TRUTH AND THE COMMON LAW JUDICIAL PROCESS*

It is often said that the trial processes conducted by common law courts are designed to discover the truth. It is further said that the judge's task may be summed up by saying that he must first discover the true facts, and then apply the relevant law to the facts so found. Statements such as those assume a number of things that are open to question. They assume, for example, that there is a clear distinction between fact and law. The common law does draw such a distinction in a variety of ways for a variety of purposes and the distinction without doubt may be a very important one.[1] It is not difficult to demonstrate, however, that it is not a simple one so as to be presented in the same way wherever it has to be drawn in the judicial process.

The difference between a statement that "Smith left a motor car in the garage at such and such an address yesterday", and the statement that the "gratuitous bailee of a chattel is not liable to the bailor of the chattel if, without negligence on the bailee's part, the chattel is stolen", is sufficient to show that there may be a fairly obvious difference between a statement of fact and a statement of law — although the statement that "Smith left a motor car in the garage at. . . . . ." may in some circumstances give rise to a question of law.[2] The statement[3] "Smith sold me his motor car yesterday", when used in judicial proceedings, is much more difficult, however, to assign to one category or another. When such a statement is made, in most cases, it is treated as a statement of fact because it will be found as a minor premise in a syllogistic chain of reasoning including a major premise which is treated as a statement of law.

* This article is based on a public lecture delivered in the University of Singapore on January 17th, 1963 and was, since, published in the *Archiv fuer Rechts and Sozialphilosophie, Beiheft* 89, whose Editors have, very kindly, allowed this further publication.

1. Some areas where the distinction is important are: in jury trials where the facts are for the jury and the law for the judge, on appeals where the appeals court is unrestricted in its review of decisions on the law but is usually greatly restricted in its review of decisions as to fact, in appeals from statutory tribunals where often appeals on questions of law alone are allowed, in the application of rules controlling the admissibility of evidence, and in the English theory of precedent. And see, *e.g.,* for general discussion, particularly in relation to theories of precedent: Gooderson, "Ratio Decidendi and Rules of Law" (1952) 30 Can. B.R. 892; Broeder "Functions of the Jury: Facts or Fictions" (1954) 21 U. of Chic. L.R. 386; Patterson, "Role of Law in Judicial Decisions", (1954) 19 M.L.R. 101; *Qualcast (Wolverhampton) Ltd.* v. *Haynes* [1959] A.C. 743; *Cf.* Silving, "Law and Fact in the Light of the Pure Theory of Law" in Sayre (ed.), *Interpretations of Modern Legal Philosophies.*

2. *E.g.,* if it were argued that the vehicle driven by Smith was or was not a motor car within the meaning of a particular legislative provision.

3. Or claim, or conclusion of law.

"Smith sold me his motor car yesterday" is a much more complicated statement than the statement "Smith left a motor car in a described garage yesterday". It is probably best described as a mixture of fact and law. The establishment of its truth or validity will not turn on descriptive evidence alone, but, in addition, on the acceptance of certain legal propositions (sometimes legal characterizations of facts) which will be accepted, or rejected, on the basis of rules prescribed within an authoritative system, and not merely on the basis of rational argument or proof at large.

The commonly asserted distinction between fact and law is worthy of special treatment so far as the common law is concerned, but it is not the matter chosen primarily for treatment in this brief essay. An understanding of its existence and something of its difficulty, however, is necessary as background to the discussion which is proposed. What is proposed is to question the assertion that the judge's, or the court's, task is to discover the truth when matters come before them for trial.

A common lay assumption, and a not uncommon legal one, is that the judge, having found the facts and applied the law, reaches a decision which will be "right" — it is further hoped that it will be "just". "Right" here usually means that the law as it exists has been correctly applied to the true facts; and "just" means something slightly different — that justice has been done in the particular case between the parties before the court. It is not proposed here to pause on the problems of justice, but merely to provide a reminder that the law often seeks divergent or at least different aims at the same time. Law and Order, and law and justice are not infrequently different things. The law, it would seem, often places order first and justice second. The aims of regularity and certainty, affected as they are by the factors of time and generality, sometimes produce particular results which would not generally be accepted as being consonant with ideal justice in a particular case. The problems which arise from distinctions between law and justice seem to be with us always. They may lie in the very nature of human society and of human reasoning; perhaps they are with us "in the nature of things" and because of our inability to comprehend the infinite particularity of things and events by a finite series of generalizations. If that is so we may accept the distinction and the divergence between law and justice, for the purpose of present discussion, without considering other factors that make for such a divergence — such as are found in the defects in human beings, their conservatism, their prejudices, their biases, and such other factors as tend to make any legal system lag behind the preferred ideals of a community.

It should be made clear that, for simplicity's sake, the following discussion is directed primarily to civil proceedings between litigants, and that it will refer to criminal proceedings, and to those other rather special proceedings which fall under the heading of matrimonial causes, only incidentally. That is because in criminal and matrimonial proceedings judges have certain special powers to intervene in the progress of litigation as conducted by the parties, and may direct that investigations be carried out or that evidence be called which the parties would not wish. In civil proceedings generally, however, the judge in the common

law system is restricted to a comparatively passive role within the rules of procedure laid down. He does not call evidence, he does not make enquiries, he does not require parties to raise issues which they do not wish to raise. He sits to judge the issue joined before him by the parties, and upon the evidence adduced by him. There are some facts which the parties would not be permitted to prove. Such limitations may spring from precise rules of law which require the freedom of litigants to be so limited, or they may spring from some more general legal notion such as the dictates of public policy. Broadly speaking, however, the common law courts are presided over by judges *simpliciter,* not by investigators, not by persons acting as directing organs of government.

The neat description of the judicial process in terms of facts — law — decision, quite apart from the difficulties indicated in the distinction between the facts and the law, is a misleading oversimplification. But at this stage it is not necessary to demonstrate the misleading nature of that description. It will serve well enough here because the suggestions to be made would be strengthened and not weakened by the proof of its inaccuracy.

There are two main kinds of "correctness" where the judicial process is concerned, and the difference between them is linked to the difference between fact and law. The first kind goes to the truth or falsity of a description or statement about objective events or things. Thus, that "Smith drove a car into a garage at 40 Rose Street, Burwood, yesterday", may be true or false as a description of events and of things that happened or were observable. But that "Smith drove *his* car into *my* garage at 40 of Rose Street, Burwood, yesterday", cannot be true or false merely as a description of that kind. Of course, to be correct, the same events must have taken place as were necessary to make the first statement true, but other things would have to be shown in addition. It would have to be correct to say, for example, that the car was Smith's and that the garage was mine. Those two statements are about relationships and have precise meaning only in the light of the legal system and its rules. They are complex statements and they turn upon authoritative rules of law as well as upon verifiable statements about things and events. To take the matter a step further, the statement "Smith sold me his car yesterday", is a yet more complex statement. The validity or invalidity of it, as a conclusion of law and fact, will turn upon the precise legal rules which enable conclusions to be reached not merely about relationships but about changes in such relationships.[4] Those distinctions must be kept in mind whenever the question of truth in judicial proceedings is to be considered.

In many judicial proceedings truth of the first kind is not the problem at all. It is assumed or admitted. Thus in many Will cases concerning settlements, trusts, dispositions of property, and in many constitutional law cases, the objective facts are not in dispute. The court is asked to resolve a dispute as to the consequences of certain facts, or as to the meaning of words, or as to the state of the law. Other cases

4. See the discussion by Hart, "Definition and Theory in Jurisprudence" (1945) 70 L.Q.R. 37.

turn on the resolution of disputes about objective facts, but in a bewildering variety of different ways.[5] This may be illustrated by some simple, if extreme, examples.

A dispute, on the face of it, may be as to whether or not Smith sold me his motor car so as to enable me to enforce my rights to the car in a court of law. The answer may turn on whether or not Smith drove car number XY 123 into the garage at 40 Rose Street, Burwood, on a certain day. That situation could arise where there was no dispute as to whether or not it was Smith's motor car, or as to whether or not it was my garage, or as to whether or not I had agreed to buy Smith's motor car. The dispute, so far as it affects or is affected by the law, may be only as to whether or not the sale which had been agreed upon between us had been completed by delivery — *e.g.,* by Smith driving the car into my garage and leaving it there. Again, to take an even simpler case, a man may be sued civilly for damages for trespass to the person. The only issue raised by the defence may be that the plaintiff's black eye was not caused by the defendant's fist striking it — as his fist did not strike it. In such a case the issue between the parties may be limited to a difference as to whether it is true or false to say that the defendant's fist struck the plaintiff's eye.

Take, in isolation, the simple issue of fact arising in the sale of Smith's car. Let it be supposed that what actually happened was that my nephew, who thought he knew that I had purchased Smith's car and thinking to do me a favour, drove Smith's car from where it was standing outside Smith's house into my garage and then departed for South America. Suppose that both my wife and I saw the car come into the garage and that we both saw a man whom we took to be Smith leave the garage and go off down the street. We may honestly believe that Smith did deliver the car in that way, and, in subsequent proceedings, we may be prepared to swear that Smith drove the car into my garage. Smith, of course, would be prepared to swear that he left the car outside his house and that he did not drive it anywhere on that day and that he did not give anyone authority to drive it. Let it be assumed that he cannot prove an alibi for the relevant time and that my nephew is out of communication with all persons concerned — in any case that no one thinks of him.

A judge may be required to decide, in the light of all the evidence and after hearing the witnesses cross-examined, whether or not Smith drove the car into my garage. That judicial task is quite different from the task facing the scientific seeker after truth asked a question of the kind: "Does the water in such-and-such a dam contain oxygen and hydrogen in fixed proportions?"; and it is usually different from that of the technician asked "Did this axle break after a sharp blow from a hard object or after being subjected to great stress over a long period of time?"

To answer the question before the court, observations cannot be verified by repetition. There is no common system of measurement to be relied upon. If the judge is self-critical and conscious of the real

5. See Toulmin, *The Uses of Argument* (Cambridge U. P., 1958) Cap. III & IV. for one philosopher's attempt to unravel the complexity of common kinds of legal arguments.

nature of his task, he cannot, in many cases, *know* that he has ascertained any objective truth. He can merely know that he has been persuaded by one side or the other to believe one thing or another. This it should be noted is not quite the same thing as to say that he believes one witness rather than another, though that may be the case.

Even if such factors as the deliberately lying witness, the relevant evidence deliberately suppressed, or the presence of a jury, are excluded from consideration, in the infinitely varied fabric of human affairs the fact-finding process is likely to be a fairly chancy one in many cases. That is not to say that there are not many cases where the facts can be established with considerable certainty. Often, once all the evidence is in, there will be no doubt in the mind of anyone as to what actually happened in the particular context. There are many cases, however, where this is not so. The facts may be complicated, the evidence may be incomplete or inconclusive, yet a decision must be given.

The language used by judges in the course of trials, and the rules said to control trial procedure and the giving of evidence, are often expressed in terms requiring revelation of the truth. Thus witnesses are required to take an oath to tell the truth. They are subjected to examination and cross-examination so that their assertions as to facts may be checked and verified as far as possible. It is the judge, however, who must decide, and he is at least two stages removed from the facts themselves in most cases. Further, the process of presentation of evidence is a complicated one in itself and many factors may conspire not merely to reveal the truth but, occasionally, to obscure it. Here an old Bar story[6] may provide a sufficient illustration of how close-run a thing may be and how a decision may be affected by the pattern of events in the presentation of evidence.

Let us imagine a case arising out of a motor car accident and a dispute as to the behaviour of the motor cars and their drivers immediately before and up to the moment of collision. The driver of the defendant's car was the defendant's chauffeur. The chauffeur gives evidence well and appears to be a reliable person and an experienced driver. His evidence, however, conflicts strikingly with the evidence of the plaintiff, who was driving his own car. The plaintiff's evidence is corroborated and supported by the evidence of a person who was a passenger in his car at the time of the accident. During cross-examination of the chauffeur, plaintiff's counsel asks whether it was not a fact that there was somebody else in the car with the chauffeur at the time of the collision.[7] The chauffeur replies first of all "No, there wasn't" and then he corrects himself and says "Oh yes there was. Of course, I had my employer's son with me".

Question: "How old was he?"

6. The origin of which I can't recall but it has appeared in various guises at various times.

7. Perhaps fishing rather unwisely and presumably hoping to discover that the chauffeur was, contrary to instructions, taking a young lady out for the evening and was driving with only one hand on the wheel.

Answer: "He was about ten at the time of the collision but I didn't think he counted in this case".

Counsel for the defendant calls the boy, who is now aged twelve, and his evidence is heard and it supports the chauffeur's story of the accident very strongly. The boy makes a very good impression on the court as being observant and as being a truthful, honest sort of boy. He is then cross-examined:

Question: "Of course you have discussed the details of this case and the accident itself with the chauffeur before coming to court, haven't you?"

Answer: "No".

Question: "But you have discussed what happened at the accident with the chauffeur since the accident took place, haven't you?"

Answer: "No, not at all as a matter of fact".

Question: "You do see your father's chauffeur from day to day quite often, don't you?"

Ansiver: "No, I don't see him very often.

Question: "Don't you go riding in the car with him?"

Answer: "No, very seldom, as a matter of fact the day of the accident was one of the very few times when I have been in the car with him".

Question: "But you are very friendly with the chauffeur, aren't you?"

Ansiver: "No, not particularly; but my brother is".

Question: "And your brother of course spends a great deal of time with the chauffeur?"

Answer: "Yes, almost every day he helps the chauffeur when he is working on the motor cars".

Question: "And your brother has discussed the accident with the chauffeur?"

Answer: "Oh yes, my brother has talked to the chauffeur a great deal about the accident, in fact my brother has been very interested in all details of it".

Question: "And your brother has discussed the accident with you?"

Answer: "Yes, of course he has, many times".

And then of course comes the question which should never be asked except by re-examining counsel, if he knows the answer to it:

Question: "How old is your brother?"

Answer: "Two years old".

In such a case it may be that whether or not that last question was asked and so answered would tip the scales of belief between one story and the other.

Whether or not we are justified in assuming, as most do[8], that the trial process is well designed as a method of discovering relevant facts on the basis that it is the best and most economical method over a multitude of cases that we have been able to devise for that purpose, even if it serves to reveal truth from an objective point of view only rarely, it cannot be true to say that the judge's task is to discover the truth. The nature of the judge's task is underlined by the rules provided by the law to enable him to decide a case where his mind is not carried to a firm conclusion by the evidence. The rules relating to onus of proof are vital. If the onus is on the plaintiff the judge is able to decide the case by saying that the plaintiff has not proved his case so as to tip the scales of probability, or in a criminal case that the prosecution has not proved the matters in issue beyond a reasonable doubt.

A new kind of truth is established, however, when the judge has found the facts. The facts as found may bear no or only some relationship to the actual facts if they could be revealed; but, subject to special appeals by way of re-hearing, or re-opening of the evidence because of the discovery of new evidence, and so on, the facts as found must be taken as fixed and true for purposes of the case and for the purposes of further proceedings on the case. So that there will be an end to dispute, which there must be at some time if one prime purpose of the law is to be served, the parties involved cannot dispute again about those facts. Here in the shifting uncertainties of the world is one absolute. The facts as found are true.

The facts as found, nonetheless, may be demonstrably untrue; not because of the weaknesses of the fact-finding process, the frailty of witnesses, *etc.,* but because of the nature of the particular case and the nature of the dispute between the parties. Thus, to return to the first illustration given, the judge may have found that "Smith drove his car into my garage" and that therefore the sale of the car to me was completed. Neither Smith nor I may have raised the question of whether or not the car belonged to Smith. Smith may have given evidence that the car was his and I may not have disputed that evidence at all. The judge may well have stated the fact, though incidentally to the matter really in dispute, that the car belonged to Smith and that he sold it to me. If in truth the car did not belong to Smith, but to Jones who was not in any way involved in the case, it may not in any way affect the conduct or the progress of the case. The arguments which will have to be resolved and the future steps in litigation, will be treated on the basis that the facts as found were true. The case as a whole, and all further steps in it, are to that extent divorced from the true state of

8. And see, for the contrary view: Jerome Frank, *Courts on Trial* (Princeton, 1950).

affairs looked at as a whole. The case has a life of its own. This again shows that the judge is not assigned the task of discovering the truth in any general sense at all, but is merely required to resolve the issues in dispute between the parties before him.

The importance of being clear about the precise issues presented for decision by the parties becomes even greater when, not questions treated as questions of fact alone, but questions either of mixed fact and law or questions of law are involved. When that is so it is often clearer that what the judge is required to do is to decide the issues presented to him by the parties and is not engaged in any more general voyage of discovery. A recent example will serve as an illustration. In *Reg.* v. *Australian Stevedoring Industry Board, Ex parte Melbourne Stevedoring Co. Pty. Ltd.*[9], the plaintiff challenged the propriety and the legal validity of certain proceedings taken against it by the Australian Stevedoring Industry Board. The plaintiff asked for a writ of prohibition to stop the Board from proceeding against it in the way the Board proposed. The Board was taking steps to de-register the plaintiff and thereby to prevent it from continuing as an employer of stevedoring labour.

The argument of the plaintiff was that the Board should be prohibited because it was taking into consideration in the formation of its decision certain *criteria* which it was legally improper for it to consider. The court decided in the plaintiff's favour.

There was, however, another argument open to the plaintiff which could have brought about, in the precise circumstances, the same result.[10] That argument was that the powers which the Stevedoring Industry Board was proposing to use were unconstitutional as being offensive to section 92 of the Constitution,[11] that is to say that the sections in the Stevedoring Industry Act, 1949 under which the board was acting, were contrary to the Constitution and should not be treated as law by the court. The plaintiff, in spite of invitations by the court, chose not to make that argument and the validity of the relevant sections was not argued by the parties and was not put in issue before the court. The court was, therefore, required to decide whether or not, under the particular sections the Board was able to do the things that it was purporting to do. It held that the Board was not able to do those things; but no inference could be drawn from that decision as to the validity of the section under which the Board was acting. It would, in law, be valid to say that the Board, acting under the powers given by the section concerned, could not de-register an employer upon certain grounds. Such a proposition of law would say nothing as to the legal power of the Board to act at all.

There are of course exceptions to the general rule that the court will sit to decide the issues joined by the parties and only those issues.

9. (1953) 88 C.L.R. 100.

10. See *per* Dixon C.J., *Ibid*., at p. 112.

11. S. 92 provides *(inter alia)* that "trade, commerce, and intercourse among the States,. . . . ., shall be absolutely free".

One exception is that the court will always decide questions as to the limits of its own jurisdiction.[12] It will not hear a case which is beyond its jurisdiction merely because the parties bring the dispute before it and agree not to raise the question of jurisdiction.

It becomes clear that, even if the facts as found represent truth in the sense of being an accurate description of things or events, the ultimate conclusion reached by the court is not merely the result of applying the law to those facts. The factors which ultimately control the reasoning of the court are the issues which the parties present for decision — what questions are asked? It is only in the light of those questions that it is possible to consider the questions of truth or falsity, or the validity or invalidity, of the conclusions reached. Of some conclusions, of course, it will not be possible to ask questions about validity or invalidity, or of truth of falsity, but only questions about their reasonableness or their justifiability. Sometimes there will be logic employed which will enable criticisms in terms of validity or invalidity in the same way as it is possible to talk about the validity or invalidity of conclusions in formal logic or in mathematics. In others, and these would represent most cases of any complexity or difficulty, the legal rules themselves are sufficiently open textured to prevent the reasoning being of that strict kind only.

It is commonly assumed that the law and the legal system are necessary for *(inter alia)* two different, though not in all cases conflicting reasons. The first is that to secure a reasonable degree of orderliness and security in community life directions as to minimum standards of conduct are necessary. The second is that there are sure to be quarrels and disputes among members of any society, and that some satisfactory method must be provided for the settlement of those disputes. Those involved in the judicial process are more concerned with the second of those reasons than with the first. The legislator does his best to preempt the field of the first.

In the common law system, at least, those engaged in the judicial process are also engaged in the process of law-making, if only because the common law is to be discovered by examining the decisions of the courts and by working within the confines of the legal doctrines of precedent. Many have said that cases may be explained by relating the essential facts to the decision.[13] Professor Goodhart argued[14] that the general proposition which relates those two, so as to make the decision follow from the facts, will be a proposition of law to be followed in subsequent cases. From the preceding discussion it should be clear that such a simple explanation cannot stand unless at least there were included in it a recognition of the role played by the questions or issues which the disputing parties require the court to decide, for those are necessary as

12. *Halsbury's Laws of England* (3rd Ed.) vol. 7 pp. 6-7 — but courts of inferior jurisdiction usually cannot decide such questions conclusively.

13. See for example, to produce somewhat uneasy bedfellows, Goodhart, *Essays in Jurisprudence and the Common Law* (Cambridge U. P., 1931) at p. 1; and the late Judge Jerome Frank in *Courts on Trial, (supra).*

14. *Loc. cit.*

premises before any conclusions can be drawn from the subsequent course of proceedings.

But the issues or questions presented for decision are chosen by the parties in the light of the requirements of the particular case and for almost infinitely varying extraneous reasons. Such reasons may have little to do with the law, and nothing to do with the problems of the dispute itself. For example, the reason why the argument turning upon s.92 of the Australian Constitution was not made the basis of an issue as to the powers of the Stevedoring Industry Board, in the case referred to above,[15] was that the powers of the Board which were in issue in that case were accepted by both parties as being useful in their respective interests.

The prosecutor did not want to destroy the Board. What was wanted was merely that the particular order that the Board was proposing to make should be prevented. At another extreme, a fact might not be proved by a party merely because it would be embarrassing to that party and because it is desired to prevent its publication at whatever cost to the success of the case itself.

It is now desirable to return to the assumption referred to at the outset: that the judicial process is one of finding the facts and then of applying the appropriate rule of law to those facts. If attention is confined to appellate jurisdictions, because of the way in which judgments are written, that assumption may not appear to be very inaccurate — for most appeals proceed on the basis that the facts found by the trial judge who heard the evidence are true. The picture in the trial court is very different however. At trial there is little isolation of the facts from the law, and there is constant interaction between them. The late Judge Jerome Frank provocatively and rather cynically has described one aspect of this interaction as follows[16]:—

> *"Interactions of Rules and 'Facts'.* — Moreover, effective criticism of a trial judge's decision is hindered by a circumstance which does not hinder criticism of a historian's writings. The judge, unlike the historian, is supposed to use substantive legal rules, *R's,* in contriving his decision. Consequently, there may occur, in his mental processes, interactions of the *R's* and the *F's,* interactions which may be exquisitely complicated in many obscure ways. I shall here note but one of those ways.
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> "As previously stated, it is a wise and accepted principle that a trial judge's finding of the facts should be affected not merely by the words of the witnesses but by their manner of testifying. Suppose, then, that, when listening to the testimony, the judge thinks a particular formulation of a particular rule will govern the case. That rule will serve as his attention-guide, *i.e.,* it will focus his attention sharply on those witnesses who testify with respect to matters specifically germane to his version of that rule. But suppose that, when the trial is over, and the judge comes to his decision, he concludes that his earlier

15. *Reg.* v. *Australian Stevedoring Industry Board, ex p. Melbourne Stevedoring Co. Pty. Ltd., supra.*

16. "Say it With Music" (1948) 61 Harv. L.R. 921 at pp.947-8.

formulation of that rule was wrong. He cannot now vividly recall the demeanor of those witnesses whose testimony is relevant to what he now considers the correct formulation of the proper rule.[17] As a result, he may well find the facts erroneously. Yet neither he nor any critic is able to know whether or not he did thus err.

"The interaction of rules and 'facts' may have some paradoxical results, baffling to both the trial judge and his critics: a trial judge may want to decide in favour of one of the parties, say the plaintiff. However, it may happen that, if the judge applies to the facts — as he believes them to be — what he considers the correct, well-settled, legal rule, he cannot logically justify such a decision. Sometimes, thus circumstanced, a trial judge, as we saw, will 'force the balance,' *i.e.,* he will deform his real view of the facts and so state them in his findings that, applying what he considers the correct rule, he thinks he can make his decision seem justifiable. If he has heard and seen the witnesses, his reported finding of the facts will usually be accepted on appeal by the appellate court. But if that court concludes that he applied an incorrect legal rule, it will itself apply what it considers the correct rule to the facts so found by him, and, reversing his decision, it will decide the case for the defendant. Now it may well be that, had the trial judge found the facts in accordance with his true view of them, and, accordingly, decided for the defendant, the upper court, disagreeing with the trial judge about the correct rule, would have reversed him; it would thus render the decision for the plaintiff which the trial judge had thought desirable but which, due to his incorrect notion of the applicable legal rule, he had felt unable to render on the basis of his honest view of the facts."[18]

Other aspects become obvious once it is considered that all the evidence and all the arguments about the law are heard before decision and then one composite judgment is delivered. But there is a more important interaction between fact and law than the interaction that Judge Frank wrote about in those passages. It is of the same kind, but it arises at an earlier stage and is more controlling. That is the interaction at the stage when the issues to be litigated are being formulated by either side to the dispute.

When a party first seeks legal advice he has no idea that, for example, he wants to prove that Smith drove his motor car into a particular garage on a particular day. He merely wants the motor car; and he demands to be able to use it as his own and that the law should secure this to him. Just what facts will have to be proved and just what issues will be important, whether of fact or of law or of both mixed, will only be decided after his legal adviser has considered the possibly relevant rules of law — and in the light of those rules. The consideration of

17. Consider here the situation when, after all the testimony is in, the plaintiff amends his complaint to conform to the proof, thus introducing new *R's* or new aspects of the *R's.*

I8. If English lawyers think that this description of possibilities could not be applied to common law jurisdictions within the Commonwealth, they have not practiced in inferior jurisdictions.

those matters by the legal adviser will, in most cases, be a continuous and changing process as more facts come to light. It must also be remembered that the process goes on from two or more separate points of view with the object of serving the wishes of each party involved in the litigation, and there may, of course, be two or many parties. Thus the issues which will have to be decided by the Judge and which control the court process, are in their turn largely controlled by the purposes moving the parties. In those circumstances it is inevitable that many cases have a life and logic of their own in which the truth or falsity, the validity or invalidity, of any statement or claim or conclusion of law will be removed from reality viewed from some other point of view or for some other purpose.

In conclusion it should perhaps be said that it is realized that the matters raised in the preceding discussion are not new. They will be familiar to all lawyers who have ever concerned themselves with the practice of their art. They are often overlooked, however, by those who write about the theory of the law, about the theory of the judicial process and of precedent, and about theories of justice, whether they are lawyers or philosophers or both. It is for that reason that it has been thought worthwhile to raise them here in as simple a way as possible, for in the common law system as we have it those matters lie in "the nature of things" and affect any generalizations about law and justice, about truth in the judicial process, and all theories about law making through the cases.

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