On CIRCUIT: 1924–1937

1924

The last big case I was concerned with at the bar, in July 1924, was before Mr Justice Bailhache. It was a dispute between an American Insurance Company and an English one, and the issue was about the technicalities of arbitration under the law of New York. As it happened London was full of American lawyers. The American and the Canadian Bar Associations were here on an organized visit. So there was no lack of expert witnesses available. I spent my evenings attending dinners in their honour—we had three at the Inner Temple—and my days examining, or cross-examining, our guests in the witness-box. I remember saying to one, whom I had made my friend overnight, "There is little I can ask you, Mr Wickersham, but I cannot deny myself the pleasure of being able to say that I once cross-examined an Attorney-General of the United States".

The case ended at the end of term. Mr Justice Bailhache bade us good-bye, though not with the ancient formula *Cras Animarum*: that was not his style. I went off for a well-earned vacation, little thinking that I should never see him again, and still less that I should be his successor in the following October. On 6 September I went with two friends and a knapsack to walk in the Pyrenees. The first day we spent at Lourdes. It was my third visit, and I found the spectacle as interesting as ever. And so to Luz, Bareges, to the top of the Pic du Midi de Bigorre, and to Gavarnie. Then over the long pass to Ordessa and the Val d'Arazas, on the Spanish side, the most beautiful spot in the Pyrenees. Back to Gavarnie and by a strenuous passage to Cauterets. And so to Pau, St Engrace, Mauléon, Ahusquy and Bayonne.

On Monday, 29 September, I got home, very brown and very fit. My wife, who had been attending to my letters, said: "There are

a lot of letters for you, and there is one you ought to answer. It is from the Lord Chancellor." "What on earth does he want?" I said. "Well," she said, "he is proposing to make you a judge." I was indeed astonished, and said I had no idea there was any vacancy. On which she told me that while I was away Mr Justice Bailhache had died suddenly. The French papers would not record that, even if I had read them. No one can ever have had such an invitation from a Lord Chancellor with more complete surprise than I did.

The Lord Chancellor was Lord Haldane, in the first Labour Government. In fact I was the only judge of the High Court whom he appointed under that administration. I was sworn in as a Judge of the King's Bench Division, before him, at the House of Lords, on 7 October 1924. Ten years before, almost to a day, in the same room, and before the same Lord Chancellor, I had taken the oath as one of His Majesty's Counsel.* On this second occasion I was told to wait upon him in a judge's robes. My own could not be ready in time; so I went rather too amply adorned in the robes of Mr Justice Shearman, who was larger than I am.

My new robes were ready for me to wear when I was sworn in before the Lord Chief Justice, in his Court, on 13 October 1924. One part of my equipment I kept for a very short time, and then returned it unused to the makers. This was the black cap. Very soon after my appointment Lord Darling finally retired from the Bench, and when he did so he gave me the black cap he had used throughout his judicial career. I have carried it throughout mine (and sometimes used it on grim occasions), and when I went to the Court of Appeal in 1937 I handed it on to Mr Justice Wrottesley upon his appointment to the King's Bench. If he, and perhaps others, should continue the transmission, this black cap is likely to accumulate associations of horror. But I hope that theatrical piece of ritual, a legacy of a macabre past, may be abandoned in a more enlightened age. And then the thing may go to a museum.

I little realized when I was at the bar how large a proportion of his time a Judge of the King's Bench spends away on circuit. I had

* That ceremony was not the same as the one when John Campbell was sworn in as King's Counsel in June 1827. He records in his diary: "We were in the Chancellor's private room in the House of Lords. They made us kneel down and swear that we did not believe in the damnable doctrine of Transubstantiation." *Life of Lord Campbell* (1881), Vol. I, p. 446.

myself never even joined a circuit. I started as a pupil of Lord Justice Scrutton. He had once joined the South-Eastern Circuit, but he never went on it. (When he became a judge, however, he was the best judge in a criminal case of his time, perhaps of any time.) In his chambers there was no connexion with any circuit. I had very little money, and to join a circuit as he had done would have wasted some of it. And as I hoped to get work chiefly in the Commercial Court I never joined one at all. As a result, of course, I was never privileged to be a Recorder.

Lord Haldane, I presume, honoured me by his selection because he had listened with approval to arguments of mine in the House of Lords and the Privy Council. If he had bethought him that perhaps the most serious work of a King's Bench Judge is to try prisoners at the Assizes and at the Old Bailey, and had enquired how far experience qualified me for that task, I am sure he would never have appointed me at all. As a youth I was once fined for riding a bicycle without a light. I had for some years occasionally sat at Petty Sessions as a county magistrate, and sometimes attended Quarter Sessions under the chairmanship of Lord Parmoor. These were the only occasions on which I had ever been inside a criminal court. Moreover my experience of juries, and their ways, was negligible. I do not suppose I addressed a jury more than half a dozen times during my twenty-seven years at the bar.*

In these circumstances it was with very considerable trepidation that on 18 October 1924 I left London for Carlisle† upon the Northern Circuit, with the prospect of having to try prisoners as my first duty. But I had two pieces of good fortune. My first marshal—first of a numerous and charming company—was John Maude, who already knew all that I did not. And secondly, there was Sir Herbert Stephen, that most experienced and kindly Clerk of Assize. Their help, especially in the matter of sentences, was invaluable. For the rest,

* Lord Wright's practice at the bar was very similar to mine, but on a more prosperous scale. He did join the North-Eastern Circuit, and therefore, like Lord Justice Scrutton (whose pupils we both were), had been at least once in a criminal court in the barristers' seats. There is only one reason for his getting the better of me, at the bar, and since, that, if it were suggested, I should strenuously contest, viz. that he was at Trinity College, Cambridge, and I at Trinity College, Oxford.

"The fault, dear Brutus, is not in our stars,
But in ourselves, that we are underlings."

† In 1435 the Act, 14 Hen. VI, cap. 3, provided that in Cumberland "in Time of Peace and of Truce" the Assizes shall be held at Carlisle.

I sat with my finger in the index of Archbold, and I hope my uneasiness was not too apparent.

I had one other very great piece of good fortune, when I started going on circuit. A judge is attended by a cook and two man-servants, who are his Circuit butler, and the marshal's man. I was able to make an alliance with John P. Devany as my Circuit butler. He had great experience, as he had been Circuit butler to Lord Russell of Killowen, when Lord Chief Justice. Devany was my very kind friend, and for about ten years he did a great deal for my happiness. When he said he must retire, owing to advancing years, it was a great loss to me.

The Circuit butler valets the judge, and waits at table. The marshal's man, who valets the marshal, is his assistant. In Grantham's *Notes* he records that the marshal's man used to have the privilege of selling the daily Cause Lists, and that at Liverpool this was very profitable.

But before I faced any prisoners there was the Grand Jury, and I had only the vaguest idea what I ought to say to them. What I did say was perhaps unusual. I spoke of the impressiveness of being received as His Majesty's Judge of Assize in their ancient city, and I added: "I do not know it for a fact, but I suspect that when my great-grandfather emigrated from Scotland he probably passed through Carlisle on foot. I am sure his reception here cannot have been as stately as mine has been, but I hope it may have been as cordial."

It was perhaps well that I did not go farther back in recalling visits of my namesakes, if not my ancestors, to Carlisle. When that city was surrendered to the Young Chevalier on 17 November 1745 a good many MacKinnons were in his invading army that went on to Derby. I doubt if I had a direct ancestor among them. For the first of them that I know of had gone from Skye to Arran at least by 1700, if not before, and three generations were farming in Arran until my great-grandfather, in 1780, came away to England on his way to Italy and later to the Argentine.

After Culloden, in August 1746, the Assize at Carlisle was a terrible affair. The Commission was opened on 12 August by four judges, headed by Chief Baron Parker. They found 382 prisoners to be tried, mostly captured refugees from the battle. It was thought impossible to try so many. So it was decreed—by what power or authority I cannot imagine—that, with the exception of some greater offenders, they

should draw lots to provide one out of every twenty to be tried, the other nineteen agreeing to submit to transportation. Some having accepted these terms, the prisoners were reduced to 127, against whom true bills were found by the Grand Jury. The Court then adjourned until 9 September. Eventually 96 were sentenced to the horrible death that was then the penalty for High Treason. Of them 31 were thus executed, including Sir Archibald Primrose, in October. All the rest, except two who had died in prison, were transported for life.*

My first prisoners at Carlisle all pleaded "Guilty", and the business of the Assize was over by lunch time. So early I learned that though on circuit one may have to sit much longer than in town—on the next Saturday, at Lancaster, I sat till 5.30—there are times of holiday. In this afternoon we had a walk to the Crown Inn, Wetheral, on the Eden. And for the next two days I enjoyed the hospitality of a High Sheriff, that pleasant experience I have so often repeated.

Judges' Lodgings are of two types, either an official house permanently kept and furnished by the county, or a furnished house hired for the period of the Assize from its owner. At Carlisle my Lodgings were of the latter sort, in a modern villa, comfortable enough but not impressive. At Lancaster there is a fine seventeenth-century house to the north of the Castle and the church. The panelled dining-room on the first floor is magnificent. In front of the house is an open space sloping down hill. When I came there the General Election was in full swing—for Lord Haldane remained in office less than a month after recommending my appointment—and the contest in Lancaster was keen. I received one day from the Labour Party a very polite message to say that, with my permission, they desired to hold an open-air meeting in the space before the Lodgings in the evening, but that if it would be in the least an annoyance to me they would cancel it. Of course, I agreed.

In Huddleston's *Notes* I find: "A dozen of port is sent to the Judges at Lancaster, supposed to be bought by the interest of a sum left by an old lady for that purpose." But in Grantham's *Notes* there is a memorandum from the Under-Sheriff, dated 5 March 1906, which gives a different explanation. "Years ago a present of Port wine for

* *Carlisle in 1745* (London, 1846), pp. 245–259. There is no MacKinnon in the list of the 127 on p. 248. Some of them may have drawn a favourable lot: there are plenty of the name in the United States and Canada.

the use of the Judges was sent either annually or periodically to the lodgings at Lancaster by the Duke of Buccleugh. The origin of this present is quite unknown, and it has been discontinued for many years. A great deal of the Buccleugh property in the neighbourhood of Lancaster has been sold, and whether this had anything to do with its discontinuance I do not know."

The Sheriff's trumpeters in Lancashire are the best in all the counties. They wear a picturesque uniform; their trumpets are keyed so that they can play all sorts of tunes as duets; and from attending four times a year at lengthy Assizes at Liverpool and Manchester they get so much practice that they play admirably. The banner on one trumpet bears the arms of the Duke of Lancaster, old John of Gaunt; that on the other the arms of the Sheriff. "D'ye ken John Peel" is a tune they play with obvious gusto: and on the last day of the Assize at Manchester they play "Auld Lang Syne" with much feeling.

In *Denman's Digest, or Archbold Abridged* (1912, p. xlviii) I find: "It was resolved by the Judges, on 12 April 1904, that the sheriff's trumpeters should not be dispensed with. There can be no doubt in the minds of those familiar with the subject that the time-honoured institution of heralding the approach of the King's representative by the sound of trumpets has a tremendous effect in impressing the populace with the importance of the proceedings. The day of the abolition of trumpeters would be an evil one."

From the Lodgings at Lancaster it is a short distance up a steep footpath to the Castle. The roadway goes by a longer and more gentle ascent. When the High Sheriff and his Chaplain come to escort the Judge to the Court the trumpeters attend with a fanfare. Then they walk up the footpath, while the carriage drives its longer course, and are ready at the Castle for a second tune.

The "carriage" is now almost always a motor-car. In Lancashire, at this time, it was the most enormous Daimler I have ever seen. It had belonged to the first Lord Leverhulme, when he was High Sheriff, and at the end of his year of office he gave it to the county for the Judges' use. When I first rode in it in 1924 it was painted a bright vermilion with immense coats of arms on each panel. A year later I found that the then High Sheriff had had it repainted a more demure colour, and the coats of arms reduced to a more modest size. And being an heraldic enthusiast he had taken great pains to get the coat

of John of Gaunt precisely correct. There was something about the label of difference, which he told me but I have forgotten, of which he was particularly proud. I believe it had been incorrectly tricked for centuries.

Lancaster Castle is a magnificent building, and the two Courts in it are very fine. The Crown Court has, in the dock, grim relics of the bad old days. On the back of the dock is an iron device into which the fingers of a man's hand can be put. Another piece of iron on a hinge comes round the wrist and can be made fast, so that the palm of the hand is exposed. Alongside is a brazier, and a branding iron with the letter M at the end of it.

Now these things are there in obedience to an Act of Parliament of 1487. And they are connected with that preposterous absurdity "the Benefit of Clergy" which disfigured the English criminal law down to the nineteenth century. Down to 1826 the penalty for every felony was death. But this was subject to the operation of the Benefit of Clergy. Originally this arose from the immunity of the cleric from the jurisdiction of the Secular Courts. And as clerics were alone literate, or were supposed to be, the Benefit of Clergy came to be allowed to anyone who, upon conviction, could show his ability to read in the dock. A woman, of course, could not even by a fiction be a clerk; but by an Act of Philip & Mary women were allowed the like privilege. Until then all women convicted of felony had to be hanged. In the seventeenth century the convict's test was always his ability to read the first verse of the 51st Psalm—or even to recite it, with the book open at the wrong place or upside down. This was known as "the neck verse". But by an Act of 1707 the claim was allowed, without reading, to anyone convicted of a clergyable felony. An example of this ritual—and of the strange lack of decorum that might occur at an Assize in the old days—is recorded in *Manningham's Diary* (Camden Society, 1868) on 24 February 1601. The Assizes were being held at Rochester, before Serjeant Daniel (later Judge of the Common Pleas, 1604 to 1610) as Commissioner. "There was one had his booke given him at the prisoners barr, where the ordinary useth to heare and certifie there readinge. And one Mr Gylburne start up sayinge 'He will reade as well as my horse'; which wordes Serjeant Daniel, having before allowed the cleargy, tooke very ill, telling him playnely that he was too hasty: and yet caused the prisoner to be brought nearer that Gylburne might hear him reade, and he reade perfectly."

Burnt in the Hand

Under this amazing system there was a time when the most brutal murderer, with sufficient wits, could go scot free. The natural reaction was to cut down the privilege, and this was first done by the Act of 1487. This provided that any convict who successfully claimed the Benefit of Clergy should be branded on the thumb with M for murder, and T for other felonies. One found to be thus branded, i.e. convicted for a second time, was to be denied the Benefit of Clergy unless he was actually in Holy Orders. This is the meaning of the sentence at the end of many old trials, "He prayed his Clergy, and was burnt in the hand".

The instruments in the dock at Lancaster are there by reason of this Act of 1487. The T iron has been lost. I believe this is the only Court in England in which there is such a survival. But I find in *History of the County Buildings of Northampton* (1885), by C. A. Markham, that until comparatively recently there was a similar iron handcuff, and branding irons, in the splendid Crown Court at Northampton. And I think I remember that in the Museum at Chester I saw the branding irons that were formerly in the Court there.

The branding had to be done by the Gaoler in open court. I believe that the Judge's marshal (whose last surviving duty was to swear the Grand Jury) had then to go to the dock, and when the horrid rite was accomplished, to report—"Good mark, my Lord". In fact, however, judges would often mitigate the barbarity of the laws they had to administer by hinting, presumably through the marshal, that a lukewarm or even a cold iron might be used. In the report* of a case in 1759, before Lord Mansfield, counsel "observed that the punishment of burning in the hand is constantly and notoriously done, in the face and with the knowledge of the judges themselves, with a cold iron". From a like motive, when the penalty for stealing in a shop to the value of 5*s*. was death (as it was until the nineteenth century), a judge would often encourage a jury to find that a valuable article was only worth 4*s*. 11*d*.

In 1547 the Benefit of Clergy was taken away altogether upon conviction for murder, highway robbery, horse-stealing, and burglary. Thereafter, and especially in the eighteenth century, successive Acts declared various offences to be felonies without Benefit of Clergy. So that by the end of the reign of George III there were 160 offences in

* *Rex* v. *Beardmore* (1759) 2 Burrow 792.

this category. I repeat that until 1826 the penalty for every felony was death. It was the enactment that these 160 offences should be without Benefit of Clergy that made them effectively capital. But manslaughter, however heinous, remained a clergyable felony until 1822.

These various Acts left fewer occasions for the branding under the Act of 1487. In 1717 transportation for seven years was substituted for the branding. And in 1779 a judge was empowered to substitute whipping, or a fine, in place of it. The Act of 1487 was repealed in 1827.

There is a surviving echo of the Benefit of Clergy in the ritual of criminal trials to-day. The difference between a felony and a misdemeanour is now arbitrary and irrational. When a person has been found guilty of a felony, the Clerk of Assize addresses him*: "Prisoner at the bar, you have been found guilty of felony. Have you anything to say why the sentence of the Court should not be passed upon you?" But he makes no such enquiry in a case of misdemeanour. In the old days the question was "Have you anything to say why sentence of death according to law should not be passed upon you?" And the question really meant "Do you claim Benefit of Clergy?" I have heard the modern question many hundred times. The convict, if he answers at all, usually protests that he is really innocent. If any of them had ever had the wit to say "Yes, I claim my clergy. Give me the book open at the neck verse", I should have been tempted to knock a month or two off my intended sentence in recognition of his historical erudition.

When I write "my intended sentence" I am not using precise language. No judge says "I sentence you" to so and so. He always says "The sentence of the Court is" so and so. A Judge of Assize sits by virtue of a Commission to him and a number of others. And it authorizes trials by "you or any two of you, of whom the Judge of our Supreme Court of Judicature shall be one". As the circuit officials are among those commissioned, the quorum of two is normally constituted by the Judge and the Clerk of Assize. But any sentence is properly the sentence "of the Court".

There was, in the old days, another difference between a felony and a misdemeanour, besides the fact that in the former the convict

* In the technical phrase he "calls upon him".

had to be "called upon", but in the latter not. In a charge of felony until 1897 the jury were not allowed to separate from the moment they were sworn until they delivered their verdict. This by the Act of 1897 survives in a charge of murder. But with a misdemeanour the jury might separate when the Court adjourned. The Tichborne Claimant was at first indicted for forgery as well as perjury, the forgery being his signing Tichborne bonds "R. C. D. Tichborne". Forgery was a felony, but perjury was only a misdemeanour. The rule that in a case of felony the jury must not separate still existed in 1872. As the trial of the Claimant was certain to be a lengthy affair—though no one can have foreseen how lengthy—it would have been an intolerable thing for the jury to be locked up together night after night. So the charge of forgery was dropped, and he was only tried on the indictment for perjury. The trial began on 23 April 1873 and the verdict of "Guilty" was returned on 28 February 1874. This was the 188th day of the actual hearing, but if the charge of felony had been persisted in the jury would have had to live together in an hotel, locked up every night, for 310 nights.

In the old days, also, when the jury retired to consider their verdict they were given in charge of a bailiff who was sworn by the Clerk of Assize in the terms*—"You shall well and truly keep every person sworn of this Jury in some private and convenient room without Meat, Drink, Fire, Candle, or Lodging...". The jury was in fact starved and frozen into agreement. At the trial of the seven bishops in 1688, when the jury were about to retire, the Lord Chief Justice (Sir Robert Wright) said, "Gentlemen of the Jury, Have you a Mind to Drink before you go?" The jury said, "Yes, my Lord, if you please". Upon which "Wine was sent for, for the Jury".

The jury were locked up all night. The solicitor for the bishops sat on the stairs to watch lest any minion of the Crown supplied food to jurors favourable to the prosecution and so enabled them to starve out the others. At four in the morning some basins of water for washing were allowed to enter: the jurymen drank it all. Ultimately they were eleven to one. The biggest of the eleven said: "I am the

* *The Office of the Clerk of Assize* (1682), p. 48. The remainder of the Bailiff's oath survives to-day almost *verbatim*—"and you shall not suffer any person whatsoever to speak to them, or any of them; neither shall you yourself speak to them until such time as they be agreed of their Verdict, unless it be to ask them whether they be agreed of their Verdict; so help you God".