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Informal Law-Making In England by the Twelve
Judges in the Late 18th and Early 19th Centuries

by James Oldham
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In 1848, Parliament created the Court for Crown Cases Reserved, in which all of the common law judges heard and decided questions reserved by trial judges in criminal cases.¹ As Sir John Baker explains, this was “a court of record, which would now sit in public and give reasons for its decisions,” even though “the reservation of cases was still at the discretion of the trial judge and the court did not have the powers of the court en banc in civil cases.”²

The Court for Crown Cases Reserved formalized an off-the-record procedure that had been followed for centuries. When a question of law or procedure arose during the conduct of a jury trial, the question could be reserved for collective deliberation by the twelve common law judges. As will be explained, the reasons for reserving a question were varied; the deliberations by the judges were both informal and private, although at times, arguments of counsel were permitted or invited; and until the late 18th century, the results of the deliberations were not regularly made public.

From at least the 16th century, it was not uncommon for a doubtful legal question to be

¹ See J.H. Baker, *An Introduction Into English Legal History*, 4th ed. (2002):139. The three common law courts were King’s Bench, Common Pleas, and Exchequer. The number of judges varied somewhat over time, but for nearly all of the years covered by this article, each court had four judges. See J. Sainty, *The Judges of England 1272-1990* (1993) 19, 57, 103-05.

² Baker, *Introduction*, 139.

reserved in a case being tried on the assizes, and this was true in both civil and criminal cases.³ Initially, the method was to take a special verdict,⁴ with the final outcome of the case to be determined after deliberation by the judges. The special verdict procedure, however, was expensive and time-consuming, and during the 18th century the much simpler expedient emerged of taking a general verdict but reserving the legal question for the full common law court in a civil case, or for the twelve judges in a criminal case.⁵ If the judges in a criminal case thought

³ *Ibid.* The assize judges were designated as commissioners to hear cases at *nisi prius* (the civil docket), gaol delivery, and oyer and terminer. Each of the civil cases would have originated by pleadings filed in London in one of the three common law courts, and the fiction was that each case would be heard in London on a specified day, *unless before* [*nisi prius*] that date, the case was to have been heard locally during the assizes. The criminal dockets (the Crown side), however, were local—they were not linked to a permanent criminal court in London with a country-wide jurisdiction. The Old Bailey, known today as the Central Criminal Court, only had jurisdiction over criminal cases arising in the city of London proper and in the county of Middlesex.

⁴ As put by Sir James Stephen, “Special verdicts are verdicts in which the jury not wishing to decide upon the law find the facts specially, referring it to the court to say whether upon those facts the prisoner is or is not guilty of the crime for which he is indicted.” J. Stephen, *A History of the Criminal Law of England*, 3 vols. (1883) 1: 311.

⁵ In *Roe, d. Hamerton v. Mitton*, 2 Wils. 356, 358, 95 ER 856, 857 (CB 1767), Chief Justice Wilmot began his opinion with the following exasperated comments: “The question in this case is a very short one, but it is so involved and covered by the length of this special

the conviction wrong, they would recommend to the Crown that the prisoner be pardoned.⁶

verdict, that it is more difficult to find it out than to determine it. This shameful prolixity puts the parties to an unnecessary and immoderate expence, and therefore it was that *cases reserved* were first introduced instead of special verdicts.” The multiple steps required for a special verdict were explained by Henry Cary as follows: “When a special verdict is found, the plaintiff’s attorney generally gets it drawn from the minutes taken at the trial, and settled by his counsel or serjeant, who signs the draft. It is then delivered over to the opposite attorney, who gets his counsel or serjeant, to peruse and sign it; and when the verdict is thus settled and signed, it is left with the clerk of *nisi prius* . . . , who makes copies for each party. The whole proceedings are then entered, docketed, and filed of record; after which a *concilium* is moved for, a rule drawn up thereon with the clerk of the rules in the King’s Bench, or secondaries in the Common Pleas, the cause entered with the clerk of the papers or secondaries, copies of the record made and delivered to the judges, and counsel instructed and heard, in like manner as in arguing upon a demurrer.” H. Cary, *A Practical Treatise of the Law of Juries at Nisi Prius* (1826) 116. Cary then described the alternative method of having the jury return a general verdict “subject nevertheless to the opinion of the court, on a special case, stated by the counsel on both sides, with regard to a matter of law; which has this advantage over a special verdict, that it is attended with much less expense, and obtains a speedier decision.” *Ibid.*, 117-18. With the “special case” procedure, however, “nothing appears on the record but the general verdict,” and “the parties are precluded thereby from the benefit of a writ of error, if dissatisfied with the judgment of the court upon the point of law.” *Ibid.*, 118.

⁶ If the judges thought an acquittal wrong, the double jeopardy rule prevented retrial, and

Prior to the late 18th century, there was no regular printed record of the twelve-judge procedure. Occasional twelve-judge cases turned up in the nominative reports, and trial records in a few notorious cases were printed in pamphlet form. The practice of reserving cases for twelve-judge deliberation began to be noted in the Old Bailey Sessions Papers (“OBSP”) in the 18th century, but only a handful of such cases appeared before the 1770s. In 1789, the first edition of *Leach’s Reports* was published, titled *Cases in Crown Law, Determined by the Twelve Judges; by the Court of King’s Bench; and by Commissioners of Oyer and Terminer, and General Gaol Delivery*.⁷ After Leach, the reporting of Crown cases reserved was carried on by Russell and Ryan, Moody, and Lewin.⁸ *Leach’s Reports* were significantly augmented by Edward East in his *Pleas of the Crown*, published in 1803. Although in treatise form, East incorporated accounts of numerous twelve-judge cases that were not in print elsewhere. He

in any case, the twelve judges did not have authority to grant a new trial. See nn. 49-51, and accompanying text, below.

⁷ Four editions of *Leach’s Reports* were printed. The fourth, published in 1815, is the edition that was reprinted in the English Reports. The great majority of the cases reported by Leach were from the Old Bailey or from the assizes.

⁸ W.O. Russell & E. Ryan, *Crown Cases Reserved for Consideration; and Decided By the Twelve Judges of England From the Year 1799 to the Year 1824* (1825); W. Moody, *Crown Cases Reserved for Consideration; and Decided By the Judges of England From the Year 1824, To the Year . . . [1844]* (1837-44); G.A. Lewin, *A Report of Cases Determined on the Crown Side on the Northern Circuit* (1834-39).

itemized in the prefatory pages of his book eleven manuscript sources that he relied upon.⁹

Neither East's *Pleas of the Crown* nor any of the numerous practice books that were published in the late 18th and early 19th centuries provides a significant explanation of the procedure followed in the twelve-judge deliberations. The first and only extensive treatment of the procedure in print is D.R. Bentley's Introduction in his *Select Cases from the Twelve Judges' Notebooks*, published in 1997.¹⁰ Bentley explains that for the period 1757 to 1828, notebooks (eventually six in number) were kept of reserved Crown cases. The custodian of the notebooks was the Chief Justice of the Court of King's Bench. Bentley quotes Chief Justice Tenterden's explanation for discontinuing the notebooks in 1828 – that it was “unnecessary to go on transcribing them after the regular practice was established of placing them in the reporter's hands.”¹¹ Eighty-four of the cases in the judges' notebooks were unreported, and these are the cases that were transcribed and published by Bentley following his Introduction. The notebooks themselves were not a public record, but they were evidently shared to some extent with the practicing bar.¹²

Bentley's Introduction and the cases he transcribed supply important information about a venerable but elusive procedure that was carried on largely outside public view. Yet the judges'

⁹ E.H. East, *Pleas of the Crown*, 2 vols. (1803) xiii-xv.

¹⁰ D.R. Bentley, ed., *Select Cases from the Twelve Judges' Notebooks* (1997) 1-52.

¹¹ *Ibid.*, 1. By “them,” Tenterden undoubtedly meant the reports that had been written out at trial of the questions reserved for deliberation and the circumstances giving rise to them.

¹² For example, the first volume of the judges' notebooks was among the manuscript sources itemized by Edward East in his *Pleas of the Crown*.

notebooks are themselves an imperfect record of the legal history of the procedure. Their principal shortcoming is the fact that in most of the cases, the judges' reasoning is not given. Also, they contain only Crown cases, even though the twelve-judge procedure was invoked in numerous civil cases and in other contexts, as will be later elaborated.

This article explores how the informal twelve-judge procedure contributed to the business of law-making. In the discussion to follow, I address the following:

- In what contexts, by whom, and for what purposes was the twelve-judge procedure invoked?
- To what extent were the twelve judges making law by rendering opinions that would be regarded as binding precedents?
- What was the effect of a resolution that was not unanimous?
- How and to what extent did the decisions by the judges and their reasoning become known?
- Apart from the fact that it was discretionary, how did the twelve-judge procedure differ from what would have been achieved by a formal appeal?

In What Contexts, By Whom, and for What Purposes Was the Twelve Judge-Procedure Invoked?

Cases were referred to the twelve judges for a variety of reasons.¹³ The twelve judges resembled a select club of gentlemen, and ordinarily they respected and consulted each other in a collegial manner.¹⁴ At the Old Bailey, the common law judges sat in rotation, but never

¹³ See generally Bentley, *Select Cases*, 12-24.

¹⁴ See John Langbein's description of the atmosphere on the bench at the Old Bailey: J.H. Langbein, "Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources,"

predictably in company with the same colleagues. Ordinarily two judges attended; frequently one of the judges was from the City of London, most often the Recorder (the chief legal officer of the City), also the Common Serjeant, and at times even the Lord Mayor.¹⁵ When a legal question arose about which the trial judges were doubtful, the most sensible course was to reserve the question for discussion with brother judges at the next opportunity, perhaps at the gathering of all of the judges on the first day of the following term.¹⁶ The result of the deliberations could then be reported back to the Old Bailey by one of the judges sitting in rotation at the next Old Bailey sessions.¹⁷

University of Chicago Law Review 50 (1983): 1, 31-36 (“A Collegial Trial Bench?”). In the *Sessions Papers*, Langbein saw evidence of “happenstance collegiality” when trials were conducted by more than one judge, but this fell far short of Continental systems that he describes. As is shown by the many cases discussed below, the frequent and extensive deliberations of the twelve judges in felony cases at least approximated, to borrow Langbein’s phrase, “a collegial bench in cases of serious crime.” *Ibid.*, 35, 31.

¹⁵ See Allyson May, *The Bar and the Old Bailey, 1750-1850* (2003) 16-17. See also *The Proceedings of the Old Bailey*, <http://www.oldbaileyonline.org>, “Judges and Juries,” “Who Were the Judges?”

¹⁶ The judges would also gather intermittently at other times. Typically they would assemble in the chambers of one of the Chief Justices, in Serjeants’ Inn, in the Exchequer Chamber, or even in the home of one of the judges.

¹⁷ See, e.g., *R. v. Jackson*, 1 Moody 119, 168 ER 1208 (Old Bailey 1826); *Charlton v.*

On the civil side, assize judges could follow the well-established method of taking the verdict subject to a case stated and then report the reserved question and the circumstances of the case to the full court during the sittings the next term.¹⁸ If the question that arose at trial was not

Hill, 5 Car.& P. 147, 172 ER 915 (Old Bailey 1831). As is later discussed (text at nn. 160-66, below), there was no certainty about the outcome of the twelve-judge deliberations. Results were reported in many cases, but at times the judges never reached a conclusion. Some cases never reached the printed records, although occasional manuscript reports can be located.

¹⁸ On this procedure, see *Luke v. Lyde*, 2 Burr. 882, 97 ER 614 (1759); J. Oldham, *English Common Law in the Age of Mansfield* (2004) 29, n.65; 52-53. If the assize judge presided over a case that originated in his own court, the procedure was simple. When the case came on for argument during term time in London, the trial judge would be sitting with his three colleagues, and he would recount from his trial notes the circumstances of the case and the question reserved. Often, however, the case tried on assize was not from the assize judge's own court. For example, if a Baron of the Court of Exchequer had the civil list on assize, the odds were that the *nisi prius* cases to be tried would have been filed in King's Bench or Common Pleas since the volume of civil cases in Exchequer was much smaller than in the other two courts. When this happened, the assize judge temporarily assumed the mantle of a judge of the court in which the case was filed. If a legal question arose that he thought proper to reserve, he would not be present when the full Court of King's Bench or Common Pleas took up the case in London, but the assize judge would have written out a report of the facts and question raised, copies of which would have been made for the four judges on the court in which the case had been filed. These

specific to the court in which the case had been filed but was one of substance or of broad procedural scope, it might make more sense to put it to all twelve judges rather than only the four judges of the originating court. This was occasionally done.

Most of the cases put to the twelve judges, however, were criminal, from the trial dockets at the Old Bailey or from the gaol delivery and oyer and terminer commissions on assize. This is unsurprising, since for these criminal cases there was no criminal court of record to which the cases could be referred.¹⁹ There was also a sentiment among the judges that in felony cases, fair

would be included in the Paper Books that were delivered to the judges when the case came on for argument the following term.

¹⁹ There was a limited option for criminal defendants in some cases – the writ of error. This, however, would require the assistance of counsel, and, as explained by Holdsworth, the writ dealt only with the formal record of a case, and since “the record took no account of some of the most material parts of the trial, where error was most likely to occur – the evidence and the direction of the judge to the jury – the writ could do nothing to remedy the only errors that were really substantial.” W. Holdsworth, *A History of English Law*, 16 vols. (reprint 1966) 1: 215-17 (footnote omitted). For a useful survey of the different modes of review, with particular attention to nineteenth-century developments, see B.L. Berger, “Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals,” *Canadian Criminal Law Review* 10 (2005): 1. The limited scope of the writ of error prompted parties at times to elect a special verdict despite the expense, since the specially-found facts would be on the record and thus covered by a subsequent writ of error.

opportunity should be given to the criminal defendant to prove his innocence, and this was occasionally the stated reason for sending questions raised by the prisoner's counsel to the twelve judges.²⁰ Further, as noted above, referring a case to the twelve judges would save time and expense, as compared to the special verdict procedure.²¹

Another category of cases that came to the twelve judges was when issues arose that were important, novel, or difficult.²² A famous early example was *Calvin's Case*²³ establishing that

²⁰ See, e.g., *R. v. Taft*, 1 Leach 172, 168 ER 189 (Leicester Lent Assizes 1777) (forgery—"the learned and humane Judge, cautious of passing sentence of death in a case which admitted a doubt, submitted to the consideration of the twelve judges"; forgery confirmed); *R. v. Powell*, 1 Leach 77, 168 ER 141 (Old Bailey 1771) (conviction confirmed and prisoner executed); *R. v. Adey*, 1 Leach 206, 168 ER 205 (Old Bailey 1779) (no opinion by the judges ever given; prisoner was discharged after imprisonment for 18 months; footnote speculation that perhaps the prisoner escaped pending the opinion of the judges when the gaol was burned down in the Gordon Riots of 1780).

²¹ See n. 5, above. For cases in which the saving of expense was expressly recognized, see *R. v. Hodgson*, 1 Leach 6, 168 ER 105 (Old Bailey 1730); *R. v. Coombes*, 1 Leach 388, 168 ER 296 (Old Bailey [Admiralty] 1785); *Parker v. Asline, Barnes* 472, 94 ER 1009 (KB 1758).

²² See, e.g., *Murry v. Eyton and Price*, 2 Show. K.B. 104, 89 ER 823 (1680) (the cause "adjourned into the Exchequer Chamber, *propter difficultatem*, before all the twelve judges"); *Pitt's Case*, *Fortescue* 169, 92 ER 801 (1734) ("this Court had the advice of all the Judges, because such an attempt to have the defendant discharged on affidavits, appeared to be a new

Scotsmen born after James VI became King in 1603 were not to be classified as aliens. Well-known examples during Mansfield's time were the forgery prosecution of Margaret Rudd,²⁴ and the common law copyright case of *Tonson v. Collins*.²⁵ In *Tonson*, Lord Mansfield

thing"); *R. v. Drinkwater*, 1 Leach 15, 168 ER 110 (Old Bailey 1740) (the question of whether a person who receives money as a reward for helping another to stolen goods could be prosecuted before the principal offender had been convicted was sent to the judges as "a case of very great importance, and of the first impression," but no opinion by the judges was ever publicly communicated—*ibid.*, 18-19); *R. v. Morgan*, 1 Leach 54, 1168 ER 129 (Old Bailey 1764) ("a Mahometan may be sworn on the Alcoran in a prosecution for a capital offence"); *R. v. Hazel*, 1 Leach 368, 168 ER 287 (Norfolk Summer Assizes 1785) (whether a special verdict could be amended in a capital case, a question "for the difficulty of it, referred to the consideration of all the Judges"—*ibid.*, 383, 293); *R. v. Hammon*, 2 Leach 1083, 168 ER 638 (Old Bailey 1812) ("the court reserved the point, it being *a new case*"—*ibid.*, 1087, 640).

²³ 7 Co. Rep. 1a, 77 ER 377 (1608).

²⁴ 1 Leach 115, 168 ER 160 (Old Bailey 1775) ("It being judged a point of great weight and importance in the criminal law, to be fully considered and finally settled, how far, under what circumstances, and in what manner an accomplice, received as a witness, ought to be entitled to favour and mercy, and farther consideration of the matter was then deferred, in order that the opinion of all the Judges might be taken upon the point of law"—*ibid.* at 124). See generally Donna Andrew and Randall McGowen, *The Perreaus & Mrs. Rudd* (2001).

²⁵ 1 Bl. W. 301, 96 ER 169 (1761).

refused to “make a case” to take the question back to the Court of King’s Bench; instead, he directed a special verdict, because, “I was determined it should be argued and judged in the most solemn manner,” and, anticipating that the parties might acquiesce under the decision of the Court of King’s Bench, Mansfield was “desirous to have it argued before all the judges.”²⁶ Accordingly, the case stood over to be argued before the judges, but as Justice Willes explained in the later, equally-famous case of *Millar v. Taylor*, the judges suspected that the action in *Tonson* had been collusive to set up a nominal defendant in order to get a judgment that might serve as a precedent, and for this reason, the judges refused to proceed in the cause.²⁷

Although most cases sent to the twelve judges were at the initiative of the trial judge, some cases went forward at the request of counsel for the defendant.²⁸ It was even possible for “gentleman of the bar” in attendance at the trial to suggest to the judge that a case go forward to

²⁶ *Ibid.* at 345, 190.

²⁷ *Millar v. Taylor*, 4 Burr. 2303, 2327, 98 ER 201 (1769).

²⁸ See, e.g., *Holiday v. Pitt*, Cun. 16, 94 ER 1033 (1734); *R. v. Brady*, 1 B.& P., 187, 126 ER 851 (1797); *R. v. Gillson*, 1 Taunt. 95, 127 ER 767 (Old Bailey 1807). In *R. v. Smith*, Holt 614, 171 ER 357 (Newcastle Summer Assizes 1817), the prisoner had been convicted and left for execution on August 18, but on the 16th, counsel for the prisoner showed the trial judge a note of a case that had been decided at York two years earlier, and after reading it, the judge “sent an express to respite the execution in order to give time to take the opinion of the twelve judges on the point of law.” *Ibid.* at 616, 360. The eleventh-hour respite did not succeed, however, and the prisoner was afterwards executed.

the twelve judges.²⁹ On one remarkable occasion, the suggestion to refer the case to the twelve judges was made by counsel for the *prosecution* after having won a guilty verdict. In *R. v. Dixon [Dickson]*,³⁰ the defendants were found guilty on three counts of stealing calico from a building on the prosecutors' bleaching grounds. The felony statute specified that the theft be from a building that was used either for printing or drying the calico.³¹ After the trial, counsel for the prosecution realized that no proof had been put in about what the building was used for and asked counsel for the defendants whether he wished "that this might be considered." Unsurprisingly, counsel for the defendants did wish this to be considered, and the trial judge (Mr. Baron Graham) referred the case to the twelve judges, even though "the objection, if taken at the trial, would probably have led to evidence that the building was frequently used for the purpose of giving the finishing print to calicoes of the description of those stolen."³² The judges concluded that the felony conviction was wrong, but since a fourth count was for simple larceny only, they recommended that the prisoners be pardoned conditional on transportation for seven years.

There were, finally, times when questions were put to the twelve judges from outside the

²⁹ See Mason's Case (Winchester Summer Assizes 1756) and Curtis's Case (Newcastle Summer Assizes 1756), reported at M. Foster, *A Report of Some Proceedings on the Commission of Oyer and Terminer and Gaol Delivery for the Trial of the Rebels in the Year 1746 in the County of Surrey, and of Other Crown Cases* (1762) 132, 135.

³⁰ Russ. & Ry. 53, 168 ER 680 (Spring assizes, Nottingham, 1803).

³¹ 18 G. 2 c. 27, s. 1.

³² Russ. & Ry. at 56, 168 ER at 681.

regular procedures of the common law courts and the regular criminal dockets at the Old Bailey. Occasionally questions calling for twelve-judge deliberation came up during the Admiralty sessions at the Old Bailey.³³ Also, court martial cases were sometimes sent to the twelve judges by the Privy Council. An unreported example is *R. v. Dixon* (1797).³⁴ Eleven seamen on board the ship *Saturn* had been convicted of mutiny and sentenced to death. The members of the Court Martial ordered that the bodies of the two of the prisoners, James Dixon and John Evans, were to be afterwards hung in chains, but doubts arose about whether the Court Martial had authority to issue such an order. On the advice of the Privy Council, the King sent an order to the twelve judges to consider the question. In Michaelmas Term 1797, the judges issued their opinion, finding no authority by which Courts Martial were “authorized to make it a part of the sentence that the bodies of offenders ordered to suffer death shall after execution be hung in chains.”³⁵

³³ See, e.g., *R. v. Coombes*, 1 Leach 388, 168 ER 296 (Old Bailey [Admiralty] 1785); *R. v. Bruce*, 2 Leach 1092, 168 ER 643 (Old Bailey [Admiralty] 1812). The Admiralty Sessions were established by two statutes of Henry VIII creating commissions of oyer and terminer, a jurisdiction that by the 18th century had been limited to felonies. See M.J. Pritchard and D.E.C. Yale, *Hale and Fleetwood on Admiralty Jurisdiction* (1993), cxxxvii, clvii-clviii. On the *Coombes* case, see *ibid.*, clviii, clx, clxx-xi. On *Bruce*, see *ibid.*, clxii, clxxv-vi.

³⁴ Lawrence MSS, vol. 6A, Crown Cases 1794-97, Middle Temple Library, London.

³⁵ This statement was signed by all of the judges except Ashhurst, who was out of town. Two additional unreported court martial cases that were referred to the twelve judges in 1811 were *R. v. Parker* and *R. v. Mulearty*, both found in Lawrence MSS, vol. 6A, Crown Cases 1794-

On rare occasions the twelve judges gathered at the request of the Crown to take up a question of statutory construction or policy. An early example is found in *Dyer's Reports* – a memorandum that on the last day of Michaelmas Term 1565, “all the Judges were assembled by

97, Middle Temple Library, London. On the *Mulearty* case, see text at nn. 87-88, below. Parker was accused and convicted on board H.M.S. *Salvador del Mundo* of committing an unnatural act, as mentioned in the 29th Article of War, with a cabin boy. The boy's testimony was unclear on whether emission from the defendant was inside the boy's body or upon it. Although the defendant was convicted, the question of whether emission inside the body was essential to a conviction for sodomy was referred to the Attorney General and Solicitor General and Counsel for the Admiralty. They concluded that emission inside the body was an essential element of the crime, but the question, “by order of the Prince Regent in Council,” was referred to the twelve judges. The judges met twice, and at the first meeting all of the judges thought that the Court Martial sentence of guilty of an unnatural act was wrong except Lord Ellenborough, “who thought the crime compleat, saying that he should in future direct in practice according to the opinion of the other judges, but he thought *emissio seminis* not necessary.” The issue was debated again at the second meeting, at the conclusion of which Ellenborough agreed to sign a certificate which read as follows: “According to what for a great number of years past has been understood to be the law and acted on as such, we are all of opinion that the evidence stated to us does not prove that the crime imputed to the prisoner was compleat, and consequently that the sentence of the Court Martial upon James Parker is not legal.”

command of the Queen to devise how the nine penal statutes, s. tillage, servants and labourers, apparel in the time of P. and M., armour and horses, artillery and unlawful games, relief of the poor and vagabonds, woods, highways and bridges, and forestallers and regrators, should be best put in execution.”³⁶

It was not invariably true that the judges were compliant when requested by the Crown to assemble, as is shown by an incident in 1748-49, described by Attorney General Dudley Ryder in his diary.³⁷ The incident was too complex to be related in full here, but in brief, George II commanded the Attorney General and the Solicitor General (then William Murray, later Lord Mansfield) to meet with all the judges to assess the validity of a commission that had issued on July 11, 1748 to the Privy Council and the judges to hear prize cases jointly by way of appeal – a commission to which some of the judges had objected because they thought that legally the appeals ought to go exclusively to the Privy Council. According to Ryder, some of the judges reacted to the King’s request “in a passionate way, as if they had nothing to do [but] to meet on such occasion,” and “they would hear nothing as to the expediency or fitness of their acting under the commission, but only as to the legality of it.” Ryder noted the individual views of some of the judges, for example, Foster’s opinion, who “did not seem so much against the legality but thought it not fit that the judges should be employed in a matter of state as he looked upon this to be.”³⁸ Foster explained to Ryder his opinion that some of the special commissions that had been created

³⁶ 2 Dyer 236a, 73 ER 521 (1565).

³⁷ Legal and Political Diary 1746-49, copy held by Georgetown University Law Library.

³⁸ *Ibid.* at 47.

in the past had been illegal, that the treaty requiring an appeal to the Privy Council could not be superseded by the King's commission, and that "he looked upon this as a state commission and it would be unbecoming the twelve judges of England to act as judges of affairs of state."³⁹

Eventually the judges did meet with Ryder and Murray, but they divided six for and six against the legality of the commission. Later, Lord Chancellor Hardwicke told Ryder that he could not think of putting the six judges who thought the commission legal on the commission because of the danger that the other six (all of whom were on King's Bench or Common Pleas) would grant a writ of prohibition, "which would be a total suspension of the case for too long a time." In the end, the matter was resolved by a statute. As noted in Blackstone's *Commentaries*, after doubts were conceived concerning the validity of the commission to which the judges, though not privy counsellors, would be added, "the same was confirmed by statute 22 Geo. II. c.3 with a proviso, that no sentence given under it should be valid, unless a majority of the commissioners present were actually privy counsellors."⁴⁰

To What Extent Were the Informal Deliberations of the Twelve Judges "Law-making"?

The classic common law method of law-making was to set a precedent by articulating, extending, or limiting a principle with the expectation that the decision would control like cases

³⁹ *Ibid.* at 49.

⁴⁰ W. Blackstone, *Commentaries on the Laws of England*, 4 vols. (1765-69) 3: 70

subsequently. If, however, an opinion of the twelve judges was merely advisory, how could it be said to have controlling effect in future cases? We can explore this question by considering how the judges themselves regarded the decisions that were reached through the informal twelve-judge procedure. As will be demonstrated, the judges clearly considered these decisions – those that reached a clear conclusion at least – to be binding.

The horizontal structure of the English central courts, with three common law courts operating largely independently of each other, would seem to have inhibited the development of the notion of binding precedent. Sir William Holdsworth argued that, nevertheless, by the second half of the eighteenth century, precedent had become a stronger force for the central court judges than was commonly believed. He said that, “A decided case makes law for future cases, and will bind all inferior courts, and generally courts of co-ordinate jurisdiction.”⁴¹ Further, he quoted Sir Frederick Pollock for the proposition that, “The decisions of a Court of Appeal are binding on all

⁴¹ W. Holdsworth, *History of English Law*, 12: 146. Holdsworth’s view was not universally accepted. See generally Neil Duxbury, *The Nature and Authority of Precedent* (2008). Duxbury states that, “By the late eighteenth century, there certainly existed among the English judiciary a practice of following precedents, but the fact that there was as yet no clear and unchallengeable court hierarchy made it difficult and often impossible to say that one decision was binding on another because of the source from which it emanated,” citing C.K. Allen’s *Law in the Making*, 3rd ed. (1939), 210. Duxbury says (at 18, n.53) that “Allen developed his argument in response to William Holdsworth, who maintained that the doctrine of precedent had become established in England by the latter half of the eighteenth century.”

courts of co-ordinate rank with the court below, and generally, according to English practice, on the Appellate Court itself.”⁴²

During the time period covered in the present article, there was no court of appeal, though cases could go forward to the Court of Exchequer Chamber and the House of Lords by writ of error. John Langbein describes the procedure of submitting a case to the twelve judges, however, as one “that functioned as a species of appellate review,” so that the judges’ decision would “resolve the case and the precedent would clarify future practice.”⁴³ Similarly, Sir John Baker observes that, although “the judges were not acting as a court of record but merely as an advisory assembly,” their opinion nevertheless “was always acted on, and—if reported—would serve as a precedent for the future.”⁴⁴ He also states that the judges’ “collective declarations were law not just because of their judicial office but because they conformed to the established wisdom of the little intellectual world of Westminster Hall and the Inns of Court.”⁴⁵

The expression “law-making” can have a variety of meanings.⁴⁶ In the English common law system from the time period under discussion, as has been stated, judicial opinions regularly established precedents that would govern like cases subsequently, though the views of historians

⁴² *Ibid.*, 147, citing F. Pollock, *A First book of Jurisprudence*, 1st ed., 299-300.

⁴³ J. Langbein, *The Origins of Adversary Criminal Trial* (2003) 212-213.

⁴⁴ Baker, *Introduction*, 139. As a number of cases discussed in this article demonstrate, the judges also treated unreported decisions as precedents for the future.

⁴⁵ *Ibid.*, 198.

⁴⁶ See generally Baker, *Introduction*, chapter 12 (“Law Making”).

differ on when the notion of precedent became firmly fixed while the three common law courts operated independently.⁴⁷ The decisions of the twelve judges, however, support and strengthen Holdsworth's view that the system of precedent was well-established by the second half of the eighteenth century. The twelve-judge decisions constituted law-making in two additional important ways. They settled the meaning and limits of statutory language as applied to specific fact situations, and they established controlling rules of procedure and evidence.

Precedent-setting

The evidence that the judges regarded the twelve-judge decisions as binding precedents is plentiful, and there is almost nothing that suggests that the decisions did not need to be followed because merely advisory. What the judges did recognize was that they, as an informal group of twelve, had limited *remedial* authority. In criminal cases, they could confirm the conviction or conclude that it was wrong. If wrong, their recourse was to recommend a pardon to the Crown, which was sure to be granted. But if a different remedy were to be requested, they would be unable to supply it. This is demonstrated in *R. v. Parry, Rea and Wright*.⁴⁸ The case involved four defendants who had been tried and acquitted for rape, after which three of the four were indicted again for another alleged rape of the same person. In the second case, the jury again acquitted the defendants, finding that there was only one incident and not two. The trial judge,

⁴⁷ See n. 41, above.

⁴⁸ 7 Car.& P., 173 E.R. 364 (1837).

Baron Bolland, said that he saw no evidence that the alleged rape in the second indictment was the same as that in the first, but, “I cannot take upon myself to withdraw the case entirely from the jury.” Instead, he reserved the case for consideration of the judges, posing the question of whether there was any evidence to justify the verdict, and if not, whether the verdict was final and conclusive. In the proceeding before all of the judges, Baron Alderson asked counsel for the prosecution what the result would be if he succeeded in establishing the points for which he contended. Greaves, counsel for the prosecution, responded that “your Lordships will order the prisoners to plead over, or will order a new trial.”⁴⁹ Justice Park responded, “We cannot grant a venire de novo because we are not a Court of Justice, we are merely advising the learned Judge who tried the case.”⁵⁰ In the end, the judges concluded that the verdict was final.⁵¹

⁴⁹ *Ibid.* at 841, 366.

⁵⁰ *Ibid.* at 842, 367. The “learned judge” (Bolland, Baron), of course, was one of the judges hearing the argument before all of the judges.

⁵¹ The defendants pleaded *autrefois acquit* [formerly acquitted] to the second indictment, with which the second jury agreed, acquitting the defendants again. The twelve judges debated whether there would be a way to avoid the second verdict if it could be shown to be clearly against the evidence – as, on the facts of the case, if the proof that there was a second rape were clear. Some of the judges appeared to be uncertain whether double jeopardy would attach in such circumstances. Prosecution counsel Greaves suggested that “if there is not a judgment *quod eat sine die* [that he go without a day, i.e., that the defendant was dismissed from any further court appearance], the party could not use the verdict on a plea of *autrefois acquit*,” to which Baron

Baron Alderson made a further observation in the *Parry* case—that “when a civil case was argued before the twelve judges, the eight sat as assessors to the four judges of the court in which the record was, and the four gave judgment.”⁵² In criminal cases from the assizes and the Old Bailey, there was no fixed bench of judges to whom the case could be returned. Instead, the case would be returned to the Old Bailey or to the assize from which the case had been referred, so that the judges’ opinion, reasoning, and resolution could be reported at the next Old Bailey or assize sessions (though this was not always done).

Apart from the limited remedial power of the twelve judges, however, the twelve-judge decisions were treated as binding precedents. Indeed, these decisions were at times considered to be weightier than decisions by only one of the common law courts, since all or most of the twelve judges would have participated.

Examples in *Leach’s Reports* of decisions that relied on previous twelve-judge cases as

Alderson responded, “That may be the true solution.” Baron Parke seemed surprised, asking, “You say that if the Judge refuses to record this verdict, you may go on at the next assizes?” Justice Littledale then interjected that, “After the minutes of the verdict are put down, the clerk of assize says, ‘Hearken to your verdict as the Court records it,’ and the Judge might then say, ‘Do not record it,’ and ask the jury to reconsider it.” *Ibid.*, 842-43, 367.

⁵² *Ibid.* at 843, 367. This technical observation merely meant that the civil case would be returned to the common law court in which it originated. The four judges of that court invariably adopted the collective decision of the twelve judges. See in this connection *Mead v. Robinson*, text at nn. 152-54, below.

binding precedents are numerous. Thus in *R. v. Williams*⁵³ the twelve judges said that “The case of *Mary Mitchell*, in Mr. Justice Foster’s Reports, . . . had been decided upon serious argument by a great majority of the judges, and therefore the principles there laid down could not now be departed from.”⁵⁴ In *R. v. Moore*,⁵⁵ the judges “could not distinguish this case from *The King v. Patch* in this Court in February 1782, and *The King v. Pear*, in September sessions 1779.”⁵⁶ John Patch had been tried at the Old Bailey by Justice Gould, accompanied by Baron Perryn and Justice Buller, and the court relied “upon the authority of the case of *The King v. Pear*.”⁵⁷ The *Pear* case, in turn, had been sent to the twelve judges by Justice Ashhurst in 1779, and the judges’ opinions were delivered by Baron Perryn at the Old Bailey sessions in February 1780, though they “differed greatly.”⁵⁸ Despite the difference of opinion, it was said in *R. v. Semple*⁵⁹ that, “The case of *The King v. Pear* was very solemnly debated at Lord Chief Justice De Grey’s house.” The court said that Semple’s actions (hiring a post-chaise with felonious intent to convert it) fell “precisely within the principle of *Pear’s Case* and the other decisions which the Judges

⁵³ 1 Leach 114, 168 E.R. 160 (Summer Assizes, Southampton, 1775).

⁵⁴ *Ibid.* at 115, citing *Mary Mitchell’s Case* (Lent assizes, Kent, 1754). See *Foster’s Crown Law*, 119.

⁵⁵ 1 Leach 314, 168 E.R. 260 (Old Bailey 1784).

⁵⁶ *Ibid.* at 317.

⁵⁷ *R. v. Patch*, 1 Leach 238, 239, 168 E.R. 221 (Old Bailey 1782).

⁵⁸ *R. v. Pear*, 1 Leach 212, 213, 168 E.R. 208 (Old Bailey 1779).

⁵⁹ 1 Leach 420, 168 E.R. 312 (Old Bailey 1786).

have made upon the subject of constructive felony.”⁶⁰ Indeed, “the most ingenious subtlety cannot distinguish this case from that of *The King v. Pear*.”⁶¹

One count of the indictment in *R.v. Hutchinson*⁶² was founded on a clause in a statute that “would reach any individual who shall forcibly hinder or obstruct a Revenue Officer in the execution of his duty.”⁶³ This offense, however, had been reduced to a misdemeanor by a later statute,⁶⁴ and the judges ruled that the felony had been “virtually repealed,”⁶⁵ as had been “settled by the twelve judges, in the case of *The King v. Davies*, reserved by Mr. Justice Gould from the Home Circuit.”⁶⁶ And in *R. v. Owen*,⁶⁷ the court held that the defendant had not been deprived of benefit of clergy, founding its decision “on the authority of the case of *Rex v. Campbell*,” a twelve-judge decision issued in January 1792.⁶⁸

Even after the Court for Crown Cases Reserved was created in 1848, prior twelve-judge

⁶⁰ *Ibid.* at 422, 313.

⁶¹ *Ibid.* at 424, 314.

⁶² 1 Leach 339, 168 E.R. 273 (Old Bailey 1784).

⁶³ 19 G. 2, c. 34.

⁶⁴ 19 G. 2, c. 69, s. 10.

⁶⁵ *Ibid.* at 342, 274.

⁶⁶ *Ibid.*, citing *R. v. Davies* [Davis], 1 Leach 271, 168 E.R. 238 (Hertford Summer assizes 1783).

⁶⁷ 2 Leach 572, 168 E.R. 388 (Old Bailey 1792).

⁶⁸ *Ibid.* at 574, 389, citing *R. v. Campbell*, 2 Leach 564, 168 E.R. 385 (Old Bailey 1792).

opinions continued to have full precedential force. In *R. v. Clarke*,⁶⁹ counsel for the Crown referred to the prior twelve-judge case of *R. v. Jackson*⁷⁰ in which a majority of the judges ruled that having carnal knowledge of a woman under circumstances which induced her to suppose she was with her husband did not amount to rape. Counsel acknowledged that the *Jackson* case had been followed in subsequent cases but he claimed that “the matter is still, I apprehend, open for argument,” despite counsel’s recognition that the facts of his case were not distinguishable from the facts in *Jackson*. Chief Justice Jervis gave counsel’s argument short shrift, stating that the five judges had conferred with several of the other judges, “and we think we cannot permit this question to be opened now, but are bound by the decision in *R. v. Jackson*.”⁷¹

Occasional cases were sent to the twelve judges specifically in order to establish a rule to govern future cases. In *R. v. Baxter*,⁷² a question was sent forward, “not so much on any doubt we [the two judges at the Old Bailey] entertained ourselves, as because it was a point likely to arise on the circuits.” And in *Wetherell’s Case*,⁷³ a question of whether assize judges had authority to try an indictment that had been transmitted to the assizes from the sessions was sent

⁶⁹ Dears. 397, 169 E.R. 779 (1854).

⁷⁰ Russ.& Ry. 487, 168 E.R. 911 (1822).

⁷¹ Dears. 399, 169 E.R. 779 (1854). Five justices constituted a quorum on the Court for Crown Cases Reserved, and according to Holdsworth, “If the five differed, any one might require the matter to be referred to all the judges.” Holdsworth, *History of English Law*, 1: 217.

⁷² 2 Leach 578, 580, 168 E.R. 392 (1792),

⁷³ 1 Lewin 209, 168 E.R. 1015 (1825).

to the twelve judges “for a rule in similar cases.”

A final example of precedent-setting by the twelve judges is extreme – a case that developed precedential force even though it was never finally decided and was never made public. The case, *Foster v. Thackary*, arose in 1779 and required the judges to address the persistent, vexing question of the enforceability of wagering contracts.⁷⁴

A year earlier, the wager puzzle had been before the Court of King’s Bench in *Jones v. Randall*,⁷⁵ in which the plaintiff sued to recover money allegedly won upon a wager on whether a decree of the Court of Chancery would be reversed or not on appeal to the House of Lords. The

⁷⁴ Wagering contracts were very close cousins to insurance contracts, the key difference being that there was no insurable interest in a straightforward wagering agreement. Two insurance statutes, one from 1746 and the other from 1774, invalidated insurance contracts “upon lives, or any other event or events, without interest in the parties.” The 1774 statute was seized upon by Lord Mansfield in 1777-78 in the case *Roebuck v. Hammerton*, in striking down a wagering contract on whether the French Ambassador to England, the Chevalier D’Eon, was male or female. Yet the *Roebuck* case and the 1774 statute did not, as might have been supposed, invalidate wagering contracts in England. *Roebuck* and a companion case, *Da Costa v. Jones*, were thought to invalidate only those wagering contracts that offended the public interest, as in inviting scandalous testimony concerning a well-known political figure. More pedestrian wagering contracts were thus not reached. See Oldham, *English Common Law*, 141-46.

⁷⁵ Cowp. 37, 98 E.R. 954 (1774).

Court of King's Bench said that such a wager was enforceable "unless the motive be fraud or other turpis causa." Arguing against the validity of the wager, Dunning, counsel for the defendant, said that the agreement was contrary to common decency; moreover, since all the judges knew the law and administered justice with uprightness and integrity, it could not be supposed that the judges were so ignorant of the laws as not to know them. Lord Mansfield disagreed. He found nothing in the wager that was either immoral or contrary to justice, and as to Dunning's second argument, "it would be very hard upon the profession, if the law was so certain, that everybody knew it: the misfortune is that it is so uncertain, that it costs much money to know what it is, even in the last resort."⁷⁶

Then in Trinity Term 1779, the case of *Foster v. Thackary* came on at the sittings before Lord Mansfield, and after counsel for the plaintiff opened the case, Lord Mansfield immediately nonsuited the plaintiff and directed that a motion be made by the plaintiff for a new trial in order to take the opinion of the court on whether the wagering policy involved in the case was void under the 1774 statute because the plaintiff had no interest.⁷⁷ The written wager read as follows:

⁷⁶ Cowp., 39-40, 98 E.R. 956.

⁷⁷ On the 1774 statute, see n. 74, above. The *Foster* case was unreported except for a brief reference in the case of *Allen v. Hearn*, 1 T.R. 56, 99 E.R. 969 (1785). Reporters Durnford and East inserted a footnote to the citation of the *Foster* case by counsel for the plaintiff, explaining that the opinion of the twelve Judges was taken on "whether the wager were void under the stat. 14 G. 3. C. 48." The judges, however, were divided – "The Courts of *B.R.* and *C.B.* were of opinion that it was; and the Court of Exchequer *contra*," and "no judgment was ever given in the

“London May 2, 1778. Mr. Robert T lays Mr. Thomas Foster £100 that war is declared against France or France deckares war against England within three months from the date of these presents.” Dunning again argued against the validity of the wager, claiming that, as had been established in *Da Costa v. Jones*,⁷⁸ wagers were illegal when upon subjects on which public discussions were improper. Representing the plaintiff, the Attorney General (James Wallace) asked, “What law in this country prevents persons from making bets in which they have no interest, if there be nothing illegal or immoral in them?” King’s Counsel John Lee, also for plaintiff, declared that, “it would be very extraordinary to pretend that wagers are unlawful in a country where the most material questions are judicially decided under this form as feigned issues.”⁷⁹ He added, bluntly: “If this is an insurance there is no wager which is not.” Lord

case.” 1 T.R. 57, n. (b), 99 E.R. 970. Two manuscript reports provide full information on the case. The first, in which the background of the case is given, is in notebooks kept by barrister Vicary Gibbs. See Gibbs MSS, Cases in King’s Bench, Easter 21 G. 3, to Hilary 22 G. 3, p. 84 (Trinity 1781), Middle Temple Library, London. The second is in the manuscripts kept by Lord Eldon while at the bar: Notes of Cases 1779, p. 55, Eldon MSS, Georgetown University Law Center, Washington, DC.

⁷⁸ See n. 74, above.

⁷⁹ Except for complicated matters such as financial accounts, questions of fact could not ordinarily be decided in the Court of Chancery and would have to be put before a common law jury. Thus, in an illustration by Blackstone, when a fact question arises in a case in equity about an inheritance, it “is usually directed to be tried at the bar of the court of king’s bench or at the

Mansfield responded that, “Wagers upon public events are very mischievous; but wagers in general are allowed at common law, and it may be very difficult to draw the line as to events which may or may not sustain a wager.” He said that if the wager fell under the 1774 statute, that would be the end of it, but discussion would be useful. He said that he would not give any opinion without consulting the twelve judges, but he would “throw out how the question struck and strikes me.” He reflected on what is a “policy,” a French word for a promise. He noted that the 1774 statute was titled “policies” but the enacting part was against wagers, whereas the reverse was true of an earlier statute from the time of Queen Anne.

The case was taken under advisement and was brought forward again on June 22, 1781, when Lord Mansfield said, “this case has been before the twelve judges and there is a difference of opinion among them.” He declined to say which way the majority was inclined, “because we will now, if desired, put it in the way of a more solemn decision.”

Evidently the parties did not seek “a more solemn decision,” and the opinions of the twelve judges were never publicly announced. Yet the *Foster* case continued to be referred to as an important precedent.⁸⁰ In *Good v. Elliott*, plaintiff and defendant placed a bet of five guineas

assizes, upon a *feigned issue* . . . wherein the pretended plaintiff declares, that he laid a wager of 5*l.* with the defendant, that A was heir at law to B; and then avers that it is so; and brings his action for the 5*l.*” – “The defendant allows the wager, but avers that A is not the heir to B; and thereupon that issue is joined.” W. Blackstone, *Commentaries*, 3: 452.

⁸⁰ See, e.g., the argument of Le Mesurier for the plaintiff in *Allen v. Hearn*, 1 T.R. 56-57, 99 E.R. 969 (1785).

on the question of whether a wagon lately belonging to one David Coleman had or had not been sold to one Susannah Tye before a certain day.⁸¹ This innocuous wager led the court into an extensive discussion of the general question of the validity of wagering contracts. After reviewing many past cases, the wagering contract was upheld, even though the judges lamented the fact that Parliament had not legislated more effectively upon the subject. Justice Buller, however, dissented, discoursing upon the subject in a lengthy opinion. He concluded his opinion by citing the case of *Foster v. Thackary*, noting that it “was not finally determined; but still I think it is a case of considerable authority.” He quoted Lord Mansfield as saying, “What is a policy? It is derived from a French word, which means a promise.” Buller then asked, “Is a particular form necessary? Must it begin ‘in the name of God, amen,’ or refer to Lombard Street?” He said that, “If the form were essential under the Act, it may be evaded immediately; for it may begin, ‘I, we promise, if war be declared, we will pay, &c.’” – or, as applied to mercantile events, “I, we promise to pay if the ship sails and does not arrive, &c.” Returning then to *Foster*, he said that even though the case was never finally decided, “it is well known that a great majority of the

⁸¹ 3 T.R. 693, 100 E.R. 808 (1790). A rule had been granted on November 10, 1788 to show cause why the jury verdict for the plaintiff should not be arrested. Defense counsel Erskine pitched the case as an opportunity to guard against frivolous waste of judicial resources; otherwise the courts “would soon have five hundred such wagers to decide” – “A man might lay a wager that his horse’s tail contained 5,000 hairs, or that an old woman sold so many apples at her stall in a given time,” and these cases would absurdly “break in upon the time which their Lordships had set aside for the distribution of justice.” *The Times*, November 13, 1788, p. 3.

Judges were of opinion against the action.”⁸²

Statutory Interpretation

Since common law crimes were few, most criminal cases at the Old Bailey or on assize involved indictments for violations of statutes. Most of these cases reached a jury verdict without any question of statutory interpretation having been raised, and the jury verdicts were conclusive. When the criminal defense lawyers came on stage in the second half of the eighteenth century, however, questions of statutory interpretation began to be raised, and as is shown in the printed reports, many of these were referred to the twelve judges. Three representative types of twelve-judge cases involving statutory interpretation are the following: (1) Those calling for applications of statutes to new situations not anticipated by Parliament; (2) those requiring the judges to reconcile two statutes with similar content; and (3) those demanding close interpretation of specific words of the statute under which the defendant had been indicted.

New situations

In *R. v. Moore*,⁸³ the question was whether a collar of iron used for graining the edges of counterfeit money was an instrument covered by the 1696 statute under which the indictment was

⁸² *Ibid.* at 702, 812.

⁸³ 2 Car. & P. 235, 172 E.R. 107 (1825).

laid.⁸⁴ A witness proved that the collar was a recent invention, not known at the time the statute was passed – “at that time, the graining of the edges was a separate process, and distinct from the process of coining, and was done by an instrument held in the hand, and called an edger or edging tool, but that instrument was not now in use.”⁸⁵ The twelve judges nevertheless “were of opinion that the collar was an instrument within the statute.”⁸⁶

In addition to technological change, the judges confronted at times fact situations that had not been anticipated by Parliament when the applicable statute was drafted, calling for creative interpretation. In the unreported case of *R.v. Mulearty*,⁸⁷ the defendant was convicted by a court martial of unnatural practices under the 29th Article of War and the statute, 25 H. 8, c. 6 (1533). The statute, titled “The Punishment of the Vice of Buggery,” declared the offense to be felony without benefit of clergy and described the offense as “the detestable and abomidable Vice of Buggery committed with Mankind or Beast.” Patrick Muleraty had been discovered in the hen coop, and graphic evidence was presented of his having committed an unnatural act with a fowl. The court martial found Muleraty guilty and ordered him to be hanged on board the ship H.M.S. *Gladiator*. Before the sentence was carried out, the Attorney General and Solicitor General and Counsel for the Admiralty were asked to give their opinion on whether the case fell within the

⁸⁴ 8 & 9 W. 3, c. 26, s. 1 (1696).

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* at 237.

⁸⁷ Lawrence’s MSS, Crown Cases 1805-1815, vol. 6D, p. 399, Middle Temple Library, London.

words of the statute, specifically whether, in a case as penal as this one, the word “beast” should be held to comprehend fowls. They, in turn, thinking it important that the construction of the Article of War and the statute should be the same, referred the question to the twelve judges by means of a memorial from the Lords of the Admiralty to the Prince Regent. On January 30, 1812, the judges concluded that the sentence was not legal.⁸⁸

In a series of cases starting in 1779, the twelve judges created and then circumscribed a concept they called “constructive violence” when faced with indictments for robbery under statutory language specifying “violence” as an element of the crime. In *R. v. Donally*,⁸⁹ the defendant was indicted for highway robbery, having accosted Charles Fielding on the street early one morning and demanded “a present,” adding, “Why, you had better comply, or I will take you before a Magistrate, and accuse you of an attempt to commit an unnatural crime!” Fielding complied. Donally was indicted, tried, and found guilty, but the trial judge certified to the twelve judges the question of whether what had happened amounted in law to a robbery. The judges assembled at Chief Justice De Grey’s house in Lincoln’s Inn Fields, where arguments by counsel were received. After deliberation, the conviction was upheld. One of the questions that was debated was whether the statutory requirement of violence had been met, and the judges (though not all of them) approved the notion of “constructive violence,” analogizing to burglary cases in

⁸⁸ Lawrence’s notes give no information about the judges’ deliberations.

⁸⁹ 1 Leach 193, 168 E.R. 199 (Old Bailey 1779).

which a notion of “constructive breaking” had been accepted.⁹⁰

Another such case was tried at the Old Bailey in 1783 before Justice Buller, the same judge who had conducted the Donally trial. In *R. v. Hickman*⁹¹ Justice Ashhurst delivered the opinion of the judges that reaffirmed the “constructive violence” principle, despite “some doubts having been entertained as to the opinion of the twelve judges in the case of Patrick Donally.”⁹² A decade later, the issue arose again in *R. v. Reane and Watkins*.⁹³ In the Reane and Watkins case, some time had elapsed between the threat by the defendant and the handing over of money. The jury nevertheless found both defendants guilty, after which their counsel moved in arrest of judgment. The twelve judges debated the case inconclusively on the first day of Trinity Term 1794. Chief Justice Kenyon thought “that there was no violence or fear at the time the prosecutor [the victim] had made up his mind,” and Chief Justice Eyre thought that the facts did not support a “constructive violence” conclusion—“It would be going a step further than any of the cases to

⁹⁰ This outcome had been anticipated in another Old Bailey case that came before the twelve judges in 1776, *R. v. Jones*, 1 Leach 139, 168 E.R. 171, although in that case nothing was indicated about the judges’ reasoning except that the defendant’s behavior “was a pretence of a very alarming nature, and that a sufficient degree of force had been made use of in effecting it, to constitute the offense of *robbery*.” *Ibid.* at 141. On these cases and others like them, see Langbein, *Adversary Criminal Trial*, 142-43, n. 173.

⁹¹ 1 Leach 278, 168 E.R. 241 (Old Bailey 1783).

⁹² *Ibid.* at 279-280, 243.

⁹³ Reported at 2 East’s Pleas of the Crown (1803) 734 (Old Bailey 1794).

hold this a robbery.”⁹⁴ The case was taken up again by the judges on the first day of Hilary Term 1795, when “they held the conviction wrong and that the prisoners should be recommended for a free pardon (Buller, J. absent).”

A second case comparable to *Reane and Watkins* came before the judges in 1802. In *R. v. Jackson and Shipley*,⁹⁵ a majority of the judges thought that the facts did not support a conviction for robbery, since “to constitute robbery the money must be parted with from an *immediate* apprehension of present danger,” and on the facts before the judges, the prosecutor had time to deliberate and apply for assistance before parting with the money. According to Justice Lawrence’s notes, the prisoner’s counsel at the trial made no objection that the case as proved did not amount to robbery, but the trial judge (Baron Graham) was doubtful and “would not venture of his own authority” to allow the guilty verdict to stand, referring the matter to the twelve judges for discussion. When the judges took the case up on 29 May 1802, three (Heath, Thomson, and Le Blanc) thought the case governed by the former decisions (*Donally* and *Hickman*), but the majority, “who thought this was not a robbery, were of opinion that the cases of *Donally*, &c. have been carried far enough and that this was distinguishable from them by the circumstance that

⁹⁴ 2 East’s Pleas of the Crown at 735. The remark by Chief Justice Kenyon in East’s report is not attributed to him; however, the case appears in Justice Lawrence’s manuscripts, where the attribution is given. Lawrence MSS, Crown Cases 1794-97, vol. 6A, 127, Middle Temple Library, London.

⁹⁵ Reported in the Addenda to East’s Pleas of the Crown (1803) at 1: xxi-xxiv. The case is also in the Lawrence MSS at the Middle Temple Library, Crown Cases, vol. 6B, 298-304.

there was an immediate delivery of the money and that it was not to be extended to a case like the present where there was a negotiation about the sum to be paid and where the party in consequence of it went to procure the money and had time for deliberation.”⁹⁶

A final example of statutory coverage presented to the twelve judges involved not so much a new situation allegedly falling under an existing statute; rather, as a matter that Parliament seemed to have overlooked. The question was whether grand jurors at the assizes were required to be freeholders. Whether and in what types of cases jurors were required to be freeholders had been legislated by Parliament for centuries.⁹⁷ With regard to grand juries, Matthew Hale observed that, “freeholders they ought to be,” adding that, “The statute of 2 H. 5. cap. 3 that requires jurors that pass upon the trial of a man’s life, to have 40s. *per ann.* freehold, hath been the measure by which the freehold of grand jurymen hath been measured in precepts of summons of sessions.”⁹⁸ Blackstone declared that grand jurors “ought to be freeholders, but to what extent is uncertain: which seems to be *casus omissus*, and as proper to be supplied by the legislature as the qualifications of the petit jury; which formerly were vague and uncertain, but are

⁹⁶ Lawrence MSS at 303-304. In a margin note, East posed a query whether the Jackson and Shipley decision did not in great measure overrule Hickman’s case. East at 1:xxiv. In Lawrence’s notes of the case, Lords Alvanley and Ellenborough are shown as stating that they would have decided Hickman’s case the other way. Lawrence MSS at 304-305.

⁹⁷ See J. Oldham, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries* (2006), Appendix 4.

⁹⁸ M. Hale, *The History of the Pleas of the Crown*, 2 vols. (new ed. 1778) 2: 155.

now settled by several acts of parliament.”⁹⁹ William Hawkins, however, expressed the formalistic view that the fact that Parliament had enacted freehold requirements for a variety of types of juries “seems to make it doubtful, whether there be any necessity either by the common law or statute, that a grand juror in any other case must be a freeholder.”¹⁰⁰

King’s Bench Justice Soulden Lawrence recorded in his Notes of Crown Cases that he, “having found in the course of the last Oxford Circuit that several persons were returned upon grand juries, who were not freeholders, and upon enquiry having learnt that such was frequently the case, wished to submit to the consideration of the judges whether persons not being freeholders are qualified to serve upon such juries.” He then referred to the passages in Hale, Hawkins, and Blackstone, and added: “In London according to the information of the Recorder, the grand jury is composed of substantial householders, and it has not been the practice under the commissioners for that City for the enquiry into offences committed there to return only freeholders.”¹⁰¹ Finally, Lawrence noted that, “On the 31st of May 1810 at Lord Ellenborough’s chambers, all the judges agreed that grand jurors need not be freeholders.”¹⁰² The twelve judges

⁹⁹ Blackstone, *Commentaries*, 4: 299, citing Hale.

¹⁰⁰ W. Hawkins, *A Treatise of Pleas of the Crown*, 2 vols. (1721) 2: 217.

¹⁰¹ Lawrence MSS, Notes of Crown Cases, vol. 6D, 280-81, Middle Temple Library, London, citing Lambard’s *Eirenarcha* 396. The passage in Lambard sets out juror qualifications, including freehold requirements for grand and petit jurors in Lancaster as specified in statutes of 7 H. 5 (1419) and 33 H. 6 (1455). See W. Lambard, *Eirenarcha* (1614 ed.) 396-97.

¹⁰² *Ibid.*, 281.

evidently agreed with Hawkins, although in considering what the practice should be for the assizes, the judges' apparent reliance on what the Recorder said about the practice in London is surprising. In 1512, Parliament established a special personalty requirement for London jurors sitting in King's Bench, Common Pleas, and Exchequer cases, since leasehold conveyancing was a common practice in London, and relatively few London jurors were freeholders.¹⁰³ No comparable scarcity of freeholders existed in most of the assize towns.

Reconciling Statutes

One example of reconciling statutes was given above – *R. v. Hutchinson*, where the twelve judges decided that a statute had been “virtually repealed” by a later enactment.¹⁰⁴ Many comparable twelve-judge decisions were reported by Leach. In *R. v. Howe*,¹⁰⁵ a statute creating the offense of stealing shrubs or plants of the value of five shillings in the night-time was held not to have been repealed by a second statute providing graduated penalties for first, second, and third offenses of stealing shrubs or plants of specified values, night or day. Another example is *R. v. Robinson*,¹⁰⁶ in which the defendant was accused of having attempted to extort money by a

¹⁰³ See 4 Hen. 8, c. 3.

¹⁰⁴ See text at nn. 62-66, above.

¹⁰⁵ 1 Leach 481, 168 E.R. 342 (Old Bailey 1778).

¹⁰⁶ 2 Leach 749, 168 E.R. 475 (Old Bailey 1796).

threatening letter sent to the prosecutor, one James Oldham Oldham.¹⁰⁷ The defendant argued that the felony statute under which he had been indicted had been repealed by a later statute dealing with the same type of behavior but only as a misdemeanor.¹⁰⁸ The judges concluded that the first statute¹⁰⁹ extended only to cases where there had been an actual extortion demand, while the second statute¹¹⁰ included letters sent with a view or intent to extort money, though no demand was made; thus, the two statutes were not coextensive and the second statute did not repeal the first.¹¹¹

Close interpretation of statutory words

¹⁰⁷ The prosecutor's middle and last names were both Oldham.

¹⁰⁸ The defendant cited *R. v. Davis*, 1 Leach 271, 168 E.R. 238 (1783), the same twelve-judge precedent that was viewed as controlling in *R. v. Hutchinson*, 1 Leach 339, 168 E.R. 273 (Old Bailey 1779), discussed above, text at nn. 62-66.

¹⁰⁹ 9 G. 1, c. 22 (1722-23).

¹¹⁰ 30 G. 2, c. 24 (1756-57).

¹¹¹ 2 Leach at 767, 168 E.R. at 483. For additional comparable cases, see *R. v. Longmead* (second statute effectively continued an earlier statute despite inaccuracy in second statute's description of earlier statute); *R. v. Collins* (assessing indictment under 36 G. 3, c. 125 [1796], which partially repealed 24 G. 3, c. 51 [1784], both dealing with the duty to be paid on hats and the stamp in the lining indicating payment); and *R. v. Pearce* (statute of 48 G. 3, c. 129, s. 2 [1808] which repealed 8 Eliz., c. 4 [1565], did not alter the offense of robbery at common law).

In *R. v. Carroll*¹¹² the defendant was indicted under a 1670 statute¹¹³ for having “unlawfully and feloniously slit the nose” of the prosecutor. The question put to the twelve judges was whether the cut “was a *slitting* within the letter of the Act, the wound being *transverse*, and not having perforated to the nostril,” whereas the statute expressly directed “that the nostrils shall be slit.”¹¹⁴ The judges “were of opinion, that the slitting of the nose was not confined to any particular form or direction, but that any division of the flesh or gristle of the nose, whether perpendicular or transverse, came within the denomination of *a slit*.”¹¹⁵

In 1774, Richard Cook was indicted under 14 G. 2, c. 6 and 15 G. 2, c. 34 for stealing a cow, but he protested that the animal stolen was a young female beast that had never been with calf, and so should have been denominated a *heifer* in the indictment.¹¹⁶ The twelve judges agreed, reasoning “that as the statutes upon which the indictment was founded mention both *heifer* and *cow* in describing the several animals they were designed to protect, the *one* must have been used in contradistinction to the *other*.”¹¹⁷

¹¹² 1 Leach 55, 168 E.R. 130 (Old Bailey 1765).

¹¹³ 22 Car. 2, c. 1, s. 7 (1670).

¹¹⁴ *Ibid.* at 56-57, 131.

¹¹⁵ *Ibid.* at 57.

¹¹⁶ *R. v. Cook*, 1 Leach 105, 168 E.R. 155 (Lent assizes, Warwick 1774).

¹¹⁷ *Ibid.* The requirement of strict accuracy in the indictment had long been established in English law. See J. Cockburn, *Calendar of Assize Records, Home Circuit Indictments, Elizabeth I*

Many more cases can be found in the printed reports of statutory interpretation by the twelve judges.¹¹⁸ One example of importance to the mercantile community was *R. v. Aslett*,¹¹⁹ in which the twelve judges determined that Exchequer bills were “*securities*” and “*effects*” within a 1741 statute,¹²⁰ even though signed by an unauthorized person. Another case of note is *R. v. Scudder*,¹²¹ where the defendant was indicted for administering a liquid to a woman in order to

and James I: Introduction (1985) 76-86.

¹¹⁸ See, e.g., *R. v. Lavey*, 1 Leach 153, 168 E.R. 179 (Old Bailey 1776) (extracting latent silver from the body of base metal by means of *aqua fortis* is a “colouring” within the 8 & 9 W. 3, c. 26, s. 4); *R. v. Palmer*, 1 Leach 352, 168 E.R. 279 (Old Bailey 1784) (paper on the face of which there is a mark resembling the stamp required by 23 G. 3, c. 49, s. 20 showing payment of stamp duty is “paper liable to the said duties”); *R. v. Ballie*, 1 Leach 398, 168 E.R. 300 (Old Bailey 1785) (construing legislation dealing with people committed as “rogues and vagabonds” in one statute and as “incorrigible rogues” in another); *R. v. Davis*, 1 Leach 493, 168 E.R. 348 (Summer assizes, Hereford 1788) (word “wilfully” was required in indictment under the Black Act, and is not impliedly supplied by the word “maliciously”); and *R. v. Williams*, 1 Leach 529, 535, 168 E.R. 366, 369, (Old Bailey 1790) (indictment under 6 G. 1, c. 23, s. 11 must specify that the assault and the injury to the clothes of the prosecutor occurred at one and the same time, with the requisite intent to cut the clothes “then and there”).

¹¹⁹ 2 Leach 958, 168 E.R. 577 (Old Bailey 1803).

¹²⁰ 15 G. 2, c. 13, s. 12 (1741).

¹²¹ 3 Car. & P. 605, 172 E.R. 565 (1828).

induce an abortion. The statute made it a felony punishable by transportation or imprisonment for any person to administer “any medicine or other thing” or “to use any instrument or other means” with intent to cause a miscarriage in a woman who was not yet quick with child. It was proved that the defendant administered a medicine in order “to kill the little one,” but since it turned out that the woman had never been pregnant, the twelve judges ruled the indictment improper.¹²²

Establishing and Applying Rules of Evidence or Procedure

Not infrequently the twelve judges were called upon to articulate or apply a rule of evidence or procedure. An example is *R. v. Steel*,¹²³ in which the twelve judges determined that a presumption of “ideotism” created by a jury verdict that the defendant was “mute by the visitation of God” was to be regarded as rebuttable. And in *R. v. Brasier*,¹²⁴ the twelve judges decided that no testimony whatever could be offered in court unless under oath, and that a child could take an oath if possessed of sufficient knowledge of the nature and consequences of the act.

¹²² *Ibid.* at 607, 566.

¹²³ 1 Leach 451, 168 E.R. 328 (Old Bailey 1787).

¹²⁴ 1 Leach 199, 168 E.R. 202 (Spring Assizes, Reading, 1779). This case has had a surprising history, most recently as the centerpiece of a careful analysis of the original understanding of the confrontation clause in the United States Constitution. See Anthony Franze, “The Confrontation Clause and Originalism: Lessons From *King v. Brasier*,” *Journal of Law and Policy* 15 (2007): 495.

A more fundamental evidentiary question with which the twelve judges struggled was whether an indictment could be upheld solely on the basis of the unconfirmed testimony of an accomplice. In *R. v. Atwood and Robbins*,¹²⁵ the judges unanimously determined “that an accomplice alone is a competent witness; and that, if the jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal.”¹²⁶ The judges explained that the distinction between competence and credit of a witness had been long settled, and since the jury in the case before the judges had found the accomplice to be worthy of credit, the guilty verdict was legal, even though founded on the testimony of the accomplice only. In a footnote, Leach referred to other cases involving the rule of evidence established in *Atwood and Robbins*, among them *R. v. Jones*, decided in 1809,¹²⁷ where Lord Ellenborough declared that, “No one can seriously doubt that a conviction is legal, though it proceed upon the evidence of an accomplice only.”¹²⁸ Ellenborough remarked that, “Strange notions upon this subject have lately got abroad; and I thought it necessary to say so much for the purpose of correcting them.”¹²⁹

¹²⁵ 1 Leach 464, 168 E.R. 334 (Somerset Summer Assizes 1788).

¹²⁶ *Ibid.* at 465.

¹²⁷ 2 Camp. 131, 170 E.R. 1105 (1809).

¹²⁸ *Ibid.* at 132-133, 1106.

¹²⁹ According to John Langbein, it is “astonishing that in *Atwood and Robbins* a panel composed of all the common law judges of England could have made such an elementary error, contradicting their current practice.” Langbein, *Adversary Criminal Trial*, 216. In Langbein’s

Among Ellenborough's comments in *R. v. Jones* intended to correct the "strange notions" upon the subject were the following: "Within a few years, a case was referred to the twelve judges where four men were convicted of a burglary upon the evidence of an accomplice, who received no confirmation concerning any of the facts which proved the criminality of one of the prisoners; but the judges were unanimously of opinion that the conviction as to all the four was legal, and upon that opinion they all suffered the sentence of the law."¹³⁰ The case to which Ellenborough referred was *R. v. Fordham, Harvey, Hartford, and Bridge*, decided in 1807. The phase of the case before the twelve judges was unreported, but it was included in the notebooks kept by the Chief Justice of King's Bench, and that version of the case is printed in Bentley's *Select Cases From the Twelve Judges' Notebooks*.¹³¹ The trial judge at the Old Bailey in this case was Justice Lawrence, and his manuscript notes of the case that are much fuller than the report in the twelve judges' notebooks. Lawrence's notes show that Lord Ellenborough in *R. v. Jones* was taking some liberty in describing the *Fordham* case as one in which the judges unanimously upheld the view that a conviction could be based solely on the evidence of an accomplice whose testimony

opinion, the *Atwood and Robbins* case effectively overruled, *sub silentio*, "the established understanding of the corroboration rule" – i.e., that uncorroborated accomplice testimony should have been excluded. *Ibid.* For a more extensive discussion of the corroboration rule, see also J.H. Langbein, "Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources," *University of Chicago Law Review* 50 (1983) 1, 96-103.

¹³⁰ 2 Camp. 133, 17 E.R. 1106.

¹³¹ Bentley, *Select Cases*, 99.

received no confirmation. The issue before the judges in *Fordham* was what might be called a question of “transferred confirmation.” Lawrence described the issue in his headnote as follows: “What confirmation is sufficient to support the evidence of an accomplice. Confirmation as to one of several offenders is confirmation as [to] the others.”¹³²

Justice Lawrence had examined a copy of the report of the *Fordham* trial in the Old Bailey Sessions Papers, and in his manuscript note of the case, he corrected a mistake in the OBSP. He said that the statement on page 64 that the witness had pointed to the defendant Hartford was wrong – that the witness actually pointed to the defendant Bridge.¹³³ The evidence against defendants Fordham, Harvey, and Hartford was principally the testimony of an accomplice, one Enoch Roberts. In his account of the deliberations of the twelve judges, Lawrence said that he “directed their [the jury’s] attention to the circumstances under which he [Roberts] stood as rendering him undeserving of credit, unless confirmed by other witnesses.”¹³⁴ The jury found all four defendants guilty, and Lawrence put the question to the twelve judges “whether the Case of the first three Prisoners ought not to have been left to the Jury with strong advice to acquit for want of Roberts’ evidence being sufficiently corroborated by the testimony of other witnesses.”¹³⁵ The evidence recounted by Lawrence showed the essential lack of confirmation or corroboration as to the first three defendants.

¹³² Lawrence MSS, Crown Cases vol. 6D, 58, Middle Temple Library, London.

¹³³ See <http://www.oldbaileyonline.org>, case no. t18070114-5.

¹³⁴ Bentley, *Select Cases* 99-100.

¹³⁵ *Ibid.* at 100.

No opinions of the judges are given in the report of the case in the twelve judges' notebook transcribed by Bentley—only the decision: “Conviction right April 7th 1807.”¹³⁶ Lawrence's notes, however, tell much more. They reflect an extended discussion of the case by the judges on April 25, 1807, a discussion missing entirely from the report of the case in the twelve judges' notebooks, and missing as well from the OBSP. Also revealed in Lawrence's notes is the fact that he relied on the *Atwood and Robbins* case (of which he had a copy from Justice Buller's manuscripts) in not telling the jury that they should acquit the first three prisoners because there was no confirmation of accomplice Roberts' testimony.¹³⁷ In the deliberations by the twelve judges, Lawrence wondered whether he had been wrong in relying on *Atwood and Robbins*. He also raised a second question – whether the convictions of the first three prisoners should stand if the accomplices were confirmed as to any other of the prisoners.

Justice Heath said “that he perfectly well remembered the case of *Atwood*, and the judges then thought slight circumstances would be sufficient to corroborate an accomplice, and that he had never understood that a moral certainty made any ingredient in that which was necessary to corroborate.” This position “seemed very extraordinary to Lawrence, J.” and contrary to sound reasoning, “on the grounds of which the Rules of Evidence were established.”

There was evidence that a pistol had been found on Fordham. Lawrence thought this was no confirmation of his story, although it seemed to have weight with Heath and with other judges. But “the question principally discussed was . . . whether in the case of several offenders, whose

¹³⁶ *Ibid.*

¹³⁷ Lawrence MSS, Crown Cases vol. 6D, p. 63, Middle Temple Library, London.

conviction depended upon the testimony of an accomplice, a confirmation of his story as to one of them was sufficient to leave his credit to the jury without strong directions to acquit.” The judges then discussed some of the logical and practical difficulties presented by this question, especially since prisoners involved in a single alleged crime often were not tried together.

Chief Baron McDonald and Justice Chambré proposed the following rule: “That unless the witness was confirmed as to each, that the prisoner with respect to whom there was no confirmation should be acquitted, although the jury believed the story as to him, in conformity to the law in cases of high treason requiring two witnesses.” This rule would have overturned the *Atwood* rule that a conviction could be based solely on the uncorroborated testimony of a single accomplice. But eventually, “the majority of the judges agreed that as an accomplice was a competent witness, if he received confirmation of his story as to anyone, it was for the jury to determine whether they gave credit to his story as to all; that it was with the judge to point out to the attention of the jury the extent of the confirmation, and it was for them to decide whether they gave him perfect credit.” They added that the rule as to confirmation was not “a rule of law similar to the law in cases of treason, but a rule of discretion.”

Baron Thomson and Justice Chambré said they had understood that the jury could not safely rely on an accomplice’s evidence unless he was confirmed, and that “as a matter of discretion they [the jury] ought to acquit those as to whom there was no confirmation,” and they wished to be told what the rule should be. Justice Heath said that “when he was first a judge the practice was very unsettled; at first it was expected there should be confirmatory evidence given before the accomplice was called, afterwards the practice was established, either to call the accomplice first or the confirmatory evidence, as made best for the understanding of the case.”

Ultimately, the judges accepted the proposition that confirmation of the accomplice as to one of the defendants could be sufficient for all the defendants, and all defendants were afterwards executed. Lawrence added a postscript that, “in this case the accomplice was most strongly confirmed as to Bridge.” The tenor of the judges’ opinions does seem to have been inconsistent with the rule established in the *Atwood* case, that the uncorroborated testimony of an accomplice was sufficient to justify conviction of a defendant. Even though confirmation as to each witness might not be necessary, the judges in the *Fordham* case appear to have insisted that *some* confirmation be present, the strength or weakness of which would be determined by the jury.¹³⁸

Resolving Conflicts of Opinions

On occasion, the judges would decide that the time had come to try to resolve divisions of opinion between or within the common law courts, or to try to reconcile conflicting precedents.¹³⁹ An early case that was sent by the Court of Common Pleas to the twelve judges because it was a new case upon a statute and one of the Common Pleas justices differed from the other three was

¹³⁸ The result reached in the *Fordham* case was also reached subsequently in other cases. See, e.g., *R. v. Dawber*, 3 Stark. 34, 171 E.R. 758 (1821).

¹³⁹ Some such cases have been referred to above. See *R. v. Rudd*, 1 Leach 123, n. 24; also *R. v. Hazel*, 1 Leach 368, and *Murry v. Eyton and Price*, 2 Show. K.B. 104, cited in n. 22.

Bainbridge v. Gardiner.¹⁴⁰ In *Biddleson v. Whitel*,¹⁴¹ a question of whether bail ought to be required on a writ of error was taken to the twelve judges because previously the Court of King's Bench and the Court of Common Pleas had decided the question differently.

Examples of cases sent to the twelve judges because of contradictory opinions in a variety of authorities and in order to settle an issue once and for all are *Parker v. Asline*¹⁴² and *Owen v. Warburton*.¹⁴³ In *Parker*, the procedural question was whether an action in ejectment could be legally maintained in the name of a nominal plaintiff when the judgment against the casual ejector had been by default.¹⁴⁴ Lord Mansfield said that the precedents were contradictory, and "for the sake of settling the practice," he chose to put the case before the twelve judges. He said that the judges "looked into the books, and produced many manuscript cases of opinions both ways," but the judges reached the unanimous conclusion that since the nominal plaintiff and the casual

¹⁴⁰ Bridg. O. 402, 124 E.R. 657 (1665).

¹⁴¹ 1 Bl. W. 506, 96 E.R. 293 (1764).

¹⁴² Barnes 472, 94 E.R. 1009 (KB 1758).

¹⁴³ 1 B. & P. N.R. 326, 127 E.R. 489 (1805).

¹⁴⁴ For an explanation of the use of legal fictions in ejectment actions to try freehold title, see J.H. Baker, *Introduction*, 301-03. Baker notes that, "For nearly three centuries from Elizabeth I to Victoria the usual action to recover real property thus involved two non-existent parties. The very title of an ejectment action – for example, *Doe d. Smith v. Roe* – concealed the truth." *Ibid.*, adding, in n. 22: "I.e. Doe (nominal plaintiff) on the demise of Smith (real plaintiff) against Roe (casual ejector)."

ejector were fictitious characters, the lessor and the tenant being the real parties, it made no material difference whether the judgment was by default or after a verdict.¹⁴⁵ And in *Owen*, the question was whether the court would entertain a motion to set aside a verdict based on affidavits from jurors about misbehavior during jury deliberations, as in drawing lots to determine the verdict. The principal case against receiving such affidavits was *Vaise v. Delavel*,¹⁴⁶ but there were contrary authorities. After the argument, Sir James Mansfield, Chief Justice of Common Pleas, “observed that the authorities upon the subject being contradictory, it was fit that the point should be settled one way or the other,” and after conferring with all the judges, they were of the unanimous opinion “that the affidavit of a juryman cannot be received.”¹⁴⁷ The judges reasoned that a contrary rule could lead to abuse, such as that “a juryman, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should happen to be against him.”¹⁴⁸

Unanimous Versus Divided Opinions

¹⁴⁵ Barnes at 474, 94 E.R. at 1010.

¹⁴⁶ 1 T.R. 11, 99 E.R. 944 (1785).

¹⁴⁷ 1 B. & P. N.R. at 329, 127 E.R. at 490.

¹⁴⁸ *Ibid.* at 330, 491. The headnote in the printed report is incorrect, stating that the court *would* set aside a verdict upon the affidavit of a juryman that the jury had decided by lot. *Ibid.* at 326, 489.

Speaking of the development in the 16th century of the importance of precedent, Baker writes:

Fitzherbert, in his *New Natura Brevium* (1534), was the first writer to make a practice of discussing earlier cases critically. At the same time, the courts took to a more methodical evaluation of precedents; cases could now be dismissed as out of date, or as aberrations, or as mere exchanges of opinion. The result of these changes was that the formal, deliberate judicial opinion was becoming a distinct source of law, to be distinguished from the passing opinion or obiter dictum. . . . By 1600 even a majority opinion would have this effect of settling the law.¹⁴⁹

In theory, the results of twelve-judge deliberations would not seem to constitute the formal, deliberate judicial opinions of which Professor Baker speaks. Yet we have seen that the twelve-judge opinions, by the 18th century at least, had come to be regarded as weighty and serious precedents. A question not yet squarely addressed is whether these opinions had such an effect if they were not unanimous.

In 1838, a pamphlet was published in Dublin by an Irish barrister named John Alcock concerning practices followed in the Irish courts. Alcock's pamphlet was entitled "Observations Concerning the Nature and Origin of the Meetings of the Twelve Judges, For the Consideration of Cases Reserved from the Circuits." Alcock began his essay as follows: "The refusal of Baron Richards to be governed by the resolutions agreed to by the majority of the Judges, upon the questions reserved for their consideration in *Glennon's Case*, and the controversy to which that refusal has given rise, invite an inquiry into the nature and origin of such meetings of the Judges; and into the authority which has been ascribed to such resolutions, at the different periods of our

¹⁴⁹ J.H. Baker, *Introduction*, 198-99 (footnotes omitted).

legal history.”¹⁵⁰ Provoked by two decisions in which a dissenting justice refused to follow a rule laid down by a majority of the Irish judges, one of the judges suggested consulting the English judges about their practice. Accordingly, on February 8, 1838, the Chief Justice of Ireland, Charles Bushe, wrote to Lord Chief Justice Denman to ask about the English practice. Alcock quotes Lord Denman’s responsive letter as follows:

London, February 13th, 1838

My Lord,

I am honoured with your Lordship’s letter, inquiring whether the Judges of England, on their circuits, hold themselves bound by the opinion of the whole body of the Judges on Crown cases reserved; and I have no difficulty in stating, that each of us does hold himself so bound, whether or not his own opinion agreed with that of the majority, or whether or not the case may have been argued by counsel.

I have the honour to be,
Your Lordship’s faithful Servant,

DENMAN¹⁵¹

Whether Lord Denman’s unequivocal view had always been true in England is uncertain, but a strong indicator that the view was longstanding can be seen in a 1743 case involving election bribery, *Mead v. Robinson*.¹⁵² The Court of Common Pleas thought there was insufficient evidence to support the jury verdict for the plaintiff on one of the counts, but the question was referred to the twelve judges. The outcome of the deliberations was reported in a footnote as follows:

¹⁵⁰ Alcock, “Observations,” 1, citing, for Brennan’s Case, *Alcock’s Registry Cases*, 55.

¹⁵¹ *Ibid.*, 4.

¹⁵² Willes 422, 125 E.R. 1247 (C.P. 1743).

“(a) All the Judges, except Mr. J. Fortescue Aland and Mr. Baron Carter assembled at Serjeants’ Inn to hear this case argued by Willes and Draper Serjeants for the defendant, and the Solicitor-General and Bootle Serjt. for the plaintiff; and on the 8th of February being again assembled at Lord Chief Justice Lee’s chambers they gave their opinions seriatim. Lee Lord Chief Justice B.R., Parker Lord Chief Baron, and Chapple, Wright, and Denison, Justices of the King’s Bench, and Reynolds and Clarke, Barons, were of the opinion with the plaintiff; and Willes Lord Chief Justice C.B., and Abney and Burnett Justices of C.B., were of a contrary opinion.”¹⁵³

Then, according to the report, “the next day the Chief Justice (Willes) declared that the Court of Common Pleas were bound by the opinion of the majority of the Judges, and against the opinion of this Court, [and] gave the rule that the verdict as to the question above stated should not be set aside, but should stand.”¹⁵⁴

In many twelve-judge cases, no opinion of the judges was ever announced, as we have seen in the case of *Foster v. Thackary*, above. Perhaps in some of the cases this was because the judges were so badly split that there was no discernable majority opinion. An unreported example is *R. v. Dempsey*, tried before Baron Thomson of the Court of Exchequer in April 1807. There, defendant was convicted of having falsely claimed to be a deceased shipmate’s brother in order to collect prize money. Defendant had been apprehended in Liverpool by one John Dorrington, an agent of the Bow Street Court in London. Both the defendant and Dorrington signed sworn affidavits in Liverpool, but Dorrington died before the trial came on at the Old Bailey. Baron Thomson admitted both affidavits into evidence, but later had second thoughts about their admissibility and referred the matter to the twelve judges. The judges met twice, and

¹⁵³ *Ibid.*, 426 n.(a), 1249 n.(a), citing MS. Abney, J.

¹⁵⁴ *Ibid.*

at the second meeting, Justice Lawrence took careful notes of their disparate views. In their opinions, the judges invoked past decisions, statutes, and treatises by Hale and Dalton. No decision was reached, but the debate evidently saved the prisoner's life. Lawrence noted that, "as the judges, who then met, differed in their opinions it was agreed that the prisoner should be recommended to the King's mercy for a conditional pardon."¹⁵⁵

How, If At All, Were the Deliberations and Resolutions of the Twelve Judges Made Public?

A typical procedure for twelve-judge cases from the assizes and the Old Bailey was to withhold the judgment of the trial court until the twelve judges had conferred, then report the decision of the judges at the next assizes or the next Old Bailey sessions. Copies of the question or questions to be considered were written out and delivered to each of the twelve judges.¹⁵⁶ Prior

¹⁵⁵ Lawrence MSS, Crown Cases, vol. 6D 1806-1815 73, 90 (1807). The OBSP contain a full account of Dempsey's trial by a London jury before Baron Thompson in April 1807, concluding with an entry of "Guilty, Death, aged 28." See <http://oldbaileyonline.org>, case no. t18070408-81. No record appears in the OBSP of the post-trial deliberations by the twelve judges in May and June 1807 or of the judges' recommendation of a pardon. (A "conditional pardon" was a pardon conditioned on transportation to one of the colonies for life or for a term of years. See J.M. Beattie, *Crime and the Courts in England 1660-1800* (1986) 431-32.)

¹⁵⁶ See, e.g., *R. v. Lyon*, 1 Leach 186, 168 E.R. 438 (Old Bailey 1778); *R. v. Pooley*, 2 Leach 904, 168 E.R. 550 (Old Bailey 1801).

to the first edition of *Leach's Reports* (1789), the chief means of keeping abreast of the twelve-judge decisions was through manuscript reports. These reports were frequently cited by both the judges and the barristers.¹⁵⁷ Even in *Leach's Reports*, the reasoning of the judges was not always given, but for cases decided in the 1780s and thereafter, it became increasingly common to print the judges' reasons as delivered at the assizes or at the Old Bailey.¹⁵⁸ Often Leach quoted the

¹⁵⁷ See, e.g., *R. v. Wilkins*, 1 Leach 520, 168 E.R. 362 (Old Bailey 1789), (Justice Gould, reporting the opinion of the judges, cited his own manuscript notes of earlier cases, as well as those taken by Justice Buller). Many more examples might be given. Prior to the start of Term Reports in the mid-1780s, printed reports of cases were either nonexistent or did not appear until years after the cases were decided. Thus, reliance on manuscript notes of the cases was essential. See e.g., J. Oldham, "Underreported and Underrated: The Court of Common Pleas in the Eighteenth Century," in *Law as Culture and Culture as Law*, Hendrik Hartog, William E. Nelson, and Barbara Wilcie Kern, eds., (2000) 119; J. Oldham, "The Indispensability of Manuscript Case Notes to 18th-Century Barristers and Judges," paper delivered at the Nineteenth British Legal History Conference, University of Exeter, UK, July 2009.

¹⁵⁸ Representative examples from *Leach's Reports* include *R. v. Burnel*, 2 Leach 588, 168 E.R. 396 (Old Bailey 1793); *R. v. Lyon*, 2 Leach 597 (Old Bailey 1793); *R. v. Bunning*, 2 Leach 621 (Old Bailey 1794); *R. v. Hunter*, 2 Leach 624, 168 E.R. 415 (Old Bailey 1794); *R. v. Gilchrist*, 2 Leach 657, 168 E.R. 430 (Old Bailey 1795); *R. v. Tilley*, 2 Leach 662, 168 E.R. 433 (Old Bailey 1795); *R. v. Reculist*, 2 Leach 703, 168 E.R. 453 (Old Bailey 1796); *R. v. Vandercomb*, 2 Leach 708, 168 E.R. 455 (Old Bailey 1796); *R. v. Knewland and Wood*, 2 Leach

judges' decision verbatim from the judges' own notes.¹⁵⁹

Another potential printed source for decisions by the twelve judges was the OBSP.¹⁶⁰ Perhaps the close reasoning of the twelve judges would not have been of as much interest to the readers as the testimony of the witnesses and the sentences imposed, but for whatever reason, OBSP reporting of the twelve-judge resolutions and reasoning was sporadic. There might be no indication at all that a question had come up that was referred to the twelve judges. Even if the

721, 168 E.R. 461 (Old Bailey 1796); *R. v. Gade*, 2 Leach 732, 168 E.R. 467 (Old Bailey 1796); and *R. v. Parkes and Brown*, 2 Leach 775, 168 E.R. 488 (Old Bailey 1796). The reports published by Russell and Ryan tended to revert to the pattern of devoting only a few lines or one paragraph to the resolutions of the judges.

¹⁵⁹ See, e.g., *R. v. Self*, 1 Leach 137, 138, 168 E.R. 170 (Old Bailey 1776). In his fourth edition, Leach supplemented his case reports with additional information that appeared in East's *Pleas of the Crown*, sometimes including the judges' own notes. See, e.g., *R. v. Phipoe*, 2 Leach 673, 680, 168 E.R. 438, 441 (Old Bailey 1795). During the early 1800s, other reporters at times acknowledged, with gratitude, information received directly from one of the judges who participated in the twelve-judge deliberations. See e.g., *R. v. Frond*, 1 Br. & B. 300, 129 E.R. 738 (Launceston Spring Assizes 1819).

¹⁶⁰ On the character and readership of the Old Bailey Sessions Papers, see Langbein, *Adversary Criminal Trial*, 180-90 and sources cited therein. See also *The Proceedings of the Old Bailey: London's Central Criminal Court, 1674-1913*, "The Value of the Proceedings as a Historical Source," <http://www.oldbaileyonline.org>.

referral of the question to the twelve judges was noted, the result of the judges' deliberations might or might not be reported subsequently in the sessions papers.

Two Old Bailey case discussed above (*R. v. Dempsey* and *R. v. Fordham*) are illustrative.¹⁶¹ Another example is the case of *R. v. Bulkley*, or *Buckley*. The case is fully reported in the OBSP for June 28, 1780, recounting Buckley's involvement with about 40 other persons during the Gordon Riots in efforts to demolish the home of one Cornelius Murphy.¹⁶² Buckley was found guilty and sentenced to death, although he was recommended by the jury to His Majesty's mercy. Nothing is indicated in the OBSP report to show that a question arose that was forwarded to the twelve judges, and the case is otherwise unreported. Justice Lawrence's manuscripts, however, contain full notes of the deliberations by the twelve judges in the case, notes taken by Justice William Ashhurst.¹⁶³

One of the witnesses against Buckley was a man named Edward Bevan who was described by counsel for the Crown as "the discoverer," that is, the informer. As an informer, he was in line to receive a reward if the defendant were convicted, and thus he was an interested

¹⁶¹ See n.155 and preceding text, and text preceding and following n.130, respectively, above.

¹⁶² <http://oldbaileyonline.org>, case no. t17800628-24. In the sentencing report in the OBSP and in Lawrence's notes, Bulkley is called Buckley, and it is likely that Buckley was the correct name.

¹⁶³ Lawrence MSS, Crown Cases, vol. 6C, 1802-1805, pp. 1-9, Middle Temple Library, London.

witness. As a general rule, interested witnesses were considered incompetent to testify under oath. Apparently (though not reflected in the OBSP) a question was raised about whether Bevan's testimony should have been received. The reward to which he might be entitled had been offered by the government on conviction of persons guilty of taking part in the Gordon riots of 1780. The courts had previously allowed informers to testify when the informers were acting under a statutory reward scheme. The rationalization was that Parliament, by enacting the reward, intended that the informer would testify; otherwise, the statutory scheme could not work. What had not been decided was whether a like result should be achieved for rewards established by a government department or by proclamation. All of the judges' remarks are of interest, but especially those by Lord Mansfield, whose comments included the following:

This is not a new case on a fact which never happened before In this country, where torture is not allowed, and no man can be convicted but upon voluntary evidence, it is impossible to bring offenders to justice, without something to get the better of people's backwardness. Experience shows there is no other way of bringing them to justice and it is of consequence to the state that they should, and this would be sufficient to induce the Judges to form a rule upon it. But it is a question of legal history. In all cases rewards are offered either by private prosecutors or the Crown, and the reward offered by a private prosecutor was never an objection, yet there the party is substantially the prosecutor—there the interest is the same.

Mansfield added that rewards had been offered by the Crown as far back as the times of Charles I and II, and in the statutes passed since the Revolution, there was nothing in them to make the witnesses competent if they were not so.

Following his notes of the views of the judges, Ashhurst quoted the opinion of the judges as he delivered it at the Old Bailey on 10 July 1780. This opinion is missing entirely from the OBSP. It provides an interesting contrast to what Ashhurst wrote of what the judges said in conference. His July 10, 1780 description of the judges' opinion was designed for the parties and

the public, as shown, for example, by his exaggerated claim that there were precedents on point in many different circuits by many eminent and learned judges.

As several of the cases that have been discussed demonstrate, some twelve-judge decisions were altogether unreported. At times they were not even entered in the notebooks kept by the Chief Justice of the Court of King's Bench. Other decisions, although unreported, were in the twelve judges' notebooks and have now been transcribed by Bentley.¹⁶⁴

Even after Crown cases reserved were regularly published by Leach and his successors, the printed reports of the cases sometimes ended inconclusively,¹⁶⁵ or indicated that no opinion of the twelve judges was ever publicly announced. The number of "no opinion" cases was significant; in *Leach's Reports* alone, there are more than twenty such cases. Although no opinion of the judges is given, Leach was able to report what happened to the prisoners in most of

¹⁶⁴ Some of these cases, in addition to those that have been mentioned, appear in Lawrence's MSS, where the judge's reasoning is usually summarized. Bentley did not transcribe any of the cases that were already in print, even though the reports of a few of the cases in the twelve judges' notebooks were much more extensive than the printed reports. One such example was *R. v. Lolley*, a trial for bigamy that was taken up by the twelve judges in November 1812. See Bentley at 34. Lawrence's MSS contain an extensive report of this case as well.

¹⁶⁵ See, e.g., *R. v. Gillson*, 2 Leach 1007, 1014, 168 E.R. 600, 604 (Old Bailey 1807) ("judgment was given at the Old Bailey on the ensuing day, and the opinion, it is said, of six Judges out of eleven, was that the prisoner should be discharged").

the cases.¹⁶⁶

¹⁶⁶ See *R. v. Drinkwater*, 1 Leach 15, 168 E.R. 110 (Old Bailey 1740) (prisoner discharged); *R. v. Fitzgerald*, 1 Leach 20, 168 E.R. 113 (Old Bailey 1741) (prisoners executed); *R. v. Parker*, 1 Leach 41, 168 E.R. 123 (Summer assizes, Rochester 1750) (prisoner ordered at next assizes to give bail); *R. v. Sloper*, 1 Leach 81, 168 E.R. 143 (Old Bailey 1772) (prisoner shown in Newgate Calender as still awaiting judgment in July 1777, but disappears from the record the following sessions); *R. v. Bolland*, 1 Leach 83, 168 E.R. 144 (Old Bailey 1772) (prisoner executed); *R. v. Adey*, 1 Leach 206, 168 E.R. 205 (Old Bailey 1779) (prisoner discharged after 18 months in gaol); *R. v. Hazel*, 1 Leach 368, 168 E.R. 287 (Norfolk Summer assizes 1785) (prisoner discharged with King's pardon after 12 months); *R. v. Aickles*, 1 Leach 438, 168 E.R. 321 (Old Bailey 1787) (remanded to a former sentence); *R. v. Cockwaine*, 1 Leach 498, 168 E.R. 351 (Old Bailey 1788) (prisoner pardoned and discharged April 1780); *R. v. Reeves*, 2 Leach 808, 168 E.R. 503 (Old Bailey 1798) (defendant was tried again on another indictment, found guilty and executed); *R. v. Bazeley*, 2 Leach 835, 168 E.R. 517 (Old Bailey 1799) (prisoner recommended for pardon by the Secretary of State); *R. v. Munday*, 2 Leach 850, 168 E.R. 524 (Old Bailey 1799) (prisoner sentenced to a fine of 1 shilling and two years in house of correction); *R. v. Smith*, 2 Leach 856, 168 E.R. 527 (Summer Assizes Maidstone 1799) (one year's imprisonment with two years' security); *R. v. Pooley*, 2 Leach 887, 168 E.R. 542 (Old Bailey 1800) (pardoned); *R. v. Bakewell*, 2 Leach 943, 168 E.R. 570 (Old Bailey 1802) (reportedly the case was never decided, as "it went off on other considerations"); *R. v. Crocker*, 2 Leach 987, 168 E.R. 591 (Summer assizes Salisbury 1805) (prisoner pardoned and discharged);

The twelve-judge procedure could work to the prisoner's advantage,¹⁶⁷ but the procedure inevitably extended the time spent in jail, and occasionally a prisoner did not survive.¹⁶⁸ An example is *R. v. Alexander*, a case decided at the Old Bailey in 1767.¹⁶⁹ The defendant was a negro servant who was convicted of perjury for falsely swearing in Doctors' Commons that his fiancée was 21 when she was only 16. The evidence showed that the defendant, Joseph Alexander, had been left in England by his master, the Duke de Nivernois, and had been accepted in the house of Mr. Nesbit as an instructor for Mr. Nesbit's daughter, Charlotte. Joseph was to teach Charlotte the French language, and, as Leach's report states, "other fashionable accomplishments, of which the prisoner was perfect master."¹⁷⁰ In time, Joseph obtained Charlotte's consent to marry, and this led to the license and his false oath. After being found

R. v. Bullock, 2 Leach 996, 168 E.R. 595 (Old Bailey 1807) (prisoner pardoned conditional on transportation for life); *R. v. Stock*, 2 Leach 1015, 168 E.R. 604 (Summer assizes Carlisle 1809) (prisoners executed); *R. v. Holden*, 2 Leach 1019, 168 E.R. 607 (Lancaster Summer assizes 1809) (prisoners executed); *R. v. Walsh*, 2 Leach 1054, 168 E.R. 624 (Old Bailey 1812) (prisoner liberated).

¹⁶⁷ See, e.g., *R. v. Dunn*, 1 Leach 57, 168 E.R. 131 (Old Bailey 1765) (because of Justice Aston's sole dissent, the prisoner was recommended for mercy); *R. v. Dempsey*, text preceding n.155, above.

¹⁶⁸ See, e.g., *R. v. Lennard*, 1 Leach 90, 168 E.R. 147 (Taunton Lent Assizes 1772).

¹⁶⁹ 1 Leach 63, 168 E.R. 134.

¹⁷⁰ *Ibid.* at 64.

guilty, the case was referred to the twelve judges, and according to Leach: “The question was agitated several times; but the prisoner dying in *Newgate*, the result of their Lordships’s deliberations was never publicly communicated.”¹⁷¹

Conclusion

Sir James Stephen summarized the informal “twelve-judge” practice that had preceded the creation of the Court for Crown Cases Reserved as follows:

From very early times a practice had prevailed that a judge before whom any criminal case of difficulty arose at the Assizes or elsewhere, should respite the execution of the sentence or postpone judgment, and report the matter to the other judges. The question reserved was argued before the judges by counsel, not in a court of justice but at Serjeant’s Inn of which all the judges were members. If they thought that the prisoner had been improperly convicted he received a free pardon. If not, the sentence was executed or judgment was passed. No judgment was delivered and no reasons were given in such cases, the whole proceeding being of an informal kind.¹⁷²

Stephen’s summary gives the incorrect impression that the informal procedure had nothing to do with law-making. As we have seen, however, the deliberations of the twelve judges made substantial contributions to the growth of the law by establishing controlling precedents, interpreting statutes, fixing rules of evidence, and resolving differences of views among the judges and the three common law courts. Some cases were not argued by counsel, some were never resolved, and some decisions were never made public. Yet by the end of the eighteenth century, it had become customary for counsel to present arguments, for the decisions of the

¹⁷¹ *Ibid.*

¹⁷² J. Stephen, *A History of the Criminal Law of England*, 3 vols. (1883) 1: 311.

twelve judges to be communicated at the Old Bailey and at the assizes, and for the reasoning of the judges to be announced. In many ways, the twelve judges had become a *de facto* court of appeal that was producing binding precedents.

This brings us to the final inquiry, to consider how the twelve-judge procedure differed from a formal right of appeal. The obvious first point is that there was no right by a defendant to demand a twelve-judge review. His counsel, if he had one, could request such a review, and it might or might not be granted. Secondly, under the informal procedure, the twelve judges had no remedial power to speak of. They could say that a conviction was right, or they could recommend a pardon. They might do the latter because they thought the conviction wrong, or because they were divided in their opinions. Thirdly, there was no guarantee that the twelve judges would come to a firm conclusion.

From the viewpoint of the defendant, the procedure was a mixed blessing. As the 18th century came to a close, counsel were increasingly allowed to cross-examine witnesses on the defendant's behalf in felony cases,¹⁷³ and, as was true in many of the cases that have been discussed, counsel were often permitted to argue before the twelve judges. The chance for a recommendation of mercy by the judges was a plus to the defendants. Undoubtedly a twelve-judge pardon recommendation to the Crown, made because the judges thought the conviction wrong, would be effective, whereas a mercy recommendation by a jury that had just returned a guilty verdict would depend on the trial judge's discretion.¹⁷⁴ The informal procedure was also

¹⁷³ See Langbein, *Adversary Criminal Trial*, 170, 256-57, 291-300.

¹⁷⁴ The pardons recommended by trial judges were virtually automatic (see Beattie, *Crime and the Courts in England*, 432, n. 49), and such recommendations by the twelve judges were

advantageous to the defendant because it cost him nothing, assuming no counsel expense. On the minus side, however, were the possibilities that the trial judge would not request a twelve-judge review, or if he did, that the twelve judges' opinion might never be known and the defendant could languish behind bars for years.

From the judge's viewpoint, the twelve-judge procedure must have been extremely satisfactory. A trial judge was never left out on a limb with a perplexing question with which he had little or no experience. A prisoner in sympathetic circumstances need not be executed if the judges found a recommendation of mercy justified. Differences of opinions between the common law courts could be resolved by plenary debate. Differences of views among the judges of one of the common law courts stood a good chance of being resolved in the larger forum, especially given the informality and collegiality of the gatherings that took place. And if the judges could not agree, they could go public on the strength of the majority view, or they could give no public opinion whatever.

This comfortable informal procedure was not likely to survive the glare of the reform era of the mid-19th century, as indeed it did not. As Sir John Baker points out, the 1848 statute "set up the Court for Crown Cases Reserved as a court of record, which would now sit in public and

certain to be accepted.

give reasons for its decisions.”¹⁷⁵ But the reservation of Crown cases reserved remained a matter of discretion for the trial judge, remedial powers remained limited, and in spite of “continuous pleas for reform, the defendant did not acquire a right of appeal until the introduction of the Court of Criminal Appeal in 1907.”¹⁷⁶

¹⁷⁵ Baker, *Introduction*, 139 (footnote omitted).

¹⁷⁶ *Ibid.* (footnote omitted).