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IS THE JURY SYSTEM A FAILURE?

In a recent number of a leading American Magazine (*The Century*, Nov. 1882), a gentleman widely known as a writer upon politico-legal matters, discusses this subject with great brilliancy. Doubtless he is more or less right in the answer which he expects to his question. Still, as a distinguished judge once repeated to his class of law students: "The trouble with the opposition to the jury system is that no one has ever been able to suggest anything else so good for a compulsory mode of trying a man before the bar of justice." In the article referred to there is a suggestion made, which in view of the vast and growing importance of the subject merits all possible attention.

It is perhaps odd that this writer finds the chief merit of the jury system just where it is most generally condemned. Examine the journals of the day, just after an important trial, resulting in a disagreement—the Star Route case for instance—and you are likely to find criticisms, more or less severe, upon the feature of unanimity in jury trials. That one stubborn, one corrupted man, can paralyze the opinions of eleven others and keep justice waiting, sometimes seems monstrous, and gives rise to proposals for verdicts by a majority more or less great. But our article enumerates two and only two meritorious features of the jury system; that the verdict is the decision of several men, and that it is their *unani-*

mous decision. This latter feature, indeed, the writer thinks, is all which has made the jury an endurable thing.

There are three methods of trial usually known to the law, viz.: by a jury, by the judges in open court, and by a referee. The article in question makes a practical and simple suggestion: that juries should be abolished, that a court composed like the New York Court of Appeals, of seven selected men, learned in the law, should try all the causes, hearing the witnesses, and, after taking ample time to consider, should render a decision upon law and fact which should admit of no appeal.

Would such a tribunal give any better satisfaction than the present system? A few considerations, only, not professing to be exhaustive, are all which are here meant to be submitted.

Through the whole system of our jurisprudence runs a clear distinction between law and fact. The law, as a science, consists of a collection of principles, the object of which is to group together classes of facts which are alike, applying the same legal conclusions to them all; and at the same time to select out those classes of facts which seem to belong under a given principle but really do not, placing such where they actually belong. As a process it may be compared to the tests for color blindness applied by some experts. Courts sit, as it were, to sort out from a tangled pile of worsted, the many-colored filaments of law, while now and then some color-blind counsel lays before the judges a bundle of red yarns containing one bright green thread, the principle connected with the case at bar, and the labor of the court consists in picking out the green thread which counsel could not see in its true color, and placing it where it belongs.

For the application of legal principles with any degree of certainty, it is needed that the facts should be determined, or else assumed. The great benefit which we derive from courts is not in their deciding the cases which actually come before them, but because in doing this once they decide a thousand other cases which never come before them. It is for the interest of the Commonwealth not only that the courts should do justice to individuals but that the lawyers should become well informed as to how the judges will decide in similar concerns. When, therefore, our author complains that the Court of Appeals only reverses the verdict of the jury because there was error, and thus sends the case back for the committing of more error, he forgets that the court has probably

settled some important principle which will be thereafter the guide of hundreds of lawyers in advising clients, and may possibly prevent the bringing or defence of scores of actions.

If the decision of a Court of Appeals were merely the decision of the rights of those particular suitors, there might be reason in a suggestion that it should be made at the outset of the cause. But being what it is, there is much reason in having such a court what the combined experience of ages has made it, a court of last resort. For such a purpose it is best that the law should be certain, even if it may be slow; that the final authority upon legal principles should be one court, and not many courts, so that there may be as near an approach as possible to absolute oneness in the character of the opinions. Even in New York, when there was a commission of appeals, as well as the court, a diversity in their decisions began to be noticed, which threatened confusion to the lawyers, and litigation to their clients. What would be the effect, then, if a separate Court of Appeals sat in each county, with numerous branches in the city of New York, and there was no superior authority to mould into one system the divergent reasoning of these different minds?

If the opposite ways in which the courts of different states have decided the same identical questions is an evil, then such a system would be a vastly greater evil, the malevolent influence of which would reach hundreds of citizens whose fortunes or liberties never will come within the influence of a jury.

That one court of seven members could hear all the causes tried, even in the smallest state is, of course, impossible. But even if it could, is that the best way to get justice: to have the same tribunal pass upon both law and fact? We have just tried to demonstrate that the proposed court would be a bad one as to establishing the law; how as to finding the facts. On this point, the opinions of practitioners are likely to differ; but the experience of the writer leads him to this result. A case is likely to be decided more justly on its facts, by a judge or referee, when the person deciding does not feel that he is really deciding it at all. There is such a responsibility upon the trier, especially in a case of importance or where the parties are influential, that a trier who is to have such causes continually coming up before him shrinks from actually deciding the case itself. He can render more perfect justice if he may simply state the conclusions of fact which he derives from the evidence,

not pretending to say whether they entitle the plaintiff or the defendant to recover; and the judge can lay down the principles of the law more satisfactorily if the facts are found for him, and are beyond all temptation to alter in order to suit the intended application of the law. Legal principles rely for their sanction upon the common approbation of legal minds, to whom it makes no difference whether the facts are imaginary, as with the Civil and Roman law writers, or real, as in the English law. And for the same reason facts are more easily found and with less temptation to error, if the legal result of them is not known to the one who settles them. His very ignorance of the law may be the best support of his honesty. Therefore, it has seemed to the writer that a court is not a good tribunal to settle both law and fact, because you cannot tell from their decision which is which, because they know too much law, and are prone to see the facts too much in their legal aspect; and because the long-continued decision by the same men, of questions of fact which cannot become the subject of legal criticism, as reported opinions may, tends naturally to arouse distrust and dissatisfaction on the part of defeated suitors. And herein lies part of the great strength of the jury system which, to the writer's mind, goes a long way to account for its survival—the fact that it is nearly always a tribunal of new men against whom no prejudices have arisen in the minds of the suitors.

No one will deny that grave objections exist against the jury system. But the question is "Shall it be abolished?" and if so what shall be substituted in its place. To the mind of the writer the remedy seems rather in some method which shall emphasize the distinction between law and fact, as herein pointed out, introducing perhaps some new class of triers, trained in the weighing of evidence, though not necessarily in the distinguishing of legal principles, who may settle the facts but not the law. It seems as if a separation rather than a blending were what the cause of justice needs.

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