Case and Comment

STANLEY v. DOUGLAS (1951) 4 D. L. R. 689

Counsel – Witness – Competency – Ground for New Trial – Judicial Control –

The Supreme Court of Canada, in this case was confronted with the unsavory situation created by a lawyer acting as both counsel and witness during a trial. Three rules relating to counsel-witnesses may be found in the observations and comments of four of the five judges who heard the appeal. (1) These three rules are as follows: (1) A party's counsel is a competent witness; (2) when counsel gives evidence as a witness the court has the power to control his conduct by refusing to allow him to continue as counsel; and (3) when a counsel has given evidence as a witness the court may order a new trial. The appeal is of interest because it is the first reported case in which these three rules have been considered to be co-existent and of equal importance. In previous cases where two or more of these rules were considered, it appears that the courts always held one of them as paramount to the others.

The appeal involved the admission to probate of a will in Prince Edward Island. The decision of the Probate Judge to allow probate of the will was appealed to the Supreme Court **en banc** of that Province and a new trial ordered. (2) Campbell C. J., who delivered the judgment of that court based his decision on the ground that the cumulative effect of three considerations led him to the conclusion that the evidence was not in a satisfactory form to assess the factual elements at their real value. The third consideration which he dealt with was that the case for the executor of the will was conducted mainly by his senior counsel, who was also the principal witness examined (to support the validity of the will).

The decision of the Supreme Court of Canada turned substantially on the question whether the Supreme Court of Prince Edward Island had the jurisdiction to order a new trial. However the matter of the senior counsel acting as a witness at the trial received sufficient consideration to warrant comment on that question.

It is clear that the courts disapprove of counsel acting as a witness. The procedure has been variously described as irregular and contrary to practice, an indecent proceeding, contrary to ethics, an objectionable practice, a disgrace, and an outrage to decency. The reasoning behind this judicial condemnation is indicated by the following extracts from cases:

(1) Kerwin, Taschereau, Kellock and Cartwright JJ., Rand J., making no observations on the matter of counsel-witness.
(2) (1950), 25 M. P. R. Campbell, C. J., MacGuigan and Tweedy JJ.

> It is very unfit that he (counsel) should be permitted to state, not upon oath, facts to the jury which he afterwards stated to them on his oath. (3)
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> Counsel cannot be unbiased witnesses, and if permitted without check to be witnesses there would be not only the revolting indecency of the proceedings, but the possible difficulty of the jury being unable to distinguish between what the counsel said as an advocate and what he said as a witness. (4)
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> It is most humiliating for counsel to be allowed to give evidence, and then address the jury, trying to make them believe his evidence to be true. (5)
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> The Bench should not be called upon to discuss with counsel the weight to be attached to evidence offered by counsel himself. The giving of such evidence must have the effect of preventing a full and free discussion on the part of both counsel and Bench and to that extent, at least, serves to hamper the proper administration of justice. (6)

Substantially these quotations resolve themselves into the proposition that it is improper for counsel to address the court or a jury on his own evidence. It is submitted that the Supreme Court in recognising the three rules under consideration has ensured that in future the courts need not be embarassed by the counsel-witness. There can no longer be any question about the rule that counsel is a competent witness. Cartwright J. (7) carefully reviewed the authorities and properly came to the conclusion that evidence of counsel is legally admissible. (8)

There also appears to be no question about the rule that the court may order a new trial on the ground that counsel was a witness. Kerwin J. who delivered the judgment of Taschereau J. and himself indicated approval of this rule by his statement:

> I am content to agree with the Chief Justice of the Island that for the reasons given by him a new trial should be had. (9)

As the reader will recall, the fact that senior counsel acted as the main witness for plaintiff, was one of the reasons for ordering a new trial. Kellock J. indicated his approval of the rule as follows:

> I think, however that the trial was so unsatisfactory as to render the direction with respect to a new trial the proper direction. (10)

(3) **Rex V. Brive** (1819), 2 B. & Ald. 605; 106 E. R. 487.
(4) **Davis v. Canada Farmers Mutual Insurance Co.** (1876), 39 U.C.Q.B. 452, at p. 482.
(5) **Bank of British North America v. McElroy** (1875), 2 Pugs. 462; 15 N.B.R. 462.
(6) **Robert Bell Engine & Thresher Co. Ltd. v. Gagne** (1914), 29 W.L.R. 322.
(7) [1951] 4 D.L.R. at p. 694. Cartwright J. dissenting in part, but that part of his judgment relating to counsel-witness is not in conflict with the majority of the Court.
(8) It is of interest to note that in the **Parish Courts Act. Ch. 122**, R.S.N.B. 1927 Sec. 12 contains a provision that a plaintiff or defendant in a suit in a parish court may appear by an attorney of the Supreme Court but on the trial of a contested cause such attorney shall not be a competent witness for the party for whom he appears.
This statutory abrogation of the right of an attorney to be his client's witness is the only instance of such which the writer has been able to find. No doubt it stems from the lack of control which a parish court commissioner can exercise over an attorney who is an officer of the Supreme Court, a problem which of course is not faced by the Supreme Court itself.
(9) **Supra.**, at p. 692.
(10) **Ibid.**, at p. 693.

Cartwright J., in his review of the cases relating to the matter of counsel-witnesses, proved that the rule has been long established.

The rule that the court may control the conduct of the counsel-witness, however has been the subject of considerable controversy in some jurisdictions. In New Brunswick the rule was recognized as early as 1828. In the case of **Hamilton v. McLean** (11) the attorney and counsel for the plaintiff gave evidence at the trial to prove a document. On appeal the court held this was an irregular practice and in future it would require some other counsel to examine such a witness and comment on his testimony. The same principle is still in effect in New Brunswick and the court will require counsel who wishes to give evidence to be examined by another counsel and will not allow him to address the court upon his own testimony. (12) It is the writer's understanding that the same practice prevails in the Supreme Court of Canada. Kerwin J. said:

> I would add only that, without deciding whether such evidence would be admissible or not, on such new trial no one appearing as counsel for any party should give evidence. (13)

Mr. Justice Taschereau adopted this statement and it would seem to indicate that the court has the power to control the actions of the counsel-witness.

The controversy over the power of the court to control the conduct of the counsel-witness was brought about by the judicial misapplication of the decision of the English case of **Cobbett v. Hudson.** (14) The **Cobbett** case was decided in 1852 and resulted from an improvement in the law which allowed a party to an action to be his own witness. Prior to this, a party was allowed to conduct his own case but was prohibited from giving evidence. The removal of this prohibition allowed the first adventurous party-counsel-witness to commence an action. In the **Cobbett** case the plaintiff sued in **forma pauperis** and conducted his own case. Lord Campbell C. J. at the trial told the plaintiff he must elect to be either counsel or witness. The plaintiff elected to be his own counsel and subsequently after losing the trial, appealed on the ground that he should also have been allowed to give his own evidence. The full court of Queen's Bench (15) held that the Court could not derogate from

(11) (1828), Chipman M.S. 47; 1 N.B.R. 192 (Saunders C.J., Botsford, Bliss and Chipman JJ.).

(12) (1951) **Broderick v. Beyea.** unreported K.B.D. Circuit sitting per Bridges, J. The same principle has been recognized by the Court of Appeal although Ritchie C. J. held that the opposing counsel should object when he deems the course being pursued is objectionable, otherwise the Court need not interfere. **Gilbert v. Campbell,** (1870) 13 N.B.R. 55.

(13) **supra.,** at p. 692.

(14) (1852), 1 El & Bl. 11; 118 E.R. 341; 22 L.J.Q.B. 11.

(15) Lord Campbell C.J., Coleridge, Wightman and Erle JJ..
Lord Campbell in his **lives of the Chancellors** referred to the first instance of the counsel-witness which happened in the case of Sir Thomas More, 1 Howe St. Tr. 386. There the then Solicitor-General who was conducting the prosecution in the language of the author, "to his eternal disgrace and to the eternal disgrace of the Court who permitted such an outrage on decency left the bar and presented himself as a witness for the Crown". Apparently he was still of this sentiment at the trial of the **Cobbett** case.

(16) it does not behoove the writer at this time to consider the effect of this case upon the principle that a party who conducts his own case cannot have counsel to assist him. **Robinson v. Palmer,** 2 Allen 223 and **Gilbert v. Raymond,** 3 P & B. 315.

the party's legal right to conduct his own case and to be his own witness, which rights had been expressly given by statute. Accordingly, it allowed the appeal. From this decision, one may derive the rule that a party to an action may be his own counsel and witness. (16)

The misapplication of the decision in the **Cobbett** case commenced with **Davis v. Canada Farmers Mutual Insurance Co.** (17) Harrison C. J. made a thorough study of the precedents and reported cases, omitting only the New Brunswick case of **Hamilton v. McLean.** (18) The following part of his judgment expressly and clearly recognizes the rule that the court may control counsel:

> The presiding judge may control the conduct of counsel but has no right to reject his testimony when tendered as a witness if a competent witness. (19)

It is submitted that the learned Judge was in error in holding that the **Cobbett** case overruled the previous decision on the matter. This error is manifested in his statement referring to the **Cobbett** case.

> The fact that the case was one of plaintiff in person acting as his own advocate, and seeking to act as a witness, makes no difference in the application of the rule. The rule applied to him is one which must be applied to any advocate whether acting for himself or any other person. (20)

Apparently there is the greatest difference between a person acting as his own advocate and counsel and a counsel acting for another party. In the one case the person is acting under statutory rights, does not represent a client and is not acting as an officer of the court. In the other case he is acting on behalf of a client and as an officer of the court subject to its discipline and control. Accordingly, the rule of the **Cobbett** case would seem to have no application beyond a party acting for himself.

The error of Chief Justice Harrison in attempting to extend the application of the **Cobbett** case was recognized by Cartwright J., who said:

> With great respect for the contrary view expressed by Harrison C. J. in *Davis v. Canadian Farmers Mutual Insurance Co.*, it appears to me that *Cobbett v. Hudson* . . . may not be of general application, as in that case the plaintiff who, it was held, should have been allowed to testify was acting as his own advocate. (21)

With this recognition, there should be no longer any question about the power of the court to control the conduct of the counsel-witness in all cases except where the party himself is the counsel-witness. Also, there should be no further question about the rights of the court, the counsel, the witness and the party to the action with respect to competency, control and conduct of the trial when the party or counsel wishes to give evidence.

(17) (1876), 39 U.C.Q.B. 452, at p. 482.
(18) (1828) Chipman M.S. 47.
(19) **Supra.**, at p. 477.
(20) **Supra.**, at p. 481.
(21) **Supra.**, at p. 695.

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