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The Inefficiency of the American Jury

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THE INEFFICIENCY OF THE AMERICAN JURY.

NOTHING else in Anglo Saxon law has ever made such an appeal to the popular imagination as the common law jury. For centuries it has been the subject of the most extravagant panegyrics. It has been considered the bulwark of liberty, the safeguard of life and property. Everything connected with it has enjoyed its share of praise. Even the number twelve has been seriously referred to as evidence of its sacred character, for Lord Coke says of the jury: "It seemeth to me that the law justly delighteth herself in the number of twelve jurors for the matter of fact, for is that number not much suggested in Holy Writ, as twelve apostles, twelve stones, twelve tribes, etc."

But great as has been the reverence for the jury system in England, its native land, we in the United States have placed it on a still higher and more enduring pedestal, for by means of our constitutions, state and national, we have made it an inalienable heritage of the people themselves.

Perhaps it is a natural consequence of this almost superstitious reverence for the jury as an institution, that its real function and true purposes have often been lost sight of. Excessive zeal for its protection has seriously interfered with its practical usefulness. It has tended to become a fetish, and has often needed nothing so much as to be saved from its friends.

What is proposed in the present article is to show that in attempting to preserve the independence of the jury in its exclusive jurisdiction over questions of fact, the people and the courts in most American jurisdictions have departed from the common law practice and have introduced a principle calculated to undermine the very institution which they wish to strengthen. That is to say, through the rules prohibiting judges from commenting on the weight of the evidence, juries tend to become irresponsible, verdicts tend to become matters of chance, and the intricacy of procedure, with its cost, delay and liability to error, has increased so much as to threaten popular respect for courts of justice.

The distinguishing feature of the jury as it developed in England and as it came to us, was the restriction of its jurisdiction to questions of fact. FORSYTH, in his careful examination of the origin of the English jury, presents very convincing evidence that such a jury was not known in Anglo-Saxon times and that it did not find its prototype in the early juries of the continent. For, as he points out, the Scandanavian, German and Anglo-Saxon analogues

were tribunals charged with the duty of determining both the law and the facts of the case. Probably in a large majority of the cases which arose in tribal days the law was so simple and the legal consequence following from the facts so definite and clear that there was no need for a separation of the two, but nevertheless the jurors not only found the facts but also determined and applied the law, and were thus both judge and jury combined.¹

The weakness of such a tribunal lies in its want of technical knowledge. Men temporarily called from the ordinary affairs of life, untrained in the law, are incapable of performing the functions of judges in any but the most primitive communities. Hence the popularly constituted continental juries passed away and the judicial power naturally became lodged in courts with a permanent personnel of trained lawyers.

But it has been asserted by the same learned writer that in England, on the contrary, the limited jurisdiction of the juries preserved them from such a fate, for while laws always grow more intricate with the development of social institutions, facts do not greatly change their nature, and twelve casual citizens may be said to be as well qualified to pass upon an issue of fact in the reign of George V as were twelve such citizens in the reign of Edward III. It is doubtful, however, whether this is strictly true. Life was simple when the jury system was young, but with the steadily growing complexity of society and social practices, the facts which enter into legal controversies have become much more complex. Perhaps it may be said that the growth of education has kept the average jurymen abreast of the times in this regard, and the modern facts are no more difficult for the modern jury than were the ancient facts for the juries of olden times. But there is no necessary relation between mental power and the quantity of accumulated information, and the widespread study of books has had only the smallest influence in improving the quality of the human mind.

However, if it be conceded that the jury is as competent today as it was five centuries ago, that would not be sufficient to fully justify its persistence. The crude institutions of primitive society cannot expect to survive amid the increasing exactions of more refined and more critical times unless they can meet the requirements. More efficiency is the demand of each successive generation, and this has usually been found through specialization. To get the best results in any line one must employ those who have had special training in it. Even so conservative a profession as the law has not

¹ Forsyth: *History of Trial by Jury*.

escaped the universal social struggle toward specialized efficiency. Why, then, has not the cumbersome common law jury, with its tedious procedure, its loose organization, its irresponsible personnel, its blundering methods, and its unsatisfactory results, been long since discarded, in favor of an expert and well trained agency for sifting evidence and finding facts? Why did not the judge, with his better training, broader experience and more efficient methods take over the duties of the jury?

In considering this question it is to be noted, in the first place, that the jury has always been considered not only a finder of facts, but a bulwark against the arbitrary power of judges. The English people feared the courts. They were willing to put up with costs, delays and unsatisfactory service if thereby they could check the encroachments of judicial authority.

BENTHAM gives a curious emphasis to this idea in his definition of a jury. "Taken in its most extensive sense", he says, "a jury may be defined as an occasional body of non-professional and non-official judges, employed to constitute and apply a check to the power of a professional or official judge, or body of judges".² In this view the jury is a social, not merely a legal institution. It is a palladium of popular liberties. For this purpose it must be of the people, bone of their bone and flesh of their flesh. It must be fearless and defiant of official despotism. If it is that, it serves its great social and political end. If the rights of a free people, seriously threatened by the tyranny of the king's judges, can be safeguarded by the institution of a jury, complaints of its inefficiency will fall on deaf ears.

In the volume above referred to, BENTHAM makes this view of the function of the jury still more striking by an analysis of the distinction between civil and criminal trials. "The beneficial effects of jury-trial are produced in a different shape" he says, "in the civil branch and in the penal. In the civil branch, it is by applying a bridle to arbitrary power in the hands of the judge; in the penal branch, as we have seen, contributing to infuse weakness into the body of the law". Such weakness is necessary in order that the rights of those affected by the laws should not be sacrificed in the interests of those who make them. By the vote of a single juror the hand of the law, when it is deemed to operate oppressively, may be paralysed. Individual security is thus exalted above governmental power, and it may well be that the jury system has in this way perpetuated

² Principles of Judicial Procedure, Chap. XXIII.

the ideals of personal liberty which have now become recognized as the most illustrious product of English political and legal struggles.

But times have changed, and the government itself is now under the absolute control of the people. The judges, if appointed, are selected by the agents of the people, and if elected are selected by the people directly. The need for the jury as a political weapon of defense has been steadily diminishing for a hundred years, until now the jury must find some other justification for its continuance.

We are thus brought to a consideration of the second and sole remaining purpose served by the petit jury, namely, the trial of issues of fact. If this is now its only considerable function, how can it survive the weakness which is certain to attend the performance of difficult duties by untrained and irresponsible persons?

With its characteristic resourcefulness the common law provided a corrective. The judges undertook to give the jury the benefit of their experience and skill by advising them in difficult cases respecting the weight and effect of the evidence. This never went to the length of obligatory instructions on the facts. That would have killed the jury as an institution. But the judges did not hesitate to tell the jury what they believed the evidence had shown, and the jury did not resent it, for it was advice, not a command, and the jury were always expressly informed that if it did not appeal to them as sound they were at liberty to disregard it.

So universally was the propriety and expediency of this doctrine recognized in England that few cases are to be found where it has been questioned. But whenever the point has been raised the rule as stated has been unqualifiedly affirmed. Thus in the Court of Exchequer, PARKE, B., said, in *Taylor v. Ashton*,³ which was an action for deceit, "The learned judge told the jury * * * * * that he did not think what was proved amounted to fraud * * * * * but this was no matter of law, it was a mere observation on the fact * * * * * And accordingly it appears the learned judge said, 'After all, it is a question for you to decide, not for me? * * * * * But looking at the mode in which that was left to the jury, and considering that the learned judge was not discussing it as a matter of law * * * * * we cannot say that any wrong observation on a matter of fact, in which we could not concur, is a ground for granting a new trial, if it was left as a question of fact for the jury.'"

In the Common Pleas, in *Davidson v. Stanley*,⁴ TINDAL, C. J., said: "The whole objection amounts to this,—that the opinion of the judge

³ (1843) 11 M. & W. 401.

⁴ (1841) 2 Man. & Gr. 721.

was delivered in favor of the defendant. I think it is no objection that a judge lets the jury know the impression which the evidence has made upon his own mind." And COLTMAN, J., said: "The learned judge seems to have made strong observations; but no stronger than he was justified in making. A large mass of evidence had been given which, though of little weight itself, was of such a nature as might mislead the jury."

In the King's Bench, in *Salarte v. Melville*,⁵ Lord TENTERDEN, C. J., said: "We are all agreed, however, that notwithstanding I did intimate to the jury my opinion upon the subject, yet as I left it to them to exercise their own discretion, and to draw their own conclusion from the evidence, we ought not to disturb this verdict."

In Canada the same rule is liberally enforced. In *Lowenburg, Harris & Co. v. Wooley*,⁶ complaint was made that the judge had taken the decision of a question of fact away from the jury, but the Chief Justice speaking for the Supreme Court of Canada said, "No doubt the learned judge, in his long and exhaustive charge, did strongly comment on the evidence, but that he has a perfect right to do, and I must add, considering the nature of the case and of the evidence adduced, I should have been surprised if the learned judge had not spoken forcibly."

The manifest advantages of such a rule of practice have frequently been pointed out. Thus, so eminent a writer as judge Pitt TAYLOR, in his work on EVIDENCE, says that "it may well be doubted whether, in the great majority of instances, it would not promote the real interests of justice, if the judge were temperately to state to the jury what opinions he has formed respecting the merits of the case, and the mode by which he had arrived at his conclusions. The jury would still have the undisputed power of deciding the question as they thought fit, but they would have the advantage of being advised by a man no more liable than themselves to prejudice or partiality, whose long experience in courts of justice must of necessity have rendered him far more competent than they can be to unravel the tangled threads of conflicting testimony."⁷

FORSYTH, in defending the jury as an institution in civil cases against the criticism that many wrong verdicts result from the ignorance and prejudice of jurymen, doubts the frequency of such miscarriages of justice because of the double safeguard of judicial counsel and advice and the granting of new trials. "The presiding

⁵ (1827) 7 Barn. & Cress. 430.

⁶ (1895) 25 Can. S. C. 51.

⁷ 1 Taylor on Evidence (8th Eng. Ed.) § 25.

judge," he says, "has, by the tendency and bias of the remarks which he makes in summing up, the means of influencing and guiding them to a right result; and they have generally the good sense to avail themselves of all the help afforded by his perspicacity."⁸

So much for the development of the English jury. Turning to the United States we find a curious reaction from the sensible and practical views outlined above. At the time when the American Colonies separated themselves from England, the rights of the people were by no means secure against the encroachments of government. The jury was still regarded as an indispensable political weapon, and when the new government was set up here, it was inevitable that a constitutional bill of rights should be adopted securing forever the right of trial by jury. This was no more than a reaffirmance of the constitutional rights enjoyed by Englishmen since Magna Charta, and was not inconsistent with the continuance of that aid and advice which English juries were in the habit of receiving from the judges.

But the American people went farther. Perhaps their experience as inhabitants of colonies, whose remoteness served as a cloak for tyranny and oppression, made them more sensitive to the possibilities lurking in the judicial prerogative. At any rate, they conceived the idea of prohibiting judges from advising juries in regard to the facts. As early as the year 1796 this novel doctrine found its way into the Constitution of Tennessee, in the following language,—“The judges of the superior and inferior courts shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.”⁹ In 1822 a similar provision was enacted by the legislature of Mississippi, which was repealed in 1830, but reappeared again in an even more drastic form in the statutes of 1860.¹⁰ In 1836 Arkansas introduced the Tennessee provision into its Constitution.¹¹ The next year North Carolina enacted a statute still more explicit in its prohibitory language,—“No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury.”¹²

The movement was thus indigenous to the South. It was nearly fifty years before the first Northern state, Illinois, took it up,¹³ Then

⁸ History of Trial by Jury, p. 441.

⁹ Const. of 1796, Art. 5, § 5.

¹⁰ R. C. 1822, Ch. 13, § 144; Hutchinson's Miss. Code, Ch. 61, Art. 1; R. C. 1880, § 1714.

¹¹ Const. of 1836, Art. 7, § 12.

¹² R. S. 1837, Ch. 39, § 136.

¹³ R. S. 1845, § 28, p. 417.

two more Southern states adopted it,—Georgia in 1850,¹⁴ and Texas in 1853.¹⁵ Georgia went so far as to prohibit courts from intimating opinions even in equity cases where juries were called in. During the next thirty-five years fourteen more states enacted statutes or adopted constitutional provisions embodying, in various phrases, this restriction on the power of judges. These were in Massachusetts in 1860,¹⁶ California in 1862,¹⁷ Nevada in 1864,¹⁸ Oregon in 1865,¹⁹ Colorado in 1867,²⁰ South Carolina in 1868,²¹ Maine in 1874,²² North Dakota in 1877,²³ Florida in 1877,²⁴ New Mexico in 1880,²⁵ Arizona in 1887,²⁶ South Dakota in 1887,²⁷ Indian Territory in 1889,²⁸ and Washington in 1889.²⁹ That marked the end of the movement toward legislative and constitutional restrictions on the powers of courts in charging juries.³⁰ It will be seen that, although most prevalent in the South, it was confined by no geographical lines and restricted to no single period of time. Of the twenty-one states and territories which adopted it, eleven were Southern, four belonged to the Pacific Coast group, two were in New England and four were in the Central West; and the period covered was almost a hundred years. Of the forty-nine states and territories comprising the contiguous portion of the United States, twenty-eight have never adopted such legislation.³¹

But while considerably less than half the states have enacted legislation on this subject, the courts in about half of the remaining states have by judicial decision adopted the same restriction,³² so that

¹⁴ Acts of 1850; now appears as § 4863, Code 1911.

¹⁵ Acts of 1853; now appears as § 1317, Sayles' Civ. Stat.

¹⁶ G. S., 1860, Ch. 115, § 5.

¹⁷ Proposed in 1861, ratified in 1862 as an amendment to the Const. of 1849.

¹⁸ Const. VI, § 12.

¹⁹ Acts of 1865, see Hill's L. 1887, § 200.

²⁰ R. S. 1867, Ch. 70, § 28; repealed by amendment, G. S. 1883, § 168.

²¹ Const. of 1868, Art. 4, § 26.

²² Acts of 1874, see R. S., 1903, Ch. 84, § 97.

²³ C. C. P. 1877, § 248.

²⁴ Acts of 1877, see G. S., 1906, § 1496.

²⁵ Acts of 1880, Ch. 6, § 23.

²⁶ R. S. 1887, § 775.

²⁷ C. L. 1887, § 5048.

²⁸ 25 U. S. Stat. at Large, c. 333, p. 783, extending rules of practice of Arkansas to the Indian Territory.

²⁹ Const. IV, § 16.

³⁰ While this and other general statements respecting legislation are believed to be substantially correct, they are subject to error, for different collections of statutes are so differently arranged and so differently and often so poorly indexed that it is quite possible to overlook provisions of this nature.

³¹ Compare 2 Thompson on Trials, § 2280, which states: "By statute and, in some states also by constitutional provisions, in almost every state and territory, judges are expressly forbidden to charge the jury on questions of fact."

³² Alabama: *Andrews v. State*, 159 Ala. 14.

Indiana: *Killian v. Eigenmann*, 57 Ind. 480.

the rule is now actually in force in two-thirds of the American jurisdictions. Only the federal courts and a minority of the state courts which were unaffected by statute have remained true to the common law.³³

It is hard to account for this widespread departure from the well-settled principles which have always governed the jury trial. The courts which have judicially created the doctrine, like the legislatures or the people who have enacted the statutes, doubtless did so in the belief they were preserving inviolate the right of trial by jury. But they have nowhere, so far as the writer's researches have shown, considered the question in a broad way, nor have they, in most cases, indicated an appreciation of the fact that they were announcing a doctrine unfamiliar to the common law. Without argument, without examination, without authority they have simply held that an expression of opinion of the facts by the judge invades the province of the jury, and it is therefore error. A few courts have gone farther and justified the restriction on the powers of the judge on the ground that the jury is notoriously so under the influence of the judge that any intimation of opinion on his part would be tantamount to a withdrawal of the case upon that point from the consideration of the jury.³⁴ But such a view is either unfair to juries or it points out so fatal a lack of independent judgment upon their part

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- Iowa: *State v. Philpot*, 97 Iowa, 365.
 Kansas: *Heithecker v. Fitzhugh*, 41 Kan. 50.
 Louisiana: *Riviere v. McCormick*, 14 La. Ann. 139.
 Maryland: *United Railways & Elec. Co. v. Carneal*, 110 Md. 211.
 Michigan: *McDuff v. Detroit Journal Co.*, 84 Mich. 1, departing from the earlier contrary rule stated in *Sheehan v. Barry*, 27 Mich. 217.
 Missouri: *Webb v. Baldwin*, 165 Mo. App. 240.
 Montana: *Wastil v. Montana Union Railroad Co.*, 17 Mont. 213.
 Nebraska: *Kleutsch v. Security Mut. Life Ins. Co.*, 72 Nebr. 75.
 Ohio: *Cincinnati, H. & D. Ry. Co. v. Hedgès*, 15 Ohio C. C. 254.
 Oklahoma: *Kirk v. Territory*, 10 Okla. 46.
 Virginia: *Whitelaw's Ex'r v. Whitelaw*, 83 Va. 40.
 West Virginia: *Harman & Crockett v. Maddy Bros.*, 57 W. Va. 60.
 Wisconsin: *Buyington v. Merrill*, 112 Wis. 211, departing from the earlier contrary rule state in *Ketcham v. Ebert*, 33 Wis. 611.
³³ *United States v. St. Louis, Iron Mountain & Southern Ry. v. Vickers*, 122 U. S. 360.
 Connecticut: *Banks v. Railway & Lighting Co.*, 79 Conn. 116.
 Minnesota: *Bonnès v. Felsing*, 97 Minn. 227.
 New Hampshire: *Flanders v. Colby*, 28 N. H. 34.
 New Jersey: *State v. Hummer*, 73 N. J. L. 714.
 New York: *N. Y. Firemen's Ins. Co. v. Walden*, 12 Johns. 513.
 Pennsylvania: *Leibig v. Steiner*, 94 Pa. St. 466.
 Rhode Island: *State v. Lynott*, 5 R. I. 295.
 Utah: *People v. Lee*, 2 Utah, 441.
 Vermont: *Rowell v. Fuller*, 59 Vt. 688.
³⁴ *Cronkhite v. Dickerson*, 51 Mich. 177; *McMinn v. Whelen*, 27 Cal. 300.

as to disqualify them entirely for the duty they are sworn to perform.

As long as the ultimate decision rests with the jury there can be no serious encroachment by the judge. His advice will be taken when it appears to be justified by the evidence; otherwise it will fail of effect. The jury will be quick to see and resent any attempt on the part of the judge to be unfair to either party, and the concurrence of the jury in the advice of the court will be good evidence that his advice was sound. Even so radical an antagonist of judicial usurpation as BENTHAM recognized this when he said:—"In so far as upon what he does or says depends the decision given by the jury—only in so far as what he does and says, has in their eyes the appearance of justice, can he hope to exercise any influence upon the decision they are about to pronounce."³⁵

The doctrine that a final decision on the facts from the judge alone is entirely proper and just in a so-called equity case, while the slightest intimation of the court's opinion on any part of the facts is a monstrous and fatal error in a so-called law case, is a phase of legal legerdemain which ought not to be perpetuated. There is no esoteric virtue in the chancellor which fails in the judge. Facts are facts, whether they are investigated on the law or the equity side of the court.

But aside from the obvious advantages which the jury would gain from the impartial advice of the judge based upon his experience, skill and technical training, the full recognition not only of the right but the duty of the judge to advise the jury on the facts, would produce amazing results in diminishing the costs, delays and technicalities of jury trials. Among the most striking of these advantages, the following may be named:

1. *It would reduce the time, strain and scandal in empanelling juries.* Nowhere in the English speaking world are there such exhibitions of judicial ataxia in obtaining juries as in the United States. Why should a judge sit helpless for days and weeks while lawyers wrangle and struggle over the selection of a jury? Why should the court be paralysed at the whim of contentious counsel, piling up expense on the taxpayers, congesting dockets, delaying justice, and bringing the law into disrepute? Chiefly because the jury is an irresponsible and uncontrolled subject for the lawyer's manipulation. In many cases he does not try to get an impartial jury, but a jury which he can handle. He wants jurors having prejudices which he can play upon, sympathies which he can appeal to, foibles which he

³⁵ Principles of Judicial Procedure, § 4.

can capitalize for his own profit. He investigates their personal histories, their political inclinations, their religious affiliations, their social habits. All this would tend to disappear at once if the judge were a real adviser to the jury. The appeals to passion, sympathy and prejudice, the distortion of the evidence, the confusing of the issues, the clever and insidious emphasis upon the things which should not count, would lose their potency. In the face of a clear, dispassionate and candid analysis of the merits of the case by an impartial judge, the tricks and artifices would fail; the worse would not appear the better reason; the jury, taken into the confidence of the court and treated like reasonable and self-respecting men, would feel the dignity and responsibility of their position. They would be what the law contemplates,—impartial jurors. But such a jury can be obtained without the long delay and interminable challenges. If the judge by his advice can counteract the efforts to prevent a decision on the merits, such efforts will cease. This has been the experience in England and her colonies. Juries are quickly obtained and do their duty well. Justice RIDDELL of the Supreme Court of Ontario recently said: "I have never, in thirty years' experience, seen it take more than half an hour to get a jury even in a murder case, and never but once heard a juror asked a question."³⁸

2. *It would facilitate the introduction of evidence.* The science of special pleading is usually pointed to as the climax of legal refinement, but the science of evidence pays a much greater tribute to the microscopic discrimination of the legal mind. It is an elaborate and comprehensive system for excluding evidence from the jury, based upon the fundamental idea that the jury cannot be trusted with all the facts of the case, but only with such as the courts think are not likely to mislead. Fearful that the jury will draw false conclusions or will become confused in regard to the issues submitted to it, the law devises a protective scheme which is so complex and so infinitely refined that the labors of a life time are hardly sufficient to master it. It is a labyrinth set with pitfalls at every turn. No lawyer fully understands it; no judge can accurately administer it. Errors in the admissions and exclusion of evidence are not only common but inevitable, and they bring with them appeals, reversals and re-trials. No such rules are necessary to protect the judge when he tries the facts, for he is deemed to have sufficient knowledge, judgment and experience to understand the probative force of whatever is presented to him. But the juror

³⁸ 62 University of Pennsylvania Law Review, 17, 32.

is presumed to be an easy prey to illegal influences and suggestions, and if he might have gone wrong by reason of such an error it is usually presumed that he did go wrong.

But if the case is carefully analysed for the benefit of the jury by the judge, and the force and effect of the various parts of the evidence is fully explained to the jury, and the judge suggests to them what appear to him to be proper conclusions to draw from it, is not the chance of the jury being misled practically eliminated? By a perusal of the judge's advice and suggestions, it can readily be seen whether the case in its substantial aspects was clearly laid before the jury for decision. If it was, no harm has been done, for cautions from the judge are a reasonably reliable corrective for violations of rules of evidence.

A recent American observer of court practice in England has suggested that much of the speed and efficiency with which the English courts dispatch business may be traced to the operation of this rule. In speaking of the tendency there shown to ignore many of the technical rules of evidence, he says:—"The real cause of this tolerance will be found in the fact that both sides rely on the influence of the judge to eliminate from the minds of the jury the effect of evidence wrongly introduced."³⁷

3. *It would enable the judge to exercise much more effective control over the conduct of the trial.* The prevailing American rule prohibits any remarks from the judge, as well during the prior course of the trial as during the giving of instructions, which intimate any opinion he may hold as to whether any fact has or has not been established, as to whether any piece of evidence is entitled to much or little weight, and as to whether any witness or class of witnesses is to be deemed more or less credible. Almost every ruling he is called upon to make during the trial relates directly or indirectly to the evidence. In just so far as he is an active participant in the trial he is likely, therefore, by word or act, to give the jury some inkling as to his own impressions. A word used, a suggestive phrase dropped, an inadvertent failure to properly balance his statements, even a perfectly valid reason given for a ruling, might reveal an opinion. In every sound he utters there lurks the possibility of reversible error. Is it strange, then, that the judge inclines to hold himself aloof from the contest, to sit as an umpire or moderator rather than as a participant in the proceeding, to let things take their own course as far as he can, and to throw

³⁷ Leaming: *A Philadelphia Lawyer in the London Courts*, p. 103.

the responsibility for a proper decision of the case upon the parties; the lawyers and the jury?

The "Philadelphia Lawyer", Mr. LEAMING, already quoted, points out the striking contrast between the current practice in this regard in the English and American courts. "The judges", he says, "take a larger part in trials than in most American courts—a practice which has much to commend it, and which is increasing on this side of the water. An American lawyer will say, 'I tried a case before Judge So-and-so'—an English barrister says: 'I conducted a case which Lord So-and-so tried'. The English judge restrains counsel, often examines the witnesses, and his personal influence is quite openly exerted to guide the jury and cause them to avoid absurdities and extremes. Yet, the crucial questions of fact really to be determined—of which there are usually but one or two—are left absolutely to the juries unfettered decision."⁸⁸

A similar situation, to a somewhat less marked degree, exists in our own Federal Courts, where the salutary rule of the common law is maintained in its purity, and the judge is free to give aid and advice to the jury and to take an active part in helping to make his court in fact what it is in name,—a court of justice.

4. *It would simplify the task of instructing the jury on the law;*

It is very difficult to prepare a set of instructions which will not be suggestive of matters of fact on the one hand, or be too abstract on the other. The judge must give the jury the law, but he must not intimate opinions on the facts; and yet the rules of law which he gives must be concrete and applicable to the precise facts in evidence. The court must not assume the existence of any controverted fact, must not put in doubt any uncontroverted fact, must not emphasize by special reference, nor minimize by silence, any particular facts, must not call special attention to particular witnesses, must not use ambiguous forms of grammatical expression which may or may not carry suggestive inferences as to the existence of facts. The whole doctrine of cautionary instructions is in a state of chaos because of the possible tendency of such instructions to transgress the rule we are considering.

In a recent examination in Practice in a large law school, several instructions were given which had been held fatally bad by American Supreme Courts as unwarranted inroads upon the province of the jury, and yet sixty per cent. of the students, using their utmost ingenuity, were unable to discover anything wrong with them. Probably the juries who received these instructions never even sus-

⁸⁸ Leaming: A Philadelphia Lawyer in the London Courts, p. 102.

pected the presence of the elements which caused the cases to be reversed, but there was a possibility that they might have interpreted them as reflecting upon the weight of the evidence, and to preserve the province of the jury inviolate it was deemed necessary to have the cases tried again.

But suppose the court should be permitted to really explain and elucidate the evidence for the jury's benefit. Most of these baffling rules and restrictions would at once disappear. There would still be the possibility that inadvertent phrases in the instructions might be constructed as binding charges on the law instead of mere opinions on the facts, but in the face of a sound analysis and commentary on the evidence, showing fully the problems which were presented for the jury to solve, the liability to error would be reduced to a minimum.

5. *It would reduce the frequency of resort to that expensive remedy for bad verdicts,—the New Trial.*

Some of the grounds for new trial are not based upon the conduct of the case in open court. Such are disqualification of jurors, accident or surprise, misconduct of the party or jury outside the court room, and newly discovered evidence. But others are based upon the manner in which the trial was conducted and upon the justness of the verdict as related to the evidence. Thus, the admission of proper evidence, the misconduct of counsel in improperly appealing to passion or prejudice or in bringing to the attention of the jury facts which are not proper for their consideration, excessive or insufficient verdicts, and verdicts which are against the weight of the evidence, all constitute grounds of this nature. We have already considered the salutary influence which an untrammelled court can properly exercise in correcting errors in the admission of evidence and in the conduct of counsel, without a resort to the delay, expense and annoyance of a new trial. But the same results would follow in the case of excessive or perverse verdicts.

The rule which forbids the court to comment upon the weight of the evidence is based upon a narrow view of the division of functions between court and jury. The court responds to questions of law, the jury to questions of fact. It is, therefore, no more logical, it is asserted, for the court to advise the jury on the facts than for the jury to advise the court upon the law. Accordingly, no suggestions from the court must touch upon matters of fact. But the doctrine of new trials based upon perverse verdicts sufficiently shows that the jury are not exclusive judges of the facts. Even if they are flattered to their faces by being told so, their exclusive

jurisdiction is repudiated behind their backs when their verdicts are set aside as contrary to the weight of the evidence.

"While it is the exclusive province of the jury to find the facts," says the Supreme Court of California, a state whose constitution prohibits comments on the evidence, "it is nevertheless one of the most important requirements of the trial judge to see to it that this function of the jury is intelligently and justly exercised. In this respect, while he cannot competently interfere with or control the jury in passing upon the evidence, he nevertheless exercises a very salutary supervisory power over their verdict. In the exercise of that power, he should always satisfy himself that the evidence as a whole is sufficient to sustain the verdict found, and, if in his sound judgment it is not, he should unhesitatingly say so, and set the verdict aside."³⁹ And Mr. Justice BREWER speaking for the state court upon which he formerly sat, observes that the trial court "has the same opportunity as the jury for forming a just estimate of the credence to be placed in the various witnesses, and, if it appears to him that the jury have found against the weight of evidence, it is his imperative duty to set the verdict aside."⁴⁰

In other words, the jury are not the exclusive judges of the weight of the evidence. They are exclusive judges if they decide right; but not if they decide wrong, and the court has the final decision. Of course it may be answered that the court's decision is not final, because the only effect of its action is to send the case back to another jury. But practically there would be little use in going before another jury with the same evidence, if held by the court insufficient, for the case would be shipwrecked on the same rock as before; and if the verdict is set aside as excessive, it would be a foolish lawyer who would tempt providence by asking another jury for the same amount.

If, then, the court has the power, for all practical purposes, to prevent parties from obtaining judgments upon perverse verdicts, why should it not have the power to help juries to avoid such verdicts. Why must the court sit mute, allow the verdict to be rendered without a word of warning, and then destroy it? A supervising architect does not stand silent and allow a building to go up in a manner he cannot approve, and when it is completed at much cost, order it demolished and built over from the beginning. To attempt it would be to prove himself crazy. An executive

³⁹ *People v. Knutte*, 111 Cal. 453.

⁴⁰ *Kansas Pac. Ry. Co. v. Kunkel*, 17 Kan. 172.

having the veto power on legislation, if he felt any interest in obtaining needed laws, would not refrain from all comment upon pending bills until after the legislature had completed its task and adjourned, and then veto its work and force another legislature to attack the same problem without any information as to why the veto had been exercised. To do so would be to prove himself a political ignoramus. And yet the American people, who pride themselves on their efficiency and common sense, require or permit their courts to be run on just this plan.

Many are the complaints against modern procedure, and many are the remedies proposed, but the writer believes that no single reform would have so wide-reaching and wholesome an effect in promoting the efficiency of courts and improving the quality of justice obtainable there, as a return to the sensible and effective rule of the common law permitting, and in its spirit requiring, that judges should generously aid juries in reaching just conclusions on matters of fact.

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