

Jury Trials: Then and Now
by Dale Alberstone, Esq.

In a case decided during the latter half of 2005, the California Supreme Court handed down a decision pertaining to jury trials which may affect many landlords. In Grafton Partners v. Superior Court (2005) 36 Cal.4th, 944, the high Court held that a party to a written contract can no longer enforce a provision in the contract which waives the right to a jury trial. In other words, if either party to a contract wants to have their dispute decided by a jury rather than a judge, that party can compel trial by jury notwithstanding any contrary clause in the contract. Although the case did not arise in a landlord/tenant context, the ruling is applicable to landlords who often insert a provision in their residential or commercial lease that both parties waive the right to have a jury decide litigation disputes between the landlord and tenant.

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Reading that case made me reflect on what I learned about the origin of jury trials while attending a portion of my law school education at Oxford University in London. Thus, the balance of this month's Legal Forum digresses from my usual discussion of current issues of Landlord/Tenant law.

Bear in mind that most early disputes concerned the right to possess or own real property, as between a landlord and tenant.

Trial by Ordeal

The origins of the jury trial are well rooted in early European history. Among the earliest accounts is that of Trial by Ordeal, which was an appeal to a supernatural power to intervene in the natural order by a sign which would make manifest the guilt or innocence of the accused person. This belief, which is almost universally still found among primitive races, had its English origins during the pre-Christian period, but by Medieval times had become closely associated with the Church. Until the early Thirteenth Century, those indicted were put to trial by an ordeal.

The ordeal could be of a variety of forms, but the predominant ones were known as the hot iron, boiling water and cold water. The hot iron ordeal was administered at the most solemn moment of Mass. The accused had to clasp his hand around a heated iron, originally weighing one pound, and carry it for nine steps. Then his hand was sealed for three nights, after which the bandages were removed. If the hand was "clean", God was to be praised; but if unhealthy matter was found where the iron was held, the accused was deemed guilty.

An alternative was to compel the accused to walk over nine red hot ploughshares – a procedure carried out in the trial of the mother of Edward the Confessor.

A variant, the Ordeal of Boiling Water, required the accused to remove from a pitcher of boiling water a stone hanging by a string at a depth equal to the length of the accused's own hand. Guilt was determined by inspecting the hand after three days. If it was found infected, guilt was pronounced. If the hand was clean of infection, no guilt would lie. If the administrator felt that the accused was innocent, then he might raise the depth of the stone. On the other hand, the accused may have been required to undergo a triple ordeal in which the stone was increased in weight by three pounds or sunk to a depth of the accused's elbow.

In the Ordeal of Cold Water, the accused was asked to confess if he was guilty. If he pleaded innocent, a priest would conjure the water not to accept a liar, after which the hands of the accused would be bound together under his knees and a knot tied in a rope adjacent to his head. He would then be lowered gently in the water and, if he sank, he would be drawn up saved, otherwise, he would be adjudged guilty. This ordeal was predicated on the belief that the

water was a pure element of the earth and, with God's supervision, would not accept a guilty person. It would only accept an innocent man.

Trial by Battle

Trial by Battle was essentially a Norman institution, being an appeal to the God of Battles as the principal procedure for settling disputes arising from claims to own or occupy land. In civil cases, the parties often did not themselves fight, but rather champions were offered in combat. Most of the battles involved the question of who had the right to possession of the land.

Although it was not actually abolished in England until 1819, Trial by Battle had become practically obsolete by the end of the Thirteenth Century for three reasons: (1) The Church turned against it thinking it to be of ill repute, (2) it appeared barbarous to those learned in the civil law, and (3) many persons felt it was unreliable.

Trial by Swearing

Of all the older methods of proof, the one which had the greatest influence on the development of the jury trial was "Wager of Law," or Trial by Compurgation. In this mode of proof, the defendant swore a solemn oath denying the charge against him. Then a group of persons who were the accused's "oath helpers" took the same oath and swore as to the guilt or credibility of the accused. In time, twelve oath helpers were generally present, and by the year 1342, the number was fixed at twelve.

The theory of Trial by Swearing was that God would suffer no perjury.

Such were the older methods of proof. Although Battle, Ordeal, and Swearing were suited to the age in which they flourished, growing civilization demanded a more objective test, less adhesive to the miracles of the supernatural and more grounded in mundane reality.

Trial by Jury

During the Twelfth and Thirteenth Centuries, a new procedure developed to determine disputes of rights to land. A body of twelve knights were assembled and sworn to testify who was the rightful owner of the property. The most important difference between these twelve knights and the modern day jurors is that the knights were selected from persons who **knew** the facts which had transpired, whereas today's jurors are **ignorant** of all facts until the trial commences. The theory was that no one would be more qualified to testify as to the facts and rights of the landowners than those who had actual knowledge of the same. Thus, the precursor to the modern day jury trial set up a procedure where the witnesses to the event were also the jurors.

By the end of the Fourteenth Century, the "jurors" began to accept others as witnesses to testify at the trial. Thus, the jury was beginning to act on extrinsic evidence in addition to its own knowledge.

Gradually, the jurors began to rely more and more on the knowledge of other witnesses and less on their own personal knowledge. The decision had to be unanimous since there could only be one truth.

Conclusion

This then, was the development of the jury trial in England. It sprouted from the discontent and distrust of the primitive methods of proof which turned toward supernatural intervention to assure a just determination of the issues. It was founded upon a yearning for a method of proof which would yield an outcome consistent with the suspicions of those individuals of the community. Instead of submission to the Diety, the controversy was put to the countrymen of the vicinity where the cause of action arose on the supposition that they would know something of the truth. The jurors were sworn to tell the truth of their own knowledge and not merely to swear as to the credibility of the accused.

The change from **proof** by jury to **trial** by jury was gradual. The earliest jurors were not expected to try the cases by hearing evidence, but to answer questions put to them. The jurors

became the triers of fact while the imposition of the sentence on an accused remained with the judge.

Today, the right to a trial by jury is assured in all California cases where monetary recovery is sought, except in the smallest of lawsuits. A jury trial in pending litigation can no longer be waived in advance by a lease or other contract.

One final comment: Although a jury trial cannot be waived by written agreement, judicial litigation itself can be eschewed in favor of arbitration. The Supreme Court still allows parties to provide in a contract that all disputes will be resolved by arbitration, rather than by litigation. Of course, in arbitration, a jury is not permitted.

Dale Alberstone is a prominent real estate attorney who has practiced real property and business law for the past 29 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.

Mr. Alberstone's practice includes boundary disputes, easements, title matters, construction law, purchase and sale contracts, fraud during sales, escrows, real estate broker duties, foreclosures, complex landlord/tenant and apartment ownership matters, resident manager wage disputes and litigation of all of the foregoing.

*Mr. Alberstone has been awarded an **AV** rating from Martindale-Hubbell. Under a registered certification by Reed Elsevier Properties, Inc., an **AV** rating reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and integrity.*

The foregoing discussion is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

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