

Washington Law Review

Volume 6 | Number 4

11-1-1931

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Recommended Citation

Edward W. Hinton, Address, *Arbitration by Jury*, 6 Wash. L. Rev. 155 (1931).

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ARBITRATION BY JURY*

The title of this paper suggests a doubt as to whether trial by jury accomplishes the results for which it was intended, and thus may smack of heresy

If it seems presumptuous to question the wisdom of the ages, we may remember that the wisdom of the ages has seldom proved enduring.

Other legal institutions, the products of the wisdom of past ages, have flourished and declined and disappeared, because unsuited to changed conditions.

Not so long ago in our legal history, trial by battle was accepted by lawyers and laymen as a rational method of settling a disputed land title. But there were skeptics in those days, and finally it dawned upon mankind that there was little correlation between the justice of a cause and the ability of the champion who with lance and battle axe defended it. When it was perceived that such a trial settled nothing beyond the relative ability of the contenders, it passed into the limbo of things forgotten.

Trial by wager of law, in which the issue was settled by the formal oath of the party and his compurgators, was held in high esteem and lauded as one of the great constitutional rights of the subject, guaranteed to him by the ancient law of the land.

But the skeptics insisted that an oath in support of self interest could not be relied on, and trial by wager of law passed into legal history

It would be unfortunate, then, if any legal institution were too sacred for questioning. Lawyers are apt to accept trial by jury as a part of the creed which requires them to presume that theories are founded on fact. They know that they lose many cases that they ought not to lose, and win cases that they ought not to win, but this rarely troubles them so long as they can maintain a fair average of successes.

It is becoming more apparent every day that the business world and laymen in general are not satisfied with the administration of the law by the courts. They believe with some justification that the enforcement of their rights is too uncertain and precarious.

We see this growing dissatisfaction with the results obtained through resort to the courts reflected in the creation and multipli-

*Address delivered at the Annual State Bar Association Convention.

cation of boards and commissions to handle special types of problems, and more significantly, in voluntary arbitration tribunals in various lines of industry and business.

Hence it may not be inappropriate to consider trial by jury as now conducted and see how well or ill it performs its function.

All sorts of surveys of the courts have been proposed and made by those who delight in statistics, but the masses of figures throw little light on the real problem. Exact information is probably not attainable, but from our general experience we may form a pretty fair estimate of the efficiency and practical utility of our present scheme for the settlement of controversies by law.

Any rational legal solution of the problems involved in a controversy requires an answer to two questions. What are the facts involved? What is the law applicable to such facts? Obviously the facts must be ascertained before any rule can be applied, and some rule must be found or made, if the matter is to be settled by law. More difficult and complex questions can scarcely be conceived, and yet an attempt to answer them is the daily task of every court from Maine to Washington.

Trial lawyers have grown so familiar with the methods employed that they are apt to lose sight of the almost insuperable difficulties involved, which are apparently even less appreciated by their brethren of the profession who have largely lost contact with the court room in the devotion of their talents to the organization and financing of business projects.

These business experts seemingly fail to realize that the business and corporate structures they plan may crash like a faulty bridge when a vital clash of interests occurs, if it should be settled on some other basis than that on which they based their calculations. Can they anticipate with any certainty the actual determination of the facts? Can they predict the rule of law that will be applied?

Every lawyer, therefore, whether primarily engaged in the trial of causes or in the field of business engineering, has a vital interest in understanding the inherent difficulties involved in the determination of disputed questions of law and fact, and in considering whether to have any reliable process or technique for their solution. In other words, are cases decided by the application of known or discoverable rules to the facts as ascertained with reasonable certainty? Or is this an unattainable theory, which breaks down in practice, so that the results of a trial too frequently represent anything but the application of the law to the facts that actually happened?

Perfection cannot be attained in any human institution. Errors are bound to occur under any system. But if our system fails in a large percentage of cases, we may well agree with an eminent English judge in the late sixteen hundreds, who is reported to have remarked, in passing on a motion for a new trial for misconduct of the jury in deciding a case by the flip of a coin, that they were about as likely to reach a correct result by that method as any other.

Every lawyer, from the recently admitted graduate of the law school to the senior justice of the Supreme Court, knows that there are some uncertainties in the law, and the frequency of majority and dissenting opinions emphasizes the fact that there is often room for a difference of opinion. But in spite of such obvious uncertainties, law teachers and practitioners alike commonly assume that by and large the law is reasonably certain and can be relied on with considerable confidence to settle rights and obligations when conflicting interests clash as they do in vast numbers of suits that clog the dockets of our courts.

This comfortable assumption is based on our knowledge and experience that in a great variety of fields, given a specific group of facts, the decision of the courts will follow with almost automatic certainty. If A should slap B's face, or appropriate his chattels, or elope with his wife, we can predict the legal consequence with about the same degree of certainty as that of the astronomer who calculates the hour of the next eclipse.

We can be pretty sure that a will attested by one witness only can not be relied on to carry out the testator's purpose, or that an instrument of a given tenor lacks the quality of negotiability. Such a list of certainties could easily be extended beyond the limits of this paper. And when the American Law Institute is through with its restatements, we shall doubtless have a great many matters of law comfortably settled for the time being, though much of it will not stay settled very long. Littleton and Coke would be sadly puzzled by the present state of the law of real property. Chitty might have some difficulties with the Washington Code of Civil Procedure. And Story and Parsons would probably be surprised if they could read Williston's Restatement of Contracts.

In the settled fields, the law teacher may analyze and classify and predict with certainty, but it is only the certainty of logic—an "if, then" certainty. So the practitioner may safely advise his client to act or refrain, if and provided the facts are conceded to be thus and so. But the settled fields are not the ones that trouble appellate

courts. They are constantly called on to deal with the broader unsettled frontier. The facts in *Smith v. Jones*, argued and submitted yesterday, are not precisely the same as those presented in *Johnson v. Brown* decided ten years ago. Is the difference material? Who can say until the opinion is handed down? Will the reasons which led to the decision in *Johnson v. Brown* influence the court to hold the difference immaterial? Would the court, as an original proposition, decide *Johnson v. Brown* the same way today that it did ten years ago? Conditions have changed in many ways since then, and so has the personnel of the court. A wave of prosperity has been followed by a wave of depression. Business methods and practices that were thought safe enough under more favorable conditions have brought run and confusion. New safeguards may be needed. Reasons which strongly appealed to the gentlemen who occupied the bench in 1921 may not prove equally convincing to their eminent successors in 1931. And so, the difference in facts, though slight, may furnish an easy way to a distinction or a "diversity" as the English judges used to say in a world that was not changing as fast as ours.

If, shortly after the decision in *Penmoyer v. Neff* (95 U. S. 714, 24 L. Ed. 565), in which the court unqualifiedly denied the power of a state to bind a non-resident except by personal service of process upon him within its borders, a highway accident had occurred with ordinary horse-drawn vehicles, and it had been sought to obtain personal jurisdiction of the non-resident traveler by some form of substituted or constructive notice, it is hardly conceivable that the Supreme Court would have sustained the claim. The court was firmly committed to the doctrine that the powers and process of the state could not extend beyond its borders. But in the intervening years motor cars came and multiplied until they filled the highways, and the east and the west met and mingled. New conditions demanded new treatment. The touring motorist became a menace to local security. And so a highway accident caused by the non-resident motorist gave us the decision in *Pawloski v. Hess* (253 Mass. 478, 149 N.E. 122 [aff. 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091]), recognizing the power of the state to summon the defendant from another jurisdiction.

The possible combinations of facts are beyond the realm of calculation. The facts in *Smith v. Jones* are rarely, if ever, quite the same as those before the court in the prior cases. Every case is likely to present a new problem, because of differences in the specific facts,

or in changed conditions. For the eternal new problem there can be no settled or established rule. Nor can we rely on general principles. Justice Holmes has warned us that general principles do not settle concrete cases. We have the general principles of due process, but it leaves us groping when we inquire what is due process as applied to the new situation. There will probably be room for a difference in opinion.

One thing is settled, that the court must decide each new problem when it arises in an actual controversy

The decision is the product of the judge's general legal training, his habits of thought, his philosophy of life, his ideas of fairness and expediency, and his grasp of social and economic needs. He may not be conscious of all the factors that led to his conclusion, and they rarely appear in the opinion which is more apt to be framed in terms of sylogistic reasoning from prior cases which are really not decisive. It is not uncommon to find the majority and minority opinions reaching different results from the same decisions. What we call rules of law in reality are the generalizations which we lawyers make from our study of past decisions to aid us in forecasting the decision on a somewhat similar state of facts. If we have taken into account the true reasons back of the prior decisions, and have made due allowance for changing conditions and changing ideas, and have not generalized too broadly, we may hope with some confidence that the courts will accept our solution of the new problem and make it the law of that case.

If the law is inherently uncertain in the sense that every day claims and defenses are made on the basis of combinations of fact for which there are no binding precedents, there is no escape from the difficulty which must be realized and faced. The same difficulty exists for the boards and commissions as for the courts. The same difficulties arise whether we are dealing with the unwritten common law or the written code. New problems must be solved by the same judicial process. No rules of procedure or method of trial can help us here. The only aid must come from a better understanding of what the courts have done and why they did it, from a more comprehensive grasp of the judicial process as the courts have labored to reach a wise and just result under the conditions as they existed at the time. Adequate training for such problems is the task that confronts your great University Law School. Whether we like it or not, the uncertainty in the law is one of the risks we must assume.

In the attempt to adjust law to life under modern complicated conditions, the decisions more and more have turned on distinctions based on small but important differences in the facts. This mass of decisions represents the most complex body of substantive law that the world has ever known. The courts have taken into account the unspoken thoughts of men. They have made the consequences of an act depend on the intention with which it was done. If such a body of law is actually enforced—if it really determines our rights and liabilities, the facts must be ascertained with the utmost accuracy and precision. It is idle to have different rules for different states of fact, if we cannot be reasonably sure which state of facts existed. What sort of machinery have we for this delicate and difficult task? We have a system of pleading theoretically designed to make clear the question of fact to be determined and give fair notice of the real nature of the claims and defences, but the decisions give rise to doubts as to whether these objects have generally been attained.

The common count under the code is no more informative than it was at common law a century ago. When a complaint for the recovery of real property alleges title or ownership as a fact, which is put in issue by a general denial, the real issues are no more disclosed than they were under the ancient system when John Doe declared on a fictitious demise, and alleged that Richard Roe, the casual ejector, entered and ousted him.

The code scheme for the joinder of causes of action may produce a more complicated trial than our ancestors ever attempted. The attempt to fuse law and equity, so highly praised by some commentators, has resulted in many instances in turning over the judgment and discretion of the chancellor to a lay jury ill-fitted to exercise it.

We have an elaborate set of rules for the exclusion of various kinds of evidence thought to be too unreliable or too productive of prejudice, with innumerable qualifications and exceptions, which test the learning of the trial judge, and occupy the time of appellate courts in such vain struggles as those involved in the attempt to draw a line between what is, and what is not, a part of the "res gestae."

We have shadowy distinctions between legitimate and illegitimate cross-examination. The rules of evidence doubtless keep out many items of information of which it is better that a jury should remain in ignorance. But after all it may be doubted whether the exclusion of the improper question is really very helpful. It is more than

likely that the jury guess the forbidden answer and view the successful objector with unwarranted suspicion.

We have endless rules of practice governing the various steps in the trial until the final submission of the ultimate questions to the jury. But whether they have any appreciable effect on the outcome may be debatable. According to accepted theory, the jury weigh the evidence and from it determine the facts, to which they apply the rule formulated by the court, so that the verdict represents the product of the law and the facts. Disregarding for the moment a large class of cases in which we turn over the whole problem of law and fact to the jury, as in questions of negligence, where they are to determine not only what acts the parties did and under what conditions, but also whether they were culpable, the theory requires the judge to determine the rule to be applied to various possible combinations of fact, and by his instructions to direct the jury, what verdict to return according to the facts as they may find them from the evidence. This theory requires us to assume that the jury proceeds by the use of reason and experience to determine the facts and return a verdict in accordance with the instructions of the court. Are cases generally so decided as a matter of fact? Undoubtedly we go through the ritual of instructing the jury that if they believe and find from a preponderance of the evidence that thus and so and this and that took place, they should return a verdict for the plaintiff, unless they further find so and so, in which case the verdict must be for the defendant, provided that something else did not take place, and send them out to consider their verdict. And there we must leave them, for the law preserves the secrets of the jury room from prying investigators, and we cannot be present at their deliberations.

Post mortem accounts of what took place in the jury room and how the decision was reached are none too reliable, but experience in trial work will enable us to reconstruct the scene we could not witness.

For the last three hundred years trial courts have been dissatisfied with the work of the jury and frankly skeptical as to its value. As Chief Justice Vaughan remarked in *Bushell's* case in 1670, (Freem. K. B. 1, 6 State Tr. 999, Vaugn, 135,) "Surely this latter age did not first discover that the verdicts of juries were many times not according to the judge's opinion and liking." In the transition period which ended with the seventeenth century, while the ancient power of the jury to decide the facts on their

own knowledge without evidence or contrary to the evidence was gradually giving way to the new idea that verdicts ought to be based on the evidence, the jury became a serious problem for the courts. The system of special pleading which attained the greatest development in the time of Lord Coke, enabled the court to decide many questions on demurrer, but was of little use where an issue of fact was submitted to the jury who still had a free hand in deciding on what they knew or had heard or might surmise. An interesting chapter could be written on the hundred years of struggle to gain some control of the jury and thereby obtain more rational verdicts.

In 1684 the Court of King's Bench felt compelled to disclaim the power to set aside a verdict against the evidence, since under the old theory the jury might have found it on their own knowledge. In 1660 a demurrer to the evidence was taken as admitting all the facts provable under the pleadings, because the jury might find them of their own "connusance." In 1670, where the trial judge had committed the jurors for contempt in disregarding his instructions and finding against the "plain and manifest" evidence, the court in banc discharged them because the judge must instruct hypothetically, and the jury were the sole and exclusive judges of the facts. But in 1697, we find Lord Holt announcing the new doctrine that juries must act with the aid and assistance of the judge and in accordance with his directions. By the middle of the eighteenth century the power of the court to direct a verdict for insufficient evidence was firmly established.

A few years later Lord Mansfield tells us that trial by jury would be an impossible method of administering justice but for the power of the court to set aside verdicts which were clearly erroneous. In the period then between 1670 and 1770, the English courts had gained considerable control over the jury

And this control appears to have been reasonably effective in the comparatively simple controversies which for the most part then claimed the attention of the courts. The power to direct the verdict where the evidence would not fairly and reasonably warrant the necessary finding eliminated large numbers of cases from consideration by the jury. The power to aid the jury by making clear to them what the disputed questions of fact were, the bearing of the evidence on these points, and its strength or weakness, had a marked tendency to lead the jury to a rational conclusion. And finally the liberal exercise of the power to grant new trials for verdicts against the weight of the evidence, furnished reasonable protection against

irrational or arbitrary decisions. So far as we can judge from the reported cases the scheme thus developed at the close of the eighteenth century represents trial by jury at its best and under the most favorable conditions. Controversies were comparatively simple because life and business had not yet grown complex. Judges of marked ability dominated the trial and exercised their powers to make it a rational method of determining the facts and applying the law.

As a natural result of the break with England, a prejudice grew up on this side of the Atlantic against the English institution which magnified the office of the judge and minimized the function of the layman in the administration of the law.

This prejudice seems to account for the changes which occurred in so many of the states. The democratic idea, carried to an extreme, is responsible for constitutional or statutory provisions in a number of the states, making jury the judges of both the law and the fact in criminal cases.

Practically the same result has been achieved in civil cases by the common statutory or constitutional provision, such as you have in the state of Washington, limiting the judge to a statement of the law by written instructions, and stripping him of the hard-earned power to discuss the evidence, and thereby aid the jury to discover the truth and come to a sensible conclusion.

This is the prevailing scheme under which we solemnly go through a ritual and piously hope for a miracle, though in less practical fields we have ceased to believe in miracles.

The accurate determination of facts in a case of real dispute is probably the most difficult task that man can undertake. The scientist knows the difficulty of ascertaining the truth about natural phenomena and may spend weeks and months in weighing, measuring and checking to be sure of his facts.

Yet his work is simple as compared with that of the investigator who seeks to discover the truth about human conduct and behavior, where large interests are at stake.

The material to be weighed is for the most part human testimony, whose unreliability has always been sensed, but not fully appreciated until the psychologist checked some of the errors of perception and recollection. Who can estimate the power of suggestions, or the effects of interest and bias? Cross-examination may discredit the accurate account as well as the inaccurate. The witness is called on to communicate his information under distracting con-

ditions. The difficulties of communication are enormous. A statement which means one thing to the speaker may mean something vastly different to the hearer. Protracted examination and cross-examination may leave a most hazy impression of what the witness really said. The inferences to be drawn from a multitude of doubtful circumstances are as uncertain as the shifting wind. The attempt to determine the truth must be carried on under the pressure and stress of a trial.

The task demands the wisdom of Solomon and we assign it to twelve men from the street, usually without previous experience in such an undertaking. They need expert advice and assistance, but they must struggle with the partisan arguments of zealous counsel. From half told tales, left fragmentary and incomplete because some rule of evidence has shut out the balance, jurors are expected to sift out the wheat from the chaff, and "a true verdict make according to the law and the evidence."

Do they succeed in this impossible task? The lawyer's creed requires him to believe so, but reason should make him a skeptic. It may be useless to argue that trial by jury has survived its usefulness, and is as unsuited to the rational determination of complex disputes under modern conditions as the trial by wager of law which it supplanted, because sentiment may be stronger than reason.

The jury has been embalmed in the Constitution, and we have been taught from early youth to believe that it is essential to the administration of justice, though we know very well that equity cases are handled quite satisfactorily without it. If the suit is to set aside a trade for fraud, we do not fear that the judge will suddenly become an irrational tyrant. But if the plaintiff elects to let the trade stand and sue for damages for the same alleged fraud, the jury is our refuge from judicial oppression.

If the jury is likely to remain with us for a long time to come, it is important to realize that as trials are now conducted in most of the state courts, complicated cases are not decided by the application of rules of law to the actual facts, because average laymen lack the necessary experience and ability to evaluate the evidence and determine the facts. They likewise lack the necessary training to understand a complicated series of written hypothetical instructions framed by counsel to test the accuracy of the trial judge, rather than for the enlightenment of the jury

Of course, there are fairly simple cases, involving few questions, in which juries do succeed in determining the facts, and understand

and apply the instructions. But if any of you think that the inability of the jury to understand and apply the instructions in a very large class of cases has been exaggerated, you may test it on your next door neighbor by reading to him the whole set of instructions in any moderately complicated case, and then cross-examining to discover how well he understands what he would be required to determine as a juror in that case. Unless the subject of such an experiment has distinctly more ability than most law students, the result of such a test is a foregone conclusion.

If the jury are unable to determine the actual facts and do not understand the law as announced by the instructions, the best they can do is to come to some agreement on what they regard as substantially fair and right between the parties under all the doubtful circumstances. If verdicts in complex cases represent some sort of a compromise according to the juries' general notion of fairness, then clearly the case is not settled by rules of law, certain or uncertain, but by arbitration, and the field of law is limited to the cases where there are practically no questions for the jury

In many fields we abandon the theory of settling right by rules, because we actually leave both the facts and the rule to the jury, as when we define negligence as what a reasonably prudent man would, or would not, have done under all the circumstances. The reasonably prudent man is a fiction—a mere conception. He does not exist in the objective world. Hence the jurors must determine from their own general experience what they think the real individual in question ought, or ought not to have done. So when we leave to a jury such matters as reasonable time, reasonable notice, and the like.

At one time judges decided the proper construction of an alleged defamatory publication, and so they do today, if the meaning is plain and unambiguous. But if the meaning is doubtful, we pass it on to the jury to arbitrate. Lawyers spend years in the study of decisions. And appellate courts toil and rack their brains to formulate rules to define the rights and liabilities of men in their various relations and dealings, all to little purpose when vital contests are settled by the general notions of twelve average laymen.

We lawyers may be satisfied with an unworkable theory, but the business man is becoming dissatisfied, and some day we shall be forced to give him something better than arbitration by jury

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