SHOULD THE CRIMINAL JURY BE ABOLISHED? — A DEBATE

WHEN Mr. Harry F. Sinclair was acquitted by a Washington jury a few months ago, after a trial for conspiracy which had attracted more nation-wide attention than any other in recent times, a certain portion of the press raised a hue and cry that the jury system had broken down. It is not the purpose of THE FORUM *to go into the merits of that particular trial one way or the other, but merely to point out that the Sinclair case, because of its prominence, focused attention upon the problem here debated. Has the jury system really broken down under modern conditions? And if it has, what substitute can be offered in its place?*

THE two debaters are peculiarly qualified to speak with authority for their respective points of view. Mr. Edgar Allan Poe, who takes the affirmative, was for four years Attorney-General for the State of Maryland — a state which has the unique distinction of having tried thousands of criminal cases without juries. Mr. Martin W. Littleton, who takes the negative, is an attorney of wide practice and was chief counsel for Mr. Sinclair.

I — JUDGING THE JURY

EDGAR ALLAN POE

THERE is no question that respect for and belief in trial by jury is diminishing and that agitation for the abolishment of the jury system in the trial of both civil and criminal cases is no longer confined to doctrinaires and those who delight in arguing moot questions. Up until quite recently, it required greater courage than most people possessed to advocate doing away with such a time-honored institution. The mere suggestion savored of sacrilege or mental aberration. An attack upon trial by jury, especially in criminal cases, was regarded as equivalent to an attempt to undermine the foundations upon which the administration of justice rested.

At the present day, however, and especially in this country, trial by jury has been weighed in the balance and found wanting, with the result that serious movements are on foot to bring about its abolishment, or at least to wipe out its constitutional guarantees.

The Committee on Criminal Courts and Procedure of the New

York County Lawyers' Association has up for serious consideration the amending of the Constitution of the State of New York so as to empower the legislature to abolish jury trials in both civil and criminal cases. In a letter sent out to the various bar associations of the state it presents many cogent reasons for the discontinuance of the jury system.

The Law Society of London has gone on record in favor of substituting for a common-law jury, law officers specially selected to pass upon questions of fact. In practically all the states, Industrial Accident Commissions have superseded juries in cases involving injuries to employees. In civil cases jury trials are frequently waived, all questions of fact being left to the determination of the presiding judge.

In the City of Baltimore, Maryland, as the result of a constitutional amendment passed in 1892, all civil cases in the common-law courts are heard by the judge without a jury, unless either party demands a jury trial within a very limited time after the institution of the suit. Consequently, jury trials rarely take place except in damage cases, at the instance of the plaintiff.

There are many, however, who, while advocating the elimination of juries in civil cases, hesitate at so drastic a step in criminal trials. Is such hesitancy justified?

It is now well established that juries played no part in the trial of criminal cases until the latter half of the twelfth century, after which time they gradually superseded the old practices of compurgation, judicial combat, and ordeal. When juries were first introduced, the same body of men discharged both the functions of grand jury and petit jury. They were chosen because of their supposed personal knowledge of the circumstances surrounding the commission of the crime, and their verdicts were reached without calling in outside witnesses. It also seems to be well established that it was not until during the reign of Edward III, about 1352, that trial by jury in criminal cases, such as we now understand it, came into existence.

There is not the slightest doubt that the cause of liberty owes a tremendous debt to the jury because of the protection it gave in the centuries gone by to the fundamental rights of citizens. History conclusively proves that in times past trial by jury was the chief security against the oft-attempted exercise of arbitrary action and wrongdoing by the Crown. Instances are numerous where the jury courageously stood firm in the defense of those

unjustly accused, refusing to yield not only to threats from the officers of the Crown and the presiding Justice, but even to imprisonment. Such instances constitute some of the proudest and finest passages in English history, and it is not surprising, therefore, that the right of trial by jury is so frequently spoken of as the bulwark of our freedom and the palladium of our liberties.

But while we may grant that the jury was admirably adapted to deal with those conditions of the past which called the institution into being, we must also recognize that times and conditions have changed. Our task is now concerned with the immediate present. If the dangers to citizens, against which the jury was designed as a safeguard, no longer threaten; if modern tendencies are such that juries no longer function as they were intended to function: then it must be evident that the jury system has outlived its usefulness, because the reasons for its continuance no longer exist. Moreover, if a new system can be found which is more efficient and better adapted to our present surroundings, it necessarily follows that a change should take place and that the new system should at least be given a trial.

The main purpose of criminal procedure is — or should be — to bring about the conviction of the guilty and the acquittal of the innocent after a prompt and fair trial. A proper observance of all fundamental constitutional safeguards is, of course, of vital importance. But this is not all. The public welfare equally demands the *prompt* and *certain* conviction and punishment of those who violate the criminal law. The ideal tribunal, therefore, should be one which is not only clothed with authority to determine guilt or innocence, but which is actually qualified for the task and is least likely to err in its judgments.

By this criterion, how does the jury qualify as an instrument of justice?

In the first place, those who are best fitted for jury service are either exempted, excused, or challenged: in consequence, those who actually sit in judgment are untrained and are generally of only average intelligence. Unaccustomed to assume heavy responsibilities, unskilled in deciding matters of complicated character and grave import, they take their duties lightly. Very few jurors have ever served before; they do so unwillingly and regretfully, with their minds fixed more or less on their private affairs, which they feel are suffering through their absence.

Having but little capacity to absorb, remember, and weigh the testimony, they frequently doze during the trial and are susceptible to prejudice and sympathy.

Moreover, the jury is composed of twelve separate units, each unit comparatively unknown in the community, so that there is an absence of individual responsibility. And since jurors are not required to give any reasons in support of their verdict, their irresponsibility is complete. Furthermore, the requirement of unanimity is a great advantage to the guilty. One obstinate, friendly, or corrupt juror can easily bring about a miscarriage of justice. It is clear, therefore, that the jury falls far short of being an ideal instrument of justice, because it is poorly qualified to determine guilt or innocence and because it is very likely to err in its judgments.

There is much less likelihood — at least theoretically — that a guilty person will be acquitted by a judge than by a jury. The judge is in court daily, becoming increasingly familiar with human nature as it is exhibited in litigation. He is accustomed to weigh and sift evidence. From his constant experience with witnesses he has acquired the ability to detect truth from falsehood, to follow the testimony carefully with a mind trained to remember, discriminate, and reason. Moreover, since he holds a position of responsibility in the community, he realizes that the eyes of the public are upon him and that he will be held strictly accountable for the correctness of his decisions. He has to justify his conclusions; he cannot decide contrary to the evidence without bringing condemnation upon himself; hence he cannot afford to be swayed by prejudice, passion, or sympathy. By learning, training, and experience the judge is an expert in the matters which he is called upon to decide.

Moreover, in a trial before a judge, a mistrial is impossible, and no time is wasted in selecting and impaneling a jury or in presenting the evidence. Counsel apply themselves strictly to the material and crucial points in the case. There is no incentive for them to appeal to prejudice, passion, and sympathy, or for dragging in irrelevant matters. The saving in time and expense is tremendous and the necessity of retrials is greatly lessened.

The belief is almost universal, and is certainly well-founded, that it is only the guilty who desire trial by jury and have reason to fear a hearing before a judge alone. In itself, such a belief is a powerful condemnation of the jury system in the trial of criminal

cases and is a very convincing justification of the movement in favor of its abolishment — a movement which has arisen out of the repeated failures of juries to convict in prominent cases where proof of guilt has been clear and convincing.

Those who believe in the superiority of trial by judge over trial by jury need not rest their case upon theoretical arguments alone, however, for there is one state in the Union where the jury system has already been superseded to a very large extent and the actual experience of that state should carry great weight. For more than one hundred years a person accused of crime in Maryland has had the privilege under the state constitution of electing to be tried by a judge instead of by a jury. As a result, juries are dispensed with in the great majority of criminal cases. The statistics for Baltimore show that seventy-five per cent of the criminal cases for the year 1927 were tried before a judge without a jury. It is no unusual thing for cases involving capital punishment to be so tried. On these occasions it is customary, but not obligatory, for the presiding judge to ask at least two other judges to sit with him. There is rarely, if ever, a miscarriage of justice. The rights of the accused are scrupulously protected and the cases are disposed of expeditiously and without any of the theatrical display and unseemly wrangling that so frequently disgrace trials before a jury. Indeed, if the question were only whether the guilt or innocence of an accused person is more likely to be determined correctly by a judge or by a jury, the proof would be overwhelmingly in favor of the former.

As far back as 1883 an article which appeared in the *Nation* stated that it was a delusion to suppose that trial by jury held a sacred position as a method of deciding questions of fact. The author added that a jury trial was a species of machinery which only aided offenders to escape the clutches of the law and that in the future it was in reality a conservative rather than a progressive force, limited to political causes.

Lesser, in his *History of the Jury System*, published in 1894, took the position that "jury trial is not in itself a good method of determining facts at all; that far from being a common right in civil cases, it is unobtainable in numerous classes of them; that in ordinary cases between man and man it is no longer regarded even by the Legislature as a precious institution; and that its chief value consists in its furnishing a popular tribunal in proceedings in which the Government is a party."

Sir James Stephen, in his *History of the Criminal Law*, states that "the securities for justice are greater in a judge trial than in a jury trial."

What then stands in the way of a change from jury to judge? It is the natural disinclination to make so fundamental a change, fortified by a deep-seated belief that the right of jury trial affords a security against the possible exercise of arbitrary or tyrannical action on the part of the government. It is the idea that, so long as the right to a jury trial exists, the people must conspire against themselves before the government can unjustly abridge their individual freedom.

As a matter of fact, however, does there exist any real or latent menace — present or future — from either the Federal Government or the government of any of the states, to the individual or to any of his fundamental rights or liberties which would not be as vigorously and successfully met by a judge as by a jury? In times of political excitement or social unrest, will not the judge stand as firm as a jury against oppression and injustice? The judges in most states are elected by the people, which strengthens their sense of independence; and even in states where they are appointed, the tenure of the appointing official is so brief as to exclude the probability that he can successfully bring any improper influence to bear upon his judicial appointees.

It may be claimed by some that trial by jury is a greater protection than trial by a judge in cases involving a violation of the laws relating to prohibition, or heresy, or Sunday observance, or other similar laws concerning the wisdom of which there is wide and honest diversity of opinion in the community. But even in these cases, if the accused be innocent, he will be as readily acquitted by a judge as by a jury. If he be guilty, the fact that there is more likelihood of his being found guilty by a judge than by a jury is certainly no argument against a judge trial; the fault goes deeper and must be laid to the improper continuance on the statute books of laws that have no rightful place there.

As to the Federal Courts, a slightly different situation prevails. There is an apparent feeling on the part of some that Federal judges take a more aggressive attitude in the trial of criminal cases and identify themselves more closely with the prosecution than state judges do. This is probably because the vast majority of Federal criminal cases are instituted as the result of investigations by United States officials, and hence are in every sense

United States Government cases and are so considered by the judges; whereas indictments in state courts generally proceed from charges preferred by private citizens and thus lack the official character that pertains to Federal cases and are consequently more impersonally regarded by the state judges.

The feeling described naturally raises an apprehension that this aggressive and sympathetic attitude might continue to manifest itself, to the injury of the accused, if the functions of the jury were transferred to the judge in Federal criminal cases. But as a matter of fact, so long as the present form of government continues in this country, so long as the individual is secured in his right in all criminal prosecutions to be informed of the accusation against him, to have a copy of the indictment or charge in due time to prepare for his defense, to be allowed counsel, to be confronted with the witnesses against him, to have process for his own witnesses, to examine the witnesses for and against him on oath, and to a speedy and public trial: the substitution of a judge trial for a jury trial carries no threat or danger to an innocent person, whether the charge against him grows out of the alleged violation of a state or of a Federal law.

It is to be borne in mind that the roots of attachment to trial by jury go back several centuries to the time when, in England, many of the prosecuting officers and some of the judges were mere minions of the Crown and when, for political reasons, men were often falsely accused of treason; and to a time, also, when almost all crimes were punishable by death, and when the accused was denied counsel and witnesses and was not even allowed to testify in his own defense. If such conditions were ever again to prevail — which is hardly conceivable — the right to trial by jury might once more be a needed bulwark of protection. Until such time, however, the right to trial by jury in criminal cases may be safely abolished and the liberty and freedom of innocent persons be entrusted to the protection of the judge without the aid of a jury.

Any movement so far-reaching and fundamental must of necessity proceed slowly and in the face of much opposition. It involves a constitutional amendment in every state where it is to be tried out. Such amendments should be so drafted as to put the matter entirely within the control of the legislature. If experience showed that the experiment was unsatisfactory, the right to jury trial could then be readily restored by legislative enactment.

Finally, the new system should be first given a thorough trial in the state courts and its merits fully proved and established therein before it is attempted to make it applicable to Federal criminal cases, which, of course, would necessitate an amendment to the Constitution of the United States.

II—EXPERIENCE VS. EXPERIMENT

MARTIN W. LITTLETON

MR. FRANCIS L. WELLMAN, the distinguished lawyer and author, in his book, *Gentlemen of the Jury*, in the chapter, "History of Trial by Jury," after saying that he would try to condense in readable form the many volumes on the subject, said: "Even these learned historians cannot agree among themselves about the origin of trial by jury; whether we owe it entirely to the Greeks and Romans; whether it was of Anglo-Saxon or Norman origin, or what not. So why should you and I worry? Suffice it to say it is of a ripe old age. All governments and all nations seem to have played at it in one form or another, enlarging it and tinkering with it and moulding it into its present form, which there can be no doubt is the outcome of English civilization. How this process was wrought from a crude, unworkable beginning — the gradual evolution of the present system — cannot fail to excite the interest of the reader or to impress him with the supreme dignity of our modern jury trial, if for no other reason than that it has taken generation upon generation to mould it into shape."

The jury system has been severely attacked by a particular element of a crusading press. It has been held up to scorn by the phrase-turning paragraphers. It has been ridiculed by the self-satisfied business man, who constantly shirks his obligation to serve. It has been picked at by a remote and detached professorial type, who never step out into the open highways of life. It has been charged upon by the devastating reformer, who prefers experiment to experience. And finally, it has been questioned seri-