



# Wigs

*John deP. Wright*

*Alice had “never been in a court of justice before, but she had read about them in books, and she was quite pleased to find that she knew the name of nearly everything there. ‘That’s the judge’, she said to herself, ‘because of his great wig.’”<sup>1</sup>*

**T**HE WIG AND the gavel are universal symbols of the judiciary in North America. No cartoon of a judge is complete without a gavel, and no one bats an eyelash to see the figure of the judge decked with a wig. All of which is passing strange when one realizes that in those places where the forensic wig is still retained it is worn not only by members of the judiciary but by all members of the Bar, the wig is extinct in all North American legal circles, and the gavel is used only below the 49th parallel.

Even in England the forensic wig is endangered. There the legal profession is divided into barristers and solicitors, but only the barristers wear wigs. As the Canadian publication, *LAWYERS WEEKLY*, reported on 6 July 2001,

Britain’s [sic. – read “England’s”] Lord Chief Justice is reviewing the Bar’s exclusive right to wear wigs after a complaint that the tradition discriminates against solicitors and breaches clients’ human rights.

Solicitors say the barristers’ monopoly puts them at a disadvantage in court and therefore breaches the protections for a fair trial under the Human Rights Act.

The move was prompted by a complaint from Solicitor-advocate Brian Kennedy, who said the wigs give barristers an unfair advantage in court and contravene the Act’s principle of ‘equality of arms’. Solicitors may wear only short black gowns.

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1 Lewis Carroll, *ALICE’S ADVENTURES IN WONDERLAND*, ch. 11 (1865).

Following this, I understand that the Chief Justice polled his judges on the use of the wig and found that the majority favoured its retention.

In April of 2002 the Lord Chancellor entered the discussion. He told the press that he would initiate a public consultation exercise on the subject of the abolition of wigs, particularly in the criminal courts. One can only surmise that the wig may be on its way to extinction in Britain.

Over the centuries the forensic wig has evolved into two forms: the “full-bottomed wig,” the classic long wig that comes down over the shoulders, and the shorter bob-wig or tye-wig. The full-bottomed was worn by the “big wigs”: Judges, Queen’s Counsel, and Recorders on formal occasions. Besides State occasions, judges wore the full-bottomed wig on the opening of Assize, while addressing the Grand Jury, and during cathedral services. Otherwise the shorter bob-wig was donned.

The forensic wig as we know it developed gradually. The original wigs seem to have required frequent frizzing and curling, and to avoid the necessity of this a patent was taken out in the early 1800s

for making a forensic wig the curls whereof are constructed on a principle to supersede the necessity of frizzing, curling, or using hard pomatum, and for forming the curls in a way not to be uncurled; and also for the tails of the wig not to require tying in dressing; and, further, the impossibility of any person untying them.

By 1877, in an article entitled “Judicial Costume,” the English publication *Leisure Hours* was reporting that

... wigs, until recently, were made of thin horsehair, plentifully greased,

curled and thickly powdered with flour. They required to be greased, curled and powdered every week or fortnight, and soon got into a dirty and offensive condition if neglected. Latterly patent wigs have been in use, made of thick white horsehair and these are much preferred. They are light, clean, and cheap, require no dressing, and their wearers are not called upon to pay hair powder duty to the Inland Revenue. The old wig, however with its greasy and floury accessories still maintains its sway with a considerable portion of the English Bench and Bar.<sup>2</sup>

Notwithstanding the relative convenience of the patented wig, use of the old powdered wig subsided slowly. As Mr. Justice MacKinnon (later Lord Justice MacKinnon) noted in his memoir of his days as a trial judge,

Foote, in his delightful book, *Pie Powder*, wrote: ‘the custom of wearing a powdered wig was cherished on the Oxford Circuit long after it had been abandoned elsewhere. Huddleston, Henry James, and Henry Matthews were all wont to appear with this effective but troublesome adjunct to forensic dignity, and I think I remember that Mr. Justice Darling once followed their example. I doubt not that the archives of the Oxford Circuit contain some explanation of this peculiarity, and it is perhaps to be regretted that so picturesque an adornment has fallen into disuse.’ It has not completely fallen into disuse. There is still in 1939 one barrister who adds to the picturesqueness of his appearance by wearing a powdered wig in court. He is Mr. George Bancroft, Clerk of Assize on the Midland circuit.<sup>3</sup>

Wigs continued to evolve. Richard Roe,

2 LEISURE HOURS 1877, pg. 777.

3 Lord Justice F.D. MacKinnon, ON CIRCUIT 1924–1937, Cambridge University Press (1940), pg. 220.

in a memoir entitled *STRAWS IN MY WIG*, recorded that “[t]he last great advance in style was just fifty years ago, when they found a way of fixing the little rolled curls so that they should not come loose in untidy grey wisps ...”<sup>4</sup>

The wig is not considered an essential element of forensic dress. It is expendable. Thus, in the latter part of the 1800s, when the first Sikh sought entry to the English Bar, the wearing of the wig by Sikhs was considered something that could be dispensed with. From time to time wigs are doffed but the occasions are so few that they are newsworthy. For example, in 1900 the *Canada Law Journal* noted that in July two English judges had appeared on the Bench without their wigs because of the unseasonably hot weather. It was also noted that judicial headgear had been dispensed with by Sir J.P. Wilde on 24 July 1868. The *Times* noted on that occasion that the judge and Bar sat for two days without their wigs.

More recently, in 1993, the *Lawyer’s Weekly* reported:

LONDON – In a radical move, some English judges dispensed justice without their traditional wigs.

According to a *Times* newspaper report, for a short period in August, senior judges in the commercial courts worked without the traditional white horse-hair wigs that have been a fixture of the judiciary since the 18th century.

Commercial barristers pressured for the move because they often represent international clients unfamiliar with judges and lawyers wearing wigs.

The innovation comes despite research concluding that the wigs should stay, *The Times* said.

On 28 March 1922, when the first woman was being admitted to the English Bar, the

judges of the King’s Bench Division met to discuss the situation. Mr. Justice MacKinnon subsequently reported that

a resolution as to the attire of women Barristers was passed. *Inter alia* they ‘are to wear Barristers’ wigs which should completely cover and conceal the hair’. When this was proposed Darling J. moved an amendment ‘that they shall wear a biretta’, and this was seconded by Horridge J. The amendment was defeated by nine votes to two.

So women were denied the more feminine biretta and compelled to wear the masculine wig. In the event, women have supported the usage of wigs because they obscure the difference between male and female barristers.

Notwithstanding its use today by both men and women the wig is essentially an item of male attire that was not discarded by the legal profession when the rest of society discarded it. The wig was originally a French fashion which was brought to England upon the restoration of Charles II.

It does not really matter now whether the wearing of wigs by gentlemen of quality originated in the reign of Louis XIII, who adopted the fashion as a means of concealing his own baldness, or in that of Louis XIV, in order that his courtiers might imitate the luxuriant locks of their royal master. However it started, the fashion rapidly spread over Western Europe and was taken to England after the Restoration. It was adopted, simply as being the general fashion in head-dress of men of quality, by, amongst others, judges and advocates. In England only some of the older judges, such as Sir Matthew Hale and that Sir Thomas Street who held out against the King’s dispensing power, refused to adopt the new fashion and continued to wear their own

4 Richard Roe, *STRAWS IN MY WIG*, London: Solicitors Journal (1954).

hair surmounted by a black velvet skull cap. There were variations as time went on. The wig of naturally coloured hair (sometimes even made from the hair of him who wore it) became the flowing grey wig worn in Sir Joshua Reynolds' well-known portrait of Lord Mansfield. The "full bottomed wig" as now worn is a little smaller, with more stylised curls.

The adoption of a smaller wig for daily wear was in the same way a following of a change in general fashion which began about 1720. The judges, however, retained their large wigs for formal wear after the rest of the masculine world had abandoned them altogether. Barristers, who hitherto had also worn the large wig, adopted the smaller type at the same time. Their present wig is in line with the fashion as it was in about 1780; the judges' wig is of a rather earlier fashion. King's Counsel followed the judges and the sergeants in retaining the full bottomed wig for formal occasions. The significant matter is that throughout Europe (with short-lived exceptions here irrelevant) the wig was abandoned as part of forensic dress as soon as its wearing, as a general fashion, ceased. Only in England and in countries which have maintained institutions derived from England, has the forensic use of wigs continued to the present time.<sup>5</sup>

The diarist Samuel Pepys noted the adoption of the wig by English society:

Pepys first mentions his adherence to the new fashion on May 9, 1663 – 'to Westminster, where at Mr. Jervas's, my old barber, I did try two or three borders and periwiggs, meaning to wear

one; and yet I have no stomach for it, but that the pains of keeping my hair clean is so great'. On August 29 – 'I to Jervas ... and did deliver back a periwig, which he brought by my desire the other day to show me, having some thoughts, though no great desire or resolution yet to wear one, and so I put it off for a while'. On October 30 – calling at my periwig makers, and there showed my wife the periwig Trade for me, and she likes it very well'. Finally on November 3 – 'By and by comes Chapman, the periwig maker, and upon my liking it, without more ado I went up, and there he cut off my haire, which went a little to my heart at present to part with it, but, it being over, and my periwig on, I paid him 3 for it; and away went he with my own haire to make up another of.'

It was of course the pains of keeping the hair clean that caused the fashion to be introduced. And that object was still not wholly achieved. On July 18, 1664, Pepys writes – "Thence to Westminster to my barber's to have my Periwig he lately made me cleansed of its nits, which vexed me cruelly that he should put such a thing into my hands'.

On February 15, 1668, he records that the Duke of York 'first put on a periwig to-day'; and Wheatley in a note says that Charles II followed his brother's example in the following April.<sup>6</sup>

Thus the wig was not originally an exclusive adjunct of members of the Bench and Bar, but was an almost indispensable part of a gentleman's costume as well indoors as outdoors. F.W. Maitland wrote in 1883, "Judges and lawyers took to wigs when other men in a frivolous moment took to them; unfor-

5 Sugerman, J. "The Wearing of the Wig," 47 *Australian Law Journal* 39 (1973), reprinted in *Chitty's Law Journal*, Sept. 1973, p. 222.

6 Lord Justice F.D. MacKinnon, "Wigs – or Biretta: Miss Buzfuz – or Portia," 61 *Law Quarterly Review* 32 (1945).

tunately they retained the silliest adornment that the human head has yet invented for itself when even physicians and bishops had recovered their wonted sobriety.”<sup>7</sup>

In the eighteenth century judges (and bishops too) had to wear wigs everywhere, and at all times, in public. When Sir John Scott was made Chief Justice of the Common Pleas, his wife, who disliked a wig, persuaded him to ask George III if he might dispense with it except when performing official functions. The King would not consent, and it was only when he became Lord Chancellor, and Lord Eldon, in 1801 that ‘the wig of private life was discontinued’. The Bishops were allowed to give it up in 1832. Joseph Jekyll writes to Lady Gertrude Sloane Stanley, 9 January 1832: ‘The King has given the Bishops leave to abandon wigs except in the House of Lords or the pulpit. Bishop of London dined at General Phipps’ on Sunday without one.’ And Coplestone, Bishop of Llandaff, wrote in his diary on 22 February 1832: ‘On this day, following the example of almost all the bishops, left off my wig.’<sup>8</sup>

Colonial judges and lawyers brought the wig with them to North America as is shown by such paintings as that entitled “Andrew Hamilton Delivering Closing Speech to Jury in Trial of John Peter Zenger,” c.1735, held by the New York Historical Society. (The acquittal of the accused in that case on the charge of seditious libel helped to establish freedom of the press in the American Colonies. The painting is reproduced in a wonderful book: *LAW, A TREASURY OF ART AND LITERATURE*.<sup>9</sup>)

G.C. Hazelton, Jr. in his *History of the*

*National Capital* (1897) says that the question of court attire was a subject of discussion by public men following the American Revolution. According to him Jefferson was against any needless official apparel, but if the gown was to carry he said, “[f]or heaven’s sake, discard the monstrous wig which makes the English judges look like rats peeping through bunches of oakum.” Hamilton was for the English wig with the English gown. Burr was for the English gown but against the inverted wool sack termed a wig! The English gown was taken and the wig left in the Federal courts.

According to Jean Edward Smith in *JOHN MARSHALL, DEFINER OF A NATION*,<sup>10</sup> William Cushing is reputed to be the last American jurist to wear a wig. Cushing discarded the wig in 1790.

The new Supreme Court of the United States got off to a less than auspicious start on February 1, 1790. The scene was at the Royal Exchange in New York, which failed to provide that symbol of judicial authority – a bench. Three of the six justices were missing and there were no cases to try. The court adjourned to dine with President Washington.

The next day, Justice Cushing from Massachusetts was jeered and hooted by a mob of youngsters when he tried to proceed down Broadway in his legal wig looking as dignified as he could. Later the Court decided to abandon the tradition of wearing wigs, adopting Thomas Jefferson’s advice[.]

The forensic wig was carried around the world with the Common Law. Some parts of Australia and other former British de-

7 Quoted in Sugarman, “The Wearing of the Wig” at pg. 39.

8 MacKinnon, *ON CIRCUIT 1924–1937* at pg. 177.

9 Sara Robbins, ed., New York: Hugh Lauter Levin Associates, Inc. (1990).

10 New York: Henry Holt & Co. (1996), pg.287.

pendencies still retain it. In North America, its last use was probably in 1905, when the Canadian province of British Columbia abolished its use. This is not to say that Canadian lawyers did not own wigs until fairly recently. Some firms maintained wigs in London, England, for the use of members of the firm who might be called to London to appear before the Judicial Committee of the Privy Council prior to the abolition of appeals to that court in 1949.

The use of the wig in Scotland today is, as MacKinnon said, a revival rather than a survival of English practice. Originally the Scottish bar adopted the wig with the rest of society.

We are told that some of the older Scottish judges were in the habit of walking from their houses to the court arrayed in their wigs and gowns. According to Lord Cockburn's Memorials, Lord Glenlee, a judge of the Court of Session till his resignation in 1843, constantly walked to court arrayed in his wig, long white cravat, silk stockings, silver buckles, just as the judges had done in his youth. Members of the Scots Bar were, however, not always so meticulous in the wearing of the wig as were the judges.

Jeffrey always evinced a strong antipathy to the wig and frequently appeared in court without it. A later member of the Scots Bar, John Park, whose name is enshrined in George Outram's delightful *Legal and Other Lyrics* is said to have been the last member of the Faculty to appear at the Bar without a wig.<sup>11</sup>

Many Advocates in Scotland ceased to wear the forensic wig once wigs ceased to be worn by gentlemen generally. According to Sheriff David Smith of Troon, Scotland,

in *The Book of Scotland* by William Chambers, 1830, the author says at p. 143: "The custom of wearing wigs is now falling into disuse among the Advocates; but they all still wear the ancient toga of the profession." And in John Kay's *Edinburgh Portraits*, published posthumously in the 1830s there is one plate depicting a group of be-wigged Advocates and another showing a group of wigless ones. Among the latter is [Sir] Walter Scott.<sup>12</sup>

The wig seems to have been readopted by Scottish Advocates between 1860 and 1870. Intrigued by this development, MacKinnon recorded:

... I wrote to my friend Lord Normand, the Lord President, to ask if he could give me any information as to the universal legal resumption of wigs [in Scotland] and whether it was voluntary or by reason of some resolution of the faculty. I may quote from his reply: 'I think that the portraits of the judges in the Parliament House are all bewigged. There is a prim, ladylike statue of Cockburn in a gown without a wig; I am not sure if the gown is a judicial robe. ... In Kay's Portraits No. CL, you will find '12 advocates who plead with wigs on', with a note that the wearing of wigs is a matter of choice. No. CLVI is a picture of '12 advocates who plead without wigs. ... All the portraits of judges in Kay's book have wigs, and they are the wigs with curls. ... In 1908 the Bar gave a dinner to Innes, the then Father of the Bar, and of great age. I believe that he spoke of advocates pleading without wigs in his youth. ... I have some recollection of an anecdote of an advocate appearing without a wig before Lord President McNeill in the 1860s. I think that our judges always wore wigs from the Res-

<sup>11</sup> "In re: Wigs," 13 *Australian Law Journal* 258 (1939).

<sup>12</sup> From a conversation between the author and Sheriff David Smith.

toration onwards, and that members of the Faculty did so until the fashion for gentlemen changed: then for a time it was optional, and did not become universal again until 1860–1870. ... Your specific question whether the resumption of the wig by the advocates was by voluntary changes or under an Act of Sederunt or resolution of the Faculty will need investigation. My impression is that it was a voluntary change. It is, I think, true that Sir Walter Scott never wore a wig. There are many portraits of him with gown and without wig, and he figures in Kay's 12 non wig wearing advocates.<sup>13</sup>

Some ask why judges and lawyers con-

tinue to wear such a silly, uncomfortable item. One answer is tradition. Another is anonymity. A disgruntled litigant is far less likely to recognize the person standing beside him in a line at the grocery store as the bewigged judge who found against him in court. As already noted, wigs also provide barristers with a measure of equality, obscuring the difference between male and female, young and old, a fact appreciated by female and young members of the Bar.

Whether the use of the wig will continue remains to be seen. But its identification with the legal profession has become part of popular culture even on a continent where its use was abolished a century ago. *GB*

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13 MacKinnon, ON CIRCUIT 1924–1937, pg. 238.