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THE FREEHOLD QUALIFICATION OF JURORS.

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IV. THE FREEHOLD QUALIFICATION IS PROTECTED BY THE CONSTITUTIONAL PROVISION IN THE DIFFERENT STATE CONSTITUTIONS WHICH PRESERVES INVIOLETE, AND WITHOUT ESSENTIAL CHANGE, THE TRIAL BY JURY.

THE Constitution of Virginia (Bill of Rights) of 1776, "made by the representatives of the good people of Virginia, assembled in full and free convention: which rights do pertain to them and their posterity, as the basis and foundation of government," provides (sect. 11): "In controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred."

The Constitution of 1777 of New York, sect. 41, provides: "Trial by jury in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate."

The New Jersey constitution of 1776, sect. 22, provides: "The inestimable right of trial by jury shall remain confirmed as a part of the law of this colony without repeal, for ever."

NORTH CAROLINA: Const. of 1776, art. 14, provides: "That in all controversies at law respecting property, *the ancient mode of trial by jury* is one of the best securities of the rights of the people and ought to remain sacred and inviolable."

KENTUCKY: Const. of 1792, art. 12, provides that "Trial by jury shall be as heretofore, and the right thereof remain inviolate."

MARYLAND: Const. of 1776, art. 3: "The inhabitants of Maryland are entitled to the common law of England and the trial by jury, according to the course of that law."

DELAWARE: Const. of 1792, art. 1, sect. 4: "Trial by jury shall be as heretofore."

GEORGIA: Const. of 1777, art. 61: "Trial by jury to remain inviolate for ever."

(See "United States Charters and Constitutions," compiled by Ben. Perley Poore.)

The ordinance of 1787, which became a fundamental law, to remain "forever unalterable, unless, by common consent," guarantees to the people of the North-west Territory "the benefits of the trial by jury, and * * * of judicial proceedings, according to the course of the common law:" (Ord. 1787, art. 2.)

The Constitution of Illinois of 1818 (art. 8, sec. 6), declares "That the right of the trial by jury shall remain inviolate."

In commenting upon this constitutional clause, and others like it, Proffat, in his work on "Trial by Jury," says (sect. 84): "No matter how expressed, whether 'shall be inviolate' or 'shall remain inviolate,' there is a reference to the mode and nature of the trial, as known and used at the time of the adoption of the constitutional provision, and in judicial construction there has been a remarkable unanimity in the interpretation of these clauses. Courts have held that it was not the intent of the people either to create, enlarge, or restrict the right, but to secure and establish it as it was previously known and practised in civil and criminal cases."

In the Illinois Constitution of 1818, there is an emphatic intention to retain, without change, trial by jury as it existed at the time of the adoption of the constitution. The words are clear and definite, for it is not any kind of trial that is preserved inviolate, but "the trial by jury," a particular kind and system of trial, without essential change: *Ross v. Irving*, 14 Ills. 171.

"Wherever," says Judge COOLEY, in his *Constitutional Limitations*, p. *319, "the right to this trial is guaranteed by the constitution, without qualification or restriction, it must be understood as retained in all those cases, which were triable by jury at the common law, and with all the common-law incidents to a jury trial, so

far, at least, as they can be regarded as tending to the protection of the accused."

It has been held in many cases that, under this constitutional clause of preservation, a jury of less than twelve men cannot be allowed, "and the necessity of a full panel could not be waived—at least in case of felony—even by consent:" (Cooley Const. Lim. *319, and cases cited.)

"Many of the incidents of a common-law trial by jury," says Judge COOLEY (Const. Lim. p. *319), "are essential elements of the right. The jury must be indifferent between the prisoner and the commonwealth; and to secure impartiality, challenges are allowed, &c. The jury must be summoned from the vicinage where the crime is supposed to have been committed, &c. The jury must unanimously concur in the verdict," &c.

There are many cases where this constitutional provision that "trial by jury shall remain inviolate," is enlarged upon; cases where it was sought by the legislature to materially change the common-law trial by jury, particularly in cases where the number of the jury was sought to be diminished below that of twelve.

In *Work v. State of Ohio*, 2 Ohio St. 296, the court say (on p. 306): "Our opinion is that the essential and distinguishing features of the trial by jury as known at the common law, and generally, if not universally, adopted in this country, were intended to be preserved, and its benefits secured to the accused in all criminal cases, by the constitutional provisions referred to. That it is beyond the power of the General Assembly to impair the right or materially change its character—that the number of jurors cannot be diminished," &c.

The court also say in same case, page 305: "If corruption or prejudice are to be feared and avoided, they are much more likely to influence the conduct of six men than of twelve."

It is urged here, that if corruption is to be feared, a jury of freeholders, men having some stake in the community, are less likely to be corrupted, because "they are selected," to use the words of an eminent judge, "from such as possess the evidence of a more permanent interest in the welfare of the community."

It has been urged too, that a jury of freeholders is inconvenient, and excludes good men who own no land; but to this it may be answered, that there is no country in the world where land is so divided among the people, and where there are so many freeholders,

as in the United States. America is the country, par excellence, of land owners.

But a better reply to this argument of convenience is found in Blackstone, who says: (4 Bl. Com. 350): "However convenient these may appear at first (as doubtless all arbitrary powers, well executed, are most convenient), yet let it be remembered that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern."

The freehold qualification was an essential feature of the *venire facias* at common law. The writ commanded the sheriff to summon twelve good and lawful men of the county having freehold lands and tenements, &c.

It was such an essential element in the make up of the common-law jury, that the old authorities are full of cases where this challenge for cause appears and is commented upon. It formed an essential element of the trial by jury, was regulated by a series of important statutes, and is called by Blackstone, under challenges, *propter defectum*, "the principal deficiency."

In *Norval v. Rice*, 2 Wis. 22, the court says (on p. 29): "We have already said that the meaning of the language used in our constitution must be gleaned from the common law, and this is because of the peculiarity of the language: 'The right of trial by jury shall remain inviolate,' [provision in constitution of Wisconsin], that is, it shall continue as it was at the time of the formation and adoption of the constitution by the people of this state. This right 'according to the course of common law' was guaranteed to the people of the north-west territory, by Art. 2, ordinance 1787. While under a territorial form of government, it was the right of the people of Wisconsin, secured to them in common with all others to whom the federal courts were open."

Owing to the exact nature of the statutory regulations of most states, the freehold qualification has never been commented upon in the light of any constitutional provision preserving the trial by jury inviolate, except by one case, that of *Byrd v. The State* (indictment for a felony), 1 How. (Miss.) 163.

Chief Justice SHARKEY, in delivering the opinion of the court (on p. 176), says: "The qualifications requisite for a juror, being the only point of difference, remains to be considered, and it is not a little surprising that a question of such magnitude should have been permitted to remain so long without adjudication. In the examination of the question under the particular structure of our government and laws, we must necessarily recur back to the principles of the common law as the great fountain from which we originally derived the trial by jury, and, indeed, from which the body of our municipal law is mainly drawn. The various statutory provisions in England prescribing the qualifications of jurors have existed so long, and with such a variety of modifications by succeeding enactments, that to rescue the common-law principle from the obscurity thus created, is a task not entirely free of difficulty.

"The learned commentators on the laws of England have not treated this subject with as much clearness as we could have wished, resting satisfied, doubtless, with the full enjoyment of the privilege as permanently secured, but I think they fully show that, according to the common law, in all courts of general jurisdiction, it was necessary that jurors should possess a freehold qualification, to what amount appears to have been a point unsettled, if any particular amount was necessary. * * * As the law stood at the time of the formation of the federal government, both the common and statute law of England required the possession of a freehold as necessary to qualify a juror, and the right of trial by jury, being of the highest importance to the citizen, and essential to liberty, was not left to the uncertain fate of legislation, but was secured by the constitution of this and all the other states as sacred and inviolable. The question naturally arises, how was it adopted by the constitution? That instrument is silent as to the number and qualifications of jurors; we must, therefore, call to our aid the common law for the purpose of ascertaining what was meant by the term 'jury.'

"It is a rule when a statute or the constitution contains terms used in the common law, without defining particularly what is meant, then the rules of the common law must be applied in the explanation.

"The framers of the constitution must have meant, therefore, to secure the right of trial by jury as it existed in England, either by the statute or common law, and the constitution, in the absence of

all subsequent legislation, would have secured to the citizen this mode of trial and all its incidents not incompatible with the republican form of our government. * * *

“Our statute nowhere defines the number necessary to constitute a jury; but the number twelve, known as the number at common law, is no doubt what is meant by the constitution and all the statutes when a jury is mentioned.

“If we have thus derived the number, and consider it secured by the constitution, is it not also a fair inference that the incidents, such as the mode of selecting and the qualifications of the individual jurors, should also follow as necessary to the perfect enjoyment of the privilege?”

“I think it does, and if the position be correct, any juror not possessing the qualifications required in that country from which our constitutional privilege was taken, and to the regulations and laws of which the constitution must be supposed to have referred, could have been successfully challenged, in the absence of a statutory regulation.”

From these authorities it is clear that all marked features and incidents of the ancient trial by jury are intended to be preserved inviolate, and beyond the power of legislative interference.

The freehold qualification is the most marked and emphasized incident attached by the common law to the persons of jurors, for it is constantly mentioned in the ancient statutes and writs prescribed for summoning and forming juries; it was the main element in the make up of the common-law jury, and no juries were ever selected in courts of record except from the body of freeholders in the county.

V. THE STATUTES, NOW IN FORCE, OF MANY STATES DO NOT ABOLISH THE FREEHOLD QUALIFICATION, BUT ON THE CONTRARY RETAIN IT.

The scope of this article forbids an examination of the statutes of the different states respecting qualifications of jurors. As illustrative of the effect and force of such statutes, the present statutes of Illinois may be taken as an example showing that such statutes do not necessarily take away the freehold qualification, although they may affirmatively announce the qualifications required of jurors.

Chap. 78, entitled “Jurors,” (Rev. Stat. of Ills. 1874,) provides

a scheme for the selection and summoning of jurors, but does not undertake, either expressly or by implication, to repeal the common-law qualifications of jurors.

Sect. 1. Provides that the county board of each county shall make a list of not less than one-tenth of the legal voters of each town or precinct, giving the place of residence of each name on the list.

Sec. 2. Provides that "such board shall select from such list a number of persons," one hundred for each term of the circuit and other courts of record, &c., &c., to serve as petit jurors, * * * "and in making such selection, shall choose a proportionate number from the residents of each town or precinct, and shall take the names of such only as are: 1st. Inhabitants of the town or precinct not exempt from serving on juries. 2d. Of the age of twenty-one years or upwards, and under sixty years old. 3d. In the possession of their natural faculties, and not infirm or decrepit. 4th. Free from all legal exceptions, of fair character, &c., and who understand the English language."

Sect. 4. Prescribes the persons, such as state officers, mail-carriers, practising physicians, constant ferrymen, &c., who are entirely exempt from serving on juries.

Sect. 14. Provides that "it shall be cause of challenge of a petit juror that he lacks any one of the qualifications mentioned in sect. 2 of this act."

Although sect. 1 of this act provides that a list shall be made up of not less than one-tenth of the legal voters, it does not by any means follow that any voter can be a juror, for sect. 2 further provides that the county board "shall make a selection from the list," and "shall take the names only of such as" possess the qualifications named in sect. 2.

At common law the sheriff selected, as far as was possible, persons duly qualified to act as jurors, and it is the policy of the statute in question to throw upon the county board the responsibility of making, at the very outset, "a selection" of persons qualified to act, to save expense and delay, and prevent the panel from being at once exhausted by challenges for cause at the bar; and sect. 14 imposes on the court the duty of discharging from the panel all persons who do not possess the qualifications required, as soon as the fact is discovered.

So too, the requirement that jurors be "inhabitants of the town

or precinct," is one corresponding with the common-law doctrine that the juror must be "commorant in the county," *i. e.*, ordinarily dwelling or residing there (3 Bl. Com. 364), and come from the vicinage. The exemptions on account of age or non-age, and on account of bodily infirmity, all correspond to like exemptions at common law: (3 Bl. Com. 364.)

The requirement that the juror be "free from all legal exceptions," refers necessarily and perforce to those exceptions or grounds of challenge which exist in trial by jury at common law, and we must turn to the common law to ascertain what they are.

They are classified by Coke, Blackstone and other commentators.

Challenges to the polls for cause are classified by Blackstone thus (3 Bl. Com. 361-2):

1. *Propter honoris respectum*. As if a lord of parliament be empannelled [of course, having no significance under our form of government, and "not being applicable to our condition.]

2. *Propter Defectum*. As if a juryman be an alien, slave or bondman. "But the principal deficiency is defect of estate sufficient to qualify him to be a juror."

3. *Propter Affectum*: for suspicion of bias or partiality; where the juror is of kin to either party; that he has been an arbitrator on either side, or has an interest in the cause, &c.

4. *Propter Delictum*: for conviction of a crime, &c.

All these challenges for cause are said by Blackstone to be different from what are termed exemptions, "whereby their service is excused, not excluded," such as physicians, officers, decrepit persons, &c., corresponding to sec. 4 of the Illinois statute exempting the like persons from jury service.

Chapter 28 of the Revised Statutes of Illinois provides that "the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of Parliament in aid thereof, prior to fourth year of James I." (with a few important exceptions), "and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority." This enactment may be found in the laws of other states also.

The doctrine of the common law sought to be sustained here is "applicable, and of a general nature." It is "applicable" to our condition as a people and in no sense an ancient relic of the law,

nor obsolete, for in the great state of New York, to-day, jurors are freeholders of the county, having real estate in their own right, or in that of their wives to the value of one hundred and fifty dollars: (3 N. Y. Rev. Stat., chap. 7, tit. 4).

In the state of Indiana, jurors are required to be freeholders and householders: (Rev. Stat. Ind. 1876, vol. 2, p. 31, Davis); *Bradford v. State*, 15 Ind. 354.

In Kentucky, no person can be a juror unless he be a "house-keeper:" Gen. Stat. Ky., 1873, p. 571.

In New Jersey they are to be those having a freehold in lands in the county for which they shall be returned. In Texas they are to be freeholders in the state and housekeepers in the county. Other states retain this qualification, either expressly or by implication.

In the case of *Musick v. The People*, 40 Ill. 268, the question arose as to challenging a grand juror for cause, and the court said: "Our statute has made no provision in regard to the time, manner or causes for which grand jurors may be challenged. In this respect the practice obtains as it was at the common law. We have, therefore, to look to that source for the rules governing such cases."

Where the present statutes of a state concerning jurors expressly refer by their language to the common-law grounds of exception and challenge, how can one common-law ground of exception be retained and another rejected?

If a juror were challenged to-day because he was of kin to either party, or because of bias or interest, or conviction of crime, these causes would not be found expressly enumerated in the statute perhaps, yet they are clearly included in the general cause "free from all legal exceptions," and would be allowed.

It seems indeed strange, then, that what Blackstone calls the "principal deficiency," one which is at the very foundation of trial by jury, and is found running all through the common law, should find no place in the laws of Illinois and of other states; laws which nowhere, either expressly or by implication, pretend to repeal it.

In speaking of trial by jury in criminal cases, Blackstone (4 Bl. Com. 350), says: "When, therefore, a prisoner on his arraignment hath pleaded 'not guilty,' and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto*, that is freeholders without just exception, and of the

visne, or neighborhood; which is interpreted to be of the county where the fact is committed."

This is but another high authority showing that the freehold qualification is a basic principle in the trial by jury; an essential element or incident inseparably connected with the very definition of the word "jury."

Blackstone further says (4 Bl. Com. 352), in speaking of challenges in criminal trials: "The particular jurors should be *omni exceptione majores*; not liable to objection either *propter honoris respectum*, *propter defectum*, *propter affectum* or *propter delictum*. Challenges upon any of the foregoing accounts are styled challenges for cause.

The expression "free from all legal exceptions," in the present statute of Illinois, is the equivalent of "*omni exceptione majores*," and includes all common-law challenges for cause, be they "*propter defectum*," "*propter affectum*," or "*propter delictum*."

In Wharton on Criminal Law, vol. 3, sect. 3381, it is said, that a new trial will be granted at common law, where it appears after verdict that some one of the jurors should not have been permitted to sit upon the trial on account of an entire legal incapacity; as where it is discovered that one of the jurors is not a freeholder: *State v. Babcock*, 1 Conn. 401.

This somewhat lengthy inquiry may be well concluded by quoting the language of an eminent member of the New York bar, the author of an able work on Jury Trial,¹ who says, in an unpublished paper written on this subject: "It was the memorable Declaration of Rights of the first Continental Congress held in October 1774, which first explicitly declared 'that the respective colonies were entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law.' Upon the formation of the several state constitutions after the colonies had become independent states, and at the time of their adoption, they contained the same declaration in substance; so that where a state has adopted as one of its fundamental doctrines 'that the inestimable privilege of its citizens of being tried by their peers of the vicinage according to the course of the common law of England be preserved,' and where such state has passed no act declaratory of a limit to that law, it must of necessity mean that the old common-law property

¹ Hugo Hirsh, Esq., author of "Hirsh on Juries."