SOME THOUGHTS ON THE USEFULNESS OF TRIAL BY JURY.

The right to a trial by a jury of one's peers is assumed to be a great boon to the British people. Some observation of trial by jury in actual operation leads one to doubt whether it is such a blessing as is generally considered.

At the outset it may be flippantly remarked that although a prisoner is presumed innocent, he is nevertheless presumed to be stupid, that is if the average jury are really his "peers" in intellect and common sense.

In modern times the jury system has evoked the perfervid admiration of eminent jurists, so much so that one hesitates to criticize. Quite recently several judges in Eastern Canada expressed warm admiration for the jury. When the subject was discussed at a recent Bar meeting in Alberta, two judges "welcomed the assistance of the jury." Of course the judges are in favor of it; it takes such a load of responsibility off their shoulders. How often does the learned judge after charging the jury, lean back in his chair with a sigh of satisfaction, as he thinks that this hard nut does not have to be cracked by him. Yet it may, with all becoming respect, be suggested to the admirers of the jury that perhaps their consideration of the system has not been undertaken with that open and unbiased mind which is desirable. We of the legal profession cannot generally be accused of radicalism. Our tendency is to conservatism, rather than to progress, and it must be acknowledged with regret that most reforms of judicial institutions have been forced upon us by pressure from without. The writer has tried to approach the subject as if he were a layman and not a lawyer (some sly rogue will no doubt say "admitted" to the latter part), and it might be well for his readers to adopt the same attitude.

Broadly speaking, the chief function of the jury may be said to be the ascertainment of truth. Does it fulfil this purpose effectively?

Let us examine the jury in operation. Someone has said that the best cure for admiration of the House of Lords is to go and look at it. So let us look—quickly, for the readers of this article (if any) have, of course seen the operation many times. There are variations in details, but substantial co-ordination exists in most Canadian jurisdictions.

First, as to choosing the jury. The statute excludes certain classes and professions—necessarily, no doubt, but in reading over the list of exceptions one must regret the necessity, for it includes many who by training and experience should have more than average intelligence—men who might be likely to function judicially. However, let that pass. It is sufficient to note that the statute provides for no standard of intelligence, experience or training. The panel is drawn from a class containing, doubtless, some who are well qualified for jury service, but it is safe to say that seventy-five per cent. are unfitted. Mark this, it is a mere chance if any of the panel are of the qualified twenty-five per cent.; they may be entirely of the incompetent remainder. When the panel gets into Court, the jury is chosen by the same haphazard method. No effort is made to get the best qualified men. Even in challenging for cause, the chief ground is bias or interest,—lack of training or experience is not a ground for challenge.

Enough has been said to demonstrate the truth of this proposition,—that intelligence, training, experience, education, temperament, are of no importance in selecting a jury. In fact the jury system seems to be based upon a fallacy, viz., that the ascertainment of truth is a matter in which experience and training are unnecessary. Let this fact be kept clearly in mind, that under the system of drawing the panel and selecting the jury there is no assurance that the case will not be tried by the most ignorant, stupid, narrow-minded and temperamental of men.

Now that our jury is chosen, how do they carry out their function of ascertaining the truth? Are there any defects? The first arises from a matter already referred to,—lack of experience. It is very seldom that there is even one juror who has served before. The fact that he has served before is generally advanced as a reason for excusing him from further service. He has done his duty. In all other matters experience is considered to be an asset, and every effort is directed towards getting men of experience. With jurors the opposite method is pursued. That experience is a valuable teacher, is such a well founded truth that the writer would refrain from mentioning it, but at the risk of being tedious we have again to observe that experience is presumed to be of no value to jurors; indeed the theory seems to be that they are better without it. Yet I would like to ask any man who has served on a jury, whether he couldn't do it better if he had it to do over again.

Another disability suffered by nearly every juryman is the natural bewilderment and confusion arising from the strange situation and

surroundings in which he finds himself. "Gentlemen, in reaching a conclusion as to these matters, you have simply to apply the ordinary rules of common sense which you use in solving the problems of your own business." How often do we hear these words addressed to the jury. How easy to lay down the rule; how hard to follow it. Unfortunately the juror is not engaged in his own business. The matters at issue are most likely not connected with his own business at all. Incidents occur, passages between counsel, which have no meaning to him whatsoever. Language is used which he most likely understands but dimly. Everything tends to his confusion and to render him other than normal. Every practitioner can give instances of gross stupidity exhibited by jurors who are in fact men of average intelligence. These blunders are largely due to the bewilderment and confusion referred to. Counsel could perhaps relieve this to some extent. We take too much for granted. Do the jury realize the difference between evidence and argument? How many jurymen know that the facts are to be ascertained from the sworn statements of the witnesses and not from the speeches of counsel? How often do counsel explain the meaning of plaintiff and defendant? A childish statement, you say. But remember that in these matters the persons you are addressing are children. One must speak to them in terms they can understand. In a recent trial, probably the longest ever held in Canada, it is said that on the twenty-fifth day a juror inquired which side "the little fat fellow" was on! However, this is digression. It is sufficient to say that having run the risk of getting the most stupid of the persons eligible for service, the jury functions at much less than the standard of its average mentality.

Another factor which tends to lower the efficiency of the jury, is the unwillingness of men of ability, experience and good judgment to serve. If they are men of ability and good judgment, they have without doubt attained to positions of importance and can ill afford the time to serve on juries. It is idle to say that it is a matter of duty and good citizenship. Men in high executive positions, men engaged in running their own big business, simply cannot be spared. Time and again the writer has seen the very men on the panel, who by reason of their training, experience and knowledge of men and affairs might be expected to make good jurors, excused on perfectly fair and reasonable grounds. Even the ordinary man serves unwillingly, at least in civil cases. In criminal cases he may perceive how the matter is of importance to him as a good citizen, but in civil cases his feeling, I am certain, is that he ought not to be forced for a dollar a day to settle disputes between individuals. He feels that it is not

his business and that it is an imposition to drag him into it at considerable personal loss. And in these days no one serves on a jury without being actually out of pocket, unless he be a hobo.

One hesitates to cite instances of the failure of the jury to function efficiently. Examples will at once come to the mind of every reader. One may be referred to the cases of *Alyea* v. *Canadian National Railway Co.* and *Hodges* v. *Canadian National Railway Co.*, reported together in (1925) 57 O.L.R. 665. The writer came upon it accidentally the other day. The plaintiffs were claiming damages caused by the alleged negligence of the defendant company. It is unnecessary to go into all the details, but at the end of the trial the foreman of the jury asked this question: "The question that was troubling us mostly a while ago is, if we give a verdict in favor of the Railway Company making the railway not guilty, can we allow Mr. Alyea damages as far as his damages go?" At the end of the trial, after what Mr. Justice Middleton described "a very careful charge," the jury had failed to grasp the issue—failed to get even the most elementary conception of its duties.

One other instance may be given, arising in a jury trial, in which the action was against a railway company for damages for personal injuries. Questions were put to the jury, the first two being the usual questions as to whether there was negligence on the part of the defendant, and if so what the negligence was. The third question was as follows: "If there was any negligence, was it the cause of the plaintiff's accident?" This would seem to be a simple question which could not be misunderstood by any person of average intelligence, and in any event the effect of the answer to this question upon the plaintiff's claim, was carefully explained to the jury by the trial Judge in an exceedingly lucid charge, and in particular the Judge said: "Was it that failure or omission on the part of the railway company's employees to do their duty that was responsible for the accident with which this unfortunate man met? If it was not, then the company is not responsible."

Now surely after such directions, any person of average intelligence would realize that a negative answer to this question would defeat the plaintiff's claim. The jury answered this question in the negative, and after the case was all over and judgment had been entered for the defendant, several jurymen expressed surprise at the result, as they thought they were finding in favor of the plaintiff!

If the jury is so efficient, it is astonishing how many safeguards require to be drawn around it. These are so well known, that only one illustration need be given: No comment is to be made upon the

accused's failure to give evidence. Why? Of course there is a statutory prohibition, but why should there be such a prohibition? Let us take a very simple case. The issue is: Did John Jones strike Bill Bones? Three persons were present—John Jones, Bill Bones and Tom Homes. Bill Bones and Tom Homes testify; John Jones does not. Now the average man is bound to speculate on John Jones' failure to testify—that is plain common sense. Surely the average man will say to himself, "If this is not true, why doesn't Jones get up and say so." Now if such thoughts are in the juryman's mind, why should fair comment be prohibited—what harm could be done to the deliberations of a person of average intelligence, by proper comment? Yet Parliament has barred such comment. The only explanation must be that the legislature recognizes that the average juryman is weakminded.

Finally, if the jury is an intelligent, efficient instrument of justice, many pleaders seem to have extraordinary ideas of the type of argument which appeals to intelligent men. Examples are many and well known. We will not pain our readers by repeating them.

Life has become too complex for the jury system. It served as a rough and ready means of ascertaining truth, suitable to the simple life of the middle ages. In those days juries were needed because judges were anxious to curry favor with their royal masters. No such necessity exists to-day. Our judges are absolutely free from any improper influence or pressure.

To-day the jury is out of date. This is an age of specializing. The ascertainment of truth is a specialty, and it should now be assigned to men who by training and experience have qualified themselves for the duty.

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