THE JUDGE'S CHARGE TO THE JURY IN CRIMINAL CASES.

It is fairly certain that before the 12th century judges did not charge juries in criminal cases—there were no juries to charge. The actual date when judges first began to instruct and direct petit juries is enveloped in the same mystery which shrouds the origin of the jury itself. Forsythe in his *Trial By Jury* traces the petit jury back to about a century after the Norman Conquest. In 1219 the Lateran Council abolished the ordeal and contestants perforce were confined to trial by battle or law. Battle did not apply to pleas of the Crown, because the Sovereign could not be challenged to fight. Thus as early as 1221 we hear of persons "putting themselves on the country," that is, paying to have a verdict for "good or ill." No mention is made of the judge's charge until a long time afterwards, but it is reasonable to assume that when juries began to try accused persons, judge's began to charge juries. Having to deal with a new body of men at each trial, they would naturally have to give instructions as to the nature of the indictment and how the jury was to act, and probably from this developed the judge's charge to the jury in criminal cases as we know it to-day.

At first the jury were witnesses as well as judges of fact. As they lost their original character of witnesses, the charge to them must also have undergone considerable changes. By the time of the Civil War in England which gave to trial by jury an undisputed supremacy, it had evolved into a form, in theory, which closely resembles the present practice. This is indicated by the advice given by Bacon to Hutton, J., on one occasion, when he said: "You should be a light to the jurors to open their eyes, not a guide to lead them by their noses."

Legal records of the 16th and 17th centuries show that in practice a far different state of affairs existed. Juries were bullied by judges into giving verdicts pleasing to them. Their directions were commands which were disobeyed at the jurors' peril. If they persisted in their disobedience they might be kept without fire, light or food until they became more tractable. Sometimes they were fined and imprisoned. Thus in *Sir Nicholas Throckmorton's* case,[1] after the jury had brought in a verdict of "Not Guilty," it is reported that Bromley, C.J., with the most marked impropriety, remonstrated with them in a threatening tone, saying: "Remember yourselves better, have you considered substantially the whole Evidence in sort as it was declared and recited?"

[1] 1 How. St. Trials, 870 at p. 899.

When they refused to change their verdict he committed all twelve to prison, later releasing four, on their humbly admitting that they were wrong. The remaining eight were brought before the Star Chamber; three were fined £2,000 each and five £200 each.

Penn and Mead's case[2] brought things to a head. The prisoners were Quakers, religiously abhorrent to the authorities, and they were charged with unlawful assembly. The jury held out for an acquittal in spite of several instructions by the judge to return a verdict of "Guilty." Finally, the court in a passion addressed the jury thus:

> Gentlemen, you shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire, and tobacco; you shall not think thus to abuse the court; we will have a verdict, by the help of God, or you shall starve for it.

Then picking upon the juryman Bushell as the ringleader in this annoying insurrection he said to him:

> You are a factitious fellow; I will set mark upon you; and whilst I have anything to do in this city, I will have an eye upon you.

When later they still insisted on their verdict being recorded, the judge said (p. 967):

> I am sorry, gentlemen, you have followed your own judgments and opinions, rather than the good and wholesome advice which was given you; God keep my life out of your hands, but for this, the Court fines you 40 marks a man; and imprisonment till paid.

Bushell and his fellow jurors fought the fines and ten out of the twelve judges who sat on the case decided that the discretion of the jury to believe or disbelieve which evidence they chose, could not be questioned. Vaughan, C.J., delivering the judgment of the court declared that two lawyers or even two judges hearing the same evidence rarely came to the same conclusion. Then how could the Recorder set up that he was certainly right and the whole twelve jurymen wrong? It amounted to a claim of infallibility. The whole effect of the decision was to establish the right of a jury to give any verdict they thought proper with absolute immunity except in cases of corruption.

This decision did not change the practice of the courts all at once. Other juries were not so courageous in resisting the threats and bullyings of the court. The notorious Jeffries during his "Bloody" Assizes found little difficulty in persuading juries to convict.

Still, judicial and public sentiment during the 18th century was surely if slowly reshaping the criminal procedure, more clearly de-

[2] 6 How. St. Trials, 951 at p. 963.

fining the jury's function and adding to their importance. Judges in their charges began to adopt a persuasive rather than a peremptory tone. Thus Lord Mansfield in *R.* v. *Dean of St. Asaph*,[3] stated that

> It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it *in their power* to do wrong, which is a matter only between God and their own consciences.

The present day charge is in startling contract to the old charge. Where once it was a direction in the sense of a command, now it is a direction in the sense of a guidance or a suggestion. The Imperative mood has given place to the Subjunctive. In matters of law the trial judge gives an authoritative instruction but in matters of fact he does not go beyond a recommendation which the jury may accept or reject.

In the United States the development has even gone further. Statutes passed by most of the States of the Union impose a duty on the trial judge to carefully abstain from any expression of opinion or comment upon the facts or evidence. It is an error for him to express an opinion, or comment on the weight or the sufficiency of the evidence, or to state expressly or by implication his belief as to the guilt or innocence of the accused, and it is also an error to comment on the credibility or lack of credibility of witnesses, or their manner of testifying, or to comment in a manner prejudicial to the accused. In *Ott* v. *Oyer*,[4] for instance, it was held an error on the judge's part to say that a certain fact was a "significant circumstance" bearing upon the credibility of a witness. In *Commonwealth* v. *Barry*,[5] the verdict was set aside on the ground that it was a comment on credibility of witnesses, because the judge said that in many of the present assize cases, policemen were the principal witnesses and he was sure that the jury would agree with him that in all those cases they had manifested great intelligence and testified with apparent candour and impartiality. But in regard to the direction on points of law the American judge's charge is virtually the same as that of his contemporary in England or Canada.

In contrast to both the English and American practice, French and other continental judges do not sum up at all. Until 1882 the Presidents of the Cour d'Assizes used to make a short résumé, but it was abolished on the ground that it encroached upon the province of the jury. Counsel address the jury on questions of law and gen-

[3] (1783), 21 How. St. Trials 847 at 1039.
[4] 106 Pa. St. 6 at p. 17.
[5] 9 Allen (Mas.) 276.

erally bring in social and political questions which would not be permitted in our courts. Commentators on the French system say that the juries habitually take the law into their own hands and acquit or convict according to their own views after hearing the prosecution and the defence, and as a result momentary sympathies have a greater influence, than has the penal code.

Strictly speaking, the judge's charge to the jury in criminal cases should model itself on the one made in the famous, though unreported, case of *Bardell* v. *Pickwick*:

> If Mrs. Bardell was right, it was perfectly clear that Mr. Pickwick was wrong, and if they (the jury) thought the evidence of Mrs. Cluppins worthy of credence, they would believe it, and if not, why they wouldn't.

As usual the practice is vastly different to the theory. Although now and again we hear of a judge giving vent to injudicious and irrelevent utterances, the best practice allows and even encourages him to comment upon the facts of the case where they are at all difficult. Behind this practice lies the consciousness that a criminal trial is the substitute for private war and that it is conducted in a spirit of hostility, which is often fervent and passionate. The judge is more than a passive umpire. His duty is to see that the jury is in possession of all the facts in such a form that they can arrive at a fair verdict.

Mr. Justice Darling in *R.* v. *Pope*,[6] stated that

> Even a judge is not disentitled to use advocacy if it is proper for the occasion. He must see that the balance is held evenly between the prosecution and the defence. If a statement is pressed too hard for the defence, the judge must put it in a proper light for the jury; and the same observation applies to the prosecution.

Coming down to particulars, the practice is, as stated in 9 Halsbury 369, for the judge to sum up

> the whole case and the evidence to the jury, giving his direction on the matters in issue and on the points of law applicable to these matters, and may give his opinion on such matters.

The following rules are laid down in *Taylor on Evidence*:

> The Judge must explain to the jury what principles of law are applicable to the point in issue, and in order to enable him to do so correctly, he must distinguish questions of law from questions of fact (s. 26).
>
> . . . He must instruct in the rules of law by which the evidence when received must be weighed. Thus he should distinctly explain the nature of any presumptions, which may apply to the points at issue, distinguishing such as are conclusive from those which are liable to be rebutted from counter evidence; and again, dividing this latter class into those presumptions upon which the jury are bound to act, in the absence of conflicting testimony, and those upon which it is expedient, or allowable, to rely (s. 25).

[6] 4 Cr. App. Rep. 123 at p. 127.

Beyond such general statements, text writers do not go, and the courts have adhered to a policy of laying down negative rules by criticising defective charges, rather than setting up positive rules as to what they should contain.

In regard to the facts of the case, it is clear from a review of the authorities that the trial judge has a very wide latitude to make such comment as he thinks proper.

Lord Justice Duke in *Meering* v. *Grahame-White Aviation Co.*,[7] says at page 50:

> The learned judge is in charge of the proceedings at the trial, and his knowledge of the law, and his experience, and his observation of the conduct of the parties, are matters which for the purpose of the proper due administration of justice it is necessary that he should use in order that the jury may have before them when they come to exercise their function, the fullest possible material to which to apply their minds.

The above is a civil case but the principle enunciated applies equally to criminal trials.

In *R.* v. *Cohen & Bateman*,[8] Channell, J. said:

> A judge is not only entitled, but ought, to give the jury some assistance on questions of fact as well as on questions of law. . . . [8] It is not wrong for the judge to give confident opinions upon questions of fact. . . . It is necessary for him sometimes to express extremely confident opinions. The mere finding, therefore, of very confident expressions in the summing-up does not shew that it is an improper one. When one is considering the effect of a summing-up, one must give credit to the jury for intelligence, and for the knowledge that they are not bound by the expressions of the judge upon questions of fact.

Incidentally, we find that it is not wrong for a judge to comment on character witnesses. In *R.* v. *Carlin*,[9] it was held no misdirection for the trial judge to say: "It is very strange that it takes forty or fifty witnesses to establish his good character." The Court said at p. 513 that this

> was an expression of opinion of the Judge which he had the right to make, leaving, however, the evidence of good character to the appreciation of the jury. It is admitted under our system of criminal law that the trial Judge can give his own appreciation of the evidence, which may or may not be accepted by the jury. The essential point is that the whole evidence be submitted to the jury, who must decide finally as to the guilt of the accused.

Usually the trial judge charges the jury to bring in a verdict of "Not Guilty" if they have reasonable doubt as to his guilt, but so wide is the judge's power that he may refrain from charging on

[7] 122 L.T.R. 44.
[8] 2 Crim. App. Rep. 197 at p. 208.
[9] 6 C.C.C. 507 at p. 509.

reasonable doubt if he thinks proper. Mr. Justice Ramsay in *Queen* v. *Milloy*,[10] stated in his charge to the jury:

> I should be wanting in my duty if I concealed from you the effect the evidence has had upon my mind. I have only to add that I have no charge to give you as to doubt, for of doubt I have none.

In *R.* v. *Fouquet*,[11] it was held that where the judge considers no doubt exists, he is not obliged to instruct the jury that the prisoner is entitled to the benefit of the doubt, such a course being more likely to impede than to assist them in the discharge of their duty.

That non-direction may, in some cases, amount to misdirection, is shown in *R.* v. *Finch*,[12] where the conviction was quashed because the trial judge failed to point out the significance of certain evidence. Avory, J. held that the jury were entitled to have the assistance of the presiding judge in directing them and adopting the language of Pickford, J. in *R.* v. *Bundy*,[13] stated that

> the jury was not directed to the vital point. . . . In all the circumstances it is clear that the trial was not satisfactory and the case was not put to the jury in a way to insure their due appreciation of the value of the evidence.

Lord Chief Justice Alverstone in *R.* v. *Mason*,[14] said:

> Generally, . . . Summings up are not to be criticised because particular expressions are or are not to be found in them, unless they amount to a misdirection. A summing up is not a lecture in law. It must be looked at from the point of view of the questions raised at the trial. . . . The Court must look at how the case was conducted. If conducted on the wrong view of the law, the court ought to interfere.

In *R. Stoddart*,[15] the matter was put thus:

> The court does not sit to consider whether this or that phrase is the best that might have been chosen or whether a direction that has been attached might have been fuller or more conveniently expressed. . . . The court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice.

A good example of what a summing up should not be is contained in *R.* v. *Gray*.[16] The trial judge in that case did not caution the jury as to evidence improperly admitted; he did not point out that the Crown failed to link up the chain of evidence, i.e., that the prosecution failed to produce affirmative evidence to the effect that the prisoner was away from his boat at the time of the crime. (This was accused's alibi). A letter was used against the prisoner and the

[10] 2 O.L.N. 102.
[11] 10 C.C.C. 255.
[12] Cr. App. Rep. 77.
[13] 5 Cr. App. Rep. 270.
[14] 1 Cr. App. Rep. at p. 76.
[15] 2 Cr. App. Rep. at p. 246.
[16] 6 Cr. App. Rep. 242.

judge told the jury that nothing in it was helpful to the accused, whereas certain portions were materially in his favour.

The judge's comments on the facts do not amount to a misdirection in law unless they have caused or contributed to cause a miscarriage of justice.[17]

Yet where the case is put so strongly against the accused (even where the view is justified) so as to raise a doubt whether the prisoner's case has been put fairly to the jury, the conviction will be quashed: *R.* v. *Frampton.*[18] In that case the court took exception to the following remark made by the trial judge:

> The witness Dunford is evidently lying, and I warn you not to accept his evidence. His evidence is not worth twopence. He is a liar. He has committed perjury in that box, and he is liable to penal servitude for what he has done.

Misdirection does not necessarily result in the quashing of the conviction. In *R.* v. *Low,*[19] it was held that where there was misdirection on a trifling matter, such that no substantial wrong was occasioned, the verdict should be upheld. But serious misstatement of the evidence in the judge's charge led to the court quashing the verdict.[20] The court stated there that

> It is important that the summing up should represent fairly the evidence . . . . (because) . . . The learned Chairman *may* have misled the jury.

The courts have looked broadly at the matter of misdirection. They quash verdicts only when the misdirection has resulted in a miscarriage of justice. This is defined in *R.* v. *Cohen and Bateman,*[21] where Channell, J. says at page 207:

> There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty.

Section 1019 of the Canadian Criminal Code is to the effect that no conviction can be set aside on the ground of misdirection unless some substantial wrong or miscarriage was thereby occasioned on the trial, thus bringing the Canadian law into alignment with the English.

If the circumstances are such that it is impossible to say that the minds of the jury may not have been prejudicially affected, then a

[17] *R.* v. *Voisin,* 13 Cr. App. Rep. 89.
[18] 12 Cr. App. Rep. 202.
[19] 19 C.C.C. 281.
[20] *R.* v. *Feldman,* 5 Cr. App. Rep. 214 at p. 215.
[21] 2 Car. App. Rep. 197.

substantial wrong has been occasioned. This result is accomplished if what has been improperly done may have influenced the jury adversely to the accused upon a material issue.[22]

It is a misdirection which will result in quashing to tell the jury in general terms that affirmative evidence is stronger than negative. The trial judge in *R.* v. *House*[23] said to the jury:

> It becomes, therefore, a question for you whether you accept the evidence of these two men. The affirmative is always stronger than the negative. The man who says a certain thing happened is more credible than the man who, in his defence, says the thing did not happen.

The Appeal Court held that this charge had the effect of shifting the onus.

A guide as to how judges should direct on points of law is to be found in the *Prudential Assurance Co.* v. *Edmonds*,[24] where Lord Blackburn stated the principle which applies equally to civil and criminal cases in this language:

> I take it that when there is a case tried before a Judge sitting with a jury, and there arises any question of law mixed with the facts, the duty of the Judge is to give a direction upon the law to the jury, so far as is necessary to make them understand the law as bearing upon the facts before them. Farther than that, it is not necessary for him to go. It is a mistake in practice, and an inconvenient one, which very learned Judges have fallen into, of thinking it necessary to lay down the law generally, and to embarrass the case by stating to the jury exceptions and matters of law which do not arise upon the case. That is not the duty of the Judge at all, and I think it is better not to do it. . . . Yet when the facts are such that in order to guide the jury properly there should be a direction of law given, the not giving that direction of law would be subject for a bill of exceptions.

In this connection it is interesting to note what Baron Bramwell once said in giving his views on the definition of "homicide" before a Parliamentary Committee:

> I think a judge who knows his business never troubles the jury with needless definitions, he declared . . . . I frankly confess that if I have to give the jury a definition 'First of all, gentlemen, I have to tell you what homicide is, and then what is not criminal homicide,' I expect the jury would be utterly bewildered. It is my duty as a judge to inform myself of the meaning of the Act, and not to trouble the jury with a definition except so far as necessary.

Among the more important matters to which special attention has been directed by the courts, these may be noted:

The Summing Up Must Put the Case for the Defence Fairly.—In *R.* v. *Dinnick*,[25] Lord Reading stated that

[22] *Allen* v. *R.*, 18 C.C.C. 1.
[23] 16 Cr. App. Rep. 49.
[24] 2 A.C. 487 at p. 507.
[25] 3 Cr. App. Rep. 77 at p. 79.

however weak it may be, is raised by a person charged, it should be fairly put before the jury. . . . It may (be) very foolish and unfounded, but (it) ought (to be) put before the jury—this is a paramount principle of our criminal law.

In *R.* v. *Thompson*,[26] many important points raised by the defence were not put to the jury and the conviction was quashed.

Where material evidence was ignored in the summing up, the conviction was quashed.[27] A Canadian illustration of this is *R.* v. *Blythe*.[28]

Of course omission does not of itself necessarily amount to misdirection; it is only when the omission is such as is calculated to mislead the jury.[29]

In this connection Lord Shaw in *Arnold* v. *King Empress*[30] observed: " . . . the view of the judge may not coincide with the views of others who look upon the whole proceedings in black type." So that if the case has been fairly left to the jury it is not misdirection.

Corroboration.—Reading, C.J., in *R.* v. *Baskerville*[31] said:

It has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on uncorroborated testimony of an accomplice or accomplices. . . . This rule of practice has become virtually equivalent to a rule of law . . . in the absence of such a warning by the judge, the conviction must be quashed.

A jury ought to be told that while they ought not to convict on the uncorroborated evidence of an accomplice, they are strictly in law at liberty to do so if they think fit. Where corroboration evidence is required by the Code, it is the duty of the trial judge to instruct the jury as to what part of the evidence, if any, bears that character, and if he misinstructs them, there is no doubt the matter can be reviewed on a reserve case.[32]

In *R.* v. *Reynolds*,[33] the judge instructed the jury that the only evidence against the prisoner was that of an accomplice and they ought not to find him guilty, but if they did the conviction could not be set aside. The prisoner was found guilty and the conviction sustained.

[26] 16 Cr. App. Rep. 6.
[27] *R.* v. *Badash*, 13 Cr. App. Rep. 17.
[28] 15 C.C.C. 224.
[29] *R.* v. *Vassileva*, 6 Cr. App. Rep. 228.
[30] 24 Cox C.C. 299.
[31] 12 Cr. App. Rep. 81 at p. 87.
[32] *R.* v. *McClain*, 7 W.W.R. 1134.
[33] 15 C.C.C. 209.

The most recent case on the point of corroboration is *Rex* v. *Hayman,*[33a] where Prendergast, C.J.M., reviewing the law, points out that it is a misdirection on a material matter for a judge to advise the jury that if they believe the uncorroborated evidence of accomplices, they must, or should, or ought to convict. The trial judge should be very careful to say nothing to detract or nullify the warning that it is dangerous to convict on the uncorroborated testimony of accomplices.

Evidence of Young Children.—Generally speaking, where there is uncorroborated evidence of young children, a warning should be given to the jury to receive such evidence with great care. The word "warn" or "caution" need not be used as long as such warning is given.[34]

> It is always wise for the judge to address some caution to the jury as to the possibility of such a young child then (ten years) having a mistaken recollection of what happened.[35]

In *R.* v. *Parkin,*[36] the Appeal Court held as a ground for allowing a new trial, the fact that the trial judge's charge fell short of the proper caution as to the extreme care to be given to such evidence. Mr. Justice Cameron said: "It is essential, nevertheless, that the accused should have the benefit of the usual and well-established safeguards given him by the law."

Alibi.—The defence of an alibi must be left to the jury; it is misdirection if the judge rules it out.[37] Here the court quashed the conviction because the trial judge said:

> here is a man who has set up an *alibi* which is no shadow of an *alibi* from any possible point of view.

It is erroneous to state to the jury that an alibi is unsatisfactory when as a matter of fact no proof was furnished as to the weakness of the alibi.[38]

Insanity.—Where a defence of insanity is set up, the judge is not bound to direct the jury that they may find a special verdict. It is sufficient if he directs them clearly that the issue is whether the prisoner is sane or insane.[39]

[33a] (1932), 1 W.W.R. 86.
[34] *R.* v. *Cratchley,* 9 Cr. App. Rep. 232.
[35] *R.* v. *Pitts,* 8 Cr. App. Rep. 126 at p. 128.
[36] 31 M.R. 438 at p. 455.
[37] *R.* v. *Rufino,* 7 Cr. App. Rep. 47.
[38] *R.* v. *Curtis,* 9 Cr. App. Rep. 9.
[39] *R.* v. *Coleman,* 7 Cr. App. Rep. 65.

Ambiguous Charges.—The judge must put all material matters clearly, pointing out what is law and what is fact. In *R.* v. *Collins,*[40] it was held that if the judge's charge was so ambiguous that the jury thought that a certain point was a point of law whereas it was a matter of fact and which therefore, they did not determine, there should be a new trial.

Joint Trials.—The judge should be very careful, where two or more persons are being tried jointly to point out to the jury which evidence applies to all and which to only particular accused persons. In *R.* v. *Murray and Mahoney* (No. 3),[41] it was held an error in law for the trial judge to omit giving an instruction to the jury that a statement made by one prisoner in the absence of the other and not admissible against the latter, was only evidence against the prisoner making the statement and not against the other.

Circumstantial Evidence.—The judge should make it clear that it is for the jury alone to decide as to the weight and inference of the circumstantial evidence. Thus in *R.* v. *Collins,*[42] it was held an error for the trial judge to instruct the jury that they cannot doubt that certain inferences are to be drawn on points material to the issue.

Duty to Charge Re Alternative Verdict.—Where a crime of less degree than that charged in the indictment and for which less crime a verdict might be given under Sec. 951 of the Code, is presented in the evidence, the jury must be instructed upon such lesser crime as well as upon the greater crime stated in the indictment.[43] An example of this would be an alternative charge on murder and manslaughter or rape and indecent assault.

Comment of the Accused's Failure to Testify.—Under Sec. 4 of the Canada Evidence Act,[44] the judge must not comment on the failure of the accused or the wife or husband to testify, or the conviction will be quashed. But a direction to the jury that the accused failed to account for a particular occurrence as to which, by reason of the testimony adduced against him, the onus was cast upon him to answer, is not a comment in the above sense.[45]

Nor is a statement by the judge charging the jury that the evi-

[40] 1 C.C.C. 48.
[41] 28 C.C.C. 247.
[42] 12 C.C.C. 402.
[43] *R.* v. *Daley,* 16 C.C.C. 168.
[44] R.S.C., 1906, Ch. 145.
[45] *R.* v. *May,* 23 C.C.C. 469.

dence of a Crown witness is wholly uncontradicted, a comment as set out in Sec. 4.[46]

The charge to the jury is one of the most difficult, and at the same time one of the most important duties placed on the trial judge. In the great majority of cases this summing up either convicts or acquits the prisoner. A good summing up is, as Sir James Fitzjames Stephens says: "the voice of justice itself." He sums up the matter most strikingly in the *History of the Criminal Law of England,* when he states at page 455, Vol. I:

> I think, however, that a judge who merely states to the jury certain propositions of law and then reads over his notes does not discharge his duty. . . . I also think that a judge who forms a decided opinion before he has heard the whole case, or who allows himself to be in any degree actuated by an advocate's feelings in regulating the proceedings, altogether fails to discharge his duty, but I further think that he ought not to conceal his opinion from the jury. . . . The judge's position is thus one of great delicacy, and it is not, I think, too much to say that to discharge the duties which it involves as well as they are capable of being discharged, demands the strenuous use of uncommon faculties, both intellectual and moral. It is not easy to form and suggest to others an opinion founded upon the whole of the evidence without on the one hand shrinking from it, or on the other closing the mind to considerations which make against it. It is not easy to treat fairly arguments urged in an unwelcome or unskilful manner. It is not easy for a man to do his best, and yet not to avoid the temptation to choose that view of a subject which enables him to show off his special gifts. In short, it is not easy to be true and just. That the problem is capable of an eminently satisfactory solution, there can, I think, be no doubt. Speaking only of those who are long since dead, it may be truly said that to hear in their happiest moments the summing-up of such judges as Lord Campbell, Lord Chief Justice Erle, or Baron Parke, was like listening not only (to use Hobbes's famous expression) to "the law living and armed," but to the voice of Justice itself.

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[46] *R.* v. *Guerin,* 14 C.C.C. 424.