Is the Law Too Dear?

A Discussion of the Question with Lord Davey, Mr. Justice Jeune, Lord Brampton, Mr. Commissioner Kerr, Judge Addison, Mr. Registrar Pritchard, Mr. Fletcher Moulton, K.C., M.P., and Mr. Robert Ellett, the President of the Incorporated Law Society.

By Frederick Dolman.

A DISTINGUISHED lawyer, writing on the subject of the cost of litigation, recently declared that respectable solicitors were sometimes conscientiously obliged "to advise their clients not to go to law, but rather to submit to an unfair loss." In the days of Dickens's "Jarndice *v.* Jarndice" and of Dodson and Fogg it was a commonplace that law was a luxury only for the rich, but nowadays most people imagine that bills of costs are very much shorter. Apart from the testimony I have just quoted, however, cases frequently occur which suggest that they are still apt to be most unjustly and ruinously long. With a view of putting this impression to the test I have consulted leading representatives of the several sections of the legal world—the Judicial Bench, the Bar, and the solicitors.

Sir Francis Jeune.
From a Photo. by Elliott & Fry.

Sir Francis Jeune, the President of the Probate, Divorce, and Admiralty Division, whom I first approached, said that he would rather not be a party to an interview on the subject, but was quite willing to put his views into writing, as follows:—

"As regards contentious business—that is, litigation—I think the law is too dear in many instances; but I believe that the only remedy lies in improvement in expedition in the courts, certainty when cases will be heard, and diminishing the number of appeals. Much has been done in these directions, but I at least think that a good deal remains to be done. In the path, however, stands the present circuit system, and everyone who has any acquaintance with the subject of law reform knows the difficulty of dealing effectively with that matter.

"As regards non-contentious business, such as the preparation of settlements, conveyances, and wills, the charges made by solicitors—I mean solicitors of the highest standing and respectability—are, I think, far too high. The counsel, who in most cases actually draws the document, receives a very small part indeed of what the client pays. I confess I do not know where the remedy for this is to be found unless it is in the invariable and automatic taxation of solicitors' bills.

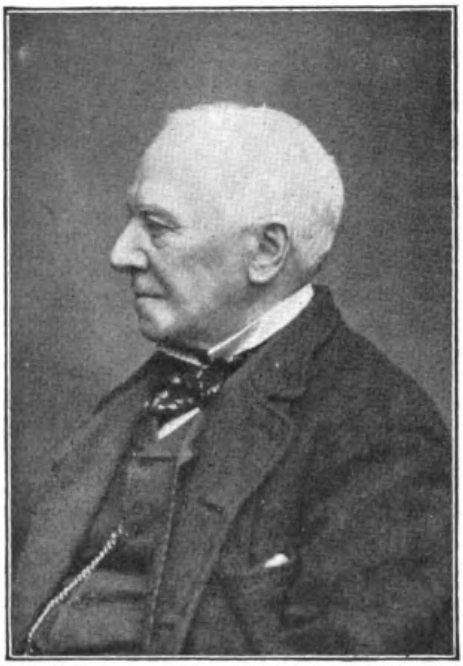
"But do what anyone may," Mr. Justice Jeune concludes, "law will never be cheap. It involves too much exercise of highly trained ability and experience—to say nothing of integrity—for that."

The words of Sir Francis Jeune, who at fifty-eight is one of the younger judges, are based upon ten years' experience on the Judicial Bench and over twenty years' wide and varied experience at the Bar. The son of a Bishop of Peterborough, married to a well-known society leader who shows extraordinary energy in philanthropic work, no judge of the High Court has shown a keener regard for the true public interest in the administration of justice—the interest of poor and rich alike.

Lord Brampton, whom readers will know better as Sir Henry Hawkins, would not commit himself to much more than a jest on the question.

"I doubt," said his lordship, "if the law is exceptionally 'dear' to any of His Majesty's subjects except the lawyers, but I do think it is too *expensive* for those who are compelled to embark in it."

This *obiter dictum* only increases the interest with which we should hear a fuller statement of opinion from the judge who, if best known for his conduct of criminal

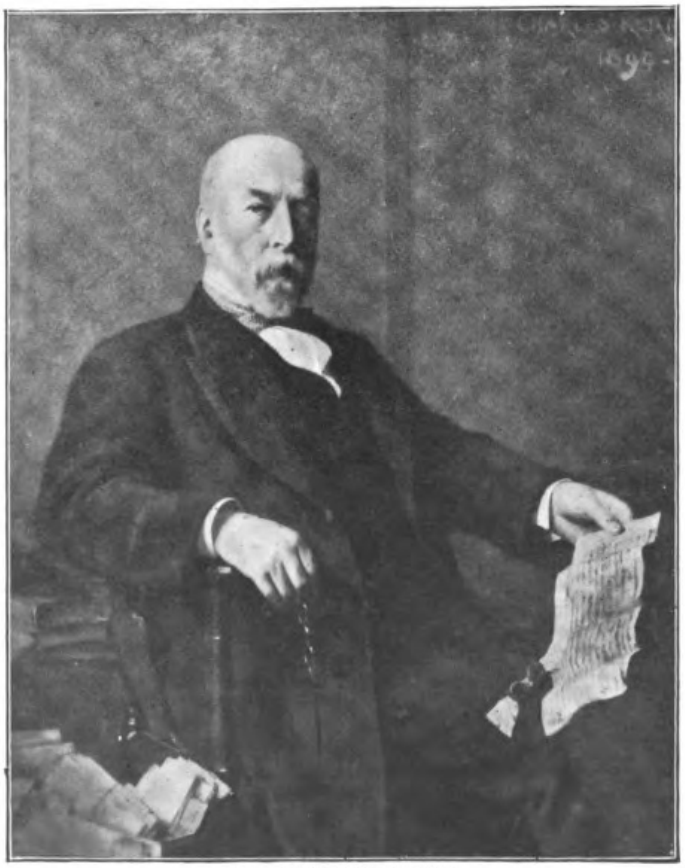


From a Photo. by] LORD BRAMPTON. *[Elliott & Fry.*

From a Photo. by] LORD DAVEY. *[Elliott & Fry.*

trials, can yet look back upon an almost unique experience of the administration of the law generally. But Lord Brampton is in his eighty-fourth year, and is enjoying well-earned rest in the House of Lords as the highest court of appeal.

"I am of opinion," wrote Lord Davey to me from his house at Haslemere, "like every sensible man, that litigation should be made as little burdensome to the suitor as possible, and I have no doubt reductions could be made in the present scale of expenses. But I have not studied the details of the subject sufficiently to enable me to form any just opinion as to the form or duration in which any reductions can advantageously or properly be made."



MR. COMMISSIONER KERR.
From a Painting by Mr. Chas. Kerr. Photo. by W. Gray, Egremont.

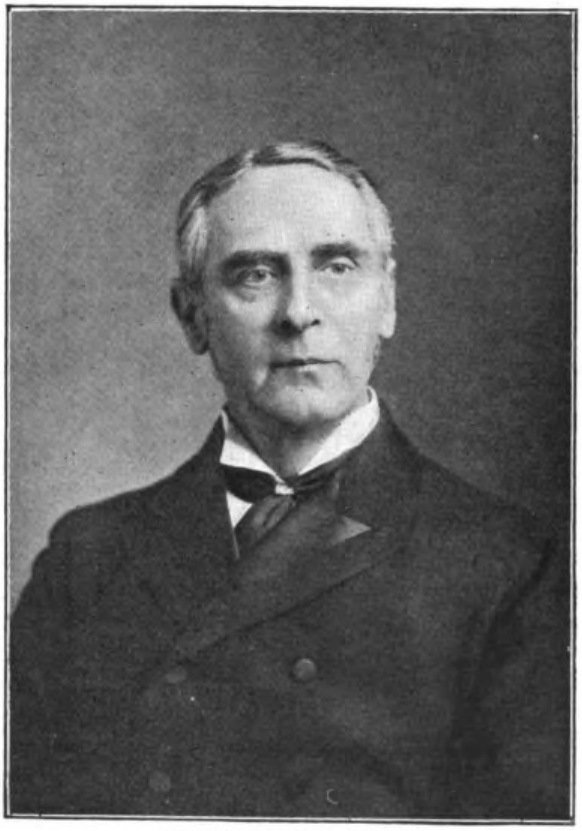
Lord Davey, whether as barrister, member of Parliament, Solicitor-General, Chancery Judge, and now a Lord of Appeal, has always been favourable to legal reform. Some years ago, when known in the House of Commons, he sent me a letter on the subject in which occurred a passage that has a direct bearing upon the costliness of litigation:—

"I think that the decision of the judge of first instance ought to be final on questions of pleading and practice generally, with an appeal only by leave either of the judge or of the Court of Appeal. I think that the reservation of this limited right of appeal is necessary to preserve uniformity of practice. I should add that in my opinion the

present procedure in these cases in the Queen's Bench Division of going from the Master to the Judge in Chambers and then to the Divisional Court is as bad as possible."

Since these words were written the Divisional Court has been abolished, but otherwise the right of appeal still unduly favours the man with the longest purse.

Lord Davey and Sir Francis Jeune may fairly be said to represent the highest judicial sphere. It is in the county courts, however, that most of the litigation takes place in which the poorer classes are concerned. Is the law too dear even as administered by these subordinate tribunals? Going first to the City, where Mr. Commissioner Kerr presides over the most important of the county courts, I find the learned Commissioner almost in despair over what he terms "the enormous cost of legal proceedings."



HIS HONOUR JUDGE ADDISON.
From a Photo. by Elliott & Fry.

"I have been denouncing these costs," says the judge of the City of London Court, whose name long years of service has made well known throughout the Metropolitan area, "for over forty years. Cromwell said 'the sons of Berniah' were too strong for him, and the late Lord Chief Justice Campbell, who sometimes said what was true, pointed out that 'the attorneys were the most powerful body in England.' He believed what he said, as it was he who introduced the practice of giving the names of the attorneys concerned in the Law Reports. That, no doubt, brought him business too!"

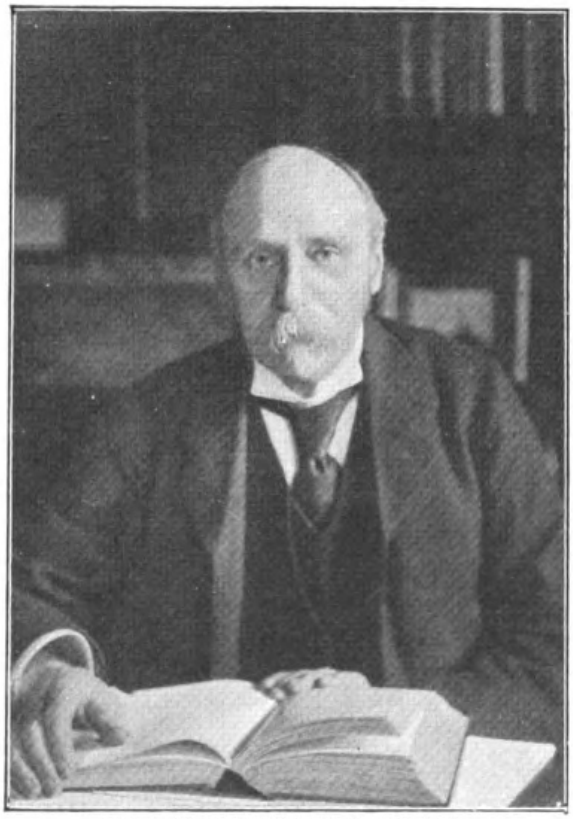
In this frame of mind it is not surprising that the learned Commissioner had nothing more to say. I turned to Mr. John Addison, K.C., the judge at Greenwich and Woolwich, and a gentleman who before accepting his present position was for many years a member of the House of Commons, in the hope that he would give me a diagnosis of the evil as it prevails in the poor man's court. This, in fact, he did in very few words:—

"It is very evident that the 'costs' on summonses and the 'hearing fee' in the county courts are very excessive and press hardly on the suitors. But they are in accordance with a policy to make the civil courts 'pay their way,' and this is not a time when Governments are likely to surrender anything."

On investigation, however, I find that at present the civil courts do not "pay their way." On the contrary, the accounts in recent years have shown an increasing annual deficit. In 1899 the county courts' receipts amounted, in round figures, to £450,000 and the expenditure upon them to £579,000, or a deficit of £129,000. In the High Court the income was £503,000, whilst the disbursements came to £631,000, of which amount judges' salaries amounted to nearly £175,000. Thus on the civil courts, as a whole, there was a loss to the country of more than £250,000 sterling. Curiously enough, the Bankruptcy Court is the only court in which the authorities succeed in making both ends meet. The policy of making the courts pay by charging fees which, in the opinion of such high authorities, are unduly high would thus clearly seem to fail completely.

This was one of the first points I brought to the attention of Mr. J. Fletcher Moulton, K.C., M.P., when I discussed the subject for half an hour one evening in the lobby of the House of Commons. Mr. Moulton, readers will well know, is a most distinguished representative of the Chancery Bar, but it was the general aspect of the question which engaged his attention.

"In speaking of the cost of litigation," said Mr. Moulton, "it is desirable to discriminate between the different classes of actions. By far the largest number determined in the county courts are brought for the enforcement of indisputable claims or rights, such as the payment of money under a contract or the recovery of possession of a house after the expiration of a lease. In all such cases, where the Courts, acting as a kind of commercial police, merely give the sanction of the law to transactions which are incontestable, the fees should be absolutely as low as possible. It is, of course, many years since I had any personal experience of the county court, but I believe its fees have been much reduced of late, although I daresay they might be made lower, more especially in respect to cases involving the smallest amounts."



MR. J. FLETCHER MOULTON, K.C., M.P.
From a Photo. by Elliott & Fry.

"Is it necessary that they should be fixed on a self-supporting basis at all—some people, as you know, Mr. Moulton, advocate what they call 'free justice,' instead of 'fee'd justice'?"

"As regards the cases I have been speaking of, I don't think there can be any objection to the county courts being conducted at a loss. But as to abolishing court fees altogether, you must remember that quite half the litigation in the world arises from unbusinesslike conduct. Why should people generally have to pay, even partly, for the litigation which arises from the carelessness of a few?"

"But it is often a matter of complaint that even the successful suitor in such cases finds that the law is too expensive."

"Yes, I believe grave injustice is sometimes done because the successful party is obliged to pay a large proportion of his own costs. This is a matter governed by the action of the taxing masters, who are influenced, however, by many traditions and unwritten rules which have grown up. I wish the masters could act on their own discretion, treating each bill of costs on its merits as it came before them. For my own part, I consider that the successful party should be able to recover his entire costs unless any were unreasonably incurred. For instance, a very nervous man might cause a high fee to be paid to a barrister whose services were not at all necessary to his success. Of course the circumstances of each case would have to be taken into consideration.

"Of course, as regards the few very big and important cases the question stands in a somewhat different position. If a man stands to gain or lose £200,000, say, as the result of an action, he will obtain the services of the counsel he considers the ablest regardless of cost, just as a man who believes his life to be in danger will obtain the advice of the ablest specialist—and the expert in any profession is thus able to command high fees. Such cases are often won before they are brought into court—as the result of the study and investigation of the counsel on one side or the other. Counsel's fees may be very largely for such legitimate preparatory work, but it would lead to abuse, I think, if fees for such work were payable by an unsuccessful party."

"I don't think one hears much complaint, Mr. Moulton, about the costliness of these very big cases?"

"No, that is true. As regards the general bulk of cases in the Queen's Bench, a fruitful source of expense is the uncertainty as to their time of hearing, causing expensive witnesses to be kept waiting sometimes for days together. This uncertainty could be largely reduced if a greater amount of judicial power were available. At the present time judges are so anxious to employ the whole of their official time that they always put into

their list, day by day, more cases than can under ordinary circumstances be disposed of, lest some of the cases should be unexpectedly brief. The judicial staff on the Chancery side is sufficient, I think, but the Queen's Bench Division should certainly have additional judges.

"At the same time, the amount of judicial power available could also be increased by a revision of the circuit system, which at the present time leads to much waste of the judges' time in the smaller places. Assizes in half-a-dozen provincial centres, such as Manchester and Leeds, should be sufficient. The present system dates from a time when communication was difficult and expensive; now it is cheaper, as a rule, for parties and witnesses to come to London than to go to the assizes, with the result that in many of these smaller places the judges, although they have to interrupt their work in London for the circuit, have little or nothing to do."

"In my division," wrote Mr. Justice Gorell Barnes, who shares with Sir Francis Jeune the labours of the Admiralty, Probate, and Divorce Division, "the Registrars have more to do with the actual costs of the cases than the judges." His lordship accordingly referred me to Mr. Registrar Pritchard, D.C.L., with whom I had an interesting conversation.

It is Dr. Pritchard's opinion that little or nothing can be done to further reduce the expense of litigation in the court with which he had to deal. He pointed out that costs had been much cut down as the result of action taken by Lord Hannen, the late President.

"There was a big probate case, for instance, lasting ten days," said the Registrar, "in which three counsel appeared on one side, and Lord Hannen directed that the fees of the third counsel were to be disallowed in the taxation of fees. Well, ever since then—this being an extreme case—we have always struck out fees for a third counsel."

By way of illustration Dr. Pritchard allowed me to examine two bills of costs which were in process of taxation, one in an undefended divorce case, which, after taxation to the tune of £2 or £3, amounted to a little more than £30, and the second concerning a probate action for about £150, the Registrar's revision in this case effecting only a slightly larger reduction.

"Is £30 a usual sort of amount for an undefended divorce case?"

"Yes, I think so. If the suit is defended, of course, there is no saying what figure the costs may amount to."

"Have you any idea as to the amount of the disputed will in the probate case?"

"No, and in such a case there can be no definite relation between the costs and the amount in dispute, although in all litigation it naturally appears improper when the former equals or even exceeds the latter. But take probate actions. In the great majority it is alleged that the testator was of unsound mind when he made the will. Well, to prove or rebut this allegation a great amount of evidence is necessary. It is necessary to inquire not merely into the state of his mind when the will was actually made, but also into his mental history for some time before by consultation with the man's friends and acquaintances; and all this necessarily costs money, irrespective of the amount in question, although I daresay there is often larger expenditure when the estate is a rich one and it is known that the costs will come out of the estate.

"The solicitor who runs up the longest bill of costs is a rare combination of rogue and fool. He will make a hopeless and foolish motion, for instance, before the trial simply because he wants to get as much as possible out of his client. But I am afraid it would be impossible to draw up a code of regulations which would meet all such cases. In course of time the solicitors will become known to the Registrar, and he can only do his best to protect the party concerned by a rigid taxation of the bill. But, after all, much must be left to the honour and integrity of individual solicitors, and if a reduction of solicitors' fees had the effect of lowering the status of their profession it would not, in the long run, be to the advantage of the public. A solicitor is consulted as to the advisability of taking legal proceedings; in many cases the client, so to speak, has not a leg to stand upon; but if the solicitor is not a man of honour he will advise—or at any rate not oppose—the issue of a writ for the sake of his business."

So far, it will be seen, Mr. Registrar Pritchard had taken a somewhat negative view of my question. Before our talk came to an end, however, the learned Registrar made a striking statement in the opposite sense. He is strongly of opinion that the law is often too dear to the successful suitor, whatever it may be to the public generally.

"I have never been able to understand why any practical distinction should be made between 'party and party' and 'solicitor

and client' costs as they are called. I have never seen any good reason why a man who has been wronged should have to pay any part of the cost of putting the wrong right. Of course, the costs between solicitor and client would have to be subject to taxation just the same as between party and party, and the solicitor would have to be deprived of any unnecessary or excessive charges."

As laymen we may, perhaps, suspect that in this last sentence Mr. Registrar Pritchard has given one reason why the present system, under which legal redress often becomes a costly luxury, should have flourished so long. As it is, a certain portion of the solicitor's charges, not being enforceable against the unsuccessful party, altogether escape the Registrar's vigilant eye.

The solicitors have their own views, however, as to the causes of the excessive costliness of our legal system, and these were very fairly and clearly put to me, I think, by Mr. Robert Ellett. Mr. Ellett occupies this year the position of president of the great solicitors' organization, the Incorporated Law Society, but he was anxious to have it understood that he was expressing his own opinions, without committing the society to them in any way.

"You ask my views on the question whether law is too dear. By this I understand you mean whether a suitor pays too much for getting his case heard and determined in the King's Courts.

"I answer that in that sense law is too dear because of the defects in the present arrangements for trial. More judges are needed unless the existing circuit system is altered. At present there are not sufficient judges to keep the courts in London going whilst the judges are on circuit. A suitor cannot ascertain when his case will be heard or before what judge or in what court. The arrangements in these respects may be made and altered over and over again before his case is heard. To-day he may find his case in the list for hearing to-morrow, and, at great expense, may bring up his witnesses from long distances and make all preparations for the trial, only to find that the case cannot be taken and is indefinitely postponed. This process may be repeated. On each occasion counsel, solicitors, and witnesses are put to additional trouble and the suitor to additional expense. The causes of all this are well known, and so are the remedies. The public can have the remedies applied whenever they like by making it clear to the Government of the day that it must be done.

"Again, law is too dear in the poor man's court—the county court—because the fees levied by the State in that court are much too high. If a person wants to enter a plaint in the county court to recover £20 he pays a guinea. If another person wants to issue a writ in the High Court to recover £20,000 he pays 10s. Other fees in the county court are in proportion. This anomaly is nothing new. A Royal Commission reported upon it and condemned it more than twenty-five years ago, but it remains."

"But are not the lawyers' bills too big?" was the question with which Mr. Ellett kindly proceeded to deal.

"Well, in the first place, there is a good deal of misapprehension about these bills. They include counsel's fees, court fees, witnesses' expenses, and all disbursements connected with the litigation, as well as the solicitor's remuneration, and yet it is a common mistake to speak of the total as 'the solicitor's bill.' If the portion of the bill which represents the solicitor's remuneration were separated it would be seen that his remuneration bears a very small proportion to the total expenses. It would then be seen, moreover, that solicitors are underpaid, both actually as respects the work done and responsibility incurred, and relatively to the charges of other experts employed. In that respect, then, it cannot be said that law is too dear.

"There is a prescribed tariff of fees for solicitors. They are in a less favourable position than the members of other professions, who can fix their own charges subject only to revision, if the employer is dissatisfied, by a judge or jury. In my opinion that is the better plan, and I see no good reason why it should not apply to solicitors. If it did, I have no doubt they would be better paid.

"One word more. Do not let anyone suppose that law (understanding it to mean the expense of litigation in which counsel and solicitors are engaged) can nowadays be cheap. Counsel's fees and the fees of surveyors, engineers, and other experts frequently required in litigation are all more than they used to be. Solicitors' fees ought to be so. All this, however, is no reason why the judicial arrangements should be such as to occasion unnecessary uncertainty and expense; and, as I have pointed out, it rests with the public themselves to enforce an alteration."