

an antiquated and obsolete argument in support of the theory for the theory itself.

TRIAL BY JURY.

Several months ago a boy was kidnaped at Omaha by unknown men. They blindfolded him, put him in a carriage which they drove many miles now in one direction and now in another to confuse him, imprisoned him in a house subsequently discovered to be in the suburbs of Omaha, and finally extorted from his father, a very wealthy man, a large sum of money under anonymous threats of burning out the boy's eyes with acids. After submitting to the extortion and thereby releasing his son, the father offered a rich reward for the conviction of the dastardly criminals.

Stimulated by that reward, the police produced a man named Callahan whom they charged with the crime. The man was identified by the boy as one of his kidnapers, the identification being made, however, by recognition of the prisoner's voice, for the boy had not seen either of his captors. A few days ago the case was tried. What influenced the jury in arriving at its verdict no outsider is competent to say. It is reported to have suspected detectives of manufacturing a case to get the reward. However that may be, it presumably weighed all the facts before it and decided conscientiously. At any rate no substantial charge of incapacity or corruption has been made against the men who composed it. It returned a verdict of "not guilty."

Now, in accordance with the Anglo-Saxon idea of trial by jury that verdict made a complete legal determination of the matter. In the eye of the law the prisoner was innocent; and whether in fact he was innocent or guilty, the judge had no other duty to perform than to order his discharge.

If, in doing that, the judge took occasion to reflect upon the wisdom of the verdict, he offended against judicial decorum quite as much as a juror would have done had he, during the progress of the trial, openly criticised a ruling of the judge upon a question of law. But the judge in this Omaha kidnaping case, unmindful of the proprieties of the place and the occasion,

forgetting that a judge is not the court and may by disorderly conduct or language be guilty of contempt none the less because there is no one to punish him when he fails to hold himself in restraint—this judge, officiously and in manifest contempt of court, addressed the following language to the jury, a functionary of the court, which, within its sphere of action, namely, authority to adjudge the facts in the case, was his judicial superior and entitled to his respect:

If Callahan had made his own choice of a jury he could not have selected 12 men who could have served him more faithfully. If the state had made the selection, I know of no men it could have named who could have been less careful of its interests. The jury is discharged without the compliments of the court and the prisoner is likewise released, as to this trial, I presume to continue the criminal practices in which you have failed to check him. I do not know what motive actuated you in reaching this decision, but I hope none of you will ever again appear in this jury box.

That insult to the jury was worse than contempt of court. It was worse than a breach of judicial decorum. It was a crime against republican government. For it was calculated, by intimidating jurors, to undermine the independence of juries and destroy the integrity of the system of jury trial. And the worst of it all is that this instance is only one among many that indicate a disposition on the part of judges generally to reduce trial by jury to an empty form with only a curious historical meaning.

This disposition, or rather, this tendency, for it has really come to that, is so dangerous to individual liberty as to demand some serious elementary consideration of the subject of jury trial.

In their Anglo-Saxon origin, juries were composed of witnesses. They testified under oath to the innocence or guilt of the person accused, whom they personally knew and of whose alleged offense they had either personal or hearsay and inferential knowledge. The idea was that a man's guilt should be adjudged by his neighbors, who might be presumed to know all about him and it. And so by their testimony, formulated into a verdict, they acquitted or convicted.

But in the course of time this idea of the jury was reversed in its formal aspects. Instead of empanelling jurors who know most about a case, we now select those that know least. This is so, at any rate, in cities. In the country, jurors are still made up of men familiar with the general setting of the cases they try. That difference would naturally exist, because jurors are still drawn from the vicinity, from the neighborhood, and in cities "the neighborhood" may be an unknown country to its own inhabitants, whereas in the country, "neighborhood" still has a meaning. But the theory that jurors should be familiar with their cases and render verdicts upon their own knowledge of the facts was long since displaced by the theory now prevailing that juries should decide cases, not upon the basis of their own knowledge, but in accordance with their judgment of the testimony of witnesses who appear before them.

In measuring the value of trial by jury, it is customary to glance down the line of this historical evolution, and draw conclusions solely from that source. But like all sociological conclusions resting upon the historical basis alone, these are quite unsatisfactory. Students who adopt them assume too readily that historical evolution is right evolution. When, therefore, they observe that the jury has passed from the stage of witnesses to familiar facts, on to the stage of judges of unfamiliar facts, and observe a growing general tendency toward expertism, they incline to the conclusion that in the progress of historical evolution, the jury must, and because it must therefore it ought to, give way to judicial experts.

But this is not the true function of history. As the man who from being a moderate drinker had become a drunkard would be a fool to conclude that he must, and therefore ought to, go on with his historical evolution to delirium tremens and a drunkard's grave, so society would be guilty of the greatest folly to infer that it must, and therefore ought to, keep on in a certain direction merely because that direction is historical. The true function of history is not to confirm us in evil courses; it is to warn us away from them. Though experience (and that is all that history is) be a good teacher,

it is not necessarily either a good or an inevitable master. Society is, indeed, an organism. By the action and reaction of individual minds, from greatest to least, a distinct social force is generated. But this force was not set in motion years ago in one direction irrevocably. The historic impulses are always subject to the influence of present conceptions of moral right and wrong. And these, if rationally applied, may divert or even reverse the course of history, instead of promoting further evolution along the old pathway.

With the question of jury trial, then, the real point is not whether it is historically evolving into a system of trial by judicial experts, but whether the people should allow it to so evolve—that is, whether they should regard trial by experts as right, whether they should regard it as tending to increase or diminish individual liberty.

In thus making individual liberty the test of morality, we do so advisedly. We are unable to conceive of any test of moral right and wrong more fundamental than that of the relations of man to man. He who said that "slavery is the sum of all villainies" was right. Immorality as between man and man consists in the imposition of one man's will upon another. Conversely, morality consists in practical recognition of the complete liberty of each, limited only by the equal liberty of all. Assuming this liberty to be the desideratum, what relation to it does the existing system of jury trial bear—the system, that is to say, which makes the jury the absolute judge in criminal cases?

In his treatise on the American constitution, Judge Story described trial by jury in criminal cases (book 3, chapter 38) as "essential to political and civil liberty." Similar quotations from men whose names Americans ought to honor might be made. But the opinion of any man, however wise and good, is after all only an opinion. It is entitled to no weight as authority. It does not decide. Such opinions, however, are entitled to profound respect and candid consideration. It is by weighing them, in an earnest search for essential truth, rather than by surrendering mind and

conscience to the demands of historical evolution, that civilization has been promoted.

One of the most thoughtful of these opinions is that of Alexis de Tocqueville, the earliest foreign observer of American institutions. It derives added value from the fact that as a Frenchman his observations of the jury system were uninfluenced by favorable prejudice. He came to a consideration of the subject much as a philosophical historian approaches the consideration of an obsolete institution. Anglo-Saxons might claim too much for this palladium of their liberties. A Frenchman of the early part of the century could regard it with unbiased mind. And that is what De Tocqueville seems to have done.

He considered the jury system only with reference to its political, and not to its judicial, influences, since his general subject was not the judicial but the political aspects of American life. And this makes his observations the more important, for it is as a political institution that the jury system now demands attention in consequence of the tendency of judges to usurp its functions.

De Tocqueville said (vol. 2 of "Democracy of America," chapter 4):

To look upon the jury as a mere judicial institution, is to confine our attention to a very narrow view of it; for, however great its influence may be upon the decision of the law courts, that influence is very subordinate to the powerful effects which it produces on the destinies of the community at large. The jury is above all a political institution, and it must be regarded in this light to be duly appreciated.

By the jury I mean a certain number of citizens chosen indiscriminately, and invested with a temporary right of judging. Trial by jury, as applied to the repression of crime, appears to me to introduce an eminently republican element into the government, upon the following grounds:

The institution of the jury may be aristocratic or democratic, according to the class of society from which the jurors are selected; but it always preserves its republican character, inasmuch as it places the real direction of society in the hands of the governed, or of a portion of the governed, instead of leaving it under the authority of the government. Force is never more than a transient element of success; and after force comes the notion of right. A gov-

ernment which should only be able to crush its enemies upon a field of battle would very soon be destroyed. The true sanction of political laws is to be found in penal legislation, and if that sanction be wanting, the law will sooner or later lose its cogency. He who punishes infractions of the law is therefore the real master of society. Now the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority. The institution of the jury consequently invests the people, or that class of citizens, with the direction of society.

In England the jury is returned from the aristocratic portion of the nation; the aristocracy makes the laws, applies the laws, and punishes all infractions of the laws; everything is established upon a consistent footing, and England may with truth be said to constitute an aristocratic republic. In the United States the same system is applied to the whole people. Every American citizen is qualified to be an elector, a juror, and is eligible to office. The system of the jury, as it is understood in America, appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. The institutions are two instruments of equal power, which contribute to the supremacy of the majority. All the sovereigns who have chosen to govern by their own authority and to direct society instead of obeying its direction, have destroyed or enfeebled the institution of the jury. The monarchs of the house of Tudor sent to prison jurors who refused to convict, and Napoleon caused them to be returned by his agents. . . . The jury is preeminently a political institution; it must be regarded as one form of the sovereignty of the people; when that sovereignty is repudiated, it must be rejected; or it must be adapted to the laws by which that sovereignty is established. The jury is that part of the nation to which the execution of the laws is entrusted, as the houses of parliament constitute that part of the nation which makes the laws; and in order that society may be governed with consistency and uniformity, the list of citizens qualified to serve on juries must increase and diminish with the list of electors.

These comments of the great Frenchman might be very much expanded, but to them nothing could be added. The whole argument for the jury system as a political force is there. And it admits of no possible refutation which does not proceed from a denial of the right and wisdom of government by the people.

Popular government being conceded, it follows that criminal cases must be tried by juries drawn from the masses of the people, and that the verdict of the jury in such cases must be absolute. For as De Tocqueville truly says: "He who punishes infractions of the law, is therefore the real master of society."

Those who oppose the system of jury trial would have accused persons tried by judges, by experts in the law, who are skilled in unraveling tangled evidence. And this is what such conduct as that of the Omaha judge quoted above tends to. It is the tendency of all the rebuking of jurymen which judges are now, almost as with one accord, indulging, from the judge who officiously probes the general opinions of jurors at the beginning of the term, and dismisses them, sometimes insolently, if he doesn't like their point of view, to those who, like the Omaha judge, chastise the juries that acquit prisoners whom the judge would have convicted. Whatever may be the purpose, the manifest effect is to intimidate jurors, thereby making them responsive to significant words and shoulder shrugs from the bench, and constituting the judge a thirteenth juror, with the independence, the intelligence and the conscience of the other twelve wrapped in the folds of his silken gown. It is to reduce the jury system to a barren formality, and for juries drawn from the people to substitute an autocratic bench of experts.

There is about the idea of trial by experts something extremely plausible. It is suggestive of getting a shoemaker to make your shoes, a watchmaker to mend your time piece, or a farmer to raise your grain. Why not a judge to try your criminals?

But the analogy doesn't hold. Men learned in the law and skillful in twisting and turning through the mazes of legal principles and conflicting testimony, are no more expert than laymen at drawing common sense conclusions. Judge McAdam, of New York, being short of a jury panel once, drew a panel from the bystanders, all lawyers—all experts. This was by common consent, of course, the lawyers

agreeing for the sensation of the thing. But that jury disagreed! Decisions of questions of fact by judges, even when there is only one judge and consequently no disagreement, are no more satisfactory than verdicts by jurors. On the whole they may be said to be less so. And as to medical experts, is not the community justly tired of their jarring opinions? The truth is that there is something unbalancing about expert qualifications, when they are brought into common or general relationships.

So far as the judicial function is concerned, no better way of deciding questions of fact has been discovered than that of trial by jury. Under this system the expert is put in his proper place. If a mechanical question is involved, experts inform the jury as to the mechanical technicalities necessary for it to know. If a chemical question, chemists perform that office. So with the whole range of technical knowledge, including the law of the case, about which the jury is advised by the legal experts on the bench. When thus informed and in possession of the facts in the case, the chances are vastly greater that a jury of twelve intelligent men will marshal those facts in a common-sense way and reach a just conclusion than that any of the experts would.

Juries are sometimes corrupt and they sometimes make mistakes. But the innocent prisoner has better guarantees of acquittal at the hands of a jury, than at the hands of a judge expert in the work of "railroading" criminals; and the guilty man has but little better chance of escape. Though juries do make mistakes in deciding questions of fact, it is hardly conceivable that they make as many as it appears from the law reports that judges make in deciding questions of law; and though they be occasionally corrupt, neither are judges always immaculate. There are few lawyers of large experience who will not concede that as a rule, even when they seem to be mistaken, juries get at substantial justice.

But the judicial function of juries is not the important one. As De Tocqueville says, the jury's function as a judge in particular cases is subordinate to its func-

tion as a political institution. In the nature of things in criminal cases, if the jury decides at all it must decide both fact and law. Legal experts may advise, but the jury must decide. So long, therefore, as the independence of the jury can be preserved, individual liberty cannot be quite destroyed. All other free institutions might go, even the suffrage might be restricted to the very rich or the highly educated, yet, if the penal law were administered by independent juries drawn from the body of the people, the grosser forms of tyranny would still be held in check.

That explains the tendency to minimize the function of juries. With the jury system out of the way or become a mere form, and experts invested with power to punish infractions of the law, our government would go on developing into a government by experts until it had reached the inevitable climax, government by a single expert born to his place and specially educated to his function—the government of a tsar.

Whoever will stop this tendency will be a benefactor. Some exceptionally courageous juror may yet volunteer for that duty. If, when a judge in some other case berates the jury after the manner of the Omaha judge, a member of the jury will rebuke him, the man who does so will have performed a most valuable public service. It should not be done pertly, nor lightly, nor rashly; but in self-respectful manner, seriously, earnestly, decisively, and with confidence in his rights as a juror and consciousness of his imperative duty as a citizen of asserting those rights.

Such a protest might call out an apology from the bench, for doubtless many judges offend in this way thoughtlessly, and that apology would not be without beneficial influence. At the worst, the protest could only provoke proceedings for contempt of court, and in these proceedings the juror's contempt in protesting against judicial outrage would be a minor issue in comparison with the judge's contempt in disturbing the course of justice in his court by intimidating jurors.

Unless jurors do assert themselves

by insisting upon a due recognition from the bench of their rights and dignity, the process of reducing juries to a place in which they will perfunctorily record the decisions of judges will go on apace; and judges, having usurped the functions of juries, will become the real masters of society.

NEWS

Last week's report of President McKinley's continental tour left the presidential party at New Orleans, where they arrived on the 1st and were ceremoniously received. On the 2d the speeches were made. The president spoke several times, but, as reported by the Chicago Tribune, the leading administration organ of the west, the only one of his speeches that went beyond local allusions was that which he made to the colored students of the Southern university, in which he said:

What you want is to get education, and with it you want good character, and with these you want unflinching industry, and if you have these three things you will have success anywhere and everywhere.

In the evening of the same day the presidential party left New Orleans for Houston. They were met at Houston by the governor of Texas, who had come down from Austin for the purpose. One speech by the president was made here, but its allusions were wholly local. At Prairie View, on the way from Houston to Austin, the president addressed the students of the colored normal and industrial school, which is situated there. In that speech he told the colored people how to succeed. We quote, as before, from the Chicago Tribune:

What we want more than anything else, whether we be white, or whether we be black, what we want is to know how to do a something well. If you will just learn how to do one thing that is useful better than anybody else can do that one thing you will never be out of a job, and all employment is honorable employment.

This was the most important part, and, indeed, the substance, of his speech. Late in the afternoon of the 3d the party arrived at Austin, the capital of the state, where they had an enthusiastic reception. No speeches are reported, though the president made one at the capitol. They resumed their journey the same evening, and on the 4th the presi-

dent spoke at San Antonio. His speech, as reported by the Chicago Tribune, was composed exclusively of local allusions and compliments. El Paso, on the Mexican frontier, was reached on the 5th. It had been intended to have the presidents of the neighboring republics meet upon the border at this point; but President Diaz was unable to leave the Mexican capital, the Mexican congress being now in session. A complimentary address from President Diaz was, however, presented to President McKinley, who returned a complimentary reply. On the 6th further congratulations were extended to Mr. McKinley by the Mexican general, Hernandez. The former responded with a public speech in which his allusions were of wider general interest than in any previous one. We quote from the same paper as before, omitting only the local or merely complimentary parts:

I am glad to know that this city believes in expansion; that it has been doing a great deal of it itself in the last four years; that it has more than doubled its population in the last half of the present decade, and given promise of still greater advancement and prosperity in the decade now at hand. . . . My fellow-citizens, if there ever was any doubt about ours being a united people, if you could have traveled with me 2,800 miles from the capitol at Washington to the city of El Paso that doubt would have been completely dispelled. There never was such unity in the United States as there is at this hour. There never was so much for a nation of 75,000,000 of people to be proud of as at this hour. We have sent our army and our navy to distant seas, and they have only added glory to our flag. They have brought no shame upon the American name. We have sent them to China to rescue our beleaguered representatives, and they did the work and did it magnificently, with the approval of the civilized world. But it is not in the art of war that we take our greatest pride. We are not a warlike people. We are not a military people. We never go to war unless we have to make peace. Our pride is in the arts of peace, in material and intellectual development, in the growth of our country, in the advancement of our people in civilization, in the arts, in the sciences, and in manufactures. This is the great pride of the American people. Here we are on the border line between the United States and another great republic, and on this side of the line we have 35 American soldiers and on that side of the line there are less than 150 Mexican sol-

diers. So that we are dwelling in peace and amity, causing "peace on earth and good will to men." We want to settle our differences, if we ever have any, with any of the powers of the world by arbitration. We want to exhaust every peaceable means for settlement before we go to war. And while we have authority to raise 100,000 troops, the necessity does not exist for that number, and we do not propose to raise but 75,000. So don't be alarmed about militarism or imperialism. We know no imperialism in the United States except the imperialism of a sovereign people.

At Deming, on the 6th, the presidential party was welcomed by the governor of New Mexico. Both at Deming and at Phoenix the president made speeches; but as they are not telegraphed they were presumably local in their references. After a ride of nearly three days across the desert, the president and his party arrived on the 8th in Los Angeles. He had been met by the governor of California at Redlands, and from that point to Los Angeles the party was welcomed at every station with floral displays. The president's speech at Los Angeles on the 8th in response to that of the governor was local and complimentary except when he said:

This republic never can fail so long as the citizen is vigilant. But our triumphs are not the triumphs of war. Our triumphs are those of a free, self-governing people looking to the development and upbuilding and extension of liberty to all humanity. We have problems on our hands, but the American people never ran away from difficult questions or from a well defined duty. We will meet those problems in the fear of God and will carry and maintain the blessings of liberty wherever our glorious banner floats.

While the president and his party journey over the country the Wall street barometer of prosperity plays eccentric pranks. The 3d and 8th are reported as unhappy days in that run-way of financial bulls and bears and lambs. There was a great slump in the price of stocks on the 3d, and many a confiding investor was divested not only of the profits he had hoped for, but also of the savings he had risked. The number of shares traded in mounted up to 3,000,000. For the week it rose to 15,567,062, of the par value of \$1,546,706,200, besides \$41,119,000 of bonds. On the 8th the condition was worse. Speculative values fell with a thud. The