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Problems in the Modern Appeal in Civil Cases

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Prior to the Judicature Acts, 1875 (in which crystallized the statutory changes initiated in the first Common Law Procedure Act, 1852), there was no such thing as trial by a single judge without a jury in the common law courts of King's Bench, Common Pleas and Exchequer, which were merged into the King's Bench Division in 1880.[1] It is true that trial by a single judge without a jury had always been the custom in the Court of Chancery, but with this fundamental distinction, that in the latter court oral evidence had not been received until 1852.[2]

Under the old common law system in vogue for centuries before the Judicature Acts the jury found the facts on a special verdict, or brought in a general verdict by applying to the facts they found the law as given them by the presiding judge; but the judgment was given, not by the judge who presided at the trial, but by his court en banc at Westminster, subject to motions for new trial, and so on,[3] functions now performed by the Court of Appeal. The right of appeal on questions of law to the old Court of Error (the Court of Exchequer Chamber) was limited in scope.[4] During the forty-five years of

[1] O'Halloran, Right of Review and Appeal in Civil Cases before the Judicature Acts, 1875 (1949), 27 Can. Bar Rev. 46.
[2] *Ibid.*, pp. 47 and 61-4.
[3] *Ibid.*, pp. 53-7.
[4] *Ibid.*, pp. 57-61.

its existence (1830 to 1875) the last Court of Exchequer Chamber, as the common law court of appeal of its day, is estimated to have heard not more than eight hundred appeals of which some two thirds came up during the last half of that period. Out of that number of appeals it is said that there was a division of judicial opinion in less than fifty.

The establishment of the new Court of Appeal[5] was in itself one of the greatest — if not the greatest — single steps in the effort to co-ordinate the separate systems of Law and Equity. Composed of judges from the Chancery as well as the Common Law side, it was empowered to exercise appellate functions in appeals originating in all the courts welded into the Supreme Court of Judicature which included Probate, Divorce and Matrimonial causes, Admiralty matters and Bankruptcy from the London Court of Bankruptcy, as well as the Courts of Chancery and Common Law. A court of appeal of this type, to engage in no other duties than purely appellate work, seemed a natural step in the effort to blend the principles of Equity and Common Law and to ensure that the common and statutory law of England would be interpreted uniformly and administered concurrently.

The old Court of Error, the Court of Exchequer Chamber,[6] was not equipped to perform these functions, for it was constituted of common law trial judges, exercising only part-time appellate duties in common law appeals. Moreover it need hardly be stressed that the functions of appellate and trial judges are quite different. For one thing, a trial judge must devote a very considerable portion of his time to observation of the witnesses: their demeanour, personality, truthfulness, powers of observation; their ability to describe clearly what they have seen and heard; their judgment and memory. He must evaluate their opportunities of knowledge, their partisanship, candour, interest, bias, and so on, in a word, appraise innumerable living and often intangible factors that cannot be reproduced in the shorthand notes of a trial. Arguments on points of law before him tend to be less comprehensive and less analytical than in a Court of Appeal, where the leading and guiding decisions and their ingredients of judgment are analysed, contrasted and distinguished in relation to the facts of the matters in issue with all the advantages of the prior examination of the case before the trial judge. A man may be a very good trial judge but quite an inadequate

[5] *Ibid.*, pp. 46 and 64-6.
[6] *Ibid.*, pp. 57-61, 65-6.

appellate judge, and vice-versa. There is a marked distinction, not easy to put comprehensively into appropriate language, between the mental approaches to the decision of a case which a trial judge and an appellate judge acquire after they have served judicial apprenticeships in their respective courts.

It is also more in keeping with the modern conception of things that trial judges should not act as judges of themselves, which in practical effect was what the old courts en banc were doing. They naturally lacked an impersonal perspective when they came to adjudicate upon matters that were affected by the customs, practices, standards and traditions of their own court, many of which perhaps had originated with or were insisted upon by some forceful chief justice, who, before the Judicature Acts, had much greater control over puisne judges. Nor could the courts en banc escape the very natural dislike to "upset" their equals, and in turn to be "upset" themselves. It is said that a party was often led to go beyond the court en banc and obtain a review by a court of error because the judge at nisi prius frequently belonged to the court en banc which would hear the argument.[7] The existence of this element in a different form was long recognized in the custom that the court of error should not be composed of judges of the court in which the error originated.[8]

The jurisdiction of the Court of Appeal to substitute its own verdict for that of the jury in cases where there has been no misdirection arises when the verdict of the jury is "perverse", that is, where the testimony is of such a character that, even if the jury accepted all the evidence favourable to its verdict, the only rational legal view of its effect points in one way only, to a verdict different from that which the jury reached.[9] This is another way of describing a "perverse" verdict, as one that no jury acting rationally could reach on the evidence it could accept to support the verdict it has given.

By the expression, the "weight of the evidence is for the jury", is here meant that there are at least two conclusions open to the jury, depending on what testimony or combinations of evidence they could reasonably accept together with legitimate inferences from them. The formula "against the weight of evidence" is sometimes used as a ground for intervention by an appellate court, but the latter's jurisdiction to do so has come

[7] Stephen & Pinder: Principles of Pleading (1860), p. 79.
[8] (1949), 27 Can. Bar Rev. at pp. 58-9.
[9] *Paquin, Lim* v. *Beauclerk* (1906), 75 L.J.K.B. 395 (H.L.); *Canada Rice Mills Ltd. v. Union Marine etc.*, [1941] A.C. 55, at p. 65 (P.C.); and *Jardine v. Northern Co-operative T. & M. Ass.* (1945), 61 B.C. 86.

to be limited to cases where the jury's verdict is so plainly contrary to the weight of evidence it could accept that the verdict must rationally be regarded as unreasonable and hence "perverse". There are many cases upon the question, founded upon the House of Lords decisions in *Metropolitan Railway Company* v. *Jackson*[10] and *Metropolitan Railway Company* v. *Wright.*[11] In the latter case Lord Halsbury said:

> If reasonable men *might* . . . find the verdict which has been found, I think no Court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to Judges. (my italics)

Perhaps it has never been stated better than by Sir Lyman Duff, Chief Justice of Canada, when he said in *McCannell* v. *McLean:*[12]

> the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

The effect of all this is that when there is no misdirection the finding of the jury must stand unless it is "perverse". However, it is much easier to state the proposition in the abstract than to apply it satisfactorily in practice. For what seems reasonable to a court of appeal may not seem reasonable to a jury. Evidence carrying little weight in the minds of the court of appeal may have assumed directing importance in the composite mind of the jury. Evidence that seems trivial in the mechanical and emotionally unrevealing typewritten transcript before an appellate court may, because of the demeanour of the witnesses and the atmosphere surrounding living persons giving testimony in a trial court, have conveyed to the fact-finding tribunal an intangible, but nevertheless accurate, appreciation of the evidence as a whole, which is necessarily denied a court of appeal. These considerations apply with greater force to a second appellate court, since the latter is so much further removed from the current and pulsing conditions of everyday life, and to that degree may be less able in the public mind to decide upon the preponderance of probabilities, which is enough to justify a judgment in a civil case.

But perhaps the most unexpected consequences of the Judicature Acts were the development of trials by a single judge without a jury and the problems it created in the two appellate courts, the Court of Appeal and the House of Lords. It may well be doubted that a generation born into a tradition of cen-

[10] (1877), 47 L.J.Q.B. p. 303.
[11] (1886), 55 L.J.Q.B. 401.
[12] [1937] S.C.R. 341, at p. 343.

turies of common law trials before juries could ever have contemplated the modern results in expense, delay and uncertainty produced by appeals from trials before a single judge without a jury. In 1935, of some 1400 actions tried in the King's Bench in London, it is said about 300 were tried before juries. I have no Canadian statistics but it is easy to believe that the percentage of jury trials is even lower in Canada. When the present development of trial by a single judge is contrasted with the old system of courts en banc, there is much to be said in favour of the opinion of those who hold that the modern method tends increasingly to weaken the authority of judicial decisions in the minds of a public whose standards of education and general knowledge are becoming wider and more critical. Contributing factors to this result are (a) the magnitude of the initial burden imposed on the trial judge, and (b) the uncertainty surrounding the conditions under which the court of appeal and a second appellate court interfere with findings of fact by the trial judge.

The magnitude of the duty imposed on the trial judge is readily perceived from the circumstances that, whereas under the old system the jury found the facts on a special verdict or brought in a general verdict applying the law to the facts they found, and the court en banc of several judges gave the appropriate judgment or directed a new trial, under the new system the trial judge alone has to find the facts and apply to the best of his individual ability the governing principles of law. The trial judge has now to undertake the combined functions formerly exercised by the jury and the court en banc under the old system. With the decreasing frequency of juries, single judges, under great pressure of trial work, struggle, unaided by judicial brethren, to give judgment on important and complex points of common and statutory law, having attempted first without the assistance of the composite human wisdom that resides in a jury to extract and assess the facts to which the law must be applied. This burden is the greater, and the authority of the decision is necessarily less, in the case of trial judges of only a few years experience on the bench, who have not yet, so to speak, reached judicial maturity.

That a single judge (even a judge of may years trial experience) is equal to a jury in finding facts and assessing damages in the multiple situations of daily life that find their way into the courts is on balance gravely to be doubted. The majority of these situations are well within the knowledge and experi-

ence of the members of a jury. A common form of question is, who is to blame in a motor or other accident. The jury, reflecting the public mind, are well equipped to answer. But the judge may drive a motor car only occasionally; he may be an elderly man with his own fixed ideas about driving motor-cars and not in touch with customs and practices that have proved their value in current common usage. In assessing general damages, the jury are more likely to understand the things affecting the circumstances and conditions of life of the great majority of people than a single judge who is expected to be removed by his office and position from the types of stresses and strains that enter so deeply into their daily lives. If it is a question of damages for fraudulent misrepresentation, the jury's knowledge of every-day business practices is necessarily superior to that of a single trial judge whom the public expect to stand apart from the commercial arena. Moreover, try as he may, a judge can never see things with any eyes except his own.

Lord Macmillan wrote that law

> has to do, not with scientific axioms or scientific formulae, but with the every day concerns of ordinary citizens. The raw material of the cases that come into Court, is composed of the struggles and rivalries, the desires and emotions to which human relationships give rise. This material cannot be analyzed with the cold precision of the chemist in his laboratory. Considerations of equity and expediency mingle themselves with the exact matter of the law; justice cannot be laid to the line or equity to the plummet.[13]

A jury is a constantly changing tribunal. It is drawn out of the vortex of daily life, and is endowed with the superior advantages that entails when faced with the duty of finding the facts in the currently existing conditions. And for that very reason also the inferences it may draw from the facts it finds possess an authoritative degree of legitimacy, common acceptance and probable truth. The great advances in literacy, general education and knowledge of the world among the general public, contrasted with seventy-five years ago when the Judicature Acts were passed, cannot be forgotten in considering the value and authority of the jury system at the present day.

The jury is the nation in miniature. Through the members of the jury the people take their responsible part in the administration of legal justice. The jury system tends to stability of government and the permanence of free institutions. Through the jury, when properly instructed in legal principles by the presiding judge, the people continue aware that the law is not

[13] Law and Other Things (1937), p. 174.

a code of sacred mysteries understandable only by a cloistered few but a living thing reflecting their own customs, habits, traditions and free institutions. If legislatures, composed of ordinary citizens, are able to enact laws to govern their fellow citizens, it would seem equally fitting that the facts to which those laws must be applied should be found and appraised also by ordinary citizens, in their capacity as members of a jury. Murder trials and important libel actions arousing great public attention are illustrations of the highly important rôles that can be performed satisfactorily only by juries. The jury system is a vestigial remnant of the pre-Norman conception of popular courts and popular justice in the ancient times when the people conducted the judicature as well as the finance and politics of their community.

No discussion of this subject is complete without citing Blackstone's appraisal of the value of the jury system in his day:

> But in settling and adjusting a question of fact, when intrusted to any single Magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. *Here therefore a competent number of sensible and upright jurymen, chosen by lot from among those of middle rank, will be found the best investigators of truth and the surest guardians of public justice.* . . . This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.[14]

Although Blackstone wrote this between 1765 and 1769, it is a fair inference that if he had changed his mind after he became a common law judge in 1770 (he died in 1780) he would not have permitted it to have been transmitted unaltered to posterity. Blackstone developed the idea further by illustrations from his own day of the inevitable trend towards what we call totalitarianism, wherever the jury system is abandoned. It was apparent in Blackstone's time, as it ought to be apparent still, that the jury system is one of the main props of the Common Law. If the law has to be bent or shaded by existing factual conditions it is much better that it be done by the sworn representatives of an enlightened people rather than by a single judge who, although he has been an able counsel or a successful practitioner, may nevertheless come to the bench ill-equipped with that combination of experience of life, temperament, mental

[14] The Commentaries (Draper ed., 1898), Vol. 3, p. 380 (my italics).

industry, general education and knowledge essential to maintain the high tradition of the Common Law, which regards the law as the great regulator of human relationships. Important as knowledge of case law may be, it is of little use if it is not applied to the current conditions of life according to time-honoured standards of reason and common sense.[15]

This is of fundamental significance when we reflect that the function of the jury, which the single trial judge is now so often called on to undertake, is the determination of matters of fact and the application to those facts of the correct principle of law. But what is "fact"? Many legal writers, Stephen, Holland, Markby, Best and Bentham among others, have attempted definitions. It may often be easier to say what a thing is not than to say what it is. Often the best definition appears in a description. What is "fact" lies in the conception that a thing is existing or true. It is not limited to what is tangible or visible or to what is only perceptible directly by the senses;[16] things invisible, mere thoughts, intentions, fancies of the mind, when conceived as existing or true, are conceived as facts. "The state of a man's mind is as much a fact as the state of his digestion" said Lord Justice Bowen. All inquiries into the truth, the reality, the actuality of things, are inquiries into the facts about them. It is thus that opinion, prejudice, emotion, actual experience of life, intuitive influences, "hunches" and other mentally formative influences, from which no human being is wholly immune, project themselves unobtrusively into the mental processes by which the facts in issue are interpreted and judged.

The jury are in a superior position to notice without proof much that is assumed as known to all men. Mr. Justice Cardozo said that in each of us there is a stream of tendency which gives coherence and direction to our thought and action and

> Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them — inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, conception of social needs . . . which, when reasons are nicely balanced, must deter-

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[15] The thought is exemplified also by the thousand odd lay magistracies in England and Wales, composed of benches of men and women untrained in the criminal law and dependent on the advice of their clerks. Ordinary citizens are thus provided with a valuable part in the administration of the law and in the exercise of its influence in the social life of the country. These lay magistracies dispose of more than three hundred thousand cases annually; some three per cent only of the cases go to the higher Courts of Quarter Sessions and Assize: see Sir Leo Page, Justice of the Peace, The Quarterly Review, January, 1949.

[16] J. B. Thayer, Evidence at the Common Law (1898), p. 191.

> mine where choice shall fall. In this mental back-ground every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought. . . .[17]

The jury system has long provided assurance that these intangible factors, which so often sway judgment of fact, shall not be the product of one mind and one type of mind only, but the composite product of many minds.

What is "fact" is further complicated by the usage giving to the judge sitting with a jury the privilege of deciding certain types of issues by calling them questions of law. Two examples are given. In the draft English Criminal Code of 1879 (which was never enacted into law) the question whether an act done or omitted is an attempt or only preparation was described as a question of law (as section 72 (2) of the Canadian Criminal Code still provides). Lord Chief Justice Cockburn protested in writing to the Attorney-General that the question was essentially one of fact.[18] Again, the construction of writings is usually held to be a question of law. But one would think that this ought to depend on the nature of the writing and whether the writer had been trained in law. To describe the construction of writings as a question of law in all circumstances (Lord Brougham criticised this in 1828) is to confuse the meaning of "law", and in some cases to pervert the language. English is said to be one of the least precise of languages, and when we bear in mind the colloquialisms, slang, ungrammatical usages, commercial idioms and new expressions constantly imported into accepted daily use, and the current widespread high-school and university education of the general public, it is highly doubtful, to say the least, that in non-legally drawn documents the judge can obtain as complete an understanding of the meaning of the loosely spoken and written language of our day as the members of the jury who pass their lives in that linguistic atmosphere.

To define the jury's function simply as determination of the facts is a classic example of over-simplification. The jury's most important function is to apply legal principles to the facts they find. The jury does this when they find a general verdict as they are entitled to do at common law. It is this special attribute of the jury that has done so much to preserve and develop the common law as we have it. Unfortunately not enough has

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[17] The Nature of the Judicial Process (1925), p. 12.
[18] J. B. Thayer, Evidence at the Common Law (1898), p. 202.

been said about this gravely important duty. Austin said what every judge finds out for himself, that the real difficulty lies in determining, not what the law is nor what the facts are, but how the appropriate legal principles are to be applied to the facts in the given case. This may be a critical test of judicial judgment in judge or jury. To adapt the principles of law flexibly to the every-day problems produced by the quickly changing conditions of modern life is hardly a task for the average case-ridden judge. To apply to the facts the available legal principles as stated by the presiding judge is more fittingly the work of common sense laymen who serve on juries, and who are equipped to meet that responsibility in the same fashion they face other responsibilities of life, such as war, business, domestic complications, community service and public life in all its phases. It is thus that the interpretation and administration of the law may be kept in harmony with the needs of contemporary society.

The foregoing reflections upon what "fact" is, and upon the basic duty of the fact-finding and law-applying tribunal, project themselves into the court of appeal when it is called on to determine whether a given question is an appeal in law or in fact, and also when it becomes important to decide how far it may interfere with the findings of fact of a trial judge sitting alone.

In questions of law, decisions of a single judge under the present system can hardly be expected to obtain the respect accorded that of three or more judges under the old system of courts en banc. The modern system does seem to place upon single trial judges too great a burden to be borne by one human being. That, as contrasted with the old system, it tends towards accuracy in findings of fact and towards increased wisdom in the application of legal principles to these facts must remain doubtful in the majority of cases. That it tends more than the old system towards error in conclusions of law can hardly be doubted. In consequence it must be regarded as tending generally to unwisdom in trial judgments. By thus increasing the opportunities for error in law and fact in trial judgments the present system also increases the occasion for appeal. It thereby weakens the authority of trial judgments and sacrifices correspondingly the prestige of the courts of first instance in the public mind. It tends to force litigants into delays, inconvenience and expense of many appeals, which were unnecessary under the old system, and is productive of a public feeling of lack of confidence in the courts.

The position of a court of appeal upon an appeal from a trial

judge sitting alone without a jury, involving fact or mixed fact and law, is far from happy. The appeal on questions of fact and mixed law and fact, which the Judicature Acts envisioned, raised from the beginning the problem of how far the Court of Appeal could go in interfering with findings of fact by a tribunal which had seen and heard the witnesses,[19] It was further complicated by Marginal Rule 865 (Order 58, Rule 1) as re-stated in the rules of the Supreme Court of Judicature 1883, which provides that all appeals shall be "by way of re-hearing".[20] A re-hearing, in the ordinary sense of the term, is a trial de novo, that is to say, calling the witnesses to give their evidence again. Manifestly it was never intended that witnesses should be called to give their evidence again in the Court of Appeal. No doubt it was intended that a transcript of all the testimony and record of the trial should be laid before the Court of Appeal, which should have power to grant a new trial, and power also within certain limits to substitute its own view of the facts (direct or inferential) disclosed therein, and then to apply the correct law to the facts so found and give the judgment that the court of first instance ought to have given.[21]

These limits were not defined or even indicated, but were left to the Court of Appeal to work out if it could. Whatever those limits may be, they impose themselves and cannot be escaped. The danger is that they may be expanded too far or restricted too much, with the further danger that whatever is done may vary with the outlook of the personnel of the court as constituted on the particular appeal. Marginal Rule 865 of the Supreme Court of Judicature Rules, in describing the modern appeal to be "by way of re-hearing", may have been adopting the term "re-hearing" in the sense long used in the Court of Chancery.[22] But when oral evidence was allowed in Chancery hearings in 1852 the whole picture changed. Under the Judicature Acts system, whereby actions may be tried and disposed of by a single judge sitting without a jury, the problem of how far a court of appeal can "re-hear" a case when it does not see and hear the witnesses has become intensified, until today, by reason of the delays and excessive expense it occasions, it is not an exaggeration to say that it offers one of the major threats to the continued use of the civil courts by the people at large.

It is in truth a misnomer to describe a court of appeal as a

[19] (1949), 27 Can. Bar Rev. at p. 66.
[20] Wilson's Judicature Acts (1888).
[21] (1949), 27 Can. Bar Rev. at pp. 64, 66.
[22] (1949), 27 Can. Bar Rev. at pp. 62-63.

court of "re-hearing". For it does not see and hear the witnesses, except on the rare occasions when fresh evidence is admitted requiring witnesses to give their testimony before the court of appeal. Depending a great deal upon the outlook of the individual judges who constitute a court of appeal at any given time, the court is caught in certain tendencies not always easy to describe. A very human reaction, with an attraction for tired or very busy judges, is in principle not to interfere with the factual findings of the trial judge unless the defects in them are admittedly of the most glaring character. The verbal expression of this tendency may be found in decorative and quotable general observations regarding the duty of appellate courts. To the extent that it may prevail it reduces to the minimum the opportunity for successful appeals in questions involving fact or mixed law and fact. For the real and most common errors of fact are not likely to be of a glaring character, since the trial judge is apt to discover these for himself. The most potent type of error to seduce the mind of a single trial judge lies in the faulty association of circumstance and fact, and the placing of undue emphasis upon some fact or circumstance. Errors of this latter description, from which few single minds can hope to remain immune, are not apt to appear in their dominating effect without a thorough examination of the evidence coupled with reflective consideration by several judicial minds.

Another tendency is for the court of appeal to make thorough examination of the trial judge's findings of fact, all the while warning itself that it has not had his opportunity of seeing and hearing the witnesses, so to speak now advancing toward, now retreating from, interference. It is somewhat in the position of a rider trying to force his horse over a fence which he is not confident the horse can jump. These tendencies have doubtless contributed to a certain vogue for the formula that the court of appeal will not reverse the trial judge unless it is satisfied that he was "clearly wrong". But on closer examination this formula appears to deal with only half the problem. The onus is on the appellant to show that the trial judge was "clearly wrong", as for example that the judgment runs plainly counter to the preponderance of probabilities appearing in the testimony. If the appellant fails to do so to the satisfaction of the court of appeal, then no difficulty is found in dismissing the appeal in the terms of the formula.

But should the appellant present his case in a manner to impress the court of appeal that he may be right, then it seems

to be rationally impossible[23] for a court of appeal to conclude that the trial judge was "clearly wrong", unless it first forms its own view of the balance of probabilities furnished by the evidence. But unless it projects itself into the trial judge's judgment seat, it cannot do so with any degree of certitude except on occasions where the trial judge has been glaringly mistaken. Here may lie the seat of the difficulty, for the trial judge's findings are necessarily governed by his appraisal of the testimony and personality of the witnesses he has seen and heard and the court of appeal has not. It is not only his opinion of their appearance of truthfulness; but also of their powers of observation, description and memory, their own certainty of the reliability of their powers of observation and memory; their neutrality in the case, their candour, and their unconscious leaning toward one side or the other; their judgment, their characteristics of over-statement, under-statement or of careless statement; in short, their general truthworthiness as witnesses of what they have seen and heard.

For a court of appeal in the light of these things to say judicially that a trial judge is "clearly wrong" must require it, in many cases, to disregard evidence in the form of these intangible factors, which are not before it. The transcript before it cannot reproduce the living atmosphere of the trial. Over-eagerness, hesitancy, astute avoidance of direct answers, extreme deliberation in answering vital questions may cause distrust of one witness while the same characteristics in another witness may lend confidence to his testimony. So much depends upon the individual personality. One witness caught in an incorrect statement may not suffer in his test of trustworthiness, while another caught in the same way may be regarded as wholly untrustworthy. Numberless small and seemingly trivial circumstances, added, subtracted or contrasted, combine cumulatively to aid the trial judge in determining upon which side lies the preponderance of probabilities. What has been said applies with equal force to inferences drawn by the trial judge. Findings of fact, colored by any of these characteristics of testimony, naturally colour the legitimate inferences from it. The trial judge in a civil case is concerned with the preponderance of probabilities. He arrives at that through the medium of his appraisal of the personality of the witnesses, his evaluation of their evidence related to

[23] This feature could be developed at some length. It is sufficient to say here that it is based upon the distinction in the degrees of proof which support judgments in civil and criminal cases respectively.

other testimony in the case and his inferences from these sources.

It does not follow that in no case can the court of appeal safely overrule the trial judge in questions of fact or mixed law and fact. But the circumstances previously outlined make it difficult to do so except when the court of appeal is satisfied that the evidence not before it (by which I mean the intangible factors that cannot be reproduced in the shorthand notes of the proceedings at trial) could not rationally affect the conclusion it finds itself obliged otherwise to reach. But except in glaring cases this is so much a matter of opinion that the view of the court of appeal is apt to vary with the experience and outlook of the members who constitute the quorum at any given time. This tends to uncertainty, and may easily be the occasion of numerous appeals which would not otherwise be taken.

The modern system encouraging findings of fact by a single judge is subject to inherent weaknesses not found to the same marked degree in findings of a jury; nor do opportunities exist as in the old system for correcting these weaknesses before judgment. But the "clearly wrong" formula tends to surround correction of these weaknesses on appeal with so many obstacles that, except in the most glaring cases, a trial judge's finding of fact is to a large extent protected from successful attack on appeal by very reason of its infirmities. The tendency of the court of appeal is to be governed by the circumstances that the trial judge has seen and heard the witnesses while it has not; and therefore, even though it may be inclined to hold that the trial judge was wrong in his final conclusion, nevertheless, unless some glaring or easily discernible defect appears which may render the decision "perverse" (one that no judge acting rationally could reach judicially), it is led to say resignedly that it cannot hold he was "clearly wrong".

The difficulty of the court of appeal is increased when the trial judge bases his findings on credibility; for example, when he says "I believe the plaintiff, and it is on his evidence I decide the case". Is the court of appeal then to say that the finding must not be upset, or shall it inquire if the trial judge tested his opinion of the plaintiff's credibility by the probabilities existing in the case? If the trial judge believed the plaintiff he must have disbelieved the defendant or his witnesses. Shall the court of appeal accept that as final or shall it also examine whether the judge tested that finding by the existing probabilities? This discussion of course does not apply to cases where no surrounding circumstances exist to furnish a test of probability of the truth or untruth of the evidence of a witness.

If the trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness-box, we would have a purely arbitrary finding and justice would then descend upon the best actors in the witness box. On reflection, one must realize that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors previously mentioned, combine to produce what is called credibility.[24] A witness may by his manner create a very unfavourable impression of his truthfulness upon the trial judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried a conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. A witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say, "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind. The trial judge ought to go further and say that the evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a court of appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

Mr. Justice Stephen put it in another way:

> . . . the *utmost result* that can in any case be produced by judicial evidence is a *very high degree of probability*. . . . The highest probability

[24] Cf. *Raymond v. The Township of Bosanquet* (1919), 59 S.C.R. 452, at p. 460.

> at which a court of justice can, under ordinary circumstances, arrive *is the probability* that a witness or a set of witnesses tell the truth when they affirm the existence of a fact. . .[25]

There is high authority to support the foregoing, namely a case in the House of Lords in 1935 to which Lord Greene M.R. alluded in *Yuill* v. *Yuill*[26] and described as inadequately reported. The case was *Hvalfangerselskapet Polaris A/S* v. *Unilever Ltd.* The trial judge had disbelieved material witnesses and found that their evidence was invented on the spur of the moment. In the Court of Appeal, Scrutton L.J., in giving the leading judgment, said the trial judge had seen the witnesses and heard the conflicting testimony and it was "impossible for this court to interfere with this finding".[27]

The House of Lords did interfere. It said that the strictures passed by the trial judge on the two witnesses were unjustified and (contrary to what the trial judge had found) it held that their evidence was truthful. The House (Lord Atkin presiding) came to this conclusion because it was satisfied that the evidence of the witnesses disbelieved by the trial judge was

> *entirely consistent with the probabilities* and the business conditions proved to be in existence at the time.[28]

Commenting on the *Unilever* case in *Yuill* v. *Yuill*, Lord Greene said that it showed how important it is that the trial judge's impressions on the subject of demeanour should be carefully checked by a critical examination of the whole of the evidence, and added that, if the trial judge in the *Unilever* case had done so, as was done in the House of Lords, then he could not have disbelieved the witnesses as he did. The *Unilever* case was decided by the House of Lords in 1933, but two years later in another case, *Powell* v. *Streatham Manor Nursing Home*,[29] the House came to a decision difficult to reconcile with the *Unilever* case, not then discussed.

The *Powell* case, which is constantly cited in Canadian courts, leads one to believe, and it is cited by counsel for that purpose, that once a trial judge says he believes a witness, there is an end of the matter, except for a document or some plainly indisputable fact or circumstance pointing conclusively to the contrary. Although in the *Powell* case the majority in the House of Lords did not in so many words say that the Court of Appeal

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[25] General View of the Criminal Law (1890), p. 191 (my italics).
[26] [1945] P. 15; approved generally in *Watt v. Thomas*, [1947] A.C. 484.
[27] *Ibid.*, at pp. 20-21.
[28] *Ibid.*, p. 21 (my italics).
[29] [1935] A.C. 243; 104 L.J.K.B. 304.

was wrong in principle in setting aside the trial judge's finding of credibility on the ground of "glaring improbability", yet, since the five members of the House (except Lord Wright and to a brief extent Lord Blanesburgh) did not see fit to examine the probabilities as was done in the *Unilever* case, and by its sweeping declarations concerning the impregnability of a finding of credibility by a trial judge who has seen and heard conflicting witnesses and by its acceptance without comment of the trial judge's failure to examine the probabilities in relation to his finding of credibility, the House of Lords succeeded in conveying the over-all impression that it did not act upon the principle of testing credibility expounded in the *Unilever* case. Even Lord Wright went so far as to say "the Judge has found that her story is true in fact: that finding must not be upset".[30] This is as much as to say that because the trial judge believed the plaintiff it ended the matter, an implication very like what Scrutton L.J. said in the *Unilever* case, which the House of Lords overruled.

The *Powell* case was a pure question of fact and the Court of Appeal decision was not reported for that reason. The question narrowed to whether the puncture of Mrs. Powell's bladder was caused by the doctor when operating, or by the nurses of the defendant nursing home when using a catheter in her within thirty hours after the operation. The doctor testified that the puncture did not happen during the operation. Mrs. Powell laid the blame on the two nurses, who denied it; the nursing home supported the nurses and contended that any injury to Mrs. Powell arose during the operation. The trial judge, after a nine-day trial, said he believed Mrs. Powell "and it is on her evidence I decide this case". He awarded her £2500 damages and her husband £977. The trial judge, according to Lord Blanesburgh, relied on the doctor's evidence as "the buttress, if not the pillar, of his judgment". The Court of Appeal unanimously regarded the doctor's evidence as "a mass of inconsistency and improbability" and set aside the judgment.[31]

The House of Lords restored the trial judgment. Three members of the House of Lords made no inquiry into the inconsistencies and improbabilities of the doctor's evidence, which had governed the Court of Appeal decision, but rested their conclusion on the circumstance that the trial judge, having seen and heard the witnesses and having said whom he believed,

[30] (1935), 104 L.J.K.B. at p. 317.
[31] *Ibid.*, at p. 318 (Lord Wright).

it was impossible to disturb his judgment. Lord Blanesburgh described the doctor's conduct briefly as "incomprehensible" and Lord Wright, in a more extended examination of the evidence, called it "curious"; but both law Lords joined nevertheless in the above stated reasons of the majority for reversing the Court of Appeal.

There were five circumstances that surrounded the doctor's evidence with inconsistency and improbability[32] and undermined Mrs. Powell's evidence, which owed its strength to the evidence the doctor gave: (1) Mrs. Powell remained in the nursing home for some three weeks after the incident, but neither during that period nor until more than two years had elapsed did she make any complaint to the nursing home. She had been paying her bill by instalments and it was not until a debt collector called over two years later that she made a complaint, but the complaint (abandoned at the trial) concerned a hernia only with no suggestion whatever, even then, of a punctured bladder; (2) the doctor who was in constant association with the nursing home for more than two years after the operation did not during that time complain to the nursing home or to the nurses regarding improper treatment of his patient; (3) eminent medical men testified that rupture of the bladder by an india rubber catheter was admittedly impossible and that no such rupture by a gum elastic catheter had ever been known; (4) the delay in making the complaint made impossible the production of Mrs. Powell's temperature charts and the catheters actually used, which might well have ended the case; (5) the trial judge did not examine the four circumstances just recited.[33]

In Lord Wright's speech[34] it appears that the doctor essayed an explanation of No. 2 above which the trial judge accepted at its face value in these terms:

> the doctor's desire not to encourage her [his patient, the plaintiff] in any way to make a claim against this home, with which he was himself associated, and of which Mr. Hogg, who was a great personal friend of his and with whom he had been away for two holidays, was the secretary. I have seen the witnesses and accept their evidence as to the delay.

But the error of the Court of Appeal in rejecting this explanation as inconsistent and improbable was not rationalized in the House of Lords. Analysis of the case indicates no weak support for the Court of Appeal's viewpoint. First, there was the circumstances that the doctor could have told his "great personal

[32] *Ibid.*, *per* Lord Blanesburgh at p. 309.
[33] *Ibid.*, at p. 309.
[34] *Ibid.*, at p. 317.

friend", the secretary, of the incompetence of the nurses without telling his patient, the plaintiff (in that way he would not have "encouraged" her to make a claim against the nursing home). Secondly, the circumstance that he was so friendly with the secretary would have made it easier to tell the latter what the nurses did, in order to protect the nursing home against the nurses doing it again to other patients. Anything that harmed the nursing home harmed his association with it and tended to injure his reputation as a medical man. His friendship with the secretary would have been an added incentive to protect the latter. Thirdly, he explained that he did not tell his patient that her bladder was punctured, so that she would not make a claim against the nursing home with which he was "associated". In the conflict between his duty to his patient and his association with the nursing home he professed to choose the latter. In doing so he disclosed his own standard of duty and provided a foot rule to measure his credibility and trustworthiness as a witness in a case where his own self-interest depended so much on the evidence he might give.

With the actual result of the litigation in the *Powell* case this paper is not concerned, but as a constantly quoted example in Canada of the finality to be attached to a finding of credibility by a trial judge it has been analyzed here for two reasons. First, the case is an illustration of delay and expense where a question of pure fact was involved; it went through two appellate courts; the judgment of the House of Lords was delivered nineteen months after the trial judgment; and it is not without significance that the appellant finally reached the House of Lords *in forma pauperis*.[35] It is true that not a few cases in Canada may experience greater delay. Secondly, it illustrates the uncertainty regarding the principles that lead appellate courts to disturb or not to disturb findings of fact by a trial judge. It is not too much to say that the *Powell* case has added to that uncertainty in Canada. It placed final emphasis on a bare finding of credibility by the trial judge, in the face of an unanimous decision by the Court of Appeal that the finding was founded on a "mass of inconsistency and improbability", and it contains an approach to credibility difficult to reconcile with the House of Lords decision in the *Unilever* case as examined and applied by Lord Greene M.R. in *Yuill v. Yuill.*

[35] *Fairman v. Perpetual Investment Building Society* (1923), 92 L.J.K.B. 50, reached the House of Lords *in forma pauperis*. In *Lowery v. Walker*, [1911] A.C. 10, and *Donoghue v. Stevenson*, [1932] A.C. 562, the costs in the House of Lords were awarded on the *in forma pauperis* scale.

Moreover in *Watt v. Thomas*[36] Lord Thankerton, in giving the leading judgment (Viscount Simon dissenting in the result) and approving *Yuill v. Yuill*, said that the value and importance of hearing and seeing the witnesses will vary according to the class of case and, perhaps, according to the individual case before the court. The decisions thus far seem to result in this, that the principles which should guide an appellate court in interfering in the particular case are left in uncertainty; when the Court of Appeal feels it ought to interfere, the House of Lords may think that it should not (the *Powell* case), and when the Court of Appeal thinks it is "impossible" to interfere, the House of Lords may think it should have done so (the *Unilever* case). Again, it may be that the conflicting witnesses (*Watt v. Thomas*, a divorce case) are so inflamed by their emotions that the law has no foot-rule to measure their credibility; in other words that their demeanour or appearance of truthfulness or lack of truthfulness cannot safely be accepted as an element in appraising the credibility of their evidence.

It all produces uncertainty, expense and delay which cannot but weigh heavily in the public mind against a system of judicial administration of justice that countenances it. No one would attribute these weaknesses to lack of ability in the Court of Appeal or the House of Lords. But they lend support to an underlying point in this paper, that in asking appellate courts to sit in appeals on fact under present conditions the legislatures are imposing on them a duty beyond human competence to perform with any degree of judicial finality. Lord Wright said in the *Powell* case:

> I think that it is difficult, *if not impossible*, to seek to lay down any precise rule to solve the problem which faces the Court of Appeal when it has to act as a judge of fact on the re-hearing, but finds itself 'in a permanent position of disadvantage as against the trial Judge'.[37]

If by some twist of fate the three Lord Justices in the *Powell* appeal had been sitting in the House of Lords at the time, it is to be expected that a different decision would have resulted in that case of pure fact. A remedy recommended by the pre-Judicature Acts system is to strengthen the courts of first instance and abolish appeals on fact.[38] If the *Powell* case had been tried before a jury (for some unstated reason the jury was discharged after the first day upon the joint request of the parties), its verdict would very likely have ended the case unless some

[36] [1947] A.C. 484.
[37] (1935), 104 L.J.K.B. at p. 316 (my italics).
[38] (1949), 27 Can. Bar Rev. at p. 49.

misdirection occurred. Or if it had been possible to try it before a bench of three trial judges without a jury, and with no appeal on fact, that would definitely have ended the case.

The opportunity for two consecutive appeals in England and in Canada (actually three in Canada, unless and until appeals to the Judicial Committee from the Supreme Court of Canada come to an end) can hardly be viewed without concern. It favours the rich at the expense of those who are not rich. A corporation or a rich individual can afford it, but even a person of moderate means cannot. The very poor may reach the Judicial Committee *in forma pauperis*, but it may be doubtful if the same avenue is open to the Supreme Court of Canada. When the Judicature Act was first introduced in 1873 by Lord Selborne, then Lord Chancellor, it was not proposed that there should be more than one appellate court, for it withdrew from the House of Lords appellate jurisdiction in English cases, although it was maintained in appeals from Scotland and Ireland. However, this provision was not acceptable to the House of Lords and, when Mr. Gladstone and Lord Selborne were succeeded by Mr. Disraeli and Lord Cairns in 1874, the jurisdiction was changed to include English appeals in the Appellate Jurisdiction Act, 1876. It is said that Lord Selborne always considered the right of double appeal to be a blemish in the edifice he was so largely responsible for erecting.

Since 1934, in civil cases an appeal lies to the House of Lords only by leave of the Court of Appeal or the House itself. In Canada, the limitations upon appeals to the Supreme Court of Canada, as a second appeal court, seem to be less restricted, particularly where the amount involved exceeds $2000. The patent evils of expense and delay in law suits, and the general uncertainty of the length of litigation occasioned by appeals from judgments by trial judges sitting alone without a jury, were obviously never foreseen by the framers of the Judicature Acts. Litigation has become too expensive, too long drawn out and subject to too many appeals to be within the financial resources of the ordinary citizen. If a person sues a strong corporation he may find himself in the Supreme Court of Canada or the Judicial Committee before he is finished. It is not surprising if he should take the best settlement obtainable out of court.

It has reached the point where no one need apologize for his temerity in making suggestions which aim to ensure that the courts remain within the financial resources of ordinary

people. Study of the pre-Judicature Acts system[39] in this respect supports the suggestion that (a) more frequent trials before juries should be encouraged; (b) all trials not before juries be heard by a bench of three judges, that is, that all trials before a single judge sitting alone without a jury should be abolished; (c) no appeal be allowed from a trial court of three judges on any question of fact, but only on questions of law. The existing courts in England have been recently described as dilatory, excessively costly and divorced from business methods to a degree that arbitration is often preferred to trial.[40] There are those who share the view that the description fits Canada equally well.

It is claimed for the foregoing suggestions that they will clothe judgments of trial courts with greater authority and finality; and that they lean toward cheapness, speed and simplicity, which Lord Selbourne hoped for when the Judicature Acts were introduced. It is reasoned that if three trial judges hearing and seeing the witnesses cannot give a just and sound judgment upon the facts, then it would seem fairly certain that an appellate court, or a second appellate court, cannot do any better, more particularly when the appellate courts have not the advantage of seeing and hearing the witnesses. An appeal would remain, as now, on questions of law, but there is reason to believe that the greater authority of the judgments of a three-member trial court would tend to decrease the number of appeals, except where a dissent occurred or in cases of more than usual importance. There is nothing new in the idea of three judges sitting together at first instance. It was the pre-Judicature Act practice of the common law courts en banc which alone could give the judgment at first instance. The use of a single judge in England since 1875 has been one of the chief differences that distinguish the English judicial system from the Continental systems.[41]

The foregoing suggestions are aimed to avoid the expense and delay now so often associated with litigation, even in cases where the amount involved is small and the case is of little general importance. A footnote in Blackstone touches on this very point in reference to a case instituted in Scotland in March 1745 (under Scottish law), which finally reached the House of

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[39] (1949), 27 Can. Bar Rev. at pp. 46-66.

[40] George Godwin, Trial by Whitehall, Nineteenth Century, September 1948.

[41] Radcliffe & Cross, The English Legal System (1937), p. 287.

Lords in April 1749, and concerned only the property in an ox of the value of three guineas. The comment there appears:

> No pique or spirit could have made such a cause in the Court of King's Bench or Common Pleas, *have lasted a tenth of that time or have cost a twentieth part of the expense.*[42]

But this great advantage, possessed by English law in Blackstone's day, was lost when the Judicature Acts of 1875 sanctioned trial by single judges sitting alone without a jury and the consequent appeal on questions of pure fact.

Trial before a three-member trial court, for reasons already stated, would tend toward cheapness and early finality in litigation. In *Law and Other Things*, Lord Macmillan remarked that it was essential that no case should be decided without each party to the dispute being afforded the fullest opportunity of presenting his side to the court.[43] But it is equally important in the public interest that litigants should be satisfied that their cases have been thoroughly understood by the trial tribunal from every aspect, and that they have been examined from the point of view not of one mind only but of several types of minds.

There is no such thing as pouring all the trial evidence into a single judge as if his mind were a mechanical contrivance of sorts that automatically produces the correct judgment. Deliberation, discussions after deliberation, coupled with individual consideration thereafter, are essential to judicial judgment in its true sense. These elements exclude the danger of hastily formed opinions, provide a check upon individual impressions, reduce the intangible factors to their proper proportions, and ensure that conclusions will be reached after that full consideration which is engendered by discussion from contrasting viewpoints. Three judges may be expected to do this efficiently. One naturally cannot, for three judges are able to look at a problem from three different mental approaches, and thus, not only important distinctions but inherent weaknesses disclose themselves more readily. Many cases may provide little difficulty it is true, but, to quote Lord Macmillan again, "the great contests of the law are always nicely balanced".[44] The same facts may make amazingly different impressions on different minds. In civil cases, where the preponderance of probabilities governs the decision, one might be justified in saying that it is almost axiomatic that a judgment which is expected to command public confidence

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[42] The Commentaries (Draper ed., 1898), Vol. 3, p. 393 (my italics).
[43] At p. 173.
[44] Law and Other Things, p. 218.

should be the finished product of more than one mind.

What has just been said is currently appropriate to the increasing tendency of Government to enter more fields of activity for the protection of the public interest. It is dangerous to fail to recognize that the great increase in public control is building a new and solid structure of Public Law. If the existing courts are to retain their traditional and constitutional position, their machinery must be streamlined to cope with the multitude of new problems in public law, and not the least important is a provision for appeal that will protect the public without running to extremes in delay and expense. If this is not done, no one need be surprised if Government should establish its own special tribunals in an effort to attain cheapness, speed and simplicity which the existing courts do not always supply, and in consequence that more and more judicial functions will come to be exercised by bureaux and anonymous administrators.[45]

There is ample support for the view that the present need in civil cases is to decrease the cost, length and delay in litigation, by strengthening the methods of decision in the courts of first instance (including quicker ways of getting down to trial), with consequent elimination of appeals in questions of pure fact, and by limiting appeals generally to one appellate court save in cases involving a point of law of exceptional public importance where it is in the public interest that the second appeal should be brought. In many respects the situation presents a challenge for survival.

Everyman His Own Lawyer

But when intemperance and disease multiply in a State, halls of justice and medicine are always being opened; and the arts of the doctor and the lawyer give themselves airs, finding how keen is the interest which not only the slaves but the freemen of a city take about them.

Of course.

And yet what greater proof can there be of a bad and disgraceful state of education than this, that not only artisans and the meaner sort of people need the skill of first-rate physicians and judges, but also those who profess to have had a liberal education? Is it not disgraceful, and a great sign of want of good breeding, that a man should have to go abroad for his law and physic because he has none of his own at home, and must therefore surrender himself into the hands of other men whom he makes lords and judges over him?

Of all things, he said, the most disgraceful. (Plato: The Republic 3.405. Jowett translation)

[45] George Godwin, Trial by Whitehall, Nineteenth Century, September 1948.