5-1-1931

Our Changing Jury System

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OUR CHANGING JURY SYSTEM

I. INTRODUCTION

A. In General

Our system of trial by jury is being discussed today more than at any other period in our country’s history. The discussion is not confined to lawyers and judges. Indeed, the greater part of the discussion comes from laymen, and the indices to our current periodical literature show that the jury system is being considered by writers of many varied viewpoints. There has been much discussion in Congress and in the state legislatures, the system has been written about almost daily in the press, and the man in the street has discussed the matter from every angle.

Of all the many and important parts of our system of jurisprudence, trial by jury is being talked and written about more than all the rest of the system.

B. System On Trial

Much of the criticism of trial by jury in the United States is very severe, some of it is a scathing arraignment of the entire system, and in much of the criticism there is unwarranted abuse. Our entire method of selecting jurors for the courts, the manner in which they are chosen for the trial of particular cases, the rules under which they must function, and the treatment that is being accorded jurors is being decried.
It is when the discussion turns to the jury in criminal cases that the critics become especially severe, and often very unreasonable. The greater part of criticism of the jury in criminal cases does not seem to be the result, however, of deep thought nor of impartial research. Unfriendly critics select some criminal case which has been played up in the press and because the jury did not see fit under their oaths to convict the defendant, a diatribe is launched against the whole system.

An English jurist is quoted to the effect that in his country “the criminal jury is smoldering to extinction without protest and with but little debate.” In America many pronounce the system cumbersome, archaic, inefficient, and declare jury trial in criminal cases a rank failure. We are told that jury trials have had their day in our system of justice, that public confidence is so shaken in them as to necessitate their abolition.

C. People Not Ready to Give Up Trial by Jury

While the mass of criticism directed at the jury system has caused our people to give some thought to the matter, the attacks have convinced only a small body of public opinion that trial by jury is not worth retaining.

The great body of the American people is not unmindful of what the jury system has done for us. They know that in days gone by it successfully checked the exercise of arbitrary and tyrannical power “and mitigated the rigors of one of the most barbarous penal codes in history.”

As our system of trial by jury stands at the bar of public opinion, it stands with many intelligent supporters and with good things to be said in its favor. These far outweigh the deficiencies that are pointed out.

D. Advantages of Trial by Jury

When cases are tried by a jury the litigant gets, as noted by Holdsworth, “a body of persons who bring average com-
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common sense to bear upon the facts of his case . . . . Their findings create no precedent; and thus they can decide hard cases equitably without making bad law. Litigants are generally contented with the measure of justice they mete out; and this is no small gain to a legal system . . . . The jury system has for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary commonsense."

Judge Frederick E. Crane, in a well-thought out address, quotes Lord Birkenhead, one of the greatest jurists our race has produced, as saying in his Life, Letters and Reminiscences, that "the traditions of English jurisprudence, the methods of criminal trials, are the admiration of the world. They depend upon the broad and simple principle that what twelve ordinary men think of the facts is on the whole more likely to be right than a very highly instructed legal functionary. The liberties of England require to be construed, where the issues are those of fact, not by technical persons very highly instructed, but by ordinary men who lead ordinary lives and think ordinary thoughts of ordinary people."

And the same thought may well be applied to trial by jury in civil matters. One judge, or several judges, can not always bring to the determination of ordinary questions of fact the combined consideration that a jury of twelve men, selected from all walks of life, of various ages and occupations and with their varied experiences in life, can bring.

There are many important matters in the civil and criminal courts that must be determined by the standard that a reasonably prudent person would have as his guide. "The law's only standard for measuring human conduct, with a view to determine its legal propriety or freedom from culpability, is the course of action which consists with that which a reasonably prudent person, likewise advised, would

have taken under similar circumstances." 2 The determination of these matters often involves thousands of dollars, and the loss of life and liberty by the citizen. Surely, in measuring the liability of the citizen to suffer the loss of his property or his liberty, the courts should have the benefit of the advice of men engaged in the ordinary affairs of our ordinary life. Judge Crane, in the article quoted above, makes this thoughtful observation:

"A democracy should be very slow in abolishing the jury and leaving questions of fact to judges, who are apt to be bookish men. Millions of dollars change hands daily because some one has not measured up to the care of the reasonably prudent man. The jury determines what care a reasonably prudent man should and would exercise in a given case. These men constituting our jury, engaged daily in the active pursuits of business, traveling all over the city and country, in and out of subways, elevators, factories, machine shops, know more about the care usually exercised than a judge whose days are spent in peaceful pursuits."

E. MORE EMPHASIS NEEDED ON IMPORTANCE OF JURY

Some of the criticism directed at the jury system in this country will prove helpful. Public discussion will arouse interest in the subject, and once interest is aroused we may hope for changes which will improve the system. But, it seems clear to the writer that what is needed today is not so much an exclusively critical and unfriendly attitude toward trial by jury, as an emphasis upon the supreme importance of the jury and the function of jurors in our scheme of government.

The author of the statement that all government, in the last analysis, consists in an effort to get twelve honest and courageous men in the jury box did not miss the mark far, for the jury box is really the most important of all places in the government. It is here that our laws are finally executed, if not made. If juries do not give their verdicts in ac-

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2 Ex parte Alabama Great Southern R. Co., 204 Ala. 504, 86 So. 100 (1920).
cord with the laws which the legislative department makes, and which the judicial sustains, then those laws are but dead letters.

F. JURY IS THE STATE ITSELF

Fifty years ago, in my own state, a distinguished Alabamian, one who was a keen observer of men and institutions, a student of history, a lover of justice, and who wrote from a long and varied experience in public life and at the bar, said this of the importance of the jury:

"In all questions of private right, or touching life and liberty, the twelve men in the jury box, in effect, constitute the State itself. Their verdict is the embodiment of the majesty and uprightness of the law itself. If the jury be upright and intelligent, injustice is seldom done beyond reach of correction; but if the verdict be the result of ignorance or corruption the evil and injustice done is, in most instances, remediless.

"In criminal cases the judge may prevent improper convictions; but when the jury is once empanelled and charged with the trial of the prisoner, what earthly power can lawfully prevent an unjust and wrongful acquittal? Bad, ignorant, or timid juries, in any community, may overthrow the entire code as to that locality, leaving no means of enforcing any law, and thus force the preservation of order by the lawless and irregular methods of mob violence, which is as bad as the evils it seeks to remedy.

"Each community must, therefore, guard its own morals and peace. If the jurors represent, and are taken from the body of the best citizens, the laws will be wisely and firmly executed there. If the men of intelligence and character, who have most at stake shun jury duty, and leave it to those having less capacity or character, an intelligent and fearless enforcement of the law is impossible, and therefore the peace, good order and morals of the community must suffer.

G. CITIZENS SHUN JURY DUTY

"It is one of the defects of our system of judicial administration that under it jury duty has come to be regarded as a nuisance which every citizen may shun, if possible to do so. The business man, the professional man, the mechanic, and the tiller of the soil, are alike eager to avoid this high service to the state. It seldom occurs to any one of them that this is unjust to their fellows and highly unpatriotic. Men who would unselfishly share their last crust with their neighbor,
or submit to any sacrifice to avert some appalling calamity from the community, will not hesitate to avoid the jury box when the life, character, or property of that same neighbor may be staked upon the issue of a jury trial."

It is a proud boast with us in the United States that we have a government of laws, and not of men. Some say that theoretically this is true, but practically false, because they say the judges have the last word, and that the law is what the last judge declares it to be.

This is not wholly true, for though legislatures may make laws, executives try to enforce them, and judges uphold them, it is in the jury box that the people finally accept or reject the laws made by their representatives. Unless the citizen who sits in the jury box puts aside sympathy or prejudice, and follows the law and not his own opinions and notions as to what the law ought to be, we do not have a government of law. Instead we have a government of men. No law is stronger than a jury of twelve men wish it to be, and if jurors fail in their duty and do not respect the statute, then the boasted government of law is dead, and we have instead a government of men with all the prejudices and weaknesses common to men. A good juror in the box in times of peace is like a good soldier in the front-line trenches in times of war—he stands between the citizen and crime and wrong—he is an outpost in the eternal struggle for justice and law:

H. Trial by Jury to be With Us for a Long Time

Those who have had the most experience with juries are not urging the abolition of trial by jury. They know that in the average case, in the overwhelmingly larger number of cases, jurors are fair, honestly endeavor to do what is right, and have the ability properly to decide the issues submitted

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to them. Verdicts generally square with common sense, and there is little or no corruption and improper influence exerted upon the jury. During the ten years he has been a trial judge, the writer has tried several thousand cases of all kinds in all parts of his State, and he does not recall a single case in which there was any suspicion whatever of the use of money or of other improper influence upon the jury. Trial by jury, while it may have some cumbersome and unreasonable features, is the best system man has yet devised for the determination of disputed questions of fact. Certainly it is far superior to anything that has been offered in its place.

Assuming that trial by jury will be with us for many, many years to come, let us turn back the pages of history and consider the methods in favor before the jury was known, then discuss the origin of jury trial, the way in which the jury functioned, and next consider trial by jury as we have it today, noting the changes which have taken place during the intervening centuries; and finally, attempt to outline, if it be not a rash undertaking, the changes which may reasonably come in the future.

II. THE OLD METHODS OF TRIAL

Before the days when Henry II of England reigned (1154-1189) there was no such thing as trial by jury, using those words in the sense known today. Questions of fact were determined in quite a different manner. The ordeal, compurgation, and trial by wager of battle were the methods used and approved to ascertain truth and right.

George Macaulay Trevelyan, Regius Professor of Modern History in the University of Cambridge, tells us (1929) in his History of England that “in looking back over the martyrdom of man we are appalled by the thought that any rational search after the truth in courts of law is a luxury of modern civilization. It was scarcely attempted by primitive peoples.”
Trial by battle, or "by wager of battle," appears to have been a Norman institution which came over to England with William The Conqueror, and was never very popular among the English. By this method the person accused fought with his accuser, believing that God would award victory to him who had the right with him. "The parties knocked each other about with archaic weapons of wood and horn, till one of the two was fain to cry the fatal word 'craven.'" Then it was solemnly adjudged that the party who uttered the word was guilty or in the wrong. Trial by battle was abolished by statute.4

The Anglo-Saxons had a barbarous method known as "trial by compurgation." In it a man proved his case, that he was innocent or entitled to recover judgment, "by bringing his friends and relations in a sufficient number to swear that they believed his oath."

The ordeal or judgment of God was the most ancient species of trial in the old English law. It was heathen in its origin, but Christians made no objection to it on that ground. Green, in his Short History of the English People, says that in the trial by ordeal "innocence was proved by the power of holding hot iron in the hand, or by sinking when flung into the water, for swimming was proof of guilt." This form of trial apparently was not used after 1215.

Henry II's various assizes laid the foundation of what has become the jury system and in the fifteenth century Professor Trevelyan tells us that "the jury system, more or less as we now have it, was already the boast of Englishmen."

A. JURY SYSTEM OF FRANKISH ORIGIN

Most people, laymen and lawyers, assume that the jury system is English and popular in its origin, but this is not correct. It is true that the word "law" is Danish; that the Danish towns in England had twelve hereditary "law men";

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4 59 Geo. III., c. 46.
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and that trial by jury was suggested in England by Norman methods of taking evidence on the Domesday and other inquests, yet trial by jury had its origin in a Frankish custom that was well established in that empire during the ninth century.

In the classic History of English Law, Pollock and Maitland, we are told that in searching for the origin of the English jury

"We must look to the Frankish inquisitio, the prerogative rights of the Frankish kings, not to the ordinary procedure of the Frankish courts; that, like the procedure of our own ancient communal courts, knows but such antique methods of proof as the ordeal and the oath with oath-helpers. But the Frankish king has in some measure placed himself outside the formalism of the old folk-law; his court can administer an equity which tempers the rigor of the law and makes short cuts to the truth. In particular, imitating, it may be, the procedure of the Roman fiscus, he assumes to himself the privilege of ascertaining and maintaining his own rights by means of an inquest. He orders that a group of men, the best and most trustworthy men of a district, be sworn to declare what lands, what rights, he has or ought to have in their districts. He uses this procedure for many different purposes; he uses it in his litigation:—he will rely on the verdict of the neighbors instead of on the battle or ordeal; he uses it in order that he may learn how he was served by his subordinates:—the neighbors are required to say all that they know about the misconduct of the royal officers; he uses it in order that he may detect those grave crimes which threaten his peace:—the neighbors must say whether they suspect any of murder or robberies. The procedure which he uses in his own rights he can and does grant as a favor to others." 5

And the authors conclude with this observation:

"Such is now the prevailing opinion, and it has triumphed in this country over the natural disinclination of Englishmen to admit that this 'palladium of our liberties' is in its origin, not English but Frankish, not popular, but royal."

B. Why Twelve Jurors?

The writer has never fully satisfied himself why the number twelve was deemed so essential in the jury system. How-

ever, it may be that this paragraph which is quoted in Bacon's Abridgment, will afford some explanation. Says an old author:

"And it seemeth to me, that the law in this case delighteth herself in the number of 12; for there must not only be twelve jurors for the tryall of matters of fact, but 12 judges of ancient time for tryall of matters of law in the Exchequer Chamber. Also for matters of state there were in ancient time twelve counsellors of state. He that wageth his law must have eleven others with him, which thinks he says true. And that number of 12 is most respected in Holy Writ, as 12 apostles, 12 stones, 12 tribes, etc."

C. Requirement of Unanimous Verdict

The foundation for the rule requiring a unanimous verdict of the jury is believed to have had its origin back in the days when the jury was a body composed merely of witnesses, and when the jury gave a verdict on what its members themselves knew about the facts. It was then thought "that when a majority testified to a state of facts on their own knowledge, and a small minority disagreed and refused to agree with the majority, that the minority wilfully and corruptly shut their eyes to the truth; and, under this view, they were considered liable to punishment." ⁶

D. Hardships of Jury Duty in Olden Days

Serving on the jury in the old days of the common law must have been far from pleasant, and it may be that the knowledge of the dreadful hardships jurors then suffered have bred into succeeding generations of jurors a dislike of jury duty and accounts, in part, for the fact that today so large a number of citizens summoned for jury duty make every effort possible to escape.

Mr. Chitty, in his Criminal Law,⁷ says that after the judge summed up his evidence, he left it to the jury to consider their verdict. "If they can not agree in a short time, by consulting in their box, they retire to a convenient place ap-

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⁶ Proffatt, Trial by Jury (1880) § 78.
⁷ Vol. 1, p. 632 (1836).
pointed for the purpose, and the bailiff is sworn to keep them as follows:

"You shall swear that you shall keep this jury without meat, drink, fire, or candle; you shall suffer none to speak to them, neither shall you speak to them yourself, but only to ask them whether they are agreed: So help you God!"

"This oath to the bailiff, comprises in a great degree, the duties of the jury when they are withdrawn. During the whole of their absence they are not to eat or drink without the permission of the justices, or to speak with any one except the bailiff, and merely to inform him whether they are agreed. And they are not only prohibited from taking refreshment, but are fineable if they have taken anything eatable with them, when they retire, though they have not actually eaten. But unless they eat at the charge of one of the parties, their misdemeanor will not avoid their verdict, but only subject them to punishment."

E. JURY DENIED CANDLE FOR THEIR PIPES

An interesting side light on trial by jury and illustrating its inconveniences is found in note four, page 113, of Prof-fatt, where he says:

"The former practice was to lock up the jury in a room, without meat, drink, or fire, or candle. On the trial of the seven Bishops this practice was rigorously observed with the jury. In a letter from John Ince to the Archbishop of Canterbury, we find a striking allusion to this practice, and also to the anxiety always evinced to learn something of the proceedings of the jury while so incarcerated. In the first chapter of this work, I had occasion to refer to the writer of these letters, showing the mode in which a jury was treated by a victorious party. The following letter is valuable as giving a glimpse of a jury in deliberation at that day:

'May it please your Grace:

'We have watched the jury carefully all night, attending without the door on the stairhead. They have, by order, been kept all night without fire and candle, save only some basins of water and towels this morning about four. The officers and our own servants, and others hired by us to watch the officers, have, and shall constantly attend, but must be supplied with fresh men to relieve our guard if need be.
'I am informed by my servant and Mr. Grange's, that about midnight they were very loud one with another, and that the like happened about three in the morning, which makes me conclude that they are not yet agreed. They beg for a candle to light their pipes, but are denied.' Law Magazine, Vol. VII, p. 54.

F. JURORS WERE PRISONERS OF THE COURT

In a note found in 34 A. L. R. 1117 the reason for keeping the jury together without meat, drink, fire, or candle, until they are agreed is thus explained:

"The object of this rigorous seclusion of juries from intercourse with the outer world, and of the interdiction of social comforts from the jury room, was apparently twofold. One purpose was to prevent the possible contamination of verdicts by extraneous and improper influences. Another purpose was, however, as we gather from the hardships and inconveniences to which the jurors were subjected, to coerce them into agreement. With a strange inconsistency, while the courts then, as now, held that duress vitiated all contracts, they regarded it as a fit instrument for securing a final determination by a jury of the most sacred rights and the most fearful responsibilities. An agreement for the payment of the most trivial sum, entered into by compulsion, could not be enforced; but a jury could be compelled by imprisonment and starvation to agree upon a verdict involving the life or death of a fellow man. Thus duress, carefully excluded from all other dealings, was made the presiding genius of the jury room."

G. HAULING JURY AROUND IN CARTS

And, in that comprehensive authority on the common law, Bacon's Abridgment, it is stated that if the jury did not agree before the justices of jail-delivery departed to hold court in another county, the sheriff was required to send the jury along with the judges in carts. And the judges were permitted to take and record their verdict in a foreign county.

Proffatt says that this matter of carrying the jury around in carts with the judges until they agreed has been questioned by eminent authority who seriously doubt if it was ever done. He quotes Chief Justice Cockburn to the effect that the "notion is founded upon loose dicta in the book of assizes, servilely copied by textwriters on criminal jurisprud-

8 Vol. 5, p. 369 (1844).
9 See 2 Hale, Pleas of the Crown, 297.
ence. I doubt whether it was ever done, and there is nothing extant to show that such was ever the practice.”

It is clear, however, that in the early days of the common law coercion was a favorite weapon to force the agreement of the jury. The unanimity which was secured was not that of conviction, but that of coercion. Sometimes the jury was afforded, that is new members were added to it until twelve were found who would agree on a verdict.

H. A Contest Between the Strong and the Weak

Chief Justice Cockburn, in *Winsor v. Queen*, said:

“Our ancestors insisted on unanimity as the very essence of the verdict, but they were unscrupulous as to the means by which they obtained it; whether the minority gave way to the majority, or the reverse, to them appeared to have been a matter of indifference. It was a struggle between the strong and the weak, the able-bodied and the infirm, which could best sustain hunger, thirst, and the fatigue incidental to their confinement.”

James Bradley Thayer, in his Legal Essays, notes a witchcraft trial which took place in 1697 and says that the jury “at the trial sat continuously for twenty-six hours. Such was the custom of that time even in England,—to go through a case without adjourning.” And in Bacon’s Abridgment, the authority of the judge to discharge the jury in case of necessity is discussed. The author says that if it may be done in case of necessity, then the court may adjourn “as, where the trial runs out into a length beyond the strength of man to bear without meat and sleep.” It appears that generally this was done by consent. However, there are many cases where the judges did it *proprio marte*, refusing to put it on so weak a ground as consent, and quoting the maxim, “What necessity compels, it justifies.”

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10 Proffatt, *op. cit supra* note 6, § 77.
11 1 L. R., Q. B. D., 289, 305 (1866).
12 Page 351 (1908).
13 Vol. 5, p. 372.
I. CURBING JURIES BY PUNISHMENT

In the early days of the common law when the jury found against the evidence and the direction of the court, it would appear that a new trial was not granted, but that the jurors were punished by a fine or imprisonment. By the old law, in civil cases, the jury judged under the penalty of an attaint. In Queen Elizabeth's time (1558-1603) juries were summoned before the Star Chamber and fined for verdicts of acquittal in criminal cases. Later a new trial took the place of these harsh proceedings.

Proffatt (whose work, Trial by Jury, is most interesting and helpful) says that when Throckmorton was acquitted, the Queen's attorney-general moved that the jury be put under bond to answer whatever charge might be made against them. To this suggestion, the foreman replied:

"I pray on, my lords, be good unto us, let us not be molested for discharging our consciences truly. We be poor merchant-men, and have great charge upon our hands, and our livings do depend upon our travails; therefore, may it please you to appoint a certain day for our appearance, because perhaps else some of us may be in foreign parts about our business."

The verdict of acquittal was not satisfactory to the court. The jury was sent to prison. Four of them admitted that they had done wrong and were discharged. Three of the jury were fined two thousand pounds each, and lesser fines were given the rest of the jury.

Blackstone says that later "the practice heretofore in use of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the judge, was arbitrary, unconstitutional and illegal; and is so treated as such by Sir Thomas Smith, two hundred years ago; who accounted 'such doings to be very violent, tyrannical, and contrary to the liberty and custom of the realm of England.'" 14

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14 4 Commentaries, 361.
J. Severe Punishment for Assaulting Juror

Severe as the judges were in the old days in dealing with juries which did not find according to the judicial liking, the judges were yet even severer when they dealt with those who threatened or assaulted jurors in the discharge of their duties.

Mr. Chitty says that the common law

"regarding with peculiar estimation the duties which jurors have to fulfill . . . has afforded to them that protection which is necessary for the exercise of their important function. If, therefore, any man assault, or even threaten a juror for anything done by him in that capacity, he is highly punishable by fine and imprisonment. And if any one strike a juror in the presence of the courts at Westminster, or the justices of assize, or of oyer and terminer, he will lose his hand, forfeit his goods, and the profits of his land during his life and suffer a perpetual restraint of liberty. And so careful are the courts to protect the rights of jurors, that where a town clerk published an order of the King's Bench, in which a jury was declared to be suspected of bribery in giving a verdict, that court granted an information against him; nor can any action be supported against a juryman for his verdict, however wrongful and vexatious his conduct may have been."  

K. No Right to Compensation

In the early days of the common law it appears that payment for a juror's services was not a right. "It can not be assumed that compensation for services as a juror is a common law right. It is stated in the Mirror of Justices, Ch. 11, Sec. 4, that 'jurors sworn upon assizes, should not have fees.'"  

III. The Jury System Today

Turning now from the jury as it was in England in the old days and at common law, we come to consider the jury system as it is in our country today. We find that, while the right of trial by jury is still highly esteemed and venerated by our people they have nevertheless consented, since the system was introduced into America by the English colonists,
to many important changes in the structure of the jury, the manner of its functioning, and the classes of cases which are triable by jury.

A. Common Law Rule Requiring Unanimity Being Departed From

One of the essential elements of jury trial at common law was that the twelve men constituting the jury should each agree to the verdict rendered. The verdict must be the unanimous verdict of the jury. There could not be a verdict by less than the whole number of jurors.

As the years have passed, however, this old common law rule of unanimity has been greatly relaxed in the states composing the federal union. In many of the states this has been accomplished by constitutional provisions which either provide that two-thirds or three-fourths of the jury shall have power to render the verdict, or that the law-making body may authorize a less number than the whole to render the verdict.

There are states whose constitutions provide that verdict of the jury in criminal cases must be unanimous. Among these states are Maine, Maryland, North Carolina, Utah, Vermont and Virginia. There are other states such as Idaho, Louisiana, Montana, Oklahoma and Texas, which do not require a unanimous verdict in all criminal cases. Many state constitutions provide that right of trial by jury shall remain inviolate, but permit verdicts in civil cases by the votes of three-fourths or five-sixths of the jury. Among these states are Arizona, Arkansas, California, Idaho, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Mexico, Ohio, South Dakota, Washington and Wisconsin.

There are yet other states whose constitutions provide that the right of trial by jury shall remain inviolate, and whose highest courts construe this to mean that all verdicts must be unanimous.
Today this rule, which requires in a large number of jurisdictions a unanimous vote of the jury before a verdict can be rendered, is being questioned by thinking people, and there is a very pronounced sentiment that the rule should be modified.

We permit the Senate of the United States, by the vote of two-thirds of the senators present, to approve treaties which affect every man, woman and child in the land. We permit the vote of two-thirds of the Senate to remove the President from office. We permit the Congress of the United States by majority vote to declare war. We permit the most onerous and burdensome taxes to be levied by majority vote. We permit decisions in the Supreme Court of the United States, and in the highest state courts, to be rendered by a majority of one. We permit administrative bodies to make the most important and far-reaching rulings by majority vote. And thinking people are asking: If all this is true, and the country has gotten along so well, then why is it so essential that twelve men must agree on a verdict in a civil or criminal case which perhaps affects only one or a few people?

The model Code of Criminal Procedure, which is representative of wise modern thought, recognizes this feeling, and the sound reasoning behind it, and provides for majority jury verdicts in all criminal cases except capital.

Section 355 of the Code provides:

"In capital cases no verdict may be rendered unless all the jurors concur in it. In other cases of felony a verdict concurred in by five-sixths of the jurors, and in cases of misdemeanor a verdict concurred in by two-thirds of the jurors may be rendered."

The commentary to this section gives a concise statement of the rules prevailing in the various states.

A good idea of the strength of public sentiment upon this question of departing from the ancient rule of unanimity in...
rendering jury verdicts is gained from a study of the vote of the National Council of the National Economic League. More than a thousand members of the League took part in the balloting.

The eleventh matter, concerning the administration of justice in this country, submitted to the members of the Council was this: "Should less than twelve of a jury be able to return a verdict,

(a) In civil cases? YES NO
   1. If so, how many should concur?
      8 jurors 121
      9 jurors 439
      10 jurors 129
      a majority of the jury 43

(b) In criminal cases? YES NO
   1. If so, how many should concur?
      8 jurors 69
      9 jurors 226
      10 jurors 173
      11 jurors 55
      a majority of the jury 10"

"Would you except cases involving the death penalty or life imprisonment? Yes 202. No 375."

The twelfth proposition submitted to vote of members of the council was this: "Should a jury of less than twelve be used in misdemeanor cases? Yes 760. No 136.

(a) If so, how large should it be? YES NO
   3 jurors 24
   5 jurors 82

19 Published in March, 1931, in The Consensus (the official organ of the League).
B. CARING FOR THE COMFORT OF JURORS

The common law, as we have shown in the early pages of this paper, had scant regard, if any, for the comforts and conveniences of the jury. "The jury must be kept together without meat, drink, fire, or candle till they are agreed. If they agree not before the departure of the justices of goal-delivery into another county, the sheriff must send them along in carts, and the judge may take and record their verdict in a foreign county." 20

Nowadays a more enlightened and humane rule prevails. The law today desires that every jury shall come to a verdict, but it does not desire any verdict that is achieved by jurors surrendering their conscientious convictions. The law seeks to surround jurors with adequate comfort and convenience, and in most jurisdictions the jurors, while engaged in the trial of cases, are afforded reasonable comfort and convenience. And while considering their verdict, after the case has been submitted to them, are given comfortable lodgings and good food at the expense of the state or county. In many instances they are quartered at the best hotel in the county, and their every comfort looked after. This is as it should be. The state has no right to take the citizen from his comfortable home, place him on the jury, keep him a prisoner of the court while a case is being tried, confine him during the day in uncomfortable jury rooms and at night put him to sleep amid unsanitary and inconvenient surroundings. Too much care can not be exerted for the comfort and convenience of jurors. Everything done to make jurors com-

20 Hale, op. cit. supra note 9.
fortable reduces the number of people who seek to evade jury duty.

Let us now consider in detail some of the changes which have taken place in the jury system since the thirteen colonies became the United States of America.

One of the most important changes relates to the qualifications of jurors. At the common law a juror was required to be \textit{liber et legalis homo}, and women were not qualified to serve as jurors. There was one exception, and that was in the case of a jury of matrons. But today in America women are eligible to serve on juries, in both criminal and civil cases, in the states\footnote{See \textit{World Almanac}, 1929 and 1930.} of Arkansas, California, Delaware, District of Columbia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Washington and Wisconsin.

C. \textbf{Number on the Jury}

Another marked change to be noted in our jury system is the fact, as has been seen, that while at the common law the trial jury must consist of twelve men, there are now in many states of the union constitutional provisions which permit a jury of less than twelve in certain cases, or in certain courts. Other state constitutions permit the legislature to regulate the number of jurors.

We also have in some of our states today something which was unknown to the common law, that is alternate jurors, or, as is sometimes called, a thirteenth juror, to serve in place of any juror who might die or become otherwise incapacitated.

D. \textbf{Compensation of Jurors}

While compensation for doing jury duty was not a common law right, the statutes of all our states today make provisions for it.
Our Changing Jury System

The *per diem* allowed jurors ranges anywhere from two to seven dollars. The compensation in most of the states is pitifully insufficient. Delaware, Illinois, Maine, Maryland, New Jersey and Wyoming allow five dollars a day, which should be a minimum. Many good citizens, particularly skilled mechanics, when summoned for jury duty in most of the states are paid far less than their average daily wage. For this reason administrative bodies which place the names of citizens in the jury box have often omitted to place therein the names of skilled mechanics; and, judges realizing the financial loss such persons would suffer in doing jury have been unusually lenient in excusing them.

Mississippi pays her jurors seven dollars a day in capital cases and six dollars a day in other cases, in addition to a mileage of five cents. In some states the juror's compensation is made upon a population basis. For instance, in Minnesota jurors are allowed four dollars a day and ten cents for each mile traveled in going to and returning from court in counties which have a population of less than 225,000 and three dollars and mileage in counties having a population of over 350,000. In some states, for example Nevada, as much as fifteen cents a mile is allowed in going and returning. Utah allows twenty cents per mile traveling one way. Wisconsin allows but four cents. New Hampshire pays her jurors seven dollars per day. Ohio pays her jurors two dollars per day. Some states make a difference between jurors and talesmen (as in Oregon), the juror being allowed three dollars per day and a talesman, not accepted and sworn, two dollars per day. In the federal courts the juror's *per diem* is four dollars. It was increased to this amount in 1926. Formerly it had been three dollars, and five cents per mile.

E. Length of Service

The length of time the citizen does jury duty differs in the various states. In some states no definite time is fixed. In other states the citizen may be required to do jury duty
at intervals for as much as three months out of the year. In other states a citizen may not be required to serve on one panel for more than eight weeks. Many states have a provision requiring a service of two weeks at each term, but service cannot be required for two successive terms. In Baltimore City a citizen may be required to serve three weeks every three or four years. In most states a citizen serves once a year unless summoned by a special venire. In Minnesota, in counties having over 200,000 population, petit jurors serve for a period of two weeks only, but in the other counties they may serve for a period of thirty days. In Alabama a juror serves one week per year. In Oklahoma the juror may serve for two weeks unless the trial judge determines that the business of the court cannot be finished in that time, then he may make an order continuing the service of the jurors for an additional week.

F. WAIVER OF TRIAL BY JURY

The right vel non of a defendant to waive a jury trial and submit the question of his guilt or innocence to the court without a jury has been a much discussed matter among the higher courts and among judges and lawyers in general. While in most of our States a defendant has been allowed generally to waive a trial by jury in misdemeanor cases, he has not always been permitted to do so in felony cases.

A few states have statutes expressly providing for waiver of jury trial in all cases, including cases in which the death penalty may be given. These states are Connecticut, Indiana, Maryland, Michigan, Ohio, Washington and Wisconsin. The constitutions of seven states expressly provide for a waiver of trial by jury. These states are Arkansas, California, Maryland, Minnesota, North Carolina, Oklahoma and Wisconsin. Constitutional provisions in Idaho, Montana, Vermont and Virginia permit, under certain conditions, trial by jury to be waived in all cases below the grade of felony. Many states
have statutes which make provision for trial of misdemeanors without a jury unless the defendant within a time fixed by law, demands a jury trial.

The decisions in a large number of our States have held that trial by jury is so essentially a part of our frame of government that the defendant himself may not waive it, and the Supreme Court of the United States, in a case involving the validity of a law dispensing with the common law jury of twelve and providing for trial by jury with eight jurors, said:

"It is said that the accused did not object, until after verdict to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given, or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons."

However, the national Supreme Court, in *Patton et al v. United States*, held, so far as the provisions of the United States constitution are concerned, that trial by jury in criminal cases is not jurisdictional, but is a privilege which the accused may forego at his election. It is held that this right of the accused to waive trial by jury extends to both misdemeanors and felonies.

The opinion delivered by Mr. Justice Sutherland discusses in a most scholarly and comprehensive manner the constitutional provisions relating to trial by jury, and traces the history of the provisions from their earliest days.

The judge, explaining the former attitude of the courts in frowning upon changes in trial by jury, quotes these words from an opinion by the Supreme Court of Wisconsin in *Hack v. State*:

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"The ancient doctrine that the accused could waive nothing was unquestionably founded upon the anxiety of the courts to see that no innocent man should be convicted. It arose in those days when the accused could not testify in his own behalf, was not furnished counsel, and was punished, if convicted, by the death penalty, or some other grievous punishment out of all proportion to the gravity of the crime. Under such circumstances it was well, perhaps, that such a rule should exist and well that every technical requirement should be insisted on when the state demanded its meed of blood. Such a course raised up a sort of barrier which the court could utilize when a prosecution was successful which ought not to have been successful, or when a man without money, without counsel, without ability to summon witnesses and not permitted to tell his own story, had been unjustly convicted but yet under the ordinary principles of waiver as applied to civil matters, had waived every defect in the proceedings.

"Thanks to the humane policy of the modern criminal law, we have changed all these conditions. A man now charged with crime is furnished the most complete opportunity for making his defense. He may testify in his own behalf; if he be poor, he may have counsel furnished him by the State, and may have his witnesses summoned and paid for by the State; not infrequently he is thus furnished counsel more able than the attorney for the State, in short the modern law has taken as great pains to surround the accused person with means to effectively make his defense as the ancient law took pains to prevent that consummation.

"The reasons which in some sense justified the former attitude of the courts have therefore disappeared, save perhaps in capital cases, and the question is, Shall we adhere to the principle based upon conditions no longer existing? No sound reason occurs to us why a person accused of a lesser crime, or a misdemeanor, who comes into court with his attorney, fully advised of all of his rights, and furnished with every means of making his defense should not be held to waive a right or privilege for which he does not ask, just as a party to a civil action waives such a right by not asking for it."

G. Exemptions from Jury Duty

There is one feature of our modern jury system, which I think is subject to criticism: that is the very liberal and comprehensive system of exemptions from jury duty which we have. Nearly every year the classes of persons who are exempted increase. And today thousands and thousands of qualified and intelligent citizens are totally exempted from all jury duty. An idea of how extensive jury exemptions are
may be gathered from a consideration of the North Carolina statute, and what is true of North Carolina is true of many other States. The statute reads as follows:

"Exemptions from jury duty. 1. All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United States Railway postal clerks and rural free delivery mail carriers, locomotive engineers and railroad conductors in active service, and all members of the National Guard of North Carolina who comply with and perform all duties required of them as members of said National Guard, shall be exempt from service as jurors."

Idaho exempts fifteen different classes of citizens from jury duty. Alabama over twenty; and Montana, New Mexico, Oregon and Tennessee allow exceedingly liberal exemptions.

H. Extravagant System of Exemptions

This extravagant system of exemptions is one of the evils of our jury plan. It is known to everybody, and is especially brought home to those charged with the administration of justice in the courts of the land.

It has been a growing evil in my own State. Fifty years ago attention was called to the fact by a distinguished Alabama lawyer. The words he then wrote are applicable to conditions today in every State:

"One who is willing to perform this duty sees the burden lifted entirely from another who has at least as great incentives to serve; and he in turn becomes discontented, and refuses, as far as he may, to aid in administering the laws of his country.

"In many incorporated towns, nearly half of those who should perform jury duty are exempt by special statutes. As an incentive to make good firemen, or efficient members of the military, business or other organizations, the legislature authorizes the flower of population
to avoid the jury box, and denies their aid to the state in the administration of her laws.

"The exemptions from jury duty are already sufficiently large. If the duty were more equally distributed, it would soon cease to be a burden at all. Much of the reluctance of jury service can be overcome by directing public attention to the subject, and appealing to the patriotism and pride of our people. Whatever influence the bar may possess should be wielded to prevent further exemptions and to effect a thorough revision of the laws on the subject.

"No more beneficial reform can be effected in judicial administration than that which will induce the people at large to heartily aid in its functions. Without this the wisest system of laws will fall into reproach, and the uncertainties and delays of justice continue to increase." 26

While public policy doubtless justifies the exemption totally of certain classes of citizens, such as the civil and military officers of the government, there is no excuse for granting total exemption to many other classes of citizens. For instance, school teachers might well be required to do jury duty when their schools are in vacation. Our present policy of exempting many of our best fitted classes of people from jury duty is weakening the entire system. The laws of practically every State in the union, touching this matter, need to be revised. The total exemptions granted to many should be entirely abolished, or greatly modified.

IV. CHANGES WE MAY REASONABLY EXPECT IN THE FUTURE

If courts in the future are to meet the demands which our increasingly complex civilization will make of them, it will be essential that their methods be changed to enable them to meet the ends of justice and become responsive to modern needs. There is need today for more business methods in the courts. There is too much lost motion, too much unnecessary expense, and there are too many archaic rules which delay the rapid dispatch of court work.

26 REPORT COMMITTEE ON JUDICIAL ADMINISTRATION AND REMEDIAL PROCEDURE, ALABAMA STATE BAR ASSOCIATION, op. cit. supra note 3.
Mr. Justice Riddell of the Supreme Court of Ontario gave expression to the thought which is uppermost in the minds of many when he said:

"We . . . regard the courts . . . as a business institution to give the people seeking their aid the rights which facts entitle them to, and that with a minimum of time and money . . . We can not afford to waste either time or money."

The future will not see the abolition of the jury system, but there are many changes which can be made for the betterment of the system, and towards better securing justice in the courts. With all of its faults, the jury system is, after all, the best method yet devised to determine disputed questions of fact.

Coming now to a consideration of the changes which reasonably may be expected in the jury system in the future, I think we will find business methods adopted to some extent, the trial judge will play a larger part in the trial, jurors will be chosen with greater care, exemptions from jury duty will be reduced to a minimum, waivers of trial by jury will be more favored, verdicts by less than the whole number of the jury will come into general public esteem (except in capital cases), there will be a tendency to leave the matter of punishment more in the hands of the trial judge, there will be alternate jurors in important criminal cases, and there will be more use of the special finding or verdict.

A. SUPERINTENDENCE OF TRIAL JUDGE

The practice has been so general and so long in the United States for the trial judge to function more as moderator or referee that people have forgotten that a different practice obtained at common law, whence comes our jury system, and where the trial judge exercised real power in the determination of a case.

As was said in Capital Traction Co. v. Hof: 27

"'Trial by jury;' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a

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27 174 U. S. 1, 13, 14, 43 L. Ed. 873, 877, 878 (1899).
trial by jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion.”

It is this essential element of trial by jury in England, the dominating position of the judge, which permits him to direct the jury past all shams to the real issues in the case.

One distinguished writer, Mr. Dicey, pays this tribute to the English judges:

“Trial by jury is open to much criticism; a distinguished French thinker may be right in holding that the habit of submitting difficult problems of fact to the decision of twelve men of not more than average education and intelligence will in the near future be considered an absurdity as patent as ordeal by battle. Its success in England is wholly due to, and is the most extraordinary sign of popular confidence in the judicial bench. A judge is the colleague and readily accepted guide of the jurors.” 28

B. VIEWS OF JUDGES NOT MEEKLY ADOPTED BY JURORS

The belief that jurors will always meekly follow the opinions of the trial judge is a reflection upon the intelligence and courage of the jurors. In the federal courts, where the judge may express his opinion upon the facts leaving their ultimate decision to the jurors, there has been no evil result of judges bullying and dominating jurors.

A distinguished American lawyer, Henry W. Taft, writing of this, says:

“The effort to lessen the power of the trial judge is predicated chiefly on the theory that if he discloses an opinion as to the facts the jury will meekly adopt his conclusions; but if it be assumed that the conclusions of the jury as to the evidence and the witnesses can not withstand the expression by a judge of a contrary view, it merely argues that a jury is a very irresolute body—a conclusion refuted by

28 See Dicey, Law of the Constitution.
long experience. Juries have intelligence enough to know whether their domain as judges of the facts is being invaded, and to resent dictation by a judge, which experienced trial lawyers know is frequently dangerous to the side he favors." 29

So long as the jury is permitted to control the ultimate determination of all questions of fact, there would seem to be no sound reason why they should be arbitrarily denied the help which the trial judge can give them in obtaining a properly balanced view of the case.

Mr. Henry L. Walker says that

"when the system of trial by jury is considered analytically, it seems hard to find any tenable objection to the rule permitting such comment" and "it is yet undeniable that the ends of justice are served by intelligent observations from the presiding judge on the various features of the evidence. His daily work consists of observing the course of litigation; he has naturally become discriminating in evaluating witnesses and testimony; his faculties are trained in sorting and coordinating complicated facts. How can justice be retarded by permitting him to place this training and experience at the service of the jurymen?" 30

C. SELECTION OF CITIZENS FOR JURY DUTY

The future will see a more careful selection of those citizens whom the state uses for the important function of jurors. As matters stand today, too often the selection of the names of citizens to go into the box from which the jurors are drawn is a mere matter of chance. Those charged with selecting citizens for jury duty should give more attention and time to their work, and our liberal laws exempting so many classes of citizens from jury duty should be modified so as to give a wider field for selection.

In most States today persons for jury duty are selected by officers who have no connection with, nor responsibility to, the courts in which these jurors are to serve. In some States county officers make the selection, in others the jurors are

29 Taft, Law Reform, p. 25.
drawn from lists prepared by municipal officers, and in other States by jury commissioners appointed by the governor.

It is believed that in the future persons who serve on the juries will either be selected by jury commissioners appointed by the court or, as in Delaware, by two jury commissioners for each county, one from each political party, appointed by the judges. In the federal courts jurors are drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, which names shall have been placed therein by the clerk of such court, or his deputy, and a commissioner appointed by the judge of the court, which commissioner must be a well known member of the principal political party in the district in which the court is held opposed to that to which the clerk, or his deputy, belongs.

D. The Baltimore City Method

There was a public dissatisfaction and adverse criticism of the quality of jurors selected for service in the six courts of Baltimore City in years past. In 1910 the Supreme Bench of Baltimore City took steps to remedy this condition. A system was devised which is one of the best in the entire country.

The material for jury duty is obtained by summoning residents of Baltimore whose names have been secured from various sources to appear before the jury judge for an informal preliminary personal interview, and to fill in a blank form which shows the person’s name, age, whether a native or naturalized citizen, residence, business or occupation, name of employer, business address, and whether claim of exemption is made.

The prospective juror is also asked during what months of the year he can serve with the least inconvenience; and, also, if he has ever served on the jury, and in what court and during what year.

From page 16 of “Report of the Supreme Bench of Baltimore City,” for the year ending January 11, 1931, I quote:
"They appear, and the jury judge notes his impressions. Following out this plan, and as is customary, and by way of illustration, in January, 1930, the jury judge made a personal preliminary examination of 2,348 prospective jurors, of whom 1,105 were deemed by him to be *prima facie* acceptable, and desirable, and 1,243 for one reason or another were rejected. Such preliminary personal interviews enabled the jury judge to form an approximate opinion of a juror’s mental and physical qualifications. Those who passed muster by the jury judge are then carefully investigated, and further undesirables rejected. In this way the Supreme Bench has built up a list of 18,036 names of qualified jurors, each name being carried on a card, with a history of his jury service, age, occupation, etc., and the time he has himself elected as most convenient to serve. This election by the prospective juror of the time for jury service he prefers is as far as possible respected; and avoids many excuses.

"The list of eligibles is constantly depleted by deaths, which are ascertained from reports of the health department, and by eligibles removing away or passing beyond the age of seventy, and other causes. Reports are had from the police department of all arrests, and eligibles arrested for any serious offense are eliminated. Therefore the list has to be recruited by approximately one thousand new names yearly, gotten as above described.

"In selecting juries for service, say in January, 1931, 750 names are taken off the cards of men who selected January service, by the Supreme Bench. These 750 names are written on ballots, and folded, put in a wheel by the jury judge, and therefrom 500 names are drawn by lot and announced in the presence of any one caring to attend. The names as drawn by the sheriff are written up on manifold copies, then bound in permanent books, from which records are furnished the sheriff and the Supreme Bench. These 500 men are then summoned by the sheriff to appear in the criminal court before the jury judge, who then publicly selects the eight panels of 25 jurors each who actually serve, i. e., 200 jurors."

E. INSTRUCTING JURORS AS TO THEIR DUTIES

It is quite probable that the future will find our high schools, and perhaps the colleges and universities, having as part of their curricula lectures instructing the future juryman in his duties.

In an article published in the American Bar Association Journal (May, 1930) Mr. Justice Simms of the Supreme Court of New Mexico makes a suggestion which is worthy of note:
"What is wrong about a jury school of a day or two before trials commence? We train everybody else in the technique of their jobs. If a trial judge would lecture his jury for a day on their function, and carefully explain to them that the governor has the pardoning power and not they, we would soon find our juries functioning rapidly, exactly and without reference to tears or prayers of counsel. Unless we tell the juryman what his duty is, and explain it patiently and carefully, we can not mistake him for misusing his function in the best of faith."

I think we are not considerate of the citizen when we summon him for jury duty and take for granted that he knows just exactly what is expected of him. A jury school, even if but for a few hours, or the distribution of instruction books among the jurors, would be most helpful in the administration of justice.

During the trial of a case before me several years ago, a case in which the guilt of the defendant was not seriously disputed, I was surprised at the length of time the jury remained deliberating on their verdict. After several hours they returned a verdict of guilty, and I learned afterwards that the cause of the delay was an argument among the jury as to whether it was permissible to recommend the defendant to the mercy of the court.

In another case where a defendant was charged with embezzling a hundred dollars entrusted to him for the purchase of an automobile eleven of the jurors, upon their retirement to consider the verdict, promptly voted for conviction. The twelfth man, a good and wealthy citizen, whose sympathy was moved by the youth and appearance of the defendant, delayed the jury in returning a verdict for quite awhile arguing with the eleven that he should be permitted to ask the court if he might not reimburse the prosecuting witness the amount lost through the embezzlement, which he wanted to do, and acquit the defendant. After the eleven had convinced him that the contempt power of the court might be used against him, he then voted for conviction.
If the jurors had been in possession of instruction books, or there had been something like a jury school, these things would not have happened with their consequent delay and misunderstanding.

While jury schools may not yet be practical, a step has been taken in some States in recent years which is worthy of commendation, and which could be followed with profit everywhere. I refer to the printing and distribution of pamphlets which instruct prospective jurors in the essential things they should know with reference to their important obligations. In some States these pamphlets are prepared by leading judges and lawyers, and distributed by the court, and sometimes they are presented each juror with the compliments and good wishes of civic organizations.

F. Popularizing Jury Service

Not so many of our citizens would dodge jury duty if something were done to make the service less burdensome. Many good citizens shun jury duty because the compensation paid a juror is such a pittance. These citizens, in the main, desire to perform this civic duty, but they are not always men of wealth and in many instances are unable to serve without what is serious financial loss to them.

There has been but little increase in the pay of jurors during the past fifty years. In Alabama in 1811 jurors were paid one dollar a day, four cents per mile and ferriage. By 1876 this had been increased to a per diem of two dollars, with five cents a mile, going to and returning from court, and ferriage allowed. Today they are allowed three dollars a day and five cents per mile, going to and returning from the court.

In 1808 jurors in civil cases attending the circuit court of the United States held in Pennsylvania were entitled to receive $1.25 for each day's attendance.\(^{31}\) Today jurors in the federal courts are paid $4 each day.

\(^{31}\) Ex parte Lewis and others, 4 Cranch 433 (U. S. 1808).
I think there would be less inclination to avoid jury duty if the citizen could say during what part of the year he could serve with the least inconvenience to himself and his private affairs, and it could be so arranged to respect that wish and have the citizen serve during the month when he could best serve. Probably it would not be feasible to do this in counties with a small population, but in the larger centers of population this should be practicable. It would result in jurors serving at times when their minds were not worried and harassed about business matters, and when they could give their undivided attention to their important duties.

G. Women on Juries

For many years women have served on juries, both in civil and criminal cases, in a goodly number of States, the number of which is steadily increasing. In some States jury duty on woman's part is compulsory, and in others it is optional. It is provided by law in some States that a woman shall not be summoned for jury duty unless she has filed with some officer, named in the statute, her wish and consent to serve as a juror.

By federal statute 32 jurors in the courts of the United States, in each State respectively, must have the same qualifications as jurors of the highest court of law of such State. So whether there shall be women on the jury in a federal court depends upon whether women serve on the juries in the State courts of the State in which the particular federal court is held.

H. One Woman's Impressions of Jury Duty

A woman juror, Diana Rose, who recently did jury duty for the first time, gives us these interesting observations:

"As I look back on it now, a woman played a decisive part in almost every verdict which we reached... In the main I believe we achieved justice. As for serving on a jury—I'd never, never miss it.

32 Judicial Code, § 275.
It's a unique and broadening experience. One comes away from it with a feeling of being a little closer to the great struggling, searching mass which constitutes our democracy."

And then the good wife and the mother in the jury-woman come to the front, and she adds:

“One returns home, too, with a greater pride in and sympathy for one's own husband and irrepressible children.”

The future will witness woman serving on the jury in practically every State in the Union. She has a part in the administration of justice which she is willing to play, and the State should not exclude her from that service, and deny to itself and the litigants in its courts the wholesome influence that woman will exert on the jury.

I. Changing Methods of Jury Trial

Our new times, and the changed conditions that have come with them, do not demand the abolition of the jury system, but they do demand that alteration be made in this ancient instrument of the law so that it will be serviceable and better meet the ends of justice.

We permit a defendant to come into court and plead guilty, and a jury is not brought into the case at all. But by a strange inconsistency we deny to a defendant the right to come into court, plead not guilty, and leave his guilt or innocence to the determination of the court without a jury.

The better thought of the country today, both among the profession and the laity, is that a defendant should have the right to waive a jury trial. In six States there are statutes which expressly provide for waiver of jury trial in all cases, including capital cases. And many of the States have either constitutional or statutory provisions which permit, to a limited extent, waiver of jury trial in criminal cases.

Expressive of the common sense thought of the nation is Section 266 of the American Law Institute's Code of Criminal Procedure which declares:

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“In all cases except where a sentence of death may be imposed trial by jury may be waived by the defendant. Such waiver shall be made in open court and entered of record.”

While we are a conservative people and changes in our jury system come slowly, it is reasonable to expect that the next half century will find the legislatures and courts of every State in the Union regarding trial by jury as a privilege, and authorizing the defendant to waive such a trial with the consent of the court.

J. Permitting Less than Unanimous Verdict

At common law there could not be a valid jury trial unless all the members of the jury were unanimous in the verdict it rendered. Texas, in its constitution of 1876, departed from this rule of the common law, and allowed verdicts by nine members of the jury in criminal cases below the grade of felony. Since that time many States, in differing fashion, have also ceased to regard unanimity as sacrosanct, and have permitted verdicts by less than the whole number of jurors in both civil and criminal cases. However, in capital cases the general requirement is that the verdict be unanimous.

K. Views of Mr. Justice Roberts

The view of those that justice can be done, and the rights of the individual fully protected, by a verdict of less than the whole number of the jury is admirably stated by Mr. Justice Owen J. Roberts of the United States Supreme Court, in an article which appears in The American Bar Association Journal for November, 1929. In it the distinguished lawyer and jurist, speaking of trial procedure, past, present and future, says:

“Now, with regard to the petit jury in criminal cases; there has been a great deal of discussion as to whether we should stick to the time-worn tradition of a unanimous verdict of twelve jurors. I have thought of that proposition a great many times, and, Gentlemen, whenever I have thought of it, I have found myself combatting that innate conservatism we lawyers have, and which always makes us feel, it has always been so, why shouldn’t it be so? But those jurisdictions
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in America, which have trial by verdict of less than twelve, have found it to work satisfactorily. I hear of no miscarriages of justice; I hear no serious criticism of the cases.

L. IMPORTANT QUESTIONS DECIDED BY BARE MAJORITY

"One of the worst troubles we have in America is hung juries in criminal cases. They have been a good deal of detriment to the proper enforcement of the criminal law, and a proper respect for the machinery of the law. We lawyers would never think of insisting upon a unanimous court upon difficult questions of law. Some of the most difficult questions that have ever been put to higher courts in this country have been decided by a bare majority. They are the law. People are satisfied with the results. We have been for majority rule in many aspects outside the mere legal line. Why not? What is wrong with trying the proposition of a verdict of nine jurors? Some of the timid say, 'Not in capital cases, not in higher crimes and misdemeanors.' But recollect, Gentlemen, that the requirement of twelve jurors of a vote unanimous by a petit jury was a requirement made necessary at a time when the shield was wholly reversed as between the government and a defendant in a criminal case. Then that defendant fought for his life. He was incompetent as a witness. The whole power of the crown was against him and much injustice was done, and many a rule of evidence, and many a rule of procedure, was made to save the neck of a man who had committed a crime, then capital, which today would amount to a very small sentence in prison.

"Now we have got to keep those things in mind when we are discussing possible changes in procedure, and changes in procedure which affect substantial rights of parties. We have got to choose, as a recent writer has said, between protection of the individual and the protection of society, which stand over against each other. I ask you, Gentlemen, what harm can be done in trying the experiment of, say, nine out of twelve jurors—the verdict of nine out of twelve jurors?"

Sec. 355 of the model Code of Criminal Procedure provides for a very sensible and reasonable rule on the subject when it says, basing the proportion on a jury of twelve:

"In capital cases no verdict may be rendered, unless all the jurors concur in it. In other cases of felony a verdict concurred in by five-sixths of the jurors, and in cases of misdemeanor a verdict concurred in by two-thirds of the jurors may be rendered."

It will not be many years, in the writer's opinion, before this common-sense rule is put into effect in all jurisdictions.
M. LEAVING PUNISHMENT TO THE JUDGE

I think the future will see the trial judge given more authority in the matter of sentencing convicted defendants. Probably in capital cases the punishment will always be left exclusively to the jury. The judges today have in most of the States of the Union considerable power in sentencing defendants and a wide latitude as to the punishment.

Juries in most States fix the fine in misdemeanor cases when trial by jury is had. In some States the fine varies from one cent to five hundred dollars in misdemeanor cases, and I have known jurors to go out on the consideration of a case and spend many hours arguing as to the amount of the fine, and the difference between them was so insignificant as not to amount to the proverbial "hill of beans." Yet, the argument as to the amount of the fine consumed a great deal of time, delayed the court in the trial of other cases, and cost the county several times the amount in dispute among the jurors. In some cases jurors have been known to refuse to consent to a verdict of guilty unless the other jurors would agree to a small fine, one out of all proportion to the gravity of the offense. If the jury were confined solely to a determination of the guilt or innocence of the accused, and the punishment were left to the court, it is thought that the ends of justice would be better promoted and the administration of justice improved.

N. ALTERNATE OR SUBSTITUTE JURORS

One good change which has been made in the jury system in some States of recent years is the provision made for alternate or substitute jurors where it is important to avoid "a mistrial on account of the death, sickness, accident, or absence of a regular juror."

When one considers how long drawn out some jury trials are in this country, and the great physical and mental strain jurors are under, and the inconveniences and discomforts
jurors must suffer, it is apparent that alternate jurors are a most common-sense provision.

Nevada in 1921 was one of the first States to introduce this sensible innovation. Colorado quickly followed, then Washington, and today we have what is substantially a system of substitute jurors in the following additional States: Utah, Oregon, California, Michigan, Ohio, Arizona, South Dakota, Wyoming, Idaho and North Carolina.

The idea has so much to recommend it to normal intelligence and the practical administration of justice that it is steadily coming into favor in the trial of important criminal cases.

O. Provisions of Code of Criminal Procedure

Section 285 of the Code of Criminal Procedure contains this provision, and fully explains the idea:

"Whenever in the opinion of the court the trial is likely to be a protracted one, the court may, immediately after the jury is empanelled and sworn, direct the calling of one or two additional jurors, to be known as 'alternate jurors.' Such jurors shall be drawn from the same source, and in the same manner, and have the same qualifications as regular jurors, and be subject to examination and challenge as such jurors, except that each party shall be allowed one peremptory challenge to each alternate juror. The alternate jurors shall take the proper oath or affirmation and shall be seated near the regular jurors with equal facilities for seeing and hearing the proceedings in the cause, and shall attend at all times upon the trial of the cause in company with the regular jurors. They shall obey all orders and admonitions of the court, and if the regular jurors are ordered to be kept in custody of an officer during the trial of the cause, the alternate jurors shall also be kept with the other jurors and, except as hereinafter provided, shall be discharged upon the final submission of the cause to the jury. If, before the final submission of the cause, a regular juror dies or is discharged, the court shall order the alternate juror, if there is but one, to take his place in the jury box. If there are two alternate jurors the court shall select one by lot, who shall then take his place in the jury box. After an alternate juror is in the jury box he shall be subject to the same rules as a regular juror."
If this wise provision for alternate jurors were adopted in each of the States trial by jury would be more efficient, much expense would be saved, and miscarriages of justice be prevented.

P. THE SPECIAL VERDICT

One of the earliest products of the common law was the special verdict, and while it is not now greatly used in this country, it is believed that the future will see a more frequent use of it. It has much to commend it and is coming to be regarded more favorably by Bench and Bar, and many distinguished lawyers, judges, and law school professors may be found in the ranks of its advocates.

Professor Edson R. Sunderland, of the Law School of the University of Michigan, in an article which appeared in the Chicago Sunday Tribune, in August, 1926, makes these interesting observations of the special verdict:

"After fortunately escaping from the Scylla of the pleadings, one hesitates to take a chance with the Charybdis of the special verdict, and the result is that this immensely useful procedure is feared and avoided, and the parties timidly succumb to that crude relic of barbaric times, the general civil verdict.

"In contrast to the usual American practice, which has made the machinery of special verdicts so intricate that it hardly functions at all, the English have developed an astonishingly simple and effective procedure. The judge himself, noting the material issues which have actually developed in the evidence, frames a few simple questions to cover them. He asks counsel on each side if they are satisfied with them, and any reasonable changes will be made if suggested, and other appropriate questions added if desired.

"In a few minutes judge and counsel have agreed in open court upon the questions to be put, and neither side may thereafter complain that the questions are insufficient in substance or form, or are inadequate in scope. They are put to the jury, the answers are taken, and judgment is rendered on the answers with or without argument."

The model Code of Criminal Procedure, representing the best thought of the profession, provides that in criminal cases the jurors may render either a general or special verdict,
and defines a special verdict as one in which the facts are
found by the jurors and the conclusion of law therefrom is
left to the court. The verdict must be in writing but no par-
ticular form is necessary. ⁸⁴

V. CONCLUSION

While trial by jury may not be deserving of the great
eulogiums which have been passed upon it by many of the
world’s most distinguished judges, lawyers and statesmen,
it is undoubtedly one of the most useful institutions we have.
It has its faults and weaknesses, but the same is true of all
human institutions. Trial by jury is deserving of kindly treat-
ment at our hands. Every citizen who wishes for a continu-
uance of the blessings secured to us by our system of gov-
ernment should interest himself in improving our trial by
jury. Particularly does this obligation rest upon the Bench
and Bar of our land. The people have a right to look to them
for courageous leadership and wise guidance. They should
not suffer disappointment.

Trial by jury is too good not to be better.

Walter Burgwyn Jones.

Montgomery, Alabama.