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THE THREE PRESENT MENACES: THE GENERAL ISSUE. THE GENERAL VERDICT. PERSONAL JUSTICE.

(*Concluded.*)

III.

PERSONAL JUSTICE.

And this just sense of right it is that in its exercise has disclosed the third menace to which I have referred, the menace of personal justice. This menace must arise where we do not take special verdicts. The revision may sometimes be influenced by a sense that the verdict, in affecting the individual alone, works an intolerable injustice—not merely an injustice, but an injustice that is intolerable. This is the sense of one trained jurist, or of one and a few associates: how can his sense or their sense find a thing intolerable against the sense of twelve men who are the established arbiters in the matter? and who by the theory of our law are the people, called the country, to whose arbitrament the dispute has been disclosed by the joint action of the parties. And if it is allowed that this may be so, will the course end in the subversion of the jury?

The famous judgment of Vaughan, C. J., on this subject is powerful. *Bushell's case. Vaughan* 135-6. The last deliberate consideration of it has been by distinguished jurists in this State, one of whom says, "It is not without the greatest apprehension that I see this wide departure from the settled law of this Commonwealth; it seems to me it must end in jury trial rapidly falling into disuse; there will then be eliminated from our judicial system one of the chief elements of our strength, and one which has always had the earnest support and warm attachment of the citizen. Although there is some exaggeration there is much truth in the declaration of the Englishman that, "The whole establishment of King, Lords and Commons, and all the laws and statutes of the realm, have only one great object, and that is to bring twelve men into a jury box." (*Smith* v. *Times Pub. Co.*, 178 Pa. 530.)

The spirit of our legislature has been assumed to favor a restriction of the power of the jury to find a general verdict in cases where in the judgment of an appellate court personal injustice not to be tolerated ensues upon a disregard of the weight of the evidence, and I will cite a statute which is said to be confirmatory of this, although I must add that I do not think it is to be feared, because it is unlikely that the suggested legislative attack upon the jury will be effective in courts of review. Yet not the less it may by some be regarded as an element of this third menace.

The statute was approved May 20, 1891, P. L. 91, 101. The second section is as follows: "The Supreme Court shall have power in all cases to affirm, reverse, amend or modify a judgment order or decree appealed from, and to enter such judgment order or decree in the case as the Supreme Court may deem proper and just, without returning the record for amendment or modification to the court below, and may order a verdict and judgment to be set aside and a new trial had."

It has not been doubted that the only passage to which one may give attention is this, "and may order a verdict and judgment to be set aside and a new trial had;" and I myself have little doubt that this passage merely expressed the law as it then stood. You may find in our books a precedent

for the Supreme Court's order that a new trial be had under all circumstances within our Constitution. That it may so order for error in law is the reason of its existence; that it may so order because a verdict imposes excessive damages has been shown in early cases, one of which is interesting because the Chief Justice in 1802 declared that a new trial must be had, as the result under review was "against justice" —a distinction looking at the menace I am now discussing, for he did not find it against law. *Woods* v. *Ingersoll,* 1 Binn. 149. And I think you can find a case in which it has thus proceeded on the ground that the verdict was against the weight of the evidence. In *Lessee, etc.,* v. *Cochran,* 1 Binn. 231, there was reviewed the action of a Justice at Circuit who does not appear to have sat *in banc* when the weight of the evidence was discussed, and Brackenridge, J., said that "the court might order a new trial where the jury had found clearly against the evidence." So also said Duncan, J., in *Sommer* v. *Wilt,* 4 S. & R. 26. These three were cases, however, at the argument of which in error the trial judges were presumed (and in two instances the report shows) to be present. It is true that in the last fifty years that court has left the question of the allowance of damage to the court below, and the *R. R.* v. *Spicker,* 105 Pa. St. 142, is an apt illustration; and that in the last seventy-five years it has refused to discuss the weight of the evidence, illustrations of which are too numerous to be here cited. It has relied upon the finding of the jury as conclusive when approved by the trial court. Now, how has the Act of 1891 reached this state of things? Has it conferred power? The question does not appear to be worth discussion. If it has conferred power it can only be with respect to a reversal of a verdict as against the weight of the evidence, with respect to this exclusively; and in such cases you must ask if it is unconstitutional. I shall say a few words on this head. Is it unconstitutional as impairing "trial by jury as heretofore"?

I would prefer to enforce briefly an unfriendly criticism of this statute by a process that sets out from a principle of law. The truth as shown by witnesses is not educed from the testimony in chief, but largely from that and the cross-

examination together. Nor is it alone from these two that it is derived. The object of legitimate cross-examination is to test the credibility of a witness, and it is always to show that what he has said in chief is not credible, is either wholly incredible, or must be taken after allowance made for certain things which it has not brought to light, and which are brought to light by the adverse inquisition. Unless an advocate has this object he does not cross-examine, or is an unskilled advocate if he does. It is an elementary sneer that an examiner has only accredited the testimony which he meant to discredit. Now, the value of cross-examination does not lie alone in question and answer: it lies largely, and often almost entirely, in the manner it discloses. The principle of law I refer to is, that to the jury must be left the question of the credibility of a witness. Therefore the jury may wholly disregard answers making one way, if they conclude, from the manner of delivery, that they are not to be believed, and that, in truth, the fact was the other way, or never arose as a fact at all. This function, according to Pollock and Maitland, was an *ancient element* of the verdict, and was what Bracton meant in speaking of the *judgment* of the jury. *Hist. of Common Law,* II, 625. Thus, you see, a new trial on the ground that the verdict is against the weight of the evidence means that the jury have misjudged the substance of things spoken and the manner of the speakers. It must mean this. And it must mean, therefore, that a reviewing power having before it both of these things—that is to say, *what* was said, and *how* it was said, and giving due effect to both, alone can validly discard a verdict. Such a reviewing power is obviously the trial judge: and his discretion must be exercised with circumspection. He rarely sits alone, but has his colleagues as assessors upon questions of law. Justice Yeates thus regarded the situation in *Comm.* v. *Shepherd,* 6 Binn. 288. His reversal of a verdict means that, finding the tenor of the open and clear run of the oral proof to be against the decision of the jury, *he finds also that there was nothing in the manner of the delivery as he had it before him, just as it was before them at the trial,* to justify in law, under their oaths, a decision upon the *manner,* that this run of oral proof was incredible. The

manner is as important a factor as the words in respect to the credibility of witnesses. If this is so, can an appellate court, to which the record carries the words only, decide, in the absence of the other factor, that things said must be taken as true even against the jury who did not credit them because the circumstances of their saying had shown them false? If this is so, no appellate court is bound by a verdict. "And thus," in the language of Eunomus, "may the Constitution suffer by dropping a jury." Wynne II, 133.

Professor Thayer has said, "This institution, the jury," . . . "has a peculiar interest for us, in the United States, in being lodged beyond the reach of ordinary legislation in our national and state constitutions." By the light of our constitutional provision that trial by jury shall remain as heretofore, we need not fear that the Act of 1891 will be held to warrant an appellate estimate of, and judgment upon, the weight of the evidence, in a tribunal without means of appreciating the foundation of a jury's judgment of credibility.

In this relation I refer to the case of *Smith* v. *The Times Pub. Co.,* 178 Pa. St. Reps. 481. We are in the way of hearing of cases which are of vital importance in the advance of jurisprudence, no matter how slight their effect upon the persons immediately involved, and I could name several in the history of our court of last resort, but I do not find it expedient in illustration of my subject to go beyond one of them. *Carrol* v. *The R. R. Co.,* 2 Pennypacker, 159, may be pointed at as the most recent of this class, and perhaps, the most important in the list, and as in the line of that one which I propose to dwell on; but I must pass it for the present. On the point referred to that case is a precedent. *Smith* v. *The Times Pub. Co.* is also, as of course, a precedent, and on the points decided is supported by the authorities in England and by a line of precedents among ourselves. I speak of this case because of its *dicta.* It is of great value to the modern student because of its *dicta,* and as to these it may perhaps be thought that they preponderate in favor of the doctrine of personal justice, to be administered in cases where the general verdict is disapproved by an appellate court, that court being influenced by a sense that the verdict,

in affecting the individual alone, works an intolerable injustice—not merely an injustice, but an injustice that is intolerable, and that it is likely would not have been incurred had a special verdict been directed.

I shall refer only briefly to this case, and for the sole purpose of suggesting a line of investigation. The plaintiff charged the defendant with the publication of a libel, and the jury found for him and assessed the damages in an amount so large as to have imposed, if finally sanctioned, an intolerable injustice upon the defendant alone, which the trial judge and his associates *in banc* did sanction upon their review on rule for new trial. The record carried to the Supreme Court exhibited the testimony and papers offered, and one bill of exceptions to a statement of the trial judge, but it did not carry up the charge; so that, apart from the bill sealed to the statement referred to, there was for examination only the amount of the verdict in its relation to the entire volume of proof. The Supreme Court held in effect that, every intendment favorable to the plaintiff being allowed from the entire volume of proof, there was no warrant for the finding of the amount, and it awarded a *venire de novo,* expressly upon the ground that the finding was excessive.

But that court invoked the Act of 1891 as authority for the procedure, and there arose a discussion of the constitutionality of that act, and a consideration of the danger of entering upon the province of the jury. The danger contemplated was, that a general verdict, when found bad by an appellate court, might lead to the graver peril of the administration of personal justice, of a remedy due to the hard case in hand, and thus might be subverted in degree the privileges and authority of the jury by the exercise of an arbitrary power to remedy a jury's mistakes. Did the act modify trial by jury as established at the adopting of the Constitution?

It was the opinion of the court that it did not, because trial by jury remained precisely as at the time of the adoption of the Constitution, and therefore as heretofore. Said the court, "All the authorities agree that the substantial features which are to be 'as heretofere,' are the number twelve, and the unanimity of the verdict. These cannot be

altered, and the uniform result of the very numerous cases growing out of legislative attempts to make juries of less number, or to authorize less than the whole to render a verdict, is that as to all matters which were the subject of jury trials at the date of the Constitution, the right which is to remain inviolate is to a jury 'as heretofore' of twelve men who shall render a unanimous verdict. Matters not at that time entitled to jury trial, and matters arising under subsequent statutes prescribing a different proceeding, are not included. 'The constitutional provisions do not extend the right, they only secure it in cases in which it was a matter of right before. But in doing this they preserve the historical jury of twelve men, with all its incidents.' Cooley Const. Limitations, 504 (Ed. 1890), and see Black on Const. Law, 451, and cases there cited." . . . "The Act of 1891 makes no change in the trial itself, nor does it deny the right. All that it does is to provide for another step between the verdict and final judgment, of exactly the same nature and the same effect as the long-established power of the lower courts. The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result not merely legal, but also not manifestly against justice, a power exercised in pursuance of a sound judicial discretion without which the jury system would be a capricious and intolerable tyranny, which no people could long endure. This court has had occasion more than once recently to say that it was a power the courts ought to exercise unflinchingly. It has never been thought to be confined to the judge who heard and saw the witnesses, but belongs to the full court *in banc,* and was freely exercised by this court when the judges sat separately for jury trials. See for example, *Sommer* v. *Wilt,* 4 S. & R. 19."

You will observe that the salient points here suggested are: that the substantial features which are to be as heretofore are the number twelve and the unanimity of the verdict; that the Act of 1891 only provides for another step between

the verdict and the judgment, that is, a review in an appellate court of the same effect as that in the court a member of which tried the case; that the authority of the court a member of which tried the case to review a verdict as excessive has always existed unchallenged; that this authority "has never been thought to be confined to the judge who heard and saw the witnesses, but belonged to the full court *in banc*."

In this relation I have concluded to suggest to you these propositions for investigation, each one of which may be tested by the authorities.

I. Is the Act of 1891 idle, as a mere statement of subsisting judicial power? If it is not, it must be concluded that it has relation only to verdicts against the weight of the evidence, inasmuch as the authorities have universally sustained the appellate action of a superior court in other directions.

II. Are the number twelve and the unanimity of finding the only indestructible characteristics of a jury? If so, the inquiry may close here. If not, then you are to consider that the investigation proceeds only with relation to questions of the weight of evidence.

III. Is there a difference of function involved between setting aside a verdict as excessive and setting aside a verdict as against the weight of the evidence? My suggestion in the course of this paper has been that there is such a difference of function. Where a verdict is excessive the error lies in the misapplication to facts found by a jury of a rule of law as to the measure of damages.

IV. Do the precedents, dating from the abolition of the attaint of the jury, warrant the action of an appellate court of which the trial judge is not a member in setting aside a verdict? In this relation we must disregard the English precedents which are not subject to any restrictive constitutional limitations, and the precedents in our earlier reports in which the Supreme Court reviewed cases tried by one of its own justices, either in circuit or at *nisi prius*. The reason for this is that by the theory of the law the trial judge always sits with the court *in banc* upon the review of verdicts complained of.

V. Assuming that in Pennsylvania the precedents at common law are against the action of an appellate court of which the trial judge is not a member in setting aside a verdict as against the weight of the evidence, may an act of the General Assembly create and confer such power within the purview of the limitations of the State Constitution? May it enact, in effect, that the presumptions of credibility and weight of evidence drawn by a jury may be set aside by a stranger tribunal?

VI. Is a statute constitutional which declares that an appellate court must (not may, but must) enter judgment upon the facts as it finds them, and not upon the verdict of a jury to whom both parties have submitted themselves for the finding of the facts? This is too serious a question to be lightly passed over. If it is answered in the affirmative, it may be apprehended that the principle which Burke correctly expressed some time ago no longer prevails, and that the peculiar feature of the law which has indicated safety and health to the community at large is no longer to be discerned in our jurisprudence. You will observe that in *Nugent* v. *Traction Co.*, 183 Pa. St. 142, the final judgment was for the defendant as on a demurrer to evidence. The court did not find the facts. "We apply," said the court, "the correct rule of law to the established facts of the case." The correction of a jury in matters of fact by a court, and not by another jury, is contrary to a long-established principle. "If," says Eunomus, "they judge apparently wrong, that judgment of theirs may be corrected, but it will still be by another jury; so that the injured party will not suffer for their wrong judgment, as they might sometimes have done in the perilous days of attaint, nor will the Constitution *suffer* by dropping a jury." Wynne II, 133. And see II, 140, 3d edit.

VII. Could an act of Assembly prescribe that hereafter juries were prohibited from drawing presumptions from facts and regarding suspicions as to credibility, but must find according to words spoken and the direct tenor of the other proofs, whilst an appellate court *might thus find and also must as its exclusive function judge of the credibility of the witnesses and draw deductions from evidence?*

VIII. Does the Act of 1891 require the Supreme Court

upon record duly brought up to grant a new trial even where a motion was not made for reasons filed according to rule in the court below? This is not an idle question, and its affirmation would seem to follow upon a conclusion resulting from your determination that the Act of 1891 affects questions of weight of evidence, and thus affecting them is constitutional.

These are questions of deep import, and they are not upon a technical branch of the law; they are questions for a statesman, having relation to the structure and life of the system of jurisprudence itself and arising with significance of danger in the future. They might have been the basis of one of the profoundest arguments of Burke, and they may well induce the writing of a great law book to-day. There is as ready and promising an opportunity here as there was for the work of Fearne, which did so much to guard against error in the disposition of estates, which indeed established the current of authority for years; and the scope of the topic is greater here because not only estates, but liberty, reputation, commercial advance, may be found involved. There should be a quickening of the professional conscience as to the jury as an institution, and an awakened interest in the very searching learning upon the subject. More than this, there should be an influence opposing the trend of American legislation against the organic law. For the creation of such influence the young men of the day should by steady investigation in their leisure hours, and careful thought, produce a sphere, an atmosphere as some might call it, of culture, in which high tone is nurtured and invigorated, and in which only may the real import and essential value, the essential necessity, of our institutions be seen. I venture to recommend to you four authors and some of the innumerable works which their citations recommend to you, in this behalf: Francis Lieber, in his chapter, *Independence of the Jus:—Trial by Jury,* to be found in his *Civil Liberty and Self-Government;*—Hegel, in his section of *The Civic Community; of the Court;* in his *Philosophy of Right;* — Sir Francis Palgrave in his *History of Trial by Jury,* an authority of some age now;—and Professor Thayer in his *Development of Trial by Jury,* the latest

great authority. The opinion of the Supreme Court of the United States, by Justice Gray, in *Capital Traction Co.* v. *Hof.* 174, U. S. S. C. 1, is valuable.

Are you aware of the extreme to which some of the new states have gone in subverting the jury of the ancient time? And, on the other hand, of the show of fear of the judiciary as a menace to the jury which two or more of the older states make? The contest lies between the sovereignty and the governed, and in one form or another is as old as government itself. The most interesting, because the farthest reaching exhibition of it, lies in the old English Statutes of Liveries and of Laborers. When the King found the people dangerous he sided wth the nobles in the Statutes of Laborers;—King and Lord against servitor and plebs; when he observed the nobles too powerful, he sided with the commons in the Statutes of Liveries;—King and plebs against Barons, Earls, Dukes. When the pervading power with us has one blind fear it strikes at the jury and enlarges judicial reach; when the nightmare incantation stirs another blind fear, the pervading power attacks the judges and puts the jury above them. For illustration of this second form of panic, let me refer you to the Dumb Act of Georgia of fifty years ago. It was enacted on the 21st of February, 1850, and prescribed in substance that a trial judge should not charge the jury as to what had or had not been shown by the evidence, or express an opinion as to the guilt or innocence of one accused, and that if he did, his language, however accurate, should constitute reversible error. This, according to the witticism of Chief Justice Bleckley, struck the judges dumb. They became so anxious not to have an opinion on the facts, and law and fact are usually so intermingled in instructions, that they frequently failed even to express an opinion on the law. (See *Am. Law Rev.*, Sept.-Oct., 1900.)

The illustrations of attacks upon the jury are so numerous as to justify a strong word. In Louisiana, except in cases where the penalty is not necessarily imprisonment at hard labor or death, the General Assembly may provide for the trial by a jury less than twelve in number, and by the Act of 1880 nine out of twelve jurors may render a valid verdict in civil cases. In Iowa the General Assembly may authorize

trial by a jury of less number than twelve men in inferior courts. The three-fourths rule prevails in Nevada, South Dakota, Texas and Washington. Two-thirds may render a verdict in Montana in all civil actions and in all criminal cases not amounting to felony, whilst in Idaho in all cases of misdemeanor five-sixths of the jury may render a verdict. In Utah the trial of a felony less than murder by a jury of eight men is legal under the Constitution.

It is interesting to consider that if we take the description of these three menaces to modern jurisprudence in its darkest import, we yet preserve our content. When we appreciate the truths, that pleading is beyond the sphere of the Law; that the finding of facts is no part of the Law; that personal justice is abhorrent to the Law, we go far towards so true and profound a conception of the Law as very few men have analyzed, and as makes us know Right itself, the real Jus that great scholars of Pennsylvania like Brinton Coxe, James Parsons, John Cadwalader and William Tilgham have always held in view. The General Issue sheds its genial influence upon Retort, and requires judges who are too busy for the labor to act as moderators in a debating society whilst a jury idly watches (see *Reeves' Hist. of English Law,* II, 219, *Finlason,* 1869); but this evil was felt at the beginning of the century in this Commonwealth, and whilst much remains to be improved, not the less by our system of affidavit of defence, which is untechnical special pleading, and of notice of special matter, there is a good degree of preparation for proofs before the trial court convenes. We should make the affidavit of defence a plea and by process of demurrer prune it from Retort to Answer. The General Verdict is without scientific sanction in many instances, but it is much less dangerous than it was in the time of Edward the First before Parliament by the Act of the thirteenth of his reign prohibited the justices from compelling jurors to find a general verdict involving a question of law, and declared that, should the jurors have the temerity thus to do of their own motion, they were to be regarded as acting at their own peril. It is safer, perhaps, as more free from one kind of interference than it was in the day of Shelley, J., who charged the jury as to credibility and weight

of the evidence, *int. al.*, that men are liars and not angels: *homines sunt mendaces at non angeli. Rolfe* v. *Hampden, Dyer,* 53.b. And although to-day it must be conceded that by it some loss at times is entailed upon corporations defendant in actions of tort, their gain by the doctrine of contributory negligence is at other times perhaps more than the strictest justice would allow them, and certainly a compensatory circumstance.

The prerogative to direct a special verdict has not often of late been exercised here, but in actions *ex contractu* it may in its exercise go far towards the restoration of the balance of power between the jury and the judge, although we must not forget the warning of Brackenridge, Justice, in *Wilt v. Franklin,* 1 Binn. 528, that on a special verdict the presumptions and inferences must be drawn by the court. Always, however, does this caution present itself to us, and particularly in the sphere of the recognition of personal justice, or the justice of hard cases, when the institution of the jury may at times appear to be slighted. But there is never a time when menaces may not be pointed at and feared by certain observers. And as these three menaces of to-day are found in branches or accessories, and not in the great system or trunk itself, we need only say that at the worst some exuberant overgrowth must be lopped off. My intention has been to describe them as fully as may be, in order to show you two things, that the science of law in its administration is not in danger, no matter how strong certain evidences of development which the superficial call innovation, reform, subversion; and that learning has been, is and always will be the light and help of the law; and that above all the Jus or Right itself remains unaffected. Learning tempers criticism, takes the tone of melancholy out of complaint, ends individual arrogance, alone makes for universal right. Learning in its fullness goes far beyond the stage of complacent disapproval which is a sure sign of weakness. Remember the great protest of Ben Jonson in his preface to the *Alchemist,* and how he closes: "For it is only the disease of the unskillful to think rude things greater than polished, and scattered more numerous than composed." Suppress every sneer to which your academic success may tempt you, for you

cannot, if a good scholar, find any feeble proposition without warrant in some record. That a judgment must not precede proof is probably the surest affirmation I can recall to you; you might think you could claim toleration for a sneer at its converse; and yet in the Anglo-Saxon procedure a judgment was rendered before the evidence was taken and conclusion of fact found, a practice not only finding warrant in a record, but warrant in a system of judicature.

Ignorant men may sometimes help you. It is always dangerous, at any rate, to contemn them. But this is because they put you upon inquiry and thus incite you to delightful and more careful investigation. It is never to be reasonably feared that the practice of the law will become vicious, or even bad, or even hurtful, through ignorance. In the very nature of the thing the practice cannot be radically wrong. There may be seasons of decadence. But the use of the intellect with a view to persuading or convincing a court, and subject not only to the correction of an adversary, but to the rulings shown by volumes of reports and prescriptions of statutes which must be obeyed, makes in practice an effective intellectual vice impossible.

William W. Wiltbank.

NOTE.—*The view expressed in this paper that "the achievement of a surrejoinder has for years been absolutely impossible" is not affected by the recent report of Allen* v. *The Colliery Engineers' Co.,* 196 *Pa. St. R.* 512, *in which a series of papers appears to have been filed in the court below entitled as pleadings up to a demurrer to a surrebutter.*