THE AMERICAN SYSTEM OF TRIAL BY JURY: AN ADDRESS

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The American System of Trial by Jury: An Address by D. H. Chamberlain

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Trial by Jury

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AN ADDRESS

DELIVERED BY

D. H. CHAMBERLAIN,

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THE AMERICAN SYSTEM

OF

TRIAL BY JURY.

English law — meaning by this term, the law which in general prevails in English-speaking countries and nations,— is to a degree unparalleled in other systems, ancient or modern, an historical growth. If we direct our attention to any important feature or principle of this law, we find that such feature or principle not only comes down from a remote period in the past, but that its present form and function is largely the result of the events, customs, usages and general historical influences which have marked its history and illustrated its progress. There is no important branch of our present jurisprudence which does not at once demonstrate this fact. The English law of Real Property, including all its leading topics — the nature and kinds of Estates, the modes of Conveyance, the law of Title, Descent, Devise, and Inheritance,— the law of Mortgages, the vast range of rights of Persons and of Things, as they exist and affect us today, are deeply intertwined with the whole development of English society. Indeed, if I were to select the characteristic of English law and jurisprudence which seems most strongly to differentiate it from other legal systems now or heretofore prevalent, I should point to its strictly historical continuity and development — its slow evolution from historic germs and forces — its genuine correspondence and harmony with the changing or advancing demands of successive periods and times.

I think it may be said that the most valuable and distinctive contribution which the present age or generation has made to the sum of human knowledge — to civilization, in a broad sense — is the method or habit of investigating and explaining phenomena of nature and life by the light of their historical origin and develop ment. I look, therefore, upon such men as Sir Henry Maine and Charles Darwin as the discoverers, in a genuine sense, of new

worlds — vast, illimitable domains of knowledge and wisdom. From such studies, led by such guides, we have spelled out what seems to be a law of all natural existence, more sweeping in its stretch, deeper in its reach, higher and more fruitful in its results and prophecies, than any known to former generations. That law is no other than the cosmic law of development — evolution — a law which contradicts no sound learning of the past, destroys nothing valuable in old opinions and faiths, but makes rounded what before was fragmentary, explains what before was inexplicable, and discloses new lines and sure prophecies of advance not before dreamed of.

No field of human history, it seems to me, is shown to have been more completely under the reign of this law than the field of English law. We have been truly told by the highest authority[1], that "the earliest notion of law is not the enunciation of a principle, but a judgment in a particular case." By a process as logical as natural, we pass by a series of judgments in similar cases, to rules and principles of general application — reaching in this way the idea and fact of *the Law*. English law is in this respect scarcely peculiar, for this rubric of growth has prevailed historically, in a large sense, in all important systems of law. English law, however, has had three chief sources, or to state it more exactly, it has in its development assumed three leading forms, moved along three main lines — unwritten law, written law, and statute law. I do not think it correct to ascribe our law chiefly to the process and source which we usually call the common law. Our common law, in the order of time, preceded for the most part the other forms and sources of our law. As the barons at Runnymede are said to have marked their assent to Magna Charta with their sword-hilts, because they could not write, so our earliest law by obvious necessity was unwritten. But our Equity law, which is mainly written law, grew by the same methods and from the same sources,— the wants of society and the gradual accumulation of particular decisions. Both systems or branches were equally marked, in the earlier stages, by a natural, silent, almost unnoticed growth — growth, too, at the hands of courts and judges, not of parliaments, legislatures, or law-givers. Statute law, or law proceeding directly from legislative authority, which is *ex vi termini* written

[1] Austin, Jurispr. 2, 83.

law, has likewise from early days moved step by step with the other forms of our law. The great statutes of Henry II., of Edward I., of Henry VII., of Henry VIII., of Elizabeth, and of Charles II., are not only great landmarks and historical sign-posts in the march of English law; they are the very sources —*fons et origo* —of a great part of our settled law and jurisprudence. Lord Bacon has said, as pithily as truly, that each feature of our law can be traced to its source, as surely as each of the converging streams that make up a great river can be traced, by "the tastes and tinctures of the soil through which it has flowed." Our common law, equity law, statute law, — written and unwritten law — are, each alike, *growths* — marked and determined alike by the varying needs of successive periods or exigencies — indented, shaped, moulded, as we now see them, by the influences of a continuous, historical, natural evolution.

"Not Nature's self more freely speaks in crystal or in oak,"—

than she has spoken and now speaks in the Law which in general characterizes the English race; and because it is a *growth*, and not a fabric, because it is, like the manners and culture of the race, the slow result of development from within, spontaneous and self-selected, not imposed or contrived by an authority or influence from without, our English system of law stands today before the world, in the almost unanimous judgment of the competent, as the most adequate embodiment and expression of the sense, as well of the method, of Civil Justice; that "Justice" which Sir James Mackintosh has told us,[1] "is, after all, the permanent interest of all men, the only security of all Commonwealths;" and of which Cicero said,[2] *Hoc verissimum est, sine summa justitia rempublicam geri nullo modo posse.*

I have been led to this rapid summation of the characteristic sources and methods of English law, on this occasion, because I am set to examine one important feature of its legal policy, one signal method of its legal administration, one remarkable instrument of the enforcement of its civil justice; and in the discharge of this duty, it is my purpose to examine our System of Trial by Jury, not as a theory nor an ideal, but as a fact, — to inquire not so much how it harmonizes with *a priori* conceptions or scientifi-

[1] Misc. Essays, 43.
[2] De Repub. lib. II.

cally-devised models, but rather what in fact it is, what it accomplishes, how it suits, has suited and seems likely to suit, the wants, sentiments, prejudices, habits; in a word, the *genius* of the English race.

In making such an examination of any notable institution of our legal system, nothing is more necessary than an ever-present consciousness of the fact to which reference has now been made—that our law and our legal institutions, almost without exception, come to us hoary with age, the slow moderated growths and accretions of many generations, and of several centuries; that if we can boast of freedom and enlightenment beyond other nations, they are ours, because ours is

> "A land of settled government,
> A land of old and just renown,
> Where freedom broadens slowly down,
> *From precedent to precedent.*"

In his profound and brilliant chapter on the "Modern History of the Laws of Nature," Sir Henry Maine has said:—[1]

"There are two special dangers to which law, and society, which is held together by law, appear to be liable in their infancy. One of them is that the law may be developed too rapidly. This occurred with the Codes of the more progressive Greek communities, which disembarrassed themselves with astonishing facility from cumbrous forms of procedure and needless terms of art, and soon ceased to attach any superstitious value to rigid rules and prescriptions. It was not for the ultimate advantage of mankind that they did so, though the immediate benefit conferred on their citizens may have been considerable. One of the rarest qualities of national character is the capacity of applying and working out the law, as such, at the cost of constant miscarriages of justice, without at the same time losing the hope or the wish that law may be conformed to a higher ideal."

Referring, for illustration, to the mobility of the Greek mind and the fickleness of the Greek judicial sense, he continues:

"No durable system of jurisprudence could be produced in this way. A community which never hesitated to relax rules of written law whenever they stood in the way of an ideally perfect decision on the facts of a particular case, would only, if it bequeathed

[1] Anc. Law, 72.

any body of judicial principles to posterity, bequeath one consisting of the ideas of right and wrong which happened to be prevalent at the time. Such jurisprudence would contain no framework to which the more advanced conceptions of subsequent ages could be fitted. It would amount at best to a philosophy, marked with the imperfections of the civilization under which it grew up."[1]

English jurisprudence consists preëminently of judicial materials and "framework" to which the more advanced conceptions of successive periods and generations have continually been fitting and adjusting themselves without break in the continuity of historical life; for, says Palgrave,[2] "by far the greatest portion of the written or statute laws of England consists of the declaration, the re-assertion, the repetition, or the re-enactment, of some older law or laws, whether customary or written, with additions or modifications. The new building has been raised on the old groundwork; the institutions of one age have always been modeled and formed from those of the preceding, and their lineal descent has never been interrupted or disturbed."

No more conspicuous example of this characteristic can be pointed out than the institution of Trial by Jury.

Its precise origin in our history is an inquiry more difficult than important, but its interest has been sufficient to attract the labors of learned investigators whose conclusions are far from uniform or harmonious; but it is clear, at least, that it did not owe its origin to any positive law; it was not the creature of any royal edict nor of any Act of Parliament. Its forms, as well as its functions, arose from usages and customs which took their place silently and gradually in the life of the people. Its purely English origin has been till recently stoutly asserted by many, Blackstone calling it "a trial that hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof." "Many writers of authority," says Canon Stubbs,[3] "have maintained that the entire jury system is indigenous in England, some deriving it from Celtic traditions based on the principles of Roman law, and adopted by the Anglo-Saxons and Normans from the people they had conquered. . . . Those who ascribe it to Norman sources do not agree as to the source

[1] P. 73.
[2] Eng. Commonw. 1, 6.
[3] Const. Hist. of Eng. I, 612.