torneys. Cases would be decided on the evidence, not on the relative ingenuity of opposing counsel. Such a tribunal would avoid the repeated postponements of a trial, involving, as that does, preparation many times instead of only once and the subjection of numerous witnesses to a constantly recurring interference with their pursuits before they ever have a chance to tell what they know. Since few cases would last more than a single day, the cleverest business men, who naturally detest prolonged and futile jury service, would willingly assist in the work of dispensing scientific justice. Such a tribunal would be incorruptible, whereas a tribunal of twelve jurymen has the great disadvantage of presenting twelve opportunities for corruption. Under the rule which requires a jury to be unanimous, justice is often defeated by an improper approach to a single juror, of which there has lately been an illustration of national notoriety.

The decisions of such a court would be based on accurate knowledge and the mature inferences of educated minds, and they would be accorded proportionate respect. To the junior legal members of such a tribunal would accrue a marvelous training in the law, which might restore the ancient traditions of the profession and revive once more in our courts the memorable days of Daniel Webster and Rufus Choate.

II—THE JURY AND DEMOCRACY

F. Lyman Windolph

DOUBTLESS the way to administer justice most efficiently would be to abolish trial by jury and put a Solomon in every court room; just as the way to govern the world most efficiently would be to abolish democracy and put a Marcus Aurelius in every capital. The supply of supermen is, however, never equal to the demand for them; nor is the supply itself either constant or predictable. Every Solomon is as likely as not to be followed by a Rehoboam, and every Marcus Aurelius by a Commodus. These considerations suggest that before proceeding to make an end of the jury system in either criminal or civil cases we ought to ask ourselves not so much whether trial by jury is

good or bad in an absolute sense, as whether something reasonably more promising has been offered to replace it.

My distinguished opponent — whose argument is concerned only with the jury system in civil cases — fairly assumes the burden thus resting upon him. He proposes that causes of lesser importance be determined by a single judge and those of greater importance by a tribunal consisting of a judge, a junior member of the bar, and "a substantial business man." He asserts that such a tribunal would be "incorruptible," as contrasted with one "presenting twelve opportunities for corruption," and he calls attention to a recent "illustration of national notoriety" in which justice was defeated "by an improper approach to a single juror." Since, in the case referred to, the juror was bribed, if at all, by the agents of "a substantial business man," the logic of the illustration is, to say the least, equivocal. Indeed, the obvious answer to the whole proposal is that if experience has shown that some juries are stupid, capricious, and corrupt, it has likewise shown that some judges (as well as some lawyers and business men) are stupid, capricious, and corrupt too. Moreover, in the nature of things, no jury can render more than one bad verdict; whereas a bad judge may, and usually does, remain in authority for life or for a long term of years.

A further answer is that some incorruptible judges are nevertheless arrogant, unduly technical in their decisions, unfeeling, and dilatory — as juries never are. No jurists in English history were more justly celebrated for learning than the Chancellors; but it was in the High Court of Chancery — where juries never sat — that men, seeing only ruined and disappointed suitors and undetermined causes, cried out bitterly for law and trial by jury, if what they saw were equity.

But we who are heirs to the political traditions of England and of those English rebels who became the first citizens of the United States, must, unless we reject our heritage, dismiss as inconclusive any argument against the jury system which is based on efficiency alone. We must dismiss any such argument because trial by jury is part and parcel of that sort of democracy which, as all authorities agree, constitutes the special and peculiar contribution of the Anglo-Saxon race to the political wisdom of the world. Its underlying principle is that the sanctity of law arises not from the fiat of any potentate, however benevolent, nor from the vote of any majority, however enlightened, but from the

common judgment and consent of the whole body of the people. This principle is reiterated in nearly all our great state papers, and in the practical application of it the jury system plays, and has always played, a vital and important part. In other words, no consideration of trial by jury can be adequate which ignores its political and legislative significance and which seeks to reduce it to a mere method of finding facts, which the passion for logic of judges and lawyers has tried to make it.

When I came to the bar nearly twenty years ago, there was no class of cases in which juries were so much criticized as in suits for damages arising from industrial accidents. The courts had laid down a variety of rules as to the master's liability in such cases. They had held, of course, that the injured servant or employee could not recover if he had been guilty of contributory negligence. They had likewise held that, under certain circumstances, the servant had "assumed the risks" of his employment, and that, even though no act or omission on his part had contributed to his injury, he was not entitled to damages if his injury resulted from the negligence of a fellow servant. These determinations constituted what is sometimes called "judge-made law." (I am not using the words in a derogatory sense; here, as always, the question is: "Is it really law?")

At all events, the juries, if they got a chance to decide the cases at all, invariably found in favor of the plaintiffs, no matter what the evidence was; and it was widely stated that the jury system had broken down in the determination of causes brought by injured employees against their employers, and that some change in the law would have to be made. The latter part of this conclusion, at least, was sound, though belated; and the result was that the legislatures of a large majority of the States adopted Workmen's Compensation Laws providing for the care and partial reimbursement of injured employees, irrespective of the nature of the accidents in which they were injured. This is exactly the principle which juries had followed as best they could, from the very beginning of the industrial age. Nor are Workmen's Compensation Laws in any objectionable sense class legislation, because they have proved quite as satisfactory to employers as to employees; and I doubt whether any respectable number of employers can be found who would return to the old system.*

*I am indebted for this excellent illustration, as well as for other help in the preparation of this paper, to "The Present-Day Jury System: a Defense," an article by Mr. Connor Hall which appeared in the *American Bar Association Journal* for February, 1924.

You may, if you please, dismiss this entire illustration by saying that it proves merely that juries in a given sort of case consistently violated their oaths for almost a hundred years. In the light of history this seems to me a foolish saying. Or you may say — as I think, wisely — that in this particular connection it took our formal legislative machinery almost a hundred years to respond to the popular will, and that the fact that justice was done in the end is to be attributed very largely to the results of trial by jury.

For justice, in the sense in which the law seeks to enforce it and in the sense in which I am using the word, is not something conceived by *a priori* reasoning in the mind of a philosopher. Though it be true, as Spinoza said, that God is beyond our little good and evil, yet it is precisely with this human good and evil that the administration of justice is chiefly concerned. Still less is justice to be defined by the technical rules and refinements of judges and lawyers. Almost numberless legislative enactments — of which one of the earliest is the Statute of 12, Edward I, and one of the latest, the Act of Congress of February 26, 1919 — declare that in the decision of cases the courts shall not be bound by form or method, but shall give judgment according to the very right of the cause, and bear witness to the passionate insistence with which the men of our race have protested, generation after generation, against inherent professional formalism.

Justice is rather, for every man, the product of the changing definitions of his own race and age. It must assert social and economic convictions as they are, not as they might be, though arguably better so. It must hold him who steals my purse to be a criminal, though posterity may perhaps conclude — as I think it will not — that communism is preferable to private property. It proclaimed the eight-hour day yesterday, though a ten-hour day may have been fair on the day before, and though a six-hour day may be fair to-morrow. To speak wisely and well, it must, in brief, speak humanly and in the present tense. This is the only justice worth having in this world, and the only way to make it better is by the slow process of breeding better men.

My opponent has said that if each of two litigants had a just claim to $5000, and a jury were to give $2000 to one and $8000 to the other, the kind of justice administered would be both "average" and "rough." No one will dissent from this conclusion; but the language used implies a determination of the very point

which is in issue in every lawsuit: What constitutes *a just claim* to recover a judgment for money or some other relief against the defendant?

Suppose that a petty tradesman negligently injures, on successive days and in an identical manner, a millionaire and an unskilled laborer, and that both injured parties bring suits for damages. Shall the millionaire and the laborer be awarded like amounts because they have sustained like injuries? Shall the millionaire receive more than the laborer because his time is of greater value? Shall the laborer receive more than the millionaire because the loss of his time has inflicted upon him a relatively greater hardship? Finally, shall the financial situation of the defendant be considered in determining the several amounts which he must be called upon to pay? These are questions concerning which not all candid and intelligent men will agree, and on which a professional opinion is intrinsically no more representative or persuasive than any other. It is precisely the merit of trial by jury that it brings into our court rooms, from day to day, the simple though deliberate views of those not technically trained as to what justice really is.

A short time ago I tried a case arising from a collision between a trolley car and an automobile in which the injured plaintiff had been riding on a pleasure trip as an invited guest. The circumstances of the collision were such as to show clearly that the motorman of the trolley car had been entirely blameless, and accordingly, the plaintiff had brought suit against his host — the driver of the automobile — to recover the damages which he had sustained. These damages were admitted to the amount of a little over three hundred dollars and were practically undisputed to a considerably larger amount. The trial judge charged the jury in accordance with the decisions of the Supreme Court of my State — which are in harmony on this point with those of most of the other States — that the plaintiff was entitled to recover if he had been injured by negligent conduct on the part of the defendant — conduct which he had had no reason to anticipate and against which he had had no opportunity to protest.

In the light of what actually happened, I am disposed to think that if unanimity on the part of the jury had not been required, the verdict would have been rendered in less than half an hour and would have been in favor of the plaintiff for some sum that would have indicated no more than a disagreement and a result-

ing compromise. As it was, the jury was out for more than five hours, and, having come at last to a general opinion in the way in which Quakers are said to arrive at "the sense of the meeting," rendered a verdict in favor of the plaintiff for one dollar. Anyone but a fool knows what such a verdict means. It means that although, in the particular case concerned, the plaintiff was injured exactly as alleged by the negligence of the defendant, it is nevertheless not seemly that a guest should sue his host. Though it so happens that I tried the case in question on behalf of the plaintiff, I am glad to think that I have in me enough of the common mind — I would say common sense, but the phrase has been so rubbed as to lose its cutting edge — to feel that this conclusion is good law in the deepest sense of the words, whatever the courts may say.

I might very well stop here and rest my defense of the jury system upon the propositions that trial by jury is an essential part of Anglo-Saxon democracy, and that, for practical purposes, common justice is preferable to justice of any other sort — even to that which might be held on theoretical grounds to be actually "more just." It is worth mentioning in this connection that the British in Afghanistan, and elsewhere in the East, have found it necessary to accept the latter of these propositions and to enforce judicially merely the custom of the country, rather than to impose on Eastern peoples the alien, though perhaps higher, standards of the West.

Still, the charge is often made that jurors are generally incompetent, by reason of ignorance and prejudice, to decide the cases which are submitted to them; or, as the charge is sometimes put, that the jury system compels the "business magnate" to accept judgment at the hands of less than his peers. To this charge I must record my answer, though the answer is perhaps not of controlling importance in this debate. I do not believe that this charge is well-founded. In certain jurisdictions there are, of course, abuses in the selection of jurors. These abuses are in no way connected with the jury system as such. They can and ought to be remedied. Incidentally, where corrupt politicians fill the jury wheel with ward-heelers, it is entirely likely that the judges whom these same politicians place upon the bench are no better than they should be.

But in respect to the fundamentals of life, liberty, and property, I do not believe that the average business man is wiser than the

average farmer or carpenter. He is better educated in the formal sense, and superficially more polished. He has a somewhat better knowledge of current events and a more nearly adequate understanding of financial matters. On the other hand, he has spent less hours alone, and accordingly has thought less for himself and is much more easily influenced by stereotypes and clichés. He is less simple and natural and, in my opinion, his prejudices are at least as deeply rooted. These are general observations of the widest sort, and are, of course, without value unless clearly understood to be such. As among themselves, "business magnates" may, if they please, submit their difficulties to arbitration. I can only say that in a matter of the last moment to myself, I had rather submit the issue to an "impartial jury of the vicinage."

Next month, a debate on the criminal jury between Edgar Allan Poe and Martin W. Littleton

CHARGING THE JURY
Cartoon by Edmund Duffy

CONRAD HOOR had made a little go a long way and no one had helped Conrad Hoor. When he was a young man, he came from Holland. He was squat, with small twinkly eyes and a twist to his mouth that mocked at fate and that ineptitude of other men who knuckled to it. Conrad Hoor felt superior. He felt unconquered even as a boy. He stood before a blackboard on Sixth Avenue in New York on his first bitter cold American day, when the snow was falling and the pavement was slippery, and neither the day nor the thousands of dark, hurrying forms cared a hoot about Conrad Hoor. The blackboards listed jobs to be had in the West. By morning he was on a train to a farm in South Dakota. He worked as a hired man for fifteen dollars a month and keep. He liked farming that stubborn land.

He found himself a wife out of an immigrant Bohemian family that lived in a drawside cave. The girl, Tessie, was the oldest of nine, fair and healthy. She would work and cost him little. She trembled when he took her in his strong arms one evening when they met in the pasture, where he allowed her to graze her one cow. His eyes shone, though he did not love her. He knew that she would always yield and cling, as she yielded and clung to him at that moment — and that when he was used to her body and her gentle ways and fed up with them, he could say: "Well, who were you before you married me? Living like an animal till I pulled you out. So whatever you are, I, Conrad Hoor, made you." And he could always get work out of her.

He took her to Kansas and mortgaged himself up to his neck to get land, although it was cheap in those days. It was in the '80's,