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The trial by jury is a theme which has, in times past, never failed to elicit the highest encomiums from all students of political and judicial systems. Blackstone (Commentaries, Book IV,) declares that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate. De Tocqueville, in his work on "Democracy in America," refers to the jury system in these glowing words:

"It would be a very narrow view to look upon the jury as a mere judicial institution; for however great its influence may be upon

the decisions of the courts, it is still greater on the destinies of society at large. * * * The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. It teaches men to practice equity, and every man learns to judge his neighbor as he would himself be judged. ___

Thomas Jefferson says:-
We think in America, that it is necessary to introduce the people into every department of

government, so far as they are capable of exercising it; and that this is the only way to insure a long continued and honest administration of its powers. They (the people,) are not qualified to judge questions of law, but they are very capable of judging questions of fact Were I called upon to decide whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislature The execution of the laws is more important than the making of them

-Letter to M. L'abbe Arnoud-

But in spite of the great weight which attaches to the opinions of these and other eulogists

of trial by jury, we find that within the last fifty years especially, many eminent writers and jurists have come to seriously question the value of our present method of jury trial, and some have even gone so far as to assail the very system itself as being cumbrous, uncertain, and ill adapted to the present condition of things. The members of this latter class do not deny the great value of the jury in times past, but they assert that it has long since outlived its usefulness; that its very existence to-day is anomalous; and they insist that it should be abolished without further delay. This dissatisfaction may, perhaps to some extent, be looked upon as but the

natural result of the age in which we live. This is the age of discontent. The tendency of the times is towards iconoclasm. The present century has been prolific of great changes – of changes in every department of art and science – in our very institutions themselves. Age alone has ceased to be recognized as a sufficient guaranty of fitness. The past is no longer blindly worshipped: veneration has been supplanted by common-sense.

That our legal institutions should be affected by this great spirit of alteration is in nowise strange; nor should such a feeling be too hastily discountenanced. It is to this self-same spirit of discontent that all the world's great reforms

must be attributed. But change does not always or necessarily bring improvment. If it can be clearly prown that trial by jury is unsuited to the spirit of the present age and, at the same time, a better and surer way of settling civil controversies and of punishing criminals can be devised, by all means let us have the benefit of such improved substitute. Human justice, at best, is and must be necessarily imperfect; and the neglect of any reasonable opportunity to improve the machinery by which it acts is criminal in the extreme. Rash changes, however, must be guarded against. That laws should be certain, is even more important than that they should be just.

Sudden and radical changes in legal methods can be justified only on the clearest proof of their necessity and the (at least) probability that they will bring about the desired reform.

That there exist some serious defects in our present jury system no one can truthfully deny. This is admitted even by its most ardent supporters. These, however, maintain that such defects are not inherent in the system itself; that their removal is not impossible; and further, they assert that even imperfect as is the system at present, it is yet far superior to any other method of trial which has thus far been proposed or which can be proposed.

The origin of trial by jury is yet to day, in spite of the arduous labors of many learned investigators, a matter of mere speculation Many eminent writers find its beginnings in the judicial systems of ancient Greece and Rome; others ascribe its institution to that great English legal reformer Alfred the Great; still others claim that it was introduced into England by the Danes; while yet a fourth class, gives the honor of establishing jury trial to the Norman conquerors of England. All of these support their contention by numerous authorities drawn from ancient writings and customs While not attempting to decide as to which of the above theories is the correct

one it may in general be said, that germs of trial by jury are to be found in the jurisprudence of almost every civilized state. The Greek dikasteries, the Roman judices, and the Saxon compurgators, all in greater or less degree foreshadow our modern jury. Unlike the Greek goddess of wisdom who was fabled to have sprung forth from the brain of Zeus, fully grown and armed, our jury system is the result of the gradual growth of centuries. No one age or nation can claim it as its sole and unaided production: it is the result of the wisdom of all ages and all countries. But while it is true that germs of trial by jury are to be found

in the legal systems of all primitive nations, it was in England alone that these germs grew and developed into a grand and symmetrical system.

The history of trial by jury in England may be divided into three distinct epochs. During the first period, we see the jury as a sworn body for the finding of facts on the mere personal knowledge of the jurors; during the second period, as a sworn body of men acting partly on their own knowledge and partly on the evidence of others; and, finally, assuming its present form and judging of the facts merely on the evidence of others laid before them.

During the period of Anglo-Saxon supremacy in England the administration of justice was rude and simple With them, as in all primitive free communities, the whole free population of each territorial division met at stated times for the hearing and determination of all cases, civil and criminal, arising within their borders. The method of procedure was characteristic. Trials in our modern sense, they had none. Their trial, as Palgrave remarks, was rather of the nature of an arithmetical computation or chemical experiment than a judicial inquiry. Their whole system of jurisprudence was based on

their great regard for the sanctity of an oath and on the idea of divine intervention. Except in special cases, the oaths of twelve men who were willing to swear to their belief in the innocence of one accused of crime, or in the truth of the statements of a party to a civil cause, if not outweighed by the oaths of the witnesses on the other side, were generally conclusive in his favor. These witnesses were called compurgators. Trial by ordeal, or by "judgment of God," was principally confined to cases of criminal accusation or where compurgators could not be readily obtained. This system with but a few minor changes, introduced by the early

early Norman Kings, remained in full operation down to the reign of Henry II. During the reign of that monarch the simplicity of the old judicial proceedings was utterly changed by the enactment of th famous statute, known as the "Magna Assisa". This provided for an entirely new method of trial in cases concerning:
(I) the recovry of lands of which the complainant had bn unlawfully dissised, (II) rights of advowson, and (III) claims of vassalage affecting the civil status of the defendant.
According to Forsyth, ("Trial by Jury" page 102,) "the procedure in cases of dissesin was practically as

follows: the demandant and the tenant, corresponding respectively to our modern plaintiff and defendant, having duly appeared in open court, the former made declaration and said:- "I claim against "A" two carucates of land in the town of B, as my right and inheritance, of which my father (or grandfather) was seised in his demesne, as of fee, in the time of King Henry I; and of which he has taken the profits, to the value of five shillings at least. And this I am ready to prove by the body of this my freeman "C", and if any mischance happen to him then by another, "D".

This wager of battle, as it was

called, the tenant might accept, but he was not, except in special cases, obliged to do so. He might if he so desired, choose instead the trial by assise. In such case, a writ was issued to the proper sheriff commanding him to summon four knights of the vicinage where the disputed property was situated, whose duty it was, having first been sworn, to choose twelve lawful knights most cognizant of the facts who were, upon their solemn oaths, to truly determine which of the two contending parties was entitled to the land. In case the jury as thus summoned could not agree upon the facts others were added, until twelve were

found who did agree, and in accordance with their finding, judgment was given, which was conclusive. Such process of adding jurors was called afforing the assise. For as has been already stated, the duties of the assise were of a strictly limited nature. It had to do only with certain matters which were clearly enumerated. In the determination of these matters, however, subsidiary questions frequently arose, without settling which, it would be impossible to further proceed. These however, the assise, as such, had no authority to pass upon. At first, it was the custom to summon a separate body called

a jurata for the settlement of these questions, but this practice was found to be inconvinient and was soon discontinued, and the same body acted as both assise and jurata; the distinction between the powers and duties of the two, however, bing carefully preserved. When this passing upon matters really outside of its jurisdiction the assise was said to be turned into a jurata. "Assisa vertitur in juratam". Here, then, is seen the jury in its first form, as judges of the facts on their personal knowledge alone.

The first great change in the province of the jury org-

inated in cases of controversies involving the execution and validity of deeds. Here the attesting witnesses, if still alive, were added to the jury and gave testimony on the matter in dispute, before it. It is still a disputed point whether such witnesses strictly speaking, formed a part of the jury and took part in the rendering of the verdict or not. The better opinion seems to be that they were added to the jury simply for its enlightenment, and that they took no part in finally deciding the matter.

When the final change took place, by which the jury laid aside its old functions and

assumed its present form, "as a body of men sworn to decide any disputed matter of fact, by judging upon evidence lawfully submitted to them", can not with any degree of certainty be affirmed. The process was a slow and gradual one; it was the peaceful merging of the old in the new, brought about by the changing condition of affairs and the consequent necessity for new legal methods. Thus far we have, in the main, confined ourselves to a consideration of the jury in civil cases. It now becomes necessary to devote some attention to the importance of the jury as a factor in the admin-

istration of criminal justice.

The criminal jury may be divided into two parts: the grand or accusing jury, and the petit or trial jury. A striking prototype of the grand jury is found in existence as early as the reign of the Saxon king, Aethelred II. According to an ordinance of that monarch, the twelve senior thengs of each county appeared in their respective county courts and there made oath that they would accuse no innocent man and acquit no guilty one. This body possessed no trial powers; its duty was simply to present to the Court those persons within its jurisdiction, who

were charged with crime. The persons thus formally accused might then prov their innocence of the crimes charged by resorting to the process of compurgation, or by successfully undergoing some one of the various forms of ordeal: in either of which cases they were discharged Whether we look upon this institution of our Saxon forefathers as the true beginning of our modern grand jury or not, it was not until the passage of the assises of Northampton and Clarendon, that the criminal jury was established on a clear and definite basis

According to Canon Stubbs, by the assise of Clarendon "in-

quest was to be made throughout each county and hundred, by twelve lawful men of the hundred, and by four lawful men of each township, by their oath, that they will speak the truth. By them, all persons of evil fame are to be presented to the justices, and then to proceed to the ordeal. If they fail in the ordeal, they are to suffer the legal punishment; if they sustain the ordeal, yet are they to abjure the realm. By the assise of Northampton, and by the Articles of Visitation of 1194, the criminal jury is reduced to a still more definite form. Four knights are chosen from the whole county who,

after being duly sworn, were to choose two lawful knights of each hundred, or if knights were wanting, "legal and free men", whose duty it was to answer under all heads concerning the hundred. Here, then, we have certainly as early as the reign of Richard I, in full operation, a grand jury with practically the same powers and duties as are possessed by it to day.

Thus far we find no traces whatever of a jury for the trial of persons accused of crime. The petit jury was of much later origin than the grand jury, and arose out of the widespread dissatisfaction

with the old method of trial by ordeal. At first, trial "per patriam," existed side by side with trial by ordeal, and was granted to an accused person only as a matter of favor and on the payment of a large sum of money to the king. It soon, however, came to entirely supersede the latter and was allowed as a matter of strict right. Some writers have thought that the accusing jury was also the jury for trying the accused, but the better opinion seems to be that they were, from the very first, entirely distinct and separate bodies.

Such, then, has been in short, the history of trial by jury in

England - a system which has survived the changes of centuries, which has witnessed the succession of many dynasties, and the influence of which has been a most important factor in the progress of the people towards civil liberty.

Starkie, in his admirable essay, on "Trial by Jury", defines a petit or trial jury as existing at present, as "twelve men, selected from the body of the community, and sworn to decide any disputed question of fact, by judging upon evidence lawfully submitted to them". The first thing that attracts attention in the above definition, is

the number necessarily required to form a jury. Why this should be twelve rather than any other number, it is somewhat difficult to decide. Many reasons for the choice of this particular number based on analogies in "Holy Writ", have been advanced, but these explanations may be shortly dismissed as being more fanciful than sound. This number having been fixed upon while yet the jurors were only witnesses of the facts in dispute, the probable explanation explanation is that it was adopted on account of its convenience, while yet being sufficiently large to ensure a thorough knowledge of the facts

on the part of the jurors. But whatever may have been the reasons which led to its adoption, it has become so thoroughly imbedded in our jurisprudence that a trial jury, composed of more or less than twelve jurors, would except in special cases, be held clearly illegal. In the next place, these twelve jurors are chosen not from any special fixed class but from the community at large. It is to this provision in particular, that we must attribute in a large degree the great popular strength of the jury system. A trial by a jury composed of men fairly chosen from one's fellow-citizens

-men for the most part surrounded by the same influences and agitated by the same hopes and passions - this seems in truth, to satisfy every requirement of natural justice. While it doubtless is true that some few individual cases would be more correctly decided by restricting the choice of jurors to a smaller and selected class, the advantage thus gained, would be more than counterbalanced by the consequent loss of popular interest in our method of administering justice. In this country, especially, where the continued existence of our form of government depends in so great a

degree on the veneration of the people for our institutions, and on their belief in the justice of our laws, any such change would be fraught with the most serious consequences

The last part of the definition as given above but serves to illustrate the great and radical difference in the functions of the jury of to-day, and that of early times. The jury not only no longer sit as witnesses, but the jurors are even forbidden under oath to take connusance of any matter, not regularly introduced in evidence in open court.

One of the most peculiar features of our present

jury system is the requirement that the finding of the jury must be unanimous before a verdict can be rendered. This has, for years, been fiercely denounced as unreasonable, as a relic of barbarism, and as contrary to the natural order of things. We are told that the application of this rule to every day business transactions would paralyze all our industries: we are reminded that our appellate courts decide the most momentous questions by a bare majority or even tie vote; and, in short, it is asserted that the retention of this objectionable feature very materially retards, and, in many cases

totally defeats the course of justice by leading to the frequent disagreements of juries. Nor does this criticism seem to be altogether unfounded. In reply, however, the champions of the present requirement argue that it is this requirement of unanimity that secures a thorough discussion by the jury itself, of the matters in dispute; that it is the one or two careful, dissenting jurors, who frequently prevent rash verdicts and often convince the majority of the fallacy of their first impressions. That there is much truth in this cannot be denied. We believe, however, that we could obtain all the real benefits resulting from the

unanimity rule and, at the same time, remove all its disadvantages, by providing, that after a reasonable time for discussion had been secured, a three fourths verdict should be received by the court and be held binding on all parties. This provision of course, should extend to civil cases only. In criminal cases, the old rule should be retained. The true object of criminal justice is not the punishment of the criminals themselves, but rather the necessary protection of society; and this is better secured by a disagreement than by a conviction on testimony not sufficiently strong to convince twelve ordinary, honest men of the

guilt of the accused.

Again, it is claimed by the opponents of the jury system, that the men selected to act as jurors are, from lack of training, utterly unable to correctly decide upon the matters submitted to them. True, it does require training to be able to select the truth from out of conflicting statements of facts, but we are not prepared to concede that such qualification is absolutely wanting in our jurors. Experience is the best education. The ordinary business mans whole life is spent in acquiring the faculty of deciding upon doubtful questions of fact. That juries sometimes make

mistakes is hardly to their discredit; for truth is many sided. In some cases, it must be granted that a certain technical knowledge is highly desirable if not absolutely necessary on the part of the jurors; but for such cases we have very generally provided the special or struck jury. If there be any any point of attack here in our system, (and that there is can hardly be denied) it is that our juries do not fairly represent the honesty and intelligence of the community at large; and this results principally from the ease with which influential citizens obtain their excusal from jury service from

too complaisant judges. Here, certainly, there is room for reform.

Moreover, it is asserted that unjust verdicts by juries are by no means rare, and that this is notoriously so, in suits for damages, brought by private individuals against railroad and other corporations, and in actions on insurance policies. That there is some truth in this latter assertion must be conceded; sympathy does, at times, influence the verdicts of juries, but at the same time we must not forget, that on the trial of any cause, the presiding judge possesses the power to refuse to allow the case to go be-

fore the jury unless, in his judgment, the evidence, on its face, is such as to warrant the submission of the case to the jury. Again, verdicts in civil cakes may be set aside as being unwarranted by the evidence or on the ground of excessive damages. Did judges fearlessly exercise this remedial power of granting non-suits and of setting aside verdicts and granting new trials, we should hear much less complaint of the injustice of juries.

Then, too, the judge through his charge to the jury, may to a great extent, prevent gross injustice being done to either party. Nor even if it be con-

ceded that this tendency on the part of jurors can never be entirely overcome, would this of itself justify the entire abolition of our jury system. Perfection in the administration of justice can never be attained here below, for man himself, the instrument through which this justice is administered, is concededly imperfect.

Let us now consider the proposed substitutes for our present system of jury trial. These are two in number, viz;- the establishment of a permanent board of experts to act as a jury on the trial of all causes, and the more radical plan of entirely abolishing the

jury and conferring all its powers upon a single judge or court of judges.

The proposition to supersede our jury by a permanent board of jurors may be dismissed without serious consideration. One of the best features of our present system is the very secrecy observed in procuring the jury. Until the very moment of trial, it is impossible to determine of what persons the jury is to be composed. Hence, attempts to improperly influence juries are rendered difficult and dangerous. Were the composition of the jury in any particular case known long in advance

the temptation to attempt bribery would become so strong as to seriously threaten the existence of our judicial institutions.

The proposed plan of conferring upon the judges the power of deciding upon the facts, as they now do upon the law, thus combining in the person of the judge the present functions of both judge and jury, meets with considerable favor. While this plan undoubtedly possesses some advantages over our present method of trial, it is not without its corresponding disadvantages. Perhaps the most serious objection to its adoption is that

it would deprive the people of their present participation in the administration of justice. "It is to trial by jury," says Lord John Russell, "more even than by representation, that the people owe the share they have in the government of the country: it is to trial by jury, that the government mainly owes the attachment of the people to the laws; a consideration which ought to make our legislators very cautious how they take away this mode of trial."

The great responsibility which such an arrangement would cast upon the judges in criminal cases, especially in those cases where the life of the pris-

oner is at stake, would become unbearable. Under the present system this responsibility is shared by judge and jury alike; and it is such divided responsibility which renders convictions possible. Moreover, such plan would confer upon the judges powers altogether out of harmony with the idea of true popular government

Attempts at bribery, and perhaps not in all cases unsuccessful ones, would become much more frequent than at present The corrupt judge is a prominent figure in history; and the knowledge of his existence in the past should at least suggest the possibility of his existence in the

future. Nor does it necessarily follow that a single judge or court of judges would more correctly decide upon disputed questions of fact, than our present jury. A man may be a very excellent judge and yet make a very indifferent juror. The training of a judge is apt to render him hypercritical, perhaps too, a little narrow Says Mr. Justice Miller, of the United States Supreme Court, in a recent paper on "Trial by Jury"—

"An experience of twenty-five years on the bench and an observation, during that time, of cases which come from all the courts of the United States to the Supreme Court for review, as well

as of cases tried before me at 'nisi prius', have satisfied me that as a method of ascertaining the truth in regard to disputed questions of fact, a jury is, in the main, as valuable as an equal number of judges would be or any less number"

The adoption of this proposal would necessitate a large increase in the number of judges and would likewise tend to render the administration of justice even less speedy than at present.

Another thing we must not fail to call attention to. A jury sits but in a single case, and, if incompetent or corrupt, the evil resulting therefrom is practically confined to the single

case decided by it; but who can estimate the amount of irreparable harm which might be done by a corrupt, or even honest but incompetent judge, elected or appointed for a long term of years, and deciding both the law and the facts?

We think we may fairly conclude that the establishment of the proposed board of permanent jurors or court of judges to take the place of our present jury would not prove altogether satisfactory, but that, on the contrary, such change would give rise to evils far more numerous and serious than those sought to be remedied.

At the same time, we believe

that the operation of our present system of jury trial might be very materially improved:-

First - By judges refusing to excuse competent jurors except for the most convincing reasons.

Second - By judges fearlessly granting non-suits and new trials in proper cases.

Third - By a more extensive use of the special or struck jury in complicated cases.

Fourth - By the enactment of a proper constitutional provision permitting a two-thirds or three-fourths verdict to be decisive in civil cases, after the expiration of a reasonable time for discussion, by the jury, of the matters submitted to them

for determination
And finally - By striving by every means, to elevate the standard of intelligence among the people at large, and by impressing them with a thorough appreciation of the important part they play in the administration of Justice. Education is the great panacea for existing evils.

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