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A DEFENSE OF THE JURY SYSTEM

By JOHN SHEA

The law itself, courts, juries and lawyers are considered by many of the lay public as worse than useless factors in the world's affairs, indeed, they are considered as barnacles upon the body politic. It's a poor newspaper or magazine which has not recently carried at least one article or editorial condemning one or more of them. Especially is this true since "mass production" and "speed" have become the shibboleths of the American citizenry. Justice and accuracy of decision to the parties litigant are of small consequence if only a great mass of cases are decided in haste.

These people sieze upon the result of one case which has been played up by the press and exalted to an importance which it does not deserve, and from that they form and express an opinion of condemnation of the law and the courts and of all legal functionaries. They do not seem to know or care of the thousands of cases, civil and criminal, legal and equitable, which are heard and determined by courts and juries, day in and day out, with small recompense for their services, and in which justice is done to the interested parties. The newspapers do not carry the story of these cases on the front page because they are heard and decided in the usual and regular order, without fireworks or other display.

For the most part the critics of our jurisprudence have struck upon the jury system as the chief obstacle to what they deem to be progress in the determination of lawsuits. Some are honestly of the opinion that it would be better if the jury system were entirely abolished, but these speak without knowledge of its function and value, while others find in it an obstacle to their own plans or have been unable to accommodate themselves to trying their matters to a jury.

For example the radical professional "dry" finds in the jury system a hindrance to his plans to convict and punish severely the offender against the "dry" laws at all costs, and at least for that class of cases he is opposed to trial by jury. Then the

attorney who is almost daily defending in personal injury suits frequently is found to be in the state of hostility to juries because of his avocation. He is constitutionally opposed to the jury system although his class of cases are not the only ones heard and passed upon by juries. However, recently I talked with one of the class last mentioned who told me that his experience with juries had strengthened rather than weakened his faith in them.

The right of trial by jury is a fundamental and integral part of a democracy as the right of suffrage or the freedom of worship, press and speech. It is engrafted as a part of our jurisprudence as the result of conflict and sacrifice. It is one of the terms of Magna Charta. There are two articles relating to it in the Bill of Rights of the Federal Constitution. One of them (Art. VI.) guarantees the right of trial by jury to the accused in all criminal prosecutions, while the second (Art. VII.) provides that in all suits at common law where the amount in controversy shall exceed twenty dollars the right of trial by jury shall be preserved. Most of the states of the Union have similar provisions, and the Ordinance of 1787 for the Northwest Territory conferred the same right upon the citizenry. If we of the present day consider the right of trial by jury of small value then we place little worth upon the handiwork of those who laid deep and solid the foundations of our Republican form of government.

So far as any substitute for the jury system has been offered it is that cause now heard by juries shall be determined by one or more judges as triers of both fact and law, and this system they would extend to criminal cases as well as civil actions. This is the panacea for the defects of the jury system. Recently many of the opponents of the jury system have used the Remus case, tried last year in Cincinnati, as conclusive evidence of the inherent defect of trial by jury. These parties fail to remember that in the Leopold-Loeb case where no defense was offered, although there was a defense in the Remus case with a reputable lawyer and former Judge to support it as one of the witnesses for the defense, it was a judge and not a jury who yielded to the dramatics, wiles and sophistry of counsel for the defense.

Lawyers like to have reputable authority to support their opinions and judgments. For such we cite the statements of Lord Birkenhead, one time Justice of Law Courts and later Chancellor of Great Britain. Lord Birkenhead says: "What twelve ordinary men think of the facts is on the whole more likely to be right than a very highly instructed legal functionary. The liberties of England require to be construed, where the issues are those of fact, not by technical persons very highly instructed but by ordinary men who lead ordinary lives and think ordinary thoughts of ordinary people."

The Supreme Court of the United States, (surely an authority of repute we all admit) in the case of *Sioux City R. R. vs. Stout*, 84 U. S.-657 at.664, said:

"Twelve men of the average of the community, men of education and men of little education, men of learning and men whose learning consists only in what they themselves have seen and heard—the merchant, the mechanic, the farmer, the laborer—these men sit together, consult and apply their separate experience in the affairs of life to the facts proven and draw a conclusion. This average judgment thus given out is the great effort of the law to obtain. It is to be assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions than can a single judge."

Justice Miller of the same Court said, as we quote from *American Bar Association Journal* of April, 1929, address by Judge Crane of New York Court of Appeals; concerning the trial of facts by a judge: "In my experience in the Conference Room of the Supreme Court, which consists of nine judges, I have been surprised to find how readily those judges come to an agreement upon questions of law but how often they disagree in regard to questions of fact, apparently as clear as the law."

Through training and habit judges bring to the determination of facts, as well as law, a technical and legalistic mind which does not always serve the ends of justice, and it is my experience that a jury usually disregards the technical and wholly theoretical phases of a claim or defense and decides the case,

wrongly or rightly, on the substantial aspects of it. It is my judgment and experience that a lawyer has a much better chance to succeed with a purely technical claim or defense before a Court than before a jury, and I believe this is the experience of most practicing lawyers.

I do not say that the jury system is a perfect one and that always the best result obtainable is had by that method of trial. Almost every practicing lawyer has had the experience of a result from a jury trial which seemed or is a miscarriage of justice. I am convinced, however, that the defect is in the administration of the laws relating to the empanelling of juries and to procedure during the trial, rather than to the defect of the system itself. Some courts are in a measure responsible for this condition. There are judges whose attitude during the trial of cases is that of an umpire and preserver of the peace of the court room instead of being the guide and director of the case and the guardian of justice. They fail to hear a case that directness, courage and dignity that inspires the confidence of the jury and the fear of the over-zealous counsel who appear before every Court. The Court should have actual control, not merely nominal control, of a case from the examination of the jury on voir dire until the verdict is returned.

If I were asked to suggest changes in the administration of the law relating to trial of cases these would be some of my suggestions:

Abolish all exemptions from jury service and excuse those called in only very exceptional cases. Let the Court first conduct the examination on voir dire with right of counsel to supplement only with questions not asked by the Court. Abolish preemptory challenges in all civil actions, but with the right of the court to excuse a juror for any reasonable ground within the sound discretion of the Court. Limit the number of challenges for cause to three on each side. I would abolish the unanimous verdict in civil actions and permit three-fourths of the jury to return a verdict, as is done in Ohio.

The American newspapers have their share of responsibility in the matter and no right that they are fairly entitled to exercise would be infringed if a limitation were placed upon their report of criminal cases especially. They sometimes heroize

a criminal and create an atmosphere of favoritism for him that finds its way to the jury room. For this reason in that class of cases which has the front page of the newspapers the jury should be closely guarded against their influence, or any other than the evidence and the law applicable thereto. One of the means afforded by the law of some of the States of testing the accuracy of a general verdict in civil cases and which is frequently not used in cases where it should be, is by the submission to the jury of a special finding of ultimate facts. Whenever this finding is opposed to the general verdict in most states it prevails over the general verdict. By this means a check is afforded on the jury and requires them to give more mature consideration to their verdict.

It therefore seems to me that while the jury system is not a perfect one its worth has been established by its long and honorable existence and that it is an achievement in a system of Democratic government that can not be surrendered without an equal loss of our faith in the fundamental principles upon which our government is founded.