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MODERN TRENDS IN TRIAL BY JURY

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Trial by jury is one of the outstanding contributions to jurisprudence made by the English common law. The basic concept of the participation of the public in the administration of justice had not been entirely unknown. It had previously existed in various forms, as for instance in ancient Athens.¹ The novel features of the English jury system consisted of the selection of a small specified number of laymen taken temporarily from the community to sit under the guidance of permanent professional judges from whom the jury received instructions and advice; of the requirement of unanimity; and of the cooperation of the jurors and the judge, each performing different functions leading to a determination of the controversy presented for decision.

The common law jury as it developed in England is thus characterized by a number of essential features. The first is that the jury is composed of a small specified number of members, the historic figure being twelve. The second is that the decision of the jury must be unanimous. Unanimity is important and vital, for two reasons: first, it leads to a more thorough consideration of the questions at issue and a more careful deliberation in the jury room than might otherwise be the case, since debate and discussion must continue until a unanimous verdict is reached; and second, the fact that the verdict is unanimous is in itself strong assurance of its fairness and justice. The only possible drawback to the requirement of unanimity is that occasionally it leads to a deadlock and thereby requires re-trial before another jury. The percentage of cases in which this happens in juris-

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¹Wigmore, *Panorama of the World's Legal Systems* 287-314 (1936).

dictions in which the common law system still prevails is, however, not sufficiently large to constitute an important factor.

The next inherent feature is that the jury decides only issues of fact, while the judge rules on all questions of law. The final cardinal characteristic of the common law trial by jury which is of utmost importance is that at the end of the trial the judge instructs the jury. While the American terminology is that the judge "instructs" or "charges" the jury, the English phrase is that the judge "sums up the case" or "directs the jury." His instructions are binding on the jury as to the law. The jury must apply the rules of law laid down by the judge to the facts it finds. In addition to instructing the jury on the law, the judge performs an additional function at the same time. He advises the jury as to the facts, that is, he points out the issues of fact, summarizes the salient evidence on both sides and possibly comments on specific items of evidence. He may even express his opinion, if he deems it wise to do so, as to the weight or effect of any part of the testimony and even as to the ultimate issue to be determined by the jury. He must make it clear, however, that his discussion of the evidence is not binding, but merely advisory, and that the jury is to be the final judge of the facts. Thus the jury does not sit as a group of arbitrators deciding the issues in controversy in accordance with its own view of substantial justice, but reaches its decision under the guidance of the judge as to the law and with the help of the judge's advice as to the facts. All of these features in combination account for the success of trial by jury over the centuries.

The common law concept of the judge's function in connection with instructing the jury has been formulated in various ways by famous English commentators. Sir Matthew Hale, in language that today seems quaint, stated that it was the function of the trial judge in matters of fact to give the jury "great light and assistance by his weighing the evidence before them and observing where the question and knot of the business lies, and by showing them his opinion even in matters of fact, which is a great advantage and light to laymen."² Blackstone enunciated a similar thought as follows:³

"When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it,

²Hale, *History and Analysis of the Common Law of England* 259.

³Blackstone, *Commentaries* *375.

with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence."

These doctrines are so much a part of the warp and woof of the common law and are deemed to be of such an elementary nature that there are comparatively few English judicial decisions dealing with this subject. In one case, however, it was observed that "it is no objection that a judge lets the jury know the impression which the evidence has made upon his own mind."⁴ In another case Lord Tenterden stated that "we are all, however, agreed, 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. . . ."⁵

Passing to more recent expressions of this doctrine, in *Rex v. O'Donnell*⁶ the Court of Criminal Appeal stated:

"[A]s this Court has said on many occasions . . . a judge, when directing a jury, is clearly entitled to express his opinion on the facts of the case, provided that he leaves the issues of fact to the jury to determine. A judge obviously is not justified in directing a jury, or using in the course of his summing up such language as leads them to think that he is directing them, that they must find the facts in the way which he indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all. He is entitled to tell the jury that the prisoner's story is a remarkable one, or that it differs from accounts which he has given of the same matter on other occasions. No doubt the judge here did express himself strongly on the case, but he left the issues of fact to the jury for their decision, and therefore this point also fails."

A late English formulation of this principle is found in Halsbury's *Laws of England*,⁷ which contains the following remarks on the subject:

"After the close of the reply of the counsel for the prosecution, or if there is none, after the final speech of the defendant or his counsel, the presiding judge sums up the whole case and the evidence to the jury and gives his direction on the matters in issue and on the points of law applicable to these matters. . . .

"A judge must leave the facts for the jury to decide and should not invite the jury to make a particular finding, though he is entitled to express his views strongly."

⁴Davidson v. Stanley, 2 Man. & Gr. 721, 728, 133 Eng. Rep. 936, 939 (1891).

⁵Solarte v. Melville, 7 B. & Cress. 430, 435, 108 Eng. Rep. 784, 785 (1827).

⁶12 Cr. App. Rep. 219, 221 (1917).

⁷10 Halsbury, The Laws of England §§ 779-80 (3d ed. 1955).

The American colonists brought the common law jury with them to this continent. The Founding Fathers were profound scholars. They were thorough students of history and law. It was their desire to preserve and perpetuate the private rights to which Englishmen had been accustomed. In fact, one of the grievances that led to the American Revolution was the disregard by the English government of the privileges of the colonists as Englishmen. One of these fundamental rights was trial by jury.

In order to safeguard this privilege and prevent any encroachment upon it, it was provided in article III, section 2, clause 3, of the Constitution of the United States, that "the trial of all crimes, except in cases of impeachment, shall be by jury." This provision was in effect reiterated in the sixth amendment, which reads that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." Constitutional sanction was accorded to trial by jury in civil cases by the seventh amendment, which provides that "in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

These clauses of the Constitution of the United States have been construed as not merely guarantying trial by jury generally, but as perpetuating trial by jury in the form in which it was known at common law. Thus in *United States v. Philadelphia and Reading R.R.*,⁸ trial by jury in the federal courts was defined in the following language:

"Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination."

The same thought was enunciated in *Capital Traction Co. v. Hof*⁹ as follows:

"'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested

⁸123 U.S. 113, 114 (1887).

⁹174 U.S. 1, 13 (1899).

with authority to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."

Later, Chief Justice Hughes, in *Quercia v. United States*,¹⁰ likewise gave expression to the same principles:

"In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. [citation omitted.] In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. [citations omitted.] . . . Under the Federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the common law are maintained in the federal courts."

Expressions of these ideas in opinions of the federal courts are legion. Two recent statements are typical. The United States Court of Appeals for the Second Circuit said in *United States v. Rosenberg*:¹¹

"[U]nlike judges in many of our state courts, a federal judge may comment outright on any portion of the evidence, telling the jury how it struck him, whom he believed, or disbelieved, and the like, provided only that he advises the jury that they are in no way bound by his expressions of such views."

Similarly the United States Court of Appeals for the Sixth Circuit stated in *Stanley v. United States*:¹²

"The trial judge had a right to express his opinion to the jury since he gave them clearly to understand that the jurors were not bound by the judge's opinion, but were free to exercise their own judgment."

Thus trial by jury as known at common law persists in its original form in the English courts, as well as in federal courts in this country. English judges seem at times more likely to review the evidence in

¹⁰289 U.S. 466, 469 (1933).

¹¹195 F.2d 583, 594 (1952).

¹²245 F.2d 427, 436 (1957).

greater detail and are somewhat more emphatic in commenting on it and in expressing their opinion than is true of some federal judges, but in its essentials the same system prevails in both groups of tribunals.

An entirely different line of development, however, took place in many of the states. In the early years of the Republic in many quarters there was a popular distrust of judges inherited from some unfortunate experiences of the Colonists with Royal judges during the pre-Revolutionary era. Accordingly, some of the states began to curtail the judge's power to comment on the facts. Some went so far as to deprive him of the authority to summarize and discuss the evidence at all, but limited him to instructing the jury solely on the abstract principles of law, sometimes even imposing an additional restriction that this be done solely in writing. This movement started in North Carolina in 1795¹³ and in Tennessee in 1796,¹⁴ and it then spread unchecked to other states. The result was that very few of the states retained the common law concept of trial by jury. New Jersey and Pennsylvania continued to adhere to it. New York and Vermont modified it only to the extent of precluding the judge from expressing any opinion on the facts and on the weight of evidence. The remaining states may be divided into several groups. Some limited the judge to instructing the jury solely on the law, a few even confining him to giving such instructions in writing. Another group of states permitted the judge to summarize the facts, but not to comment on them.¹⁵ Maryland was in an isolated position in that it empowered the jury to decide both the facts and the law. The practical result has been that in most state courts the jury became almost supreme and was at times likely to decide cases in accordance with its own ideas of substantial justice rather than in compliance with the governing principles of law.

A mere series of abstract principles of law stated by the judge is not always well understood, or practically applied by a group of laymen, if the judge is shorn of the power to discuss the facts and the evidence which must be measured by these rules. It is sometimes customary to speak of the right of the judge to discuss the facts and comment on the evidence. It should be better called the authority or power of the judge. It is the jury that has the right to receive the advice and assistance of the judge. It is the jury that under the pre-

¹³N.C. Gen. Stat. § 1-180 (1953).

¹⁴Tenn. Const. art. 6, § 9.

¹⁵Vanderbilt, *Minimum Standards of Judicial Administration* 224-30 (1949).

vailing state system is deprived of the aid to which it was entitled at common law. Necessarily, in such instances the judge is transformed into not much more than a presiding officer or a moderator at the trial, while the jury tends to become sovereign. Extreme appeals of advocacy are more likely to sway or to have an undue effect on the jury under these circumstances, because it lacks the guidance and the stabilizing influence of the judge. Such criticisms as have been directed against the jury system generally relate to trials in the state courts and are due very largely to these circumstances.

The judge's discussion of the evidence is intended to assist the jury and thereby to aid it in arriving at a just result. It tends to clarify the issues, to enable the jury to discard extraneous matters that are at times injected into a trial, and to concentrate and focus the attention of the jury on the crucial points of the case. The judge is in a position to place the various items of evidence in their proper setting and to restore them to their correct proportions, rather than to permit them to remain in the distorted shape that at times they assume as a result of partisan presentation of counsel. On occasion the judge's observations may assist the jury in resolving doubts or misgivings as to the weight to be accorded or the importance to be attached to some phase of the evidence.

The test of desirability of the common law procedure is whether it is conducive to just verdicts and therefore aids in a proper administration of justice. This question answers itself. It is capable only of an affirmative response. Counsel for the parties are permitted to summarize the evidence and to comment on the facts from their standpoint. Their presentation must of necessity be one-sided and argumentative. The judge is the only impartial lawyer participating in the trial and the only lawyer in a position to give unbiased advice to the jury. It seems a paradox, therefore, to permit counsel to discuss the facts, but to bar the judge from doing so. It has been said by an eminent federal judge that "it is always the right of the federal judge to review and marshal the testimony, and it is often his duty, for in no other way can he more effectively promote the doing of justice."¹⁶

The only argument advanced against the common law procedure is the contention that the judge's advice is likely to influence the jury unduly. This objection was demolished by Chief Justice Taney in the following manner:¹⁷

¹⁶Graham v. United States, 12 F.2d 717, 718 (4th Cir. 1926).

¹⁷Mitchell v. Harmony, 19 U.S. (13 How.) 420, 424 (1851).

"Nor can it be objected to upon the ground that the reasoning and opinion of the court upon the evidence may have an undue and improper influence on the minds and judgment of the jury."

One of the most experienced jurists of our time, who for many years had been a trial judge before his elevation to the appellate bench, Judge Learned Hand, observed that "the belief very commonly held by judges that a jury is excessively subject to the judge's influence, my own experience at least did not bear out. I found them generally quite robust enough to form their own opinions independently of any indications I might give them of mine."¹⁸ In an earlier case, Judge Hand remarked that "juries are not leaves swayed by every breath."¹⁹

Judge Goodrich in the language of a homespun philosopher had occasion to make the following comment:²⁰ "Juries are not so likely to get excited or inflamed by lawyers' talk as lawyers think they are."

Another important factor in respect to which there has been a departure in many states from the common law concept of a jury trial is the abandonment of the rule of unanimity. In many states less than a unanimous verdict is permitted in some cases. The purpose of unanimity has already been discussed. The only reason for abrogating the traditional rule is the avoidance of disagreements and the consequent necessity for new trials. In jurisdictions in which the judge has not been shorn of his common law power, the percentage of disagreements is small and not a sufficiently significant factor to require a change in the mode of administering justice.

Thus, it can be said that trial by jury as it exists in most of the states today is no longer the trial by jury originated by the common law and prevailing in England and in the federal courts. The differences are so marked as to lead to the conclusion that we are dealing with two different types of trials, and with two different institutions, when we refer to modern trial by jury in the United States. One, the common law form prevailing in the federal courts and a few states; and the other, that found in most of the states.

Some years ago, the American Bar Association undertook to lead a campaign to reinstate the common law jury trial in the states by restoring to judges the power to instruct the jury and to advise it on the facts and on the evidence. In 1938, the Section of Judicial Ad-

¹⁸United States v. Goldstein, 120 F.2d 485, 491 (1941).

¹⁹United States v. Garsson, 291 Fed. 646, 649 (1923).

²⁰Smith v. Philadelphia Transp. Co., 173 F.2d 721, 726 (1949).

ministration of the American Bar Association, under the chairmanship of Judge John J. Parker, appointed several committees to make a study of judicial procedure with a view to suggesting needed reforms and formulating standards that might serve as guides to those interested in improving the administration of justice. One of these groups was a Committee on Trial Practice, of which Judge Calvin Chesnut was Chairman. In its report the Committee discussed in some detail the proper function and authority of the trial judge. It made the following recommendations:²¹

1. That the common law concept of the function and authority of the trial judge be uniformly restored in the states which have departed therefrom.

2. That after the evidence is closed and counsel have concluded their arguments to the jury, the trial judge shall instruct the jury orally as to the law of the case, and he may advise the jury as to the facts by summarizing and analyzing the evidence and commenting upon the weight and credibility of the evidence or upon any part of it, always leaving the final decision on questions of fact to the jury.

At its annual meeting, the Section of Judicial Administration approved these recommendations and adopted them verbatim.²²

In 1946 at the annual meeting of the American Bar Association held in Atlantic City, the Section of Judicial Administration conducted a symposium on "The Right of a Judge to Comment on the Evidence in his Charge to the Jury," and passed a series of resolutions similar in tenor to those adopted in 1938.²³ In 1950, a Committee of the Section of Judicial Administration, of which this writer had the honor of being Chairman, submitted a report on the subject of instructions to jurors, and recommended that active efforts be made to achieve the standards previously adopted by the American Bar Association. This report was approved at the Annual Meeting of the Section.

The leadership of the American Bar Association in this matter has not proved as productive of results as had been hoped, although some advances have been made. Elsewhere, active endeavors are in progress to further similar objectives. California, Michigan and Wisconsin have restored this authority to their trial judges, although the writer is informed that it has not as yet been widely used in those

²¹Vanderbilt, *Minimum Standards of Judicial Administration* 538 (1949). The report is set out in full. *Id.* at 536-44.

²²Vanderbilt, *op. cit. supra* note 15, at 506.

²³6 F.R.D. 317-39.

states.²⁴ There has been some agitation in some of the other states to adopt this much needed reform.

The jury system has been the subject of many encomiums. Alexis de Tocqueville, the great French observer of American institutions, made the following challenging comments on this subject over a century ago:²⁵

"The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority. . . .

"The jury contributes powerfully to form the judgment and to increase the natural intelligence of a people; and this, in my opinion, is its greatest advantage. It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties. I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use that they have made of the jury in civil causes."

From a practical standpoint trial judges and trial lawyers, who have come in constant contact with trials by jury, have invariably been of the opinion that as a means of administering justice and arriving at just dispositions of both criminal and civil cases, the jury system has been an outstanding success.

A noted English barrister, the Earl of Birkenhead, made the following illuminating remarks concerning his experience with juries:²⁶

"I suppose I was employed in litigation for nearly twenty years, and very largely in jury cases. I cannot remember, in the thousands of cases which I suppose I must have argued before juries, more than three in which I was absolutely certain that the juries were completely wrong. And even in these three the value of my judgment is diminished by the fact that I was an advocate."

Sir Patrick Hastings, who in his day attained renown as a trial lawyer, expressed similar views:²⁷

²⁴Cal. Pen. Code § 1127. Mich. Ct. Rules 37 § 9. See also a survey conducted by James C. Toomey, Director of State Committees of the Section of Judicial Administration, summarized in Report of Director of State Committees, August 1956.

²⁵1 de Tocqueville, *Democracy in America* 283-85 (Reeve transl. rev. ed. 1945).

²⁶1 Birkenhead, *Law, Life and Letters* 255 (1927).

²⁷Hastings, *Cases in Court* 90.

"An English jury is the foundation stone of English justice. The ordinary juryman knows nothing of Law, and is not very greatly concerned with the stricter rules of evidence, but he possesses a positive genius for arriving at the truth—possibly because no lawyer is ever required to sit upon a jury. After a not inconsiderable experience, I cannot personally remember one single instance in which a jury have been wrong; I have often been annoyed at their verdict, and may have recognized it as one which no lawyer could have given, but on thinking the matter over at a later date, I have invariably come to the conclusion that they were right... [O]f the many hundreds of juries I have faced there is not one that has not left behind a feeling of deep admiration; for that reason alone it would be ungrateful not to pay some slight tribute to their memory."

Judge Chesnut in his 1938 report, to which reference has been made, expressed a similar opinion in a somewhat different form:²⁸

"Criticism of juries in federal courts is comparatively rare. There the common law function of the trial judge is firmly established...."

The writer shares these views. It has been his day to day observation in the trial of cases that juries perform their duties seriously and conscientiously as well as intelligently. The composite product of the twelve jurors is generally superior to the average of the twelve. In a vast majority of cases the jury does substantial justice. Contrary to a general impression, that sometimes is found even among members of the bar, juries are not easily influenced or readily swayed by emotion, sympathy, passion or prejudice. Neither are they affected by minor episodes that occasionally occur, or side issues that sometimes arise during a trial. Ordinarily, juries can be trusted to set to one side all irrelevant and inconsequential matters, to focus their attention on the main issues presented for their decision, and to decide them impartially and fairly. This is particularly true in the federal courts, where the judge is in a position in his instructions to the jury to point out the issues of fact and summarize the evidence, thereby directing and concentrating the jury's attention on the precise matters presented for its determination. Juries often show remarkable discernment and an almost occult and uncanny ability to differentiate between numerous issues presented to them, even in complicated cases involving multiple defendants and counts. To be sure, like all other human beings, jurors occasionally err. It has been this writer's observations, however, that the percentage of errors or miscarriages of

²⁸Vanderbilt, *op. cit. supra* note 21, at 537.

justice in jury trials is very small. It is not practicable to say that the percentage of mistakes on the part of juries is any greater than that on the part of judges. In criminal cases such errors when they do occur are likely to be on the side of acquitting the guilty rather than convicting the innocent. The latter result is rare indeed.

Some of the criticisms directed against jury trials are not well founded. They generally emanate from persons who have had little or no practical experience or actual contact with jury trials. Insofar as they are justified, they generally relate to trials in the courts of those states in which juries are bereft of the guidance of the trial judge and are required to embark in a rudderless vessel on an uncharted sea. Such defects can be met by restoring to state judges the power to instruct and advise the jury as at common law.

Although the efficacy of jury trials is recognized as much as ever, nevertheless, there has been a decline in the use of this mode of trial in some places and in certain types of actions. In England trial by jury has been reduced to a minimum in civil cases. Since England has no written constitution, the privilege of trial by jury is not safeguarded as an inviolate right, and its use is subject to the control of the courts. In civil litigation trial by jury regularly prevails in England today only in actions for libel and slander. Other civil suits are tried by the court without a jury. The explanation sometimes advanced for drawing a line of demarcation in this respect between actions for defamation and other civil cases, is that the former relate to reputation, whereas the others affect only money or other property. It must be observed that in England libel and slander are regarded as a much more serious matter than is often true in the United States. It is felt in England that an action affecting one's reputation is of such importance as to warrant trial by jury. On the other hand, in England personal injury suits, which today form the bulk of civil litigation, are invariably tried by the court without a jury. The advantage of this drastic change lies in its increased efficiency by shortening the duration of the trial. In England less than a day is generally consumed by the trial of an average personal injury case. It is obvious what benefit can be derived by this manner of disposing of a crowded docket.

On the other hand, in criminal cases the right to a jury trial is still preserved in England. A few years ago a procedure was introduced, however, whereby a defendant in a criminal case may waive trial by jury and consent to be tried by a magistrate in the police court. This is frequently done, at least in London, where so-called "stipendiary magistrates" are generally men of learning and stature that would qualify them to sit on a higher court.

Some of the provinces in western Canada have in recent years followed the English tendency of doing away with jury trials in civil actions.

In the United States, trial by jury has been preserved to a much greater extent than in the mother country. Here both civil and criminal cases are generally so tried. Ordinarily it is impossible to abolish jury trials except by consent of the parties, in view of the fact that the Constitution of the United States and most state constitutions preserve the right to this mode of trial. Neither the legislative branch of the government, nor the courts under the rule-making power can abrogate or abridge this privilege. Thus, personal injury cases still continue to be tried by juries in most of the states as well as in the federal courts. This is likewise true of criminal cases. There seems to be a feeling at the bar in this country that trial by jury should be preserved. Certain encroachments on this mode of trial have been made, however. There is a class of personal injury actions that are regularly tried in the federal courts without a jury. This group comprises tort actions in which the United States is a defendant, because the Federal Tort Claims Act, by which the United States waived its immunity to suit in respect to tort claims, attached as a condition to the waiver that in such cases the trial should be without a jury.²⁹ In view of the numerous ramifications of the activities of the federal government, there are many such suits, the great majority of them arising out of accidents involving government vehicles. Thus, in the fiscal year ending June 30, 1958, 1216 cases were filed in the federal courts under the Federal Tort Claims Act.³⁰ While no doubt a large proportion of them will eventually be disposed of without a trial, those that remain to be tried will be heard without a jury. Experience shows that because of this circumstance a trial under the Federal Tort Claims Act usually takes a much shorter time than is true of private tort cases. There has been no complaint, so far as this writer is aware, against this mode of trial of tort suits against the United States, nor has there been any suggestion that judges are less liberal than jurors, either in passing on the issue of liability, or in ascertaining the amount of damages.

The writer is informed that in Louisiana a practice has arisen, more or less by common consent, to waive jury trials in a great many actions for personal injuries. The explanation of this local usage is

²⁹68 Stat. 589 (1954), 28 U.S.C. § 2402 (Supp. III, 1956).

³⁰Report of Administrative Office of the United States Courts pp. I-1 to 18, Sept. 1958.

that under the Louisiana law, appellate courts may pass on the weight of evidence and that, therefore, a judge's decision is subject to a review on the facts as well as on the law. It is said that this practice operates successfully.

In criminal cases, an interesting local practice has grown up in Maryland. For a great many years it has been customary in the city of Baltimore to waive jury trials in criminal cases. The result is that in Baltimore, considerably over 90 per cent of all criminal cases are tried without a jury. To some extent the same practice prevails in the rest of the state, although there the percentage of cases tried by the court alone is somewhat lower.

The practice of waiving jury trials in the federal courts is on the increase in some districts. For example, at one time this writer was temporarily sitting by assignment in the Eastern District of Michigan, and found that in about 60 per cent of the criminal cases that came before him for trial, there was a waiver of a jury and a consent to trial by the court. To take another instance, in the District of Columbia such waivers are not uncommon. Not long ago the writer tried a case of murder in the first degree, in which there were two defendants, both of whom not only waived a jury trial, but even insisted and urged that the court accept the waiver, which the court felt in duty bound to do. Recently there has been a tendency to waive jury trials in criminal cases in which the defendant relies solely on the defense of insanity.

One of the methods recommended for accelerating congested dockets in metropolitan centers is the abolition of jury trials in personal injury actions, which have been clogging the calendars. It has been urged that jury trials constitute a luxury that we must forego in order to manage the mounting volume of tort litigation. One proposal involves a substitution of trial by the court without a jury. In the federal courts and in most states this end can be attained only by a constitutional amendment, or by the consent of the parties in individual cases. Another proposal is more drastic. It has been suggested that an administrative tribunal be created to award damages in automobile accident cases on a compensatory basis, without regard to negligence. Such a scheme would be similar to the method of adjusting compensation in Workmen's Compensation cases. Every motorist then would be required to carry insurance or perhaps contribute to a fund out of which compensation would be paid. The shortcoming of such a plan is that as the award of damages would not be based on negligence but would be more or less automatic, in many cases adequate compensation would not be received for pain and suffering or for the

results of serious permanent injuries. Moreover, to permit administrative bodies forming a part of the executive branch of the government, to pass on personal civil controversies, might well be deemed an encroachment on the tri-partite division of government and an infringement on the jurisdiction of the judicial branch.

One may inquire why lawyers do not waive jury trials if by this means trials can be shortened and cases can be reached for final disposition faster than is true in some metropolitan centers today. It would seem that it should be of interest to counsel representing plaintiffs to do so. The explanation often advanced by lawyers who specialize in practice on the plaintiff's side in personal injury cases is that juries are likely to be less rigid in enforcing the doctrine of contributory negligence than is often true of judges. It is sometimes said that jury trials would be frequently waived and trials by the court alone accepted, if the doctrine of contributory negligence were abolished and the rule of comparative negligence were substituted, particularly in jurisdictions where the judge is clothed with his common law powers.

The doctrine of contributory negligence, if rigidly applied, frequently leads to unjustified results, in that it absolves the defendant from all liability irrespective of the fact that he may have been negligent and even grossly negligent. Some amelioration in the hardships of this rule has been introduced by the doctrine of the last clear chance which, however, may on occasion be equally unjust in respect to defendants. Under the last mentioned doctrine a defendant may be held liable irrespective of how negligent the plaintiff may have been, and in what degree he may have contributed to the accident. The doctrine of comparative negligence seems to hold the scales even between the parties. In the federal courts it operates successfully in cases under the Federal Employers' Liability Act and the Jones Act. It has likewise met with considerable success in several of the states. Many far-sighted persons are urging its adoption elsewhere. If accepted it may have a considerable effect on the extent to which resort will continue to be had to jury trials in negligence actions.

Trial by jury has been a magnificent and a cherished institution. What the future holds in store for it is shrouded in mystery. It is indeed within the realm of possibility that those who seek to eliminate it partially in civil cases in order to expedite the disposition of litigation may be successful. Whether this is likely to happen is, however, highly speculative and problematical. In any event, we must strive to restore trial by jury in the state courts to its common law form, in order to enable juries to render the best possible service to the administration of justice.

THE OBSOLESCENT LAW OF LARCENY*

ARTHUR L. GOODHART†

On frequent occasions in the past this *Review* has urged that the law concerning larceny, larceny by a trick, embezzlement, false pretences, and other forms of dishonesty by which the property belonging to another can be acquired, should be reconsidered, and that a simplified law of theft on the Continental model should be substituted for the forest of provisions in which it is so easy to lose one's way. It is only fair, however, to point out that there are three things which can be said in favor of the present chaos. The first is that it gives the ingenious but dishonest rogue a sporting chance to get away: with any luck he may find a legal loophole through which he can escape. The second is that it gives the teacher of law an excellent means by which to test the memory of his students because a detailed knowledge of the precedents, frequently distinguished although in fact indistinguishable, is essential here. As these cases are based on legal fictions, invented by the judges for the laudable purpose of doing justice when the strict law would lead to an undesirable result, it is hardly surprising that ordinary reasoning is more of a hindrance than a help in trying to understand them. The third argument in favour of the present law is that it has given the critics of the legal profession, from the time of Bentham to the present day, an obvious example to advance in support of their allegation that lawyers are too strongly wedded to the past and are prepared to follow an ancient and outmoded rule merely because it is ancient. These three considerations must, of course, be given full weight when any change in the law is proposed, but whether they furnish a sufficient justification for the existing confusion may, perhaps, be open to doubt.

It is therefore most encouraging, if we may say so with respect, to find that in *Russell v. Smith* [1958] 1 Q.B. 27, 31, Lord Goddard C. J.

*EDITOR'S NOTE: This short article is reprinted from the April 1958 issue of The Law Quarterly Review, in which it originally appeared as an unsigned Note. In writing to the Editor, Professor Goodhart of Oxford, for permission to reprint, a request was included to use the name of the author. In kindly granting the permission, Professor Goodhart said that he wrote this note, as well as all the other unsigned notes in the L.Q.R. The April issue contained twenty of these notes, with a subject matter that apparently covers the complete range of English law.

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has quoted with approval the following "strong words" from Mr. Rupert Cross's note ((1956) 72 L.Q.R. 183) on *Moynes v. Cooper* [1956] 1 Q.B. 439: "[Such cases] are a public scandal both because the courts are reluctantly compelled to allow dishonesty to go unpunished, and because of the serious waste of judicial time involved in the discussion of futile legal subtleties." The Lord Chief Justice concluded that "it would be a good thing, I think, if the law of larceny could be somewhat simplified and cleared up."

The instant case contains some pretty legal subtleties. An information was preferred against the respondent S., a lorry driver, alleging that he had stolen certain sacks of meal, the property of C., Ltd. When S. collected a ton of feeding stuffs from C., Ltd., to deliver to J., Ltd., an extra batch of eight sacks was loaded on his lorry in error. S. did not know of this mistake until he discovered it when unloading at the premises of J., Ltd., and he then decided to keep the eight extra sacks for himself. The justices dismissed the information as they were of the opinion that the "taking" of the eight additional sacks took place at the time of the loading, and that at that time S. did not have the intent permanently to deprive the owner thereof. On ordinary grounds of common sense there is obviously much to be said in favour of this conclusion, as it seems to be impossible to distinguish the eight excess sacks from the rest of the load. Which eight sacks did S. not intend to receive at the time of the loading? Were they the last eight sacks which were loaded, or were they the eight sacks which he finally retained when he found that an excess number had been loaded? Similarly, which eight sacks did the C. Co. not intend to load on the lorry? On appeal the Divisional Court held that there had been a taking and that the case must go back to the magistrates with a direction to convict. Lord Goddard C.J. analysed in his judgment the various precedent cases and reached the conclusion that the decision in *R. v. Hudson* [1943] K.B. 456 must be followed. He held that the respondent did not know what he had in the lorry until he found that he had eight sacks too many. "He was never intended to have eight sacks too many and he never intended to take eight sacks too many" (p. 34). It would obviously be possible to argue with equal force that the respondent intended to receive all the sacks that were loaded on his lorry even though an error in the number of sacks was made. The Lord Chief Justice continued: "I do not think that a man can take into his possession, or come into possession of, a thing of which he has no knowledge . . . If the respondent did not know that the goods were there, how can he be said to be in possession of them?"

On the other hand, in *Hibbert v. McKiernan* [1948] 2 K.B. 142 it was held that the members of a golf club have possession of balls which have been lost by individual players even though the members can have had no knowledge of "the position or number of balls that might be lying on their property" (Lord Goddard C.J., p. 150). In the present case the respondent had no knowledge of the number of sacks but it seems reasonable to suggest that he intended to exercise control over all the sacks on his lorry. Justice was obviously done in both cases, but it is not markedly easy to reconcile them. They both, however, strongly support the Lord Chief Justice's plea that the law should be "somewhat simplified." One way by which this could be accomplished in large part would be to get rid of the whole doctrine of possession as it relates to the law of theft.

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