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RIGHT OF TRIAL BY JURY IN CIVIL ACTIONS*

ASHTON FILE**

There have always been critics and opponents of trial by jury, but in periods of great political and social unrest, like that which hovers round about us today, its enemies are more bold to assail its virtues and usefulness; to clamor for its abolition and to insist that the functions now performed by the jury be exercised by one or more trial judges. Is the right worthy of defense? This question leads us to inquire why it was instituted by our forefathers, and what reasons have motivated the lovers of freedom and justice to guard this right with such jealous care and unceasing solicitude through the many centuries that have passed since it was established. In commenting upon the excellence of trial by jury, and the reasons for its preservation, Mr. Justice Blackstone said:

> "So that the liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern."[1]

Starkie, speaking of trial by jury, said:

> "It constitutes the strongest security to the liberties of the people that human sagacity can devise; for in effect, it confides the keeping and guardianship of their liberties to those whose interest it is to preserve them inviolate; and any temptation to misapply so great an authority for unworthy purposes, which might sway a permanent tribunal, can have no influence when

* Address of the President of the West Virginia Bar Association, delivered at the fifty-sixth meeting of that Association at White Sulphur Springs, West Virginia, on August 9, 1940. Introductory remarks omitted.

** President of the West Virginia Bar Association 1939-40; member of the Beckley bar.

1 4 BL. COMM. *350.

entrusted to the mass of the people to be exercised, by particular individuals but occasionally."[2]

This right also was lauded by the English bar. Sir James Mackintosh, in his defense of James Peltier, said in presenting the case to the jury, "He (Peltier) now comes before you, perfectly satisfied that an English jury is the most refreshing prospect that the eye of accused innocence ever made in a human tribunal."

The colonists of America brought the right of trial by jury with them from the mother country, and it was preserved to the people of Virginia in their Bill of Rights adopted June 12, 1776, by the following language:

> "That, in controversies respecting property and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred."[3]

This right was also preserved to the people of West Virginia by their Bill of Rights, which provides:

> "In suits at common law, when the value in controversy exceeds twenty dollars . . . . the right of trial by jury, if required by either party, shall be preserved. . . . No fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law."[4]

President Jefferson, in his first inaugural address, included trial by juries *impartially selected* along with freedom of religion, freedom of the press, and freedom of the person under the protection of the writ of *habeas corpus*, and said "These principles formed the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation."

Mr. Justice Harlan, speaking for the court, with respect to the right of trial by jury, in the case of *Thompson v. State of Utah* said:

> ". . . . Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.' 2 Story's Const. § 1779. In Bacon's Abridgment, Title Juries, it is said: 'The trial *per pais*, or by a jury of one's country, is justly esteemed one of the principal excellencies of our Constitution; for what greater security can any person have in his life, liberty or

[2] STARKIE ON EVIDENCE (10th ed. 1876) 9.
[3] VA. CODE (1819) c. 3, § 11.
[4] W. VA. CONST. art. III, § 13.

> estate, than to be sure of not being divested of, or injured in any of these, without the sense and verdict of twelve honest and impartial men of his neighborhood?' "[5]

Under our Bill of Rights the right of trial by jury in civil actions, as well as in criminal prosecutions, is a part of the birthright of every citizen of this state. The people of West Virginia have ever regarded and treated this provision in their organic law as an essential part of free government, and as one of the fundamental bulwarks in their civil and political liberties.

Objections to the jury system are believed to come chiefly from two sources, (a) theorists, authors and teachers, who little understand the jury system from a practical viewpoint, and who sincerely believe that the human mind, unaided by a knowledge of the law, will not likely reach the right decision on disputed questions of fact, and (b) members of the bar who, for one cause or another, have been unsuccessful in jury trials.

What principles underlie these objections? If knowledge of the law were a sure guide to the right conclusion on disputed questions of fact, all judges, knowing the law, would reach the same conclusion on the same state of facts. Yet we know, from the many dissenting opinions which appear in the reported cases, that eminent jurists often reach different conclusions as to the facts of a case. Mr. Justice Miller, after twenty-five years' experience as a judge in the United States Supreme Court, in contrasting favorably the results of trials by jury that had come under his observation from all the courts of the United States for review, with his experience among the judges in his own court, made this significant comment:

> "I must say that in my experience in the conference room of the Supreme Court of the United States, which consists of nine judges, I have been surprised to find how readily those judges came to an agreement on questions of law and how often they disagreed upon questions of fact, which, apparently, were as clear as the law."

Therefore, in the first objection it seems to me the so-called knowledge of law is a misnomer for logic, and that it ignores the psychological fact that honest men reason and think justly, according to the common consent of mankind generally, and that the human mind is not a single geared mechanism which will properly function only when aided by knowledge of the law, in the sense that law is understood by lawyers. The answer to the objection of

[5] 170 U. S. 343, 349, 42 L. Ed. 1061 (1898).

those who have been unsuccessful as advocates is that an implement is not to be discarded as undesirable because some are unable successfully to use it.

On the other hand, the guardians of our jury system are found in that great army of patriots whose faith in our state and its institutions is anchored to the faith of the fathers, and who cherish the right of trial by jury as one of the great bulwarks of our liberties.

Let us notice some of the objections made to the jury system by those who oppose it.

A common objection made is that cases come before the courts involving principles of the arts and sciences which untrained jurors do not understand. That is true, but an intelligent jury will be found to readily grasp enough of the testimony of those learned in the technical matters involved to reach a right decision.

Pomeroy, the distinguished authority on equity, commenting on the practical surrender by the equity courts of America of so large a portion of their original and most certain jurisdiction, stated that it was both unfortunate and unnecessary, and further said:

> ". . . . There are multitudes of cases, even for the recovery of money alone, in which justice could be administered and the rights of both litigants protected far better by a trained judge than by leaving everything to the rough-and-ready justice of an ordinary jury."[6]

It is believed that this statement of Mr. Pomeroy reflects the refined opinions of other authors, and of teachers and many others who criticise or oppose the jury system.

In considering this question we should keep in mind the important facts that lawyers and judges come from the great body politic, although often from different walks in life and varied strata of society; that the juror of today may be the lawyer of tomorrow, and the lawyer in turn become the judge. Therefore, it seems quite evident to the analyst that the first major error in the premise of the critics of the jury system is in assuming that all the wisdom and learning is in the legal profession, and that a license to practice law, plus elevation to the bench, will endow a man with ability to find the right of a controversy superior to the combined faculties of twelve honest, intelligent jurors to find the truth and do justice between the parties.

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[6] 2 POMEROY, EQUITY JURISPRUDENCE (3d ed. 1905) 1638n.

One author, commenting on results likely to be obtained in trials before a judge and those before judge and jury, made the following observation:

> "For intellectual discernment, for keen discrimination, for subtlety of reasoning, the judge is immeasurably superior to the jury. . . .
>
> "But whenever you want intellects unimpaired by too much learning, and notions not etherealized by too much refinement; when, in fact, you do not want coals weighed out by the ounce, the jury is, in my opinion, beyond comparison entitled to the preference. Their unassisted reason might often go wrong without the judge's clearer mind, but when you have both it seems to me you have the best combination of forces for the production of an honest decision. In my humble opinion, speaking generally, I think trial by judge and jury the best that has ever been devised. There is a variety of mind and character not elsewhere to be obtained; and in the gradual assimilation of minds with reference to facts you have the best machinery for bringing out a true result."[7]

Quoting again from Starkie:

> "Secret and complicated transactions, such as are usually the subject of legal investigation, are too various in their circumstances to admit of decision by any systematic and formal rules; the only sure guide to truth, whether the object be to explore the mysteries of nature, or unravel the hidden transactions of mankind, is reason aided by experience.
>
> "It is obvious, that the experience which would best enable those whose duty it is to decide on matters of fact, arising out of the concerns and dealings of society, to discharge that duty, must be that which results, and which can only result, from an intimate intercourse with society, and an actual knowledge of the habits and dealings of mankind: and that the reasoning faculties best adapted to apply such knowledge and experience to the best advantage in the investigation of a doubtful state of facts, are the natural powers of strong and vigorous minds, unencumbered and unfettered by the technical and artificial rules by which permanent tribunals would be apt to regulate their decisions."[8]

Elliott says:

> "As jurors are liable to err on the one side, judges are liable to err on the other side, through fear of sacrificing duty to sympathy."[9]

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[7] HARRIS, BEFORE AND AT THE TRIAL 164.

[8] STARKIE ON EVIDENCE 8-9.

[9] ELLIOTT, WORK OF THE ADVOCATE (2d ed. 1911) 117.

Speaking before the American Bar Association in 1898, Joseph H. Choate, one of the greatest advocates of all time, paid this beautiful tribute to trial by jury:

> ". . . . I cherish, as the result of a life's work nearing its end, that the old-fashioned trial by a jury of twelve honest and intelligent citizens remains to-day, all suggested innovations and amendments to the contrary, the best and safest practical method for the determination of facts as the basis of judgment of courts, and that all attempts to tinker or tamper with it should be discouraged as disastrous to the public welfare."[10]

Moreover, it would be a contradiction to claim that our people under constructive leadership are capable of intelligently deciding by means of the ballot national and state problems of government, and directing the destinies of our country, and at the same time assert that there cannot readily be chosen from among the voters men fully capable of deciding all controverted questions of fact between litigants in courts of justice, instituted and maintained by the people who select the presiding judge, when guided only by legal evidence and a sense of duty, and by proper instruction from the court.

Therefore, in this field of study, theory and fact will often be found to come into sharp and irreconcilable conflict, and the question involved is further complicated by the fact that in the realm of theories there are nearly always two or more schools of thought.

In trials by a court the judge is too apt to be full of theories and lacking in practical knowledge and experience, as applied to the everyday life of the average litigant. The judge also is inclined to weigh the evidence, and measure the rights of the parties, by the strict yardstick of the law which he applies to the case, without taking into consideration the human elements which so strongly enter into most transactions between man and man, generally spoken of as "jury equities", because under his theory of the law, as applied to the proof, such equities are not material to the controlling facts of the case.

When properly analyzed it will be found that those who extol the superior ability of the judge, to hear and determine controversies involving disputed questions of fact, would arrive at what they term justice through the process of refined theories, applied *impersonally* to fixed principles of law, whereas those who advocate

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10 CHOATE, THE TRIAL BY JURY (1898) 21 A. B. A. REP. 285, 293.

trial by jury believe that the so-called "rough-and-ready" justice meted out by juries is the nearer approach to a fair and just settlement of controversies between man and man. Therefore, it would appear after all, that the real difference between the opponents and proponents of trial by jury, is not in the mode of trial, but rather in the concept of what constitutes justice under a given state of facts.

Man thinks and his mind is largely trained by the things his hands find to do. His life is molded by his work, which may be so different from the life of the judge, as to prevent both the judge and the litigant from fully understanding the language, or grasping the viewpoint of the other. Moreover, the judge is also handicapped by the fact that both his position and his work withdraw him from contact with the general public, so that in a world changing as rapidly as the world we know today, he will, after a few years, lose much of the knowledge of the public life taken with him to the bench.

There can be no serious doubt about the psychological fact that men of different minds and environments see things with very different eyes. Therefore, it is believed that a knowledge and sympathetic understanding of the mode of living, the passions and the prejudices, and the joys and sorrows of the average suitor, are as essential to a fair administration of justice as knowledge of the law applicable to the controversy between the parties. The vast majority of litigants come from the same walks of life as the jurors who try their cases and only they, therefore, understand the so-called "rough-and-ready" justice meted out by juries. That is the justice the litigants seek and expect at the hands of their peers. Any other concept of justice is injustice to them.

The combined wisdom and experience through the centuries since Magna Charta have demonstrated that trial by judge and jury is the best that has ever been devised, and the "best machinery for bringing out a true result".

No one, however, claims that trial by jury is a perfect method for trials, or that juries do not make mistakes. Perfection is not to be expected in this life where human agency is involved, but the jury system, in order to retain public confidence, must be properly administered.

There are now in some sections of the state, just causes for complaint with respect to the manner in which the jury system is being administered, and those causes are made possible by defects and im-

perfections in our laws governing our system. We will mention some of the complaints and suggest how the defects and imperfections may be remedied.

The most serious defect in our law, which makes possible one of the chief causes of complaint against the administration of our jury system, is that it does not provide for a uniform method of selecting the panel of twenty jurors from which the jury of twelve is to be selected. This feature of our subject is so well stated in an address of Mr. Lon H. Kelly that his statement of it is adopted:

> "... . In some counties the names of all jurors drawn are written on separate cards and this pack is kept on the clerk's desk. When a jury is about to be impaneled, this pack is shuffled and twelve or twenty cards, as the case may be, are dealt from the top and the names called. In other counties, when a jury is about to be impaneled, the clerk selects twelve or twenty names from the entire list, places them upon a tablet or sheet of paper and then reads those names as composing the jury. These last two systems make it possible for the clerk to select a jury of his own choosing. The worst system we have ever observed is operated in the following manner: when the parties announce ready for trial, the clerk proclaims, 'twenty men get in the jury box'. On more than one occasion where this system is practiced, we have observed what appeared to be a stampede for the jury box, and the suspicion was irresistible that there was a race on by the friends of one party or between the friends of both parties."[11]

Under our law the list of inhabitants of the county from which persons to serve as jurors are to be drawn is made up by two jury commissioners appointed by the judge of the court in which the jurors are to serve. The qualifications required of the commissioners are that they shall be of opposite politics, citizens of good standing, residents of the county in which they are appointed, and well known members of the principal political parties thereof.

As to what constitutes a citizen of "good standing" may be a debatable question, but it is a known fact that in late years men have been appointed to fill this high office who were unfitted for the trust, and that they selected many men called for jury service who were little calculated to manifest a wholesome concern with the administration of justice.

It would not serve any useful purpose to go further into detail.

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[11] KELLY, TRIAL BY JURY (1934) 50 W. VA. BAR ASS'N REP. 54-55.

The following changes in the laws now governing our jury system are proposed to correct the defects and imperfections believed to exist therein:

1. Require as the qualifications of jury commissioners that they be men of intelligence, morality and integrity, who have shown themselves to be interested in public affairs, and who, by reason of their learning and experience, may be expected to take a lively interest in promoting an efficient and impartial administration of justice.[12]

2. Require that, except when personally known to a commissioner, they shall not include the name of any person in the list of inhabitants of the county to be made up by them for jury service, until after having fully and fairly investigated by inquiries at his place of residence, business or employment, or by other means, his reputation, character and fitness for jury service, and further provide that the sheriff and his deputies shall, on request of the commissioners and without charge therefor, give them all possible assistance in making such investigation, and that all such information so furnished shall be privileged within the meaning of the statute relating to privileged communications.[13]

3. Provide that the drawing of names by lot from the jury box for jury service be made by the clerk, in the presence of the judge of the court and the jury commissioners, and that if for any reason the judge is unable to be present, he shall enter an order of record appointing a commissioner in chancery of the county to attend in his place.[14]

4. Provide for a uniform system of selecting by lot the panel of twenty jurors from which the jury of twelve is to be selected.

It is suggested that no juror should be excused by the court from service except for cogent reasons. Jury service sometimes entails inconvenience and sacrifice on the part of the juror, but it is a duty every worthy citizen should be willing to perform as his contribution to good government, and in the interest of the general welfare of the people.

There is yet another important factor to be considered in connection with this momentous question which seems to have escaped the notice of the opponents of our jury system, and that is that all government is of the people — rather than of theorists and critics— and that no judicial system will long command public confidence

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[12] VA. CODE (1919) § 5986.
[13] 2 Mass. Gen. Laws (1921) 2520.
[14] VA. CODE (1919) § 5992.

which does not perform its public functions in accordance with the common concept of justice between man and man, rather than according to the theories of inexperienced and impractical men. Jurors are selected from the public at large, and through jury service the people take a large and important part in the administration of justice. The jury system provides a divided responsibility between the judge and the people. When discharged from duty, the juror takes home with him his appraisement of the ability and fairness of the judge, and is quick to challenge unwarranted complaints or criticisms of the court by disappointed suitors. Remove this public contact with the courts, take from the people this ancient right to have a part in the administration of justice, and you will thereby sow seeds of suspicion and distrust in the courts, which will be quick to bear fruits of general alarm and deep discontent, resulting sooner or later in the reassertion of the sovereignty of the people or open civil strife.

Never before has it been more important to guard the ancient institutions of our state. We are prone to regard them as matters of course, much as we enjoy the blessings of sunshine and the rains, while the combined enemies of all democratic institutions are seeking to undermine their foundations that they may totter and fall.

> "One ship drives east and another drives west
> with the self-same winds that blow;
> 'Tis the set of the sails and not the gales
> which tell us the way to go."

So it is with trials by jury. The quality of jury service in the administration of justice is not to be measured so much by the jury system, as by the personnel of the jury. The system will not properly or successfully perform its public functions except when placed in competent hands. Let us, therefore, set ourselves to the task of remedying the defects and imperfections known to exist in our laws relating to our jury system, which permit practices calculated to arouse well grounded suspicions and distrust in the purity and integrity of verdicts, and to bring reproach upon trials by jury. Let us see that only those worthy of the high office of a juror come to the jury box, so that those who compose the jury, and thereby take such a vital and important part in the administration of justice, may be what our forefathers who established the system intended they should be, "twelve good men and true".