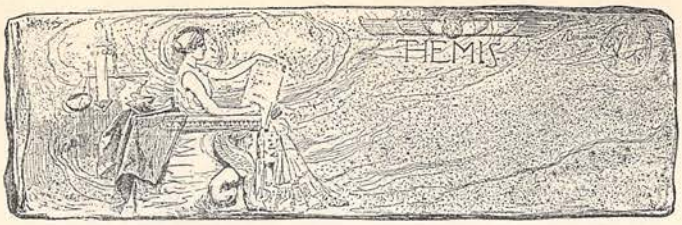

IS THE JURY SYSTEM A FAILURE?

An elderly merchant from Eastern lands was making his first journey in the United States, in company with a New York banker, through one of the richest sections of our country. He admired our large cities, our mountains, our great lakes and rivers, and our forests, which were then in the full splendor of their autumnal colors. He spoke of his surprise at the marvelous energy with which this American race had conquered a wilderness and developed the resources of a continent. He asked all manner of questions about our commerce, our railways, our schools, and our politics. At last he spoke of our courts. He said that if in his own country the people could only have pure courts, where they could get justice surely and speedily, they would, he thought, soon enter on a new and prosperous existence. The American, in answer to the questions that were put to him, explained our judicial machinery, and especially the system of jury trials, under which, as he told his guest, the people themselves took part in the administration of justice, and causes were decided by the verdict of twelve ordinary citizens, under the supervision of a judge, from whom they received their instructions on the points of law arising in the case before them.

"And these twelve citizens," said the merchant, "how are they selected? They are chosen, I suppose, by a vote of the people. That is, I am told, the distinguishing feature of democracy."

"No," said the banker, "they are not chosen by a vote of the people."

"Then are they selected by the judge for their wisdom, or for the experience they have had in the hearing of causes?"

"No, they are not selected for their wisdom, or for their experience."

"Then, how is it decided who these twelve men are to be?"

"These twelve jurymen," said the American, "are chosen by lot. We place a large number of names in a box, draw out the names of twelve men at random, and these twelve men form the jury who hear the cause."

"That is most singular," said the merchant. "In my own country, indeed, our games are many of them games of chance, as it is with all highly enlightened peoples. So it is, I know, with yourselves. You Americans, in play, use cards and dice. Some of your embassadors at the royal courts of Europe have taught us much that we never knew about cards. But in my own land we do not use the processes of gambling in the daily working of our government. We do not choose our public servants by drawing lots or throwing dice. We make an attempt, in theory at least, to select our officials because they have skill and experience in public affairs. I do not mean that we often succeed in putting our theory in practice."

He paused for a moment.

"You surprise me greatly," he continued. "But when you have once chosen your jurymen, no doubt they soon get a large experience, and in time they must become very useful public servants."

"Why, no," said the American, "I cannot say that they do. We do not keep the same jurymen long in our judicial service. In fact we draw a new set of jurymen for each cause. The same man may by chance serve on a jury two or three times in the course of a year—hardly oftener than that."

"You are, indeed, a wonderful people! But do you choose all your public officers by lot?"

"It has been suggested that we should do so; but as yet, we use that method only for our juries."

"And with your other public servants—do you choose new men each day?"

"Oh, no! Our jurors are the only ones of our public servants whom we change as often as that. Our President, for instance, who is the Commander of our Army and of our Navy, and the head of our diplomatic service, who is, in short, the chief executive officer of the whole nation, we keep in office for four years."

The Oriental for some time seemed wrapped in deep thought, and, with a smile on his face, again began his questions.

"Tell me," he said, "the engineer on our

railway train,—is he, too, a new man? Is this the first time he has ever driven a locomotive?"

"By no means," said the American. "This engineer is a man of experience. As I happen to know, he has been in the employ of this railroad company for twenty-five years."

"I am heartily glad to know that. I feared it might be your custom to do with your engineers as you do with your jurymen, and take a new engineer on each train. But as a rule, how often do you discharge them and put new men in their places?"

"My dear friend," said the American, "you do not understand us. It is only in our government that we keep continually changing our servants. You could never carry on a railway on such a system as that. It takes eight or ten years for a man to learn how to manage a steam-engine. It would never do to put a locomotive in the hands of a man with no experience."

"So I should suppose. Otherwise you would soon have neither railway trains nor passengers. And these magnificent mills that I see on every side, they are operated, I imagine, by men who are trained for their work, and follow one calling all their lives, are they not?"

"Certainly: in mills you must have skilled labor. No mill-owner would trust his costly machinery to ignorant workmen. We manage our mills as we do our railroads."

"And in your mills you do not select your operatives or your superintendents by drawing lots?"

"Certainly not."

"It is then only in your government affairs that you use ignorant men for doing your work, and it is there alone that you choose your servants by lot?" He paused a few moments, and resumed: "Your people must have a wonderful genius for government, or, it may be, for getting on without any government. How long with you does it take a man to learn to make a shoe?"

"That I cannot tell you precisely; but I should suppose that a man of ordinary intelligence might learn how to make a tolerably good shoe in four or five years, if he began to learn the trade when he was young. If he waited till he were old, he would never become a really skillful workman. His hands and fingers would be stiff and awkward."

"Or to be an accountant, to keep the accounts of your bank, for instance,—how long would it take a man to fit himself for that?"

"My dear sir, the man who has the charge of the accounts of my bank has been in the employ of our house for forty-five years. He grew up with us from a boy. He is familiar with all the details of our business through all its branches. He knows the whole history of each one of our transactions more thoroughly than I do myself. I could easily get another accountant as skillful as he is, but no other man has his knowledge of our affairs. That is what makes his value to me. And it has taken him forty-five years in our service to learn what he now knows. But you ask me how long it takes to become an accountant. I should say that in two or three years a man might gain skill enough to keep the books of an ordinary retail house, if he were intelligent, and, as we say, quick at figures."

"Allah be praised! But you are a wonderful people! In our wildest and most fanciful romances I have never read anything that equals what you now tell me. You say it takes a man five years to learn to make a good shoe, and two or three years to become an accountant. And at the head of your government affairs once in four years you place a man who has had no experience at his work, and in your courts to administer justice you have new men each day, and choose them by lot. You are indeed a most wonderful people. And is this what you call democracy?"

"It would seem that it must be," said the American. "I do not know that I have ever before tried to think what democracy really was. But this would seem to be one of its features as we practice it."

The aged Oriental kept silence for a time, and at last his thoughts found vent in the pious ejaculation: "Allah be praised! There is one God, and Mahomet is his prophet!" And that was, as is easily seen, the only strictly logical conclusion which he could reach from his premises.

This may sound like an attempt at burlesque; but it is not. However we may theorize on the matter, as a fact the distinctive features of our jury system are precisely these: that we take men to sit as judges in our courts who have neither training nor experience for their work; we take new men each day; and we select them by lot.

Can this be wise? It is a method which we use nowhere but in our public service. Throughout all other human affairs, if we wish work of any kind done well, we use men of skill and training. Everywhere but in our public service a man must learn his trade, as the phrase is, must learn how to do his one kind of work, whether it be hard or easy, whether it be ditching, or coal-mining, or building iron steam-ships. But when we come to the management of the state affairs of a great people, we seem to think that training is of no value. And in the administration of justice we go to the extreme length of taking

new men to decide each new cause, and choosing them by lot. Can it be that government work is the one kind of work in the world that men can do well without first learning how?

Thoughtful persons are beginning to have their doubts on this question, or, rather, they are beginning to end their doubts. It is true that, in times past, many able men have been of the opinion that the jury system, as a part of the working machinery for the administration of justice, was well fitted to its uses. But public opinion on that point is changing. The men who still have faith in the jury system are mostly theorists, men who do not know its real workings. The men who really see its workings know its faults. And, of all men, those who think worst of it are jurymen themselves. They are the men who best know what it is. I have often heard opinions as to the methods of juries given by men who have served in the jury-box, and never once a favorable one. Always they have said that they would never wish a cause of their own, if it were a just one, to be tried before a jury.

The whole question is a practical one. Men say that, theoretically, the jury system may not be perfect, but that "it works well." This is the whole point. I maintain that the jury system does not "work well," if words are to have their true meaning. When we say that a system works well, we mean, or we ought to mean, not that we have thus far been able to endure it, but that it is the best thing we can get for its purpose. Now our present jury system "works well" in the same way that a cart without springs works well. We can, indeed, use it to transport hay and cord-wood. It is even possible to make a journey with it, and perhaps bring our bones unbroken to the journey's end. A cart without springs is an improvement on a sledge without wheels. But how does it compare with this thing which we call a steam railway train?

The question is not one to be decided hastily, or from only one point of view. Many men, who are quite convinced that the jury is not a perfect tribunal for getting wise decrees, yet have a doubt whether we can devise anything better to take its place. Others who think that we may possibly frame something better than our jury system, looking at it merely as a part of the machinery for the administration of justice, yet have a belief that we must keep it as a bulwark of the people's liberties. Others think that the jury system has great value as a means to the political education of the people. An idea, too, is widely held that the jury is a political growth, that it is only one organ in a large organism, and that an attempt to make any great change in the one organ will endanger the health or the existence of the whole organism. And, finally, many men who are well convinced that, on every ground, we ought to have some new machinery in the place of the jury, say that we can *do* nothing, that the people cannot be persuaded to make a change, even if a change be wise.

I propose then, by way of an individual contribution to the people's thought on one of the people's questions, to consider our jury system from these different points of view. And my attempt will be to show that we can find something which will better serve the people's needs than our present jury system, whether we view it merely as a part of the people's machinery for the administration of justice, as a safeguard of the people's liberties, as a means to the people's education, or as a stage in the growth of the people's government. And I shall also try to show that, if it be wise to make a change in our jury system, the change can be made.

The first point to be considered is whether we cannot devise something better than our jury system, viewing it merely as a part of the people's machinery for the administration of justice. And here we must consider, what are the ends to be accomplished by any possible system of legal tribunals; whether the jury system serves those ends well; and whether any other system will serve those ends better.

At the outset we must give up all idea of having any system which will make us sure in every case of getting the one right decree. We shall at times have wrong decrees, under any system. We have to use in the administration of justice imperfect human beings. We cannot get from them perfect results. Counsel will not always find out the whole truth of a case from hearing only one side of it, nor will courts always do so after hearing both sides. Justice will at times miscarry, as long as men are what they are, and until the bench and bar finally accomplish their glorious mission of regenerating human nature in its moral aspects.

Assuming then that any system of tribunals will be imperfect, the end to be accomplished by any system of courts is to make justice—so far as we can—sure, speedy, and cheap. To make justice sure is, of course, the first thing. But it is almost as important to make it cheap and speedy. The delays and the cost of litigation are now its greatest evils. Most men might nearly as well give up their rights as get them only after years of weary waiting. Especially is it the poor and weak who must always suffer most from these

delays of the law, which now often amount practically to a denial of justice.

How, then, does the jury system serve these purposes of getting justice surely, speedily, and cheaply? What are its good points, and its bad ones?

Two features in the jury system are, in my belief, thoroughly good, and should be had in every tribunal which is to give final decrees in cases involving more than very small amounts of property. And these two features are, that the jury is a tribunal made up of several members—and that the assent of every member is required to its verdict. As it seems to me, in no cause of any importance, should a final judgment be given by only one man. There should always be the working together of several minds. As a rule, one mind does not see all the points of a case, or wisely weigh them all, and different minds see different points. If then we should have a tribunal made up of several members who were men of ability and training, it would be as near to a certainty as we can get, that no points of real weight in a case would go unseen. And if the assent of each member were required to the judgment, it would be as near to a certainty as we can get, that every point seen in a case would be thoroughly considered. For the man whose voice must be had in order to reach a result, has in his hands a sure means of compelling a hearing. This requiring the assent of each member of a jury to the verdict has been, it is true, very often disapproved. I am convinced it is a thoroughly wise feature. In practice it has never worked any great inconvenience. Even with our present juries, made up, as they are, of men new to their work and to one another, there is almost never any great difficulty in their agreeing on a verdict. This is natural enough. Men of common sense, where it is necessary that they should come to an agreement, come to an agreement. And juries are generally made up of men who have common sense. They are able to see that, where individual views differ, individual views must yield; and they yield. It may be said that, although this is the case with inexperienced jurymen, it might not be so with old judges, who are stronger men, with firmer opinions. But here we have the results of actual experiment. And we find as a fact that judges after learning law do not lose their common sense, and that where it is necessary for them in the discharge of their duty to agree on a judgment, they agree on a judgment. An examination of the Reports of the present New York Court of Appeals shows that the decisions are unanimous in about ninety-five cases out of a hundred. And the judges of that court have to agree on the hardest thing in the world for men to agree on,—mere opinions and processes of reasoning. If they had to agree only on a result, on a just judgment, I venture to think that they would not have a disagreement once in five hundred times, and that they would seldom have any difficulty in agreeing quickly. Men who know how to do their work, and are in the habit of working together, learn to work together with smoothness and speed. I venture the further opinion that it is only the requiring the assent of every juryman to the verdict which has made the jury an endurable thing. Our jurymen now, especially in the large cities, are as a class much more intelligent men than the jurymen of fifty or a hundred years ago. But even with the more intelligent juries of this day we do get at times unjust verdicts. It is owing to this requirement of agreement, that we do not have them oftener than we do. Almost always on a jury there are at least two or three men of superior shrewdness and intelligence. These men usually control the result. They are enabled to do so because they have it in their power to prevent a wrong verdict by withholding their votes. A verdict which commands the assent of every one of twelve men will not often be very unjust.

So far the good points.

There are bad points. The jury is a body of men who have no knowledge of the law,—who follow other callings,—and who have practically no experience or training in hearing and deciding mere questions of fact. Moreover, in causes which are tried before a jury, no final judgment can be had without a jury's verdict.

The results which follow are most remarkable.

In the first place, it is this fact that a jury is a body of men who have no knowledge of the law, that compels us to use that most singular piece of judicial machinery, the double tribunal, of judge and jury, made up of one man who knows the law and twelve men who do not; but where the twelve men who do not know the law decide the cause, and the one man who does know it merely tells them what the law is. That is what we are driven to so long as we have juries. Causes must be decided on some fixed legal principles, and jurymen know nothing of them. The simple, natural course would seem to be to have a court made up of men who do know those principles. But we keep the jury, and place the jurymen under the guidance of a judge. Here, too, the natural course would seem to be to have this trained judge give the judgment. But the judgment or verdict is given by the untrained

jurymen. It will be said that the jury has only to apply the principles of law, which are stated to them by the judge. But it is this applying legal principles, as it is called, which tries the brains of the strongest men in the legal profession. That is especially the work to which untrained minds are not equal. This attempt to have one man decide a cause on another man's ideas of law,—to have twelve men think with another man's brains,—is not fitted to give the best results.

We come to another point. The fact that the jury is a temporary body, made up of men who have other callings, which they leave at a sacrifice, to which they must at once return, makes it impossible that intricate causes should have, either as to the facts or the law, the thorough consideration they need. It is not an infrequent thing for a trial to last a week, or even a month. Many witnesses will be examined, many papers read. To carry all the evidence of a long trial in the mind is a thing that few men can do, even with the training of a life-time. In a cause which has a large mass of conflicting testimony, it is an impossible thing, even for the most able and experienced judges, to give sound decisions on mere matters of fact, without having the exact record of the witnesses' words, copies of all the papers, and, above all things, *time* to read and think. But this body of men, with no training at all, as a rule, have no record of the evidence, no papers, must depend on their mere memory of what they have heard, and they come to their decision in one hurried conference of perhaps one or two hours; or if they take a longer time for their deliberations the result at times depends on a mere contest of physical endurance. At the same time, too, the judge, in making his charge upon the law, is placed under every possible disadvantage. Many difficult points are presented to him for his decision at the very end of a trial. He has little time for quiet thought, or for the examination of books. If he makes a slight misstatement as to any of the legal principles bearing on the merits of the cause, it will be ground for a new trial. And it is from a hurried oral statement that the jury is supposed to gain a sufficient knowledge of the legal principles involved in the cause, to master which the judge has taken the study of years. In short, both judge and jury are placed in circumstances which go far to make a careful examination of the law and facts of a case impossible, and to make error certain.

The fact, too, that the jury is made up of inexperienced men necessitates all the wearisome and needless contests over the admission of evidence. A tribunal of men who were fitted for their work would hear, within reasonable limits, everything which could possibly throw any light on the case to be decided, and would wisely weigh all the evidence laid before it; but with a jury we know that testimony will not always be rightly weighed. We are compelled, therefore, to have the judge exclude all testimony which is not strictly relevant (as the phrase is) to the points to be decided, for fear that it may have an undue weight in the jury's minds. Can anything be more absurd? We say in so many words that a jury cannot be trusted rightly to weigh testimony, and yet we keep the jury for the one purpose of weighing testimony.

But the jury is not a tribunal well fitted to decide even mere questions of fact. It is often said that, for deciding the every-day differences of business men, we need the every-day common sense of business men. No doubt we need common sense. But every-day common sense is not enough. We must have trained common sense. This work of judging, of sifting large masses of conflicting testimony, of detecting falsehood, is a thing which cannot be well done by men picked from the community at random. It takes strong minds, and it takes experience in this special work of judging. The ablest and most experienced lawyer at the bar, before he can be a really useful judge, must have a new experience on the bench. It is often said, too, that to decide the causes of business men we must have the experience of business men. But is that true? A contract is a contract, whether it concerns flour or railway bonds. And for a man to decide justly the rights of the parties under a contract for the sale of flour or bonds, it is not necessary that he should be a flour-dealer or a bond-broker. What is needed in order to judge business causes is, not personal experience in any one branch of business, but a knowledge of the general methods of business men in all branches. In a few years on the bench, a judge gets a knowledge of the general methods of business men which no business man can possibly have. The thing especially needed in deciding causes is a knowledge of human nature as it shows itself in the witness-box. And that knowledge can be had only from a long experience in court-rooms.

But the most singular point of all is yet to be given. It is almost a certainty, that with tribunals thus constituted there will be errors to correct. In fact, in a trial of any length, with adroit counsel on either side, it is almost a wonder if there is not error. To correct these errors there must then be appeals. But since, under our law, the

final decision must be made by a jury, the appellate court gives no judgment on the merits of a cause. It only decides whether there was or was not error in one process, in the judge's rulings, either on points of law or on points of evidence. The result of the trial, the verdict, may have been right or may have been wrong. With that point the appellate court has nothing to do. Moreover, if it finds there has been error, it does not correct the judgment, but only orders another trial, to begin anew the series of blunders and appeals with not much more certainty of a right result than there was in the beginning. It is this possibility, or almost certainty, of appeals and new trials, and wearying delays, which causes half the litigation that burdens our courts, and which is the worst result of our jury system. It is a result which comes directly and necessarily from having men do work which they have never learned how to do.

The result, then, to which the argument thus far has brought us, is this: that there are two good features in the jury, its being a tribunal of several members, and the requiring the assent of every member to its verdict. And, on the other hand, our conclusion is that its other features, its being made up of men who have no knowledge of the law, and its being a temporary body of men having other callings, make it certain that we shall have many wrong judgments, with long delays and heavy expense to suitors. In short, the jury at this day fails to accomplish the ends which should be accomplished by a well-devised judicial system.

But what can we have that is better?

Suppose that we were to try this very simple plan. Suppose we were to keep in our judicial system the features which had been found by experience to work well, and were to do away with those features which have been found to work ill. Suppose that, in the place of this double tribunal,—made up partly of untrained men who give their time to other affairs, with whom deliberate examination of a case is impossible,—we were to have a single tribunal, of trained men, who should give their whole time to their work, who should give to each cause the time it really might need. Suppose, in short, we were to put our appellate court of trained judges at the beginning of the litigation instead of at the end of it; were to have them hear the whole of the cause on its merits, instead of one or two points of it on a technicality; were to have them give a judgment themselves, instead of simply saying whether some one else had made a blunder, and that we were then to abolish appeals?

This may sound somewhat sweeping. But let us recall some steps of the argument, and see if there is any way of escaping the position in which we now find ourselves. We know that this jury is a body of men having no training for their work. We know that its constitution makes thorough deliberation an impossible thing. We know that it drives us to the double tribunal. We know that errors must certainly result. And we know that the existence of these errors must and does cause the costly and tedious delays of the law. Now, can any man point out any other cause for all these errors and delays, except this one fact, that we use a tribunal of untrained men for doing work which requires men of training? And what other remedy then is possible except to use trained men in their place? It may, too, at first seem that there would be danger in abolishing appeals. But what is the end that under our present system we try to gain by appeals? Nothing but the correction of error. And what is the means that we use for this correction of error? Nothing but the having in the final appellate courts seven learned and experienced lawyers to hear the cause. If then we have our seven learned and experienced lawyers hear the cause in the beginning instead of at the end, what are we to lose, except delay?

But let us examine with somewhat more care the probable results of the modifications here proposed.

In the first place we should, with these modifications, have as great a certainty of just decrees as we can get under any system. So long as we use human beings for the administration of justice we cannot possibly devise a better tribunal than one made up of a reasonable number of able and experienced judges. Suppose an important cause were to be tried, and that the hearing were had before a court of seven experienced judges, like our present New York Court of Appeals. Suppose that they heard all the witnesses, admitted such testimony as they saw fit, giving—as they undoubtedly would—all reasonable latitude on this point, hearing everything which could throw any real light on the matters in dispute, and taking for their decision, not one hour or one day, but precisely such time as they might need. Would not a decree which should be assented to by every member of such a court be very certain of being just? Would not the judgment of such a court, on the whole case, be better than its own judgment on half the case? And would not the careful judgment of seven trained men be better than the hasty judgment of twelve untrained men? This would seem to be somewhat in the nature of an old-fashioned sum in arithmetic, in Rule of Three.

At the same time similar modifications should be made in that branch of our procedure which concerns what we call equity practice, where causes are now heard in the first instance before a single judge. Here, too, instead of having the cause first heard before one man, taking the chance of his errors, and then appealing to higher courts to set those errors right, we should have the cause heard in the beginning, once for all, on the merits, before a court of several judges, should get our best possible result at the outset, and avoid all this needless expense and delay. This would give us, too, a simple method of fusing common law and equity practice, which lawyers generally agree is a very desirable thing, but which can never be thoroughly accomplished so long as we retain the system of jury trials for what we call common law actions.

But what would be done, it may be asked, if the members of such a court could not agree? To this the answer is, we would do as we do now when a jury does not agree, —have another trial. But this point has, it seems to me, been already fairly met. Experience shows that there would very seldom be disagreements. It is sometimes supposed that the duty of a juryman or a judge requires a man to refuse his assent to a verdict or a judgment which he does not think a correct one. But this is not so. No doubt a juryman or a judge is bound to do what he can in reason to bring about a result which he thinks right. But he is bound to help a result, not to hinder one. It might be well to provide that in the event of a second trial a judgment could be rendered by fewer members. I do not believe, however, that such a provision would be needed once in five hundred cases. But it could do no harm.

It may be thought that such a change would necessitate a large increase in the number of our judges, and would therefore greatly increase the public expenses. If it did increase the direct outlay for judges' salaries, there would be in the end a great saving to the people. The item of judges' salaries is a small fraction of what the people now have to pay for the administration of justice. The delays of our courts are what now make the main tax on the people. Here, as elsewhere, it is no true economy to work with poor tools or bad materials. I doubt, however, if the force of judges needed would be much, if at all, increased by the changes here proposed. The work now done by the judges of our courts consists very largely in the hearing of appeals. As the practice now is in the State of New York, a case which goes but once in the regular course through the different courts to the highest appellate court, is heard in one form or another before eleven judges. It is not an infrequent thing for a cause to go through all the courts twice, in which case it is heard by twenty-two judges. This appellate work is the most laborious work of all, as it involves the writing of many opinions. Moreover, as I believe, half the cases which now get into the courts would never be brought there, if they were sure of being quickly heard before a court of able judges who would give at once a final judgment. It is the hope of delay that makes half our lawsuits.

The plan here given is to have no appeals, in their present form. But though we should do away with appeals, it would be necessary to have graded courts,—courts arranged for the trial of causes according to the amounts of property involved; perhaps, too, according to the different classes of matters involved. It might be wise, too, that causes should be sent by the lower courts to the higher ones for a hearing, when some new and important principles came up for decision. There would, too, in the minds of some men, be the fear which is, no doubt, still widely spread among us, of some danger at the hands of permanent officials of any kind. But this fear, I believe, is now fast disappearing. When our judges were independent of everything save the consequences of their own misconduct, before judges became politicians, while such a thing as a corrupt order or decree from a judge on the bench was a thing almost undreamed of, could a better tribunal possibly have been found than one made up of five or seven judges? Could a cause be in safer hands than in those of seven men like Kent, and Shaw, and Story? But take our judges as they now are, and I believe the general opinion of both lawyers and laymen would be overwhelming in favor of having causes heard before a court of judges, rather than before a court of laymen. The remedy here is not to take causes out of the hands of judges, but to take judges out of politics.

Any attempt to suggest a radical change in government methods is now generally received with great distrust, and almost with contempt. It is called theorizing. But everywhere else men try to make improvements,—and they make them. Moreover, they try to make those improvements by following principles, of some kind, after a study of faults and a search for remedies. Why should we not do the same in our government affairs? Is it there alone that we must use the machinery of five hundred years ago?

This whole system of trial by jury never was anything but a clumsy make-shift. In its

origin, the jury was not a court of justice for hearing causes, but only a feudal court of the lord's vassals. These vassals first became something in the nature of a judicial body merely for the purpose of deciding disputes as to landed estates or feuds; and in deciding these disputes they served mainly as witnesses to facts within their knowledge, and not as judges to hear causes on evidence. This court of vassals was, in time, converted into something like a court of justice, but merely for lack of any better machinery. No doubt the jury system was an advance on the methods it superseded. Trial by jury, as a method of ascertaining the truth, is something better than trial by battel. It answered very well for the simple transactions of a rude race just emerging from the fighting era of existence. But how does it serve the needs of a great working people in this nineteenth century? This system of having lawsuits heard by men who know nothing of law, this mixing of one lawyer with twelve laymen and calling them a court, is about as sensible as to try to drive a wild elephant and a thorough-bred in double harness. The combination is not a useful one. Need it be said that this marvelous monstrosity is the morganatic device of that grand old blundering, synthetic English people, which, in affairs of state, always insists on adapting old machinery to new uses, which tries to convert an antique feudal tin-pot into the cylinder of a modern legal locomotive, and which produces as its masterpiece in political machinery that wondrous thing called parliamentary gov ernment, where a minister is put in the War Office because some other men have been outvoted in Parliament, where he gives his time to general legislation instead of to army affairs, where he resigns from the War Office because he has blundered in the legislature on some measure concerning the Irish Church, or Irish landlords, but keeps his seat in the legislature, where he has made his blunders?

So far we have considered the jury as a part of the machinery for the administration of justice. We have, then, to see how necessary it is as a safeguard to the people's liberties.

In England, where the jury system grew, under the rule of hereditary kings, there was no doubt, in times gone by, great danger to the rights of the individual subject from kingly tyranny. The jury system did there fill a great need; it was the bulwark of the people's liberties. But have we, in this country and at this time, the same dangers, or, indeed, any dangers against which the jury system is the only, or the true, protection?

We have no hereditary king. With us the danger is, not to the rights of the individual from a king, but to the rights of the people from individuals. The fact is that the jury in our criminal procedure,— and in truth nearly our whole criminal procedure,— is especially adapted for the protection of criminals. It is society which needs protection for its liberties. And that protection can be had only by making in our criminal procedure the changes here already urged for our civil procedure,— by having a machinery for the speedy trial of all criminal charges before a fit tribunal, and by providing some means for getting a judgment against the criminal before the crime is forgotten. The only dangers there are with us to the rights of individuals come from the existence at times of popular passions or prejudices, which are almost always honest, though unreasoning. Against these passions and prejudices, the uniform experience of the community show that the only sure safeguard is in able and upright judges. How could it be otherwise? A judge is led by his whole training, by all his habits of life and thought, to take calm and deliberate views of the questions which are brought before him. Juries will at times work injustice through mere prejudice and excitement. The inclination of a judge is always to save the law and the individual from the passions of the hour. The old maxim, that it is better for fifty guilty men to escape than for one innocent man to suffer, is a judge's maxim. The law that citizens give to citizens, when they are not restrained by the authority of courts, is lynch law.

The argument thus far, if sound, brings us to the conclusion that the modifications in our judicial system here proposed— the having our courts composed of trained judges— would be a change for the better, so far as it concerns the administration of justice and the security of the people's liberties. But a widespread idea exists that the jury system has great value as a means to the political education of the people. My belief is that in this respect, too, we should be the gainers by the changes here proposed.

What is the real value of the jury system as a means to the people's political education? In its mere quantity the experience which citizens gain from their jury service is almost nothing. A man serves on a jury, at most, in the trial of three or four causes in the course of a year. This is a liberal allowance. Even supposing then that the trial of each one of these causes involved weighty principles of constitutional law, matters of the deepest interest to the citizen, how much could be learned from an experience of that extent? The men who follow the profession of the law for a long lifetime, at the end of their labors only

begin to learn the depth of their own ignorance. Take the most intelligent men we can find in the whole community, put them in the jury-box during the trial of half a dozen of the most important causes that ever come before a court, and how much can they learn, during those trials, of constitutional law, of the machinery of government, or of anything else?

But, as a matter of fact, the large majority of causes that come before a jury have not the most remote connection with constitutional law, with the science of government, or with anything that can rightly interest any living person other than the parties to the suit. The real experience of the juryman is something like this: A jury has before it a suit on a promissory note against a man who has indorsed it. They hear the testimony and are told by the judge that it is for them to consider the evidence, and pass upon the facts; and if they find that notice of non-payment of the note was given to the defendant in a particular manner and at a particular time, they must find a verdict for the plaintiff, and otherwise for the defendant. Or they have before them a suit to recover a quantity of merchandise of which, as the plaintiff claims, the defendant got possession by fraud. The jury hear the testimony, and are instructed by the court that if on all the evidence they believe that the defendant made certain false and fraudulent misrepresentations, they must find a verdict for the plaintiff,—otherwise they must find for the defendant.

Can it be seriously urged that such experiences as these (and these are fair examples of the proceedings on ordinary jury trials) can have any substantial value for the purposes of political education? I venture to doubt whether the jury-box is very serviceable as a school of constitutional jurisprudence, or whether the juryman by his service of two or three days in each year, gains any real knowledge as to the machinery or workings of a free government.

This idea that our jury system is a great educator for the people sprang up in the brain of Alexis de Tocqueville. Very probably that eminent Frenchman, when he was on this Western continent, was not more than ten times in a court-room; possibly he never heard the whole of one jury trial from its beginning to its end. It is easy to fancy his experience. Some learned and leisurely scholar no doubt took him to a court-room, where he probably found in progress a trial over the price of a cow, or some other equally exalted matter. De Tocqueville had heard that questions of constitutional law did at times come before our courts for decision. And he knew that juries sat as part of our courts. We can fancy him exclaiming:

> "Behold, at last my dream! I am thrilled with emotion at this sublime spectacle of a free people governing itself! The humblest citizen here feels himself to be part of the great State. In his own person he makes and expounds the laws, and under the guidance of learned judges studies the grand principles of constitutional jurisprudence. The sovereign people itself sits on the throne of justice! *Ah! c'est ravissant!*"

This might be thought an exaggeration. Here are De Tocqueville's printed words from his "Democracy in America." Speaking of the jury system, he says:

> "It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights, enters into *daily communication with the most learned and enlightened members of the upper classes*, and *becomes practically acquainted with the laws*, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even by the passions of the parties."

Could anything be further from the fact? To imagine that a man can become "practically acquainted with the laws" from a few days' service as a juryman is really humorous. As well might one hope to learn something of the science of medicine from carrying a few physicians' prescriptions to the druggist. Or, perhaps, we might at once convert the American people into accomplished surgeons by having them visit the hospitals two or three times a year and witness an amputation.

No doubt it is a wise thing for every citizen to learn as much as he can of the working of every part of our government system. Let him read and observe, on all subjects, as far as his opportunities will allow him. If he can take the needed time from his ordinary occupations, by all means let him make a personal inspection of the methods of our courts. Let him listen attentively to the arguments of distinguished counsel, and the utterances of learned judges. But shall he be allowed to learn law by deciding the causes of litigants? That is too costly, as a scheme of popular education.

But suppose, on the other hand, that every man who refused to perform his legal obligations could be brought before a court where it was certain that justice was not only sure but speedy, could any mere political machinery be devised, which could have a more healthful effect upon the people's moral tone?

But even if the points thus far argued be conceded, it may be said that the jury system is a growth,—that institutions must grow,—that such sweeping changes do not follow nature's laws, and are full of danger. How much truth is there in that?

It is for the very reason that human institutions grow, and that they grow by nature's ordinary processes, by the survival of the fittest, that it is certain we must and shall have some new and better judicial machinery in the place of our jury system. The whole doctrine of survival of the fittest rests on the fact that old organisms cease to be fit, and new organisms come into being which are fitter. The conditions of existence change. There was a time when this jury system was tolerably well fitted to the needs of the people. But that time has gone by. The jury system has had its day. When we say institutions grow, do we mean that we are to let them grow wild, or are we to guide their growth? The method of this American people is to make changes in their public institutions, when changes are needed, on principles; it may be on mistaken ones, but still on principles. We made these State and National constitutions, new things in political science, because they were needed. And no one of the men of a hundred years ago imagined that these constitutions would serve the needs of the American people for all coming time. We find now that this jury system is not equal to our needs, and we must change it. The question is, what shall we have in its place? We know that the growth which has been going on for ages is not now to cease, but will still go on for ages to come. And what is the next growth to be? Shall it be a wild natural fruit, or shall it have the care of man, to give it a rich, healthy development?

But can the people be persuaded to make this change? That is the question which comes after all the others. And the answer is, they can be persuaded to make a change so soon as they find the right change to make. What is the right change is the point we have to ascertain and decide by careful discussion. Every step that the American people has thus far taken in the development of popular government has been a step taken because the people thought it wise. And the American people are not afraid of anything because it is new. On the contrary, they are, if anything, too much given to new theories and sweeping constitutional changes. And the changes that have been thus far made have been changes, in the main, for the better. Everywhere else in the world we see the cause of civilization advancing. Are we here to reverse all the processes of nature, and are we here to begin losing ground? There is no doubt that elsewhere than in their general affairs the people act on their views of their own interests. Will they do the reverse in their governmental affairs? What their true interests are, they may not yet know; but in good time they will learn. Meantime, to say that things cannot be done will not greatly help the doing. Of that kind of assistance to the people's progress we have had quite enough.

But, last of all, it may be said that such a scheme for having all causes, civil and criminal, decided by permanent judges, without juries of citizens, would not be democratic. But what does this mean? As has already been repeated, the only change here suggested is to put men of experience in the place of men without experience. If it be undemocratic to have our work done by skilled servants, who give their whole time to our affairs, then this proposed system is undemocratic. But let us not mistake the meaning of words. True democracy consists in having the people control the machinery of government, not in having them make a vain attempt to operate it with their own hands. The whole point lies here. This work of administering justice must be done by individuals, selected in some way from the community at large. The only question we have to decide is,—How shall those individuals be selected? Shall we take new men every day who cannot by possibility gain skill and experience, or shall we use trained workmen?

We must change our methods. We must learn that government work in all its branches demands men of training. The old system of turn and turn about no longer answers the needs of the age. One hundred years ago we were clearing a wilderness. The citizen of that day was compelled by the necessities of his position to follow all callings. He had to be by turns a farmer, a carpenter, a blacksmith, a soldier, and a judge. And at the end of the year, when the snow and ice of winter somewhat checked his ordinary activities, and he shared with his ursine neighbors the torpor of the season, he gave his vacant hours to the making of his own laws. That was, in a measure, his opera and theater.

That scheme of life was very well for its day. But its day is gone. In this nineteenth century, in this land of railways, telegraphs, and printing-presses, the work of making, expounding, and executing, the laws of a great nation, must be put in the hands of men who are trained for their work and give their lives to it. We have had enough of the rotatory, or annular, system—in government.

Albert Stickney.