B A T T L E F O R J U S T I C E

by Tom Sargant

CHAPTER I

FAMILY BACKGROUND

No account of my work and achievements as Secretary of JUSTICE and of the events that led up to it would be complete without a tribute to my parents and upbringing.

My father's family were colonial merchants whose fortunes had fluctuated with the rises and falls in the price of metals, rubber and spices. His mother's family, the Carrs of Highgate, were successful industrialists. Between them, they provided me and my brothers and sisters with a large company of uncles, aunts and cousins, and a background of culture and intellectual interests.

By common consent, my father was the outstanding member of his own family of eight. He was a deeply committed Methodist who radiated goodness and kindness and devoted much of his spare time and wealth to helping and befriending the poorer families in Upper Holloway who attended the Archway Methodist Church. He was a popular and commanding figure in the Mincing Lane, but, he was prone to play the markets beyond his firm's financial resources and was too easily talked into unwise deals by smart alec brokers. His fortunes fluctuated throughout my youth and shortly after I entered the family business he got caught on the wrong side of the rubber market and virtually lost everything.

My mother came from quite different stock. Her grandfather was the son of a Herefordshire blacksmith. His mother was a devout Methodist who brought him up strictly and sent him as a young man to Monmouth, where the records show that he became a tea merchant and a pillar of the local church and community. He married a girl called Nancy Price, whose origins were the subject of a family legend which we have only recently been able to turn into a historical fact - namely that she was the illegitimate daughter of the Duke of Beaufort and, very probably, by a notorious courtesan of her day, Harriet Wilson.

Shortly after his marriage he became mysteriously possessed of a brewery in Pontypoc

My grandfather, William Davies Walters, was his oldest son and sales-director of the brewery, but he 'got the call' and entered the Methodist ministry. He was a powerful evangelist, helped to found the London Methodist Mission and was its first General Secretary. He married the granddaughter of the Rev Thomas Rought, one of John Wesley's converts, who bore him fifteen children. They all had impressive personalities. Five of the seven sons entered the Methodist or Anglican ministry and two of them became Presidents of the Methodist Conference. She was a remarkable woman, if only because she managed to cope with the problem of moving house every three years with up to ten children. My grandfather thought it discourteous to inspect the new house in advance and my mother used to tell us stories of how they would arrive and find that four of them had to share a bed - two at the top and two at the bottom. By a strange quirk of fate, she was killed while saving the life of a child who had run in front of a brewer's dray.

I regarded my mother as the embodiment of law and order. Before her marriage she had acted as her father's secretary and organized all his fund-raising tours. When my father developed political ambitions and fought four elections as Liberal candidate for North Islington, she organized his campaigns and put the fear of God into his agent. At his fourth attempt he lost by only 500 votes and would have won if he had not proclaimed such strong temperance views. The busmen at the Holloway Depot used to call out to him, "we'd all vote for you, Norman, if it wasn't for the drink".

Despite her outward sternness, my mother was essentially kind, and interested in people, but she lacked imagination and could never come to terms with my father's romantic nature. She had no sympathy for the rogues and ne'er-do-wells who preyed on his good nature.

We were seven in family and I was the eldest of three boys sandwiched between four girls. We were brought up very strictly. For those of us who were at home this meant regular attendance at morning and evening service and at Sunday School. My father held daily family prayers after breakfast until a few days before his death. The youngest child sat on his knee and many torn pages in the family bible bear witness to this. We lived in a large house in Hornsey Lane standing in four acres of garden and in my father's more affluent days we were looked after by three maids and two nurses. But we enjoyed none of the luxuries of

school holidays we made music together on Sunday evenings. This was the only diversion we were allowed - the playing of games being strictly forbidden.

My father's great love was for Handel's Messiah. Every year, at Christmas or Easter, and sometimes both, he took us to the Gallery at the Albert Hall, where we heard all the great conductors and singers of the day: Sir Thomas Beecham and Ben Davies' rendering of 'Comfort Ye' stands out in my memory. I have acquired the same love for this mighty work as my father and have never lost it.

He was also keen on sport and anxious that we should all excel in some way. He played cricket until he was well over fifty and was playing tennis three days before he died of a virus pneumonia at the age of 72.

I can best sum up this brief account of my upbringing and family background by saying that it was impossible to live up to, but was equally impossibl to live down. Although it gave me a narrow view of the world, it also gave me the only personal qualities that I value and I have never had cause to regret it.

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CHAPTER II

EDUCATION AND EARLY CAREER

I was an unpleasantly precocious child, quick to learn and with an excellent memory. Whereas all my brothers and sisters were sent to boarding school, it was decided that I should go to Highgate School, where my father had been before me. I was given a good grounding in classics & mathema in Highgate Preparatory School and when, at the age of 11, I went up to the Senior School, I went straight into the fourth form. In those days at Highgate the top boys in a form were moved up every term and I found myself in the Classical Sixth before I was fourteen.

This was in many ways a disaster. I was too emotionally immature to be accepted by boys of 17 and 18. My form master was a loveable old parson who had taught my father before me and used to peer at us from time to time over the top of his spectacles. Some of us took advantage of this and I once narrowly escaped being sent down to the Fifth Form when he caught me playing chess on a pocket set with the boy sitting next to me. He was, however, a superb classical scholar and fired me with a zeal for writing Greek and Latin verse. By the time I was 17½ I had won all the available school prizes and was awarde a minor scholarship at Cambridge.

My headmaster however, a Dr Johnston who bore the appropriate initials J.A.H., set great store on major scholarships and persuaded my father to let me stay on for a further year on the understanding that I would be made Head Boy. I was also a good all-round athlete and he wanted me to win the Public Schools Mile Championship. I duly fulfilled this wish and the Times report of the race: "T. Sargant (Highgate) came from nowhere in the last 100 yards to win easily" to some degree foreshadowed my life style.

His main wish, however, was denied him. My father's financial situation had taken a turn for the worse. The younger children were still at boarding school. My elder sister had just gone to Cambridge. My brother William had set his heart on becomg a doctor. I therefore told him that if he wanted me to give up the idea of going to Cambridge and join him

in the family business I was ready to do so. I cannot pretend that this involved any great sacrifice on my part for by then I had become bored with the classics and my thoughts were turning to politics and economics.

There was another reason for my decision that I have not yet mentioned. I had been afflicted since early childhood with a chronic stammer. I was told that when I was a baby, my pram had rolled down some steep steps and I had sustained a minor concussion. The stammering took a strange form. It came over me whenever I was faced with a personal confrontation of any kind, or the need to ask questions or give explanations. This was a great handicap to me in my personal relations. I could not take an intelligent part in argument I was constantly teased, and became shy, lacking in self-confidence, and very much of a bear. My parents sent me to a succession of psychiatrists and speech therapists, but none of them could help me. I did not want to speak in an artificial w mainly because once I got started I could read with comparative ease and twice won the School reading prize, to the obvious aggravation of masters who had had to put up with my stammering in class. I could also speak in public if I knew what I was going to say. The affliction remained with me until I was we over thirty when, for no reason I could explain, it left me and has since only returned in a mild form when I have been overtired.

After I left school, my father sent me to Montpelier University for six months to learn French. I there met a Czech girl, some years older than myself, whom I subsequently married. My parents advised me strongly against the marriage but I was obstinate and wanted to escape from my Methodist strait-jacket. After a few months in Mincing Lane I spent six months in the office of our agents in New York. On returning I found that the atmosphere of Mincing Lane was not to my liking. I made a number of good friends but I did not enjoy the wheeling and dealing of the market place. My father got caught on the wrong side of a steep rise in the price of rubber. This led to a dispute with his two brothers, the dissolution of the partnership and the loss of my father's entire fortune. He was rescued from bankruptcy by two friendly firms and started up again on his own but he could only scrape a modest living and it

became clear that there was no future for me in Mincing Lane and that I would have to find some other way of earning a living.

It so happened that an old friend of the family was the head of the bullion department at N.M. Rothschild & Sons who owned the Royal Mint Refinery. Great Britain's abandonment of the Gold Standard in 1931 had led to large shipments of gold from India arriving in London for refining. Another clerk was needed, and I was offered and accepted the job at a salary of £240 a year plus free lunches in the staff canteen. In the years that followed I had to abandon all my political ambitions. Every week-end hundreds of boxes of gold bars arrived on the P & O steamer from India. This was followed by boxes of gold jewellery from the Near East and Far and bars of melted jewellery for all parts of England. All this had to be weighed and checked by a member of the staff before and after refining and the fine gold and silver contents calculated and the accounts typed.

No sooner had the gold rush subsided that the West African silver coinage was sent to London for refining and realization and this was followed by thousands of boxes of Chinese dollars, collected from the provincial treasuries and sent to London to finance the Sino-Japanese war. When theJapanese penetrated the mainland they plundered what remained, melted it in the Tokyo Mint and sent the resulting rough bars to London. We all knew where it came from but this did not worry the international bankers who handled it.

We worked long hours for long periods and were paid overtime at the generous rate of 50p for every evening we stopped after 7pm and £1 for Saturdays and Sundays. Just before the war my friend in charge of the bullion department died. His successor was a man without scruples who took an instant dislike to me, turned down any suggestions I made and blocked any increases in my salary. By the time war came,we had installed a large copper rolling plant, and the foundry was turned over to casting brass billets for shell cases from swarf and scrap. I was put in charge of buying, costing and controlling metal supplies and, through the intervention of Lord Rothschild, I was eventua accorded the status of commercial manager and given a substantial increase in salary.

I can have nothing but admiration and respect for the members of the Rothschild family with whom I had to deal. In the early days ot the war Mr Anthony de Rothschild, the partner who looked after the Refinery, called together all the sta and foreman and told us that he would like us to break even, but we were not to make any profit. He further told us that there was to be no fiddling over licence applications or unnecessary husbanding of labour. This had an astonishing effec on morale. We were in a very vulnerable area, adjacent to docks and a railway shunting yard. The demand for shells was such that we had to keep the foundry working for three shifts through the worst of the blitz. The work-force agreed to this on the understanding that two members of staff would roof-spot throughout t night and warn them of imminent danger in time for them to get down into the vau We were lucky enough to escape a direct hit but on many nights there was fire and destruction all round us and many of the men arrived home to find that their homes had been bombed. In spite of this there was very little absenteeism and some of the men would walk miles to get home or come to work.

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CHAPTER III AN INNOCENT AT LAW

At the beginning of 1938 my marriage started to break up. The gulf between our backgrounds and religios beliefs proved to be too great. We separated at the en of the year and I gave her custody of our two daughters, then aged 8 and 5. She agreed to divorce me in 1942 and I married my present wife, Dorothy. She later married a famous Czech Professor of Egyptology, who gave her a much better and fuller life than I could ever have done.

Soon after we parted company I gave up the flat in which we had lived and rente two rooms in Mornington Crescent for 15/- a week. After a while some good frie offered me a large ground floor room in a flatlet house on Haverstock Hill, Hampstead. The husband was a pacifist and when war threatened they decided to emigrate to Australia. They offered to sell me the remainder of their lease and t fittings for a modest sum that I was able to borrow from friends. This gave me a financial base for the next 25 years but it brought about an encounter with the law which very nearly led to disaster.

In September 1940, before the main blitz on London had started, a marauding pl dropped a 1,000 lb bomb about 300 yds from my house. I went out in the early morning and found that it had fallen on an Anderson shelter. Three women had b in it and had been taken to the Hampstead General Hospital. I thought no more about it but two weeks later, when the blitz was at its height, my Austrian hous keeper telephoned me at the office to tell me that a Mrs Barry and her daughter,

who had just been discharged from hospital, had called and asked if I could let them a room. I told her that she could take them in and they duly returned with a billeting order.

I came home that evening and was horrified by what they told me. They had been in a flattened Anderson shelter, taken to Hampstead General Hospital and put in a ward under the care of a Harley Street consultant, Dr Lawson Whale. He had behaved very badly to them and other patients in the ward, spoken to them roughly and made them cry, and discharged them before they were ready and willing to go. There was no doubt about the truth of their last complaint. Their faces were still scarred and they were in a highly nervous state. The next day the other daughter came to the house and confirmed what they had told me about Dr Whale. There was a heavy raid that night and succeeding nights. The other occupants of the house and two neighbours used to shelter in my basement and we were all affected by the near panic state of the two women when the gunfire was heavy or bombs dropped nearby. This prompted me to ask my psychiatrist brother to recommend a suitable sedative. Two nights later I was fire-watching at the Refinery and after a hectic night I sat down at my typewriter and wrote an angry and undoubtedly libellous letter of protest to the Hospital Secretary. In it ** I said that a surgeon in one of the wards had behaved in a brutal and callous way towards Mrs Barry and her two daughters and was unfit to be in charge of air-raid casualties. I described the way in which they had upset all the occupants of my house so that I had had to ask my brother for some sedative pills. In reply to an enquiry I identified the surgeon as Mr Lawson Whale.

In due course I received a reply from the Chairman of the Management Committee, who by chance was the senior partner in one of the firms that had rescued my father from bankruptcy, assuring me that my complaints had been investigated and found to be without foundation. This made me angrier still and I wrote a further letter saying that I was not prepared to accept his assurances and that unless my complaints were taken seriously I would take them up with the Minister of Health and our local M.P. The next communication I received was from the solicitor to the Medical Defence Union informing me that I libelled their client, Dr Lawson Whale, and that unless I was prepared to make an apology in terms dictated by them they would serve me with a w

** This letter to be printed in full.

I replied to this in conciliatory though somewhat naive terms. I said that no honest man could be expected to agree to signing a document he had not seen but I would be willing to meet Mr Whale and, if I found that I had done him any injustice, to make suitable amends. I also admitted that I had been in error in assuming that both daughters were in his ward.

In the meantime I had decided to go and see the Hospital Secretary. I told him what had happened as the result of my letter and to my great relief found him both friendly and sympathetic. He told me 'off the record' that Dr Whale was a strutting game cock who continually upset patients. He hinted that the Barrys may have been discharged because he wanted the beds for his private patients and that Minutes of the Management Committee would be helpful to me. This was a real gift of providence and greatly strengthened me in my resolve to resist Mr Whale's demands, but I discovered that it was not necessarily as helpful as I thought it would be. In those days you could only plead justificatic in a libel suit if you could prove the truth of every fact in the libel and I had mistakenly implied that the younger daughter was in Dr Whale's ward. I could therefore only plead that the letter was privileged and this meant that evidence relating to anything that had happened after I had written it could not be pleade In due course the writ was delivered at my door by a seedy looking gentleman whom I defiantly told to inform his employers that they had picked on the wrong mar

I then decided it was time to take legal advice. I consulted a brother-in-law who was a very wise and experienced City solicitor, and he very helpfully arranged for an informal consultation with Valentine Holmes, who was the leadir libel counsel then in practice. His advice was shattering. He told me that I had no hope of winning, that the only available defence was qualified privilege for which he could see no grounds. Unless I could find some way of settling the action I would face financial ruin. When we left him my brother-in-law said to me : "If you are determined to fight, Tom, all I can suggest is you fight it yourself," and this I eventually decided to do.

A barrister friend drafted what I thought was an inadequate defence to the statement of claim. It started before by saying that I denied writing the letter. When I told him this was a nonsense he replied, "You always put that in because it makes the other side prove it". I told him I wanted none of that, so we cut it out before I filed it.

The next thing I received was a summons to appear before a Master to answer an application by the plaintiff to strike out my defence. I was told that this was part of the game played with litigants in person, so I went along and successfully asked for an adjournment and leave to amend. By that time I had become seriously to wonder whether Mr Holmes had correctly advised me that I had no grounds for pleading qualified privilege or whether he had done this for my own good. So I borrowed a copy of "Gatley on Libel and Standard" and took it with me into the country for a long weekend. I there found to my relief and amazement that my letter appeared to be covered by qualified privilege under at least four substantial heads, viz.

(a) I was a ratepayer in Hampstead and therefore contributed to the cost of running the hospital

(b) If I was injured in an air-raid I would be taken there

(c) The Barrys had been billeted on me and had disturbed my household

(d) I had written the letter in good faith and in the public interest.

The only open issue appeared to be that of malice and I was confident that once I could get into the witness box, I could dispel any such charge. As it turned out my main problem was how to get there.

I accordingly redrafted my grounds to include these points, but before I could finalize them and put them in, I received a call to go and see Sir Kenneth Brown, the Senior Partner of Kenneth Brown, Baker Baker. My wife had started divorce proceedings, and he was acting for her. She had told him about the libel action a he was worried as to how its outcome might affect my ability to provide for her and our two children.

I told him my story and said that if the worst happened I would give her most of n salary and obtain help from my family. He was a grand old man and very friendl and offered to talk to the other side and see if they would agree to an honourabl settlement. When I went back to him he told me that they would accept nothing less than the apology they had demanded, but in the meantime he had persuaded Valentine Holmes to tidy up my revised defence. This was met with a lengthy request for further and better particulars. I was advised to hedge my replies but I stuck to my resolve not to play any legal games and replied to the questions fully and frankly. In the meantime I had asked all the six people who had sheltered in the basement with the Barrys if they would come to court as witnesses, but with one accord they all refused with the excuse that they did not want to give evidence against a doctor for fear of what might happen to them if they were taken ill. I was thus deprived of all my witnesses and my remaining hope lay in the Hospital Secretary and his Minute Book, if, against all the advice I had received, I could get it into court.

Then, when I was beginning to despair, I had another gift from providence. I had written to the National Council for Civil Liberties asking if they could give me any legal help and I received a call from a young solicitor, John Oliver, asking me to meet him. I told him my story, he read the pleadings and then to my surprise and joy he said : "Mr Sargant, I think you have quite a good chance of winning this case. If you want me to, I will take it on for you on the basis that you pay me only if we win and I think that I can persuade John Platts Mills to be your counsel on the same basis".

Before, however, we could have any further conversations, I was laid low by a serious lung abcess. Some weeks previously, when I was returning from a visit to my mother in Sevenoaks, a heavy blitz developed as we ran into Cannon St Station. During the journey I had got into conversation with the only other occupant of the carriage and had learned that his name was Leitner, and that he was a Harley Street consultant of Hungarian origin who knew my psychiatrist brother.

We waited for a lull in the bombing, ran across to the Bank Underground Station and had just got down on to the Central Line platform and moved a few yards to the right when a 2,000 lb bomb landed in the booking-hall. The blast swept down the escalator and out on to the platform. All the lights went out and the air was filled with swirling dust and debris. We had just recovered from the first shock when a train drew in and by its lights we could dimly see scores of bodies lying near the exit from the escalator. Visiting the scene two days later I learned that 20 or more people waiting for the train had been swept on to the line and killed by it. By some miracle we had both escaped injury and we later agreed that we had not felt any blast.

A party of soldiers came off the train and as best we could we sorted out the living from the dead and helped or carried them down the spiral staircase to the Northern Line, where Dr Leitner set up an emergency medical station. There was no medical supplies or first aid equipment of any kind in the station and no emergency lighting. Despite this, Dr Leitner set to work, bound up compound fractures with improvised appliances, dressed a score of head wounds and gave fifty injections or morphia he fortunately had in his bag. No man could have worked more efficiently and he must have saved many lives. In the course of my own efforst I had breathed in more dust and debris than was good for me and it w this that was later the cause of the abcess.

Early the next morning he tracked me down at my home. We exchanged impressions of the night's events and formed an enduring friendship. I wrote to a senior official at the Home Office describing the lack of medical supplies and suggesting that Dr Leitner be sent a letter of thanks. An enquiry was ordered and I received a somewhat curt summons to attend. I asked if I could bring Dr Leitner with me and was told I could. I asked for a station porter who had provided me with information to be allowed to attend as a witness, but he did not appear. After we had given our evidence, the Chairman, with the help of the City Corporation officials, proceeded to refute or explain away all our criticisms.

They made it appear that we were the offenders and officialdom blameless. There were ample medical supplies in the Guildhall, but the relevant authority had not the structural work for the medical aid post. The lack of emergency lighting was attributed to the same cause. The Chief Medical Officer said blandly that it would be a waste of supplies to equip the shelters in the way I had suggested they should be. When I suggested that many people had been killed because the only sanitary facilities were in the street, the Clerk to the

The enquiry was about to be closed when I suggested that Dr Leitner should be thanked for his services . The Chairman responded grudgingly, adding as if by way of rebuke that he was lucky to have so much morphine with him. He never received a formal letter.

I have told this story at some length because of its relevance to battles with officialdom that I was subsequently called upon to wage.

I was taken to St Mary's Hospital where I had to stay for six weeks. The chest consultant looking after me was a friend of my brother and had been told about my troubles. He took me to his room one night and told me that he would like to help me because he thought that the worry about the case was delaying my recovery. He was on the Council of the Medical Defence Union and would try to persuade them to call it off. A week later he sent for me again and told me that they would not budge. I was the only person who had ever stood up to them and they were out to smash me. This news was far from cheerful, but it at least told me what I had to face.

When I came out of hospital, Lord Rothschild, who had a watching brief on the Refinery, asked me to come and see him. He had been told about my illness and my worries about my case. I explained the full circumstances to him and without hesitation he said that he thought I was quite right to fight the action and that he would pay for the best leading counsel I could obtain. This could only be Valentine Holmes, about whom I had some doubts, but after consultation with John Oliver I agreed that he should be briefed.

I then had a meeting with John Platts Mills and explained to him how I wanted my defence conducted. I wanted Mr Whale to be cross-examined on the basis that he was a kind and considerate doctor rather than as a villain. When I went into the witness box I wanted to be asked all the awkward questions that plaintiff's counsel was likely to ask me so that he would have no ammunition left to fire at me. He clearly thought I was a bit mad but after some discussion he eventually agreed to pass these instructions on to Valentine Holmes.
I told him that I had sub-poenad the Hospital Secretary and the Minute Book and one of the Barry girls, but he told me that there was no chance of getting in the Minute Book and expressed doubts about the wisdom of calling the girls,

[illegible] would only damage them.

On the day fixed for the trial I met Mr Holmes outside the court. He told me that he had been talking to Mr J.P. Sandilands, Mr Whale's counsel, who had offered not to press for costs if I would make some kind of apology. I said that I wasn't interested in any such offer. He then said that I had always offered to talk to Mr Whale. He was round the corner, so why not go and see what he had to say? I took his advice but found that he was as obdurate as his lawyers. I reported this to Mr Holmes who continued to stall. In the end, my pent-up tensions exploded. I lost my temper and barked at him : "Mr Holmes, you are being paid to fight the case, so for God's sake get inside and fight it". And I pushed him through the door of the court.

Before the trial proper started, there was a legal argument about whether or not my letter admitting error should be kept in the bundle. I had been advised that it was highly prejudicial to my case but to my delight Mr Justice Atkinson had other ideas. He looked at Mr Holmes and said : "While you have been arguing I have been reading the letter and all it tells me is that Mr Sargant is an honest man". This buoyed up my confidence.

Counsel's opening speech for the plaintiff made me squirm. He read out my letter in the most pompous tone of voice he could muster. He called me an interferring busy-body and accused me of being malicious because I had refused to accept the assurances of the Chairman of the Management Committee. He ended with this jibe : "This man was presumptious enough to assume the role of a doctor. Perhaps he would like to be the judge in his own case". This was followed by a succession of doctors and nurses called to testi fo the kindness and good nature of Dr Whale. A surgeon gave evidence to the effect that Mr Whale had no responsibility for the Barrys and that they showed no signs of shock when they were discharged. It looked at this point that I would need a miracle if I was to win the case. I prayed for one and it came. At the lunch adjournment, the Hospital Secretary came up to me and said :

"Mr Sargant, I can't stand this any longer. These witnesses are all telling lies and I am going to show you the Minute Book". In it was an item that read : "The Committee considered a letter from Mr Tom Sargant complaining about the conduct of Dr Lawson Whale towards some air-raid casualties and found it to be substantially justified".

I hastened to show it to Mr Holmes and beseeched him to find some way of getting it in. He expressed doubts, but promised to do his best. My impressio was that this was the first time he had appreciated the strength of my case and that his professional reputation was at stake.

When the trial resumed, Mr Whale went into the witness box and vigorously denied having ill-treated the Barrys or being in any way responsible for their discharge. Mr Holmes then rose to cross-examine and after asking a few harmless questions held up the Minute Book. Mr Sandilands promptly jumped up and protested that anything that was in the Minute Book was evidence after the libel and not admissible as evidence on a plea of privilege. Mr Holmes then played his master trump : "Your Lordship, I would like to point out to my learned friend that I am not seeking to introduce the Minute Book as evidence in the case, but merely to rebut the charge of malice made against my client because he refused to accept the assurances of the Chairman of the Management Committee. The Judge accepted this. The usher handed the Book to Mr Whale and the following exchange took place.

Mr Holmes : "Now, Mr Whale, have you ever seen that book before?"

Mr Whale : "No, sir".

Mr Holmes : "Will you please look at the top of that left hand page and read what it says".

Mr Holmes : (After a pause) "Will you please read it aloud."

Mr Whale : (hesitantly) "The Management Committee considered a letter from Mr Tom Sargant complaining about the conduct of Mr Lawson Whale towards some air-raid patients and found it to be substantially justified".

Mr Holmes : "We did not hear it properly, Mr Whale, so will you please read it again more clearly".

And so the embarassed Mr Whale twice had to read out his own condemnation. I naturally thought that this would be the end of the case. Mr Holmes left the Court to go to another case, but Mr Plattis Mills rose and told the Judge that he proposed to argue the case for qualified privelege. "There is no need fc you to do that" the judge replied. "The letter is clearly protected by qualified privilege. The only issue is malice, so will you please put your client in the witness box".

My examination and cross-examination went exactly as I had planned it. When Mr Sandilands rose to cross-examine me, he quickly ran out of questions and unwisely asked me why I had not withdrawn my complaint after the Chairman of the Management Committee had told me that it was without foundation. I turned to the Judge and asked him if I could answer the question i full. He told me to go ahead and I was thus free to tell him about my conversation with the Secretary and of his description of Mr Whale as a struttin gamecock. For good measure I threw in two or three other opinions I had obtained at the time from nurses and former patients. Mr Sandilands threw up his hands and sat down.

For the second time I thought that the battle was at an end, but this was not to be. He wanted to show that I had based my letter on unreliable evidence and we had to call Eileen Barry. Her evidence was shattering. With a strong, clear voice and the scars still visible on her face she gave a straightforward account of how Mr Whale had behaved towards her and other patients in her ward. Mr Sandilands dare not cross-examine her but hastily asked for an adjournment on the grounds that he had to go to another case. On the following morning, counsel on both sides conferred and Mr Holmes came and told me that Mr Whale was ready to withdraw his action or my terms and pay all my costs. I was asked, however, if I would be merciful

as he was shortly to face a serious charge of knocking down and injuring a young girl on a pedestrian crossing. In the end I agreed that his counsel would say on his behalf that, having seen Mr Sargant in the witness box he was satisfied he had acted responsibly and throughout in good faith. For my part I agreed to say that my letter was too strong in its terms and I was sorry.

Mr Justice Atkinson, who had behaved with impeccable fairness to me throughc the trial, thought it necessary to say that he was very satisfied with the result of the case so long as it was clear that there was no reflection on Mr Whale. He further took unfair advantage of his judicial position by making cruel and uncalled remarks about hysterical women. This rightly made Mrs Barry and her daughters very angry.

For my part I could not resist saying to Mr Sandilands after we had agreed the terms of the settlement : "You see, Mr Sandilands, I was the judge in my own case after all".

I later learned that either Mr Whale had not been aware of the contents of the Minute Book or he had not told his solicitors about them. If he had, the action would probably never have been brought.

I did not obtain all the satisfaction I was entitled to because the terms of the agreed order did not entitle me to recover all the costs I had incurred and the Press reports of the trial proceedings were heavily biassed on the side of Mr Whale. They did not even hint at any of the evidence in my favour which had come out in the course of the trial. But I had justified my stand and vindicated my faith and this is what most mattered to me.

Above all, I gained first hand experience of the unbelievable pressures which can be and are brought to bear on litigants who dare to stand up to

powerful vested interests, and I have often wondered what would have happened if I had come from a different background and had not been, as my mother used to describe me, "as obstinate as a mule".

When I became Secretary of JUSTICE I found it easy to believe disillusioned litigants who came and described to me how they had received similar treatment.

* * *

CHAPTER IV

POLITICAL INTERLUDE

Not long after my libel action had been settled I was given the chance to renew my active interest in the political struggle. In the 1918 election, when I was 13, my eldest sister and I had gone hand in hand knocking on doors in Upper Holloway, giving out leaflets and asking people to vote for our daddy. By 1923 I had graduated to mounting soap boxes at street corners. When, after 1925, my father retired from the battle, the Liberal vote gradually dwindled and in the 1931 and 1935 elections we both spoke for the Labour candidate, who was a fellow Methodist. But because of its bigotry I could never bring myself to join the local Labour Party.

I was however becoming increasingly concerned with the plight of the poor and the evils of unemployment and in the early months of the war I was made conscious of a number of ways in which the war effort was being undermined by commercial considerations. I decided to write a book which I entitled "These Things Shall Be". It was in the main a plea for a new and more just social order of the war and it forcefully argued the case for the essential unity of religion and politics. I had never been able to understand how so many sincere Christians could daily recite the Lords Prayer but close their minds to the implications of its first two sentances and fail to observe that it made no mention of preparation for the life hereafter. And I was becoming increasingly impressed by the principles and precepts of social and economic justice taught by the prophets in the Old Testament.

The book was accepted by Heinemann and went into two editions, and was chosen by Foyle's Religious Book Club as its book of the month. The Press reviews were mainly critical but I drew comfort from the fact that its detractors had to resort to sneers in order to make their points. A friend of mine showed it to Sir Richard Acland who was then launching the Christian Socialist movement Common Wealth. He invited me to join it and I was elected a founder member of its National Committee. Richard Acland was a remarkable

man: a visionary and prophet ahead of his time. He had been Liberal M.P. for Barnstaple since 1935. He was converted to the economics of socialism in 1937 by Keyne's 'General Theory' but perceived and preached it as a moral force. His evangelism was in the tradition of John Wesley whose sermons were described by a contemporary as "like hammer blows on an anvil". By the power of sincerity and intellectual argument he could persuade members of the middle-classes that they were guilty of not caring about the plight of their fellow men. His first book "Unser Kampf", published in 1940, sold 100,000 copies in three months and brought him thousands of letters from all over the country. The recruits to the movement included doctors, lawyers, teachers, writers, persons and industrialists, who had previously played no part in politics. They included a number of independent Marxists and agnostics who accepted the principles and purposes of the movement.

After a while, it became clear that Common Wealth could not continue simply as a movement. The political truce was tempting adventurers to stand as independent candidates at by-elections and we decided to enter the political arena. There were then three vacant seats and in January 1943 I agreed to go down to Portsmouth to fight Admiral Sir William James, the Commander-in-Chief and the original of Millars' famous picture 'Bubbles'. To the dismay of some of his non-Jewish hirelings, Mr Anthony Rothschild gave me three weeks leave of absence, but I had no sooner arrived in Portsmouth and announced my candidature than the Conservatives, taken by surprise, postponed the polling date for three weeks. So I had to return to London and start off all over again.

When I got to work the outlook was indeed grim. There was a total black-out which made it very difficult to hold indoor meetings. The register was hopelessly out of date. I was allotted an elderly and incompetent agent. All I could obtain for a committee room was an empty fishmongers shop which stank to high heaven. Russia was by then our ally, communists were actively campaigning on behalf of the Admiral and the local Labour party treated me with indifference and suspicion.

In a very short time however I discovered three ways in which I could attract attention and support. Every day at lunch-time I got up on a chair and harangued the

dockyard workers at the dock gates; I made friends with the assistant Editor of the Portsmouth Gazette and fed him with news about my campaign. and I launched a poster campaign. The most effective was one I had devised for our national campaign and had been commended by the Archbishop of York :

COMMON WEALTH
asks
Is it expedient?
Does it pay?
Is it right?

Another was :

ARE YOU AN IDIOT?
You may think you are not - but the word idiot comes from a Greek word which means one who only looks after his private affairs and takes no interest in public affairs.

Fortunately the campaign had its lighter moments. A Chief Petty Officer named Foster announced his intention of standing as a candidate representing the lower deck. This was regarded as akin to treason by the Admiral's supporters and pressure was brought on him to withdraw. He used to come into my committee room every evening and tell me about his troubles. He was finally persuaded to withdraw by a threat that would be posted overseas. The following night he appeared on the Admiral's platform and said how sorry he was ever to have thought of opposing him and promised to support them. The next day, Tom Driberg, who had just won a by-election at Maldon as an Independent backed by Common Wealth, came down to speak for me. I told him the sad story, and also that a young Lieutenant was anxious to speak for me but had been refused permission. On his return to London, he asked a question in Parliament with the result that a special signal was sent to all the ships in the Hoe Fleet reminding all ranks that, unless they were candidates, they were not allowed to take an active part in any election. On the day of the count, I was talking to the Lord Mayor when Admiral Jones came up to him and said : "Mr Mayor - your officials don't know the rules. They let me out of the room when they ought not to have done.". I could not resist remarking : "It's not so surprising; even Admirals sometimes ignoreKing's Regulations".

As the days past, supporters and helpers started drifting into my committee room. We sat up till three in the morning addressing envelopes and filling them with

election addresses and poll cards. Individual members of the Labour Party ignored their leaders advice and in the end I polled 2,500 votes against the Admiral's 4,000.

By the end of 1944 Common Wealth had fought and won two remarkable by-elections and had moved its campaigning team into four constituencies that were fought and won by responsible independent candidates. At Eddesbury in April 1943, Flight Lieutenant John Loverseed won Eddisbury by 500 votes, in January 1944 Hugh Lawson a civil engineer, won Skipton by 200. In both these constituencies, Conservatives had been returned unopposed in 1935 and an independent candidate polled 8000 votes. Then in May 1945, Flight Lieutenant Ernest Millington achieved a sensational victory at Chelmsford, turning a Conservative majority of 12,000 into a Common Wealth majority of 6,000.

But as the time of the General Election approached it became clear that we could not survive the ending of the political truce. The Labour Party had been ~~bitter~~ unremittingly hostile and had made Common Wealth a proscribed organization. There was no chance of a deal over seats and all but 23 of our prospective candidates were withdrawn. Of these, only one, Ernest Millington, was returned to Parliament and only two saved their deposits.

I was more fortunate than most of our candidates. After the by-election in North Portsmouth I had nursed the constituency and built up a Common Wealth branch of over 200 members. I had some hopes that the Labour Party would let me fight the seat at the General Election and up to a month before Polling Day it had showed no signs of activity. I therefore went ahead with my campaign, addressing envelopes, drafting my election address and holding two meetings. Four days later, the Labour Party announced that it was fighting the seat and had adopted Donald Bruce, now Lord Bruce, as its candidate. This caused consternation in my camp. Labour Party members who had promised me their support told me that they faced an agonising conflict of loyalties and begged me to stand down. My more enthusiastic Common Wealth members begged me to stay and fight. I could see no way of resolving my dilemma with honour until I learned that as yet no Labour candidate had been adopted

in the neighbouring constituency of East Hants. I therefore decided to go and talk to Donald Bruce secretly by night and offer to stand down if he could obtain an undertaking from Transport House that there would be no Labour candidate in East Hants and would take me over to Petersfield and commend me to the officers of the local Labour Party. The deal was done and I announced it at my meeting on the following day. I handed over all my canvassing records and addressed envelopes to Donald Bruce and we made our way together to Petersfield with three weeks to go before Polling Day.

To my dismay, I found that there was no Labour Party in Petersfield, or in any other town in the constituency. There was an elderly former chairman, a woman secretary of the Co-operative Society and an unattached group of left-wing teachers, which included the headmaster, at Dertington School. At the General Election of 1935, with no Liberal candidate, Labour had polled 6000 against the Conservative's 23,000. The sitting member, General Sir George Jeffreys (whose wife was a Lady Canteloupe in her own right) had been returned unopposed at a by-election in 1941. This time, there was strong Liberal candidate, Flight Lieut. Basil Goldstone, who had arrived there 10 days before me. He had already wooed the nonconformist vote, was supported by the communists, and had already circulated his election address to the armed forces. The headmaster called a meeting of about a dozen potential suppofters at the school and when I told them why I had come to Petersfield they politely asked me to go away. They had all decided to support the Liberal candidate as this offered the only chance of beating Sir George Jeffreys. I was too proud and obstinate to abandon my announced intentions so I patiently argued with them for two hours and eventually persuaded them that there was no chance of a Liberal victory and that it was important for the future that the Socialist flag should be flown.

The Co-op gave me a committee room and I managed to acquire an energetic young agent A group of my Common Wealth supporters came up every evening from Portsmouth to address envelopes and canvass in Petersfield. Almost immediately I received the first of a daily flow of anonymous postcards which read : "Go away Tom and save your deposit". On the fourth day I decided to explore the constituency which included four towns, 53 villages and nearly as many hamlets. I started in New Alresford, a feudal town on the way to Winchester. I spent the day canvassing for supporters without any

success and at 6 o'clock turned into a local for a glass of cider. I started chatting to the landlord, told him who I was and about my failure to find any support in the town. I talked about holding a meeting in the Town Hall but he warned me that any posters I put up would be torn down. He was the brother of the Labour M.P., George Wigg, but a staunch Conservative. He therefore surprised me when he said, "You've got an honest face and I would like to help you. I own the local cinema and if you go and book the Town Hall for next Saturday I will advertise it for you on the screen".

This I duly did and I arrived at the Town Hall with an aged trade unionist official as my chairman and the Flight Lieutenant from Portsmouth as my supporting speaker. There were about thirty people present. The Flight Lieutenant spoke first with considerable force but without response. I followed him and thought I was speaking reasonably well but no-one batted an eyelid or clapped when I sat down. The Chairman invited questions but there were no questions. I asked anyone who was willing to help me to stay behind. I got down from the platform and stood by the door, but they all filed out without even looking at me.

We thought we'd had it in New Alresford but I decided to repeat the exercise and addressed the meeting by loudspeaker. When we arrived, we found the hall full to capacity with 15-20 standing round the back. The Flight Lieutenant made his stock speech with no visible reaction. I made very much the same speech but I spent some time stressing the moral aspect of Socialism and in denouncing the feudal hold over the area. As I had toured the villages with a loudspeaker the inhabitants would listen from behind their curtains but were too frightened to come out and talk to me.

Even this produced no reaction - I might just as well have been talking to rows of dummies. The Chairman asked for questions. There was a long silence and then an elderly gentleman stood up and said : "I don't want to ask a question but to make a statement. As everyone here knows, I have been the doctor in this town for many years. What Mr Sargent has said about the feudal system in this area is true. As I go on my rounds in the villages, it makes me quite sick to see how frightened all the people are to say what they really think. I can also say that I have wanted all my life to hear socialism preached in the spirit that Mr Sargent has done. I promise

him my whole-hearted support". At this, the dummies came to life with smiles and cheers. As soon as they died down a somewhat forbidding looking lady in the third row, whom I had taken for an opposition spy, got up and said to me, "My name is Mrs Tope. I am the wife of Major-General Tope and we live in the Square. I agree with everything that Dr Merrion has said and you have my full suppoet as well".

When the ensuing hubbub had subsided, I asked for any one who wanted to help me to stay behind. About a dozen did so and I was offered a committee room in a private house. Dr Merrion gave me £250 and distributed my leaflets in the villages as he went on his rounds. Mrs Tope gave me £100 and put up window bills. But, far more important, it was widely reported in the East Hants press that Dr Merrion and Mrs Tope had 'stood up' in my meeting.

From that point my campaign started to take off and offers of help came in from other parts of the constituency. I found that there was no longer the same fear of being seen coming to my meetings or listening to me in the open air. When, on the eve of the polling day, I arrived at New Alresford I found a crowd of 600 or more waiting for me in the Square. The feudal hold on that area at least had been well and truly broken.

The result of the poll was :	General Sir George Jeffreys	20208
	Flight Lieut Basil Goldstoke	8268
	Tom Sargent	6600

I had at least saved my deposit and the honour of Common Wealth. Donald Bruce won North Portsmouth with a comfortable majority.

At a national conference held some months after the General Election, it was decided that the party should be dissolved and its members (then numbering 15,000) advised to join the Labour Party. This was a dpressing ending to a glorious and exciting enterprise. We all thought that we had failed and I learned only three years later from the late Arthur Greenwood that unbeknown to us we had changed the course of history. At the end of the war there was a strong difference of opinion in the leadership of the Labour Party as to whether they should stay in the coalition as Lloyd George had done, or come out of it and fight. Those who wanted to break with Churchill and fight were able to invoke the Common Wealth by-election victories and

won the day.

I duly joined the Hampstead Labour Party, became its Vice-Chairman and was adopted as candidate for South Hendon in the 1950 General Election. It was a seat I had no chance of winning but I did reasonably well. The sitting Conservative member was Sir Hugh Lucas-Booth and the Liberal candidate was the golfer, Cyril Tolley. We all respected each other and kept the fight free from personalities. It was at this election that I first encountered Gerald Gardiner who spoke at my eve of poll meeting and made the most cogent and moving election speech I have been privileged to hear.

At the 1955 General Election I fought West Lewisham. The Conservative majority at the last election had been only 2,000 and I had high hopes of winning the seat, but Harold MacMillan's election cry "You've never had it so good" caught the mood of the electorate, produced a general decline in the Labour vote and I lost by 4,000. I had preached a quite different gospel of unselfishness in national and international affairs. I later failed to secure re-adoption because, as I was later told, I hadn't bashed the Tories hard enough.

During this post-war period I had attended and spoken at four Labour Party conferences and also become an active member of the supervisors and executives union then known as A.S.S.E.T. It was a good and progressive union with the motto Maintain the Right and advocated a national wages policy to be administered by the T.U.C. For several years I was Chairman of its London District Council and Executives Staff Board which were both under threat of being taken over by communists and their sympathisers. I kept up my membership until, under a new name and new leadership, the union abandoned its old principles objectives and came out in favour of an alien gospel that the prizes go to the strong.

CHAPTER V

THE BIRTH OF JUSTICE

In 1947, I parted company with the Rothschilds. My political activities were the subject of adverse comment in the banking office. My arch enemy there said they could not understand why the partners let me get away with it. The manager of the refinery died and he recommended the appointment of the works chief-chemist, a fellow freemason, who had no experience of management. I decided that there was no future for me and was offered the job of manager of a firm of non-ferrous metal merchants. This didn't work out. I didn't like the directors trading methods and I lacked the qualities required of a salesman. He paid me off and after an interval I went back to the Metal Exchange as market clerk and assistant to a partner. We got on well but my reactions were too slow to cope with hectic manner of trading and I was passed over to an associate from which traded in non-ferrous metals in the international markets.

At this time there were severe restrictions on the export of strategic materials, especially metals, to communist countries and I felt myself indirectly involved in illicit dealings of various kinds. City firms of high repute were taking part in this exercise. Thousands of tons of copper wire bars and strategic metals destined for behind the Iron Curtain were being shipped to Tangier and Gdynia and to Macao for China. I decided to move to get another firm whose director I had known for many years. We got on well until he insisted that I should renague on a contract I had entered into with his approval. Some months earlier my lung had been troubling me again. I was feeling very tired and in need of rest and it was agreed that I should resign from the firm at the end of the year.

I had been to the chest clinic and three days before Christmas 1955 my consultant sent for me and told me that there were signs of tuberculosis and that I would have to go to bed for nine months. Apart from the aggravation this meant I would be without any income until I recovered and could find another job to my liking. My wife did not want me to go into hospital and, although she was working full-time as a teacher in Hammersmith she insisted on nursing me at home with the help of her mother who lived with us. My brother provided some financial help.

When, at the end of September, I started to get up and was allowed to get around, I gradually fell into a deep depression. I hated the idea of going back to the City. I applied without success for two or three socially useful jobs but I was by then over 50 and had no university degree or other qualifications. I began seriously to doubt if the future held anything worth while for me to do. Then, towards the end of November, there came out of the blue a telephone call from Peter Benenson, a young Socialist barrister with whom I had made friends at the Labour Party Conference. He had persuaded some leading lawyers in all three parties to take joint action over the mass treason trials in South Africa and Hungary and asked me if I would like to come and help him. I jumped at the invitation. With the financial help of Christian Action arrangements were made for Gerald Gardiner Q.C. to attend the opening stages of the trial in South Africa where 91 blacks were herded into a disused warehouse and charged with high treason. His arrival not only focussed world attention on the trial, but encouraged the Johannesburg Bar to organise the prisoners' defence. A succession of distinguished lawyers were sent out as observers and all the accused were finally acquitted.

Efforts to secure the admission of observers to Hungary were unsuccessful but in February 1957 members of the JUSTICE group led by Sir Hartley Shawcross met representatives of the International Commission of Jurists to discuss the continuing repression in Hungary and to prepare evidence for presentation to the United Nations Committee of Five.

We had made early contact with Norman Marsh, a Fellow of University College Oxford, who had recently been appointed Secretary General of the Commission. He had shared our concern over events in South Africa and we found that he was anxious to form national sections. Peter Benenson had for a long time wanted to form an all-party human rights society but the Conservatives had always feared with good reason that it would be used by the left for political ends. The appearance on the scene provided a golden opportunity for him to achieve his wish. I told him that if such a society could be formed I would like to be its secretary. His response was that if it was formed, which he thought unlikely, it would have no funds to employ a secretary and if it had it would want a young lawyer. He urged me to go off and look for a job, but I hung around in hopes.

The negotiations were not easy. Sir John Foster and John Arnold (now Lord Justice Arnold) were the prime movers for the Conservatives but their committee was fearful of entering into any firm commitment. John Arnold came along to one meeting and told us it had decided not to join in, to which Lord Shawcross, as he was shortly to become, replied with feeling : "I suppose that means we have to say 'that's JUSTICE - that was' ". But Conservative fears were gradually dissolved and at a meeting with Norman Marsh in January 1957 it was agreed that each of three party associations should nominate three members to the Council, which should be completed, after further consultation, by the Commission issuing invitations to a number of solicitors and professors of law. Lord Shawcross, the British member of the Commission, was invited to be Chairman and it was decided to stick to the name JUSTICE which Peter Benedon had given to the ad hoc group.

With my hopes thus raised I went into his chambers, looked after correspondence and made the arrangements for Gerald Gardiner's report back meeting in the Niblelt which attracted an audience of 300. My mother gave me £20 to buy a new suit and overcoat to go to the Hague, the ten headquarters of the Commission. I there learned about the work of the Commission and worked out the basis of future co-operation with Norman Marsh and Eddy Kozera, its American administrative secretary. They generously offered to provide a loan of £1000 and to circulate membership leaflets and forms to all the barristers and solicitors in the Law List. A week before the inaugural meeting of the Council, held in June 1957, I wrote to Lord Shawcross and offered to act as part-time secretary of the Society for a remuneration of £500 a year.

My offer was accepted and I was, though a chain of events which had appeared at the time to take no meaning, given the opportunity of doing the kind of useful work I had always wanted to do. I must however put on record that I could not have undertaken it and carried it out for so many years without the full support and financial sacrifice of my wife, Dorothy, who was a senior mistress and later deputy head of the John Howard School in Hackney, and timely help from my brother, Will.

Membership subscriptions (then £1) came in slowly. By June 1958 we had received 375. My total budget was £1000 for the first year and £1500 for the second.

I had the service of a typist two half-days a week, but for the most part I did all my own typing and duplicating and delivered membership notices round the Inns on Saturday mornings.

Having had no schooling in the politics of the law, or indeed in any aspects of it, I was for a while out of my depth and relied greatly on the help and guidance of Peter Beneson, but all the officers and Council members were kind and understanding. They included such men as Sir John Foster, Gerald Gardiner, John Arnold, Elwyn Jones, Sir Edwin Herbert (later to become Lord Tangsty) and Sir David Cairns. I was much encouraged to learn that the last two were practising Methodists and knew members of my mother's family.

All the members of the Council set an example from which their successors have never departed. There was no rivalry for office. When vacancies occurred and changes had to be made, the well-being of JUSTICE has always been the first consideration. Voting was a rarity - our decisions being guided by the Quaker sense of the meeting. I recall only two divisions on party lines. They were both on international matters and resolved by accompromise. Indeed any eaves-dropper would have found it difficult to identify party allegiances. The two most radical law-reformers were Sir John Foster and Geoffrey Howe, whom I would much rather have seen as Lord Chancellor than as Chancellor of the Exchequer or Foreign Secretary.

We had only one serious disagreement and it had nothing to do with politics. Early in 1970 we had set up a strong and well-balanced committee, under the chairmanship of Peter Webster, Q.C., to enquire into a number of matters relating to the judiciary. Its draft report strongly argued the case for the appointment of solicitors to the Circuit Bench with prospects of promotion to the High Court Bench, and for academic lawyers to be eligible for appointment to the Court of Appeal and the Judicial Committee of the House of Lords. It further urged the need for more adequate training of judges, the establishment of a judicial staff college, and of a judicial commission to combine the functions of an advisory committee for appointments, a tribunal to investigate complaints and to consider recommendations for the removal of judges.

This provoked a split between the barristers, who regarded the judiciary as their

special preserve and jealously guarded its independence, and the solicitors, who felt that they are looked upon as inferior brand of the profession. While the debate was in progress, someone who I was never able to identify leaked the main recommendations of the report to the Sunday Times, which headlined the dissension it had caused and named Lord Shawcross as its chief critic. This did us immense harm. We could not decently bury the report nor could we publish it as a report endorsed by the Council. In the end, with some minority dissent, it was agreed that we should publish it as a report for discussion, but the Sunday Times leak had deprived it of any publicity value and led to the resignation of Lord Shawcross from the Chairmanship of the Council.

I was sorry to see him go. We had enjoyed a good working relationship. Without him JUSTICE would not have been brought to birth and his reputation and flair for publicity had put it on the map. He had a genuine concern for the rights of the ordinary citizen or, as he put it, "the little man". His courageous championship of the freedom of the Press brought great public benefit. He was emphatic in his condemnation of long and costly civil trial procedures and in his advocating of ethical standards in criminal prosecutions.

It was fortunate for JUSTICE that Lord Gardiner was by then free from the burdens of office and agreed to succeed him as our Chairman.

CHAPTER VI

THE COMING OF THE OMBUDSMAN

For the first two years we were heavily involved in the problems of our then colonial territories which I will deal with in a later chapter. On the domestic front we set up committees to look into such matters as contempt of court, legal penalties, the right of asylum and complaints against the administration. Of these, the last led to what I have always considered to be the most important and far-reaching achievement of JUSTICE - namely the bringing to birth in Great Britain of the Scandinavian institution popularly known as the Ombudsman.

It came about in this way. Before the war I had written for an obscure left-wing weekly a humorous article entitled "Wanted - a Minister of Stupidities". He was to be a man to whom anyone could go with a complaint about unjust or stupid bureaucratic decisions on the part of government departments or local councils. He could investigate them and have the power to decree "This is unjust" or "This is stupid. It cannot be allowed". When, therefore, Prof. F.H. Lawson, the most eminent constitutional lawyer of the day sent me an article he had written about the Swedish ombudsman, it immediately rang a bell. I said to myself: "This is my Minister of Stupidities" and from that moment I became dedicated to the realisation of the idea.

We assembled a small committee under Prof Lawson, and among its members was Prof J Fag Garner, an expert in administrative law who was later to become the kingpin of all our subsequent activities in that field. We gathered and studied information about the functions and working methods of the ombudsman in Sweden, Denmark, Norway and Finland but soon realized that it was beyond our very limited resources to evaluate it in relation to British scene. Such a study needed a full-time director, research assistants and adequate funds. I had been in friendly correspondence with Sir John Whyatt, the Chief Justice of Singapore, and when he returned he invited me to have lunch with him at the Travellers Club. I told him about our ombudsman project and he immediately told me that he would like to take it on.

Our problem was then one of obtaining the necessary funds. When the subject had

first appeared on the Council agenda, Lord Shawcross had written me a friendly note saying that he did not want JUSTICE to get involved in any hare-brained schemes. He soon repented of this and became an enthusiastic ombudsman advocate, but his instinctive reactions had not been far wrong for when he started approaching charitable foundations he found a similar reaction. It was a foreign idea of which no-one had ever heard. And so we had to tell Sir John Whyatt that the project was in abeyance and he went off to Malta on a six months assignment.

In the meantime there had been some stirrings of public interest. We had arranged for Prof Stefan Huwitz, the Danish Ombudsman, to give a series of lectures in Manchester, Nottingham, Oxford, Bristol and the Temple, but apart from in Nottingham they were poorly attended and reported. Louis Blom-Cooper had visited Prof Hurwitz and wrote an article for the Observer and the Society for Individual Freedom started jumping on the bandwagon. Then while Lord Shawcross was still searching for funds I acquired an unexpected ally.

Dr Donald Mackay Johnson, the somewhat eccentric Conservative member for Carlisle, had the misfortune to be poisoned by some food he had eaten in a country hotel. His mind had been temporarily affected, he was shut up in a mental hospital and it had taken him three weeks to regain his freedom. When he started complaining about his treatment he found that, even though he was an M.P., no one in authority was willing to do anything about it. He was told about our interest in the ombudsman, came to see me and became a firm ally.

Just after Lord Shawcross had given up hope of obtaining funds, he came into my office and I told him the bad news. He suggested that the only course open to us was to ask the government to undertake an enquiry and we drafted an appropriate question to Harold MacMillan, the then Prime Minister. A few days later, Sir George Coldstream, the then Head of the Lord Chancellor's Department, telephoned me. "Mr Sargent", he said, "Dr Johnson, the member for Carlisle, has put down a question to the Prime Minister asking if the government will institute an inquiry into the Swedish Ombudsman idea. We know nothing about it here but I have been told that you do. ~~Will you~~ Please tell me what it's all about?". I proceeded to explain to him that it was a highly regarded Scandinavian institution for the investigation of complaints against government departments, and that we were about

to embark on a serious enquiry into it under the direction of Sir John Whyatt. Although in the course of a later JUSTICE inquiry into the problem of perjury I had argued that perjury by omission could be as heinous as positive perjury, I omitted to tell him that we lacked the necessary funds.

Three days later there appeared in Hansard, among the written answers to Prime Minister's questions : "In my reply to the question asked by the Hon Member for Carlisle, I am informed that JUSTICE, the British Section of the International Commission, is about to undertake an enquiry into this institution and the Government thinks it sensible to await its report". With these few lines, Lord Shawcross was able to go back to some of the foundations which had previously refused him and say "Please - we must have some money - the government is waiting for the result of our inquiry". He was given £2,500 each by the Wolfson and Nevill Bland Foundations and early in 1960 Sir John Whyatt returned from Malta. He proved to be the ideal choice for the assignment. He combined a searching mind with great personal and intellectual integrity and was never tempted to ignore unpalatable facts and opinions. He had a highly trained American Secretary and two research assistants who analysed a thousand or more Parliamentary questions and answers and were given access to M.P.'s complaints files. He visited all the Scandinavian Ombudsmen and obtained confidential memoranda from the Permanent Secretaries of State of all the main departments.

He was given a small Advisory Committee composed of Lord Shawcross, Sir Sydney Caine Cairns, Director of the London School of Economics and Dr H.W.R. Wade, Fellow of Trinity College, Cambridge and a member of the Council on Tribunals. When Lord Shawcross was later appointed to the Commission of Inquiry into Events in Nyasaland, Norman Marsh took over the Chairmanship and Lord Devlin attended some meetings by invitation.

It soon became apparent that the Committee would have to overcome three major objections to a British ombudsman :

(1) It would undermine the constitutional doctrine of ministerial responsibility

(2) Members of Parliament were jealous of their right to take up their constituents' grievances and would not want it to be interfered with

(3) There was all the difference between a country with a population of 5 million and one with 50 million. A British Ombudsman would be swamped with complaints.

The first objection was easily overcome. It had not prevented New Zealand, which had a similar constitution, from appointing its Ombudsman.

The two other objections proved for a time to be intractable. The Committee spent many hours discussing them until, as if out of the blue, there dropped on the table a solution which killed two birds with one stone. This was that a constituent should first take his complaint to his M.P. who could be asked to refer it to the Ombudsman if he failed to obtain satisfaction.

This denial of the right of direct access, which came to be known as the Parliamentary filter, became the subject of acute controversy when the Whyatt Report was published, and has been ever since. Some M.P.s are good constituency members and take up every legitimate grievance that is brought to them. Others are lazy and leave their constituency correspondence to their secretaries. Many are ministers and their constituents lack confidence in them. They can go to any M.P. but it is a convention that M.P.s should not trespass on each others territories.

The objections are real but I have always taken the view that without the Parliamentary filtre a British Ombudsman would never have been appointed. The third Ombudsman, Sir Edward Pugh, soon became conscious of the way in which the denial of direct access was lessening his effectiveness and devized a sensible compromise whereby, if he received a complaint from a member of the public, he would ask the M.P.'s permission to investigate it.

The Advisory Committee had other difficult problems to resolve, for example, by what criteria should the Ombudsman adjudicate on the merits of the decisions he was asked to investigate. In so far as the civil service was willing to accept him as a necessary

restriction on its freedom, it was emphatic that he should only report on acts of maladministration and not be allowed to comment on the merits of a decision, ie. to say that it was unjust or oppressive. This was a far cry from my Minister of Stupidities and from the power granted to the New Zealand Ombudsman to declare that a decision was wrong. The Committee also conceded on grounds of expediency that the ombudsman should have no power to deal with matters that were justifiable in the courts or were concerned with the administration of criminal justice and that he should not be able to require the disclosure of internal civil service notes and memoranda. The last important recommendation was that the ombudsman should be the servant of Parliament, by styled "The Parliamentary Commissioner for Administration with powers comparable to those of the Controller and Auditor- General and submit periodic reports to Parliament".

The Committee also recommended that the Council on Tribunals should be empowered to survey the area of discretionary decisions not covered by tribunals and that a General Tribunal should be established to deal with appeals from miscellaneous decisions not covered by specialized tribunals. These recommendations have not been implemented.

The report, which was entitled "The Citizen and the Administration : The Redress of Grievances" was published in October 1961. The preparation for its coverage by the Press and Television and Radio were unfortunately upset by an accidental leak of its contents, but it nevertheless received wide publicity and editorial comment. In the years that followed innumerable books and articles were published about the institution both here and abroad. In 1965 Prof Donald Rowat of Carleton University, Ottawa, published a book called : "The Ombudsman" which carried 28 articles describing and discussing the merits of complaints in other countries, many of them in relation to the Whyatt proposals. The bibliography lists about 150 books and articles on the ombudsman theme.

In November 1962, the government turned down all the recommendations of the Whyatt Report, for reasons which the Times and the Economist described as disputable and them, and without allowing Parliament to discuss them. In anticipation of such a

discussion, we had prepared and addressed a letter and memorandum to every M.P. rebutting the various criticisms that had been made. By accident and not by design these were posted on the day the government made its statement and provided an effective answer to it.

Early in 1964, Gerald Gardiner went to the House of Lords in anticipation that if a Labour Government were returned at the forthcoming General Election, he would be made Lord Chancellor. ~~and this expectation was realized~~. He had suggested that it would be a useful exercise to reassemble the Whyatt Committee, re-appraise its proposals in the light of the objections that had been made of it and draft a Bill. This was duly done and a further explanatory memorandum was prepared and sent to selected M.P.s. In the meantime there had been a steady flow of enquiries and visits by lawyers from many Commonwealth countries.

The incoming Labour Government had announced its intention to introduce an Ombudsman Bill but it was not mentioned in its manifesto or in the Queen's Speech, but We were assured that it had not been shelved and in our Tenth Annual Report, published in June 1967, we note with satisfaction that Sir Edmund Compton had been appointed the first British Ombudsman. The Act, which somewhat strangely was passed after his appointment, was in many ways more restrictive than we had wanted it to be, so much so that ten years later we published a report entitled "Our Fettered Ombudsman" in which we urged that :

(a) The term "maladministration" should be replaced by "unreasonable, unjust or oppressive action". Richard Crossman, when introducing the Bill in Parliament, had promised that 'maladministration' would be interpreted in that spirit, but this promise has not been fulfilled.

(b) The Commissioner should be empowered to undertake investigations on his own initiative and to suggest changes in legislation or departmental practices.

(c) There should be direct access to the Commissioner.

(d) His jurisdiction should be extended to cover commercial transactions of government departments, personnel matters relating to service under the Crown, and the actions of overseas consular officers.

(e) Detained persons should be able to send uncensored letters to the Commissioner.

(f) There should be more publicity for the Commissioner's work.

Our report was referred to the Select Committee on the Parliamentary Commissioner which had been set up in ? and We gave oral evidence to it, and it endorsed a number of our recommendations, but the only concession made by the government was in respect of consular offices.

We had also urged that the Commissioner should not always be a civil servant with his staff composed solely of civil servants and were gratified by the appointment of Cecil Clothier, Q.C. The Scandinavian Ombudsmen had always been lawyers - the Danish Ombudsman, Prof Hurwitz, was a distinguished lawyer and his staff consisted of young lawyers with no inbuilt loyalty to the Establishment. We had envisaged a well-known lawyer or Parliamentarian who would become a father figure, but the Government had other ideas and justified its appointment of Sir Leslie Compton and his two successors on the grounds that only a civil servant could know the tricks of his profession. Sir Alan Marre and Sir Idwal Pugh both widened the horizons of the office but nowhere near the same extent as had Sir Guy Powells, the New Zealand Ombudsman, in whose reports appeared such comments as "I received a complaint about X. It was outside my jurisdiction but I thought it right to have a word with the Minister concerned".

In November 1969, JUSTICE published a report of a committee chaired by Prof. J.F. Garner entitled "The Citizen and his Council". It recommended the appointment of a number of commissioners for local administration who would each service a region but be stationed in one central office so that their work could be co-ordinated and have close links with the Parliamentary Commissioners and the Council on Tribunals. The government did not respond until early in 1972 when it published a White Paper

outlining its own proposals and inviting comment. These differed from ours in that they provided for three regional Commissioners stationed in their regions with a Chief Commissioner stationed in London and country to our recommendation laid down that complaints had to be made through a Council member. The Commission was eventually established in 1974 and its major weakness, which JUSTICE has tried in vain to remedy, is that even after two condemnatory reports it has no power to order a Council to make reperation for any loss or damage suffered by the complainant.

Then followed the appointment of a Commissioner for the National Health Service and for central and local government in Northern Ireland and it is now almost commonplace to hear of demands for an ombudsman in areas where disputes with governing bodies or corporate interests are likely to arise. More significant still however is the extent to which, through the advocacy of Prof Stefan Hurwitz and Sir Guy Powell, and of the International Commission of Jurists through its Review and international conferences, the ombudsman principle has become recognised throughout the Commonwealth as an essential instrument of defence for the ordinary citizen against the inevitable growth of arbitrary governmental power. As I write there are ombudsmen with varying jurisdictions in New Zealand, Australia, Canada, India, Tanzania, Mauritius, Fiji and Zambia.

CHAPTER VII
COLONIAL EXCURSIONS

Very few months had passed after the birth of JUSTICE before we were asked to intervene in a number of what were then British colonial territories. Our first Annual Report, published in June, 1958, records that we had received and investigated complaints from Northern Rhodesia, Cyprus, Singapore and the Seychelles and taken what we considered appropriate action.

The Seychelles presented us with an intractable problem. The first complaints were about the lack of legal aid and delays in bringing cases to trial. These were followed by complaints about the administration of justice in general. The Chief Justice was M.D.Lyon, a former Somerset cricketer, and according to reports we received from a retired English lawyer, he was consistently the worse for drink and his judgments in both civil and criminal cases were far too frequently overturned by the East African Court of Appeal.

The real trouble in the islands was that they were effectively ruled by a few French creole families who owned all the coconut plantations and whose "Grande Madame" seemed to have the power to seduce all the servants of the Crown from their allegiance to it. The resident Anglican Canon was imprudent enough to denounce the poverty and injustice in the Islands and was recalled to England.

We made strong representations to the Colonial office ~~which resulted~~ resulting in the departure of M.D.Lyon but we then learned that a local Q.C., a crony of the Madame, was likely to succeed him. Lord Shawcross and I went together to the Foreign Office and argued ~~in vain~~ with the Permanent Secretary of State about the wisdom of such an appointment, but were later told that no better qualified person was willing to accept it. This was not true. Some years later I was told by a judge of the East African Court of Appeal that he had recommended an excellent man who was willing to accept the appointment. About the same time I met Hilda Selwyn Clark, whose husband had been sent to the Seychelles as Governor by the Labour Government but had stayed there for only a short time. I asked her about the situation as they had found it and her reply was terse and illuminating: "The only solution, Tom, is to

transport all the native inhabitants to the mainland and leave the French families to pick their own bloody coconuts".

Our interventions in Northern Rhodesia were more fruitful and led to a dramatic legal confrontation with the Colonial office. During the strikes and unrest on the Copper Belt in September 1956, 56 mine workers were arrested and put into a detention camp. After six weeks, a retired South African judge went up to Lusaka and successfully applied for a writ of Habeas Corpus on the grounds that the Emergency Regulations then in force did not permit the Governor to delegate the power to make detention orders to the Provincial Commissioner. Their freedom was short lived because they were promptly re-arrested and rusticated to the far corners of the territory. The cases were renewed from time to time, but in January 1959, 20 of them were still rusticated and unable to earn a living.

A

After repeated representations on their behalf had failed, we decided to explore the possibility of applying to the Divisional Court of the Queen's Bench in London for a writ of Habeas Corpus. The exercise was master-minded by Prof. Gerald Draper and Bryan Anns, a young barrister who a few months earlier had come into my room and asked if there was anything he could do to help JUSTICE. They had discovered that the Emergency Regulations of Northern Rhodesia were in all probability illegal in that they had not been published in the London Gazette because they were the same as those that had been drafted for use in the United Kingdom in the event of war. They had also unearthed a long-forgotten obiter of a judge of the Divisional Court to the effect that a writ of habeas corpus could run in a protectorate, which Northern Rhodesia then was.

So Bryan Anns was accordingly despatched there to seek out a suitable candidate, prepare affidavits covering his earlier detention and obtain his instructions to apply for a writ on his behalf. He achieved this despite various obstacles that were put in his way and his choice was Andrew Mwenya.

B

The application was taken by Neil Lawson, Q.C. after consultations with Gerald Gardiner, Sir John Foster and Sir David Cairns. The Attorney-General, Sir Reginald Manningham-Buller, appeared for the Secretary of State for the Colonies and took a preliminary and unexpected objection that an English Court had no jurisdiction to hear

the application as Northern Rhodesia was technically a foreign country. Lord Parker, who was sitting with two other former Treasury Counsel, accepted this argument and dismissed the application, with a judgment that can at best be described as obscure. This was not surprising because in an address to the Annual Meeting of JUSTICE in June 1960 he described the judiciary as the handmaiden of the administration. The application had produced panic in the Colonial office because, unbeknown to us at the time, the whole court system in Northern Rhodesia and the Emergency Regulations in Nyasaland where serious trouble had broken out, were threatened. It was thought by some to be a communist conspiracy.

Our Counsel and solicitors had all acted pro deo and Canon Collins, of Christian Action, offered to finance an appeal to the Court of Appeal. This was entrusted to Sir John Foster who argued it superbly. The Court, which consisted of Lord Evershed, Romer L.J. and Sellers J., was made of sterner stuff than the Divisional Court. Just before the lunch adjournment, Lord Evershed read out a passage of Lord Parker's judgment which included a passage about 'the plenitude of absolute power' and said to the Attorney-General "None of us can understand this - perhaps you will explain it to us after the adjournment". This he lamentably failed to do. The Court reserved judgment until after the summer vacation when it unanimously allowed the appeal with judgments of great constitutional importance. Sellers, L.J. said that the test of whether a writ could run to a country normally outside the jurisdiction of the English courts was its degree of subjection to the English Crown and a court of law could not deprive a subject of his right to protection even though it might be politically inconvenient or hazardous to uphold it.

The court then adjourned for three days to allow the Crown time to decide whether it wanted to appeal to the Lords. When it reassembled, Counsel for the Governor of Rhodesia appeared and told their Lordships that all the rusticated persons had been released on the previous day. The Attorney-General then rose and said that, although welcomed the decision, he regretted that he had been deprived of the opportunity of arguing the matter in another place. To this Lord Evershed remarked (to his obvious discomforture) "Perhaps, Mr Attorney, the Governor had this in mind when he ordered these men's release". The merits of the case were thus never finally decided, but we had gained our objective and had no wish to embarass the authorities any further.

After the victory, we held a celebration dinner in Soho, for which I composed an irreverent ode :-

Ode to Mwenya ~~17.11.58.~~

Said Lords Evershed, Romer and Sellers,
"These establishmentarian fellers
In the Court down below
Have dealt such a blow
To British Protectorate dwellers

In Northern Rhodesia and Kenya
And especially poor Andrew Mwenya
That Manningham-Buller
With pride growing fuller
Must be shrunk to a stature far teenier.

To plead before Slade, Winne and Parker
With the brazen aplomb of a barker
That the writ does not run
To the lands where the sun
Never sets is a deed even darker

Than casting unworthy aspersions
On Devlin's judicial diversions.
The writ Habeas Corpus,
You ~~stupid propeies~~ [illegible]
Was designed to defeat all coercions!

Andrew Mwenya's appeal shall be granted,
Their Lordships relentlessly chanted.
An appeal to the Lords?
You can only cross swords
With yourself now the gaoler's recanted.

So JUSTICE emerged as the winner
With the Treasury purse slightly thinner
And this bold legal caper,
The brain-child of Draper,
Providing an excellent dinner.

The reference to Lord Devlin was prompted by his forthright criticism, as Chairman of the Inquiry Commission into Events in Nyasaland, of the way in which the emergency situation had been handled. This had embarassed the government and it was widely believed that it had prejudiced the chances of being made Lord Chief Justice.

The leaders of the unrest in Nyasaland and Southern Rhodesia were detained in Salisbury and in due course a tribunal presided over by Mr Justice Beadle was set up to hear applications for release and with the help of Christian Action we sent out counsel from London to appear on their behalf. This brought about my first encounter with Joshua Nkomo and the vanity which led to his undoing. Reports reached me from Salisbury that a wholly unsuitable counsel had arrived from London and was doing more harm than good. We discovered that he had been sent out by Joshua Nkomo and when Canon Collins and I asked him why he had done this without consulting us he replied "I have to show my people that I am looking after them".

During those early years the activities of JUSTICE in Central and East Africa consisted mainly of arranging for the defence of African detainees either by sending out counsel from London or encouraging local lawyers and obtaining funds. We carried out a survey of legal aid provisions. Two officers of JUSTICE undertook extensive tours. We formed branches in Kenya, Uganda, Tanzania and Northern Rhodesia and enrolled a group of 20 members of the Salisbury Bar who gradually melted away after Ian Smith's Unilateral Declaration of Independence. To our great regret all our colonial branches eventually dissolved as the territories obtained independence. They could have become national sections of the International Commission but the political climates made it impossible for them to satisfy its all-party requirements.

C.I

I made my own tour of African countries in 1964 when I was invited to attend the Zambia Independence celebrations. The day before they ended news reached us that the government in Salisbury was about to execute by hanging a group of Africans who had been convicted of petrol bomb offences. I expressed my concern about this to a Lusaka lawyer and through a friend in Salisbury he arranged for me to go there on the following morning and be received by Ian Smith and Lardner Burke, the then Minister of Justice. When I arrived I learned that Ian Smith had called a special session of Parliament to reply to what he described as an ultimatum he had received from Harold Wilson. I was able to attend it and he made such a

frighteningly defiant speech that I felt my mission was doomed to failure. I was however allowed to see Lavens Burke for an hour before lunch. He was very courteous but I felt as I have rarely felt that I was in the presence of evil. I put forwarded every argument I could think of why it would be wrong and bad policy to hang these men. His only defence was that he was following the example set by the British. I ended the interview by urging him to enquire into allegations of brutality against his police. I had been told it was common practice for white officers to send his black sergeant into the bush to beat up a suspect before arresting him and then to deny any knowledge of this when the man appeared in Court. I later saw the Attorney-General and repeated my plea. I was never able to find out to what extent my intervention contributed to the government's decision to postpone the hangings but it is a matter of record that none took place until some years later, after the failure of appeals to the Privy Council.

I took advantage of my subsequent tour of East and Central Africa to promote the Ombudsman idea. It had been generally accepted that the institution could only function in a democratic framework but the Swedish Chairman of our Kenya branch, pointed out that it was born at the time of an absolute monarchy to enable the King to be kept informed of any evil-doing on the part of the ministers. It appeared to me that that an Ombudsman could performa similar function for a government that was over-sensitive to hostile criticism and I wrote an article for the East African Standard.

At about this time, President Nyere of Tanzania was setting up a Commission of Inquiry into a one-party state. I lobbied a member of JUSTICE who had been appointed to the Commission and was much gratified when it recommended the setting-up of an Ombudsman Commission with wide power. This was duly done and its first chairman was a magnificent tribal chief before his reports made fascinating reading. He described how when he was making a tour of country towns and villages, local officials would do their best to stop complainants from coming to see him. He overcame this by standing in the market square, announcing who he was and why he had come, and inviting anyone with a grievance to come into his hut and talk to him.

Early in 1962 we made a successful intervention on behalf of the Secretary of our Jamaican branch, Peter Evans. He was an Irish member of the English Bar who had gone to practise in Kenya and made himself persona non-grata by assisting in the defence of Jomo Kenyatta. He decided to move to Jamaica where he established a strong branch of JUSTICE, the Registrar of the High Court and the Solicitor-General being among its members. He was a fearless advocate and inevitably became a thorn in the flesh of the authorities by his exposures of police brutality and malpractice, both in court and in a weekly column he wrote for The Jamaican Gleaner. In the autumn of 1961 I received a pleading letter from his Jamaican Secretary telling me that he had been arrested and was being put on trial on a charge of conspiring to effect a public mischief. He had defended a coloured American who was convicted and sentenced to death for the murder of a Chinese grocer. Shortly before the date fixed for the execution the man's sister arrived in Kingston, ferreted in the underworld and came and told Peter Evans that according to three girls she had talked to in a brothel, her brother had been there throughout the night of the murder.

He asked them to come to his office and make statements. Two of them did so and after they had been properly sworn before the Registrar of the Supreme Court, he sent them to the Governor for investigation and requested a reprieve. This was no more than any responsible lawyer would have done in similar circumstances. The third girl, who was in charge of the brothel, told the police about the enquiries. The other two girls were interviewed and under pressure said that their statements were false and that they had not made them. Despite the deposition of the Registrar that the statements had been read to them, Peter Evans was committed for trial.

He appealed for help to the Council of JUSTICE and John Hobson, Q.C. offered to go out and defend him. He was acquitted on the main charges but to his dismay was found guilty of a minor charge of inciting the third girl to conspire and sentenced to nine months imprisonment. He immediately appealed but he was refused bail until May, when two Q.C.'s from neighbouring islands appeared for him, and because of delays in obtaining transcripts his appeal to the Caribbean

Court of Appeal could not be heard until July when at his suggestion I was able to persuade Donald McIntyre Q.C. to go out and represent him at very short notice. The Court allowed the appeal and questioned the conviction, wholly rejecting the Crown's suggestion that he had fabricated false information and explicitly exonerating him from any motive to do more than his professional duty required of him. There was much rejoicing in Jamaica and favourable repercussions throughout the Caribbean, but Peter Evans' professional career was effectively shattered. He returned to London with his secretary, who acted as my secretary for two years. He later married her and went off to live in France, where my wife and I visit him every year.

The gradual transformation of Empire into Commonwealth had involved the drafting of constitutions with effective safeguards for the rights of minorities and the independence of the courts. Particularly in Africa the constitution makers had overestimated the capacity of the new rulers to accept and operate the British Parliamentary system without prior training and participation in the processes of government. They needed to establish their new authority and to make sweeping changes, and this meant that they became intolerant of the kind of opposition that is regarded as normal in countries with a long tradition of Parliamentary government. In varying degrees they have now become one-party states.

This danger had been to some extent foreseen and was discussed at the first major world congress of the International Commission of Jurists held at New Delhi in January 1959. We had been given generous grants by the Foreign Office and British Council to assist the attendance of Commonwealth participants and to send a powerful British delegation which included Lord Denning, Lord Devlin, Lord Gardiner, Lord Elwyn-Jones, and Sir David Cairns.

I have always been a firm believer in the importance and influence of the Commonwealth in world affairs and towards the end of the congress I was allowed to arrange for Lord Denning to address a meeting of all the Commonwealth participants. In the course of his speech he suggested that the Judicial Committee of the Privy Council

should be transformed into a truly representative Court of the Commonwealth with peripatetic jurisdiction. On our return to England we put the idea to the Lord Chancellor and the Commonwealth Office but they would have none of it. We were told that their Lordships had no wish to become peripatetic. We continued to pursue the theme and made submissions to a succession of Commonwealth Prime Ministers and Law Officers' conferences that they should consider the possibility of drawing up a Commonwealth Convention of Human Rights to be administered by a Commonwealth Court. This was rejected and we put forward a modified proposal that the Court should be established and that individual countries should be invited to accept its jurisdiction in limited areas of their own choosing. This came to nothing and in the end we had to settle for a Legal Branch of the Commonwealth Secretariat. Tom Kellock, Q.C. a member of our Council whose vigorous advocacy had been largely responsible for its setting up, became its first Secretary. It provides a valuable agency for the collection and circulation of information on legal developments in the Commonwealth but falls a long way short of our original aims.

CHAPTER 8

CONTEMPT, LEGAL PENALTIES AND COMPENSATION

I was frequently asked about the objects of JUSTICE and how it set about achieving them. They are set out in the preamble to its constitution and are wide-ranging. The two which cover domestic matters read as follows :-

> "To uphold and strengthen the principles of the Rule of Law in the territories for which the British Parliament is directly or ultimately responsible; in particular to assist in the maintenance of the highest standards of administration of justice and in the preservation of the fundamental liberties of the individual."
>
> "To keep under review all aspects of the Rule of Law and to publish such material as will be of assistance to lawyers in strengthening it."

The preamble also lays down that a fair representation of the main political parties be maintained on the Council in perpetuity.

Our method of working was to select an area of the law in which injustice could too easily arise and to appoint a committee to study it and recommend appropriate reforms. We did our best to ensure that committees were politically and professionally balanced, which meant that they had no axes to grind and their reports commanded respect. Whenever it was appropriate, we invited lay experts in the subject to join the committee. This proved to be of immense value, not only because of their knowledge of the social effects of the particular law under discussion, but also because they could see defects in it to which the lawyers had been blind. Having come to my task without any inbuilt reverence for the law and its institutions, I was often able to render our committees a similar service.

The criteria we gradually evolved were that :-

(a) The subject was within our resources

(b) No other responsible body was working on it

(c) Because of the composition of our committees we could produce an authoritative report

(d) There was some prospect of achieving the desired reforms within a reasonable time.

In the early years there was a wide field of choice. There were few bodies engaged in law reform and those that were tended to have a sectional or professional axe to grind. We could keep track of what was going on. But since then the situation has changed dramatically. The areas of the law which have come under criticism and scrutiny have increased tenfold as have the bodies who have entered on the law-reform arena, so that as the years went by it became increasingly difficult to find subjects which satisfied our criteria and to keep abreast of current activities. Furthermore, the Parliamentary time-table became so crowded that even when the recommendations of our reports were widely accepted, the government of the day could find no time for them unless it had reasons of its own for wanting them enacted.

For the benefit of lay readers I should perhaps explain at this point that we were restricted by our objects to procedural law reform, otherwise known as lawyers' law reform. This covers such matters as the fairness of trials, rights of appeal, rules of evidence, access to the courts, legal aid and general safeguards for the individual against being made a victim of injustice. For obvious reasons we have kept out of the areas of substantive and social law, such as divorce, obscenity, homosexuality, sentencing and capital punishment, which are the subject of deeply held religious, ethical and political convictions.

Despite this limitation, the 25th Annual Report of JUSTICE shows that it had then produced over fifty pioneering reports covering most aspects of civil, criminal and administrative law. The librarian of Anglia University whom we allowed to go through our files unearthed nearly 100 memoranda we had submitted to Royal Commissions, government committees and the Law Commission. Of these I can mention only those which have borne fruit or are of continuing importance.

Our first report was on contempt of court, of which there are three kinds: refusing to obey the order of a court, which is a civil offence, contempt in the face of the court, and publication of material which scandalizes a judge or prejudices the fairness of a trial. The last two are criminal offences. When our committee was set up, there was a right of appeal in civil contempt but not in criminal contempt. An exasperated litigant who refused to sit down when ordered to by the judge or, as has happened,

threw a book at him, could be sent to prison by the same judge for an unlimited time or until he made an acceptable apology, without having any right of appeal. Subsequent legislation provided a right of appeal and also laid down the proceedings for contempt of court could not be started without the consent of the Attorney-General.

A case resulting in imprisonment for contempt gave me a rare insight into the innate kindness of Lord Gardiner. Shortly after he became Lord Chancellor I was summoned to go and see him. He greeted me warmly, invited me to sit down and without more ado said, "Tom, I believe that I am still a good member of JUSTICE". I assured him that he was. "That means, I suppose, that it's quite in order for me to give you a donation". I told him that I could see no objection and he handed me a cheque for £50. "Now," he said, "I can tell you why I have asked you to come and see me. One of my duties as Lord Chancellor is to keep under review everyone who has served an overlay sentence for contempt of court. One of them is a man called DennisLusty. He refused to pay the damages awarded against him for libelling a solicitor whom he had accused of letting him down,and he has refused to disclose where his assets are hidden. He is an obstinate man and it looks as though he could be facing a life sentence. Do you think you could find a good solicitor and get him out?".

I duly gave the £50 to Philip Kimber, a member of my Council who was a master-tactician and always willing to advise or assist distressed litigants. He enlisted the help of the late Mr Justice Bean, who was then the Chairman of our Liverpool Branch. An honourable compromise was reached and DennisLusty was freed.

Our next report was on the need for a revaluation of legal penalties. There was a widespread feeling that for historical reasons, offences against public order and private property carried far higher maximum sentences than offences against the person, particularly sexual and cruelty offences against children and young persons. The work of this committee brought into the inner counsels of JUSTICE a city solicitor, Geoffrey Garrett, who was to become a tower of strength to us and was Chairman of the Executive Committee for five years prior to his retirement. He had no experience of the criminal law but he went off with a copy of Archbold and came back a week later with all the known criminal offences analysed and classified under two separate headings - severity of sentence and type of offence.

These tables gave the committee a factual basis for its recommendations that there should be a wide-ranging re-appraisal of the penalties that had been considered appropriate in Victorian times. An example that hit the headlines when the report was published was that the maximum penalty for abducting a woman with intent on her virtue was 2 years, but for abducting an heiress with intent on her fortune was 14 years. There have since been some minor increases in the penalties for sexual offences against young persons, but the general public continues to be outraged from time to time by the leniency of the sentences passed on baby battarers and child molesters in comparison with those passed on robbers who have done no-one any physical or psychological harm.

Shortly before her death in 1958, Miss Marjory Fry wrote to Lord Shawcross asking him if JUSTICE would carry on her crusade for a scheme to compensate victims of crimes of violence. He wrote a letter to the Times which revealed considerable all-party support and R.A. Butler, the then Home-Secretary, agreed to receive a deputation from JUSTICE, the Magistrates' Association and the Howard League. He gave us no encouragement but agreed to set up an interdepartmental working party to look into the problem and report to him. The report, published in June 1961, discussed some of the practical problems of setting up a scheme. Its proposals were cautious and inconclusive, but it stimulated public interest and this prompted us to set up a widely representative committee under the chairmanship of Lord Longford, with a mandate to produce a workable scheme as quickly as possible.

Its report was completed and presented to the Home Secretary in November, 1962. A committee of the Conservative Party produced proposals similar in some respects to those of JUSTICE, but when Lord Longford initiated a debate in the House of Lords, the Lord Chancellor expressed sympathy with the purpose of our scheme but said in effect that there were too many obstacles to be overcome. Fortunately, as with the Ombudsman, we were helped by the more progressive outlook of the New Zealand Government. The New Zealand section of the International Commission became interested in our report, asked for copies and before the end of 1963 had persuaded its government to introduce a statutory scheme based largely on the JUSTICE proposals. This enabled us to go back to the Home Secretary and say to him, in effect, "If New Zealand can do

it, why can't we?". The shaft went home because within six months the government came forward with its own proposals for a non-statutory experimental scheme. It differed however from ours in a number of respects, in particular that it was based on the principles of common law damages rather than those of industrial insurance and that the Board was to consist entirely of lawyers.

The scheme which was not subject to amendment by Parliament had a number of other weaknesses. The Board was to be self-governing and answerable only to itself, however much its decisions might be contrary to the principles of natural justice. Members of a criminal's family were wholly excluded from the scheme and the provisions for persons injured while helping the police, and for the police themselves, were too narrowly drawn. These defects have been to some extent remedied but two major ones still cause concern. Compensation can be denied to a victim because of his way of life or because of some act of provocation on his or her part, and no legal aid is available to claimants. A case which highlights both these defects is that of Mr and Mrs Duthoit.

George and Dorothy Dutholt had a problem daughter, Jeanette, who had become undesirably involved with a married television engineer, David Bulworthy. He had been to their house to repair television sets and had pestered Jeanette ever since. One evening in February 1975 she ran off after an argument with them and they went round to Mr Bulworthy's house and accused him of harbouring her. At first he refused to let them in but he later did so and satisfied them she wasn't there. After some heated exchanges, the Dutholts tried to leave by the front door. They found it locked and Mr Bulworthy made them leave by the back door, which led into a garage. They tried to get out and according to the statements theymade to the police, Mr Bulworthy picked up a mallet and attacked them with it. He hit Mr Dutholt repeatedly on the head, causing a depressed fracture of his right frontal bone and three deep lacerations. These left him with several disabling symptoms and a Consultant Neuro-Surgeon, Mr David Utley, who examined him in May 1976 reported as follows :

"Mr Dutholt appeared the picture of misery this afternoon. He sat huddled in his chair constantly twisting his walking stick and when he attempted to speak made gestures of despair. He frequently rubbed his head during the interview in a bewildered way and appeared thoroughly depressed and anxious and tense. His speech is grossly impaired in that he tends to stammer and stutter and to break the words into their component parts, so that I gained an overall impression that he was speaking like a Dalek with a stammer. At times, he was virtually unable to proceed with what he was saying, and at other times he seemed to be rather more fluent, but at no time did he speak normally."

Mr Utley further reported, "He is still greatly depressed and suffering from anxiety and tension. He sometimes wishes he were dead. When he goes to bed he develops throbbing, stabbing frontal or vertical headaches which shoot down into the back of his neck". He never fully recovered from his disabilities and died at the end of 1983.

Mrs Duthott was likewise attacked by Mr Bulworthy and sustained a fissel fracture of the left skull and a fractured thumb.

On the basis of statements they made to the police, Mr Bulworthy was duly charged but he was released on bail and added to their anxieties by terrorising them. At the trial he dismissed his counsel because "he would not ask the questions he wanted asked", and defended himself. When he went into the witness-box he said that Mr Duthoit had attacked him with a kitchen knife and he supposed that he must have lashed out at them with the mallet.

The credibility of Mr and Mrs Duthoit had by then been destroyed because the evidence they gave was at variance with the statements they were alleged to have given the police. The trial judge's summing-up was unduly favourable to Mr Bulworthy and he was acquitted on all charges.

Prior to the trial, which took place in September 1975, Mr and Mrs Duthoit had applied for compensation to the Criminal Injuries Compensation Board, but in January the Secretary of the Board informed them that the Single Member had refused their application on the grounds that Mr Bulworthy had been found not guilty on all charges and that Mr Duthoit had first attacked him with a knife.

In the meantime, there had been a dramatic development. Mr Bulworthy had remained desperately in love with Jeanette, who had been living with him under duress. She was in deep psychological trouble and both he and her parents wanted her to have treatment. He called on them and in a series of meetings he admitted that from fear of having to serve a long prison sentence, he had told lies at his trial. Mr Duthoit had not attacked him with a knife, but Mrs Duthoit had hit him on the nose and he had gone berserk. After his first visit, Mr Duthoit was advised to tape any further conversations. In the course of these Mr Bulworthy asked if he could make amends by going to the Criminal Injuries Compensation Board

and there is a suggestion in the tape transcripts that the police had been bribed to doctor the Duthoit's statements.

The tapes were forwarded to the Police Complaints Board and thence to the Director of Public Prosecutions who decided not to prosecute Mr Bulworthy. No legal aid is available for appeals to the C.I.C.B. but the Duthoit's solicitors offered to represent them before a Full Board for an advance payment of £400. The transcripts of the tapes were submitted and, somewhat unusually, the Full Board also took into account a misdirection in the summing up of the trial judge. They awarded Mr Duthoit £16,700 compensation and Mrs Duthoit £1,130, but they had to bear their own legal costs of £1,055.

Serving prisoners who are assaulted by fellow prisoners, or by prison staff, have the greatest difficulty in establishing claims for compensation and receive no help from the authorities. Although it relates to the death of a prisoner, the case of Albert Frowley is an outstanding example of Home Office evasion and obstruction.

Frowley, a young man of 24, had been sentenced to 5 years imprisonment for a serious sexual offence against a young girl. On transfer to Maidstone Prison in May 1978, he had refused to go into solitary confinement under Rule 43, ie. removal from association with other prisoners. He wanted to stand his ground and be accepted by them. In August 1978 he was attacked by a man called Kesson, who was serving a life sentence for murder. On the same day Kesson had attacked another prisoner, threatened to kill a third, and warned the prison authorities that he could not control his violent tendencies. They ignored the warnings and a week later Kesson and another prisoner attacked Frowley and killed him.

His parents were told that he had been killed and that they could attend the trial of his murderers, but they were not notified of the date. They were told nothing about the circumstances of their son's death and in November 1978 Mr Frowley wrote to the Home Office enquiring about the possibility of compensation on the grounds that Kesson's earlier attack on

his son had been ignored and that they were partly dependent on him. The letter was acknowledged but despite a reminder, Mr Frowley did not receive a reply until 11 months later. This expressed regret at his son's death, but offered no explanation of its circumstances and advised the Frowleys to consult a solicitor about compensation. This they did but were told that they would not get legal aid, and they could not afford to bring an action at their own expense.

In September 1980 the Frowley's approached "JUSTICE" for help in finding out the circumstances of their son's death and about obtaining compensation. They also complained that some of his property had never been returned and that when his body was released to them for burial it was discoloured and decomposing. My legal colleague, Peter Asman, drafted a memorandum which was submitted to the Home Office through their M.P. In his reply the Minister denied liability on the grounds that Frowley had not asked to be segregated after Lesson had attacked him. He apologised for the delay in replying to the original letter, but told them nothing about the circumstances of his death and advised an application to the Criminal Injuries Compensation Board.

He should have been better advised because it turned out that one of the gaps in the scheme is that the Board does not compensate an estate for loss of life. It could have paid for the burial and a tombstone but because of the Frowley's poverty, the Prison Department had already done so.

A solicitor member of our Prisoners' Rights Committee offered to take up the case. Legal aid was refused, but a leading counsel offered to act pro deo, ie. without fee. A writ was issued and the Home Office straightway offered £2,000 compensation plus legal costs, which was accepted.

David Freeman, whose case will be fully recounted in a later chapter, had been found guilty of a number of highly unpleasant sexual offences against young boys. He had protested his innocence to JUSTICE and a fellow-prisoner had asked him for our address. Perhaps unwisely, he went into the man's cell with one of my letters and was attacked by him with a knife around the face and head. He sustained lacerations from which the scars are still visible and suffers persistent headaches. When he applied for compensation, the Chairman of the Board, acting as a single member, awarded him £1,000 but reduced it by 50% because of his way of life. He took exception to this on the grounds that he had in no way provoked the attack and decided to appeal. A friendly solicitor offered to help him, but they could not agree about the presentation of his case and he went ahead on his own. The outcome was the Board gave him a nil award.

Despite these defects, and many other questionable decisions, a workable and productive scheme had however been established and in 1983 the Board paid out over £22 million pounds to victims of criminal assaults who otherwise would have received no compensation. Whenever I was invited to address gatherings of police officers on the defects in our system of criminal justice, I was invariably asked, "Mr Sargant, do you ever give any thought to the victims of these criminals?", but had no difficulty in discomforting my questioner.

it, why can't we?". The message went home because within six months the government came forward with its own proposals for a non-statutory experimental scheme. It differed from ours in a number of respects, in particular that it was based on the principles of common law damages rather than on those of industrial insurance, and that the Board was to consist wholly of lawyers.

It also had many weaknesses, viz : there was no right of appeal against the decision of three members of the Board and no legal aid for claimants; members of a criminal's family were wholly excluded from the scheme; compensation could be denied to a victim because of his way of life; and the provisions for those injured while helping the police were too narrow.

Despite all this, a workable scheme had been established. In the intervening years many but not all of its weaknesses have been remedied and in 1983 the Board paid out over £22 million pounds to victims of criminal assaults who otherwise would have received no compensation. Whenever I was invited to address gatherings of police officers, I was invariably asked, "Mr Sargant, do you ever give any thought to the victims of these criminals?", and had no difficulty in discomforting the questionner.

In contrast to the victims of criminal assault, tens of thousands men, women and children who have been injured in road accidents have been deprived of compensation by the requirement that they have to establish fault on the part of the driver of the vehicle responsible for their injury. There are often no witnesses to the accident, or potential witnesses make off before statements can be taken for them. Even if they have sufficient evidence to start a civil action for damages, they may only have third party insurance. They may be able to get legal aid but it can take years before their cases come to trial, or they can too easily be pressed into accepting a wholly inadequate sum.

In September 1972 JUSTICE set up a committee under the chairmanship of Paul Sieghart, the present chairman of its Executive Committee, to consider whether it would be desirable and practical to compensate victims of accidents regardless of who (if anyone) could be shown to have been at fault. The committee decided to produce an interim report on road accidents but almost immediately the Government announced the appointment of

a Royal Commission on Civil Liberty and Compensation for Personal Injuries under the chairmanship of Lord Pearson. As soon as our interim report was completed we sent it to Lord Pearson pointing out the urgency of dealing with the problem of road accidents but he declined to consider it in isolation.

Our report recommended that a no-fault system of compensation should be substituted for the existing common-law claim for damages. The existing heads of loss would still be compensated, but compensation would be immediate, and instead of the lump sum damages now awarded it would take the form of earnings-related periodical payments and could be adjusted to changes in the victim's condition and the value of money.

The Pearson Commission did not report until 1978, over five years after it had been appointed. It recommended a system of no-fault insurance for the victims of road accidents as the JUSTICE report had suggested, but proposed that there should be a ceiling on no fault damages and that the tort system should be retained for those with high earnings or serious injuries. This strange compromise may have allayed the fears of the legal profession, but it did not command itself to the Government of the day or its successor. The Pearson report lies mouldering in the catacombs of Whitehall and countless victims of road accidents will continue to cry out for the compensation that society denies them.

In the same field, I would personally favour a scheme of no-fault insurance against medical negligence. It is very difficult and often distasteful to bring an action for damages against a doctor who may or may not have been guilty of negligence. Clinical judgment cannot be accurately measured. Doctors are understandably reluctant to give evidence against each other. Actions may fail and in the absence of legal aid prohibitive costs be incurred.

A tragic case in which I became involved was that of an Indian whose wife went into hospital for an abortion. It was decided to induce it by oxytocin but the doctor in charge of her at the weekend left the drip-feed functioning for longer than he should have done. She went into a state of coma, was taken into a surgical ward and given a physical abortion. She developed a fever which was not taken sufficiently seriously, was discharged prematurely and ended up with serious and untreatable brain damage. Her husband's lawyers, acting on the best medical advice they could obtain, brought an action against the doctor who had been in charge of the drip-feed, but when the action came to trial they could cite no cases in which it had been established that excess

doses of oxytocin had caused permanent brain damage. The judge therefore held that the action failed. An experienced gynaecologist consultant with whom I later discussed the case took the view that the excessive damage of oxytocin had made the brain more vulnerable to damage by the septic abortion than it would normally have been and that the action should therefore have been against the hospital. Whatever the rights or wrongs of the case, this unfortunate woman went into hospital as a healthy, intelligent woman and came out with the mentality of a child. Without compensation, the husband had to sacrifice his business to look after her and their three children. She never recovered and ten years later poured a can of paraffin over herself and burned to death.

An equally unsatisfactory situation exists in respect of compensation for persons who have been wrongfully imprisoned. They have no statutory right to compensation, their only legal recourse being by way of a civil action for damages against the police. This is a difficult and hazardous undertaking because it is necessary to prove that the police acted maliciously.

If, however, a convicted person is granted a free pardon by the Home Secretary under the Prerogative of Mercy or his conviction is quashed by the Court of Appeal on a Letter of Reference from the Home Secretary on the basis of new evidence, he is automatically granted compensation, the amount being decided by the Chairman of the Criminal Injuries Board after representations by his solicitor. The Home Secretary will also grant compensation in exceptional cases where there has been a fault or malpractice on the part of the prosecution.

Apart from these exceptional cases, no compensation is payable to persons whose convictions are quashed by the Court of Appeal after a normal appeal hearing, or to persons who have been remanded in custody, sometimes for over a year, and when they come up for trial, are either found not guilty by the jury or discharged by the judge because he rules that there is no case to answer or the prosecution offers no evidence. The situation is the same for those whose cases are disposed of in magistrates' courts. The consequences of this can be disastrous for the individual concerned. Apart from deprivation of liberty, he may lose his job or other means of livelihood, or, if his period in custody is prolonged, his wife, children and home.

I regard this as quite monstrous because those who cause him such loss as he suffers are acting in our name and should be compensated by the authorities on our behalf. I was therefore glad to have the opportunity shortly before I retired of drafting the report of a JUSTICE committee on this blot on our system of criminal justice.

The problem is not an easy one - Many accused persons have provoked the charges brought against them by suspicious behaviour. Acquittals at trial are quite often perverse. They may be due to the inadequacy of the preparation or presentation of the case for the prosecution. Juries sometimes acquit, without considering the question of guilt or innocence, because they feel that the judge has been unfair or a police officer has been caught lying. The quashing of a conviction by the Court of Appeal does not necessarily betoken innocence - it may mean that the trial judge has gone beyond the banks of fairness, or there has been a material irregularity which cannot be condoned.

It would clearly be unacceptable to society to compensate those who owe their acquittals more to chance than to merit and we concluded that to overcome this difficulty any scheme for awarding compensation would have to operate outside the framework of the accusatorial system. We therefore recommended that an Imprisonment Compensation Board should be set up and function on the lines of the Criminal Injuries Compensation Board. On receiving an application it would have the power to look at any evidence or receive any representations which had not been before the courts. A refusal of compensation would not in any way prejudice the applicant because all the procedures and decisions of the Board would be confidential.

Anyone whose conviction is quashed by the Court of Appeal on the grounds that it was unsafe or satisfactory would have an automatic right to apply to the Board, as would those who were acquitted by the direction of the trial judge. Persons acquitted by a jury, or by magistrates, would be entitled to ask for a certificate entitling him to apply and, if this was refused, his counsel could apply. Needless to say, these proposals were rejected ~~MMK~~ by the Home Office out of hand.

CHAPTER IX

CRIMINAL APPEALS Legal Aid

Shortly after the publication of our first two reports, the Daily Mirror carried a full-page feature article about JUSTICE headed "TWENTY FOUR JUST MEN". This provoked a number of letters from prisoners complaining that they had been wrongly convicted and had been refused leave to appeal. One of these letters taught me a lesson I sometimes wished I had never headed. The writer was a publican called Blackman. He had quarrelled with his wife, had a nervous breakdown, and sought out an elderly aunt to ask her to lend him the money to emigrate to Australia. Her son had come in, decided that Blackman was threatening her, and called the police. He had been duly arrested, found guilty of demanding money with menaces, and sentenced to four years imprisonment. He had sent in a notice of appeal and ordered to serve an additional 42 days for impertinence.

His catalogue of woes was formidable :

(a) His counsel had been useless and afraid to stand up to the judge.

(b) The only prosecution witness, his aunt, had said that he wasn't threatening her.

(c) The judge had kept interrupting him when he was giving evidence and had refused an adjournment for a psychiatric examination.

(d) He had put off sentence until the next day and told counsel he didn't want him to come.

(e) When he turned up, the judge was angry, sent him away, and put off sentence until the following day, when he had come to speak for him

One or two other letters had worried me but this was too serious to ignore. I was then very much of a new boy in criminal matters, but I plucked up my courage, rang up the Registrar of the Court of Criminal Appeal, Master King, and asked him if I could come and see him about a prisoner's letter that was worrying me. He asked me the man's name and when I arrived in his office he had the file in front of him. I gave him Blackman's letter and when he had finished reading it he looked at me and said : "Surely, Mr Sargant, you cannot believe any of this nonsense. It's common prisoners' form. They all try it on. You'll soon learn. What he says just cannot be true. He was defended by a very competent counsel."

I left his office feeling like a schoolboy who had just received a wigging from the headmaster, but being far from reassured, I sought out Blackman's counsel and showed him the letter. Having read it, he hesitated and then said : "I hate having to admit it, I everything this man says is true. It was Mr Justice X. I had appeared before him at his previous Assize where he was in bad temper because his brother judge, Mr Justice Y, had been given the best lodgings. I had an up-and-downer with him and for Blackman's sake I just dare not get up against him again. I did what I could but he just wouldn't let me mitigate for him."

From that time I have never disbelieved any prisoner's story, however horrendous, until I have checked it and found some good reason to doubt it. I was often accused of being too credulous and I may occasionally have been conned, but, if this was a fault, it enabled me to win a number of appeals for prisoners when no-one else was willing to believe. Among the letters I have most valued have been from men whom I was unable to help but who have told me in their own way how much it meant to them that someone had believed them. The cruellest aspect of the criminal process is that once a man has been convicted of an offence, or even only arrested and charged, he and his family and associates automatically forfeit all credibility and right to consideration in the eyes of authority.

When further letters asking for help with appeals continued to arrive, a young member of the Bar, Hilary Cartwright, offered to analyse and evaluate the complaints. Like Bryan Adams before her she had put her head round the door of my office and asked if there was anything she could do to help JUSTICE. With the support of Peter Rawlinson, Q.C., as he then was, we were able to persuade the Council to set up a committee to inquire into all the aspects of our criminal appeal system. The committee was chaired by Edward Sutcliffe Q.C. and included four other Q.C.'s, two academic lawyers and four solicitors nominated by the Law Society. Hilary Cartwright was its secretary and gave unstinting help until she left London to take up an appointment as Legal Officer in the International Commission.

The Committee's terms of reference were wide and its original intention was to issue one comprehensive report, but because of the number and seriousness of the complaints about the lack of any provision for legal aid and advice, the Council asked it to produce an interim report on this problem. Before I discuss it, I should perhaps set out the bare bones of the criminal appeal system as it then was, and to a large extent still is. After a prisoner had been convicted and sentenced he could apply for leave to appeal against conviction and for sentence within ten days. His counsel and solicitor were under no obligation to advise or assist him, but if they wanted to, they could claim fees of £10 each under their Legal Aid order. No steps, however, were taken to inform convicted prisoners of this entitlement under the Legal Aid and Advice Act 1949 which had come into force in March 1950. Furthermore, before 1966 only one defendant in four was totally represented at his trial.

The appellant's grounds of appeal, such as they were, were then submitted to a single Judge together with the depositions and other material that had been before the Court of trial. The grounds were usually quite inadequate and often illiterate and could rarely satisfy the requirement of an error in law or serious misdirection. The Single Judge could then either refuse or grant leave to appeal. If he granted leave, then the appellant would be allotted counsel to argue the appeal before the Full Court. If the appeal failed, there was no right even to apply for leave to appeal to the House of Lords unless the Court of Appeal was willing to certify that a point of law of public importance had arisen which had not yet been decided. This restriction still exists.

If the Single Judge refused the application, the appellant was liable to be ordered to serve an additional 42 days and, if he had the ~~penalty~~ ordeal to pursue his application to the Full Court, this penalty could be increased to 90 days. Furthermore, the Court had the power to increase sentence. Except for murder convictions, when a Lord Justice would normally preside and a Q.C. be appointed to argue an application, the Court was comprised of three puisne Queen's Bench judges sitting in judgment on their equals. It would thus be difficult to imagine a situation less worthy of the claim that English justice was the best in the world, or more depressing in that JUSTICE was the only organisation actively concerned to do something about it.

Our interim report on legal aid published in April 1963 recommended sweeping reforms, the most important being :

(1) A Defence Certificate should not lapse after conviction and sentence, but the solicitor's retainer should be deemed to continue and to cover :

(a) advice on appeal

(b) all matters connected with the appeal.

It should, however, be limited to (a) in cases where solicitor and/or counsel advises that there is no reasonable prospect of success.

(2) There should be a newly constituted Criminal Appeal Aid Committee, composed of representatives of both sides of the legal profession, to consider applications for Appeal Aid Certificates from those who :

(a) were not represented at their trial

(b) had been advised by their lawyers acting under a Defence certificate that they had no grounds of appeal

(c) wanted to change their legal advisers

(d) had been privately represented but now needed legal aid.

(3) To fill the gaps which even the full implementation of these proposals would leave, there should be an independent appeals officer in every prison or group of prisons, or a scheme for the periodical attendance at prisons of local solicitors or barristers to advise on appeals, matters arising from and after the dismissal of appeals, and family and business problems.

Commenting on this report, the Legal correspondent of The Times sied : "The interim report on legal aid in criminal appeals published yesterday by JUSTICE goes to the root of a scandalous situation - both convict and judiciary alike are plagued by a disease which JUSTICE, with Beeching-like efficiency, has now diagnosed - an anachronistic system of legal aid for the convicted". Furthermore, the Final Report of the Home Office Working Party on legal aid in Criminal Proceedings, which had received a draft of our report, was published a month later and endorsed all its criticisms of the existing system.

Despite these endorsements, the fight to secure the implementation of even the more modest of our proposals was long and frustrating. For example, it was not until October 1968, on the recommendation of the Donovan Royal Commission on Criminal Appeals, and after strong opposition from the Law Society ~~on Criminal Appeals~~ that a solicitor acting under a Legal Aid Order, which had superseded the old Defence Certificate, was laid under a duty to give advice and help in submitting grounds of appeal. The JUSTICE recommendation that the legal aid order should additionally cover all matters connected with an appeal has never been accepted. Any right to advice and assistance ceases with the submissions to the Single Judge. This means that an appellant cannot call on his counsel to advise him whether or not he should renew his application to the Full Court. The solicitor who submitted the grounds may not even be told that they have been rejected by the Single Judge.

On the recommendation of the Donovan Commission, Legal Aid Orders became available to cover the circumstances described in the JUSTICE Report, but they are granted only by the Registrar and usually for a limited purpose. Representation can only be sanctioned by a judge. As is the case with trials, the authorities have adamantly insisted that the granting of legal aid in criminal matters, unlike as in civil matters, must remain the sole prerogative of the courts. Appeals Officers were also appointed in the larger prisons, but they can advise only on administrative matters.

Because of the failure of the Home Office to see the problem as a whole and grapple with it decisively, the situation grew worse rather than better. In 1968, applications for leave to appeal were running at the rate of 7,000 a year of which only 10% showed signs of legal assistance. In 1969 the rate had risen to 8,000 and in 1970 to 12,000. This sharp increase was largely due to the abolition of the power to increase sentence and of the automatic 42 day penalty which had been recommended by the Donovan Commission. It had not been realised that the strict rationing of letters and visits imposed on newly convicted prisoners was a direct invitation to them to lodge notices of appeal (which they could later abandon) so that they could enjoy the privilege of unlimited letters and visits granted to an appellant. This abnormal flow was stemmed by a stern warning that applications without merit would be penalized and by a tighter control over appellant's use of the privilege. The JUSTICE call for a properly enforced

duty to give legal advice and a rota of solicitors to advise on domestic and business matters would have been a much fairer remedy than a blanket threat that deters a victim of an injustice.

In its Annual Report of June 1970 JUSTICE noted that the provisions of the Criminal Justice Act 1967 for advice and assistance after conviction had been in the main ineffective. Solicitors had not recognised their responsibilities or been aware of the facilities open to them or they had been deterred by the transfer of their clients to distant prisons or the absence of a transcription on which to base an appeal. We had continued to make representations to the Home Secretary and a standard letter on official paper was eventually made available for convicted prisoners to send to their solicitors asking for advice. The Lord Chancellor was asked to write to the Chairmen of the Bar Council and the President of the Law Society requesting the full co-operation of the profession in implementing the provisions of the 1967 Act.

By 1972 the situation was still far from satisfactory and at our suggestion the Registrar, Master Thompson, convened a small private conference of interested parties under the chairmanship of the late Mr Justice Bean to review the situation and make further recommendations to the Lord Chief Justice and the Home Secretary. The most important of these was that when the Criminal Appeal Office received an application that showed no signs of professional assistance his solicitor should be asked whether or not he had received the advice to which he was entitled.

The other important problem discussed was the provision of transcripts to would-be appellants or their advisers. Without a transcript of the summing-up it is difficult, if not impossible, to formulate grounds that will carry any weight with the Court, which will only quash a conviction if the judge has been guilty of a serious misdirection or error in law, or of unacceptable bias. The Interim Report of JUSTICE had highlighted this difficult and recommended that the short transcript, ie. the summing-up and sentencing proceedings, should be made available to an appellant on the certificate of counsel, but this has never been accepted. The willingness of the court to provide transcripts had however been gradually increased and the formula agreed was that a counsel could submit an advice on appeal accompanied by provisional grounds and ask for a short transcript and transcripts of evidence in order to perfect the grounds. He is, however, required to justify the request.

If a determined appellant has been unable to submit sufficiently cogent grounds to justify the ordering of a transcript all he can do, if he or his family can provide the funds, is to order a transcript from the shorthand writers, which can cost up to £3 a page. As his legal aid order will have expired he will have to instruct solicitor and counsel to advise on grounds and if necessary to argue the application before the Full Court. This can open the door to greedy solicitors who in my experience are capable of charging up to £3,000 for mounting an appeal against conviction and £1,000 for an appeal against sentence. To meet these demands, parents have mortgaged their houses and a merchant seaman convicted of manslaughter was induced to commute his pension.

After what seemed an excessive delay the recommendations agreed at the private meeting were in the main agreed by authority and Master Thompson drafted a booklet of instructions for circulation to solicitors and members of the Bar engaged in criminal practice. But the problems facing many would-be appellants were by no means resolved. For example, whereas solicitors and counsel were asked only whether or not they had provided the statutory advice, some who were over anxious to prove that they had done their duty sent the actual advice to the Registrar, which could not have helped their client's prospects. Far more importantly, the appeal prospects of a prisoner who had been wrongly convicted or given too heavy a sentence depended, and still depends, very largely on the competence and concern of his counsel, and on the extent to which his solicitor is willing and able to exploit the facilities which the Registrar is ready to make available to him. Levels of competence and concern vary greatly, and, even when they are high, a wrongly convicted man may still feel he had been denied justice for reasons which speak for themselves in a letter I received from an experienced counsel.

"I entirely agree that the Deputy-Chairman's summing-up was heavily biassed against the defence. It contains a great number of comments favourable to the prosecution and almost none favourable to the defence. Indeed, the comments made on the defence evidence are almost all adverse comments. Despite this, I feel

that I could not argue that the judge's comments in the summing-up were so unfair as to entitle the Court of Appeal to say that they deprived the accused of a fair trial." At about the same time, another counsel told me that after a client for whom he had drafted particularly cogent grounds had been ordered to lose 30 days by the Single Judge if he would now hesitate before advising anyone to appeal.

These letters followed a warning by the Lord Chief Justice, which has since been repeated, that counsel should not settle grounds of appeal which they are not fully prepared to argue.

I have consistently taken the view, as did my Council, that it is wholly wrong to deter a man, either directly or through his counsel, from seeking to remedy an injustice he had suffered, particularly when a wealthy criminal can employ solicitor and counsel to argue an appeal before the Full Court on grounds that can at best be described as tenuous. I have always believed and argued that the only fair and sensible way to reduce the work-load of the Criminal Appeal Office (still running at 7,000 applications a year) is for the Lord Chancellor, and the Court of Appeal to come down heavily on judges who regard it as their duty to assist the prosecution and protect the police. A very large number of futile appeals are lodged because the appellants have reason to feel that their trials were unfair.

I cannot conclude this chapter without paying tribute to Dick Thompson, the Registrar of the Court of Appeal, whose respect and friendship I have valued more highly than that of any man I have known. Since he was appointed in 1965, he has been tireless in his efforts to ensure that every appellant receives such consideration as lies within his power and has imbued all his staff with the same spirit. Such improvements as JUSTICE was able to bring about in the provision of legal aid in appeals have been largely due to his dedication and concern.

Addendum to chap 9

The vital importance of advice and assistance in criminal appeals, even against sentence, cannot be better illustrated than by the cases of Augustus O'Connor and James Kimber.

Augustus O'Connor was an old lag, without friends or family, who had spent most of his years in hospitals and prisons for minor illnesses and minor offences. In 1968, two weeks before Christmas, he was discharged from a Manchester hospital without funds and without a home to go to. He was cold and hungry and, as many had done before him, decided that he would like to spend Christmas in prison. So he picked up a bottle of milk from a doorway marched into a Manchester police station and asked the Sergeant to charge him with stealing it.

The response was friendly. "Of course I'll help you," replied the Sergeant, "but you'll have to help me in return. I've got a whole lot of minor offences I want to clear up. If you'll agree to have them taken into consideration, I'll speak up for you in court and see that you don't get more than a month". Augustus was willing, and he was eventually taken before the local magistrates with a schedule of some 30 offences put down to his account. The Sergeant kept his word, but the magistrates had other ideas and sent him up to the Crown Court for sentencing. When he appeared there he was naturally scared. He pleaded guilty to stealing the milk bottle, but protested that he had been tricked into admitting all the other offences. The Sergeant naturally denied this and when his record was read out the Recorder took the view that he was an incorrigible rogue and sentenced him to ten years preventive detention. This sentence is now a thing of the past, and quite rightly so, because it did not carry the usual statutory remission.

Augustus quite naturally appealed, but he was refused leave and a fellow inmate advised him to write to me. He told me his sad story and said he was fairly certain that he had been in hospital when some of the alleged offences had been committed. I checked the hospital dates and then asked the Clerk of the Court for a schedule of his offences and from this it was quite clear that he could not have committed well over half of them. The Clerk agreed to join me in representations to the Home Office and the next thing I heard was that the Court of Appeal had ordered Augustus O'Connor's immediate release. But he had by then served 18months for the bottle of milk and I doubt very much if the Sergeant was even reprimanded.

In June 1970 James Kimber, then aged 40, pleaded guilty at Nottingham Assizes to offences of burglary and robbery and was given an extended sentence by Mr Justice Cusack. He had entered a house that had already been burgled, drunk a bottle of brandy and made off home with 4 other bottles of wine and spirits and 8 tins of food to a total value of £25. Having drunk half a bottle of sherry, he sallied out with it to try to raise some money and encountered an elderly neighbour. He seized the top of his shirt, brandished the bottle and demanded some money. The man produced £1, and Kimber seized it and ran off.

In themselves, these two offences in no way justified a ten year sentence, but Kimber had a truly appalling record. He had spent over 20 of his 40 years in custodial institutions, having served five years for armed robbery and assault, three years and two years for office breaking, a number of shorter sentences for theft and taking and driving away and finally a 7 year sentence for armed robbery, from which he had only recently been released. His counsel, who had made an eloquent plea in mitigation, advised him that he had no grounds of appeal, but he submitted long grounds of his own. These were turned down with scorn by the same judge who had given him his 7 year sentence.

While serving the last three months of his sentence in a probation hostel, he had been befriended and later given a home by an elderly woman, Mrs Dalby. She wrote to the Director of N.A.C.R.O. who passed her letter on to me. From what she told him, I decided that it was necessary to go up to Nottingham Prison and let Kimber tell me his own story. I found him to be a pathetic little man and the facts he gave me, which I was later able to confirm, were both revealing and depressing, and a sorry indictment of our penal system. His father had been killed in action in 1941 and at the age of 12 he was sent to a remand home for stealing a thermometer, value 5/-, from outside a house while carol singing. For crying and asking to go home, he was twice beaten with a stick in front of all the other boys. After three months, he was sent to an approved school for three years. He came out in 1945 and took a job as a tea-boy on a building site. He then did his National Service and was discharged in 1950, with character "very good". In October 1950 he was put on probation for stealing a coat out of a car, but this was the only chance he was ever given. He kept out of trouble for 18 months, but from this point a mania for joy-riding brought him six sentences for taking and driving away. He also committed two minor robberies.

In 1955 he was being driven home by a friend after a drinking bout when they were stopped by two police officers. They pulled the friend out of the car, Kimber punched one of the officers to protect him and the other officer cracked him on the head with his truncheon. He was taken to hospital and had to have 24 stitches. The scar was still visible and he told me that thereafter he suffered acute periods of depression from which he could only escape by drinking. The Court did what they regarded as justice to this episode by sending him to prison for six months.

The sentence of 5 years was listed on his record for armed robbery and two related charges. He and a friend had entered the house of a boxer who they knew was out. He returned unexpectedly and found them there. Kimber picked up a knife and grabbed hold of him. He broke away and called the police. He was not injured and nothing was stolen. The seven year sentence which followed seemed to be even less merited. Again, after a drinking bout, he had been wandering around and saw a lady sitting alone at dinner. He went into her house by a back door, confronted her with a toy pistol he had previously bought at Woolworths, and asked her for money. She gave him £5 from her handbag. He thanked her, went out of the house

and was later picked up by the police.

While he was waiting for his release, in the Nottingham hostel he got a job as a fitter and his manager gave me an excellent report on his enthusiasm and reliability. Then, almost immediately after his release, the Nottingham C.I.D. questioned him about two armed robberies and a murder, making enquiries at his home and place of work. This completely unnerved him. He was terrified of being locked up again. He gave up his job, went to his mother in Southampton, found that she did not want him, and returned to Mrs Dalby, only to find that his job was no longer there. It was in this state of despair that he had committed his last offences. This was put to the Court, but not his earlier history. There was no social enquiry report, no psychiatric report and no mention of the fact that throughout his criminal career the total value of his thefts had not exceeded £100 and he had injured no-one.

I prepared a lengthy report for the Court of Appeal which was supported by letters from his probation officer, his employer and a neighbour who had observed the effect on him of the police harassment. Four counsel turned down my request to represent him, but I eventually found a volunteer. The Court was unexpectedly receptive and reduced his sentence to three years. He was released on parole a few months later, married Mrs Dalby and did not return to prison thereafter.

CHAPTER X

CRIMINAL APPEALS - POWERS OF THE COURT

In January 1964 our Committee issued a second interim report. The Government had unexpectedly announced its intention to introduce a Bill empowering the Court to order a new trial on being presented with fresh evidence. This was prompted by the case of Lucky Gordon, a coloured man who had attacked a witness in the Stephen Ward case and whose conviction the Lord Chief Justice had been reluctant to quash outright. Somewhat ironically, it was not a suitable case for the use of such a power.

The Justice report, which was then in draft, unanimously recommended the granting of the power on fresh evidence and by a majority of nine to four recommended the granting of a general power. But in supporting the Bill in principle it stressed that its benefits would be negligible unless the Court adopted a wider interpretation of fresh evidence and that its self-imposed restrictions were contrary to the express wishes of Parliament. This theme was so forcibly pressed in both Houses of Parliament that the Attorney-General and the Home Secretary conceded that the Court might feel called upon revise its practice. This has turned out to be a pious hope. The judges have consistently refused to follow the wishes of Parliament. Indeed, in the course of one debate in the House of Lords, Lord Parker virtually said that, whatever Parliament laid down, the policy of the Court would not be effected.

The advantage for the Court of the new power is that it in difficult cases it provides an additional option to rejecting or allowing an appeal. The advantage for the appellant is that a new trial allows the new evidence to then be judged by a jury in the context of all the other evidence rather than by judges who can only take a restricted view. Appellants must surely prefer to be given a second chance of proving their innocence before a jury than to have their appeals dismissed. In the outcome, the power has been so seldom so rarely used to the extent that appellant counsel rarely invoke it. In the four years 1978-1981 only seven new trials were ordered and in 1982 none. This can too easily lead to denials of justice. It is surely significant that in 1982 out of 1352 appeals against conviction, the Court of Appeal allowed only 113 (8 per cent) whereas in appeals from Magistrates courts to the Crown Court, which are complete rehearings, out of 6083 appeals, 1698 (27 per cent) were allowed.

The substantive report of our Committee was published in June 1964. Its main

* * * Up-to-date figures to be substituted.

recommendations were :

(1) A radical reconstitution of the Court of Criminal Appeal (as it was then called) to give it true appellate status.

(2) A wider interpretation of new evidence.

(3) A new ground of appeal, namely that it would be unsafe, having regard to all the evidence, to allow the verdict of the jury to stand.

(4) The abolition of the power to increase sentence and the automatic infliction of a 42 day penalty (which could extend to 90 days) for appeals without merit.

(5) An extension of the time allowed for lodging an appeal (then only 14 days).

In respect of our first recommendation, it may now be regarded as beyond belief that the Court could be and often was composed of three puisne judges from the Kings Bench Division, hardened by years of conducting criminal trials, sitting in judgement on the fairness of one of their brethren, who might well be senior to them.

On the morning of the report's publication I happened to meet outside the Royal Courts of Justice a recently appointed judge who had been a member of one of our committees and was greeted me with, "Hello, Tom, I'm glad to see that you are having a crack at those boys in there". I was invited to make my first appearance in a television programme and can recall saying, "A wrongly convicted man could bang his head in against the walls of his cell for all anyone in authority cares". I still hold the same view although I might express it more circumspectly.

Within a very few weeks, the Government announced the appointment of a Royal Commission under the chairmanship of Lord Donovan. Our evidence had a decisive effect on its deliberations to the extent that when I ran into Mr Justice Lawton shortly after the publication of its report, he greeted me with, "Well, Tom, we've given you nearly everything you asked for".

(1) The Court of Criminal Appeal should cease to exist as a separate entity, but be made Division of the Court of Appeal in which judges from other divisions should be entitled to sit and at least two Lords Justices should be required to hear serious conviction appeals.

The recommendations of the Donovan Commission were implemented in the Criminal Appeal Act,1966, by which time Lord Gardiner, who had been a member of our Committee, had become Lord Chancellor. Its main provisions closely followed the recommendations set out above with two important variations, viz :

(ii) The Court should be requested to allow an appeal if it thinks that the verdict of the jury under all the circumstances of the case in unsafe or unsatisfactory, or if there was a material irregularity in the course of a trial.

(iii) The word 'substantial' should be deleted from the proviso which at present enables the Court to dismiss a technically well-founded appeal if it considers that no substantial miscarriage of justice has occurred.

The appearance of civil judges in the Court came like a breath of fresh air and I was able to promote three successful appeals which would have stood very little chance under the old regime. But before many months, the alarm bells must have rung in the judge's corridors and I encountered the same old reluctance to allow appeals which, in the opinion of counsel had considerable merit. The Justice Annual Report of June 1967 stated, "We are not yet satisfied that the Court is making full use of its powers under the Act. We are also disturbed by the possibility that, with the abolition of the fixed penalty, meritorious appeals may be deterred by the Court's warning that an appellant who does not accept the decision of the Single Judge and presses his appeal to the Full Court may have his sentence increased by the full time he has spent as an appellant. This warning is included in every notice of rejection by a Single Judge and in 1978 (?) the Lord Chief Justice issued a directive to counsel that they should not settle grounds of appeal unless they were prepared to argue them before the Full Court. These deterrents were designed to decrease the virtually unmanageable load of work on the staff of the Criminal Appeal Office but they have undoubtedly had the effect of aborting scores of potentially successful appeals. After the warning to counsel we protested in a letter to The Times, and in two subsequent Annual Reports, that the fairest and most effective means of cutting down the number of applications for leave to appeal was for trial judges to provide fewer causes of complaint about their conduct of trials and for the Court of Appeal to condemn rather than condone irregularities and bias.

The intentions of Parliament when it passed the Criminal Appeal Act were to be further diluted by a directive that an appeal against sentence could be determined by two judges and that a Single Judge who had rejected an application could sit in the Court that determined a renewed application. But this was not all. One of the minor provisions of the 1966 Act was that a Single Judge should give brief reasons for rejecting an application. The importance of this is that it helps the appellant or his counsel decide whether or not to press his application to the Full Court.

The third requirement can be devastating in its consequences for a man who has been wrongly convicted because of shortcomings on the part of those who defended him. His solicitor may have failed to interview an important witness or have taken an inadequate or misleading statements from him which induced counsel not to call him. He may not have felt justified in incurring the cost of tracing a witness or have thought it his duty to protect the legal aid fund. In the famous case of Luke Dougherty, recounted in a later chapter, his solicitor thought it sufficient to call only three witnesses to testify that he had been on a coach trip with 25 other persons and the Court ruled that he could not call any more witnesses on appeal. In the case of a man convicted of armed robbery on police evidence, his solicitor and counsel had taken the view that they need only call five respectable witnesses to swear that they had been in a public house with him at the time of the robbery. For his application for leave to appeal, his solicitor had assembled outside the court a further 11 witnesses with affidavits, because of the cost. Counsel explained that they had not been called to the Legal Aid Fund, but the Court refused to hear them.

Miscarriages of justice due to inadequacy or bad judgment of counsel are fairly common, especially in respect of decisions not to call available witnesses. Sometimes it is not their fault. They have been briefed at the last minute, are not allowed to interview witnesses and may have to rely on the advice of an articled clerk who has interviewed them. They tend to discard witnesses with criminal records, however minor, and members of the accused's family because of the vulnerability. Whether or not to put the accused in the witness box or to disclose his criminal convictions can be another difficult choice. In a life sentence case with which I am currently dealing, two honest alibi witnesses, when pressed to tell the Court what made them so certain of the day, were discredited because they did not want to say that it was the day after the accused had come out of prison.

Whatever may have been the reason for the failure to call evidence that was available at the trial, the Court of Appeal will not listen to it, nor will it consider a line of defence that was not put forward at the trial. This means that a wrongly convicted man may have to pay the penalty for the shortcomings of lawyers whose appointment was outside his control. This is surely wrong and justice has said so in no uncertain terms. The reason advanced for the rule is that without it counsel would deliberately try to have 'two bites at the cherry'. This shows a low opinion of the ethics of counsel

of the Court that there has been

and it cannot be beyond the capacity to relax the rule if it can be shown a genuine but fatal error of judgment, which may have brought about a miscarriage of justice

There are two other self-imposed fetters which inhibit the Court from remedying miscarriages. The first is its unreasoning respect for the verdict of a jury and unwillingness to interfere with it, unless there have been serious material irregularities in the course of a trial or the judge has gone too far beyond the bounds of fairness. Its criterion is whether there was evidence on which a jury could properly convict and often without regard for the evidence pointing to innocence. One of its devices is to go through each ground of appeal separately and write them off without taking into account their effect on the jury when taken together. If it has made up its mind in advance to dismiss an appeal, it will give counsel a rough ride and it will abandon any appearance of objectivity. For an innocent man it can fairly be described as heartbreak house and for counsel a source of disillusionment.

The final obstacle that may have to be overcome is the unwillingness of the Court to let down the police. I was once told that this policy was first laid down by Lord Goddard and has been followed ever since. It is fully in line with the widespread policy of trial judges to protect the police from over-vigorous cross-examination and to minimise or to excuse contradictions in police evidence, and to admit vigorously contested admissions.

It may be thought that I have painted an unnecessarily black picture of the Court's unwillingness to remedy miscarriages of justice. For a long time I could find no valid excuse for it, but as I became more aware of all the hazards for innocent persons inherent in the accusatorial system and the number of complaints of unfairness to which it gave rise, it became clear to me that the Court's self imposed fetters were in part a necessary protective wall built by the judges against a flood that might otherwise overwhelm them, and in part inspired by the need to preserve public confidence in the jury system and on the police. I will expand on this theme in later chapters.