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## THE HISTORIC ORIGIN OF TRIAL BY JURY.\*

### II.

After the brief review of the growth of trial by jury on the continent, contained in the previous installment of this paper, we shall now return to Great Britain and the course of its development there.

It is to be remembered that the Romans had political organizations, which they imposed on all their conquered countries, known as provinces. These were divided into counties or *comitates* (ruled over by a count or *comitas*), with further subdivision into centuries (100 men) and decennaries (10 men).<sup>1</sup> While it is generally stated<sup>2</sup> that King Alfred divided England into counties, hundreds and tithings, it is probably more accurate to say that he restored these old Roman political divisions,<sup>3</sup> using Saxon names;<sup>4</sup> thus paving the way for the growth of certain early institutions or devices for working out the ends of justice, which I shall discuss after a few relevant words on the subject of these political divisions and their management, as the latter sheds light on the matter we are investigating.

\*Part I of this article was published in the November, 1921, issue of the UNIVERSITY OF PENNSYLVANIA LAW REVIEW, pages 1 to 13, inclusive (Vol. 70).

<sup>1</sup> Reeves, *Hist. Eng. Law* (1st Am. Ed.), Vol. 1, pp. 41, 166-8, notes.

<sup>2</sup> Hume, *Hist. Eng.*, Vol. 1, c. 2; Lesser, *Hist. Jury System*, p. 64.

<sup>3</sup> Coke's *Inst.*, Vol. 1, p. 168.

<sup>4</sup> Reeves, p. 210, notes.

A hundred was originally 100 freemen, and, in the country it meant 100 villas, embracing also the land. As the villas grew to villages, the inhabitants became much more numerous; this seems to explain inconsistent statements<sup>5</sup> that the hundred consisted of (1) 100 tithings, (2) 100 hides of land, (3) 100 families and (4) 100 freemen.<sup>6</sup> A "hide" of land was the amount sufficient for the support of one family.<sup>7</sup>

Hundreds assembled monthly,<sup>8</sup> and we are told that freeholders were chosen and sworn to hear and determine causes, with a presiding magistrate;<sup>9</sup> the headman or caldorman (corresponding to the Frankish count) or his deputy—gerefa or sheriff—presided, the bishop having co-ordinate authority.<sup>10</sup>

The increase of families, and the migration of residents from place to place, caused many changes in the various tithing districts, and finally the practice arose whereby the freeman of each hundred met twice a year, to examine into the tithings and see whether they had their proper complement of members.<sup>11</sup> Hume treats these hundred courts as the origin of the English jury system,<sup>12</sup> though this is one of the points of contention among historians.

Under the Anglo-Saxons the inhabitants were divided into the free and the unfree. The unfree, while not all slaves, at first could hold no lands as their own property. Pomeroy says that the term "free" referred "simply to the status of the person, and the amount of privileges he could legally enjoy as an essential element of the state. . . . Freeman were then sub-divided into two generic classes, noble and those not noble, or, in their own language, the 'Earl' and the 'Ceorl' [churl or husbandman]. . . . The freeman thus in the possession of a share of the soil, could unite with his fellows in all matters concerning the general

<sup>5</sup> Pomeroy, *Mun. L.*, Sec. 388.

<sup>6</sup> Reeves, p. 210, notes.

<sup>7</sup> Pomeroy, Sec. 380.

<sup>8</sup> *Id.*, Sec. 388.

<sup>9</sup> Lesser, p. 65.

<sup>10</sup> Pomeroy, Sec. 114.

<sup>11</sup> Forsyth, p. 55.

<sup>12</sup> *Hist. Eng.*, Vol. 1, c. 2.

interests and welfare of the community. One of the most important of this branch of rights was the ability to attend the local folk courts, and join in their deliberations and decisions, as one of the primitive judges of the law and facts of controversies brought before them. . . . One noble was considered equal to six simple freeman. Thus, in judicial disputes, when it became necessary to resort to the oaths of compurgators [they—the compurgators—being part of an institution concerning which I shall speak presently more at length], . . . that of one earl was equivalent in effect to those of six ceorls [so was it likewise in private feuds, or compensation for death, whereof also I shall speak later]; but their [the nobles'] most important advantage was of a political nature—from among this class alone could the chief judges, the ealdormen, and the kings be chosen.”<sup>13</sup>

Thayer, treating of these ancient gatherings of freemen, says:<sup>14</sup>

“The great fundamental thing to be noticed first of all, out of which all else grew, was the conception of popular courts and popular justice. We must read this into all accounts of our earliest law. In these [primitive] courts it was not the presiding officers, one or more, who were the judges; it was the whole company [of freeman]; as if, in a New England town-meeting—the lineal descendant of these old German moots—the people conducted the judicature, as well as the finance and politics, of the town. These old courts were a sort of town-meeting of judges. . . . The conception of a trial was that of a proceeding between parties, carried on publicly, under forms which the community oversaw.”

Among the earliest Anglo-Saxon institutions or devices for working out the ends of justice, we find the Wergild and Frithborh. The Wergild required that a sum of money be paid for personal injuries, according to a regular schedule, which the law fixed, depending upon the nature of the injury and the rank of the victim,<sup>15</sup> part going to the king, part to the lord of the manor, and the balance to the claimant. The infliction of a wound an inch long, on the head, was punished by the payment of one shilling; if on the face, by the payment of two shillings. The loss

<sup>13</sup> Pomeroy, Secs. 366-70.

<sup>14</sup> Prelim. Treat. Evid., p. 9.

<sup>15</sup> Black's Law Dic.; Forsyth, p. 48.

of an ear was estimated at thirty shillings, but if the hearing was gone, at sixty shillings; and a regular price was fixed on the head.<sup>16</sup> So, it may be seen, the modern Workmen's Compensation Law is not quite original after all. In its essential idea, it is but a repetition of this old Saxon institution, which was created to abolish the feuds, that were frequent among the early Teutonic nations; for, in those days, if an offender refused to pay, he was exposed to the vengeance of the injured party and his friends,<sup>17</sup> just as our present law was enacted as one means of overcoming the existing feud between labor and capital; but, in the ancient law, in addition to the compensation for the person, there was also a penalty (called "wite") due the state because of the breach of the peace.

The Frithborh (meaning a peace pledge, and later called a frank-pledge) consisted of a guarantee by which every member of a tithing became surety to the other members, as well as to the state, for the maintenance of the public peace. If any member was accused of crime, the others were to arrest and bring him to trial. If innocent, they could clear him by their oaths, but if guilty, they were obliged to pay the wergild and wite.<sup>18</sup> Even today every citizen is subject to be called on to maintain the peace, and, when called, he must respond; the sheriff or other officer can, and often does, summon a *posse comitatus* to his assistance.

The several institutions already referred to had their place in the Anglo-Saxon scheme of government, prior to the Conquest; but, in the main, their judicial system may be considered under four principal headings: (1st) the sectators (followers, attendants), or suitors of court, sometimes referred to as  *pares curia* (equals or peers of court), whose determination was designated *judicium parium* (judgment of their equals or peers); (2nd) the *secta* (suit following), or trial by witnesses from the suit, or suite, as we would say today, of the respective litigants; (3rd) the system of official witnesses; and (4th) trial by compurgators (purgers—from *compurgo*, to purify com-

<sup>16</sup> Laws of King Alfred, cited in Worthington on Juries, p. 20.

<sup>17</sup> Forsyth, p. 49; Stat. Hen. I, c. 70, Sec. 9.

<sup>18</sup> Forsyth, p. 51; Turner, Hist. Anglo-Saxons, Vol. I, p. 475.

pletely).<sup>19</sup> None of these functionaries, if they may be so termed, were jurors, in the sense of that word as we now understand it; although, in future references, I shall so designate them, for the sake of convenience of expression.

The several forms of trial just enumerated may be examined with profit under their respective headings.

(1st) The sectators were freemen, whose duty it was to attend the hundred, county and manorial courts, to determine disputes and try offenses; they discharged the functions of both judge and jury, being, according to Lesser,<sup>20</sup> "the whole court." He says they were presided over by an officer, "closely analogous to the lawman of the Swedish and Norwegian tribunals"; and he thinks the institution "a modified outcome" of what is called Alfred's county system. However that may be, it was of early feudal origin, whereby the lord with his vassals sat as a court, principally to try questions of title.<sup>21</sup>

Reeves says:<sup>22</sup>

"It seems that causes in the county and other courts were heard and determined by an indefinite number of persons called *sectatores*, or suitors of court; and there is no great reason to believe that [in the earlier or primitive courts] they had any juries of twelve men; this was an invention of a much later date. The sectators used to give their judgment or verdict both on matters of fact and law. . . . In a law of King Etheldred there is a provision that there should be twelve thanes [or superior persons], whose concurrence was made necessary; it should seem, however, these were rather assessors to the judge of the court than a part of the suitors, or indeed anything like a jury. By all the monuments that remain of these times, it appears that the number of sectators was various, according to the custom of different places, and perhaps in most instances depended on chance and convenience, but in no case is there the least reason to believe it was confined to twelve. These sectators discharged their office, it is thought, without any other obligation for a true performance of it than their honor, for it does not appear that they were sworn to make declaration of the truth. It is not improbable that the thanes in the counties, the citizens in boroughs, and those who

<sup>19</sup> Lesser, p. 74.

<sup>20</sup> *Id.*, p. 167.

<sup>21</sup> Cooley, Am., Cyc., IX, Art. Jury; Lesser, p. 75.

<sup>22</sup> Hist. Eng. Law (1st Am. Ed.), Vol. I, pp. 203-6.

were the sectators in other courts, might determine all causes in like manner as peers of the realm, at this day, determine in criminal cases, without an oath."

(2nd) The *secta*, or trial by *secta* witnesses, was a proceeding wherein the plaintiff summoned, to testify in his behalf, a certain number of persons, who came from the neighborhood and had knowledge of the transaction in controversy; and the defendant rebutted by producing, if possible, a larger aggregation.<sup>23</sup> None of the investigators make the exact proceeding clear; but Thayer is of opinion<sup>24</sup> that *secta* witnesses probably had no part in the ultimate trial. He says, "It was the office of the *secta* to support the plaintiff's case, in advance of any answer from the defendant," and states "this sort of 'witness,' might have nothing to do with the trial," adding, "he belonged to that stage of the preliminary allegations, the pleadings, where, belonged also profert of the deed upon which an action or a plea was grounded"; then Professor Thayer suggests that, "as rules belonging to the doctrine of profert crept over in modern times, unobserved, into the region of proof, under the head of rules about the 'best evidence,' and 'parol evidence,' so the complaint-witnesses were, early and often, confused with proof-witnesses—a process made easy by the ambiguity of the words '*testis*,' '*secta*,' and 'witnesses.'"

This writer thinks the *secta* were merely, what he terms, "complaint-witnesses." He says, "the defendant could stake his case on the examination of these complaint-witnesses [of plaintiff], and, if they disagreed among themselves, defendant won"; if not, plaintiff proceeded to trial. He suggests this as the origin of the phrase—which long survived and was used in all the old narrs—"and thereupon he [plaintiff] brings his suit."

In this connection Blackstone, in treating of pleading, says:<sup>25</sup>

"The declaration always concludes with the words 'and thereupon he brings suit, *et inde producit sectam*,' etc. [meaning 'thereupon

<sup>23</sup> Lesser, p. 76.

<sup>24</sup> Prelim. Treat. Evid., pp. 10 to 19.

<sup>25</sup> Com., Vol. 3, p. 295.

he brings his suit<sup>\*</sup>—or followers]. By which word, suit, or *secta* (a *sequendo*, from *sequor*, to follow) was anciently understood the witnesses or followers of the plaintiff.”

On the same point Forsyth says:<sup>26</sup>

“Besides the trial by assize or *jurata* [jury], Bracton notices another mode of determining disputes; this was when a party made a claim *et inde producit sectam*. The meaning of this was that the claimant offered to prove his case by vouching a certain number of witnesses, from his followers or suit, who had been present at the transaction in question. The defendant, on the other hand, rebutted this presumption by producing a larger *secta*, that is, a greater number of witnesses on his side, whose testimony, therefore, was deemed to outweigh the evidence of his opponents . . . Inasmuch, however, as the evidence of defendant's *secta* [following] was not deemed to be absolute proof, but merely raised a presumption in his favor sufficient to countervail the presumption on the other side, he was not allowed to resort to this mode of rebuttal where the complainant could produce evidence of a different character, such as a deed or charter. If this was denied, the case was tried *per patriam* [by the country or jury] or *per patriam et testes in carta nominatos* [by the country, or jury, and witnesses named in the instrument, deed or charter]; but if the plaintiff produced his *secta*, and the defendant had none, but was obliged to rely upon his own denial, he was not—at all events in the instance given by Bracton of an action for dower (*unde nihil habet*) [or from which she has nothing]—allowed to put himself on the country, but the plaintiff recovered by force of the *secta*, or the defendant was called upon to wage his law; that is, he was obliged to bring forward double the number of witnesses adduced by his opponent until twelve were sworn [as to the truth of his defense]. It seems that if he could procure that number to swear for him he succeeded in resisting the demand. Here there was no interposition of a jury at all, but the dispute was decided solely by the witnesses, according as the requisite number preponderated. An exception, however, was made in the case of merchants and traders, for they were allowed to prove a debt or payment *per testes et patriam* [by witnesses and the country].”

(3rd) Defects incident to the trial by *secta* led to the establishment of trial by official witnesses appointed for each district, whose duty it was to attend all private bargains or transactions, such as contracts of sale, so as to testify thereto when occasion

\* Trial by Jury, pp. 128-30.

arose. These official witnesses, like the *secta*, gave evidence of the transaction itself.<sup>27</sup>

Thayer describes trial by official witnesses as follows:<sup>28</sup>

"There was no testing by cross-examination; the operative thing was the oath itself, and not the probative quality of what was said, or its persuasion of the judge's mind. Certain transactions, like sales, had to take place before previously-appointed witnesses. Those present at the church door when a woman was endowed, or at the execution of a charter, were produced as witnesses. In case of controversy it was their statement, sworn with all due form before that body of freeman who constituted the popular court, that ended the question."

W. F. Finlason, editor of Reeves's "History," thinks the system of official witnesses the true origin of trial by jury;<sup>29</sup> but, be this as it may, the calling of these witnesses, with actual knowledge of the facts, was responsible, in all probability, for the general development of rules of evidence. Perhaps, as nearly as any other one institution, it constitutes the foundation of our present jury system; in any event, Prof. Robertson<sup>30</sup> joins with Mr. Finlason in so thinking.

(4th) Trial by compurgators, or "wager of law," was originally used in criminal actions, but later extended to civil cases. The charge of the prosecutor was sufficient to put one accused of crime on his defense;<sup>31</sup> but we are told that, in civil actions, so long as the custom continued of producing the *secta*, or witnesses, to give probability to plaintiff's demand, defendant was not put to wage his law unless the *secta* were first produced and their testimony was found consistent—if the evidence of the *secta* proved inconsistent or contradictory, plaintiff failed, and the proceeding ended there. In criminal proceedings the defense was entered, first by the denial of the accused, who then called witnesses, known as compurgators, to whose oaths credit was attached according to their rank.<sup>32</sup> These witnesses did not testify to mat-

<sup>27</sup> *Id.*, pp. 72, 73.

<sup>28</sup> Prelim. Treat. Evid., p. 17.

<sup>29</sup> Note to Reeves, p. 187.

<sup>30</sup> Article in Enc. Brit. (9th Ed.), Title, Jury.

<sup>31</sup> Lesser, p. 77.

<sup>32</sup> Forsyth, p. 61.

ters within their own knowledge, but only vouched for the trustworthiness of the party on whose behalf they appeared; they were, in fact, merely witnesses as to character. Where a party was accused of crime, and denied it in court, if compurgators appeared and swore they did not believe he had testified falsely, judgment was given in the defendant's favor, unless the other party produced a greater number of such witnesses on his side (which may suggest our present rule as to presumption of innocence and the obligation of the prosecutor to overcome it). The usual number of compurgators was twelve,<sup>33</sup> though eleven had power to reach a conclusion. If a party was unable to call a sufficient number of these witnesses he was deemed to have taken a false oath, and lost his case in a civil suit, or was convicted in a criminal action.<sup>34</sup> Frequently the compurgators on both sides formed a considerable assembly. Starkie<sup>35</sup> states that evidence as to character in criminal cases, as we now have it, is the last remnant of the process of compurgation.

Blackstone gives the following description of trial by compurgators:<sup>36</sup>

"The manner of waging and making law is this: He that has waged, or given security, to make his law, brings with him into court eleven of his neighbors, a custom which we find particularly described so early as in the league between Alfred and Guthrun, the Dane; for by the old Saxon constitution every man's credit in courts of law depended upon the opinion which his neighbors had of his veracity. The defendant, then standing at the end of the bar, is admonished by the judges of the nature and danger of a false oath, and, if he still persists, he is to repeat this or the like oath:—'Hear this, ye justices, that I do not owe unto Richard Jones the sum of ten pounds, nor any penny thereof, in manner and form as the said Richard hath declared against me. So help me God.' And thereupon his eleven neighbors, or compurgators, shall avow upon their oaths that they believe in their consciences that he saith truth; so that himself must be sworn *de fidelitate* [from or upon good faith], and the eleven *de credulitate* [from or upon their belief]. It is held indeed by later authorities, that fewer than eleven compurgators will do; but Sir Edward Coke is positive that there must be this number; and his

<sup>33</sup> *Id.*, p. 63.

<sup>34</sup> *Id.*, p. 68.

<sup>35</sup> Evidence, p. 76, note h.

<sup>36</sup> Com., Vol. 3, page 343.

opinion not only seems founded upon better authority, but also upon better reason; for as wager of law is equivalent to a verdict in the defendant's favor, it ought to be established by the same or equal testimony, namely, by the oath of twelve men."

Forsyth says:<sup>37</sup>

"Although we have no express information on the point, we may reasonably conclude that compurgation was not allowed in cases where the plaintiff could prove his demand by calling the legal witnesses who had attested the contract. Otherwise, the absurdity would follow, that the oath of a defendant, backed by relatives or friends who vouched for a belief in his integrity, would be sufficient to discredit the positive testimony of those whom the law had appointed as trustworthy witnesses; and this view is confirmed by what we know of wager of law in later times. This was not permitted when the debt claimed was secured by a deed or other specialty which spoke for itself, but only, as Coke says, 'when it groweth by word, so as he may pay or satisfy the party in secret, whereof the defendant having no testimony of witnesses may wage his law.'"

Forsyth concludes, what he calls the results of his investigation, thus:<sup>38</sup>

"1. We find that courts existed presided over by a reeve, who had no voice in the decision, and that the number of persons who sat as judges was frequently twelve, or some multiple of that number. 2. The assertions of parties in their own favor were admitted as conclusive, provided they were supported by the oaths of a certain number of compurgators; and in important cases the number was twelve, or, at all events, when added to the oath of the party himself, made up that number. 3. The testimony of the neighborhood was appealed to, for the purpose of deciding questions which related to matters of general concern. 4. Sworn [official] witnesses were appointed in each district, whose duty it was to attest all private bargains and transactions, in order that they might be ready to give evidence in case of dispute. 5. Every care was taken that all dealings between man and man should be as open and public as possible; and concealment or secrecy was regarded as fraud, and in some cases punished as guilt."

The system of trial by compurgators made perjury one of the principal crimes of the Middle Ages,<sup>39</sup> and the ease with

<sup>37</sup> Trial by Jury, pp. 75-76.

<sup>38</sup> *Id.*, p. 76.

<sup>39</sup> *Id.*, p. 69.

which it was possible for a man to select from his friends a sufficient number to swear they believed him, led to the practice of permitting the opposite party to select certain witnesses, from among whom the defendant or accused was obliged to choose. If a man were of bad character, three times the usual number of witnesses were chosen, or, if a crime was openly committed, the defendant could not clear himself by the oaths of compurgators, but, after the accuser had supported his charge, by the oaths of a sufficiently long list of that class of witnesses, the defendant was made to suffer an ordeal to establish his innocence;<sup>40</sup> and this was also the case, ordinarily, where one was unable to present a counter-balancing number of these purgers. When the compurgators agreed, there was a complete acquittal.<sup>41</sup>

Wager of law, or compurgation, gradually fell into disuse,<sup>42</sup> and was finally abolished by Act of Parliament.<sup>43</sup>

The ordeals, just referred to, consisted of, *first*, the ordeal of the hot iron, whereby the accused was required to carry a piece of red-hot iron, of from one to three pounds, for a distance of nine paces, or to walk, barefoot and blindfolded, over nine red-hot plowshares laid lengthwise at unequal distances; *second*, the ordeal of hot water, whereby he was made to take out of a pail of boiling liquid a stone sunk to a depth equalling the length of his hand or forearm. In these two, if the victim was burned, or scalded, he was declared guilty, otherwise, innocent; but in the third—the ordeal of cold water—strange to say, if the victim, who was thrown into a pond, sank, he was declared innocent.

Anderson's Law Dictionary, which I have always, with this exception, found reliable, speaking of the cold water ordeal, says, "Floating without the act of swimming was deemed evidence of innocence," but this is an evident mistake. To begin with, the accused had his thumbs tied to his toes before he was thrown into the water, which, guilty or innocent, must have made swimming a bit difficult; but, aside from this, the authorities, from Black-

<sup>40</sup> *Id.*, pp. 65, 66.

<sup>41</sup> Lesser, p. 76.

<sup>42</sup> Thayer, Prelim. Treat. Evid., pp. 32-34.

<sup>43</sup> 3 & 4 Wm. IV, c. 42, Sec. 13.

stone<sup>44</sup> down, all agree that floating was evidence of guilt, "the superstitious belief" being that the "pure element" of water "would not receive into its bosom anyone stained with the crime of a false oath."<sup>45</sup> Dr. Henry Charles Lea, in his learned work on *Superstition and Force*, says:<sup>46</sup> "The accused, bound with cords, was lowered into [the pond] with a [short rope] to prevent fraud if guilty, and to save him from drowning if innocent."

There were still other ordeals, which do not call for discussion, one of these being the ordeal whereby the accused was required to swallow a piece of bread accompanied by a prayer that it might choke him if guilty.<sup>47</sup>

The ordeals came to an end in the early part of the thirteenth century,<sup>48</sup> directly through the influence of the church;<sup>49</sup> but, it is fair to believe, this was affected by a general realization of the fallacies on which they were based.

It may be appropriate at this point to say a word or so on the origin of the grand jury and the establishment on a definite basis of the jury for trial of criminal cases. In Anglo-Saxon times, as has already been mentioned, there was the inquisition by twelve senior thegns; who, according to an ordinance of Ethelred III, were sworn, in the county courts, that they would accuse no innocent man and to acquit no guilty one. The twelve thegns were in the nature of a jury of presentment, or accusation, like the grand jury of later date,<sup>50</sup> and the absolute guilt or innocence of those accused by them had to be determined in subsequent proceedings, by compurgation or ordeal. A thegn, or thane, was always a man of importance in the kingdom.

The Articles of Visitation of 1194 required four knights to be chosen from the county, who, by their oaths, were to choose

<sup>44</sup> Com., Book 4, pp. 335-337.

<sup>45</sup> Dr. Lea's *Superstition and Force*, pp. 216, 268, 320; Pettetta's *Ordealie*, c. 1. See Inst. of Narada, Jolly's Trans. from the Hindu, pp. 44-54.

<sup>46</sup> 2nd Ed., p. 216.

<sup>47</sup> Prof. Thayer in 5 Harv. L. Rev., pp. 64, 65; Pomeroy, Mun. L., Sec. 409; Thayer, *Prelim. Treat. Evid.*, p. 35, note.

<sup>48</sup> Lesser, p. 142, and note.

<sup>49</sup> Thayer, *Prelim. Treat. Evid.*, p. 36.

<sup>50</sup> Palgrave, *Eng. Com'lth*, Vol. 1, p. 213; Lesser, p. 136.

two lawful knights of each hundred, or, if knights were wanting, free and legal men, who, in turn, were to select ten others, so that the twelve might answer for all matters within the hundred, including, says Stubbs, all the pleas of the crown, the trial of malefactors, as well as a vast amount of civil business.<sup>50\*</sup> This is the historical grand jury, and for a time it seems to have been both a jury of accusation and of trial.<sup>51</sup> Forsyth says that the petit jury, as it is called, which is the real jury of trial, appears to have arisen as an alternative of trial by ordeal; but the separation between the two juries was, at any rate, complete in the reign of Edward III.<sup>52</sup>

The criminal jury, as it then was, became established on a definite basis toward the end of the twelfth century;<sup>53</sup> though the right to trial by jury in criminal cases seems to have been a matter of favor for a time, to be purchased for a consideration; this, however, was changed by article 36 of Magna Charta, which made such trials, in their then existing form, a matter of right.

By the end of the thirteenth century trial by jury in criminal cases had become well established,<sup>54</sup> and refusal of a person charged with crime to be tried was, at one time (the middle of the thirteenth century), equivalent to a confession of guilt.<sup>55</sup> This was soon changed by statute,<sup>56</sup> which provided imprisonment and a penalty, consisting of barbarous torture for criminals who stood mute or declined to be tried by jury.<sup>57</sup> Several centuries later, it was provided that persons standing mute, when charged with felony or piracy, should be held committed by their own confession,<sup>58</sup> and, in 1827,<sup>59</sup> that, where one charged with a crime re-

\*<sup>50</sup> *Constit. Dist. Eng.*, Vol. 1, p. 568.

<sup>51</sup> Forsyth, p. 178.

<sup>52</sup> *Id.*, p. 180.

<sup>53</sup> Lesser, pp. 138, 139; Stubbs, *Select Charters*, p. 140.

<sup>54</sup> Lesser, p. 143.

<sup>55</sup> *Id.*, p. 146.

<sup>56</sup> 3 *Edw. 1*, c. 12.

<sup>57</sup> Lesser, p. 147.

<sup>58</sup> 12 *Geo. III*, c. 20.

<sup>59</sup> 7 and 8, *Geo. IV*, c. 28.

fused to plead to an indictment, a plea of not guilty should be entered for him to the same effect as if he had personally pleaded, thus establishing the rule in the form generally adopted in America jurisdictions today.

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

(To be Concluded.)