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

### III.

The several ancient customs and institutions mentioned in the previous installments of this paper, after contributing their part to the development of our present system, gradually disappeared; but, before being superseded, they in turn were no doubt affected by the introduction of new institutions and the development of other customs, some of which call for notice. Prior to taking these up, however, it may be well to direct attention to what Burke has to say upon the subject of our Anglo-Saxon ancestors' contribution to the development of trial by jury; he states:<sup>1</sup> "There are few things in our history so irrational as the admiration expressed by a certain class of writers for the institutions of our barbarous Anglo-Saxon ancestors;" and he expresses the opinion that "trial by jury did not exist till long after the [Norman] Conquest." This latter assertion, as we have seen, is dissented from by many other authorities upon the subject; but, whoever may be right about the amount of credit due to the Anglo-Saxons and Normans, respectively, it seems to be very generally agreed that the Normans caused the separation of the spiritual and tem-

\*Part I of this article was published in the November, 1921, issue of the UNIVERSITY OF PENNSYLVANIA LAW REVIEW (Volume 70), page 1, *et seq.*; Part II in the January, 1922, issue, page 73, *et seq.*

<sup>1</sup> Burke's Hist. of Civilization in England, vol. 2, c. 2, note 28.

poral courts, and, on the other hand, that they introduced the combat, or duel, as a means of determining civil suits as well as questions of guilt or innocence in criminal cases.<sup>2</sup> They also appointed justiciars (who were high royal judicial officers, supposed to directly represent the crown) to try suits in various parts of the country<sup>3</sup> and, under them, persons from the neighborhood where the dispute arose were called to prove facts within their own knowledge;<sup>4</sup> all of which were steps on the road to trial by jury.

One of the most important institutions we have to consider—which comes nearest, in time and character, says Prof. Robertson,<sup>5</sup> to English trial by jury,—is the system of “recognition” by sworn inquest, introduced into England by the Normans. Such “inquest,” says Stubbs in his Constitutional History, “is directly derived from the Frank capitularies, into which it may have been adopted from the fiscal regulations of the Theodosian code, and thus owns some distant relationship with the Roman jurisprudence.” The Frank capitularies, or early French code of laws, became Norman subsequent to 912, when Rollo established himself in the territory afterwards known as Normandy. Lesser says,<sup>6</sup> “These capitularies—so called because of their division into chapters [or *capitula*] were promulgated by the kings, after consideration thereof in a general council or assembly, and are thus of mixed kingly and popular origin.”

However derived, the inquest by recognition was originally to ascertain facts in the interest of the crown or the exchequer—as for purposes of taxation;<sup>7</sup> but it was gradually allowed between subjects, to settle disputes of fact. Mr. Freeman, in his “Norman Conquest,”<sup>8</sup> states that the Norman rulers of England were obliged, more than the native rulers would have been, to rely on this system for accurate information. “The Norman

<sup>2</sup> Lesser, pp. 91, 103, n. 15; Forsyth, pp. 124, 125.

<sup>3</sup> Forsyth, p. 81; Lesser, p. 91.

<sup>4</sup> Forsyth, p. 90.

<sup>5</sup> Encyc. Brit., 9th Am. Maxwell Somerville ed., title, Jury.

<sup>6</sup> Hist. Jury System, p. 94.

<sup>7</sup> *Id.*, p. 93.

<sup>8</sup> Vol. 5, p. 451 *et seq.*

Conquest," says Professor Robertson, "therefore fostered the growth of those native germs, common to England with other countries, out of which the institution of juries grew"; and it is suggested, in a foot note to Professor Robertson's article, that this is the chief reason for the remarkable development of the jury system in England. The inauguration of the inquest by recognition, with its analogies to the native institutions, already described, was entirely consistent with this policy of fostering "the growth of native germs," as will no doubt be observed from the account I am about to give.

The system of recognition consisted in questions of fact being submitted to sworn witnesses in the local courts, who determined the issues involved. Lesser<sup>9</sup> says: "By virtue of the institution thus presented, as a substitute for the existing inefficient modes of trial, the power and duty to decide in a particular case was entrusted to a limited number of freemen selected from the district; the number was generally twelve or some multiple of twelve. This delegated body, unlike the compurgators, did not act without knowledge of the facts involved in the dispute, but such knowledge was not acquired by means of any evidence submitted to or predicated upon argument heard by them; they decided entirely upon their own personal knowledge and information. In the selection of these persons, who were called recognitors [reviewers, investigators], care was taken that they should be acquainted with the circumstances of the case, with the litigant parties, and with the situation and ownership of the disputed property; they were, therefore, invariably chosen from the immediate vicinity of the parties or of the land in question. In doubtful cases they were strictly examined, to discover the amount and source of their knowledge. When appointed, they heard no evidence or allegations, but retired apart, and by comparing their previous information, whether acquired by sight of the occurrence or by traditions in the vicinage, or by other means, they rendered their decision or verdict, *verdictum*, upon oath. As they assumed to speak upon oath, from their own personal knowledge, they were liable to the penalties of perjury, if they returned

<sup>9</sup> Hist. Jury System, p. 97.

a false verdict. Thus there was substituted, for the mere numerical preponderance of oaths, by irresponsible compurgators, a decision upon knowledge, by twelve recognitors, who acted upon some cognizance of the facts involved in the dispute, but they derived that information from themselves; they were, indeed, a jury of witnesses testifying to each other."<sup>10</sup>

The extension of the inquest by recognition began with the assize of novel disseisin,<sup>11</sup> whereby the king protected by royal writ and inquest of neighbors every seisin of a freehold, and was followed by the grand assize, applicable generally to questions affecting freehold.<sup>12</sup>

Where a complainant had been disseised, the parties appeared in court and made their respective claims, which they offered to prove by champions, who were obliged to testify, from their own knowledge, of the justice of the respective claims;<sup>13</sup> though hearsay evidence was not excluded.<sup>14</sup> The case, when in doubt, was decided by the outcome of a duel, which followed, according to Canon Stubbs,<sup>15</sup> as "a sort of ultimate expedient to obtain a practical decision, an expedient partly akin to the ordeal—as a judgment of God—and partly based on the idea that, where legal measures had failed, recourse must be had to the primitive law of force"; this method of trial soon fell into unpopularity because might becomes right, and, in a suit between a rich owner and a poor man, the former could afford to hire the better champions, thus easily defeating his adversary. Though little used, trial by battle was not formally abolished until the early part of the 19th century, by statute 59 Geo. III, c. 46, which was passed as a result of the decision in *Ashford v. Thornton*,<sup>16</sup> where, to the amazement of the profession, it was held that this ancient device was still a legal method of settling disputes in the courts.

<sup>10</sup> See also Pomeroy, *Mun. L.*, secs. 125-8.

<sup>11</sup> Statute of Henry II.

<sup>12</sup> Lesser, pp. 112, 113.

<sup>13</sup> Forsyth, p. 102.

<sup>14</sup> *Id.*, p. 103.

<sup>15</sup> 1 *Const. Hist. Eng.*, vol. 1, c. 13, p. 653.

<sup>16</sup> 1 *B. & Ald.* 405.

When a defendant did not choose to accept an offer of combat, he could avail himself of the grand assize, which more nearly approaches our trial by jury; this substituted, for the testimony and physical powers of the champion, the oath of twelve knights.<sup>17</sup> The sheriff summoned four knights of the neighborhood, and these, being sworn, chose "twelve lawful knights most cognizant of the facts," whose duty it was to determine, on their oaths, the right to the land. If they all knew the facts and were agreed as to their verdict, that ended the matter; if some or all were ignorant, the fact was certified in court, and new knights were named until twelve were found to be agreed. The same course was followed when the twelve were not unanimous, new jurors being added until the twelve were agreed. This was called afforcing the assize.<sup>18</sup>

The knowledge of the knights was acquired independently of the trial; "so entirely," says Forsyth, "did [they] proceed upon their own previously formed view of the facts in dispute that they seem to have considered themselves at liberty to pay no attention to evidence offered in court, however clearly it might disprove the case which they were prepared to support."<sup>19</sup>

The use of recognition is prescribed by the constitutions of Clarendon, 1166, for cases of dispute as to lay or clerical tenures, and in course of time the judges who held the assize were directed to entertain cases other than those involving land. In 1285 we find it provided that, for convenience of suitors and others, instead of bringing the parties to Westminster, inquisition of trespass and other pleas shall be determined before the justices of assize. The grand assize was discontinued as a mode of trial in 1834.<sup>20</sup>

Forsyth,<sup>21</sup> writing on the general subject in hand, states: "The machinery for this mode of inquiry was ready in the existence of the *jurata*, so familiar to the people in the decision of

<sup>17</sup> Forsyth, pp. 103-4; Starkie, p. 14.

<sup>18</sup> Forsyth, pp. 104-105.

<sup>19</sup> *Id.*, p. 107.

<sup>20</sup> *Id.*, p. 115.

<sup>21</sup> *Id.*, p. 123.

disputes, and the assize supplied the model of the form in which it [the *jurata*] was henceforth to appear. The transition from a varying number of neighbors assembled at a county or other court, to that of a fixed number, namely, twelve, summoned to the assize [or *jurata*] court, was easy and slight; and the verdict of the jury was originally neither more nor less than the testimony of the latter."<sup>22</sup>

Admitting with Stubbs,<sup>23</sup> Reeves,<sup>24</sup> and others, that the Norman recognition was the instrument which the lawyers in England ultimately shaped into trial by jury, Freeman maintains,<sup>25</sup> none the less, that the latter is a distinctively English thing. Forsyth comes to substantially the same conclusion;<sup>26</sup> noting the jury germs of the Anglo-Saxon period, he shows how out of those elements, which continued in full force under the Anglo-Normans, was produced at last the institution of the jury, as we now know it. Other writers give much credit to the effect of the civil law in influencing the establishment of the jury system in England. Strahan, in his preface to Domat's Civil Laws, says: "We are not to look upon the civil law altogether as a foreign commodity, with respect to England; some of the particular laws thereof having been enacted for deciding controversies which arose here in England, and bearing date from this country. The greatest part of this island was governed wholly by the civil law, for the space of about three hundred years;<sup>27</sup> during which time some of the most eminent among the Roman lawyers . . ., whose opinions are collected in the body of the civil law, sat in the seat of judgment, here in England, and distributed justice to the inhabitants; and the law thus administered is embodied in Justinian's Code." While Judge Cooley<sup>28</sup> states that, since Roman institutions, "which resembled in many particulars our jury, were in full force in England for more than three cen-

<sup>22</sup> See also Stubbs's *Const. Hist. Eng.*, vol. 1, p. 617.

<sup>23</sup> *Const. Hist. Eng.*, vol. 1, p. 617.

<sup>24</sup> *Hist. of Eng. Law*, vol. 1, pp. 82-88.

<sup>25</sup> *Norman Conquest*, vol. 5, p. 451 *et seq.*

<sup>26</sup> *Trial by Jury*, pp. 5, 11.

<sup>27</sup> A. D. 41-396.

<sup>28</sup> *Am. Cyc.* v. IX, p. 722.

turies, it would seem unreasonable to deny them any important influence in creating the trial by jury." <sup>29</sup>

Finally, John Norton Pomeroy<sup>30</sup> summarizes the situation thus: "The jury trial in its present matured form involves two very different elements, each equally important, but having no historical or theoretical connection. They are [1] the decision of the facts in a judicial trial by a number of individuals, distinct and separate from the official judge or magistrate; and [2] the free choice of these individuals from among the mass of ordinary citizens. The Romans possessed the first of these features in their administration of justice; the origin of the second is to be found in the tribal customs of the German peoples, who overran the provinces of the Western empire, including the Angles and Saxons, who settled in Britain." He then reviews the folk-courts of the shires, or *gamotes*, which were composed of assembled free men presided over by the *ealdorman*, or the sheriff, or his deputy, and trial by *compurgators*, which he asserts developed into *recognitors*—"a jury, as it were, of witnesses," stating,—“In the reign of Henry III [the practice] was introduced of joining with these *recognitors* others who were actual witnesses of the transaction”; but, as he says, “all united in rendering the verdict.” Mr. Pomeroy then goes on to state that, “during the reign of Edward III [1327-1377], a still more important and radical change was effected; witnesses were added to or connected with the *recognitors*, who communicated to the latter their knowledge of the facts, but took no part in the decision. . . . The innovation once made, the progress of aiding the *recognitors* by the testimony of outside parties was rapid.” <sup>31</sup>

None of the writers on the subject shed any clear light, however, upon the supposed transition period, when jurors, as such, ceased to be witnesses, and the latter, as such, ceased to be jurors.

<sup>29</sup> But see Pollock & Maitland, *Hist. Eng. L.*, p. iii.

<sup>30</sup> Johnson's *Cyc.*, title, *Jury*.

<sup>31</sup> See also Pomeroy *Mur. L.*, secs. 124-133.

Pollock & Maitland, in their *History of English Law*, say:<sup>32</sup> "We have to explain why the history of the jury took a turn which made our jurors not witnesses, but judges of fact; and the requisite explanation we may find in three ancient elements which are present in trial by jury, so soon as that trial becomes a well-established institution. For want of better names, we may call them [1] the arbitral, [2] the communal, and [3] the quasi-judicial." The authors then explain how [1] the arbitral element is recognized in the phrase, used by litigants, "putting themselves upon the country," as it involves consent and submission. They next explain [2] how the verdict of the jurors is not just the decision of twelve men—it is a verdict of "a pays, a country, a neighborhood, a community;" and, in this connection, they say, "The justices seemed to feel that, if they analyzed the verdict, they would miss the very thing for which they were looking, the opinion of the country." Lastly, the authors explain how [3] we may "detect in the verdict of the jurors an element which we cannot but call quasi-judicial," saying, "they [the jurors] must collect testimony, they must weigh it and state the net result in a verdict." Pollock and Maitland then go on to state: "It is to the presence of these three elements that we may ascribe the ultimate victory of that principle of our law which requires an unanimous verdict," saying, in elaboration of this thought: "For a long time we see in England various ideas at work: If some of the recognitors profess themselves ignorant, they can be set aside and other men can be called to fill their places. If there is but one dissentient juror, his words can be disregarded and he can be fined . . . ; but gradually all these plans are abandoned and unanimity is required [even to the point of shutting the jurors up without meat or drink]. The arbitral and communal principles are triumphing; the parties to the litigation have put themselves upon a certain test—that test is the voice of the country. Just as a corporation can have but one will, so a country can have but one voice . . . Nor must it escape us that the justices are pursuing

<sup>32</sup> Vol. 2, pp. 622-9.

a course which puts the verdict of the country on a level with the old modes of proof . . . The *verdictum patria* is assimilated [compared] to the *judicium dei*. [So also] English judges find that a requirement of unanimity is the line of least resistance; it spares them so much trouble . . . It saved the judges of the middle ages not only from this moral responsibility, but also from enmities and feuds. Likewise, it saved them from the, as yet unattempted task, a critical dissection of testimony . . . The principle that the jurors are to speak only about matter of fact, and are not concerned with matter of law, is present from the first. They are not judges, not doomsmen; their function is not to 'find the doom' as the suitors do in the old court, but to 'recognize,' to speak the truth."

Forsyth<sup>33</sup> takes issue with those who think the witnesses at any time acted judicially, but admits that, "in so far as their evidence was conclusive, it may be taken to have been equivalent to a judicial sentence;" and he says, "this has perhaps misled . . . others to suppose that they did pronounce such a sentence in the character of judges." He adds: "Originally, indeed, there may have been no difference between these two characters, for, when all the freemen of the hundred attended the gamot, or court, they necessarily included those who could give evidence upon the matters that came before it, and were as much members of the court as the rest; their testimony, therefore, on a disputed question was the judicial decision upon it." His thought is that, "afterwards, when the court consisted of a limited number, the judges [in the sense of jurors] and witnesses must have been different persons, although the effect of the evidence of the latter remained the same."

It appears, however, that the trial by an indefinite number of sectators for many years after the Normans came to England, and not until the reign of Henry II (1154-1189) was a real approach made to a general custom of trial by jury, with outside witnesses called before such a body.<sup>34</sup>

<sup>33</sup> Trial by Jury, pp. 75-6.

<sup>34</sup> Reeves's Hist. of Eng. Law, v. 1, pp. 82-88.

Indeed, some historians insist that till the reign of Henry VI (1422 to 1461) trial by jury, to all intents and purposes, was but trial by witnesses;<sup>35</sup> Forsyth<sup>36</sup> asserts that in the reign of that monarch, "with the exception of the requirement of personal knowledge in the jurors, derived from near neighborhood, or residence, the jury system had become in all essential features similar to what now exists;" but, by the middle of the thirteenth century, the jury had become so firmly established as an institution that Bracton<sup>37</sup> describes its then existing form, and tells us that prior perjury by, or the serfdom of, a proposed juror, or his near relationship or intimacy with, or enmity to, the parties litigant, would disqualify him for service.

Mrs. Margaret C. Klingelsmith, librarian of the Biddle Law Library of the University of Pennsylvania, in a paper published in the UNIVERSITY OF PENNSYLVANIA LAW REVIEW<sup>38</sup> a few years back, produces an array of matter, which she modestly calls<sup>39</sup> "examples taken here and there from among the many on record," to prove her belief "that the earliest juries of which we have records were not the sole witnesses as to the facts;" that, although the jurors may have been witnesses, they also heard others, took testimony—sworn testimony—and were expected to ascertain the facts of the cases before them for decision from documents and evidence which supplemented their own knowledge.

However, in the course of time, jurors became judges of the evidence submitted to them, as well as witnesses; and from this was gradually evolved the system whereby they were solely judges of the evidence, and were not supposed to have any personal knowledge of the facts involved.

When the triers of fact changed from recognitors to those having power to decide on testimony laid before them, it was, no doubt, found essential to have some superintendence of the

<sup>35</sup> Macclachlan, Eng. Cycl., III, 26.

<sup>36</sup> Trial by Jury, c. 7, p. 123.

<sup>37</sup> De Laud, book 4, c. 19.

<sup>38</sup> Vol. 66, pp. 107-122.

<sup>39</sup> *Id.*, p. 116.

admission of testimony, in order to exclude that which was improper; and this necessity became the foundation of the system of rules governing the admission of evidence which we now follow.

The practice of receiving evidence openly in court also led to the extension of the duties of attorneys in the trial of cases; they were permitted to examine and cross-examine witnesses, also to influence by argument the decision of juries, and, in this development, any juror, who might have personal knowledge of the facts which were the subject-matter of inquiry, was obliged to offer himself as a witness, so as to bring his testimony before the rest of the jurors in a safe and proper manner. We find this held in *Bushnell's Case*,<sup>40</sup> about 1670; and finally Lord Ellenborough, in the reign of George III, plainly said that a verdict based on the jurors' own knowledge, rather than on facts produced in evidence, should not be sustained.<sup>41</sup>

A word of warning should be given to those who wish to delve into these antiquities. Anyone who has read with care the preceding pages will be struck by the great divergence of opinion among the writers quoted, some of them historians of unquestioned authority. While it is possible to reconcile a few of these differences, quite a number are fundamental, and they must stand in opposition. Then there is the difficulty of deciding on the trustworthiness of the individual author. The authority of one generation is often discredited in the next, and sometimes reinstated later. Green's "History of the English People" is now generally recognized to be more entertaining than reliable—as also Macaulay's History. The authors cited in my text, and quoted from quite extensively, are considered more as purveyors of facts than as authorities in the development of the story. The student should be careful not to place too much reliance on well-known writers. Forsyth's "Trial by Jury," quoted by me quite frequently, is characterized in the English Dictionary of National Biography<sup>42</sup> as "a careful

<sup>40</sup> Vaughan, 135, 6 How. St. Tr. 999.

<sup>41</sup> *Rex v. Hutton*, 4 Maule & S. 532, decided in 1816.

<sup>42</sup> Vol. II of Supplement.

and trustworthy study (quoted with high commendation in Lieber's 'Civil Liberty').” The New International Encyclopædia says that some of Forsyth's legal works “are of great value and are considered authorities on the subject which they treat;” yet Mr. Hampton L. Carson, well known as a learned and accurate master of legal lore, tells me that Forsyth is not now considered a very reliable authority. Reeves's History of English Law is a standard work; but W. F. Finlason, the editor of the second English edition,<sup>43</sup> constantly challenges the correctness of the text. One of the authorities Finlason relies on, in so doing, is the “Mirror of Justices,” which Pollock and Maitland<sup>44</sup> utterly condemn as consisting of “false history,” “speculations” and “satire.” So, it may be seen, a student with thirst for real knowledge will probably have to go back to the original data, and judge for himself, which the present writer frankly states he has had no opportunity to do.

It seems apparent we must all agree with the statement, previously made, that the origin of trial by jury is not traceable to any particular institution, country or nation, but is the net result of the customs of the various peoples who contributed to English civilization.<sup>45</sup> We must, however, be impressed that the inauguration and development of the Norman system of recognition marked a distinct advance toward our present mode of trial; this Norman institution no doubt affected, and maybe was affected by, existing institutions of earlier Anglo-Saxon origin, just as the latter had been affected by, and perhaps to a degree moulded on, still more primitive ones, which showed Roman influence. It nevertheless appears that the functions of the ancient and modern juries are distinct, in that the former, in most instances, were merely compurgators, deciding on their own knowledge, while the latter are judges of fact, deciding on evidence; yet the two are connected by the tribunal of mixed functions, which decided on its own knowledge, assisted by the testimony of witnesses; and from all of these came the jury, as

<sup>43</sup> Reprinted in 1st American edition.

<sup>44</sup> Vol. I, p. 28.

<sup>45</sup> See Pomeroy, *Mun. Law*, sec. 27; Cooley, *Am. Cyc.* vol. IX, title, Jury.

now existing, which decides exclusively on the evidence presented before it. Just when and precisely how these changes came to pass, as before said, are points which none of the students of the subject seem able to tell us much about; but we know what we possess, and every lawyer should have some knowledge of the origin and development of this, the greatest practical administrative achievement in the field of the common law.

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