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LAW IN THE JURY ROOM*

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The recent years have echoed with the challenges of established institutions. Particularly in connection with the administration of justice has this been true. Witness the Wickersham Commission's Report on Lawlessness in Law Enforcement and the widespread agitation for improvement in Criminal Law Administration;[1] the poll of the Ohio State Bar Association concerning the selection of judges,[2] the proposed small claims Division of Common Pleas Court to supersede the justice of the peace,[3] the recently enacted simplified Appellate Procedure Act.[4] The civil jury has not escaped its fair share of criticism and discussion.[5] Opinions regarding it have run the gamut from the encomium of the Fourth of July orator to the condemnation of the legal reformer who will have none of it. One writer says, "I consider the jury, not as it was seven hundred years ago, but

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[1] See the program of the Cincinnati Conference on Criminal Law Administration in OHIO BAR, Vol. VIII, No. 33, p. 411 (Nov. 11, 1935).

[2] OHIO BAR, Vol. VIII, No. 11, p. 127 (June 10, 1935). See also the tentative draft of a constitutional amendment for appointive judges, OHIO BAR, Vol. VIII. No. 25, p. 311 (Sept. 16, 1935).

[3] OHIO BAR, Vol. VII, No. 42, p. 566 (June 14, 1935).

[4] G.C. 12223-1 to 12223-49 and numerous other sections, 116 O.L. 104. Effective Jan. 1, 1936.

[5] In an article by Clark and Shulman "Jury Trial in Civil Cases—A Study in Judicial Administration," 43 YALE L.J. 867 n. 1, the following recent discussions are cited: Lummus, Civil Juries and the Law's Delay (1932)

as it is today. We have fostered and improved upon the original conception of our ancestors centuries ago, until it has reached the form in which it now exists—an instrument for the decision of facts nowhere rivaled, in the field of the legal tribunal, for its impartiality independence and satisfaction to the great body of our citizenry."[6] Another tells us that the jury "is about as well fitted to the needs of modern society as a smooth bore musket to those of a modern marine."[7]

When the warfare on the jury front had quieted down to desultory sniping a barrage was let loose in the form of Mr. Jerome Frank's book, "Law and the Modern Mind."[8] A single chapter was devoted to the jury but that chapter was quite devastating.[9] Since then Mr. Frank has trained his guns on other institutions and has dropped a couple of shells on the law schools.[10] The writer was sufficiently jarred by these blasts that he was quite receptive to the suggestion of a colleague[11] that a study be made of civil juries in Franklin County. One of the matters on which it was hoped that some light might be shed

17 MASS. L.Q. (No. 4) 34 (1932), 12 B.U.L. REV.. 487; Wilkin, The Jury: Reformation, Not Abolition (1930) 13 J. AM. JUD. SOC. 154; Duane, Civil Jury Should be Abolished (1928) 12 id. 137; Wigmore, A Program for the Trial of Jury Trial (1928) 12 id. 166; Corbin, The Jury on Trial (1928) 14 A.B.A.J. 507; Sweet, The Jury on Trial: A Reply (1929) 15 id 241; Proskauer, A New Professional Psychology Essential for Law Reform (1928) 14 id. 121, 13 MASS. L.Q. (No. 5) 2; Green, Why Trial by Jury? (1928) 15 AM. MERCURY 316; Elder, Trial by Jury: Is It Passing? (1928) 156 HARPER'S 570; Duane and Windolph, Should the Civil Jury be Abolished? (A Debate) (1928) 80 FORUM 489, 498. Cf. *Peterson* v. *Fargo-Moorhead St. Ry. Co.*, 37 N.D. 440, 160 N.W. 42 (1917); Ethridge, J., dissenting in *Talbot & Higgins Lumber Co.* v. *McLeod Lumber Co.*, 147 Miss. 186, 192, 113 So. 433, 434 (1927).

[6] Corbin, "The Jury on Trial," 14 A.B.A.J. 507, 516 (1928).

[7] Sweet, "The Jury on Trial: A Reply," 15 A.B.A.J. 241, 243 (1929).

[8] Brentano's Publishers, New York, 1930.

[9] Chapter XVI "The Basic Myth and the Jury."

[10] See Frank "Are Judges Human?" 80 U. PA. L.R. 17; 233 (1931); "What Courts Do in Fact" 26 ILL. L.R. 645; 761 (1932); "What Constitutes a Good Legal Education" 19 A.B.A.J. 723 (1933). "Mr. Justice Holmes and Non-Euclidean Legal Thinking" (1932) 17 CORN. L.Q. 568.

[11] Prof. Silas A. Harris. This study was not only his idea but in carrying it out he did the major portion of the work. It happened to fall to the writer's lot to tell about it.

was that of the effect of knowledge of insurance in automobile accident cases. The case of *Pavilonis* v. *Valentine*[12] at the time represented the last word of the Supreme Court on the question of the voir due examination relative to insurance. The holding in the case was such as to permit prospective jurors to be asked as to their connection with, interest in, or relationship to a casualty insurance company interested in the outcome of the case.

Judge Robinson in the majority opinion stated that, "It is a matter of common knowledge that automobile owners rather generally carry casualty insurance, and that jurors rather generally own automobiles, and that counsel and representatives of the casualty insurance companies do not generally appear at the trial and conduct the defense of suits in which they are not interested."[13]

Chief Justice Marshall quoted this statement in his dissenting opinion and remarked that "This is an assumption of fact which is contrary to well authenticated statistics on that subject. In 1925 (this case was decided in 1929), when there were 1,400,000 automobiles in this state, statistics show that only 14% of them were covered by indemnity insurance, while 86% were uninsured."[14] This quotation of statistics appeared to be a rather appropriate answer to the assumption of the majority. The dissenting opinion also sets forth constructive suggestions for means of meeting the problem. The following statement, however, was one which raised a question. "The fact that such methods (indicating the background presence of an insurance company) are resorted to by counsel for the plaintiff, and that they are so stoutly resisted by counsel for the defendant, is proof sufficient that the experiences of the past have shown that verdicts are facilitated and the amount of recovery augmented by such means."[15]

With the great amount of controversy that has arisen concerning this matter of keeping the jury uninformed as to de-

[12] 120 O.S. 154 (1929). 165 N.E. 730.
[13] Id. p. 159.
[14] Id. p. 172.
[15] Id. p. 164.

fendant's insurance,[16] we were interested in trying to find out in a few cases how important a consideration it actually was. While we were about it we decided to study some other phases of the jury system of trying cases as well. Our first problem was to get ourselves in a position where we could talk to jurors with some assurance that we were getting a fair measure of the truth. This problem proved surprisingly simple. The three judges of the Franklin County Common Pleas Court[17] who happened to be sitting in the civil jury rooms were most obliging in their cooperation with us. Without their cooperation we could not have procured information from many of the jurors.

Our method of procedure was as follows. In each case one or both of us sat through the trial from the impaneling of the jury till the final charge and giving the case to the jury. This meant that for the better part of three months we haunted the Court House during the week day hours when we were not required to be on the campus with our classes. While there are times when this is an interesting diversion, it is not to be recommended to any one as a life work. Trying a case on the part of a lawyer and hearing it on the part of the judge has its compensations, but to sit day after day as a more or less passive bleacherite soon loses its charm. We generally did our hunting in pairs and when the jury had returned its verdict and had been discharged we were hot on the trail. We went armed with a letter signed by the judge who had presided in that case and which explained the purpose of our study, and suggested to the jurors that they might feel free to tell us as much as they cared to about their deliberations and what took place.[18] In interviewing over a hundred of the jurors in about 25 different cases there was only one instance when we had the slightest difficulty in getting the

[16] See exhaustive annotations, 56 A.L.R. 1418, and 74 A.L.R. 849.

[17] Judges John R. King, Charles A. Leach, and Henry L. Scarlett.

[18] In Ohio, petit jurors take no oath of secrecy and there is no rule of law which prevents them from discussing freely with anyone the proceedings in the jury room. While it is common for jurors to discuss a case with the lawyers and judges, it seems possible that something less than the whole truth may be told, in the interest of tact and diplomacy.

jurors to answer our questions. In that case the man, a not too intelligent Irishman, would have opened up for us, as we sat with him on the porch, if his mother had not stood in the doorway like the counsel for the accused and warned him that he "shouldn't say a thing." The old lady said she knew what we were up to, that her brother used to work in the Court House and that she was on to the likes of us. With this single exception the judge's letter was an open sesame and I feel that we were given a fair and honest description of what took place in the determination of every case.

One of the first questions which we would ask was concerning the selection of the foreman. This and other features of the actual mechanics of rendering a verdict seem to be taken so much for granted that there is a rather amusing hit or miss, happy-go-lucky lack of system about the whole thing. Most of the persons called for jury service during our term of study were novices. Because of their feeling of combined responsibility and bewilderment about the mystical processes into which they were being initiated, one who had previously been on a jury was almost certain to be acclaimed as the fountain head of wisdom and the logical person to be selected as foreman. That the experience that set him apart and made him appear to be of different clay was quite commonplace never seemed to suggest itself to the others in the first case. In the next and later cases the former foreman was reduced to mortal size and the nimbus which had surrounded him before was recognized as the reflection of the inexperience and naivete of the neophytes rather than any attribute of his own. In several of the cases so great was the devaluation of the office of foreman after the first experience that a person was chosen because he came into the jury room after the others or because he happened to sit down in a chair away from the circle around the room. In one case a rather dominant individual nominated as foreman an old gentleman, who was almost deaf, and then proceeded to conduct the meeting for him.

A question which might be expected at this point is "what difference does it make who is chosen foreman, or how he is chosen?" It seems possible that it is of some importance who is chosen and how. We found it to be a common thing for the foreman as soon as he was selected to proceed to demonstrate his capacity for quick action. In a number of cases the first thing he would do was to take a vote as to whether the defendant was liable. This sometimes took the form of balloting or whether defendant was "guilty."[19] If the vote was against the defendant a considerable amount of time would usually be spent in arriving at an agreement as to the amount of damages that he should pay.

Again it might be asked, "Isn't that the most expeditious way of getting the result?" It is expeditious and is one way of arriving at a result, but it does such violence to the whole theory of trials that one cannot help wondering as to its justification. It is true that the power is given to a jury, when a general verdict is returned without special findings of fact, to resolve the one issue of defendant's liability and the extent of it, if any.[20] But surely it is the contemplation of lawyers and the judge that some attempt be made by the jurors to break the case up into its component parts and to settle each issue by itself.

For instance in one of the cases the issues which the lawyers and the judge could see were several. A young man employed by a corporation was driving an automobile belonging to it, in the south end of the city. At an intersection he collided with another automobile driven by another young man employed by another corporation. Both were injured so seriously that their first opportunity to speak to each other was in the operating

[19] In his book "Judge and Jury," p. 398, Dean Leon Green tells of a jury in a New Mexico case, in which the plaintiff sought to recover damages for money taken from him by force. The jury returned this verdict: "We the jury, find for the plaintiff in the sum of ten thousand five hundred dollars, less one hundred and ten dollars, and sentence each of the defendants to five years in the penitentiary, and recommend the mercy of the court."

[20] For an excellent discussion of the development of this concept see Farley, "Instructions to Juries—Their Rôle in the Judicial Process," 42 YALE L.J. 194 (1932).

room of a hospital where each admitted to the other that he didn't know how the accident had happened. The first young man, whom we shall call A, had sued the corporation which was the employer of the other young man, B. That claim was settled out of court and the case which we heard was B's suit against A's employer. At the time of the collision, A was on his way to a city market to solicit business for his employer. He had previously driven to the 5- and 10-cent store and purchased supplies for his little daughter's birthday party. A question was raised as to whether at the time of the accident he was acting in the course of his employment or whether he was off on a "frolic of his own." The issue of agency was so clearly raised in the minds of the lawyers and the judge, that, after plaintiff's evidence, the jury was given a considerable vacation while the legal minds wrestled with that problem. The judge found it so difficult of solution that he returned to the court house in the evening and searched the books for further light on it. His efforts were rewarded by the discovery of an opinion by an appellate court which convinced him that he should overrule the motion for directed verdict and permit the jury to determine the issue of agency.

Naturally with such a situation as has been indicated the issue of contributory negligence was very definitely in the case. It is scarcely probable that plaintiff's employer or its insurance company, would have paid a claim of several thousand dollars, if there had not been considerable evidence of his negligence. Therefore it was clear to the lawyers on both sides and to the judge that the task of the jury was to consider each of these issues—not only the negligence of the defendant's employee but the question of whether he was acting for his employer, and the question of the contributory negligence of the plaintiff. The judge covered these matters in his charge fully and carefully, and was explicit in placing upon the jury the responsibility for resolving these issues in favor of the one party or the other. What happened in the jury room?

The question of the negligence of defendant's employee was raised, briefly discussed and decided against defendant. A considerable discussion was had as to the permanency of plaintiff's injury and the amount of damages to which he was entitled. Agreement was reached and the verdict signed and returned to court without the question of agency and contributory negligence having been considered at all. A motion for new trial was subsequently sustained because the judge felt that he had committed error in allowing the jury to determine the question of agency.

Undoubtedly the most important consideration in the minds of the jurors and that which prompted them to disregard complicated issues of law and go directly to the matter of awarding plaintiff damages, was something which occurred long after the accident and which therefore in the eyes of the law could have no bearing on the cold legal question of liability. The jurors believed that one of the counsel for defendant had dealt unfairly with plaintiff in getting him to come to his office and to make out and sign a written statement concerning the accident, without advising him that the counsel was at the time representing the other party.

There is a story of a naughty little boy who was kept after school. The teacher got right down to brass tacks, and delivered an appeal to his better nature which, she was convinced, was really getting across. His attention was so rapt that she was reluctant to break the spell of her words by pausing for breath. And when she did the boy broke out with the delighted exclamation, "Gee! Miss Smith, its your lower jaw that moves when you talk, ain't it?"

One wonders if it is not probable that lawyers and judges do a great deal of moving of their lower jaws, which to a greater or less degree, fascinates the jurors for whose benefit it is done, but adds little if anything to the sum total of human intelligence. If we would be a little more candid and objective we could see why this is almost necessarily the case. The twelve

good men and true, who theoretically absorb the instructions given them by the judge are not particularly apt. The druggist's wife and the farmer, the policeman's wife and the unemployed carpenter have one thing in common. None of them has ever seen the inside of a law book. The judge comes as teacher to this group of not too ambitious pupils, toward the end of a long day of listening to meaningless wrangles, interspersed with fairly intelligible questions and answers of witnesses and immediately following what may have been a nerve racking appeal to their emotions by one or more counsel.

In our classes in law school we endeavor to get a setting that is somewhat conducive towards the uninterrupted play of intellect upon intellect. To accomplish this we have thoughtfully placed the classrooms so that every other word is not drowned out by the clanging of passing street cars and honking taxicabs. We have been quite successful in eliminating the mere spectator and hanger on, so that those for whom the instruction is intended will not forget their role as instructees and become engrossed in the conduct of others. We have purposely refrained from equipping the classrooms with clocks because of the fundamental principle of human behavior that absorption in the movement of the hands of a clock, prevents absorption of anything else. Most important of all we have so arranged it that we have placed before us for instruction young men and young women who are hand-picked for the purpose. They come to us before their thought processes have become crystallized and unyielding. They are college graduates or have had two or three years of college training. They have a real and intense interest in the field of law and in the particular subjects in which they receive instruction.

Taking all this together the task of the law teacher would seem to be a simple one. And yet after every examination it is brought home to a teacher that it is an extremely difficult job to get across to law students the abstractions that go to make up the law.

It is hoped that in thus sketching the portrait of the law student and the classroom, the contrast with the average juror and the courtroom in which he goes to school has been made sufficiently clear. It is possible that a common pleas judge would find it difficult under the conditions which surround the giving of his charge, to get it across in a way that would show its effect, if he were addressing it to a group of selected law students. Furthermore, under conditions such as prevail in a classroom it may be doubted if the net result of the judge's charge upon the intellects of the picked jurors hearing it, would be a simplification and aid in the solution of the problem before the jury. This is said with the greatest respect for judges but with considerably less respect for many of the abstractions with which they deal, than one may have had as a law student.

Let us consider, for a moment the typical charge on the question of negligence. It is addressed to a jury of laymen none of whom has even been a party to a negligence action. If he had he would probably be eliminated by challenge. None of them knows anything about the law of torts and few have ever been inside a courtroom except possibly to listen to a divorce case or something of that sort. To such laymen the legal concept of negligence has very little significance except as it may be made clear by the court's charge. Negligence has been defined a great many times in such charges and the definition has probably never varied to any considerable extent from this language. "Negligence is the failure to exercise ordinary care. Ordinary care is that degree of care which a person of ordinary prudence or care would exercise under the same or similar circumstances."[21] Let the reader place himself in the position of a housewife or plumber or farmer serving on a jury and imagine how much he would be helped by a definition like that. "Negligence is the failure to use ordinary care. Ordinary care is ordinary care." Who is this person of ordinary care who is set up as the standard of human conduct? Manifestly it is each indi-

[21] See *L. S. Elec. Ry. Co.* v. *Shepherd*, 48 O. App. 167, 173 (1933). 192 N.E. 740.

vidual juror. If the charge has any effect whatever it will have some such effect as this. While the judge goes right ahead reading from the books or the transcripts of former charges, the juror sets up the man of ordinary care in his own image and backs off to see how he would act under the same or similar circumstances.[22] The timid old lady who has never driven an automobile sets up as her man of ordinary care the driver of a Model T Ford, who stops at every intersection and drives at 10 miles an hour down the middle of the road, so that there is no danger of his running off the road on either side. Those who have driven automobiles will have entirely different standards. The net result of the court's charge on the subject of negligence is necessarily a direction to the twelve jurors to take their preconceptions and long-standing convictions on the subject of automobile driving into the jury room and come out with a verdict that represents the best judgment of at least nine of the twelve.

But to come back to the subject of the selection of the foreman. Under the conditions as we observed them there was an utter lack of system and method in selection and also lack of knowledge on the part of the one selected such as would enable him to conduct the deliberations in a manner which would indicate some understanding of the issues actually raised by the evidence. It may be an unsound suggestion, but it would be interesting to try the experiment of the selection by the judge of the foreman of the jury. This could be done on the basis of the voir due examination and the general impression of intelligence and ability to command respect and attention. It could be made possible for the judge in the presence of counsel to instruct the foreman and answer his questions concerning the judge's written charge which would be taken by the foreman into the jury room.[23] To any criticism of such a method that it gives the

[22] See Farley op. cit. n. 18, p. 209.

[23] The law now makes provision for a written charge if requested. See G.C. 11420-1. Such request was not made in any of the cases included in this study and in no case was the court's charge taken to the jury room.

judge too great a control over the jury's deliberations and destroys much of the democratic character of jury trials it may be answered: (1) There is something of a precedent in the statutory method of selection of the foreman of the grand jury by the judge;[24] (2) One hesitates to believe that our common pleas judges are not worthy of being intrusted with this degree of control over a jury's deliberations; (3) In a much less efficient and more cumbersome way we lodge such control in the trial and appellate judges with the power of directing verdicts,[25] and of granting a new trial.[26]

In one of our cases a truck loaded with lumber had broken down on the National Road east of Columbus. The driver had left it parked on the highway without a light and the plaintiff had come up behind it in his automobile and collided with the parked truck. The issue of contributory negligence was definitely in the case and the defendant's counsel requested that a written instruction be read on the subject. This was done and the instruction was taken to the jury room with the pleadings and exhibits. The instruction contained the usual language in such a charge, but the word "directly" had been written in with pen and ink before the words "contributed," so that it read that the plaintiff could not recover "if he was guilty of negligence which directly contributed in the slightest degree to the accident." This jury, contrary to the practice of many of the others, actually read the special instruction in the jury room. A controversy arose as to its meaning. Some of the jurors argued that the word "directly" meant intentionally, and they contended that plaintiff did not intentionally drive into the truck. The

[24] G.C. 13436-3. "When a grand jury is impaneled in the manner provided by law, the court shall appoint one of the members thereof, as foreman, and shall administer, or cause to be administered, to said juror an oath in the following words. * * *"

[25] With the abrogation of the "scintilla rule" and the substitution of the "reasonable mind" test in *Hamden Lodge* v. *Ohio Fuel Gas Co.* 127 O.S. 469, 189 N.E. 246 (1934) the power of the trial judge has been increased.

[26] See Farley, opus cited supra n. 18 for a discussion of the control of the jury and trial court by the appellate court. See also Green, opus cited supra n. 17, ch. 14. "Jury Trial and the Appellate Courts."

vote on this issue was 7 to 5. The minority could not be convinced, and it was agreed that they ought to return to the court-room and let the judge explain what the instruction meant. The judge guided by the statutory provision[26a] that a written instruction once given must not be orally qualified, modified or explained to the jury, said that the meaning was plain and that he could not further clarify it. The particular question as to the meaning of the word "directly" was not asked. On returning to the jury room, the discussion was resumed, with the line up of 7 to 5 on the issue of contributory negligence still being maintained. Just before adjournment time it was agreed that plaintiff should recover for the actual damage to his car, with nothing for his personal injuries and other damages, because of his own carelessness.

When we make the doctrinaire statement that the principle of comparative damages does not obtain in Ohio,[27] and that contributory negligence, however slight, will defeat a recovery, we are talking of the law in the books. Certainly in actual practice, the plaintiff, who can get by the obstacle of a directed verdict, stands a good chance of getting a verdict in spite of his contributory negligence, if it is not too gross. In this respect as in many others an element of common sense and fairness may creep into the administration of justice because of the inability of lay jurors to understand concepts which are accepted as simple and obvious by lawyers. The latter may be too prone to think of the doctrine of contributory negligence as something fundamental and necessary, when as a matter of fact it finds no place in some systems of law[28] and is being changed in many jurisdictions in this country.[29]

[26a] G.C. 11420-1.

[27] 45 C.J. 1037. "The doctrine has been expressly repudiated in Illinois, and except in so far as established by statute, none of the other states have recognized the doctrine and most of them have expressly repudiated it." Citing cases from many jurdisdictions including *Murphy* v. *Dayton*, 7 O.N.P. 227.

[28] Under the Civil Law comparative negligence is recognized. See 45 C.J. 1037. The same is true in Admiralty Law, 1 C.J. 1327.

[29] See 45 C.J. 1038 et seq. In Ohio the doctrine of contributory negligence has been superseded by that of comparative negligence in certain actions

An experience of several years in teaching the subject of negotiable instruments, and observing how difficult it is for some of its peculiar rules to be understood by second and third year law students, should have prepared one for the result in a case involving a promissory note. The plaintiff was suing as the holder of the note, which had been given by defendant, without consideration, and as part of a reorganization scheme, to save a speculative venture in which the defendant had previously invested money. The plaintiff claimed to be a holder in due course, without notice of the original transaction, and of the fact that defendant had not received consideration. The jury was charged explicitly upon the status of a holder in due course and his freedom from the defense of lack of consideration.[30] Within fifteen minutes the jury returned a verdict for defendant, and after a deliberation in which there was no discussion whatever of the various issues. The sole basis for the decision for defendant was that he had received nothing for the note, and it wouldn't be fair to make him pay it. The knowledge or lack of knowledge in the part of plaintiff was not discussed in the jury room and was not considered as having any significance. Here again may be seen the tempering effect of the jury system upon the cold and sometimes harsh doctrines of the law in the books which young lawyers are apt to take for granted, as necessarily controlling and decisive.[31]

by employees against employers, by virtue of G.C. 6245-1; see *Tube Co.* v. *Prusakicueicz*, 15 O.C.C. (N.S.) 21; *Bartson* v. *Craig*, 121 O.S. 371 (1929). 169 N.E. 291. See Mole & Wilson "A Study of Comparative Negligence" (1932) 17 CORN. L.Q. 333, 604. Campbell "Wisconsin's Comparative Negligence Law" (1932) 7 WIS. L. REV. 222.

[30] G.C. 8162.

[31] Frank "Law and the Modern Mind" supra n. 8, at p. 176. "The jury are sometimes credited with liberalizing strict law because they ignore instructions. An often-cited illustration is the refusal of the juries to apply the harsh fellow-servant rule which the courts evolved. But is it not possible that the courts failed to abolish the fellow-servant rule by 'judicial legislation' just because the juries made the abolition unnecessary? In other words, the courts could maintain their attitude of strictness and 'pass the buck' to the jury. The jury is an unnecessarily cumbersome agency for the process of nullifying rules. The courts are adept enough in that process when they can't 'pass the buck.' "

Some little light was obtained on the question which was mentioned in the beginning, "What part does insurance play in the decision of an automobile accident case?" An action was brought by the widow of a man who was found dying in the road just below Lancaster. She sued a bus company and the evidence disclosed that a bus had gone down the road just before he was found, and that certain passengers on the bus had heard a thud, and had seen an object lying in the road when they looked back. Some little sparring over the question of hinting at insurance, had taken place between counsel early in the case. Later one of the defendant's witnesses was asked a question which, when answered, disclosed that a report had been made to a claim adjuster for an insurance company. Defendant's counsel immediately protested and demanded a mistrial. The court considered the matter, admonished plaintiff's counsel, and instructed the jury to disregard any allusion to insurance in the case. One or two more witnesses were called for defendant, and after the arguments and the charge were given, the case went to the jury. A unanimous verdict for $12,500 was returned.

A new trial was granted on two grounds—first, the court's belief that there was not sufficient evidence of negligence on the part of the bus company to sustain the verdict, and second, because of misconduct of counsel in bringing to the attention of the jury the fact of defendant's insurance. There were several very intelligent women on the jury and the foreman was a prominent business man. We were rather surprised to discover that the matter of insurance had not been mentioned in the jury room and that the women jurors at least had caught no suggestion of an insurance company being the real defendant in the case. Seemingly that which seems to lawyers to be the plainest indication that an insurance company is involved and to be the equivalent to a signal to the jury "to soak the defendant" may go entirely unobserved or unabsorbed by a group of laymen and particularly those not familiar with the insuring

of cars. As a matter of fact the unanimous verdict against the defendant in this case was due not to any hint of insurance[32] but entirely or nearly so to the failure of defendant's counsel to put the bus driver on the stand. The jurors had seen him waiting in the hall for his turn to testify, and when he was not allowed to do so, the impression was quite naturally created that what he might say would be damaging to the defendant. Upon the second trial he did testify and the jury in that case returned a verdict for $2000 which was immediately paid by the insurance company.

In another case the father of a small child, killed in a collision, sued the driver of the other car. The usual questions concerning insurance were asked by plaintiff's counsel under the rule of the Pavilonis case. Conflicting stories were presented by the evidence, and the verdict was for defendant. Several women jurors told us that they had been guided very largely by the statements and attitude of an intelligent colored man who had been on the jury. They told us to be sure to talk with him as he understood the whole thing very well, and could tell us just what took place. We were glad of the chance to talk with him and agreed with the ladies that he seemed to be a very intelligent, level-headed sort of individual. When we asked him if the jurors had known that the defendant was insured, and that the insurance company was defending the suit he was jarred very noticeably. His exclamation was "Why didn't they tell us?" The assumptions as to the worldly wisdom of jurors may or may not be justified.

In a recent case[33] the Court of Appeals of Franklin County discussed the question of quotient verdicts. A verdict of $5391 had been returned against a taxicab company. A motion for new trial was filed, one ground of error being misconduct of the jury in returning a quotient verdict. To support this claim there was

[32] It seems probable that if there is a prevalence of "soak the defendant" attitude on the part of the jury it would vent itself upon a defendant bus company with little regard to the matter of insurance.

[33] *Stadium Cab Co.* v. *Shawd*, 36 O.L.R. 456 (1932).

filed an affidavit of the court reporter that he had found twelve pieces of paper in the jury room with amounts ranging from $500 to $10,000 on each. Affidavits of two jurors were also filed in which it was stated that the jurors had agreed to place amounts on ballots, and the quotient of the total divided by 12 was to be the verdict. The court of appeals in its opinion states that "it is evident that if the affidavit of the jurors represents what was done by the jury in reaching the verdict which it returned, and if it was competent and proper evidence to be offered on the motion for a new trial, the verdict is a quotient verdict, recognized as illegal because of chance and it must be set aside." The court then found that the ballots themselves did not tend to show a quotient verdict, and affirmed the judgment based upon the verdict. The fact that the claim was made and that the court saw fit to use the language which it did in condemning quotient verdicts is further support of the suggestion made earlier that law in the books and law in the jury room bear slight resemblance one to the other.

In many if not in most of the cases which were followed in this study the amount of the verdict was determined by balloting and obtaining a quotient. In the books it makes all the difference in the world whether the jurors go through a certain mumbo-jumbo before they ballot, to the effect that the quotient will be the verdict. It is submitted that there is nothing so obviously wicked or outrageous about such a course of procedure, that any group of laymen ought to realize the illegality of it, and shun it as the work of the devil. It is extremely rare for a court in the charge to call attention to the illegality of the practice. And yet in most jurisdictions the law is settled that where a quotient verdict has been returned a new trial must be granted.[34] Is it not a serious reflection on the efficiency of the administration of justice that there is always the possibility of a verdict being set aside and the entire jury trial being held for naught, because laymen were not familiar with a fine distinction

[34] See annotation "Quotient Verdicts" 52 A.L.R. 41.

concocted by lawyers, but kept jealously secret until it can be brought out to nullify the work of the jury?

There were a great many other features of jury trials which were seen in a new perspective as a result of getting the jurors' reaction to them. In one case interrogatories were attached to the petition,[35] and the refusal of the officers of the defendant company to unequivocally answer those questions had a material bearing on the large verdict rendered against it.[36]

In another bus case the over-willingness of certain passengers to testify favorably to the defendant company had much to do with the adverse verdict. A little too much zeal on the part of one who is supposed to be merely a disinterested witness may become a dangerous thing.

The lack of attention given to exhibits, such as X-ray pictures,[37] and to the written instructions and pleadings which go to the jury room was surprising.[38] One case developed a feature of jury trial that may or may not be rather common. This case was bitterly contested and the trial consumed more than a week and resulted in a disagreement. One of the jurors, an exceptionally intelligent woman, was quite incensed that three of the jurors were so much influenced by something other than the evidence presented. She said that these three insisted upon having Divine guidance before making a single decision, and having obtained it, no amount of persuasion or reasoning could

[35] G.C. 11348.

[36] Two corporations organized under the laws of different states had similar names and were closely affiliated in business. The truck of one of them was alleged to have collided with plaintiff's automobile. The interrogatories were intended to clear up the doubt as to whether the truck in the collision was that of defendant or of the other company. Each of three questions was answered "We don't know." Counsel for plaintiff made capital of the evasiveness in his argument to the jury.

[37] In one case, doctors who had testified for the opposing parties had disagreed as to the meaning of certain shadows on an X-ray picture. It developed that although the picture had gone to the jury room no attention had been given to it. The jurors expressed the belief that if the doctors could not agree as to what the picture meant it was a waste of time for laymen to study it.

[38] Perhaps it is not so surprising when one recalls the horror which the layman has of legal terminology.

have the slightest effect. It may be that she was mistaken in so characterizing these individuals. In any event it is remarkable that, in a civil action with nothing more vital at stake than a few hundreds of dollars, an attitude of that sort should be found in the jury room.

If space and the reader's patience permitted, other features of this study could be recounted. Perhaps enough has been said to indicate the writer's belief that the law in the books has enjoyed too much of a monopoly of the attention of those pursuing a legal education. The study just described was crude and amateurish in many respects and cannot be regarded as anything more pretentious than a starter. It is believed, however, that if other studies of somewhat similar character could be made, much useful knowledge concerning the actual administration of justice might result. If no other result is to come, it has at least aroused in two law teachers a new interest in that old, and yet new field, the law of the jury room.