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Trial by Jury

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TRIAL BY JURY.

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The origin of this most remarkable and characteristic system is shrouded in mystery, and has been a source of discussion and has occupied the attention of scholars for many years.

It is pretty well agreed that it is essentially the product of English jurisprudence, and whether the germs of the system existed under the Anglo Saxon domination or were brought in by the Norman conquerors, it is quite true that there existed embryonic forms of trial by jury both under the Anglo Saxon domination and under that of the Normans.

The establishment of the system under Anglo Saxon domination is like many other beneficient rules and regulations ascribed to King Alfred, and that great and good man, whether he established the system or not, may well be given the credit as its original founder, though in form totally different from the system under which we now transact our business.

It is certain, however, that it was one hundred years or more following the conquest by William of Normandy, before the system reached anything like the real purpose and intent of its founders.

The sole province of the jury has always been to try and determine the facts of a civil or criminal proceeding, and whether the jurymen are chosen on account of their ignorance of the case or on account, under the older English system, of their complete knowledge of the facts of the case, the condition is the same.

Under the inquest by recognition under the enactment of Henry II, it was provided that four knights of the neighborhood should be summoned by the sheriff, and after being sworn, they were to choose twelve other knights supposed to be most conversant with the facts; these were duly sworn by their verdict to find facts by unanimous vote. If it appeared that any of them of their own knowledge were ignorant of the facts they were thereupon discharged, and others selected in their place until twelve men were

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found who were in accord, having personal knowledge of the disputed facts, and who finally returned a unanimous verdict.

Whether this older English system is preferable to the present day system may be a question, but there is no question but the extreme limit to which we, in our day go, in prescribing the qualifications of jurors is as much objectionable as anything could be.

The purpose of trial by jury is to obtain an unbiased finding of facts and we have fallen into the mistake of placing a premium upon ignorance, or we might say a lack of intelligence, when we eliminate from the panel any juror who has formed or expressed an opinion, or is familiar with the facts of the case from having talked with parties, witnesses or other persons proficient to detail the facts.

It is manifestly proper that a juror, even though he has formed an opinion, or even though he has heard the full discussion of all the facts of the case, and who may be so biased as to retain that preconceived opinion in the face of a further full exposition of the facts by the witnesses ought to be eliminated.

However, it frequently occurs that the jury selected for their complete ignorance of the facts of the case, may, for some hours during the progress of the trial, grope in the dark for the real turning point of the action, and while listening to lawyers "run rabbits," in the language of an eminent old practitioner, fail to notice the real question involved when it does come out in evidence.

A fair understanding of the facts of the case prior to entry into the jury box ought never to disqualify any honest man from sitting on the jury, and ought really to add to his qualifications, if he is an honest man, because of his previous intelligent knowledge of the question involved, even though he may enter the jury box with his mind made up, but with that intelligent knowledge of the conditions, he will be on the hunt for real facts, and when they are brought out, they will either confirm him in his opinion or else be so impressed upon his mind as to raise that doubt for the discussion in the jury room.

It is a well known fact that twelve persons witnessing a happening and called upon to testify as to what did take place, will frequently give most divergent testimony as to what occurred, and

each one seeing the transaction from his own point of view, and from the bent of his own individual mind, will be equally honest or equally true in the testimony that he gives; so twelve men listening as jurymen to the testimony of witnesses will hear and comprehend what is said by the witness according to the temperament, disposition and mental training of each juror.

The words of the witness detailing certain facts may be heard by all twelve of the jury, and while the particular testimony given may be comprehended by one or more of the jurymen, it may, as far as comprehension is concerned, have never been heard by the others.

The discussion in the jury room is intended to reconcile the conflicting ideas which may be present in the minds of the twelve men, for it is very seldom that a jury, on entering its room, is at once in entire accord, and it is well known that the very matter of which we have just spoken, comprehended by one juror is brought to the attention of others, and when brought to their attention is seen by them, and when comprehended, may prove the turning point in the case.

The varied and divergent ideas of the twelve men sitting through the progress of a trial is well known, and as we deem it, the ancient right of trial by jury is one of the safeguards of our institutions.

The Federal Constitution, as originally adopted by the convention did not guarantee the right of trial by jury, but the oversight was immediately seen, and it was guaranteed in criminal cases by article six, and in civil cases when the amount involved exceeded twenty ($20.00) dollars, by article seven, submitted to the states by the first Congress.

Our own first state Constitution in section 6 of article twelve provided:

"That trial by jury shall be as heretofore, and the right thereto remain inviolate."

There is nothing to indicate what

"Shall be as heretofore"

referred to except the common law right of trial by a common law jury of twelve jurymen.

In the second Constitution, in section six of article ten, the language is a little different. and is as follows:

"That the ancient mode of trial by jury shall be held sacred and the right thereof remain inviolate."

In the Constitution of 1850 the language of the second Constitution is repeated, but there was added thereto the following:

"Subject to such modification as may be authorized by this Constitution."

There is nothing in the Constitution of 1850 modifying or changing the ancient mode.

In the present Constitution, section seven, is the identical language of the Constitution of 1850, but section 248 of the present Constitution modifies very materially the ancient mode, and the applicable part is as follows:

"The General Assembly may provide that in any or all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by all the jurors who agree to it."

Provisions under section 248 worked a radical departure from the system theretofore in vogue, and the result brought about many a verdict in civil actions which might have been prevented by the recalcitrancy of one man. We believe that the adoption of the rule by the legislature has met with general approval.

Under the system of summoning the jury in vogue prior to 1906 there arose in many jurisdictions great abuse of the system, and frequently the right of a litigant, or the life of an alleged criminal, or the right of society represented by the Commonwealth, was endangered by what was called a packed jury, and the legislature saw fit, in 1906, to change the system of selection, authorizing the circuit judge to appoint three commissioners, who, from the assessor's book of the county, shall carefully select from the intelligent, sober, discreet and impartial citizens, resident housekeepers in different portions of the county, a certain number of names, ac-

cording to the population of the county, and deposit these names in what we call the jury wheel.

The number of names is taken in proportion to the population, and runs from one hundred and twenty-five to one thousand, except in the counties where there are branches of the circuit court.

The purpose of the wheel is to have a diversified list of jurors and from all portions of the county, and the purpose and intent of the law is a good one.

Now as to the jury system as it obtains in our Commonwealth, we feel that it is pertinent to offer a few suggestions caused by our reverence for the ancient mode of trial by jury.

"In my mind he was guilty of no error, he was chargeable with no exaggeration, he was betrayed by his fancy into no metaphor, who once said that all we see about us, kings, lords and commons, the whole machinery of the state, all the apparatus of the system, and its varied workings, end in simply bringing twelve good men into a box."

Under our American system of Government, we divide the power among three co-ordinate branches, the executive, the legislative and the judicial, each equal in authority and co-ordinating with the other, and if we mistake not, we divide the functions of our courts of justice into two branches, that of judge and that of jury, co-ordinating one with the other, the jury under the guidance of the court in matters of law, and being equal in dignity with the court in matters of fact where there is any evidence to sustain a verdict, and yet the jury as an institution has, either by our judges, or by men who are called as jurymen, been degraded and dragged down from its honorable position.

We know not how it is in other portions of the state, but in our own circuit it is not an uncommon thing when as many as thirty men are summoned as jurors, and, after qualifying, are asked, "Have any of you a reason to offer the court why you should not serve?" to have two-thirds of them arise and request release.

It frequently happens that the excuses are trivial, especially in the case of business men, or as the result of impatience and disinclination to sit quietly and weigh and determine controversies between litigants.

It is a well known fact that even though the courts are limited to three persons in summoning by-standers, yet it frequently happens that the court will summon the three by-standers, the next day excuse three from the regular panel, pick up three more by-standers, and so on until he has acquired practically a bystander jury.

Professional jurymen are not, as a rule, the most valuable adjunct in the trial of a case, but there is one thing certain about them, when they stand around the court room for the purpose of being summoned, it is always quite certain that they will have the patience to sit and listen to the testimony and to take part in the discussion in the jury room, and not be like the average dogmatic business man who wants to decide the case in sixty seconds and get busy about something else, and is not willing to sit down and "whittle awhile" and talk the matter over.

> "The hungry judges soon the sentence sign,
> And wretches hang, that jurymen may dine."

While the legislature was prescribing the wheel method and keys for it, and in what pocket of the judge's coat the key was to be carried, and was casting so many safeguards around the selection of a jury, it might have gone a little further and clothed the position of the juryman with some of that dignity and responsibility which would have restored it to the position that it evidently once occupied in English jurisprudence.

Why should the jury commissioners only select six hundred names in a county of a population of fifty thousand people. In such a county there are approximately qualified jurors to the number of three thousand, many of that number never having been on the jury list, and many of the six hundred coming back term after term, their names drawn from the wheel by luck or accident.

Our law prescribes the qualifications of a juror, requiring him to be sober, impartial and discreet, and it is beyond our province to add to the qualifications, and say that the highly educated, or the wealthy, or the unlearned, or the poor man is better qualified as a trier of facts.

Jurors while in the box are no more than human beings, and one uneducated man, not even able to write his name, may have a keener discernment of human nature than another highly educated man whose life is either in the clouds, or whose head is buried in the sand of selfishness and lack of perception.

The younger men about to enter into the practice of law will do well, whether in college or after graduation, to take up one other study, that is, the study of human nature.

It is a well known fact that the jury panel sometimes begins like the man-eating tiger. At the beginning of the term it gets a taste of blood, either for the defendant or for the plaintiff, and practically every case tried at that term is affected by this disposition on the part of the jury.

Many things enter in to bring about this condition, and it is impossible to explain it, or to give any reason why a jury should take one tack or the other.

The selection of jurors is not a matter within the purview of this article, but we cannot refrain from alluding to an instance occurring in this circuit some years ago. It so happened that two jurors, two very intelligent men, for some reason appeared to be very objectionable to a certain set of lawyers defending at that term of court, and were at each trial immediately excused from the panel; this went on for some days until it became quite a joke in the court room. After a time a younger lawyer defending one of the same classes of suits, when about to enter upon the trial, these two men being on the panel, he was approached and whispered to by several of the older lawyers, who advised him to immediately scratch them, but being of a rather observing turn of mind he purposely left them on the jury.

When a verdict for the defendant came in, it was discovered that these two men had been leaders of the jury, thus justifying the study made of men.

The statement has been made by a very eminent Kentucky jurist that

"The fewer the names that can be placed in the wheel, the higher will be the standard of the jury."

As we have above stated, no man can fix the standard for a juryman any better than that fixed by our statute. Under the above principle the jury commissioners would each year select a provisional jury according to their own preconceived ideas, frequently making the mistake of selecting men who are not by disposition or desire qualified to listen to evidence, and sit in judgment upon the affairs of litigants.

Why would it not be well to require the commissioners to place in the wheel the name of each qualified juror and to provide that a juror should be summoned for service such a length of time before the term of court as to enable him to arrange his business affairs, and to provide that no excuse should be taken for failure to serve, except illness of the juror or his family, certified to by a competent physician's certificate.

The theory of our judicial system is that the humblest man is entitled to the machinery of the law for the enforcement of all his rights as well as the wealthiest citizen, and every case, whether large or small, is entitled to careful consideration of the court and of the jury.

Our judicial system was not set up under the Constitution with regard to cheapness or expense, and consisting, as it does, of judge and jury, let the people consider the fundamental provision of our organic law, that not only the right of trial by jury remain inviolate, but that it be held sacred.