as a proceeding in which a plaintiff sues a defendant because the defendant has injured the plaintiff in some way, either by acts amounting to a tort or by breach of contract. We have seen, also, that in equity a plaintiff may secure an injunction to prevent the commission of a threatened wrong. Generally it is the latter form of procedure which is followed in the rate-regulation case; but, though the form is that of the ordinary suit for an injunction, the substance of the proceeding is an effort to have the court substitute its opinion for that of the legislature in respect of whether a rate determined by the latter is a proper rate

or one which must be set aside as improper and confiscatory. Manifestly an opinion upon such a question differs radically from an opinion upon questions of the kind which control ordinary suits for injunctions. The fundamental basis of the court's opinion in a rate case does not rest in law, but in business, finance, and the broadest questions of public policy.

During my own year as chancellor, or judge of an equity court in Baltimore, one very important case of this kind came before me. I shall conclude the discussion with a full account of this case. It illustrates admirably the conflicting views of public policy which are the controlling factors in the decision of this entire class of cases.

In Maryland, as in many states, the legislature itself does not fix the rates which may be charged by public-service corporations. It has delegated this power to a Public Service Commission, a body continuously in session, with a corps of engineering and other experts to assist it in its work. Although such a commission functions as if it were a cross between a court and an administrative body, it is regarded in law as an agent for the legislature. Its orders, fixing rates or otherwise regulating the management of public-service corporations, have the same status as statutes passed by the legislature and are subject to the same tests regarding their constitutionality.

In the general readjustment of prices following the World War one of the last industries to benefit by the upward movement was the street-railway. In Baltimore the price of street-car fares was gradually raised until in 1927 it had reached seven and one-half cents. The United Railways and Electric Company, operating all of the street-cars in the city, found this rate unprofitable, however, and applied to the Public Service Commission for permission to charge a ten cent fare. Following its usual course the Public Service Commission conducted an investigation, examined witnesses, made elaborate financial and engineering calculations, and passed an order expressing its findings. That order denied the Company's plea for a ten cent

fare but authorized the raising of the existing seven and one-half cent fare to one of eight and one-third cents — three for a quarter, instead of four for thirty cents. The Railway Company protested that this small increase was insufficient and insisted that it could not live and continue to serve the public unless it were given the right to charge ten cents.

To bring the question before the courts, the Company filed suit against the members of the Public Service Commission, asking that the court issue its injunction forbidding the commission to carry into effect its order fixing the fare at eight and one-third cents and directing it to reopen its investigation with a view to the allowance of the ten cent fare. That was the *form* of the case which came before me for hearing, an ordinary suit for an injunction in an equity court. Its substance was that the court was asked to decide that the Commission's "order," the legal equivalent of a statute passed by the legislature, should be adjudged unconstitutional because it would have the effect of taking the Company's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. If the rate of fare fixed by the order was so low that the Company could not live under it, then the Company was entitled to an injunction; for an unconstitutional law is no law at all, and if the order of the Commission was not a law, then it was an arbitrary commandment, the carrying out of which ought to be enjoined by a court of equity. This is the somewhat round-about method by which judicial control over legislative rate-making is usually sought.

Counsel for the railway company and for the Commission appeared in court and placed on the trial table the record of the proceedings before the Public Service Commission. These consisted of several huge bound volumes of typewritten and printed material, including many elaborate charts and tables of figures. My own notes of the hearing indicate that the testimony of one important witness was read to me from page 2263 of this record; and my recollection is that the whole record com-

prised upwards of 5000 pages. I refer to its sheer size in order to convey some idea of the elaborateness of the investigation upon which the Commission had based its order, and of the nature of the data supplied to the court upon the application to have the order declared unconstitutional. Given the ability to comprehend the data, there was practically nothing about the history, the property, and the business of the Railway Company which the court could not learn from this record. There were reports of engineers, tables of construction costs, annual reports of operations, many pages of testimony by railway men, financiers, and economists. The whole railway system, reduced to typewritten and printed form, lay on the trial table before me.

Four entire days were given to the hearing. The proceedings before the Commission had lasted several weeks. All the relevant and important parts of the testimony and exhibits had to be called to my attention; the principles of constitutional law applicable to them had to be explained and re-enforced by argument. These tasks were performed by a group of the ablest lawyers at the Maryland bar, and it was a delight to hear them. A good lawyer at the trial table may not be doing the greatest and most lasting intellectual work; in the eyes of the philosopher his performance may seem superficial, even trivial. Nevertheless I dare to assert that in accuracy of apprehension, quickness of reaction, precision of statement, in forcefulness and in vigor, a good lawyer at his work exhibits the mind of man at peak performance. At the end of these four days the fault was my own if I did not understand the case.

Still it was not an easy case to decide. In this chapter I have tried to state very simply the basis of constitutional law upon which rests the decision of every such case. Perhaps I have made it seem simpler than it actually is. When one comes to apply the principles to an individual case, many conflicting considerations come into play and many factors have to be balanced, one against the other. I trust that I have made it clear already that though the case is one in a court of law (or equity), its decision

rests primarily upon consideration of business, finance, and the relationships of the public to corporate wealth, rather than upon law in the usual sense of that word.

At the conclusion of the argument, I announced a recess of the court for one week. The pendency of the case was affecting the market value of the securities of the Company, and I felt that public interest required that it be decided as quickly as possible. I knew that my own decision would be of only temporary consequence, that there would be an immediate appeal from it to the Maryland Court of Appeals and probably a further appeal to the Supreme Court of the United States for final decision. In this situation, I might have been justified in handing down at once a decision on either side of the controversy and in leaving to those higher courts the labor and the responsibility which would be theirs ultimately, no matter what my own decision might be. But the better traditions of judicial responsibility forbade any such summary disposition of the case. It had been argued before me seriously and fully. The court over which I was presiding was a part of the judicial system of the state, an arm of the government. My duty was to consider the case as thoroughly and to decide it as carefully as though my decision would be final.

So I went into retirement for a week. In addition to the five thousand page record and my own notes of the oral arguments, I had the printed arguments or briefs of counsel to assist me in my work. If you have never seen a brief, do not let the word mislead you. Each of the two principal briefs in this case was a book over 100 pages long; and there were three shorter ones in addition. I used the greater part of two long days in reading these briefs and making for myself an outline or analysis of the case. Up to this point I had no clear idea which way I was going to decide; and as I read and recalled the conflicting arguments I could almost feel something physical moving inside my head inclining me now toward one decision, now toward the other.

My purpose in recounting my own mental processes in connection with this case is not merely autobiographical. I know that it is of no earthly importance whether I decided it easily or with difficulty. But in my effort accurately to portray the law as a living organism I am using myself as what lawyers call an "exhibit." *Why* should I have had so much difficulty? *What* was it that troubled me? If I can answer those questions clearly, I shall succeed in explaining the function of a judge in a lower court as compared with that of a judge in an appellate court, and the parts played by them respectively in the development of the law. That explanation is entirely aside from the proposition of constitutional law which we are examining; but it is equally important for the purposes of this book.

On the morning of my third day of solitary work on this case the familiar hunch came to me. Quite suddenly, while reading an opinion of the Supreme Court, I discovered that I was going to have to decide in favor of the railway company. This discovery came to me with a shock; for not until then had I realized fully the strength of my bias the other way. I had known for years that I was inclined to be what both conservatives and radicals scornfully call a liberal. The opinions of the so-called liberal justices of the Supreme Court had always attracted me strongly. In particular, within the special branch of constitutional law involved in this case, I had admired the dissenting opinions of Mr. Justice Brandeis. His close reasoning and the icy hardness of his English fascinated me. Yet now I found myself on the other side; and I did not like it.

Therefore I determined to test to the utmost the validity of my hunch. The way to do that was to write an opinion. If the half-thoughts and partial conclusions which were forming in my mind would go down on paper and stay there, then they were my deliberate judgment. Otherwise I might erase what I should first write and decide the case the way I wanted to decide it. For by this time I did want very much to decide against the railway company, and I knew it. There had developed

within me a clear-cut issue between the emotions and the intellect.

Let us return to the question before the court. It was: Would the carrying out of the order of the Public Service Commission result in the taking of the property of the railway company without due process of law? To answer that question two distinct steps had to be taken. First, it was necessary to determine what effect the order would have upon the Company's finances. That was merely a business question involving neither law nor public policy. Having answered that I should have to consider the relationship of a monopolistic public utility to its community, the rights of the people entitled to use its facilities, and the rights of the holders of its securities. The Supreme Court had announced long ago that a rate established by law must be fair both to the public and to the industry. The Public Service Commission had studied this industry with great care and had passed an order fixing a rate which, in its judgment, met that test. Tabulations were before me, containing calculations brought down to a degree of accuracy expressed in hundredths of a percentage point, showing what would be the practical, business consequence of enforcing the Commission's order. One of the important elements in the case was the determination of a reasonable item which the Company should be allowed to set aside out of its annual income to take care of worn-out and obsolete tracks, rolling stock, and other property, an allowance called by accountants Depreciation Reserve. By varying the theory used in the calculation of this item, considerable differences were brought about in the final item, the ratio of the net income of the company to the value of its property. Up to this time the Supreme Court had not passed upon a rate case involving the properties of an urban street railway company. There were, however, many decisions concerning other public utilities, and certain principles had been given repeated expression. The court had indicated, not precisely but approximately, how a rate had to be calculated and what numerical relationship had

to exist between capital value and net income in order that the rate should not be held confiscatory. The matter of Depreciation Reserve had received less attention from the Supreme Court; and no earlier decision of that court bore directly upon the conflicting theories for its calculation which were before me in the present case.

The hunch that had come to me was that the decisions of the Supreme Court in these other public utility rate cases had established, as a principle of public policy, a ratio of earnings to capital value so much higher than that allowed to the Company in the Commission's order that the enforcement of the order would amount to legal confiscation. But the differences between this case and the cases in which the Supreme Court had spoken were many; and the Supreme Court had refrained from stating generally what ratio would be regarded as fair and non-confiscatory, limiting itself always to an answer in the particular case then before it. Furthermore, the element of a proper Depreciation Reserve entered into this case in such a manner as to throw all the other calculations out of line until it should be determined properly. As a judge in a lower court, my duty was clear. If my hunch was right, if the earlier decisions of the Supreme Court had established a rule in such terms as to apply to this case, I was bound by it. I was bound by it in a case of this kind, wherein the rule was one of public policy, no less than I should be bound by a rule of law laid down by a higher court in respect of an ordinary case governed by ordinary rules of law.

In preparing the written opinion which was to test the validity of my hunch, I dealt first with the question of Depreciation Reserve. Here I was comparatively a free agent. The Supreme Court had not passed upon the precise question before me. A court in Michigan and another in Kansas had decided it one way; the Interstate Commerce Commission had decided otherwise. Therefore I was within my rights in considering the question upon its merits, looking to these other decisions for light

and guidance, but free to disregard either of them if I did not agree with it. After reflection, I adopted a view contrary to that reached by the Commission, but in harmony with my understanding of the general policies announced by the Supreme Court.

That question out of the way, I attacked the main problem. As my written opinion took form, the partially reached conclusions which were in my mind when I began became, for me, inevitable. I finished writing in about two and one-half days and allowed twenty-four hours to pass while I tried to think of other things. My purpose was to re-read after that interval what I had written, to see whether it still impressed me as being so utterly inescapable. For I still wanted to decide the other way. Remember, the question was not one of theoretical law; it was public policy, the relationship between corporate wealth and the people. The liberal opinions of Mr. Justice Brandeis had become flaming torches before my eyes. But they were dissenting opinions; not decisions of the Supreme Court —criticisms of those decisions. Therefore, I had no right to follow in the paths which they lighted.

When I read my opinion again, I had to give up the fight. Try as I might, I could bring myself to no other conclusion. Unless I should ignore deliberately the decisions of the Supreme Court, as I understood them, I was compelled to decide in favor of the railway company. My opinion was put into type and handed down just one week after the argument was concluded.

The remaining history of the case may be told briefly. It was carried promptly to the Court of Appeals of Maryland. All of the eight judges in that court agreed with me on the subsidiary question of Depreciation Reserve. But on the main question, five of them thought I was absolutely wrong. What had seemed inescapable and inevitable to me they announced to be illogical and erroneous. Recalling my own strong wish to decide the other way, I drew some comfort from the two dissenting opinions which upheld my own reluctant conclusions.

Then the case went on to the Supreme Court. In due course of time it was decided, Mr. Justice Sutherland delivering the opinion of the majority of the court. The Maryland Court of Appeals was reversed, my decision was affirmed on all points; and Mr. Justice Sutherland went so far as to say of my own contribution to the case that: "The Circuit Court, in an able opinion, sustained the company on both grounds, and enjoined the enforcement of the commission's order." Unless he shall happen to read these pages, Mr. Justice Sutherland will never know how grateful to me were those words of praise. For Mr. Justice Brandeis, Mr. Justice Holmes and Mr. Justice Stone dissented from the majority of the court. The dissenting opinions expressed, far better than I could have dreamed of doing so, the views which I had wanted to announce as my own. It was something then, to have written an "able opinion," even though it came from the head alone, and had no heart in its body.

Chapter Eleven

MURDER

The story of Jeremiah Norwood should be called "The Man Who Shot the Wrong Woman." To tell that story I must go back to a time eleven years before the day in February, 1927 when Jeremiah stood before me in the Criminal Court and entered a plea of "Not guilty" as he was arraigned for the murder of his wife.

In 1916 he was seventeen years old and lived on a farm in southern Maryland. He was a tall, loosely built youngster, who could pitch hay and do the other hard work on a farm as well as any man; and as there were several growing boys in the family, his father could spare him readily from the work on their own place. That gave Jeremiah an opportunity to earn a little money by helping those neighbors who needed assistance when the ploughing was heavy, or during harvest time. In that way he became a frequent visitor to the farm of Mrs. Rutledge. No one thought it queer when he formed the habit of sleeping there so that he would be ready to start work at dawn. This went on for about two years, when Mrs. Rutledge sold her farm and moved to Baltimore. Then it seemed perfectly natural for Jeremiah to leave his home and go to the city to find work; and the Baltimore home of Mrs. Rutledge was the natural place for him to go for board and lodging.

Mrs. Rutledge was then a woman of forty-one, with two children. Both were daughters, Mary the elder being thirteen years of age, the younger an infant. Mr. Rutledge was a sailor, who

spent most of his time at sea but visited his wife from time to time before she left the country and once after she moved to Baltimore. Their relations were friendly, and the date of the birth of the younger daughter bore a biologically proper relationship to that of the latest visit which Mr. Rutledge had made to his wife in the country. Shortly after she came to Baltimore she learned that her husband had been drowned at sea.

All went smoothly for another two years. By this time Mary was fifteen years old—and pregnant. Under the law of Maryland, in order to impose upon the father of an illegitimate child the responsibility for its support, he must be arrested and tried in the Criminal Court on a charge of bastardy. If his paternity of the child is established, the court passes an order requiring him to pay to the mother a small weekly sum, prescribed by statute, until the child reaches the age of fourteen. In accordance with the provisions of this law, Mrs. Rutledge swore out a warrant for the arrest of Jeremiah, asserting that he was the father of Mary's unborn infant. There was the usual preliminary hearing before a magistrate, at which Jeremiah freely admitted his guilt and offered to marry Mary at once, so that the child would be legitimate. Jeremiah, by this time twenty-one years old, was a steady worker at the Sparrow's Point steel mills and had a good job. The relatives and the neighbors who were present at the hearing before the magistrate on the bastardy charge were amazed when Mrs. Rutledge opposed this marriage. She did oppose it bitterly, though Jeremiah insisted that he loved Mary and wanted to make a home for her and their child. Five days after the magistrate's hearing Mrs. Rutledge relented, gave her consent to the issuance of a marriage license, and was present at her daughter's wedding. Jeremiah was freed of the bastardy charge and entered upon his life as a married man, which continued until a few weeks before he stood in court charged with the murder of his wife, Mary.

During the first day of the trial nothing of extraordinary interest was brought out. Norwood had stated that he could

not afford to employ counsel, and I had been called upon to appoint a lawyer to defend him. In Maryland counsel so appointed are paid by the state, but the statute limits their fee to one hundred dollars for each case, no matter how arduous it may be. The judges usually select such appointed counsel from among the young, ambitious members of the bar, who welcome the opportunity for experience in trial work and are quite content with the small fee. But in this case, when Norwood asked me to appoint counsel, the State's Attorney came up to the bench and told me that the State had a very strong case and intended to seek a verdict of guilty of murder in the first degree, carrying with it the possibility of hanging as the penalty. He requested me, therefore, to give special consideration to the selection of an attorney for the defense. This had taken place several days before the beginning of the trial; and I had appointed as defense counsel an able and experienced trial lawyer, who some years before had served as an assistant state's attorney. This man knows how to try a case, whether in the civil or the criminal court; and I felt sure that Norwood's legal rights would be fully protected.

As that long first day of the trial wore on, I began to wonder what the attorney for the defense had up his sleeve, for he seemed to be making no defense at all. Witness after witness testified for the State, and each one seemed to make it more nearly certain that the verdict of the jury would be the extreme verdict that the State demanded. The story told by these witnesses carried us back through several years of the married life of the defendant. He never had made that home for his wife which he promised when he stood before the magistrate in the bastardy case. Instead, they had continued to live at the home of Mrs. Rutledge, with her younger daughter and their own child making up the household. Frequent quarrels between Jeremiah and his wife were recounted by neighbors and by visitors to the home, and some of these quarrels were said to have led to blows. One witness testified that she had seen Mrs. Rutledge intervene

to protect her daughter during a recent and violent quarrel and that Jeremiah was then heard to mutter, "Never mind, I'll get you for that!" The witness could not say whether this remark was addressed to Mary or to her mother.

Still other witnesses told of the shooting and of the events shortly before and after it. Two weeks before this final tragedy, Mrs. Rutledge and Mary had moved away from the home, taking the two young children with them. A neighbor saw them move out and saw Jeremiah when he came home that evening. He was surprised and nonplussed. His family had not told him they were going, and he went into the empty house, "looking like a whipped animal." He was not seen to come out again that evening, but next morning when he went to work, the same neighbor saw him, and "he looked kind of wild like." Then he disappeared from the neighborhood.

He had traced his wife and his mother-in-law through the truck driver who had moved their belongings; and now Jeremiah took a room near the house in which they were boarding and spent his time trying to persuade his wife to return to him. Mrs. Rutledge did her best to keep them apart, going along with Mary almost every time she left the house and dragging her away when she stopped to talk to her husband on the street. Jeremiah became sullen and morose and began to drink heavily. His grievance seemed to center primarily upon the fact that his small boy had been taken from him, and he made repeated efforts to see the child and to take him out for walks. In view of what happened later, it was interesting that, during these days Jeremiah insisted that the boy's hair needed cutting and gave that as his reason for wanting to take him to a barber-shop. Mrs. Rutledge was equally positive that the boy's hair did not need cutting; and Jeremiah was heard to quarrel with her violently on that score. As he grew more morose, his desire for his young son seemed to increase. The most touching bit of testimony was that given by a woman who lived next door to the house in which Mrs. Rutledge and Mary had taken rooms

for themselves and the children. This woman had found Jeremiah asleep on her front porch late at night. He told her he wanted to spend the night there so that he would see his little boy early in the morning.

The State built up its case step by step. Having shown that Jeremiah had threatened his wife, it next proceeded to show that he bought a gun, an automatic of large bore. Finally witnesses were produced who heard the actual shooting and one who almost saw it. The latter was a passer-by who recognized in the defendant the man he had seen a few minutes before the shots talking to Mary as she stood in the door-way of her boarding house. This witness had walked past and gone into the barber-shop nearby. Soon afterward he heard a "loud noise"; and almost at once thereafter, Norwood walked into the shop and slunk down into a chair "with a dazed look on his face and muttering something about 'the kid needing a hair-cut.'"

The witnesses who heard the shooting and recognized it as shooting were two very unfortunate women, for both were themselves innocent victims of the event. They were seated in the kitchen of the house when Mary went to the front door. They saw her go and saw the door close behind her. Suddenly, five shots were heard in quick succession. At the same time both women felt something strike them. One of the heavy bullets had pierced the wooden door of the house and gone back to the kitchen, where it went through the ankle of one of these women and then glanced upward slightly, coming to rest in the calf of the leg of the other. My respect for the power of an automatic was greatly increased as I heard this testimony. The two women, in spite of their own wounds, ran to the front door, where they found Mary lying in the vestibule, dead. Four of the five shots had passed through her body; any one of them was enough to have killed her. If one killing is worse than another, this began to look like what the newspapers call "a cold-blooded murder."

All this testimony was developed by the State's Attorney, and defense counsel made no apparent move. His cross-examinations were perfunctory, merely a few polite inquiries to make sure that he had understood what the witnesses said. This continued to be his attitude when the State clinched its case by producing the signed confession which Norwood had made after his arrest. Defense counsel did ask the lieutenant of police who identified this paper whether he did not know that Norwood could neither read nor write. The lieutenant replied that the prisoner had said he could not read but was able to sign his name and that the paper had been read aloud to him twice before he signed it; defense counsel merely nodded his head, said "Thank you," and interposed no objection when the confession was read to the jury.

The prosecution closed its case at adjournment time, quite late at night. In Maryland, when a case is one in which there may be a verdict carrying the possibility of capital punishment, the jury is not allowed to separate until the end of the trial. Therefore in such cases it is customary for the court to postpone its hour of adjournment, so that the trial may be completed in as few days as possible. On my way home that night, I ran over the State's evidence in my own mind, trying to detect a weak spot in it, wondering why defense counsel had not advised Jeremiah to plead guilty and throw himself on the mercy of the court. The only thing that stood out at all in my memory was one question which had been asked Mrs. Rutledge during her very brief cross-examination. "Madam, you will pardon me for asking you this: were you not intensely jealous of your daughter Mary?" The reason I remembered that question was that before she answered it, Mrs. Rutledge had turned around squarely in the witness chair and faced Jeremiah where he sat in the prisoner's dock. She had looked at him long and silently, while her face became distorted with emotion: whether hatred, or fear, or something else, I could not tell. Jeremiah's eyes did not meet hers. He continued to look down at his big, bony

hands folded in his lap, as he had done most of the time during the trial. At last Mrs. Rutledge pulled herself together and answered the question with a monosyllable. Her mouth seemed to snap shut on that "No" as though to close something up and keep it closed up forever. That night I found myself wondering what that something was.

Next morning the defense opened its case. Usually in a murder case, defense counsel makes a full opening statement to the jury, explaining the theory of his defense. This is useful because, if done well, it relieves the tension caused by the closing of the prosecution, and creates an atmosphere favorable to the defense. This time, to my surprise, defense counsel announced that he would make no opening statement and at once called Jeremiah Norwood to take the stand as a witness. I felt that something startling was about to happen.

It was startling, and it was shocking, even in this day when nothing is shocking. By a few carefully framed questions Jeremiah was led back swiftly to his boyhood days when he first went to work on the Rutledge farm. In his slow monotonous voice, he told how Mrs. Rutledge kissed him and fondled him when he came in tired from his work in the fields; then how she took him into her bed and "taught him how to be a man." She had always told him that her younger daughter was their baby, and he had believed it. For several years, both before they left the country and after they came to Baltimore, he and Mrs. Rutledge and Mary had slept together in one bed. He "guessed" that was how Mary got to be pregnant. Anyhow, as Mary grew up, he "liked her better than he liked her mother"; and Mrs. Rutledge never would "stop plaguing him about it." That was why she did not want him to marry Mary; and that was why he and Mary never set up housekeeping by themselves. Mrs. Rutledge wouldn't let him go. And she was always talking about how her baby girl looked like him. At first she didn't say this in front of Mary, but of late she'd been doing that too; that was what he and Mary got to quarrelling about. But he

"never had hit Mary, and never had threatened her." It was Mary he loved, Mary and his boy.

"Then why did you shoot your wife?"

"I can't say why. I can't say I did shoot her. It seems I must have, or all these folks wouldn't say I done it. But I don't remember nothing about it. My mind went kinda blank while I was in the room in my boarding house; and the next I knowed I was in the police station."

And then, from counsel:

"The defense rests."

But the defense did not rest, at least not at once. The State's Attorney subjected Jeremiah Norwood to a vigorous and skillful cross-examination. His movements on the morning of the shooting had been traced by the police, and his assertion that his mind was a blank after he left his boarding house was made to appear extremely doubtful, to say the least. He was asked about brief conversations he had with two men immediately before he rang Mary's door-bell. Both men were seated in the court room. At first, Jeremiah denied all recollection of seeing them. When, at the request of the State's Attorney, each of them rose from his seat, Jeremiah faltered, admitted that he had "passed the time of day" with them, but said he had forgotten it. Also, on cross-examination, Jeremiah's explanation of the purchase of the gun was far from convincing. He had paid twelve dollars for it at a time when he was out of work and when his savings were dwindling. He said he bought it "just to fire off and make a noise with, at New Year's, or the Fourth of July"; but he was able to give no reason at all for the purchase of the heavy, steel-jacketed ammunition, instead of blanks which would make as much noise. The entire cross-examination lasted about half an hour and there was not a wasted question. The State's Attorney seemed to know in advance precisely what Jeremiah would say as one question quickly followed another. They were asked quietly and in a respectful tone of voice, creating the impression of reluctance in the face of unpleasant duty, as

the questioner relentlessly drove Jeremiah into a corner. At the close of Jeremiah's direct examination he was a pitiable creature, caught up in a maze of life that was too hard for him, not a free agent but an automaton. He seemed less guilty of the crime than did the gun from which the heavy bullets had been fired. After his cross-examination, he was a murderer.

There was little additional testimony. Mrs. Rutledge was recalled to the stand and given an opportunity to deny Jeremiah's story of his relations with her. She did deny everything, vehemently. Counsel for the defense looked grieved; or was it skeptical? At all events, he did not cross-examine her. One or two other witnesses contradicted Jeremiah regarding the few points left for contradiction after his devastating cross-examination, and the case was ready for the jury. I was sure the verdict would be "guilty of murder," either in the first degree or second degree.

The jury remained out until late at night, and its verdict was "guilty of murder in the first degree." Under the law of Maryland that verdict required me to sentence Jeremiah to be hanged, or to be imprisoned for life. The choice between these two penalties lay with me alone; but one of these it had to be. I was ready to pronounce sentence at once. But I was not able to do so because counsel for the defense gave immediate notice of his intention to file a motion for a new trial, and this necessitated delay.

The Baltimore Court House is a gloomy place at night. As I was about to leave the building, I noticed a little group of people standing in a dimly lighted corridor. They were the members of the Norwood family who had come up from the country to be with Jeremiah during the trial. Chief among them was his old father, the gaunt figure I had seen sitting on a front bench in court during the past two days. Nowhere and never have I seen a face more expressive of dull pain. He had sat for hour upon hour, looking straight ahead most of the time, occasionally turning for a quick glance toward a witness or a lawyer. When

points particularly unfavorable to Jeremiah were made, his eyelids trembled, and he flinched as from a blow. Now he stood near the door of the Court House, looking straight ahead, silent. I walked past him. Then I had a sudden impulse of humanity. I turned back, took his hand in mine, and said something platitudinous about the sympathy everyone must feel for him. His expression did not change, and his voice was dull and flat. Without a trace of inflection, the words dropping like dead things, he said: "Has he got to hang?"

Then and there I resolved never again to be humane. Not in a dim corridor of the Court House at midnight, anyway. And I was forced to leave his question unanswered; for I had no right to speak until after the hearing on the motion for a new trial. For the present, I shall leave it unanswered for you also and shall ask you to consider with me another case of murder in the first degree.

In this second case there will be no need to rehearse the circumstances of the crime or the events of the trial. The murder was perpetrated in the course of an act of banditry. The relevant facts are all set out in the written opinion I filed on the day sentence was pronounced. That opinion is as follows:

"In 1928 Herman Webb Duker was an inmate of the Maryland School for Boys. He was then 18 years old. Throughout his childhood and youth he had been troublesome and unmanageable. He had already served a term of nine months in the New York City Reformatory. He was committed to the Maryland School for Boys as a result of a series of thefts, probably to the amount of $2,000, committed by forcibly entering apartments in Baltimore.

"At the Maryland School he was examined and studied by the psychiatrist of that school and was found to be a 'psychopath of the chronic delinquent type, with some sexual psychopathy and with marked tendency toward the runaway reaction.' This condition is not recognized by the law of Maryland as 'insanity.' Moreover, Maryland has no place of deten-

tion for the permanent segregation of seriously defective delinquents.

"True to his type, Duker escaped from the Maryland School. A few months later he was caught in the commission of another crime in New York and was sentenced to eighteen months in the Elmira Reformatory. His behavior record there was so bad that he had to serve thirty-one months before he was released. While at Elmira Reformatory, he was again studied and examined by the psychiatrist of that institution; and again there was made a diagnosis of 'psychopathic personality.' New York maintains a hospital for the criminal insane, but Duker's condition does not amount to 'insanity' under the law of New York. In January, 1931, he returned to Baltimore.

"On April 20th, 1931, in company with Dale Lambert, a weak-willed youth of 19, he attempted to hold up and rob John W. Anderson, a driver of a milk-wagon. Anderson made some resistance. Duker shot and killed him.

"Today, November 3, 1931, Duker has been sentenced to be hanged. Lambert has been sentenced to imprisonment for life in the Maryland Penitentiary.

"Anderson left a widow and three children.

"If the laws of Maryland were like the laws of Massachusetts, Duker might have been confined for life in a place of detention for defective delinquents immediately upon the diagnosis of his case by Dr. Partridge in 1928. Then John W. Anderson would be alive; Lambert would not be a prisoner for life; and Duker would not have to be hanged.

"This case came before the court under a general plea of guilty. Thereupon there was presented testimony covering the facts of the case which was so conclusive that the Court unhesitatingly fixed the degree of the crime as murder in the first degree. It then remained to hear additional testimony and to make further investigation in order to determine between the

alternative penalties fixed by statute, viz., life imprisonment in the Maryland Penitentiary or death by hanging.

"At the outset, the Court feels impelled to express its approval of the course of action followed by counsel for the defense. Possessed of information tending to show that the defendants are not 'normal' persons mentally, that one of them, Duker, is a pronounced psychopathic personality and that the other, Lambert, is possessed of a degree of intelligence close to the feeble minded border-line, counsel nevertheless advised their clients to plead guilty. In doing this, counsel courageously assumed a heavy burden of responsibility. The Court believes they acted wisely and in a manner creditable in the highest degree to the fine standards of the Maryland bar.

"A word of explanation may, perhaps, be necessary at this point. Under a plea of insanity, opinion evidence must be limited to evidence of insanity as legally defined — namely, inability to distinguish between right and wrong, and lack of appreciation of the consequences of one's acts. This legal definition came into the law of Maryland in 1888. Since that time (and even before) medical science has evolved tests and standards of mental abnormality and of moral responsibility which do not fall under the categories of this legal definition. It became abundantly clear in the course of this hearing that by legal definition both defendants are perfectly sane. Every psychiatrist who testified, whether employed by prosecution or defense or acting as a court official, agreed in that regard. Obviously, then, a plea of insanity would have availed nothing; and none was filed.

"On the other hand after plea of guilty a defendant stands before the court subject to every kind of inquiry and scrutiny which the Court thinks may discover pertinent facts and may prove helpful in reaching a sound decision as to sentence. The Court may use its own discretion as to the nature and scope of such inquiry. It may be made by the judge in the court room or through the agency of others wherever the truth or some

part of it may lurk. Obviously, in such an inquiry the Court will seek to inform itself to the utmost regarding the individual who is to be sentenced. His heredity, his past life, his bodily health or sickness, his type of mind—all of the factors that go to make him the person he is, are important if he is to be dealt with justly, and if society is to be protected from crime. In such an inquiry the Court can, and should, take advantage of every resource afforded by the available methods of modern science. If modern science has set up standards of moral or mental responsibility that differ from those legally defined as 'insanity' in 1888, then, in an inquiry of this nature and for this purpose, the Court is not limited to the standards as defined by law, but can and should seek information illuminated by the best scientific thought of today.

"In the case of one of these defendants, Lambert, the problem was a comparatively simple one. He is sane, he is of borderline intelligence, he has a previous criminal record of comparatively minor offenses of which none involved violence. He is described as an individual not particularly dangerous to society. Although he was engaged in a robbery and was armed, it is of some significance in this respect that he neither fired the fatal shot nor even drew his loaded gun. Confinement in the penitentiary for life is the obviously appropriate penalty in his case. He is reasonably likely to become adjusted to that environment and to be entirely amenable to the discipline of that institution.

"The case of Duker presented far greater difficulties. In the effort to learn as much as possible about this defendant, the Court heard the testimony of seven expert witnesses who had studied his case. While five of them went on the stand at the request of Duker's counsel, and two of them at the request of the State's Attorney, it would be a misdescription to refer to the five so produced at the instance of the defense as 'defense experts.' One of these five, Doctor Guttmacher, is the Medical Officer of the Supreme Bench, whose examination of Duker

was made at the direction of the Court. A second, Doctor Oliver, held the same position when he studied Duker in 1928. A third, Doctor Partridge, examined Duker in 1928, when Duker was an inmate of the Maryland School for Boys and Doctor Partridge was the psychologist of that institution. The fourth, Doctor Christian, is the superintendent of Elmira Reformatory (New York), and knew Duker there as an inmate in 1928–29–30. This leaves only Doctor Truitt as a witness specifically employed by the defense as an expert for this case; and Doctor Taneyhill and Doctor Gillis employed by the State in the same capacity.

"Besides hearing the oral testimony of these witnesses the court has had the benefit of an opportunity to read and to consider their written reports in which are set out the details of the studies they have made, which are the bases of their conclusions. These written reports are very voluminous—in all they and other similar exhibits filed in the case comprise over one hundred pages of material and represent the result of many long days patiently spent by highly trained experts in the study of this young man's history and personality. The factors, both hereditary and environmental, that have gone into his making have been laid absolutely bare to the court. Every detail of his past years, from early childhood down through his more recent criminal career, has been checked and re-checked and calmly set down in black and white upon the printed or written page. Moreover, the court has seen and interrogated the defendant on the witness stand, briefly, it is true, but enough to assist in the evaluation of the testimony which has been offered.

"Duker's twenty-two years of life unfold types and degrees of activity that indicate a grossly distorted personality. He is not merely a youthful delinquent who has achieved a precocious maturity in crime. As a small child he exhibited an appalling and inhuman cruelty to animals which persisted for many years. The full record of his robberies and like crimes

will never be known. He confesses many for which he was never apprehended; and says that after committing them he experienced an unusual sense of peace and satisfaction — almost of exaltation — a release from his nervous restlessness. This is certainly not the common experience of normal criminals. He has for years suffered from serious abnormalities in the sex sphere. None of these peculiarities is at all obvious to superficial examination. On the witness stand he presents the picture of an alert, courageous and peculiarly plausible individual. His apparent normality, coupled with his abnormal career, is itself an evidence of his pathological condition.

"What is that condition? With a degree of unanimity that reflects credit upon every medical witness in this case, the Court is assured that Duker is a 'psychopathic personality.' This is the conclusion reached by the present and former medical officers of the Supreme Bench, whose freedom from bias was to be presumed. It is the conclusion reached in 1928 by Doctor Partridge, then psychiatrist of the Maryland School for Boys, and in 1930 by Doctor Christian and the late Doctor Harding, Superintendent and Psychiatrist, respectively, of Elmira Reformatory — long before this murder had been committed. It is the same conclusion reached by Doctor Truitt, employed by the defense, and by Doctor Taneyhill and Doctor Gillis, employed by the State, for the purposes of this hearing. The 'battle of experts,' so often and so properly denounced as characteristic of American criminal trials, did not occur in this case. The 'expert witnesses' were there, but they tried fairly and honestly and regardless of immediate consequences to assist the Court in its search for the facts. The Court would be sadly lacking in appreciation of their fine public spirited attitude if mention were not made of it in this opinion.

"What, then, is a 'psychopathic personality'? In the first place, in Maryland, it is a legally sane person. He knows the difference between right and wrong; he is capable of appreciating the consequences of his acts. He may be a highly intelli-

gent person. But he is emotionally unstable, abnormally self-centered, and his moral responsibility is less than that, or different from that, of a normal man. Psychiatrists, writing for scientific readers, speaking to scientific audiences, using the terminology of their science, do not find it easy to define the term. But this Court is thoroughly convinced that difficulty of statement does not, in this instance, indicate confusion of thought. The line between mental health and mental disease, as now understood by the medical profession, is not always easy to draw, is not always a simple straight line. In this field lawyers and judges are merely laymen; and it would be as presumptuous for this Court to offer its opinion as superior to that of competent medical men as it would be for the doctors to attempt to instruct the lawyers upon the law of contingent remainders or like abstruse questions of law. Nevertheless, if the law is to apply and use medical concepts, some effort must be made to express them in language comprehensible not only by lawyers and judges, but by the general public which is affected by that application.

" Probably this has been done as well as possible in one of the reports on Duker referred to in the testimony of Dr. Truitt. Doctor Frankwood E. Williams, Medical Director of the National Committee for Mental Hygiene, referring to Duker in a letter written in August, 1929, said that the 'psychopathic' person, though legally responsible for his delinquencies is 'as little able to conform his conduct to social standards, as he would be to walk in the air.' To paraphrase the views expressed by every expert witness in this case, the psychopathic personality is emotionally unbalanced so that he does not respond normally to what his conscious mind tells him. He knows the consequences of wrong-doing, but impulses beyond his control sway his actions regardless of the result to himself or to others. It is as though he were a high-powered automobile with a skillful chauffeur sitting at the wheel — but with the chauffeur's hands tied behind his back. The machinery of the automobile may

be perfect. That represents the psychopath's 'brain'—his powers of thought. But the more powerful the machinery, the greater the danger to people in the street if the chauffeur's hands remain tied—if the normal emotional and moral impulses and controls are not present. Every witness in this case agreed that Duker has not the normal emotional and moral impulses and controls—and every witness concluded that he is 'not fully responsible' for his actions.

"It should be added that this classification is not just a psychiatrist's way of saying that nobody is responsible for crime and that nobody should be held accountable for criminal acts. The witnesses in this case drew a clear line of demarcation between psychopathic personalities and habitual or confirmed criminals. The former commit crimes because, though understanding what they do, they lack the power to control their actions. The latter, the confirmed criminals, have chosen a life of crime and have adjusted themselves to it as an occupation, just as merchants are merchants or doctors are doctors or lawyers are lawyers—as a means of livelihood. Doctor Christian estimates roughly that 30 per cent of the inmates of Elmira Reformatory are psychopathic personalities.

"Furthermore, there are various types of psychopaths. Doctor Partridge, testifying about this defendant, Duker, placed him in a sub-group, which he called 'socio-pathic.' These unfortunate persons are peculiarly anti-social in their behavior. They are 'the most incorrigibly rebellious persons.' According to Doctor Christian they are the type of persons who lead in prison riots. Doctor Guttmacher says of Duker that he is potentially one of the most dangerous types of individual that society knows; that in a penal institution he would not be amenable to authority, and would be among the leaders in rebellion against it. Doctor Truitt, interrogated by the Court specifically as to how he thinks Duker would respond to the discipline of imprisonment for life in the Maryland Penitentiary replied that 'the outlook would be unfavorable.' The Court had, then, to

decide between life imprisonment and hanging for a man who is legally sane, medically of abnormal psychology, and socially extremely dangerous. Moreover, he is socially dangerous and a menace to the life of others whether he be at large or confined in prison. And it must not be forgotten that prison guards are human beings — and that administration of law 'for the protection of society' applies to them as well as to other citizens.

"For these reasons, the Court has sentenced Duker to death. This action is, let it be added, a confession of social and legal failure. The best available medical opinion is to the effect that men of this type can be restrained adequately and effectively in institutions of the proper kind. Maryland has no institution specifically designed and intended for the permanent or long time segregation of defective delinquents of this type. If it had one, Duker could not be confined in it for life, which is what should be done with him, what should have been done with him years ago — because, in the eyes of the law, he is not 'insane.' This is not said in bitterness — but in the hope that this case may help to bring nearer the day when our state will deal with this problem realistically and humanely.

"The problem is a large one and there is no simple answer to it. In the first place, it calls for a better understanding between the legal and medical professions. Today, as expressed by Doctor William A. White in his *Insanity and the Criminal Law* (page 103) 'lawyers and doctors talk at each other in the court room, each using a different language, each approaching the problem with different traditions, different objects, and neither one understanding the other.' These two influential groups must try to find a common viewpoint so that they may work together. The legal concept of insanity, described by Edwin R. Keedy, Professor of Law in the University of Pennsylvania, as 'obsolete medical theories crystallized into rules of law' needs to be made to conform to modern medical standards. But this must be done as part of a general program so that the new legal definition will not result in turning loose into society dangerous

persons who ought to be segregated. Proper institutions must be provided and the law must be so amended that defective delinquents will be sent to them and kept in them for treatment until cured, if curable, or for life, if not curable. The field is not an uncharted one. A model statute has been prepared by a distinguished group of judges, lawyers and physicians comprising a committee of the American Institute of Law and Criminology. The State of Massachusetts has developed both a system of jurisprudence and a group of institutions which are generally conceded to approximate the ideal method of dealing with such cases. It would transcend the proper limits of a judicial opinion — already too long — to discuss in detail the legal, medical and penological problems here suggested. One thought only should be stressed. Whatever is done should be done after the most thorough study and upon a comprehensive basis. There should be no tinkering with existing laws, no half-baked and half-way legislation dealing with mere details of procedure. Instead, there should be set up legal standards, legal procedure, and proper places of detention, all carefully planned and thoroughly integrated — and all designed to protect society from crime by reducing the opportunities for its commission.

" But until the law is changed, and so long as our institutions remain what they are, it is the province of a court to apply the law as it finds it. In this case, a sentence of life imprisonment in the penitentiary for Duker, would carry with it a threat, and a serious threat, against the lives of the other prisoners and of the guards in that institution. The Court, circumscribed by the paucity of choice afforded by our laws and our institutions, is compelled — in order to protect society and to prevent further probable homicides — to sentence a man to be hanged who is 'not wholly responsible' for his acts. No doubt other courts have done this before — doubtless it will be done again. This Court is doing it knowingly and with a realistic conception of the tragedy of it — because there is no workable alternative." [1]

[1] " Note — For a learned discussion of the law, citing and construing the leading

The cases of Norwood and of Duker and Lambert should be considered together, as they illustrate numerous phases of the relationship of courts and law to crime. It is probably unnecessary for me to say that Norwood was not sentenced to be hanged. The motion for a new trial was abandoned; and without hesitation I imposed upon him the alternative sentence permitted by law, imprisonment for life. It must be clear from my opinion in the Duker and Lambert case that this choice was the only one possible to a judge entertaining the views there expressed. Norwood has been in the penitentiary for over five years and has made a model prisoner. My guess is that the routine of prison life has been, for him, an almost welcome relief from the responsibilities and the confusion with which life overwhelmed him. Note well, though, I say "almost welcome," not quite so; for I am convinced that at its very best, imprisonment has elements of torture for every man. Occasionally you will read about a prisoner who, at the end of a long term, fears the complications of "the outside," and asks to be permitted to remain in prison. I recall just one such case in Baltimore during many years of observation; but that is so exceptional it may be disregarded.

The first point I wish to make in connection with these three murderers is that no study of criminal law is of the slightest importance if it is confined to a mere consideration of the laws relating to crime. I might cover many pages with a dissertation upon the nice differences between first degree murder, second degree murder, and manslaughter. Volumes have been written upon the law of evidence in criminal cases. Other volumes are being written on the relative merits of jury and judge trials,

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authorities, see Articles by Professor Edwin R. Keedy, of the University of Pennsylvania, in Vol. XXX, Harvard Law Review, pp. 535–560; and pp. 724–738.

"See also an authoritative recent volume — "Mental Disorder and the Criminal Law — a Study in Medico-Sociological Jurisprudence," by S. Sheldon Glueck of Harvard University. Mr. Glueck's book is encyclopaedic in scope within its field.

"See also the current files of the Journal of Criminal Law and Criminology, and of the American Journal of Psychiatry."

on the right of a judge to comment on the evidence, on his charge to the jury, and on numberless other rules of practice in the conduct of criminal trials. Criminology, the science of crime, has a large and technical literature of its own. Penology, the science of punishment, or prison management, is blessed in the same way. At every step we meet a specialist, studying minutely his own part of the problem, elaborating theories about it, proposing new laws to put those theories into practice, and ignoring the work of the other specialists. The problem of crime, the criminal, and criminal law is a single problem, and it must be viewed as such and dealt with as such. Instead, it has been looked at piece-meal, studied as though it were a dozen unrelated problems, and dealt with in spasmodic jerks leading toward nowhere in particular.

Murder is the crime that lays hold most strongly upon the popular imagination, regarding which it is easiest to arouse popular interest. Civilization, which kills its thousands in industry, its tens of thousands in automobile accidents, and its millions in war, is nevertheless shocked anew each time one civilized man kills another in a private quarrel. The proceedings, in and out of court, which follow this private killing become the subject of columns of news, read greedily by a sensation-loving public. Whether the convicted murderer shall be imprisoned or executed for his crime becomes a burning question, debated throughout the community with great vigor, often with intolerance, seldom with real understanding. Meanwhile, the United States maintains its shameful lead in the world's homicide rate, and nobody seems to know just why.

I believe that the principles which should guide society in its dealing with homicide cases, the most easily dramatized and interesting type of crime, are the same principles which apply to the whole crime problem. That problem is one with which society must learn to grapple more effectively than it has in the past. To do so, there must be developed a new spirit of co-operation, founded upon a new basis of understanding. The

criminal court judge, the criminologist, the penologist, and the legislator must find a common ground upon which to build up a new kind of team-work. They must seek assistance in every quarter from which help may come, and they must labor to educate a public opinion favorable to such constructive plans as may result from their seeking.

First, then, what is the problem? It is a stupendous one. This is a crime-ridden country. Crime takes its annual toll of many lives and of money running into the millions. Society spends additional millions for the maintenance of police departments, prosecuting agencies, and prisons; and, like "ole man river," crime "keeps rollin' along." Most laymen think it rolls in greater volume, that it is increasing at an alarming rate. This I greatly doubt; and nobody really knows. The statistics of American crime are woefully confused and inadequate. We do know, though, that wide-spread crime in this country is not the new phenomenon that the sensational press would have us believe. "Crime-waves" are primarily a public state of mind. Any newspaper can manufacture one in any city in less than a month. All it need do is to feature specially the daily news of local crime. The material is always present, normally present, if repetition of the abnormal can be said to make it normal. Focus public attention upon the ordinary run of crime, play up its sensational features, and your crime-wave is there, ready to excite the public and to stimulate the production of a new crop of half-baked panaceas. Even the most superficial examination of available historical data will disclose the error. For example, Adams in his *Epic of America* tells us that "in April 1840, a New York journal pointed out that although New York had a population of only 300,000 against 2,000,000 in London, there were seventeen murders in the smaller city to one in the larger. A Philadelphia paper two years before had also noted that there were more murders in the South in one year than in Italy in five."

That was in 1840. The same, or approximately the same,

might be said for 1830, or 1850. The facts answer conclusively most of the glib and positive statements we hear about the causes of crime in 1932. In 1840 the influence of the home was strong; parents still applied the birch to children who needed it. In 1840, the church and organized religion were still powerful; modern skepticism and unbelief had not weakened their influence. In 1840, there were no automobiles, no movies, no beer-rackets, no labor-rackets, no Volstead law, no post-war freedom of speech and action. Sex was taboo, young ladies wore petticoats, and boys did not go to dances carrying flasks on their hips. And, in 1840, this was the most lawless country in the western world, even as it is in 1932. Obviously the cause of American pre-eminence in crime is something far more deep-seated than any of the single factors emphasized by one or another of those who inveigh against it. Only in so far as the administration of the criminal law has failed to cope with it, is the problem one for our present consideration. If, as I believe, the criminal law in action has done positive harm in some directions, and has made the evil worse rather than better, then especially we who are cogs in the machine must pause to ask what is the driving force behind that machine and what principles determine our own participation in its movement.

In the United States, and during the period since 1840, what have criminal-court judges been doing when they imposed sentences upon persons convicted of crime? The answer is simple. In the main, and until very recently, they have been *punishing* those persons for their misbehavior. That is all they have tried to do, all they have thought they were called upon to do. If the judge was a passionate man, the measure of his resentment was the measure of the punishment he imposed. If he was a gentler soul, with a judicial temperament and a kind heart, he tried "to make the punishment fit the crime." The legislatures helped him toward the accomplishment of this ideal by prescribing a list of punishments fitted in advance to named crimes: six months in jail for petty larceny, five years

for grand larceny, ten years for burglary, twenty for robbery. When judicial discretion was allowed, judges exercised it in the same naive fashion. I once sat in a court room and heard two Negroes tried successively. The first was found guilty of the theft of $10; he was sentenced to ten days in jail. The second stole $20, and was given twenty days. The judge solved the sentencing problem by simple arithmetic. I wondered a little what term he would impose upon a bank cashier convicted of embezzling $250,000. By his method it comes to a little less than 685 years. I think that is too long, even with time off for good behavior.

About a year ago I was required to impose sentence in two cases, both of which had attracted a considerable degree of public attention. I took advantage of the opportunity to deliver a short opinion, designed primarily for publication in our local press. I shall reproduce it here because, in brief and simple form, it expresses everything that many years of study have taught me upon this subject.

"The imposition of sentence in cases of this character is generally regarded and rightly so, as a peculiarly difficult task. The judge must attempt to vindicate the law, to do justice to the individual, and to satisfy that vague but insistent force called public opinion.

"Only two days ago there was published in a Baltimore newspaper an indignant letter protesting against the apparent inconsistency between the sentences in two cases — one a sentence of five years for a theft of $33,000, the other a sentence of fifteen years for a theft of $300. Regarding one of those cases I have first-hand knowledge. About the other I know nothing in detail. But I do know that there is no mathematical formula for the determination of wise and just sentences, and that the number of dollars stolen is often a relatively minor factor.

"It would serve no useful purpose for me to make a public statement of the mental processes which have led me to the conclusions I have reached in respect of the two sentences which

I am about to pronounce. After all, they are but the fallible conclusions of an individual, doing the best he can to grapple with a complex problem.

"But this is, I think a proper occasion for some general observations concerning the sentencing of persons convicted of crime. I shall attempt merely to tabulate some of the factors which ought to enter into the determination of every sentence. These are:

"1st. The protection of society against wrongdoers.

"2nd. The punishment — or much better — the discipline, of the wrongdoer.

"3rd. The reformation and rehabilitation of the wrongdoer.

"4th. The deterrence of others from the commission of like offenses.

"It should be obvious that a proper dealing with these factors involves a study of each case upon an individual basis. Was the crime a crime against property only, or did it involve danger to human life? Was it a crime of sudden passion, or was it studied and deliberate? Is the criminal a man so constituted and so habituated to war upon society that there is little or no real hope that he ever can be anything other than a menace to society — or is he obviously amenable to reformation? Is there any evidence upon which to do more than guess that severity of sentence has an actual effect in deterring others from crime? Does the individual before you really need any discipline greater than that involved in his conviction — which, as in the cases before me this morning, may mean the final ending of his professional or business career? Or is he an individual upon whom a term of imprisonment may be expected to have a wholesomely correctional effect?

"These are a few of the questions a judge must ponder and try to answer whenever he imposes a sentence. And he must know in his heart that there is no absolute answer to them. But more than that, he must know that our institutions are not yet developed so as to make it possible always to deal as wisely with

offenders as his own judgment might indicate. Hundreds of men must be sent to prison each year because no adequate provision has yet been made for their supervision and rehabilitation under suspended sentence and probation. That form of treatment must be reserved for the obviously amenable few who require little supervision.

"Finally, the judge must proceed cautiously lest he run counter to the community's sense of justice. While he must not allow public or private demands for vindictive punishment to sway him toward undue severity, he must not, on the other hand, allow the advanced thought of science to sway him toward a degree of clemency that might shock the public conscience and bring the processes of the law into disrespect."

The two murder cases described in this chapter illustrate strikingly the principles just stated. Three young men, Norwood, Duker, and Lambert, were in the eyes of the law equally guilty of the most heinous of crimes. Society had to do something about it, something for itself, and something for them. I say, without hesitation, that society's *first* thought should be for itself. Unless the criminal law, the police, the courts, and the prisons measurably protect society against wrongdoers, they have no right to exist. Social utility ought to be the primary test of every social institution, but that does not say that other factors ought to be or can be left out of consideration. It was over-emphasis upon this factor plus the desire for social vengeance that led the law-makers of England a hundred and fifty years ago to prescribe death by hanging as the sole penalty for 160 different crimes. A dead pick-pocket picks no more pockets. The formula was simple, its logic was perfect. But it did not work. It did not work for many reasons, chief among them being that the very enormity of the law shocked the public conscience, and evasions of it got to be so frequent that a less rigorous system had to be devised.

It is when we consider the factors other than the protection of society that we encounter our greatest difficulties. Theo-

retically, I should like to eliminate altogether the element of punishment; but I realize that this is only theory and in its most abstract form. My own civilized impulse to punch the nose of the man who jostles me out of line at a ticket window, as well as the dozens of congratulatory letters I received from vindictive Baltimoreans who looked upon my sentence in the Duker case as an expression of their own simple resentment, convince me that society is not yet ready to drop the idea of punishment entirely from the criminal law. I have suggested the substitution of the word "discipline." There is not much difference, but inch-by-inch progress is better than no progress at all.

The element of reformation I shall discuss at greater length in my next chapter. Society today is not especially receptive to the thought that first degree murderers can be reformed. Of course that is an absurd differentiation. Treated properly, given a new set of surroundings and a fresh start, the probabilities are that Jeremiah Norwood will be law-abiding, industrious, and a perfectly safe next-door neighbor. Locking him up for the rest of his life is not necessary for the protection of society, and a law which makes that act obligatory is a foolish law.

As for the specific deterrent effect upon others produced by the imposition of penalties upon the convicted, one has to guess. No doubt, it is an important factor in some types of cases. The thought of the policeman around the corner probably prevents the perpetration of many crimes. I believe, however, that fear of being caught counts for more than fear of any specific consequences. If that be so, the judge imposing penalties may choose them without giving special consideration to this element.

If modern thought has taught us anything, it is that the penalties of the law must be chosen and imposed upon an *individual* basis. They must be made to fit not the crime, but the criminal. Return to our three murderers. Norwood was sentenced to prison for life, not because I thought that he would be benefited

by that treatment nor because I thought that the protection of society demanded it. I was forced by the present inelasticity of the law into a compromise with principle. It is a compromise the less obnoxious in that Norwood may be paroled after the lapse of several years. Lambert too was sentenced for life. In his case, that sentence may well be the best solution of the problem. He is weak and suggestible and has had lessons in banditry which make him a dangerous person. But in his case too, it is quite possible that the time may come when it will be safe to return him to society. Meanwhile, the rigid discipline of prison life is probably the best thing for him, as his segregation there is the best thing for society.

The case of Duker was the one that presented real difficulties. Duker is a mentally abnormal person, and I knew him to be so when I sentenced him to hang. There is something very ugly about that bald statement. Even a judge who believes in capital punishment would hesitate a long time before he imposed the death sentence upon a person known to be mentally irresponsible. I do not believe in capital punishment. I have just read Warden Lawes' moving chapter on that subject in his *Twenty Thousand Years in Sing Sing*. I did not have to read it to be convinced that society confesses its own failure every time it exacts a life for a life. That is so, as I look at it, whether the victim is mentally responsible or mentally irresponsible. But being opposed to capital punishment is a merely negative sentiment. Vegetarians are opposed to eating meat; but they would starve if they did not eat something in place of it. If capital punishment is to go, society must provide an adequate substitute. For its own protection it must provide proper places in which to segregate those anti-social individuals who can not otherwise be adjusted to life. According to all the information I could obtain, Duker was that kind of person. But according to the same information, the state had provided no place where he could be confined with a reasonable degree of safety to him-

self and others. If that was so, then my duty was to the many whom he might injure, rather than to this one unfortunate individual.

An appeal was made to the Governor for commutation of his sentence to life imprisonment, as an act of executive clemency. The Governor sent the case back to court for a further hearing, at which certain prison officials testified that in their opinion Duker could be confined safely in the penitentiary. At the same time some of the medical witnesses slightly modified their testimony. Opposed to that new testimony were the original statements of the physicians and my own knowledge of the nature of prison life and discipline in Maryland. In a supplemental opinion, I refused to assume the responsibility involved in a change of the original sentence, saying definitely that there was presented a difference of prediction only. The Governor, as the chief administrative officer of the state, able to control its policies of prison management, and responsible for those policies, was able to predict and also to control the conditions which would affect the correctness of his prediction. If he should see fit to commute Duker's sentence, he could at the same time take steps to create the hospital type of environment necessary for his safekeeping. The court could deal only with conditions as they existed.

This case excited much local discussion. I have said already that a large part of the public, missing the point entirely, applauded the action of the court as " courageous " vindictiveness. Others, in and out of the press, condemned it as philosophically and morally unsound, because it proposed the taking of the life of a " mentally irresponsible " person. From my own point of view, this was largely irrelevant. Duker was mentally responsible, according to legal definition, however fallacious that legal definition might be. That, also, I regarded as irrelevant. " Responsibility," whether mental responsibility or moral responsibility or social responsibility, is a concept about which it is useless to argue. Opinion concerning it is not the result of reason,

but rests in emotion or belief. To me it was clear that a judge pronouncing sentence had to disregard altogether this kind of philosophical consideration. When an individual is attacked, his right of self-defense is absolute, and he need not stop to inquire whether his attacker is acting voluntarily or by reason of compulsions beyond his control. When society is subjected to attack, either actual or potential, and whether by one who is responsible or by one who is irresponsible, those charged with its protection *must* repel the attack, using such means as are available for the purpose. Whenever the only available instrumentality makes it necessary to kill one man by the joint action of one million men, the one million have failed. Had they done their duty fully, they would have fashioned their laws and their institutions in such manner that the individual might be restrained by means less drastic than by hanging him to a gibbet.[1]

This one case, in which Duker was sentenced to be hanged and Lambert to be imprisoned, points to what I conceive to be the cardinal principle that should animate the whole of the criminal law. First, the primary object is the protection of society. Second, each offender must be treated as an individual, upon the basis of his personality and his relationship to society, rather than upon the basis of the specific crime he has committed. Third, progress toward a more rational and more socially advantageous dealing with the problem can come about only through the co-operative effort of many agencies. The legislator, the judge, the prosecuting officer, and the prison administrator must learn to meet upon a common ground of understanding and to join one another in a constructive programme of action. For a hundred years they have labored separately, often at cross-purposes. The old theory of vindictive punishment has accomplished very little, and various new

[1] After the above passage was written, the Governor held another hearing upon this case and subsequently commuted Duker's sentence to one of life imprisonment. The statement made by the Governor in explanation of his action is printed in full in the Appendix.

theories have been tried out, partially, spasmodically, and ineffectively. The time has come when we must think the problem through, and integrate our efforts. It would be too shameful to have to confess that we are helpless and that the anti-social elements in the community have us by the throat.

In my next chapter I shall describe some of the newer social mechanisms which have been suggested and tried in administering the criminal law. Before doing that, however, a concluding word should be said regarding my own judicial experiences with murder and murderers. During my two years of criminal court work, there were tried before me 66 cases in which the defendant was accused of murder, using the word in its popular sense to include all cases in which the crime was the killing of a human being. Among the number, however, were 10 manslaughter cases, growing out of automobile accidents in which the State charged criminal recklessness. Eliminating these, which properly fall into a class by themselves, the 56 murder trials resulted in convictions in 41 cases. In only one of these, in addition to the Duker case, did it even occur to me that the death penalty might be demanded. That was a case in which "Country Carey," an inmate of the penitentiary, serving a life term for murder, killed a guard while trying to escape. I sentenced him to be hanged, and he went to his death calmly and fearlessly. There was something peculiarly futile about that proceeding. When he committed the second murder, Carey was undergoing already what those who entertain conscientious scruples against capital punishment think should be the maximum penalty of the law. For my own part, I could rouse myself to no great heights of moral indignation against him. A healthy, young, human animal in a prison cell has a desire for freedom like that of a lion in a cage. The keeper is fair game, in the eyes of the prisoner as in the eyes of the lion. Your moral values and mine have no place in this psychology. Nevertheless, when the keeper is killed, something has to be done to the killer. To send him back to serve the same life sentence he was serving

before would fail utterly to satisfy the moral sense of the community, which still looks to the courts for the infliction of punishment. I have said above that courts must heed the sentiment of the community. Gradually, very slowly, judges can play their part in educating public opinion, in helping to create new moral values. But from time to time cases will arise in which a judge must bow to forces stronger than the force of his own private conscience. I felt that this was such a case. The social demand for punishment was an actuality so strong in 1927, when this case was before me, that I was compelled to yield to it. Otherwise, I faced the loss of community respect not only for myself but for the whole legal process. If I am still on the bench in the year 2027 I may be able to deal with a similar case quite differently.

The remaining murder cases before me could all be disposed of as are less serious cases. That is to say, none of them had aroused public clamor, and none presented special circumstances which stood in the way of the application of the principles which guide me in the imposition of sentence generally. Each murderer could be looked upon as an individual man or woman out of adjustment with society and its laws. He could be studied and evaluated, and he could be incarcerated, for a longer or shorter time as the case might be, in an institution reasonably fitted for his care. In short, the problem before the court in these cases was no different from that in every case, even of the most minor nature. For in every criminal case the moment when the convicted criminal is sentenced is a vital moment. If at that moment he is brought into contact with a rationally adjusted social mechanism, wisely operated, it is entirely possible that he may be put on the road to social readjustment. If, on the other hand, he faces the old routine of punitive justice, the moment is one of hopeless tragedy for the convict and of supreme futility for the state.

Chapter Twelve

A DAY IN THE CRIMINAL COURT

When I reached my office on a certain Wednesday in November 1931, three visitors were waiting. First, there was the warden of the jail, who wanted to confer about a prisoner to be tried in a few days for larceny. The prisoner had told the warden a rambling story about his wife and another man and had shown signs of violence; the warden suggested that I direct the court psychiatrist to examine the defendant before trial. I sent for an assistant state's attorney and quickly arranged to postpone the trial until after a thorough investigation.

Meanwhile, I had been glancing through the batch of written reports handed me by my second visitor, the chief probation officer. These reports were short life histories of four men tried during the past week. Two had been found guilty of stealing automobiles, one had embezzled funds belonging to his employer, the fourth was a "sex offender." All were under twenty-two years of age and were being held in jail until the probation department could complete its investigations. The chief probation officer came to hand in the reports and to request an extension of time for the completion and verification of two of them. In these two cases the prisoners had made statements concerning their former employment in other cities, and the investigator had not yet received answers to letters addressed to the employers. Thereupon I read these two incomplete reports with greater care. Finding one of them unfavorable in so

many particulars that it was obviously useless to delay, I directed that the defendant in that case and the two whose reports were complete be brought in for sentence the next day. Respecting the remaining case I told the chief probation officer to send a telegram urging an immediate reply to the unanswered letter and to report to me again in a few days.

Although only one week had elapsed since these four young men were tried, in the intervening time I had heard no less than forty-four cases. Therefore when the reports were handed me, they awakened no definite recollection; and before reading them I examined my trial notes in each case. The reports and my notes together brought the men before me as living personalities, so that I was able to check against my court-room impressions the large mass of data contained in the reports and to plan further action in respect of real human beings and not mere case records. Of course this took time; and meanwhile the third visitor was pacing nervously back and forth before the partly opened door to make sure I should not forget he was waiting to see me. Therefore at half past nine I told the chief probation officer to come back after adjournment of court, when I should have a better opportunity to study the records with him and arrange definite plans regarding the disposition of these cases.

My third visitor plunged at once into his story. As he spoke I remembered him as George Cain, the prosecuting witness in a somewhat unusual case heard nearly three months before. With my notes of the trial before me to refresh my recollection I listened to George begging me to release his father from prison. He had been told I had the legal right to do this during the current term of court; his father's imprisonment was breaking his mother's heart; they were sure there would be no further trouble.

The father had been sentenced for a murderous assault upon this very son now pleading so earnestly for his release. But in my notes of that trial the last entry showed that I had referred the defendant to the court psychiatrist for study. Therefore

before answering, I got out the psychiatrist's report to see what light it threw upon the case. This report covered eight closely typewritten pages and represented the result of many hours of study and investigation. It embodied a physical history and the results of a physical examination, a psychological history, the findings of a psychological examination, a searching family history, a personality study, and a specific inquiry into the facts and circumstances which led the defendant to shoot his son George. The defendant himself had said in court that he did it while he was drunk and could give no reason for his act. Under the friendly questioning of the psychiatrist in his office, he had told a very different story; that story was corroborated by the statements of his wife and several others and by a strange letter which the defendant wrote to his wife a few days before the assault.

The trouble had begun nineteen years before when the defendant's wife and George, then a mere child, followed him into the home of a prostitute where he had gone while intoxicated. Together they had taken him home, and his antagonism to George had begun from that day. For a number of years he drank heavily. Whenever he was drunk he would beat George unmercifully. He also struck his wife at times and failed to support his family. As the several children reached working age they took over the burden of family support; some of them had married, but George regarded himself as the head of the family and his mother's protector. He bought a small house into which he took his mother, ordering his father to remain away from them altogether.

Shortly afterward a younger brother came to George's place of employment and warned him that the father was lying in wait with a gun near the new home. George summoned the police and with the aid of an officer disarmed his father; but he lodged no complaint against him at that time. A little later the father tried to force his way into the house when George was at home. This time he drew a knife and cut his

son severely on the forearm; still George took no steps toward a criminal prosecution. The father came with a gun a second time and fired point blank at George's chest. The bullet passed just above his heart. The father was arrested and George went to the hospital.

A few days before this occurred the father had written his wife a letter in which he announced that he was determined to break up her life with "her lover." Jealousy and a realization of his own failure had preyed upon his mind until he imagined an incestuous relationship between his wife and their son. The psychiatrist described his condition as "temporary paranoid psychosis induced by alcohol" and recommended that he be confined in an asylum for observation and treatment.

This recommendation had been duly adopted. But after the patient had been in the asylum less than two months, the superintendent reported him cured and ready for discharge. Again our psychiatrist examined him; he found him greatly improved and reiterated his opinion that alcohol was the principal cause of his temporary psychosis. George and his mother both appeared at the second hearing and expressed the most profound fears of danger to themselves should the defendant be released. They assured me that his promises to refrain from drink could not be relied upon, that he had made and broken like promises repeatedly over a long period of years. Fortunately, from a technical point of view, there was no evidence in the record to show that the defendant was insane on the day of the assault upon his son. Therefore I was justified legally in the acceptance of his plea of guilty and was able to deal with his case in a way calculated to protect both him and his family. I sentenced him to a term of five years in prison. He was no longer a young man and the psychiatrist was of the opinion that forced abstinence from the use of alcohol for a number of years probably would arrest further mental deterioration and might even result in actual cure.

And now, when his father had served less than a month of

his five year sentence, George was begging for his release. He seemed to have forgotten the knife wound in his arm, the bullet just over his heart. Psychologically this was interesting. So completely had George come to play the father rôle in the family that now he was talking about his own father as a fond parent talks of a wayward child. He could not bear to think of his poor father as a prisoner; he was certain that he could take care of the situation if I would give the old man another chance.

This interview with George did not take as long as the recital of it. I tried to explain the situation, tried particularly to explain George to himself. Observing that ten o'clock was drawing near, I sent for the court psychiatrist and turned George over to him for further explanations. Of course I did not promise to release the prisoner. Later in the day the doctor reported that George left his office after two hours, apparently convinced that his father's imprisonment was both just and desirable. Parenthetically I may add that in June 1932 I received a pathetic letter from George in which he begged me again to do something for his "poor old father."

At ten o'clock I went on the bench to begin the day's work. You may ask at this point how cases get into a criminal court for trial. Manifestly, the first step is the arrest of the person accused of crime. Therefore an efficient and honest police department is the foundation of every intelligent attack society can make upon the crime problem. In Baltimore we have escaped that shocking demoralization of the police which disgraces so many American cities. While we hear rumors about police protection of illegal gambling and of speakeasies, I believe I am not too naive when I say that there is in our city little or no evidence of actual alliance between the police and the criminal gangs of the underworld. Consequently the ratio of arrests to reports of crime is definitely higher in Baltimore than in many cities of like size.

Upon being arrested, the culprit is given a hearing before a

magistrate. If the charge is a minor one, such as violation of a municipal ordinance, the magistrate hears the case and disposes of it finally. When major crime is charged, he hears the evidence of the prosecution only. If that evidence is insufficient to warrant holding the accused, the magistrate dismisses the case; if sufficient, he sends it to the grand jury. Here there is a second hearing, again of the witnesses for the prosecution only. The grand jury must be convinced by these witnesses that the state has a *prima facie* case, in which event a "true bill" is found, the defendant is indicted, and his case goes on the docket for trial in the criminal court. But the grand jury, like the police magistrate, may dismiss the case if it finds the evidence insufficient. Thus, before a person accused of major crime comes to trial, he has already had two chances to escape prosecution. In some states the second of these steps is omitted, and the case goes directly from preliminary hearing before a magistrate to trial in the criminal court, an "information" prepared by the state's attorney taking the place of grand jury indictment.

On the morning I am describing, the first case called for trial was *State vs. Paul Silver, Philip Jones,* and *John Short.* Three well-dressed young men were brought into court from the lock-up, charged with the crime of robbery with deadly weapons. Asked to plead, they somewhat jauntily answered, "Guilty," and said they had no lawyer. The State thereupon called its witnesses to prove the facts of the crime. The first was a clerk in a down-town shoe-store who said that two weeks before, when he was alone in the store, the three defendants came in. Jones tried on a pair of shoes and then asked for a drink of water; the clerk went to the water-cooler, turning his back to his three visitors. When he turned around with the glass of water, he looked into the muzzles of two guns, one held by Jones, the other by Short. They ordered him into the rear of the store, where Jones backed him against the wall, holding the gun to his stomach while the other two emptied

the cash-register. They warned him to make no outcry for five minutes and hurried out of the place with the shoes and the money. As soon as the clerk saw that all three men had left, he gave the alarm. A police officer standing at the corner ran after them, commandeered a passing taxi, and caught the three defendants still running together about four blocks from the place of the robbery. This officer was the only additional witness called by the State; he testified that the defendants surrendered at once when overtaken and submitted quietly to arrest, although two of them had fully loaded guns in their pockets. The third still carried the package of new shoes and the money taken from the cash-register.

A person charged with crime cannot be compelled to testify against himself. But after he is found guilty or if he pleads guilty, he may be called to the witness stand and interrogated so that the judge may secure information helpful in the imposition of sentence. Paul Silver was called first; he swaggered to the stand and testified with an air of braggadocio. He said he came from New York, denied any previous criminal record, but used the jargon of the professional criminal, referring to the hold-up as "pulling a job." He gave his age as nineteen and was evasive when questioned about his past life. In spite of his impudent manner there was something indefinably attractive in his personality.

Philip Jones impressed me less favorably. He was twenty-one years old and said he had a wife and baby in Washington; he claimed that Silver and Short met him in Washington and proposed a visit to Baltimore, where Short wanted to call on a girl. After the trip was planned, Jones purchased one of the two guns used in the hold-up; yet he insisted they came to Baltimore merely for a social visit and that the hold-up was an afterthought when they found themselves short of money. He admitted that he was the person shown by the Washington police records to have spent eighteen months in a reform school for juvenile delinquents and that in 1930 he was arrested for

larceny, and later in the same year for carrying concealed weapons. On both of these occasions he was put on probation. His demeanor on the witness stand was cringing, very different from the jaunty impudence displayed by Silver.

John Short was the last of the trio called to testify. I could not make him out at all; either he was the most dangerous of the three, or he was an unfortunate victim of circumstances. He gave his age as nineteen, his home as Gulfport, Louisiana. He said he met Silver in New York and lived with him there for about a month; they did not work but were given money by a "friend"; they left New York for Washington with $80, a gift from this same friend. When arrested Short had a gun which he said he had bought in New York for five dollars. He too insisted that the hold-up in Baltimore was not planned, though he admitted they discussed it for half an hour before they went into the shoe-store. He had no known criminal record, and his demeanor was pleasant and refined.

That was all the information I could get. Were these three young men gangsters, menaces to society, or were they ordinary young men caught in a foolhardy criminal adventure? If they were gangsters, they had come to the wrong city. We pride ourselves in Baltimore that organized criminal gangs have not obtained a strong foothold among us. Probably the principal reason is our relatively honest police force; in addition to that, our courts deal relentlessly with the professional criminal when he is recognized. The law allows a maximum sentence of twenty years in the penitentiary for armed hold-up; our judges seldom impose less than ten years in such cases, and the gangsters know it. I am convinced that heavy penalties exercise a definitely deterrent influence in this category of crime, for there are men who make a business of robbery and calculate their chances of success precisely as do persons engaged in legitimate enterprises. Criminals of this type often go to a city where they are not known by the police for the express purpose of committing crime. If these three youths were

professional gangsters, I had no hope that leniency would help toward their reformation. The only way society can protect itself against men who deliberately go after money with loaded guns in their hands and murder in their hearts is by locking them up and keeping them locked up for a long time.

These three defendants did go after money and they did have loaded guns. But they did not behave like professionals. In the first place they had arranged no get-away. If one of them had waited at the curb in an automobile with its engine running, the other two could have executed the hold-up; and all three could have been out of sight before the policeman started to chase them. Besides, all three ran in the same direction and allowed themselves to be caught together; and though two were armed they offered no resistance to arrest. On the other hand they were about the age of the modern gang criminal, and what little was known of their antecedents was unfavorable.

Since I had the power during the term of court to reduce their sentences if investigation showed them to be too severe, I decided to treat these defendants as though I was sure they were professional criminals. I sentenced them to ten years in the penitentiary and at the same time wrote out an order to the probation department, and another to the court psychiatrist, directing that thorough investigations be made at once and reported to me within thirty days. The defendants heard the imposition of sentence but did not know of the orders for investigation. They showed plainly as they were led away that my apparent severity shocked them.

It may be asked at this point why I did not simply order the investigation and postpone sentence until the results were known. I had a definite reason for not doing it that way. These men were arrested on November 10th. If they were professional gangsters, their arrest was known throughout gang-land. Next to certainty of arrest, the thing criminals like least is promptness of trial; they have everything to gain by delay, and in ad-

ministering the criminal law in Baltimore we strain every nerve to keep the machine moving rapidly. If the severe sentences were proper and were allowed to stand, their deterrent effect upon others was likely to be greater when it became known that sentence followed quickly upon the heels of arrest. If the sentences were too severe, the shock to the prisoners might itself prove a salutary warning and the subsequent remission of part of the penalty an encouragement to better behavior.

A little later I shall state the results of the study of these three young men. Now let me go on to the next case. William Andrews was brought in, charged with the larceny of an automobile. He had a lawyer who at once addressed the court, saying that his client had taken the automobile while drunk and was willing to plead guilty to the lesser charge of "unauthorized use of a motor vehicle." I turned to the State's Attorney, who looked over his papers and announced that the State would accept that plea. The automobile had been recovered, and it made little practical difference if the defendant was recorded as guilty of the one charge or the other. The further proceedings lasted only a few minutes. The police officer who arrested Andrews narrated briefly the circumstances of the arrest. The defendant took the stand and I recognized him at once as a chronic alcoholic. His eyes were dull, his hands trembled, and he smiled vacantly. He admitted a long series of delinquencies beginning about twenty years ago when he was nine years old. At the age of fourteen he had been sent to a reformatory but was released after being there less than a month; five years later he had been sentenced to the penitentiary for burglary, and in 1928 a second burglary had earned him a three-year sentence to the same institution. He had been released only a week before committing the crime that he now admitted. I was about to impose sentence when his attorney requested that I withhold action until the court psychiatrist could have an opportunity to examine Andrews. It was obvi-

ous that penal incarceration had accomplished no good in the past, and I readily granted this request, hoping it might lead to some constructive suggestion. Andrews was taken back to jail, and I called the next case.

Two robust colored men, Bernard and Joseph Fox, were brought in, charged with failure to support their aged mother. There unfolded a pitiful and sordid story of the life of the very poor. The mother was a Negress of the old South, neatly dressed, soft spoken, deferential in manner, yet dignified. She was reluctant to prosecute her sons but felt that she must do so in fairness to her other children. Though suffering from diabetes she was still able to work a little and earned about two dollars a week; she needed an additional three dollars weekly to get along; that would pay her room rent, and what she earned was enough for her food and clothes; her married daughters helped out all they could and gave her food enough for several meals each week but they had large families and could give her no more. She had three sons, each of whom had promised her a dollar a week. Only one kept his promise, so she had been forced to have the other two arrested, though she hated to do it.

Bernard admitted he had broken his promise but said that, when he gave his mother money, the other members of the family, particularly Joseph, sponged on her. He had a wife and two young children, made $20 a week at a steady job, and was buying a home for his family; his mother could come and live with them. But the old lady said Bernard's wife did not want her; and Bernard's wife admitted that she and her mother-in-law could not get along together.

Joseph was the disturbing element. He said he was willing to help his mother but could not because he had been out of work for over nine months. Yet he was well dressed and looked sporty, very different from the staid and sober Bernard. Clearly he was the focal point of the family trouble. If he could be made to do his share, the rest were willing to do

theirs, and the old mother's meager needs would be supplied. I dismissed the case against Bernard, found Joseph guilty, sentenced him to six months in jail, but suspended sentence on condition that he pay his mother a dollar every week. I warned him that on the first complaint the suspension of sentence would be stricken out, and he would go to jail. That was over nine months ago, and no more has been heard of the Fox family in court. Any further trouble would have been adjusted by the family case-work agency, to which I referred the case for more intensive treatment.

The last case tried that day was a bastardy case. Sherman Newell, the defendant, was represented by counsel. He plead not guilty and elected a jury trial. The hearing lasted nearly three hours, and I shall state the salient facts very briefly. The prosecuting witness was a feeble-minded girl of eighteen. As though repeating a lesson learned by rote, she told of her acquaintance with Newell and of an act of sexual intercourse with him precisely nine months before the date of her baby's birth. On cross-examination she denied similar acts with other men at about the same time and denied also various statements contradictory of her present testimony which she was said to have made at the preliminary hearing. A large number of witnesses testified on each side, and when all had been heard the only fact that seemed proved with any degree of certainty was that the prosecuting witness had a baby. Any one of three men might have been the father. Newell admitted casual acquaintance with the girl, denied emphatically any intimacy with her, and insisted that her accusation came to him as a complete surprise, just one month before the child was born.

The case was vigorously argued before the jury, Newell's lawyer dwelling particularly upon three propositions: First, that the defendant in a criminal prosecution is presumed to be innocent; second, that this presumption of innocence extends over him as a protecting shield throughout the trial; third, that the burden rests upon the prosecution to overcome the pre-

sumption of innocence by evidence proving the guilt of the accused beyond a reasonable doubt. This is the familiar line of argument followed in every criminal case; in this case it seemed unusually appropriate and convincing. The State's evidence had failed to prove anything to me. I was sorry for the feeble-minded girl and her baby, but I could see no reason for more than a supposition that possibly Newell might be responsible for what had occurred.

When the jury retired, I expected an almost immediate verdict of not guilty. I went into my chambers and sent for the chief probation officer to continue our interrupted discussion of the morning, concerning the three young men to be sentenced next day. I also told him some of the details of the hold-up case referred to him that day, impressing upon him that I wanted a thorough investigation and a full report because of the numerous factors about which I was doubtful. The greater part of an hour was spent in this discussion; and still the Newell jury had not come in with a verdict.

Newell's counsel and the assistant state's attorney who had prosecuted the case then asked to see me. The assistant state's attorney was worried. He had made the most of his weak case before the jury, and now he feared that his zeal had led him to overstep the line of fairness. He said the evidence of both prosecution and defense taken together had not convinced him of the defendant's guilt and wanted to know my opinion. Before I could answer there was a knock at the door and a bailiff announced that the jury had agreed.

We returned to the court room. The verdict was, "Guilty." Sympathy for the young mother had led the jury to a conclusion flatly against the law and the facts.

Again into chambers with the lawyers. The defendant's attorney was crest-fallen, for he knew from experience my unwillingness to interfere with the action of a jury. This time I surprised him. I requested him to file at once a motion for a new trial and assured him it would be granted. The jury's ver-

dict in this case had "shocked my judicial conscience." The assistant state's attorney expressed relief and assured me that unless he should unearth more convincing testimony the State would abandon the prosecution and *stet* the case.

By this time it was after five o'clock and the day's work was over. It had been an ordinary day in the criminal court, a day devoted to run-of-the-mine cases. An analysis of what was done in these cases will demonstrate both the strength and the weakness of the administration of criminal law as we have developed it in Baltimore. I shall present such an analysis in a few moments. Before doing so I must set down the findings in the four cases which I had referred on this day to investigating agencies attached to the court.

A month elapsed before the probation department made its full report on Silver, Jones, and Short. Correspondence with similar agencies in New York, Washington, and Gulfport had elicited a host of facts about these three young men. Both Silver and Short had served in the navy, and the full records of the Navy Department disclosed much valuable information. Silver was the product of a broken and degenerate family; his father had committed suicide after an attempt to kill the boy's mother, and young Silver had lived for several years in an orphan asylum. The records of that institution showed that he was a "behavior problem" throughout his stay there. Short was honorably discharged from the Navy and, while looking for a job in New York, he met Silver whom he had known slightly on shipboard. They were befriended by a retired petty naval officer, who took them into his apartment to live; this was the mysterious "friend who gave them money." Though it could not be proved, there was reason to suspect that he "kept" the young men in his apartment for homosexual practices. Short, in spite of his recent bad behavior, had an excellent record. He came from a good family; his parents were ready to take him home; an apparently well-organized probation department in Gulfport offered to assume responsibility

for his supervision if he were returned to that city under suspended sentence.

Jones presented a less clear-cut personality picture. His father came over from Washington to intercede for him and gave detailed information about his early life. "Very weak" was the most definite thing that could be said about young Jones; intemperate use of alcohol and laziness were his besetting sins. His previous collisions with the criminal law were frequent in number, trivial in character. No effective effort to build upon the foundation of his better qualities had been made, either in his home or elsewhere. A little over a year spent in a reformatory for juvenile offenders, another year in a reform school for adults, and a term of probation all had failed to overcome his innate weakness of character.

These findings of the probation department were supplemented by equally full studies made by the court psychiatrist. He made and reported the usual formal tests, but he did much more. His analyses of the life histories and personalities of the men were reinforced by a wealth of information obtained from them and from members of their families; his conclusions were obviously wise and well-considered. The complete reports of both sets of investigations comprised fifty-one pages of single-spaced typewritten material and represented the results of many hours spent in patient study. There was all the difference in the world between my knowledge of the three defendants after reading these reports and my hazy doubts at the conclusion of the trial. Then, they were simply individuals guilty of crime; now, they had become living persons. We could make plans for their further treatment, based upon certain knowledge of their characters and habits.

It was certain, for one thing, that they were not professional criminals or gangsters. Nevertheless one of them, Silver, was a potential menace to society. He was of the psychopathic personality type, probably a less dangerous individual than Duker, but presenting the same kind of problem. Indefinite confine-

ment in a hospital for the criminal insane would have been the wise and humane disposition of his case; this was impossible for the same reasons that prevented like action with respect to Duker. Reluctantly and as the only available alternative, I confirmed his ten-year penitentiary sentence. Subsequently at the request of the warden I reduced it to eight years, hoping that this manifestation of leniency might encourage him to conform to the discipline of the institution. It is practically certain that he will commit further crimes when released. Society is protected against him for eight years and has itself to blame that its lack of proper laws and institutions renders permanent protection impossible. Jones, the weak young man from Washington, seemed an almost equally hopeless case. Incarcerated and removed from the temptation to drink he is a harmless creature. Free and faced by the realities of life he yields to whatever evil forces come in his way. Probation had not strengthened him; imprisonment had done him no good. Fully aware that anything I might do would be essentially futile, I reduced his term of imprisonment from ten years to three.

Short had been a prisoner for nearly two months when I reconsidered his case. As human material he offered real hope for successful rehabilitation. His youth, his family background, his personality, and the means available for his supervision all made it seem probable that he could be converted into a social asset instead of a social liability. He was kept in prison a few weeks longer until arrangements were completed to give him a fresh start in his own home. At his father's expense a Gulfport probation officer came to Baltimore to meet Short and take him back to Louisiana. The little group in my office on the morning when Short left to go home were all cheerful and hopeful for the future. The probation officer had secured in advance a job for his new charge and told about a literary and athletic club which probably would accept Short as a member. Short volunteered the statement that his weeks in prison had impressed upon him, as nothing else could, the folly of

law-breaking. I explained to him that he was to be released, not finally but under suspended sentence, and that failure to comply with the conditions of probation would be followed by arrest and return to prison for the remainder of his term. He smiled as he grasped my hand to say good-bye, assuring me his lesson was learned and that he never would return to Baltimore as a prisoner. The latest report I have seen from the Gulfport probation officer was dated August 1, 1932. Short has made good in his job, and his salary was raised in July; he is an active member of the athletic club, plays shortstop on its baseball team, and plans to go to night-school next winter. He and the probation officer see one another frequently and have become good friends. This last I know from a grateful letter Short wrote to me in June.

The psychiatrist's report on Andrews, the automobile thief, was thoroughly discouraging. Andrews is the black sheep in a respectable family. His father is a sergeant of police with an honorable record; there are four other children in the family, all married and leading normal lives. Andrews is now twenty-nine years old; he has been delinquent since the age of nine. Before he was fourteen he was arrested five times and brought into the Juvenile Court. On the fourth occasion he was committed to a reformatory, but after being there less than a month he was released in the custody of his father. Nearly half his life from the age of nineteen onward has been spent in prison. When at large he works irregularly and drinks heavily. He cannot explain his craving for alcohol and is quite hopeless of controlling it. In the present case, imprisonment for more than a year would have appeared cruel and vindictive punishment to a society still accustomed to measure sentences by gravity of offense. After all, while drunk he merely took a joy-ride in someone's else automobile. With a weary sense of the uselessness of it, I ordered him locked up for a year.

That is the full story of a fairly typical day in the criminal court. No doubt you have observed that in telling it I have said

little or nothing about the criminal law in its more technical aspects. Of course there are days when sensational cases are tried, and screaming headlines misinform the public about nice points of technical law and angry clashes between lawyers. But my own experience leads me to the surprising conclusion that a judge in the criminal court has comparatively little concern with the criminal law as the layman usually thinks of it. He must rule upon the admissibility of evidence, but usually that is not hard to do. A few general principles become part of his habitual mode of thought, and in most cases he applies them almost automatically. The several categories of crime are clearly defined, often by precisely worded statute, and he must familiarize himself with the definitions. But his primary concern is with problems of social engineering. A sympathetic understanding of men and life, coupled with a stern resolution to use as effectively as he can those tools which society has forged for its own protection, are the main equipment he needs. He must remember always that the court over which he presides is only a small part of an elaborate and specialized social mechanism which has come down to us from the past, with a very poor record of achievement. Remembering this he will expect many failures; an occasional success will inspire him to hope and to work for the creation of a system founded upon the realities of modern life and designed to serve the social needs of today.

Our experience in Baltimore throws light upon a number of questions that await intelligent answers. First let me repeat that we are blessed with an unusually honest police force. This is the absolutely essential foundation of all hope for the control of crime. Next we have developed great speed in bringing offenders to trial. Barring some slight delay during the summer months when regular sessions of the criminal court are interrupted by vacations, the average time intervening between indictment and trial has been cut to about six days. This is important not only as a menace to the guilty; it is perhaps more important as justice to the innocent who are sometimes falsely

accused. Especially a prisoner unable to give bail is entitled to be released at the earliest possible moment if his arrest was improper.

Certain outstanding features of our local procedure require special mention. You may recall my somewhat elaborate analysis of the respective functions of judge and jury in the trial of cases in the civil courts. There the judge rules on law, the jury on facts; each must exercise care not to invade the province of the other. In the criminal courts of Maryland all that is radically different. Let me quote from my report on the work of the Baltimore Criminal Court for the year 1931:

"Maryland is one of only two states in which the jury is judge of both law and fact. The judge presiding in a Criminal Court does not ordinarily 'charge' the jury. He has no right to 'instruct' it upon the law. He may not comment upon the evidence. His function is limited to ruling upon the sufficiency of indictments, to determining the admissibility *vel non* of the testimony, and to a general control of the conduct of the trial. If there be a verdict of guilty, he imposes sentence. While he does have the power to grant advisory instructions to the jury, he seldom avails himself of it because such instructions must be coupled with a warning that they are advisory only, and that they are not binding upon the jury. Most judges seem to feel that the giving of an instruction so hedged about by warning and qualification, so emasculated in the very pronouncement of it, is a nearly nugatory act not worth the doing.

"It would be interesting to know what effect this peculiar system has upon the results of criminal trials by jury. Does it increase or decrease the ratio of convictions to acquittals? Does it make it easier for the guilty to escape, or does it increase the likelihood of unjust convictions of the innocent?

"Strangely enough another peculiarity of our Maryland system renders it almost impossible to secure a statistical answer to this question. In this state the accused may waive a jury trial and elect to be tried by the judge for any crime — from petty

larceny or violation of minor municipal ordinance, all the way up (or down) to rape or arson or murder. Recently several states have passed laws adopting this system in whole or in part. But until now Baltimore has been almost the only large center in which this right to a 'court trial' has been availed of by a large proportion of defendants. In this city it is the rule rather than the exception. In 1931, according to the report of the State's Attorney, 4,362 cases, involving 3,370 persons, passed through our two criminal courts. Of the 4,362 cases, jury trials were had in only 147 — a little over 3 per cent. Of course it would be possible to compare the percentages of convictions and acquittals in these 3 per cent of the whole number of cases with corresponding percentages in the remaining 97 per cent. But that would be a comparison of little value, without an intensive study of the nature of each of these 147 clearly exceptional cases. For example there were in all 57 homicide cases actually tried during the year. Jury trials were had in 24 of these, which is a larger proportion than in cases of other classes. The jury trials include also a probably undue proportion of the cases in which well-to-do defendants can afford to employ particularly skillful counsel and to set up an elaborate defense. But that is not always so. In many instances it is just this class of cases in which the election is made to have a trial by judge without jury.

"In short the inter-play of these two unusual factors makes it difficult to answer statistically the questions that arise at once as to the effects actually produced by them. Fortunately, the Institute of Law of the Johns Hopkins University is now engaged upon a thorough study the results of which may be expected to substitute exact statement of fact for the subjectively influenced opinions which might now be hazarded."

Some of the figures in the aforegoing report lead me to consider the greatest fault of our local system, a fault I believe common to the administration of criminal law almost everywhere in America. We work entirely too fast, sacrificing thoroughness of treatment to speed of performance. I have

outlined the events of a single day in our court and have suggested the great mass of human problems which grew out of that day's activities. In the course of a year a judge in our Baltimore criminal court is called upon to impose sentence in from 1500 to 2000 cases. No judge I have ever known can do that even reasonably well; he can only skim the surface in most cases. In fact few criminal courts in America are equipped to do more. The work of the day I chose from among the many recorded in my note books was abnormal in one very important respect. On that day it happened that four of the seven defendants were subjected to thorough study by trained investigators before the judge decided what to do. This should be routine procedure in every case, but very few criminal courts have the staff of trained investigators necessary for following such a practice.

In fact the imposition of sentence by judges is merely an historical survival that probably will be discarded if ever we begin to deal rationally with crime. A man convicted of crime is a man determined by the legal process to be socially maladjusted. The trouble may be superficial or it may be grave. Readjustment may be attained easily or it may be impossible. A procedure must be devised which will seek in every case to discover the causes behind his criminal impulse and to apply a remedy that will make unlikely the commission of more crimes by the same individual. Precisely what form that procedure will take I do not pretend to say; but I hazard the guess that the judge on the bench measuring out predetermined doses of imprisonment will not be a part of it.

The old method has produced a weary procession of social misfits passing through the criminal court into prison and out, only to commit new crimes, to be re-arrested, re-tried and re-imprisoned again and again. Punishing men for crime as it has been done and is being done is society's most costly failure. If you doubt that statement, spend a day in any criminal court and count the men being punished for second, third, and fourth offenses. Each crime those men commit entails a heavy expense

upon society. The money they steal and the lives they take are only a part of that expense. Strangely blind, the state goes on in the old grooves, pouring millions of dollars every year into the upkeep of social institutions of proved inefficiency. Yet when something better is proposed, opposition usually takes the form of a plea for economy.

The most striking example I know is a device to which I have referred several times — probation. This is America's outstanding contribution to the practical and constructive treatment of crime and criminals. An early legislative recognition of the practice is found in a Massachusetts statute enacted in 1878. With the beginning of the present century it began to spread over the country and today probation is provided in some form by the laws of no less than thirty-four states. In spite of this general recognition, however, probation is frequently misunderstood and is supported so inadequately that almost nowhere have its full potentialities been realized.

Most laymen think of probation as an act of mercy by a soft-hearted judge who gives a convicted offender his freedom coupled with an admonition to sin no more. Unfortunately many judges whose heads are as soft as their hearts have justified this misconception. The case of young John Short from Gulfport illustrates the probation method as I should like it understood. You will recall in that case the first step was a thorough investigation and study of the offender both as an individual and in his social relationships. Probation ought never be granted without this preliminary study. A judge who relies merely upon his impressions of the defendant's personality as revealed during the trial is likely to be wrong more often than right. In the next place, when Short was placed on probation he was required by the court's order to conform to fixed standards of conduct and was placed under the continued supervision of a probation officer. Finally, that probation officer has maintained a close personal relationship with Short; he has helped him find work and has guided into healthful channels his use of

leisure time. The probation officer has not acted merely as a court officer charged with the enforcement of an order of court; he has made himself the counsellor and friend of his probationer, a continuing influence in his life. This intensive form of treatment is absolutely necessary if old habits are to be exchanged for new, if a man out of adjustment with society and its laws is to be cast in a new mold and made into a law-abiding citizen.

Yet how seldom we see this ideal realized. In many American cities a parsimonious policy has given us a probation department that is a mere shell. Probation officers, who ought to be mature men and women of great tact and profound human understanding, who ought to have the best possible training in social work, are paid salaries appropriate for the higher grades of clerical help. They are so few in number that personal friendship between officer and probationer is possible only in rare and accidental instances. An officer charged with the supervision of 128 probationers is physically able to do little more than to obtain perfunctory reports from men whose daily lives he ought to know intimately. Sometimes probationers commit new crimes and the officer does not find out until they appear in court for trial. Thereupon a half-baked public opinion becomes vocal with condemnation of probation as a method.

In a few communities a different attitude prevails. Notably in the state of Massachusetts and in a few large cities elsewhere, we find probation departments relatively well manned and supported by adequate appropriations of public funds. Viewed in terms of dollars and cents alone the wisdom of this policy is obvious. The *per capita* cost of effective probation is a mere fraction of the cost of imprisonment. When to this consideration are added human and social values, the economy plea which so often blocks efforts to build up a strong probation department is revealed as tragic stupidity. John Short, living with his family in Gulfport, working for his own support, respecting himself and enjoying the respect of his neighbors, is an

asset to society. In the penitentiary he would be an expensive liability now, a menace to public security hereafter. But we must have the courage of our convictions. Probation is no magical formula. It is a method of treatment holding great promise for the prevention of crime and the rehabilitation of criminals — provided it is employed wisely. If we believe this, we must set up and adequately support probation departments capable of doing the work assigned to them. That way lies true economy. A probation department half-supported by cheeseparing parsimony is often little better than no probation department at all, and the money appropriated to it is wasted.

Perhaps the worst feature of the administration of the criminal law is the mental attitude of prosecuting officers and judges, who think their work is done when the offender has been convicted and sentenced. The convict leaves the court, goes to prison, and is forgotten. He is remembered when he comes again into court charged with another offense and burdened with a record. What has happened to him in the meantime? More likely than not, he has been confined in an institution where he was one of an indiscriminate herd under a brutalizing discipline calculated to destroy his every vestige of decency. Most prisons are unspeakable places. We send men into them unmindful that those same men will come out again bearing the marks of their prison life. We have been so intent upon punishing the prisoner that we have turned him into a flaming sword of retribution when he leaves his prison cell.

Happily a better day is dawning. Men like Lewis E. Lawes, the far-sighted warden of Sing Sing Prison in New York, have begun to prove that prisons need not be places of torture. "Every prison a reformatory," must be the slogan of the future. Warden Lawes' books are a fascinating and inspiring record of what can be done when intelligence and human sympathy are brought to bear upon the jailer's task. Men are beginning to think in terms of the prisoner as a human being on the day of his release from prison. What he is then must be the measure

of the success of his incarceration. Unless he can come out of prison a better man than he went into it, he ought not come out at all. Furthermore the state must provide specialized institutions for the long-time and permanent custodial care of defective persons who now make the weary round in and out of prison, committing crimes because they are too weak for the strains of modern life. Men like Andrews the chronic alcoholic, like Silver the psychopath, who come out of prison only to commit new crimes, cost society more than they would if maintained in such institutions permanently. They must be incarcerated not for punishment but for their own protection no less than for the protection of society.

Is it not clear from this superficial sketch of criminal court problems that one great need is for team-work? Law-makers must reconsider legal definitions. The present antiquated conception of insanity, recognized in law courts and nowhere else must give place to modern medical standards. Prosecuting officers and judges must join forces with biologists and psychologists and sociologists, in thoughtful attempts to understand the men and women who file past the bar of justice. Courts must welcome the aid of psychiatrists and social workers, must plan the treatment of each offender with a view to his rehabilitation if he has in him the human material that goes to make a normal man. Judges and prison officials must learn to know one another and each other's work. Every criminal must be regarded as a problem challenging the best efforts of all the many officials who deal with him from the moment of his first arrest. If he is not susceptible of reformation he must be confined permanently where he can do no harm. In his place of confinement, whether temporary or permanent, he must be treated humanely. This is perfectly consistent with firmness and does not mean that he is to be coddled.

In short we need a "planned economy" in the treatment of crime and criminals. I have not attempted even to enumerate the causes of crime, and I offer no plan for its eradication. But

I do not shrink from facing the law's responsibility for the treatment of the law-breaker. This responsibility has not been met with any degree of effectiveness. It has not been met because an out-worn philosophy of retributive punishment has been allowed too long to cast its shadow over the newer conceptions of social utility. The time has come when everybody employed in the administration of the criminal law, from the policeman on the beat to the judge on the bench and the keeper of the prison, must realize they are working together on a single task. That task is to protect society against wrongdoers. It can never be accomplished in full. But if we face our problems resolutely, if we cast aside our prejudices, if we look fearlessly for facts and as fearlessly deal with the facts we find, at least we shall approach nearer to ultimate success.

Chapter Thirteen

APPEALS: CONCLUSION

APPEALS

Once upon a time there was a contentious litigant. His case had been contested stubbornly and his lawyer was by no means hopeful of success. The litigant was called out of town while the jury was deliberating its verdict, and when he left, he gave the lawyer an address, requesting that a telegram be sent him as soon as the verdict was known. The jury decided in his favor, and the lawyer was so overjoyed that he sent this enthusiastic message: "Justice and right have triumphed." The reply was brief and pointed: "Enter an appeal at once."

In earlier chapters I have had occasion from time to time to refer to appeals and appellate courts. The method by which a case is carried to a higher court and the procedure in such court were suggested in my account of the hearing of the Baltimore street railway fare case. That case was tried before the Maryland Public Service Commission. There witnesses were examined, documents and papers were introduced into evidence, counsel made their oral arguments, and a decision was rendered. The statute regulating the prosecution of such a case provides that a party dissatisfied with the Commission's decision may have it reviewed by a court of equity. Though the proceedings in the equity court took the form of a suit for an injunction, they were in effect an appeal from the Commission. For the purposes of that case the equity court was an intermediate court of appeal whose decision was in turn subject to a further appeal to the Court of Appeals of Maryland;

and we have seen that the decision of that court, too, was not final but was appealable to the Supreme Court of the United States.

So far as procedure is concerned, each of these steps after the initial hearing before the Commission had much in common. Each was a hearing upon appeal and differed radically from an original trial. Neither in the equity court where I presided, nor in the Court of Appeals, nor in the Supreme Court of the United States was any new evidence presented. There were no witnesses, there was not the slow, painstaking, and sometimes uncertain unfolding of the case, which characterizes an original trial. The case came into each of these courts already made up in the form of a written or printed record. The lawyers who made their arguments and the judges who listened to them were the only participants in any of these appellate proceedings. A hearing upon appeal is simply a debate between lawyers, often interrupted by searching questions from the bench. It lacks those warm human contacts, those elements of sudden surprise, which make every trial in a lower court a dramatic episode.

The purpose of an appeal is of course to afford opportunity for the correction of error. The very obviousness of this purpose often leads the layman to a false assumption about the scope of appellate court action; for not every kind of error in the court below can be set right upon appeal. Generally an appellate court does not substitute its opinion upon every phase of an appealed case for that of the original tribunal, but limits itself to a review of the questions of law decided by the trial judge. This distinction can be observed most clearly in an appeal of a case heard below by judge and jury.

Perhaps you will recall my emphasis upon the respective functions of judge and jury in hearing a civil suit in a law court. The judge, in his rulings upon the admissibility of evidence and in his instructions to the jury, rules upon the law of the case; the jury decides the facts. Consider for example the

case of *Johnson vs. Robinson* discussed at length in Chapters II and III. The plaintiff in that case was the young lawyer whose hand was maimed in an automobile accident; the trial ended with a verdict for the defendant. If that case had been appealed, a record would have been made up consisting of a full account of everything that occurred in the trial. The testimony of each witness as taken down by the court stenographer, every ruling of the judge upon the evidence, the instructions to the jury, the jury's verdict, all would have been set out in a printed book (the record) and filed with the judges of the Court of Appeals. Usually in making up such a record, that part of the testimony which has been admitted without dispute is condensed into brief narrative form. Nevertheless the record in a case of ordinary duration is a book of considerable size, and the expense of printing it is an obstacle to the prosecution of an appeal by a poor litigant.

Had such a record been sent to the Court of Appeals, counsel would have filed their printed briefs (another item of expense), and the case would have been argued. But none of this took place. A conversation I had with plaintiff's counsel a few weeks after the trial will explain why. He came to see me about another matter and took occasion to express his disappointment over the loss of the Johnson case. He added: "We thought seriously of an appeal and made up the record. But when I studied it carefully, I couldn't find a single ruling upon which I could argue that I thought you were wrong. So we gave it up. The jury licked us, and that's all there was to it."

Those few words spoken by an experienced lawyer sum up very briefly the limitations in most cases, upon the scope of review by appellate courts. Those courts consider and correct erroneous action of the lower court in respect of matters of law; they do not interfere with its conclusions about matters of fact. Frequently the rulings that the judge below must make upon legal questions present so little difficulty that he can scarcely make a mistake, unless he goes to sleep. In the case of *Johnson*

vs. Robinson I recall very well that counsel examined witnesses so carefully that my rulings upon questions of evidence were few and perfunctory; and my instructions to the jury followed stereotyped forms. Therefore I found little flattery in the assurance of counsel that the record revealed no erroneous action on my part. The jury, on the other hand, considered only the facts of the case. My own decision upon those facts would have been different. Possibly the Court of Appeals also would have thought the jury was wrong, but that kind of error is generally beyond correction upon appeal. This is what I had in mind when I said above that when we consider our legal system as a working entity the jury is so often a factor of primary importance in the determination of the substantial rights of litigants.

In other cases the line is not drawn so easily. When a case goes up from an equity court, for example, the decision below was made by a judge without the aid of a jury. In Maryland his decision ordinarily does not differentiate between his findings of fact and his conclusions of law; he simply passes a decree in favor of one party or the other. When such a case is appealed, the appellate court reviews the record as a whole and often is unable to determine whether the decision below differs from its own conclusions because the trial judge conceived the law differently or because he took a different view of the facts. Consequently reversals are more frequent in this class of appeals. In some states the judge in an equity court is required to announce his decision upon the facts and upon the law separately; and in those states the appellate court accepts as final his decision upon the facts, unless it is conspicuously erroneous.

A type of question subject to review upon appeal in every case, because always a question of law, is that raised by the action of the lower court in its rulings upon the admissibility of evidence. We have seen that such rulings may be both numerous and important. In order to have a higher court pass upon these points of law, counsel are required when each ruling is made to give notice of their dissatisfaction with the action of

the trial judge. This is called "taking an exception," and is done by saying the word "exception" or, more fully, "I note an exception." Very polite trial lawyers go further and say, "Your Honor will permit me to note an exception to your ruling." The phraseology is unimportant; but the exception must be clearly taken, otherwise the point is waived. The taking of an exception is important for another reason too; frequently by directing attention to the point of law involved in the court's ruling, it affords the trial judge an opportunity to correct an error of his own by the reversal of a hurriedly made ruling. Though in reality an essential and often useful step in the trial of a case, the noting of exceptions is one of the technical details of trial practice that seems formal and absurd to the uninstructed layman.

I recall a sense of anxiety during my first few months on the bench when I sustained or overruled the flood of objections that poured from the trial table. The word "exception" seemed to ring continuously in my ears. I knew I could not be right in every ruling, and for a time I feared that all my decisions would be reversed upon appeal. Reflection upon my own previous experience at the bar, as well as further service on the bench, soon revealed my mistake. Probably it is true that the trial judge makes one or more erroneous rulings in the course of every trial, especially upon points of evidence; but appellate courts do not reverse a decision simply because the record discloses error. To constitute ground for reversal, the error must be of some importance and must appear to have prejudiced the rights of the aggrieved party.

To test the accuracy of my last statement I have run through four recent volumes of the reported decisions of the Court of Appeals of Maryland and have examined the opinions in the several cases appealed from my own decisions below. In some of these cases I was affirmed; in others I was reversed. In every case I made numerous rulings upon the admissibility of evidence, to which counsel reserved exceptions. Eighty-one such rulings were considered and discussed by the Court of

Appeals. Many were declared to be correct, many others were criticized; but in not a single instance was my decision reversed because of erroneous rulings on points of evidence. This does not indicate an unusual degree of skill on my part in deciding such questions; I make a great many erroneous rulings. But though adherence to the rules of evidence is important, it is more important that unprejudicial errors of the trial court shall not lead to the delays and expense incidental to reversal. In one of the cases I examined, the Maryland Court of Appeals said: "It would be trifling with the law to reverse a judgment in a case which has been fully and fairly tried for so trivial an error." The "trivial error" to which the court referred was a ruling I had made upon a hypothetical question asked of an expert witness. The court's discussion of the question of law involved in my ruling covers four pages of the printed report and is a learned and technical presentation of a complex legal proposition; though the court decided that my ruling was legally wrong, the judgment was affirmed. I cite this case as typical of the modern attitude which leads appellate courts in reaching their decisions to regard substance rather than form. At one time many American courts displayed the opposite tendency, bringing merited reproach upon our whole system of law; but today the emphasis is strongly away from over-technical formalism.

Appellate courts, then, do not reverse decisions simply because they disagree with them. Reversal must proceed from error of law and such error must be substantial. But if this account is to be veracious I must call attention to a fact familiar to every experienced lawyer, yet not apparent in the classical literature of the law, and probably not consciously admitted even to themselves by most appellate judges. Practically every decision of a lower court *can* be reversed. By that I mean practically every record contains some erroneous rulings. Therefore, although appellate courts may insist that they are not concerned with general results, that it is not their function to pass

upon the facts, and that they are limited to a review of the points of law ruled upon by the court below, they can nearly always find some error if they want grounds for a reversal. And the human mind being what it is, there is not the slightest doubt that appellate courts do find substantial error in a record when the case seems to them to have been decided unjustly or unwisely; whereas the same error would have been passed over as trivial if the decision had seemed wise and just.

Let me illustrate. In a criminal case tried before me last year I was called upon to make 830 rulings on evidence. Six hundred and fifteen of these rulings were adverse to the defendant. It happened that the defendant was acquitted by the jury, and there was no appeal, the state having no right of appeal in such cases. But suppose there had been a conviction. Then the defendant would have appealed, and the record in the appellate court would have presented 615 opportunities for reversal. It is obvious that among so many rulings some must have been wrong. I know I cannot possibly make that many decisions about points of law or about anything else and be right every time.

When such a record gets before an appellate court, no matter what the court may say about the limited scope of its power of review, I believe the thing that often happens is this. The court reads the whole record and comes to a conclusion upon the merits of the case. It decides that the defendant had a fair trial and was convicted justly; or it decides that he was not guilty and that he was tried unfairly. Then it proceeds to scan the record. If its opinion is that the conviction should stand, it finds that the errors of the lower court were trivial. But if in its opinion the defendant should be given a new trial, it can always find error upon which to base that action.

The case I cited in this connection is unusual only in the number of rulings which might have been subject to review. Nearly every case presents a similar possibility, and I dwell upon the point because it illustrates from another angle what

I have said before about the difference between law-in-action and law-in-the-law-books. Law-in-action is always more realistic, generally more concerned with actual justice, than is merely theoretical statement of law.

Dealing as they do with printed records and passing in the main upon questions of law rather than questions of fact, the judges in an appellate court unquestionably are able to act more impersonally than judges in lower courts. A too aggressive trial lawyer, or a witness whose demeanor and facial expression suggest that he does not value truth, invariably arouses in me a strong spirit of antagonism. Try as I may to overcome this, I know perfectly well that it affects my judgment and enters into my rulings upon the law; and I have no reason to believe that other trial judges are immune to such influences. When the record reaches the Court of Appeals, these purely personal elements do not appear in it. On the other hand, a stenographic transcript of testimony correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the mere words signify. The best and most nearly accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried. Thus though the appellate court is freed from some of the obstacles to impersonal judgment that beset the judge below, it meets others which may be equally serious in another direction.

The foregoing observations are preliminary to a brief discussion of the human or personal element in law as found in the decisions of courts of appeal. Many students have asserted that the pronouncements of legal doctrine contained in such decisions are altogether impersonal. In their view, law is an abstraction, a philosophical principle; the judge who states it does no more than put the principle into words and fit it to the specific case. Appellate judges themselves are prone to characterize their mental processes in this way, and the material with which they work makes it natural for them to do so. A judge

in a lower court, faced by living men and women, soon learns that he also is a human being and that his judgments are compounded of reason and of prejudice and of error too. The appellate judge with only a printed record before his eyes may be forgiven for thinking that his opinions state pure reason and that his conclusions are infallibly correct.

One circumstance alone should be enough to demonstrate the fallacy of this view. An appellate bench consists of a number of judges. Usually all are good lawyers, presumably all are intellectually honest; yet frequently they are unable to agree among themselves. The individual personalities of the judges who make up an appellate bench constitute a factor which cannot be overlooked in any effort to comprehend the law as a living organism. There are progressive courts, and there are conservative courts; there are courts hospitable to the newer concepts of the social sciences, and there are courts that resist every kind of innovation. And on each appellate bench one is likely to find individual judges representing both points of view.

Often it is this individual and human element in judges that accounts for the rendering of dissenting opinions. An appellate court acts by majority vote. The usual course is for the whole bench to meet in conference shortly after a number of cases have been argued. At this time the cases are discussed briefly; in many courts one judge has been designated to give special study to each case and to lead the discussion at this first conference. Thereupon a tentative or preliminary vote is taken. Perhaps all agree; perhaps differences of opinion are manifested at once. Then one of the judges is assigned to prepare a preliminary opinion expressing the views of the whole bench or of the majority, as the case may be. A copy of this preliminary opinion is submitted to each judge and is considered by him before the next conference. Then and at subsequent conferences the several judges offer their comments and criticisms, and further votes are taken. If all then agree, the preliminary

opinion is rewritten so as to embody the suggestions arising out of the conferences, or it may be adopted without change as the opinion of the court.

But sometimes agreement is impossible, and the court announces a decision based upon the views of the greater number of its members. That decision is law no less than if all the judges subscribed to it. Yet who shall say that the dissenting judge is incontestably wrong? He may be the most learned judge upon the bench; he may have given special thought and study to the problem before the court; his judgment may be the embodiment of supreme human justice and wisdom. Yet unless other judges agree with him, his opinion is not law.

The extraordinary scope of power possessed by judges in the United States, as noted in an earlier chapter, leads to the frequent occurrence of such irreconcilable differences in our courts. In particular we have seen that the political and social philosophy of the judge is often a controlling factor in the formation of his views upon constitutional questions. An opinion in a case involving the right of laboring men to picket during a strike or in another case involving the right of freedom of speech in time of war, to cite but two of many examples, is an opinion that has bound up in it much besides abstract legal doctrine. The whole of his philosophy of life, his beliefs and his aspirations, his deep convictions resting in emotion that defies analysis and is often below the level of his consciousness, all emerge together as the stuff that makes a judge's opinion in such a case. Is it then a matter of wonder that another judge on the same bench whose fundamental approach to life is different finds himself under a compulsion to record his own views?

He does so by filing a dissenting opinion; and if the bench has divided almost evenly, we have the now familiar five to four decision with both majority and minority views supported by opinions of apparently equal learning and legal correctness. To many this is only disquieting. Wishing to think of law as

something certainly and necessarily right and of non-law as something incontestably wrong, they are disturbed. The more realistically minded, who regard the legal process merely as part of man's effort to regulate life and conduct for the best interest of society as a whole, view the phenomenon with greater equanimity. Some, including myself, go even further. We believe the dissenting opinion of today may be a guide-post to the law of tomorrow, and we welcome it as another indication that the legal organism lives and grows.

It should be clear that the decisions of appellate courts share with statutory enactment the leading place among the forces that make up the whole body of the law. As between the two it may be said that the decision is often the more important; for not only may a statute be declared unconstitutional and a nullity, but often its force and effect remain uncertain and vague until clarified by judicial construction. Judges in a lower court are bound by the decisions of the appellate court which is empowered to review their action, and their decisions are factors of minor consequence in the development of legal principle. If in this book I have devoted disproportionately little space to the appellate court, the explanation is obvious. It is not that I fail to recognize both the power and the importance of that institution, but that my own experience has been mainly in a less exalted sphere.

As a practicing lawyer, of course, I tried cases before courts of appeal. But my experience on the bench has made me realize that as a lawyer trying cases I was always in one sense an outsider not fully initiated into the mysteries of the legal process. My prepossession in the interest of my client deprived me of the mental detachment and impartiality of outlook requisite for an objective view of law as a social phenomenon. In writing this book, I have drawn principally upon my experiences as a judge believing that in those experiences I should find the material for a delineation of the law in some, at least, of its

essential characteristics, unmixed with the bias that colored my earlier observations.

For another reason, too, I have chosen to draw the material for this study mainly from trial court occurrences. In the conventional treatise on jurisprudence the lower court is almost ignored, and attention is given largely to the activities and the legal product of appellate courts. The greater dignity of such courts, their position of controlling influence in the development of the law, make this a natural and a logical division of emphasis. But this conventional treatment loses sight of one extremely important factor. Most cases never are appealed. They are tried in a lower court and that is the end of them. Even when counsel think they might win on appeal, the question of expense often stands in the way; and in many cases an appeal would be useless because of the limited scope of appellate review. Less than six per cent of the civil cases and less than one-half of one per cent of the criminal cases tried in our Baltimore courts are taken up on appeal, and I understand that in other jurisdictions the proportion is about the same. Therefore a study of law-in-action, of law as a living social force, ought to concern itself far more with the lower courts than has been customary in the past. It is true that the appellate judge speaks with authority; but the judge below and even the jury play an active part in the development of the law as well as in its application. Thus a picture of law such as I have drawn is not out of perspective merely because it places the lower court in the foreground. For most cases that court supplies both foreground and background of the picture.

CONCLUSION

As I look back over what I have written I recall a conversation with a lawyer a few months ago. I told him I was trying to write a book about law, but not a law-book, and that I

wanted to write it in such manner that a reader not trained in the law might gather from it a fairly comprehensive notion of what law is, particularly law in the United States. My friend asked at once what I had set out to prove—as he phrased it: "What is your thesis?" The question bewildered me. I was forced to admit that I did not want to prove anything. My only desire was to look at the law and to put into words what I should see. I told him this and added that the note books I have mentioned so often were the eyes I counted on to aid my own eyes in the search. He shook his head as though to say that was a very unimportant bit of work, scarcely worth the doing. Unless I wanted to prove something, unless I had a thesis, why write a book?

Now that the book is written, I discover that I must have wanted to prove something all the time, though I did not realize it in the beginning. For running through my whole work I find reiterated insistence upon one thought. Law is alive! Law is not a cold dead abstraction, it is a living product of many human minds. Like the minds from which it comes, law is not perfect. Sometimes it seems to stand still too long, often it falters in its march. But move it does, and forward too. Its goal is the perfect service of man's social needs. That goal lies a long way off; progress toward it is slow and toilsome. All of us must live subject to the control of law. If we know and understand its nature, something of its origin, and something of its manner of growth, the path of real progress will be made more smooth.

APPENDIX

Statement by Governor Albert C. Ritchie Commuting the Sentence of Herman W. Duker To Life Imprisonment

The law in Maryland, as in all, or certainly in practically all other States, is that a man is sane if he knows the difference between right and wrong, and appreciates the consequences of his acts.

In this case the Court (Judge Joseph N. Ulman), in conformity with the testimony of both State and defense, found that Duker is afflicted with a definite mental ailment or disorder, known as psychopathic personality, which had reduced his mental and moral responsibility and control, but that he is sane according to the legal standard. Being legally sane, Duker on the facts was found guilty of murder in the first degree. For that crime the law provides alternative punishments,—hanging, or imprisonment in the Penitentiary for life, as the Court, in its discretion, may decide is proper.

In this situation, I can understand how the Court, in the exercise of its discretion, might take the view that while Duker is legally sane, yet his mental disorder should be considered in mitigation of punishment, and so sentence him to life imprisonment instead of hanging.

I can also understand how the Court, in the exercise of its discretion, might take the view that inasmuch as Duker's mental disorder does not amount to insanity, it should *not* be considered in mitigation of punishment, and that Duker should be sentenced to hang.

What I cannot understand is how the Court could first decide—as it did—that Duker's mental disorder should be considered in mitigation of punishment, and that he should not be hanged; and

then sentence him to be hanged anyhow, not for his crime, but because the Penitentiary is the only place to which he could be committed, and because of the Court's prediction that in the Penitentiary Duker would be a dangerous prisoner.

It seems to me that if Duker is to be hanged, this should be because, all things considered, including his mental condition, hanging is the just punishment for his crime. I do not think he should be hanged because of anybody's prediction as to the kind of prisoner he might be.

Yet the mere prediction of the Court that in the Penitentiary Duker would be a dangerous prisoner,—a prediction, by the way, strongly combatted by competent witnesses,—completely overcame the profound conviction of the Court that Duker, because of his mental disorder, should not be hanged,—that it would in fact be a "tragedy" to hang him,—and this prediction was the Court's reason for sentencing Duker to death.

Facts

On the morning of April 20, 1931, at about eleven o'clock, in Baltimore City, Herman W. Duker, with his companion Dale Lambert, attempted to hold up and rob John W. Anderson, the driver of a milk wagon, who was on the sidewalk delivering milk.

What happened is described as follows in the agreed statement of Facts which appears in the Record for the Court of Appeals:

"Lambert, going to the pavement, asked Anderson for a bottle of milk, while Duker stood in the road. Lambert's coat was blown open, and Anderson saw a pistol strapped to Lambert's belt. Realizing that he was being held up, he picked up a milk bottle and attempted to strike Lambert with it. He then reached over and seized Lambert's pistol, pointing it towards Lambert's abdomen. Thereupon Duker, thinking that Lambert was about to be shot, pulled out a pistol and shot Anderson, aiming at his legs, so as to cripple him. Anderson died later in the day from the wound thus inflicted."

The Verdict

At the trial before the Criminal Court of Baltimore City, both Duker and Lambert pleaded "Guilty." Testimony was then offered,

covering the facts of the case, in order to enable the Court to fix the degree of guilt. In the language of Judge Ulman, this testimony "was so conclusive, that the Court unhesitatingly fixed the degree of the crime as murder in the first degree." Counsel for the defense acquiesced in this finding, and a verdict of first degree murder was entered against both Duker and Lambert.

The Sentence

It is provided by Article 27 Section 403 of the Annotated Code of Maryland that "every person convicted of murder in the first degree, his or her aiders, abettors and counsellors, shall suffer death, or undergo a confinement in the penitentiary of the State for the period of their natural life, in the discretion of the Court before whom such person may be tried."

Thereupon the Court proceeded to hear additional testimony in order to determine which of the alternative sentences it would impose upon Duker and Lambert, that is to say, death or life imprisonment.

Lambert Gets Life

The Court found Lambert sane, "of border line intelligence," not particularly dangerous to society and likely to become amenable to prison discipline. He was sentenced to life imprisonment.

Duker is a Case of Psychopathic Personality

With respect to Duker, the Court found that he is a case of "psychopathic personality." This ailment is thus described by the witnesses: It is a definite, abnormal mental condition, well known to the medical profession, and recognized as a distinct mental disorder. It appears in the official classification approved by the American Psychiatric Association and the American Medical Association, and is accepted in all governmental and official classifications of mental disorders. The psychopathic personality manifests itself differently and in different degrees in different persons.

The psychopath may, as in the present case, be a person who understands the difference between right and wrong, and who is sane according to the legal definition of sanity, as laid down by the

Court of Appeals in Spencer vs. State, 69 Md. 28. The testimony shows, however, that the psychopath is mentally and emotionally unbalanced and unstable. He lacks the power of control. He may know the consequences of his acts, but is not able to consider those consequences, or their results to him or to others, as a normal person would do. He cannot control his impulses, regardless of what that may mean to him or to society.

Six psychiatrists testified for Duker. They were Dr. Ralph P. Truitt; Dr. John R. Oliver, formerly Chief Medical Officer of the Supreme Bench; Dr. George E. Partridge, Director of Psychiatric Research for the Maryland Penal Institutions; Dr. M. S. Guttmacher, present Chief Medical Officer of the Supreme Bench, who examined Duker at Judge Ulman's request; Dr. Frank L. Christian, Superintendent of the Elmira Reformatory, and, at the second hearing, Dr. Ross McC. Chapman, Superintendent of the Sheppard and Enoch Pratt Hospital.

Two psychiatrists testified for the State, Dr. G. Lane Taneyhill and Dr. Andrew C. Gillis.

In addition, the Court had before it the reports of certain competent physicians and psychiatrists who had occasion to examine Duker before the Anderson crime occurred.

These witnesses all agreed that Duker is a psychopathic personality, and some of them pointed out in him certain characteristic symptoms of his malady in addition to those general symptoms described above,—immaturity, sexual irregularities, and so on. All agreed that morally and mentally Duker is not fully responsible for his acts.

Judge Ulman adopted this view. He found Duker to be a psychopath. No other conclusion was possible under the evidence. As Judge Ulman said, "every witness in this case agreed that Duker has not the normal emotional and moral impulses and controls—and every witness concluded that he is 'not fully responsible' for his actions."

More persuasive, to my mind, than the physicians who actually testified, are certain medical reports made on Duker before the Anderson crime occurred.

Some of these reports are in the printed Record, and others were filed as Exhibits. Some are long and remarkably minute and ex-

haustive in their study of Duker and his parents and relatives. I have examined all these reports with the greatest care.

To begin with, Duker's life has been a record of badness, perversion and delinquency. Nothing seemed effective to deter him from the repetition of his practices. There is no need to be specific as to their character.

When Duker was thirteen years old, the family physician suggested an examination at Phipps Clinic, but this was not had.

In 1925, when sixteen years old, Duker ran away from home. He wound up in the Hampton Farms Reformatory of New York City, where in April, 1927, he was sentenced to six months for petty larceny. He was paroled, and returned to Baltimore. Shortly afterwards he was arrested for robbing apartment houses, and in January, 1928, was committed to the Maryland Training School for Boys. He was then eighteen years old.

At this time Dr. John R. Oliver, then Chief Medical Officer of the Supreme Bench, made a written report to Judge George Solter upon Duker. Dr. Oliver went thoroughly into Duker's family environment and history, and pronounced him sane from a legal standpoint, but "rebellious," "anti-social," "emotionally unstable," acting "on the spur of the moment, without any adequate understanding or realization of the consequences of his actions."

Dr. George E. Partridge, who testified in this case, was then Psycho-Pathologist at the above institution, and in May, 1928, he made a report upon Duker, in which he concluded that "we should place him under the class of psychopathic personality."

Subsequently, Dr. Partridge wrote an article entitled "Psychopathic Personalities among Boys in a Training School for Delinquents." It was published in the American Journal of Psychiatry, July, 1928, Vol. VIII, No. 1, page 161. This article discusses the psychopathic personality at considerable length. It is a detailed study of fifty "especially problematic" boys, of whom twelve were psychopathic. One of these was Duker, and as to him Dr. Partridge concludes: "We should regard him as a psychopath of the chronic delinquent type, with some sexual psychopathy and with marked tendency towards the runaway reaction."

Mr. Harold E. Donnell, who was then the Superintendent of the

Maryland Training School for Boys, wanted Duker sent for treatment to the Sheppard and Enoch Pratt Hospital, a psychiatric institution; but arrangements for this were not made, and about that time Duker ran away, and went to New York, continuing there his abnormal and delinquent career.

In June, 1928, Duker was committed to the New York State Reformatory at Elmira, and Dr. John R. Harding, (now deceased), psychiatrist of that institution, pronounced him "a psychopathic personality." Dr. Lichtenstein, the court psychiatrist, had already reported him as "emotionally unstable and a constitutional psychopath." The Department of Research at Elmira recorded Duker as "weak willed, a psychopath with a contempt for authority and a disregard for the property rights of others. He has the unbalanced temperament, the indolence, the impulsive disposition and the utter disregard for the rights and feelings of others that go to make up the personality of a psychopath. Will need supervision and close watching when released from here."

In August 1929, while Duker was at Elmira, Dr. Frankwood E. Williams, Medical Director of the Mental Hygiene Society of New York, made a report upon Duker, in which the Doctor said, "he is as little able, on account of his psychopathic condition, to conform his conduct to social standards, as he would be to walk in the air." Dr. Williams strongly recommended that Duker be sent to the Sheppard and Enoch Pratt Hospital, upon his release from Elmira, for observation and treatment, but this was not done.

These reports from thoroughly reliable psychiatrists, all made before the Anderson crime occurred, are competent, disinterested and inescapable confirmation of the opinions of all the physicians who testified at the trial, both for the State and for the defense, that Duker is a definite case of psychopathic personality.

This is what Judge Ulman decided. The Judge was of the opinion that Duker was legally sane, but that because of his instability, abnormality and reduced mental and moral responsibility,—all due to his psychopathic condition,—he should not be hanged. The Judge was strongly and emphatically of this opinion. He referred to Duker's hanging as "a confession of social and legal failure." He called it a "tragedy."

Why, then, did Judge Ulman sentence Duker to be hanged?

Appendix

Why Duker Was Sentenced To Be Hanged

Consider the situation.

Being legally sane, the law of the State, under the undisputed facts, required Duker to be found guilty of murder in the first degree, and he was. But the law of the State does not require a person found guilty of murder in the first degree to be hanged.

On the contrary, the law says that such a person shall *either* be hanged, *or, in the discretion of the Court,* sentenced to life imprisonment. The law provides these two alternative punishments for first degree murder, and the Judge is completely free to impose either sentence he thinks the circumstances call for.

In fact, the Court's discretion to decide between life imprisonment and death is so absolute that Judge Ulman's decision could not be reviewed by the Court of Appeals. It was for this reason that the Court of Appeals declined to interfere, when Duker's attorneys appealed to that tribunal to set aside the sentence of death on the ground that it involved an abuse of the lower court's discretion.

Moreover, one thoroughly accepted ground for imposing the lesser rather than the severer sentence, when alternative punishments are provided, is the mental condition of the prisoner. When this does not amount to insanity, as it did not in this case, it is proper for the Court to *convict* the prisoner of murder in the first degree. But when it comes to imposing the *punishment,* then it is perfectly usual and sound for the Court to consider a lowered, abnormal or unstable mentality *in mitigation of sentence,* and as calling for the lesser punishment.

This was fully recognized by Judge Ulman himself, both expressly in his opinion, and by the fact that he received the evidence as to Duker's mental condition.

Now in the present instance we have a twenty-three year old boy, concededly the victim of a definite, accepted mental disorder. His case was well known to the medical profession, and had actually been written up, almost three years before the Anderson crime, in the leading American psychiatric publication. He was legally sane, but actually, because of his mental disorder, his emotional control was so lowered and restricted, his impulses so beyond regulation,

that the witnesses for the State as well as for the defense, agreed he was only partially responsible for what he did.

Judge Ulman did not think such a boy should be hanged, and said so emphatically. Why then did he sentence him to be hanged? No legal rules, no rigors or technicalities of the law required it. Why did Judge Ulman not exercise his discretion, and sentence Duker to life confinement, which was the disposition he thought and said ought to be made of him?

The reason given by Judge Ulman was that Maryland has no State institution to which a person suffering from Duker's mental ailment, and convicted of Duker's crime, can be committed by the Court; and if there were such an institution Duker could not be confined in it for life, "which (Judge Ulman said) is what should be done with him," because "in the eyes of the law he is not insane." Not being legally insane, Duker could not be committed to one of the State hospitals for the insane. The only place to which he could be sent is the Maryland Penitentiary; but Judge Ulman was unwilling to send him there, because, he said, Duker might be a rebellious prisoner, not amenable to prison discipline, and "a serious threat against the lives of the other prisoners and of the guards in that institution."

So the Judge sentenced Duker to be hanged.

Let us examine these reasons for the death sentence.

Duker Should Not be Hanged Because Maryland Has No State Institution for Such Psychopathic Personalities. No State Has One

It is, of course, true that there is in Maryland no special State institution for psychopathic cases, such as this case; and even if there were, Duker, being legally sane, could not be confined in it by the Court, unless the Maryland law were changed so as to permit the compulsory confinement of such psychopaths.

Judge Ulman's characterization of this situation as "a confession of social and legal failure," which leaves "no workable alternative" to "the tragedy" of hanging Duker, has caused in some quarters criticism of this State's legal and institutional systems which is totally unjustified.

There is not one State in the whole country which maintains a State institution for psychopathic prisoners of Duker's status, or whose laws permit the compulsory commitment or confinement of psychopaths of his type. Dr. George H. Preston, the Maryland State Director of Mental Hygiene, Dr. Ross McC. Chapman, Superintendent of the Sheppard and Enoch Pratt Hospital, and Mr. Harold E. Donnell, the Superintendent of Prisons, have separately investigated this question for me, and each advises me that this is the fact.

Judge Ulman, in his opinion, stated that "if the laws of Maryland were like the laws of Massachusetts, Duker might have been confined for life in a place of detention for defective delinquents immediately upon the diagnosis of his case by Dr. Partridge in 1928. Then John W. Anderson would be alive; Lambert would not be a prisoner for life; and Duker would not have to be hanged."

With great respect, the learned Judge is mistaken. He confuses in this case a *defective delinquent* with a *psychopathic personality* of normal intelligence. These are two perfectly distinct classes of mental disorder.

I am advised by the authorities at Bridgewater, (which is the Massachusetts State institution Judge Ulman had in mind), that they do not take "psychopathic personality cases as a group, but only as they appear among our defective delinquents and in our hospitals for the insane." In other words, Bridgewater is an institution to which psychopaths are only committed if they also happen to be defective delinquents or insane.

Duker is not insane. He is not a defective delinquent. He is not feeble-minded or of low grade mentality. He is a psychopath, as Judge Ulman describes so clearly in his opinion.

Were Duker a resident of Massachusetts, he could not be committed to Bridgewater, and no State in the country maintains an institution, such as the Court had in mind, to which he could be committed.

Indeed, only a very few States maintain institutions for *defective delinquents,* — Dr. Preston only finds two, — and a very few other States are undertaking to segregate such prisoners in their penal institutions. But it is hardly necessary to go into this, because, as Dr. Chapman advises me, "Duker would not be eligible for commit-

ment to such an institution, on account of the fact that he is not defective."

The plain fact is that psychopaths when found guilty of crime are in this country sent to the penal institutions. Mr. Donnell estimates that there are about 130 white and about 56 colored psychopaths in the Maryland Penitentiary now.

Perhaps with the advance of the science of penology, the States will in the future have State institutions for such cases. Whether this should be or not, is a question which admits of considerable diversity of opinion. But in this case the important thing is that there are no such State institutions now.

If, as Judge Ulman finds, Duker's psychopathic personality is such as to make his hanging a great wrong, then I cannot bring myself to think that this great wrong should be done because there is no Maryland State institution in which a case like his can be legally confined and treated. If Duker is to be hanged, I think this should be because, all things considered, hanging is the just punishment for his crime, and not because the State does not maintain some particular kind of institution. And it seems to me clear beyond question that Duker should not be hanged because this State does not maintain an institution in which he could be legally confined, when no other State in the country maintains one.

Duker Should Not be Hanged on the Prediction That He Will Be a Dangerous Prisoner

But, Judge Ulman says, the only alternative is to sentence Duker to the Penitentiary, and there he would prove a rebellious and dangerous prisoner, a potential leader of riots, a menace to the lives of guards and other inmates, and so he must be hanged.

This is tantamount to saying that if in fact Duker could not be prevented from instigating riots in the Penitentiary, if he would be in rebellion against authority there, and a serious threat against the lives of guards and prisoners, then, in the language of the Court, "in order to protect society and to prevent further probable homicides," it would be necessary for the State to kill him, somewhat as an individual may kill in his own defense.

To my mind, this question does not arise in the present case, be-

cause surely the probability of such dangers ought first to be at least reasonably clear. What is the testimony?

When the case was first heard by Judge Ulman, Dr. Partridge, Dr. Christian, Dr. Guttmacher and Dr. Truitt made statements upon which the Judge based his apprehensions in this regard.

When the plea for commutation was made before me the first time, and when it was urged by Duker's attorneys that Judge Ulman had misinterpreted the testimony of these witnesses, I suggested that the Court be asked to reopen the case in order to clear up any misunderstanding which might exist.

This was done, and on the rehearing Doctors Partridge, Guttmacher and Truitt, and Dr. Christian by letter, all gave testimony which, to my mind at least, cleared up substantially, if not entirely, any idea which might have been drawn from their earlier testimony that Duker would be a dangerous and menacing *prisoner,* or that he could not be readily restrained *in prison.* Dr. Chapman testified that he thought Duker stood a good chance of becoming a conformist prisoner. Mr. Donnell and Colonel Stuart S. Janney, the Director of Welfare, expressed the same beliefs.

Subsequently, the Judge submitted a memorandum, which expressed his final conclusion in these words:

"I think it became apparent during the supplemental hearings that the case has now boiled down to a very simple issue. That issue is not even a difference of opinion, properly so called. It is just a difference of prediction. I have said, in my formal opinion heretofore filed, that, under existing laws and institutions, I predicted evil and dangerous consequences if the defendant should be confined in the penitentiary for life. As a judicial officer, concerned with the protection of society, I was unwilling to take the responsibility of so confining him. Certain expert witnesses and certain administrative officers of the State have now made a different prediction. Upon the whole record, I am compelled to adhere to my original conclusion."

Thus the Court confirmed its former sentence that Duker be hanged.

I have previously said that I do not think Duker should be hanged because this State does not maintain a State institution for his confinement such as no other State maintains. Neither do I think he

should be hanged because of the Court's prediction that he will be a dangerous prisoner.

In the first place, the witnesses on whose testimony this prediction was based disclaimed having intended to convey such idea. The point had not been understood by any of them in the beginning, and as soon as it was understood all testified that they had not meant that Duker *in the Penitentiary* would be a menace, and a threat to the lives of others.

Dr. Partridge, who is thoroughly familiar with the prisoners in the Maryland Penitentiary,—he has made 1400 examinations of them,—testified that many are more dangerous than Duker. Mr. Donnell advises me that he believes there are at least twenty men in the Penitentiary of more dangerous psychopathic tendencies.

When, therefore, the Court finally decided that Duker must be hanged because of the Court's prediction of "evil and dangerous consequences if he should be confined in the Penitentiary for life," there was, as I read the Record, no evidence before the Court, certainly there was no substantial evidence, on which this prediction could be justified.

But even if there had been, it was at most a mere prediction. The Court himself said the witnesses made different predictions. Who can say that the Court's prediction will prove true? Who can say that the contrary prediction, made by competent witnesses, will not prove true? What we actually know is that Duker has been in the Penitentiary for ten months, and during that time has not caused the slightest trouble or concern of any kind. Furthermore his previous prison or correctional history contains nothing to indicate that in such a setting he has ever been a serious trouble maker. Maybe in the Penitentiary Duker will ultimately give trouble. Maybe he will not. In any case, I do not think he should be hanged on anybody's prediction about it. To my mind, that is not at all the proper test. If Duker is to hang, I think, as I have said before, this should be because hanging, all things considered, including his mentality, is the just punishment for his crime.

With great respect to the learned Judge who imposed the sentence of death, I do not consider that the reasons given for that sentence justify it.

Duker's Sentence Will Be Commuted to Life Imprisonment

The case reverts, therefore, to the findings of the Court upon the testimony of the witnesses for both State and defense, — confirmed by the medical reports made before the crime, — which I have previously set forth at length.

There is no need to undertake to draw the line between uncontrollable impulses which are due to the mental disorder of psychopathic personality and those which are not. I can only decide this case upon the Record before me, and on this Record there is complete agreement between the Court and all the witnesses and medical reports that there is a definite, recognized mental ailment known as psychopathic personality, that Duker is a victim of this ailment, and that because of it he is not fully responsible, mentally and morally, for what he does.

The literature of the subject, which I have read at considerable length, and the actual practice of the courts, recognize that reduced mental and moral responsibility, short of insanity, while not a justification for *reducing the degree of guilt,* (that is, first degree murder will still be first degree murder), may be complete justification for *mitigating the punishment,* and for giving the lesser instead of the severer sentence, where, as in the present case, the court has the discretion to decide between alternative sentences.

Judge Ulman makes it abundantly clear that, because of these very considerations, he would not have sentenced Duker to be hanged, but would have sentenced him to life confinement, except for the reasons which have been discussed.

As already explained, I do not consider these reasons adequate to justify hanging, and, therefore, I will exercise my executive discretion and do what the Judge wanted to do in the exercise of his judicial discretion, but did not do for reasons he deemed sufficient, but which I cannot accept.

I will commute Duker's sentence to imprisonment in the Maryland Penitentiary for life.

SUGGESTIONS FOR FURTHER READING

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CARDOZO, BENJAMIN NATHAN: *The Growth of the Law* (1924)

CARDOZO, BENJAMIN NATHAN: *Paradoxes of Legal Science* (1928)

INDEX

A NOTE ON THE TYPE IN WHICH THIS BOOK IS SET

DEVICE OF ROBERT GRANJON

This book is set in Granjon, a type named in compliment to ROBERT GRANJON, *but neither a copy of a classic face nor an entirely original creation. George W. Jones drew the basic design for this type from classic sources, but deviated from his model to profit by the intervening centuries of experience and progress. This type is based primarily upon the type used by Claude Garamond (1510–61) in his beautiful French books, and more closely resembles Garamond's own than do any of the various modern types that bear his name.*

Of Robert Granjon nothing is known before 1545, except that he had begun his career as type-cutter in 1523. The boldest and most original designer of his time, he was one of the first to practise the trade of type-founder apart from that of printer. Between 1549 and 1551 he printed a number of books in Paris, also continuing as type-cutter. By 1557 he was settled in Lyons and had married Antoinette Salamon, whose father, Bernard, was an artist associated with Jean de Tournes. Between 1557 and 1562 Granjon printed about twenty books in types designed by himself, following, after the fashion of the day, the cursive handwriting of the time. These types, usually known as "caractères de civilité," he himself called "lettres français," as especially appropriate to his own country. He was granted a monopoly of these types for ten years, but they were soon copied. Granjon appears to have lived in Antwerp for a time, but was at Lyons in 1575 and 1577, and for the next decade at Rome, working for the Vatican and Medici presses, his work consisting largely in cutting exotic types. Towards the end of his life he may have returned to live in Paris, where he died in 1590.

This book was composed, printed, and bound by The Plimpton Press, Norwood, Mass. The paper was manufactured by S. D. Warren Co., Boston.