

THE DECISION OF QUESTIONS OF FACT.—The decision of questions of fact by judges and referees is often a disagreeable, though not usually a difficult, duty. It is disagreeable because it is frequently impossible to avoid seeming to cast suspicion upon reputable parties or witnesses. Where there is palpable perjury, it probably does not affect a magistrate's sensibilities in the least to say so. But the unpleasant cases are those in which the truth-stretching is largely unconscious. Many a controversy is decided against a party on the facts, apparently in the teeth of his solemn oath, when in reality his testimony was not deliberately untrue. He had started with a basis of fact in his mind, which had been gradually modified, exaggerated and colored by self-interest. His attorney, in all probability, had gone through a similar process, until at the time of the trial it would have been impossible for either of them to state the circumstances with anything like fairness. We are not referring merely to dishonest men or illiterate men. The best and wisest of us are subject to the deflecting influence of the personal equation. To aid in deciding issues of fact, there is first the feature constantly given as a reason for not reversing judgments as against the weight of evidence. The original tribunal sees the witnesses, hears them testify, and notices their manner. These, of course, are valuable helps in arriving at the actual circumstances. A skilful piece of cross-examination often makes the determination of the controversy a foregone conclusion almost from the start. If, however, both sides appear equally truthful under the ordeal of cross-examination, a reliable key to the problem is to be found in the admitted facts. The disputed facts are to be tried by the conceded facts, and rarely will this test fail to suggest presumptions so strong that they may safely be followed. Such process of weighing the probabilities is a strictly scientific one, analogous to a physician's method of diagnosis from physical symptoms or any other method of scientific inquiry. It cannot be said to demonstrate the truth of the conclusion, but it produces a high degree of probability, sufficient for all purposes in civil actions, and working out substantial justice in the large majority of cases. Science is only a higher form of common sense, and we believe that the mental process by which juries reach verdicts is essentially the same as that above outlined. In instances where there are no external helps from the manner or appearance of the witnesses, jurymen necessarily take the conceded facts as a touchstone, and decide which version of the disputed facts is more consistent with it. We do not say that such intellectual action is always deliberate or conscious; it is rather the instinctive course of a normal human mind in searching for truth. It is practicable, therefore, for the average man, without special education or professional training, to arrive at results on disputed facts which in most cases are correct. Juries, when they disagree, do not, as a rule, divide in the middle. Rarely will a jury stand 6 to 6, or 7 to 5, or even 8 to 4. In disagreements it is customary to find nine or more for one side, and one, two, or three for the other; and the majority is almost invariably for giving a verdict in accordance with the opinion, on the merits, of educated outsiders who have watched the trial or kept track of the evidence. The great hope of counsel on the wrong side of a cause is to capture one or more jurymen of not quite normal