

## THE SEVERANCE FOR TRIAL OF LIABILITY FROM DAMAGE

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In eager quest for the improvement of our civil procedure, we scan the innovations attempted in one or another of our states; we even search abroad. Yet, all the while, within each of our states, in our daily practice in the equity courts, we encounter and accept as a matter of course, without thinking of extending it to trials at law, a trial procedure more rational, more expeditious, and better calculated to ensure justice than our procedure at law. In the equitable action for an accounting, where, as is almost always the case, the action involves the two separate issues of (1) the existence of liability and (2) the pecuniary extent of such liability, we try these issues in sequence, not trying the second at all if the first is determined in the negative;<sup>1</sup> in an action at law, we almost invariably try the two issues simultaneously. We litigate at length and in the uttermost detail, often with the aid of expert witnesses specially called, the question of the extent of the plaintiff's alleged damages and the sum required to make him whole, before it has even been determined that the defendant is in any event liable for a farthing.

The process is inherently so absurd, so at variance with the procedure followed in investigations in every other department of life, that only our lifelong inurement to it makes it possible for us to accept it without question. It requires, perhaps, an actual experience of the contrast between law and equity on this head to bring us to an appreciation of the situation.

In a courtroom in a metropolitan center, an equity trial is proceeding. The plaintiff alleges that his relation to the defendant, ostensibly that of employe, was in fact that of co-partner, and demands an accounting. The trial occupies the better part of a day, the sole issue being whether the plaintiff was a co-partner. At its conclusion, the judge announces that in his opinion the plaintiff has failed to establish his case, and dismisses the complaint on the merits. The trial is at an end.

On the same day, in an adjoining courtroom, there begins the trial of an action at law. The plaintiff, a selling agent, alleges that his arrangement with the defendant manufacturing corporation, which was wholly oral, contemplated that he should have exclusive selling rights in his territory on certain lines of merchandise, and that the manufacturer, in breach of the

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1. A similar severance of issues for trial is, of course, also found in many of our states in the practice of the courts supervising the administration of decedents' estates.

agreement, has secretly sold such merchandise to others. The answer denies that the plaintiff's selling rights were exclusive of the manufacturer's. The testimony of the plaintiff and of one of his employes relative to the alleged conversations, and admissions by the defendant's president spelling out the alleged agreement, are offered. The plaintiff's attorney then calls as witnesses several past and present employes of the defendant and interrogates them as to the bookkeeping methods employed by the defendant in recording sales (beginning four years ago, when the first of the alleged secret sales was made), and the system of "style numbers" and "lot numbers" used in identifying the several kinds of merchandise. Certain records are also submitted to these witnesses for identification. At the close of the day, when the accountant, who has by leave of the court examined the defendant's books before trial, takes the stand, it is agreed on all hands that his testimony promises to be lengthy and had better go over to the following day.

The accountant, on resuming the stand the next day, presents a long and complicated transcript of the items allegedly sold by the manufacturer in violation of the alleged agreement. He explains the manner in which he identified those items. There follows a protracted cross-examination, designed to discredit the methods employed by the accountant and to impeach the correctness of a number of separate items appearing on his transcript, the contention being that they relate to lines of goods other than those covered by the alleged agreement. The day is well advanced before the plaintiff rests. Following motions to dismiss the complaint, which are denied, defendant's president takes the stand. The judge and jury, after a day of haggling over accounts, in which the existence of the alleged agreement was assumed, are now brought back to the primary question, whether the agreement was actually made. The direct testimony of the president, denying the existence of the alleged existing agreement, occupies the remainder of the day. The last day of the trial is given over to cross-examination of the president, examination and cross-examination of several witnesses called in corroboration, and, finally, extended testimony in rebuttal by the defendant's chief accountant.

The jury, after lengthy instructions covering both the issue of the making of the contract and the determination of the amount due to plaintiff, should his version of the agreement be accepted, retires, and shortly returns with a verdict for the defendant. Obviously, they have rejected the plaintiff's version of the agreement. All the testimony regarding the allegedly wrongful sales by defendant, occupying more than half the trial (as also the entire examination before trial of the defendant's books) has been a sheer waste.

What proportion of trials of actions at law result in judgment for the defendant, and what portion of the time occupied by such trials is devoted to the issue of damages—thus representing, in the light of the outcome, a total

loss—the scattering of statistics on civil litigation thus far gathered by the several surveys and judicial councils do not disclose, although in one important jurisdiction jury trials resulting in judgment for the defendant have been found to be nearly one-half, the proportion being particularly high in tort cases, in which the trial of the issue of damages is particularly time-consuming.<sup>2</sup> Still less can any statistics reflect the loss of clarity in our trials which necessarily results from the attempt to investigate simultaneously two wholly distinct questions.

By instinct one is likely to assume that so essentially irrational a feature of our procedure at law is hallowed by a venerable antiquity, by which it is condoned, even if not justified. But barely two hundred years have passed since the two-stage trial of certain actions at law was commonplace. The action of account-render, in which this procedure prevailed, was developed by the law courts before equity existed. Originally available only to bailiffs, receivers, and guardians in socage, and subsequently to merchants, it was in time extended to every case where money was received to the use of another.<sup>3</sup>

The two-stage procedure in this action is thus described by Blackstone:

“. . . upon a stated account between two merchants, or other persons, the law implies that he, against whom the balance appears, has engaged to pay it to the other; though there be not any actual promise. . . . But if no account has been made up, then the legal remedy is by bringing a writ of *account de computo*; commanding the defendant to render a just account to the plaintiff, or show the court good cause to the contrary. In this action, if the plaintiff succeeds, there are two judgments: the first is, that the defendant do account (*quod computet*) before auditors appointed by the court; and, when such account is finished, then the second judgment is, that he do pay the plaintiff so much as he is found in arrear.”<sup>4</sup>

At the opening of the 18th century, the action of account-render was still apparently in full vigor; for it was in 1705 that, “after many fruitless attempts in parliament,”<sup>5</sup> the action was finally made available against per-

2. In 1928 and 1929 the Judicial Council of Massachusetts made an analysis of the outcome of actions at law in the Superior Court of that state. The following results for actions tried by jury will be found in 5 REPORTS OF THE JUDICIAL COUNCIL OF MASSACHUSETTS (1929) 10.

	Year ended June 30, 1928				Year ended June 30, 1929			
	TOTAL	TORTS		CON-TRACTS	TOTAL	TORTS		CON-TRACTS
		Motor Torts	Other Torts			Motor Torts	Other Torts	
Plaintiff	1328	268	616	444	1158	412	400	346
Defendant	1088	257	616	215	963	360	421	182
% in favor of Plaintiff	55	51	50	67	55	53	48	65

3. See *infra* note 11.

4. 3 BL. COMM. \*164.

5. *Ibid.*

sonal representatives.<sup>6</sup> By Blackstone's time, however, the action was said to be "now very seldom used."<sup>7</sup>

The decline of the action was thus in the main contemporaneous with the development of the equitable action for an account;<sup>8</sup> and Blackstone indeed assigns the procedural superiority of the equitable action as the reason for the decline of the action at law:

" . . . it is found by experience, that the most ready and effectual way to settle these matters of account is by bill in a court of equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce."<sup>9</sup>

Writing some sixty years later, an American commentator assigns a somewhat different reason:

"In theory there seems but little difference in the forms and respective advantages of the two methods. The stages of litigation are precisely the same. The decree of an account and the judgment *quod computet*—the reference to masters and auditors—and the final decree and judgment after report made, possess no intrinsic advantage over each other. . . .

"The true reason of the obsolescence of the action of account render is perhaps to be found in the intricacies of practice attached to it by the ancient lawyers. At the time when that action was most in use, scholastic subtlety prevailed in jurisprudence, as it did in all other sciences, and was generally received and mistaken for learning. The subject of accounts is in itself so complicated that it requires all the facilities that liberality can give it, to render it amenable to judicial form. In a field so pre-disposed, the favorite subtleties of the age grew up with unusual vigor. Interminable pleadings were made to heap issue upon issue. Intricacies of evidence were introduced where a free admission of testimony was most imperiously required. The forms of action, which, in every system, are intended only for the protection of the substance, began to assume a primary importance, and to be regarded as the conditions of justice. In this manner account render became what one of its modern eulogists was compelled to admit it to be, a chaos of clashing hints, notices and cases, (Per Wilmot, C. J., *Godfrey v. Saunders*, 3 Wils. Rep. 113, 117) and the court of Chancery, availing itself,

6. 4 ANNE c. 16, § 27 (1705): "And be it enacted by the authority aforesaid, that from and after the said first day of *Trinity* Term, actions of account shall and may be brought and maintained against the executors and administrators of every guardian, bailiff and receiver, and also by one joint tenant, and tenant in common, his executor and administrators, against the other, as bailiff for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant or tenant in common; and the auditors appointed by the court, where such action shall be depending, shall be, and are hereby, empowered to administer an oath, and examine the parties touching the matters in question, and for their pains and trouble in auditing and taking such account, have such allowance as the court shall adjudge to be reasonable, to be paid by the party on whose side the balance of the account shall appear to be."

7. 3 BL. COMM. \*164.

8. 5 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1922) 288.

9. 3 BL. COMM. \*164.

as usual, of the errors and illiberality of the common lawyers, raised up a new and important branch of jurisprudence."<sup>10</sup>

Whatever the reasons, in this country as well as in England account-render, despite an early tendency in some of our states to liberalize and extend it,<sup>11</sup> eventually lapsed into disuse. Though it survives in theory in our common-law states,<sup>12</sup> it is now everywhere obsolete; and with it the two-stage trial, which might well have extended itself to other types of action, had the development of the action of account-render fulfilled the promise of its youth, became a total stranger to our courts of law.

And yet the advantages of the two-stage trial are so clear that little argument would seem to be called for—at least in actions at law which are in effect actions for an accounting (such as an action by a salesman or distributor for commission, or an action for compensation for personal services allegedly based on a percentage of receipts). Indeed, a suggestion that the scope of the equitable action for an accounting might well be extended to cases of this type, thus automatically extending to them the two-stage trial procedure, would doubtless commend itself to most practitioners, were it not for the obstacles offered by constitutional provisions preserving in civil cases the right of trial by jury according to the forms of the common law.<sup>13</sup>

But it is by no means only in such out-of-the-ordinary actions that the separate trial of the issues of the existence of liability and of the amount thereof is called for. On the contrary, in the ordinary breach of contract, tort, or negligence case, the severance of these issues is just as clearly called for. In the typical contract action the issues of performance by the plaintiff and non-performance by the defendant, and in the typical negligence case the issues of negligence and freedom from contributory negligence, are entirely separate and distinct from the question of the amount of damages. Not only

10. BALLOW, A TREATISE ON EQUITY (4th Amer. ed., Laussat, 1935) 440n. Cf. the language of Bronson, J., in *McMurray v. Rawsom*, 3 Hill 59, 62 (N. Y. 1842), one of the last actions of account-render in New York to reach the reports: "All the books agree, that this is one of the most difficult, dilatory, and expensive actions that ever existed, and it has long since given place to other remedies. In this state, it does not appear that more than one action of account was ever brought before—(*Jacobs v. Fountain*, 19 Wend. 121)—and the present experiment will probably be the last."

11. In 1788 the legislature of New York extended the action to any case where "any person is or shall be bound or liable to account as guardian, bailiff, receiver, or otherwise to any other, and will not give an account willingly. . . ." N. Y. Laws 1778, c. 4, p. 4 (italics supplied). Account was also in earlier days regarded as a proper remedy for one partner against another. *Young v. Pearson*, 1 Cal. 448 (1851); *Beach v. Hotchkiss*, 2 Conn. 425 (1818); *Kelly v. Kelly*, 3 Barb. 419 (N. Y. 1848). And it was used as well to recover money appropriated by one partner after the dissolution of the firm. *Fowle v. Kirkland*, 35 Mass. 299 (1836).

12. Cf. *Belsheim, The Old Action of Account* (1932) 45 HARV. L. REV. 466. In Pennsylvania there was an action of account-render as late as 1920. *Krewson v. Sawyer*, 266 Pa. 254, 109 Atl. 798 (1920). In 1933, however, the action was abolished in that state. PA. STAT. ANN. (Purdon, Supp. 1937) tit. 12, § 1402a.

13. It is to be noted, however, that Colorado and Louisiana have no constitutional guaranty of jury trial in civil cases. COLO. CONST. art. 11, § 23, *Huston v. Wadsworth*, 5 Colo. 213 (1880); LA. CONST. art. 1, § 9.

are they capable of being tried separately, but they can be better and more correctly so tried.

In the automobile accident case, which consumes so large a part of the energies of our urban courts, the suggested procedure would have several special advantages. It would present to the jury the issue of how the accident happened, divorced from all information (except such as might come to light incidentally) as to the injuries sustained by the respective parties. In a New York negligence case in which the defendant pleaded a release and asked for a separate trial of that issue in advance of any trial of the merits, the appellate court, in overruling the trial court and ordering such separate trial, observed that:

“The danger which may result from attempting to try all the issues at one time is that evidence upon the defendant’s negligence, or plaintiff’s freedom from contributory negligence, may create an atmosphere which shall produce an unconscious influence upon the triers of the fact as to the entirely separate and distinct issue of the validity and sufficiency of this release.”<sup>14</sup>

Would it not be an even more accurate observation that in the typical negligence case, certainly in the typical automobile negligence case, evidence upon the injuries suffered by the plaintiff (and upon his present deplorable state) “may create an atmosphere which shall produce an unconscious influence upon the triers of the fact as to the entirely separate and distinct issue” of the defendant’s negligence and the plaintiff’s freedom from contributory negligence?

It has indeed been asserted by persons familiar with this important, and, from a numerical standpoint, increasingly important, area of litigation that our juries have come largely to ignore the issue of liability except as a factor in the mitigation or appreciation of damages<sup>15</sup>—that the judge’s instructions to the jury to find for the plaintiff only if he has established by a preponderance of the credible evidence the defendant’s negligence and his own freedom from contributory negligence go unheeded, particularly if the defendant is known or believed to be insured. A jury confronted solely with the issue of negligence might well be more heedful of the law as laid down by the court.

Some there are, indeed, who regard the present picture as eminently satisfactory. Our doctrines of negligence are—certainly as applied to automobile accidents—obsolete, a survival of the horse-and-buggy age; and the jury here performs a useful function by letting a breath of fresh air into our musty legalism; so runs the argument.<sup>16</sup> Outworn the doctrines may be;

14. *Warner v. Star. Co.*, 162 App. Div. 458, 462, 147 N. Y. Supp. 803, 805 (2d Dep’t, 1914).

15. ULMAN, *A JUDGE TAKES THE STAND* (1933) 30 *et seq.*

16. *Cf.* I HOLDSWORTH, *op. cit. supra* note 8, at 347 *et seq.*

but surely, if so, there is a better way of modernizing them than by permitting juries to ignore them. If the adoption of the present proposal should result in these cases in a more rigorous application of our negligence doctrines than now obtains, the natural outcome will be to bring to a head whatever just dissatisfaction exists, with resultant reform or amelioration of the doctrines.

There is another aspect of these cases and of negligence cases generally which makes the proposed procedure especially suitable for them. The issue of negligence is best tried as promptly after the accident as possible; the damages can often properly be determined only after the lapse of a considerable time. Moreover, the position of the injured person under present practice is often a most unhappy one. Injured and disabled, he is often at a loss how to proceed. If he knows, as promptly as possible, whether his medical expenses and loss of income are to be at the expense of the defendant, he may be able to make proper arrangements for financing them, and no doubt would often be able promptly to come to some terms with the defendant for such financing, particularly where the defendant is insured. If, on the other hand, he knows that he must carry his burdens himself, he may plan far more intelligently.

Moreover, were the issue of negligence promptly disposed of, there would often be no trial at all of the issue of damages—a species of trial from which our courts draw little public esteem. The issue of damages is litigated, all too frequently, in the contentious spirit generated by the underlying issue of liability, at a time when that issue has not yet been determined. With the non-liability of the defendant established, there would remain no issue of damages; with his liability established, the issue of damages would, in many cases now fiercely litigated, be disposed of by settlement, and, if tried, would be tried on a less contentious plane.

Although the two-stage trial thus makes possible two separate and distinct hearings, separated by any interval of time suitable to the situation, such a separation is not, of course, a necessary result of the two-stage procedure. The disposition of the entire case at a single hearing, and, if desired, before a single jury, is inherently just as practicable where the issues are tried successively as where they are tried simultaneously; for there is nothing to prevent the trial's proceeding without delay to the issue of damages, before the same jury if desired, as soon as the affirmative verdict of liability has been rendered.

Whether it is desirable in a particular class of cases, where an affirmative determination of the issue of liability has been made, to proceed at once and before the same trier of the facts to the assessment of damages, or whether it is more advantageous to reserve such assessment for an entirely separate and distinct hearing, possibly before a new judge and jury, is a question as

to which a decision would at this time be premature. In any consideration of the matter, however, attention should not be confined to the trial procedure; for the effects of the choice may extend also to appellate procedure. Severance of issues for trial carries with it the possibility of severance of issues for appeal also. For it is obviously possible to defer the determination of the amount of the damages until after not only the trial court, but the appellate court as well, have passed upon the issue of liability—as is done in an action for an accounting in equity, where, as is the case in some states, the appellate procedure permits an appeal from the interlocutory judgment ordering an account, and such appeal acts as a stay of the accounting itself.<sup>17</sup>

The proposal here advanced requires for its adoption primarily a change, not of statute or rule, but of the mental attitude of the profession and the bench; for it is at least arguable that, without any express statutory or other authorization, our courts, unless prevented by specific restriction or limitation (of which no instance has been found) have the inherent power to sever any issue for separate trial.<sup>18</sup> That such a separation, even in a case in which

17. In New York an appeal from an interlocutory judgment in an action for an accounting lies to the Appellate Division of the Supreme Court; a further appeal lies to the Court of Appeals only if the Appellate Division reverses, or fails of unanimity in affirming the trial court, or if it grants permission by reason of questions of law. Should no appeal to the Court of Appeals be available, either as of right or by permission, the accounting must be proceeded with; and, the accounting having been had and being affirmed by the Appellate Division, the Court of Appeals may then conclude that there should not have been an accounting in the first place. N. Y. CIV. PRAC. (Cahill, 1931) §§ 588, 590. Cf. *Fendler v. Morosco*, 253 N. Y. 281, 171 N. E. 56 (1930). Thus we have, in this situation, a severance of issues for trial and intermediate appeal, but not for final appeal.

In the federal courts appeal from an interlocutory judgment in an action for an accounting is permitted apparently only in patent infringement suits, 44 STAT. 1261 (1927), 28 U. S. C. A. § 227a (Supp. 1937), and in suits involving receiverships or injunctions, 43 STAT. 937, § 129 (1925), 28 U. S. C. A. § 227 (1927), and admiralty, 44 STAT. 233 (1926), 28 U. S. C. A. § 227 (Supp. 1937). Aside from these cases there is thus no severance of issues for appeal.

18. No case has been found in which the specific question of the inherent power of a court of law to sever the issue of liability from that of damage for separate trial has been passed upon. Diverse views have been expressed by practitioners and scholars whom the writer has consulted. In some jurisdictions the inherent power of the courts of law to sever any issue seems to be assumed, as in *Dixon Livery Co. v. Bond*, 117 Va. 656, 86 S. E. 106 (1915), in which the issue whether the plaintiffs, suing as a partnership, were in fact a partnership was first tried separately, before the issue of an offset interposed by the defendant against one of the partners. In other states the assumption has apparently been that at common law the courts possessed no power to sever issues for jury trial. Thus in *Smith v. Western Pac. Ry.*, 203 N. Y. 499, 96 N. E. 1106 (1911), the action of the lower court in severing the defense of statute of limitations for separate prior trial, under authority of the New York statute, N. Y. CIV. PRAC. (Cahill, 1931) § 443 (3), was upheld at some length against an attack on the constitutionality of the statute on the ground, not that the statute was merely declaratory of the common law, but that the severance authorized thereby was merely procedural and did not work any such substantial change in the common-law trial by jury as to be beyond the power of the legislature to provide without violating the constitutional guaranty of jury trial. The PRELIMINARY DRAFT OF THE PROPOSED RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (prepared by the Advisory Committee appointed by the Supreme Court of the United States) contained a provision (Rule 43b) empowering the court to "order separate trials, and determine the order thereof, of any distinct issues arising in an action." This language was, however, eliminated in the Final Draft. Since the whole form of the proposed rules reflects the intention to give the courts large discretion in trial procedure in the interest of expedition, it may be hazarded that the elimination was not made with a view of denying the courts the power to sever issues, but rather in the belief that they possess such power without specific authorization.

jury trial is guaranteed by constitutional provision, is permissible, even though the trial of the second issue be deferred and a new jury consequently impanelled therefor, has been definitely held in the single case in which the question has, apparently, thus far been raised.<sup>19</sup>

But even should a change or statute or rule be required, the new rule or statute will doubtless, and perhaps of necessity, vest in the court a large measure of discretion as to whether, and to what extent, the issues in the case before it call for separate trial. The actual effect of the rule or statute will thus, in the long run, be chiefly dependent upon a change in the traditional attitude of bench and bar toward the matter. That such a change comes all too slowly is made clear by the experience of England and New York, in which the law and rules have long expressly permitted severance of issues.

The English practice, as formulated in the Rules of the Supreme Court of Judicature, has, for over half a century, contained specific authorization for the two-stage trial. The rules provide that "the court or judge may, in any case or matter, at any time or from time to time, order that . . . one or more questions of fact be tried before the others . . . and in all cases may order that one or more issues of fact be tried before any other or others."<sup>20</sup> Yet almost the only references to the matter in the reports are to be found in two opinions of Jessel, M. R., one in 1877, in which he appeared to lean toward a liberal application of the rule,<sup>21</sup> and one in 1879, in which he concluded that "the application of the rule should be limited to extraordinary and exceptional cases."<sup>22</sup> In current practice the rule is very seldom applied. "The usual practice in Chancery and Admiralty if there is any substantial question of amount involved, is for the judge to decide the question of liability, including of course the facts relevant to such question and to send the question of amount to be tried, in the Chancery Division by a Master, and in the Admiralty Division by a Registrar. On the Kings Bench side, on the other hand, the practice is the other way; that is to say, it is almost the invari-

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19. *Smith v. Western Pac. Ry.*, 203 N. Y. 499, 96 N. E. 1106 (1911), the facts of which are set forth *supra* note 18. The court held that so long as every issue was submitted to the determination of a jury the constitutional right of trial by jury was met, the order of submission of issues being within the discretion of the legislature. Judge Hiscock, who wrote the opinion, quoted with approval from *People v. Dunn*, 157 N. Y. 528, 535, 52 N. E. 572, 574 (1899), wherein Judge Gray said: "It is to be observed that our Constitution does not secure to the defendant any particular mode of jury trial", and said ". . . it does not destroy or impair the substantial right of a litigant to have his case tried before a proper jury, but only prescribes the method in which this may be done. Every issue is submitted to the verdict of a jury. This is the substance of the right. As a matter of convenience the court may order some issues to be tried before others are taken up. This is a matter of procedure and detail. The Constitution does not provide, and there should not be interpolated into it a provision, that all of the issues, even though completely separate and distinct, must be tried at one and the same time." 203 N. Y. at 504, 96 N. E. at 1107.

20. RULES OF THE ENGLISH SUPREME COURT OF JUDICATURE (1883) order 36, rule 8. Prior to that date, substantially the same provision was contained in the 1875 Rules, order 36, rule 6.

21. *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918 (1877).

22. *Piercy v. Young*, 15 Ch. D. 475, 480 (1879).

able practice for the tribunal which tries the question of liability to try at the same time the question of amount." <sup>23</sup>

In New York, the statute, enacted in 1907, provides that "The court, in its discretion, may order one or more issues to be separately tried prior to any trial of the other issues in the case." <sup>24</sup> Despite the comprehensive language of the provision, the courts of New York have in the main construed it as intended to authorize the separate trial only of such affirmative defenses (such as *res adjudicata*, release, statute of limitations, account stated, discharge in bankruptcy, etc.) as do not go to the merits of the action. <sup>25</sup> And although it has not expressly been held in any of the reported cases that the issues of the existence of liability and of the amount thereof may not be separately tried, the practice is well-nigh universal of trying them together; <sup>26</sup> and an application to a trial court to sever the two issues would doubtless be received with astonishment by the average judge.

The remark of Jessel, M. R., that "Separate trials of separate issues are nearly as expensive as separate actions . . ." <sup>27</sup> reflects a state of mind which is doubtless responsible for much of the failure of the notion of separate trial of separate issues to make progress. But such an attitude completely overlooks the fact that in a great proportion, perhaps a half, of the cases coming before the typical court of law there would be no "separate trials of separate issues", but only a single trial of the issue of liability, which, determined adversely to the plaintiff, would as a matter of law put an end to the litigation; and that in many of the cases in which the issue of liability was determined in favor of the plaintiff, such determination would with equal effectiveness terminate the litigation as a matter of fact, due to the parties' reaching a settlement on the amount of damages.

Nor is it only the trial courts which evince inertia in this field. The appellate courts also exhibit a curious unwillingness to realize the possibilities of expedition. In a New York condemnation case in which the ownership of the land appropriated by the state was in dispute, the parties stipulated

23. From a recent letter to the writer from Barnett Hollander, Esq., a member of the New York Bar, who has for many years had occasion to observe the practice in the English courts as counsel on American law in London.

24. N. Y. CIV. PRAC. (Cahill, 1931) § 443 (3) (N. Y. Laws 1907, c. 526).

25. In thus restricting the application of the provision, the courts have seemingly acted in accord with the views of the original proponents of the provision, who do not, despite the broad language of the statute they framed, appear to have had in mind the possibility of separate trial of separate issues going to the merits. 30 REPORTS OF THE NEW YORK STATE BAR ASSOCIATION (1907) 304.

26. The only reported case which has come to attention in which the two issues were tried separately is one in which the severance was agreed upon by the parties at the trial. *Rockaway Pacific Corp. v. State*, 200 App. Div. 172, 193 N. Y. Supp. 62 (3d Dep't, 1922).

27. *Piercy v. Young*, 15 Ch. D. 475, 479 (1879). Cf. the remark of the Supreme Court of Missouri that "The press of litigation is such in the Circuit Court of the City of St. Louis, and in this court, that the time of neither should be frittered away through multiple hearings where one will suffice." *Osmack v. American Car & Foundry Co.*, 328 Mo. 159, 171, 40 S. W. (2d) 714, 719 (1931).

that the issue of title should be tried first, so as to determine which of the two claimants to the land was entitled to the sum thereafter to be fixed by the court as the value thereof. The issue of title having been tried pursuant to the stipulation, judgment was entered declaring the entire area to be the property of one of the claimants. The other claimant and the state objected in the appellate court, contending that while separate *trial* was stipulated for, the stipulation did not authorize separate *judgments*, and that the trial should have proceeded to the issue of damages before any judgment was entered. The appellate court accepted the contention and vacated the judgment, ordering the trial to be resumed as to the issue of damages, the defeated claimant presumably to be permitted to litigate to the full the issue of the value of the property, as to which it had already been adjudicated by the trial court to be wholly without title. Whether the language of the stipulation did or did not warrant the construction placed upon it by the court is here immaterial (particularly as there were other grounds as well on which it rested its vacation of the judgment). What *is* relevant is the language of the opinion: "The propriety of entering separate judgments in respect to issues separately tried is still another proposition. . . . We think the parties or any of them under the stipulation and the circumstances of this case have a right to insist that there shall be but one judgment determining all questions involved in the controversy and that they shall not be required to conduct per chance two appeals in order to have the entire controversy reviewed. . . . it [the defeated claimant] is in a position to insist that the usual practice be followed and that it shall not be subjected to double judgments and double appeals."<sup>28</sup> What is of interest here is the repeated insistence of the court upon the seemingly oppressive possibility of "double judgments and double appeals"; yet the same court accepts "double judgments and double appeals" as a matter of routine in all accounting actions, whether arising out of partnership dissolution, claims against fiduciaries, stockholders' grievances, unfair competition, or any one of several other situations!

Perhaps an even more striking illustration of the inertia of our appellate courts in this field is to be found in the practice, in negligence actions in which the plaintiff has properly prevailed but has received judgment in an amount deemed excessive, of ordering a new trial of the entire case (unless the plaintiff consent to an indicated reduction in the amount of the judgment). In these cases the trier of the facts has, in the view of the appellate court, correctly decided the issue of liability, but has erred on the issue of damages—it has "lost sight of the rules governing the assessment of damages" because they were "obscured by the smoke of the battle over the ques-

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<sup>28</sup> Rockaway Pacific Corp. v. State, 200 App. Div. 172, 175-176, 193 N. Y. Supp. 62, 64 (3d Dep't, 1922).

tion of liability . . . .”<sup>29</sup> The obvious course would seem to be to order a new trial *solely* on the issue of damages; and at least one reported case has been found in which this has been done.<sup>30</sup> Most of our appellate courts, however, seemingly continue the incredible practice of sending the *entire* case back for re-trial; and, indeed, in perhaps the most overcrowded state appellate court in the land—the Appellate Division of the Supreme Court of New York, First Department—there have been instances of the same case being twice sent back for complete re-trial merely because the court deemed the amount of the judgment excessive. The issue of liability had already been determined in favor of the plaintiff on the first trial, and the determination had been affirmed by the appellate court. At the second trial it was, nevertheless, tried anew; and on the third trial it was again tried anew, though twice decided favorably to the plaintiff and twice affirmed. Moreover on the second appeal the entire record of the second trial was before the court, the court being thus required to entertain anew any questions of law which may have been raised by counsel for defendant on the first trial as to the finding of liability or the admission of evidence related to that issue, as well as any new questions on these heads which counsel may have raised for the first time on the second trial.<sup>31</sup> Seemingly double and even triple trials and appeals of an issue that has been correctly decided the first time, and held on appeal to have been so decided, do not have the same power of evoking sympathy from the courts as does the plight of the litigant who has been subjected to “double judgments and double appeals”—even though there is in fact no “double” judgment or appeal, but merely two successive trials and judgments, and perchance two successive appeals, on two entirely separate and distinct issues.<sup>32</sup>

In so irrational a collocation of variations in our practice, a subconscious element is probably at work. Perhaps it is to be found in the veneration of trial by jury. Traditionally, trial by jury has been associated with a single hearing, a single verdict, and a single judgment entered thereon. To modify this pattern, even though all the safeguards supposedly inherent in jury trial be preserved, is doubtless felt by some to be in some subtle way an attack on the ancient institution. To the extent that progress is made toward a rational, as opposed to an emotional, re-appraisal of the jury as a tribunal

29. *McKay v. New England Dredging Co.*, 93 Me. 201, 205, 44 Atl. 614, 615 (1899).

30. *McKay v. New England Dredging Co.*, 93 Me. 201, 44 Atl. 614 (1899).

31. The further possibility that in the second or third trial the jury might find for the defendant is not discussed.

32. It is interesting to note in this connection that in New York, until 1937, where separate issues had been submitted to a jury and the jury disagreed on one of them and agreed on the others, a retrial of all the issues by a new jury was necessary. N. Y. CIV. PRAC. (Cahill, 1931) § 463. The amendment of 1937 provides that the court “. . . may direct the retrial only of the issues as to which the jury disagreed, or may in its [the court’s] discretion direct the retrial of such issues and of any other issue as to which the jury rendered a verdict either by direction or otherwise.” N. Y. Laws 1937, c. 613.

for civil litigation, the separation of the issues of liability and of damages may be expected to gain ground.<sup>33</sup>

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33. The intimate connection between the proposal under discussion and the special-verdict procedure will not have escaped attention. The advantages of the special-verdict procedure have been ably set forth in a number of articles. See, e. g., Coleman, *Advantages of Special Verdict* (1929) 13 J. AM. JUD. SOC. 122; Green, *A New Development in Jury Trial* (1927) 13 A. B. A. J. 715. The severance of issues in nowise conflicts with the special-verdict procedure. Under that procedure, the jury, while required to pass separately on two or more distinct issues, hears the evidence on all of them simultaneously; under severance, it hears the evidence upon one of them at a time. "Experience teaches that the issues for a jury should be as simple and as few as possible." *Matter of Cook*, 244 N. Y. 63, 72, 154 N. E. 823, 826 (1926).