Professor Phillipson & Mr T S O'Halloran

May 8th 1923 Continued. Advertiser 10.5.23

LAW REFORM.

MR. T. S. O'HALLORAN'S EVIDENCE.

"PERJURY A COMMON THING."

TRIAL BY JURY.

A representative of the Law Society says nobody who has been connected with the administration of the law can shut his eyes to the fact that an immense amount of perjury goes on.

Mr. T. S. O'Halloran, on behalf of the Law Society, continued his evidence before the Law Reform Commission at Parliament House on Monday. There were present Messrs. Young (chairman), Birrell, Butterfield, Robinson, Reidy, Tassie, and Carr.

Mr. O'Halloran, dealing with the Supreme Court, said there had been a large increase in the work. In 1913 there were 300 numbered matters instituted. All the principal cases were numbered. In 1922 there were 700. This year there had been an alteration in procedure, and it was required that a summons be first issued, which meant paying a fee. The profession had "shied off" that, and had not taken out summonses, so that there would be a considerable decrease in numbered cases this year. Yet, notwithstanding this the first three months of this year showed an increase of 40 cases over the number of such cases for the first three months of last year. In the Adelaide Local Court last year between 16,000 and 17,000 summonses were instituted, excluding unsatisfied judgment summonses.

Mr. Birrell—Litigation is popular.

The witness said certain actions now instituted in the Supreme Court ought to be dealt with in the Local Court. In support of that he mentioned a case which came before him recently. It was that of a returned soldier and his wife who came out on a transport that did not call at Adelaide. At Fremantle the transport was boarded by an officer, who addressed the men on the advantages of repatriation, and suggested that they allow the department to handle the passengers' luggage and deliver it to the addresses. These two complied with the suggestion. They affixed the official labels supplied and last saw their luggage on the deck of the transport at Melbourne under the charge of an armed guard. They wrote to the department about their luggage, but received no satisfaction, and the department declined to take any responsibility for its loss. Because the department refused to admit anything the case had to be taken to the Supreme Court. The department brought a witness from Perth and some witnesses from Melbourne, and fought the case hard, but judgment was given for the plaintiff for £70—the amount claimed was £70. The Repatriation Department had to pay £126 costs to the plaintiff, and their own costs probably amounted to £300. If he had been able to institute that case in the Local Court the plaintiff's costs, recoverable from the department, would not have amounted to more than £10. They desired that the Local Court should have power to deal with interrogatories. He mentioned cases taken in the Supreme Court which should have been dealt with by the Local Court, and said his suggestion was that a man who went to the Supreme Court for damages should stand or fall by his verdict in the recovery of costs. If his verdict was for not more than £400 he should be entitled to receive costs on the Local Court scale only.

The Chairman—That would prevent people going to the Supreme Court without good cause.

Ability of Juries.

On the question of trial by jury the witness said the society advocated the abolition of trial by jury in civil cases, including matrimonial causes, but excluding all actions in which a criminal offence was involved, such as libel or an insurance claim in which arson was charged. The witness referred to evidence given by Senator Benny and Professor Coleman Phillipson. The latter had denied that he was never in a court in Adelaide and said that he had passed through...

The Chairman—Don't you think it would be better not to criticise a witness?—I am going to have something to say about Professor Coleman Phillipson's criticism of the legal profession. I have had 36 years' experience at the bar and considerable experience of jury work. Before anyone can express an opinion of a jury system in any country he must have had experience in that country. It is little use for him to have had experience elsewhere. There is a difference even in the administration of the jury system in Victoria and South Australia. One cannot shut one's eyes to the fact that very often perverse verdicts are given in criminal cases.

The Chairman—Supposing a verdict is contrary to the evidence would you give the judge power to order a retrial?—No. That would alter the principle that a man is tried once and for all by his peers. Once you upset that you institute trial by judge instead of by jury.

Obtaining Evidence.

Mr. Butterfield—Would it not be an advantage to have an appeal both ways so that if there is fresh evidence it can be brought out by the Crown?—Very often when evidence is wanted it is forthcoming.

Mr. Reidy—That is an extraordinary statement.

Mr. Butterfield—Very extraordinary.

The Witness—Surely you cannot doubt it.

The Chairman—It can often be obtained?—Yes. It is a bad thing to say, but nobody who has been connected with the administration of the law can shut his eyes to the fact that an immense amount of perjury goes on. And there is a good deal of false evidence also. It has been stated by competent men that perjury is an ordinary every day occurrence. It is awful to think it is so, but there is no use shutting your eyes to it.

Mr. Tassie—Have you known cases where there was cause to believe that evidence against a prisoner was wrongly rejected?—Yes. That point sometimes arises. It is about time we had a new criminal code. A judge should be able to state a case for the opinion of the Supreme Court at the request of the Crown as well as at the request of the prisoner. Minimum sentences need altering. Some cases are shocking.

Speaking of a recent criminal case, the witness said that while the case was on he was informed on testimony that he accepted that some of the jurors had been discussing a sentence of two years imposed on a young man whom they had recommended to mercy and that they had made up their minds not to "pot" another prisoner that session.

Mr. Reidy—Is that not an argument for the abolition of juries?—I think there are strong arguments for that.

Mr. Tassie—What about the juror's oath?—If it can be proved a juror has broken his oath he can be dealt with.

The witness said he favored trial by three judges, with a unanimous verdict.

Mr. Butterfield—Did the jury let every prisoner off after that?—I think there was only one other case, and the jury disagreed. It is occasionally known that there is a man on a jury who will not convict at all.

Witnesses in Jury Cases.

The Chairman—We have evidence that one deaf man was on a jury?—That might well happen. I have a special jury case coming on, and a man is drawn on the panel who cannot read or write.

The witness said trial by jury in civil cases considerably lengthened the case. The purpose of cross-examination was very often to create an atmosphere, and the questions asked might have no real relevance to the trial. Cross-examination as to credit was often pushed to an extreme in jury cases. In a few cases it happened that improper questions were asked, and the sting lay in the question. The judge might intervene, but the sting was there. He knew of no case in his experience at the bar of questions put with a view of damaging a witness from malice, there being no ground for the question. Cross-examination with a view to getting contradictions considerably lengthened jury cases, because of the effect upon the jury. A judge sitting alone could stop counsel, but he could not do it before a jury. A jury was more influenced by counsel than a judge was. He mentioned the Wilson-Hall divorce case, before Sir James Boucaut, in which, when the respondent's case was opened, the judge stopped it, saying that he could not be convinced by anything that could be advanced by the respondent. The case was cut down by about a week. Browbeating witnesses would be found to occur in most cases before a jury. It had not the same weight with a judge, and if sitting alone he could stop it. Abolish trial by jury and the browbeating of witnesses would stop. The witness suggested that if a judge wanted assistance he should have skilled assessors.

Farcical Special Juries.

Mr. Reidy—Special juries would be skilled assessors.

The Witness—I am coming to that, and you will see what a farce special juries are in this State. In the special jury case I have mentioned 18 men were drawn. Only 13 could be summoned, and out of those two were excused for infirmity and two for old age, and probably two more would have to be excused. So only nine men were qualified, and the case could not go on. That jury cost £9 4/, and that sum had had to be paid over again for another jury.

The witness quoted the qualifications for a special juror, and pointed out that under the Act any man who had a block of land of the value of £100, or occupied property of that value, and described himself as a gentleman or an agent, or who was a justice of the peace, was qualified as a special juror. And those men could not be challenged.

Mr. Reidy—But he might have just as good a brain to decide the matter.

The Witness—Then make that the test.

Mr. Reidy—Do you favor an educational test?—Certainly I do. In seven years there have been 29 juries in civil cases so that if a list of about 300 qualified jurors were drawn no man would have to serve more than once in eight or nine years.

The witness said although he favored an education test for jurors he saw an objection to it, because a man of the lower class might think he was not being tried by his peers but by another class. Speaking of the availability of the law for a poor man the witness said he thought a man should have the opportunity of getting the advantage of taking his case into court and getting counsel assigned to him even if he had £150 and not the £25 as was at present stipulated. Apart from matrimonial cases that clause in the Act was not availed of. It might be because people did not know of it, but it might be that rather than make such an application for a client a counsel might take a case on spec.

9.5.23

PROFESSOR PHILLIPSON AND MR. O'HALLORAN.

To the Editor.

Sir—In his evidence before the Law Reform Commission Mr. T. S. O'Halloran, according to your report, correctly stated that I had denied I was never in a court in Adelaide, but incorrectly stated that I said I "passed through"! I must ask him to see once more the source of his information; I am sure he is not deliberately misrepresenting my statement. Mr. O'Halloran says he objects to my criticism of the legal profession here. But I never criticised the legal profession. Mr. O'Halloran must have noted my public statement last week that I had a high regard for my legal friends here. What I did condemn was certain practices in cross-examination brought to my notice in a few notable cases. I also told the Commission that the conduct of cases by counsel in England was more dignified than what I have seen here: and I repeat it, not for the sake of hurting the susceptibilities of Mr. O'Halloran or any other lawyer, but in the interests of truth. Some South Australian practitioners who have been in courts in London agree with me; if Mr. O'Halloran does not agree, I am sorry, but I cannot help it. Mr. O'Halloran mentions his 36 years' experience, as against my shorter experience. But competence to form right opinions does not depend merely on length of experience. Mr. O'Halloran says that before anyone can express an opinion of a jury system in any country he must have had experience in that country. But he overlooks the fact that the jury system is, in its essential features, the same in Australia as it is in the other Dominions, in England, and also in the United States. I, having been asked about the essential features, made my observations accordingly. Unlike several South Australian witnesses who have condemned the jury system, I have sufficient confidence in, and regard for, the people at large to advocate its retention, subject to the reservations I carefully indicated. The strangest thing about Mr. O'Halloran's attitude and reference to me is that later on he actually agrees with me, so that his long experience does not, as he seemed to suggest earlier, differ from my shorter experience, but confirms it. For instance, he speaks of the irrelevance of cross-examination, of its purpose to create an atmosphere, pushing it to an extreme, asking improper questions, and so on. Further, he recommends the continuance of juries in criminal cases and in various civil cases. So did I. What reason, then, was there for the observations made earlier by Mr. O'Halloran?—I am, &c.,

COLEMAN PHILLIPSON.

The University, May 8, 192[illegible]

10.5.23

PROFESSOR PHILLIPSON AND MR. O'HALLORAN.

To the Editor.

Sir—I am sorry that in giving evidence before the Royal Commission I have evidently hurt the feelings of Professor Phillipson. Certain parts of his letter refer to matters upon which I have not completed my evidence, and I consider it proper that the Commission should hear what I have to say on those matters by evidence given before it, and not through the columns of the press. I regret if in referring to a letter of Professor Phillipson's, which I had not read for some days, I made it appear that he "said" that he had "passed through the courts." What I was endeavoring to convey was that the impression formed on my mind was that Professor Phillipson's first-hand knowledge of our courts was of a very casual nature. It is a pity that Professor Phillipson did not, either in his evidence, or in his two letters to the press, tell us how many hours he had spent in our courts while witnesses were being examined. It would also be interesting if he gave the names of the cases, or at least the names of the counsel engaged, and stated whether any case he had heard was being tried before a jury. Such a statement might help the public to arrive at a true estimate of the material upon which he founded his strictures on the Bench and Bar of South Australia. Professor Phillipson refers to the contrast I drew in my evidence between the length of his experience at the Bar (I think it was stated in the press at 16 years), and my 36 years' experience. I readily concede the weight and truth of his criticism that "competence to form right opinions does not depend merely on length of experience." Mention of my experience was made in the course what was virtually an apology to the Commission for my temerity in venturing to voice an opinion contrary to that expressed by so great an authority. Such reference was in the nature of a warning to the Commission, so that it might not fall into the possible error of thinking that 36 years of the experience at the Bar of T. S. O'Halloran could under any circumstances be considered as having very much weight in comparison with 16 years' experience of Professor Phillipson. "Better fifty years of Europe than a cycle of Cathay." Having made the above concession to the views of Professor Phillipson, perhaps he will concede the weight and truth of my humble suggestion that "competence to form right opinions" on the practice of any particular courts of justice "does not depend merely" on a total absence of any practical experience in such courts, nor does it "depend merely" on experience gained by sitting in court as a spectator for a few hours a day, even though that experience may be assisted by a perusal of press reports of certain episodes in a few cases.—I am, &c.,

T. S. O'HALLORAN.

11.5.23

PROFESSOR PHILLIPSON AND MR. O'HALLORAN.

To the Editor.

Sir—The letter of Mr. O'Halloran, which appears in "The Advertiser" to-day, and purports to be a reply to mine, is not a reply at all, as any impartial and logically minded reader may at once see by comparing the two letters. Therefore I need not say anything further on this subject, except that Mr. O'Halloran's latest remark about my "strictures on the bench and bar of South Australia" is quite untrue, and I am prepared to show its untruth before any committee of the Law Society which he represents. The limits within which my criticism was made of certain methods of cross-examination I have carefully indicated, and the kinds of questions I condemned were specifically put to me by the Law Reform Commission. As to the bench, I never made the slightest disparaging reference to the judges, nor, indeed, had I ever even the least deprecatory thought concerning them. The ablest judges in the world cannot always keep in proper order every practitioner in every case at every moment of the case. The excellence and dignity of judicial administration do not depend only on the judges. If a man of 36 years' experience can impute to me disparagement of the judges, when I condemned certain practices of counsel in certain notable cases, it does not say much for