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By H. A. LEDIARD, M.D. Edin., F.R.C.S. Eng.,
Surgeon to the Cumberland Infirmary and Her Majesty's Prison, Carlisle.

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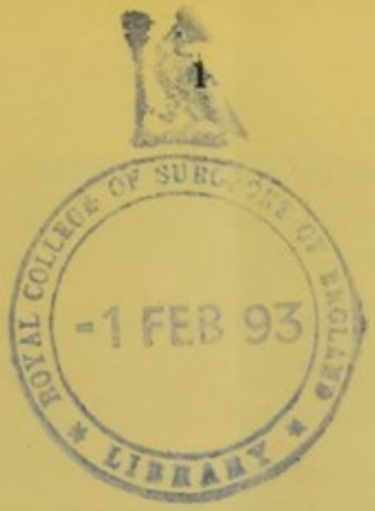

REFORMS NEEDED IN CRIMINAL PROCEDURE

By H. A. LEDIARD, M.D., Edin.; F.R.C.S., Eng.

(Read at Penrith, June, 1892.)

Reforms in the Criminal Procedure of our Courts of Justice have been imminent for many years; discussions have been held in Parliament, Royal Commissions have sat, judges have met in consultation, but as yet nothing of importance has been effected, except, perhaps, that the ground has been cleared, and future progress thereby facilitated.

That reform is needed goes without saying; indeed, all high legal authorities are in favour of several alterations, but such has been the pressure of business in Parliament that delay has been inevitable. In this short paper it is intended to point out where our present system has been found wanting, and to indicate the direction which reform in criminal procedure is likely to take. The subject is not one in which I am naturally interested, nor is it one in which I can claim any special knowledge, and were it not that certain circumstances have, so to speak, forced themselves upon my view, it is highly probable that I should not have paid any attention at all to reform in criminal procedure. On the other hand, questions relating to medical jurisprudence are a part of the training of every medical man, and therefore all reforms in law have a practical bearing upon the medical profession at large.

For my hearers to-day my subject may not only appear ill-chosen, but absolutely wanting in interest. I am aware of the difficulty, and if I ask your attention it is because I hope to attract your

sense of fair play, and to concentrate it for a short time upon matters demanding public ventilation no less than Parliamentary enactment.

The object of all criminal procedure is to establish the truth, to vindicate the law by punishing the guilty, and to protect the innocent; whilst the indirect result should be to deter others from crime of all sorts. To this end procedure divides itself into two parts: that which is publicly and that which is privately carried out.

I deal first with the private steps taken in criminal procedure. The discovery of crime rests with the police, for the most part, to whose knowledge the circumstances may come from various sources; they have, so to speak, the getting up of the case, or the preparation of an accusation for the magistrates or the coroner. These higher authorities await the evidence brought before them by the police, and the upshot of the preliminary investigation depends much upon the intelligence which has been brought to bear upon the case by the police. The coroner is often, as much as the magistrates, in the hands of the police; for whether he may or may not discover the guilty party depends mainly upon the evidence brought before him.

Those who know anything of criminal justice are aware that in cases which turn on circumstantial evidence, as cases of murder almost always do, it requires great intelligence and some experience to avoid a blunder. It requires an intellect to construct a theory of guilt upon certain facts, so as to arrive at conclusions as to the course to adopt. I lay stress upon the fact that the earliest stage in our criminal procedure is the most important, and is, under our present system, left in the rudest and clumsiest hands. I am not, at the present moment, casting any reflection upon so useful a body as our police, who are more or less educated, and more or less intelligent.

When, however, we consider the ranks from which they are necessarily recruited, the wonder is, not that they should occasionally make mistakes, but that the blunders are not more frequent than they really are.

A man is one day a railway porter, or an agricultural labourer;

the next day he is a policeman, with uniform and a note-book, and may be taking part in the investigation of a serious crime. Some of such men have more or less aptitude for the business; some are hopelessly stupid, and make terrible blunders. I admit at once that in this respect but little more can be expected; by and by, when the new education scheme has had time to bear fruit, we may have a better intellectual unit to start with. In the meanwhile, the policeman needs the direction and control of a far superior sort of officer than he has under the present system. The Scotch *régime* is far superior to our own, for in it the private and preliminary part of the investigation of a crime is conducted by a Procurator Fiscal, who is generally an acute and experienced lawyer. In his work he is aided by the police, who are his assistants; he is the promoter of the accusation or prosecution, the police are simply the executive agents of justice, and not its managers or prosecutors. The police are subordinates, and not the principals, in the administration of criminal justice.

The higher the character of the public functionary, the less considerable is the danger of false charges or conspiracy, whilst as regards false charges being pressed upon false theories, not only is our present system no guarantee against it, but, on the contrary, it is one of its main evils that it tends so dangerously to it. For, as already seen, the preliminary stage of our criminal procedure is practically in the hands of the police, hence the probability is that they form a false theory, and sooner or later they come to rest on it; and then, having once acted upon it, they become deeply interested in adhering to it, and then one of two things follows: either an innocent person is in danger of conviction, or justice is baffled, and the guilty party escapes.

One of the main evils of the present system of leaving criminal prosecutions in the hands of the police is, that they are stimulated to over eager and precipitate conclusions from a desire to promote their own advancement; for promotion in the police force depends on the number of convictions obtained.

The preliminary investigation in all criminal charges should be, in my opinion, entrusted to a legally trained and qualified man,

who would have the police as his agents, and who would not only act as a check for too zealous constables, but direct the steps in the tracking out of a crime.

I pass on now to say a few words upon an important change which is contemplated in a Bill at present referred to a Standing Committee of the House of Lords, I mean the Lord Chancellor's Bill to amend the Law of Evidence. Its purport is as follows: that "every person charged with an offence, and the wife or husband as the case may be, of the person so charged, shall be a competent witness." To the lay mind it seems the most proper and natural thing in the world, that if a man is accused of a crime, he should be asked at the earliest possible moment to give an explanation of the circumstances which led to his being suspected; but at the present time a person charged with an offence is, with certain statutory exceptions, incapable of testifying in his own behalf. Denounced by Bentham in 1827, this practice has still to be swept away. In the Middle Ages, "the question" meant torture. If a prisoner was arrested and charged and refused to admit his guilt, he was tortured until he confessed. There is no fear now of a prisoner being questioned in the old sense; but the time has come when in the interests of justice and of the prisoner himself, he should be free to give, on oath, his own version of the circumstances.

Under our present system, a prisoner is protected from all judicial questioning before or at his trial, but he is prevented from giving evidence on his own behalf. This system has been considered advantageous to the guilty; it avoids any appearance of harshness. On the other hand, questioning, or the power of giving evidence, is of positive assistance to innocent persons; "for a poor and ill-advised man is always liable to misapprehend the true nature of his defence, and might in many cases be saved from the consequences of his own ignorance or misfortune by being questioned as a witness."*

It is not that people are reluctant to lie so much as it is an extremely difficult matter to lie minutely and circumstantially

* Stephen's *History of Criminal Law.*

without being found out, and no greater test of innocence can be given than the fact that as soon as he is charged, and while there is time to inquire into and test his statements, a man gives an account of the transaction which will stand the test of further inquiry.

Nothing could be more favourable to innocent persons accused, say of murder, than the opportunity of explaining their own case in the witness box; and nothing could be more fatal to those who are guilty, and who would necessarily have to rely upon a fictitious or hypothetical defence.

How Poverty Influences Justice.

In the present day, the defence offered by a prisoner is very much a question of means, and I desire to make a few observations upon the difficulties which attend the poor when they are face to face with a grave charge.

For the well-to-do, probably our criminal procedure presents no particular disadvantage, for an able solicitor is at once consulted, and in his hands all that is needful is done. Every stage of the preliminary investigation is watched. A brief is carefully prepared and counsel instructed, so that there is not a point omitted. We may feel sure that under such circumstances if a prisoner is innocent he will have but little difficulty in establishing his innocency. On the other hand, the poor prisoner, in addition to his intellectual disadvantages, is hampered at each step by want of means, and when a wrong conviction occurs in an English Criminal Court, it is usually caused by treating a poor and ignorant man as if he were rich, well advised, and properly defended. Let us suppose the case to be one of murder, and that an individual has been charged with it. In the case of a rich man, a solicitor immediately instructs a medical man to watch the *post-mortem* examination on behalf of his client, which step has the important influence of checking the observations of a scientific nature made by the medical men employed by the police. The eye often sees what it expects to see, and a medical man looking out for certain appearances which the information he has received leads him to

expect may be present, may very easily be deceived; but where another doctor is watching in the interests of a prisoner, any such fault of observation is probably corrected at once. A poor man cannot afford such a protection, he is completely at the mercy of the doctors employed by the police, who may be conscientiously doing their best to report faithfully the result of a *post-mortem* examination, and yet may be mistaken in spite of the greatest care.

For example—Dr. Thomas Smethurst was tried August 15, 1859, for poisoning Isabella Banks; found guilty, and sentenced to death. The case gave rise to much discussion, and Smethurst was reprieved and then pardoned. The Home Secretary wrote to the Lord Chief Baron: "The necessity which I have felt for advising Her Majesty to grant a free pardon in this case has not arisen from any defect in the constitution or proceedings of our criminal tribunals. It has arisen from the imperfection of medical science, and from the fallibility of judgment in an obscure malady, even of skilful and experienced medical practitioners."*

It should be a rule that no *post-mortem* examination should be made in a case of gravity unless a prisoner has an independent medical man to watch over his interests at all examinations of the body, parts of the body, clothing, stains, weapons, or furniture, or any object or thing destined to form a part of the circumstantial evidence to be brought against him.

The force of circumstantial evidence depends entirely upon whether all fallacies have been eliminated, and this applies very strongly to medical evidence. There may be mal-observation, in which the error does not lie in the fact that something is unseen, but that something is seen wrong. Whilst the greatest of all causes of mal-observation is a preconceived opinion.

The next point where a poor man is at a disadvantage is at his trial; here the solicitor engages counsel, to whom a small fee is paid, and a somewhat hasty line of defence is drawn up, no brief even having been prepared. The defence, owing to want of means, is wanting in all essential particulars, and scientific witnesses have not been engaged. When a prisoner is undefended, his position is

* Stephen's *History of Criminal Law.*

often pitiable, even if he has a good case; for an ignorant and uneducated man has the greatest difficulty in collecting his ideas, and seeing the bearing of the facts alleged. "To a man," says Sir James Stephen, "who has sense, spirit, and, above all, plenty of money, the present protection afforded is considerable, but it is not possible to prevent a good deal of injustice where these conditions fail."

I have elsewhere, *i.e.*, in the *Lancet*, October 18, 1889, expressed my views as to expert medical evidence, and just allude to the subject in order to repeat the opinion there stated, that an ordinary medical practitioner is not competent to deal with intricate chemical analyses of stains on clothing, and obscure or questionable injuries on the human body.

Court of Criminal Appeal.

It is a characteristic feature in English criminal procedure that it admits of no appeal, properly so called, upon matters of fact, although there is a Court for Crown Cases Reserved, which can determine questions of law arising at a trial, yet it cannot take notice of questions of fact. No provision whatever has been made for questioning the decision of a jury on matters of fact.

However unsatisfactory such verdict may be, whatever facts may be discovered after the trial, which, if known at the trial, would have altered the result, no means are at present provided by law by which a verdict can be reversed. All that can be done is to apply to the Queen for a pardon for a person believed to have been wrongly convicted; the evil is notorious, but it is far from easy to find a satisfactory remedy.

I will endeavour to put the difficulties before you. If every convicted prisoner had a right of appeal, in all probability an appeal for a new trial would be made whenever a prisoner could afford it, and thus appeal would be rather for the well-to-do prisoners than for the needy. Thus there would be a verification of the old saying, "there is one law for the rich and another for the poor."

If the question whether or not there should be an appeal, rested with the judge who had tried the case, the new trial would depend upon whether the judge thought that the jury had been harsh

towards the prisoner, and this would not provide for cases where fresh circumstances had come to light since the trial, as the judge would probably have to act upon the notes he had taken at the trial.

In the next place, it has been proposed to give the Secretary of State power to grant a new trial. Here again the Secretary of State would be largely influenced by the judge who tried the case. At the present time he is so influenced in questions of reprieve, to a very great extent.

It is obvious that this suggestion would not help matters much; and the only way to settle the question would be to allow all convicted prisoners the right of appeal to a Court of Appeal composed of several judges, who would have power to order a fresh trial if a case was made out.

At the present time there is a sort of private appeal to the Home Secretary, who can advise Her Majesty to reprieve a prisoner sentenced to death, to remit a sentence altogether, or to curtail an imprisonment. This appeal is made to a political person who has an enormous weight of other duties to perform, and who naturally refers to the judge who tried the case; and this judge may have been absolutely wrong in the direction of his remarks in his summing up, and may have misled the jury completely. The private nature of the present mode of appeal is objectionable, as it is rarely known upon what grounds the convict is reprieved or the Queen's pardon granted. The proposal at the present time—although it has not been put into a practical form—is to establish a Court of Criminal Appeal, consisting of five or more judges, and to this Court, I take it, all prisoners convicted would have power to appeal for a new trial.

It is in cases of death sentence, however, that the Court of Appeal would have considerable difficulty, because, in this country, so short a time is allowed between a death sentence and the execution. Here an appeal would have to be made at once; and one can quite understand that in every case of death sentence there would be an appeal made—in some cases probably with no other object than to postpone the carrying out of the execution;

but it is precisely in death sentences that appeal would be of enormous value.

Take into consideration the instances, well known, where the death sentence has been actually carried out, and the convict actually proved to have been entirely innocent by subsequent confessions of others. In spite of the utmost care, it is known that even the strongest circumstantial evidence has sometimes led to conviction and death of absolutely innocent persons. There is much reason to conclude that, for example, Wiggins hanged in London in 1867; Hayes and Stone of Durham, 1873; and two of the three men hanged at Leicester in 1877, with various others recently executed in foreign countries, were put to death by mistake.*

Others have been saved after sentence, and ultimately shown to have been innocent, as in the cases of Polizzioni, of London; Habron, of Manchester, 1876; Alice Rhodes, of Penge, 1877; Siddle, of Durham, 1884; Travis, of Cheshire, 1889, and many more.*

When a man is hanged through a mistake in the evidence, judge, jury, or witnesses concerned in his trial, there is no restitution possible; whereas, if a man is sent to penal servitude, it is not impossible, whatever the delay may be, that the Home Secretary may be induced to listen to arguments in favour of a prisoner which may be brought before him.

Under the present system many have had their lives spared, many have been restored to liberty, but the public have never learned where the mistake was, or who was at fault; whether the police were misled, whether the witnesses committed perjury, whether the judge was biassed, or whether the jury was stupid and ignorant. All that transpires is that the Home Secretary has reprieved a man sentenced to death, or that such and such a prisoner, convicted at such and such assizes at such a time, has been liberated by order of the Home Secretary. However satisfactory a mode of proceeding this may be to those concerned, it is a highly objectionable proceeding for the general body of the public; and if any want of trust is felt in the justice of our present

* From Howard Association Report.

criminal procedure, some of it is, no doubt, due to the uncertainty which surrounds the conduct of the Home Secretary in dealing with the private appeals made to him for his intervention in the cases of convicted prisoners. Take the liberation of Mrs. Osborne this year. Would a poor woman have been thus leniently treated?

I have mentioned the case of Polizzione, and it is worth another word added. In February, 1865, this man was tried for the murder of Harrington, found guilty, and sentenced to death by Baron Martin, who said he "never heard more direct and conclusive evidence." Mr. Negretti, after the trial, obtained much new evidence, and Polizzione was respited; Mogni, a cousin of Polizzione, who was tried for the manslaughter of Mr. Harrington, and being found guilty, was sentenced to five years penal servitude. Mogni confessed that he, and not Polizzione, stabbed Harrington. Polizzione was afterwards liberated on a free pardon. (See Annual Register, 1865.)

It has been put forward as an objection to the establishment of a Court of Criminal Appeal, that such a Court would weaken the position of the assize trials and diminish the responsibility of juries. To my way of thinking, nothing weakens our present system so much as the knowledge we have that occasionally undoubted criminals go scot free, and occasionally innocent persons are nearly hanged or sent to penal servitude. Eliminate the fallacies associated with our present system by providing a Court where mistakes can be publicly corrected, and the majesty of the law will be upheld. I am not aware that the appeals now provided for from the Courts of Summary Jurisdiction, the County Courts, and all Courts where civil business is transacted, have had any injurious influence upon justice in general; if it is so in the least degree. I have never heard of any proposal to abolish such appeals; on the other hand, many efforts have been made to harmonize criminal procedure to civil procedure by establishing a Court to which appeals might be made.

Let it be clearly understood, that upon a question of a sale of a horse, or a dog, or a cow, appeal is allowed, but not upon a case which concerns the life of a man. It is merely by accident that there may be some informal re-investigation of the case by the Home Secretary. It depends upon whether local or public interest happens to be excited by it. If not, the man or woman is

executed, and there is an end of it; or the murderer escapes, and triumphs over justice, and there also is an end of it, for a prisoner can never be tried again after once he is acquitted.

In the Bill introduced by Sir Henry James in 1883, it was proposed to give every defendant convicted of a capital crime an absolute right, irrespective of the opinion of the judge who tried the case, to apply to the Court of Appeal for a new trial, not only on the ground that the judge was mistaken in his law, but also on the ground that the verdict was against the evidence, or was founded on insufficient evidence.

In non-capital crimes the leave of the court of trial was to be required to enable a defendant to apply for a new trial to the Court of Appeal on a question of fact. The action of the standing committee to which the Bill was referred was very decidedly in the direction of extending rather than limiting the absolute right of appeal, and had the Bill in its final shape become law, it can hardly be doubted that almost every conviction for murder, and a large number of convictions for other crimes, would henceforth have been followed by an application to the Court of Appeal for a new trial.

It is not pretended for a moment that any system can give us absolute security against an occasional doubtful conviction, or even that a Court of Appeal would be infallible; indeed, it is quite possible that a prisoner's pecuniary resources would determine the appeal, rather than the intrinsic merits of the verdict; nevertheless, cogent reasons weigh down all these objections, and the matter of grave importance is to determine how a prisoner sentenced to death could avail himself of the benefit a Court of Appeal might afford him.

In civil cases new trials can only be applied for immediately after judgment, but the course contemplated in the Criminal Appeal Bill was an application made by the defendant for an appeal within a week after judgment, and it is clear that in capital cases the application, if it is to be made at all, must be made quickly. A prisoner sentenced to death is usually executed in less than three weeks after judgment, so that in capital cases it may be

said that a new trial would hardly ever be granted on the ground of fresh evidence.

In non-capital cases, it is most improbable that any application would be made on this ground till a considerable length of time after judgment had elapsed, and then the difficulty of getting together the original witnesses would usually be found insuperable, and the Court of Appeal would have to act on very imperfect information as to the circumstances accompanying the alleged crime. It is of importance not only to recognise the difficulties occasioned by the establishment of a Court of Criminal Appeal, but to discuss them fully in order to advance another step towards reform in our criminal procedure. I turn for a moment to an aspect of the question I have not seen touched upon anywhere, although, no doubt, it has crossed the minds of those interested in criminal appeal.

It seems to me that for those whose business it may be to get up a case or prepare an accusation, be he policeman, lawyer, or doctor, and for those who are concerned in the trial, be he magistrate, counsel, juryman, or judge, that the knowledge that behind all said, done, or sworn, a Court of Appeal is prepared ready, perhaps, to overhaul false statements, perjuries, fallacies of observation, mistakes due to haste, and many other sources of error, it seems to me that such a Court would not have anything but a controlling effect, and that we should have more care exhibited to avoid blunders.

The policeman would, perhaps, be more careful in his arrests if he felt sure that his promotion depended not only on the issue of the assize trial, but also upon the issue before a possible Court of Appeal. The lawyer who prepared the brief for the prosecution would hardly feel a sense of lessened responsibility, whilst medical and scientific witnesses would have to be far more careful in their investigations and analyses than they sometimes are at present.

As for the judge, his notes would, if anything, be still more carefully taken, and the witnesses more searchingly examined upon all doubtful points arising in the course of a grave charge.

It stands to common sense, no less than to reason, that no one

likes to be told that he has made a mistake, and, as a consequence, there would be greater care taken in the private preparation of an accusation, in case those responsible were found on the appeal to have been guilty of apathy or of too much zeal.

Common Juries.

Experience has shown that the verdicts of juries are just in the very great majority of instances, but where strong prejudice exists, juries are frequently unjust, and are as capable of erring on the side of undue convictions as they are of undue acquittals. Juries are by no means infallible, and this applies more especially to an average common jury consisting of small shopkeepers and petty farmers, who will rarely have the memory, mental power, or habits of thought essential for the purpose.

Of good special juries this is far from being true, and in criminal cases of gravity or difficulty there should be power given to summon a special jury. Probably many defects that exist in our jury system would be removed by having more highly qualified jurors; and if arrangements were made for their comfort and payment of expenses when on duty, men of standing and consideration might be found willing to fill the position.

Counsel is often heard in Court appealing to the jury to dismiss from their minds all they have heard of the case before them prior to their coming into Court, and they are reminded of their oath to well and truly try the prisoner. I imagine, however, that it is impossible for a juryman to get rid of the impressions first made upon his mind by what he has heard shouted in the streets by newspaper boys, or read in a district newspaper, of a shocking murder, assault, or the like. In the present day, all details connected with crime, or supposed crime, are published with the utmost rapidity, and these details, which are always more or less incorrect, are circulated in newspapers in the district from whence the jury are drawn—so that in spite of himself, a man's mind may be tolerably well made up long before he goes into the jury box. We have had, during the last two generations, considerable experience of trials of all kinds without juries, and, in the opinion of

some eminent in the law, there is a greater probability of justice being done by trial before a judge alone than by trial before a judge and a common jury. On the other hand, a good special jury leaves but little to be desired.

Of the reforms needed in our Criminal Procedure, it may be that if a prisoner was allowed to give evidence upon his own behalf, a Court of Appeal would be less necessary; or again, if jurymen came from a more educated class, a Court of Appeal would be less pressing. Nevertheless, in my opinion, there should be a Court of Appeal, even though it should prove a considerable cost to the country.

I have endeavoured to point out that miscarriage of justice may arise from various causes frequently associated in the course of our criminal procedure. In the first instance, the original steps taken privately are not under the control of a legally educated or experienced person; in the second place, the poor circumstances of a prisoner may lead to his absolute powerlessness to throw off charges brought against him; in the third place, in grave charges, I have questioned whether our common juries have sufficient intelligence to grasp intricate points argued before them. There is one point more; now that equity and law have been fused, our criminal judges are chosen indifferently from the Chancery, and the Common Law Bar; hence it may well happen that the first time an eminent barrister makes acquaintance with a criminal court, may be when sitting as judge to try for his life the first criminal whom he has ever seen; and thus it happens that many of the judges when first appointed, are by no means experienced persons as far as acquaintance with criminal law goes. Is this not another strong reason in favour of the establishment of a Court of Criminal Appeal?

It is impossible to make any judge infallible. He is simply a barrister who has been successful in his profession, and may or may not possess the special quality essential to a good judge; he may not have a judicial mind, and if so, no amount of experience will give it to him. Of the judges in the present day, some have and some have not judicial minds; it is not difficult to distinguish.

Now, if a judge wanting in judicial capacity sums up against a prisoner, and the jury—as juries sometimes do—pay no heed to the counsel and listen attentively to the judge and endeavour to take the cue from him, it is not unreasonable to believe that occasionally the verdict returned is not what it should be; and yet we have at present no adequate means of reviewing sentences in criminal cases.

In conclusion, I add a note of what has been done elsewhere, as it has a direct bearing upon what has already been stated. The Vienna correspondent of the *Times* has reported as follows: "A bill which may be described as of universal interest, has just been before the Austrian Chamber of Peers. It concerns the indemnity to be granted to victims of a miscarriage of justice. The House has declared itself, without reserve, in favour of the State being compelled to afford ample compensation for judicial errors. A measure in all respects similar has been adopted by the Lower House. According to the Bill in the Chamber of Peers, the State must be held responsible for a miscarriage of justice in criminal affairs, as a railway company is called to account for an accident on its line. It is practically on this basis that the House has proceeded. When the Emperor Leopold II., prior to his accession to the throne, governed Tuscany under the title of Grand Duke Leopold I., he instituted a law according to which innocent people who had suffered judicial punishment were entitled to an indemnity from the Government. There have of late years been sad instances of the kind in England, in which, unfortunately, the Treasury did not feel called upon to grant anything approaching an adequate compensation for the great wrong inflicted. The example just given by Austria might be followed with advantage at home for the administration of justice, which is in almost all respects more efficient and equitable than in this country."