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SHOULD THE JURY SYSTEM PASS?

IT is a truism, recognizable to most students of jurisprudence and, for that matter, even more so to the man in the street—that every new enactment of law that disturbs the even tenor of traditionally-accepted custom, is so unwelcome as to provoke impatient criticism. The hue and the cry from the four corners is, “not more laws, but stricter enforcement of those now extant.” Business to-day, accustomed as it is to an unswerving routine, has no appetite for and rebels at, every change in the law as an inroad upon, a visitatorial inquisition into, its sacred precincts of violatory peace, and as an attempt by legislatures to regulate and stultify the march of progress, of development and of surpassing achievement. And it must be admitted that any custom “hallowed by the worship of ages,” should long endure, despite a radical passion for change and undue progress, and when that radicalism seeks to upset our system of juridical procedure, the seven centuries of unbroken progression bear witness to the decided wisdom of arriving at a just determination of disputed facts through the intermediary of the collective mind rather than the solitary. Indeed, it has been said that whether we have place in our progressive system of legal procedure for a “crude and costly piece of machinery like the jury, is a very grave question.” “Crude and costly,” though it appear to some, it is all in all the safest, the nearest approach to accuracy, and the most expeditious method of settling legal disputes, that has as yet been devised.

Our modern jury system had its embryo in England in the twelfth century, having been transplanted therein by the Norman kings from the quondam Frankish inquests.¹ These “inquests” consisted of the herding together of a number of nearby inhabitants to obtain information to enable the King to assess taxes. The information was disseminated by the summoned inhabitants themselves and from facts within their own knowledge, and, based upon it, the King levied his taxes. The same system was later extended to the settlement

¹ Thorpe, *Ancient Laws and Institutes of England*, Vol. 1, p. 299.

of controversies between the King's subjects, and in time (circa 1350), displaced "trial by combat" as to the disputed ownership of land, the chosen twelve knights of the realm basing their determination not on evidence adduced on the trial, but in utter disregard and complete rejection of it, if it were not in conformity with their own personally acquired knowledge of the facts in dispute. Indeed, diametrically opposed to our present-day practice, the sheriff of the county sought, by the process of elimination, twelve local knights *who were cognizant fully of the facts of the case*; if he were successful and all were agreed, a "verdict" was had, but if any of those summoned were ignorant of the facts, or if any dissented from the majority, they were displaced by others who were found to agree, and this process continued until twelve were found to be unanimous,—the procedure being termed "affocing the assize." Thus, the jury was in effect, a panel of witnesses and on their own individual knowledge and their ultimate unanimity was based a belief in the infallibility of witnesses by quantity rather than by quality.²

The number, twelve, of the jurors, was assumed (according to Lord Coke and Lord Somers) :

"Like the prophets were twelve to foretell the truth; the apostles twelve to preach the truth; the discoverers twelve, sent into Canaan to seek and report the truth; and the stones twelve that the Heavenly Hierusalem is built on."³

In those early days, the "affocing of the assize" was not without its discomforts. Resort was had to many tactics in attaining an unanimous jury, tactics which to our latter-day veniremen would be looked upon as barbarous. For example, in the midst of their deliberations, the jurors were allowed nothing to eat; fires for heating purposes were not for them, and if after all the jury was "deadlocked" in a disagreement, they were solemnly loaded into a cart, hauled to the border and as solemnly upset into a ditch!⁴

² Bracton, *De Leg. et Consuetudinibus Angliæ*, cap. 19.

³ Guide to English Juries, 1682, Lords Coke and Somers.

⁴ Von Moschizisker, *Trial by Jury; History of English Law*, Vol. 1, pp. 314 *et seq.*

Reviewing the gradual evolution of our present jury system, we cannot but regard with approval the almost perfection in standards that has been attained by the development—at least so far as a practically secure method of arriving at truth is concerned in factual controversies. We have hitherto retained the traditional number of twelve persons as triers of the facts, but the trend of modern legislation seems to be pointing toward the end of reducing that number to one, with a supposed faith in that one's infallibility of judgment, in decreeing that a judge will determine the issues, unless a timely demand be made for a jury.

I propose to demonstrate herein the ill effects of resorting to a one-man decision of disputed facts involving property rights and personal liberty, and to urge reliance upon the security of a jury determination, albeit upon a "majority" rule rather than unanimity. The agitation now rampant for speed in the trial of causes is a salutary one, for we cannot forget that justice delayed is justice denied, but we must likewise not forget the vice of forcing decisions in litigations in an abortive attempt at economy of time, attempts which often result in a kindred denial of justice. Witness the perverted habit of gathering counsel and litigants about the bench in an endeavor to settle a case. The very demeanor of one counsel will in many instances cause the self-appointed "arbiter on the bench" to take sides for or against that counsel in proportion to his own peculiar impressions of the demeanor, and to argue in the light of those impressions, nay, persuade, and oftentimes cajole him into foregoing a property right that should in good conscience never have been abandoned. An all too hasty absorption of the facts at issue, culled from the conference at the bench, in many instances has its defects supplied and the real facts themselves indeed supplanted by those personal impressions, favorable or not, of the litigant or his counsel. Human beings will continue to differ, despite a striving to formulate a universal standard of social conduct, and the fact of the existence of that disparity of judgment is best manifested by our divided appellate courts. Indeed, I personally recall one of these self-appointed arbiters almost *insisting* upon a counsel yielding on several major points in a lawsuit, solely because the impression he

received of that counsel was of moral weakness to resist pressure and cajolery. There is a likely perversion of justice in this sacrifice of equity for time's economy. We cannot retort that calendar congestion demands it. It is false economy. Better that one cause be decided justly at an expense of time, than that many become travesties of justice at a saving.

Again, is there really conservation of time, of effort, in taking a cause from the jury, or in waiving a jury verdict, and submitting the facts to a judge? I have experienced cases in which a jury has been improvidently waived—cases that could be tried and a jury-verdict rendered in less than a day's time—adjourned by the court to his chambers where three hours would be spent in a futile attempt at settlement, only to return the following morning for a resumption of hostilities *in foro* and to extend throughout the entire day, submission of case, one week for briefs, argument in chambers, five, ten days judicial deliberation, mayhap further argument on the measure of damages, the court's opinion, order signed directing a verdict. That order will have been entered perhaps three weeks after the commencement of the trial—a culmination that could, with suitable preliminary preparation, have been achieved in one court day. And this is not the most serious consequence. In the case of the expiration of the term of the sole trial judge (not to mention his untimely demise), a complication is apt to arise that can only have its dénouement at a sacrifice of great expense and time. Nor is it improbable. For example, in North Dakota, such a complication did arise. A judge, sitting without a jury, after deciding the main issues of the action, entered an order directing the taking of further testimony as to value, damages. He subsequently, and before the taking of such testimony, resigned his office and his successor continued the case solely on the question of value. As was requisite, he made findings of fact on the main issues, basing them on his predecessor's minutes of the trial, and, on the question of value, upon the testimony heard by him. Of course, the judgment was reversed on appeal, it being held that the successor judge should have conducted a new trial on all the issues in the action. The resultant loss of hope, of time, of energy, and

of money is striking. A jury would have rendered its verdict at the close of the case.

As an example of the great field for human error, Professor Green of the Yale School of Law writes in the American Bar Association Journal anent the judge's charge to the jury. After labeling it "more frequently than not, inaccurate," he adds:

"(it) is the greatest single source of reversible error and both trial and appellate courts would be relieved of their greatest source of annoyance if the general charge could be eliminated from trial procedure."⁵

If the liability to err in the realm of law in which he is supposed to be well trained, be a vice of a one-man jury, how much the more so is it in a realm of factual truth, in which vast experience alone in the walks of life can qualify him to judge. Even the Supreme Court of North Carolina strongly intimates the inadvisability of commingling in one body the duty of finding material facts with a consideration of legal principles. The peculiar form of submitting issues to a jury in that State was "for the purpose of enabling the jury to find the material facts with as little consideration as possible of principles of law."⁶

We cannot afford to overlook the respective elements that go to make up the proneness of man to err. No matter how he strives, a man must be a master to overcome his personal prejudices which of their nature sway his perspective, his prevision, in deciding a case. And, the comparing of a witness' mannerism or facial expression with some similar mannerism or expression in untoward circumstances, recalls subconsciously to the observer the dire or unfortunate earlier occurrence to such an extent that it is applied to the witness now before him. We have all experienced this. Take, for instance, the risible type of witness. At a critical point in his testimony, he unconsciously smiles lightly at his most stupendous utterances on the stand. But the judge, asso-

⁵ A new Development in Jury Trial; Am. Bar Ass'n, Journal, Dec. 1927, p. 715.

⁶ *Elizabethton Shoe Co. v. Hughes*, 122 N. C. 296, 300 (1898); *Hatcher v. Dobbs*, 133 N. C. 239 (1903); *Busbee v. Land Co.*, 151 N. C. 513 (1909).

ciating that smile with a flippancy that he some days ago absorbed from a man on the street enacting those utterances, subconsciously stamps his witness as a trifier of sacred things, a mocker of sublime thoughts, in consequence whereof that witness' testimony, innocent and truthful and unrestrained though it be, is weighted down with an aversion on the part of the judge that cannot be eradicated, except by an almost superhuman effort. Method of carriage, lack of poise, too much poise, verbal pronunciation, all affect the one human mind, that, although striving earnestly to be unbiased, is nevertheless blunted by the personal equation that cannot be evicted from judicial consideration. On the contrary, there is less likelihood of this stultification when twelve minds dissect the witness and his testimony. And although one of the twelve might have the same mental associations as our judge above, their influence, or at least their reactionary impulse, is temporized by the other eleven jurors. On the other hand, the converse is true of the perjurer or the witness who distorts and exaggerates. He may possibly deceive a one-man jury by his veneer, but the chances are very, very slim that he will so succeed with twelve.

And so instances and examples may be multiplied where a witness will give an impression far different from what is the truth, and so long as the contest of legal causes connotes after all a searching for the truth, it is obvious that the disparity between one man's capability of arriving at it and twelve, is too great to admit of serious discussion. The but recently retired Justice Jeremiah T. Mahoney, after an exemplary reign on the New York Supreme Court bench epitomized the subject in these strong words:

“* * * the jury system is the basis of and productive of the most reasonable and fairest results in adjudicating disputes between fellow citizens.”⁷

Amongst those exempt from the civic duty to sit as a juror are lawyers, and although the exemption is voluntary, no counsel in a case would accept as a juror for his client's cause, a man “learned in the law.” And why? Because such a juror would weigh the facts only as they fit in with his legal

⁷ Farewell Address, N. Y. Athletic Club, N. Y. City, November 15, 1928.

concepts; he would apply legal principles to the facts proven; he would reach his decision and cast his vote not on the evidence alone but on that evidence as applied to his conception of the law. His unbiased judgment of the facts, of the truth, would be warped by maxims and dicta, common law and statutes, as appropriate to the facts at hand; and although directed by the judge to confine his deliberations to the facts alone, he would be utterly unable to pick and choose between truth and falsity, and *his* verdict would be the result of hairsplitting of, and overrefined distinctions between, facts as his mind has been schooled to do with the law itself. Now, if this be the case with the lawyer in the jury box, surrounded and aided and temporized by his eleven fellows, how much the more so is it with one man, unaided in his overrefined distinctions between facts in an attempt to arrive at the truth, and not unfettered by a conglomeration of equitable maxims and legal principles? The hard-headed, steady, well-balanced common sense of the ordinarily responsible business man is overshadowed by the profundity of legal knowledge. Indeed, not until Solomon reincarnate appears to us can we hope to approach certainty of right judgment in disputes; until then, the power of the collective whole is the most practical means to this end as opposed to the solitary opinion of one man.⁸

The vulnerability of the jury system lies not so much in the system itself as in the method that it is constrained to function.⁹ We shall always have our critics of the jury system as such. The defeated litigant is tireless in his condemnation of a body of men that fails to see the case as he does and to approach the solution of the disputed problems in the light of his own individual way of thinking. Again, we shall ever have the recurrent "deadlocks," or "hung juries" that spell discouragement in a just cause and oft-times the ultimate defeat of equal justice. Just as the elevation to the bench fails to cure a human proneness to err, so also does the mystery of the locked jury room fail completely

⁸ Oregon Homebuilders v. Montgomery Ins. Co., 184 Pac. (Ore.) 487 (1919).

⁹ A New Development in Jury Trial; Green, Am. Bar. Ass'n, Jr., Dec. 1927, 715, 720.

to dispel the possibility of mistake. But I contend that the chances of error are far less in the latter case.

There appears to be but little salutary gain in requiring unanimity of the jury in its verdict. When we reflect how one man, either through perverseness or from conscientious application can prevent not only a just determination of property rights, but any determination whatsoever, we are confronted with the desirability of facilitating the arrival at a definite verdict, terminating delays and obviating the dread of a "hung jury." So long as the traditional number of twelve is acceptable for a jury, what is there to prevent the requirement of a majority verdict, and in the event of a tie ballot, the presiding judge to cast the deciding vote after hearing and *carefully considering* the arguments of the two opposite factions in the jury box through a duly accredited spokesman? Thus the judge, faced with the necessity of sub-consciously applying legal principles to the disputed facts, will have the great advantage of the mental approach to the problems of twelve hard-headed men of business who daily meet the same or kindred situations in their respective walks of life.¹⁰

A few years ago I was engaged in defending a case wherein the actual proven damage, if the plaintiff prevailed, could not possibly be less than fifteen thousand dollars. The jury was out for approximately seven hours and brought in a verdict for the plaintiff for seventy-five dollars! There was no alternative for the trial judge but to order a new trial. Now, this vexatious result was in no measure due to the system, but to the procedure. I insist that if the majority vote rule had been the accepted practice, there would have been a verdict in less than an hour, for the defendant. But it is apparent even to the most initiate what a seventy-five dollar verdict meant in those circumstances. It meant that the jury, as a *collective whole*, was for the defendant, but that, in order to give a *semblance* to the plaintiff of having prevailed, what virtually amounted to but nominal damages was given as a compromise. There, unquestionably, a majority of the jury would have returned a verdict for the defendant; and even though the jury was equally divided, the judge

¹⁰ See Section 305, British India Code of Cr. Proc. of 1882.

could not have failed to cast his deciding vote for the defendant, for by the very division in sentiment, it would be unmistakable that the plaintiff had failed to sustain the burden of proof in eliciting a preponderance of the credible testimony.

We are not interested herein in finding a panacea for the ill, if ill there be. Our province is to defend the system as such, as a system, leaving the remedy for all procedural shortcomings to the legislators. Judge I. T. Richardson, of the Fifth Judicial District of Kansas has perhaps the more nearly approached a solution than any heretofore proffered remedy—were it practicable. He urges coöperation of judges and lawyers with the Commissioner of jurors, or whatever functionary prepares the panels in the respective States, to weed out the diffident citizen and select the intelligent, "men who can leave their business without undue anxiety as to consequences and men who are upstanding in their integrity."¹¹ This utopian aim would, however, narrow the panel almost exclusively to the well-to-do, the retired, or in the other extreme, to the man with no work to do at all, and hence with no "undue anxiety as to consequences." But it is Mr. Common Citizen, the "Thee and Me" element with whom we are to deal in the ordinary trial of causes. And so long as we must do so, let us find the antidote in minimizing "deadlocks" by accepting the verdict of the majority of the jury.¹²

Wendell Phillips favored the jury system, claiming for it the working out of "a rough, average justice." But Mr. Russell Duane pleads not for a justice that is "rough" and "average," but for one that is "intelligent" and "exact." And he stops not at a plea, but extends it to the admonition that "the community ought to have it." We have on all sides of us: "What this country needs is * * *," etc. And we are all fully cognizant of the needs of the community, and the defects in our system of meting out justice. But to find a constructive remedy is our aim, to discover some improvement over our present method of discerning truth. And while this article is confined to a defense of the jury system

¹¹ Amer. Bar Ass'n, Journal, July 1928, p. 410.

¹² Zeisler, Jury Verdicts by Majority Vote; The Forum, May 1890, pp. 309-322.

as a whole, we cannot blind our eyes to the unfounded attacks upon it, and we are content to champion it as a greater road to certitude than the single judge, as suggested by our own Empire State, or than the commission of experts suggested by Mr. Duane, or indeed than any other of the "remedies" with which our magazines and legal periodicals abound. Most of them complain that the average juror is "unintelligent." If by this is meant that he lacks erudition or is wanting in a profundity of legal lore, I can only say, "Thank God for it!" For the fundamental requirement of any juror is neither of these, but is a familiarity with the common experiences of mankind in their relation to their fellowman; and acquaintance with the problems and the trials of and the obstacles that beset mankind in his pursuit of security, liberty and peace; an ability to judge of a product or a commodity to determine if it is made of "whole cloth," and a courage to defend that conscientious determination against unjust attack. Common sense—and I mean common, ordinary, average, sense—sums it up, and such a trait is not difficult to find this side of the African jungle or the Esquimauxian ice fields. The plaint is made that the average juror cannot comprehend such matters as science, commerce, mechanics, and medicine when offered to him for determination of disputes arising in relation thereto. But, first, must not even a judge be aided by the testimony of experts in these lines, to arrive at an "intelligent" decision? Why not also an "average" jury? Secondly, it is oftentimes undesirable, nay dangerous, to have in, say, a trial involving science, a jury composed of scientists—a fact which indicates all the more the need for the "average" citizen as a juror; and thirdly, a dispute being primarily a disagreement as to actual occurrences or as to interpretation of the subject-matter of the scientific, commercial or medical issue, the basic thing to be determined is one of *practical* fact, not of scientific fact, or commercial fact or any other of the specialized pursuits enumerated. As an illustration, take a case involving a medical issue—the more common, malpractice. Is there required, or even desired, a jury versed in or familiar with, medicine or surgery? The practical fact there is, was the treatment accorded the plaintiff consonant with the accepted

treatment for such an ill, as *testified to by the respective experts?* And if, as is to be supposed, the experts of the two factions are in conflict, which are the more reliable, which truthful? And this *practical* issue is the more accurately, the more exactly disposed of by the collective mind, than by the single; and by a body of men with the only requisites of common sense, conscientiousness and fortitude.¹³

Even those writers who think they condemn the jury system, after all condemn the method alone. The system is marked only because its components are charged with lack of ability. But as we cannot all be Platos, the mere fact that some not of the intelligentsia find their way to the jury panel, is insufficient to decry the system as a whole. After all, who is to determine what is an "intelligent" jury? Apart from the fact that to nearly every defeated litigant (and, to our shame, often to a defeated advocate) his jury is "stupid,"—apart from this, a jury that will appear "intelligent" to a less astute lawyer might be "dumb" to a more discerning one, thus confirming the thought that, so far at least as juries are concerned, "intelligence" is a relative term.

Mr. Duane and his disciples bemoan the fact that juries are prone to be influenced by spectacular displays in the court room of hospital cots, smelling salts, superfluous crutches, etc. I emphatically deny any such untoward influence, on a jury, both from actual experiences and from a rational standpoint. We in the East here distinctly recall the revolting "hospital scene" in the trial of Mrs. Hall, *et al.* for the murder in New Jersey of her husband and one Mrs. Mills. The picture is one long to be remembered, and despite its histrionic setting, its melodrama; despite the "pig-woman's" sonorous and sepulchral intonations, divined to tinge the atmosphere surrounding that jury with a supernatural solution of the case—the jury acquitted. Moreover, and by far more important, even a jury of "average" intelligence is prone to bristle and stiffen at any undue theatrical display. It views it with suspicion and invariably discounts it, and its sordidness is understood. This happy discernment

¹³ Chamberlain, *The Amer. System of Trial by Jury*; *Journal of Social Science*, No. 23, p. 85.

is far less probable in one man than in twelve—the chances are twelve to one that the veneer will be pierced.

Finally, who has not heard the experienced advocate claim: “Know your judge’s temperament”; or “Is Judge —— sitting? Well, I know how to appeal to him.” But only a master will be able to appeal simultaneously to the conflicting emotions of twelve laymen who, after all, are instructed to base their decision on the evidence alone.

In the immortal words of Judge Jeremiah S. Black:

“It (the jury trial) has borne the test of a longer experience and borne it better than any other legal institution that ever existed among men. England owes more of her freedom, her grandeur and her prosperity, to that than to all other causes put together. * * * Within the present century, the most enlightened states of continental Europe have transplanted it into their countries, and no people ever adopted it once and were afterwards willing to part with it.”

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