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NEW TRIALS AND APPELLATE REVIEW

By

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The cry of the wounded lawyer, stung by defeat in a trial by jury, is only slightly less vociferous than that of the unfortunate loser when trials were decided by combat. It was probably always so, and it probably always will be. But for many years this vocal anguish was apparently regarded by the bench with something like amused tolerance and the early courts took no action in respect to jury verdicts except for actual jury misconduct.¹

True, the writ of attaint was available to the disappointed party, but the invocation of this writ involved the selection of 24 jurors to try the twelve who had rendered the undesirable verdict, and if the verdict was found improper, the original 12 had their goods seized, their houses pulled down and, to catch anything that might be left, they were fined.² This drastic remedy was seldom invoked, so that in the normal course of events, the occupational cry of the defeated lawyer went unheeded.

However, in 1655, a now-forgotten advocate charged that the jury "must have been a packed business, else there could not have been so great damages". His plea was so moving that the court granted a new trial because of excessiveness.³ Thus was born the practice of granting new trials by the court for reasons other than actual misconduct by the jury.

This practice, of course, has been a traditional part of our Pennsylvania jurisprudence, and it is not intended here to examine the *grant* of new trials by inferior tribunals. Rather, the function of this article is to examine the scope and effectiveness of appellate review when such orders granting new trials have been made by a lower court.

In spite of some early doubts regarding the appealability of an order granting a new trial,⁴ it is now accepted that the *right* to appeal from an order granting a new trial does exist and that it is a right derived from the common law.⁵ But whether that right has substance, or whether it is, in fact, so illusory as to be a practical nullity, is by no means clear.

True, there exist more or less crystalized rules that would seem to demand reversal in certain categorized situations. Thus, where the trial court grants a

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¹ 24 Edw. III 24; 11 Hen. IV 18; 14 Hen. VII 1.

² Fortescue, *DeLaudibus Legum Angliae*, ch. 26 (circa. 1468).

³ *Wood v. Gunston*, Style 466, 82 Eng. Rep. 592 (1655).

⁴ *Graham v. Graham*, 1 S. & R. 331, 333 (1815).

⁵ *DeWaele v. Metropolitan Life Insurance Company*, 358 Pa. 574, 584 (1948).

new trial because of a supposed error of law, which the appellate court decides was not, in fact, an error, the grant of the new trial will ordinarily be reversed.⁶ And indeed, it would seem that an appellant should be able to predict reversal with certainty once he has convinced the reviewing court that that trial court was mistaken in its apprehension of its own error, the only uncertainty being whether or not legal error was in fact committed at the trial. But even in this apparently *a fortiori* situation, our appellate courts, by their holdings in other but cognate cases, have thrown a pall of uncertainty over what should seemingly be a definite rule. For, say the courts, the action below will not be reversed unless it expressly and affirmatively appears by certification that the trial court's mistaken conviction of its own error was the *sole* reason for the new trial,⁷ and even the fact that the court below discussed only one reason for its action does not necessarily mean that this was the exclusive cause of the new trial.⁸ It is apparent that though the court below was manifestly wrong in concluding that legal trial error had been committed, an appellant cannot predict that the mistake will be righted unless the trial judge's certification accompanies the appeal.

It would seem, too, that where a plaintiff is admittedly entitled to a verdict against one or both of two tort-feasors, he should never be deprived of his verdict against one merely because the trial court conceived that both were liable, and both appellate courts have so held.⁹ And yet, in spite of the obvious justice of such a rule and in spite of the apparent definiteness of the courts' language, it has nonetheless been intimated that even in such a situation, the lower court has the power to grant a new trial as to all defendants.¹⁰

Where, the layman (or indeed the lawyer) may well ask, is the "known certantie of the law that is the safety of all"?

But if appellate action in those individual situations is uncertain, there is at least a semblance of appellate review. The litigant deprived of his verdict has, at least, the hope of reversal. However, where the trial court cloaks its actions under the magic formula of "interests of justice" or "weight of the evidence", hope is virtually gone. Then the litigant is practically at the mercy of a single individual,—the trial judge. He whose evidence has been of sufficient compulsion to persuade twelve jurors, fairly selected from a community cross-section, may still be wrecked on the reefs of a single individual's personal predilections, belief, background, philosophy and emotions. Indeed, even to persuade more than twelve jurors is not enough to stop judicial interference with a verdict, no matter how consistent in

⁶ *Se-Ling Hoisery, Inc. v. Margulies*, 364 Pa. 45 (1950); see *DeWaele v. Metropolitan Life Insurance Company*, *id.* 5.

⁷ *Reese v. Pittsburgh Railways Company*, 336 Pa. 299, 301 (1939); *Steilein et al. v. Vogel, et al.*, 363 Pa. 379 (1949).

⁸ *Regan v. Davis*, 290 Pa. 167, 170 (1927).

⁹ *Trerotola v. Philadelphia, et al.*, 346 Pa. 222, 226-7 (1943); *Kins v. Pittsburgh Railways Company, et al.*, 154 Pa. Superior Ct. 29, 31 (1943).

¹⁰ *Frank v. W. S. Losier & Co., Inc.*, 361 Pa. 272, 277 (1949).

one direction, for a verdict will not be allowed to stand, no matter how many new trials must be granted to effect the ends of justice.¹¹ We must pause to ask: whose concept of justice? What divine inspiration is breathed into one man by the investiture in a robe that clothes him with omniscience? Is it not logical that after, —not twelve,—but 48 people of the community have been convinced of a party's case, the matter should rest, and that "weight of the evidence" and "interests of justice" had both been satisfied? And yet, even after all 48 had found the same verdict, another new trial was granted.¹²

However, the possible shortcomings of trial courts are not the subject of this article. Rather, we are concerned with what, if anything, an appellate court will do about such possible shortcomings.

In the first place, it cannot, of course, be doubted that under our practice the grant of a new trial on the weight of the evidence, or in the alleged interests of justice, rests in the discretion of the trial court.¹³ But this statement is by no means the be-all and the end-all, for a proper conception of the meaning of the rule involves an examination into the meaning of (a) discretion; (b) weight of the evidence; and (c) interests of justice.

The term "discretion" imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion.¹⁴ Discretionary power can only exist *within* the framework of the law and it is not exercised for the purpose of giving effect to the will of the judge.¹⁵ Discretion *must* be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions.¹⁶ Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is misapplied, or where the record shows that the action taken is the result of partiality, prejudice, bias or ill-will.¹⁷ And when any of these factors appear, the exercise of discretion is subject to appellate review.¹⁸

Thus, both on reason and authority, the mere fact that the grant of a new trial is "discretionary" constitutes no impediment whatever to a review of the order on appeal. That this must be so appears from the host of opinions in which the supreme court states it will not interfere with the trial court's action *unless* discretion was abused.¹⁹ The very use of the word "unless" clearly imports that an abuse of discretion will be both reviewed and reversed.

¹¹ *Maloy v. Rosenbaum Co.*, 260 Pa. 466, 472 (1918).

¹² *Sandonawicz v. Metro. Life Ins. Co.*, 129 Pa. Superior Ct. 431 (1937).

¹³ *Bellettiere v. Philadelphia*, 367 Pa. 638, 642 (1951) and cases there cited.

¹⁴ *Paschall v. Passmore*, 15 Pa. 295, 304 (1850).

¹⁵ *Osborn v. U. S. Bank*, 9 Wheaton 738, 866 (1824).

¹⁶ *Dauphin Co. Grand Jury Invest. Proc.* (No. 3), 332 Pa. 358 (1938).

¹⁷ *Mielcuszny v. Rebol*, 317 Pa. 91, 93 (1934).

¹⁸ N. 16.

¹⁹ *Tupponce v. Pennsylvania R. R. Co.*, 358 Pa. 589 (1948); cf. *Class & Nachod B. Co. v. Giacobello*, 277 Pa. 530, 538 (1923) wherein Chief Justice Moschzisker reviews appeals from the grant of new trials.

Thus, (1) discretion is not and cannot be absolute; and (2) its abuse will be reversed on appeal. What magic meaning, if any, is implicit in the phrase "weight of the evidence" that would make the rule any different? What is, in fact, the meaning of the phrase?

We know, of course, that weight of the evidence never rests upon mere numbers of witnesses.²⁰ Rather, it has been defined as evidence which has the effect of inducing belief,²¹ or that credibility is the measure of weight.²² Considering together both of these criteria, each of which has been approved by the supreme court, it would seem to be a legitimate inference that evidence which induces belief is credible evidence, so that a verdict rendered in accordance therewith would be supported by the weight of the evidence. Conversely, evidence which does not induce belief is not credible. A verdict rendered upon evidence of the latter type would appear, therefore, to be against the weight of the evidence. Were these propositions the guideposts in the consideration of motions for new trials, there would at least be definable standards. Of course, the question must always recur: evidence which induces belief in whose mind? For it would appear to be an *a fortiori* proposition that where twelve jurors render a verdict, the evidence of the prevailing party must have induced belief. If "credibility is the touchstone of testimony in the measure of its weight" and if the jury alone is to pass upon its value,²³ then obviously when belief has been induced in the minds of 12 people, and 12 people to whom has been committed that function have found the evidence credible, it would seem to be anomalous to say that their finding was against the weight of the evidence. Obviously, their very verdict determines that the weight of the evidence was the way they found. And to argue further that evidence is incredible because it did not induce belief in the mind of one person, although it did in the minds of 12, cannot, it seems to us, withstand any logical scrutiny.

However, so long as the trial judge has the power to set aside a finding of fact on *his* reaction to the evidence, it would certainly seem that where the evidence does not induce belief in this omnipotent mind, a verdict rendered thereon would be against the weight of the evidence, at least according to the trial judge's standard of weight. And yet, perversely enough, we find courts saying that the weight of the evidence was distinctly in favor of the non-prevailing party, and yet refusing a new trial.²⁴ In one case, both the trial judge and the supreme court thought the jury should have found differently, thus implying that the prevailing side's evidence did not induce belief in their minds, and yet both the inferior and the appellate courts refused a new trial.²⁵ The court has even said that a refusal of a new trial will not be disturbed, even though the weight of the evidence was with the appel-

²⁰ Braunschweiger v. Waits, 179 Pa. 47, 51 (1897).

²¹ N. 20.

²² See Henes v. McGovern, 317 Pa. 302, 312 (1935).

²³ Lindemann v. Pittsburgh Rys. Co., 251 Pa. 489, 493 (1916).

²⁴ Brown v. Philadelphia and Reading R. R. Co., 2 Wood. 144, 145 (1863).

²⁵ Kelly v. Traction Co., 204 Pa. 623 (1903).

lant.²⁶ Once again, then, we find decisions turning on the application of a phrase whose meaning is uncertain, undefined and as variable as the courts wish to make it, and whose effect is equally variable.

Coming now to the phrase "the interests of justice". In our opinion, this language has been tortured by the courts far beyond its original meaning. So far as we can determine its first use in connection with the grant of a new trial was in *Cleveland Worsted Mills Company v. Myers-Jolesch Co.*, 266 Pa. 309 (1920). There the trial judge conceived that he had charged erroneously on the measure of damages and awarded a new trial. The lower court stated that "in the interest of justice a new trial should be granted, in order that the plaintiff may have the measure of damages properly submitted to a jury". Defendant appealed and the supreme court affirmed, saying, at page 311:

"Defendant now appeals from the order granting a new trial, averring an abuse of discretion because, as it alleges, the charge to the jury was correct. We cannot so hold, however, for the 'interest of justice' may well demand a new trial be granted in order that an important question in the cause may be so raised on the record as to permit of its consideration on appeal, and this whether or not it was properly decided at the trial".

It is quite apparent that at its inception "the interests of justice" was used in connection with *legal*, and not *factual*, error. Today, however, the words are used in all cases where new trials are granted, not because of demonstrable or supposed legal error, but because of the judge's feeling. There is no doubt that emotion enters into any jury verdict. But does not at least a "legalistic emotion" enter where the judge, who is, after all, simply another human being, considers the evidence against his own emotional or philosophic background?²⁷ When the phrase "interests of justice" is used, unsupported by reasoning, as it so frequently is, it is often the case of a thirteenth juror undoing the act of the other 12. There would appear to be no rational basis for concluding that this thirteenth individual's perception of "the interests of justice" is significantly more acute than the perception of the other 12. Indeed, in *Aaron v. Strausser*, 360 Pa. 82 (1948), the late Chief Justice Maxey quoted with approval this language (pps. 85-86):

"***The average judgment of 12 jurymen of average sense, drawn, as they are, from all walks of life and impartially selected . . . is more likely to reach a practical result in sifting, weighing, rejecting, reconciling proof, and deciding facts than is that of the trained and technical reasoner or specialist whose mind runs in the groove of artificial analysis and logic; for peradventure men do not usually get into trouble through logical processes, and logicians cannot always get them out of it'***"

²⁶ *Hegarty v. Berger*, 304 Pa. 221, 227 (1931).

²⁷ *A Judge Takes the Stand*, by Joseph Ulman (1933), c. V, pp. 52-66.

Logicians certainly would have difficulty in reconciling this language with the appellate courts' insistence that the interests of justice are practically co-extensive with the trial judge's reaction to the proof.

We have gone thus at length into "discretion", "weight of the evidence" and "interests of justice" to show what an ephemeral and at times contradictory nature they have. This is important, because if discretion must be exercised with the law, and not blindly, it would seem that the appellate courts should at least erect the standards to be followed. Otherwise, the concepts of "weight" or of "justice" can and do vary with the individual judge. As a result, lawyers may predict with some certainty,—not what the law is,—but what a particular judge is likely to do. The result of this, in turn, is an unseemly "jockeying for position", with constant maneuvering to set a particular case before a particular judge. No more undesirable result can be imagined, but it will continue so long as the appellate courts shun review whenever the magic words are used.

The curious and distressing fact is the total inconsistency of the appellate courts. A new trial, they say, will not be granted on a mere conflict in the evidence.²⁸ Nevertheless, new trials have been granted and the order has remained undisturbed where there was only a conflict in the evidence.²⁹ Although the supreme court has stated that it has not abdicated its reviewing function in such cases as these,³⁰ and although the court itself has referred to the phrase "in the interest of justice" as a "somewhat cryptic explanation",³¹ the hard fact is that in the vast majority of cases where the lower court uses that phrase, the Supreme Court looks away.

Out of all the new trials granted on the weight of evidence, or in the interest of justice (or both) that have been appealed to the Supreme Court, we can find but four instances of reversal.³² One of those³³ was a case where the lower court conceded plaintiff's right to a verdict, but erroneously concluded that the exculpated defendant had been negligent as a matter of law. Another³⁴ was a case where the appealing defendant, against whom a new trial had been awarded, was entitled to binding instructions as a matter of law, and reversal followed as a matter of course. Neither of these cases, then, represents a real, independent appraisal of the evidence by the appellate court in order to determine for itself whether, in reality, the verdict *was* against the weight of the evidence or against the interest of justice.

²⁸ Harmer v. American Railway Express Co., 269 Pa. 271 (1921).

²⁹ Campbell v. Philadelphia Transportation Co., 366 Pa. 484 (1951); Bellettiere v. Philadelphia, 367 Pa. 638 (1951).

³⁰ Jones v. Williams, 358 Pa. 559, 564 (1948).

³¹ Fritz (Admr. v. York Motor Express Co., 358 Pa. 398, 401 (1948).

³² Jones v. Williams, 358 Pa. 559 (1948); Fritz, Admr. v. York Motor Express Co., n. 31 Martin, et al. v. Arnold, 366 Pa. 128 (1950); Stewart, et vir. v. Ray, et al., 366 Pa. 134 (1950).

³³ Jones v. Williams, n. 32.

³⁴ Fritz, Admr. v. York Motor Express Co., n. 31.

The first indication that the court was cognizant to the point of action of its admitted duty to review the record for itself⁸⁵ came in two cases decided in 1950.⁸⁶ In the *Martin* case, there was a verdict for plaintiff against both defendants, with a new trial awarded as to one. The other defendant appealed. Mr. Justice Chidsey, not content with time-worn reliance on a phrase, painstakingly reviewed the evidence and concluded independently that the verdict was not against the weight of the evidence. The order was reversed. In the *Stewart* case, there was a verdict for plaintiff against one defendant only, and a verdict for the other defendant. Plaintiff's motion for new trial as to both was granted. The exculpated defendant appealed. Again, Justice Chidsey reviewed the evidence and held that discretion had been abused.

The method of approach and the action taken by the court in these last two cases we conceive to be the true exercise of judicial review. But apparently whatever progression was made in those cases was doomed to an equivalent retrogression. In *Campbell v. Philadelphia Transportation Co.*, 366 Pa. 484, decided January 2, 1951,⁸⁷ the court not only reverted to its former aloof position, but retreated even further. There, in spite of all its previous pronouncements that a new trial will not be granted on a mere conflict,⁸⁸ the court solemnly repeated the old formula and affirmed, including in its opinion, incredibly enough, the statement that "The evidence is in complete conflict". But the court went even beyond that manifest inconsistency. It said (page 485):

"***Neither in this conflicting testimony, nor in any part of this record, have we been able to find any settled facts that so strongly support plaintiff's case as to persuade us that the trial court has abused its discretion.***"

Thus, now, in order to prevail with any certainty, a party must (a) convince the jury; and (b) produce "settled facts" that "so strongly support" his case that the trial judge or the appellate court will also be persuaded. Truly, this turn of the law is incomprehensible when contrasted with cases where a new trial was refused even though the trial judge,⁸⁹ or both the trial judge and the appellate court⁴⁰ thought the weight was with the losing party.

Actually, in the *Campbell* case, the record shows that the trial judge charged (record, p. 78a):

⁸⁵ *Jones v. Williams*, n. 32.

⁸⁶ *Martin v. Arnold and Stewart et vir. v. Ray et al.*, n. 32.

⁸⁷ We should confess immediately that the writer both tried and argued this case and we therefore invite an independent examination and appraisal of the record.

⁸⁸ n. 28.

⁸⁹ *Campbell's Lessee v. Sproat*, 1 Yeates 327, 328 (1794) where the court said, "Though the judge who tried the cause, inclined that the weight of the evidence was with the plaintiff, yet it is no ground for awarding a new trial, that the jury have differed from him in opinion. Were the rule otherwise, such motions would greatly multiply on us, and the greatest inconveniences would ensue."

⁴⁰ n. 25.

“***The thing that this case rests or falls on is this: Was that automobile across these two tracks and partly over to the other track when this trolley car plowed into it? That is the big point in this case***.”

The physical evidence, supplied by a disinterested witness, showed that a side skid mark from plaintiff's automobile began at a point between the two sets of tracks, thus supplying apparently incontrovertible evidence that the automobile *was* partly over to the other track when struck. Apparently, we must now ask: What are “settled facts”?

The most recently reported case on the subject is *Belletierre v. Philadelphia*, 367 Pa. 638, decided June 27, 1951. There, the plaintiffs brought suit for personal injuries suffered as a result of a collision between the automobile driven by the husband plaintiff and a fire engine. The husband was brought on the record as additional defendant in the action of his wife and daughter. The jury's verdict was for all plaintiffs against the city. The lower court granted the city's motion for a new trial. The lower court's opinion (record, page 170a), after summarizing the testimony, justified its ruling on the following asserted factors: (1) that the plaintiffs were not disinterested witnesses; (2) that the testimony of the firemen as to the sounding of the siren and the bell was positive testimony; (3) that there was not enough evidence to show the city's recklessness; (4) the verdicts may have been excessive; (5) that under the circumstances in the interests of justice a new trial should be granted. In affirming, Mr. Justice Stern reviewed the testimony, but failed to discuss the validity of any of the reasons advanced by the trial court for its action. Rather, he *inferred*, without any sanction from the opinion of the lower court, that the lower court had an additional but hidden reason, namely, that the verdict was against the weight of the evidence. The opinion then went on to buttress this absent but inferred reason by pointing to the testimony of alleged disinterested witnesses, and the fact that the plaintiff's story as to speeds and distances could scarcely be regarded as convincing. What the court did *not* mention was: (1) that the fire truck driver's testimony was totally at variance with his statement given to the police immediately after the accident (record, pages 98a-99a); (2) that although the engine was answering an alarm, it was going 20 miles per hour, slowing to 10 miles per hour at the intersection (according to the firemen's testimony, record, 100a); (3) that three of the alleged disinterested witnesses were indoors and removed from the intersection (record, pages 107a, 110a,

111a); and (4) that the city's estimates of speeds and distances, together with the admitted point of impact, was inherently improbable.⁴¹

The net effect of the *Bellettiere* holding is to throw into the path of effective appellate review a still further obstacle that did not previously exist; that is, the imputation to the trial court of a reason that the lower court itself did not advance, with support for the non-existent reason advanced, not by the trial court, but by the appellate court which did not see or hear the witnesses.

Mr. Justice Bell, in his concurring opinion, would review only for "fraud or collusion", basing his suggestion, not on the conscience of the lower court *en banc*, but on what the trial judge might sense from the atmosphere of the trial.⁴² Thus, Justice Bell would remove all traditional restraints from the asserted exercise of discretion and would repose in one man,—the trial judge,—absolute power. The trial judge's action could be arbitrary, whimsical, biased and prejudiced, could violate all established concepts of legal discretion, but if it stopped short of fraud or collusion, there would be no possibility of correction. Such a suggestion, we believe, is at sharp variance with all our traditions of the jury system and the reviewing function of our appellate courts, and finds no support in our system of jurisprudence.

The record of the supreme court in the review of orders granting new trials leads to the inescapable conclusion that the aggrieved party's "right" of appeal is in reality a right without substance. Although the court has denied that it has abdicated its reviewing function, it has certainly not exercised that function in any practical sense. It has, on the contrary, paid lip-service to a right, and promptly taken all value from the right by worship of an empty, confusing and largely meaningless phrase,—the weight of the evidence and the interests of justice.

The reason for this apparent apathy, inertia, or mere reluctance to review, of course, does not lie in the mere statement that the trial court is invested with discretion. We must seek the *reason* for the imposition of such discretion and then examine its validity.

⁴¹ The accident admittedly occurred at the middle (record, p. 117a) of the intersection of two 26 foot wide streets with 12 foot sidewalks (record, p. 92a). Under the best view of city's evidence, the fire truck was going 10 m.p.h., or approximately 15 feet per second (record, pp. 90a, 105a). The additional defendant was going 20-30 m.p.h., or 30-45 feet per second. The fireman said the additional defendant was 60-70 feet from the intersection when the fire truck was between the near house line and curb line, so that the additional defendant traveled 60-70 feet, plus one-half of the intersection (13 feet), or 73-83 feet, while the fire truck traveled 19 feet. Obviously, were this testimony true, the fire truck would have cleared the intersection before the collision, or at most, the fire truck would have been struck in the rear, although admittedly its front struck the middle of the other car (record, pp. 95a, 159a). Conversely, if the fire truck at 10 m.p.h covered 19 feet, the automobile would have had to cover 4 times that much in the same time, and no witness said *Bellettiere* was going as much as 40 m.p.h., or 4 times as fast as the fire truck. *Bellettiere's* testimony on the other hand (record, pp. 23a-25a) withstands the scrutiny of mathematical analysis in light of the admitted facts.

⁴² 367 Pa. 638, 645.

⁴³ *March v. Philadelphia & West Chester Trac. Co.*, 285 Pa. 413, 418 (1926); *Campbell v. Phila. Transportation Co.*, 366 Pa. 484, 485 (1950).

Most frequently, when the appellate court gives any reason at all for investing the trial court with such broad powers, it is that the trial judge, who saw and heard the witnesses, is best able to decide the weight to be given to their testimony.⁴³ Historically, however, the very opposite approach obtained. The *Nisi Prius* judges who were sent from Westminster with commissions,⁴⁴ had jurisdiction only to try the cases and had no power to grant new trials.⁴⁵ Even today, the English Rules of Court of 1883 provide that "no judge shall sit on the hearing of any motion for a new trial in any cause or matter tried with a jury before himself".⁴⁶

However that may be, though, our courts have consistently relied upon the ground that the trial judge, having seen and heard the witnesses, is best able to judge the weight of the evidence.

Whatever superficial cogency there may be in this reason, however, disappears under closer scrutiny of the authorities, because actually the order granting a new trial is *not* that of the trial judge, but of the court *en banc*.⁴⁷ It is the duty of all the judges to sit together, hear the motion, meet and discuss the matters present,⁴⁸ and if more than one judge is not available, a judge from another district must be called in to sit with the trial judge.⁴⁹ But beyond this, if a majority of the court *en banc* feels that a new trial should be refused⁵⁰ or granted,⁵¹ the majority will prevail, even though the trial judge disagrees.

Obviously, the judges of the court *en banc* (other than the trial judge) did not see or hear the witnesses and must decide from the same record presented to an appellate court. It is equally clear that the non-trial judges below have no greater insight into the witnesses or the evidence than has the appellate court. It would seem, therefore, that the special ability to weigh the evidence attributed to the trial judge is of doubtful significance. We are unwilling to concede that our appellate judges and justices are less capable than our lower court jurists of examining and appraising accurately the record of a trial.

The sum and substance of all this is simply that the reasoning of our appellate courts in their opinions reviewing orders granting new trials is both inconsistent and confusing, and that appellate review of such orders is totally inadequate. What, if anything, is the solution?

⁴⁴ Statute of Westminster, 2d, 13 Edw. I, c. 30.

⁴⁵ Cf. *Balmforth v. Pledge* (1866) L. R. Q. B. 427, 431.

⁴⁶ Order XXXIX, r. 2.

⁴⁷ *Kearney v. McCauley*, 360 Pa. 255, 258 (1948).

⁴⁸ *Dobson v. Crafton Borough*, 315 Pa. 52, 55 (1934).

⁴⁹ *Zimmerman v. Penna. R. R. Co.*, 293 Pa. 264, 266 (1928).

⁵⁰ *Dobson v. Crafton Borough*, n. 48.

⁵¹ See *Grail v. Philadelphia*, 273 Pa. 275, 293 (1922).

Probably most important is a more vigorous enforcement by the supreme court of its own Rule 43.⁵² A mere statement that the verdict was against the weight of the evidence, or that the interests of justice demand a new trial, is not the statement of a reason, but the statement of a conclusion. The supreme court should require the court below to state why the interests of justice demand a new trial, or in what particulars the verdict was against weight of the evidence. The court should be compelled to specify, with references to the record, whatever inconsistencies in or incredible portions of the testimony motivated its action. A step in this direction was taken by Mr. Justice Stern in the *Bellettiere* case,⁵³ but a statement of the exact reasons for a new trial should be mandatory, rather than merely desirable. Proper enforcement of Rule 43 would accurately inform counsel and the court of why the discretion was exercised below. Quite possibly, with a succinct and specific statement of reasons before him, counsel would be deterred from prosecuting unmerited appeals. Certainly, such a rule would have the effect of containing discretion within legally defined limits, subject to intelligent and accurate review.

Rule 43, as lower courts now interpret it, is totally without meaning in practically all cases where new trials are granted on the weight of the evidence or in the interests of justice. Properly enforced, it would compel lower courts to state the *sole* reasons (as opposed to conclusions) for their action. There would then be no necessity for the "certificate" rule and the appellate court would be enabled to appraise intelligently the propriety of action taken below. The opportunity of the appellate court for appraising and balancing the weight of the evidence and the interests of justice would be at least as favorable as that of the judges of the lower court *en banc* who did not sit at the trial. We point out in passing that as written, Rule 43 is mandatory, but in view of the present lack of enforcement, it is almost precatory.

It may be that the court is fearful of a spate of appeals if its rigid attitude is relaxed. As we have pointed out, a literal compliance with Rule 43 would probably go far toward discouraging many appeals which now proceed blindly. Perhaps, however, it would be well to consider the advisability of adopting a rule of *certiorari* in respect to new trials, similar to the rule of the Supreme Court of the United States. Certainly, no tribunal in the world is more subject to bombardment by the litigious than that one. Yet the requirement that at least four judges favor *certiorari* has been eminently successful in limiting the work-load of that court. A similar rule in Pennsylvania would require merely that all justices read the record in cases of appeals from new trials. If three judges favored hearing the case, briefs and argument would be ordered. The court would be thus en-

⁵² That rule requires the appellant to give notice of the appeal, and goes on to provide that "****the court below shall forthwith file of record at least a brief statement, in the form of an opinion of the reasons for the ruling, order, judgment or decree therein referred to, or shall specify in writing the place in the record where such reasons may be found, and this opinion or writing shall be attached to the record and printed as part thereof."

⁵³ 367 Pa. 638, 644.

sured of hearing only meritorious (although not necessarily reversible) causes. There would be saved the time of the court spent on the arguments and consideration of, and opinions in unmeritorious cases. Litigants would be spared expense. But more important, jury verdicts would have more meaning. Verdicts would be, in a sense, creatures of substance and body, instead of will-o-the-wisps which may vanish at any moment by the mere incantation of the magic formula "weight of the evidence and interests of justice".