

University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Quarterly, November to June, by the University of Pennsylvania Law School, at
34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 70

NOVEMBER, 1921.

NUMBER I

THE HISTORIC ORIGIN OF TRIAL BY JURY.*

This is not an attempt to trace minutely the origin of trial by jury, for it would take a volume to compass that, nor is it an effort to decide between conflicting views of writers on the subject; it is merely a glance back along the past, showing in a comparatively brief way what recognized historians and writers on the law have to say concerning the early customs of other countries, which most likely had their influence in helping to form the jury system as it gradually developed in England, and a review, with more detail, of its growth in that great country which passed the perfected institution on to us.

Trial by jury, as we now know it, contains many features which would no doubt have been unnecessary and burdensome in a primitive state of society, when the family or clan was the social and political unit, and laws were few and readily understood. On the other hand, the ancient modes of trial would be totally inadequate for the complex society of today. In searching for

*This article, on the historical aspects of trial by jury, is taken from notes prepared by the author for use in connection with what were intended to be the first three lectures of a course delivered by him before the Law School of the University of Pennsylvania during the Spring Term of 1921. On reflection, it seemed that the publication of the text of these three particular lectures would serve a more useful purpose; so, when the Editor-in-Chief of the UNIVERSITY OF PENNSYLVANIA LAW REVIEW asked leave to print, the manuscript was handed to him. The same matter will be used by the author as introductory chapters to a book on trial by jury, which he is about to publish.

origins, we must therefore not expect to find in any one country an exact counterpart of our present system. It is interesting and instructive, however, to take account of certain points of resemblance in the ancient laws and customs of various countries, noting their influence upon our early Anglo-Saxon institutions, particularly those institutions which many writers now accept as marking the sources of trial by jury.

The exact time of the introduction of the jury trial into England is a question much discussed by historians, some of them contending it was developed from laws brought over by William the Conqueror, while others point to certain evidence of its existence, in an embryo state, among the Anglo-Saxons prior to the Norman Conquest; and still others suggest even an earlier date.

Blackstone refers to trial by jury as "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"; he adds that "some authors have endeavored to trace the origin of juries up as high as the Britons themselves, the first inhabitants of our island, but certain it is that they were in use among the earliest Saxon colonies, their institutions being ascribed by Bishop Nicolson to Woden (or Oden) himself, their great legislator and captain. Hence it is that we may find traces of juries in the laws of all those nations which adopted the feudal system, as in Germany, France and Italy, who had all of them a tribunal composed of twelve good men and true . . . being the equals or peers of the parties litigant. . . . Its establishment, however, and use in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battle, was always so highly esteemed and valued by the people that no conquest, nor change of government, could ever abolish it. In Magna Charta it is more than once insisted on as the principal bulwark of our liberties."¹ Nicolson,² Coke, Spelman, Hume and Turner³ take very much the same view. On the other

¹ 3 Bl. Com., pp. 349-50.

² Preface, in Latin, to Wilkins's Anglo-Saxon Laws.

³ Hist. Anglo-Saxons (6th Ed.), Vol. 2, Bk. 5, c. 6, p. 153.

hand, Reeves,⁴ Palgrave,⁵ Hallam,⁶ Thayer,⁷ and others, give to the Normans the credit for establishing the jury system in England.

Profatt, in his treatise on Jury Trials, says:⁸

“Perhaps the reason opinion has been so divided here is that many would look for the establishment of the jury in the same form and character, with the same functions as it possesses at the present time, not realizing or perceiving that it was a growth of several centuries from its first introduction in a rudimentary form, until it attained its present form and development. All we should seek to find in this early period is some form or method of trial out of which, as a germinal element, the jury was to develop to its present form and character. It is in vain to look for such a settled procedure at that early day, in that rude age, as will make a nice and distinct separation of law and fact in the administration of law; and for this reason we find one body discharging the functions of both judge and jury.”

Starkie⁹ is also of opinion that, notwithstanding the differences of view as to the origin of the system, “there seems to be great reason for supposing that it is derived from the *patria* or body of suitors which decided causes in the county courts of our Saxon ancestors.” He says:

“That the trial *per juratum patriæ* [by jury of the country] of Glanville was derived from the trial *per patriam* as used both before and after the Conquest, is rendered highly probable, not only by the very description of the trial *per patriam* [by the country or people of the country-side, as a jury], yet retained, but even still more strongly by the powers, qualifications and duties incident to the *jurata patriæ* [jury of the country-side, community, district, county or neighborhood] of Henry II and Henry III.”

Mr. Forsyth¹⁰ calls attention to the conflicting theories as to the origin of the jury system, advanced by various writers and historians,¹¹ and contends¹² that the jury does not owe its exist-

⁴ Hist. Eng. Law (1st. Am. Ed.), Vol. 1, pp. 22, 24, 34.

⁵ Hist. Eng. Com'lth, Vol. 1, p. 243.

⁶ Middle Ages, Vol. 3, pp. 517, 593.

⁷ Prelim. Treat. Evid., p. 7.

⁸ Sec. 11.

⁹ Evidence, p. 4, note c.

¹⁰ Forsyth's Trial by Jury, Morgan's Ed., 1875.

¹¹ *Id.*, pp. 2-4.

¹² *Id.*, p. 5.

ence to any preconceived idea of jurisprudence, but gradually grew out of modes of trial in use among the Anglo-Saxons and Normans, both before and after the Conquest. In discussing the causes of different views on the subject, he points out¹³ that a distinctive characteristic of the jury system is that it consists of a body of men, quite separate from the law judges, summoned from the community at large, to find the truth of disputed facts in order that the law may be properly applied by the court; that, in considering the ancient tribunals, composed of a certain number of persons chosen from the community, who acted in the capacity of judges as well as jurors, few writers keep this principle steadily in view, and thus confound the jurors with the court. The conclusion reached by him,¹⁴ and which is said by Lesser¹⁵ to afford the fairest statement of the case, is as follows:

“It may be confidently asserted that trial by jury was unknown to our Anglo-Saxon ancestors and the idea of its existence in their legal system has arisen from a want of attention to the radical distinction between members, or judges, composing a court, and a body set apart from that court, but summoned to attend in order to determine conclusively the facts of the case in dispute. This is the principle on which is founded the intervention of a jury; and no trace whatever can be found of such an institution in Anglo-Saxon times. If it had existed, it is utterly inconceivable that distinct mention of it should not frequently have occurred in the body of Anglo-Saxon laws and contemporary chronicles which we possess, extending from the time of Ethelbert (568-616 A. D.) to the Norman Conquest (1066 A. D.). Those who have fancied that they discovered indications of its existence during that period have been misled by false analogies and inattention to distinguishing features of the jury trial, which have been repeatedly pointed out. While, however, we assert that it was unknown in Saxon times, it is nevertheless true that we can recognize the traces of a system which paved the way for its introduction, and rendered its adaptation at a later period neither unlikely nor abrupt.”

Profatt,¹⁶ after discussing the various modes of trial used by the Anglo-Saxons, says:

¹³ *Id.*, pp. 4, 9.

¹⁴ *Id.*, p. 45.

¹⁵ *Hist. Jury System*, p. 69.

¹⁶ *Jury Trials*, Sec. 20.

“In all this we do not find the trial by jury with exactly the same form and character as it is presented to us at the present time; that would be manifestly impossible. We do find, however, a system of trial adopted, containing the very germ, and some of the features, of jury trial, which, when afterwards systematized, developed and improved under competent jurists, and moulded to meet the growing exigencies of society and the increasing importance of law, became after centuries a regular and established institution, with well-defined and separate functions in the administration of law.”

In speaking of the effect of the Norman Conquest, the same author states:¹⁷

“It is the common belief that on his accession to the throne of England the Conquerer made a radical and complete change in the laws and institutions, and that an entirely new system was established on the ruins of the old; but that was by no means the case. While changes and innovations were certainly made, there was no sweeping abolition of laws and customs, no entire uprooting of old institutions, and no extensive interference with the ancient rights and privileges of the people. There were, no doubt, alterations, but they were such only as adapted the old established institutions to the new polity of the Normans. That it was never the intention of William to introduce a new system of laws and customs and abolish the old, is evidenced by his constant endeavors to appear, not so much in the light of one who acquired his rights by conquest, as in the character of one who came to the throne regularly, *de jure*, as one entitled by his relationship to the Saxon line. It was his constant endeavor to show to the people that the old laws and privileges should remain intact; that their cherished institutions should still remain as before.”

The historians fail to agree, but the most tenable theory is that the present system represents a gradual development of ancient customs, brought to England by the earliest invaders, upon which, most likely, the Norman influence wrought material changes, and that subsequent developments kept pace with the increasing complexity of society. This view is supported by a study of the various modes of trial, which existed in other countries, long prior to Anglo-Saxon times, showing the germ of the system even in distant lands.

For instance, in the time of Pericles there was established in Athens an institution for the legal settlement of disputes

¹⁷ *Id.*, Sec. 21.

(termed "Dikasteries," or courts of justice), which consisted of ten panels of what, for want of a better term, we may call jurors, of five hundred each, selected from six thousand citizens, drawn annually. The particular body before which a cause was tried was chosen by lot from one of these panels; it was presided over by a magistrate, who stated the questions at issue and the results of his own preliminary examination. This was followed by statements of the parties and their witnesses. The Dikasts, or members of the tribunal, were ultimate judges of both law and fact; but, aside from this distinguishing feature, apparently they were in many respects quite similar to our modern jurors.¹⁸

The Romans had a judicial council, called Comitia (Assembly), which had personal power to delegate its criminal jurisdiction to minor bodies, made up from members of the Comitia. They employed a formal system of pleading, to determine the issues for trial, and, in a proceeding *in jure*, a magistrate defined in writing the disputed points, referring them for trial (the proceeding *in judicio*, *i. e.*, a court of justice) to a lay judge or judges (judices) sworn to the performance of their duty, and corresponding in some ways to our jurors.¹⁹ According to certain authorities, the trial was somewhat similar to that before a modern jury;²⁰ but Starkie says:²¹

"The principal and characteristic circumstances in which the trial by a Roman differed from that of a modern jury, consisted in that in the former case neither the praetor [or magistrate], nor any other officer distinct from the jury, presided over the trial to determine as to the competency of witnesses, the admissibility of evidence, or to expound the law as connecting the facts with the allegations to be proved on the record. In order to remedy that deficiency they resorted to this expedient. The jury generally included one or more lawyers, and thus they derived the knowledge of law from their own members, which was necessary to enable them to reject inadmissible evidence and give a correct verdict as compounded both of law and fact."

¹⁸ Grote, *Hist. of Greece*, Vol. 5, c. 46. See also Bryce's *Modern Democracies*, Vol. 1, p. 198, for an interesting description of the workings of the Greek Dikasteries.

¹⁹ Pomeroy, *Mun. L.*, Sec. 106; Lesser, p. 33.

²⁰ Colquhoun, *Rom. Civil Law*, Secs. 2322-2341.

²¹ *Evidence*, Vol. 1, p. 5, note b.

“When the judge was directed to decide according to equity and good conscience, without strict reference to the instructions of the magistrate, he was called an arbiter.”²²

This system, like our trial by jury, went through various stages of development, until it was finally overthrown during the Empire (352 A. D.) ; and the Justinian Code (533 A. D.) merged the duties of the judge and jury, so that the court should decide both the law and the fact in civil cases.²³

Cooley states that when judices were employed they were selected from the community at large, in much the same manner as in ancient Athens; and that there was a method provided for objecting to those chosen to try any particular case, “which answered very exactly to our challenges” of jurors.

Repp, a Danish jurist, says,²⁴ but his statements are not wholly consistent :

“Respecting the antiquity of juries, perhaps we ought to say nothing more than this, that their origin lies beyond the age of clear history. Yet the history of Scandinavia is clear and authentic from the beginning of the ninth century, or the year 800.” . . . “Indeed, the exact antiquity of the jury cannot now be determined. We discover it with the earliest dawn of northern history, and even at that early period, as an ancient institution ; beyond this we have not enough of materials left for a fruitful investigation. . . . We can trace the undoubted existence of juries as far back as one thousand years ; before that period, the history of northern Europe is wrapped in Cimmerian darkness, and we must not expect to find authentic records respecting juries where all other records fail.”²⁵

Repp further says there are evidences in the Edda—certainly not a very authentic source—that trial by jury antedates the birth of Christianity.²⁶

Trial by battle was also a popular method of settling disputes in Scandinavia, especially among men of rank, and the benefit of the jury trial was claimed by the weak and aged.²⁷ With

²² Pomeroy, *Mun. L.*, Sec. 106.

²³ *Id.*, Sec. 109.

²⁴ *Historical Treatise on Trial by Jury, etc., in Scandinavia, etc.* (1832),

p. 3.

²⁵ *Id.*, p. 9.

²⁶ *Id.*, pp. 16, 17.

²⁷ *Id.*, p. 9.

the advent of Christianity in that part of the world, trial by ordeal was introduced by the clergy in order to strengthen their influence, the theory being that God would protect the innocent from injury. These three modes of trial existed for a time, though Repp asserts²⁸ that trial by jury was the only one legally sanctioned by the most ancient code, as far as the records show.

In early times, Norway had a judicial body called "laugretto-madr" meaning "law-amendment-men," the designation being derived from the circumstance that they were judges of both law and fact, and hence their decisions often amounted to amendments of the law.²⁹ Three persons, holding office under the crown, nominated deputies from each of the districts to attend the meetings, called "Things," or courts, where there was a place paled off by staves driven in the ground, in which the court was held. From the total number thus chosen, thirty-six were selected to act in a capacity much like jurors,³⁰ and these were presided over by a "lawman" ("logmann"), whose qualification for office was that he could recite the laws of the land. The jurors were sworn³¹ and had power to decide both law and fact, also to impose such sentence as the law prescribed.³² If they were unanimous in their verdict, their decision fixed the law of the case; if not, the lawman had power to decide with those of the jury who agreed with him,³³ unless the king, with the advice of the "most prudent men," should otherwise determine.³⁴

In Sweden quite similar tribunals existed, composed of twelve men, sworn to investigate and ascertain the truth in any cause, before whom witnesses appeared; they were judges of both fact and law, and seven were competent to return a verdict.³⁵ There were three kinds of tribunals, or juries; first, the hundred's

²⁸ *Id.*, p. 19.

²⁹ Forsyth, pp. 16-18; Repp, p. 56.

³⁰ Forsyth, p. 16; Repp, p. 47.

³¹ Repp, pp. 47, 48.

³² Forsyth, p. 18; Repp, p. 50.

³³ Repp, p. 53.

³⁴ *Id.*, p. 55.

³⁵ Forsyth, pp. 19, 22; Repp, pp. 88, 89.

jury, from which an appeal lay to the lawman's jury; and from the latter to the king's jury, from which there was no further appeal.³⁶ The wager of law was also used extensively, requiring the oath of six, twelve, eighteen, thirty-six or forty-eight persons.³⁷

In Denmark, there was a first body called Tingmaend, which means "thing-men," or men who frequent a "thing" or court,³⁸ of whom seven constituted a quorum, though in certain cases there were as many as twenty-four; it was their business to pass upon the public affairs of the district. They were somewhat similar to a municipal council³⁹ and, strictly speaking, were not jurors, though frequently employed in that capacity, where no other jurors were provided by law or could be had.⁴⁰ Next came the Naevninger ("nomination-men"),⁴¹ who were more like jurors, twelve in number,⁴² chosen by the inhabitants of the district or by the prosecutor or magistrate;⁴³ a majority controlled,⁴⁴ their decisions being reviewable by the bishop and eight men of the district. It was the province of this body to pass on the more important criminal causes; also to decide upon preliminary proofs, somewhat like our grand juries;⁴⁵ but the historians tell us that, when Canute, the Dane, became ruler of England, in 1014 A. D., he did not attempt to incorporate these Danish institutions into the system of that country.

The wager of law was also extensively used in Denmark. Under this form of trial the defendant denied, on oath, the act of which he was accused, and this oath was confirmed by his conjurators, usually twelve, but sometimes a multiple of twelve, who declared themselves satisfied that the defendant told the truth. While the wager of law was a means to disprove a false charge,

³⁶ Repp, p. 90.

³⁷ *Id.*, p. 99.

³⁸ *Id.*, p. 115.

³⁹ Forsyth, p. 23.

⁴⁰ Repp, p. 117.

⁴¹ Forsyth, p. 23; Repp, p. 118.

⁴² Repp, p. 123.

⁴³ *Id.*, p. 122.

⁴⁴ *Id.*, p. 127.

⁴⁵ Forsyth, p. 25; Repp, pp. 119, 125.

by the oath of defendant and others, where no actual witnesses were to be found,⁴⁶ yet, later, in important civil cases, actual witnesses were required even though wager of law was followed.⁴⁷ In trial by jury, the majority decided the cause, but unanimity was required in wagers of law, because the conjurators were produced by defendant himself to swear they believed him to be telling the truth, and, if one of them failed to do so, defendant necessarily failed to support the truth of his statement by the required measure of proof.⁴⁸

At this point it may be interesting to note that Reeves says⁴⁹ Rollo, the Scandinavian, led his people into Normandy about 890 A. D. (912 A. D.) carrying with them the method of trial by twelve jurors, and, when the Normans conquered England, they endeavored to substitute this method of trial in place of the Saxon "Sectators,"⁵⁰ of which more will be said in a later part of this article.

Iceland was settled by the aristocratic element of Norway, who emigrated because of a political revolution in the latter country.⁵¹ They established "Things," similar to those of Norway. The Althing (Universal-thing), founded in 928,⁵² was a central legislative and judicial assembly, to which appeals lay from all the district things, called Varthings;⁵³ judicial procedure, both in the form of jury trials and wagers of law, was employed, and the first of these reached a high stage of perfection. The practice is described in their code, called the "Grey Goose."⁵⁴ The number of jurors was five, nine or twelve, depending upon the nature of the cause.⁵⁵ The body of twelve called the "Tolfstar guida" (a nomination of 12) was in use before the introduction of Christianity in Norway (prior to the year 1000 A. D.); this

⁴⁶ Repp, pp. 135-137.

⁴⁷ *Id.*, p. 139.

⁴⁸ *Id.*, pp. 141 and 173.

⁴⁹ Hist. Eng. Law, Vol. 1, p. 84.

⁵⁰ Prof. Thayer, 5 Harvard Law Rev., 250.

⁵¹ Repp, p. 153.

⁵² *Id.*, p. 166.

⁵³ *Id.*, p. 171.

⁵⁴ *Id.*, p. 173.

⁵⁵ See list of causes in Repp, pp. 173-180.

was usually employed in disputes between the Godas (magistrates) and their Thingmen. A Godi nominated eleven jurors and for the Twelfth he nominated one of his fellow Godas from the same district. The verdict was by majority.⁵⁶ The jurors were required to be at least twenty years of age, bearing no relationship to the parties,⁵⁷ and in good health. They were chosen from the better class of society, since they were required to pay their own transportation to and from the Althing. Those of the neighborhood where a fact occurred were preferred, provided they were not interested in the cause.⁵⁸

The Sandemaend, or truthsmen, of Jutland, consisted of eight members, nominated by the king for each division of the country.⁵⁹ They had jurisdiction of criminal cases, disputes concerning land and church property, etc.,⁶⁰ being judges of both law and fact; the verdict of the majority was received as a final judgment.

It will be observed that in all the tribunals of ancient Scandinavia the lay triers, or jurors, performed the double function of judges of both law and fact; the lawman, who presided over them, merely acting in an advisory capacity, to aid in determining relevant questions of law, except where the jury could not agree, when he had greater power. Forsyth⁶¹ uses this circumstance in support of his contention that the English jury system could not have been derived from this source.

In ancient Germany, the country was divided into districts, called marken, several of which together made up a "Gau." At the head of each Gau was a lord, who acted as military leader and also as president of the courts of justice.⁶² Meetings were held at stated times, composed of all the freemen of the community, who were obliged to attend; they constituted the tribunal, and a majority ruled. The frequency of such meetings and the absence

⁵⁶ Repp, pp. 180, 181.

⁵⁷ *Id.*, p. 183.

⁵⁸ *Id.*, p. 184.

⁵⁹ *Id.*, p. 131.

⁶⁰ *Id.*, p. 129.

⁶¹ Trial by Jury, c. 2.

⁶² *Id.*, p. 32.

of the freemen of the community, as well as the large number present at times, led to the practice of the parties themselves choosing certain freemen, usually seven in number, who formed a court for the hearing of the particular case.⁶³ Before giving judgment, the members of the court retired from the presence of the presiding officer in order to consider their decision.⁶⁴ In these early courts, the freemen chosen as members, decided both questions of law and fact, as in the early Scandinavian courts. Witnesses from the neighborhood were heard under oath; if the testimony was conflicting, the court did not usually weigh and determine the evidence, but merely decided that the question should be tried by combat, or that a prisoner should submit to the ordeal as a final determination of the question of guilt or innocence, or what, according to custom, should be done in the specific case. Even the judges themselves might be challenged to fight by the accused and six of his friends.⁶⁵ So it may be seen that those times called for strong judges.

Of course, the jury system, in more or less modified form, operates today in most continental countries; but it has had its best development and fullest use in England and in the other English-speaking nations.

Pomeroy thus explains why the jury trial did not grow up, by natural sequence of events, in France, Italy and Spain, as it did in England:⁶⁶

"In the interval between the abandonment of England to the natives by the withdrawal of the [Roman] legions and governors, and the completed invasion of the Angles and Saxons, the vestiges of the Roman policy and laws had been nearly swept away by the continual wars between the Britons and the wild tribes of the north. . . . The Roman element was not sufficiently powerful and concentrated to warp the development of the pure Saxon ideas in their natural order. The Franks, Lombards and other barbarian nations, on the contrary, met the Roman laws and institutions existing in full force, and although at first overwhelming them by their rude violence, yet finally yielded to their inherent and vital power."

⁶³ *Id.*, p. 35.

⁶⁴ *Id.*, p. 36.

⁶⁵ *Id.*, pp. 43, 44; see also Lesser, pp. 47-52.

⁶⁶ Pomeroy, *Mun. L.*, Sec. 117.

Lesser ⁶⁷ states, citing Forsyth;⁶⁸

"The explanation of the fact that an institution of the common ancestors of the English and Germans, at the start characterized by the selection of triers from the community at large, should flourish on English soil and ultimately develop into the jury, while falling into gradual desuetude in Germany, and finally becoming obsolete, must be sought in the successive stimuli—above all, the Norman invasion—which affected it in Britain; while, on the hand, its decay on the continent may be attributed to the gradual exclusion of the freemen (at first voluntary, but afterwards compulsory) from the ancient tribunals, and to the establishment of the institution of the *scabini* [appointed or selected judges]⁶⁹ in Germany by Charlemagne. These were the sole judges of fact as well as law; they absorbed the whole of the judicial functions of the court, and, therefore, in the opinion of our authority, there was no room for another body distinct from them, whose office should be conclusively to determine questions of fact for them. When the principle was once established of thus making the court consist entirely of a limited number of duly qualified judges, the transition to single judges, who decided without the intervention of a jury, was a natural and almost necessary consequence."

I think, however, the explanation lies deeper than that given by Lesser and Forsyth; it may be found in the different schools of thought adopted by the English and Germans respectively, the one being democratic and the other autocratic; in other words, the one, on principle, trusted to the collective opinion of a number, while the other, on principle, preferred a single will.

Robert von Moschzisker,
Chief Justice of the Supreme Court of Pennsylvania.

(To be Continued.)

⁶⁷ Hist. Jury System, pp. 51-52.

⁶⁸ Trial by Jury, c. 3, p. 42.

⁶⁹ Pomeroy, Mun. L., Sec. 113.