## BOTH SIDES OF THE JURY QUESTION.

[REPLIES TO "IS THE JURY SYSTEM A FAILURE?" AND REJOINDER.]

EDITOR OF THE CENTURY MAGAZINE.

SIR: Undoubtedly there are serious defects in the jury system as at present organized. It may be conceded that it does not give satisfaction in complicated civil cases,—for instance, those involving patent rights. There are also defects not inherent in the nature of the system, such as those arising from the method of selecting the jury, which tend to exclude the most intelligent class. All this goes to show that the system needs reform. Mr. Stickney's paper in the November CENTURY attacks it on grounds that, if proved, demand its abolition. He is in error, it may be noted, regarding the origin of the jury system. It was not in its inception "only a feudal court of the lord's vassals"; it did not have its origin in the feudal system, nor did it form a part thereof. On the contrary, its germ is found in customs common to the whole Teutonic race, and its development was no further connected with feudalism than as it took place during feudal times, and among a feudal people. These statements may be fully verified by reference to Hallam's "Middle Ages" (ch. VIII., pt. 1, note 8), Freeman's "History of the Norman Conquest" (vol. V., p. 302), and Stubbs's "Constitutional History of England" (vol. I., p. 608). As to the cause given for the adoption of the jury system, the "lack of better machinery," it is the true one, so true that it may be given with equal propriety for the establishment of any great institution, human or divine. Further, Mr. Stickney is hardly fortunate in his choice of comparisons, when he couples as twin results of English blundering trial by jury and parliamentary government. Whatever may be the merits of trial by jury, parliamentary government is acknowledged to be, in its results, inferior to none.

Turning from Mr. Stickney's assertions to his arguments, it appears that his main objections to the jury are, that it is composed of men who have no knowledge of the law and no experience in deciding questions of fact. Their ignorance of the law is, as he admits, remedied by the instructions of the judge. But the jury are, he says, incompetent to apply these instructions. This difficulty occurs more frequently in complicated civil cases; but these are comparatively few, and are often settled by arbitration. In all cases, too, the jury may, if in doubt concerning the application of the law, find a special verdict of fact, leaving the decision to the court. Again, the jury are not commonly left to apply, unaided, a bald statement of legal principles to such facts as they may find, but, in civil cases at least, they are frequently directed that upon the finding of such-and-such facts, they are to return such a verdict,—a practice well calculated to remove any difficulty in the application of legal principles. As for criminal law, it is so simple that its application causes comparatively little difficulty.

Mr. Stickney argues further, that the jury is not well qualified to decide questions of fact, for lack of training. On the contrary, every man's daily life is a training in the decision of questions of fact. Every business man must again and again, in the course of his business, sift evidence, weigh testimony, and balance probabilities. Knowledge of the world and knowledge of human nature are almost synonymous, and both are acquired in ordinary social and business relations. This is the knowledge and this the training needed in the jury-box. The judge, on the other hand, is by his position removed from the current of popular life. His acquaintance with business methods and the life and sentiment of the people is, as far as his profession is concerned, almost entirely theoretical. Instead of being fitted by his professional training for the determination of questions of fact, he is in a measure unfitted. His business is to determine questions of law, and law is a science, the principles of which are ascertained and illustrated in a vast number of reported cases, and its conclusions reached by logical deduction from those principles. All is definite and exact. Questions of fact, on the contrary, require for their determination a nice estimation of probabilities, in which formal logic goes for little, and the very foundation of reasoning is loose and uncertain. A contract is indeed a contract, whether concerning flour or railway bonds; but the law governing that contract, and the facts to which that law is to be applied, are very different things, determined by very different methods, and requiring diverse abilities for their determination.

Mr. Stickney concludes his case against

the jury with an argument, which he very correctly introduces as "the most singular point of all." Reduced to a simpler statement it is this: Errors occur in the rulings of the judge, for the elimination of which appeals and new trials are used; but these cause great delay and expense, to remove which evils the jury should be abolished. Thus it seems that the jury which decides on fact is to be abolished because the judge errs in deciding the law,— an application of the doctrine of vicarious atonement both new and striking.

Mr. Stickney has little to say of any merits belonging to the jury system, and nothing of the process of double selection, by which the worst elements of the community may be kept out of the jury-box; nothing of special juries, by which a superior class of jurors may be obtained when desired; nothing of the advantages of the check which judge and jury mutually exercise upon each other, though he must have known that the judge may prevent any gross injustice by setting aside a verdict. Such criticism is neither candid nor convincing. He very properly denies that the jury is longer needed as a security for popular rights against the encroachments of government. However, as a security against the encroachments of wealthy and unscrupulous corporations, the jury is still valuable. It is true that jurymen are human, and may sometimes be corrupted; but their brief term of service limits the power to do mischief, while a corrupt court, clothed with jury powers, would be a perennial source of injustice and oppression.

*H. E. S.*

BAY CITY, MICH., NOV. 11, 1882.

EDITOR OF THE CENTURY MAGAZINE.

SIR: To a lawyer, the article in the November CENTURY, assuming that the jury system is a failure, and coolly proposing a bench of judges in its place, is startling and suggestive. That justice is not always speedy is not the fault of juries. It is largely the fault of lazy and incompetent judges, whose blunders force litigants to appellate courts. The number of cases appealed because the verdict is contrary to the evidence is extremely small. In comparison, the number appealed because of errors in law, chargeable to the presiding judge, is extremely large. Judges are trained men, and yet appellate courts disagree as to the law. The disputes that weary litigants are disputes about the law of the case, not the facts of the case.

Mr. Stickney says: "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." This is too sweeping. The aim of criminal law is to punish guilt, but its humanity is too broad to sacrifice innocence by "running amuck" after crime. The law declares that no citizen shall be deprived of his sacred rights of life or liberty unless twelve of his countrymen, after seeing and hearing the witnesses, state, under oath, that in their opinion there is no reasonable doubt of his guilt. Does Mr. Stickney wish that rule amended? Does he wish to hang men on surmise and imprison on suspicion, because a felon now and then goes free? "To innovate," says Edmund Burke, "is not to reform." Our penitentiaries are moderately filled with the work of juries. The ratio of acquittals to convictions is wonderfully small, as any prosecuting attorney will admit. And many of these are lost by the absence of witnesses, the weakness of the proof or the prosecution, and some are justly lost. A bench of judges would never do for criminal cases. They would become hardened. As Hamlet says of the grave-digger who sang at his work, "Truly, the hand of little employment hath the daintier sense." And oftentimes the humanity of the jury has offset the callousness of the judge, and tempered justice with mercy. I have never known juries to err except on the side of mercy. I have known courts to oppress.

The jury system is an educator of the people; and this idea did not "first spring up in the fertile brain of Alexis de Tocqueville." Erskine remarked it. It educates them more in their sentiments than in their acquisition of mere legal and political knowledge. "English subjects judge each other," says Erskine with pride. The jury system is democratic; the bench of judges monarchical. One diffuses power among the people; the other centralizes it. The jury chosen from the people, representing directly the people, identified with the people, answerable to the people, is more alert to the rights of the people than a bench of judges whose very position makes them independent of public opinion, and who are less immediately responsible to the people. Those who believe in the maximum of power in the people and the minimum in the government will never consent, without a struggle, to a jury of judges. A stream is not purer than its source, and the value of the jury system depends upon the moral character of the citizen. The sole cause of the unfavorable view of the system arises from the alacrity with which complacent judges excuse the wealthy, influential, and prominent citizen from serving his country when called upon

the jury. There is just where the reform is needed, and there alone.

*Andrew Lipscomb.*

WASHINGTON, D. C., Nov. 7, 1882.

EDITOR OF THE CENTURY MAGAZINE.

SIR: I have read, with careful attention, the paper on the abolition of the jury system in the November CENTURY; and, while it has left an impression, it does not satisfy me. It is a subject which has been quietly simmering in a multitude of minds for a long time, and, I believe, needs only to be brought prominently before the people to provoke the liveliest discussion. Mr. Stickney desires to substitute trial by a commission of judges, which shall be conclusive in the first instance, save in the one event of disagreement of the judges in rendering judgment; in which case a new trial, or re-trial, would be had. But where would this trial be had? In the same jurisdiction? Before the same judges? The answer is, before a smaller number of these same judges. That means, I suppose, that if, in the cause of A *vs.* B, four of the judges were for A and three for B, the second trial would be had before either the four A or the three B judges only (presumably the four who were for the plaintiff), in either of which cases the event of the trial is certain beforehand, supposing the evidence to be the same in the second trial. And if it is not the same, then the new trial could not (perhaps I ought to say should not) be had for disagreement of the judges, but for evidence admitted or refused contrary to law, or afterward discovered; and thus, at the outset, we have an important exception to the rule of practice. There could be no other division of the judges in which there would exist the smallest possibility of agreement. Unless there were a material change in the testimony at the second trial, the judges who had solemnly weighed the evidence and carefully applied all the then existing principles of law bearing thereon, and then deliberately put themselves on record as in favor of the demand of one party, would be chary, indeed, of changing a conviction so clearly settled. The opinion of a judge would come to be worth but little, and precedents would be valueless if he could hold two opinions upon the same state of facts. Why should not the first opinion be entitled to as much weight as the second? To me it seems entirely improbable that any system will be adopted which does not include a provision for appeals to a higher jurisdiction. While the article in question expressly admits that under no system can all decrees be just, it yet expressly stipulates that no appeal can be had to correct these occasional errors. Can a system for the administration of justice be sure, and as perfect as circumstances will allow, while no preparation is made for the correction of certain error?

The fact that suitors would in all cases know what judges were to try their causes is, to my mind, a formidable objection to the plan proposed. Every man has his relatives, friends, and partisans. Every man has his biases in religion, morals, and politics. Every man has his weaknesses. Every man has his prejudices against persons, places, things, and methods, and so *ad infinitum.* Can it be supposed that some of these things will not sometimes, however infinitesimally, operate for or against him who sues for pure justice? Would a judge construe the evidence against a near relative as he would against a stranger? How many of his personal or political friends, how many of his faith would come before him for trial? Would he lend a willing ear to the offerer of bribes? Would he be impressed with the social grandeur of one man or the social abasement of another? If he were suspected of any of these things, how would you find it out? Put him upon his *voir dire?*

Very truly yours,

*J. L. Long.*

PHILADELPHIA, Nov. 2, 1882.

EDITOR OF THE CENTURY MAGAZINE.

SIR: Mr. Stickney seems to have overlooked many things far from unimportant in his sweeping abolition of the jury system. He says that "a contract is a contract, whether it concerns flour or railway bonds"; but does he mean to say that a jury composed of men accustomed to dealings in flour or bonds, as the case may be, cannot better decide as to whether a breach of a contract relating to either of those articles has occurred, than a court of judges, who could hardly be expected to be familiar with the details of every business followed by their fellow-citizens? Surely his argument on that point fails in all cases where a special jury is obtainable, if not in others. He suggests that "the judge, by a few years' experience on the bench, gets a knowledge of the general methods of business men which no business man can possibly have." Is that true? If it is, our judges should all go into business, and, *vice versâ,* our business men into law, since there is to be had an education superior to any they can find in the counting-house or the board of trade. Here I must take issue squarely with Mr. Stickney. The judge may acquire a general knowledge of business forms and usages, in fact usually does, but from whom does he learn it? Why, he learns

it from the very men Mr. Stickney declares unqualified to sit on juries.

As far as knowledge of human nature is concerned, I have seen men in the jury-box as shrewd as any judge that ever sat on the bench; plain farmers in homespun garb, with as keen eyes for the "animus" of a witness, and as good judgment as to his credibility as is to be hoped for in anybody. Besides, the juryman's attention is solely directed to the witness's statements and manner, and is not distracted by having to pass on the admissibility of evidence and similar questions,—an advantage of no small account.

The exclusion of irrelevant matter, I suppose, arose not so much from a fear or distrust of the jury, as from a desire to save time. Would Mr. Stickney have counsel drag the history of the neighborhood before the jury, however trustworthy, or would his court of judges be disposed to listen to all that might be offered? Here, again, I think he totally overlooks reasons more potent than those he demolishes.

How often, comparatively, does it happen that the judge's charge contains good ground for appeal? And does Mr. Stickney suppose that one opinion out of a hundred would be changed if the judges took twice the time to prepare them? I do not, for the reason that as the judge has to pass upon many points over and over again, he necessarily becomes familiar with the greater number of questions daily submitted to him, and can decide them "instanter" to the best of his ability and learning.

The real usefulness of courts of appeal consists in the aid they afford to the trial judges, and were the former to have cognizance of the facts as well as the law, much valuable time would be wasted, and the appellate court prevented from establishing the law on all points presented to it, thus enabling the courts of original jurisdiction to decide causes rapidly and correctly. As to the number of appeals, would not disappointed suitors appeal every time they suspected a hostile prejudice in the mind of the presiding judge, if they knew the facts would be passed upon again, and would not Mr. Stickney's proposed system be peculiarly liable to this objection?

With regard to expense, I do not see how his plan would diminish that at all. And how about the state of unsettled legal rights which would probably exist during the time the change was being made? The history of the jury system is not at issue: the question is, does it fill the purpose for which it is used? By keeping the courts as free from corruption as possible, I think our system of judicature will be as near perfection as the spirit and genius of our people will allow.

Respectfully yours,

*Edwin F. Bishop.*

HOUGHTON, MICH., Nov. 11, 1882.

MR. STICKNEY'S REJOINDER.

IN the space allowed me I can only make a summary of what seem to me the chief considerations in the question before us. I could, I think, establish my historical accuracy where it has been questioned by your correspondents. For instance, as to my statement that the jury system which we in this country now use (and that is the jury system that I considered) was originally a feudal court of the lord's vassals: When I take your correspondent's express admission that its development "took place in feudal times, and among a feudal people," and add to that admission the facts that the very essence of a jury was that it should be made up of the parties' "peers," and that the "peers" were the vassals of the same feudal lord, I think we come somewhat near to establishing the point that *our* jury *was*, at first, "a feudal court of the lord's vassals." If we were to seek the "origin" of the "jury," we should have to go much farther back than the Teutonic races,—among whom your correspondent intimates that the "jury" had its first existence.

But such points do not touch the merits of the discussion. The real question before us is whether we cannot frame some piece of judicial machinery which will better serve our needs than this mixed tribunal of judge and jury.

What the American people ought to have, in the way of judicial machinery, is a system of courts, where the poorest and weakest man could summon the richest and strongest man or moneyed interest, and be sure of getting justice,—not at the end of six or seven years, and at great cost, but at once, and at slight cost. Nothing less than that will serve our needs. With the majority of our citizens, a long delay in getting justice is almost as bad as not getting it at all. The delays of the law are now the chief evils in the administration of justice. Those delays now amount to almost a denial of justice to any but the rich and strong. Our judicial machinery must make justice not only sure, but cheap and speedy.

In order to secure this general result of sure, cheap, and speedy justice, and to secure it for all men, poor and rich alike, the machinery for the administration of justice must be as perfect as it is practicable to make it. Especially the tribunal which first hears the

cause should be made as perfect as may be, the first hearing should be as thorough as possible, and the first hearing should, as a rule, be the last. In other words, the work of hearing and deciding a cause, like most other human work, should be done as well as it can be done at the outset,— once for all,— instead of having the first doing of the work almost certainly imperfect, and afterward spending several years in the correction of old errors and the making of new ones.

Does not that general proposition have in it, at first blush, a shadowy glimmering of sound sense?

I ventured to suggest as to our present jury system these considerations:

1. That it is made up of several men is a valuable feature. This tends to secure a consideration of all sides of a case.

2. The requirement of unanimity in reaching a verdict is a valuable feature. It tends to insure the thorough consideration of every essential point in a case, and almost never works any practical inconvenience.

3. The use of men who are without special fitness and experience for the special work they are to do necessarily brings the same practical results in the administration of justice that it does elsewhere. This work of sifting evidence, of seizing and holding the vital points in a case, of giving due weight to the contradictory statements of the parties and the arguments of able counsel, is a work that requires strong minds and thorough training.

4. The use, in any tribunal, of men who are only temporarily taken from their ordinary callings, and who must therefore make their decision in all cases without delay, makes impossible the thorough consideration of the evidence in complicated cases, and makes it almost certain that there will be errors in the judge's rulings, which he is compelled to make on first impressions, without a full opportunity for deliberation.

5. This certainty, or great probability, of errors compels us to allow appeals in (practically) every case, through sometimes two or three appellate courts.

6. These delays, of appeals and new trials, constitute the greatest evil in our present system of procedure.

I then ventured to suggest that we should keep the good points of the jury system (for there are good points) and attempt to eliminate the bad ones. I suggested the following main features of a judicial system:

1. Our tribunal for the original trial of causes should be made up of a reasonable number of men (as is the case in the jury),— say, five or seven.

2. These men should be men of training and experience.

3. They should at the outset decide the whole of the case on the facts and the law.

4. They should take for the consideration of each case such time as should be needed, be it more or less.

5. Unanimity should be required in giving a judgment, as is now the practice with the jury's verdict.

6. Appeals (except in very special cases) should be abolished.

The chief objection made to this proposed scheme, by the most intelligent men, is that it is not practical.

The scheme has been tested by experience. It is in substance the system that has now been in operation in the United States Court of Claims for over twenty-eight years. As to its practical working there, I am allowed to print extracts from letters from the Honorable William A. Richardson, Judge of the Court of Claims, whose large experience on the bench and in public affairs will command for his judgment the greatest weight. Judge Richardson, who has been a judge of the Court of Claims now for more than eight years, was, before being Secretary of the Treasury, for more than sixteen years a judge of probate in Massachusetts. He writes (I have ventured to italicize some phrases):

"I have had considerable experience in the line of your suggestions. The Court of Claims, of which I have been a judge for more than eight years, very nearly meets your ideas of the wants of the people as a remedy for the evils of the jury system. It has been in existence now twenty-eight years, and works with entire satisfaction, apparently, to all suitors, *with little expense and little delay*. * * *"

"As to the point raised by those who object to your plan for judicial investigation of facts by trained judges, instead of by untrained and often uneducated juries,—the anticipated danger that judges trained in the law *would not be so able to agree upon facts* as jurymen,— I may say:

"This point has been subjected to a crucial test, by our Court of Claims, under laws and regulations which require the utmost exactness in the determination of facts, and do not admit of a general verdict or judgment on the whole case without a statement of the facts agreed upon.

"By a rule of the Supreme Court, made in 1865, the Court is required to make, in each case, a finding of the facts in the case established by the evidence, in the nature of a special verdict, but not the evidence establishing them.

"There are five judges of the Court, and the Act of Congress of June 23, 1874, ch. 468, provides that 'the concurrence of three judges shall be necessary to the decision of any case.' This is understood to apply to the facts, each and all of them, and to the law, as well as to the final result. Therefore, in reducing to writing the exact and minute facts which are material to the issues involved in the opinion of any one of the five judges, the test of agreement is tried upon many points in every case before the final judgment can be considered at all. Experience has proved that there is no difficulty whatever in the five judges bringing

their minds to an agreement *on every single point of fact* raised by either of them in conference, or by the counsel at bar. The statute requiring the concurrence of three judges has had no practical operation, as to the findings of fact. *There has rarely been a case in which, at the end of the judges' conference, there has been a single dissenting voice to the findings, in whole or in part, and no case where the findings were adopted by three against two of the judges.*

"Judges are much more likely to disagree upon the law or the application of legal principles to the facts than upon the facts themselves. Superficially considered, this might seem strange, but the reason for it becomes manifest upon a careful investigation. The several judges come from different States, where they have been educated and trained each in the peculiar practice of his State. Their views upon legal principles have, of course, been molded to a greater or less degree upon the decisions of their respective State courts; and those decisions have, from time to time, modified the ancient principles of the common law to adapt them to State legislation, and the conditions, habits, and customs of the people of the local sovereignty. In other words, the judges, having been educated in somewhat different, though not antagonistic schools, very naturally at times take different views at first of legal principles, or the application of legal principles to the facts. But that *even these differences melt away in conference* may be inferred from the official printed reports, the latest two volumes of which disclose only two dissents, one in each volume. At the present term *there has not been a single case of disagreement as to the law or fact.*

"As to the facts, the evidence of them is presented to all the judges alike. Each one has exactly the same means of ascertaining them as do his associates. Their previous training as to principles of law does not color the evidence differently in the eyes of the several judges, and no one of them has preconceived ideas on the case, because the whole case is unknown to them until presented in open court. In memory, closeness of observation, and powers of analysis, judges may differ; but as they are all *men of trained minds, accustomed to weigh evidence, and take into consideration the views and opinions of others*, as well as to express clearly and forcibly their own, any differences which exist at the beginning of a conference are almost invariably reconciled before its close. If one has forgotten any part of the evidence, another remembers it, and calls attention to it. If one does not at first see the bearing of any part of the proof upon other points or upon the issues, some other one is sure to point out its force and effect. In this way, by intelligent discussion, comparison, and examination, extending through all the time that may be required for that purpose, and not stifled by a general verdict hastily agreed upon, an agreement is almost invariably reached; and no one can reasonably doubt that the real facts are established just as they are proved.

"Juries are practically compelled to return a verdict within a limited time, usually within a few hours. But the judges can deliberate as long as the complication of the facts and the necessities of the case may require."

The main principles underlying the scheme which I propose are these:

1. The decision of causes needs to be in the hands of selected able men.

2. Training is as necessary for the men who administer justice as it is for men engaged in any other service.

3. Whatever work is to be done at all should (as a rule) be done as well as it can be done in the beginning, once for all, and not done rudely and incompletely at the outset, with the possibility of afterward correcting errors by a series of new trials and appeals.

There are many other practical considerations in favor of the scheme which can be fully appreciated only by lawyers. I may mention this one: that a scheme having the main features here proposed would furnish a simple and easy method of fusing the common law and equity jurisdictions, which is very generally regarded in the profession as desirable.

*Albert Stickney.*

NEW YORK, April 20, 1883.

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## DISSOLVING VIEWS.

WHEN I have been long gone, if one I love,
  And who loves me, shall chance upon a ring
  That I have worn, or any simple thing,—
A knot of ribbon, or a faded glove,—
I wonder if the sight of it will move
  To fond remembrance, and if tears will spring,
  And if the sudden memory will bring
A sudden sadness over field and grove.

Perhaps: and yet how quickly we forget!
  And how new scenes, new faces that we meet,
    Crowd out the old,—until the world grows gay
Above forgotten graves. Softest regret
  Grows stale by keeping; and, however sweet,
    No Past has quite the sweetness of To-Day.

*Caroline A. Mason.*