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IS TRIAL BY JURY: AN INEFFECTIVE SURVIVAL?

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In the January issue of the *American Bar Association Journal*[1] appears an article written by a member of the California Bar severely arraigning the modern procedure of trial by jury. The indictment consists of six counts or specifications. The gravamen of the charge that trial by jury is an ineffective survival, is quite clearly set out in the opening paragraph of the article. It is there said:

"Those who have had occasion to observe the methods employed in the administration of judicial principles, have necessarily been confronted with a realization of the inadequacy and inefficiency of the judicial trial by jury. Its defects are so patent as to compel the attention of even the casual observer, and to one compelled to cope with it as an essential factor in his personal concerns, it assumes the characteristics of the fabled dragons of mythology, frustrating the objects of commendable endeavor and reducing to wretchedness the victims it cannot destroy. The jury, established in answer to the peculiar needs of the age that produced it, exists to-day without a vestige of reason, the altered conditions occasioned by man's progress having made it ineffectual and inexpedient as an agency of legal administration."

The writer of the article in question, apparently realizing that a mere condemnation of modern trial by jury and an advocacy of its abolition, would only amount to mental exercise, suggests a substitute for the procedure he condemns. To test the sufficiency of the indictment it will be profitable to consider, briefly, the substitute offered for the procedure condemned.

The substitute suggested is the establishment of a state judiciary composed of three separate divisions, and there should be as many courts of the first division established in each county of

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the state as necessity would dictate. This first division is to consist of three members elected for a term of eight years by the voters of the county or district in which they are to officiate and this division is to constitute the original trial courts for all legal controversies, irrespective of their character or the nature of the matters involved. In other words, this first division court is to take the place of the Circuit Courts now established in this state. The three judges of this first division are to sit in bank in the trial of those cases in which now a trial by jury is granted as a privilege or as a matter of right to either party and by a concurrence of two of their members, decisions on both facts and law involved in these cases are to be rendered. Where under the present procedure a trial by jury is not provided, or where neither party to a controversy desires a trial by the court sitting in bank, one member of the tribunal is to hear and determine controversies.

An appellate tribunal to hear appeals from the decisions of these trial courts is also provided, consisting of five members elected for a term of sixteen years by the vote of the people of the state. The number of these appellate courts will depend upon the necessity for such courts in the different states. There is also created a last and final court of the state, composed of seven members elected to office for life by the voters of the state, to which appeals could be taken from the decisions of the appellate courts.

This is the outline of the new judicial procedure proposed as a substitute for our present procedure of trial by jury. It will be noted, in passing, that while under our present system of the trial of facts by a jury the concurrence of twelve minds, or at least of ten, is necessary to establish a fact judicially; under the proposed system the final determination of a fact judicially may be had by the concurrence of but nine minds assuming that a fact is so established by a majority vote in each of the three divisions. If there is any safety in numbers, this safety is effectually eliminated by this proposed substitution.

The various counts of the indictment under discussion will now be briefly considered.

Count One: It is charged that trial by jury is old, antiquated, and was the outgrowth of a peculiar social and economic system for the protection of the common people, but that in modern times such protection is no longer needed and the institution itself is unsuited to present day conditions. It is asserted that

trial by jury was first promised and guaranteed by the provisions of Magna Carta and that the conditions existing in 1215 when the signature to this instrument was forced from King John by the Barons of the Realm, were so peculiar that the liberty of the common people depended upon having their rights as between man and man determined by their peers, but that the conditions now have so vitally changed from the conditions then, that there is at present no excuse for the survival of this method of determining facts in litigation.

It is true that trial by jury is old, in fact, the principle is much older than the date given by the writer of the article in question. Again, Magna Carta not only did not create the institution of trial by jury, but did not even guarantee it. Thus it has been said:

"One persistent error, universally adopted for many centuries, and even now hard to dispel, is that the Great Charter granted or guaranteed trial by jury. This belief, however, which has endured so long and played so prominent a part in political theory is now held by all competent authorities to be entirely unfounded."[1]

This historian in concluding his discussion of trial by jury as referred to in Magna Carta says:

"Magna Carta does not promise 'trial by jury' to anyone."

Other historians who have examined the origin of trial by jury have reached the same conclusion.[2] Trial by jury is older than Magna Carta.

The historian Hume credits Alfred the Great, (871-901) as the originator of trial by jury in England. Thus in discussing the procedure adopted by Alfred in determining controversies between members of different decennaries, the historian says:

"Their method of decision deserves to be noted as being the origin of juries; an institution admirable in itself, and the best calculated for the preservation of liberty and the administration of justice that ever was devised by the wit of man. Twelve freeholders were chosen, who, having sworn, together with the hundreder, or presiding magistrate of that division, to administer impartial justice, proceeded to the examination of that cause which was submitted to their jurisdiction."

Trial by jury is older than the reign of Alfred the Great. The

[1] McKechnie, Magna Carta, page 158.
[2] II Reeves, History of English Law, page 42.
Forsyth's History, Trial by Jury, page 91.
Pollock & Maitland, History of English Law, page 152.

institution was known in the time of the Roman Republic; thus under the Plantian law proposed and adopted 89 B. C. the jury was made a popular institution and all classes were admitted to the jury box, three qualifications being required: first, proper age; second, honorable character; third, no other office in the public service. Hence, all Roman citizens were eligible to jury service.

But trial by jury was known even under the Mosaic law. Thus it was provided under that ancient law that in cases where a person had inadvertently or accidentally killed another and had successfully escaped into one of the Cities of Refuge, the question whether the homicide was accidental or otherwise, was not to be determined by judges or priests, but by the "Congregation," that is, by a jury.

The purpose of these historical references is not so much to correct the author of the article in question or to give a chronology of the origin and development of trial by jury, as it is to emphasize the fact that an institution which has survived varying experiences for centuries, under varying conditions, and among totally dissimilar peoples and civilizations, must have something innately vital and must have filled a human want during all these centuries and under all conditions of civilization. When it is remembered that trial by jury in every instance where it was inaugurated in the various civilized countries, ancient and modern, succeeded trials by judges alone, a reason for this vitality is readily suggested. Hence, the age of the judicial system under discussion, its survival under all kinds and forms of civilization, its meeting the needs of peoples and nations widely different in their tastes, their aspirations and their governmental systems, instead of being a cause for condign condemnation, is rather a badge of its excellency and fitness for even modern conditions.

Count Two: It is next charged that trial by jury has ceased properly to function as a judicial institution because of the mimicry indulged in "with pathetic earnestness" of selecting members of modern juries from political subdivisions, the inhabitants of which know nothing of the facts involved in the litigation for the determining of which they are selected, and resulting in a situation described as—

"Abysmal ignorance constitutes a condition precedent in the qualification of jurors, and that ignorance must be established to the satisfaction of contending counsel, else the prospective

juror is summarily dismissed from the body to which he would, if permitted. have brought enlightenment."

It is possible that there are some benighted communities where the result just depicted by this charge is occasionally produced. If so, such is not the case in this state where jurors are selected by a judicially appointed commission from the electors at large, who represent the average intelligence and integrity of the community. In Wisconsin, women now have full civil rights and are eligible for jury duty, and hardly a jury is now selected here in which there are not a number of women. Hence, here, at least, "abysmal ignorance" is not only not the rule, but not even the exception. If communities can be found where jurors are justly subject to the criticism contained in this count, then such communities receive just the kind of justice they deserve.

Furthermore, this charge challenges the efficiency of the method of selecting the jurors and in no way affects the value of the institution of trial by jury itself. The supposed ignorance of jurors selected to determine facts in a given litigation which, it is claimed, will control their judgment in such determination, would likewise control their judgment in selecting and voting for the three judges of a given division who are to constitute the original trial courts and determine all facts in all litigations arising in the pertinent political division. If the assumed ignorance of jurors in a given case vitiates the due administration of justice in such case, then the same vice would operate when the same ignorant jurors select the trier of facts in all cases.

Count Three: It is next charged that in addition to the ignorance of the members constituting the modern jury, the jurors are asked to determine the issues of an instant case upon a distorted presentation of the facts because of the astuteness of respective counsel in carefully concealing the evidence of material facts that would adversely effect their clients, and that such deceit is possible because of the artful practices peculiar to the court room. This charge, instead of being a serious one against the modern jury and its members, is a most serious arraignment of the legal profession, as well as a serious reflection upon the courts. If such sharp practices are permitted by the presiding judge in the trial of a case, then such judge is either incompetent, ignorant, or worse, and if a miscarriage of justice results from such practices, it cannot properly be charged against the jury or against the institution of trial by jury. If this practice has

become so universal as to call for the abolition of trial by jury, then it must follow that a majority of the members of the bar are skilled in and practice this "astuteness" which results in a distorted presentation of facts elicited from "carefully coached and instructed witnesses." If the majority of practicing attorneys are thus corrupt, then the proposed substitute for trial by jury will call for the selection and election of three judges as triers of all facts from this tainted contingent of the community. Shades of Bacon, note the advance made in judicial procedure under modern civilization!

Count Four: The next charge is that trial by jury is a failure because jurors are human, are subjected to human frailties and delinquencies and possess human passions and desires so that they leave the province of disinterested triers of fact and indulge in prejudice, bias and all uncharitableness. This accusation is sought to be sustained by the assertion that the three judges who are to take the place of jurors are not subjected to human frailties, delinquencies and passions, but have, by sustained and arduous discipline, overcome these human attributes and become unsympathetic arbiters of facts, cold-blooded logicians and, in a law suit, will "hew close to the line, let the chips fall where they may." Unfortunately, experience does not sustain this proposition. It may seem a paradox, but it is, nevertheless, true that the habitual and constant exercise of balancing disputed facts to discover where the truth lies, unfits a man to determine the truth. Every person, even though he be a judge, has a mode of drawing inferences from certain facts proved, peculiar to himself, has certain theories with respect to the motives that influence conduct, has a strong disposition to adopt and resort to some general rule by which all questions of doubt and difficulty are to be measured and determined. It is certainly extremely unsafe in determining the motives of human conduct which play so large a part in cases of disputed and contested facts, to generalize and to assume that men will act according to a theory of conduct which a judge, or three judges, may have adopted as a guiding rule. Very many, if not the most, of the cases which reach courts for determination, arise out of commercial and industrial transactions, and it is safe to affirm that the persons most likely to understand the nature of these transactions and arrive at the truth of the dispute between litigant parties are those who are conversant with the details of business and engaged in similar occupations themselves. It is

such men who constitute our juries, who enter the jury box in a given case without any preconceived ideas of how the facts are to be tested and the probative value of circumstances proven to be measured in determining the rights of the parties before the court and the jury. It is a matter of almost common knowledge in the profession that many of our judges, while learned in the law and safe determiners of the law in cases tried before them are rather unsatisfactory triers of fact, and the longer they remain upon the bench the more unsatisfactory their decisions of fact frequently become, because of their withdrawal from the active business and industrial affairs of the community and a consequent want of familiarity with the practical affairs of life.

Count Four: The next charge is that trial by jury is a failure the jury system in that it alleges that the average citizen, and our juries are composed of average citizens, is a man of small means and if at all susceptible of corruption, makes him an easy prey to be influenced in reaching his verdict by financial considerations either directly offered by one of the parties to the litigation, or indirectly offered by the hope or the suggestion of financial advantage in the future after the verdict has been reached. That verdicts of juries have been bought may be admitted, but such crass corruption of our judicial procedure is very rare. If history is to be believed, judges have not been free from being so influenced, but, as already suggested, the instances of verdicts from juries, and decisions and judgments from courts, obtained by bribery are so infrequent, that these few cases cannot be considered as a condemnation of either judges or juries.

Count Six: The last specific charge lodged against the institution of trial by jury is that verdicts of juries are frequently based upon the popular opinion of the community at the time, rather than upon the evidence submitted in Court; in other words, that juries are guided by their decisions as to the facts of a case by what they believe would be the opinion of the majority of the people, were the question submitted to them. That juries sometimes decide cases not upon the facts presented to them but upon what they believe would reflect the popular side of the litigation is true, but it can be asserted with confidence that judges are not always entirely free from the influence of popular opinion in deciding cases before them. The instances where the "ear to the ground" is decisive in determining the facts in a litigated case, rather than conscience and judgment, are generally criminal cases

brought under an unpopular law, a law that the majority of a community does not endorse. Where such a miscarriage of abstract justice occurs, the community, as stated before in another connection, receives just such an administration of justice as it deserves.

Perverse verdicts have been rendered by juries, but the damage done to the administration of justice by such verdicts, has been greatly minimized, if not entirely neutralized, by the power of the court to set aside such verdicts and grant new trials. A striking example of the use of such power on the part of the Court was the recent case of *Jackson v. The American League Baseball Club, et al.,* tried in the Circuit Court of Milwaukee County within the month. The jury in this case returned a large verdict in favor of the plaintiff and the trial court reprimanded the jury for the verdict, set it aside, and dismissed the action on the ground that the trial of the case "reeked with perjury." During the trial of the case, one of the witnesses for the plaintiff was ordered arrested by the court for perjury, and after the case had been submitted to the jury the plaintiff himself was arrested for perjury upon the order of the court.

Trial by jury is not to be consigned into oblivion because here and there an individual jury will fail to do its duty, will cause an apparent miscarriage of justice, render a perverse verdict, be misled by the "adroit manipulation and the flagrant disregard of principles" on the part of astute and conscienceless attorneys in the trial of cases.

So far I have considered trial by jury merely as a judicial institution, as an arm of the court in the administration of justice, but trial by jury plays a large part in the social and political life of a community. Serving upon a jury brings the individual not only in close contact with the law as administered by our courts, but brings him in closer contact with his fellow citizens, gives him a very active share in the administration of public affairs and offers him an opportunity to make his voice heard and his influence felt in questions of local interest. Want of respect for the law has been repeatedly urged as one of the dangers threatening our Republic. While quite a respectable number of the people of a community are called to serve as jurors and thus brought into direct and close connection with the law itself and given a share in its administration, respect for the law will be created in the minds of those in whom it did not exist, and will

be strengthened in the minds of others who had it, but in whom such respect may have lain dormant.

Trial by jury also tends to foster respect for our courts, the last and final protecting tribunal of our liberties. Abolish this institution and you have taken away practically the last opportunity the great mass of the people have of participating in any way in any of the activities of Government, of being in any way concerned in the political life of the community and have left them only the right of exercising the elective franchise, a privilege which all too many of our citizens at present do not appreciate.

Trial by jury is too deeply rooted in our civilization, is too important to our judicial system, is of too great value to our social and political life to be rudely condemned and unceremoniously abolished at the request and behest of disappointed litigants and their attorneys, and to be replaced by an experiment in judicial procedure which history has shown to be a failure whenever tried and to replace which trial by jury was instituted. At any rate, it is the part of wisdom to follow the conclusion of Hamlet when he said:

> "rather bear those ills we have,
> Than fly to others that we know not of."

The indictment should be quashed.