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# History of Criminal Appeal in England

LESTER B. ORFIELD\*

Like so many of our institutions of criminal procedure that of criminal appeal is based on English origins. Although the statement is frequently made that there were no such things as criminal appeals in England until the passage of the Criminal Appeal Act in 1907, it must be remembered that some form of review in criminal cases had previously existed for several centuries.

The modern day appeal is not to be confused with the ancient appeal of felony. The latter appeal was a private accusation against the wrongdoer by his victim or representatives of his victim.<sup>1</sup> It was one of the methods of accusation existing in England after the Norman Conquest, the other two being indictment and information. The appeal was tried by battle. The appellor made a minute and highly formal statement before the coroner as to the nature of the offense. The coroner enrolled the statement. The appearance of the appellee was then secured by publishing the appeal at five successive county courts. If he failed to appear he was outlawed. If he did appear, he might resort to a considerable number of pleas or exceptions. If he did not plead or pleaded inadequately, battle was waged except when there was a very strong case against the appellee. If the appellee was defeated before the stars appeared, he was hanged. If not, or if he won, he was acquitted. At one time the appellee in spite of such acquittal could still be tried by jury on indictment. After 1485 indictments were usually tried first, the defendant still being subject to an appeal even though acquitted by the jury.<sup>2</sup> Only in this sense could it be said that the common law appeal resembled anything like review of a case.<sup>3</sup> In the most common type of appeal, that of murder, if the prisoner defendant was acquitted by a jury, under circumstances which left the relatives of the deceased dissatisfied, he might still be subjected to the old appeal. Although little used in later centuries, it was held to be the law of the land in the famous case of *Ashford v. Thornton* in 1818,<sup>4</sup> following which it was abolished by Parliament.<sup>5</sup>

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1. I STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 244.

2. CARTER, A HISTORY OF THE ENGLISH COURTS (5th ed. 1927) 128.

3. Notice, however, that the appeal was by the victim, not the defendant. The appellate character of the remedy was referred to in the discussion of the American Law Institute over the proposal to grant new trials to the state. (1932) 10 PROC. AM. LAW INST. 130, 136. See SIBLEY, CRIMINAL APPEAL AND EVIDENCE (1908) 43, n. 2.

4. 1 B. & Ald. 405.

5. 59 GEO. III, c. 46.

CONTROL OF THE JURY

While the mode of trial of an appeal of felony was by battle, the normal mode of trial has long been by jury. With no appellate tribunal to review the action of juries it might be thought that wholly arbitrary verdicts might be rendered. Indeed the early chapters of Thayer's *Preliminary Treatise on Evidence* indicate that there has been an unbroken effort to avoid the rendition of unreasonable verdicts ever since the jury was first developed.<sup>6</sup> Valuable hints as to the development of appellate review of criminal cases may therefore be gotten by sketching briefly the development of methods of controlling the jury. Some of the methods occur during the trial; some occur afterwards, being thus in the nature of a review of its acts. Almost all of them are employed in the trial court. Although the danger of an uncontrolled verdict is obviously greater in criminal cases than in civil, since life or liberty may be at stake, the development of control over the jury was much earlier and more extensive in civil cases.

*Attaint*—The first method of reviewing the action of the jury to develop seems to have been the attaint.<sup>7</sup> The verdict of the jury was subjected to review by a second jury double the number of the original jury.<sup>8</sup> If the second jury thought the verdict erroneous, the verdict was reversed, the jurors lost their chattels, were jailed for at least a year, and were accounted infamous. It appeared in 1202 at a time when jurors were more witnesses than judges of the facts.

Attaint, if available in criminal cases, seems to have been very rarely used. At first there was no assize, that is to say, statutory jury, in criminal cases; and attaint lay only in assize cases. No attaint lay when the accusation was by appeal. The jury in criminal cases came in but gradually and with the consent of the defendant; and the notion was that a person who had consented could not have the attaint, as that would be blacking his own witness. Where the verdict was guilty, attaint was never thought to lie. Thus it was not a remedy to which a defendant might resort. On the other hand, it was thought by Bracton<sup>9</sup> and Hale<sup>10</sup> to lie when there was an acquittal. But the silence of the cases on the subject has led to doubts as to its existence.<sup>11</sup> In 1690 a proposed bill extending the writ of attaint to

6. It has been suggested that the creation of the Court of Criminal Appeal in England grew out of the lack of control exercised over the jury. RAIGA, *LA COUR D'APPEL CRIMINEL EN ANGLETERRE* (1913) 39.

7. 1 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (3d ed. 1922) 337; ZANE, *The Attaint* (1916) 15 *MICH. L. REV.* 1, 127.

8. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* (1898) 156; 1 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (3d ed. 1922) 340; CRAIES, *Criminal Appeal in England* (1907) 8 *J. SOC. COMP. LEG. (N. S.)* 93.

9. BRACTON, f. 290 b.

10. 2 *PL. C.* (1736) 310.

11. *Bushell's Case*, Vaughan 135, 146 (1670); 1 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (3d ed. 1922) 340; THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* (1898) 156. After examining the authorities N. W. Sibley concluded that it probably lay though seldom used. Sibley, *Appeal on Matter of Fact in Criminal Cases* (1907) 32 *LAW MAG. AND LAW REV.* 314, 319.

criminal cases was dropped. The king did not need the attaint as the procedure was very favorable to him; for example, the defendant could have no witnesses or counsel. The King had other ways of dealing with juries which refused to convict. In 1825 attaints were abolished.

*Special Verdict*—In order to relieve the jury from the harshness of attaint the special verdict was invented.<sup>12</sup> The jury would find the facts and the judge would pronounce judgment on the facts found. But the jury could not be compelled to return a special verdict if they chose not to do so. After its earlier development the judges sought to diminish the broad power exercised by the jury under a general verdict by compelling them to render a special verdict. The special verdict was rarely used in criminal cases. The court could not review the facts or rehear the evidence. It could only apply the law to the specifically stated findings of fact of the jury.

*Punishing Jurors for Erroneous Verdicts*—The judges were unsuccessful in their attempts to compel juries to render special verdicts. The next mode of control resorted to was to fine or imprison jurors not bringing in satisfactory verdicts.<sup>13</sup> The Star Chamber often fined jurors for acquitting murderers or other felons. They would do so on the ground that there was no remedy by attaint. In the sixteenth century the Star Chamber often treated a verdict of acquittal against the weight of the evidence as corrupt. Later they came to restrict their penalties to verdicts corrupt in fact. This method of controlling the jury came to an end in 1670 with *Bushell's Case*.<sup>13a</sup>

*New Trial*—The next method of checking the action of the jury was the granting of new trials. In civil cases the courts of Common Pleas and King's Bench granted new trials as early as the fourteenth century. But there seem to have been no medieval precedents in the criminal law, and new trials in criminal cases were not there allowed until the latter half of the seventeenth century.<sup>14</sup> In 1660 there were two cases allowing a new trial to the prosecution. But the notion of double jeopardy seems to have prevented the development of any such rule. In 1671 the court by an even vote refused a new trial after conviction.<sup>15</sup> But two years later a new trial was granted after a conviction of perjury.<sup>16</sup> After that date new trials were permitted in misdemeanor cases tried by the Court of King's Bench. It lay for errors in the admission or exclusion of evidence, erroneous instructions, a verdict against the weight of the evidence, or where it appeared that a new trial would further the ends of justice.<sup>17</sup> It did not lie in felony cases.<sup>18</sup>

12. GREEN, JUDGE AND JURY (1930) 353; Morgan, *A Brief History of Special Verdicts and Special Interrogatories* (1923) 32 YALE L. J. 575, 588; Comment (1934) 12 TEX. L. REV. 327.

13. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1922) 343; THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898) 162.

13a. Vaughan 135, 146 (1670).

14. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1922) 216.

15. Rex v. Hannis, 2 Keb. 765 (1671).

16. Rex v. Latham, 3 Keb. 143 (1673).

17. ARCHBOLD, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES (23d ed. 1905) 291.

18. A single case permitting it, Regina v. Scaife, 17 Q. B. 238 (1851), though never overruled, has been generally doubted.

Unlike the practice in the United States the application for a new trial was not made before the judges who tried the case but before the King's Bench sitting *en banc* thus giving the proceedings somewhat of an appellate character.<sup>19</sup>

When the power to grant new trials in civil cases in the King's Bench Division was transferred to the Court of Appeal, the jurisdiction of the former to grant new trials in criminal cases was specifically preserved. The practice under the Crown Office Rules of 1886 was to move for an order *nisi* within eight days after the trial before a divisional court of the King's Bench Division. It was made on the judge's notes of the trial, or upon affidavit. If granted, a new trial proceeded as if no trial had taken place. No appeal lay to the Court of Appeal from the grant or refusal of a new trial. Under Section 20 of the Criminal Appeal Act this power to grant a new trial was abolished. Hence at the present time new trials are not granted in any cases in England even by the Court of Criminal Appeal. Even prior to the act the remedy of new trial was very limited except in cases of summary jurisdiction since, although it might be granted on very broad grounds, it was available only as to cases tried by the King's Bench, and furthermore it could not be had in the cases where the defendant had most at stake,—felonies.

*Venire de Novo*—Not to be confused with a new trial is a *venire de novo*. The trial court may award a *venire de novo* after verdict where there has been some irregularity in the proceedings not affecting the merits, but amounting to a mistrial.<sup>20</sup> This would include cases of defect of jurisdiction with respect to time, place, and person, or cases of verdicts so imperfect or ambiguous or inconsistent that no judgment could be founded on them. It would cover the case of a defective special verdict.<sup>21</sup> A court of error might award a *venire de novo* on a writ of error in cases of mistrial of treason, felony, or misdemeanor, and it was said to lie of right instead of being discretionary as in the case of a new trial.<sup>22</sup> The Court for Crown Cases Reserved granted the writ in only one case.<sup>23</sup> The Criminal Appeal Act does not prevent the trial judge from discharging a jury before verdict and having a new jury summoned. It can still do this after verdict. Where judgment is entered the remedy is by appeal. The Court of Criminal Appeal on finding that a trial has been a nullity may order a *venire de novo*.<sup>24</sup>

*Demurrer to the Evidence*—Another method, now obsolete, of checking the jury, was the practice of demurring to the evidence. Of course so long as the theory was that the jury could decide cases of their own knowledge

19. Riddell, *New Trial at the Common Law* (1916) 26 YALE L. J. 49, 57.

20. ARCHBOLD, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES (23d ed. 1905) 294. See also *id.* (28th ed. 1931) 358. It might also be awarded before the completion of the first trial if the judge thought fit to discharge the first jury.

21. *Rex v. Woodfall*, 5 Burr. 2661 (1770).

22. *Rex v. Edmonds*, 4 B. & Ald. 471 (1821); *Campbell v. Regina*, 11 Q. B. 799 (1846).

23. *Regina v. Yeadon and Birch*, Leigh & C. 81, 9 Cox C. C. 91 (1861).

24. *Rex v. Williams*, 19 Cr. App. R. 67 (1925).

the device had but little value. But when the idea became accepted that juries should decide solely on the basis of evidence produced in court, the demurrer to the evidence became a method of withdrawing the case from the jury on the theory that by admitting the facts there remained only a question of law to decide. But this device lost most of its utility in 1793 when in the case of *Gibson v. Hunter* it was held that where the evidence is circumstantial, the demurrant must admit in writing every fact which the evidence tended to prove.<sup>25</sup> Besides, by demurring the demurrant forfeited the opportunity of putting in his own evidence. And if the demurrer was not well founded, judgment was rendered against the demurrant.

*Directed Verdict*—A still more modern check was that of the directed verdict. Where the party bearing the burden of proof had produced no evidence, the jury could not fairly decide in his favor. Hence began the practice of directing a verdict where the party with the burden of proof had offered no proof.<sup>26</sup> This was ultimately expanded into the rule that a verdict might be directed against a proponent if on the evidence introduced the jury could not reasonably declare the facts to be proved necessary to establish his case.<sup>27</sup>

*Other Checks Applying to Civil Cases Only*—The subsequent checks developed apply more particularly to civil cases, and may be but briefly mentioned. Nonsuits might be entered against a plaintiff who had failed to prove his case.<sup>28</sup> Judgment notwithstanding the verdict might be rendered.<sup>29</sup> By the early 1800s the jury was still further subjected to control by the use of pleadings for narrowing the questions so that the judge might decide with little or no jury participation, by continual insistence that the juries must accept the judge's instructions on the law as the judge gave them, and by freely advising the jury as to the weight to be given to the evidence. Finally by the development of a simplified special verdict, by requiring that jury trial be affirmatively claimed by the parties, and by the power given to the appellate courts to weigh the facts and hear new evidence, the jury has been pretty completely controlled.<sup>30</sup>

It has thus far been indicated that the verdict of the jury has been from early times subjected to various types of control and review. But none of these involved appellate review until the later period. Was there a time when neither a verdict or a judgment might be attacked in a higher court?

25. 2 Hen. Bl. 187, 126 Eng. Reprints 499 (1793).

26. *Syderbottom v. Smith*, 1 Strange 649, 93 Eng. Reprints 759 (1725).

27. *Toomey v. London Ry. Co.*, 3 C. B. (n.s.) 146, 140 Eng. Reprints 694 (1857); *Smith, The Power of the Judge to Direct a Verdict: Section 457-a of the New York Civil Practice Act (1924)* 24 COL. L. REV. 111.

28. This had the advantage over a directed verdict in that it did not prevent the bringing of another action, while a directed verdict was a decision on the merits.

29. It is said that such motion lay in a criminal case as an alternative to a motion for new trial in ARCHBOLD, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES (23d ed. 1905) 292.

30. The development of control over the jury is concisely sketched by GREEN, JUDGE AND JURY (1930) 375, *Jury Trial and the Appellate Court* (1930) ILL. BAR ASS'N REP. 261.

Pollock and Maitland assert that nothing that could properly be called an appeal from court to court was known to our common law.<sup>31</sup> But in the twelfth century the canon law offered a model for the English courts. One might appeal from archdeacon to bishop, from bishop to archbishop, and from archbishop to pope. In the early days when executive and judiciary were indistinguishable there was no appeal. But when the king began to delegate power to judges, he found it desirable to supervise the judges by using an appellate tribunal. And so partly, probably mostly, out of self-interest and partly from a sense of justice, an appeal system developed.

Today it seems perfectly natural to have an appeal from an erroneous decision, with the attention focused on the decision rather than the persons deciding. But in the early days a complaint against a judgment seems to have been viewed as a complaint against the tribunal.<sup>32</sup> The jury might be attainted or semi-criminal proceedings brought against the judges. Only in the fourteenth century did there emerge the differentiation of a complaint against the judgment from a complaint against the judge.<sup>33</sup> But the older conception left its mark on the procedure of appeal. The proceedings were treated as new proceedings as the case must have been settled by final judgment. The ground of complaint must be clearly formulated, and the best way to accomplish this was to look at the record, and indicate some error appearing in it.

#### SUSPENSION OF IMPOSITION AND EXECUTION OF SENTENCE

The fact that no appeal at first lay in criminal cases was somewhat relieved by the power of the court to suspend indefinitely the imposition of sentence.<sup>34</sup> In a great many cases the court no doubt never imposed the sentence. The court could suspend not only the imposition but it might also suspend the execution of sentence.<sup>35</sup>

#### PARDON

Though pardon is not a judicial process it seems well to point out that this power resided in the Crown from time immemorial. Such relief depended on the wishes of the Crown, however. There was no right to such relief. Deserving persons might go unpardoned, while undeserving persons were granted pardons.

#### WRIT OF ERROR

The appellate process which has most influenced American criminal procedure, the writ of error, appears to date back to the twelfth century. Its early history seems to be shrouded in obscurity. The writ of error was a writ at first issuing out of Chancery requiring a lower court of record to

31. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (1895) 661.

32. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (1895) 665; Blacklock, *A Court of Criminal Appeal for Scotland* (1892) 4 JURID. REV. 150, 155.

33. 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW (3d ed. 1922) 213.

34. Regina v. Ryan, 7 COX C. C. 109 (1855).

35. 2 HALE P. C. (1778 ed.) 412; 2 HAWK. P. C. (1824 ed.) c. 51; Barnett, *Executive, Legislature, and Judiciary in Pardon* (1915) 49 AM. LAW REV. 684, 709.

send up the record to a superior court for review of errors apparent on it.<sup>36</sup> It did not lie until after judgment. It was the only means of reviewing the record in a criminal case in a higher court after judgment. The record consisted of the judge's commission, the indictment, the plea of the defendant, the verdict, together with the entries kept in the minute book, such as the names of the jurors, an abstract of the indictment, a memorandum of the pleas, verdict, and sentence.<sup>37</sup> The minute book was, however, a mere private memorandum book. It had no certain form, and it did not have to be kept. Thus whatever real or important errors there were appeared in the midst of a mass of unrelated facts. Only such errors would be reviewed as appeared in the record, and the record was confined to the items above mentioned.

In more modern times the writ lay for every substantial defect appearing on the face of the record for which the indictment might have been quashed, or which would have been fatal on demurrer, or in arrest of judgment, provided such defect is not cured by verdict. Up to 1826 the writ was often used for trivial and formal errors. Statutes of 1826 and 1851 restricted its use. Apart from these statutes it was a general rule of common law pleading that where an averment necessary for the support of a pleading was made, but imperfectly stated, if it appeared to the court after verdict that the verdict could not have been found on this issue without proof of this averment, the defective averment was cured by verdict, even though it might have been bad on demurrer. Under the nineteenth century statutes the writ came to be used with respect to every defect in substance in an indictment not cured by verdict, where a question of law had not been reserved for the judges of the Court for Crown Cases Reserved.

Prior to 1700 the writ of error did not issue as a matter of right.<sup>38</sup> It was only granted when the King because of the injustice of an actual error, or because of mercy or favor, though there was no error, saw fit to grant it. It was a method for the Crown to reverse when it wished. The defendant brought his writ, the attorney general admitted that there was error, and the court without inquiry into the merits of the case accepted the admission and set aside the conviction.

But in the third year of the reign of Queen Anne the modern English practice up to the present century was established.<sup>39</sup> The writ issued of right in misdemeanor cases if there were probable ground in the proceedings. The Attorney General would issue his fiat after examining whether the writ

36. 4 BL. COMM., \*461. For an excellent account of the writ especially as it existed in the nineteenth century see ARCHBOLD, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES (23d ed. 1905) 278.

37. 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 308; 1 CHITTY, PRACTICAL TREATISE ON CRIMINAL LAW (1816) 720; Comment (1932) 32 COL. L. REV. 860.

38. *Crawle v. Crawle*, 1 Vern. 170 (1683); *Paty's Case*, 2 Salk. 504 (1705).

39. Lord Mansfield described the development in a later case, *Rex v. Wilkes*, 4 Burr. 2527, 2550 (1770).



was sought for delay or on probable error.<sup>40</sup> The court on the issue of the fiat then judicially determined whether there was error instead of accepting the Attorney General's admission as it once had. But the writ still continued to issue only as a matter of favor in cases of felony and treason, though in practice in modern times it seems to have been granted invariably.<sup>41</sup> Writs of error were abolished under Section 20 of the Criminal Appeal Act, 1907.<sup>42</sup> The writ had been an unsatisfactory appellate remedy in two highly important respects. The appellate court could review only errors apparent on the record, which on the one hand contained a mass of useless items and on the other hand took no notice of the rulings on the evidence, nor the instructions by the court to the jury, not to mention errors of fact such as the innocence of the defendant. Hence it was not often used in practice. Furthermore the writ issued of right only as to the less serious offenses—misdemeanors, and even then the consent of an interested party, the Attorney General, was necessary. A final serious defect was that the appellate court could only affirm or reverse; it could not modify a sentence.<sup>43</sup>

Because of its influence on American criminal appellate procedure it seems proper to sketch briefly the proceedings involved on review by writ of error.<sup>44</sup> The first step was to apply to the Attorney General for his fiat. For this purpose a certificate signed by the defendant's counsel accompanied by an affidavit was submitted to the Attorney General. On the filing of a *praecipe* and the production of the fiat, the writ of error, which was prepared by the defendant or his solicitor on parchment, was sealed and issued. The writ was then delivered to the court officer having the custody of the indictment. He allowed it, made up the record, and made out the return to the court. The writ was then filed where it had been sealed and issued. After the writ had been properly returned, the next proceeding was the assignment of error. Defendant then would obtain an order for the Attorney General to join in error. After the filing of joinder in error the case might be put on for argument on the application of either party. Under the Crown Office Rules of 1886 the defendant two days before hearing was to deliver two paper books containing copies of the writ of error, the record,

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40. In *Rex v. Wilkes*, 4 Burr. 2527, 2550 (1770), it is said that the court might order the Attorney General to grant his fiat if he refused. But in *Ex parte Newton*, 4 E. & B. 869 (1855), it was held he could not be forced to do so as he acted in a political capacity in deciding whether there was probable error. See also *Nally v. Regina*, 15 Cox C. C. 638 (1884).

41. I STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 308.

42. Under Sec. 47 of the Judicature Act the Court of Appeal was debarred from receiving any criminal appeal except a writ of error from the King's Bench Division on a point of law apparent on the record. From the Court of Appeal the case might still be carried up to the House of Lords. Blackstone states that in his time the writ lay from all inferior courts (not summary) to the Court of Queen's Bench, from the Queen's Bench to the Court of Exchequer Chamber, and from the Court of Exchequer Chamber to the House of Lords. 4 BL. COMM., \*461.

43. *Rex v. Bourne*, 7 A. & E. 58 (1837).

44. For a fuller account see ARCHBOLD, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES (23d ed. 1905) 282.

the arguments of error, and the joinder in error. Under the earlier practice the points intended to be argued had to be stated on the margin.

*Bill of Exceptions*—Since 1285 in England under the Statute of Westminster a litigant in a civil case might bring up errors as to evidence, instructions, and other phases of the trial by a bill of exceptions.<sup>45</sup> At the time the alleged error was made the appellant would write it down and have it signed and sealed by the court. The appellate court might then examine such errors as well as errors appearing on the face of the old technical record. It has long been thought that a bill of exceptions would not lie in any criminal case.<sup>46</sup> This seems clearly to have been the rule in cases of treason and felony. But for a time it was deemed to lie in misdemeanor cases.<sup>47</sup> This view was overruled in 1858,<sup>48</sup> so that since that date bills of exception have been inadmissible in all criminal cases. The scope of review was thus narrowly cramped. To a modern this view seems almost inexplicable. An attempted explanation is that of Matthew Bacon that "if such bills were allowed, it would be attended with great inconvenience, because of the many frivolous exceptions that might be put in by prisoners to the delay of justice; besides, in criminal cases, the judges are of counsel with the prisoner, and are to see that justice is done him."<sup>49</sup>

#### CERTIORARI

The Court of King's Bench was in practice the highest criminal court from the reign of Edward I to 1875.<sup>50</sup> Among its powers was that of issuing writs of certiorari. The writ did not offer an appellate remedy, however, for other than summary offenses. It was used for varying purposes: (1) to remove a case from the lower court in order to secure a fair trial; (2) to review a summary proceeding; and (3) as an auxiliary remedy to bring up the record of the lower court on the ground that the record as sent up was incomplete.<sup>51</sup> As to summary proceedings it lay after judgment, as that was the only mode of review available. But as to indictable offenses after judgment the only mode of appellate review was by writ of error.<sup>52</sup> A case in 1703 held that even as to indictable offenses a writ of certiorari lay after conviction but before judgment, but that the upper court would exercise its discretion in granting it at that late stage.<sup>53</sup> But in a subsequent case it was held that a new trial could not be secured on the ground that the

45. The bill is discussed in RAYMOND, *THE BILL OF EXCEPTIONS* (1846).

46. ARCHBOLD, *op. cit. supra* note 17, at 290; REPORT OF THE CRIME SURVEY COMMITTEE, LAW ASSOCIATION PHILADELPHIA (1926) 277.

47. POWELL, *THE LAW OF APPELLATE PROCEEDINGS* (1872) 292. In *State v. Mitchell*, 3 Mo. 283 (1833), it was said to lie *ex gratia* in minor criminal cases.

48. *Regina v. Brown*, 7 Cox C. C. 442 (1858); *Regina v. Esdaile*, 1 F. & F. 213, 227, 175 Eng. Rep. 696, 704 (1858).

49. A NEW ABRIDGEMENT OF THE LAW (1876 ed.) 114.

50. 1 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* (1883) 85; ARCHBOLD, *PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES* (28th ed. 1931) 114.

51. Goodnow, *The Writ of Certiorari* (1891) 6 POL. SCI. Q. 493, 497; WROTTLESLEY AND JACOBS, *THE LAW AND PRACTICE OF CRIMINAL APPEALS* (1910) 88.

52. *Rex v. Inhabitants of Seton*, 7 T. R. 373 (1797).

53. *Regina v. Potter*, 2 Ld. Raym. 937 (1703). See 2 HALE PL. C. (1736) 210.

verdict was against the evidence, in the upper court at this stage.<sup>54</sup> This would be an intrusion on the trial of the case and furthermore appellate courts cannot go into the merits of a case now pending. A defendant applying for certiorari as to an indictable offense should do so before the trial.<sup>55</sup> Furthermore the writ as far as a defendant was concerned was not one of right, but lay in the sound discretion of the court.<sup>56</sup> It issued to the king as of course.<sup>57</sup> Like the writ of error it was confined to errors of law. Its outstanding limitation, however, was the fact that as far as appellate review is concerned it lay only to tribunals not acting in accordance with the common law. It is doubtful whether certiorari lies (if it did before) to remove an indictment for felony or misdemeanor after verdict and before judgment since the creation of the Court of Criminal Appeal.<sup>58</sup> The creation of the Court for Crown Cases Reserved had previously resulted in unwillingness to grant the writ on the ground of questions of law arising on an indictment.

#### COURT OF CROWN CASES RESERVED

One appellate tribunal is deserving of special consideration, namely, the Court for Crown Cases Reserved, established in 1848. Prior to that date a practice had long existed under which if a defendant objected either to the indictment or the evidence, the court might take the opinion of the jury upon the facts proved and reserve the objection for all the judges of the superior courts meeting at Serjeant's Inn on a case stated by the judge who presided at the trial.<sup>59</sup> If a majority of such judges thought the objection valid, they would recommend a pardon. Although these judges heard counsel for the defendant if he desired, they were not sitting technically as a court, and the ultimate judgment pronounced was considered to be that of the trial judge. The results of their conferences were announced but not always their reasons. The practice was a limited one as a case could be stated only as to trials for treason or felony, tried by a court of oyer and terminer and gaol delivery, and provided the trial judge thought the objection worthy of more mature consideration.<sup>60</sup> The proceedings were too informal and too private and did not apply to inferior courts of criminal jurisdiction. The courts of quarter sessions could not reserve a case though

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54. *Rex v. Inhabitants of Oxford*, 13 East. 411 (1811).

55. *Rex v. Inhabitants of Pennegoes*, 1 B. & C. 142 (1822). Archbold says that the writ is rarely issued to remove an indictment after judgment except to carry the judgment into execution; and that while it could be issued after verdict but before a judgment it seldom would be. ARCHBOLD, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES (28th ed. 1931) 117.

56. *Rex v. Bass*, 5 T. R. 251, 252 (1793).

57. *Rex v. Eaton*, 2 T. R. 89 (1787).

58. ARCHBOLD, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES (28th ed. 1931) 117.

59. 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 311; ARCHBOLD, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES (23d ed. 1905) 271.

60. It has been claimed that in practice, the defendant had an absolute right to appeal on points of law since on petition to the Crown, the Chancellor if he found the matter arguable would refer it to the judges. SIBLEY, CRIMINAL APPEAL AND EVIDENCE (1908) 26 n. See *Rex v. Wait*, 11 Price 518 (1823); *Rex v. Henry Fauntleroy*, 1 Moo. C. C. 52 (1824).

they did have the power to transmit to the assizes indictments which from the nature of the charge should be more properly tried by them.

To remedy some of the defects just suggested, in 1848 this informal tribunal was erected into the Court for Crown Cases Reserved.<sup>61</sup> Under the Crown Cases Act cases might be stated by the courts of quarter sessions and in misdemeanor cases. But the act was far from providing a perfect appellate remedy.<sup>62</sup> A defendant still had no right to have a case stated. The court could not deal with new evidence nor go behind the finding of facts stated. It did not apply to points raised on an indictment before the accused had pleaded and trial begun, such as demurrers, motions to quash, and challenges of the array. And no provision for proper argument was made. Very few cases were taken to the court—about eight cases a year.

The Judicature Act of 1873 transferred the jurisdiction of the Court to the High Court of Justice.<sup>63</sup> Section 20 (4) of the Criminal Appeal Act in turn transferred such jurisdiction to the Court of Criminal Appeal. The power to state a case continues to exist precisely as before, but is rarely exercised since the same object may be more conveniently accomplished under Section 3 (b) of the Criminal Appeal Act. The Act gives the Court of Criminal Appeal the power to require the trial court to state a case in the form of a case reserved as to issues of law as to matters not within the Crown Cases Act. But this power seems not to have been availed of, probably because of the comparative simplicity of the ordinary appellate process.

#### CRIMINAL APPEAL ACT OF 1907

It is obvious from what has been said that none of the types of review provided in criminal cases was at all satisfactory. Equity, patterning itself on the model of the canon and the Roman law, had long previously developed an appeal in the technical sense,—a rehearing of the case. In civil cases after 1873 an untechnical, speedy system of appeal was possible, as had long been the case in equity. A special appellate court, the Court of Appeal was provided, and though review by the House of Lords on points of law was still possible it was very rare because of the enormous expense.<sup>64</sup>

What the Judicature Act did for civil appeals was done by the Criminal Appeal Act of 1907 for criminal appeals.<sup>65</sup> It is frequently asserted that this court was created because of the dissatisfaction arising out of the conviction of Adolph Beck, who was later found to be innocent. Such was doubtless the immediate cause. But the way had been paved by three-quarters of a century of agitation. Twenty-eight separate bills had been

61. 11 & 12 VICT. c. 78 (1848).

62. Craies, *Criminal Appeal in England* (1907) 8 J. Soc. COMP. LEG. (N. S.) 93, 95.

63. 36 & 37 VICT. c. 66 (1873).

64. For a good short summary see Atkin, *Appeal in English Law* (1927) 3 CAMB. L. J. 1. The answers by Lord Chancellor Loreburn to questions by Mr. Justice Lurton of the United States Supreme Court, describing the English system in civil cases are to be found in *The Operation of the Reformed Equity Procedure in England* (1912) 26 HARV. L. REV. 99, 106. For a criticism of civil appeals in England, see MULLINS, IN QUEST OF JUSTICE (1931) 140-160.

65. 7 EDW. VII, c. 23 (1907).

introduced in Parliament.<sup>66</sup> Judges, prosecuting officials, and pardoning authorities had all taken part in the movement. The court was thus the culmination of much deliberation and discussion, not the mere expression of a passing whim.

The Act, which came into operation in April, 1908, provided for a court made up of the Lord Chief Justice and eight judges of the King's Bench Division appointed by him. This was shortly changed to provide that all the judges of the King's Bench Division should also be judges of the Court of Criminal Appeals. The court when sitting must be made up of an uneven number of judges and contain at least three members. It has appellate jurisdiction over all criminal cases tried at quarter sessions, assizes, the Central Criminal Court, and the King's Bench Division, on indictment, information or coroner's inquisition. It is thus not a court of review of summary cases.

Appeal is of right against conviction on questions of law. It is by leave either of the Court or the trial court against conviction on questions of fact, or mixed law and fact, or any other ground deemed by the court to be sufficient. It is of leave of the Court alone against sentence.

The defendant is given ten days after conviction to take his appeal, and the appeal is usually heard within four or five weeks. The original proceedings in the trial court constitute the record sent up and no briefs are prepared. The trial judge's notes and a report by him also go up. Provision for shorthand reports of the testimony has been construed as merely directory, hence they are not always taken. The court almost invariably pronounces its opinion orally immediately after the hearing. Provision for legal aid for poor defendants is made. Bail may be, but seldom is, granted.

The court is empowered to quash a conviction and enter an acquittal, to affirm, to substitute another sentence where the appellant though not properly convicted on one count has been properly convicted on some other count, or to substitute for a verdict of guilty of one offense, a verdict of guilty of another offense if the jury under the indictment could have found him guilty of that other offense. It may reduce or increase a sentence. It has the power to hear new evidence. Even though it decides the point raised in the appeal in favor of the appellant it may dismiss the appeal if it is of the view that there has been no substantial miscarriage of justice. It may not order a new trial. Pardons may still be granted. Other features of the court will be described in subsequent discussion.<sup>67</sup>

66. These bills are summarized in COHEN, *THE CRIMINAL APPEAL ACT, 1907* (1908) 63.

67. The following books deal wholly or extensively with the court: BOULTON, *CRIMINAL APPEALS* (1908); COHEN, *THE CRIMINAL APPEAL ACT, 1907* (1908); ROSS, *THE COURT OF CRIMINAL APPEAL* (1911); SIBLEY, *CRIMINAL APPEAL AND EVIDENCE* (1908); WROTTLESLEY AND JACOBS, *LAW AND PRACTICE OF CRIMINAL APPEALS* (1910); MENDELSSOHN BARTHOLDY, *ENGLISCHES RICHTERTUM IM COURT OF CRIMINAL APPEAL 1908-1909* (1909); RAIGA, *LA COUR D'APPEL CRIMINEL EN ANGLETERRE* (1913). See also: address by Lord Chief Justice Hewart, 12 *PROC. OF CAN. BAR ASS'N* 127 (1927); HOWARD, *The English Court of Criminal Appeal* (1931) 17 *A. B. A. J.* 149; HOWARD, *CRIMINAL JUSTICE IN ENGLAND* (1931) 275-285; Vanderbilt, *Work of England's Court of Criminal Appeal* (1936) 20 *JNL. AM. JUDICATURE SOC.* 95.

The Court of Criminal Appeal is for all practical purposes a final court of appeal. Appeal may, however, be taken to the House of Lords by all parties provided a certificate is obtained from the Attorney General that a point of law of exceptional importance is involved and that it is desirable in the public interest that a further appeal should be brought. The application for a certificate from the Attorney General must be made within seven days from the date of the decision of the lower court.<sup>68</sup> Where the appeal is by the prosecutor the defendant may be kept in jail in the meantime. Appeals to the House of Lords are so rare as scarcely to deserve mention.

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68. Criminal Justice Act, 1925, 15 & 16 GEO. V, c. 86, § 16.