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to those who perceive the nature and extent of the danger. It is peculiarly the province of lawyers to lead in this great movement which must be undertaken before it is too late.

From the beginning of the government to this day the lawyer has nobly responded to every appeal to his patriotism, to his ability and to his courage. The present appeal makes infinite call upon each of these qualities. I feel confident that as in the past with other great questions, this great national question will receive such attention and treatment at your hands that the nation will some day realize the debt it owes you for the great duty that you will perform.

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THE DEMOCRACY OF JUSTICE—THE JURY.*

By Delphin M. Delmas.

In endeavoring to estimate the present value and to predict the future fate of trial by jury, it is but natural to seek guidance and instruction from the experience of the past.

That experience teaches the familiar lesson that trial by jury, as it is the most ancient, has been the most enduring of all the political and judicial institutions which have flourished among the English speaking peoples. Coeval with the earliest dawn of organized society in Britain, its origin is lost in the mists of antiquity. Though in a crude and rudimentary form, it had existed for centuries when the Norman invader set foot upon English soil, and it survived the general wreck of the English laws and customs which followed in the wake of his conquering footsteps. The hand of time, beneath which all other institutions underwent alteration or decay, left is untouched. The march of ages, which swept away other great achievements of human polity, but served to confirm it. The wars and revolutions, which uprooted weaker growths, but

* By courtesy of Southwestern Law Review.

strengthened the hold which it had upon English earth, and endured its trunk to defy still mightier storms. In the long unfolding of centuries, it saw kingly houses, founded in the confident hope of perpetual succession, rise, flourish and vanish, leaving no trace behind; it saw the Tudor dynasty overthrow the Plantagenet, the Stuart succeed the Tudor, the Hanoverian supplant the Stuart; it saw the feudal system crumble into dust, and upon its ruins rise the structure of modern society; it saw the crown of spiritual supremacy pass from the head of the Pope of Rome to the head of the Monarch of England; it saw the scepter of empire and of rule, fallen from the nerveless grasp of the nobility, snatched up and gripped by the strong hand of the Commons in Parliament assembled; it saw the kingly office decline from the rank which gave it once a voice potential in the affairs of the state, to become an empty dignity, best fitted to grace a social function, or adorn a public show; it saw the material wealth of the realm transferred from the baronial halls of the landed aristocracy to the counting houses of merchants, money changers and bankers in Leadenhall and Lombard street; it saw the whole frame of legal procedure recast and remolded, antique forms grown hoary with age abandoned, the constitution and the name of courts consecrated by the lapse of centuries fundamentally altered, and the whole fabric of the judicial hierarchy rebuilt from turret to foundation stone—all this it saw, and, amid the universal wreck of things which seemed endowed with enduring life, it alone, defying time and change, stands in all the essentials of a popular tribunal, as it stood in the years when Edward the Confessor sat upon the throne of England.

As no other institution ever struck its roots so deep into the hearts of the English speaking races, so to none have they clung with equal tenacity. As long as the people continue to govern themselves, so long shall it endure among them. Its decay will mark the decadence, and its overthrow the end of popular liberty.

The great commentator upon the laws of England has described it as "the glory of the English law," as "the most transcendent privilege which any subject can enjoy," and as "the best preservative of English liberty." Speaking of it, the greatest of English advocates has said: "What is it that distinguishes the

government of England from the most despotic monarchy? What but the security which the subject enjoys in a trial and judgment by his equals?" A volume would be required to record the words which have been uttered in our own country by eminent men in its praise.

I therefore venture to reaffirm that trial by jury shall endure among us as long as the people continue to govern themselves. Its decay would mark the decadence, and its overthrow be the end of popular government. For I hold it true that, for the practice and the perpetuation of self-government, the right of the people to administer their own laws is no less indispensable than their right to make them.

The essential function of all governments of free men is to administer justice—in other words, to regulate the conduct of the community in accordance with the dictates of that instinctive sense of right and wrong which exists in the breast of every man. By the light of that sense each individual guides his footsteps through life and shapes his conduct toward his fellow men. By that same light too he is guided when called upon in a station of authority to regulate the conduct of others. Whenever on this earth a rule is promulgated for the government of human beings—whether by the master of a ship in mid-ocean or by an Indian Chief in his wigwam, and whether by an absolute monarch, or by the people themselves through accredited delegates—the rule is ever the expression of the lawgiver's sense of justice. And it is manifest that, in a representative government, the individual legislator has no other norm to determine his vote upon schemes of legislation than his own personal sense of justice. Equally manifest it is that, in such a government, the law is nothing more than the formal expression of the people's collective sense of justice, voiced through accredited representatives.

That, in a government in which the people's will is the supreme authority, the people have a right to make their own laws—to give formal expression to their own sense of justice—no one denies. To deny it would involve an obvious contradiction in terms. No less undeniable is it that, in such a government, the people have an equal right to enforce their own sense of justice in and through

the administration of those laws. Being the source of all authority and power, they may select their own methods of reaching this end. They may reach it directly and immediately, as in a pure democracy, or, as in a representative government, they may reach it through their authorized agents. In our country, the people's sense of justice is enforced by delegation—by judges and by juries.

There are not wanting those who claim that this double representation is unnecessary not only, but mischievous; that justice is best administered—inded, can be administered only—by men who have made of jurisprudence their special study; that such alone can adequately understand and properly expound the law; and that it is little less than folly to confide the rights of litigants into the hands of untrained and unlearned persons devoid of the special knowledge which should constitute an indispensable guide to a correct judgment. Such is the attitude of those who would see trial by jury abolished as—to borrow the language of one of their number—"a relic of barbarism."

Since the aim of all judicial proceedings is justice, the tacit assumption underlying this objection to trial by jury is, that better justice will be obtained through judges than through jurors. If this assumption is true, it silences, of course, all further discussion. The question is, Is it true?

Assuming for the present, that an exact and unbending enforcement of the law were the worthiest and most laudable end of a judicial tribunal, it would still remain to inquire whether that end would be certain of attainment through the instrumentality of judges. Were jurisprudence an exact science, were its rules fixed and unvarying, were its verities like the truths of mathematics, and like them capable of such demonstration as to compel universal assent, the claim that such a science could best be expounded by those who through special study had mastered its mysteries would be undeniable. But nothing is more certain than that jurisprudence is not such a science. To refute those who might claim otherwise, it suffices to refer to the history of our own courts for the last century. What do the recorded proceedings of these courts during that period proclaim? They proclaim that law is a science upon whose principles the most learned and conscientious

of jurists entertain the most conflicting views; that judges, sitting upon the same bench and dealing with the same question, are often as wide apart as the poles in the determination of what the law is; that upon the same subject different courts announce different doctrines; that the same tribunal may repudiate today a decision promulgated by it yesterday; and that the preponderance of opinion of what is accepted as a legal truth over what is repudiated as a legal heresy is often reached in the same court by the narrowest possible majority.

We need seek no further for an instance and an illustration of this assertion than the reports of the Supreme Court of the nation for the last quarter of a century. It is a historical fact, deserving of the most attentive consideration, that, during this period, upon occasions when issues of prime magnitude and overshadowing importance have come up for adjudication, the decision of the court has, by a species of perverse fatality, been, in nearly every instance, rendered by a bare majority of one. Nor have the divergencies which have characterized the conflicting opinions of members of that exalted tribunal been less fundamental than frequent. Did space permit or the occasion require, numberless dissents expressed in terms of vehement, if not indignant, protest against the views of the majority could readily be adduced. But these are familiar to every lawyer.

Let no man have the temerity to imagine that what I have said is intended to lessen the respect of the people for the judiciary, or to inspire them with distrust of their decisions. To point out their imperfections is but to say that they are human. Being human, the differences of opinion between different courts and between members of the same court are easily accounted for. It needs but to recall that men are but men, even though they be judges; that elevation to the bench is not an apotheosis, which endows the human soul with the attribute of a godlike infallibility; that the judicial ermine casts no blighting shade, beneath whose upas-like influence all human sentiments and passions wither and perish; that, like other men, judges, even in the discharge of their high office, may unconsciously experience the emotions of love or of hate, may be swayed by the promptings of ambition or warped by the

blight of prejudice; that, like those of other men, their hearts may soften with sympathy or be inflamed by resentment. Moreover, men reach the bench at a period of life, when the formative epoch has been passed, when their natures are set, their characters formed, their mental habitudes fixed, their moral principles settled. No material change is at that time reasonably to be expected. What the man then is, for better or for worse, he remains to the end. He brings with him upon the bench his own political opinions, his own views upon questions of governmental policies, his own attitude toward sociological problems, his own conception of the proper relations of the different classes of society and of their respective rights. He has and retains his own partisan affiliations, his own social duties, his own family ties, his own religious beliefs or unbeliefs.

Nor could these imperfections be obviated by recruiting the judiciary—were such a thing possible—only from among men of the most exalted character and most commanding intellect. These imperfections are inherent in and inseparable from human nature. They exist among the greatest as among the humblest. Had Daniel Webster and John C. Calhoun both sat upon the bench in Washington, in 1830, and the question had come up before them whether the Constitution is or is not a compact between sovereign states, would anyone have expected them to concur in a decision? Would anyone have imagined that the opinions which each had entertained for a lifetime, had solemnly defended on numberless occasions, had made the very basis of his public career, would now be abandoned? Would it have required great sagacity to predict where, on such a question, the great Nullifier from South Carolina and the great Defender from Massachusetts would take their stand?

When the decision of the House of Lords in the celebrated case of Allen v. Flood, which dealt with the relative rights of capital and labor, was rendered by a divided court, the leading English law journal editorially said that, in that contest, "politics took sides," and that "the decisions of English judges could be predicted from their political leanings." Has not the same thing taken place in our own country? When the Electoral Commission sat, in 1876, did any one doubt that the fourteen members

selected equally from each political party would in voting, divide upon all essential questions according to their political affiliations? Did any one doubt that the decision of the question, Who shall be the next President? depended wholly upon the question, To what party shall the fifteenth member belong? And did anyone doubt that, when fate had decreed that that member should be a Republican, Mr. Hayes, and not Mr. Tilden, was destined to be declared elected? And this even though the person who thus had the casting vote was a justice of the Supreme Court of the United States, venerable in years, honored for the exalted purity of his character, and universally admired for his learning as a jurist.

To contend, in view of what has been said, that jurisprudence is an exact science, or that it is certain that the administration of justice—assuming that to be the same thing as the exact and unbending enforcement of the law—will be unerringly attained if left exclusively to judges, would be a manifest delusion.

But, a still larger question remains to be answered. Is it true that an exact and unbending enforcement of the law is the most desirable function of human tribunals—in other words, the highest reach of human justice? And is it true that the loftiest conception which can be formed of a judge is that of one who, in the discharge of his office, looks to the law, and to the law only, as his sole guide, and to its unbending enforcement as his sole duty?

The most perfect conception of a magistrate is that of a just, not that of a learned, judge—of one who, knowing the law, also knows that it deals with imperfect, not perfect, beings, that it is made for men, not for angels, and that its administration must subserve the purposes, not of a divine, but of a human justice. No higher conception of the functions of magistracy has ever been formulated than that of the Roman lawgiver, who enjoined that, in all proceedings, regard should be had to justice and equity rather than to the strict mandate of the law—"*Placuit in omnibus rebus praecipuam esse justitiae equitatisque quam stricti juris rationem.*" No less profoundly human was the aphorism of Roman jurisprudence that the exaction of the fullest measure accorded by the law may constitute the height of injustice—to use the terse epigram of the latin text: *Summum jus summa injuria.* In the

imperfect condition of all human affairs, it not seldom becomes indispensable to subordinate the attainment of one desirable object to the attainment of another still more desirable—to expand or to restrict the mandate of the law, in order to compass justice.

That all preeminently great judges have pursued this course, and that their greatness is grounded upon the fact that they have followed it, their lives and their works abundantly attest. Upon what does the fame of Lord Mansfield rest, if not upon this, that his genius liberated justice from the shackles in which the unbending rules of the common law and the narrow conservatism of common law judges held it in thrall? Upon what, if not upon the fact that, under the sway of his mighty intellect, the artificial barriers which separated the administration of law from the administration of equity were swept away, and the principles of natural justice were made the groundwork of his decisions? Whence springs the debt of gratitude which the commerce of England owes to him, if not from the fact that his daring hand it was that brushed aside the cobwebs of antiquated forms and obsolete methods of procedure, born of a former age and adapted to an extinct civilization, which held it bound, and permitted the merchants of England to govern their business by the equitable rules which constitute the universal Law Merchant of the world?

And is not the same true of the great judges of our own country?

Chancellor Kent has left a well known letter descriptive of the methods which he followed in the discharge of his judicial duties. In this letter, it stands recorded that it was his custom first, to make himself accurately familiar with the facts of the case; that, when this task was accomplished, he had usually reached the judgment which his sense of justice prompted; and that he then consulted the book to search for the rules of law which supported his conclusion—and, of course, seldom failed to find them.

Of another great American, one who, next to Marshall—if, indeed, second even to him—was, by common consent, the greatest judge that ever sat upon the bench of the Supreme Court of the United States—of Samuel F. Miller, it was said, at the time of his

death, that "he was wont to wipe away the law, in order that justice might prevail."

One of the most eminent of judges, lawyers and law-writers, which this or any age has produced—one who still lives to enjoy in the ripeness of years, the fruits of a long and illustrious career—has left, as the recorded result of his long experience on the bench and at the bar, these memorable words:

"I always felt, in the exercise of the judicial office, irresistibly drawn to the intrinsic justice of the case, with the inclination, if possible the determination, to rest the judgment upon the very right of the matter. In the practice of the profession, I have always felt an abiding confidence that, if my case is morally right and just, it will succeed, whatever technical difficulties may appear to stand in the way, and the result usually justified the confidence."

In what does that vast stream of jurisprudence, technically called by the name of "equity," have its source, if not in the violence done by magistrates to positive law, in order to accomplish justice? To show this, one single illustration, out of a score that might readily be cited, must suffice.

It was the common law of England that the land given in pledge by way of mortgage, in case of non-payment at the time limited, was forever dead and gone from the mortgagor, and that the mortgagee's estate then became absolute. When an English Chancellor first allowed a debtor who had thus lost his property a space of time to get together the principal, interest and expenses, and upon payment of this, to regain his estate, where did he find a warrant for his decree? Not in the law; he was proceeding in violation of the law. Not in the agreement of the parties; he was acting in the teeth of their agreement. Not in the protection of vested rights; he was taking away from a man an estate legally his. Where then? Where, if not in the dictates of justice—of a justice, the attainment of which was, in his eyes, more desirable than the observance of the law? And where did he find this sense of justice whose behests he obeyed? Not in the law; the law was the other way. Not in the books; there was no precedent. Not in the statutes; Parliament had not spoken. Where, then, if not

in himself? Where, if not in that instinct which God has implanted in the breast of every man, and which, without the aid of code or statute or legal commentary, teaches him to distinguish right from wrong, to abhor the insolence of power, to succor the oppressed, and to protect the weak against the rapacity and the violence of the strong? Where, if not in the impulse, common to every right-minded man, to yield obedience to the exhortation, uttered on a not dissimilar occasion, by one of the characters of Shakespeare, and which irresistably moves him to

> "Wrest once the law to his authority;
> To do a great right, do a little wrong."

At the time the Chancellors of England thus began to disregard the undoubted law of the realm, in order to compass justice, the second period of the evolution which takes place in every system of jurisprudence had been reached. The first is that in which the body of magistrates, losing sight of their true mission place the administration of the law beyond the reach and comprehension of the community, by surrounding it with ceremonial which they alone understand. A rigorous insistence upon the strict observance of the rules of that science, which they arrogate unto themselves as their own exclusive province, becomes then the chief solicitude of the judicial body. Thus it was that, in the early days of Rome, the administration of the law grew to be the privilege of a chosen class, which, in order to exalt their dignity and to maintain their monopoly, insisted upon a literal compliance with the formularies prescribed by themselves for the institution and the maintenance of actions allowed for the enforcement of civil rights. The result was that the function of a judge was no longer the administering of justice but the enforcement of forms.

That the common law of England passed through the same process is too familiar to need comment.

The second period in the evolution of jurisprudence is that in which a reaction takes place against the jealous conservatism of the judicial body, and the demand is for justice—plain, ordinary every-day justice. That period was reached in Rome when the

praetors began to assume as the basis of their decisions the principles of the law of nature. It was reached in England when, in the days of Edward III, the Chancellor commenced to relieve suitors from the rigors and the inadequacy of the common law, in order to subserve the purposes of justice.

The advance thus commenced toward a better kind of justice than the mere rigid enforcement of the law has never since ceased. From that day to this, both in England and in our country, the current has been constantly setting toward the prevalence of the precepts rather of justice than of law. It was one of the greatest of chancery judges—Lord Redesdale, I believe—who said that the principles of equity are gradually but steadily being adopted by the courts of law and that the rule of chancery of today becomes tomorrow a common law doctrine. That conception is embodied in the statute enacted during the reign of Queen Victoria, directing that, in all decisions, preference shall be given to the equity rule over the common law rule.

Thus, bearing in mind that the decrees of chancery proceed "according to the principles of conscience, good faith, honesty and equity," it is not difficult to perceive the goal toward which the administration of justice nowadays is tending. That goal is the universal recognition of those great principles, which, being deduced from natural reason, are equally diffused over all mankind, and are not subject to alteration by any change of place or time.

And now, the final question remains, In the trial of juridical controversies, into whose hands shall the application of these fundamental principles be confided? Shall it be intrusted to judges, or to juries? Shall it be given to a body of men which represents but one class of the community, or to a body composed of all classes? Shall it be exercised by those whose studies, pursuits, associations and official dignity necessarily remove them from contact with the mass of mankind, or by those, who being brought in daily touch with their fellow men, know by personal experience their ideas of justice? Shall it be given to those who are the people's equals, or to those who assume to be their superiors?

For my own part, I have no hesitation in answering this question. Believing in self-government, I believe in the right of the people to make their own laws. Believing in the right of the people to make their own laws, I believe in their right to administer them. If they are not competent to do both, they are competent to do neither. As laws are the formal expression of the people's sense of justice applicable to future possible conduct, so verdicts are the expression of the people's sense of justice brought to bear upon past actual conduct. In one case, the popular will is voiced by accredited spokesmen called legislators; in the other it is voiced by equally accredited spokesmen called jurors. In the one, the rule prescribed is an abstract expression of the people's will; in the other, it is a concrete application of that will The ultimate aim in both is justice—the people's justice.

I give my fullest assent, therefore, to the memorable words uttered by one of the great Chief Justices of England of the Victorian age, who summed up his judicial experience by saying:

"A jury trial gives expression to the sense of justice of the people, which is the nearest approach to absolute justice attainable in earthly tribunals."

May this institution, which, after having stood for ages as the bulwark of the liberties of Englishmen, was brought here as their birthright by the colonists who first landed upon the banks of the James and upon the shores of Massachusetts, which they cherished with such devotion that its violation by the king was enumerated by them as one of the grounds justifying rebellion, which, so soon as their independence had been achieved, they embodied in the Constitution as a fundamental right of American citizens, and which every American state has since incorporated into its organic law—may this venerable institution, which has come down to us unimpaired through the lapse of centuries, abide with us yet, and remain sacred and inviolate forevermore.