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TRIAL BY JURY*

Roy P. Wilcox

It is not my purpose to discuss either the philosophical or historical aspect of trial by jury. My comments will be confined to the selection, qualifications and functioning of the jury as we have it in Wisconsin.

The jury has always been, more or less, a Cinderella of the court. It has come down to us from ancient times as a part of our judicial machinery, almost in its original form. It has suffered from the same difficulty Mark Twain noted about the weather,—"Every one complains about it, but nobody does anything about it."

A glance at our statutory provisions concerning the selection and qualifications of jurors, will disclose that the original provisions of our code were practically unchanged, until the enactment, in 1889, of Sections 2544a to 2544n, Sanborn & Berryman's Annotated Statutes. These sections were applicable only to Milwaukee County, but they did contain something new and really constructive, in an effort to improve the method of selecting jurors, in that they provided, essentially, for their selection by jury commissioners, to be appointed by the trial judges. Eight years later these sections were made applicable to the entire state.

We may say, generally, that since then there has been no substantial change in this method of selecting persons who are to serve as jurors. It is rather odd that while there has been much discussion during the intervening years of reforms and changes of the practice sections governing court procedure, and many rules have been adopted with the purpose of expediting trials and simplifying procedure, the method of selection and the qualifications of jurors, as fixed by statute, have stood unchanged and, so far as my observation goes, have never even been discussed, for over forty years.

It is interesting to recall that before the enactment of these statutes, the law required each of the supervisors of the several towns, the trustees of the several villages and the aldermen of each ward in the several cities, to furnish to the county clerks of the respective counties a list of ten names of persons believed to be qualified to act as jurors. The county board was required to make from these lists a final list of names and certify it to the clerk of the circuit court, and he, at a stipulated time, in advance, drew from them thirty-six names of persons who were to serve as jurors for the next terms of court.

One of the early memories of my apprenticeship in a law office, is the furnishing by my employer to the aldermen of his ward and to

*An address delivered by Roy P. Wilcox, Eau Claire, Wis., member of the Wisconsin bar, at the annual meeting of Wisconsin's Circuit Judges, Milwaukee, Jan. 7, 1941.
supervisors some of the country towns, names of persons "well qualified" to act as jurors at the next term.

It seemed to be the common practice to select elderly gentlemen who were not very busy with their own affairs, and who were accustomed to sit quietly at various places, who would have no objection to sitting and acting as the fact-finding arm of the court.

Of course, the aldermen and supervisors, when confronted with the duty of furnishing the names of properly qualified persons, and not knowing much about what these qualifications might be, were very apt to inquire of attorneys in whom they had confidence, who would be proper persons to place upon their lists. Naturally, the attorneys, being willing to accommodate these leaders from the political subdivisions of the county, were glad to assist. This division of labor seemed finally to produce jurors that were, in the main, satisfactory to some of the lawyers who tried cases before them; at least, it may be presumed, to those who had assisted in their selection.

My purpose in calling attention to the present law on the subject is to remind us that, while machinery has been provided by which the quality of jurors could be much improved, full advantage has not been taken of the opportunity presented, and to show that the judges of the circuit courts may greatly improve the quality of persons selected for jury service. My first suggestion is this: The judges under the law appoint three jury commissioners. These should be selected with great care, and be men who can understand the duties of the office, and who will honestly cooperate with the judge in their enforcement. The statute specifies the qualifications of persons who shall be liable to be drawn as jurors in this way:

"All citizens of the United States who are qualified electors of this state, who are possessed of their natural faculties, who are not infirm or decrepit, who are esteemed in their communities as men of good character, approved integrity and sound judgment, and who are able to read and write the English language understandingly, etc. * * *

Having secured the right kind of commissioners, the circuit judges should confer with them and outline their duties, not only in merely providing lists of names of persons for jury service, but in selecting persons of the kind specified in the statute; persons who will be able to considerately listen to the testimony and arrive at a sound and rational judgment. Why not call in your jury commissioners, point out to them that the essential things in a juror, apart from his artificial qualifications of citizenship, ability to read and write English understandingly, etc., are contained in the language,—"who are esteemed in their communities as men of good character, approved integrity and sound judgment." Explain to them that every man who may have
acquired or inherited citizenship, avoided infirmities and can read and write, is not necessarily qualified to listen to and weigh the testimony given orally in court, arrive at a sound judgment of its truth and resolve the ultimate fact in accordance with the weight of the credible evidence. Let the commissioners understand what is necessary to be a good juror, and admonish them to select such persons with these particular qualifications in mind. This would be an attempt to improve the quality of the jury as a trier of fact, by selecting persons of the kind who could and would, because of approved integrity and sound judgment, listen to the facts as they unfold in court, and decide where the truth lies, resolving contradictions, inconsistencies and variances in accordance with the sound judgment necessary for that purpose.

Another suggestion should be made by the judges to the commissioners, and that is that the persons selected to serve be in some proportion to the representative groups of citizens residing in the county. While our statute does not specifically require this, it is of the essence, it seems to me, that jurors be drawn from the body of the county with some sort of relation to the numbers of the representative groups residing in the county. We have eminent authority for this suggestion. A recent opinion of the Supreme Court of the United States, written by a justice whose elevation to the Supreme Court bench was challenged because of his alleged connection with one of our better known intolerant organizations, took a very strong stand on this subject. A negro, convicted of crime, based upon an indictment returned by a grand jury, from which negroes were excluded because of their race, was discharged because such exclusion was held to be a denial of the equal protection guaranteed by the Fourteenth Amendment to the Federal Constitution. The Justice said: “It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community * * * . If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.”

An amusing example of failure to consider the representative character of persons selected as jurors occurred recently in a damage suit, involving claims of one hundred thousand dollars, in one of the municipal courts with large financial jurisdiction, in the eastern part of the state. Owing to the number of defendants, twenty-two persons were called into the jury box from the panel of jurors provided at the term. Examination as to qualifications disclosed, that of the twenty-two, fourteen were ex-municipal employes, living on pensions. No doubt they were qualified and exemplary citizens, but all were of about the same age, with similar physical characteristics, and might well have acquired a common viewpoint.
The new census will give information on the number of persons in the various occupational groups in each county, the number employed in executive capacities; the number of industrial workers; the number engaged in mercantile business; the number who are clerks, small business men, accountants, office workers, farmers, laborers, contractors, mechanics, etc. It will be easy, in making up lists of jurors, for the commissioners to keep in mind, at least in a general way, especially if the judges suggest it, a proportional representation from the various groups, relative to the total number of jurors to be placed on the list, in accordance with the statutory order of the circuit judge.

These are some things that the circuit judges can do easily, under the existing law, to improve the quality of the jurors who will sit with them in their courts as triers of the facts.

The jury for the term having been selected, and being in attendance, a suggestion, which, if adopted, might greatly improve their functioning, would be a conference between the jurors and the presiding judge. A method somewhat along this line might be adopted:

After the call of the calendar at the opening of the term and the setting down of cases for trial, the disposition of motions affecting the calendar, etc., let the circuit judge call the jurors for the term inside the bar and seat them before the bench. Then let him explain what their duties are; that they are a co-ordinate branch of the court, whose particular function it is to ascertain what the facts are in any particular law suit in which they may be called upon to serve as jurors; that the judge is the presiding officer of the court, in control of the procedure and the law as it may apply, but that, from the stories told by the witnesses and the exhibits offered in evidence, it will be their duty to decide what the truth is, so far as the facts are concerned; that when they have determined these facts, the judge will apply the law to the facts and render the final judgment which may be appropriate according to law; that their responsibility is just as serious and important as his, and that they are sworn just as he is, to perform their duty, which is fixed by the oath they take; that they have the supreme duty of deciding these facts in a private conference in which each one of them will have a right to speak out and make up his mind; that each one should approach these duties in a sober, honest and considerate spirit, ambitious only to ascertain and declare the truth as it shall appear from the evidence given in court; the endeavor being, primarily, to arouse in each juror a spirit of emulation, and to appeal to his best instinct in an effort to establish in the jury, as a co-ordinate arm of the court, an esprit de corps to which they will respond with their best effort in the discharge of their duties.

In further preparation to discharge their function, the presiding judge should then explain to the jurors, and define, some of the terms
which will be used in the trial with which, even though they are educated persons, they may not be familiar so far as their technical aspect is concerned. For instance, tell them that the word “plaintiff,” as it is used in court, means the person who has brought the suit, claiming that he has been denied something which, of right, ought to be his; that he has set forth, through his counsel, in what is called the “complaint” the rights and the reasons why he should have what he claims; that the “defendant” is the person against whom the claims are made and that he has set forth his reasons, through his counsel, in what is known as his “answer,” why he thinks the plaintiff is not entitled to what he claims. Explain that the word “party,” as used in court, means either a plaintiff or a defendant; tell them what a “deposition” is; that it is a transcript of evidence given under oath by a witness before a magistrate who has sworn him to tell the truth, at another place and another time, because of convenience or some other reason why he could not appear in open court and tell his story, and that the deposition is just as much evidence as if the witness had appeared on the witness stand before them and testified to what is contained therein. As illustrative of the necessity for this, a little anecdote was printed some time ago, about a suit brought by a non-resident insurance company against a surviving partner for compensation premiums. Defendant had no records nor personal knowledge of the account. The company produced, by deposition, the policy and a payroll audit. Defendant testified he had paid in full, in cash, to an agent, whose testimony he did not produce orally or by deposition, but had no receipt. The jury found for the defendant, and, after the trial, a juror said to plaintiff’s counsel: “Now if you had produced that audit you talked about, we would have found for your client.” The plaintiff’s attorney had read the audit verbatim as a part of a deposition. The jury simply did not understand what the deposition was about, as it had been read. Another juror once said: “Of course, if we had believed those written statements that were read by the attorney we would have had to decide the case the other way, but we didn’t think they were binding on anybody.” They were contained in a deposition read by counsel.

The judge might also explain the right and purpose of counsel in objecting to evidence when offered. A few general statements to the effect that the law, from long experience, has made certain rules as to what evidence may properly be brought out in proof of certain facts; that evidence not within these rules is said to be not competent, but is incompetent evidence; that certain other evidence offered may not be relevant,—that is, does not tend to prove the particular fact sought to be proved; or is immaterial,—that is, even though of the proper kind, has no probative bearing on the ultimate fact; that counsel have
a right to make these objections, and it is the duty of the court to overrule,—that is, to decide that they are not well taken and that the evidence should come in; or to sustain these objections, thereby deciding that they are well taken, and that the evidence should be excluded; that objections present only questions for the judge to decide as to what evidence shall be received, and are in no way to influence the jury.

Other things of this character might be considered in such a conference, which will suggest themselves to members of a body like this, composed of trained and experienced trial judges.

Much has been said and done in the last few years about pre-trial procedure and conferences, looking toward settlement, clarification of issues, stipulating facts and saving time. No doubt they are important where calendars are crowded and trials may be delayed. Generally, outside of Milwaukee, my experience is that cases can be brought to trial without much delay if attorneys are diligent. Issues can be simplified before the jury is drawn and little time need be wasted because of pleadings or facts.

When we come to the trial itself there are a number of things which could be done to promote better functioning of the jury, all of which might be helpful in giving them understanding, arousing their sense of responsibility and preventing their being misled. Among these, I would suggest:

That the presiding judge personally swear each witness before he testifies, giving to the administration of the oath all the dignity and impressiveness which he can, to the end that the witness may be cautioned and strengthened in his determination to tell the truth.

That when a deposition is offered the court explain again to the jury what a deposition is, and it should be read to the jury, either by the judge, the clerk of court, or the court reporter. It seems to me that the practice of letting each attorney read such parts of the deposition as he has produced by examination is apt, not only to minimize its effect, but creates a situation from which the jury might infer that the lawyer is testifying on his own side of the case,—a practice, of course, prohibited as improper. If the deposition is read in full by a disinterested officer of the court, it will not only be more attentively listened to and, therefore, more effective, but will also enhance the dignity of the proceeding and be more in consonance with a judicial atmosphere.

Another practice which judges might generally adopt, and which would make for more honest testimony, would be to keep all witnesses out of the court room until they are called to be sworn and examined, and, after they have concluded their testimony, to dismiss them from the court room until they might again be required. This has been the practice in England for many years, and when we see how often it
happens, in a sharply contested law suit, that one side or the other puts on his star witness, or leader, to give his testimony first, and the other witnesses hang breathlessly upon his words, so that their story may agree with his when they are called, we can see that mass swearing, on one side or the other, might be considerably checked, if the witness who follows the first one did not know how he had fared in the story that he told, nor exactly how he had come through the cross-examination, or had finally left his tale of what he was to unfold.

All our experience has shown us that one of the most helpful things we have had to produce an honest finding of fact is the special verdict or special questions, and it would seem to me that all trial judges might have a standing rule that issues of fact, when not left to the judge for determination, would be submitted to the jury without request on a special verdict or special questions, prepared by the judge, as the law requires. When so submitted they afford another opportunity for the judge to re-emphasize, what he has already told all the jurors in the preliminary conference,—the necessity of using sound judgment in making their answers, and basing them entirely upon the weight of such testimony as they find to be true; to be impartial; to be fair; to try, as earnestly and zealously as the judge does, to find what the truth is on the disputed facts and to write their answers after the questions submitted.

While trial by jury can never become an exact science, and the frailties of human nature always intervene, so that the best we can hope to obtain is an approximation of justice, it is believed that action along the lines suggested, would improve the quality of jurors, the impartiality and correctness of their verdicts, and result in final judgments which would make trials by jury matters of pride, rather than of apology.