

founded the City of Carthage on the resulting Texas-size spread.

I have just scratched a little at the surface of the possibilities involved, but I must return to my original phrase. These new tools have been invented, and more important, new ways of looking at our work have been invented, and have created the necessity to examine them to see what good they can do for us. Some of this may seem simplistic, even petty. But we do not demean ourselves by thinking about ways to abolish the drudgery of our profession.

We would demean ourselves if we continued to be drudges without the need of it. Blaise Pascal was, and is, remembered as a great philosopher; but the world may owe him more for having invented the common wheelbarrow. Some exploratory notions — many of mine, I am sure — will come to nothing except as curiosities, overtaken by nimbler minds. That is no great matter; one success caps many such defeats. As a law teacher, I should be happy to boast that I spurred someone else to do better than I could do myself.

The Use, Misuse And Reuse Of The Jury

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MY INTEREST IN juries dates at least from my first year of law school when my wife sat, not wholly satisfactorily, in a criminal case for procuring.

My second article dealt with jury challenge; but my main interest stems from the 4½ weeks I spent on a jury panel in Seattle in 1962. Following that service I talked with other jurors, lawyers and judges all over Washington, and I have to other groups since. Today my topic has been cast in a different vein, but I still want to draw on that jury experience for some of my comments.

Now to the use, misuse and reuse of the jury. It wasn't my choice of title, but it's much better than some under which I've been billed.

Historians do not agree just when and where the first juries as we know them came into being. At one time, jurors merely swore to the story of one of the parties, i.e., they were character witnesses. Later jurors gave testimony of their own knowledge concerning the situation in question.

While trial by battle still existed as late as 1819, juries in their modern form were developing as early as the 1300s. In 1305, Prince Edward (later Edw. II) interceded for a friend asking that a defendant be tried by a jury containing none of the indicting jurors, i.e., the Grand Jurors.

Some of the early writers, Bracton for example, thought the jury a fairly satis-



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factory institution, but the *Mirror of Justices*, a vigorous criticism of the law, written about 1290, contained a violent attack on the jury.

So the current attacks on the jury are nothing new and we're not liable to lose the right to a jury trial in a hurry, but that's no reason not to improve it as much as possible, and I'd like to make some suggestions toward improvement today.

As early as 1468, Fortescue gave a picture of a jury trial, to all intents and purposes in modern form. What have we done to improve the institution since then?

We know all about juries—you more than I—or do we? If I may analogize for a moment. Most of you probably at one time or another have called or written to a classmate or friend on a law faculty in support of the application of some young

friend or acquaintance. More often than not you probably got the response that the faculty man doesn't handle admissions, but that he will call the dean's or admission committee's attention to the matter. In other words, law faculties often assume that a new group of students will automatically appear in the Fall, and give little thought to how they got there, or what was necessary for their admission. Are you in the same position re the jurors which greet you when you walk into the courthouse on Monday morning? I don't want my faculty making uninformed assumptions, and you're probably not doing as good a job as you could if you don't know what has happened to those jurors before you see them as a panel before you in court.

How are the jurors' names selected in your county or district? Are you happy with the group you see in court? Are there better ways of selecting the panel? Originally the matter of selection for jury service was a development of common law rules and procedures. Now it is largely or exclusively controlled by constitutions and statutes. But are the rules being followed in your jurisdiction? One of the reasons I was able to get on the panel in 1962 in Seattle was because an amendment of a pertinent statute declared that the names as they came up on the voting lists by lot could not be altered by those doing the selecting. As a result, all the attorneys, their wives, etc., remained on the list and were in a position to claim their exemption if they wanted it, rather than having that exemption turned into a disqualification by virtue of having their names removed from the list. (Another statute not requiring selection by lot remained on the statute books in Washington and some counties followed it, effectively excluding all lawyers in the process.) Of the Connecticut selection procedures, someone said in 1948, "The system is archaic and completely outmoded, having remained essentially unchanged since 1744." The Bar just hadn't been interested enough to take any steps to change the system.

If the rules are being followed, would you like them changed? Then take some steps.

And when is the last time you looked at the summons to jury duty in your jurisdiction? In 1962 in Seattle, the summons should have listed eight classes of exemptions, including all women, and people

over 65. Both of the latter two categories were left off in one printing, which resulted in the presence of several little old ladies on that panel who would not have served had they known of their exemption. The plaintiff's lawyer in one of my cases would have done much better if one of those 65-year-old ladies had received a proper summons, for we awarded the magnificent sum of \$500 in a case that had \$465 worth of medical specials alone, to say nothing of car damage. So the next time you're waiting around the courthouse, ask the clerk about the summoning procedures. You might learn something to your advantage. And you might be in a better position to advise your clients when they complain to you about having been summoned for jury duty.

Peremptory challenges. How many are allowed in your jurisdiction? Why? You know how many. But why that number? The trend nationally is to raise the number of peremptory challenges. Is that necessary? What does an increased number of peremptory challenges contribute to the improvement of the system? It does help you to *select* a jury, rather than merely eliminate objectionable individuals. But is that your function? True it allows you, over the years, to charge your companies for a few more days of court time, but couldn't you, on the average, do as well with three peremptories as with six? And if you can't, is it really of any greater benefit to the plaintiff's bar? *Think of the jurors* for a minute. If they have been through an efficient selection procedure, don't more of them feel that their time has been wasted if substantial numbers of them are then peremptorily excused. *Don't lose sight of what they think.* Much is heard these days of the lack of respect for law. With the possible exception of traffic court, more laymen have contact with law and the courts through service as jurors than in any other manner. If their jury exposure is a pleasant, expeditiously handled experience, the whole system stands higher in their estimation, which redounds to your benefit, directly if you are the cause of their pleasure, but even indirectly as a member of the profession involved. We can all stand improvement of the lawyers' image.

What oaths are given in your courts, and by whom? To jurors? To witnesses? On

consecutive cases in Seattle, two judges represented extremes here. In one, witnesses were sworn by one judge in a smiling, casual manner, "Do you swear to tell the truth?" Another judge in a voice of doom, added, ". . . the whole truth, and nothing but the truth, so help you God?" Now an oath may not mean today what it did in the 13th century, but the witnesses in his court at least thought twice about any stories they were planning to tell on the stand, and the jurors were impressed with the seriousness of the proceedings.

Talking about the seriousness of the proceedings, can't we get rid of some of the unrealistic absurdities in our rules of evidence. (I realize that now I'm in an area in which it can well be harder to produce changes, but nevertheless an area which, if cleaned up, will do much to remove some hypocritical aspects of trials.) For instance—admonitions by the judge to disregard testimony. Jurors in Seattle tried mighty hard not to consider such testimony, and I can't recall a time during any of my four deliberations when any of the jurors mentioned anything that we'd been told to disregard, but how much effect that type of testimony had in the *minds* of the 12 is hard to say. One juror, whom I interviewed later, said, "The judge's admonition to disregard often implants the testimony that much deeper in the jury's minds."

Attorney's fees. An approved instruction in Texas is as follows: "You must not consider, discuss, or refer in your deliberations to attorney fees. You will not allow any recovery therefor or for costs of litigation, and you will not take these matters in consideration." (Why? Are attorneys' services free?)

With or without a cautionary instruction, the jurors know the facts of life here, too. Why play with them? You gentlemen, particularly, may be interested in the *comment of an insurance salesman* during the deliberations of one Seattle jury. After the jury had apparently reached the sum they intended to award a plaintiff, it was he who said, "Don't forget attorney's fees."

For those of you in states which omit any mention of income tax considerations in the instructions, wouldn't it be to your advantage to see that a correct version of the law in this area is conveyed. Here, of course, you may well have rather strong

opposition from ATLA, and perhaps I shouldn't mention such "partial" items in light of my main theme of *cleaning up our procedures generally* and giving the jurors a better picture of attorneys, the courts and their function in the judicial process. But even this suggestion will contribute to their understanding of the rules and processes involved, and that in my mind is all to the good. Intelligent participation in an efficiently administered, well-run system of adjudication by as many laymen as possible can do much to counteract the decline in moral standards which we hear so much about today.

Turning for a moment to a few items of more practical value gleaned from my jury service, there appeared to be some confusion in jurors' minds regarding opening statements, especially by the defendant. I learned only recently from one Texas defense attorney that opening statements are seldom employed by either side in his area. He liked that just fine. The plaintiff just puts on his first witness and starts asking questions. The jury remains in the dark regarding where everyone is going, but of course by the time the defense takes over, the picture is partially framed, and defense counsel can add the finishing touches. He said he was afraid that if he started employing opening statements, plaintiffs' counsel might decide that it was a good idea for them, too, in future cases. I find it hard to believe that ATLA hasn't been able to sell opening statements to any plaintiff's counsel, but then perhaps my experience in Washington and California was more enlightened than I thought.

Assuming, however, that opening statements to the jury are employed, the defendant's opening statements bothered some Seattle jurors. If they were reserved until after the plaintiff's case, some jurors wondered what kind of shenanigans defense counsel was up to. In other cases where the defendant's main witness was a doctor who went on in the middle of the plaintiff's case in order to accommodate the doctor's busy schedule, a subsequent "opening statement" by defense counsel was a bit out of place, admittedly. Other jurors thought that a defendant's opening statement should never be reserved, because it made his cross-examination of the plaintiff's witnesses too confusing, if the jurors didn't know what he was seeking to prove.

In summary, from my experience sitting and interviewing many of the jurors, give or reserve your opening statement based on what the case calls for, not upon what you think the jurors will think. But don't reserve it forever.

Depositions. When you use them, explain the procedure. Jurors can follow what they can see, but when you and someone else start reading from a deposition, perhaps using terms like "direct" and "cross" without any explanation, and maybe mixing up the references once in a while, the jurors are lost. Too, impeachment by deposition is vastly overplayed. If the only question at issue is whether or not there is pain, half an hour with a deposition to prove that the plaintiff formerly placed that pain two inches to the left is worthless. In sum, don't feel you have to publish a deposition just because your company paid for it.

If dates are at all important in the case, have them pinpointed in the testimony of all witnesses, and put the key ones on a blackboard or better yet on paper in full view of the jury so they can keep track of what's going on.

Finally, at the practical level, an absurd example perhaps, but one which happened to an experienced defense counsel in Seattle. In an industrial accident case, one of the job foremen involved sat in the front row in the courtroom for four days in a Pendleton shirt, and a goatee. The day of his testimony he appeared clean shaven, in a blue suit, white shirt and tie. I don't think I have to tell you the impression which he left with the jury. And handsome fellow that he was, with or without a goatee, he should have left a more favorable impression at least with the women on the jury.

Some care regarding these practical matters will contribute to improving the operation of the jury system. But on a broader scale, what should be the role or function performed by the jury? In most states, juries decide who wins, and, if the plaintiff does, how much he should receive. In Texas and some other states, although Texas appears to be the leading example, jurors merely answer questions or special issues regarding the facts involved in the case. Hopefully, if all the special issues have been properly framed and consistently answered, the judge is then able to inter-

pret the answers and indicate a winner in the litigation. Ideally, this type of a system can remove the necessity for talking to the jury about contributory negligence, last clear chance, and other technical terms, and let them devote their attention to the facts. The issues can be relatively few in number and the jury can understand its task. Unfortunately, one need only to look at the articles and cases which have revolved around the matter of special issue submission in Texas to know that the system is not working as simply as planned. Even if it did, I'm not sure that merely finding facts and omitting a final determination of the litigation should be the sole function of the jury. As McCormick has said, there are better, less expensive and less time-consuming methods of fact finding than having witnesses tell 12 laymen about something they think they saw or heard three or four years ago.

My own experience gave me some opportunity to evaluate that type of procedure. In Washington in workmen's compensation cases, the transcript made before a hearing examiner is the sole evidence produced in court if an appeal is taken from the determination of the Department of Labor and Industries. Counsel take turns reading the questions and answers back and forth, and then the jury must answer a few questions, similar to those involved in special issue submission in Texas, i.e., was the Board correct in granting a 35% disability? 35% of what? And if we decide the Department was wrong, will our statement that the Department was wrong be referred back to the Department, or what will happen? Needless to say, I had a better idea than most of those jurors, but I didn't know precisely what would have been the result had we found the Department in error. That type of proceeding—where the jurors didn't know the ultimate result of their determination—frustrated the jurors tremendously. Texas juries often feel the same frustration with the special issue practice. The issues may be so phrased that juries do not know, after having answered the questions, who will win. This may be exactly what some of you think should be the place of the jury.

Respectfully, I wish to dissent. If the jury procedures in your state are intelligently and efficiently run, you should be able to allow your jurors the freedom of

deciding the cases presented to them. In this respect I agree wholeheartedly with Professor Kalven, the leader of the University of Chicago jury project. He says: "The freedom of the jury to inject its own sense of justice is one of the greatest strengths of the American Jury system." If the system is to continue, that aspect of a jury's duty must also continue.

A jurors' handbook puts it as follows: If he will permit his conscience to guide his intelligence, a juror will not often be wrong in his endeavor to render justice.

Little if any of what I've said is new to you, but it may well have been sometime since you gave many of these things serious thought. As you relax in the sun and surf here, you may have more time to cogitate

on these matters and plan improvements for the system as it operates in your home jurisdiction than you ever will again.

You are an influential group. Use that influence to improve the court and jury procedures in your respective states. Through the National College of State Trial Judges and other groups disposed to improve the judiciary and judicial procedures, much is being done. But there's no reason that the Bar shouldn't contribute to the improvements and get some of the credit.

In many of these areas you can even get the plaintiffs Bar to participate and cooperate. And if you work on the same side for a while, you might all end up wearing white hats.

Upgrading And In-Service Training For The Judiciary

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I. INTRODUCTION

Like all of Gaul, judicial education and training may be divided into distinct component parts.¹ One, pre-service orientation and training; two, resident programs of instruction for newly elevated judiciary;² three, for the established jurist, refresher courses³ and academic leaves of absence;⁴

¹For an excellent definitive treatment of the topic, see *Judicial Education in the United States: A Survey*, New York University, Institute of Judicial Administration, New York, 1965.

O'Connell, *Continuing Legal Education for the Judiciary*, 16 *J. Legal Ed.* 405 (1964).

Also, 5 *Trial Judges Journal* 4 (April, 1966).

²Information concerning the National College of State Trial Judges, its admission policies and scholarship aid, may be obtained by writing the National College of State Trial Judges, University of Nevada, Reno, Nevada 89507; see also 48 *J. Am. Jud. Soc'y* 95 (Oct., 1964).

³During the summer of 1964, the Institute of Judicial Administration offered an advanced program for judges who had previously attended an Appellate Judges Seminar. A majority of the participants in this week-long program were presiding justices.

⁴2 *Trial Judges Journal* 17 (April, 1966).



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four, for the entire state, annual judicial seminars.⁵

A moment's consideration suggests that no one scheme meets the requirements of

⁵For a complete discussion of state judicial seminars including a partial roster of state seminars held through July, 1965, see *Judicial Education in the United States: A Survey*, New York University, Institute of Judicial Administration, New York (1965). Additional information on state judicial seminars since September, 1966 may be found in the Annual Report, National College of State Trial Judges, University of Nevada, Reno, Nevada.