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BY

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TRIAL BY JURY

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We meet at a most auspicious moment. Since this Association last assembled for its annual conference the nation has been engaged in a war which has absorbed all thoughts, and necessarily distracted us from those peaceful purposes which annually bring us together. But now, with unexpected suddenness, at the cost of great treasure and much precious blood of our heroes, the truly noble object of the war has been accomplished, and peace is already in sight. It might perhaps be expected that in accepting the very great honor of delivering the annual address provided by your constitution, I should enter upon a discussion of some of those important questions which must arise out of the consequences and results of the war.

It is obvious that all such questions, as they arise, must naturally engage the best thought and the noblest and most patriotic exertions of our profession, which has always exercised a controlling influence upon controversies about Constitutional power and national policy, and to whose special keeping is entrusted the study of those principles of right and justice, which must
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govern the conduct of nations, as well as of the individuals who compose them.

At all the great and critical points of our national progress the American Bar has found its appropriate spokesman for the public honor and the public safety. When Otis, against the malignant power of the British Crown, pleaded for the right of every citizen to be secure against tyranny in his person, his home and his papers, and set the ball of freedom rolling—when Henry led the friends of Colonial rights in Virginia and shook the Continent by the thunder of his eloquence—when Hamilton by the main strength of his arguments carried the Federal Constitution against a defiant majority in the New York Convention—when Webster by his majestic speech inculcated in the hearts of Americans that flaming spirit of nationality which saved the Union twice and will preserve it forever;—when Fessenden and Trumbull sacrificed their political fortunes to rescue the great office of the Federal Executive from destruction, they furnished examples for the lawyers of all times to stand at all hazards for public justice and for public honor.

But it seems to me that it would be out of place for us to-day to undertake to pronounce, as the organized representatives of the American Bar, upon the possible, but as yet unformulated, questions in diplomacy, in policy, and in public law, which will naturally follow upon such a momentous struggle and such overwhelming
victories by sea and land. In the meantime, I prefer, as I hope you prefer, to rely upon the wisdom and the patience, the courage and the firmness, of the President and his constitutional advisers, who have conducted the campaigns of our gallant army and navy to swift and sweeping victory.

You will remember that only two years ago in this very presence, the Lord Chief Justice of England, in his admirable discourse before you on arbitration, declared, with your unanimous approval, that there may be even greater calamities than war, and that national dishonor is one of them. Nothing can be more certain now, than that we should have incurred real national dishonor if we had any longer refrained from intervening for the rescue of our oppressed and downtrodden neighbors. In that intervention war was the last argument and the only really effective one. The God of Battles and the judgment of the Nations have completely vindicated that step, and I have no fear that ambition for dominion or lust of glory will bring upon us any calamity or dishonor whatever.

In truth, the generous, the magnanimous terms of peace offered to our fallen and prostrate foes have already demonstrated that. The Constitutional Power to declare war is in Congress, but the equally important power to make peace rests with the President, subject to the subsequent approval of the Senate as to the terms of the treaty. It rests safely with him, and
for one I am not in favor of intruding upon him too much outside advice and assistance. The war, of course, could not cease until every foot of American soil was purged of the last vestige of Spanish power; but in war, as in law, the beaten party must pay the costs, and in settling the terms of peace, we meet novel problems and serious and unexpected responsibilities, which the triumph of our arms has imposed upon us in both hemispheres. These responsibilities we cannot shirk if we would, and would not if we could, and in dealing with them the government must not be held too rigidly to purposes and expectations declared before the commencement of the war, and in utter ignorance of its possible results.

If that had been the rule, our fathers would never have been permitted to declare and maintain their independence, for it was only a month before the battle of Lexington, that Franklin declared to Lord Chatham that he had travelled far and wide in America and had found not one man, drunk or sober, who was in favor of independence. If that had been the rule, the proclamation of emancipation could never have been issued, and the shame of slavery would still blot the stars upon our flag;—for at the outset nothing was more distinctly declared by Lincoln and his advisers, than that slavery, where it existed, would not be interfered with. In war, events change the situation very rapidly, and only when the end crowns the work shall we truly comprehend the great questions
which await us. In the meantime, let us trust the President, who has our national honor most truly and wisely at heart.

Recurring, then, to the more strictly professional objects of our meeting, and selecting a topic pertaining to the science of jurisprudence, which this Association was organized to promote, I have thought that you would indulge me for a brief hour in considering a subject to which I could bring at least the results and convictions of a large experience, and which I have greatly at heart—a subject so trite, that perhaps nothing new can be said about it, which has been more discussed than any other, but which yet remains a subject of ever fresh and vital interest to every American lawyer and citizen—the trial by jury.

Since you last met, a thrilling event of prime importance in its relations to jurisprudence has occurred in France, which must have arrested the attention of every thoughtful observer, and have led especially those sagacious theorists, who have never tired of denouncing trial by jury, and those experimental philosophers and legislators who are always seeking to limit or to mutilate it, or tamper with it in some way or other, to reconsider the matter and to think once more whether we should not do better to let it alone, or only sustain and improve it so as to preserve it inviolate, as the Constitution of the United States and those of most of the States require.

You will readily recall the main incidents of the trial of Zola. An army officer belonging to a race
obnoxious to the hatred and jealousy of the French people, accused of an infamous crime, hounded by a licentious press, had been tried and convicted by a court martial, and after the most shameful degradation, had been condemned for life to solitary confinement upon a rock in the sea, eating out his heart with despair more biting than the talons of the vulture or the beak of the eagle. He protested his innocence, and scores of the best men in France declared their faith in it also, among them statesmen and officials of high rank and character, and before long it became apparent that, whether guilty or innocent, he had been condemned practically unheard, and the Government declared that "reasons of State" forbade that the truth should be known.

It was at this point that Zola, the most notorious at least, if not the most powerful, of French writers, with a courage and a chivalry never surpassed, took up the unhappy victim's cause, proclaimed his innocence, and challenged the authorities to bring himself to trial for his accusation against the court martial, which, as he declared, had covered the illegality of the conviction of Dreyfus by the judicial crime of consciously acquitting the real criminal.

The government took up the challenge, and then followed a trial, which, for reckless and cruel disregard of every principle of right and justice known to us, is surely without a precedent in modern history, and yet it purported to be a jury trial. A jury was sworn, but apparently its sole
function was to register the edict of the government, the army and the press, which demanded conviction. Of course, the defendant was presumed to be guilty until he should prove himself to be innocent, but every effort of himself and his counsel to elicit the truth was thwarted. A hostile audience, with which the court room was packed, was permitted to cover the accused with contumely. "Conspuez Zola!" greeted his entrance. Invective from Court, prosecutor and witnesses took the place of evidence and argument. There was no right of cross-examination, no law of evidence; witnesses who were summoned defiantly stayed away; those who came refused to testify further than they chose, and were suffered to harangue the jury for the prisoner and against the prisoner, and "retired amid irresistible applause." Hearsay was the main staple of the proceedings. A perfect pandemonium prevailed throughout the trial, and at the end of two weeks, as everybody had known from the beginning, the heroic defendant was convicted and sentenced, and his principal witnesses were degraded or dismissed from the public services.*

However satisfactory such a method of administering criminal justice may be to the French people, who cling to it through all changes of government, it could not but excite horror and disgust throughout the Anglo-Saxon world. The proceedings were read wherever Zola's fascin-


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ating romances had preceded them. Every safeguard of personal liberty enjoyed in England and America for two centuries had been violated. We could not read the account of the trial without contrasting it with our own trial by jury, or without the pious utterance from every lip, "Thank God! I am an American."

Heroic Zola! It is pleasant to think of him enjoying the free air of Switzerland after all, having taken French leave of his country, instead of rotting in the dungeon to which her despotism under a republican mask would have consigned him.

This signal event, so shocking to our sense of justice and right, has done more, I am happy to believe, than whole volumes of argument to strengthen and perpetuate our faith in our wholly different system of procedure for the ascertainment of facts on which life, liberty or property are to be brought in judgment. It will help to preserve in its integrity our precious trial by jury, by which no man can be deprived of life or liberty by the sentence of a court until his guilt has been proved beyond all reasonable doubt to the unanimous satisfaction of twelve of his fellow citizens, and no man can lose reputation or property by judgment of a court, until by a clear preponderance of evidence his right to it has been disproved before a similar tribunal.

I do not appeal to mere sentiment or popular prejudice in defence of this, which I believe to be the best method yet devised for the determination of disputed questions of fact in the administra-
tion of justice. There is no need of such appeals — and if I were weak enough to resort to them, they would be wasted upon an assemblage of lawyers like this.

The truth is, however, that the jury system is so fixed as an essential part of our political institutions; it has proved itself to be such an invaluable security for the enjoyment of life, liberty and property for so many centuries; it is so justly appreciated as the best and perhaps the only known means of admitting the people to a share, and maintaining their wholesome interest in the administration of justice; it is such an indispensable factor in educating them in their personal and civil rights; it affords such a school and training in the law to the profession itself; and is so imbedded in our Constitutions, which, as I have said, declare that it shall remain forever inviolate, requiring a convention or an amendment to alter it—that there can be no substantial ground for fear that any of us will live to see the people consent to give it up.

For the trial of persons charged with crimes, I do not believe that any material alteration of its character will ever be adopted. It is so much better that ten guilty men should escape than that one innocent man should suffer. In truth, in these days of multiplied statutory crimes and misdemeanors, a large majority of guilty men do escape by not being found out, by not being accused, by not being brought to trial after indictment, and largely, too, by setting aside the ver-
dict by Courts of Appeals, so that our established public policy seems to lean against any harsh or rigid or arbitrary application of the criminal laws.

But accepting, as we must, the rule that the defendant’s guilt must be established beyond all reasonable doubt before he can be convicted, it is hard to see how, as long as three, or two, or one honest man on the jury has a reasonable doubt, the prisoner can justly be deprived of the benefit of it without destroying our cardinal rule. But the insuperable answer to any change so far as criminal trials are concerned, is the question what substitute will you provide—and none has ever been suggested that would command the approval of lawyers or of laymen.

Let me call your attention to two cases in the Court of Appeals in New York, which will illustrate the necessity of the absolute inviolability of the jury in criminal cases for which I contend, one of long standing, and one just announced, both of which resulted in the reversal of convictions for murder, and which must, as I believe, commend themselves to general approval. In the celebrated Cancemi case,* a juror being taken ill and unable to go on with the trial, the Government and the prisoner’s counsel in his presence consented that the case should go on to a verdict with the remaining eleven jurors, and the defendant was convicted—but the Court reversed, upon the ground that a jury of eleven was a tribunal for

* People vs. Cancemi, 18 N. Y. 128.

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the trial of felony unknown to the common law, and that it was too dangerous a precedent to establish. It held that the public had a vital and inalienable interest in the preservation intact of this constitutional tribunal, which it had created for the trial of crimes—that if the prisoner could waive one juror he could waive eleven, and create a tribunal of his own; and then, how could a man on trial for his life be competent to determine on the sudden as to the wisdom or safety of going on with a juror lost, and who else could be empowered to decide for him? The other was the Sheldon case,* decided but yesterday, where the trial judge kept the jury out eighty-four hours and so compelled a conviction, and the Court of Appeals reversed on the ground that the prisoner was convicted by force and not by reason or evidence; a result which all the world must approve.

There is one serious infirmity in trial by jury in criminal cases in times of great excitement, especially when the more boisterous portion of the press undertakes, as it generally does, to pre-judge the case and to condemn the accused unheard. The jury, under such circumstances, find it hard to resist the impression of public sentiment so loudly proclaimed. The courage and firmness which stood as an effectual barrier against the wrath and tyranny of kings, and which won for the petit jury so much of its prestige and glory in English history, are certainly likely at times to fail, when confronting the outraged sen-

* People vs. Sheldon, 156 N. Y. 268.
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timent of that more potent and dangerous despot, an enraged democracy.

Fortunately, such tempests of popular fury are very rarely directed against innocence, and other tribunals do not withstand their fury while the storm lasts, any better than the jury. Judges of the first instance, and even the local tribunals of appeal, have been found equally powerless to stem the tide. Study the reports of our own Court of Appeals in recent years, and you will find more than one instance of public wrath in our great metropolis, fanned into a devouring flame by some lawless newspapers and a somewhat lawless investigating committee, where the trial Court, unconsciously influenced and loudly sustained by public opinion, committed fatal errors against the prisoner, which were confirmed by the local tribunal of appeal, and it was only when the storm had passed and the atmosphere cooled, that the Court of last resort, sitting in the remote capital, corrected the error, and each time with the unfortunate result than an apparently guilty prisoner, who had been convicted upon illegal evidence or rulings, escaped altogether.

One other charge against trial by jury in criminal cases is the possibility of corruption and bribery of individual jurors. But in my judgment, the common estimate of the extent of this danger is greatly exaggerated. There are but a few well authenticated cases of such crimes in the jury box. I have had little to do with the trial of
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criminal cases, but in an experience of more than forty years in the trial of civil cases before juries, I cannot recall one case where I had reason to believe that corruption or bribery had reached a single juror. And if you can show me a few authentic cases of such infamy in the jury box, I will undertake to match them with an equal number of similar crimes committed by judges who have been properly exposed and punished.

No! with all its defects and faults, which cannot be denied or disguised, there is no danger of trial by jury in criminal cases being supplanted in the confidence of the American people—nor has any possible substitute for it ever been seriously suggested.

It is for the integrity, efficiency and utility of trial by jury in civil causes that I am chiefly concerned, and would most earnestly plead to-day with my professional brethren, who are naturally responsible for public sentiment on such a subject. For I cherish, as the result of a life’s work nearing its end, that the old-fashioned trial by a jury of twelve honest and intelligent citizens remains to-day, all suggested innovations and amendments to the contrary, the best and safest practical method for the determination of facts as the basis of judgment of courts, and that all attempts to tinker or tamper with it should be discouraged as disastrous to the public welfare.

You may say that I am contending for an ideal tribunal. On the contrary, I speak for what is not only possibly, but actually within the reach of
every State and every community—ideal only for the purpose designed, as when we say that a particular man would make an ideal judge, an ideal senator, or an ideal general.

Let me say what I understand by a jury trial; that picturesque, dramatic and very human transaction, that arena on which has been fought the great battle of liberty against tyranny, of right against wrong, of suitor against suitor;—that school which has always been open for the instruction and entertainment of the common people of England and America, that nursery, that common school of lawyers and judges, which has had five times more pupils than all the law schools and Inns of Court combined—for there are ninety thousand lawyers in America, of whom four-fifths probably never saw the inside of a law school.

Well, the first and most essential element in a jury trial is a wise, learned, impartial and competent judge—a judge qualified by his character, learning and experience, to preside over and control the proceedings, and to advise the jury as to the discharge of their duties. Add to the ordinary modicum of legal learning, courage, honesty and common sense, and you have the kind of a judge I mean. If we say that an adequate supply of such judges, possessed of these ordinary qualities of manhood cannot be found, we libel our own profession, we befoul our own nest wherein they are bred. Of course, they cannot be had, if we apply to judicial nominations our favorite democratic idea that one man is as good as another for
any office; of course they cannot be had if selected for partisan services; of course they cannot be had if appointed by a boss, or if they are required or allowed to pay for their nominations, directly or indirectly; but they can be had if selected on their merits from the gladiators in this same arena, as England has selected her judges since 1688, always with assured success. They must be had, if our institutions are to be preserved.

And then there are the twelve honest and intelligent jurors, drawn from the body of the community, sworn to pass upon the issue, and to return whence they came when their task is done. If we say that the average citizen is not equal to the duty, we belie our American manhood, we contradict the whole course of judicial history, and we fail of our duty to the communities of which we form a part, which rely upon us implicitly for the legislative machinery by which juries are to be secured.

And then you must have the earnest and loyal advocates, sworn to do their whole duty; which means to employ all their powers and attainments, and to use their utmost skill and eloquence, in exhibiting the merits each of his own side of the case. In doing so, as Mr. Justice Curtis well said, the advocate only does his duty, and if the adversary does his, the administration of justice is secured. I omit not the indispensable presence of the public, an ever essential feature in this great historic forum, for justice, though blind to the parties and to everything but the
merits of the case, must never be secret. It is the sacred possession of the people in whose name and by whose authority it is done.

Do you say again that this is an ideal picture? Who of you has not seen it? Who of you does not know that it is not only possible, but can be and ought to be the actual and everyday scene in our Courts? I well remember witnessing such an administration of justice by Chief Justice Shaw and his associates in the Supreme Judicial Court of Massachusetts, aided uniformly by juries representing the best citizenship of that grand old State, and by a group of advocates whose superiors the world has never known, disposing of great causes in the presence of a bar instructed, and of a public educated, by the noble spectacle. I have witnessed the same scene in the city of New York, under the administration of Chief Justice Oakley and Judge Duer and their associates, and coming down from those early days to the present, I have seen it a hundred times since, down to the last term of our Federal Court, when I saw an important and intricate cause disposed of by as good a jury as ever sat, under the guidance of a faithful and competent judge.

Are we willing to admit that the Bench, the Bar, the intelligence of the community from which the average juror is drawn, have so degenerated in the last fifty years, or in our generation, that this great tribunal, which has commanded the confidence and approval of all English speaking people
for centuries, is no longer adequate for our public needs? For one, I refuse to believe that. I know that the Bar of to-day is adequate for the duties of to-day—that it can furnish material for the bench worthy of the great service of justice. And I feel quite sure that the average standard, not only of morals but of intelligence in our American communities which furnish our supply of jurors, has not receded, but has actually advanced in the last half century.

This trial by jury for which I stand, is not only ancient as magistracy, rich in the traditions of freedom and of justice, glorified by the prestige and the prowess of all the great advocates of our race, but it is the proudest and most delightful privilege of our whole professional life. It alone atones for and mitigates all the drudgery and painful labor of the rest of our professional work. Here alone we feel the real joy of the contest, that *gaudium certaminis*, which is the true inspiration of advocacy. Here alone occur those sudden and unexpected conflicts of reason, of wit, of nerve, with our adversaries, with the judge, with the witnesses; those constant surprises, equal to the most startling in comedy or tragedy. Here alone is our one entertainment, in the confinement for life to hard labor, to which our choice of profession has sentenced us, and here alone do the people enter into our labors and lend their countenance to our struggles and triumphs. Sorry, indeed, for our profession will be the day when this best and brightest and most delightful func-
tion, which calls into play the highest qualities of heart, of intellect, of will and of courage, shall cease to excite and to feed our ambition, our sympathy and our loyalty.

Let me now consider the principal evils and mischiefs incident to and perhaps inseparable from this much prized trial by jury, for which all sorts of nostrums and legislative innovations have been suggested as radical cures. The existence of some cannot be denied, but I am persuaded that the force and effect of each of them has been grossly exaggerated, and that they can all be remedied, not by any material alteration, but by a better administration of the system as it now exists in our Federal courts, and in the vast majority of States whose constitutions still require that it shall be preserved inviolate.

And first and most common is the complaint of the rule of unanimity, which requires the entire votes of the twelve to render a verdict. To listen to the impassioned arguments of those who seek to destroy this ancient and time-honored rule of unanimity, you would think that in almost every jury impanelled there is among the twelve one Judas ready to betray the cause of justice, or one crooked stick which by no amount of application can be made to fit in with the rest. But, in truth, the discharge of a jury because they are unable to come to an agreement, and the consequent necessity of a new trial is a comparatively infrequent event.

So far as the imperfect statistics which I have
been able to gather show, only about three or at most four per cent. of all jury trials end in a disagreement.

There is a certain percentage of cases so doubtful and so difficult, that the disagreement of the jury, instead of being a disaster, is a positive good, as leading the parties to such a compromise as they ought to have made before carrying the case into Court—or if that fails, in giving an opportunity for new light and re-consideration. Take, for instance, the Sheldon case, to which I have already alluded—to be sure it was a criminal case, but the same considerations will apply in this respect to a civil case—how much better it would have been for the cause of justice and the spirit of truth, if, instead of making the decision the result of a contest of physical endurance among the twelve, they had been discharged after a reasonable number of hours and a new jury entrusted with the case. A new jury can always be impanelled at the next term, and no great delay is involved.

Again, where very great amounts are involved and the contest is extremely close—and these are the cases, I think, in which the largest percentage of disagreements occur, a second trial is not an unmixed evil—a second trial is better than a wrong decision. The truth is discoverable, of course, in every case, but how often on the first trial in such cases is some evidence omitted or misunderstood, from lack of preparation or of knowledge—which, being cleared up on a second
trial, makes the truth more obvious and discernible.

So clearly is this recognized in the public policy of the State of New York, as embodied in its statutes, that in actions for the recovery of title to land, so apprehensive are the State and the law, of accident, or surprise, or negligence, or lack of knowledge of evidence, that even after one full trial and verdict rendered, either party may have the verdict vacated and a new trial, as matter of right, on payment of costs. So jealously is the right guarded, and so much better is it deemed, both for the parties and the public, that there should be a right decision than a quick decision.

Again, if I may rely upon my own experience and observation, the disagreement when it does happen is quite as likely to be the fault of the judge as of the jury. The failure of the judge to perform his most important duty, to explain to the jury the proper legal bearing of the evidence upon the issues of fact which it is their sole province to decide, is the most frequent cause of disagreement. It sends the jury in an intricate case to their consultation room without a proper understanding of the questions submitted to them. Some judges at nisi prius are lazy, and some don’t care what the verdict is to be, and some care too much; and the least appearance of partiality in the judge is apt to awaken the jealousy and resentment of some more or less intelligent jurymen. Juries are, as a rule, extremely
jealous of their province of deciding the facts, and anything like invasion of it by the judge very properly tends to excite their alarm. Perhaps I may cite an actual case in my own experience, which I tried twice. Each time the jury disagreed, necessitating a third trial. Both disagreements were directly traceable to the clear manifestation of pressure or bias on the part of the judge. It was a speculative case for damages. The tort was plain enough, and the question was how much damages. On the first trial the judge charged so strongly for the plaintiff, and on the second trial another judge charged so strongly for the defendant, that in both cases the jury, instead of taking an average verdict, as is the only way in such cases to reach a verdict at all, revolted and disagreed.

This leads me to say that the vast majority of cases brought to trial before juries are cases where the principal, if not the only question to be determined by them, is the amount of unliquidated damages; and for the decision of such a question there can be no reasonable doubt that the average of the estimates of twelve sensible laymen is far safer, and far more likely to approximate to the just estimate, than the assessment of one man, however learned and instructed in legal questions he may be. There is something in the technical training and habit of mind of the judge, that tends really to unfit him to pass alone upon such a question; and for his caprice, his prejudice, his error of judgment, there is no check or balance
and no cure; and so long as the power of the judge who tries the case to reduce the verdict for manifest excess, or to set it aside for manifest insufficiency, is reasonably exercised, any practical danger of injustice is eliminated.

So let me say, and again upon the same authority of personal experience and observation, that for the determination of the vast majority of questions of fact arising upon conflict of evidence, the united judgment of twelve honest and intelligent laymen, properly instructed by a wise and impartial judge, who expresses no opinion upon the fact, is far safer and more likely to be right than the sole judgment of the same judge would be. There is nothing in the scientific and technical training of such a judge that gives to his judgment upon such questions superior virtue or value, and we cannot be too frequently reminded of the valuable opinion on this point, of one of our clearest and broadest minded judges, Mr. Justice Miller, given as the deliberate result of a quarter of a century's experience in the chief court of the nation.*

"It is of the highest importance," he says, "that in a jury trial the judge should clearly and decisively state the law, which is his peculiar province, and point out to the jury with equal precision the disputed questions of fact arising upon the evidence, which it is the duty of that

body to decide. Without this a jury trial is a farce.

"An experience of twenty-five years on the bench, and an observation during that time of cases which came from all the courts of the United States for review, as well as of cases tried before me at nisi prius, have satisfied me that when the principles above stated are faithfully applied by the Court in a jury trial, and the jury is a fair one; as a method of ascertaining the truth in regard to disputed questions of fact, a jury is in the main as valuable as an equal number of judges would be, or any less number. And I must say, that in my experience in the conference room of the Supreme Court of the United States, which consists of nine judges, I have been surprised to find how readily those judges came to an agreement on questions of law, and how often they disagreed upon questions of fact, which apparently were as clear as the law."

But the great objection to dispensing with the rule of unanimity, and requiring the decision of a majority or of two-thirds or three-quarters of the jury to control, is the certain danger of hasty and therefore of unjust or extravagant verdicts. It is not to be forgotten that with every verdict when carried into judgment property passes, or claims to money or property are determined. The rule so long insisted upon by the English and American people, that the right to the property or money in question shall not pass until the whole jury is satisfied, by the clear preponder-
ance of evidence, that it ought to pass, is not too
great a security by which the sacred right of
property ought to be held. The right of property,
as Mr. Webster said at Plymouth in 1820, is the
corner stone of civil society, and its sanctity can-
not be safely invaded or impaired.

The secrets of the jury room generally leak out
after they are discharged, and it very rarely hap-
pens that a majority, and seldom that two-thirds
or even three-quarters, are not united on the first
ballot, and if you make their vote decisive you
will have a hasty verdict; while experience has
often shown that intelligent discussion in the jury
room is just as effective as it is anywhere else,
and often results in converting the majority to
the real truth. The prejudice of juries, so far
as it affects their conduct, is always and natu-
really for the weak against the strong, for the poor
against the rich, for the individual against the
corporation, and it sometimes sways the whole
to the very verge and even beyond the verge of
injustice. And if you break down the barrier
which lies in the rule of unanimity, and which has
heretofore for ages been the only sufficient safe-
guard of property, you will be likely to cause a
great deal more injustice than you will cure by
such a change. Imagine a jury roused to even
just indignation by the oppression, or miscon-
duct of a rich individual or gigantic corporation
against an unfortunate plaintiff, and not re-
strained by the cooler sense and judgment of the
three or four most conservative or intelligent of
their number, and you can easily foresee what havoc they would make with the rights of property.

It takes no prophet to foretell that the great contests in the courts in the coming generation are to be against and in defence of the right of property, and I can conceive of no more destructive and fatal weapon, which its adversaries could secure in advance, than the abolition of this rule of unanimity, excluding practically the votes of the more conservative, the more deliberate, the more just members of the tribunal.

Coming down then to the isolated instances where juries disagree by the dissent of one from the decision of the eleven, whether the one be a crank or, as sometimes happens, the only man who is right, I submit that the cases of such disagreement are very rare indeed, not one per cent. of jury trials, and present no good reason for a change in the rule which, in the general, has worked well in the whole history of our litigation. I decline to discuss the question of bribery and corruption in this connection, for its occurrence is so nearly infinitesimal that I do not believe in its existence.

Nor do I overlook the fact that learned essayists and philosophers without number, who probably never sat upon a jury or participated in the trial of a cause, headed by Bentham, who failed as a lawyer and hated all form of litigation, and had a special aversion to Blackstone, have decried the rule of unanimity. On such a question better fifty years of experience than a whole
cycle of theories. And I treat with equal indifference that constant torrent of declamation from the periodical and the newspaper press, which declares that the effect of the rule of unanimity is to create popular discontent, and to bring the administration of justice into contempt. I believe that the great mass of the people, whose rights and interests are herein chiefly involved, are satisfied with the rule as it now stands, and cannot and ought not to be argued out of it.

But I do not forget that certain judges of the very highest repute, to whom we owe all deference and honor—Mr. Justice Miller among them—have declared themselves in favor of some departure from the ancient rule of unanimity—and that a report was once made to this Association, by a majority of its standing Committee on Judicial Administration and Remedial Procedure in favor of such a change—that by the constitutions of three or four states which include less than ten per cent. of our people, a verdict by nine of the jury has been directly provided for—and that by those of four or five other states, indirect provision in the same direction has been made, by authorizing the legislature, under prescribed limitations, to enact laws to the same effect—and that in Scotland, a verdict by three-quarters of the jury has long been permitted.

But it is fair, I think, to say, that the judges referred to, however eminent, represent but an infinitely small proportion of judicial opinion on the subject, that their suggestions on this point
were rather *obiter dicta*, without any statement of reasons, and that they had for the most part been long removed in appellate tribunals from direct touch with *nisi prius* affairs;—that the report of your committee referred to, after a very brief discussion, was consigned to an oblivion from which it has never emerged—that the few States which have by their constitutions made the direct change, adopted it under social conditions differing somewhat from those of the older states that maintain the old rule;—that although in those states the new method is said by some to work well, there is no evidence that anywhere it works on the whole any better than the old rule;—that the legislatures which have received constitutional permission to make such change have, as I understand, hitherto wisely refrained from making it;—and that as to Scotland, her whole system of judicial administration is peculiar, and that her course in this regard, however satisfactory to her own people, has never suggested to the English people or government the idea of following her example.

Upon the whole, the English people and ours maintain sound and wholesome views on this important subject, which ought not to be disturbed, especially in these times, when the aggressive ranks of socialism and populism are disposed to strike at the right of property, the foundation of civilized society, and would naturally seek to convert the jury box into a weapon of offense.

The next formidable charge against the com-
mon law trial by jury is to accuse it of a great share in the law’s delay. But I deny the charge absolutely and altogether. There is nothing in the whole realm of litigation so short, sharp and decisive as the ordinary jury trial. From the first moment when the impanelling of the jury begins, down to the last when the verdict is recorded, there is no pause or interruption except such as the natural wants of those concerned, for food and rest and sleep require. It would not be possible to devise a mode of trial which in its actual operation would more absolutely preclude delay. As compared with the abominable system of references which is the practical substitute for it, a trial by jury is like the lightning’s flash. These references hang on for months and generally for years; they wear out the life blood of the parties, and pile up an accumulated mass of expense for the fees of lawyers, referees and stenographers, fatal to the patience and endurance of clients. Why, I have one in my hands today which began in September, 1864, has survived both parties, all the witnesses, and a long succession of referees, and will still live on to be buried with the surviving counsel.

In these days too, when in trial by the judge without a jury, written and printed briefs are to be submitted after the oral argument, indefinite delays ensue.

No, the charge of delay against juries and jury trials is wholly without foundation.

But there are most grievous delays between
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the joining of issue of fact and the opportunity to try the case before a jury, and further grievous delays between a just and righteous verdict and the realization of the money or property represented by it—delays at both ends, for which the jury are in no wise responsible, and which are the direct result of vicious legal machinery, capable in a large degree of alleviation and cure. It is to these that I bespeak your most careful attention; for here, as it seems to me, this association owes a duty to the profession and to the community the constant performance of which it ought not to shirk.

These codes of procedure, which have taken the place of a simple practice regulated by rules of court, have become so cumbrous and impossible; —they afford and create such opportunities for delay; —they provide for and contemplate such countless preliminary motions, each a litigation in itself; —that there seems no way out but to cut the Gordian knot and return to the ancient practice. Take our own New York Code alone, the degenerate mother of so many illegitimate offspring. It has grown to a monster of more than 3,600 sections, each section pregnant with some procedure —and while, unhappily, in our City, it takes nearly two years, except in preferred cases, to reach a jury case for trial, every intervening week from the day of its commencement may be filled with a distinct and separate motion. Surely this fruitful source of delay could be and ought to be cut up by the roots.

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The long waiting for a jury case to be reached on the calendar is in many cases a denial of justice. If ten jury terms constantly at work, for instance in our City, are not enough to keep the calendar down, twenty ought to be assigned to sit until the docket is cleared.

The unavoidable delays subsequent to appeal, waiting for years for the appeal from judgment on the jury's verdict to be heard and disposed of, ought also to be remedied and prevented for the future. Of course my experience is mostly confined to the New York courts, but there it does now take nearly three years from verdict to final judgment in the Court of Appeals, making five years from commencement of suit to the recovery of one's just dues by suit, and all this delay—not an hour of it chargeable to the jury—avoidable and therefore inexcusable.

It is very clear now that we made a great mistake in the Constitutional Convention of 1894 in revising the judiciary article, in not retaining the clause which provided for the appointment of a special commission when necessary for clearing off all arrears of appeals. No wonder that suitors tire and resort to settlements, arbitrations, and board committees for a prompt and speedy adjustment of their controversies. Such a result, however brought about, is a direct benefit, for litigation is a positive evil. But for the thousands upon thousands, the vast majority of suitors in every community who remain and claim their rights in the
court, these intolerable grievances by delay ought to be remedied, so that the administration of justice may not be brought into contempt, and this unjust and wholly undeserved stigma, falsely imputed to trial by jury, be forever removed.

There is one other serious evil after verdict which the common sense and sound judgment of our judicial brethren might and should reduce, if they cannot altogether remove it without new legislation. I mean the granting of new trials for trivial and unsubstantial errors, in the charge of the trial judge, or in the admission or rejection of evidence. Where, for such errors which do not go to the root of the action or defence, a new trial is granted, I think that your universal experience will testify that a second jury, in at least twenty-nine cases out of thirty, finds the same verdict over again—making the whole procedure between the two verdicts a total loss of time, expense and labor. And so, as the judges should exercise a liberal discretion in reducing excessive verdicts in cases of unliquidated damages, they should exercise a like discretion in other cases, and never grant a new trial, even for manifest errors, where it is clear that no positive harm has resulted and substantial justice been done.

Review by appeal is only designed for parties really aggrieved, and in jurisdictions where full power to this extent does not already rest in the courts, it ought to be provided. Juries
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are naturally jealous of any interference by the Courts with their exclusive domain, and their will must finally prevail upon the facts. In the celebrated case of Shaw vs. Boston & Worcester R. R. Co.,* the Supreme Court of Massachusetts set aside the first verdict of $10,000 for error. The second jury gave $18,000 and the Court set it aside on the same ground again. The third jury gave $22,500, and then the Court denied the motion to set it aside as excessive, but gave up the unequal contest and let it stand.

The only other important defect attributed to the trial by jury as conducted from time immemorial, is the too prevalent notion that it permits to the trial judge too great a power in conducting the trial and guiding the deliberations of the jury. And so jealous have the people in some of the States become of such imputed interference of the judges with the functions of the jury, that in several States, instead of taking measures to improve their breed of judges, statutory contrivances have been devised to curtail and impair what seems to me to be the necessary function of the court, as an inherent part of the tribunal, without which its duties cannot be well and properly performed, whereby frequent failure of justice must eventually result.

As an illustration of these devices the New York Legislature at its last session was asked to pass a bill, said to be a literal copy of recent enactments of other States providing not only

* Gray 45.
that the judge in charging the jury shall only instruct them as to the law of the case, but also that no judge shall instruct the jury in any case unless such instructions are reduced to writing, and that a charge once made shall not be modified—and various other similar devices for shortening the arm of the court in jury trials have been proposed and occasionally enacted.

I can conceive of nothing better adapted than all such devices for mutilating and emasculating trial by jury, marring its symmetry, and destroying its utility as the best means of ascertaining the truth of the facts for judgment. That they are an unconstitutional invasion of the rights of the court and the people, in a State whose constitution like that of New York provides that trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever, may be claimed with great force and probable success. They seem to be clear and palpable encroachments by the legislature upon the judiciary department, as was well explained by Mr. Justice Brown in the admirable paper read by him before this Association in 1889, and by Mr. Justice Field in the judicial opinion which he cited.

But aside from that, my objection is that they tend to disable and impair the jury itself, so far as they tend to deprive it of the rightful and necessary aid and assistance of the court. If the first provision merely means that the court shall not attempt to thrust upon the jury its opinion on the questions of fact, it was wholly unnecessary—
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it always was the law—and no self-respecting judge ever would or did interfere with that exclusive province of the jury. But as I understand, as generally construed and applied in States where they have been enacted, these provisions operate to limit the court to the submission in writing to the jury of bald propositions of law on legal questions in the case, without any comments or advice upon the relevancy, or application, or relative force of the testimony on the issues of fact which they are to decide.

The proper functions of the judge in a jury trial were never better expressed than by Lord Bacon in his charge to Mr. Justice Hutton in handing him his commission to the Court of Common Pleas, "That you be a light to jurors to open their eyes and not a guide to lead them by their noses." And when those great judges to whom I have already referred as models in the conduct of jury cases, to whom we look for example as young painters look to the old masters, Chief Justice Shaw and Chief Justice Oakley, charged the jury, having kept in their hands all the threads of the evidence from beginning to end, whether the trial lasted a day, or a week, or a month, they stated clearly to the jury what the distinct questions of fact were upon which they were to pass. They then proceeded to go over the testimony and point out its application to those issues, and to instruct the jury by what rule and standard they were to measure the relative weight and credibility of conflicting pieces of tes-
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timony, in applying them to the questions to be decided by them. And the result was that when the judge's charge was finished, the jury understood the case as they had never realized it till then, they understood what questions they had to decide, and what material they had for making up their decision. How they should decide those questions was their own business, and those great judges never presumed to suggest or interfere; and there is no doubt that that was jury trial, according to the uniform course of the common law both in England and America.

But you will say that all our judges are not Shaws or Oakleys. Neither were they in those days. Those were the great models. The others differed in degree rather than in kind, and so they do now. But if your judges don't suit you, get better ones. Don't remove the ancient landmarks of the constitution and law, and turn trial by jury into a farce. There is no doubt that jurymen require such aid and assistance to enable them to perform their proper duty, and that whatever tends to deprive them of it, in whole or in part, to that extent weakens their capacity and impairs their usefulness.

It is impossible for twelve jurymen, laymen of average or even of superior intelligence, unaccustomed to the application of evidence to issues, called from their several vocations for the service of the court, however patient and attentive they may be,—without aid from the court to carry along all the evidence as it falls from the lips of
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witnesses for a week or a month,—to apply each piece of testimony to the issues, and pack it away in their minds as they go along,—to measure the results of cross examination upon the direct testimony,—to weigh the evidence of the one side against that of the other. They are necessarily intent for the moment upon each word of testimony as it drops from the lips of the witnesses. In a long trial the general effect of the evidence upon their minds is vague and indefinite, their memory of details far from clear, the conflicting arguments of counsel confusing, and they naturally look to the judge to be the light, as Lord Bacon says, to open their eyes to see their way through the labyrinth, and find the clews that shall conduct them to the truth.

Take the Tichborne cases—the civil and the criminal trials both—those master-pieces of trial by jury, those colossal specimens of adjudication, full of great masses of conflicting evidence—the lost baronet’s own mother had actually recognized the claimant as her son—the civil trial lasting 103 days and the criminal 188 days, where Counsel at the Bar summed up for weeks, and Lord Chief Justice Cockburn charged the Jury for 18 days, recalling to their minds the whole evidence on both sides, and instructing them how to apply it to the issues, with the result that the Jury, to whom the whole case, without that marvelous charge, would have been a perfect maze, were led to the light and the truth. What a farce, what an insult to judicial genius, what a re-
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proach to law, what a hindrance to truth and justice, if Parliament had said to the jury at the close of the evidence and the summing up of counsel: "You can have no aid from the Court! all it can do is to hand you written statements of propositions of law, upon which you will retire and decide the case the best way you can!"

No, for common assault and battery cases these new devices may not stand in the way of Justice, but when great and complicated cases arise—as they are likely to arise any day, when men's passions are excited—when long and complicated trials ensue, on which great interests depend, they are intolerable stumbling blocks.

But you will justly ask, is there no defect, no drawback, no decadence in this much boasted trial by jury? and is there no improvement, no remedy which you can suggest as the result of forty years experience, as a participant in this mode of trial? and you will very properly expect from me an answer to these questions.

Well, I do admit the existence in some degree of the very faults which I have been considering, but the result of my experience and observation has been, that in the general estimate their extent is grossly exaggerated. And if you have followed me thus far and read between the lines of my address, you have seen that I have no faith in the legislative remedies which have been experimentally applied, because they tend generally to impair the integrity, the efficiency, and the utility of this great and time honored tribunal,
and because they do not propose—there has never yet been proposed—any adequate substitute to take its place.

But if you would have jury trial as it has been and ought still to be, if you would make it still worthy of the high encomiums which have been pronounced upon it by great jurists and great lawyers since 1688, and worthy of the confidence which it still enjoys with the great mass of the people, for whose security and safety all courts exist;—if you would transmit it to posterity as a heritage from the past improved and not impaired by your keeping; there is an obvious and an open way. If you would have trial by jury as it has been exhibited in those wholesome and impressive instances to which I have referred, you must lend your aid to make the component parts of the tribunal what they can be and should be, and to furnish better jurors, better judges and better advocates to conduct the proceeding.

That the general grade of jurors especially in our large cities can be raised to the ideal standard there can be no doubt, and generally the existing statutes are ample. It is neglect and abuse in executing and administering them, neglect and abuse for which I think the commissioners, the courts and the bar are largely responsible, that bring into the jury box too often too much of the refuse of our city directories, too much of ignorance and incapacity, and allows the men of business, of property and of character to escape the arduous and responsible duty.
What lawyer practising at the bar, what Bar Association in any state, has ever taken any pains to see to it, that the power of selection entrusted to official hands is so exercised as to bring fit men to this important service? Have our judges taken due care in exercising the power entrusted to them to compel the reluctant to serve? Take for instance the city of New York with its six or seven hundred thousand voters, and its annual need of ten or twenty thousand jurors, a list to be selected by a commissioner appointed for the purpose. Will anybody pretend to say, that if the duty of selection is properly performed, a body of men amply qualified can not be had for the service of the State, and ignorance, incapacity and low character in all respects excluded from the first approach to the jury box? Let me give you an illustration which shows what the faithful discharge of the duty of selection will accomplish. In the Circuit Court of the United States for the Southern District of New York, petit jurors are selected by the clerk and a designated commissioner under the supervision of judges who take pride in securing competent jurors. Instead of selecting from the vast list of voters men who are not known, as seems to be the too common method, they select only those who are known for character, for intelligence, for merit and fitness, and the result is that a panel of twelve for the trial of any case can always be had representing the general intelligence of the community and even better, and entirely worthy of the
palmiest days of jury trials. And competent men, having been thus selected, must be compelled to serve. Too great exemptions are allowed, too paltry excuses accepted, and the very men who by their weight and character would leaven the whole lump escape altogether.

Jury duty is a great political and public service, as much so as voting or military service, or the payment of taxes, and no fit men ought to be allowed to escape from the liability to perform it. I know how irksome it is—I know how thankless it too often appears to be;—but if our political institutions are worth saving, if this cardinal feature of free and popular government is to be preserved and transmitted entire, this peculiar form of public service must be performed by citizens fit for the duty; voluntarily if they will—but by force of compulsion if need be;—and it is very largely in the hands of the Bar and of the courts to see to it that this is done. But we mustn’t wait till our case is called, and a battalion of incompetents lined up for our choice. If we strike at the fountain and insist upon the proper selection of the lists by the constituted authorities, we shall clear the whole stream from pollution, and any legislation necessary to that end we ought to devise.

And then I insist that the judge who presides in the Court is the keystone of the arch in the jury trial, that he must be permitted to have control of the proceedings from beginning to end, and be indeed a clear light to open the eyes of the
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jurors. The selection of judges lies largely in the hands of the bar, whose members generally compose by a large majority the judiciary nominating conventions of both parties. All that can be done—all that ought to be done in each instance is to select with sole regard to merit and fitness, the best man that can be had for the judicial seat. I will not insist without regard to party—although I think so—but without regard to the dictation of any party machine or of any party despot.

You may be republicans or you may be democrats, but you are lawyers and citizens first, and you owe this duty at least to your profession and your country. By common consent, the American people, in all but four of the States, have long ago abandoned an appointed judiciary, as inconsistent with their theory of republican institutions, and have insisted upon the election by the people of every judicial officer. But under the system of boss rule, the only part the people are permitted to take in the selection of judges is simply to choose between two candidates, each selected by an irresponsible despot, who generally makes his choice for personal or party allegiance, with just as much and just as little regard to merit and fitness as his own partisan necessities require or dictate. How long will the bar submit to be the instruments of such a power?

There is one other abuse against which we can at least utter an indignant protest. I mean the toleration of judicial candidates who are willing
or permitted to pay for their nomination or to pay their party for their election. No matter what their personal or professional qualifications in other respects may be, such a means of reaching the office cannot but degrade the Bench. Imagine John Marshall, or James Kent, or John Jay contributing ten thousand dollars or any other sum to his party, as a condition precedent to taking office! Could it have been said of either of them that the judicial ermine touched nothing less spotless than itself when it fell upon his shoulders?

And finally the advocates, the third great factor and component of the trial by jury. They at least are in your hands, and they must rise or fall to the standard which you fix. They are not a class set apart, like the English Barristers, by special training and office for the work of the court room, but are necessarily eliminated by accident, by ambition, by personal faculties, for this peculiar service. In the long run the doctrine of selection operates. It is necessarily the survival of the fittest that groups them by themselves, but the fountain cannot rise higher than its source, and their courage, their honesty, their training and fitness will always be measured by the standard which the Bar at large exemplifies, imposes and demands.

Give us then competent jurors, able judges and honest, fearless and learned advocates, and trial by jury, which I am sure the people of America are determined to maintain, will still be the best
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safeguard of their lives, their liberties and their property.

This Association necessarily looks to the future for the results of its annual conferences, and its earnest work. Our individual labors are nearly finished, but we can do much to clear the field for our sons, for the youth who as we hope will follow in our footsteps. The best hopes of our noble profession have always been, as they always will be, in its youngest ranks, and this was never so true as at this very moment. The standard of legal education has never before been advanced to its present height. The young men who come annually from the Law Schools to recruit our ranks, are better equipped and qualified—far more so than we ever were—to enter upon the arduous and responsible duties that await them. Let us preserve and restore and transmit to them in all its wonted vigor this ancient and noble tribunal—to arouse their ambition, to stimulate their ardor, to stir their eloquence, to seal their devotion, and if in turn they prove true to the dreams of their youth—which are always of lofty aims and high ideals—our jurisprudence will indeed have been advanced.