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# TRIAL BY JURY: AN OUTMODED RELIC?

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The system and use of the jury was originated as a protection against the despotism of Kings and frequently has been acclaimed the "palladium of our liberties."[1] Recent statistics have indicated, however, that over a period of years juries have been used to a decreasing extent, and that increasingly convictions in criminal cases are obtained on the basis of a guilty plea. To substantiate this, it has been stated that 86 percent of convictions in trial courts were on a plea of guilty, six percent were so adjudicated by the finding of a court acting as jury, while only eight percent were determined by a jury finding of guilt.[2]

By definition, a trial is the examination, before a competent tribunal according to the laws of the land, of the facts in issue or laws in dispute for the purpose of determining whether there is validity in the facts or whether the law has been broken. According to legal theory the business of the jury is to determine, on the basis of evidence, a question of fact: Did the accused commit the act? It is about this nucleus that our concept of justice radiates. Yet, as Pascal wrote: "Justice is subject to dispute; might is easily recognized and is not disputed. . . . And thus being unable to make what is just strong, we have made what is strong just."[3]

Again, in relation to the concept of Justice, Radin wrote:

> I do not know what justice is, nor how the moral sentiment we call by that name arose nor when it became differentiated from the general category of virtues. I have read very carefully what wise men have said about it, men who knew exactly what it was. The difficulty is that, when their statements left the Nebula of Orion and got within a few million miles within this earth so that I could partially understand them, they seemed to me either self-contradictory or containing a position of the form: Justice is the quality of being just, or Justice is that which produces just results.[4]

The tendency is to think of justice as being a "square deal" in the courts for every suitor, fair play for the litigant, nonviolability of the rights of the accused, and the attainment of the "correct" results for society in cases of guilty.

[1] SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 289 (4th ed. 1947).

[2] *Ibid.*

[3] M. PASCAL, PENSEES SUR LA RELIGION ET SUR QUELQUES AUTRES SUJETS NO. 298, cited in CAHN, THE SENSE OF INJUSTICE (1949).

[4] POLLITT, *Defeat of Justice*, 23 FLA. L. J. 118 (1949).

Unquestionably, in the mind of the layman, the right of trial by jury is maintained as among the major propositions in his right to justice.

And yet Edwin Borchard filled a book with recent cases of convictions of the innocent. Perhaps noteworthy is the fact that he did not include cases in which an upper court had regarded a jury verdict as one no reasonable man could have reached.

The whimsies of jury verdicts are a favorite source of lawyers' anecdotes. For example, there is the famous Dunn case, where the defendant was indicted for (1) maintaining a nuisance by illegal possession of liquor; (2) illegal possession of liquor; (3) illegally selling liquor. He was convicted on the first count, acquitted on the last two![5]

## Historical Development

The origin of the jury and its subsequent development is derived from Celtic tradition based on Roman law and adopted by the Anglo-Saxons and Normans from the peoples they conquered.[6]

### Trials by Oath

The accustomed Anglo-Saxon modes of trial were variations of oaths and ordeals. Judgment in the Communal courts consisted merely of awarding to a party or condemning him to the mode of trial to be pursued.[7] The trial itself was not a rational investigation of facts involved. Rather, it appealed to the supernatural for intervention with a miracle to show the right. In disputes over property and contracts, the party to whom the test or trial had been awarded by judgment of the freemen could in most cases settle the matter by his oath. It was not necessary for him to testify to the facts. He would, however, be obliged to repeat a set form of words (ritual) setting out his whole claim or defense. Usually the oath of a defendant had to be supported by the oaths of a designated number of freemen, who were "with united hand and voice sworn together as oath helpers that (his) oath was clean and without falsehood."[8]

The efficacy of these affirmations lay, not in the substance of what was said, but in the oath itself. Here the appeal was to spiritual powers—the sworn assertion before the Supreme Being and the multitude of saints, provoking wrath of Heaven if the oath were false. If any slip were made in the proper pronouncement of the words, or if there were not sufficient oath-helpers present, it was regarded that the party lost his case and was punished for his false claim or defense. Such modes of trial continued to be used for centuries after the Norman conquest. Subsequently, trial with oath-helpers was called "compurgation" or "wager of law."[9]

### Trial by Ordeal

The second Anglo-Saxon method for trying persons accused of crime was by ordeal. Thus, in criminal accusations a man in good repute could usually clear himself by the oaths of himself and his oath-helpers; but if the circumstances pointed strongly

[5] Hanna, *Jury Verdicts Under Our Judicial Process Examined*, N. Y. Times, March 12, 1950.

[6] Branham and Kutash, Encyclopedia of Criminology 205 (1949).

[7] Bigelow, Papers on the Legal History of Government 152 (1920).

[8] *Ibid.*

[9] *Id.*

to his guilt, or if the previous character of the accused was bad by common report, he was sent to some form of ordeal.[10] In the more common ordeals, the person to whom the test had been adjudged was bound and cast into a pool or stream of water. Another way, was that he was made to walk blindfolded among red-hot plowshares, or to carry red-hot iron, or to plunge his arm into boiling water.[11] If the pool or stream refused to receive him, i.e., if he floated, or if he was seriously burned or scalded, it was believed that God had adjudged him guilty. These ordeals were survivals, probably of ancient heathen appeals to the god of fire or water, as the case might be.[12]

The Church at first objected to these ordeals, then provided impressive prayers and ceremonials to accompany them. Finally, but not until long after the Norman Conquest, it forbade the clergy to participate in them.[13]

### Trial by Battle

Trial by battle or judicial combat was a form of ordeal used by most of the Germanic tribes. It consisted of a duel fought under the supervision of the court. However, this duel was not merely an appeal to physical force, but was based on the belief that God would give victory to the right. As a Norman importation, it took its place after the Conquest along with the Anglo-Saxon forms of trial in both the feudal and royal courts. Though hated by most of the English, it was much used in criminal accusations and in litigation over land, and had lasting consequences in the formation of criminal law and the law of property.[14]

### The Period of Transition

In the thirteenth century, the common law courts began to develop what has become trial by jury from the inquest or recognition used in the possessory assizes. The group of neighbors who constituted the petty assize, summoned for the purpose of answering the single question put in the original writ, were gradually permitted, (if the parties so agreed) to decide the issue raised by the pleadings, or a sound group of neighbors was called for this purpose and displaced the first group. As it began to spread to other actions the older modes of trial declined. In 1219, following the example of the church, Henry III forbade the use of ordeals.[15]

At first, trial by jury was optional. At least the accused had to consent to the trial.[16] By the sixteenth century, the ancient trials, i.e., by battle or by oath, were almost unheard of in practice, but the right to demand them gave defendants a ready means of defeating meritorious claims or forcing a compromise. Parliament, strangely enough, did not abolish trial by oath until 1819, or wager of battle until 1833.[17]

[10] Daly, The Common Law 36–37 (1894).
[11] *Ibid.*
[12] *Id.*
[13] Branham and Kutash, Encyclopedia of Criminology (1949).
[14] Daly, *op. cit. supra*, note 10.
[15] Forsyth, Trial by Jury 165 *et seq.* (1878).
[16] Branham and Kutash, Encyclopedia of Criminology 206 (1949).
[17] Forsyth, *op. cit. supra*, at 165

In the intervening period, then, the remarkable result was that, in many cases, an accused person who refused jury trial could not be tried at all. The expedient adopted by the judges to meet this dilemma was the technique of *peine forte et dure* (torture strong and hard). The prisoner was stretched out naked on the floor of a dungeon and weights were heaped upon him until he either consented to jury trial or was crushed to death. Paradoxically, it was only until after five hundred years of this barbarity that the modern solution was reached—to put him on trial before a jury whether he consented or not.[18]

As stated, the jury was, at first, a body of neighbors called in to answer questions from their own knowledge; they were both witnesses and triers of fact. But very gradually, at the hand of the King's judges, juries lost their function as witnesses and took on exclusively the character of triers. As such, they obtained the facts from the testimony of witnesses called before the court or from evidence introduced in the form of documents. Finally they received the law applicable to the facts in the form of instructions from the judge. Generally, the function of the jury is to determine questions of fact; the function of the judge is to determine questions of law.[19]

## Effectiveness of Trial by Jury

### Current Procedure

Determination of issues of fact by a jury became a distinctive feature of common law procedure, unless the right was waived. In equity, however, issues of fact were ordinarily determined by a chancellor, although he might have the issues presented to a jury. In such cases, however, the verdict rendered was advisory only.[20]

Concerning the common law right of trial by jury, the Constitution of the United States provides that, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[21] In regard to the right of trial by jury under the unified federal system, the Federal Rules of Civil Procedure in part provide:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties involate. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action.... In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable.... The failure of a party to serve a demand as required by this rule ... constitutes a waiver by him of trial by jury.[22]

[18] *Ibid.*

[19] *Id.*

[20] *Id.*

[21] U. S. Const. Amend. VII. The Sixth Amendment to the Constitution states that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed ..." While these provisions are not applicable to the states, Rottschaefer, Constitutional Law 785 *et seq.* (1939) similar provisions are found in almost all state Constitutions.

[22] Fed. R. Civ. P. 38.

SELECTING PROCESS

When an action at law is called in court, the jury is drawn and selected from the "panel" which consists of prospective jurors summoned according to law by the proper officer. Their names are drawn by lot and each is examined by the attorneys for the respective parties to the action. The examination is provided for the purpose of determining whether or not the persons called are unbiased and otherwise properly qualified to serve as jurors.

Yet we must remember that jurors are selected by random sample. The verbalized impartiality is often not borne out by behavior. These individuals, duly chosen by formal procedure, are called upon to decide matters of fact: the rights to property, or the right to freedom or commitment to penal servitude.

The qualifications demanded are meager when compared to the responsibility incurred. Perhaps the selection on such a basis is more applicable to the decision whether Brand A is "milder and less irritating" than Brand B rather than to the rights and lives of men.

The complexities of the trial process:—the opening statements, introduction of documentary evidence, conflicting statements of sworn witnesses and technical experts, the objections—sustained, overruled, excepted-to—bombard the layman. To understand the trial procedure demands more than average intelligence. Can we assume that most juries are even remotely qualified to do the job which is set up for them?

In the summation which follows the production of evidence and testimony, it is for the lawyer to point out where his adversary has failed to prove his case. He can comment freely upon every pertinent (or trivial) fact in evidence, criticize the witnesses, their powers of observation, their credibility, truthfulness, moral turpitude, and the improbabilities of their stories.

The fundamental duties of the jury then can be limited to three:

1. To pass on the validity of the facts presented.
2. To interpret the statements of the witnesses.
3. To render a just verdict in light of the facts presented.

With reference to the latter point, it is significant that the jury may decide on the facts alone or the law and the facts. Similarly, the jury must also decide the degree of guilt in rendering a just verdict.

ARE JURIES "PEERS"?

The concept that men should be tried by a jury of their peers is not new.[23] Yet in these days of modern industrialization and cosmopolitan urbanism, it is questionable whether the tradition of a trial by one's peers is still in effective operation. It would seem that our judicial institution was predicated upon and designed to meet the needs of a non-urban, agricultural society.

The bulk of our institutions, customs, mores and ideals no longer correspond to the actual conditions of life since they were developed under the conditions of a different and more simple society. Thus the gap between expectation and reality

[23] Kenney, Judgment by Peers (1939).

persists and widens. The familiar term "culture lag" has been used by sociologists to designate this general situation.

The difference between the human environment of our great grandparents and our own may be easily illustrated. Then, walking out of his house, every man or woman encountered was known by face, occupation, family and antecedents. Today it is possible for an urban dweller to walk for an hour, day, or week without seeing a familiar face, and one that is encountered will be just that—a face and little more.

Law, while never simple in operation, has become a far more complicated field in the past century. No longer is prosecution always designed solely to discriminate between the guilty and innocent. It has sometimes become intricately associated with individual opportunism, political organization and the like.[24]

While in centuries past the family as a social unit was distinct and absolute, the process of urbanization has altered the structure and some of the functions of the unit. Hence, there is now lacking a feeling of primary group relationship outside the home toward those persons with whom we come into contact daily. In addition, by the nature of their selection the jury lacks a number of seemingly necessary attributes, among which is a knowledge of the psychology of testimony. The ability to hold a number of facts in mind, to consider their relation one to each other, and then to render a verdict as a result of these complicated mental processes, is a result of intensive training. In the light of the fact that the average juror is swayed by the emotion and prejudice of his heredity, background, training, (and how often, his breakfast?) there is often little hope that the objectivity desired in a trial will be obtained by recourse to the judgment of a panel of laymen.

Secondly, the jury cannot render a proper verdict in light of the facts presented. In a sense this is due to the fact that the laws of evidence and procedure are not adequate. Even when ruled out by the judge, evidence still creates an effect. Furthermore, since a juror is not chosen on the basis of his knowledge of the law—often rather his lack of knowledge—it is not always possible for him to understand the evidence presented by witnesses in question and answer form.

Lacking in this understanding of the court procedure, the juror—as the average man or less—is apt to form judgments quickly. Facts are not given full weight, and the moral values which an individual places upon the act may weigh heavily in the verdict, even before the evidence for the defense is presented.

The jury's attitude toward the accused can vary with the type of charge. If the indictment is for violation of one of the multitude of regulatory statutes, it is not impossible that the jurors can see themselves in the dock and sympathize with the defendant.[25] Where the defendant has pulled off a fraud on big business, the jurors may regard him as a hero. But woe to the defendant who is accused of the crime of robbery, rape, or something in that category! Whatever the law says, it may well be

[24] It is not difficult to trace the careers of several elected officials starting at the successful prosecution of cases which drew considerable newspaper attention.

[25] A striking illustration of this fact occurred recently in a case tried in the North Dakota Federal District Court, where the foreman of a jury was charged with having concealed the facts about his own difficulties with the Bureau of Internal Revenue while being examined as to his qualifications to sit as a member of the jury in a case involving a tax fraud prosecution.

that the jury puts on the defendant the burden of proving his innocence. After all, is not the sanctity of the home and the chastity of womanhood at stake?

It has been recognized to some extent that a mediaeval system of law enforcement by sheriffs and peace officers is unsuited to meet the complexity today's society presents. Yet in terms of the trial process, court decisions are still based upon precedent established in the Middle Ages, often without sufficient reference to the findings of modern sociology, psychology and psychiatry. And judgment is still processed by a system equally antiquated. If it must be that the technique of trial by jury is to be maintained, the legal profession might well consider the introduction of new techniques in the selection of jurors.