might be suggested. All that can be said with certainty is that the cases do not provide any clear indication how the definition of embezzlement is to be interpreted. Perhaps this should have been apparent from the contrast between the judgments in *R.* v. *Cullum* and *R.* v. *Gale*, but the problem is raised in an acute form by the facts of *R.* v. *Davenport* because it appears to be the first case in which a servant has been convicted of embezzling the proceeds of an unauthorised disposition of something received from, and not for, his master.

Embezzlement and fraudulent conversion

The decision also gives food for thought concerning the relation between embezzlement and fraudulent conversion under section 20 (1) (iv) of the Larceny Act, 1916. This misdemeanour is committed by someone who, being entrusted with property in order that he may apply, pay or deliver it for any purpose, fraudulently converts the property or "any proceeds thereof." The definitions of embezzlement and fraudulent conversion are sometimes said to be mutually exclusive,[12] but the view is fast becoming one which it is impossible to maintain.

In *R.* v. *Davenport* the Court of Criminal Appeal considered that the accused should have been convicted of the fraudulent conversion of a number of his employer's cheques which he had completed in an unauthorised way, but, instead of being charged with this offence, he had been found guilty of larceny of the proceeds of the cheques, and the court substituted a conviction for embezzlement of such of the latter as had actually been received by him in cash.[13] If the accused was guilty of fraudulent conversion of the cheques entrusted to him for the purpose of completing and delivering them to creditors, the wording of section 20 (1) (iv) seems to indicate that he was also guilty of this offence with respect to the proceeds of the cheques, including the very sums which he was held to have embezzled. It is therefore difficult to escape the conclusion that Davenport's conduct with regard to the cash received by him came within both the definition of embezzlement and the definition of fraudulent conversion, although he could not

transaction, so that he could not have been guilty of stealing them. He sold the rabbits, but was not charged with embezzlement of the proceeds. The animals can hardly be said to have been "entrusted" to the accused, but none of the authorities refer to such a requirement.

12 Kenny's *Outlines of Criminal Law*, 16th ed., p. 270.

13 The court acted on s. 44 (2) of the Larceny Act, 1916, and s. 5 (2) of the Criminal Appeal Act, 1907. The accused made a number of the cheques payable to his creditors' bank, and the convictions in respect of these cheques were quashed.

have been convicted of the latter crime because he was not charged with it.

The truth of the matter is that any attempt to draw a hard and fast line between offences is bound to prove abortive in the long run if their statutory definitions overlap on anything approaching a grammatical construction of their wording. In *R.* v. *Williams* [1953] 1 Q.B. 660,[14] the Court of Criminal Appeal expressed the opinion that, on a proper indictment, the accused might have been convicted of fraudulent conversion in respect of conduct which was held to be larceny, and *R.* v. *Davenport* seems to show that the same facts can sometimes constitute either embezzlement or fraudulent conversion. This may be untidy, but what else can be expected from such a piecemeal assortment of antiquated statutory provisions as the Larceny Act, 1916? It had great value as a consolidating measure, but surely the time for a complete remoulding of the law relating to crimes against property and possession is long overdue.

The Duties and Responsibilities of Prosecuting Counsel[1]

By Christmas Humphreys,
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A prosecuting counsel, and I include in that term all, whether solicitors or barristers, who prosecute in a criminal court, represents the Crown, and his powers—nowadays it may be hers—are correspondingly enormous. His responsibility for the right user of those powers is commensurate. What are these powers? They may be classified under four heads.

The powers of prosecuting counsel

In the first place, he has unlimited funds behind him. True, in this matter as in all else, it does not follow that because a power is available it will be used to its full capacity, but the power

14 *Cf. R.* v. *Misell* (1926) 19 Cr.App.R. 109 at 111, suggesting that a servant can never be convicted of an offence against s. 20 (1) (iv).

1 This is a shortened version of an address to the Inns of Court Students

is nevertheless in hand. Secondly, he has the whole police force of the country at his command. If, for example, to prove a point it is necessary to make inquiries at every public-house within a mile radius of a crime, that inquiry will be made, and in a recent London murder the statements taken from members of the public ran into four figures. Thirdly, every prosecutor can use, through the police, the enormous powers of a public appeal for information, through the press, radio, television and cinema screens, and witnesses so obtained can be brought from one end of the country to the other and there lodged at the public expense for so long as their services are required. I have myself caused a man to be brought from North Africa by air and kept in England for a month in order that he might give evidence against a police officer charged with blackmail. Fourthly, and this is a growing branch of criminal procedure, the forensic laboratories of the police are available to check and often to prove a point against a suspected man, and to prove it to such perfection that the defence, while trying to "explain" the fact, do not attempt to deny it. In this connection I cannot refrain, at the risk of irrelevance, from describing a recent incident at the Old Bailey. A girl called for the defence, with an elaborate gesture of coy reluctance flatly refused to disclose the nature of the material which arrived, in circumstances which she related at length, on the turn-up of her young man's trouser leg after a visit to a farm. "I could not," she exclaimed, "use such a rude word in public." Finally she was persuaded to reveal that it was, as the forensic laboratory had proved, dung. But as the whole point of the defence was to "explain" the presence of *cow*-dung on the trousers there was much merriment when the young lady, asked as to the genesis of the offending matter, finally answered: "A n'orse."

Now here is a fact of vital importance about these powers—all of them are nowadays equally available to the defence. Not only are the defence entitled to call upon the prosecution to assist them to find witnesses and bring them to court, or even to make wide inquiry for certain evidence believed to exist, and to spend public money in the course of that inquiry, but I believe it to be the duty of prosecuting counsel to offer that aid. And why? Because the prosecutor is at all times a minister of justice, though seldom so described. It is not the duty of prosecuting counsel to secure a conviction, nor should any prosecutor ever feel pride or satisfaction in the mere fact of success. Still less should he boast of the percentage of convictions secured over a period. The duty of the prosecutor, as I see it, is to present to the tribunal a precisely

formulated case for the Crown against the accused, and to call evidence in support of it. If a defence is raised incompatible with his case he will cross-examine, dispassionately and with perfect fairness, the evidence so called, and then address the tribunal in reply, if he has the right, to suggest that his case is proved. It is no rebuff to his prestige if he fails to convince the tribunal of the prisoner's guilt. His attitude should be so objective that he is, so far as is humanly possible, indifferent to the result, with this exception always, that I have never myself continued a prosecution where I was at any stage in genuine doubt as to the guilt, as distinct from my ability to prove the guilt, of the accused. It may be argued that it is for the tribunal alone, whether magistrate or jury, to decide guilt or innocence. I repeat that the prosecutor is fundamentally a minister of justice, and it is not in accordance with justice to ask a tribunal to convict a man whom you believe to be innocent.

Assisting the defence

I consider it the duty of prosecuting counsel to assist the defence in every way. Whenever, as nowadays is normal in cases of gravity, the accused is represented, I approach his counsel before the trial, as soon as I know his identity, to see in what way I can help, and in return for such help to find, if possible, what parts of my case are admitted, so as to reduce unnecessary evidence. In many cases I am told of witnesses or documents wanted by the defence, or further information which the Crown may already possess. In the Towpath murder,[2] for example, witnesses were fetched from Northumberland to help the defence, although it seemed to the Crown that their evidence was quite useless; otherwise, they would have been called for the Crown. And I shall never forget Det.-Supt. Hannam's magnificent reply to defending counsel, at the end of the most gruelling cross-examination to which, in my experience, an officer has ever been subjected. Patently nearly exhausted with the ordeal, he was asked by counsel, who for hours had charged him with everything from perjury to conspiracy to convict an innocent man, could the officer help him by making some further inquiries "Sir," replied Mr. Hannam, "I am only too willing to do anything I can at any time to assist the defence." That was true, and it should be the ideal of prosecuting counsel.

On the other hand, it is the duty of prosecuting counsel to prosecute and he need not rise to his feet and apologise for so doing. It is not unfair to prosecute, and the defence will look after the

[2] See article at [1954] Crim.L.R. 179.

defence. I believe in hard hitting, but with blows that are scrupulously fair.

I have said that all the powers of the prosecution should be available for the defence. The same may be said to apply to information in their possession, though in this matter there is room for difference of opinion. There is always available to the Crown a mass of information, much of it irrelevant to the issue and much that, though possibly relevant, is wholly unreliable. How much of this that is not being used in the depositions and exhibits should be made available to the defence? Generally speaking, any information which the prosecution does not intend to use, but which might, if believed, assist the defence, should be made available. The present custom in London is to inform the defence that a witness, giving the name and address, might be able to assist them. For myself, I take the view that a copy of the statement taken should be given to the defence, and I satisfy my own principles by handing a copy of it to defending counsel at the trial.

Far more difficult is the question of disclosing to the defence the previous convictions of witnesses for the prosecution. Where they are trivial or very old, or where, though serious, they pertain to a witness only on the fringe of the case for the Crown, they need not be mentioned. But I believe it to be the duty of the Crown to make known to the defence the convictions of a man whose evidence is really material to the Crown's case; still more if he is virtually the prosecutor, and the credibility of his evidence may be the deciding factor in the jury's mind. This can either be done by oneself disclosing to the jury that the character of the said witness is such that they should regard his evidence with special care, or by lending, but not giving to the defending advocate, the material for cross-examination. The former method must be used when the defendant has himself a bad character, for a cross-examination thus invited will necessarily open the accused to the equivalent attack.

Duties of prosecuting counsel

These are some of the principles which, in my view, should guide all prosecuting counsel in the right exercise of their enormous powers. We may now turn to a brief survey of their duties, as they generally appear, in the course of which these powers are exercised.

All prosecutions are brought by the police, the Director of Public Prosecutions, some other Government Department's own legal staff, or by private individuals and companies, and I should think in that order of quantity. In each case, some person coming within my definition of prosecuting counsel begins the proceedings. He exercises at once a *de facto* power of summons or arrest, for a magistrate will rarely refuse to issue process where a reputable authority applies for it. He will draft the charges on which process issues; he will decide the venue of the initial proceedings and the mode of proof. He will, in deciding whom to charge, exercise the grave choice as to whom to put in the dock and whom in the witness-box to give evidence against them. He will often have the power to decide whether the proceedings should be summary or before a jury, and whether bail should be granted and if so, on what terms. All this is obviously within the range of a "minister of justice," but having conceived, formulated and built up to the point of acceptance by the committing magistrate his case he should, even at this early stage, consider how he can help his colleague for the defence. If notice of further evidence is already planned to be given, he can disclose its nature in advance, and defending counsel or solicitor may already have decided what further evidence he will require and ask assistance to procure it.

Although up to this point the "prosecuting counsel" may be a solicitor, at the trial there must be counsel and the counsel must be "free," that is, "on the cab-rank" of the general Bar and not in the full-time employ of any Government Department (the law officers always excepted).

Treasury counsel

At the Old Bailey the standing counsel for the graver cases are known as Treasury Counsel. Their origin may here be explained. A long time ago it was found convenient for the Attorney-General of the day to appoint divers practising counsel of the junior criminal Bar to represent him at the Old Bailey in the cases committed there for trial by the Director of Public Prosecutions, as he was later called. This office was originally a department of the Treasury, and the Solicitor to the Treasury was also Director of Public Prosecutions. The first to bear the title was Sir John Maule Q.C., but the first exclusively Director of Public Prosecutions was Sir Charles ("Willie") Mathews, whose offices, nevertheless, were still in the Treasury offices in Whitehall. With Sir Archibald Bodkin (1920–1930) the office became completely separate from the Treasury when he moved to premises in Richmond Terrace. Nowadays, the Director has premises built for the purpose in Buckingham Gate. The first counsel appointed were Sir Harry Poland and Montagu Williams. Later the number was raised to four, with Frederick Mead, Charles Mathews, Charles Gill and Horace Avory. These were soon known as Treasury Counsel; the name has remained long

after the cause of it has disappeared. There are now three senior and three junior counsel, but all alike are "stuff-gownsmen," and on taking "silk" they must resign their appointment. They are free to take any other work in any other court, but naturally are in honour bound to give precedence to the briefs allotted to them each session by the Director's department. Their briefs are not marked and their fees are paid at the end of each session as marked in the Director's office. For circuit cases the Attorney-General has a separate list for each circuit, from which he nominates counsel for each brief, and there are no standing Treasury counsel outside London.

The Old Bailey team, the leaders of whom, I do not attempt to conceal, consider themselves the equals of any leader on circuit, has included many notable men. At one time the senior of the six was successively Sir Archibald Bodkin, Sir Richard Muir and Sir Travers Humphreys, and since that time the team has contributed, besides my father, Mr. Justice Oliver and Mr. Justice Byrne to the Queen's Bench, as well as the present Recorder, the Common Serjeant and His Honour Judge Maude Q.C. to the Old Bailey's permanent Bench.

Most other prosecutions at the Old Bailey, as almost all at London and Middlesex Sessions, are conducted by the Solicitor's Department of the "Yard," which has its own list of counsel among whom the work is distributed. A young man's first ambition on coming to the criminal Bar is to be placed on this list, for save for an occasional "soup" such briefs will be his first, and for a long time his only, chance of proving himself as prosecuting counsel.

A case at the Old Bailey

Let us assume, then, that prosecuting counsel is presented with a brief for the Old Bailey, and it matters not whether he conducted the proceedings in the court below or whether he is seeing the brief for the first time. He will perhaps be asked to draw the indictment, although in most simple cases this task is performed by the Clerk of Indictments at the Old Bailey. He may, after conference, want notice of further evidence given to prove facts not hitherto adduced. He may decide to use one of the accused as Queen's evidence against the others; if so, there can be no bargaining. It is not, in my view, right to cause it to be intimated to the accused that if he is prepared to give evidence against his fellows no evidence will be given against him and he will be released. This is putting tremendous pressure on a man to give what may be false

evidence. In the Clapham Common murder,[3] for example, I sent a message to counsel for four of the six youths committed for murder to the effect that I proposed to offer no evidence against their clients, and that my decision was final. I added that if any youth wished to give evidence in accordance with his statement already in my possession I would call him for the Crown, which might, of course, help him with his punishment for the less offence with which he still stood charged. Two accepted the offer, two refused. All were released from the charge of murder.

It is at this stage, if not before, that I consider it right to approach the defence to see how I can help their defence against my case as they already know it. Only when I have, as it were, provided all the weapons I can with which to fight my case, do I feel free to fight out in court, with a clear conscience, the forensic battle of the prisoner's guilt or innocence according to English law. Meanwhile, prosecuting counsel is busy, in the words of the late Sir Richard Muir, stopping up the rat-holes, that is, working out what the defence must be or may be, and seeing what may be done to close the loop-holes still remaining.

Differences between the prosecution and the defence

When issue is joined, the differences between prosecuting and defending in a criminal case immediately appear, and they are none the less wide for the fact that the two counsel concerned may on the following day be defending and prosecuting respectively in the very same court. At the opening of the trial the defence have in their possession every fact and document on which the prosecution proposes to rely. The prosecutor, on the other hand, has no knowledge of the defence save what may be gleaned from any cross-examination before the committing magistrate, and whatever defending counsel cares to tell him. There are no pleadings in crime; the defence may do precisely nothing, and at the close of the Crown's case submit no case to answer. They may, in the alternative or in addition, take a point of law without previous intimation to the prosecution, and win on that alone. For myself, I lean towards more and more pleadings, in the sense of an exchange with opposing counsel of the points disputed and those agreed, and the cases on which, in any dispute on law, I propose to rely. When prosecuting I am always willing to tell defending counsel what evidence I shall not dispute if tendered by the defence, and when defending I am, save on rare occasions when I am "sitting on a point" deliberately, always willing to say what I

[3] *R.* v. *Davies.*

concede as proved, and to reveal what is in dispute. When I propose to take a point of law I give a list of my authorities to the Crown. But the distinction between counsel remains. The Crown is interested in justice; the defence in obtaining an acquittal within the limits of lawful procedure and Bar etiquette.

In action, both counsel are impersonal, but whereas some element of the theatrical, of forensic emotion is still permitted to the defence, any passion of argument, any grandiloquence of phrase or "playing to the gallery" is out of place in the representation of the Crown. The day has passed when the case for the prosecution is ever pressed, and though defending counsel will always, for want of a better defence, attack his opponent for the jury's benefit with allegations of unfair pressure, inaccuracy and all other vices short of subornation of perjury, he will get no reaction in the prosecuting counsel's reply to the jury, if it is still to come, save correction where there has been any error, and a quiet review of the actual evidence.

Wherever English law obtains the court will rely, and know that it can safely rely, on both sides to assist in the right presentation of the law to the jury. Even defending counsel must reveal any case which he knows to derogate from his argument. How much more must the Crown, at all stages of the trial, reveal any law which helps the defence, and reveal, in my view, every fact of possible relevance which may appear as the trial proceeds. I shall never forget the series of incidents behind the scenes of the trial of Hume for the murder of Setty in 1950. Night after night some crisis of evidence arose. Once, it was revealed that a man in a Manchester gaol might help the defence; he was sent for by the Crown and brought to the cells at the Old Bailey next morning, only to be returned when it was found that he was not the man required. On another occasion it was thought that the Press might have interfered with the administration of justice; that matter was ventilated in open court. At the very last minute a witness came forward whose evidence might have been conclusive. I did not press for its admission when speeches had already been made. My point is that all such matters, if they can conceivably help the defence, should be disclosed at once to the defence and, if need be, to the court. Always the principle holds, that Crown counsel is concerned with justice first, justice second, and conviction a very bad third.

Duties at the trial

With the actual duties of prosecuting counsel at the trial I need say little, but the choice may be onerous and the decision grave. He may have to amend the indictment; he may have to make up his mind what plea if any to accept which is less than the whole indictment. He may decide to offer no evidence against one defendant in order to use his evidence against the rest; he may decide to let one man go when another pleads guilty and takes the whole of the blame. He may, while on his feet, have to decide whether or not to accept an unusual verdict of the jury; if the jury disagrees, is it right to ask for a new trial, or fairer now to offer no evidence?

There are times, though they are not many, when counsel may want guidance from the presiding judge. I say not many, for as a rule it is for him to bear his own responsibility. In this case, he should ask permission for the interview and take the defence counsel with him. Never should either counsel attempt to see the judge alone on a matter touching the conduct of the trial. When in want of advice the prosecuting counsel, as any other member of the Bar, has all other members of the Bar, with their accumulated experience, at his command, and for that matter all members—I was about to say of the criminal Bench, but you will know what I mean!

But, generally speaking, all these problems are for prosecuting counsel and for him alone to solve. The responsibility is his and he should not seek to shift it. Let him "take instructions" by all means, in the sense of discussing the matter with those instructing him, but the decision is his, and he is not the mouthpiece of a Government Department. In making his own decisions he will not go far wrong if he exercises any doubt in favour of the accused. True, it has been said of some counsel—and who am I to name names?—that at times they prosecute so gently that it is not easy to know whether they prosecute or defend; on occasions even the Bench has with delicate irony inquired of counsel's status. But if the counsel concerned is troubled about the possible and even probable injustice of that particular trial; if he is convinced that in the circumstances, not all of them before the court, that this particular accused should not in justice be convicted, should he hesitate to throw his own weight into the scales of an acquittal? I know not the right answer to this question, but I know my impenitent own.

When the summing-up is reached, the duty of Crown counsel is largely discharged, for in the matter of sentence he will exercise no grain of pressure towards severity, and will leave his opponent to say what he may in the matter of mitigation. At any appeal he acts as a lawyer only and is merely present to assist the Court of Criminal Appeal to exercise its powers in the interests of justice.

With the result, as with the verdict at the trial, he is enormously unconcerned. He has only one criterion of success in his own efforts—his own standards as a lawyer, advocate and minister of justice. He has only one concern; has he in that particular case achieved or fallen short of the standards of his own ideal? If these are satisfied he is reasonably content, for he will have acted in accordance with the highest traditions of his profession in the administration of English justice according to English law.

Aspects of Forensic Science

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Forged Signatures

"Is this signature forged, and, if so, who forged it?" is the double question so often posed to the document examiner. The possibility of answering this question depends on a number of circumstances; in general it may be said that while the first may offer little difficulty to an experienced man, the second can be answered positively in but a small number of cases.

Forged signatures may be divided into two classes. In the first, we have those forgeries where no attempt has been made to copy a genuine signature, any resemblance the forgery may have to the genuine signature being purely fortuitous. The second class comprises those forgeries where an attempt has been made to copy the outline at any rate of a genuine signature.

There is little difficulty in proving that signatures of the first class are forged, the most convincing demonstration being the proof that they are in the handwriting of the forger. This is, indeed, the only satisfactory way of dealing with the "signatures" of fictitious persons because of the difficulty of proving that such a person does not exist. When real people are involved and it is possible to produce their genuine signatures, the differences between these and the forgeries are usually sufficiently marked to prove the fact of forgery.

The problem of determining the authorship of these "not-copied" forgeries resolves itself into the determination of the authorship of a small quantity of handwriting which has probably

been disguised to some extent because it is the rare person who writes a forged signature in his normal handwriting without making some attempt at disguise.

Whilst it may happen that in the majority of these cases there is insufficient evidence to prove authorship to the degree of certainty required in a criminal prosecution, it is often possible to indicate the probable author and so direct the investigation into profitable channels.

With forgeries of the second class, especially where the genuine signature has been cleverly imitated, it is sometimes very difficult to establish that the questioned signature is really a forgery and not an extreme variant of a genuine signature, much less indicate the identity of the forger by a comparison of the handwriting of the forgery with that of the suspect. It is obvious that the more closely the handwriting of the victim has been copied in making the forgery, the less likely are there to be present sufficient of the characteristics of the forger's own handwriting to enable him to be identified in this way.

The problem of exposing a forgery is further complicated by the existence of genuine signatures which have been deliberately written in an unusual manner so that they can be disowned by their authors at a subsequent date.

The first line of attack on a signature which is thought to be fraudulent is concerned with the document as a whole. This is examined with a view to the discovery of any anachronisms connected with the paper, printed matter, typescript or ink.

Paper may be given a limit of age through watermarks and the nature of the fibres included in its make-up and different inks, and in particular the dyestuffs they contain, have been brought into use at different times. Even typescript changes in design from time to time and every character on the typewriter keyboard serves to restrict the period during which a document could have been typed.

When nothing conclusive can be gleaned from the examination of the document as a whole, attention must be directed to the signature itself.

By anyone but the novice, a signature is written with but little attention being given either to spelling or to the details of letter formation. The attention of most people is directed more to what they are signing rather than on how they are forming the letters which make up their signature. The signature, above all others, is the one word which is written automatically and without conscious thought as to its production.

Very often the pen point is in motion before it is placed on the