Volume 56 | Issue 1 Article 4

February 1954

The Mechanism of Our Jury System Should be Adjusted and Lubricated

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THE MECHANISM OF OUR JURY SYSTEM SHOULD BE ADJUSTED AND LUBRICATED*

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WHEN the colonists came to America, they brought with them the right of trial by jury. To preserve and protect this right for them and their descendants, it was incorporated in the Bill of Rights of the Virginias, and it is now firmly entrenched in the judiciary system of West Virginia. The citizens of our state have ever zealously guarded this as a sacred right, and looked to it as a bulwark of protection when their rights have been invaded, or their liberties jeopardized. Notwithstanding all the recognized defects and imperfections of the jury system, experience has demonstrated that trial by a jury of "twelve good men and true" is the best machinery yet devised for arriving at a true result.

Through the ages, our jury system has repelled vicious assaults of its enemies. It would be folly for one to now advocate that trial by jury be supplanted by any other method of determining an issue of fact. In this treatise, neither the abolishment of trial by jury, nor any radical and revolutionary changes in that system will be advocated; but an endeavor will be made to examine the mechanics of the jury system of West Virginia to determine whether it can be developed into a smoother running machine by adjustments and lubrication. By so doing, we may find that the machinery of the jury system is properly designed and fabricated to do the work prescribed for it, but, because of the lack of necessary adjustments and lubrication, and inefficient and careless engineers, it has developed some "piston knocks" that have unjustly relegated it to the graveyard of used and useless machinery, in which the public is losing confidence.

A workable jury system must of necessity keep pace with the times. We should not—we cannot—be straight-jacketed by antiquity, and hope to maintain the respect for our jury system that it is entitled to. We must be alert to the defects of its practical operation, and take immediate steps to correct them. This is not a

*Address delivered at the annual meeting of the West Virginia Bar Association, October 3, 1953.

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radical suggestion. In recent years, almost every agency and instrumentality forming an integral part of our judicial machinery has been modified, changed and improved—adjusted, lubricated, or eliminated, except the jury machinery, which has been untouched. The suggested adjustments and lubrication of the mechanics of our present jury system which follow, are derived from the comments of no less than twenty-five active and outstanding trial judges and trial lawyers of West Virginia, many papers on the subject heretofore read by distinguished jurists and lawyers at meetings of this association, and from actual trial experience for thirty-one years—twenty-four years as a trial lawyer, seven of which were as an assistant prosecuting attorney, and eight as a circuit judge of one of the larger circuits. One does, or should, absorb some valuable first-hand information and knowledge of the subject from that experience. Let us now raise the hood covering the working parts—the mechanics—of this jury system to see if we can find anything wrong with it, and, if so, consider the best methods of putting it in good running condition.

Personnel of the Jury

At the first glance, we discover that a singular and disturbing weakness in our jury system is attributable to its personnel, too often composed of too many illiterate men, and men of questionable character and integrity, who neither understand nor appreciate their responsibilities as jurors, or, understanding and appreciating those responsibilities they wilfully and intentionally ignore and disregard them. The responsibility of correcting this weakness, or at least improving it, rests primarily upon the trial judge, for it is he who appoints two jury commissioners of opposite politics, whose duty it is to select men for jury service. Each jury commissioner is an officer of the court. No office in the administration of justice is more important than that of a jury commissioner. It necessarily follows that jury commissioners should be outstanding men of the community, possessed of the highest degree of honesty and integrity, fully cognizant of the importance of their offices, and genuinely dedicated to the improvement of the administration of justice by the selection of persons truly "of sound judgment, of good moral character, and free from legal exception." Too often, men not possessed of such qualifications serve as jury commissioners; and as a consequence, jury lists are composed of

too many men not "of sound judgment" nor "of good moral character". This type of personnel also gets on the jury lists prepared by jury commissioners possessed of all the essential qualifications of their offices, because they do not take the time, are not provided with the facilities, and are not adequately compensated ($5.00 for each day of service) to properly investigate each person selected for jury service, to determine whether he has the essential qualifications of a good juror.

In counties with a population in excess of 50,000 the jury commissioners must place the names of not less than 800 inhabitants (even citizenship is not requisite) on the jury list, exclusive of the many persons, too many, exempt from jury service by law, and exclusive of all persons who have actually served as jurors in any court of record within two years prior to the preparation of such list. So, in counties so populated, (and there are twelve counties in West Virginia with a population of over 50,000, twelve with a population of from 25,000 to 50,000, and thirty-one with a population of from 5,119 to 23,537) it may be necessary for the jury commissioners to have at least 1600 names available for the jury lists they prepare each year at the levy term. In counties with a population of less than 50,000, at least 200 names must be placed on the jury list. How many lawyers know the male inhabitants of their counties well enough to prepare a jury list containing the names of 800, or even 200 men "of sound judgment and good moral character"? How do a great many jury commissioners procure the names for their jury lists? In the answer lies one of the causes for "poor juries". In some counties, the prosecuting attorney or the sheriff has been known to submit to the jury commissioners a substantial number, if not all, of the names of persons to be put on the jury list, and, although the jury commissioners knew nothing concerning these persons, they accepted the tendered list, adopting it as their selections without investigation. Too often such lists are made from a political standpoint, and for ulterior purposes. Then, jury commissioners request the superintendents of mining operations or other industries to give them the names of "good men" to serve as jurors, and these officials, being more interested in not having any of their key men called from their positions for jury service than in promoting the administration of justice by their service, submit a list of the names of persons who would never be missed from the job. In some instances, close friends

of the jury commissioners in various communities are asked to furnish the names of some "good men", but, as a general rule, these close friends, not realizing the importance of serious consideration of the qualifications of the persons named by them, hurriedly and carelessly submit a sub-par list of names, which is adopted by the commissioners solely upon the recommendation of the "close friends", without knowledge of their qualifications, and without investigation. Then, jury lists are made, wholly or in part, from the land and personal property books in the assessor's office, without any knowledge whatever relating to the judgment or character of the persons there listed. True it is, each commissioner knows a limited number of men well enough to form a reasonable opinion as to their qualifications for jury service, but of the great majority of the 800, or even the 200, he has no personal knowledge of their qualifications, and the statutes of this state do not impose upon him the duty to thoroughly investigate the fitness of each man selected by him for jury service; nor are there any statutory provisions whatever for such an investigation. The pertinent provision of the statute simply directs the jury commissioners to select 800 men of sound judgment and of good moral character, excluding idiots, lunatics, paupers, vagabonds, habitual drunkards, persons convicted of infamous crime, and persons otherwise exempt by law. Many splendid citizens are now serving as jury commissioners, but until the tremendous importance of their office is more fully recognized by trial judges who, even in the absence of specific statutory authority, should step in, prescribe in detail how they should go about the investigation and selection of men for jury service, and see to it that they are adequately compensated for services rendered, we cannot expect much improvement in their services. It is believed that trial judges could prescribe reasonable rules and regulations for the guidance of jury commissioners under present statutes, or that they have the inherent right to do so, without in any manner usurping their functions. If this be debatable, then proper legislation should take care of the situation. Many progressive states have such legislation. For example, in Illinois it is provided by statute that the county board fix the pay of jury commisioners, and set up an allowance for clerical services, stationery and office supplies; and judges may make rules not inconsistent with the act, deemed proper for prescribing powers and duties of jury commissioners. Ohio and other

states have similar statutes. In California, judges appoint jury commissioners to serve at their will and pleasure, and fix their compensation not to exceed $1500 annually.

To repair this most important part of the mechanism of the jury system, by legislation, if necessary, it is suggested:

1. That judges be permitted to fix the compensation of jury commissioners at not to exceed $1000 annually in counties with a population in excess of 50,000, and not to exceed $500 annually in all counties with a population of less than 50,000; and in addition thereto, a reasonable allowance be made by the judge for clerical assistance, stationery and supplies.

2. That the duties of jury commissioners be specifically prescribed by statute, among which shall be that the commissioners make the necessary personal investigation to enable them to intelligently determine the reputation for honesty and integrity of each person considered for jury service; and that in making such investigation, the commissioners visit the various communities of the county to personally inquire concerning the persons under consideration for jury service; that only persons qualified for jury service be placed on the jury list, irrespective of occupation, profession, religion, political affiliation or station in life, so that a reasonably fair cross section of honest and reliable men of sound judgment, free from prejudices will compose that jury list.

3. That the commissioners keep a permanent card record containing this data: Name, age, address, duration of residence, married or single, number of children, if married, occupation or profession, name of employer, whether a householder or freeholder, and any other pertinent information; that after each term of court there be recorded on the card of any person, serving as a juror, the date of service; that two sets of cards be kept, one containing the names of persons who have not served as jurors within two years, and the other the names of persons who have served within that period; and that this active and inactive card record be checked from time to time so that it will always be kept accurate to date as nearly as possible.

4. That the judge of each court may prescribe additional rules and regulations governing jury commissioners, not inconsistent with statutes.

5. That the present jury exemption list be reduced by repealing certain exemptions, and that the age limit exemption be increased from 65 to 70 years.

6. That the assessor of each county, prior to June 1st each year, be required to prepare and deliver to the jury commissioners an accurate list of all names appearing on the real and personal property books of the county.

7. That the number of names placed on the jury list be reduced from 800 to 500 in counties with a population in excess of 50,000, thereby making it less difficult for the jury commissioners to select good men.

8. That at the time prescribed by statute for jury commissioners to draw names from the jury ballot box for jury service at a term of court, the two jury commissioners, in the presence of the judge, the clerk of the court, and two members of the local bar, shall draw the names in public, in the court room, and that at least ten days news notice of the time and place of such drawing be carried in all newspapers published in the county.

9. That the judges and jury commissioners encourage bar associations, civic clubs, schools and other organizations to carry on continuous programs of education, stressing the importance of serving on juries. That appropriate newspaper editorials on the subject be written, and that periodic radio programs, featuring a discussion of the subject by a competent speaker, be broadcast.

This is a good sized prescription, but the ailment justifies the dose. It may not entirely cure, but it will surely improve the trouble.

Excusing Jurors

When jury commissioners select good jurors, what does the judge do with them? That brings us to the next defect, and that is, "good men", selected to serve as jurors, beg to be excused, and too often the trial judge, to be a "good fellow", excuses too many who really have no valid reason for not serving. By the process of elimination—excusing men from jury service—the judge could if he were so minded, select every panel of jurors for every term of court. It should not be inferred that there are any judges who would do this. The point is that if the trial judge excuses men from jury service who do not have a valid excuse—simply excuses them because they ask to be excused—then the good work of jury commissioners goes for naught, and sometimes the court winds up with a reduced panel of jurors way below the proper standard, and at the same time the cross section feature of the jurors in attendance becomes a "one class section." The same situation arises by the questionable practice of excusing jurors subject to call. While we do not advocate a "blue ribbon" jury, we do believe there should be some ribbons in it, and not too many

tattered shreds. Nor do we advocate a "plaintiff's jury" or a "defendant's jury", but there should be a mixture of both.

The code provides that "any court, when not incompatible with the proper dispatch of its business, shall have power to discharge persons summoned as jurors therein, or dispense with their attendance on any day of its sitting."

It is believed that it would be an aid to most judges to limit their right to excuse jurors—not to prevent them from abusing this right, but to provide them with a statutory inhibition against excusing jurors, except for specific cogent reasons, and for a limited number of days. Fortified by such a statutory provision, the judge could cite it to the person asking to be excused, and inform him that under the law he could not be excused. It is so provided in many states. For example, in Ohio, a judge may excuse a person from jury service for not more than three days at a time, and it is provided by statute that:

> "Except as herein provided, the Court shall not excuse a person liable to serve as a juror . . . unless it is shown *by the oath of the juror,* or if he is unable to attend, *by the oath,* of another person acquainted with the facts, (a) that he is then necessarily absent from the county, and will not return in time to serve; (b) or that the interests of the public, or of the juror, will be *materially injured* by his attendance; (c) or that he is physically unable to serve; (d) or that his wife, or near relative of himself or his wife, has recently died, or is dangerously ill."

If judges would follow a rigid policy of excusing persons from jury service only when *absolutely necessary,* such a statute would not be needed. We get nowhere when jury commissioners properly perform their duties by selecting good men for jury service, and then the judge excuses them for the term without good cause, or excuses them "to call' which is probably worse.

In this connection, and in order not to work an undue hardship on any person, it would seem advisable to provide by statute that no person be required to serve more than three weeks as a juror in any court within the period of two years during which he is eligible for jury service. It is so provided in some states.

Comfort and Convenience of Jurors

Too many courts in this state have no facilities, or grossly inadequate and miserable facilities, for the comfort and convenience of jurors in attendance. Many "good men, of sound judgment," shirk jury service because of these deplorable conditions. They do not like to leave the comforts and conveniences of their homes, offices and places of work or business, to sit on hard benches eight hours each day. Who can blame them for this attitude? Who, among you, would enjoy taking their places?

This is a serious defect, which judges and members of local bars should compel all county courts to correct with the least possible delay, to the end that good jurors may enjoy the accommodations they deserve.

Then, it must be remembered that jurors necessarily make varied sacrifices by their attendance in court, wherefore, every judge should promptly convene court at the appointed time, and diligently and expeditiously dispatch the business at hand, with the least possible delay. One of the common complaints of jurors is that they come to court on time, and then sit around doing nothing for unreasonable periods of time, because the judge is not present, or, if present, he is not dispatching the business of the court in an orderly and efficient manner. Such procedure tends to irritate jurors to the point that they have no desire to serve. In many courts this complaint can be eliminated by an alert judge. A judge with executive, as well as judicial ability, can do much to make jury service a pleasure instead of a burden and drudgery. Jurors are quick to recognize and appreciate these qualities in a judge, and, if they exist, the jurors deem it a privilege and honor to serve as a part of the court over which such a judge presides. They have an entirely different attitude if a judge lacks these abilities, or, having them, fails to exercise them.

Instructing Jurors as to Their Rights and Duties

Many men summoned for jury service have never served on a jury, and, while they are honest men who want to do the right thing, they do not have the slightest conception of their duties. Likewise, those who have served, while they have a general idea of their duties and responsibilities, are woefully ignorant of some of the most important.

This defect can, and should be cured by the judge orally charging the jurors on the first day of each term of court as to their duties, rights and responsibilities. This may be a brief charge, but it should be supplemented by a printed booklet containing a concise statement, in simple language, covering the subject. Each juror should be given one of these booklets, and required to sign a printed form, attached thereto, certifying that he has read it, and that he understands what he has read. This signed certificate should then be handed to the clerk of the court. It might be a good idea, and certainly more economical and uniform, for the judges of West Virginia to appoint a committee from their number to prepare a tentative draft of such a booklet of instructions, submit it to all of the judges for their comment, or approval, and then prepare a final uniform draft for use in all courts of the state. Regardless of how it is done, individually or collectively, this booklet of instructions is a *must.* Judges will soon learn that it will be of invaluable aid to them with their juries.

Instructions to Juries

This under-hood inspection of the jury system will by-pass an examination of the procedure in selecting a jury for the trial of an action, and take a look at the twelve men in the jury box, upon whom rests the responsibility of "rendering a true verdict according to *the law* and the evidence." As a general rule, they are qualified to separate the "wheat from the chaff", and arrive at a true state of facts, but how about the law? This brings us to a perennial subject of discussion—instructions to juries—which will be briefly mentioned, and, as usual, left to decay in its ruts. As judges and lawyers, fully conscious that the present method of giving instructions to juries is ordinarily a farce, we yell to the high heavens, yet do nothing about it.

Judges and lawyers constantly tell members of the jury that they are triers of facts—they are to determine what the true facts are—and the court will instruct them as to the law to be applied to the facts, because they are presumed not to know the law. Any good lawyer knows that the most difficult problem he is always confronted with is to analyze the facts of a case and properly apply the principles of law applicable thereto; yet, by our present method of instructing laymen, not trained in law, we expect them to apply

principles of law which many licensed attorneys are incapable of properly applying. Opposing lawyers engage in a contest of preparing sheaves of confusing and complex instructions, couched in highly technical legal phraseology, throw them at the trial judge when all the evidence is in, and expect him, with slight thought and deliberation, to pick out the good ones, and read them to the jury for their enlightenment, hoping, if we represent the defendant, that the judge will refuse to give a good one we offered, or give a bad one offered by the plaintiffs, and thereby give us another "shot"if we lose. We then elevate the intelligence of the jurors to the highest peak by the fallacious assumption that they understand the instructions read to them by the court, and that they are capable of applying the law stated in the instructions. Still more absurd and ridiculous, we assume that from the court's mere reading of a raft of instructions, the jurors should understand them, and therefore, the instructions are not taken to the jury room unless requested by a juror, and counsel are not permitted to read them to the jury, notwithstanding the fact that in many instances a trained lawyer cannot understand written instructions he has before him after thoughtful reading and study.

If the purpose of instructions is to tell the jury what the law is, why not adopt some method which will approximate that purpose, instead of pursuing the present method of confusing rather that advising, because that is the exact result of reading two diametrically opposed sets of instructions.

Without further comment, but with timidity, there is again offered for the consideration of the bench and bar these suggestions:

1. Permit the court to comment on, and explain, the law to the jury before argument, reserving to counsel the right to object; or
2. Continue the practice of each side tendering written instructions, the legal principles in which, if correct, shall be assimilated in plain, understandable, simple language and given to the jury by the court in a general charge, before argument.
3. Permit the use of interrogatories in state courts as now in use in federal courts.

Those interested in this subject may be more fully enlightened

by reading two splendid articles by Judge Haymond Maxwell[1] and by Judge Charles G. Baker.[2]

UNANIMITY

Further inspection under the hood discloses a propellor shaft, so constructed that it operates only when its twelve component parts click in unison; and if they do not so click, the machinery stops on dead center. That brings us to the highly controversial issue—the requirement of unanimity in civil cases. Though deserving of a paper devoted entirely to this phase of trial by jury, and meriting the earnest consideration of all members of the bar, it can only be touched briefly on this occasion. Some observations will be made. It has been said that "the great intrinsic defect incident to jury trial is the prevalence of that preposterous relic of barbarism—the requirement of unanimity, long ago stigmatized as repugnant to all experience of human conduct, passions and understanding,"

In the legislative and judicial branches of government, involving every conceivable form of tremendously substantial property rights and individual liberties, the majority rules. In our churches, lodges, civic clubs and business organizations, the vote of the majority controls. Yet, by the hoary rule of unanimity as to verdicts, there is conferred upon one single juror, or a jury of twelve men, more power than is enjoyed by a minority of two of the five judges of the supreme court of this state, and four of the nine justices of the United States Supreme Court. One single juror, refusing to join his eleven fellow jurors, either honestly or dishonestly, for good reason or for no reason, or from pure unadulterated obstinacy, can completely terminate a trial, thereby causing a new trial of a case that has taken days, weeks, and even months to try, and has involved the expenditure of a huge sum of money, not to mention the mental and physical exhaustion of the judge, lawyers, jurors, court attaches and witnesses in attendance. In these modern times of democratic government, with so many advancements in every field, it is strange that so much unlimited power is vested in a single individual of a judicial body of twelve.

Unanimity has been abolished in a number of states. Pursuant to constitutional authorization, statutes have been enacted in Min-

[1] Maxwell, *The Problem of Jury Instructions*, 43 W. VA. L.Q. 1 (1936).
[2] Baker, *Instructions to Juries*, 1932 PROC. W. VA. BAR ASS'N 196.

nesota, Nebraska, New Mexico, New York, Oregon, Washington and Wisconsin, providing in civil cases for a verdict of five-sixths of the number of jurors; in Arizona, Arkansas, California, Mississippi, Missouri, Ohio, South Dakota and Utah for a verdict of three-fourths of the number; and in Montana by a verdict of two-thirds of the number of sworn jurors. Provision is made for a verdict of five-sixths of the number of jurors in civil cases in inferior courts of Kentucky, and for a verdict by three-fourths of the number in such courts in Idaho, Louisiana and Texas.

A great number of distinguished jurists and lawyers of this state favor majority verdicts in civil cases, varying from majorities of three-fourths to four-fifths. Justice Miller of the United States Supreme Court had this to say: "I am of opinion that the system of trial by jury would be much more valuable, more shorn of many of its evils, and much more entitled to the confidence of the public, if some number less than the whole should be authorized to render a verdict."

While we fully subscribe to that statement, we will probably continue to adhere to this age-old rule for a long time. This comment on the subject no doubt will draw the fire of some of the old warriors of our profession, but we respectfully submit that three-fourths majority verdicts in civil cases could reasonably be expected to accomplish these results:

1. Bribery and jury-fixing would disappear, because corruption is less possible when it becomes necessary for four jurors out of twelve to succumb to its influence.
2. Hope of profit would no longer be an inducement for dishonest persons to serve as jurors.
3. Men of honesty and integrity would be more willing to serve as jurors, since their opinion would then carry its proper weight, and could no longer be nullified, except by the voices of four of their twelve colleagues.
4. Trials would become shorter, and confinement in the jury room less nerve racking and exacting.
5. There would be fewer compromise and quotient verdicts.
6. The aim of an advocate would no longer be to persuade just one juror to dissent. He would have to resort to the nobler advocacy of striving to convince the majority of the jurors of the justice of his cause.

Alternate Juror

The advantages of having an extra or alternate juror should be apparent to all of us. The principal purpose is to eliminate mistrials by reason of the illness or death of a juror selected to try a case. We have a statute authorizing selection of an alternate juror in criminal cases only.

To modernize trial of civil cases by jury, it should be provided by statute that when it appears to the court that a trial is likely to be protracted, the judge may direct that an additional juror be selected in the same manner as the regular jurors, with the right of each party to challenge. The person so selected sits next to the regular jury and listens to the evidence. Then, if, before submission of the case, a regular juror becomes incapacitated or disqualified, he may be discharged, and upon order of the court the alternate juror becomes one of the jury.

This would seem to be a good system available for use by a judge, if necessary. We cannot conceive of any logical argument against such procedure. It cannot hurt. It might help.

Keeping the Jury Together in Felony Cases

We now want to briefly discuss two matters arising in criminal procedure. First, in courts trying criminal cases, it is common knowledge that men seek to avoid jury service almost solely for the reason that in felony trials they must be kept together until they reach a verdict, or until they are discharged, regardless of housing and boarding facilities. It is questionable whether this procedure, a relic of common law, is either desirable or necessary to insure proper verdicts in felony trials. Many states, including Virgina, have long since repealed or modified statutory regulations governing the jury in such cases.

The house of delegates of this state, at two recent sessions of the legislature, passed bills changing the system, but they were lost in the senate judiciary committee. Judge Wagner of the ninth circuit of this state has proposed an amendment to our statute which, in our opinion, takes care of the situation without weakening the administration of justice in felony cases. This amendment does not change the system in capital punishment trials. It simply provides that "in a case of felony in which the punishment cannot be death, the jury shall not be so kept together unless the

court, in its discretion, order it to be so kept together."

It will be observed that this amendment leaves it to the discretion of the court as to whether the jury shall be kept together, or permitted to separate; otherwise, the section of the code remains the same. The adoption of such an amendment would remove a most serious objection to jury service. It is not believed that such a change in procedure would in any manner prejudice either the state or the accused.

Grand Jury

Next, the code provides that the jury commissioners draw the names of sixteen persons to serve on the grand jury. If any fail to appear or are disqualified, the judge appoints two citizens to summon additional men to make up the grand jury. To eliminate the possibility of "packing" a grand jury, and the delay incident to getting a full jury, we should follow the statutory procedure in California, where not less than twenty-five, nor more than thirty names are drawn, and nineteen, composing a grand jury, are selected by lot; or, as in Illinois, where the grand jury panel consists of twenty-three men, sixteen of whom are sufficient to constitute the jury.

Conclusion

This paper, already too voluminous, would be unduly extended if we were to endeavor to discuss other pertinent phases of the jury system and trial procedure, such as the manner of selecting a jury to try a case, and rules and regulations governing the conduct of judges, lawyers, jurors and court attaches, as well as other aspects which deserve attention. The adjustments and lubrication herein prescribed, if adopted in whole or in part, should result in a smoother working and more efficient mechanism in the administration of justice.

The jury system has its defects, though its essentials are buttressed by the vindication of a long history of near satisfactory service. We must always remember that this system is administered by men, wherefore it will inevitably continue to disclose the frailties of men. Perfection cannot be expected, but our goal should be to minimize the existing imperfections as much as humanly possible, and at the same time maintain the highest standards in the administration of justice.

If this paper should become the moving factor in the adoption of some of the recommendations made, it will have served its purpose.