JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW: FROM ANTIQUITY TO MODERN TIMES

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Bifurcation and the bench: The influence of the jury on English conceptions of the judiciary

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The jury system, in which local laypersons decided civil and criminal cases, was the defining institution of the English common law. Organising the legal system in this way profoundly affected the other institutions of the legal system, in particular the judiciary. My theme is that the jury system severely impaired the development of the judicial function in English law. My focus is on civil justice, although there were many points of overlap with the administration of criminal justice.

Adjudication, the work of determining the rights of the parties to a dispute, is the central activity of a civil justice system. *Most of what adjudication is about is fact-finding.* Blackstone underscored this point in a notable passage, remarking that 'experience will abundantly show that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of'.[1] Was the traffic light red or green? Was the signature on the document forged or genuine? Was the claimant in the celebrated Tichborne affair really the lost heir, Roger Tichborne, or was he the imposter, Arthur Orton?[2] Decide the facts in such cases, and the law is usually easy.

The jury system divided adjudicative responsibility between judge and jury. The judges decided questions of law, juries decided matters of fact.[3] In the jargon of comparative law, this division of function in the Anglo-American

[1] W. Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford, 1765–69), III, p. 330 (spelling modernised).

[2] See J. B. Atlay, *The Tichborne Trial* (London, 1899); R. Annear, *The Man Who Lost Himself: The unbelievable story of the Tichborne claimant* (Melbourne, 2002).

[3] 'Ad questionem facti non respondent judices ... ad questionem juris non respondent juratores'. E. Coke, *The First Part of the Institutes of the Laws of England*, 1st edn (London, 1628); ed. F. Hargrave and C. Butler, 16th edn (London, 1823), bk 2, ch. 12, §234 at 155(b). Of course, Coke's formula oversimplifies the division of function, by omitting the jurors' role in law applying, that is, fitting the facts to the law as stated to them.

tradition is known as the bifurcation of the trial court.[4] By isolating the judge from the work of fact-finding, the English common law emerged with a stunted or impoverished concept of the judicial function. A judge who is kept away from fact-finding is so remote from the core function of adjudication that he is only peripherally responsible for the court's decision.

I begin this account with a comparative glance at European civil justice, which, from the Middle Ages onward, made judges responsible for adjudication. I then contrast the English development and discuss some of the ways in which the medieval jury system, by impairing the judicial function, undermined the substantive law. I explain why Chancery procedure, although rooted in the European adjudicative tradition, failed to become the path of judicial empowerment in England. Rather, English judges acquired adjudicative authority incrementally across early modern times, by developing techniques of jury control that slowly transferred effective decision-making power to the bench. This process of reallocating power within the bifurcated court led ultimately to the suppression of civil jury trial in the twentieth century.

Roman-canon procedure

For purposes of comparison, it will be instructive to begin on the European Continent. Roman-canon civil procedure was developed in the church courts in the twelfth and thirteenth centuries and then spread to the secular courts.[5] Roman-canon procedure was jury-free;[6] it placed on legally trained judges full responsibility for adjudication on matters both of fact and of law.

In a case involving disputed facts, it was the judge's responsibility to examine the witnesses whom the parties nominated,[7] collect any documentary evidence, hear the parties and their lawyers and render a written

[4] See e.g. M. R. Damaska, *Evidence Law Adrift* (New Haven, 1997), pp. 46–7.

[5] For a succinct overview in English, see R. C. van Caenegem, 'History of European civil procedure' in *Int'l Encyc. Comp. Law* (Tübingen, 1973), VI, §§2–13/16, at pp. 16–19; see also J. A. Brundage, *The Medieval Origins of the Legal Profession* (Chicago, 2008). Regarding the procedure in the English church courts, see R. H. Helmholz, *The Oxford History of the Laws of England: The canon law and ecclesiastical jurisdiction from 597 to the 1640s* (Oxford, 2004), pp. 311–53.

[6] Regarding the elimination of lay judges in France and Germany, see J. P. Dawson, *A History of Lay Judges* (1960), pp. 35–115.

[7] Regarding the practice in medieval English ecclesiastical courts, see C. Donahue Jr, 'Proof by witnesses in the church courts of medieval England: An imperfect reception of the learned law' in M. Arnold *et al.* (eds.), *On the Laws and Customs of England: Essays in honor of Samuel E. Thorne* (Chapel Hill, NC, 1981), p. 127.

judgment. The aspiration that the judgment should contain a statement of reasons for the decision (*jugement motivé, Begründung*) was not, however, always realised.[8]

Because court-conducted investigation and adjudication concentrated power in the hands of the judge, careful provision was made to protect against abuse of discretion or other error. The main safeguard[9] was liberal appellate review. A dissatisfied litigant was entitled to have a higher court re-examine the case under a *de novo* standard of review – that is, with no presumption of correctness attaching to the first-instance decision.[10]

The three core attributes of this system continue to this day in refined form to characterise European civil justice systems: (1) judge-conducted evidence-gathering and adjudication; (2) the written, reasoned opinion; (3) and liberal appellate review.[11]

Adjudication in the medieval common law

I turn now to the medieval English common law. The pretrial pleading process, in which the judges decided issues of law, was jury-free, but in matters that required fact-finding, jury trial was the mode of trial in virtually all[12] cases. Within the bifurcated court, the judge presided, but adjudicative power rested with the jury.

[8] Regarding the pressures that restrained the giving of reasoned judgments in French practice until the Revolution, see T. Sauvel, 'Histoire du jugement motivé' (1955) 61 *Revue du Droit Public et de la Science Politique en France et à l'Étranger* 5; regarding the distortions in the style of French judicial opinions that resulted from revolutionary ideology, see J. P. Dawson, *The Oracles of the Law* (Ann Arbor, MI, 1968), pp. 375–86.

[9] Another was the complex law of proof that was meant to guide and restrain the judge's discretion, remarked by van Caenegem, 'History of European civil procedure', §2–17, at p. 20. I have discussed this topic in connection with criminal procedure in J. H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago, 1977), pp. 3–17.

[10] *De novo* review was feasible because the evidentiary record assembled in the dossier at first instance was sent up to the reviewing court. Retrial for the most part entailed only a re-reading of the file.

[11] I have discussed the German system in J. H. Langbein, 'The German advantage in civil procedure' (1985) 52 *U. Chi. L. Rev.* 823; see generally P. L. Murray and R. Stürner, *German Civil Justice* (Durham, NC, 2004); H. Koch and F. Diedrich, *Civil Procedure in Germany* (The Hague, 1998).

[12] See Blackstone's chapter on 'the several species of trial' (Blackstone, *Commentaries*, III, p. 325), concluding that trial by jury was 'the principal criterion of truth in the law of England', *ibid.*, p. 348. Regarding wager of law (compurgation), which was the mode of proof under the writ of debt, see T. F. T. Plucknett, *A Concise History of the Common Law*, 5th edn (London, 1956), pp. 115–16, 363–4.

In the formative years of English civil procedure, the jury was largely self-informing. As Thayer put it, medieval jurors were persons 'chosen as being likely to be already informed'.[13] The vicinage requirement, that jurors be drawn from the immediate neighbourhood of the events in dispute, was meant to produce jurors who already knew what had happened, or whose communal relations would enable them to find out on their own.[14] Medieval jurors came to court mostly to speak rather than to listen. (The question of just how self-informing the medieval jury actually was is a question that has been subjected to reconsideration in the legal historical literature of the past generation. I follow Daniel Klerman in reading that scholarship as having left intact the basic account from Thayer and Maitland that the juries of the twelfth and thirteenth centuries were prevailingly self-informing, while showing us a good deal about how and why the system of self-informing juries unwound in later centuries.[15])

The trial judge was ordinarily not privy either to the evidence or to the rationale for the jury's verdict. A verdict so opaque (in Plucknett's apt term, 'inscrutable'[16]) was effectively unreviewable. Accordingly, the early common law not only isolated the trial judge from any significant role in fact-finding, it also precluded the development of any effective system of appellate review of first-instance adjudication.[17]

[13] J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston, MA, 1898), p. 90.

[14] *Ibid.*, p. 91. It was the duty of the jurors, in Maitland's words, 'so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court. They must collect testimony; they must weigh it and state the net result in a verdict.' F. Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I*, 2nd edn, 2 vols. (Cambridge, 1898), II, pp. 624–5.

[15] D. Klerman, 'Was the jury ever self-informing?' (2003) 77 *S. Cal. L. Rev.* 123, 146–8; another version appears in M. Mulholland and B. Pullan (eds.), *Judicial Tribunals in England and Europe, 1200–1700: The trial in history*, 2 vols. (2003), I; regarding the vicinage requirement, see M. Macnair, 'Vicinage and the antecedents of the jury' (1999) 17 *Law and Hist. Rev.* 537.

[16] Plucknett, *Concise History*, p. 125.

[17] The medieval common law developed two largely ineffective remedies to challenge first-instance outcomes, the writs of attaint and of error. The writ of attaint would quash a verdict as perjured, visiting savage consequences on the trial jurors for their false oaths. Regarding the shortcomings of attaint, see Blackstone, *Commentaries*, III, pp. 402–4. Under the writ of error, review was limited to matters of record, which included neither the evidence nor the judge's direction. Accordingly, 'the grossest errors of fact or of law may occur without being in any way brought upon the record'. J. F. Stephen, *A History of the Criminal Law of England*, 3 vols. (London, 1883), I, p. 309, emphasised in B. L. Berger, 'Criminal appeals as jury control: An Anglo-Canadian historical perspective on the rise of criminal appeals' (2005) 10 *Can. Crim. L. Rev.* 1, 6.

The main work of English judges was to process cases for decision by juries. In the pleading process, much of what judges did was to supervise the process of framing cases for jury trial. At trial, the judges took verdicts about which they commonly knew little or nothing. So long as the juries were largely self-informing, the role of the judge at trial was essentially administrative as opposed to adjudicative. It is in this sense that I speak of the judicial role in England as stunted or impoverished.

Adjudication by laypersons acting on unknown evidence poses a serious risk of error,[18] a risk that helps explain many of the limitations on adjudication that the judges developed, above all the requirement of single-issue pleading.[19] Single-issue pleading allowed only one contested issue of fact to reach the jury for decision, no matter how complex the facts of the case. Single-issue pleading was a way to restrict and simplify the jury's task, but often at the heavy cost of oversimplifying and distorting the case.

Another example of the judges' distrust of jury fact-finding was the exalted status that the medieval common law gave to sealed instruments. The judges insistently refused to allow fact-based defences such as prior payment to be pleaded against sealed instruments. Seal precluded adjudication.[20] The message that these judge-made rules sent to transacting parties was, seal your deal. Use a sealed instrument and you will not be subjected to jury trial.

Concern about the shortcomings of jury trial also underlies the various judge-made rules that hobbled the early contract writs of debt and covenant. I have in mind the *quid pro quo* and sum-certain requirements

[18] Regarding the concept of error-risk in the modern law of evidence, see A. Stein, *Foundations of Evidence Law* (Oxford, 2005), pp. 111–40.

[19] Regarding single-issue pleading, see J. H. Baker, *An Introduction to English Legal History*, 4th edn (London, 2002), pp. 76–8. 'The logic of medieval pleading was directed to the possible misleading of juries.' S. F. C. Milsom, *Historical Foundations of the Common Law*, 2nd edn (London, 1981), p. 79.

[20] See C. H. S. Fifoot, *History and Sources of the Common Law* (London, 1949), pp. 232–3. Bacon put the point as a maxim: 'the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law, for that were to make all deeds hollow'. F Bacon, *The Elements of the Common Lawes of England, Regula* 23, at 91 (1630), cited by A. W. B. Simpson, 'The penal bond with conditional defeasance' (1966) 82 *L.Q.R.* 399. Defences such as 'failure of consideration, impossibility of performance, or fraud in the underlying transaction were quite irrelevant'. E. G. Henderson, 'Relief from bonds in the English Chancery: Mid-sixteenth century' (1974) 18 *Am. J. Legal Hist.* 298, 300. The common law did leave to the determination of a jury a claim that a sealed instrument was a forgery, or that the maker had been coerced to execute it. D. J. Ibbetson, 'Words and deeds: The action of covenant in the reign of Edward I' (1986) 4 *Law and Hist. Rev.* 71.

for debt, and the seal requirement and the elimination of specific relief in covenant.[21] If your civil justice system does not allow you to compel witnesses' testimony and documentary evidence, and if it does not provide you with an experienced and legally skilled decision-maker to evaluate the evidence and to apply the law, then the system is simply not able to explore the issues of intent and performance that arise in contractual relations. Instead, medieval English law channelled commercial business, especially lending, into the penal bond and the confessed judgment, which were modes of obligation that effectively dispensed with adjudication.[22]

The limitations of jury-based adjudication also underlie the failure of the common law to develop specific remedies such as injunction and specific performance. Tailoring and supervising specific relief requires continuing factual investigation of a sort that was beyond the capability of a jury of laypersons convened for a one-time sitting at an itinerant *nisi prius* trial court.

These examples underscore that the impoverishment of the judicial role in English civil procedure had the consequence of retarding the substantive law. Bifurcation so impaired adjudicative capacity at common law that in many cases neither judge nor jury could do a proper job of rendering civil justice.[23] The medieval common law was rooted in a failed system of adjudication.

Chancery

Into this breach stepped the Lord Chancellor, with his jury-free, bifurcation-free Court of Chancery. In the late fourteenth and fifteenth centuries, when Chancery procedure took shape, the Chancellor was usually a bishop or an archbishop,[24] steeped in the Roman-canon

[21] Discussed in Fifoot, *History and Sources*, pp. 228–9, 257–8.

[22] See especially Simpson, 'Penal bond'. On the origins, see J. Biancalana, 'The development of the penal bond with conditional defeasance' (2005) 26 *J. Legal. Hist.* 103. Regarding the prevalence of defeasible bonds and contracts of record in sixteenth-century commercial transactions, see S. E. Thorne, 'Tudor social transformation and legal change' (1951) 26 *N.Y.U.L. Rev.* 1, 19–21.

[23] See W. T. Barbour, *The History of Contract in Early English Equity* (Oxford, 1914), pp. 54–8 (summarising gaps in contract law).

[24] Of the eighteen Chancellors from Edmund Stafford in 1396 until Thomas More in 1532, 'almost all were bishops or archbishops and several were cardinals. Thus they were well versed in ecclesiastical administration.' T. S. Haskett, 'The medieval English Court of Chancery' (1996) 14 *Law and Hist. Rev.* 245, 260; biographical detail on each is collected, *ibid.*, pp. 311–13.

procedure that he or his officials were applying in the ecclesiastical courts. The ecclesiastical Chancellors based Chancery's procedure on the Roman-canon model.[25] The early Chancellors themselves took witness testimony[26] and documentary evidence, and they adjudicated based on what they learned.

Because the Chancellor could obtain and evaluate witness testimony, he could ventilate types of transactional legal relations such as contract and trust that turned on evidence of the intention of the parties. In a study published nearly a century ago, Willard Barbour showed how close Chancery came to capturing the law of contract in the fifteenth century.[27] Chancery's investigative capacity also made possible its incursion into the common law's jurisdiction over freehold land. Chancery's enforcement of the use (trust) and the mortgage rested on Chancery's ability to require the production of relevant documents; and to put the parties and other witnesses on oath, in order to examine them about the purpose of the conveyance or transaction in question. Chancery's procedure also enabled the court to develop an appellate function of sorts, by enjoining enforcement of a common law decree and then employing Chancery's superior procedures of investigation to examine or re-examine the merits of the case.[28]

Because Chancery procedure was based upon a workable concept of the adjudicative function, Chancery had the potential to supplant much

[25] Macnair presents authority for the view that the English 'courts of equity [were] fundamentally civilian in their proof procedure and concepts'. M. Macnair, *The Law of Proof in Early Modern Equity* (Berlin, 1999), p. 14.

[26] 'In one case in 1438 the Chancellor examined the defendant orally at the Chancellor's own manor in the country and secured a confession that a particular feoffment had been made in trust.' Dawson, *Lay Judges*, p. 149. In a commercial dispute heard in the 1460s, which involved conflicting evidence about the circumstances in which a sealed instrument had been created, the surviving depositions indicate that the Chancellor (and in one instance his principal deputy, the Master of the Rolls) conducted examinations of parties and witnesses. Barbour, *Contract*, pp. 148–9, 218–19.

[27] Barbour, *Contract*, p. 23.

[28] Mansfield remarked that before the new trial remedy became available (in the mid seventeenth century) to correct mistaken verdicts, the situation was 'so intolerable, that it drove the parties into a Court of Equity, to have in effect, a new trial at law, of a mere legal question, because the verdict, in justice, under all the circumstances, ought not to conclude [the case]. And many bills [in equity] have been retained upon this ground, and the question tried over again at law, under the direction of a Court of Equity.' *Bright* v. *Enyon* (1757) 1 Burr 390, 394–95; 97 E.R. 365, 367 (K.B.). Rainsford CJ had voiced a similar concern a century before, observing in 1674 that 'denying a new trial [in King's Bench] will but send the parties into the Chancery'. *Martyn* v. *Jackson* (1674) 3 Keble 398; 84 E.R. 787, 788 (K.B.).

or even all of the common law, as happened in several places in Northern Europe in the roughly contemporaneous movement known as the reception of Roman law.[29] But no such thing happened in England. Instead, Chancery procedure became so dysfunctional that by the nineteenth century, Dickens was advising the prospective litigant to '[s]uffer any wrong that can be done you, rather than sue in Chancery'.[30]

What kept Chancery from fulfilling its adjudicative promise is that Chancery never came to grips with the staffing implications of the Roman-canon procedures it was employing. Gathering and evaluating witness testimony and documentary evidence is time-consuming work. If you are going to have such a system, you need a large bench. In a famous passage in his *History of Lay Judges*, John Dawson calculated that France, with four times the population of England, had about 5,000 judges at a time when the English royal courts had about a dozen. Population adjusted, therefore, the ratio was about a hundred to one.[31] Yet Chancery, using procedures of the sort then found in France, was a one-judge court – indeed, less than a one-judge court, because the Chancellor was a high officer of state who had to devote time to many other duties. The result of Chancery's under-staffing was that, although the court had the power to adjudicate, it failed to develop the resources to adjudicate effectively.

As Chancery's subject-matter jurisdiction grew, Chancery responded by delegating ever more of its workload, especially evidence-gathering. The pattern that emerged was to allow private lawyers acting on behalf of the litigants to control the investigation, by drafting interrogatories to be put to witnesses. This departure from the Roman-canon model of court-conducted evidence-gathering effectively privatised the investigative phase of the adjudicative process.

[29] For English-language accounts of the reception in Germany, see F. Wieacker, *A History of Private Law in Europe with Particular Reference to Germany*, tr. T. Weir (Oxford, 1995), pp. 71–142; Dawson, *Oracles*, pp. 176–213.

[30] C. Dickens, *Bleak House* (London, 1853), ch. 1, 'In Chancery'.

[31] Dawson estimated that by the eighteenth century, '[t]he total number of royal judges [in France] . . . must certainly have exceeded 5,000', whereas 'from 1300 to 1800 the judges of the English central courts of common law and Chancery rarely exceeded fifteen'. Dawson, *Lay Judges*, p. 71. Dawson's figure for England omits the lay Justices of the Peace, some of whose functions, such as the exercise of summary jurisdiction over lesser offenses, would in France have fallen to the royal bench. Dawson also did not take account of the masters in Chancery, whose work resembled that of the examiners in French practice.

Outside London, Chancery used country gentlemen – parsons and Justices of the Peace and such – to administer the interrogatories – that is, to read the questions to the witnesses, to summarise the responses, and to return the resulting depositions to the court.[32] The lawyers for the parties were forbidden to attend the examination of witnesses. Accordingly, there was no opportunity for cross-examination, in the sense that there was no opportunity to formulate follow-up questions in light of the responses that a witness gave during the examination. Every line of potential questioning had to be fully anticipated in advance, a daunting and fundamentally impossible task. Only after all the examinations had been taken were the depositions disclosed to the parties.[33] If the case did not settle or go to arbitration, it was commonly sent to a master to formulate recommendations for the court. If the case turned on a fact dispute, the Chancellor was, in Blackstone's phrase, 'so sensible of the deficiency' of the court's procedures for investigating fact that he sometimes sent the disputed question to a common law court for trial by jury on a feigned issue.[34]

In an eerie way, therefore, adjudication in Chancery wound up replicating the fundamental failing of common law procedure: Chancery procedure isolated the judge from the facts. Delegation of functions by an overburdened Chancellor came to have much the same effect that bifurcation had produced in the medieval common law. Both were systems of adjudication in which the judge was unable to adjudicate fact. Like common law, Chancery became a failed system of adjudication.

I should say in passing that I regard the failure to staff Chancery properly as one of the great puzzles of English legal history. Why did Chancery remain a one-judge court until the nineteenth century? One way to understand the fusion of law and equity that got underway in the 1850s and that culminated in the Judicature Acts of the 1870s is that

[32] Dawson, *Lay Judges*, pp. 151–62.

[33] '[T]he cross-examination of witnesses, both friendly and hostile, had to be undertaken before their testimony had been heard'. *Ibid.*, p. 157. Because '[a]ll the lines of testimony that might develop had to be anticipated' in the initial interrogatories, the procedure invited 'prolixity'. *Ibid.*

[34] Blackstone, *Commentaries*, III, pp. 452–3. Chancery's reluctance to exercising its fact-finding powers has been misread as indicating that Chancery lacked the power to find facts. H. Chesnin and G. C. Hazard Jr, 'Chancery procedure and the Seventh Amendment: Jury trial of issues in equity cases before 1791' (1974) 83 *Yale L.J.* 999. The Chancellor did have the power to find facts, but as a practical matter he lacked the resources to exercise that power in most cases. See J. H. Langbein, 'Fact-finding in the English Court of Chancery: A rebuttal' (1974) 83 *Yale L.J.* 1620, 1629.

fusion turned every High Court judge into a mini Chancellor. What needs explaining is why it took English law so long to escape the convention that there could be only one judge with Chancery powers of discovery and remedy.

The law of jury control

How, then, did English civil justice overcome the stunted conception of the judicial role that was its legacy from the Middle Ages? The path of reform did not lie through Chancery, although Chancery did contribute important tools of discovery and remedy in the final phase of fusion. Rather, what occurred was a three-centuries-long process of incremental adjustment inside the bifurcated common law trial court. The judges steadily diminished the jurors' adjudicative power, by developing techniques of jury control. This process got underway in earnest in the seventeenth century, although there are some earlier antecedents.[35] By the twentieth century, the web of controls had become so extensive that the judges had effectively captured the jury's decisional role. Control of the jury ultimately led to its suppression.

The decline of the self-informing jury was an essential precondition. What had kept the judges so isolated from fact-finding in the formative period of the common law was that the jurors alone knew the facts. By the end of the Middle Ages, however, the structure and composition of trial courts[36] and juries[37] had undergone significant change. As more and more jurors came to court largely ignorant of the events in dispute, trial became an instructional proceeding, at which evidence was presented to inform the jurors' verdict.[38]

The great consequence was that the jury lost its monopoly over the facts. The judge who presided over the instructional trial would now know the evidence as well as the jurors. That change gave the common law bench its

[35] See n. 55, below.

[36] Regarding the emergence of the assize system, see J. S. Cockburn, *A History of English Assizes 1558–1714* (Cambridge, 1972), pp. 15–22.

[37] Fortescue, writing about 1470, voices the expectation that jurors would routinely hear witness testimony at trial. J. Fortescue, *On the Laws and Governance of England*, ed. and tr. S. B. Chrimes (Cambridge, 1942); ed. S. Lockwood (Cambridge, 1997), ch. 26, pp. 38–40.

[38] For early glimpses of the trend to informing jurors in court, see Thayer, *Evidence*, at pp. 97–124; A. Musson, *Public Order and Law Enforcement: The local administration of criminal justice, 1294–1350* (Woodbridge, 1996), pp. 201–5.

opening, its opportunity to fashion rules of jury control that steadily diminished, and finally eliminated, the adjudicative role of the jury.

The practice of jury control took three main forms: judicial comment regarding the evidence, judicial instruction regarding the law, and judicial review of verdicts by means of the motion for new trial. A fourth device, mandating that jurors disclose their thinking and reconsider their verdict before the court accepted it, was also employed, although this practice fell out of favour in later times.

Judicial comment

The trial judges developed, and exercised extensively, a power to advise the jury about the merits of the evidence. Especially in civil cases, jurors welcomed the views of these experienced and learned officers of the law. Matthew Hale, the most prominent judge of the middle decades of the seventeenth century, praised what he called the 'Excellency' of this practice. '[I]n Matters of Fact', Hale said, the judge gives the jury 'great Light and Assistance by his weighing the Evidence before them, and observing where the Question and Knot of the Business lies, and by showing them his Opinion even in Matter of Fact, which is a great Advantage and Light to Lay Men'.[39]

Jurors routinely followed the judge's guidance. When Boswell asked Lord Mansfield in 1773 whether juries always took his direction, Mansfield answered: 'Yes, except in political causes'[40] (which were mostly criminal cases, notably in Mansfield's time prosecutions for seditious libel). I have elsewhere pointed to examples of detailed comment on the merits in civil cases recorded in the judicial trial notebooks of Sir Dudley Ryder, chief justice of King's Bench in the years 1754–6.[41] Instances of judicial comment on the merits in criminal cases abound in the pamphlet accounts of Old Bailey trials that commence in the later seventeenth century.[42]

[39] M. Hale, *The History of the Common Law of England*, 1st edn (London, 1713); ed. C. M. Gray (Chicago, 1971), pp. 164–5 (a posthumous publication; Hale died in 1676).

[40] J. Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, 2 vols. (Chapel Hill: NC, 1992), I, p. 206, n. 44, quoting G. Scott and F.A. Pottle (eds.), *The Private Papers of James Boswell from Malahide Castle*, 18 vols. (Mt Vernon, NY, 1928–34), VI, p. 109.

[41] See J. H. Langbein, 'Historical foundations of the law of evidence: A view from the Ryder sources' (1996) 96 *Colum. L. Rev.* 1168, 1191–93.

[42] Examples are discussed in J. H. Langbein, 'The criminal trial before the lawyers' (1978) 45 *U. Chi. L. Rev.* 263, 285–87.

Judicial comment left undisturbed the nominal division of adjudicative function within the trial court. The jurors still decided the facts and applied the law. But the functional reality was that judicial comment allowed the judge to shape the jury's verdict when he thought it important to do so.[43] By the nineteenth century, contemporary legal observers were saying as much. Chitty, for example, wrote in a practice manual in the 1830s that jurors 'in general . . . follow the advice of the judge, and therefore in substance, the verdict is found . . . by the judge's direction'.[44] A Middle Temple barrister writing in 1859 contended that jurors 'generally do little more than find a verdict which [the trial judge] has already suggested to them . . . [W]hen they do take it upon themselves to find contrary to his opinion, the court will most commonly set aside the verdict, and order a new trial', except in cases of small value.[45]

[43] In the nineteenth-century United States, a movement to forbid judicial comment on the evidence took hold in state constitutions and statutes. See R. L. Lerner, 'The transformation of the American civil trial: The silent judge' (2000) 42 *Wm. & Mary L. Rev.* 195, 213; K. A. Krasity, 'The role of the judge in jury trials: The elimination of judicial evaluation of fact in American state courts from 1795 to 1913' (1985) 62 *U. Det. L. Rev.* 595. Reacting to this development, Thayer wrote that it was 'impossible to conceive of trial by jury [in England] as existing in a form which would withhold from the jury the assistance of the Court in dealing with the facts. Trial by jury, in such a form as that, is not a trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected.' Thayer, *Evidence*, p. 188, n. 2. In a similar vein, Wigmore thought that this 'unfortunate [American] departure from the orthodox common law rule has done more than any other one thing to impair the general efficiency of jury trial as an instrument of justice'. J. H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd edn, 10 vols. (Boston, MA, 1940), IX, §2551, pp. 504–5. Ironically, this American departure played a significant role in the ultimate survival of civil jury in the United States. By silencing the judge, the Americans enhanced the ability of the trial lawyers to affect the outcome of the trial, and thus gave the trial bar a vested interest in preserving jury trial. To be sure, other factors also played a role in the survival of civil jury trial, especially the entrenchment of the right to civil jury trial in the federal and state constitutions.

[44] J. Chitty, *The Practice of Law in All Its Departments*, 2nd American edn, 4 vols. (Philadelphia, PA, 1836), III, p. 913. I owe this reference to Renée Lerner.

[45] J. Brown, *The Dark Side of Trial by Jury* (London, 1859), p. 14. Because the jury's verdict will be overturned 'the moment they presume to differ with him', what 'is the use of troubling the jury for their opinion?' *Ibid.* Michael Lobban directed attention to this tract in his chapter 'The strange life of the English civil jury, 1837–1914' in J. Cairns and G. McLeod (eds.), *'The Dearest Birth Right of the People of England': The jury in the history of the common law* (Oxford, 2002), pp. 173, 175 and n. 10.

Judicial instruction on the law

Closely connected to judicial comment on the evidence was the power that the judges developed to instruct jurors on the law.[46] Across the eighteenth and especially the nineteenth centuries, the judges devised ever more detailed jury instructions, whose effect was to treat as questions of law matters that had previously been regarded as fact. As yet this phenomenon has not been well studied, although its importance has been widely noticed. Both Brian Simpson and John Baker have remarked on what Simpson calls the 'progressive dethronement of the jury'[47] in nineteenth-century contract law. Many questions that came to be treated as law were matters that had previously been 'left to juries as questions of fact'.[48] The celebrated case of *Hadley* v. *Baxendale* (1854),[49] which established the standard for remoteness of damages in contract law, exemplifies this process.[50] Until that case, it had been 'entirely the province of the jury to assess the amount [of damages], with reference to all the circumstances of the case'.[51]

The development of the law of evidence in the eighteenth and especially the nineteenth centuries was another chapter in this process of recasting questions of fact as questions of law.[52]

[46] Indeed, there was not much demarcation at trial between the judge's summation of the evidence and his instruction regarding the law. Speaking of the practice in criminal cases, Green has observed that '[t]here was no real separation between the judge's comments upon the evidence and his charge to the jury'. T. A. Green, *Verdict According to Conscience: Perspectives on the English criminal trial jury, 1200–1800* (Chicago, 1985), p. 139.

[47] A. W. B. Simpson, 'The Horwitz thesis and the history of contracts' (1979) 46 *U. Chi. L. Rev.* 533, 600. The courts produced law 'where before there was little or none'. *Ibid.*

[48] J. H. Baker, 'Book review of Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (1979)' (1980) 43 *M.L.R.* 467, 469, discussed in Oldham, *Mansfield*, I, pp. 222–3. Baker has made a similar point about criminal jury practice: 'by enlarging the scope of the substantive law the judges were able to tell the jurors what conclusions followed if they found certain facts to be true.' J. H. Baker, 'The refinement of English criminal jurisprudence' in L. A. Knafla (ed.), *Crime and Criminal Justice in Europe and Canada* (Waterloo, ON, 1981), pp. 17, 19.

[49] (1854) 9 Ex 341, 156 E.R. 145 (1854).

[50] See R. Danzig, '*Hadley v. Baxendale*: A study in the industrialization of the law' (1975) 4 *J.L.S.* 249, 252–7; see also F. Faust, '*Hadley v. Baxendale*: An understandable miscarriage of justice' (1994) 15 *J. Legal Hist.* 41, 54–65.

[51] J. Chitty, *A Practical Treatise on the Law of Contracts*, 4th edn (London, 1850), p. 768, cited by Danzig, '*Hadley v. Baxendale*', at p. 255 and n. 21.

[52] Regarding the timing and character of the law of civil evidence, see Langbein, *Historical Foundations*, p. 41; T. P. Gallanis, 'The rise of modern evidence law' (1999) 84 *Iowa L. Rev.* 499; regarding the development of the law of criminal evidence, see J. H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford, 2003), pp. 178–251.

An important contributor to this reworking of the law/fact line was the growth and refinement of the law reports, both *en banc* and at *nisi prius*.[53] Another background factor of deep importance was the growing confidence in the integrity of the judiciary, which was connected to the development of judicial independence across the eighteenth century.[54]

New trial

The third main component of the law of jury control, in addition to judicial comment and instruction, was the development of judicial review of jury verdicts, which took place under the rubric of new trial. The judges' power to order new trial had originated in late medieval times as a means of remedying jury wrongdoing in exceptional cases such as bribery or jury tampering.[55] In the second half of the seventeenth century the judges began extending their power to grant new trial to cases in which they regarded the verdict as contrary to instruction or contrary to the weight of the evidence,[56] and by the later eighteenth century, the law of new trial had acquired immense range.[57]

[53] The five volumes of Burrow's *King's Bench Reports*, which became the gold standard for law reporting, cover the years 1756–72, and were published from 1766 to 1780. See generally W. P. Courtney, rev. D. Ibbetson, 'Burrow, Sir James (1701–1782)' in *Oxford Dictionary of National Biography* (Jan. 2008 (online ed.)), www.oxforddnb.com.

[54] See C. Hanly, 'The decline of civil jury trial in nineteenth-century England' (2005) 26 *J. Legal Hist.* 253, 255–9; D. Lemmings, 'The independence of the judiciary in eighteenth-century England' in P. Birks (ed.), *The Life of the Law: Proceedings of the Tenth British Legal History Conference, Oxford, 1991* (London, 1993), pp. 125, 127–8.

[55] Regarding the practice of quashing verdicts (and disciplining jurors) for misbehaviour in late medieval times, see D. J. Seipp, 'Jurors, evidences and the tempest of 1499' in Cairns and McLeod, *Birth Right*, pp. 75, 86; see also J. H. Baker, 'Introduction' in *The Reports of Sir John Spelman, II*, Selden Society, vol. 94 (London, 1978), pp. 112–3 (discussing early sixteenth-century sources).

[56] The landmark case was *Wood* v. *Gunston* (1655) Style 466; 82 E.R. 867 (Upper Bench), on which see Thayer, *Evidence*, pp. 170–1. For an overview of the history of new trial in England, see R. B. Lettow [Lerner], 'New trial for verdict against law: Judge-jury relations in early nineteenth-century America' (1996) 71 *Notre Dame L. Rev.* 505, 510–15 (reviewing English case law); regarding the American practice, see *ibid.* at pp. 515–53. The subject gave rise to a treatise, D. Graham, *An Essay on New Trials* (New York, 1834) (cited by Lerner); the second edition took up three volumes: D. Graham, *An Essay on the Law of New Trials in Cases Civil and Criminal*, ed. T.W. Waterman, 2nd edn, 3 vols. (New York, 1855).

[57] For Mansfield's expansive view of the 'numberless causes of false verdicts' that merit correction by means of new trial, see *Bright* v. *Enyon* (1757) 1 Burr 390, 393; 97 E.R 365, 366 (K.B.). For the law of new trial immediately post-Mansfield, see W. Tidd, *The Practice of the Court of King's Bench in Personal Actions*, 2 vols. (London, 1790–94),

Requiring jurors to disclose their rationale

Reinforcing the judges' power to grant new trial was the authority that they claimed to probe the basis for a proffered verdict before accepting it. In *Ash* v. *Ash*,[58] decided in 1697, Holt CJ explained that jurors were expected to disclose their thinking to the court in order that the court could assist them to amend their verdict. In that case he reversed what he deemed to be a grossly excessive award of damages (£2,000 for an incident of false imprisonment involving the detention of a youth for a couple of hours), saying: 'The jury were very shy of giving a reason for their verdict, thinking that they have an absolute, despotic power, but I did rectify that mistake, for the jury are to try cases with the assistance of the judge, and ought to give reasons when required, that, if they go upon any mistake, they may be set right.'[59]

Having learned the basis for a proffered verdict, the trial judge could – if he thought the verdict mistaken – reinstruct the jurors and require them to redeliberate. We have a particularly detailed example of this practice in the pamphlet account of a criminal case tried at the Old Bailey in 1678. The defendant was accused of statutory rape. The jurors twice deliberated and proffered a verdict of acquittal; the trial judge rejected the verdict both times, reinstructed the jurors twice and succeeded on their third deliberation in obtaining from them the conviction that the judge thought appropriate to the facts.[60] This practice of requiring redeliberation endured into the nineteenth century,[61] although signs of unease about it appeared earlier, at least in criminal cases.[62]

II, pp. 605–10. Regarding the mechanics of obtaining new trial, see Oldham, *Mansfield*, I, pp. 131–3.

[58] (1697) Comb 357; 90 E.R. 526 (K.B.).

[59] (1657) Comb 357, 357–8; 90 E.R. 526, at 526.

[60] *Arrowsmith's Case*, in *Exact Account of the Trials of the Several Persons Arraigned at the Sessions-House in the Old Bailey for London & Middlesex* (London, 1678), pp. 14–16 (concerning statutory rape). The case is reprinted in Langbein, *Lawyers*, pp. 291–3.

[61] The principle was restated judicially as late as 1862: 'A judge has a right, and in some cases it is his bounden duty, whether in a civil or in a criminal cause, to tell the jury to reconsider their verdict.' *R.* v. *Meaney* (1862) Le & Ca 213, 216; 169 E.R. 1368, 1370 (Crown Cas. Res. per Pollock C.B.). However, the report continues, the trial judge is 'bound to receive [the jury's] verdict [if the jury] insist[s] upon his doing so'. *Ibid.* I owe the references in this and the next note to S. Lilley, 'The decline of jury control: 1690–1860', unpublished, on file at the Yale Law Library (Jun. 2006), pp. 8–11.

[62] Hawkins wrote in his influential treatise in 1721 that requiring redeliberation 'is by many thought hard, and seems not of late years to have been so frequently practiced as formerly'. W. Hawkins, *A Treatise of the Pleas of the Crown*, 2 vols. (London, 1716–21), II, p. 442.

Across time, the application of the three main techniques of jury control – comment, instruction and new trial – transferred ever more of the adjudicative role from jury to judge. By relabelling law as fact, the judges used instruction as a means of diminishing the scope of the jury's authority. Within the sphere that nominally remained for the jury, the judges used their powers of comment to dominate jury fact-finding. In cases in which the judges thought that the jury had resisted their direction or their view of the merits, they used their power to order new trial to make their views prevail.

In the end, it came to be understood that the jury's role had become so confined that the jury had ceased to affect outcomes. The work of abolishing civil jury trial took about a century, roughly from the mid nineteenth to the mid twentieth. Conor Hanly's important article has traced out that development.[63] He emphasises that the benign experience with jury-less adjudication for petty matters under the County Courts Act of 1846 helped legitimate jury-less adjudication in the superior courts.[64]

The breakthrough came in the Common Law Procedure Act of 1854,[65] which, for the first time, authorised judges to decide questions of fact in common law cases. The Act applied only to cases in which the parties were willing to waive jury trial, but in later decades as bench trial became familiar, further legislation whittled away the parties' right to demand jury trial, transferring to the judges the power to decide whether or not to permit a jury.[66] By the middle of the twentieth century, civil jury trial had been abolished, except for a handful of marginal cases such as slander, seduction, malicious prosecution and fraud.

The final collapse of civil jury trial in England was astonishingly rapid. Not until 1854 did an English common law judge ever make a finding of fact, yet a century or so later the work of finding fact in traditionally common law matters had become the exclusive province of the bench. In this way, English judges finally became judges in function as well as in name, adjudicators as opposed to jury minders.

[63] Hanly, 'Decline'. [64] *Ibid.*, pp. 266–74. [65] 17 & 18 Vict., c. 125 (1854).
[66] Hanly, 'Decline', p. 278 and nn. 186, 189.