

The court fined him \$10, and put on him all the costs of the mandamus proceedings, some \$200, but did not imprison him, on the ground that being out of office he could not perform its duties, to enforce performance of which imprisonment was the proper remedy.

C. C.

THE FREEHOLD QUALIFICATION OF JURORS.

I.

THE trial by jury has been as loudly denounced on the one hand as its praises have been sounded on the other, and many and varied have been the schemes proposed for its improvement, amendment or entire abolition.

But it is probable that a majority of the legal profession in America and in England would decide from experience, that in spite of its faults the system should be "preserved inviolate and without change from ancient usage" even in civil cases; for the common sense and judgment of twelve intelligent laymen is better generally in the determination of matters of fact than the overworked brain of one judge, skilled though he may be in legal science, yet necessarily hampered and harassed in making up his judgment on a question of fact by conflicting principles of law seeming to apply with equal pertinency to the issue.

The great cause of dissatisfaction with the trial by jury is plainly to be found, not in that admirable system of trial itself, but in the *material* from which juries are (in our large cities at least) too often made up.

Mr. Proffatt, in his valuable work on Jury Trial, presents this idea with truthful force in these words: "The efficiency and safeguards of the body (*i. e.* the jury) as a part of the administration of justice, very materially depend upon a proper and careful selection of jurors; and the greatest abuses of the system, and the complaints made against it, are based not so much on the nature and functions of the body as upon *the character of the class sometimes composing it*:" Proffatt on Jury Trial, sect. 114.

The same idea is well emphasized in the first Constitution of New Hampshire, adopted A. D. 1784 (art. 1, sect. 21): "In order to reap the fullest advantage of the inestimable privilege of the trial by jury, great care ought to be taken that none but *qualified persons* should be appointed to serve, and such ought to be fully compensated for their travel, time and attendance."

It is believed by the writer that if the ancient and fundamental qualification of the common law requiring all jurors to be FREEHOLDERS should be enforced and upheld, it would tend to a better administration of justice and a renewed satisfaction with this system of trial in the legal profession and among the people.

The doctrine that jurors must be freeholders is found in, and running through, the common law of England from the very earliest times, and has in that country been aided by a series of statutes on the subject from the time of Henry V. down to that of George II. It was a doctrine sacredly maintained likewise in the Bill of Rights of 1688, under which William and Mary ascended the English throne. It was a doctrine brought by our ancestors to the American Colonies, where it uniformly prevailed, and when the Declaration of Independence of 1776 "was submitted to a candid world" by the thirteen original states, charging that the "king of Great Britain had given his assent to acts of pretended legislation (among others) for depriving us, in many cases, of the benefits of trial by jury, the freehold qualification was a distinguished feature of that system, then justly held in such esteem by the American people.

It was the early law of Virginia (whence were derived the early laws of many states), and the doctrine prevailed in that commonwealth when "the county of Illinois," which included the north-west territory, was formed subject to the jurisdiction and sovereignty of Virginia.

It was the law of the North-West Territory, whose inhabitants were guaranteed for ever "the benefits of the trial by jury, and of judicial proceedings according to the course of the common law:" Ordinance of 1787.

It was the law of the "territory of Illinois," from its foundation in 1809 down to the time of its admission into the Union as a state, and likewise the law of many other territories at the time of their admission as states into the Union.

It was the law of most of the territories at the time of the adoption of nearly all our different state constitutions, which declare that "the right of trial by jury shall remain inviolate," and this has been generally construed as meaning a preservation of that mode of trial, as it was understood to exist at the time of the adoption of the constitution: *Ross v. Irving*, 14 Ill. 171; Proffatt on Jury Trial, sect. 84 and cases cited; *Norval v. Rice*, 2 Wis. 22.

On all hands, it is admitted that this ought to be the law, for it is a rule tending to the elevation and preservation of trial by jury, and one which for ever eliminates the "professional juror" from the system, as well as that class of persons, who, having no stake in the community, are most easily liable to be bribed or suborned.

II. JURORS FREEHOLDERS BY THE COMMON LAW.

To ascertain the common law on this subject, it is necessary to examine the year books and earlier reports, mostly prior to the reign of Henry V., for in the second year of that reign the first general statute was passed, regulating the qualifications of jurors, and the *quantum*, or extent, of freehold qualification necessary.

In the very earliest history of trial by jury, it appears that juries were composed of freeholders; an instance of this is found in the ancient treaty between Alfred the Great and Guthram, where the practice on trial by compurgators is brought out (the trial by jury of that period), and where it appears that the accused, together with eleven freeholders, was required to make oath of not guilty: Anglo Saxon Laws, p. 155; Proffat on Jury Trial, sect. 12.

In speaking of the court of the hundred, in the time of Alfred, Hume says (History of England, vol. 1, chap. 2, p. 72, ed. 1854): "Their method of decision deserves to be noted as being the origin of juries, an institution admirable in itself, &c. Twelve freeholders were chosen, who, having sworn, together with the hundredreder, or presiding magistrate of that division, to administer impartial justice, proceeded to the examination of that cause, which was submitted to their jurisdiction."

"The next superior court to that of the hundred was the county court, * * * and consisted of the freeholders of the county, who possessed an equal vote in the decision of causes."

The body of laws framed and compiled by Alfred (though afterwards lost), served so long as the basis of English jurisprudence, that it is well deemed the origin and base of the common law.

In the Year Book of 3 Hen. IV., p. 4, is the following report: That a juror was challenged because he did not have sufficiency of freehold, and then at the prayer of the triers, he was sworn to say what his freehold was worth per annum, and he said five shillings, and then the triers were charged [to answer] if he spoke truly, which then was sufficient, and he [the juror] was sworn in chief thereupon.

Another juror was challenged by defendant because he was not of sufficient freehold, and Read asked that this challenge should be tried by those who were sworn, who were of the same county as the juror who was challenged, and not by those of a different county, because these could not have knowledge of his freehold; and yet the challenge was tried by those who were [already] sworn *quod nota*: Year Book 4 Hen. IV., p. 1.

One W. De K. brought a writ of Formedon * * * and in the Formedon aforesaid a juror was challenged for non-sufficiency of freehold, and the triers say that a certain one was seized of certain land for the term of his life, reversion to the wife of him challenged; and this one [the life tenant] leased his estate to the man and wife, they paying certain rent; and there was an entry for default of payment; and the challenge was allowed, per RICKHILL: Year Book, 7 Hen. IV., p. 1.

Yaxley showed that at the last term the defendant in trespass justified damage done, &c., where he had feoffees to his use, and the demurrer was sustained; and it seems that the plea is good, for notwithstanding his feoffment, yet the land is his own land, and he would be empanelled [as juror] the same as he who had the land in possession, as it was at the common law. If a juror had but a fraction of land he would be sworn, and then comes the statute of 2 Hen. V., c. 3, and advanced the common law, and commanded that a juror who should pass upon the death of a man, in an action real or action personal, where the damages amount to 40 marks, ought to expend 40s. per year, and they construe [it to] the tenant at sufferance by equity, for that is in the intention of the framers of the statute; it being the common law at this day in a personal action under 40 marks, that it is enough if he [the juror] can expend one penny: Keilwey's Reports of Cases, temp. Henry VII., p. 46.

One of the panel was challenged because he had nothing in the hundred, and upon that the triers pray that he upon that may be examined, and being done, he said that he had half an acre of land in the hundred, and the triers report that much, and then he was sworn, *quod nota*: Year Book 16 Edw. IV., p. 8.

In the case of *Filpott v. Fielder*, 2 Rolle 395, and Palmer 386, it was urged that the statutes regulating the qualifications of jurors only governed the law courts, and did not apply to that case, because it was (although a law case) tried in the court of

chancery; that the venire facias specifying at least 4*l.* as the *quantum* of freehold of the jurors summoned, was erroneous, and the plaintiff moved to arrest judgment on that ground.

As reported, 2 Rolle 395, the court held: That at common law venire facias was general that jurors should have sufficient freehold, but in special cases the judges, in their discretion, could add a caution to the venire that the sheriff should not return any but such as had lands of the value of 5*l.*, or more or less. Judgment accordingly.

In the same case as reported, Palmer 386, the conclusion reads: And they [*i. e.*, DODDRIDGE, C. J., and HOUGHTON and CHAMBERLAINE, JJ.,] agree that at common law the venire facias was general that jurors should have sufficient freehold without particular value. But the court, according to the exigency of the case and their discretion, could make a caution in the venire that the sheriff should not return any but jurors who had freehold of the value of 5*l.*, more or less, and the values were inserted in the writ by the statutes, 2 Henry V., 25 Henry VIII., and 27 Elizabeth, by which the plaintiff took judgment accordingly, and the same day another case was decided accordingly between Horwood and Sabyn.

In *Sir Christopher Blunt's Case*, 1 Cro. Eliz. 413, which was an information upon an intrusion, by the Queen against Sir C. Blunt, the report reads, thus: "A juror was challenged for non-sufficiency of freehold, and by examination of the juror it appeared that he had freehold of the value only of 15*s.* per annum, yet it was ruled by the court that he had sufficient to pass on that jury, for at the common law if a juror had any freehold, it was sufficient. But by the 2 Henry V., c. 3, he ought to have 40*s.* per annum, and by 27 Eliz., c. 6, he ought to have 4*l.* per annum, where the damages exceeded 40 marks. But the statutes speak only between party and party, which extends not to the Queen, wherefore the juror was sworn. But it was ruled that he ought to have some freehold, and, therefore, one who had not any freehold was there challenged and withdrawn."

The same case, as reported Gouldsbrough 136, reads: "A juror was challenged for want of freehold, and by examination was found that he had 20*s.* a year. FENNER and GAWDY [judges] doubted whether this be sufficient freehold or not; POPHAM and CLINCH [judges] held it is sufficient, for the statute binds not the Queen, and by the common law, if he had any freehold, it

was sufficient. FENNER: 'This is a statute made for the benefit of the Commonwealth, and, therefore, the Queen shall be bound by it, though she be not named in it.' But the juror was sworn by commandment of POPHAM, against the opinion of Justice FENNER."

In "De Laudibus Legum Angliæ," by Sir JOHN FORTESCUE, Lord Chief Justice and Lord Chancellor in the reign of Henry VI., a work which fills the same authoritative place in English law of the fifteenth century, which the Institutes of COKE and the Commentaries of BLACKSTONE occupy in subsequent periods, is found the common-law rule as to freehold qualifications of jurors: (chap. 25, Gregor's translated ed. 1874, p. 88.) "Every one of the jury shall have lands or revenues [*redditus*¹] for the term of his life, of the yearly value at least of 12 scutes (*i. e.* 40s.) This method is observed in all actions and causes criminal, real or personal, except where, in personal actions, the damages or thing in demand, shall not exceed 40 marks, English money, because, in such like actions of small value, it is not necessary nor required that the jurors should be able to expend so much; but they are required to have lands or revenues to a competent value, at the discretion of the justices, otherwise they shall not be accepted, lest by reason of their meanness and poverty they may be liable to be easily bribed or suborned."

There is clearly a reference here to the statute 2 Hen. V., c. 3, and to the common law which prevailed in cases not coming within the statute, *i. e.*, actions where the damages declared upon were less than 40 marks.

The statute 2 Hen. V., c. 3 (vol. 3, Statutes at Large of England, p. 34), is as follows: "The king, considering the great mischief and disinherisons which daily happen through all the realm of England, as well in case of the death of a man, as in cases of freehold, and in other cases, by them which pass in inquests in said cases, which be common jurors, and others that have but little to live upon but by such inquest, and which have nothing to lose because of their false oaths, and willing thereof to have correction and amendment, hath ordained and established, by assent of the lords and commons, that no person shall be admitted to pass in any inquest upon trial of the death of a man, nor in any inquest between party and party in plea real, nor in plea personal, where

¹ *Redditus*, *i. e.*, revenues arising out of lands.

the debt or the damage declared amount to 40 marks, if the same person have not lands or tenements of the yearly value of 40s. above all charges of the same."

The reason and policy of the law requiring that jurors be freeholders, cannot be clothed in better or stronger language than that of Fortescue, and the preamble to the statute 2 Hen. V.

In 1 Co. Lit. (Butler and Hargrave notes), sect. 234, pp. 156 *b*, and 157 *a*, in defining the various challenges to jurors, the law according to the statute 2 Hen. V., c. 3, is given with this addition: "But if the debt or damage amounteth not to fortie marks, any freehold sufficeth," thus clearly indicating that, in a case outside the statute, the common law prevails.

In 2 Co. Lit. sect. 462 (Butler and Hargrave notes), is given the original text of Littleton, in which the question is raised whether, when a man enfeoff other men of his land, upon trust to perform feoffor's last will, and feoffor occupieth the same land at will of feoffees, a release by feoffees to feoffor of all their interest is good or not.

"Some say," (says Littleton), "such release is good;" "Sect. 464, [Because] that if such land be worth fortie shillings a yeare, &c., then such feoffor shall be sworn in assize and other inquest in ples reals, and also in ples personals, of what great sum soever the plaintiff will declare. And this is by the common law of the land," &c.

In Coke's Commentary on this section of Littleton (2 Co. Lit. sect. 464, p. 272 *a*), he quotes the text of Fortescue "De Laudibus," concerning jurors, already noted, and says that the statute 2 Hen. V., c. 3, "was made to remedy a mischief that the sheriff used to return simple men of small or no understanding, and, therefore, the statute provided that hee should returne sufficient men."

In England the freehold qualification was regarded as an essential element of the right of trial by jury, and this is well illustrated in some of the trials for high treason before the revolution of 1688, when juries composed of non-freeholders were summoned, and the attempt was made to overrule this ancient challenge for cause, already grown sacred and inviolable in all courts of the realm, because it was urged that where the king was a party, and for other like sophistic reasons, the right to have a jury of freeholders did not exist; thus denying to unfortunate men,

whose existence was distasteful to the sovereign, a fair trial, and forcing them to hazard their lives in courts organized to convict, and before juries "who, by reason of their meanness and poverty, were easily liable to be bribed or suborned."

The arbitrary denial of the right of trial by juries of freeholders, in some of the trials for high treason, was one of the causes of the English revolution, just as, in after times, the denial of the right of trial by jury was one of the causes of the American revolution.

In the Bill of Rights of 1688, which was the charter under which William and Mary ascended the British throne (1 W. & M., 2d sess., cap. 2, v. 9, Statutes at Large of England), is found a solemn declaration of the grievances suffered by the people under the Stuarts. It is recited: "That King James did endeavor to subvert the laws and liberties of this kingdom. * * * Sect. 9. 'And whereas, of late years, partial, corrupt and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason, which were not freeholders, * * * all which are utterly and directly contrary to the known laws, statutes and freedom of this realm.' * * * Therefore, the parliament, 'for the vindication and asserting the ancient rights and liberties of the people declare,' * * * Sect. 11. That jurors ought to be duly empanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders."

In the age when the Commentaries of Blackstone were written, the doctrine that jurors should be freeholders had already been settled and crystallized in the statutes of England for centuries; hence we find in Blackstone (3 Bl. Com. 361), under the head of challenges to the polls for cause, simply a reference to the various statutes passed, from that of 2 Henry V., down to that of Geo. II. "But," says Blackstone, in reviewing the various causes of challenge *propter defectum*, "the principal deficiency is defect of estate sufficient to qualify him to be a juror," thus clearly indicating the importance attached to this element of the trial by jury in the common law.

In 3 Bl. Com. 357, where the distinction between special and common juries is pointed out, it is said that "special juries were originally introduced in trials at bar, where the causes were of too great nicety for the discussion of common freeholders," &c.

III. JURORS WERE FREEHOLDERS IN THE AMERICAN COLONIES BEFORE AND AT THE TIME OF THE REVOLUTION, NOTABLY IN VIRGINIA. JURORS WERE FREEHOLDERS IN INDIANA, ILLINOIS AND OTHER TERRITORIES.

The laws of Illinois, Kentucky, Indiana and other Western States, were originally founded upon, and derived from those of Virginia, and it is necessary in the history of the freehold qualification of jurors, to keep in view certain historical facts and dates which link the statutes quoted below into facts pertinent to this inquiry.

It is a notable fact, that at the time the people of Virginia and of the United Colonies, published their celebrated declarations against the King of England, among other things: "For depriving them, in many cases, of the trial by jury," the people of the far north-west were equally dissatisfied with the courts organized by the English military commander in the Illinois country, and "insisted," says the historian, "upon trials by jury:" Brown's Hist. Illinois.

Virginia, although bearing her portion of the burden of war against Great Britain, yet had energy and resources sufficient to send a little army of invasion, composed of her militia, to the Mississippi, in 1778, under Col. George Rogers Clarke, who soon held the country now known as Illinois, by conquest, in the name of the Commonwealth of Virginia; a country whose inhabitants took willingly the oath of allegiance to that state.

The North-west Territory was included in the Colonial Charter of Virginia, granted in the fourth year of James I., and Governor Patrick Henry, in his instructions to Col. Clarke, says: "If the inhabitants of Kaskaskia, and its neighborhood, give evidence of their attachment to Virginia (for it is certain they live within its limits), let them be treated as fellow citizens, and their persons and property duly secured:" Brown's Hist. Ills., p. 230.

The title of Virginia was the best to the North-west Territory for (1) it was included within her original patent from the British crown; (2) it was acquired by conquest of her own state militia; (3) Virginia was in actual possession of the country, and (4) in 1778 a county called the "Illinois county," was organized under her laws and jurisdiction. See Act forming "County of Illinois," 9 Hen. Stat. at Large, Virginia, p. 552.

In 1783 Virginia ceded the North-west Territory to the United States. In 1787 "The North-west Territory" was created, and

the ordinance of 1787 passed, which became a fundamental compact between the United States and the people in said territory, "for ever to remain unalterable, unless by common consent." In 1800 the territory of Indiana was formed, which included all of the present states of Illinois and Indiana. In 1809 Illinois proper was erected into a territory by itself.

There is the most intimate connection, therefore, between the early laws of Virginia and those of Illinois, and other states formed out of the North-west Territory, and in tracing the common-law doctrine back to the fountain-head, the laws of Virginia become necessarily a most pertinent subject of inquiry: *Penny v. Little*, 3 Scam. 301.

As an example of the importance attached to the freehold qualification in early colonial times, may be cited sect. 68 of the "Fundamental Constitution of Carolina" of 1669, said to have been framed by John Locke, which provides: "Sect. 68. In the Precinct Court, no man shall be a juryman under fifty acres of freehold. In the County Court or at Assizes, no man shall be a grand juryman under three hundred acres of freehold, and no man shall be a petty juryman under two hundred acres of freehold. In the Proprietor's Court, no man shall be a juryman under five hundred acres of freehold."

Among the early statutes of Virginia are the following: "An act concerning juries, in force June 10th 1751: Henning's Stat. at Large, Va., vol. 5, p. 525.

Sect. 3 provides for a grand jury of twenty-four freeholders.

Sect. 6 provides: "That no person shall be capable to be of a jury in any cause whatsoever depending in the general court, unless such person be a freeholder and possessed of a visible estate, real and personal, of the value of one hundred pounds current money at the least."

Sect. 59 of "an Act for establishing a general court in this commonwealth," passed in 1777, found in 9 Hen. Stat. at Large, Va., p. 416, provides "that when any person is removed [to the general court] to be tried for treason or felony, the clerk of the county from whence the prisoner is removed shall issue a venire to the sheriff of that county commanding him to summon twelve good and lawful men, being freeholders of the county, to come before the general court, which freeholders, or so many of them as shall appear not being challenged, together with so many other good and

lawful freeholders of the bystanders as will make up the number twelve, shall be a lawful jury for trial of such prisoner."

In the "Territorial Laws of Indiana," approved September 17th 1807, p. 144, is found an act regulating the practice in forcible entry and detainer, and providing that the sheriff shall "summon twelve good and lawful men of the same county, each of whom having freehold lands and tenements, and they shall be empanelled to inquire into the entry or forcible detainer complained of." The form of venire is thus prescribed: "You are commanded on behalf of the United States to cause to come before us upon the —— day of ——, at the ——, in said county, twelve good and lawful men of your county, each of whom being a freeholder, to be empanelled and sworn," &c.

In same "Territorial Laws of Indiana," chap. 70, p. 450, is an act regulating the duties of sheriffs, where the right of property taken in execution is called in question, where (sect. 6) it is declared to be the duty of the sheriff to empanel twelve freeholders as a jury to try the right of property.

In the laws of Illinois of 1819, p. 201, is found an act passed March 23d 1819, providing that the sheriff of each county where a circuit court is to be holden, shall, before the sitting of every such court, summon twenty-four discreet freeholders, part of them from each township in their respective counties, "and the said twenty-four freeholders, or any sixteen of them, shall be a grand jury." * * * "And if a sufficient number of freeholders do not attend, the sheriff shall summon from among the bystanding freeholders qualified according to law, a sufficient number to form, together with such of the first mentioned freeholders as do attend, a grand jury."

In the territorial laws of other states of the north-west may be found like provisions requiring jurors to be freeholders.

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(To be continued.)
