

TRIAL BY ORDEAL, NEW STYLE*

By WALTON H. HAMILTON†

THE good old custom of trial by ordeal still endures. But as judges, who have always been learned, have become literate, it has changed its form. Fire, water, hot irons have receded; the syllogism, the reference of instance to category, the staccato of an unruly dialectic have come into their places. In so verbal a ceremonial where a parade of sequiturs separates premises from conclusion, there is many a chance for a "therefore" to go astray; and the arbiter who would keep a combat at law the instrument of justice must be wise in the vagrant ways of the mind. Great jurists — Stone, Cardozo, Black for example — admit the difficulty of their task and confess their human frailty. They practice an elusive art, keenly aware of the pitfalls into which the would-be omniscient judge may fall: assumption of the thing to be proved, the trespass of the abstract rule on the facts, the mask of logic worn by the undistributed middle, the use of colorful words to prod a balking reason, the putting of the question in a way that will induce the right answer. For one who cries to the courts there is no escape from a judgment which emerges from an exercise with fictions. But due process would seem to demand that he who resorts to the law has the right to a proper ceremonial performed by a priest well versed in its mysteries.

Such a right to due process has been denied Bertrand Russell.¹ If his equity in a chair at City College is to be resolved by legal law, he is entitled

*This essay, in modified form, will appear as one of a series of discussions in a book to be called *THE BERTRAND RUSSELL CASE*, edited by Horace M. Kallen.

† Southmayd Professor of Law, Yale Law School.

1. Bertrand Russell was appointed professor of philosophy at the College of the City of New York, beginning with the fall term of 1941. At once a storm of protest arose over the Board of Higher Education's choice. Cries were raised that this internationally famous mathematician and philosopher adhered to unorthodox moral views. In reply, the Board reconsidered its appointment but stood by its choice. On March 18, 1940, the same day on which the Board asserted its independence, Jean Kay, a Brooklyn taxpayer, filed suit in the New York Supreme Court to review the Board's action and to revoke the appointment. In the only written opinion on the merits of the case, Justice McGeehan revoked the appointment. *Matter of Kay v. Board of Higher Education*, 173 Misc. 943, 18 N. Y. S. (2d) 821 (Sup. Ct. 1940). This decision was unanimously upheld by the Appellate Division without opinion. 259 App. Div. 879, 20 N. Y. S. (2d) 1016 (1st Dep't 1940). Permission to appeal was denied by both the Appellate Division and the Court of Appeals. 259 App. Div. 1000, 21 N. Y. S. (2d) 396 (1st Dep't 1940); N. Y. Times, Jan. 17, 1941, p. 36, col. 2. For further elaboration of the factual background see Kallen, *Behind the Bertrand Russell Case* (1940) 5-6 *TWICE A YEAR* 441.

to a fair and honest trial. The challenge must come from a party entitled to make it; it must be entertained by a court of competent jurisdiction; judgment must emerge from the application of established norms to the distinctive circumstances of the instant case. Yet here protest has been taken by a person who can scarcely be accorded a legal interest in the matter; the court presents no convincing proof that it has warrant to hear the cause; the principles by which the facts are commuted into an adverse holding reside in no legal authority. The issue is entertained and resolved by a judge who is superbly unaware of the hazards indigenous to his calling. In an opinion of some five thousand words — half of which represent a labor of supererogation — the judge rises to every error which opportunity presents. Nasty names confer the human touch and a preconceived answer supplies the target for a wayward logic. Given the judge, the judgment could have been predicted — and that without reference to statute or precedent. But, even given the judge, no judicial analyst could have predicted the ideo-mosaic of syllogisms or the distinguished use of the word “therefore.” In spite of his crimes against ignorance, Bertrand Russell deserved a bout at law under an umpire who could at least affect conformity with the great ceremonial.²

In a proper sequence of steps decorum observes the ritual. The faithful referee is eternally vigilant to confine the battle within the bounds of fair play. Lest there be taunts of Star Chamber, each round must be complete before the next is called. But Justice McGeehan, racing to uphold the victor's hand, telescoped the rounds and sped to judgment over murmurs from protagonist and defender alike.³ The Justice sat as judge to hear motions, not to conduct trial.⁴ Before him was only a motion — to dismiss an action against the Board of Higher Education. Without further ado, he reserved the motion, held trial, rendered judgment and closed the case. Lost was the immemorial right to answer to charges filed; ignored were objections to irregularities of process. The urge against free thought left no time for the etiquette of stately adjudication.

2. One wonders why the court's judgment does not, through its denial of a civil liberty, present a substantial federal question which under the aegis of due process might be carried to the Supreme Court. That judicial scotching of such liberties may be constitutional ground for relief in Washington, see *American Federation of Labor v. Swing*, 9 U. S. L. WEEK 4192 (U. S. 1941); cf. *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 9 U. S. L. WEEK 4185 (U. S. 1941).

3. Jean Kay's attorney, when told to proceed with evidence in a motion hearing, balked at first. Counsel for the city subsequently objected to findings without benefit of answer or trial. Comment, *The Bertrand Russell Case: The History of a Litigation*, (1940) 53 HARV. L. REV. 1192.

4. Rules of the Supreme Court, First Judicial District, New York County — Special Terms, Rule I authorized the term in which Justice McGeehan was sitting to hear motions, not to conduct trials.

Aside from the slurred-over proprieties, the Justice denies us landmarks by which to place the substance.⁵ Jean Kay, who tilts against the Board of Education, is presumably a woman; and the newspapers—a void to the jurist and hearsay to me—report her to be a mother. But gentility in sex is not a passport to any legal arena; and even maternity in distress must present its cause of action. As to why the lady went tattling to the court, and as to why the jurist allowed himself to be diverted from cosmic matters, we know nothing. The opinion throws little light upon these initial—yet essential—matters. A casual word here and there implies—it does not say—that this is a taxpayer's suit, and a headnote which goes a little further than the text warrants, seems to confirm. A taxpayer has a stake in his own return, and if more is collected than is due he has his case; but, even in so personal an affair, the rule is to pay first and sue for the refund. In any case, the courts have been grudging in allowing a taxpayer to challenge the use to which tax receipts are put.⁶ Now and then one is allowed to plead that an expenditure which includes dollars he has paid does not serve a public purpose.⁷ At best, a very dubious best, Jean Kay might be permitted to challenge an appropriation for public education, or perhaps to protest the squandering of the people's money on so esoteric a subject as philosophy. But it is difficult to vest her as a tax-payer with a legal interest in *who* is to have and to hold a chair of mathematics. And, however severely her conscience may chastise her into legal combat, her disguise as a taxpayer is perfectly transparent when she questions the moral character of a teacher.

In the sight of the judge, her cause is a crusade; it follows that she is entitled to whatever form of action is in stock. The law has provided her conscience with no appropriate action; its gross negligence does not lie at her door; she is driven to an improper remedy only for want of a proper one. But jurisdiction, even though the layman views it as hocus-pocus, is an institution of social significance. Through jurisdiction the courts close their doors to questions which can be better answered in some other forum; through it they limit their discretion to matters which fall within the orbit of their special competence; through it they protect a going society against interference by persons who would affect their trifling interests with a legal concern.⁸ If Jean Kay is in any way incommoded or distrained by the Russell appointment, it is not in her capacity of taxpayer; resort to the law promises to abate her assessment

5. It is interesting to note that while the opinion makes frequent reference to judicial precedents in regard to minor matters, there is a total absence of citation of authority in what Justice McGeehan concedes to be the most important part of the opinion.

6. *Massachusetts v. Mellon*, 262 U. S. 447 (1923).

7. See *Campbell v. City of New York*, 244 N. Y. 317, 155 N. E. 628 (1927); *Hathaway v. Oneonta*, 148 Misc. 695, 266 N. Y. Supp. 237 (Sup. Ct. 1933); *Altschul v. Ludwig*, 216 N. Y. 459, 111 N. E. 216 (1916).

8. Foster, *Jurisdiction* (1932) 8 ENCYC. SOC. SCI. 471.

by not one cent. The newspapers have described her motive as solicitude lest the souls of her offspring be put in mortal jeopardy. If such be the case — the opinion seems to corroborate with circumstantial evidence — maternal concern has no need of resort to legal process. Bertrand Russell's courses were to have been elective, an offering for youths advanced enough in morality to forsake superstition. And, if the contagion were to spread to the whole climate of campus opinion, Jean Kay could send her young into the Bible Belt or even guard their innocence against any exposure to the higher learning.

But for a special *causa matris* — even where the mother makes up like a taxpayer — there is no statutory provision. Nor have judges, in the wisdom of their experience, seen fit to create so exposed a form of action. Mothers are an unstandardized lot; their urges run the spectrum of all the emotions. Their solicitude for their young presents a motley pattern; there is no unity in maternal beliefs as to which sort of words of teachers will incite immature youth to sin. If one would shield against honest utterance about the facts of life, another would tolerate no plain speech about business enterprise and a third would refuse to condone any criticism of the national state. Among a people whose culture makes them severally parts of one another, morality can not be an attribute of sex alone; the taint of ethics attaches to every personal relationship. There is not an aspect of life — race, religion, the arts, literature, finance, government, human nature — in which a critical attitude towards dominant belief could not be challenged as immoral. Nor is there any staircase rising from the profane to the secular by which indulgence may be allowed in venial matters and blasphemy outlawed in mortal ones. A brief two centuries ago an age which accepted the common whore as a shield for maidenly virtue rose in a great "moral storm"⁹ to consign the theater

9. While to the mind of Justice McGeehan morality is exclusively a matter of sex, the moral urge is unpurposive. The many directions in which it may be impelled have been well described by Mr. Justice Holmes, dissenting, in *Tyson v. Banton*, 273 U. S. 418, 446-447 (1927):

"The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. Lotteries were thought useful adjuncts of the State a century or so ago; now they are believed to be immoral and they have been stopped. Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed it did not need the Eighteenth Amendment, notwithstanding the Fourteenth, to enable a State to say that the business should end. What has happened to lotteries and wine might happen to theatres in some moral storm of the future, not because theatres were devoted to a public use, but because people had come to think that way.

"But if we are to yield to fashionable conventions, it seems to me that theatres are as much devoted to public use as anything well can be. We have not that respect for art that is one of the glories of France. But to many people the superfluous is the necessary, and it seems to me that Government does not

to perdition. The nineteen-twenties found imbibition¹⁰ as baleful, in law at least, as white-slavery or free love. In a section of our land where the folk are at home with the fundamentals, a statement that the world was not made in six days is far more outrageous than soft words about so polysyllabic a thing as homosexuality. Age, section, group, nation, culture — each has woven its ability-to-take-it and its sense-of-outrage into its own design. Open the courtroom door to all who could discover a flaw in the moral armor of a teacher — and contemplate the office of the judge as a mediator between the words of instructors and the conscience of mothers.

If a *causa matris* were to become a weapon against moral wrong, it would be impossible to fix its bounds. In the instant case, Justice McGeehan finds legal harm, not in what Bertrand Russell may say in a City College classroom, but in what he has already said in print. Yet ostracism of the man is not a taboo upon the book. The argument which supports the decree proves too much; to be true to its own logic, the personal ban would be accompanied by a libel against the works. Nor can the norms of law be restricted to the single offense against which they are invoked. All persons whose books upon law, the state, psychology, the economy provoke doubts in an accepted faith should be excluded from the faculty and an action *in rem* should lie against pamphlet and tome of so iniquitous an authorship. If the book reveals the character of the man, surely its pages are not proof against the immoral individual who wrote it. Shakespeare does not curb his licentious characters; Goethe's sex-life did not fall into the elementary formula of Christian marriage; George Eliot was at times slightly confused as to who was her lawful husband. A whole catalogue of learned folk — whose writings have long been the stock in trade of the higher erudition — are subject to such an injunction as that displayed here. It will require a defter stroke than Justice McGeehan can effect to damn Bertrand Russell and to let the pagan Plato and the Christian Abelard go unscathed; the art of hair-splitting will have to be further refined to sacrifice *Education and the Good Life* and save from the slaughter the Song of Solomon.

It is easy to see why courts, not yet enlightened by Justice McGeehan's opinion, have frowned upon such a form of action as silently he allows.¹¹

go beyond its sphere in attempting to make life livable for them. I am far from saying that I think this particular law a wise and rational provision. That is not my affair."

10. Viewing the following instance in terms of 1941 highlights the ephemeral nature of a taboo: during prohibition a professor of philosophy at the University of Virginia was suspended from his office for one year because local police had discovered one bottle of whiskey in his automobile.

11. The courts have generally been reluctant to interfere with the discretion of Boards of Education. See Comment, *Academic Freedom and the Law* (1937) 46 YALE L. J. 670.

A judicial solicitude for moral scruples can have no finite bounds; it imposes upon legal process the duty of sitting in judgment upon every alleged threat to the character of youth. If, all along the intellectual front, judges are to keep watch and ward, they must speed the return of the inquisition. At City College there must be nothing said or read about Biblical men who looked with lust upon female flesh, about Greek heroes who without leave helped themselves to beauties, about men of the desert who upon Arabian Nights seized moon-faced virgins, about rapes as diverse as those of the Sabine women and of Pope's Lock. But books and villains who make them cannot stand alone; perhaps, as our culture currently goes, they are minor influences in moulding the characters of girls and boys. Surely, by the same rationale an action would lie against the newspaper, the magazine, the modern novel, the motion picture. And, since as we have it upon the authority of holy writ, verified by Justice McGeehan, that "as a man thinketh in his heart, so he is" and all his works, the doom of the law would have to be visited upon all who as accessories became parties to the filth. A notion of an indignant mother masquerading as a balking taxpayer is a fiction with which the courts cannot afford to do business. In the instant case the learned judge, completely off his beat, mightily invokes the eternal verities.

A confused awareness that the case is none of his business haunts the bellicose lines of the opinion. Jean Kay has filed her complaint and Justice McGeehan denies a motion to dismiss. Instead of looking into her credentials as a litigant, he proclaims the righteousness of taking the matter away from the Board of Higher Education. But even in so efficacious a court a case cannot go forward on its own steam; nor can the judge on his own motion decree that it must be brought to him. The propriety of party and jurisdiction is elementary; yet it is considered only in the interstices of the opinion. The judge, without reaching for an authority, declares that the appointment of Bertrand Russell is "an insult to the people of the City of New York"; then, using indignation to buck up an absent sequitur, he invites Jean Kay to use the facilities of his court. It is all a judicial version of the old Uncle Remus story. Brer Rabbit escapes from the inescapable by climbing a tree; the act runs against the hero's nature and the mores of his tribe; but in the extreme instance there was no other way. The auto-call of self-righteousness prompts the jurist to reverse the Board of Higher Education. *Ergo, itaque* and therefore, a worthy cause blesses with legal sanction any old plea that is within reach.

If the judge is not overvocal about his right to entertain, he burns with zeal in behalf of the complaint. Society has its way of disbursing discretion among its agencies; policy has it that although mistakes, sometimes serious mistakes, may occur, it is on the whole best to leave matters to bodies appointed by law to handle them. An inkling of this is an

aspect of His Honor's omniscience; Justice McGeehan would not allow an appeal to court — even to his own court — from every decision of a school board; yet here is an action which obviously cries to heaven for review. He admits that the Board of Higher Education has "sole and exclusive power to select the City College faculty"; he must, accordingly, drive a line between the Bertrand Russell appointment and others of its kind. In this humane endeavor he essays a number of starts which break down, get lost in their own meanderings or do the vanishing act; then, rising in his judicial strength, he leads one in triumph to its inevitable *quod erat demonstrandum*. The appointment was in violation of the Constitution of the State of New York — but the Board, composed of upright men and women, thinks otherwise and the question of conformity to the higher law is theirs. The appointee must be a citizen¹² — but the statute allows an exception and it is for the Board to judge circumstances. The distinguished philosopher bears no certificate from a normal school — a defect in subduing the free spirit of inquiry to routine which at Bertrand Russell's age might be indulged since he is much too old a dog to be taught the up-to-date tricks of teaching. His qualifications were not subjected to competitive examination¹³ — some other in a handful of bluebooks might have overtowered the series of volumes in which the story of his competence is written. In all of this the judge demands for the teacher a formal and precise fitness; a kindred demand would level the jurist's art to the craft of the case-bound and forbid so creative a contribution as the instant opinion.

As leads encounter barriers, his argument falters and threatens to flicker out. Then a judicial hunch which rises to sheer inspiration suggests the penal code. It is a far cry from Bertrand Russell's unassuming it-seems-to-me to an act of overt crime; yet Justice McGeehan is a crusader, staunch in faith and glands, doughty in verbal adventure. At one end he sets down passages from *What I Believe* and *Education and the Modern World* — abstracted from context and blessed with a judicial gloss — in which Bertrand Russell wonders whether man in all his fumbings has as yet discovered the ultimate answer to the riddle of sex. At the other he places provisions of the criminal code — likewise adorned with his own comment — which outlaw "abduction" and "rape." Then he undertakes to span the yawning gulf with a dialectical bridge. There is set against the appointee no charge of crime, of participation in a conspiracy to commit one, of being an accessory before the fact. Instead an at-

12. Justice McGeehan declares that should Bertrand Russell make application he would be refused. It may be noted here that the judge believes his own scheme of values to be shared by the naturalization laws.

13. For further discussion of this aspect of the case, see Comment, *The Bertrand Russell Litigation* (1941) 8 U. OF CHI. L. REV. 316; Comment, *The Bertrand Russell Case: The History of a Litigation* (1940) 53 HARV. L. REV. 1192.

tenuated but highly vocal course of reasoning is strung upon the fragile thread of tendency. The statutes which outlaw rape and abduction seek to protect chaste females under eighteen.¹⁴ As report has it there are at City College no chaste females, over eighteen years of age or under; even worse, there are no females at all.¹⁵ The "personality," then, of the "extraordinary" Bertrand Russell must operate by remote control. It must play entirely upon males—whether chaste or unchaste the learned jurist deposeth not—though he does grudgingly admit, as though it had something to do with the case, that some of them have years in excess of eighteen. It is unfortunate that the argument peters out at this point, that the judge does not strip naked the process of corruption by which the teacher's mind corrodes the morals of his pupils. It is, however, not impossible to supply the links essential to the unbroken chain. The student body at City College consists of males, chaste or unchaste, some of them over eighteen, with morals poised so delicately that, if Bertrand Russell expounds mathematics or philosophy,¹⁶ they are impelled to abduct and rape, while if he does not appear in their midst, woman's virtue knows no peril. In the modern world such an Eden of innocence as City College is too precious to allow the serpent to intrude.

A broad chasm lies between a tentative statement about education and a breach of the penal code; yet the logic of a judge of an inferior court leaps it in an easy stride. Some of us might think that Bertrand Russell's frailty lies in a sheer incapacity to rise to hypocrisy; that, with a naive honesty he recites the inquisitive journeys of his mind while we, more sophisticated folk, erect our screens and say acceptable things. We might plead in extenuation that exposure to a teacher of uncompromising honesty might, in its humble way, have "more to do with forming a student's opinions than many syllogisms." But the learned judge, who thinks well of the law he conscripts to his own point of view, exhibits a more distinctive morality. A thing is to be acclaimed evil if it tends to a fracture of the penal code. It matters not that we live in a culture which has related aspects but no isolated parts. Nor is it of note that every influence plays upon objects which are subject to countless other influences; or that

14. A friend in history adds this gloss. A bill was introduced in the legislature of Mississippi back before the Civil War which decreed direful punishment for any who put in jeopardy the virtue of a chaste female. A realistic member from a backwoods county proposed to amend with "chased and cotched."

15. Women are barred from the School of Liberal Arts, where Dr. Russell would have delivered his lectures, but a few occasionally enter Liberal Arts classes by the back door—through enrollments in other schools.

16. At the close of the preface of Dr. Russell's latest book, *AN INQUIRY INTO MEANING AND TRUTH* (1940) is this comment. "This book would have formed the substance of my lectures at the College of the City of New York, if my appointment there had not been annulled." It is submitted that these recondite lectures on epistemology could hardly result in general demoralization of the student body.

gradually the force of an influence is spent as it takes its way down the maze of human activity. Nor is it relevant that logic has never subdued "tends" into cause; that in philosophy tendency is still at large; that hitherto the law has refused to assess liability or impose punishment by so vague a reference. Yet, for Justice McGeehan, let it be said that he brings the touch of creation to legal judgment. It is not the least among his accomplishments that he rests responsibility upon a ground which logic, philosophy, and the established law have found to be sinking sand.

All of this may seem to exhibit an overconcern with the technical issues of party and jurisdiction. But it is in just such procedural matters that the issue of substance lies. It is here that the judge strikes his real blow at academic freedom. In abuse of his judicial trust, he accepts a case he has no right to entertain and makes a decision which does not belong to his court. In behalf of his victim it has been argued that since he is to teach mathematics, the strictures from the bench are beside the point. Such an argument is unfair to Bertrand Russell; its conception of specialty belittles the teacher's calling; it evades the very question of freedom of thought which should be driven home. Justice McGeehan, in usurping an office which does not belong to his court, puts the pursuit of knowledge, upon which all human progress depends, in mortal jeopardy.

If the matter involved Bertrand Russell alone, it would be of concern. If the instance is made general, its significance stands even more sharply out. Let Bertrand Russell be any instructor; let his remarks on sex be any utterance on race, religion, finance, politics, industry, foreign affairs which is not in lockstep with the symbols which currently circulate as fact; let Jean Kay be any parent-turned-taxpayer for purposes of litigation only, who finds printed passages anathema; let Justice McGeehan be any inferior judge who gets his prejudices and the law all muddled; and overall make the word "tends" pinchhit for cause in all questions of legal liability — and ask what can be the future of critical inquiry in a democratic land. Like all possessions which enrich human life, morality is a thing to be attained; in respect to it we are as yet little beyond the dark ages. It is too bad that the learned judge has given us very unlearned law. It is far worse that, just as we are painfully fumbling for the tentative, he insists upon serving up a spurious absolute.