Can the Jury System Be Improved?

BY TUDOR JENKS.

IS THE JURY A PRECIOUS BULWARK OF HUMAN LIBERTY, OR IS IT A SURVIVAL FROM THE DARK AGES, PERVERTED FROM ITS ORIGINAL FORM AND PURPOSE, ILLOGICAL AND UNSATISFACTORY IN ITS CONSTITUTION AND ITS RESULTS, A NUISANCE TO THOSE WHOSE SERVICES IT COMPELS, AND A FREQUENT SOURCE OF INJUSTICE?

The hungry judges soon the sentence sign,
And wretches hang that jurymen may dine.
—*Pope.*

A HIBERNIAN drill sergeant eyed with disgust the ragged line formed by the awkward squad, and suddenly gave the order, "Four paces to the front, ivery wan of yez, and look at yerselves!"

There is often wisdom in an Irish bull, though that wisdom be presented wrong end first. If we are to judge intelligently the institutions of our own time, we must occasionally "take four paces forward and look at ourselves."

Let us take such a view of our jury system. Its workings are known to very few of us by daily experience. An actual contact with it is often quite unpleasant enough to cure any desire for a second approach. Yet the institution has come to us with all the prestige of a hoary antiquity. In popular estimation it is regarded with the awe due to something reverenced by our remotest ancestors. We feel that we must say: "Surely, having survived so many changes of fortune, the vitality of the jury system must be due to inherent virtues rather than ingrained vices." It seems to belong with the Constitution, the Bill of Rights, or Magna Charta, as a bulwark of human freedom. In the words "a jury of his peers" there is something trumpet-like, something inspiring. The grandiloquent lawyer would sadly miss the resounding phrase from his battery of buncombe.

Now let us make a brief and impartial inquiry into the claims of this system to its honored place in popular estimation.

First, as to its antiquity. Let us not forgot the apothegm, "Custom without truth is but the rust of error." Has the jury, as we see it, the recommendation of long years of honored usefulness? No man unlearned in the law will presume to answer. Any man of legal lore will inform us that the modern jury and the ancient jury have little in common besides the name. Alfred the Great was once supposed to have invented the jury; but the critics have slain that notion long ago, and have likewise put out of the question the theories that traced juries to the Germans or Scandinavians, the Celts or Normans or Danes. That the crusaders brought the system home from Asia is quite as cheerfully denied, and it would be easy to lengthen the list of nationalities that did not invent it. The most learned authorities can do little more than take *Topsy's* phrase and say, "I 'spect it growed." Away go all the venerable gray hairs of this comparatively youthful institution. We may grant it an ancestry, but in its modern shape it is no veteran.

And with the claim to great age we must give up the popular origin. The jury system did not spring from the common people, but was a creation of the aristocracy. Edward Jenks, in his "Short History of Politics," says:

> This famous institution, about which much nonsense has been talked, seems to have been originally *a royal privilege* inherited by the Emperor Charles the Great from the decaying Roman Empire, and spread by his officials throughout western Europe.

Yet the early juries were a vast improvement upon still earlier judicial methods. Any sort of jury was preferable to a row of red hot plowshares, or even to the ordeal by battle. Think of putting a man, armed with a club, in a pit breast deep, and then letting his woman opponent try to kill him with a rock wrapped in a stocking! Naturally, when Henry II of England gave men the privilege of having their quarrels settled otherwise than by battle or compurgation, the latter being a method of proving your case by finding twelve men who would say they believed you on oath,

the average man found the change an improvement.

WHAT THE OLD-TIME JURY WAS.

At its best, the old jury was a body of reputable citizens, called together from the neighborhood wherein arose the question to be decided. They were selected because they knew something about it, and because they were likely to give a decision based upon preconceived opinions as to the parties and the matter in dispute. In this respect they were the exact opposite of their degenerate descendants, the modern jurymen.

They were to inform and aid the court, to see that equity was done, by taking into account precisely the things that strict legality must ignore. The jury was to supplement the court's jurisprudence by that intimate knowledge of persons, places, and things to be acquired only by long familiarity with the men and affairs of their home neighborhood. The ne'erdo-well of a community might perhaps play a part before his honor Judge Shallow, and by hook or crook might bring to the scales of justice as great weight as the honest householder or substantial citizen. But the jury, knowing the annals of both for years, could and did strip Master Jackdaw of his borrowed plumes.

So constituted, and so acting, the jury was in verity something of what it has since only pretended to be. In a monarchy, a feudalism, against an aristocracy, it may have often proved itself a palladium of liberty. But how different a body that old-time jury was from its modern namesake. Its number was not fixed, since none could tell what individuals could show claim to act in a given cause. Between witnesses and jurymen no impassable line was fixed, and either might contribute to the ranks of the other. The judges must hold such a jury in respect as a coördinate branch of the tribunal.

HOW THE JURY OF TO-DAY IS DRAWN.

How is it today? A justice of our Supreme Court, talking to the Yale Law School on the duties of citizenship, recently, said that it was astounding to see how many people are suddenly taken ill when called upon for jury duty. He added:

I think I should be. It is like the Sunday headaches we use to have when I went to college. The present jury system is little more than a relic of a semi-civilized system. The juror is treated as a criminal or as if it was feared he would become one. He is watched by day and locked up by night. I hope the time will come when the juror will be treated as if he were an honest man. He should have as much home life as the judge. He should be paid adequately.

The jury of today is secured by the same bulldozing and bullyragging methods that are necessary to enforce a draft or to collect personal taxes—and with similar results. The following item from the *Green Bag* should be appreciated by lawyer readers:

Here is a story which Baron Dowse, the celebrated Irish judge, once told in that exaggerated "brogue" which he loved to employ.

"I was down in Cork, last month, holding assizes. On the first day, when the jury came in, the officer of the court said: 'Gintlemen av the jury, ye'll take your accustomed places, if ye plaze.' And may I never laugh," said the baron, "if they didn't all walk into the dock."

A New York newspaper, in speaking of the need of reform in selecting grand jurors, who are drawn from the regular jury panel, says:

The only qualifications demanded of the grand juror are that he shall be a citizen of the United States, between the ages of twenty one and seventy years, a resident of the county, able to read and write, and possessing two hundred and fifty dollars' worth of property. He may have been convicted of crime, he may be engaged in an unlawful business, he may be a liquor dealer with possibly a direct interest in the cases to come before him—but so far as the law goes, the commissioner of jurors is not required to examine him on these matters, if he is satisfied that he is of "good character."

Well, from the panel the "twelve good men and true" to try a particular case must be selected. The process is such as to put a high premium upon ignorance and imbecility. The juryman must know neither plaintiff nor defendant with any intimacy that would assist in estimating their relative weight in controversy. A special knowledge of the matters at issue brings both attorneys to their feet, aghast lest they have on their hands a juryman whom they cannot bamboozle, and the poor fellow is driven out before a storm of objections and challenges—to his great joy and relief, probably, but to the serious detriment of justice.

HOW THE SYSTEM WORKS.

When twelve paragons of putty have been stuck in the box the ideal of the lawyers is attained. Hear what a New Jersey critic says upon this subject:

When it is remembered that the original idea of a trial by jury contemplated the selection as jurors of those who were bystanders, witnesses, or persons most likely to have personal knowledge of the circumstances surrounding the crime, it seems absurd that a man should now be excluded simply because he has formed an opinion. Under the New York system the idea seems to be that every man who knows anything of the facts should first be excluded

from the jury box, and that, having found twelve men absolutely ignorant of the circumstances, an attempt should then be made to put them in the same position as if they had witnessed the crime. How much more conducive to the administration of justice would be the selection, if possible, of twelve unprejudiced eyewitnesses of the occurrence at issue?

Once caught, the jury is anxiously shielded from all light not refracted through the legal atmosphere, and colored or dimmed by that medium. The judges have little respect for the jurors, often regarding them as a necessary nuisance, an impediment in the true course of justice, and a body to be fooled or bullied, or at best led to a right verdict despite their many headed confusion. Lawyers have a saying that "only the Almighty can foresee the verdict of a jury," and consider the jury box as a sort of dice box from which verdicts are rolled by the operation of conflicting chances.

Judges sometimes lecture and rebuke juries for their verdicts, scathingly denouncing them for coming to a conclusion against what their honors consider "the weight of evidence"—a delightfully elastic phrase that may be stretched to cover a multitude of judicial prejudices and opinions. Now, there are just two sides to this matter. Either the judges are right, and the juries make themselves out fools or knaves, or the juries are right, and the judges must take up the other horn of the dilemma. Which shall it be? Either way condemns the system that permits such a collision between instruments of justice. Here is a recent example, taken from the daily press, the names being omitted:

OMAHA, April 28.—An interesting chapter in the —— case was closed to-day when the jury returned a verdict acquitting ——. The verdict was unexpected, and the Court was so shocked that a dramatic scene occurred.

Judge —— denounced the jury, declaring that justice had been perverted and that because —— is a man of wealth the twelve men would refuse to punish the guilty person. He also declared that all the evidence indicated the man's guilt, and that the jury had deliberately placed a premium upon this evil of stealing children.

The twelve men at first seemed abashed by the outbreak of the judge, and hung their heads. Then they recovered and assumed a defiant attitude. The jury took only two ballots.

Judges refuse to permit certain jurors to "sit in any more cases" during a term. Sometimes they try to force a verdict where jurors conscientiously disagree, and not long ago the jury was left without light, fire, or food for this purpose. What should we think of putting judges on short allowance when they got "behind the calendar"? Where do judges find authority for this right to imprison? When did the people give them that power?

Is it altogether strange that jurors curse their fate when called, all but perjure themselves to escape service, and, when hooked so fast that they cannot break loose, go through their task with what ease and indifference conscience will permit?

Every man who has done time as a juror knows that jury room deliberations are too often combats only lung deep; that the prevailing consideration is too often the physical longing for free and pure air, that verdicts seldom are other than compromises. I have no reason to doubt the story told me by a man, now dead, that he brought over an obstinate twelfth juror by beating him in a game of checkers.

Who does not know the sleepy juror, the stupid juror, the one who will vote obstinately, refusing to hear or give reasons?

In a hotly contested malpractice case, involving the future of a physician of high repute, and bringing to the witness stand the best medical talent of New York State, I heard a juror say, after the jury had disagreed:

"That ain't no sort of a case for such fellers as us. We didn't know nothin' about it from the start." This was no doubt true, since the question at issue turned upon a disputed point in operative surgery.

Stripped of non-essentials, submission of a controversy to a jury is simply referring the matter to twelve strangers, selected by lot, and requiring them to come to a unanimous decision regarding the merits of two stories. Does that seem reasonable? Is that the method any sane man would prefer?

The law provides methods of arbitration. Why are they provided, if the jury system is the perfect flower of the experience of centuries?

Usually there is one rogue in a dispute, and he is likely to prefer a jury trial. He knows that the law of chances must be against an agreement. Probably corruption of jurymen is rare; if so, it is not the system that deserves credit for the rarity.

POSSIBLE SUBSTITUTES FOR THE JURY.

It may be said that the jury system is good because nothing better is available. Any proposed substitute they brand as "pure theory." "It wouldn't work," they sagely assert; or, "If that would do, why hasn't it been tried?"

Of course it is difficult to formulate a substitute for the moss-grown jury system. But we can, at least, appeal to the opinions

of experts, and can cite the history of attempted improvements. The number of judges and lawyers who will admit that the existing system is a bungle will surprise any inquirer who will collect opinions from the profession. The existence of boards or committees of arbitration in connection with organizations of business men speaks eloquently against the practical man's trust in juries when he desires a just or speedy settlement of differences. The growth of these agencies for avoiding litigation is appalling to those attorneys who thrive upon what these institutions tend to supersede.

Some years ago, in the *Century Magazine*, Albert Stickney, of the New York bar, carried on an exhaustive discussion of the question, "Is the Jury System a Failure?" In his final rejoinder he cites as a tribunal that embodies the principles for which he contended—a substitute for the jury—the United States Court of Claims, and quotes at length the opinion of Judge Richardson of that court. The opinion is given in the *Century* for June, 1883, and certainly seems to establish the practical nature of a court without a jury.

In criminal cases, the disinclination to serve upon juries is intensified; but once caught, the importance of the issues involved has a sobering and steadying influence, and tends to give weight and value to the verdict. Yet this added worth might also attach to any other system that should be substituted, and cannot fairly be urged as a reason for retaining the cumbrous, slow, uncertain, restless jury. Special juries, special panels, all attempts to patch up the deficiencies of the ordinary jury, are but so many confessions of its failure to perform its functions.

The ordinary suggestion of a substitute comprehends an abolishment of the lay jury, and the establishment of a tribunal of judges to decide upon both law and facts. Possibly it would be wiser to keep the two separate, and to arrange for two tribunals, one to take jurisdiction of issues of the fact, the other to apply the law—as at present; but to put in place of the jury of laymen, a jury made up of men trained to decide matters of fact and evidence, just as legal judges are now educated to decide questions purely of law.

WHY NOT PROFESSIONAL JURORS?

What is there revolutionary in such a proposal? Is it not in line with all modern progress? We have long passed the days when every man was a jack of all trades. The decision of controversies upon weight of evidence, and the nice estimation of theories, is expert work and should be done by those educated, trained, and experienced in such matters. After all, lawyers, in order to present their clients' cases to juries, are trained in precisely this ability. They learn to sift evidence, to estimate credibility, to decide upon the relative probability of opposing accounts; they, in short, are trained jurymen, and need only the law's sanction to perform the functions now blunderingly botched by the haphazard laymen.

For this work they should be adequately paid. In their work, they should be assured of the same respect and submission now exacted by the bench. They should be able to settle issues, and, when settled, to decide them. The equity courts have long performed such offices, and have proved the possibility and desirability of the change.

The professional jurors would take to the consideration of issues of fact the probity of their characters, instead of the ignorance that characterizes the ideal lay juror. They could be allowed to go home and visit their families with the same reliance upon their honor that now forbids any espionage or restriction of the judge upon the bench. There might be corrupt jurors, as there are corrupt judges; but the rarity of soiled ermine would be as great in one case as in the other.

Legislatures are the most powerful bodies in the world; and the legislatures rule themselves. If a President of the United States be impeached, we do not require that a jury to try him shall be drawn by lot from the citizens of the republic. And yet, if the jury system be the ideal, why should it not be invoked in these, the most important cases that can arise under our government?

In brief, my proposal is this: Let there be a professional jury bench, made up of men learned in those branches of legal lore and civil and criminal codes that teach the correct determination of issues of fact. Let the lay jury be abolished, and all issues of fact be made triable before a bench that shall determine these, and these alone. Such a change would be no more than the specialization and division of labor that insures skilful and just sifting of facts, and it requires only the utilization of the surplus legal talent available in all civilized lands.

The modern jury is a survival, in a corrupt form, of what was once a useful means of justice. Modern ideas demand its reformation, and its return to something that will accomplish for us what the old jury system did for our forefathers.

Mary Lane's Adorable Feet.

HOW CONDON MADE A MISTAKE WHICH WAS PROBABLY A LUCKY ONE.

BY SYBIL STEWART.

MANY people think Mary Lane pretty, and all agree that she has adorable feet. They are not mere feet. Indeed, they seem to have little in common with those plebeian, utilitarian members. They are aristocratic in every proud little curve; and as for being utilitarian, all the world seems to be united in a devoted effort to keep them as useless and ornamental as possible. Everybody laments that instead of tripping down marble stairs in a princess' dainty shoon, as they deserve, they must repose beside the broken fender in the shabby drawing-room of Miss Lane's maiden aunt. But the best that can be done under the circumstances is to insure to them that repose, and to offer up all the admiration any princess could claim.

This is done by all Miss Lane's friends and acquaintances, and most of all by her maiden aunt. The soft click of the suède slippers is never heard on the stairs until after nine o'clock in the morning, when the aunt has the dainty breakfast ready. After breakfast the slippers never move in a more strenuous task than to wander out into the summer garden while Miss Lane gathers a rose or two. They do not linger near the low, laborious rows of nasturtiums. Then, when luncheon is over, they swing beneath the fluffy skirts from the hammock in the little old orchard.

Here Miss Lane used to read and dream until five, when some of the men began to stroll in on their way from the offices. They would come down the orchard path to bow before the big gilt buckles and the shining little Colonial shoes, while the aunt looked on approvingly from the window, where she sat putting the most exquisite little darns into her niece's silken hose.

Miss Lane seldom talked, though six young men sat at her feet in worshipful silence, or in the most interesting conversation they could invent. Why should she? The eloquence of slender ankle and arching instep seemed to be enough for her adorers; and besides, she did not care for them, anyway. They were merely young men in offices, in their first five years' struggle with the world, and were not nearly as interesting to Miss Lane as some of her dreams. So she dreamed and thought and planned while the young men worshiped and made themselves entertaining. Some of them, perhaps, ceased coming after a while, but there were always others to take their places, and it was all the same to Miss Lane. The one she really would have cared to see there never came, and the rest were all alike.

All Miss Lane's dreams had the same scene and *dramatis personæ*, though they varied in brilliancy and *tempo*. They centered about the great house on the hill, standing in beautiful dignity in its own little park. This dignified seclusion attracted Miss Lane, as did also the idea of the charming bachelor that it secluded. She had not met him, but she had seen him flying by in his smart red-wheeled trap, and she knew that a man with such a house and such horses must be charming. Then she had heard of his hand-carved staircase, and often in her dreams she saw herself descending it to the click of her own bewitching slippers. It was a delightful picture, but it made her restless and very much bored by the young men, who did not own any staircases at all.

If she could just meet the bachelor once! She smiled a soft little smile into the patent leather Colonial shoes, and fluffed up the foamy skirts over the hammock edge.

In July she did meet him. It was in the bank, and merely an accident. Her usual composure and indifference were rippled for a moment, and she felt her smooth cheeks flush; but if you will believe it, he hardly looked at her—merely lifted his hat politely and walked on. Miss Lane could not understand it. Her dreams had not ended that way at all. Then, too, when he raised his hat she saw that he was slightly bald. But he was very good-looking, and most men that have fine houses and smart traps are slightly bald.

That afternoon she was more silent than ever, and abstractedly contemplated the straps of her slippers. While the