

Chapter 6

THE "FIGHT" THEORY versus THE "TRUTH" THEORY

When we say that present-day trial methods are "rational," presumably we mean this: The men who compose our trial courts, judges and juries, in each law-suit conduct an intelligent inquiry into all the practically available evidence, in order to ascertain, as near as may be, the truth about the facts of that suit. That might be called the "investigatory" or "truth" method of trying cases. Such a method can yield no more than a guess, nevertheless an educated guess.

The success of such a method is conditioned by at least these two factors: (1) The judicial inquirers, trial judges or juries, may not obtain all the important evidence. (2) The judicial inquirers may not be competent to conduct such an inquiry. Let us, for the time being, assume that the second condition is met - i.e., that we have competent inquirers -- and ask whether we so conduct trials as to satisfy the first condition, i.e., the procuring of all the practically available important evidence.

The answer to that question casts doubt on whether our trial courts do use the "investigatory" or "truth" method. Our mode of trials is commonly known as "contentious" or "adversary." It is based on what I would call the "fight" theory, a theory which derives from the origin of trials as substitutes for private out-of-court brawls.

Many lawyers maintain that the "fight" theory and the "truth" theory coincide. They think that the best way for a court to discover the facts in a suit is to have each side strive as hard as it can, in a keenly partisan spirit, to bring to the court's attention the evidence favorable to that side. Macaulay said that we obtain the fairest decision "when two men argue, as unfairly as possible, on opposite sides," for then "it is certain that no important consideration will altogether escape notice."

Unquestionably that view contains a core of good sense. The zealously partisan lawyers sometimes do bring into court evidence which, in a dispassionate inquiry, might be overlooked. Apart from the fact element of the case, the opposed lawyers also illuminate for the court niceties of the legal rules which the judge might otherwise not perceive. The "fight" theory, therefore, has invaluable qualities with which we cannot afford to dispense.

But frequently the partisanship of the opposing lawyers blocks the uncovering of vital evidence or leads to a presentation of vital testimony in a way that distorts it. I shall attempt to show you that we have allowed the fighting spirit to become dangerously excessive.

This is perhaps most obvious in the handling of witnesses. Suppose a trial were fundamentally a truth-inquiry. Then, recognizing the inherent fallibilities of witnesses, we would do all we could to remove the causes of their errors when testifying. Recognizing also the importance of witnesses' demeanor as clues to their reliability, we would do our best to make sure that they testify in circumstances most conducive to a revealing observation of that demeanor by the trial judge or jury. In our contentious trial practice, we do almost the exact opposite.

No businessman, before deciding to build a new plant, no general before launching an attack, would think of obtaining information on which to base his judgment by putting his informants through the bewildering experience of witnesses at a trial. "The novelty of the situation," wrote a judge, "the agitation and hurry which accompanies it, the cajolery or intimidation to which the witness may be subjected, the want of questions calculated to excite those recollections which might clear up every difficulty, and the confusion of cross-examination . . . may give rise to important errors and omissions." "In the court they stand as strangers," wrote another judge of witnesses, "surrounded with unfamiliar circumstances giving rise to an embarrassment known only to themselves."

In a book by Henry Taft (brother of Chief Justice Taft, and himself a distinguished lawyer) we are told: "Counsel and court find it necessary through examination and instruction to induce a witness to abandon for an hour or two his habitual method of thought and expression, and conform to the rigid ceremonialism of court procedure. It is not strange that frequently truthful witnesses are ... misunderstood, that they nervously react in such a way as to create the impression that they are either evading or intentionally falsifying. It is interesting to account for some of the things that witnesses do under such circumstances. An honest witness testifies on direct examination. He answers questions promptly and candidly and makes a good impression. On cross-examination, his attitude changes. He suspects that traps are being laid for him. He hesitates; he ponders the answer to a simple question; he seems to 'spar' for time by asking that questions be repeated; perhaps he protests that counsel is not fair; he may even appeal to the court for protection. Altogether the contrast with his attitude on direct examination is obvious; and he creates the impression that he is evading or withholding." Yet on testimony thus elicited courts every day reach decisions affecting the lives and fortunes of citizens.

What is the role of the lawyers in bringing the evidence before the trial court? As you may learn by reading any one of a dozen or more handbooks on how to try a law-suit, an experienced lawyer uses all sorts of stratagems to minimize the effect on the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of that testimony. The lawyer considers it his duty to create a false impression, if he can, of any witness who gives such testimony. If such a witness happens to be timid, frightened by the unfamiliarity of court-room ways, the lawyer, in his cross-examination, plays on that weakness, in order to confuse the witness and make it appear that he is concealing significant facts. Longenecker, in his book *Hints On The Trial of a Law Suit* (a book endorsed by the great Wigmore), in writing of the "truthful, honest, over-cautious" witness, tells how "a skilful advocate by a rapid cross-examination may ruin the testimony of such a witness." The author does not even hint any disapproval of that accomplishment. Longenecker's and other similar books recommend that a lawyer try to prod an irritable but honest "adverse" witness into displaying his undesirable characteristics in their most unpleasant form, in order to discredit him with the judge or jury. "You may," writes Harris, "sometimes destroy the effect of an adverse witness by making him appear more hostile than he really is. You may make him exaggerate or unsay something and say it again." Taft says that a clever cross-examiner, dealing with an honest but egotistic witness, will "deftly tempt the witness to indulge in his propensity for exaggeration, so as to make him 'hang himself.' And thus," adds Taft, "it may happen that not only is the value of his testimony lost, but the side which produces him suffers for seeking aid from such a source" -- although, I would add, that may be the only source of evidence of a fact on which the decision will turn.

"An intimidating manner in putting questions," writes Wigmore, "may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. So also, questions which in form or subject cause embarrassment, shame or anger in the witness may unfairly lead him to such demeanor or utterances that the impression produced by his statements does not do justice to its real testimonial value." Anthony Trollope, in one of his novels, indignantly reacted to these methods. "One would naturally imagine," he said, "that an undisturbed thread of clear evidence would be best obtained from a man whose position was made easy and whose mind was not harassed; but this is not the fact; to turn a witness to

good account, he must be badgered this way and that till he is nearly mad; he must be made a laughing-stock for the court; his very truths must be turned into falsehoods, so that he may be falsely shamed; he must be accused of all manner of villainy, threatened with all manner of punishment; he must be made to feel that he has no friend near him, that the world is all against him; he must be confounded till he forget his right hand from his left, till his mind be turned into chaos, and his heart into water; and then let him give his evidence. What will fall from his lips when in this wretched collapse must be of special value, for the best talents of practiced forensic heroes are daily used to bring it about; and no member of the Humane Society interferes to protect the wretch. Some sorts of torture are as it were tacitly allowed even among humane people. Eels are skinned alive, and witnesses are sacrificed, and no one's blood curdles at the sight, no soft heart is sickened at the cruelty." This may be a somewhat overdrawn picture. Yet, referring to this manner of handling witnesses, Sir Frederic Eggleston recently said that it prevents lawyers from inducing persons who know important facts from disclosing them to lawyers for litigants. He notes, too, that "the terrors of cross-examination are such that a party can often force a settlement by letting it be known that a certain ... counsel has been retained."

The lawyer not only seeks to discredit adverse witnesses but also to hide the defects of witnesses who testify favorably to his client. If, when interviewing such a witness before trial, the lawyer notes that the witness has mannerisms, demeanor-traits, which might discredit him, the lawyer teaches him how to cover up those traits when testifying: He educates the irritable witness to conceal his irritability, the cocksure witness to subdue his cocksureness. In that way, the trial court is denied the benefit of observing the witness's actual normal demeanor, and thus prevented from sizing up the witness accurately.

Lawyers freely boast of their success with these tactics. They boast also of such devices as these: If an "adverse," honest witness, on cross-examination, makes seemingly inconsistent statements, the cross-examiner tries to keep the witness from explaining away the apparent inconsistencies. "When," writes Tracy, counseling trial lawyers, in a much-praised book, "by your cross-examination, you have caught the witness in an inconsistency, the next question that will immediately come to your lips is, 'Now, let's hear you explain.' Don't ask it, for he may explain and, if he does, your point will have been lost. If you have conducted your cross-examination properly (which includes interestingly), the jury will have seen the inconsistency and it will have made the proper impression on their minds. If, on re-direct examination the witness does explain, the explanation will have come later in the case and at the request of the counsel who originally called the witness and the jury will be much more likely to look askance at the explanation than if it were made during your cross-examination." Tracy adds, "Be careful in your questions on cross-examination not to open a door that you have every reason to wish kept closed." That is, don't let in any reliable evidence, hurtful to your side, which would help the trial court to arrive at the truth.

"In cross-examination," writes Eggleston, "the main preoccupation of counsel is to avoid introducing evidence, or giving an opening to it, which will harm his case. The most painful thing for an experienced practitioner is to hear a junior counsel laboriously bring out in cross-examination of a witness all the truth which the counsel who called him could not" bring out "and which it was the junior's duty as an advocate to conceal." A lawyer, if possible, will not ask a witness to testify who, on cross-examination, might testify to true facts helpful to his opponent.

Nor, usually, will a lawyer concede the existence of any facts if they are inimical to his client and he thinks they cannot be proved by his adversary. If, to the lawyer's knowledge, a witness has testified inaccurately but favorably to the lawyer's client, the lawyer will attempt to hinder cross-examination that would expose the inaccuracy. He puts in testimony which surprises his adversary who, caught unawares, has not time to seek out, interview, and summon witnesses who would rebut the surprise testimony. "Of course," said a trial lawyer in a bar association lecture in 1946, "surprise elements should be hoarded. Your opponent should not be educated as to matters concerning which you believe he is still in the dark.

Obviously, the traps should not be uncovered. Indeed, you may cast a few more leaves over them so that your adversary will step more boldly on the low ground believing it is solid."

These, and other like techniques, you will find unashamedly described in the many manuals on trial tactics written by and for eminently reputable trial lawyers. The purpose of these tactics -- often effective -- is to prevent the trial judge or jury from correctly evaluating the trustworthiness of witnesses and to shut out evidence the trial court ought to receive in order to approximate the truth.

In short, the lawyer aims at victory, at winning in the fight, not at aiding the court to discover the facts. He does not want the trial court to reach a sound educated guess, if it is likely to be contrary to his client's interests. Our present trial method is thus the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation.

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However unpleasant all this may appear, do not blame trial lawyers for using the techniques I have described. If there is to be criticism, it should be directed at the system that virtually compels their use, a system which treats a law-suit as a battle of wits and wiles. As a distinguished lawyer has said, these stratagems are "part of the maneuvering...to which [lawyers] are obliged to resort to win their cases. Some of them may appear to be tricky; they may seem to be taking undue advantage; but under the present system it is part of a lawyer's duty to employ them because his opponent is doing the same thing, and if he refrains from doing so, he is violating his duty to his client and giving his opponent an unquestionable advantage..." These tricks of the trade are today the legitimate and accepted corollary of our fight theory.

However, some tactics, unfortunately too often used, are regarded as improper by decent members of the legal profession. We know, alas, that an immense amount of testimony is deliberately and knowingly false. Experienced lawyers say that, in large cities, scarcely a trial occurs, in which some witness does not lie. Perjured testimony often goes undetected by trial courts and therefore often wins cases. Judge Dawson of the Kansas Supreme Court found one of the "real and crying hindrances to a correct and efficient administration of justice...the widespread prevalence of perjury practiced with impunity by litigants and witnesses..." A wag has it that courts decide cases according to the "preponderance of the perjury." Some -- not all -- that lying testimony results from coaching of witnesses by dishonest lawyers.'

But much inaccurate testimony, not to be classified as perjurious, results from a practice that is not dishonest: Every sensible lawyer, before a trial, interviews most of the witnesses. No matter how scrupulous the lawyer, a witness, when thus interviewed, often detects what the lawyer hopes to prove at the trial. If the witness desires to have the lawyer's client win the case, he will often, unconsciously, mold his story accordingly. Telling and re-telling it to the lawyer, he will honestly believe that his story, as he narrates it in court, is true, although it importantly deviates from what he originally believed. So we have inadvertent but innocent witness-coaching. The line, however, between intentional and inadvertent grooming of witnesses cannot easily be drawn. Now, according to many lawyers of wide experience, the contentious method of trying cases augments the tendency of witnesses to mold their memories to assist one of the litigants, because the partisan nature of trials tends to make partisans of the witnesses. They come to regard themselves, not as aids in an investigation bent on discovering the truth, not as aids to the court, but as the "plaintiff's witnesses" or the "defendant's witnesses." They become soldiers in a war, cease to be neutrals.

"I do not think I am exaggerating," wrote Eggleston in 1947, after a resume of the ways of trial lawyers and trial courts, "when I say that the evidence contains only kaleidoscopic fragments of the facts. It is as if a checker of light and dark patches were held over reality. All that gets down in the record is that seen

through the light patches. It is quite clear," he continues, "that reality does not survive in the process of analysis to which" the contending lawyers "submit it from opposite poles. Cases are won by the exercise of the last degree of ingenuity, and this marginal utility makes the contest highly artificial."

In 1906 the French lawyer, De la Grasserie, said that, in a modern (civil) trial, "deceit" has "succeeded to . . . force, bringing with it almost the same disasters. It is...a conflict...which has been substituted for the primitive conflict of force.... Its wounds are often as deep, its risks as serious... . The battle of craft is enacted by the parties under the eyes of the judge.... Each [party] strives to conceal what is contrary to his interests and to take advantage of everything that helps his cause.... No doubt craft is preferable to violence from the point of view of the social order, but the risk that judgment is wrong is at times as great." An English lawyer, at about the same time, said that, in litigation, "one party or the other is always supremely interested in misrepresenting, exaggerating, or suppressing the truth"; and he spoke "of the characteristic dangers of deception...to which judicial tribunals are exposed... ." As applied to all contemporary American trials, these statements are excessive, misdescriptive. Yet one who visits many of our trial courts, or who reads the books and articles on practical trial techniques to which I have referred, will perhaps incline to believe that, in many cases, matters are not altogether different in this country today. The views of so competent a student of trials as Judge Learned Hand (whom I shall quote in a moment) tend to support such a depressing belief.

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The effects of the contemporary American fighting or adversary method must sorely puzzle many a litigating citizen. The parties to a suit, remarks Eggleston, "know exactly what they are fighting about when the writ is issued, but find themselves fighting a very different case when the trial is actually launched. It is a wise litigant who knows his own quarrel when he sees it in court." "If," said Judge Learned Hand to the lawyer, "you lead your client into the courtroom with you you will, if you have the nerve to watch him, see in his face a baffled sense that there is going on some kind of game which, while its outcome may be tragic to him in its development, is incomprehensible." The legal profession should not take much pride in a system which evokes from Judge Hand the remark, "About trials hang a suspicion of trickery and a sense of result depending upon cajolery or worse." To Judge Hand's comments I would add that, were it impossible to contrive a better system, we lawyers could legitimately defend ourselves, saying, "We do the best we can." But I think such a defense not legitimate because I think we do not do the best we can, since an improved system can be contrived.

Mr. Justice Frankfurter recently observed that a criminal statute is not unconstitutional merely because in one trial under that statute a man goes scot-free while in another trial under the same statute another man is sent to jail for "similar conduct." Such "diversity in result . . . in different trials," said the justice, is "unavoidable," because, in each trial, the ascertainment of the facts must be left to "fallible judges and juries." He concluded that "so long as the diversities are not designed consequences, they do not deprive persons of due process of law." This statement by Justice Frankfurter -- which I think correctly states the judicial attitude towards trials -- has such significance that I want the reader thoroughly to understand it. When, in that context, the justice spoke of "due process of law," he meant a "fair trial," that is, one which meets the minimum test of fairness required by the Constitution. The Supreme Court holds that a trial is constitutionally "fair," if only it does not depart from the methods usually employed in our trial courts. I am not criticising the Supreme Court when I suggest that one imbued with a lively sense of justice will not be satisfied with that minimal constitutional test. A particular trial may be thus minimally "fair" when measured by the standard of our present usual trial practices. But the question remains whether those usual practices can be regarded as actually fair when, due to practically avoidable human errors, they deprive men of life or liberty in criminal proceedings, or of property or money in civil suits. I would answer, No. Our mode of trials is often most unfair. It will, I think, continue to be, until everything

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feasible has been done to prevent avoidable mistakes. Only avoidless mistakes should we accept among life's necessary dangers.

After careful scrutiny of the record of the famous Sacco-Vanzetti case, lawyers of experience have concluded that those men received an egregiously unfair trial, because obviously the trial judge was poisonously biased against the accused, and the prosecutors hit below the belt, resorting to measures which violated the Marquis of Queensbury rules governing court-room bouts. However, in the case of Campbell, and many others like it, innocent men have been convicted after trials from which such glaring defects were absent. Were those trials fair? Yes, in a constitutional sense. They would be pronounced technically fair by the lawyers who criticize the Sacco-Vanzetti decision. But forget the lawyer's perspective. In terms of common sense, how can we say that those trials were fair since, almost surely, in their course, the government lawyers utilized some of the legitimized lawyer-tactics which were likely to mislead the trial courts? Intelligent laymen should insist that it is not enough that a trial seem fair to many lawyers, who, indurated to the techniques of their trade, have become so calloused that they acquiesce in needless judicial injustices.

Take, for instance, a speech made last year, before a Bar Association, by a highly respected judge. He began by saying, "We start with the fundamental conception that a trial, under our procedure, is not a game or battle of wits but a painstaking, orderly inquiry for the discovery of the truth." Now that judge, I have no doubt, believed that statement -- or, rather, believed that he believed it. Yet a few minutes later in his speech, he cautioned the lawyer never on cross-examination "thoughtlessly [to] ask the one question which will supply an omission in your opponent's case." He quoted, with approval, the remark of an expert cross-examiner that, if you put such a question, "you may find the witness has had time to think, and you will get an answer" that hurts your client. So here you have a judge who, after seriously depicting a trial as "an inquiry for the discovery of truth," goes on to encourage lawyers to avoid bringing out the truth. That bewildered judge -- and alas there are too many like him -- will make no serious effort to change a system which permits a lawyer to act as did Mr. Chaffanbrass in another of Trollope's novels: "Nothing would flurry this [witness he was cross-examining], force her to utter a word of which she herself did not know the meaning. The more he might persevere in such an attempt, the more dogged and steady she would become. He therefore soon gave that up ... and resolved that, as he could not shake her, he would shake the confidence the jury might place in her. He could not make a fool of her, and therefore he would make her out a rogue As for himself, he knew well enough that she had spoken nothing but the truth. But he . . . so managed that the truth might be made to look like falsehood -- or at any rate to have a doubtful air."

I repeat that we ought not to blame the trial lawyers for employing such tactics. Yet the legal profession is somewhat responsible for the fact that non-lawyers do sometimes assess such blame. For lawyers and judges declare solemnly that every lawyer is an "officer of the court." So to designate the lawyer, said one court, "is by no means a figure of speech," since "it is his duty to help save the court from error and imposition, and to aid the court to a proper determination of the law and the facts. Theoretically, at least, it is counsel's first duty to see that the issue is justly decided, however his client is affected." His "office" is "indispensable to the administration of justice" But these words mean only that a lawyer must not affirmatively mislead a court, must not introduce in evidence, at a trial, documents which he knows to be false, testimony which he knows to be perjured. Most courts do not effectively disapprove of the lawyers' wiles I have described. Little wonder, then, if laymen sometimes smile cynically when they hear lawyers called court "officers," think it a strange sort of judicial officer who is authorized ingeniously to obscure the facts from trial judges and juries.

The layman's bafflement at the workings of the judicial system has been remarkably described by Kafka, in his book, *The Trial*. There, too, he gives a layman's attitude towards the apathy of many lawyers concerning reforms of the system. Although "the pettiest Advocate," he writes, "might be to some extent

capable of analysing the state of things in the Court, it never occurred to the Advocates that they should suggest or insist on any improvements in the system, while-and this was very characteristic-almost every accused man, even quite ordinary people among them, discovered from the earliest stages a passion for suggesting reforms which often wasted time and energy that [the Advocates thought] could have been better employed in other directions. The only sensible thing [for an Advocate] was to adapt oneself to existing conditions One must lie low, no matter how much it went against the grain. Must try to understand that this great organization remained, so to speak, in a state of delicate balance, and that if someone took it upon himself to alter the disposition of things around him, . . . the organization would simply right itself by some compensating reaction in another part of its machinery~since everything interlocked-and remain unchanged, unless, indeed, which was very probable, it became still more rigid, more vigilant, more severe, and more ruthless."

Kafka's reaction is one of mild bitterness. Jonathan Swift was more vitriolic. He referred to lawyers as "a society of men . . . bred up from their youth in the art of proving by words, multiplied for the purpose" -- and in "a jargon of their own that no other mortal can understand" -- that "white is black, and black is white, according as they are paid." Kipling talks of "the tribe who describe with a jibe the perversions of justice"; and Soddy calls lawyers "charlatans" who aim to "mystify the public." ' Those strictures are altogether too severe; their analyses of lawyers' motivations are inaccurate. And such writers, being uninformed laymen, cannot be constructively critical. What we need today is the kind of vigorous, patient, reformist zeal of a knowing critic like Jeremy Bentham, whose untiring attacks (in the late 18th and early 19th centuries) on lawyers' complacency in the face of judicial injustice, led to the elimination of some of the worst features of judicial procedure.

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Our contentious trial method, I have said, has its roots in the origin of court trials as substitutes for private brawls. But that does not altogether explain its survival. Wigmore (following up a suggestion made by Bentham) suggested that "the common law, originating in a community of sports and games, was permeated by the instinct of sportsmanship" which led to a "sporting theory of justice," a theory of "legalized gambling." This theory, although it had some desirable effects, "has contributed," said Wigmore, "to lower the system of administering justice and in particular of ascertaining truth in litigation, to the level of a mere game of skill or chance . . .", in which lawyers use evidence "as one plays a trump card, or draws to three aces, or holds back a good horse till the home-stretch"

Damon Runyon had much the same idea. "A big murder trial," he wrote, "possesses some of the elements of a sporting event. I find the same popular interest in a murder trial that I find . . . on the eve of a big football game, or a pugilistic encounter, or a baseball series. There is the same conversational speculation on the probable result, only more of it The trial is a sort of game, the players on the one side the attorneys for the defense, and on the other side the attorneys for the State. The defendant figures in it merely as the prize And the players must be men well-schooled in their play. They must be crafty men The game of murder trial is played according to very strict rules, with stern umpires, called judges, to prevent any deviations from these rules" The players "are supposed to be engaged in a sort of common cause, which is to determine the guilt or innocence of the defendant A player . . . for the State represents the people. His function, as I understand it," Runyon continued, "is to endeavor to convict any person who has transgressed the law It is inconceivable that he would wish to convict an innocent person. But it has been my observation that the player or attorney for the State is quick to take any advantage of the rules that puts his side in front, and equally quick to forestall any moves by the other side."

This Wigmore-Runyon explanation may be partially sound, but it seems to me to over-emphasize sportsmanship. I suggest, as an additional partial explanation of the perpetuation of the excessive fighting

method of trials, both civil and criminal, the belief in uncontrolled competition, of unbridled individualism. I suggest that the fighting theory of justice is not unrelated to, and not uninfluenced by, extreme laissez-faire in the economic field.

"Classical" laissez-faire economic theory assumed that, when each individual, as an "economic man," strives rationally, in the competitive economic struggle or "fight," to promote his own self-interest, we attain public welfare through the wisest use of resources and the most socially desirable distribution of economic goods. The "fight" theory of justice is a sort of legal laissez-faire. It assumes a "litigious man." It assumes that, in a law suit, each litigious man, in the court-room competitive strife, will, through his lawyer, intelligently and energetically try to use the evidential resources to bring out the evidence favorable to him and unfavorable to his court-room competitor; that thereby the trial court will obtain all the available relevant evidence; and that thus, in a socially beneficial way, the court will apply the social policies embodied in the legal rules to the actual facts, avoiding the application of those rules to a mistaken version of the facts. Legal laissez-faire theory therefore assumes that the government can safely rely on the "individual enterprise" of individual litigants to ensure that court-orders will be grounded on all the practically attainable relevant facts.

Most of us have come to distrust, in the economic field, ultra let-alone-ism, the ultra laissez-faire theory with its anti-social concept of an "economic man." For observation of social realities has shown that the basic postulates of that theory, although in part correct, are inadequate as exclusive postulates. I think that, in like fashion, observation of court-room realities shows that the postulates of legal laissez-faire are insufficient as exclusive postulates. We should retain what there is of value in the fighting theory of justice, eliminating what is socially harmful. We should retain, I repeat, so much of "individual initiative" in the trial of cases as serves to bring out evidence that might be overlooked and the niceties of legal rules a court might otherwise ignore. But the fight should not so dominate a law-suit that it leads to the non-discovery of important evidence and the distortion of testimony.

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The fighting theory has, in part, broken down. Time was when a litigant could refuse to disclose evidence in his possession to the adversary party before trial. But so-called "discovery" procedure has been developed which requires such disclosure in non-criminal cases. The federal courts are particularly energetic in compelling such "discovery." Thus far, at least, have we advanced towards effectuating the "truth" theory.

There have been other advances, such as increased insistence on the power and right of the trial judge to take a hand in examining witnesses, and even to summon witnesses of whom he is aware and whom neither litigant has called. I must add, however, that regrettably (as I see it) few judges avail themselves of that power. Judge Shientag, a learned and respected judge, recently said that "a litigant has the right to expect ... that the judge will not interfere in die examination of witnesses, even though he believes he can do a better job than counsel, except to correct patent errors, misconceptions or misrepresentations . . ." Some bolder trial judges disagree!

But even if the judge does "interfere," and even if "discovery" procedure is open, the trial court may fail to learn of crucial evidence. Partly this may be due to the incompetence of the lawyer for one side. For lack of means to retain an able lawyer, the impecunious litigant may here be singularly disadvantaged. To some extent we are overcoming that handicap, through Legal Aid Services, although much remains to be done before the legal procession catches up with the medical profession in assisting the indigent and the "white-collar" men.

Apart from failure to bring out the evidence, the mistakes of a man's lawyer may cause him to lose his case -- a proper result under strict legal laissez-faire theory. But is it fair that a litigant should be punished because he retained an incompetent lawyer?" When an error of a trial court, resulting from a lawyer's blunder, is egregious, the upper courts sometimes relieve the litigant. But there persists a reluctance to grant such relief. Maybe that reluctance is justified. I am not sure.

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There is one most serious handicap in litigation that has received little attention: with the ablest lawyer in the world, a man may lose a suit he ought to win, if he has not the funds to pay for an investigation, before trial, of evidence necessary to sustain his case. I refer to evidence not in the files of the other party and therefore not obtainable by "discovery" procedure. What I mean is this: In order to prove his claim, or to defend against one, a man may need to hire detectives to scour the country -- even sometimes foreign countries -- in order to locate witnesses who alone may know of events that occurred years ago, or to unearth letters or other papers which may be in distant places. Or, again, he may need the services of an engineer, or a chemist, or an expert accountant, to make an extensive-and therefore expensive-investigation. Without the evidence which such an investigation would reveal, a man is often bound to be defeated. His winning or losing may therefore depend on his pocketbook. He is out of luck if his pocketbook is not well-lined with money. For neither his lawyer nor any legal-aid institution will supply the needed sums. For want of money, expendable for such purposes, many a suit has been lost, many a meritorious claim or defense has never even been asserted.

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That is not true justice, democratic justice. This defect in our judicial system makes a mockery of "equality before the law," which should be one of the first principles of a democracy. That equality, in such instances, depends on a person's financial condition. The tragedy of such a situation is etched in irony when a man's impoverished condition has resulted from a wrong done him by another whom he cannot successfully sue to redress the wrong. Many of our state constitutions contain a provision that "every person ought to obtain justice freely and without being obliged to purchase it." But, as things stand, this is too often a provision in words only. For the advantage in litigation is necessarily on the side of the party that can "purchase justice" by hiring private assistance in obtaining evidence when his adversary cannot. Unless we contrive some method to solve the problem I have posed, we must acknowledge that, in a very real sense, frequently we are "selling justice," denying it to many under-incomed persons. It should shock us that judicial justice is thus often an upper-bracket privilege. Here we have legal laissez-faire at its worst.

That brings me to a point which the fighting theory obscures. A court's decision is not a mere private affair. It culminates in a court order which is one of the most solemn of governmental acts. Not only is a court an agency of government, but remember that its order, if not voluntarily obeyed, will bring into action the police, the sheriff, even the army. What a court orders, then, is no light matter. The court represents the government, organized society, in action.

Such an order a court is not supposed to make unless there exist some facts which bring into operation a legal rule. Now any government officer, other than a judge, if authorized to do an act for the government only if certain facts exist, will be considered irresponsible if he so acts without a governmental investigation. For instance, if an official is empowered to pay money to a veteran suffering from some specified ailment, the official, if he does his duty, will not rely solely on the applicant's statement that he has such an ailment. The government officer insists on a governmental check-up of the evidence. Do courts so conduct themselves?

In criminal cases they seem to, after a fashion. In such cases, there is some recognition that so important a governmental act as a court decision against a defendant should not occur without someone, on behalf of the government itself, seeing to it that the decision is justified by the actual facts so far as they can be discovered with reasonable diligence. For, in theory at least, usually before a criminal action is begun, an official investigation has been conducted which reveals data sufficient to warrant bringing the defendant to trial. In some jurisdictions, indigent defendants charged with crime are represented by a publicly-paid official, a Public Defender-a highly important reform which should everywhere be adopted. And the responsibility of government for mistakes of fact in criminal cases, resulting in erroneous court judgments, is recognized in those jurisdictions in which the government compensates an innocent convicted person if it is subsequently shown that he was convicted through such a mistake.

In civil cases (non-criminal cases), on the whole a strikingly different attitude prevails. Although, no less than in a criminal suit, a court's order is a grave governmental act, yet, in civil cases, the government usually accepts no similar responsibilities, even in theory. Such a suit is still in the ancient tradition of "self help." The court usually relies almost entirely on such evidence as one or the other of the private parties to the suit is (a) able to, and (b) chooses to, offer. Lack of skill or diligence of the lawyer for one of those parties, or that party's want of enough funds to finance a pre-trial investigation necessary to obtain evidence, may have the result, as I explained, that crucial available evidence is not offered in court. No government official has the duty to discover, and bring to court, evidence, no matter how important, not offered by the parties.

In short, the theory is that, in most civil suits, the government, through its courts, should make orders which the government will enforce, although those court-orders may not be justified by the actual facts, and although, by reasonable diligence, the government, had it investigated, might have discovered evidence-at variance with the evidence presented -- coming closer to the actual facts.

Yet the consequence of a court decision in a civil suit, based upon the court's mistaken view of the actual facts, may be as grave as a criminal judgment which convicts an innocent person. If, because of such an erroneous decision, a man loses his job or his savings and becomes utterly impoverished, he may be in almost as serious a plight as if he had been jailed. His poverty may make him a public charge. It may lead to the delinquency of his children, who may thus become criminals and go to jail. Yet in no jurisdiction is a man compensated by the government for serious injury to him caused by a judgment against him in a non-criminal case, even if later it is shown that the judgment was founded upon perjured or mistaken testimony.

I suggest that there is something fundamentally wrong in our legal system in this respect. If a man's pocket is picked, the government brings a criminal suit, and accepts responsibility for its prosecution. If a man loses his life's savings through a breach of a contract, the government accepts no such responsibility. Shouldn't the government perhaps assume some of the burden of enforcing what we call "private rights" ?

...

I do not suggest that courts, like such administrative bodies, conduct their own investigations through their own employees. I do suggest that we should consider whether it is not feasible to provide impartial government officials -- who are not court employees, and who act on their own initiative -- to dig up, and present to the courts, significant evidence which one or the other of the parties may overlook or be unable to procure. No court would be bound to accept that evidence as true. Nor would any of the parties be precluded from trying to show the unreliability of such evidence (by cross-examination or otherwise) or from introducing additional evidence. Trials would still remain adversary. As I concede that to use that

device in all civil cases would lead to many complications, I do not urge that it be at once generally adopted. But I think experiments along those lines should now be made.

...

It will also be said that any such proposal is absurdly radical. Yet something of the sort was endorsed by President Taft, by no means a radical. More than thirty years ago he said: "Of all the questions ... before the American people I regard no one as more important than this, the improvement of the administration of justice. We must make it so that the poor man will have as nearly as possible an opportunity in litigating as the rich man, and under present conditions, ashamed as we may be of it, this is not the fact...."

Statutes in some jurisdictions authorize the trial judge to call as a witness an expert selected by the judge. Judges might sometimes avail themselves of that power to help indigent or under-incomed litigants. But I believe that none of those statutes, as they now read, provides for payment by the government to judge-called experts in non-criminal suits. Moreover, those statutes will not meet the difficulties of a prospective litigant when making up his mind whether to bring or defend a suit. Nor do they permit expenditures for detectives and other investigators not regarded as "experts." Nevertheless, this expedient might be expanded so as partially to solve the problem I have presented.

None of these proposals, if adopted, would usher in the millennium. Official evidence gatherers, or public prosecutors of civil actions, will make mistakes, or become excessively partisan. The trial process is, and always will be, human, therefore fallible. It can never be a completely scientific investigation for the discovery of the true facts.

...

10

Suppose that, in a crude "primitive" society, A claims that B took A's pig. If that is true, B violated a well-settled tribal rule. But B denies that he took the pig. A attacks B and kills him. Does A's killing of B prove that B was wrong about the facts? Does that killing constitute the enforcement of the tribal rule? Now suppose somewhat the same sort of dispute in the U.S.A. A sues B, claiming that, by fraud and deceit, B got A's pig. A legal rule says that if B did those acts, then A has a legal right to get back the pig or its money value. If A wins that suit, does the decision in his favor constitute the enforcement of that legal rule, even if A won through perjured testimony or because the trial court erroneously believed an honest but mistaken witness?

A lawyer friend of mine, to whom I put this question, replied, "Yes, in theory. In theory, the facts as found must be assumed to be true." His answer does not satisfy me. That we must accept the facts found by a trial court does not mean that a rule against fraud is really enforced when a court holds a man liable for a fraud he did not commit. My friend is saying, in effect, that, even were it true that the courts misfound the facts in 90% of all cases, still the courts would be enforcing the rules.

That conclusion does not bother the hardened cynic. "In the long run," one may imagine him saying, "what is the difference whether courts make many mistakes in fact-finding, and, as a result, render erroneous decisions -- as long as the public generally doesn't learn of those mistakes? Take, for instance, all this to-do about 'convicting the innocent.' One of the important purposes of punishing a man for a crime is to deter others from becoming criminals. Conviction and punishment of the innocent serve just as effectively as if they were guilty to deter others from crime -- provided only the errors are not, too frequently, later discovered and publicized. It's tough on the innocent; but we can afford to sacrifice them for the public good. In the same way, if a non-criminal legal rule is of a desirable kind -- for instance, a

rule concerning the duty of a trustee to the beneficiaries of a trust -- why bother whether, in particular law-suits, the courts, through failure to discover the actual facts, apply it to persons who haven't violated it? Public respect for that rule, and its infiltration into community habits, will come just as well from its misapplications as from its correct applications-if only the public doesn't learn of its misapplications. If you call it injustice to punish the innocent or mistakenly to enter money judgments against men who have done no legal wrongs, then I answer that effectively concealed instances of injustice are not only harmless but socially beneficial. They serve as useful examples. Don't get squeamish about such mistakes." I doubt whether any reader will agree with the cynic.

11

No one can doubt that the invention of courts, which preserve the peace by settling disputes, marked a great step forward in human progress. But are we to be so satisfied with this forward step that we will rest content with it? Should not a modern civilized society ask more of its courts than that they stop peace-disrupting brawls? The basic aim of the courts in our society should, I think, be the just settlement of particular disputes, the just decision of specific law-suits.

The just settlement of disputes demands a legal system in which the courts can and do strive tirelessly to get as close as is humanly possible to the actual facts of specific court-room controversies. Courthouse justice is, I repeat, done at retail, not at wholesale. The trial court's job of fact-finding in each particular case therefore looms up as one of the most important jobs in modern court-house government. With no lack of deep admiration and respect for our many able trial judges, I must say that that job is not as well done as it could and should be. ...

A distinguished legal historian, Vinogradoff, has said that an "ancient trial" was little more than a "formally regulated struggle between the parties in which the judge acted more as an umpire or warden of order and fair play than as an investigator of truth." To continue that ancient tradition, unmodified, to treat a law-suit as, above all, a fight, surely cannot be the best way to discover the facts. Improvement in fact-finding will necessitate some considerable diminution of the martial spirit in litigation.