Court of Appeal Criminal Division and Its Jurisdiction

by Francis Bennion

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It is not often that litigants in person, even when members of the bar, write legal articles about their experience. My excuse is that a question of law of some importance was settled by the Court of Appeal Criminal Division in dismissing an application I made to them in June 1975[1]

This article will refer to my own experience only so far as is necessary for expounding that question of law, which goes to the root of the court's jurisdiction.

I

In 1966 and 1971 Parliament made fundamental changes in the law and procedure governing trials on indictment in England and Wales and appeals relating to them. In 1966 the Court of Criminal Appeal gave way to a new Criminal Division of the Court of Appeal, for the first time bringing appeal respecting indictable offences within the province of the Supreme Court of Judicature.[2] In 1971 courts of assize and quarter sessions were replaced by the Crown Court, also explicitly brought within the structure of the Supreme Court[3]. In this article I am mainly concerned with the former of these changes, and will seek to show that decisions of the Court of Appeal Criminal Division ("the Criminal Division") have established that the reform of 1966, far-reaching though it may have seemed at the time, has made virtually no practical difference.

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In 1951, in the only detailed study of the Court of Criminal Appeal known to me, Professor Seaborne Davies commented that "the judgments of the Court present a trifle too frequently an air of thinness in their articulation" and criticised the Court's practice of giving only one judgment and their reluctance to give reserved judgments, commenting that there had been cases of "lawyer's law" in which it would have been better not to let extempore judgments pass into the Reports.[4] He argued for a final court of appeal in criminal matters which "will pre-eminently contribute to the creative, comprehensive and authoritative development of the field of law especially entrusted to its care".[5]

When Parliament passed the Criminal Appeal Act 1966 it seemed that it was meeting such criticisms as those of Professor Seaborne Davies and intending to bring to criminal appeals the erdition and concern for legal principle which have marked the Court of Appeal since its inception in 1873.[6] The Act of 1966 abolished the Court of Criminal Appeal and transferred its jurisdiction to the Court of Appeal.[7] It went on to divide the Court of Appeal into two divisions, one civil and the other criminal.[8] Except as might be otherwise provided by rules of

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[1] In *re Central Funds Costs Order* [1975] 1 WLR 1227.

[2] Criminal Appeal Act 1966, now largely re-enacted in the Criminal Appeal Act 1968, a consolidation Act.

[3] Courts Act 1971, section 1. Although there are a number of separate courts known as Crown Courts, "the Crown Court" is one and indivisibles *R. v Slatter* [1975]. WLR 1084.

[4] D. Seaborne Davies, The Court of Criminal Appeal; The First Forty Years, *Journal of the Society of Public Teachers of Law* 1951, pp.425, 436, 440.

[5] *Ibid*., p. 436.

[6] The Court of Appeal was set up by the Supreme Court of Judicature Act 1873, (repealed and replaced by the Supreme Court of Judicature (Consolidation) Act 1925).

[7] Criminal Appeal Act 1966, section 1(1).

[8] *Ibid*., section 1(2).

court, the Criminal Division was to have the entire jurisdiction of the old Court of Criminal Appeal[9] but it was not in express terms given any further jurisdiction.

As the Criminal Appeal Act 1966 stood it required reference to the Criminal Appeal Act 1907, as amended, in order to ascertain in detail the jurisdiction of the Criminal Division. To avoid this inconvenience, the Criminal Appeal Act 1968 re-enacted with suitable modifications the relevant provisions of the 1907 Act. It did not however entirely supersede the 1966 Act. The 1968 Act contains all the machinery for appeals against conviction or sentence, but the overall jurisdiction of the Criminal Division is still laid down by section 1 of the 1966 Act. Section 1 was however amended in a way which is of significance. As amended, it confers on the Criminal Division, subject to rules of court:

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(i) all jurisdiction of the Criminal Division under Parts I and II of the Criminal Appeal Act 1968 (i.e. the jurisdiction to hear appeals against conviction or sentence, which is the same as that formerly possessed by the Court of Criminal Appeal), and

(ii) all other jurisdiction which was that of the Court of Criminal Appeal immediately before it ceased to exist (including the jurisdiction to order the issue of writs of *venire de novo*).[10]

The significance of the italicised passage, together with the implications (if any) of the fact that the Criminal Division is a superior court and the senior component of the Supreme Court (of which the Crown Court is the junior component) form the theme of this article.

Why did Parliament go to the trouble of abolishing one court only to confer the same jurisdiction on another? If it was not a pointless exercise (and "Parliament does nothing in vain") it must surely have been undertaken with the object of giving that jurisdiction to a court of different status and with different traditions. Essentially the Court of Criminal Appeal, developing from the Court of Crown Cases Reserved, was a court composed of puisne judges of the High Court, successors to the justices of the old Court of Queen's Bench - the remnant of the *aula regia* where once the king himself sat and dispensed the royal justice. The Court of Appeal, on the other hand, is a modern creation of higher status whose judges, in token of this, are granted the description "Lords Justices of Appeal" and whose president is the Lord Chancellor himself.[11] It is true that a High Court judge may be required by the Lord Chancellor to sit as an additional judge at sittings of the Court of Appeal,[12] but in the "undivided" Court of Appeal this was done rarely. Lords Justices of Appeal have been selected from lawyers of outstanding legal ability and the quality of the Court has been uniformly high. Parliament must surely be taken to have had this in mind when effecting the reform of 1966.

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Parliament must be taken to have had something else in mind too. Not only is the Court of Appeal traditionally composed of judges of high legal calibre: it has from the first interpreted largely the words conferring on it "appellate jurisdiction" *tout court*.[13] The law reports are full of instances of this. An example at random is In *re Londonderry's Settle*ment[14] where trustees appealed against an order by Plowman J. requiring them to disclose to a *cestui que* trust minutes of their meetings. Although finding that the appeal was an irregularity, the Court of Appeal nevertheless determined it "in mercy to the parties."[15] A more substantial example is the long-standing and well established disregard by the Court of Appeal of the direct

[9] *Ibid*., section 1(2) and (5).
[10] Criminal Appeal Act 1966, section l(2)(b) as amended by the Criminal Appeal Act 1968, Schedule 5.
[11] Supreme Court of Judicature (Consolidation) Act 1925, section 6(3) and (4).
[12] *Ibid*., section 7.
[13] See p.5, *post*.
[14] [1965] 1 Ch.918.
[15] *Ibid*., p. 931.

statutory prohibition on the hearing of appeals against an order "as to costs only which by law are left to the discretion of the court".[16] But then the Court of Appeal has always been quick to correct an erroneous exercise of judicial discretion.[17] As Lord Denning has said: "No judge is infallible, and every system of justice must provide for an appeal to a higher court to correct the errors of the judge below.".[18] The classic attitude of the Court of Appeal is epitomised in Lord Denning's proclamation that "No one suffering an injustice will be left without a remedy in this court, if we can help it."[19]

In 1966 then Parliament handed the jurisdiction of the Court of Criminal Appeal to a body with very different traditions, and one moreover which, like the Crown Court to come, formed part of the Supreme Court of Judicature.

The Courts Act 1971, which established the Crown Court, laid considerable stress on the fact that it was to be part of the Supreme Court. This is specified in the long title to the Act, and again in the opening words of section 1, which read :

> The Supreme Court shall consist of the Court of Appeal and the High Court, together with the Crown Court established by this Act.

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The reforms of 1966 and 1971 were the first to alter the constitution of the Supreme Court since it was set up in 1873. For close on a century it comprised only the Court of Appeal and the High Court. Now there was added a third component. It is clear from the tenor of the Courts Act 1971 that the Crown Court is the junior component, ranking last in the hierarchy even though expressed to be a superior court of record.[20]

What is the significance of making these three courts parfe of the Supreme Court of Judicature instead of allowing them to stand separately? Has it indeed any significance at all ? The preamble to the Judicature Act of 1873 stated that "it is expedient to constitute a Supreme Court, and to make provision for the better administration of justice in England." Section 3 of the Act provided that the existing superior courts of record "shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature in England." Section 4 provided that "The said Supreme Court shall consist of two permanent Divisions .... the other of which, under the name of 'Her Majesty's Court of Appeal, shall have and exercise appellate jurisdiction...".[21]

From the beginning the Court of Appeal, as we have seen, applied to its fullest extent this general appellate jurisdiction, and in doing so exercised a considerable degree of supervision over the junior component of the Supreme Court, the High Court of Justice. The conclusion seems irresistible that when a still more junior component, the Crown Court, was added this supervisory function of the Court of Appeal was to be extended to it. Indeed it is plausible to argue that the exercise of such supervision was a principal object both of setting up the Criminal Division and of making the Crown Court part of the Supreme Court.[22]

It is true that the Court of Criminal Appeal itself exercised a considerable degree of supervision over trials on indictment, and would have been quite capable of continuing to do

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[16] See *Donald Campbell and Co. Ltd., v Pollak* [1927] A.C. 732. The prohibition is contained in section 31(l)(h) of the Supreme Court of Judicature (Consolidation) Act 1925*

[17] See *Ward v James* [1966] 1 Q.B. 273; *Instrumatic Ltd. v Supabrase Ltd*. [1969] 1 WLR 519.

[18] *The Road to Justice* (1955), p. 29.

[19] *R. v Smith (Martin)* [1974]_2 WLR. 495.

[20] Courts Act 1971, section 4 (1).

[21] It is noteworthy that the words in section 4 conferring appellate jurisdiction were quite general. These general words were not reproduced in the Supreme Court of Judicature (Consolidation) Act 1925, but since this was a straight consolidation it cannot be taken to have been intended by Parliament to alter the law as laid down in the 1873 Act.

[22] Although the Criminal Division was set up five years before the Crown Court the reform of the assize and quarter sessions system on such lines was already being mooted.

so when trial jurisdiction passed to the Crown Court. The Court of Criminal Appeal supervised the working of

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the Indictments Act 1915 and laid down rules about the joinder of charges in on indictment and the practice of adding counts. It exercised surveillance over the procedure at trials and in a great variety of cases insisted on respect for due procedure.[23] It laid down rules of evidence, and elaborated the requirement of corroboration. Altogether, through its decisions on individual appeals, it operated a widespread surveillance.[24] As we have seen, that function, as part of the jurisdiction of the Court of Criminal Appeal, was expressly passed to the Criminal Division.

Surveillance by the Court of Criminal Appeal was not only exercised through decisions on individual appeals however: it also issued practice directions. For example, Professor Seaborne Davies remarks that,

> Again and again it has proclaimed that outstanding charges must not be left hanging over the heads of prisoners. One of its most constant themes has been that prisoneers should come out of prison with a clean sheet and should not be met at the prison gates with new charges on old offences. At least once, the Court went so far as to direct (under what power is not clear) that such outstanding charges were not to be prosecuted . . . [25]

The Court of Criminal Appeal also issued practice directions on such matters as the lines on which the discretion to award costs to persons acquitted should be exercised. [26] While the Court's powers of surveillance could be ascribed to its ordinary jurisdiction to hear an appeal against conviction or sentence when they were exercised on the hearing of such an appeal, this clearly does not apply to its power to issue practice directions. No specific statutory power was conferred on the Court of Criminal Appeal.to issue such directions, but they are clearly regarded as having the force of law.[27] Are they to be ascribed to what is sometimes called "the inherent jurisdiction" of the Court ? If this means something apart from what is conferred by statute the answer is that there is no such thing. A court created by statute has the powers conferred by statute, and no

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others. [28] An alternative meaning of the phrase is suggested below.[29]

In setting up the Crown Court Parliament was at pains to indicate in section 10 of the Courts Act 1971 how far decisions by the Court were open to challenge, and in what way. Clearly a conviction on indictment and the resulting sentence can be brought by the person convicted to the Criminal Division for review, and no more need be said about that. A decision of the Crown Court not relating to trial on indictment can be questioned on grounds of law by applying to have a case stated by the Crown Court for the opinion of the High Court.[30] Furthermore, in relation to the jurisdiction of the Crown Court not relating to trial on indictment, the High Court may direct orders of *mandamus*, prohibition or *certiorari* to the

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[23] Prof. Seaborne Davies records that Cassels J. once remarked in the Court of Criminal Appeal that "A little regularity in the hearing of criminal cases on indictment is not out of place." (*op.cit.*, p. 429.)

[24] See D. Seaborne Davies, *op cit*., *passim.*

[25] *Op.cit*., p.427.

[26] See 36 Cr. App. Rep. (1952) 13; 43 Cr. App. Rep. (1959) 219. The nature of the power to issue these practice directions is dealt with below, p. 13.

[27] Cf. *R. v Bow Street Magistrate* (1969) 113 Sol. J. 735.

[28] Cf. Sir Eric Sachs in *R. v Smith (Martin)* [l974] WLR 495: "That argument . . . is fallacious; it involves the assumption that we have some inherent jurisdiction, whereas we have only statutory jurisdiction.".

[29] Page 15, *infra.*

[30] Courts Act 1971, section 10(1) - (4).

Crown Court as if it were an inferior court.[31] But what of matters of law which do relate to trial on indictment but are outside the ambit of an appeal against conviction or sentence ? Does the Criminal Division, as a superior court of record and as the senior component of the Supreme Court, have a supervisory jurisdiction over the Crown Court in such matters or does it not ?

First we should get out of the way a possible argument about what "relates to trial on indictment" and what does not. In *Ex parte Meredith*[32] an accused man, who was acquitted, applied for costs. The circuit judge refused the application, and the applicant sought an order of *certiorari*. The Divisional Court had no difficulty in deciding that the order did not lie since the matter related to trial on indictment.[33] The problem was slightly more difficult in *R. v Smith (Martin).* [34] The appellants, a firm of solicitors, had been ordered by a circuit judge to pay costs thrown away by an adjournment for which the judge held them responsible. Although the matter was clearly on the criminal side the solicitors elected to appeal to the Civil Division of the Court of Appeal and secured the sympathetic attention of Lord Denning M.R. Even his sympathy was not enough, and they lost. Lord Denning held that the matter related to trial on indictment, but allowed that he might be wrong.[35] Megaw LJ went further:-

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> . . . I am by no means convinced that an order made by the Crown Court against a solicitor, in the exercise of its inherent disciplinary jurisdiction over an officer of the court (if that be the true nature of the order) is properly to be described as an order 'relating to trial on indictment' merely because an order against a defendant in a trial on indictment in respect of costs incurred in that trial is an order 'relating to trial on indictment'. [36]

Either way, the Court held it had no jurisdiction to entertain the appeal, and with respect this seems to be clearly right for the simple reason, if for no other, that the appellants were in the wrong division of the Court of Appeal. That was enough to decide the matter, but the Court produced some obiter dicta discouraging to the idea that the Criminal Division would itself have had jurisdiction.[37]

We now approach the nub of the argument. Has the Criminal Division any jurisdiction over the Crown Court as to matters relating to trial on indictment, other than its ordinary jurisdiction to hear appeals against conviction or sentence? First we need to consider the words conferring on it "all other jurisdiction" of the Court of Criminal Appeal.[38]

There would have fallen within those words the power, preserved by section 20 of the Criminal Appeal Act 1907, to state a case under the Crown Cases Act 1848 if that power had not been abolished at the moment the Criminal Division came into existence.[39] The power to order the issue of writs of *venire de novo* falls within these words because the Criminal Appeal Act 1966 says so.[40] The Act clearly contemplates that other matters fall within them too. What are they?

An attempt at one answer was made in R. *v Collins*,[41] where the accused sought particulars of a count in an indictment before the trial. The circuit judge refused to order the prosecution to

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[31] Courts Act 1971, section 10(5).
[32] [1973] 1 WLR 435.
[33] See also *R. v Crown Court at Cardiff, ex parte Jones* [1973] 3 WLR 497.
[34] [1974] 1 AUER 651.
[35] *Loc. cit*., p.656.
[36] *Loc. cit*., p.658.
[37] *Loc. Cit*. p.658.
[38] See p. 3, *ante.*
[39] Criminal Appeal Act 1966, section 1(8).
[40] See p. 3 , *ante*.
[41] [1970] 1 QB 710.

give particulars, and the accused applied to the Criminal Division for an order requiring the judge to order that the particulars should be delivered, or else that the Criminal Division should itself order the particulars to be delivered. The Criminal Division held that it had no jurisdiction to entertain the application. Salmon LJ held that "As far as our criminal jurisdiction is concerned, it is

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no whit larger than was the criminal jurisdiction of the Court of Criminal Appeal".[42] He rejected the argument that the court had an inherent jurisdiction to hear such applications, and pointed out that the accused would suffer no injustice because he could always appeal if convicted.

It seems then that the only jurisdiction of the Criminal Division falling within the reference to "all other jurisdiction" of the Court of Criminal Appeal (apart from that concerning writs of *venire de novo*) is the power of that Court to issue practice directions, discussed above.[43] But, as we shall see, the Criminal Division appear to have ruled that such directions involve no question of jurisdiction.[44]

[42] *Ibid*., pp. 713-4.

[43] See p. 6, *ante*. Section 6(3) of the Courts Act 1971 continues in force "all enactments and rules of law relating to procedure in connection with indictable offences" subject only to modifications arising from the setting up of the Crown Court.

[44] P.18, *post*. The Criminal Division issued a practice direction in 1968 prohibiting the award to an acquitted person of part only of his costs: [1968] 1 All E.R. 778.

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II

I come now to the personal side of the argument. In 1970 I determined, for reasons not relevant to the theme of this article, to bring a private prosecution against one Peter Hain for conspiracy to disrupt certain sporting events.[45] After Hain's conviction in the Crown Court the circuit judge ordered the costs of the prosecution to be paid from central funds. The costs were lodged for taxation at £37,788.01 and allowed at £11,000. The Home Secretary had not used his power to make regulations to "provide a right s of appeal from any decision on taxation, or ascertainment of the amount, of the costs, whether to a Taxing Master of the Supreme Court or to any other officer or authority."[46] Nevertheless a right of appeal against the taxation did exist. A practice direction applying only to the South Eastern Circuit provides that "in the absence of rules (sic) governing appeals from decisions of the taxing officer an appeal lies to the court.[47] The practice direction goes on to say -

1. The Chief Taxing Master of the Supreme Court will hear appeals from Crown Court taxing officers and advise the Presiding Judge.
2. The appellant and the taxing officer are to follow the procedure laid down in The Legal Aid in Criminal Proceedings (Fees and Expenses) Regulations 1968, regs. 8 and 9, excluding payment of the £2 fee but otherwise as far as applicable.
3. The decision of the Presiding Judge will be communicated to the parties.

I appealed under the practice direction on various grounds, and there was lift a two-day hearing before the Chief Taxing Master of the Supreme Court.[48] Taking part in the hearing were junior counsel for the Crown in the prosecution, two partners of the firm of solicitors who acted for the prosecution, an Assistant Treasury Solicitor (as *amicus curiae*)with an assistant, and myself. The grounds of appeal were questions of fact (about whether items had been properly disallowed or reduced) plus two questions of law. The taxing officer had allowed the costs at £15,000 but reduced this by £4,000 because of voluntary contributions by members of the public.[49]

One of the questions of law was whether it was right to make the reduction.

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The other related to the costs which did <u>not</u> consist of counsel's or solicitors' fees or solicitors' disbursements. Totalling £8,546, these other costs had been wholly disallowed as ineligible in law - even though some had been incurred on the direct instructions of leading counsel for the Crown. In the main however they consisted of a chartered accountant's allocation of salaries and overheads in my office in respect of investigating .the alleged

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[45] For an account of the trial see *The Cricket Conspiracy* by Derek Humphry, National Council of Civil Liberties, 1975.

[46] Courts Act 1971 Sch. 6, para. 3(3). See now Costs in Criminal Cases Act 1973 s. 17(2), where the wording is identical.

[47] Practice Direction No. 2 of 1972 (South Eastern Circuit). It is not clear under what power this practice direction was made, and when in November 1974 I appeared in person before the Court of Appeal Civil Division (see p. 12, *infra*) Lord Denning expressed doubt as to its validity. In later proceedings however the Criminal Division did not question it.

[48] Graham J. Graham-Green, T.D., author of the definitive work on criminal costs, *Criminal Costs and Legal Aid* (Butterworths - 3rd.edn, 1973).

[49] The £4,000 was an arbitrary sum, arrived at without an inquiry. In fact the voluntary contributions totalled £14,382.42. The total prosecution costs were £39,148.83, an item of £1,360.82 on abortive mandamus proceedings having been omitted from the amount lodged for taxation.

offences, researching the law and gathering evidence. Nothing was claimed for my own time.[50]

On the questions of fact the Chief Taxing Master decided that certain disallowed items should be restored and other items increased. As a result of these decisions the amount allowed by the Taxing Officer was raised to £22,787.25. As the Lord Chief Justice later remarked,[51] all those who took part in the hearing "confidently believed" that the outcome of the appeal would be that the Presiding Judge would confirm the Chief Taxing Master's findings and increase the prosecution costs payable out of central funds from £11,000 to £22,787.75 without any reduction in respect of the voluntary contributions by the public.

When, nearly two years after the trial, the decision of the Presiding Judge (Melford Stevenson J.) was given it was found that he had reduced the amount arrived at by the Chief Taxing Master on his item-by-item examination to the round sum of £20,000. No reason was given for thus depriving the private prosecutor of nearly three thousand pounds and no opportunity was afforded to make representations to the judge before the reduction was made. These were obvious breaches of the requirements of natural justice. Lord Denning says in the chapter of his book "The Road to Justice" which is entitled "The Just Judge" : "the judge must act only on the evidence and arguments properly before him and not on any information which he receives from outside."[52] Lord Denning adds that, whether in a criminal or civil case, a judge"would not take notice of any information about the case unless it was given in evidence properly before him in the presence of both parties. If the judge should inadvertently depart from this principle, his verdict would be

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upset."[53] Lord Denning states as another principle of natural justice that "the judge must give his reasons for his decisions for, by so doing, he gives proof that he has heard and considered the evidence and arguments that have been adduced before him on each side: and also that he has not taken extraneous considerations into account."[54] Lord Denning goes on to criticise, as falling below this "elementary principle", ministerial inquiries where "The person who decides does not confine himself to the representations made at the inquiry.... Furthermore the man who hears the representations is often not the person who decides. It is departures like this from the course of justice that have led to a demand for a review of the way these decisions are reached."[55] These words of Lord Denning's exactly fit the procedure followed on the present costs appeal. Only it was not some civil servant ignorant of law who acted in this way, but a High Court judge.[56]

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[50] In justifying his decision to disallow these costs the taxing officer wrote to the prosecution solicitors: "I take the general view that once you, as Solicitors, were instructed, the responsibility for the conduct of the prosecution and the incurring of expenses in connection with it was yours. The fact that [the prosecutor] elected to act independently, as he apparently did, carries the matter beyond the ambit of section 47 [of the Courts Act 1971] and its reasonable interpretation". Comment is superfluous on this remarkable view of the relationship between a prosecutor (in this case a member of the bar) and the solicitors for whose costs and disbursements he is personally responsible.

[51] In *re Central Funds Costs Order* [1975] 1 WLR 1227, 1229.

[52] *The Road to Justice* (1955), p.25.

[53] *Ibid*., p. 27.

[54] *Ibid*., p.29.

[55] *Ibid*. See also *R. v Huntingdon Confirming Authority* [1929] 1 KB 698.

[56] A written "judgment" was issued recording the decision of the judge and signed by the Chief Taxing Master. It gave no reason however for reducing the amount found by the latter from £22,787.25 to £20,000. Indeed it did not record that such a reduction had been made. It is worth stressing that the judge substantially altered an amount painstakingly found after an item-by-item check by the most experienced taxing authority in this field. Judges are not experienced in the minutiae of taxation. As Coleridge J. said in *R. v Newton* 1 Cox's CLC 195 at 196: "It is impossible, upon a matter of amount, that the Court can form anything like so good an opinion as the Master himself can, who has the parties before him, examines the items, and investigates various circumstances as stated on

On the two points of law raised in the appeal the judge decided as follows. He did not make the deduction of £4,000, or any deduction, in respect of voluntary contributions. [57] He confirmed the taxing officer's view that the £8,546 in respect of non-legal costs was ineligible.

It seemed to me that on principle it should be possible to bring before the Court of Appeal, and the House of Lords as well if need be, the two questions of law at issue here - to which there was now added a third in view of the way the judge had arbitrarily reduced the amount of £22,787*25 to a round £20,000. This is not the place to argue the merits of the right of private prosecution, but it is regarded by some as an important constitutional safeguard. [58] If the prosecutor cannot accept contributions from the public on the footing (as here) that they will be returned when the state pays up, his position is weakened. It is further weakened if he is precluded from claiming his direct costs of investigating the offence and gathering evidence.[59] These seemed to me matters of law of some public importance.

I did some research and decided to try my luck. In the Court of Appeal Civil Division, where I was courteously and sympathetically heard by a court consisting of Lord Denning MR, Lord Diplock and Lawton L.J.[60] They decided

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that the case should be fully argued on a future occasion, and instructed the Treasury Solicitor to brief an *amicus curiae*. I carried out further research however and came to the conclusion that, much as I would have appreciated the opportunity of exploring the complex issues involved before a court of the Calibre just mentioned, the argument lay in a different direction and led to the Criminal Division. Lord Denning, when the point was put to him in correspondence, agreed. So, a few months later, I appeared in person before the Criminal Division.[61] I was of course heard with no less courtesy and sympathy than in the Civil Division, but without the feeling that I could fully deploy legal arguments of depth.[62]

The first question for the court (as it turned out the only question) was whether it had jurisdiction to entertain an appeal against Melford Stevenson J's decision. I decided to approach the matter along the avenue where it seemed to me the Criminal Division plainly did have a general supervisory jurisdiction over the Crown Court, namely in the issue of practice directions. The taxation of costs is clearly a matter of practice, and as mentioned it has been the subject of practice directions given both by the Court of Criminal Appeal and by the Criminal Division.[63] As I understood it, one function of a practice direction was to correct

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either side."

[57] It appeared that his decision might have been different if the total of counsel's and solicitors' fees and solicitors' disbursements (which was £29,242.01) had been less than the total of £20,000 plus £4,000.

[58] See, e.g. Maitland, Constitutional History of England 481-2; Stephen, 1 History of the Criminal Law of England 495-6.

[59] Cf *R. v Burt* [1960] 1 QB 625, where Lord Parker CJ held that in a private prosecution for shoplifting a sum is recoverable for the time of a store detective in investigating the matter. In ruling that any salary should be allowed "which the prosecutor has to pay to a person whose activities are necessary in and about a prosecution" Lord Parker added "It matters not that . . . the person to whom the salary is paid is not a solicitor or a professional man" (p.).

[60] On the principle of not throwing good money after bad I appeared in pervon, disregarding the alternative principle that he who represents himself has a fool for a client.

[61] It is worth pointing out, in view of the comments made above (p.3), that the court included no Lords Justices of Appeal. Consisting as it did of the Lord Chief Justice setting with Waller and Kilner Brown JJ., its composition was no different from what it might have been if the old Court of Criminal Appeal had remained untouched.

[62] At one point when 1 sought to quote from Comyn's Digest and found that the court (although advance notice had been given) did not possess a copy, Lord Widgery was kind enough to apologise, adding: "We do not often get arguments of this kind".

[63] Pp. 6 and 9, *ante*.

errors of practice which were founded upon errors of law. In doing this the court might of course find itself 6k determining a doubtful point of law.[64]

I therefore submitted to the court that it had power to issue the following practice directions, pointing out that if they had been issued before the taxation in ray case, and complied with, I would have had no cause to complain about the taxation :-

A. On the taxation of the costs of a private prosecution, an item otherwise allowable should not be disallowed or reduced on account of contributions voluntarily made to the prosecutor by members of the public, since the taxing officer is not concerned with how the prosecutor meets his expenses pending receipt of a payment from central funds.

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B. On the taxation of the costs of a private prosecutor, an item (including a share of overhead expenses) incurred by the prosecutor personally (i.e. not as solicitors' fees or solicitors' disbursements) should not be disallowed if it was properly incurred by him in carrying on the prosecution, whether before or after the issue of process.

C. In reaching a decision on an appeal under Practice Direction No. 3 of 1972 (South Eastern Circuit) the Presiding Judge should not disallow or reduce an item which, on the hearing of the appeal, the Chief Taxing Master of the Supreme Court has allowed without -

(a) giving the party affected an opportunity to make representations to the Presiding Judge, and

(b) stating his reasons for disallowing or reducing the item.[65]

If this submission had been accepted it would still have been necessary to convince the court that, since no such practice directions had in fact been issued, they should be issued now. Furthermore the court would have needed to direct Melford Stevenson J. to revise his finding so as to accord with them.[66]

I put the argument to the court on these lines, but it was clearly necessary to examine the statutory provisions which, in my submission, gave the Criminal Division jurisdiction to issue directions of this kind to the Crown Court. These were the provisions which make the Criminal Division the senior component of the Supreme Court (in criminal matters) and the Crown Court the junior component,[67] the provisions which make both the Criminal Division and the Crown Court superior courts of record,[68] and a further provision not less important for being often forgotten: article 29 of *Magna Carta*.

Article 29 reads (in part) : "We [i.e. the king] . . . will not deny or defer to any man either justice or right." It is perhaps necessary to say that it is still in force, though no more than a declaration of the common law principle that the crown is the origin of the judicial power. That power was first exercised by the king in person, sitting in the *Aula Segia* with his great officers of state. As every student knows, the peripatetic nature of the royal court led to hardship, and *Magna Carta* required

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[64] It is clear that, although law and practice are often contrasted, points of law can arise in connection with matters of practice.

[65] I was confident that I could support the correctness of these propositions in law, but that was not in issue. For the purpose of deciding the question of jurisdiction they were assumed to be correct.

[66] The same result could have been achieved of course by a simple direction to the judge to revise his finding along the correct lines. This would have had the same general authority as the practice directions, but would have appeared more of a departure.

[67] See p. 5, *ante*.

[68] See p. 5, *ante*.

"*communia placita non sequantur curiam nostram sed teneantur in aliquo loco certo*." This "fixed place" was of course Westminster Hall, where the king's court of justice was established as the Court of Common Pleas.[69] The position was seen by Blackstone as follows :-

> "A court is defined to be a place wherein justice is judicially administered. And, as by our excellent constitution the sole executive power of the laws is invested in the person of the king, it will follow that all courts of justice, which are the medium by which he administers the laws, are derived from the power of the crown. For whether created by act of parliament, letters patent, or prescription (the only method of erecting a new court of judicature) the king's consent in the two former is expressly, and in the latter impliedly, given. In all these courts the king is supposed in contemplation of the law to be always present; but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative." [70]

While our constitution thus recognises that all judicial power derives from the crown it has also recognised in modern times that the crown has divested itself of all the judicial power and transferred it to the courts:

> "The king has distributed all his power of judicature to divers courts, And therefore the king himself cannot administer justice except by his justices." [71]

It thus follows that the courts collectively have all the royal power of judicature, since none of this power can be said to be undistributed. This principle has particular importance for the Court of Appeal, as the senior component of the Supreme Court of Judicature. If on a literal construction of the enactments conferring jurisdiction on the courts any of the royal powers do not appear to be allocated the residue must, it is submitted, be treated as inhering in the Court of Appeal (unless this conflicts with the express wording of an enactment). Since, on the hypothesis upon which the argument was being conducted, serious injustices were deemed to have occurred in the present case and there was no statutory provision to the contrary, this argument was enough to establish jurisdiction.

I then passed to the argument based on the fact that the Criminal Division is a superior court. The expression connotes a court having an

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inherent jurisdiction to administer justice according to law "as and being a part of, or descended from, and as exercising part of the power of, the *Aula Regia*"[72] It is of the essence of a superior court that it has a "general superintending jurisdiction" over other courts.[73] ' The only court over which the Criminal Division can now be said to have a superintending jurisdiction is the Crown Court. If it has no such superintending jurisdiction (over and above its specific jurisdiction on appeals against conviction or sentence) there is little meaning in its having been given the status of a superior court.

Does it make any difference that the Crown Court is also a superior court? It seems not. The Crown Court has a limited superintending function over magistrates' courts,[74] and needs to be a superior court for this purpose if no other. There is nothing unusual about one superior court having superintending functions over another :-

> As there are degrees in the peerage yet each member is a peer, so of the Superior Courts. At one time, error lay from the Common Pleas to the King's Bench, but that did

[69] Bract. 3,1,7.
[70] 3 Bl.Com. 23.
[71] 3 Com. Dig. 315.
[72] Stroud's Judicial Dictionary: *Superior Court* (1).
[73] *Mayor etc. of London v Cox* [l867] LR 2 HL 239, 260. See also p. 261.
[74] Courts Act 1971, section 9 and Schedule 1.

> not in the slightest degree interfere with the doctrine that the Common Pleas was a superior court.[75]

Again, this argument was in itself sufficient, in my submission, to justify the issue of practice directions by the Criminal Division to the Crown Court, and in particular the kind of directions I was seeking.

Finally, I relied on the fact the t in 1971 Parliament made the newly-established Crown Court the junior component of the Supreme Court of Judicature. Surely, I argued, this was not a mere piece of semantic tidiness, meaningless in law. If it was to be given any meaning it could only be that the junior component was in general terms subject to surveillance by the senior component. Otherwise it might as well have been left outside the Supreme Court, as were the former courts with jurisdiction to try cases on indictment.

I urged that not only were Parliament's actions in 1966 and 1971 consistent only with an intention that the Criminal Division should exercise supervision over the practice of the Crown Court but that it was necessary that such

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supervision should be possible in order to avoid injustice. I sought to distinguish *R. v Collins*[76] on the ground that it would have been premature for the Criminal Division to intervene in that case, before the matter had been fully dealt with by the Crown Court. I urged that on the matter of costs particularly justice required the Criminal Division to display the adaptability of the undivided Court of Appeal[77] and that the Criminal Division should be if anything more adaptable since it dealt with crime and the liberty of the subject.[78]

It was of no avail. In a single unreserved judgment delivered by Lord Widgery CJ the court held that it had no jurisdiction to entertain the application. On the disallowance of the £4,000[79] Lord Widgery said -

> I draw attention to that because for my part I cannot understand why that was done. I take it no further because it has been agreed that today we only consider whether this Court has jurisdiction to hear the prosecutor's proposed appeal, but I cannot let the opportunity pass without saying that the reason why that £4,000 was disallowed from the total bill put in by the solicitors is, I fear, somewhat beyond me.[80]

After referring to the way Melford Stevenson J. had reduced the costs by £2,787.25 and disregarded that "non-legal" costs, Lord Widgery went on -

> There the position is, and the prosecutor, not surprisingly I must say on the material which we have before us, is aggrieved . . .[81]

On the question of what fell within the phrase "all other jurisdiction of the Court of Criminal Appeal",[82] Lord Widgery said "we are somewhat hard put to it to give examples" which might fall within that phrase.[83] In fact the court could find no such examples, and held in effect that the words were otiose.

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[75] Per Erie CJ, Ex parte Fernandez 10 CBNS 28.
[76] P. 8, *ante*.
[77] See, e.g., *Robertson v Robertson* LR 6PD 119, where the Court of Appeal reversed a long-standing practice about divorce costs.
[78] Cf. *R v Taylor* [1950] 2 KB 368, where on this ground the Court of Criminal Appeal reversed a previous ruling on the law of biga See also *R v Simmons* 51 C.A.R. 316, 337.
[79] P. 10, *ante*.
[80] In *re Central Funds Costs Order* [1975] 1WLR 1227, 1229.
[81] *Ibid*., p. 1230.
[82] P. 3, *ante*.
[83] *Ibid*., p. 1230.

On the argument based on the fact that the Criminal Division is a superior court Lord Widgery contented himself with remarking that "I find it very difficult to conceive a supervisory relationship between two superior courts",[84] ignoring the plain fact that such a relationship has been common in our legal history.[85]

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The most puzzling feature of the judgment was the treatment of practice directions. Lord Widgery said :-

> For my part I do not find the argument on the practice directions of any help at all to the prosecutor. Practice directions, as I understand them to be, are of two kinds. The most common kind is a direction indicating to trial courts the way inWhich they ought to approacl^ja discretionary power which is being used in different ways in different parts of the country. It is not something which ceaates rights or purports to create rights. It is something which indicates the principles upon which a particular discretion might properly be exercised. The other kind is the so-called practice direction which indicates some error of law which we find, sitting here, is common in different parts of the country and to which attention needs to be drawn. The document which draws attention to the point is conveniently and accurately called a practice direction. But none of those to my mind even begins to show that we are exercising, or are entitled to exercise, a general supervision over the Crown Court from this court, the Court of Appeal, Criminal Division.[86]

For the application to succeed it was not of course necessary to establish a general supervisory power. Since the application was considered on the footing that certain errors of law had been made in the instant case (and might well be made again in the future, if they had not been made in the past) it is hard to see why from the point of view of jurisdiction the court were unable to make the practice directions asked for. (Of course, whether as a matter of discretion they would have thought fit to make them is a separate point, not argued or considered.)

It is submitted that if the Criminal Division would not exercise supervision over the Crown Court in this case they are unlikely to do so in any case. The court recognised that injustice had been done and that there was no other way to get it remedied. If they had approached the matter in the spirit of the undivided Court of Appeal they could have asserted a supervisory jurisdiction in matters of practice which would have been salutory. Instead, they chose the barren path pointed out for them previously by Salmon L.J in *R. v Collins*.[87]

References:

[84] *Ibid*., p.1231.
[85] See p. 16, *ante*.
[86] *Ibid*., p. 1231.
[87] P. , *ante*. Leave to appeal to the House of Lords was refused, but in fact no appeal lay. The argument that the application was an "appeal" within the meaning of section l(1)(b) of the Administration of Justice Act 1960 was no longer available because of the way that section has been consolidated.

None