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SOME NEW ASPECTS OF THE RIGHT OF TRIAL BY
JURY.

THE two features of the subject of jury trial which are most often in the public mind are, first, the tenacity with which the people adhere to the system, and, second, the growing dissatisfaction with it, which is perceived among educated men and in the legal profession. Without exception this mode of trial is preserved in the judicial system of the several states; all of them giving assurance of it as a right in criminal cases, and two-thirds of them by their constitutions depriving the legislatures of the power to take from litigants the privilege in civil cases. Moreover, almost without exception, it is the historical jury that is retained; the jury of twelve men, who must return a unanimous verdict, and to whose judgment the facts are referred for final determination. The recent efforts in the line of constitution-making will show clearly the general drift of public action, which is all in one direction. Texas and Alabama provide that "the right of trial by jury shall remain inviolate;" Pennsylvania that "trial by jury shall be as heretofore, and the right thereof remain inviolable." Missouri and Nebraska make similar provision, except that they permit trials in the inferior courts by a less number than twelve. Colorado preserves the right "inviolable" in criminal cases, but in civil cases and cases of minor offences, permits the number to be less than twelve. Thus

the traditions and practice of immemorial times are adhered to on all sides, and the modifications permitted are immaterial. Nor have the people been content to leave the subject with the law-making authority, but they have assumed the right to be one of the essentials of good government; something not to be improved upon, tampered with or put aside under any circumstances, and have treated it as a part of the due process of law which was and for ever was to be the sacred right of the citizen. We take no notice here of provisions for the waiver of the right, as these are not important to anything which follows.

In several of the states the legislature has gone beyond the constitution in giving importance to the jury by diminishing the functions of the judge; taking from him entirely the right of assisting and guiding the action of the jury in sifting and weighing evidence, which was an important part of his duty at the common law. The judge is required in these states to confine his charge strictly to a written presentation of the law, and is inhibited from commenting on the facts. It does not seem to have occurred to any one to raise the question whether in preserving the historical right of jury trial the constitution had not guaranteed the functions of the judge as well as those of the jury; and whether it was admissible to change the system radically in one particular any more than in another; but some of the changes made are unquestionably very great. In some states, the same jury that passes upon the facts of an alleged crime, also assesses the punishment, and curious results are sometimes worked out which the judge must accept and act upon, however erroneous or absurd they may appear to him. It is surely a matter of some importance to know whether the judge may be made a cipher in this time-honored tribunal, and whether the agreement of twelve men in a certain conclusion on the facts, however accomplished, is all the constitution aims at. The recent changes in the method of selecting the jury, whereby the prisoner's peremptory challenges have been diminished in number, or those of the government increased, or the grounds of challenge modified, have all been defended and sustained on the ground that they were not changes in the mode of trial, but only such modifications in the method of selecting the impartial tribunal which the jury is supposed to be, as experience had shown were important to preserve the right in its constitutional integrity: *Walston v. Commonwealth*, 16 B. Mon. 15; *Warren v. Commonwealth*, 37 Penna. St. 45; *Walter v.*

People, 32 N. Y. 147; *State v. Ryan*, 13 Minn. 370; *State v. Wilson*, 48 N. H. 398; *Commonwealth v. Dorsey*, 103 Mass. 412; *Dowling v. State*, 5 S. & M. 664; *Stokes v. People*, 53 N. Y. 164. Modifications of that sort must always be admissible; they are in harmony with the system, not radical changes of it.

But while from generation to generation we have been repeating the guaranties of the institution, embarrassments have been springing up in the actual administration of it, some of which are new because the circumstances from which they grow are new, and some perhaps are due to the gradual operation of judicial decisions in a wrong direction. Among these is the increased difficulty of making up the panel from intelligent men, arising from over-strictness on the part of judges in rejecting all whose minds have in any way been influenced by what they may have heard or seen published on the subject which they are to investigate. The theory of jury trial implies that the tribunal is always to be composed of men wholly unbiased and indifferent between the parties; and Chief Justice MARSHALL very justly ruled in *Burr's case* that the existence of "strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them—which may combat the testimony and resist its force," was reason sufficient for excluding a person from the panel. But, on the other hand, this eminent judge did not undertake to require for jurors in his court persons whose minds were a blank, and wholly unimpressed by anything they may have heard or read concerning the case to be tried. If assertions are made in the community as facts, either in common discourse or in the papers, some impression is likely to be produced upon the mind by them; but if the impression does not become settled belief, there is no reason why it should constitute a disqualification in the case of a man disposed to regard the evidence. It is not to be supposed that such impressions will close the mind against a fair consideration of the testimony; and in the absence of further proof of bias, the juror should be accepted: 1 *Burr's Trial* 416. The intelligent observance of this distinction would tend to keep the tribunal both impartial and respectable; but it must be conceded that in some of the states the rules for securing impartial jurors had been so far perverted as to bring serious discredit upon the administration of justice, and sometimes to present the "intelligent juror" to the public as an object of derision. New York, in the action of some of its inferior tribunals, was particularly

unfortunate in this regard; and the city of New York being the chief business centre of the country, the doings of whose tribunals would have general interest everywhere, the impanelling of jurors there attracted general notice. The public journals heaped ridicule upon the jury as a body carefully sifted of intelligent men; and the impression found its way into the public mind that in contemplation of law a man sufficiently intelligent to read the current news was presumptively disqualified, by having read of current events, from having a place on the jury. This was a great evil, something of which has been corrected by legislation, and more, perhaps, by a more careful attention on the part of courts to the reasons for exclusion: *Osiander's Case*, 3 Leigh 785; *Mann v. Glover*, 14 N. J. 195; *State v. Potter*, 18 Conn. 174; *Smith v. Eames*, 3 Ill. 78; *Holt v. People*, 13 Mich. 224; *Bradford v. State*, 15 Ind. 347; *Scranton v. Stewart*, 52 Id. 68; *State v. Phair*, 48 Verm. 366; *Black v. State*, 42 Texas 377; *O'Mara v. Commonwealth*, 75 Penna. St. 424; *Ortwein v. Commonwealth*, 76 Id. 414; *Elbin v. Wilson*, 33 Md. 135; *Union Gold Mining Co. v. National Bank*, 2 Col. 565. A more serious embarrassment springs from the fact that in large classes of cases it has come to be generally accepted by the public as a fact the jurors will be influenced in their verdicts by considerations which have no proper place in their deliberations; and these considerations are calculated upon, and juries demanded in view of their existence when otherwise they would be waived. Special reference is here made to all those cases which afford an opportunity for an appeal to the sympathies in favor of one party against the other party; but more especially to those cases in which corporations are parties defendant. Confining our attention now exclusively to this last class of cases, we only mention a notorious fact when we state that in suits with corporations, especially when the question involved is one of personal injury or injury to property, the liability for which is charged upon the corporation, the counsel for the defence generally goes into the case with the conviction that he must address a prejudiced tribunal, whose members are likely to look upon themselves as the representatives of the people, sitting to award justice to one of their own number against a member of an obnoxious privileged class. The fact of probable bias is so notorious that no one ever questions it, or fails, as far as may be practicable, to govern his conduct by it, if his interests require him to do so. The mischiefs

resulting from this are infinite. Among them we may mention the following:—

1. A general distrust of the tribunal established by law for the trial of facts.

2. The growth of an apparent antagonism between the judge and the jury in these cases; the judge, if he obeys fearlessly the dictates of duty, being frequently compelled to interfere, and to set aside verdicts which in his view have no better foundation than the prejudices or the sympathies of the jurors. Cases against railroad companies furnish numerous illustrations of the necessity for such interference; verdicts being frequently set aside as having no evidence whatever to support them.

3. The undermining of the confidence of the community in the judges themselves. This may happen from several causes.

(a) If the judges endeavor faithfully to give to corporate rights the same protection which is given to individuals, the community from which jurors are chosen, and whose members will be likely to sympathize in the views and feelings of the jury, may come to look upon the judges as the champions and defenders of monopoly and oppression, and to distrust them accordingly.

(b) The judges themselves, if they believe they are acting in the correction of prejudiced and unfair conduct on the part of jurors, are liable unconsciously to go to the other extreme, and to invade the province of the jury by setting aside verdicts as unwarranted, when in truth the facts in evidence fairly presented a case for the jury to pass upon and from which a conclusion either way was admissible.

(c) The same considerations which influence the counsel to demand a jury in preference to the submission of his case to the court may sometimes tempt him during the trial to play the part so impudently played by Dr. Kenealy in the *Tichborne case*, and by such artifices as the case affords opportunity for, to endeavor to impress the jury with an idea of unfairness and partiality on the part of the judge, thereby preparing them to receive with distrust and suspicion all his rulings, and encouraging them to nullify in their own action the efforts of the judge to do justice to an unpopular party. The counsel who after an adverse ruling by the judge said to the jury, "Gentlemen, you stick by me and I'll stick by you, and we'll beat the court yet," was only one of a class, though few who adopt his policy so plainly and publicly announce their reliance.

And who will respect either the court or the bar if thus they publicly show that they do not respect each other?

(d) An elective judiciary is also exposed to the suspicion of yielding to popular sentiments and prejudices in the same cases in which jurors are likely to be improperly swayed. Their positions are conferred by the public voice and held at the popular will; and the judge who, while honestly administering the law, endeavors faithfully to maintain the privileges and prerogatives of the jury, may be suspected of courting popularity at the expense of unpopular litigants. In this way the American method of selecting judges is brought into disrepute, and the confidence of the people in their legal tribunals is further weakened, without presenting any reasonable prospect that the distrust which is cultivated can lead to any change in the method in which judges are chosen.

These matters are manifestly very serious, and the mere mention of them is sufficient to bring to the mind something of the difference in jury trial as it exists in some of the American states, under judges stripped in great measure of their common-law power of control, and jury trial as it has been preserved in Great Britain, with juries held by the judge in strict subordination to the law. The system may still deserve our respect and attachment, but we must take it as it is to us and not as it was to our ancestors.

We think also that the disputed border line between the cases in which parties are and those in which they are not entitled to jury trial, has of late been growing more and more indistinct and doubtful. There are cases as to which the courts have never been able to agree whether they ranged themselves on one side or the other of the division line. Cases involving the right to a public or corporate office are of this description. Where the constitution is silent regarding the method of trying this right, the different states have made different provisions, some naming an administrative body to which disputed elections should be referred, some providing for jury trial, and some leaving such cases to be determined according to the rules of the common law. In the cases last mentioned it is generally assumed that jury trial is matter of constitutional right. It has been so held in Alabama, New York and Louisiana: *State v. Burnett*, 2 Ala. 140; *People v. Albany, &c., Railroad Co.*, 57 N. Y. 361; *State v. Head*, 22 La. Ann. 54; and a like opinion has been intimated in Michigan without authoritative decision: *People v. Ciott*, 16 Mich. 283, 309, per CHRISTIANCY, J. See *People v.*

Doesburg, 16 Mich. 133. But in Pennsylvania this conclusion is disputed. The court in the opinion place much stress upon a long practical construction of the constitution, but advancing beyond this they assert the principle that "it is not in the act of organization of the state, nor in the perpetuation of its organic succession, but in the administration of rights under the organization, that the constitution secures the right of trial by jury. The jury is the popular element in the determination of rights which need enforcement by means of the state organization; but there is a much larger popular element in our elections, the votes of all our people; and all our political practice shows that we have not considered the jury an essential means of deciding contested elections of public officers. We see nothing but inexpediency to prevent the legislature from declaring that the process of election should end with the general return, and that that should be conclusive evidence of the title to office or commission. But they have wisely chosen not to do so, and have appointed the court to finish the process, if the general return be contested, by a proper review of the work of the election officers. And as they have not required that the court should have the aid of a jury for this part of the process, any more than for any previous part, no such aid can be demanded of right by either party, nor is allowable." *Ewing v. Filley*, 43 Penna. St. 384, 390, per LOWRIE, C. J. See *Commonwealth v. Baxter*, 35 Id. 263.

The same learned court has nevertheless held that when the question is one of the forfeiture of an office into which the claimant has been inducted, jury trial is of right. When he has once been vested with the office, he has been clothed with a right, and this cannot be taken from him on the ground of forfeiture, except upon a "legal proceeding before a competent court, where the party has his day in court, and a due jury trial according to the course of the common law:" *Commonwealth v. Allen*, 70 Penna. St. 465, 472. The office in question was that of councilman in the city of Philadelphia. (Compare *Commonwealth v. Leech*, 44 Penna. St. 332; *State v. Johnson*, 26 Ark. 281; *Wammack v. Holloway*, 2 Ala. 31.) This distinction between a claim to an office and a right in an office has not been made prominent in other states. There can be no doubt, we suppose, that a dispute concerning an office presents a case at law; the courts of equity having always refused to interfere in election cases—disclaiming all right to do so: *Mozeley v.*

Alston, 1 Phil. Ch. 790; *Tappan v. Gray*, 9 Paige 506; *Mickles v. Rochester City Bank*, 11 Id. 118; *Hartt v. Harvey*, 32 Barb. 55; *Doremus v. Dutch Church*, 2 Green (N. J.) Ch. 332; *Updegraff v. Crans*, 47 Penna. St. 103; *Dickey v. Reed*, 78 Ill. 261, and cases cited.

In equity cases properly so called, it is well settled that a jury is not a matter of right, though in its discretion the court may cause issues to be framed for trial by jury, or direct a suit to be brought at law.¹ In a few of the states contested facts are triable by jury either by the provisions of their constitution as construed by the courts or pursuant to express statutory provisions.²

¹ For convenience of reference, a few of the cases on the subject are referred to; these being but a small portion of the whole number: *Dale v. Roosevelt*, 6 Johns. Ch. 255; *Colie v. Tift*, 47 N. Y. 119; *Brinkley v. Brinkley*, 56 Id. 192; *Farmers', &c., Bank v. Joslyn*, 37 Id. 353; *Baker v. Williamson*, 2 Penna. St. 116; *Scheetz's Appeal*, 35 Id. 88; *Phillips's Appeal*, 68 Id. 130; *Ward v. Hill*, 4 Gray 593; *Crittenden v. Field*, 8 Id. 626; *Black v. Lamb*, 12 N. J. Eq. 113; *Hildreth v. Schillenger*, 10 Id. 196; *Trenton Banking Co. v. Woodruff*, 2 Id. 117; *Nice v. Purcell*, 1 Hen. & M. 372; *Marshall v. Thompson*, 2 Munf. 412; *Grigsby v. Weaver*, 5 Leigh 197; *Isler v. Grove*, 8 Gratt. 257; *Fornhill v. Murray*, 1 Bland 479; *Williamson v. Montgomery*, 40 Md. 373; *Waters v. Comly*, 3 Harr. 117; *Lea v. Beatty*, 8 Dana 207; *Kernsely v. Kennedy*, 2 Ala. 571; *Atwood v. Smith*, 11 Id. 894; *McGowen v. Jones*, R. M. Charl. 184; *Iler v. Roath*, 4 Miss. 276; *Fry v. Ford*, 8 Rich. Eq. 349; *Smith v. Croom*, 7 Fla. 180; *Randolph v. Adams*, 2 W. Va. 519; *Carlisle v. Foster*, 10 Ohio N. S. 198; *Cahoon v. Levy*, 5 Cal. 294; *Morris v. Morris*, 28 Mo. 114; *Weil v. Hume*, 49 Id. 158; *White v. Hampton*, 10 Iowa 238; *State v. Orwig*, 25 Id. 280; *Ray v. Doughty*, 4 Blackf. 115; *Lapreese v. Falls*, 7 Ind. 692; *Russell v. Paine*, 45 Ill. 350; *Dowden v. Wilson*, 71 Id. 485; *Lake v. Tolles*, 8 Nev. 285; *Massie v. Watts*, 6 Cranch 148; *Harding v. Harding*, 11 Wheat. 103.

² The provision in the New Hampshire constitution which has been held to give the right was as follows: "In all controversies concerning property, and in all suits between two or more persons, except in cases where it has been heretofore used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless in cases arising on the high seas, and such as relate to mariners' wages, the legislature shall think it necessary hereafter to alter it." In *Marston v. Brackett*, 9 N. H. 336, 349, the bill was filed to set aside a mortgage for fraud, and the court say, "Upon the motion for a trial by jury we are of the opinion that a defendant in chancery has a right by the constitution to have matters of fact alleged in the bill and denied by the answer tried by a jury, if they are material to the decision of the cause and the application is seasonably made." And see *Hoitt v. Burleigh*, 18 N. H. 389. The constitution of Texas gives the right to a jury trial in equity cases in very explicit terms. See *Faulk v. Faulk*, 23 Texas 653. As to North Carolina, see *Taylor v. Person*, 1 Hawks 298; *Andrews v. Prichett*, 66 N. C. 387. In Georgia all questions of fact in equity cases are sent to a jury; *Mounce v. Byars*, 11 Geo. 180; *McDougald v. Dougherty*, 11 Id. 570; *Brown v. Burke*, 22 Id. 574.

To those accustomed to a distinct law and equity jurisdiction some confusion is necessarily brought by the doing away of all distinctions, not only in the forum, but in the forms of procedure. But as matters of constitutional right cannot depend upon forms of legislative prescription, it is clear that wherever the ancient trial by jury is preserved, it must exist in the cases in which it was formerly allowable; and if these were classified according to the old distinctions between legal and equitable jurisdiction, the distinctions themselves must determine the right. It thus continues as necessary as ever to keep the distinctions in view. This is made plain by the decisions in Pennsylvania; the nature of the right in dispute and the relief sought being referred to as tests of the right to jury trial, and not any form of proceeding. An ejectment cannot be tried in equity upon bill and without a jury, by merely giving it the semblance of an equity suit, and praying to have the adverse claimant enjoined from denying or resisting the complainant's claim and the exercise thereof.¹ Boundary disputes are not to be transferred to equity through a mere assumption of equitable forms, unless some equity is superinduced by the acts of the parties: *Norris's Appeal*, 64 Penna. St. 275; *Tillmes v. Marsh*, 67 Id. 507.

In the cases referred to in the note, and in the still more recent

¹ " ' Trial by jury shall be as heretofore, and the right thereof remain inviolable.' What can this mean but that the right of having controverted questions of fact in common-law cases decided by a jury should be beyond the reach of any department of the government, whether it be the legislative, the executive or the judiciary? This was the right which had always been enjoyed before, and if the constitutional provisions were not intended to protect that in all its length and breadth, they can mean nothing. It is true the legislature are authorized to vest in the courts such powers beyond those enumerated, to grant relief *in equity*, as shall be found necessary (art. 5, § 6), but this must be understood as referring to powers in equity cases; in that class of cases of which chancery had jurisdiction. Such an understanding is necessary to make the different parts of the constitution consistent with each other, and to give effect to all. It cannot mean that the legislature may confer upon the Supreme Court and the Courts of Common Pleas, the power of trying, according to the Courts of Chancery, any question which has always been triable according to the course of law by a jury. If it can, then an ejectment founded solely on legal title, an action of debt on bond, or a replevin, or an action of trespass, may be sent into chancery, all contested facts in it be decided by the judge, and the intervention of a jury be unknown. Then what has become of the constitutional right of the citizen? Such a doctrine would startle the people of this Commonwealth, and justly, for it would deprive them of one of their most valued privileges." STROUD, J., in *North Penna. Coal Co. v. Snowden*, 42 Penna. St. 488, 492.

case of *Haines's Appeal*, 73 Penna. St. 169 (and see *Haines v. Levin*, 51 Id. 412), the authority of the legislature to give to a tribunal acting without a jury the power to determine legal rights where no equitable ground of relief appears, is most emphatically denied. In Michigan the same rule has been declared in a case where by statute it was attempted to substitute a bill in equity for an action of ejectment: *Tabor v. Cook*, 15 Mich. 322. A like general rule is declared in North Carolina: *Andrews v. Prichett*, 66 N. C. 387. In New Hampshire it is held that proceedings to assess damages for the taking of property for the public use need not be by jury, because they were not so when the constitution was adopted: *Backus v. Lebanon*, 11 N. H. 19 (see *Cocheco Co. v. Strafford*, 51 Id. 455); but in Indiana they must be because that was the previous mode: *Lake Erie, &c., Railroad Co. v. Heath*, 9 Ind. 558. In Wisconsin, the legal and the equitable causes of action upon a mortgage and the obligation which it secures may be united, because such was the practice before the adoption of the constitution, in that state as well as others: *Stilwell v. Kellogg*, 14 Wis. 461. And in the same state there may be a compulsory reference of a case involving long accounts, though one issue in the case is upon the question of the release and discharge of the defendants upon an official bond: *Supervisors of Dane v. Dunning*, 20 Wis. 210 (compare *King v. Hopkins*, 57 N. H. 334). In Ohio, it is held that a party charged under the statute in probate proceedings with concealing or embezzling the effects of the deceased, cannot, if he disputes the charge, have judgment rendered against him without jury trial: *Howell v. Fry*, 19 Ohio N. S. 556. But in the same state, though the plaintiff's cause of action may be triable by jury, this fact will not prevent an equitable cause of action, set up by answer, from being tried by the court, nor preclude the court from disposing by its decree of the whole merits of the controversy: *Buckner v. Mear*, 26 Ohio N. S. 514.

The right of jury trial cannot be indirectly taken away, by enlarging the jurisdiction of inferior courts which proceed without jury: *Thomas v. Bibb*, 44 Ala. 721 (compare *Guile v. Brown*, 38 Conn. 237). In divorce cases, whatever may be the forum or the forms of proceeding, a jury is not a matter of constitutional right unless given by the constitution in express terms: *Leffel v. Leffel*, 35 Ind. 76; *Bigelow v. Bigelow*, 120 Mass. 320.

The case of receiverships is deserving of special attention in this connection. A receiver is an officer of the court, usually appointed for some temporary purpose, such as to take possession of partnership or corporate property, or of a disputed fund, and hold the same while the equities of claimants are being adjusted. To preserve the property and keep its value unimpaired, it may sometimes be necessary to keep an existing business in operation pending the adjustment of rights; and in partnership and some other cases, this may be the only method of preserving the good-will of a business which has become valuable. Meantime the possession of the property by the receiver is regarded as the possession of the court which has appointed him; he retains, manages and protects it that the court may in due time make the proper disposition of it; and the court will not suffer this possession to be disturbed without its permission: *Peale v. Phipps*, 14 How. 368; *In re Colvin*, 3 Md. Ch. Dec. 278; *Ellicott v. Warford*, 4 Md. 80; *Field v. Jones*, 11 Geo. 413; *DeGroot v. Jay*, 30 Barb. 483; *Ohio, &c., Railroad Co. v. Davis*, 23 Ind. 553.

Lord ELDON warned a solicitor that he would proceed against the receiver in an ejectment suit, without the leave of the court, at his peril: *Angel v. Smith*, 9 Ves. 335. See *Beverley v. Brooke*, 4 Gratt. 211.¹ And some cases have gone so far as to say that it is a contempt of court to bring suit against a receiver for the property in his custody, or for anything done by him as receiver, without leave obtained: *Taylor v. Baldwin*, 14. Abb. Pr. 166. (See *Riggs v. Whitney*, 15 Id. 388; *DeGroot v. Jay*, 30 Barb. 483; *Miller v. Loch*, 64 Id. 484; *O'Mahoney v. Belmont*, 62 N. Y. 133; *Beverley v. Brooke*, 4 Gratt. 211; *Thompson v. Scott* (U. S. Circuit Court, Iowa), 3 Central Law Journal 737.)

This doctrine strikes us as unnecessary to the receiver's protection, and unsound. Of course if suit has been enjoined, there is a clear contempt of court in bringing it, but if not enjoined, we should say that no one was bound to take notice of the official character of the receiver in bringing suit against him. It is enough that he has a cause of action against the individual; and if the defendant desires the protection of the court which has appointed him, he must apply for it. The failure to obtain leave to sue in a court of

¹ A suit brought without leave would be enjoined on application of the receiver: *Vermont & Canada Railroad Co. v. Vermont Central Railroad Co.*, 46 Vt. 792; *High on Receivers*, §§ 140, 256, and cases cited.

law could, we should suppose, be no defence in that court; still less could it be a contempt of the Court of Chancery. The doctrine is clearly and, it seems to us, correctly laid down in *Blumenthal v. Brainerd*, 38 Verm. 403, 407, where it is held that while the Court of Chancery will protect a person acting under its process or authority against suits at law, and will compel parties to apply to that court for relief, yet that this protection is accorded by the court to its officers only on their own application, and is granted as a matter of discretion. The plaintiff is under no obligation to assume that the protection will be applied for, or that if applied for it will be accorded. The like doctrine is declared by the Supreme Court of Iowa in *Allen v. Central Railroad Co.*, Western Jurist for June 1876, 3 Central Law Journal 434. (And see *Vermont & Canada Railroad Co. v. Vermont Central Railroad Co.*, 46 Verm. 792, 799.) Leave is given in suitable cases when application therefor is made,¹ but the judgment when obtained is allowed to charge the defendant in his representative capacity only, not personally: *Meara's Adm. v. Holbrook*, 20 Ohio N. S. 137; *Cardot v. Barney*, 63 N. Y. 281; *Camp v. Barney*, 6 T. C. (N. Y. S. C.) 622, s. c. 4 Hun 373; *Davenport v. Receivers, &c.*, 2 Woods 519. (See *Commonwealth v. Runk*, 26 Penna. St. 235; *Klein v. Jewett*, 26 N. J. Eq. 474.) It is obvious that if leave must be asked for it may be refused as well as granted: *Henderson v. Walker*, 55 Geo. 481;² and it may follow that in the innumerable cases in which disputes will arise concerning the right to property in the receiver's hands, or in which personal injuries may be sustained through the management of the business by the receiver, the party claiming to be injured by the receiver's act or default will be without any remedy whatever according to the course of the common law, unless the Court of Chancery in its discretion shall see fit to accord it. Whether actions could of right be brought against the receiver upon contracts made by him as such is perhaps not so clear, though it is assumed in a leading case that even such an action would be one that the Court of

¹ As in *Meara's Adm'r v. Holbrook*, 20 Ohio N. S. 137. This was a statutory action, allowed to be brought against the receiver of a railroad company for the negligent killing of the plaintiff's intestate through the negligence of the receiver's servant. And see *Ames v. Trustees, &c.*, 20 Beav. 332; *Noe v. Gibson*, 7 Paige 513; *Skinner v. Maxwell*, 68 N. C. 400.

² Leave has often been denied. See 3 Central Law Journal 427.

Chancery might in its discretion restrain : *Blumenthal v. Brainerd*, 38 Verm. 403.¹

In order that we may appreciate how extensively the doctrines referred to may encroach on the constitutional right of trial by jury, it is only necessary to call attention to the fact that at this time several of the most important railroad lines in the country are in the hands of receivers. Numerous short lines are also in the same condition, and in some of the states it would almost seem that the chief business of the Federal courts had come to be the supervision and management of railways. The state courts also have some part in the same business. Nor have the roads been placed by the courts in the hands of receivers for any of the temporary purposes for which receivers are usually appointed ; they have been placed there in many cases for permanent management and operation. The receivership is not a matter ancillary to the settlement of rights and adjustment of equities in a pending suit, but the suit is brought and left pending as a necessary proceeding in transferring the management of a road to new hands, and the suit becomes an incident to the receivership, not the receivership to the suit. At this time the larger portion of all the railroads in the country are in condition which would justify the Court of Chancery, in accordance with its precedents, in placing them in the hands of receivers ; for they are defaulters on their bonds, and presumptively the interests of the creditors are superior to those of the stockholders, as certainly their equities are. It is therefore apparent that the question whether these roads shall pass into the hands of receivers, is only a question of what, in the minds of creditors, is most likely to protect and advance their interests ; according to the rules governing equity jurisdiction they are entitled to receivers if they apply for them ; and if in their opinion the advantages of that course will more than countervail the disadvantages, the demand for the appointment is likely to be made.

Now it is an advantage of a very startling and important character if, by submitting a road and its workings to the control of a court of chancery, and putting it in possession of an appointee of that court, selected by those principally interested in the road, the

¹ In this case suit against the receiver of a railroad on a contract for the carriage of property, was sustained ; no application having been made to the Court of Chancery to stay it. And see *Paige v. Smith*, 99 Mass. 395. Of course a receiver can be called to account only in the court by which he was appointed : *Conkling v. Butler*, 4 Bissell 22.

right to jury trial for all the numerous wrongs and injuries, real or pretended, which may arise or be alleged in the conduct and management of railway business, can be superseded, or at least put under the restraint of the Court of Chancery. The advantage is too great to be overlooked when the question of a receivership is under consideration; and we are perfectly safe in saying that it cannot fail in many cases to have a controlling influence. Why should the parties interested in a railway consent that a tribunal which they assume will generally be prejudiced against them, may pass upon the claims asserted against them, or their trustee, arising out of the management of their property, when it is entirely in their power to transfer all controversies to a tribunal which in their minds is subject to no such suspicions? Especially when, according to the common belief of persons interested in railroad property, a large proportion of the claims made will be unfounded, and in the case of others a prejudiced tribunal would have the power and would be likely to exercise it, of awarding excessive damages?

The ancient province of jury trial is, therefore, encroached upon largely, not only through the vast increase in the number and importance of the cases of receiverships, but also through the giving of a permanent character to an office usually temporary. It may also be questioned whether the extent of the protection accorded to receivers has not insensibly been enlarged so as to embrace cases not within the original intent. It is obviously one thing to protect the possession of the receiver and enjoin suits for the property in his hands, and quite a different thing to shield him against the consequences of his own trespasses, negligences, or refusals to observe his contracts. The questionable nature of the protection is presented in a very striking light when the complaint is one of personal fault on the part of the receiver himself, and not of technical responsibility for the fault of others. Conceding that the receiver's possession is not to be disturbed or endangered without the leave of the court, and that the doctrine *respondeat superior* ought not to be applied to him as a ground of personal liability where personal fault is not imputed, does it follow that where personally he is in fault, and a common-law right of action for this fault has arisen, the Court of Chancery can, consistent with any acknowledged principle of constitutional right, plant itself before its receiver, and preclude the party injured from having his case heard in the usual way? If one knowingly puts an incompetent servant in possession of his car-

riage and I am run over in consequence, of what importance can it be in a legal or constitutional point of view that he holds the carriage in some fiduciary capacity, and not as owner or hirer? We barely allude to this question here, as one that hitherto has been passed over *sub silentio*, but which ought, one would suppose, to receive careful and thorough consideration if jury trial is to be preserved. It is not a desirable feature in any legal system, that of two persons injured alike and under like circumstances, one should be entitled to a popular remedy, sanctioned by time and solemnly guarantied by the constitution, while the other is left to petition for redress to a judge who will grant or refuse it in his discretion.¹

But it is not alone that civil rights of action are taken from jury cognisance by means of receiverships. The Courts of Chancery are enabled to, and do, take notice of some offences against the general laws, and punish them. A riot on the New York Central Railroad which interferes with the running of its trains is only a riot; but on the Erie Railroad it is a contempt of the Court of Chancery. In the one case only a jury can deal with it, and twelve men must agree concerning its legal bearings; in the other a single judge may administer summary punishment. This may be a useful power, but it is an enormous power, and it is not surrounded by the usual securities which protect individual liberty; and we may be reasonably certain that its frequent exercise will lead to new consideration of the logical foundations of jury trial, and perhaps also of the limitations to the power to punish as judicial contempts acts not committed in the presence of the court. Rights and protections

¹ In *State v. Vermont Central Railroad Co.*, 30 Vt. 108, it is held that a railroad company is not liable to indictment for a nuisance in the obstruction of a highway by trains while the road is operated by a receiver; but it is assumed that the receiver would be liable. In *Ohio & Mississippi Railroad Co. v. Fitch*, 20 Ind. 498, a railroad company was held responsible in a suit to recover value of cattle killed by its machinery, though the road was then operated by a receiver. *Sprague v. Smith*, 29 Vt. 421, and *Lamphear v. Buckingham*, 33 Conn. 237, were cases of suits against trustees of bondholders operating railroads, and who were held liable as owners, but the position of these trustees under mortgage is obviously quite distinct from that of receivers. In *Meara's Adm'r v. Holbrook*, 20 Ohio N. S. 137, the receiver was not charged with personal negligence. In *Cardot v. Barney*, 63 N. Y. 281, the action for causing the death of plaintiff's testator was held not maintainable. Defendant was assignee in bankruptcy of a railroad, and stress is laid upon the fact that the negligence complained of was not his own, but that of servants whose assistance he must necessarily have had in the discharge of his official trust.

ought to be the same everywhere; the property which the receiver manages for its owners is no more sacred than that which the owners manage in person; it ought to have the same protection and no more.

It has not been our purpose in this paper to call in question the correctness of any recent judicial action, but rather to direct attention to some very noticeable and important facts. One of the most remarkable of these is, and one deserving of special attention and reflection, that since the late riots great gratification has been expressed in various publications, that the courts were enabled in certain cases to bring the rioters summarily before them and to inflict speedy and effectual punishment without delay or the opportunity to appeal to a popular tribunal. This gratification has had no regard to the fact that the property was peculiarly situated; that was only a circumstance which was thought fortunately to afford the opportunity for the summary remedy; and the latter has been treated as a thing good in itself. Now the power of the courts to punish for contempts is exceedingly vague and indeterminate; its limits are uncertain; the constitutional protections which surround jury trial do not apply to it, and it is subject to few statutory regulations; for the most part the power is in the breast of a single judge without fixed rule or landmark limiting his discretion. But manifestly if a discretionary authority like this is good and useful in some cases it is good in all other similar cases; and its exercise ought not to depend on a circumstance that in no manner affects the degree of offence or the just rights of the accused to a deliberate and careful trial. The logical conclusion is that it would be better for the state that some tribunal—perhaps a court, perhaps a ruler unrestrained by constitution or statute—should have discretionary power to deal summarily with all breaches of order as contempts of authority, and to punish them without the hindrance which the necessity of associating himself with others for the trial might cause. The expressions referred to are distinct admissions of belief that the restraints we impose on power are worse than useless, and they exhibit us in the aspect of abhorring unbridled authority in theory while we applaud it in practice.¹

¹ Mr. Chief Justice CARTER, of the District of Columbia, in the case of *Kilbourne*, decided not long ago that where an act constituting a legislative contempt has by statute been made a misdemeanor it can no longer be punished as a contempt, since that would be to put the party twice in jeopardy. We should say that this