OTHER PEOPLE'S LAW. By Lord Kilbrandon. [London : Stevens & Sons. 1966. x + 119. 27s. 6d.].

"Other People's Law" is the title of the Hamlyn Lectures delivered in 1966 by Lord Kilbrandon. He is a very distinguished lawyer of Scotland and is currently the Chairman of the Scottish Law Commission. Reading these lectures one gets the strong impression that Lord Kilbrandon is both, by vocation and by instinct, a legal reformer.

In his first two lectures, Lord Kilbrandon expounds the theme that the tort of negligence, with its basis of liability resting on a moral concept of fault, is inadequate to deal with the myriad of accidental injuries that occur in and seem a permanent and ineradicable feature of our modern societies. This is not an original theme. Although the diagnosis is not original, the prescription is a drastic one. Lord Kilbrandon proposes the creation of a comprehensive social insurance scheme, or the extension of existing schemes, to include all injury by accident, however caused. This comprehensive insurance scheme will be compulsory and will not permit any contracting out. It will replace civil actions for negligence but not prosecutions for such faults as dangerous driving or breaches of the regulations under the Factories Acts. Indeed, Lord Kilbrandon is in favour of taking a stricter view of those offences although he thinks it may be desirable to set up special courts to deal with them.

The third and fourth lectures are devoted to issues in the criminal law and procedure. Lord Kilbrandon starts off by reminding us that when an accused is acquitted at the conclusion of a criminal proceeding, either a guilty man has escaped, and the machinery of crime prevention has in that instance broken down, or an innocent man has been wrongly arraigned, to his grievous and undeserved injury. What are the injuries which the acquitted man would have suffered? He would have incurred expenses in securing the services of a lawyer. He would have undergone mental agony. His reputation might have become tarnished in the eyes of the public even though he was acquitted. Kilbrandon puts this last point more strongly, perhaps too strongly. He says:

> The public, accordingly, takes the view that, so far from there being a presumption of innocence, the man in the dock has been put there because he is believed to be guilty, and if the public is not right, then the public ought to be right. To say that a man who is believed to be guilty is presumed to be innocent is a sophistry.

With that assumption, Kilbrandon poses three questions:

(1) Upon whose belief in the guilt of the accused is the action of placing him before a court to be taken?

(2) What pre-trial procedure will have the effect of bringing the guilty and only the guilty to trial?

(3) What kind of trial will best ascertain the truth?

In answer to the first question, he observes that in England, for all but a small minority of serious crimes, it is the police who decide whether or not to prosecute. He is critical of this situation because the police are not disinterested in the outcome of the proceeding. He says, ". . . those who have conducted the inquiries, whose reputations will to some extent depend on their bringing some person to book for every crime reported to them, and who will almost certainly have to give evidence in support of their conclusions, cannot, on this side of the Kingdom of Heaven, be expected to preserve that calm and impartial indifference to the decision of the court which should characterise the professional advocate responsible for conducting a prosecution's case." I think Kilbrandon's expectations of the kind of attitude which public prosecutors should have towards the results of their prosecutions are too idealistic. They are also likely to be actuated by a desire to secure convictions. One hopes that, being lawyers, they would have a stronger fidelity to the rules of the game and a greater competence.

In answer to the second question, Kilbrandon observes that in England, all persons who appear before juries for criminal trial have been committed by justices

or magistrates, who have satisfied themselves judicially, after hearing evidence, that the accused has a *prima facie* case to answer. In England, the committal proceedings are usually held in public. Kilbrandon is critical of this feature for two reasons. First, potential jurors, having read the committal proceedings in the newspapers, are likely to be influenced. Secondly, injustice may be done when the magistrate, after a public hearing, refuses to commit for trial. This is because the public would have heard evidence accusatory of an innocent man. Kilbrandon prefers the Scottish system where the whole preliminary inquiry takes place in private. He also points out the merit of the French procedure, for the "L'instruction criminelle" ensures that an accused is not arraigned upon a serious charge in open court with all the attendant publicity unless and until a magistrate, after carefully and impartially investigating the facts, is prepared in effect to say that there is a sustainable case against him.

Kilbrandon is critical of the English practice of forbidding an accused from being interrogated by the police once he has been arrested. Kilbrandon doubts if the practice is required by the "Judges' Rules". He feels that it should be possible for an arrested man to be interrogated before a magistrate and in the presence of a defending solicitor. The interrogation would be recorded verbatim and the refusal to answer any question would be noted and could be made use of at the trial. The defending solicitor would not be allowed to take part in the proceedings as he is there to see that the proceedings are carried out in accordance with the rules.

Kilbrandon is also critical of the rule which prevents the prosecution from compelling the accused to give evidence. This rule is founded on the idea that a man should not be compelled to incriminate himself by giving evidence. Kilbrandon rejects the rule because, in his view, to make an accused a compellable witness for the prosecution — could not possibly prejudice an innocent person and it would facilitate the suppression of crime.

The author is critical of the rule that evidence of the accused's bad character, including his previous criminal record, is not relevant until after his conviction. Kilbrandon feels that the exclusion of such evidence from the jury and the judge is an insult to the capacity of the judge for impartiality. I do not agree for I think that even though a judge may appreciate intellectually the difference between treating such evidence as conclusive and treating it as merely relevant, the possession of such evidence is likely to jaundice the judge's view of the facts and in particular, of the truth of what the accused says in his defence.

It is true that this rule is not an absolute one and is relaxed under three circumstances. First, should the accused attack the character of a prosecution witness. Kilbrandon states, "it seems illogical to hold that if the accused take a certain line in his defence, then, as a kind of punishment, cogent evidence, which would otherwise have been excluded, will instead be admitted." I agree that there is a certain illogicality in this, but it is the qualifying circumstance which should be struck down, not the principal rule. It is also true that the accused's good character is relevant. Kilbrandon seizes upon this and argues that if evidence of the accused's good character is relevant, evidence of his bad character should also relevant. It seems to me that the argument of parity ignores the fact that in an English criminal trial, the scales of justice are not even, but are weighed in favour of the accused. Thirdly, Kilbrandon points out that similar fact evidence is relevant and admissible. Is there a rational justification for excluding evidence of the accused's bad character generally, but admitting evidence of similar facts? Professor Glanville Williams seems to think that the distinction is supported by common sense. He states in "The Proof of Guilt":

> If, for instance, a man is convicted of arson or a hayrick, he had better for his own safety avoid hayricks in future, for if he alone is near one when a mysterious fire breaks out, he has only himself to thank if he is charged with arson and if his previous conviction is given in evidence against him — as could probably be done, although the point has not been precisely determined. The probability that in such circumstance it was the convicted arsonist who started the fire is obviously very high. On the other hand, a convicted burglar is not expected to avoid passing near houses for it is impossible for him to avoid them; and if he is caught in the neighbourhood

> of a house in which a burglar has just been committed, his previous conviction is not generally evidence against him. It would be evidence, however, if there were marked similarities between his previous burglary and the one for which he is now charged.

To sum up, I would say that although I do not agree with all of Lord Kilbrandon's ideas for reform of the law, I was greatly stimulated by them. His lectures are worthy additions to the stimulating series of Hamlyn Lectures.

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