The Evolution of Civil Liberty and Equality?

Trial by jury of a civil action is a rarity in our Province since the Rules of Court were changed in 1938, and it does not appear to me that this latest chapter concerning the jury system and this latest development in the evolution of civil liberty and equality should be without comment.

As an expression of the democratic ideals of liberty and equality, trial by jury, rather than by arbitrarily appointed officials, became the accepted mode of trying both criminal and civil actions at a very early period in English legal history. At the time of the Judicature Acts, all common law actions were tried with a jury, and suits in Equity were tried by a Judge alone. After the Acts, the English Court of Appeal ruled, that, "wherever there was, before . . . , a right to trial by a jury, such right still exists." (1) ——This right to the trial of an action at law by a jury became part of the law of this Province upon the inception of the laws of England, and it was preserved by the Rules of Court under our Judicature Act 1909. (2)

In England this right to a jury trial was, generally speaking, unrepealed until 1933; in that year the Administration of Justice Act provided that in a civil action the order upon the summons for directions must indicate whether the action is to be tried with a jury or without a jury. This enactment has been held to have placed the question regarding the mode of trial within the absolute discretion of the Judges. (3)—— The New Brunswick rules regarding the mode of trial for civil actions were repealed in 1938, and new and different provisions were substituted. (4) After providing for a right to a jury trial in actions for libel, slander, breach of promise of marriage, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment, the new rules direct that all other actions be tried by a Judge alone, unless the Court or a Judge directs a jury trial, because, "the questions in issue are more fit for trial by a jury than by a Judge." These new provisions have never been interpreted by the Court of Appeal; however members of the profession embrace the view that the amended rules repeal any common law right to a jury trial.

The lawyers of New Brunswick cheerfully accept the inferiority of juries for the trial of all issues, since, presumably as a result of their advice to their clients, there are no applications for civil jury trials. We

(1) **Jenkins v. Bushby** (1891) 60 L.J. Ch. 254, per Lindley, L.J.
(2) **Fairweather v. Foster** (1918) 46 N.B.R. 40, per White, J., at 60.
(3) **Hope v. G.W.R.** (1937) L.J. 563.
(4) Order 36, Rules 1-6.

have far outdone the rest of the common law world in the matter of the abolition of civil juries. The right to a jury trial is only slightly abridged in any other common law jurisdiction in Canada; on an appeal after a jury trial in another Province, the Supreme Court of Canada may still make this observation: "A jury is an eminently proper body for the trial of a negligence action arising out of an automobile collision." (5) In England it is certainly still common practice to obtain a direction that a jury find the facts in issue between litigants in a civil action. The dockets of Circuits Courts in New Brunswick are alone unencumbered by jury trials. It may be said that in our Province we set an example for the rest of the common law world in the matter of the simplification of the administration of justice. (Simplicity is a mark of perfection! Of course it can not be said that the process of simplification has really culminated yet. While we are still burdened by the now outmoded laws of evidence (6) and not fully adjusted in every way, the abolition works a severe hardship on our very capable, but very overworked Judges, for their task of adjudicating legal disputes approaches the impossible since they have been deprived of the assistance of juries.)

The reasons advanced by the majority of the members of our Bar as demonstrating the superiority of non-jury trials are said to become apparent even when one considers the points concerning this superiority about which there might be debate, and certainly the superior fitness of a Judge alone to try actions which involve issues of law only or issues of fact involving the integration of complicated data is not debatable.

It has been said that seven heads are better than one for weighing issues of simple fact, so that a jury would be the proper body for the trial of such issues. Even if it is admitted that individual jurors, as opposed to an entire jury, are equally as reasonable as a Judge and equally as fit to try issues of simple fact, especially since their unfamiliarity with the intricacies of law insures that their deliberations on a question of fact are not distracted by considerations of points of law, it is said that one should realize that each additional member of a body of triers increases the chance that the body will err; seven persons have seven times the capacity for error of one person. It is submitted that this fact rebuts the clever sophism, that seven heads are better than one.

The additional expense of jury trials is the factor which must outweigh any advantage which society might have derived from more general participation in the administration of justice by its citizens, so as to nullify what might otherwise be a sufficient reason for preferring trial by jury of cases which might properly be delegated to juries. Of course the weight of any advantages to be realized from more general participation in the administration of justice is only slight, otherwise it would not be less than the factor of the small additional expense. The same thing, that it is outweighed by the additional expense, must be true of the possible advantage, that the formality of jury trials engenders an awe which acts as a deterrant to perjured testimony by witnesses.

(5) **Telford v. Secord; Telford v. Nasmith** (1947) 2 D.L.R. 474.
(6) See the final paragraph.

One must regard the abolition of civil juries as an important development in the evolution of civil liberty and equality. Ever since individuals first banded together, there have been disputes concerning the conflicting interests of different persons; the resolution of these disputes was always a major concern of society. The abolition of civil juries can only be interpreted as evidence of the fact that individuals have learned to co-operate to such an extent that our society is enabled to concern itself less with these conflicts between the interests of its citizens. There was a time when laymen were sufficiently uninformed, that, except for the fact that they were an integral part of the Courts and familiar with their necessary role and the noble way in which they discharged their duty by reason of sitting on juries, they might not have appreciated this role and might even have suspected the arbitrarily appointed Judges and court officials of favoritism and the denial of the equality of all men before the Courts. However today, since the advantages of more general participation in the administration of justice are outweighed by the factor of the additional expense involved, the knowledge of the average layman has apparently increased to such an extent that, even though he takes no part in the administration of justice, he is aware of the role of the Courts and is confident of their integrity. Consider what a fine compliment this is to litigants, who are now willing to entrust the determination of their disputes to apparently casual treatment in a practically deserted courtroom or a Judge's chambers!

It is to be hoped that our lawyers, who must be credited with unselfishly abolishing civil juries even though it results in the relegation of their art to a lower place in the management of our society, will now apply themselves to the simplification of our procedural rules and especially to the modernization of the rules of the Law of Evidence applicable to civil trials, for inasmuch as the rules of evidence are largely a product of the jury system they are superfluous to non-jury actions.

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