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THE ANGLO-SAXON LAW SUIT.

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One of the most common mistakes to which a student of history is liable is to criticise past ages from the standpoint of the age in which he lives. This error we apply in our criticism of men and institutions. William the Conqueror is condemned for the harshness of his actions, Henry V for renewing the useless war with France, the critics forgetting the rough habits of the time in which the Conqueror lived, and the ideas of foreign war and its justification prevalent in the fourteenth and fifteenth centuries. In the same spirit we criticise the particular ideas prevalent in a prior civilization. We single out some custom, which we have abandoned, for condemnation, forgetting the conditions which made it possible. For instance, nothing is so easy for the modern economist as to criticise the mercantile system of the middle ages. It is true that, in modern conditions, to look upon the store of a large quantity of gold in the country as the chief object of mercantile legislation would be absurd; but in a state of civilization where credit, in its modern sense, was little used, where war, at least one-half of the time, was to be expected, and where victory depended as much upon the amount

of gold in the coffers of the army in the field as on the amount of amunition, or on the bravery of the men, a policy which gathered in the country large stores of gold, and which looked upon the favorable balance of trade as the *sine qua non* of national prosperity, was perhaps one eminently suited to the conditions of mediæval life—one dictated by a wiser and more profound knowledge of those conditions than exists among the critics of the present day. In the domain of law, it is no uncommon thing for some tyro to point the finger of ridicule at the strictness of ancient pleading and the apparent arbitrariness of technical rules; especially does he, as we have seen him, ridicule the compurgation and ordeal of his Saxon ancestors with their apparent total lack of appreciation of the rules of evidence, or ideas of equity.

In this paper, we simply wish to point out some of the conditions of Anglo-Saxon life, which rendered their conception of a suit at law infinitely more serviceable for the correct administration of justice than our own modern ideas would have been.

The main features of the Anglo-Saxon suit are probably familiar to all the readers of *THE AMERICAN LAW REGISTER AND REVIEW*. The plaintiff himself summoned the defendant to court. A court was not a court in the modern sense of that term. To us it is composed of one or more judges learned in the law. These judges are officers of the government. The judge or judges, sitting in a manner which the law directs, is the court. The court, to the Anglo-Saxon, was the general assembly of all the free men of the district; the larger the district the larger and more important the assembly. The County court was more important than the court of the Hundred. These assemblies had a presiding officer—a hundred's earldor or a shire's geref; but the presiding officer was not the court. The court was the whole body of attendant freeman. In this assembly the plaintiff made his claim. Suppose it was a suit for a debt, the plaintiff might say: "In the name of the living God, as I money demand, so have I lack of that which the defendant promised me when I mine to him sold." Then the defendant was called upon to answer.

He brought forth no facts to show the reason he was not indebted, just as the plaintiff had brought forth no facts to prove that he was indebted. His choice was simply to admit the debt or deny the debt, and if he denied it, to deny it in the words of the charge. Thus, the direct denial of such an assertion would be: "In the name of the living God, I owe not to the plaintiff scatt, shilling, or penny or penny's worth, but I have discharged to him all I owed him, so far as our verbal contracts were at first." Here was a direct assertion and a direct denial: a fact in issue, as we would call it; a fact, the truth of which was with us to be determined by a judicial investigation of the evidence. Not so with the Anglo-Saxon court.

There was a direct assertion and a direct denial, and the Saxon said: As both offer to prove their assertion, we will only allow one to do so. If he succeeds in proving his assertion, then the matter will end; if he does not succeed, then the judgment will go against him. Therefore, the judgment followed instantly on the direct assertion and the direct denial. The defendant in such a case would have the privileges of the proof. That is to say, he would be permitted to prove his denial, and if successful, that proof would clear him from the suit.

There might be circumstances in which the plaintiff would have the proof. For instance, supposing A claimed that he had lost his horse as the result of a theft, and that the horse was now in B's possession. He charged B with having taken it. B might be innocent of the theft. We may suppose that he might have bought the horse from C, who had stolen it from A. In such a case, if he denied the theft, and claimed that the horse was his from birth, of course, the direct denial gave to the defendant the proof; but if he failed to prove his assertion he would then be liable as a thief. Not caring to run this risk, he might claim that he had bought the horse from C, believing it to be C's of right. In such a case, the defendant was allowed to clear himself by the ordinary proof from the charge of theft, and the plaintiff had the proof so far as the ownership of the horse and the original theft was concerned.

The proof itself was not evidence adduced before the court, of the sufficiency of which evidence the court judged in each case. But for all cases there was a definite rule as to the amount of proof and kind of proof necessary to establish an assertion. This proof never consisted, as in a modern suit, of a fact tending to show the existence or non-existence of the fact in issue. This is made clear when we perceive the three kinds or classes of proofs allowed. The first was that of oath with witnesses; that is to say, if the defendant procured a certain number of persons, differing according to the respective social status of the parties to the suit, to swear that they believed him to be telling the truth, that was sufficient to satisfy the requirements of the proof. Or, he who had the proof might procure a certain number of transaction witnesses, or witnesses who would swear that they had been present at the sale in the case which we have before described, and had seen, with their own eyes, the money actually paid by B to A. The second method of proof was that of ordeal, in which the defendant appealed to the Deity to prove that his assertion was correct. This solemn appeal was made in certain prescribed forms. For instance, the ordeal of cold water, practically used, like all other ordeals, exclusively in criminal cases, was one in which the accused, who had appealed to the ordeal, was thrown into a pond or stream of water, where, if he sank, he was innocent, and if he floated, it was considered conclusive that he was guilty. Besides the ordeal of cold water we have those of hot water, and morsel. The third method of proof was that by document. This was used principally in suits concerning land, and probably only after the introduction of Christianity. It consisted in the production by the party who had the proof of a written document establishing his assertion.

There arise, in the modern mind, many practical objections to such an administration of justice as is here described. In the first place, the very claim on the part of a plaintiff, without any proof advanced by him to substantiate that claim, will put the defendant in the position of submitting to the plaintiff's claim, unless he can prove his denial by one of three arbitrary methods. Again, there is no investigation of the facts. A

man who has a perfectly valid claim may lose it because an unscrupulous adversary has denied it under oath, and has hired, or in some manner procured, the requisite number of persons to swear that they believed him.

These objections are perfectly valid, but we can imagine that the Anglo-Saxon, if he were here to-day, could urge two valid reasons why the conclusion which we are at first tempted to draw, does not follow. It would not have been better for him to instantly substitute the modern conceptions of a suit with its fact in issue and investigation by a jury under the direction of the court of that fact. In order to investigate and weigh evidence, two things are requisite—time and the machinery suited for such an investigation. Now, there is no doubt that the court of the Anglo-Saxons had not time to investigate and weigh the facts of every case which was brought before them. They were called together in the open air. They came from all parts of the shire or hundred, and all were more or less anxious to return to their various occupations. Even had they the time, any attempt to decide each case on its merits would have resulted in the worst of all judicial tribunals—a tribunal in which the basis of decision was the whim of the populace.

The Dikasts of Greece are a notorious example of popular tribunals undertaking the decision of judicial questions. Practically no system of law grew up in Greece because of this attempt of a comparatively primitive people to investigate the facts of each case—*i. e.*, to decide the dispute by popular vote. But why, it may be asked, did they not institute a regular court with a single judge; why not leave the question of fact to be investigated by the sheriff, or referred to a single man for arbitration, or a body of men, like the jury? Decisions of a court, so called, are useless unless they are respected, and the complete answer to this objection is that the Anglo-Saxon would not have abided by the decision of such a tribunal. To have the decision of a court or arbitrator conclusive on the parties, the judge must wield arbitrary power, or be a person in whom the litigants have entire confidence. Arbitrary power, whether of king or judge, such as we know

it in the East, was entirely foreign to the whole trend of Anglo-Saxon civilization, and the referring of disputes to arbitrators, in whom both sides had respect, could not have been a permanent method for administering justice. It is to the credit, we believe, of our Anglo-Saxon ancestors, that, in spite of the knowledge of their most learned men of more advanced judicial systems, which knowledge we can almost presume from the learning of their clergy, they refused to attempt to perform the impossible. A judicial absolutism was out of the question. The tribunal whose decisions would be obeyed in the majority of instances, thereby ending personal strife between the litigants, was incompetent from its very composition to weigh evidence, and it did not attempt to do so. Time and temper would have alike rendered it futile to introduce evidence on either side. What is the use of going into the existence or non-existence of a fact in issue if the evidence cannot be properly weighed? Again, just as the tribunal would have been unable to decide between conflicting evidence, so likewise it was incompetent to say, in any particular case, whether the amount of evidence produced on one side was sufficient to show that he who had the proof had proved his case. Here again, we find that they did not attempt to do the impossible. They prescribed general rules as to the quantum of testimony sufficient to substantiate an assertion. Once this quantum had been obtained, he who had the proof won the case. It was, therefore, a system in which the result did not in any way depend upon the judgment of the court, or on the judgment of any part of the court. No one was called upon to weigh evidence. We believe that if we were translated back to that time, an investigation would show that in the long run that system of judicial administration was best which accomplished this very result, viz.: the absence of all necessity for the courts to determine disputed questions.

But further our Anglo-Saxon, replying to his modern critics, might say that the methods of proof which he devised were peculiarly well calculated, so far as arbitrary rules can ever be calculated, to ascertain the party in whom the right lay.

Their lives were open and simple. Their important transactions of business, such as the buying and selling of cattle, were by law required to be before witnesses, often in the hundred court itself, or before the court of the manor. A person, therefore, who claimed a right of another, and got eleven men, or the number which the necessity of the case required, to swear that they believed him, was probably making a just claim; for the fact in controversy was much more likely to be known to all the people of the neighborhood than a similar fact in the private life of a modern individual. The very method of ordeal, which seems to us the crudest and most primitive part of the whole procedure, had its origin in an advance of humane instincts on the part of the people. When a man who was friendless, who had no family to be his oath-helpers, and who had been cast out by his own village, was accused of crime and denied it, the giving of the proof to him would, perhaps, have been useless, if he was required to bring many witnesses to swear in their belief in his honesty. And so, the Saxon in this quandary, gave him another chance. They allowed him, in solemn form, to appeal to supernatural authority; at first, perhaps, to the heathen gods, and, after the introduction of Christianity, to God himself. It is true that this appeal determined nothing as to the justness or unjustness of the charge, but it was just as efficacious as any attempted investigation of the facts would have been. Besides, it was used only as a last resort and expedient, and was distrusted by the Saxons themselves, as is shown by the fact that the more the guilt of the accused appeared on the face of the accusation, the harder the ordeal became. In the ordeal of hot water, for instance, instead of plunging his hand in up to his wrist, he might be required to plunge it up to his elbow; and even did he escape the ordeal, had his accusation been made in early Norman times by the twelve men of his neighborhood, he was obliged to leave the country.

It may be replied to the arguments here advanced that the large number of cases we have from the *Codex Diplomaticus*, which were settled by agreement between the parties, and not by regular legal procedure, shows that that procedure was

unsatisfactory even to the people of that time. The celebrated expression in the case of Wynflaed and Leofwine is used to prove this. It is as follows: "Then would have followed the whole full oath of both men and women; but the Witan who were there said it would be better to omit the oath rather than give it, because after the oath there could be no amicable arrangement:" *Essays on Anglo-Saxon Law*, p. 356; *Cod. Dip.*, DCXCIII.

The large number of suits, however, settled, and this suit in particular, do not show, it seems to us, that the methods of Anglo-Saxon legal procedure were unsatisfactory to the people, but that in many instances, if carried to their legitimate conclusion, the state would not have accomplished its primary object in interfering between the disputes of private individuals. That primary object is not the administration of justice, the determination of the right between man and man, but the final settlement of a controversy which would otherwise be continued indefinitely by personal altercation and violence. When the assembly, perceiving, as it must often have perceived, that the judgment of the court in strict legal form would not have pacified the disputants and ended the quarrel, then the friends of both parties stepped in and effected a compromise. In doing this, they did not attempt to reach an equitable conclusion, as would have been the case to-day, but a conclusion which both parties would abide by; or, perhaps, that which was more likely to occur—a conclusion which the stronger party would submit to, when such party would not have abided by a decision entirely against him.

Finally, one word as to the technicality of the procedure; that if the defendant, in denying the claim of the plaintiff, stumbled or hesitated, or did not deny in the strict formula prescribed by law, he lost his case. This strictness, which seems to us at first only the dictate of imaginary and useless consistency, was, we believe, in fact necessary to obtain any regular administration of justice at all among not only the Saxon, but any primitive people. If any latitude had been allowed to the defendant in denying, or the plaintiff in stating his claim, a slight variation might have brought forth a ques-

tion as to whether the denial was a denial or not. Now, questions of this kind the Saxon tribunal, as the primitive tribunal of all peoples, was wholly incompetent to decide. The strictness and technicality of the rules were necessary in order to avoid the possibility of all such nice questions as whether a fact in issue had been raised.

We have said these few words in answer to a common criticism of the institutions of a past age. Its value, perhaps, is slight, except the ethical one, that we should not misjudge those who have gone before us. For, if we are careful to judge from the standpoint of past conditions, past ideas and institutions, our descendants, following our good example, will be more lenient than they otherwise would be with respect to some of our own ideas and actions.