# TRIAL AND ERROR, A STUDY OF LITIGATION AS A MEANS OF ACHIEVING SOCIAL PURPOSES

BY THE HON. F. W. EGGLESTON,* BARRISTER AND SOLICITOR

A MEETING of the Medico-Legal Society of Victoria was held at the British Medical Society Hall on September 30, 1939, at 8.30 p.m. The President, Dr. F. Kingsley Norris, occupied the chair.

Mr. F. W. Eggleston delivered an address entitled "Trial and Error, a Study of Litigation as a Means of Achieving Social Purposes."

Mr. Eggleston said: I have called this paper "Trial and Error," or litigation considered as a social process. I did at first intend to call it "Ordeal by Battle," for reasons which will be clear later. The title "Trial and Error" was chosen because I am giving the address to an audience composed largely of men of scientific training who use the experimental process; by it I intend to suggest that litigation should be regarded as a search for truth by scientific method, and it might be better if we admitted the possibility of error. My underlying thought is that courts, in trying cases, are not merely the embodiment of authority issuing decrees which should not be criticized; they are engaged in ascertaining the facts by weighing evidence of events which do not take place before them. This can only be done by a method which will accurately record visual, aural and documentary evidence and interpret it with psychological insight. This is a strictly scientific process, and I think that enquiry is needed to determine whether the means now adopted by courts is calculated to elucidate truth and serve social needs.

I esteem it a great privilege to belong to this Society and also to be asked to address it. I say this not only because I am addressing eminent members of two of the most learned of professions with specially trained minds

*Now Sir Frederic William Eggleston, Australian Minister to China.

whose co-operation is most valuable to the community. I believe that the professions are the salt of any community and vitally necessary to its health; they represent the vitamins of social life. Now each profession receives a training of a specialized character which brings out the best in a particular type of mind, and thus the types tend to be different. We can get the best out of each profession if we recognize this and call upon its practitioners to use the particular mentality their practice has developed in the best way for the community. We may also recognize that this specialization of types has its weaknesses and that these weaknesses can be rectified if we can call on other professions when the occasion demands.

Those of you who have read *The Spirit of Science* by Bertrand Russell will remember an interesting discussion of two contrasted types of mind—the inductive and the deductive, the creative and the analytical. Lord Russell pointed out that successful priests, lawyers and theologians have used deductive methods, while practically the whole of the advance of knowledge has been due to induction. Inductive minds have had to wage a struggle, generally unsuccessful in their lifetime, against the pillars of authority, safe in the position in which the accumulated learning of the past had found them; deductive logic is skill in the elucidation and analysis of texts, the examination and expansion of the known. The work of induction is to explore the unknown and grasp the truth from it; it requires creative thought, inspired intuition, imagination and aspiration. The official and authoritative expounder of texts speaks with superior confidence of accepted knowledge, while the creative mind striving to carve truth from the rude block can never know how his work will turn out, never be sure of himself. That is why in this society the legal section exhibits the superiority complex and displays such assurance, not to say arrogance!

The distinction I suggest is directly in point to my subject because both of the professions represented here have to base their conclusions on evidence. I am going to suggest

that the task of establishing facts in litigation depends essentially on inductive methods similar to those applied by all scientists, and that owing to the very concentrated training in deductive methods which is necessary for the study of legal rules and texts, the legal mind in the examination of evidence suffers from typical defects.

The traditionalism which distinguishes legal institutions also arises from the mentality which is created by legal practice, and the process of litigation has suffered from this conservative spirit. In the fourth decade of the 20th century we live in quite another world from that of 1750, yet there is less change in legal forms, less development of a truly scientific method, than there is in any other phase of social life. The Common Law Procedure Act and the Judicature Act seem to lawyers to have produced catastrophic changes in legal processes, but they brought little change in the essential principles of legal evidence; nor did they adapt legal procedure to the requirements of modern business conditions. I should like it to be understood that I am trying to make my examination of legal procedure as impersonal and objective as I can and I must not be taken as criticizing personally anybody engaged in it. I am a student of social philosophy and am interested in every phase of social activity. Each has its typical method, its psychological basis; it should be examined as to its methods, its efficiency and the result it achieves. Here is a legal process the actual law developed over centuries; is it efficient and well directed—does it produce worthwhile results without waste? My social studies tell me that no social process is really 100 per cent. efficient. The efficiency of the steam engine is said to be about 25 per cent.; the efficiency of a social engine is likely to be lower. I feel inclined to criticize what seems to me to be a strange confidence in the efficacy of legal processes on the part of practitioners. A little scepticism, an appreciation of typical errors of the method, would do good. Possibly, however, there is less confidence than appears on the

surface. My other criticism relates to the lack of any ardent desire to better the process.

There are ways in which it can be made more scientific, and we should give our attention to them. Every man who has a professional instinct should be keen for the improvement of the machinery he uses and alive to the defects. A true lawyer will be a law reformer. The professions may be the salt of the earth, but we know on very good authority that salt may lose its savour.

I can deal with my subject more effectively if I set out a list of the social purposes which litigation should serve, and then examine to what extent it falls short.

I would state these requirements as follows:

(1) Litigation should effectually supersede the settlement of disputes by private conflict and self-help.
(2) The court should know the law and be able to apply it without hesitation.
(3) The process should ascertain the facts and the equities with reasonable accuracy.
(4) Decision should be obtained without undue delay.
(5) Decision should be obtained at a reasonable cost to the State and the individual concerned.

The only one of these purposes which, in my opinion, litigation serves satisfactorily is the first. Litigation in Australia and in most British countries does supersede private conflict and self-help. Now this is a highly important achievement basic to society. The King's justice administered by skilled lawyers is one of the most potent factors in the integration of the modern state. The King helped to establish his position by offering the King's peace and the King's law and by demonstrating that it served human needs better than self-help and private conflict. It would, however, be quite absurd to accept this as a complete vindication of the legal process. I have not time to go into the history of litigation here, but primitive communities resorted to most absurd methods of deciding human disputes and thus avoiding a breach of the peace. Questions of fact

were decided by various types of ordeal—the ordeal by water and the ordeal by fire were used to test the credibility of witnesses or the validity of legal claims. The ordeal by battle was also used, the victor in armed conflict securing a verdict; the present system is the development of the system of ordeal by compurgation or judgment between competing oaths. It will be one of my contentions that we have not really got away from the system of ordeal by battle, and that modern litigation, though it discards the methods of physical force, really makes litigants fight in a psychological battlefield represented by skilled gladiators in the shape of their legal representatives, and that victory is not always the result of correct ascertainments of fact, but of the skill of the gladiators and the economic strength of the litigants. However, let us not forget that even such an ordeal, imperfect and unscientific as it is, is better than private conflict, and society is justified in relying on it if it cannot find anything better. My point is that lawyers, knowing the system, should try to find a better method for society to use.

(2) The court should know the law and apply it without hesitation to the facts.

I do not intend to discuss the efficacy of the legal process to decide questions of law. Theoretically every man knows the law; in fact, nobody knows it for certain. If the law is doubtful, as it undoubtedly is, it is not the fault of the present judges or practitioners. I want, however, to confine myself to trial of facts and the use of evidence, and I will not therefore pursue the equally important problem of certainty of legal rule.

(3) Does the process ascertain the facts and the equities with reasonable accuracy?

This, of course, is the crucial part of my thesis and I want to state the position with some precision and without exaggeration. The system does not, in fact, ascertain the facts with great accuracy. It is absurd, of course, to suggest that the dramatic incidents of ordinary life can be recon-

structed in court with any close resemblance to reality. A high degree of accuracy is therefore not to be expected. What degree is obtained is hard to define. If cases were decided by a toss of a coin, the right would triumph in 50 per cent. of the cases. In general, it is likely that the plaintiff will be more sincere in his claim than the defendant; he takes the risk of the initiative; the defendant is often sparring for time, staving off bankruptcy or fighting a forlorn hope. Judges who have an appreciation of affairs will be able to make a general judgment which is somewhat more likely to be right than wrong. Summing it up very generally, I would put the index of accuracy at not more than 75 per cent., that is to say, the court, assisted by chance, is able in 75 per cent. of the cases which are tried to give a true verdict on the facts; in 25 per cent. of the cases it is substantially wrong. In details, however, the inaccuracy is very great indeed. After 40 years of active practice as a solicitor I hardly know a single case where very great inaccuracies in details were not made. Cases are often argued by counsel on quite wrong conceptions of the facts, and I have known very few judgments in which details could not be corrected. Litigation is, indeed, so risky when disputed questions of fact are the chief issue that I rarely find myself justified in allowing a client to go to the risk and expense without attempting a compromise. I hope I won't offend anybody by these remarks, but I think a recognition of the imperfection of the legal process is necessary not only for any hope of improvement but also for justice. A good deal of the trouble at present is due to the apparent confidence of judges that they are right in their summing up of complicated facts. I am reminded of the charge of Mr. Justice Maule to the jury: "Gentlemen, if you believe the evidence of the plaintiff in this action you will no doubt find for the plaintiff; if on the other hand you believe the evidence of the defendant you will no doubt find for the defendant. But if, like myself, you believe the evidence of neither, God help you all. Gentlemen of the jury, you may now consider your verdict."

The legal process is not actually a process of trial and error; neither the judge nor the barrister sees the incident nor knows anything about it except for the few short hours in court; he never sees the result of the verdict. It is the solicitor who has the long acquaintance with parties, who sees them both before and after, who can give prolonged consideration to the facts. He has the opportunity of mature judgment. It must, of course, be understood that I make no criticism of the way in which courts try questions at law; that is a task which they accomplish with great efficiency. I will only say two things as to this. One is that the court adopts the process of settling the facts before it proceeds to the settlement of the law. This means that undetermined legal questions exercise an enormous influence on the tactics and strategy of trials, and the evidence has to be prepared to meet the eventual position created by legal decision. This causes much distortion. The other is that the qualities necessary to decide legal questions are quite different from those qualities necessary to decide disputed questions of fact. I recur to my distinction between the deductive or analytical method and the inductive method. The ascertainment of facts depends on the inductive method, and one of the chief causes of error is that men who are skilled and specialized in analysis are unable to call up the intuitive and imaginative faculties which are necessary if we are to reconstruct any human occasion.

This will not be convincing unless I can establish my case more in detail, and I will attempt to do so under the following heads:

(a) The manifest impossibility of reconstruction of facts in court.
(b) The artificial character of the law of evidence.
(c) The forensic methods of the litigious conflict.
(d) The passive role of the court.
(e) The failure to define the status and role of expert witnesses.

(a) *Impossibility of Reconstruction of Facts*

I suppose that nobody believes that anything in the nature of a photographic or cinematographic reconstruction of the facts can be given in court. This is sometimes not recognized by practitioners, but the imperfections of human testimony have been demonstrated so many times that it is hardly necessary to stress it. Mr. J. V. Barry, our secretary, has made a study of this and if you are interested I would refer you to an article by him in the *Australian Law Journal* for January, 1938. I only wish to say that the difficulties of reconstruction are immensely increased by the other defects which I will proceed to consider. I repeat again that I criticize the system and not the participants. I think, if I may be allowed to say so with respect, that the judges, subject to the limitations, do their work with great skill and impartiality. I also say with much respect that their work would be improved if they actually realized the imperfections of the methods used and were not so confident of things for which no certainty is possible. It is, for instance, impossible for any judge, however inspired, to judge of the credibility of a witness unknown to him who appears in the witness box at 11 and leaves at 11.30. This is contrary to experience and reason.

(b) *The Artificial Character of the Law of Evidence*

This is a phase of the subject which I think should profit from the mutual consideration of the two professions I am addressing. Both have the problem of ascertaining facts by the collection of evidence; there are, of course, significant differences between the two. Scientifically attested evidence is rather more important for the medical man than for the lawyer, for it is often a case of life and death for the doctor, or at least his patient; in the case of the lawyer only the pocket is affected. The doctor makes an examination of the body which is diseased and arrives at judgments from inference and various tests, if possible objective; he requires imagination, insight, experience and scientific knowledge;

he is often able to apply the test of trial and error. He hardly relies on personal testimony. I have always been snubbed by medical men when I tried to give evidence of my own complaints. The method of proof in litigation is dependent almost entirely on human testimony, and objective tests of truth, though often available, are little used. You will all recall, I think, an address to this Society of the expert on ballistics, who showed how facts can be established by objective evidence. Every scientific man will testify to the superiority of objective as against subjective evidence. Witnesses give evidence in words the products of their own minds which really represent their judgment rather than the facts—the only method of testing their evidence is by cross-examination.

This evidence has to be called and presented in court by each side consecutively in a trial, and as the trial is expensive the time factor is all-important. There is little time for reflection and no opportunity for the experimental method. The method is chiefly directed towards the elimination of false or erroneous testimony. I do not say that this is not necessary, because there is a very great deal of false testimony. I have, however, the feeling that some of the rules of evidence have no better justification than that they are designed to save the court's time. If this is the object it signally fails, because the rules are so technical, so based on analytical subtlety, the advantages to be obtained by including or excluding evidence are so great, that arguments on points of evidence are almost interminable. I remember in one case I made a tally of the time spent in arguing questions of evidence, and it occupied 20 per cent. of the time of the case. As the case lasted 45 days and cost 10/- a minute, the uncertainty of the law of evidence cost the parties about £1200. This fact is a better illustration of the subtlety which is introduced into the laws of evidence than any analysis I could give you.

As a portion of my audience is composed of lawyers it is incumbent upon me to make my criticism more specific and I will summarize it as follows. Artificiality and subtlety

and the use of evidence for tactical purposes are displayed most in the following phases of the law of evidence:

(i) The doctrine of relevancy.
(ii) The doctrine that only the best evidence can be given.
(iii) The barring of statements not on oath.
(iv) The doctrine of the onus of proof.

I will admit that none of these rules can be attacked as bad in principle; it is the rigid and artificial application of them which is in my opinion the cause of imperfection.

(i) *The Doctrine of Relevancy*

The court's time cannot be taken up in irrelevant evidence, but if you want to get evidence from the mind of the average witness you will find truth embedded in a mass of irrelevant detail; if, therefore, the court tries to dissect the testimony of the witness, exclude the irrelevant and accept only the relevant, it will get something very unreal. Evidence is often excluded which is nearly relevant or contingently relevant. Moreover, relevancy often turns on the decision on certain legal points, and great tactical advantages are gained by one side or another from preliminary decisions on these points. Cases have to be built up by adding one relevant fact to another. It would, in my opinion, be better to admit all evidence at all connected with the subject matter and let the judge decide. At present the more important a piece of evidence is, the more one side or another seeks to exclude it.

(ii) *The Doctrine that the best evidence only should be given and inferior evidence is only admissible if the best evidence is not available.*

In my opinion it would be better to allow all evidence which is evidence, and allow the judge to determine its weight. I am aware that this doctrine is principally concerned with documentary as against verbal testimony, and it would be rather against my principles to place subjective verbal testimony against objective documentary evidence. If parties put their views in the form of a contract they

should be bound by it or only relieved in specific cases. This, however, does not apply to other writings, and there are often undisputed facts which very much affect the interpretation of documents, and there are other cases in which the definition of best evidence excludes much quite good secondary evidence.

(iii) *Exclusion of Statements not on Oath*

It is obviously impossible to allow hearsay evidence if the witness who made the statement is available, but what if he is dead or absent? Has the statement no value? I venture to say that in ordinary life we make decisions of the greatest magnitude on hearsay evidence.

It seems to me to be bad psychology to exclude statements made by witnesses at the time of the event or near it and before the possibility of litigation was present to their minds, even statements made by the parties themselves. These statements have the nature of objectivity. It is, I think, correct to say that people of learning and culture sacrifice their visual and aural memory and rely on memory of words. They can frequently only recall the facts by remembering what was said. If I have to reconstruct an incident in my own mind I find myself basing it on my recollections of what was said and often of what I said myself. Of course if I was giving evidence in a trial, a careful barrister would get me to make this reconstruction before I went into the box and give my evidence as if it were visual recollection. In my opinion great injustice is done when important witnesses are dead. Under the present rules their evidence cannot be given. What they have said or written should be given for what it is worth. Generally speaking, I should say that all grades of evidence should be allowed and the judge should decide its value.

(iv) *Burden of Proof*

In my opinion the absence of important facts from the record is more due to this rule than to any other. If a person who has the onus of proof of a certain fact cannot

adduce evidence supporting it, it is presumed against him. The other side may know it, the court may know it, but he fails. This leads to a most elaborate tactical display. A witness who can give a fact which another side is vainly trying to prove is kept out of the witness box lest he should "spill the beans." If a judge knew or suspected that a witness could give the fact he is not allowed to ask for him to be called or ask the question himself.

Now I quite admit that all these rules are based on substantial grounds; they are designed to make human testimony on oath reliable; the real defect is the unreliability of subjective human testimony, and any reform of legal procedure should seek to minimize its importance as far as possible.

I cannot, however, over-emphasize the consequences of these defects. The consequence is that the record of evidence exhibits a particular human occasion as if it was seen through a transparent chequer board; the white spaces show the facts which have been given in evidence and the black conceal the facts which have been excluded from evidence through the interpretation of the laws of evidence. I have heard judges complain that quite substantial phases of the case are excluded from their view because neither of the parties care to risk introducing them because of dangers which lurk there.

There is, I think, plenty of ground for saying that the laws of evidence are interpreted with far more subtlety in Victoria than in other States and than in England. This is due to the decay of advocacy. Great advocates have never relied on points of evidence; subtlety breeds subtlety. Finally, these artificial rules are usually designed to correct the weaknesses of human testimony. It is a question, however, whether human testimony is the best way of establishing fact. The court knows no other way except the production of documents, but, as I have said before, makes little effort to test by objective facts. Most lawyers will say that circumstantial evidence is unreliable. I doubt whether this is so. I do not think that many convictions

on circumstantial evidence are wrong. The following remarks about circumstantial evidence by Mr. Justice Roche seem to me valuable:

> "The charge is one of murder in a way that is peculiarly dangerous and peculiarly cruel. To a very large extent the material available is circumstantial evidence. Human testimony is liable to all the defects of human nature—forgetfulness, want of observation, partiality, etc. These infirmities rather than wilful falsities more frequently colour and weaken the value of human testimony. Real circumstantial evidence is evidence of fact. If these facts point unmistakably in one direction, then they are not less reliable, but more reliable, than human testimony."

In other words, the judge was calling for objectivity in evidence rather than subjectivity.

(c) *The Forensic Method of the Litigious Conflict*

I do not use the term "forensic" as a term of reproach. Barristers are paid to represent the parties and win cases for them, and conduct cases with great ability and, on the whole, with restraint. Certain rules are observed which prevent gross abuse. In all human controversy from debates in mutual improvement societies to the august debates in Parliament these forensic methods are observed with increasing refinement and subtlety, and applauded by the people. But I attack the theory that the conflict of opposing combatants, each exclusively concentrating on one client's interests, is likely to assist in the elucidation of truth. The barrister, to get a claim established, has to prove certain facts to support a particular legal rule. In many cases he cannot prove them directly and he must establish some of the facts and deduce his conclusions by inference based on logic or probability. Now some of the facts are awkward; they may be of value or they may not. It is better to have your case as simple as possible. Analysis and inference are far more important than real facts. Thus the skilful pleader constructs a case which contains a selection of the facts which suit him; only those witnesses

are called who can give facts which are wanted. Many witnesses are not called because their evidence is awkward or because their evidence, though valuable in some parts, contains some damaging fact. The process goes on on both sides, and in the end it is a wise litigant who knows his own quarrel when it appears in court.

This analytical subtlety is seen at its worst in cross-examination. The objection chiefly urged against cross-examination is that it is directed to shake the witnesses' credit. People, especially scientists, object to this, but I am afraid that it is inevitable owing to the large amount of successful lying. My chief objection to cross-examination is that witnesses without trained minds are put hypothetical questions designed to support certain legal points of view, and men who have a perfectly clear visual or auditory recollection of events are put into a kind of strait-jacket so that their evidence can be directed at certain analytical legal propositions. This, of course, does not apply merely to cross-examination. It has been inherent in a legal process devised by men trained exclusively on analytical lines. Lawyers will remember that at Common Law only a limited number of forms of legal action were available, and the evidence had to be confined within artificial limits. Only painfully was developed the action on the case and then equity to liberate legal processes. As a solicitor who has prepared briefs over the last 45 years, I have witnessed the most absurd results of this process. One gets a statement from a witness and then draws it up in the form of a proof or an affidavit and takes it to counsel. Counsel whoops when he sees it and abuses the witness for not making his evidence support this or that legal proposition. I have seen eminent counsel take home an affidavit carefully prepared to represent what the deponent knows and return it next day with subtle changes designed to meet the legal propositions involved. In a very curious way the evidence adduced is designed to make the factual basis as narrow as possible and the field of inference as wide as possible. Legal practice has not hardened me to these things and I

must confess that I feel the most profound sympathy for witnesses who are put through these legal hoops. Cross-examination under the present artificial conditions too often becomes the application to evidence given of a series of artificial assumptions which have no psychological basis. These assumptions are put to him with an assurance and a temper which gets the untrained mind into confusion. The assumption is made that he must have a perfect memory; any defect of memory is put down as lying; any hesitation is due to the prompting of uneasy conscience. If he is too glib he has made up his evidence beforehand. It is, indeed, a question whether more than a very few witnesses have a photographic record in their minds of an event. What they remember is the effect it produced on their minds. Cross-examination always assumes that there is a visual memory and will not allow a witness to give impressions or reactions.

There are, of course, characteristic psychological defects of human testimony. The barrister, however, does not perfect himself as a psychologist with the view to co-operate in the elucidation of truth but rather as an actor to assume the role of stern fury to terrorize the witness and break him down. This has reached rather sinister proportions and certain barristers are such a terror for witnesses that it is at the present day exceedingly difficult to get witnesses to volunteer evidence, and parties opposed to the counsel prefer to settle.

(d) *The Passive Role of the Judge*

One contributing cause for this condition of things is the passive role cast for the judge in the English legal process. Truth is not elicited by the method of conflict but by co-operation. It is the judge who can enforce co-operative attitude on the part of the representatives of the parties. If he showed that the extreme forensic methods used did not impress him he would discourage their use. I am afraid, however, that this would not be enough. The doctrine is that the judge is a mere referee and should not join in the

search for truth. In fact, he never makes any preliminary examination of the facts, and frequently hears the pleadings for the first time when he hears them read in court. Many of the more artificial rules of evidence and presumptions are designed to enable a judge to adopt this passive role, and the attempt by some judges to explore avenues that are not led by counsel or put questions excluded by the formal rules of evidence is deeply resented. I appreciate that this aloofness of the judge is the basis of the reputation of the British bench for impartiality, and the Continental courts have forfeited such a reputation by their judicial examination of witnesses and parties. It is, however, open to question whether the British temperament is not sufficiently independent and judicial to adopt some aproach to the research method, and whether the defects of the Continental method are not due to political conditions and reasons of state. At any rate, I am confident that in complicated cases the passive role of the bench prevents the ascertainment of facts. The parties bring before the court just what points they think will serve their case, and the result is a patchwork of fact and no-fact in which truth is hidden. I do not think it is necessary that the judge should change his role very much, but I think courts should have an organization which can conduct an independent research into the facts and report to the judge and the litigants. Specialists should not be regarded as witnesses for parties but officers of the court. An amusing story illustrates this. In a case two parties from the wilds of Gippsland were disputing about a question relating to a lease, and one question was whether a stack of cut firewood existed. Witnesses from both sides contradicted each other as to its existence. The court never thought of sending an officer out to see whether the wood was there. I can speak with some authority on this point because, as some of you know, I am the chairman of a semi-judicial tribunal which attempts to settle financial relations between Commonwealth and States. We have an expert staff which conducts a continuous research on these financial relations. We have sittings in which witnesses

give evidence on oath (the oath is a quite unnecessary provision); the members of the Commission, prepared beforehand, conduct the examination themselves. It is not cross-examination in the ordinary sense nor in the sense of being bad-tempered. I believe we get much nearer the truth than the court does by forensic methods, and so far we have not incurred any charge of want of impartiality or independence.

The other two defects I mentioned—time and expense—I will pass over lightly. I suppose the average time a case takes to come to trial is six or nine months. No average time can be given for the period of the hearing, but I may say that cases in Victoria take just about double the time taken in New South Wales, or rather I should say that the New South Wales courts try more than double the number of cases tried by the Victorian courts. The fact that litigation is very much smaller in Victoria is probably a result as well as a cause of these figures. The case in which more than two parties are involved and in which senior counsel are involved will now cost about £1 per minute. These things are definite evils. Human disputes should be tried as soon as possible after the event. The high cost of litigation causes something very like blackmail. I once told a solicitor friend of mine that my invariable practice before starting litigation was to have a talk with my client and ask him to consider seriously whether he was prepared to settle. If he was, he should see if it could be effected at once, before the expense was incurred. My friend replied: "Oh, no, I never do that. I go straight on, never make a suggestion of settlement, and it is amazing the number of bad cases I win by settlement at the last moment." The difference between his practice and mine was that I act for average middle-class people and he acts for large companies. A very successful business man confirmed this by telling me that he always settled his cases at the door of the court.

I have now built up a case about the present system which I venture to say is fairly substantial. It is certain to cause

controversy, but I repeat the evils of the system are not to any great extent the fault of the participants in it. They are the faults of a system logically designed but not sufficiently responsive to the facts of life, and now, in modern complicated conditions, ineffective. I will also say that the litigant is entitled to most of the blame because he is obsessed with his personal interests and determined to assert them without scruple. What he wants most in his representative is aggressiveness. My suggestions to my clients to consider settlement (though entirely conceived in their interests and against my own) have almost invariably been badly received, though when the case is near trial they get cold feet and will settle at any cost if you will let them. Nor do I think that a perfect system is possible. The litigant should understand the large factor of error which exists. Many human problems cannot be solved on logical lines. Human beings must take some of the mischances which now eventuate in litigation as part of the contingencies of life. How many victorious plaintiffs in actions for libel in domestic disputes have really benefited from their victories? A litigious spirit in a community is a thoroughly bad thing. Those who have read early Australian history will have remarked large numbers of libel and slander actions. There was a vicious desire to ventilate personal quarrels in court. This is quite unhealthy.

Again, I do not think that much could be done to improve the legal trial arising out of accidents or momentary or human clashes. If people will litigate these things the court must submit to be used. I am afraid that trial by jury cannot be very much changed, though the retention by the legal profession of their interest in this form of trial shows a tacit preference for unsophisticated commonsense. For events involving long trains of conduct and complicated business transactions, the modern legal process is really unfitted.

Have I then no practical suggestions for improvement? Yes. I will summarize them as follows:

(1) The greater use of arbitration of the type I will mention.
(2) The greater activity of the court in determining the mode of trial after preliminary investigation and itself directing the research into the facts.
(3) The use of expert advisers as officers of the court and not as witnesses.

(1) *Arbitration*

Arbitration which is merely a copy of legal procedure is of no value; it is less authoritative, less skilled and often more expensive than litigation. Yet on the Continent, I am told, about 90 per cent. of business disputes are settled by arbitration. Our Chamber of Commerce decides numerous cases in this way. There is obvious scope for it in particular phases of industry. The continuous demand for arbitration clauses in contracts shows there is confidence in it by business men, and a distrust of the legal process. But the type of arbitration I would suggest is illustrated by some facts given to me by an American lawyer. During the Great War some great American electrical companies pooled their patents, and after the war the question came up as to how they were to be disentangled. It was recognized that if the matter were litigated it would take years and would cost hundreds of thousands, if not millions, of dollars and the result could not be satisfactory. The decision was then taken to put the whole thing before one outstanding electrical engineer, let him make his own investigations in his own way and give a conclusive and binding decision. This case was thus decided for a fee of nearly 200,000 dollars.

This is what I suggest—business men should get into the habit of referring their disputes to the arbitrament of some trained expert in the community who will undertake to make the investigation himself, satisfy himself in his own way and give a binding decision. The chief difficulty of this is the litigious spirit which affects people who have just quarrelled and which blinds them to commonsense.

My next suggestion contemplates a very much more active role, not necessarily for the judge but the staff of the court. It involves the appointment of masters trained along certain lines. I have not time to do more than outline my suggestion.

(2) *Determination of Mode of Trial*

All cases of over a certain amount and of a certain type should go to an officer of the court called a Master, with all the documents and a statement of the facts from each side. The officer should then consider them and make a report first on the legal questions involved; he would give his opinion as to what the law was. This opinion would then be communicated to the parties, who would then have the responsibility of accepting or disputing his decision. If they accepted it then the legal consequences would be determined. If they disputed them the legal issues would be tried in court at once. When the decision was made it would either determine the case or leave certain issues of fact to be determined. Directions could then be given for the trial of these issues, and these directions might include handing technical issues over to experts for investigation and report. If a party insisted on trying particular issues of law or fact he could be penalised in costs if he lost.

In most cases when the issues were thus dissected the parties would know whether they could succeed or not, and would not court failure. At present the whole case is surrounded with contingency because neither the law nor the facts are certain. Both are fought on the chance of victory on one or other of a number of doubtful points. In the reaction between the two the case becomes hopelessly complicated.

I lay great stress on the trial of legal issues first because I have made very close investigations, and it is quite clear that legal questions can be tried with about one-fifth of the cost of issues of fact. My suggestion would mean that more legal issues would be raised, or rather decided, than at present, but that would be a good thing. The State

should bear the extra cost entailed in its organization because it should be responsible for a set of legal rules which are fixed and certain; at present the Law Department is a profit-making department.

This suggestion of reform has the merit that it can be approached gradually. For instance, the originating summons might be avoided by the parties submitting the will to the court for a preliminary decision on the legal point. When it was issued the parties would have to take the risk of disputing it; if they did not it would be authoritative. The originating summons is the greatest scandal in the law. It may cost £200 or £300 to decide a knotty point under a will. Just recently an originating summons was tried merely to get permission to sell a property and lasted a few minutes in court. It cost £60. When I draw an important will I always put a clause in enabling the trustees to act on the opinion of counsel.

(3) *Experts*

Finally, I suggest that expert evidence should be given by persons selected by the court as officers of the court and responsible to it, and that all facts capable of being objectively determined should be determined in this way. The court has never taken kindly to the expert. From time to time assessors have been appointed to assist the judge, but they have usually received the cold shoulder. I remember on one occasion assessors sat with a Victorian judge and he set them apart from him and ostentatiously refrained from consulting them on the ground, I understand, that they were ignorant of the rules of evidence.

I am afraid in the time at my disposal I have been able to present a sketch only of my views, but after the controversy which these arouse I may, if I survive, be able to expand them in a way which will make them clearer.

I hope that I have been able to present to you a balanced analysis of the litigious methods and that my diagnosis of the defects is clear and without exaggeration. I hardly dare to hope that the lawyers will agree with all that I have said.

I have always been amazed at the lack of any criticism by the lawyers of the process and I have been unable to make up my mind whether this indicates complete satisfaction with it or whether others feel the same about it as I do, but do not think anything can be done. Whether the faults in it can be remedied is another question. The task of finding the facts by litigious methods is extraordinarily difficult and failure does not reflect on the character and still less on the ability of those engaged in it. Possibly an improvement is not to be expected and people who litigate must put up with a justice which is not complete. The method of improvement I have suggested is bureaucratic and will require to be examined carefully and worked with skill, but I think something of the kind is needed. I hope I have interested the medical section of the audience. The contrast between your conception of evidence and ours is striking. I know many medical men have strong views of legal procedure. I hope my remarks may provoke some reactions from them.

## Discussion

Dr. E. G. Coppel said that as a lawyer he felt that the legal profession owed Mr. Eggleston its gratitude for his stimulating address. He (Dr. Coppel) had often been impressed by the artificiality of the law of evidence, but the rules of evidence were designed to exclude prejudice and to ensure that juries should not be misled from their task by extraneous matters. The rules of evidence as applied by the courts can only be properly understood in the light of their history. He felt that the time was drawing near when the traditional methods of enquiry would have to be reshaped, and then the expert would probably no longer be a witness but would exercise judicial functions.

Judge Foster said that the legal method was good, but inherently it was so constituted that it could not ensure that entirely satisfactory results would be achieved. The basic material on which the courts worked was human testimony, and the liability to error and the difficulties in satisfactorily assessing the value of human testimony were so great that those who had the duty of determining facts were usually left with little satisfaction in their determinations. He felt that juries were entirely unsatisfactory tribunals of fact, and there was a saying in the legal profession, "If you have

a bad case, get a jury." The burden of proof rule is a comfort to judges, and, in the main, the rules of evidence as a guide to reasoning were sound.

Dr. Cowen said it was a truism that medicine was the art of passing judgment on insufficient evidence. Osler observed that more mistakes are made by not looking than by not knowing. It might also be said that more mistakes are made by not listening than by not knowing. The difference between a really experienced physician and the tyro is increase in knowledge plus the correctness with which the evidence can be elicited from garbled statements of patients. He felt that legal methods of examination often confused witnesses, because those methods do not pay sufficient regard to the difficulty of eliciting the truth from unskilled witnesses. All reputable members of the medical profession resented any endeavour to turn them into advocates; they wished merely to inform the courts accurately on the matters in which they were experts.

Dr. Weigall said he supported Dr. Cowen's remarks about experts. It was a scandal that a medical witness could be procured to give evidence either way. He thought experts should be selected by the court and paid from public funds.

Mr. Barry said that he disagreed with Judge Foster's observations that juries were unsatisfactory tribunals. From his experience, he (Mr. Barry) did not think that in the main judges were any more skilled in finding facts than juries. After all, a tribunal, whether constituted by a judge alone or a judge sitting with a jury, measured questions of fact by the yardstick of its own experience, and with a jury there was the advantage of collective experience, an experience much wider and probably closer to realities than the experience gained by a judge as a member of the legal profession. He desired to protest against the notion which seemed to be finding favour in some quarters that because a judge disagreed with a jury's verdict, the jury's verdict must be wrong. The saying, "If you have a bad case, get a jury" meant only "If you have a bad case for trial before a judge, get a jury." The trouble about trials at law was that two contradictory ideas underlay them. In form and in reality, a trial is a contest between parties, but there is involved an additional idea, that the court should ascertain the truth. The parties are not assisting in a truth-finding investigation; each of them wishes the court to accept his version, whether or not it is the actual truth. It might well happen that a proper investigation of matters involved in an action would show that neither of two parties, even

though they were honest and desirous of doing so, was in fact telling the actual truth.

Mr. Arthur Dean said that lawyers should overhaul procedure and substantive matters of law as well. It must be remembered, however, that the function of litigation was to do that kind of justice that parties want done. He thought there should be a permanent law revision committee actively functioning.

Mr. Vroland said that he thought that a stricter enforcement of rules of evidence would be of value. He deplored the tendency on the part of judges to become remote from everyday affairs. Judges would benefit from closer contact with the professions.

The President said that much the same problems confronted doctors as lawyers. The task of both professions was the application of known principles to facts. The difficulty was the ascertainment of facts, but lawyers have the more difficult task, for they are usually reconstructing facts, whilst doctors are only ascertaining existing facts.

Dr. Albiston, proposing a vote of thanks, said Mr. Eggleston flattered the medical profession in attributing to its members a scientific method. The patient didn't want truth; he wanted relief from anxiety if he could not be cured. Regrettably, the medical profession did not know enough to know truth. There was a law of admissibility in medical practice, which was that patient's story must be confined to the time available; if he was pressed by time, a practitioner after a brief outline might jump to conclusions. If he could put the patient in a particular category, and could, by the use of the soothing technique so well displayed by the elder members of the profession, convince the patient that his diagnosis was right even if he could not offer a cure, the patient was happy. Both legal and medical members were greatly indebted to Mr. Eggleston.

Mr. W. St.G. Sproule, K.C., in seconding the vote, said that judges, all seem agreed, were gentlemen of high aims but with low trajectories. Objections to evidence argued at length constitute a scandal. Judges should rule immediately objection was taken without argument in the American fashion. He had great pleasure in seconding the vote of thanks to Mr. Eggleston.