FROM AN ENGLISH OFFICE WINDOW

MIDDLE TEMPLAR

The Nuremberg Trial

Dr. C. K. Allen has voiced in the columns of *The Times* the anxiety felt by a good many people about the conditions surrounding the Nuremberg Trial. He has argued that the newspaper reports amount to contempt of court since expressions used by responsible journalists "would not be tolerated in respect of any criminal trial in this country". To this he adds that "the far graver issue is whether a process before a military tribunal, of improvised constitution, procedure, and jurisdiction, on charges some of which have never before been heard of in national or international law, is a trial at all in any sense that Englishmen have ever understood the term, except in the days of political treason trials". This aspect of the subject was examined by Professor Goodhart in an illuminating lecture delivered before the Edinburgh University Law Faculty Society, which is now available in the latest number of The Juridical Review (April 1946). He is concerned "solely with the jurisprudential questions whether the International Military Tribunal so established is a legal court in the true sense, and whether the trials it is conducting can properly be described as legal trials".

First of all, Professor Goodhart deals with the contention that the judges must lack impartiality because they represent the victorious Allied Nations. To this he replies that "the prisoner has the right to demand that his judges shall be fair, but not that they shall be neutral", in support of which he cites Lord Wright that the same principle is applicable to ordinary law because "a burglar cannot complain that he is being tried by a jury of honest citizens".

The publicity that has been given to the trial Dr. Goodhart claims as a contribution to ensure its fairness. The requirement in Article 26 of the Charter of the International Military Tribunal that "the judgment of the Tribunal as to the guilt or the innocence of any defendant shall give the reasons on which it is based" is "the strongest guarantee of fairness".

Dr. Goodhart then proceeds to consider the rules of procedure and evidence and to what extent the Nuremberg Trial has a definite body of law applicable to it so that it can be regarded as a legal trial in the true sense. He thinks that the

fairness of the rules of evidence and procedure cannot be questioned. His examination of the question of legality leads him to the conclusion that "under International Law an individual can be under a legal duty not to commit certain international crimes, such as, for example, piracy or violations of the Hague and Geneva conventions". "This conclusion does not however", continues the Professor, "solve the whole problem because it is still necessary to consider whether the particular acts with which the defendants have been charged constituted crimes under International Law at the time, when, it is alleged, they were committed". Accordingly he proceeds to an illuminating examination of the charges and finds that the first three counts—common plan or conspiracy, crimes against peace, and war crimes—are in accord not only with the charter of the International Military Tribunal but also with the existing International Law. It is only on the fourth count, crimes against humanity, that there is serious legal difficulty and, although based on a novel international principle, he claims that it is "in accord with the principles found in every civilized system of law".

The conclusion of the whole matter is that, whatever the risk, these trials had to be held in the name of justice. Professor Goodhart claims that they have served three major purposes:

> In the first place they have given the defendants an opportunity of proving, if they could, that they had not taken part in the Nazi conspiracy, or that some other ground of defence was open to them. In the second place the trial has placed on record the full story of these crimes, so that future generations will be able to know the truth. This time it will not be possible to say that the atrocity reports are 'propaganda'. In the third place, the trials will have established once and for all that aggressive war is an international crime, and that those who are guilty of waging such a war must pay the penalty.

Regimental Records

A Divisional Court over which the Lord Chief Justice presided recently had to consider the scope of the rule admitting public documents as evidence. Phipson[1] lays down the principle that "the general grounds of reception are (i) that the statements and entries have been made by the authorized agents of the public in the course of official duty and (ii) that the facts recorded are of public interest or notoriety". This, however, may be stating the matter a little too widely. The question arose over the regimental records of a serving soldier. It was

[1] LAW of EVIDENCE, 8th ed., 1942, at p. 328.

desired to establish by the records the absence of the soldier overseas in support of a charge of perjury against a soldier's wife in connection with the registration of the birth of a child. Goddard L.C.J. laid down that because a document was an official document, as were the records in the present case, it by no means followed that it was a public document within the meaning of the rule. He then went on to say that "the public had no right of access to the records, and they were documents, which an officer of the Crown could refuse to produce on a subpoena if it was considered contrary to the public interest to do so. They were kept, not for the information of the public, but of the Crown and the Executive. A public document meant a document, which was made for the purpose of the public making use of it and being able to refer to it, and its object must be that all persons concerned in it should have access to it. That was not the case with regard to regimental records, and they were properly excluded in the case under consideration". (*The Times*, April 13th, 1946).

Patent Judges

Patent law is such a specialized branch that there does not seem to be any necessity to go into the details of the report of a Committee which has just been making a close examination of the operation of the Acts (Patents and Designs Acts Departmental Committee Cmd. 6789 H.M. Stationery Office). But one point in particular has attracted public attention. After dealing with the procedure in making application for a patent and the rights of patentees, the Committee examined the later stage of an appeal from the decision of the Comptroller of Patents to the High Court. The Committee had found that there is "a widespread, in fact a universal feeling of dissatisfaction" with the present method of dealing with patent actions and they attributed it largely to the fact that the decision of cases is entrusted to judges who, however learned and eminent they may be as exponents of the law, have no previous scientific training. A judge is inclined to require in the specification of a patent the same kind of precision to which he is accustomed in a legal document and he has not sufficient technical knowledge to appreciate the nature and limits of the invention. Similarly, he is at a disadvantage in attempting to reconcile the evidence of expert witnesses. It is even possible that a newly appointed judge, whose practice at the bar had nothing to do with patents, may be called upon to adjudicate in a patent case, with the result that unnecessary time may be taken to explain prin-

ciples with which all practitioners in patent litigation are thoroughly familiar.

Accordingly the Committee recommend the appointment of two judges, selected as at present from members of the bar, but also possessing technical or scientific qualifications. The late Lord Fletcher Moulton at once comes to mind as a notable example of this combination of talents. There should be two judges, partly because of an anticipated increase in the volume of work and partly to make a judge with these qualifications available to sit in the Court of Appeal. The analogy for this is that King's Bench judges are frequently called upon to sit in the Court of Appeal.

Since this particular point in the Committee's report has been emphasized, it should be added that the Committee have made a comprehensive review of the whole subject with a view to the needs and wishes of the business community. This particular proposal merits attention because it possesses a certain amount of novelty. In a way, however, it may be regarded only as an extension of the practice by which members of the common law, chancery and divorce bars are selected for appointment as judges in their respective tribunals.

The Faithful Servant

The duty of a servant to his employer received consideration on a somewhat unusual point of law in the recent case of *Hivac, Ltd.* v. *Park Royal Scientific Instruments Ltd.*[2] Five employees of the former company, who were engaged at work on five and a half days in the week, spent their spare time on Sundays working for the latter firm, a new company formed by former employees of Hivac. Under war time restrictions the employing firm were not in a position to discharge the members of their staff and obtain others in their places, as probably they would have done in normal circumstances. The work upon which they were engaged was the manufacture of hearing aids and the lower court as well as the Court of Appeal were satisfied that there had been no disclosure of confidential information although, as both firms were engaged upon the same type of instrument, this was an eventuality that might develop.

The Master of the Rolls, in delivering the judgment of the court, regarded it as "shocking that business people" should behave as these employees with a long period of service had done and as contrary to all principles of commercial morality.

[2] (1946), 62 T.L.R. 231.

The court had to determine, however, whether there was any injury in law and in doing so found themselves between the Scylla of the rights of the employer and the Charybdis of the employee's freedom to use his leisure for his own profit. The Court of Appeal gave the desired protection to the plaintiff on the ground that "it would be deplorable if it were laid down that a workman could, consistently with his duty to his employer, knowingly and deliberately and secretly set himself to do in his spare time something which would inflict great harm on his employer's business". Morton L.J., in agreeing with Lord Greene, adopted the language of A. L. Smith L.J. in *Robb* v. *Green*[3] that it is the necessary implication of a contract of employment "that the servant undertakes to serve his master with good faith and fidelity".

French Criminal Law in War Time

The French Society of Comparative Legislation has heralded the revival of its activities by the publication of a comprehensive volume of more than four hundred pages showing developments in the field of criminal law during the war years. Some of the laws examined in the volume have ceased to operate with the regime which produced them, though they may leave their influence behind; others are likely to find a permanent place in any revision of the system of criminal justice and procedure.

The influence of war conditions is shown by the opening article dealing with prostitution. A large section is devoted to various aspects of juvenile delinquency. The legal problems of rationing receive the attention of another contributor. In addition to discussing such special subjects, there are surveys of the criminal law and criminal procedure as well as a detailed chronicle of the laws and decided cases. The whole is a comprehensive piece of work to which more than a dozen eminent French lawyers have contributed. It thus provides a companion to the English studies in criminal science, which have been so hospitably received by the Canadian Bar Review.

The Law's Delays

The new Lord Chief Justice, Lord Goddard, has soon had an effect upon the cause lists. At the end of Hilary term he drew attention to the fact that every case entered in the King's Bench Division at the beginning of the term had been disposed of, though a certain number had been held over because the

[3] [1895] 2 Q.B. at p. 320.

parties were not ready. The actual number of cases heard was 521, against 429 set down, and for the first time in a long while London litigants have been getting their cases heard as quickly as cases heard at assizes. The Divisional Court was much in the same position as before the end of the term. Cases were being heard which had been set down since the beginning of the sittings. The law's delays, Lord Goddard claimed, did not exist in the King's Bench Division, presenting a contrast to the Divorce Court where the condition of affairs has lately been described in these notes.

Parliamentary Work

Whatever political views may be held about the present Government, no one can accuse them, either individually or collectively, of lack of industry. The legislative output has been quite exceptional in its range and importance, most of the measures dealing with matters that have long required attention. From the assembly of Parliament last year until the Eastertide recess one bill on an average was presented every two days and nearly half of them had received the royal assent. At the present rate of progress nearly one hundred important laws will have been placed upon the statute book by the time these lines are in print.

The output of legislation involves considerable demands upon the civil servants in the Government departments who, in addition, have had to prepare a number of White Papers, which are on a much larger scale than the explanatory memoranda formerly regarded as adequate introduction for a bill. They are full explanations of Government policy upon such important subjects as employment and civil aviation; the wide range covered can be appreciated from the fact that there have been over two hundred and fifty already in the present session. Not only do they inform members of Parliament but they also educate the electorate and provide material for discussion in bodies concerned to carry them out or affected as members of the community by their operation. This work has been done on a scale without precedent and may well be expected to produce a more enlightened and co-operating nation to carry out the tasks of peace.