

defendant may suffer a substantial injustice by departure from the rule and the disregard of its manifest intention.

The recent departure from the practice followed in former years is due to a wholly unjustifiable sensitiveness to shallow and baseless criticism. The writer can recall conditions when a dominant personality on the Bench could carry with him the convictions of enough of his associates to make an equal division of the court a very rare occurrence. There was greater unanimity, but the greater unanimity may have connoted greater injustice. Cases were parcelled out among the judges, one assigned to one and another to another. These were the conditions of a former century. They were the conditions of a date so far distant in the past that they can be referred to with an inoffensive freedom. There was not frequently a dissenting judge. The late Chief Justice Weatherbe, when delivering one of his earliest dissenting opinions, jocosely called attention to the fact that he had been appointed to succeed ex-judge Lewis Morris Wilkins, who, as he did not say but as his hearers well knew, was the "dissenting judge" of the court of which he was a member. If among the judges at present composing the court there is less unanimity than in former days, it is because the suitor gets the benefit of the greater independence of the members of the court and their greater individual energy and research. So far from its being a reproach to a court that its conclusions are not unanimous, it should be taken as *prima facie* evidence of a more careful and thorough individual application and industry than where the conclusions arrived at by one are unanimously acquiesced in by the rest.

One of the strongest objections to the insistence upon a quorum of five judges has not yet been dealt with. It is frequently the case that not more than six judges are available for work. One or more may be "indisposed" or even seriously ill. One may have been granted leave of absence for the enjoyment of a well-earned sabbatic year. A vacancy may have occurred which the government of the day cannot conveniently fill. This is a condition of things which has occurred under every government of Canada so far back as my memory carries. It is one that reflects no discredit on any government or on either or any party.