THE
HISTORY OF TRIAL BY JURY

By

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With best wishes from
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THE HISTORY OF TRIAL BY JURY

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The institution of trial by jury is today the most comprehensive and comprehensible, reliable, well-established, democratic method of safeguarding the rights, privileges, liberty and freedom of the people, in common, general and frequent use in the administration of justice in the United States.

It is firmly entrenched in the jurisprudence of this country, and its legislative sanction originates in the Constitution of the United States, especially in the famous Bill of Rights.[1]

The Fifth Amendment to the Constitution states that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ." And again, Amendment VI provides that "In all criminal

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EXPLANATIONS

Eyre of Kent (pronounced air of Kent).....Reports of common law cases.
Co. Litt. .....Coke's Littleton (a commentary)
Y. B. 20 Ed. III (R. S.) ii, xxiii—xxviii.....Year Book, 20th year of Edward III's reign (Rolls Series) book 2, chapters 23 to 28
(S. S.) .....Short series

1. Article III, Section II, paragraph 3, prescribes that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. . . ." Amendment VII is specific as to civil matters, in that, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

This mode of determining the issues of a controversy is not restricted to the United States, nor even to the English-speaking jurisdictions, where it is universally prevalent, but is in practice in nearly every civilized state in existence.

Trial by jury may be defined as the examination of a civil or criminal cause, by a judicial tribunal competent so to do, in which the decision of the issues of fact rests with a sworn body of men and/or women selected for that purpose.

There is, at the present time, little choice or election as to a jury trial in criminal actions, particularly in the major crimes, and the accused is bound to have his guilt or innocence established upon a plea of not guilty by a judgment of his peers, in a trial by jury. But this was not always the case. Historically, the option lay with the accused to "put himself upon the country," that is to say, to demand a jury trial. In civil matters, that option can still be exercised.

The modes of trial which preceded trial by jury, and which, to some extent, were contemporaneous with it, at its inception, were:

1. Trial by Ordeal.
2. Trial by Compurgation (Wager of Law).
3. Trial by Witnesses.
4. Trial by Wager of Battle.

1. Trial by Ordeal

Black's Law Dictionary[2] describes Ordeal as follows: "Ordeal. The most ancient species of trial, in Saxon and old English law, being peculiarly distinguished by the appellation of 'judicium Dei, or judgment of God,' it being supposed that supernatural intervention would rescue an innocent person from the danger of physical harm to which he was exposed in the species of trial. The ordeal was of two sorts,—either fire ordeal or water ordeal;

2. 3rd ed. (1944) p. 1297.

the former being confined to persons of higher rank, the latter to the common people."[3] And further it states: "Fire Ordeal: The ordeal by fire or red-hot iron, which was performed either by taking up in the hand a piece of red-hot iron, of one, two or three pounds weight, or by walking barefoot and blindfolded over nine red-hot plowshares, laid lengthwise at unequal distances."[4] Funk and Wagnalls New Standard Dictionary of the English Language,[5] says:—"Ordeal: A medieval form of judicial trial wherein supernatural aid was invoked in the place of evidence, as in trial by fire, water, or battle: an appeal to the immediate judgment of God."

This institution of trial by ordeal was, at one time, the principal mode of settling disputes among the tribes of Africa. We are indebted to this same authority just quoted for some light on this point. At the same page, it states:—"The downbark of Western Africa, used in ordeal. The root of a species of strychnos, used by Africans, in ordeals. Any one of several African trees yielding some poisonous product used in ordeals by the natives; as the ordeal-tree of Madagascar, and that of South Africa, both of the dogbane family; also, the sassy-tree of Sierra Leone. Of the first, the kernel of the fruit is used; of the two latter, the bark."

Potter's "An Introduction to the History of English Law"[6] calls Trial by Ordeal, "A unilateral appeal to the supernatural which varied a good deal with time, place, and circumstance." "Perhaps the most common ordeals," he goes on to say, "were: hot water, i. e., plunging the arm into boiling water up to the elbow; cold water, i. e., whether party did sink or swim (much used till a late date in witch trials); hot iron, i. e., carrying molten metal in the hand; and cursed morsel (corsned), i. e., swallowing a morsel without choking. Each one of these different ordeals was performed under the auspices of the Church, a priest blessing (or cursing) the particular operation. If the person put to the ordeal was really injured, e. g., in the hot iron, if after seven days his hand was found to fester, then he was held to have failed, but if the wound healed, he "came clean from the ordeal." This method was largely used in criminal

3. 4 Bl. Comm. 342.
4. 4 Bl. 343.
5. 1941 edition, p. 1737.
6. 2nd ed. (1926), p. 101.

trials, but the growing distrust of it is found in the Assize of Northampton,[7] which provided that persons indicted by their hundred and who came clean from the ordeal should abjure the realm if they were not of good character. In 1215, the Lateran Council forbade the clergy to assist at the ordeal, and in this country it shortly after became entirely obsolete."

2. TRIAL BY COMPURGATION, OR WAGER OF LAW

This method of trying the issues of a cause is defined by Funk & Wagnalls' New Standard Dictionary of the English Language[8] as: "Old English Law: The calling of twelve persons from the vicinage by one accused of crime, to swear to their belief in his veracity or innocence. In the civil courts it gave place to the jury system, though it was revived in the case of King vs. Williams.[9] The right was abolished by Act of Parliament in 1833.[10] Compurgation was formerly in great vogue in the ecclesiastical courts."

Each person who came forward to testify in this manner on behalf of the one by whom he was called was named a "compurgator." Blackstone defines the term to be "One of several neighbors of a person accused of a crime, or charged as a defendant in a civil action, who appeared and swore that they believed him on his oath."[11]

Under early Saxon rule an accused was acquitted, if he could find twelve persons, or more, compurgators, who could come forward and swear a veredictum, or true statement to the effect that they believed him innocent. This was also called a "wager of law." It was abolished in 1833[12] after it had fallen into long disuse.

Potter[13] states that "This oath was taken by the party, and he might be adjudged not only to take this oath without hesitation and in form word-perfect, but also to bring oath helpers or compurgators. In fact, it was unusual to allow a defendant to clear himself by his unsupported oath. At the same time, the compurgators did not swear to the issue but only to their belief

7. 1176 A. D.
8. 1941 edition, p. 546.
9. 2 B and C. 538 (1824).
10. 3 & 4 William IV, C. 42, Sec. 13.
11. 3 Bl. Comm. 341.
12. 3 & 4 William IV, C, 42.
13. Potter, *An Introduction to the History of English Law*, 2nd ed.

in the truth of their principal's oath, 'By God the oath which A hath sworn is clean and unperjured'."

Compurgation still exists in a modified sense in common law jurisdictions, although devoid of its old nomenclature. Where a defendant is charged with a crime, under the common law, he may call character witnesses, or, as the ancients would have called them, compurgators, who may testify as to their belief in his upright character. But when he has thus put his character in issue in this manner, the prosecution, theretofore precluded from offering testimony of this nature, can rebut by evidence tending to show that he bears a bad reputation in his community. This evidence does not bear directly on the facts in issue, nor even on the facts relevant to the issue, but may be classified as being relevant to relevant facts; and its probative value lies entirely within the discretion of the jury. It is more often employed after verdict, in an effort to mitigate the sentence of the court.

Originally, there seems to have been no definite legal rule regarding any certain number of compurgators necessary to testify in any given case. In the manorial courts, three to six were thought to be sufficient.[14] It was not until the year 1342 that the number twelve was settled upon.[15] At the Assize of Clarendon[16] it was enacted that an accused person who had successfully waged his law, but was of bad character, should depart from and abjure the realm within eight days. Gradually, in real actions, i. e., suits to recover real property, the assizes took the place of this form of trial[17] except as to incidental questions, such as those pertaining to proper service of judicial process.[18]

3. Trial by Witnesses

According to Holdsworth, this mode of trial "has a modern sound; but such a trial meant in the twelfth century something very different from the trials of modern law. These witnesses were analogous, not to our modern witnesses, but to the secta. They were persons produced by plaintiff or defendant to swear to a belief in his tale. . . . There was no testing by cross-

14. *Select Pleas in Manorial Courts* (S. S.) 7, 18, 37—six; 140, 151—three; 175—five.
15. Y. B. 16 Edward III. (R. S.) ii, 16; Co. Littleton 295; Bl. Comm. iii, 343.
16. 1166 A. D.
17. Y. B. 6, 7 Edward II (S. S.) 82-83.
18. Y. B. 16 Edward III (R. S.) ii, xix, xx.

examination; the operative thing was the oath itself, and not the probative quality of what was said, or its persuasion on the judge's mind. . . . The plaintiff told his tale and produced a secta, or followers, to support it. Then the defendant put forward his defence and a body of witnesses to support it."[19] The decision in such a case rested, not on the credibility of the testifying persons, but on the unanimity of the tale told by the greater number.

In 1308-1309 the point at issue was as to whether or not the husband of a woman was alive. This woman "came and proved her husband's death by four people who were sworn, and who agreed with each other in all things." On another day the opposite party came forward and "proved that the husband was alive by twelve people who were sworn and who agreed with each other in all things." The latter prevailed, because the proof "was better and greater than the woman's proof."[20] In 1560, in the case of Thorne v. Rolff,[21] the issue of whether or not the plaintiff's husband was alive was tried in the same way. The plaintiff brought two witnesses while the defendant brought none. The former was allowed to succeed on the ground that the better proof had won the day. "And their testimony tended to no full proof, but by conjecture and presumptions. . . . And these testimonies were entered verbatim upon the record before judgment was given; and no witness of the life of the man was given upon the part of the tenants; therefore it was considered that the demandant should recover seisin, etc. . . . Also it was said that qui melius probat melius habet."[22]

By the thirteenth century, these bands of witnesses were being examined by the judges, in order that decisions could be based on credibility. In Bracton's Note Book,[23] in the year 1234, conflicting claims to a stray mare were made. The issue was decided after examination of the two sets of witnesses; and the judges came to the conclusion that the tale of one set of witnesses was consistent, while that of the other set was inconsistent.

Potter states that "These witnesses might be persons or charters, and there was little difference whether it was one or

19. Holdsworth, *A History of English Law* (1931), Vol. 1, p. 302.
20. Y. B. 1 Edward II (S. S.) 111.
21. Dyer's Reports, 185.
22. Idem.
23. Case 1115.

the other. From the nature of things a charter cannot be interrogated and the persons called as witnesses under this procedure were not interrogated either. They swore to the issue and nothing else. Again, the oath here was very formal and the slightest slip meant failure. Witness trials as we know them came to us through much more devious ways, it would seem."[24]

To quote Holdsworth, "The modern witness and the modern law of evidence only gradually began to appear when, in the course of the sixteenth century, the jury were losing their character of witnesses."[25] "The question whether a husband was dead, so that his widow could claim dower, was tried in this way until 1834."[26] In 1313, the question whether a life tenant was dead or alive was also tried in this way.[27]

Although it was manifest that in the thirteenth century the influence of the canon law had failed to make this mode of trial a serious rival to trial by jury, in the seventeenth century the influence of the common law definitely changed this old method of trial by witnesses into "a trial by the justices upon proofs made before them."[28] This method of trial ended in 1834.

4. Trial by Wager of Battle

Wager of battle, or trial by battle, is defined by Potter as, "A bilateral ordeal in its inception, an appeal to the god of battles."[29] "The tenant in a real action and the appellee in appeal of felony had an option when trial by assize or jury was introduced, to choose this method of trial. The battle was fought all day if the demandant or tenant could not drive his opponent to cry the hateful word, 'craven,' earlier, and if they fought till the stars appeared then the person bringing the action or appeal lost."[30]

"Trial by battle is almost universally found among the barbarian tribes from whom the nations of modern Europe trace their descent. It was not merely an appeal to physical force

24. Potter, *An Introduction to the History of English Law* (2nd ed.) (1926), p. 102.
25. Holdsworth, *A History of English Law* (1931), Vol. 1, p. 304.
26. Pollock and Maitland, *History of English Law Before the Time of Edward I* (2nd ed.) (1898), Vol. ii, p. 636; Y. B. 16 Edward III (R. S.) ii, 86-90; Faux v. Barnes (1698) 1 Ld. Raym. 174.
27. Y. B. 6, 7 Edward II (S. S.) 59.
28. Case of the Abbot of Strata Mercella (1592) 9 Co. Rep., p. 30f.
29. Potter, *An Introduction to the History of English Law* (2nd ed.) (1926), p. 103.
30. Idem.

because it was accompanied by a belief that Providence will give victory to the right. Christianity merely transferred this appeal from the heathen deities to the God of Battles. The trial by battle is the judicium Dei, par excellence. The Anglo-Saxons seem to have been almost the only nation who did not possess it."[31]

Sir Walter Scott has woven a stirring romantic tale of this mode of trial in *Ivanhoe*. There, in his characteristic captivating style, he tells the story of Rebecca the Jewess, charged with sorcery, a crime punishable with death, by the preceptor of Templestowe, who is the head of an order of knights. Sir Brian de Bois Guilbert is selected as the champion for the order. In her despair, Rebecca can turn to only one friend, Wilfred of Ivanhoe, the disinherited son of Cedric the Saxon. Although wounded, and scarcely able to bear arms, Ivanhoe consents to defend the beautiful Rebecca. The combat takes place in the lists of Templestowe. Sir Brian dies, a victim of his own contending emotions, untouched by the spear of Ivanhoe. But the Jewess is set free, since the decision was regarded to have been in her favor. In the words of the preceptor of the order, the judgment of God had decided the issue. "Fiat voluntas tua" he recited, gazing solemnly on the face of the deceased templar.

More than anything else, this story tends to exemplify the deep religious sentiment surrounding this mode of trial about the time of Richard Coeur de Leon,[32] one of the early Plantagenet kings.

Trial by wager of battle is distinctly of Norman origin and was introduced from the continent by William the Conqueror, the first of the Norman sovereigns. It was used to settle a variety of issues, and it could not be declined, except by infants, women, or persons over sixty years of age. But, although it was looked upon with increasing disfavor, it lingered on in English law until 1819, when it was abolished.[33]

In 1818, in the case of Ashford v. Thornton,[34] Lord Ellenborough, C. J., presiding in the King's Bench, the whole court was thrown into consternation, when the defendant on a private charge of murder, suddenly challenged the appellant to a wager

31. Holdsworth, ubi supra, p. 308.
32. 1189-1199 A. D.
33. 59 George III C. 46.
34. 1 B. & Ald. 457.

of battle. It was then discovered that this ancient mode of trial was still on the statute books. Lord Ellenborough decided in favor of it, but the defendant was set free, because the appellant declined.

Holdsworth[35] tells us that "It was practically obsolete by the end of the thirteenth century." When it does occur in the Year Books, it is described as though it was a legal curiosity.[36] In the thirteenth century it had already begun to die.[37] In Lowe v. Paramour,[38] Dyer reports that the judges dressed in their scarlet robes, together with the sergeants-at-law, repaired to Tothill fields in London, where a crowd of four thousand persons had gathered to witness a fight that failed to take place. Finally, following Thornton's case,[39] trial by wager of battle was removed from the statute books.

Trial by Jury

There seems to be no better scheme of discussing this mode of trial by jury than by adopting Holdsworth's five heads, viz.,

(1) The origin and the English development of the jury;
(2) The different varieties of jury;
(3) The development of the judicial functions of the jury;
(4) Methods of controlling the jury;
(5) The legal and political effects of the jury system.[40]

(1) The Origin and the English Development of the Jury

"Trial by jury was for long the proud boast of Englishmen as one of their great indigenous institutions. This boast seems to have been founded upon a half-truth. Trial by jury as we know it has existed only in the English system, so far as we are aware, but in its origin it appears to be continental."[41] "Everywhere," says Maine, "in Teutonic countries we find deputies of the king exercising authority in the ancient courts, insisting that justice be administered in the king's name, and finally administering a simpler justice of their own amid the ruins of the

35. Holdsworth, ubi supra, p. 310.
36. Y. B. B. 17 Edward III (R. S.) 20 (appeal of murder) 20 Ed. III (R. S.) i, 482 (writ of right); Fitcherbert, Ap. Corone pl. 78 (appeal of robbery).
37. *Select Pleas of the Crown* (S. S.)xxiv.
38. Dyer, 301 (1571).
39. Supra.
40. Holdsworth, ubi supra, p. 312.
41. Potter, ubi supra, p. 93.

ancient judicial structures fallen everywhere into disrepute and decay."[42]

Stubbs is of the opinion that the jury system took its rise in the provisions of late Anglo-Saxon law in which twelve thegns presented offences, but Maitland differs. He believes the true origin of the jury is to be found in the Frankish Inquest introduced by William the Conqueror.[43] In reality, this inquest was a means of acquiring information needed by the executive branch of the government with the aid of the royal authority, which was, in Norman times, manifest by an efficient army. The compilation of *Domesday Book* by the Conqueror was accomplished in this manner, but the purposes to which this use of the royal power was put, were legion. Henry II particularly used it in all departments of his administration, and to him largely is due the growth of the institution of trial by jury.

When it first became known in England, the jury was essentially "A body of neighbors summoned by some public officer to give, upon oath, a true answer to some question."[44] This procedure had already been introduced into Anglo-Saxon England by the inquisitory methods pursued by the Church in the exercise of jurisdiction in its own courts. When *Domesday Book* was compiled, the jurors who were summoned were compelled to answer questions relating to the value, extent, type of tenure, etc. of the realm of England, and to render the verdicts thereof. Such enquiries were made "By the oath of the sheriff, and all the Barons and their Frankish men, and of the whole hundred, and of the priest, reeve and six villeins from each township."[45] The provisions of the Assize of Clarendon[46] and the Assize of Northampton[47] imposed upon the juries summoned thereunder, very extensive and comprehensive questions which they were compelled to answer of their own knowledge. Among others, they were required to give information touching persons suspected of having committed crimes, as to escheats, as to outlaws, and as to the misfeasance of officials.[48] The itinerant justices, or justices in Eyre, the forerunners of our circuit judges, used

42. Maine, *Early Law and Custom*, p. 172.
43. *Pollock and Maitland*, ubi supra, i, p. 140.
44. Idem i, 117.
45. *Inquisitio Eliensis*, cited by Stubbs, *Selected Charters* 86.
46. 1166 A. D.
47. 1176 A. D.
48. Stubbs, *Selected Charters* 143, 150.

this method of inquest extensively in their supervision of the doings of all local courts. The question of ownership of land was settled by means of the various assizes, which term, at that time of English history connoted (1) the statute; (2) the legal proceeding itself; (3) the jury trying the cause. The Grand Assize, the possessory assizes of Darrein Presentment, Mort d'Ancestre, and Novel Disseisin, together with the Assize of Utrum, determined all title to real property and to the nature of the tenure, i. e., whether lay or ecclesiastical. Since these assizes were all introduced by Henry II[49] during the Norman conquest, Maitland rightly remarks that Henry II "Placed at the disposal of litigants in certain actions that inquest of the country which ever since the Norman conquest had formed part of the governmental machinery in England."[50]

It is to be noted that at this stage of its development, the institution of trial by jury was in use both in the central and in the local courts. Gradually, as the power of Parliament rose in the thirteenth and fourteenth centuries, its use by the central government became restricted, leaving much of its growth to the local courts. The decadence in use by the former dates from Edward I's Model Parliament in 1295 which history regards as the first real attempt to form a democratic assembly. Says Holdsworth: "So gradually, in the course of the fourteenth century, the use of the jury in connection with the central government came to be chiefly confined to judicial functions. It is this use of the jury and its development under the exigencies of this use, that is peculiar to England."[51]

Undoubtedly, the rapid growth of the jury system in the eleventh, twelfth and thirteenth centuries, was to be attributed to the power of the crown in maintaining a very highly centralized government. According to Sir William Holdsworth, "The delegates of royal power could make their influence felt all over the country, and royal justice everywhere superseded the justice administered by the local courts. One of the most important instruments of the royal power was the inquisition held under the supervision of a royal judge by means of a jury."[52]

The continental development of trial by jury differed widely

49. 1154-1189 A. D.
50. Pollock and Maitland, ubi supra, ii, 602.
51. Holdsworth, *A History of English Law* (1931), Vol. 1, p. 314.
52. Idem, p. 316.

from the English, although the latter originated from the former. The causes for this phenomenon must be sought in the difference in course pursued by legal history in Britain and France, the most highly developed of the European states at that period of history. There was greater decentralization under a stronger feudal system in the latter than existed in the former. In consequence, the royal power was nearly always engaged in a struggle for supremacy against the great feudal barons, and thus was unable to exert any real authority over any large sections of the country so as to impose any general universal procedure. On the other hand, immediately upon the conquest of England by William the Conqueror,[53] a very strong central government was established, and save for a brief period under Stephen,[54] the feudal barons never were again in any worth-while control.

In the beginning the jury assumed the character of witnesses, rather than judges of the facts. "The decision upon questions of fact was left to them because they were already acquainted with them, or if not already so acquainted with them, because they might easily acquire the necessary knowledge. For this reason it has been said that the primitive jury were witnesses to, rather than judges of, the facts. They were in a sense witnesses. But they were more than witnesses. They were a method of proof which the parties were either obliged to or had agreed to accept."[55] In time, set rules governing the capacity of juries were introduced into procedure at common law, whereby greater emphasis was placed on their judicial, in contra-distinction to their witnessing capacity.

At an assize brought at Northampton in 1346, eleven out of twelve recognitors agreed on a verdict. The twelfth would not agree, and said that he never would agree with his fellows. The verdict was accepted and it was awarded that the twelfth should go to prison.[56] In 1367, it was settled finally that the verdict rendered by juries should be unanimous.[57] And earlier, the principle that they should not separate until after verdict was established.[58] To hasten their deliberation it was the law that they could neither eat nor drink till they had given their

53. 1066 A. D.
54. 1135-1154 A. D.
55. Holdsworth, ubi supra, p. 317.
56. Y. B. 20 Ed. III (R. S.) ii, 534-536.
57. Y. B. 41 Ed. III Michaelmas Pleas 36.
58. Y. B. 24 Ed. III Hilary Pleas 10.

verdict.[59] Brian, C. J., thought "That any eating or drinking after they were sworn made their verdict void"; but Fineux, C. J., thought that "This would not avoid the verdict if they had agreed on their verdict first, unless corruption could be proved."[60] It seems to have been agreed that if the jury ate and drank together at their own expense the verdict would stand.[61]

As early as 1401, the principle was recognized "That a jury could give their verdict to the judge after the court had risen; and that they could then have meat, drink, and beds, but that they could not separate, and must give their verdict in court the next day."[62] This was the common practice in 1561. In Coke's Littleton,[63] this type of verdict was called a "privy verdict." Coke says that when this privy verdict was given in court, on the following day it might be either confirmed or altered.[64] Blackstone confirms that a jury could separate after giving a privy verdict.[65] He, however, considered it a dangerous practice, as the jury might be tampered with. The Court of Appeal endorsed Blackstone's opinion in Fanshaw v. Knowles.[66]

By 60 Victoria C. 18[67] in a trial for felony other than murder, treason, or treason felony, the jury can separate after being sworn. But in Rex v. Ketteridge[68] it was decided that this could not be done after the judge had summed up. In R. vs. Kinnear[69] it was held that a separation of the jury on a trial for misdemeanor, before the judge had summed up did not necessarily invalidate the verdict, although in the seventeenth century at the trial of Lord Delamere,[70] this was the case. The present conditions under which refreshments are permitted to juries are laid down in 33 and 34 Victoria.[71]

Today, the institution of trial by jury is one of the most popular in the administration of justice wherever it is in use; but it is safe to say, insofar as its development in Britain is con-

59. Y. B. B. 21, 22 Ed. I (R. S.) 272; 3, 4 Ed. II (S. S.) 188; Co. Littleton 227 b.
60. Y. B. 14 Henry VII, Trinity Pleas 4.
61. Y. B. 20 Henry VII Mich. pl. 8.
62. Y. B. 2 Henry IV Trin. pl. 1 p. 22.
63. P. 227 b.
64. 9 State Trials p. 186.
65. Blackstone, *Commentaries* iii, 377.
66. (1916) 2 K. B. at p. 547.
67. 1896-1897 A. D.
68. (1915) 1 K. B. 467.
69. 2 B. & Ald. 462 (1819).
70. II State Trials 559 (1686).
71. C. 77, Section 23.

cerned, that "The jury would never have won this popularity, it would never have attained these results, if it had not been developed and controlled by the action of the courts, the legislature, and the Council."[72]

(2) The Different Varieties of Jury

It will be necessary to differentiate between the juries used in criminal cases and those used in civil ones. Of those used for criminal trials there are and were:

(a) The Grand Jury or the Jury of Presentment.
(b) The Petty or Petit Jury.

Of the juries used in civil trials we have:

(a) The Assizes
  (i) The Grand Assize.
  (ii) The Possessory Assizes.
  (iii) The Assize Utrum.
(b) The jurata.

(a) *The Grand Jury or the Jury of Presentment*

The Assizes of Clarendon[73] and Northhampton [74] provided that "twelve legales homines of every hundred" must present the crimes of which they knew or had heard. They did not speak of their own knowledge, but what was reputed in their neighborhood. This was substantially the modern grand jury, although the steps by which the twelve became twenty-three are not known. Their duty was to bring to the notice of the judges criminal cases that justice might be done after proof of guilt, and not to adjudicate upon that guilt.[75] They had, however, to conceal nothing about which they had heard, and the rolls of the coroner and sheriff served as a check on them in this respect.[76] In the Constitutions of Clarendon,[77] which preceded the Assize of Clarendon, Section 6 provides that for the purpose of accusations before the ecclesiastical courts, the sheriff, on the demand of the bishop, "faciet jurare duodecim legales homines de vicineto seu de villa, coram episcopo, quod inde veritatem

72. Holdsworth, ubi supra, p. 321.
73. 1166 A. D.
74. 1176 A. D.
75. Potter, ubi supra, p. 96.
76. Chalmers & Asquith, *Outlines of Constitutional Law*, 4th Ed. (1930) p. 431. Appendix F.
77. 1164 A. D.

secundum conscientiam suam manifestabunt."[78] This jury of presentment was used in the tourns, or sheriff's courts, and in the Eyre, or king's court. In the thirteenth century, they were selected from the several hundreds following the provisions of the Assize of Clarendon. But when the itinerant justices came to be sent out not in Eyre, but on commissions of Oyer and Terminer, Gaol Delivery, and Nisi Prius, and when justices of the peace in quarter sessions were invested with authority to hear criminal matters, the method of selecting them changed.[79] "The sheriff was directed to summon for the business either of the assizes or of the quarter sessions twenty-four persons from the body of the county. From these twenty-three are chosen, a majority of whom decides whether to find a true bill or ignore the accusations preferred.[80] The presentments made by grand juries were never, at any time, conclusive of the guilt of the accused; nor was this even asserted. They merely stated a suspicion of guilt which was to be tried by a different jury. And since this second jury was sometimes composed of jurors who had sat on the jury of presentment, it was at one time held that if the second jury acquitted the accused, those who had joined in presenting the accusation, could be punished. Blackstone states, in speaking of the eventual separation of functions between the two types of jury, that "It came to be recognized that the function of the grand jury is merely to say whether from the evidence for the prosecution (at which alone they look) there is probable ground of suspicion."[81]

"The grand jury of modern times still retains some traces of antiquity which have been lost to the other varieties of the jury. They consider the evidence in secret, and the court does not control or advise them as to their findings in the individual cases which come before them. It merely charges them generally as to the nature of the business which they are about to consider. They can always act if they please on their own knowledge; and Holt tells us that they often so acted at the end of the seventeenth century. They can act at the present day

78. He should make twelve lawful men from the vicinage or the village swear in the presence of the bishop, that thence they shall tell the truth according to their conscience.

79. Pollock and Maitland, ubi supra, ii, pp. 646-647.

80. Hale, *Pleas of the Crown*, ii, pp. 153-155; 6 George IV C. 50; 33 and 34 Victoria C. 77.

81. Blackstone, *Commentaries* IV, p. 300; also Hawle's remarks on the Earl of Shaftesbury's grand jury and State Trials, pp. 838-839.

in much the same way as they acted in the thirteenth century."[82] At the end of Charles II's reign, attempts were made to have the deliberations of the grand jury done in public.[83] Luttrell's *Diary*[84] mentions a case in 1681 where a bill was removed from the grand jury by a clerk of the crown office before any true bill could be found. That grand jury immediately returned a true bill against the clerk and sent it for endorsement to another grand jury. Lord Holt, in arguing the case of the Earl of Macclesfield v. Starkey[85] said: "It is the constant universal practice of grand juries, after they have dispatched the bills that we brought to them in form, they go and consult amongst themselves what they know of their own knowledge, or are informed of concerning any of the matters relating to the business of the county within their charge and authority, and according as upon enquiry they find matter to present, they do present it to the court. . . . This is done by them at every assizes and sessions." Today, the duty of a grand jury is to bring to the notice of the judges criminal cases that justice might be done after proof of guilt, and not to adjudicate upon that guilt.[86]

(b) *The Petty or Petit Jury*

"At the end of the twelfth century a person appealed, i. e., accused of crime by a private person, could get by payment the right to be tried by a jury."[87] Strictly speaking, he was supposed to prove his innocence by one of the orthodox ways—by battle, compurgation, or ordeal.[88] In the same way, a person against whom a grand jury presentment was returned accusing him of crime, was supposed to clear himself either by compurgation, or by ordeal. There could be no wager of battle since the crown, as accuser, could not submit to combat. According to Bracton, "Rex non pugnat, nec alium habet campionem quam patriam."[89] The difficulty of having the guilt or innocense of an accused person determined became greatly increased when these older forms of proof began to be discredited. The Assize

82. Holdsworth, ubi supra, pp. 322-323.
83. The Earl of Shaftesbury's Case 8 State Trials, 771-772 (1681).
84. i. 101.
85. 10 State Trials 1356 (1684).
86. Potter, ubi supra, p. 96.
87. Pollock and Maitland, ubi supra, ii 615-616.
88. *Law Quarterly Review* Vol. XXVII, p. 347.
89. Bracton f. 142 b (The king fights not, nor has he any other champion than his country.)

of Clarendon provided that criminals who had come through the wager of law clean should abjure the realm, if their character was bad. The Lateran Council of 1215 abolished trial by ordeal and forbade members of the Church to associate themselves with it. There remained only the trial by wager of battle. But this was far from satisfactory, because the king could not do battle with his subjects. In 1219, a writ directed to the judges informed them that those who were accused of great crimes should be imprisoned, but not so as to endanger life or limb; that those whose crimes were less heinous should abjure the realm; and that those accused of small offences should be released if they would find securities to keep the peace. But much was left to their discretion. It was the need to find some new means of determining the guilt or innocence of a suspected person that led to the gradual evolution of the petty jury.[90]

At first, the trial jury was partly composed of the jurors of presentment, partly by added numbers. The uncertainty of practice during the thirteenth and early part of the fourteenth centuries left the judges very free to follow what procedure seemed best to them in the circumstances.[91]

It came to be recognized early in the development of trial by jury that the accused should be allowed to object to members of the jury on the ground that they were his personal enemies.[92] In 1302, an accused knight objected to the trial jury because (1) they had presented the accusation; and (2) they were not his peers. His objection was allowed on the second ground, and a jury of knights was impanelled. He was also permitted to object to individual members of this jury.[93] The number twelve was probably selected because some limit had to be imposed. We are told in the *Law Quarterly Review*[94] that "These combination juries numbered from twenty-four to eighty-four jurors, and the number became embarrassingly large and unwieldly"; a tendency therefore grew up "to select some special jurors for the case to be added to the original presentment jury; "the number twelve was fixed upon, probably because that was the number of the presentment jury from the hundred. Therefore just as the presentment jury represented the voice of the hundred

90. Holdsworth, ubi supra, p. 324.
91. The Eyre of Kent (S. S.) i. xlix.
92. Bracton f. 143 b.
93. Y. B. 30, 31 Ed. I (R. S.) 531.
94. Vol. xxvii, pp. 356-357.

in making the accusation, so the jury 'of the country,' with the same number, represented the whole county in deciding whether the accused was guilty or not." It was by a very gradual process that the number came to be twelve. Bracton says that "though for the Assize of Mort d'Ancestor there must be twelve at least, for the Assize of Novel Disseisin there must be seven at least; and the Grand Jury, the Grand Assize, the attaint jury, and the inquest of office were not twelve in number."[95]

The crown was averse to the total elimination from the petit jury of all the members of the presenting jury, since it was mostly interested in gaining convictions. Parning, J., in 1340 said: "If indictors be not there, it is not well for the king."[96] But it was enacted that no indictor should be put on an inquest upon the deliverance of one indicted for trespass or felony, if he were challenged for this cause by the accused.[97] A case is related in the Eyre of Kent[98] in which a man, acquitted of homicide at a sessions of Gaol Delivery, was indicted at the Eyre on the same facts; five of the acquitting jury were on the indicting jury, and they were committed to prison as attainted, and ordered not to serve on another jury during the Eyre.

For a long time, an accused was not allowed to produce witnesses, and when he was thus permitted to have them, they were not sworn; and over a long period of time, the accused was not allowed the benefit of counsel.[99] But this rule was abolished in 1836.[100] Still, there were many rules which operated against a defendant. No remedy for a wrongful conviction existed. And when there happened to be an acquittal the jury were subject to fine and imprisonment. New trials were granted sparingly and the process was gradual.

Trial by jury in the olden days could not take place unless the accused gave his consent, i. e., put himself upon the country, or consented to abide by the decision of twelve of his neighbors. If he failed to do this, some judges were inclined to force him to accept it. But in later days, this gave place to an alternative—either such trial or peine forte et dure. This was a form of torture legalized in 1275[101] and described vividly in the Year

95. Folio 255 b.
96. Y. B. 14, 15 Ed. III (R. S.) 260.
97. 25 Edward III, St. 5, C. 3 (1351-1352).
98. (S. S.) i. 112.
99. Y. B. 30, 31 Ed. I (R. S.) 529-530.
100. 6 & 7 William IV, C. 114.
101. 3 Ed. I C. 12, Statute of Westminster I.

Books thus: "Justice, take him back to prison and load him with as heavy weight of iron as he can bear." It is related, in the Eyre of Kent,[102] that "Bereford, J., remitted him to his penance, seeing that he refused to submit himself to the common law; and charged the gaolor that the cell should be bare and without litter, and that on the day whereon Allan had bit to eat he should eat barley bread, and of that but half of what would suffice a man, and should have nought to drink, and on the day when he had sup to drink on that he should eat naught." As late as 1658, a prisoner was pressed to death. The advantage gained from not consenting to a trial by jury was that upon conviction of a felony the lands and goods of the felon were forfeited to the state. If he did not consent, then there could be no forfeiture.

Where the defendant did not wish to consent to this form of proof upon arraignment, he could "stand mute." A jury would then be empanelled to ascertain whether or not he stood mute by "malice," or by "the visitation of God." If the former, then he was subjected to peine dure et forte and the more stubborn he proved, the greater was the "peine" applied. If he stood mute by the "visitation of God," he was deemed to have consented to the trial by jury. In 1772 it was enacted that standing mute in cases of felony was equivalent to a conviction.[103] Long before this time, standing mute in cases of treasons and misdemeanors was the equivalent of being convicted.[104] Finally, in 1827, it was made law that if the prisoner stood mute in a case of treason, felony or misdemeanor, a plea of not guilty shall be entered and that the trial shall proceed as if the prisoner had pleaded.[105]

Of the Juries Used in Civil Trials

(a) *The Assizes*

(i) The Grand Assize

An assise, or assize, is defined as "An ancient species of court, consisting of a certain number of men, usually twelve, who were summoned together to try a disputed cause, performing the functions of a jury, except that they gave a verdict from their own investigation and knowledge and not upon evidence adduced. From the fact that they sat together, (assideo) they were called

102. Eyre of Kent (S. S.) Vol. I, pp. 112 and 125, Bolland's Translation.
103. 12 George III C. 20.
104. Stephen, *History of Criminal Law*, i. 298.
105. 7 and 8 George IV C. 28.

the assise."[106] But there were other uses to which this term applied, e. g., "The verdict or judgment of the jurors or recognitors of assise."[107] "An ordinance, statute, or regulation; a species of writ, or real action, said to have been invented by Glanville, chief justice to Henry II, and having for its object to determine the right of possession of lands, and to recover the possession."[108] "The whole proceedings in court upon a writ of assise."[109] "The verdict or finding of the jury upon such a writ."[110]

The Grand Assize was a type of trial by jury, first introduced by Henry II, in which a tenant or a defendant in a writ of right, was given an alternative to a trial by battle, by a judgment of his peers. It was abolished in 1833,[111] when real actions were discontinued. The latest case tried in 1835 and again in 1838 was Davies v. Lowndes.[112]

(ii) The Possessory Assizes

These assizes, also called the petty assizes, were three in number, viz., (a) Novel Disseisin; (b) Mort d'Ancestor, and (c) Darrein Presentment. They were actions by jury trial to determine the ownership of land. Where the claimant had only recently been disseised, the writ of assize was Novel Disseisin. If the land had been held by an ancestor and since his death the claimant had been deprived, then the writ was Mort d'Ancestor.[113] The writ of assize Darrein Presentment lay where the patron of a benefice who had last made a presentment either through his ancestor, or of himself, was ousted by a stranger in the next presentment, thereby interrupting the continuity in the real patrons.[114]

(iii) The Assize Utrum

The action in this writ lay to a church in order to repossess lands which had been improperly taken from it.[115] The question to be decided here was whether or not the land was a lay fee or one held in frankalmoigne. The jury that was impanelled

106. Black's Law Dictionary, 3rd Ed. (1944) pp. 156-159, quoting Bracton 4. 1. 6; and Coke's Littleton 153 b, 159 b.
107. 3 Bl. Comm. 57, 59.
108. 3 Bl. Comm. 184-185.
109. Coke's Littleton 159b.
110. 3 Bl. Comm. 57.
111. 3 & 4 William IV C. 42, Section 13.
112. 1 Bingham New Cases 597; 5 Bing. N. C. 161.
113. 3 Bl. Comm. 185; Co. Littleton 159 a.
114. 3 Bl. Comm. 245.
115. 3 Bl. Comm. 257.

to try the issues of fact came to be known as "jurata de utrum."[116] The history of the development of this assize brings us to what has come to be the most usual form of jury used in civil cases—the jurata.[117]

(b) *The Jurata*

In old English law, the jurata was "a jury of twelve sworn men, especially, a jury of the common law, as distinguished from the assise."[118] But Sir William Holdsworth states that "The terms jurata and assise are often used convertibly by the earlier writers, such as Glanvil, to mean a body of persons summoned by public authority to answer some disputed question of fact."[119] The two terms were not always interchangeable. In the writ of assize the issues were already framed and known, but if during the trial, incidental issues of fact were raised, then a jurata was empanelled to determine them, before proceeding to the settlement of the real issues. It was said that "An action in which the facts were to be ascertained through a body of men summoned by virtue of an original writ, to pronounce upon issues mentioned in that writ, was regarded as belonging to a class different from actions in which the issue of fact to be evolved out of the pleadings was unknown at the time of commencement, and had to be determined by a body of jurors to be brought together at some future time by virtue of a judicial writ of venire facias."[120]

(3) THE DEVELOPMENT OF THE JUDICIAL FUNCTIONS OF THE JURY

There was a gradual development in the functions of a jury. For a long time it was thought necessary to have all the jurors summoned from the immediate vicinity in which the facts to be decided occurred. But in 1705 it was enacted[121] that the jury could be selected from the body of the county. And, finally, in 1826, it was provided[122] that there was no necessity to have hundredors on a jury in criminal cases. By this time, the jury had long ceased to be regarded as mere witnesses, and had taken on the important judicial status of judges of the facts. "This result

116. Y. B. 20 Ed. III (R. S.) ii, xxiii-xxviii.
117. Holdsworth, ubi supra, p. 330.
118. Black's Law Dictionary, ubi, supra, p. 1036.
119. Holdsworth, ubi supra (1931), Vo. I, p. 330; also Y. B. 12, 13 Ed. III (R. S.) xli; Co. Litt. 154 b.
120. Y. B. 12, 13 Ed. III (R. S.) liv.
121. 4 Anne C. 16, Section 6.
122. 6 George IV, C. 50, Section 13.

had been brought about by two sets of causes mainly—firstly, by the evolution of the manner in which the jury were accustomed to inform themselves of the facts in issue, and secondly, by growth of the law as to the persons whom the parties were able to object to as jurors."[123]

It was not the business of the court to ascertain very closely how the jury acquired their knowledge in deciding issues brought before them. If they had personal knowledge of the matter, so much the better. In Bushell's case,[124] Vaughan, C. J., in granting a writ of habeas corpus expressed the view that the jurors might have had knowledge of their own, in setting free William Penn and William Mead, and consequently could not be fined for so expressing themselves. And Pemberton, C. J., in the Earl of Shaftesbury's case,[125] addressed the jury thus: "Look ye, gentlemen, you are to go according to the evidence of the witnesses; you are to consider of the case according to the things alleged and proved, unless you know anything yourselves; but if any of you know anything of your own knowledge that you ought to take into consideration, no doubt of it." There was a custom to deliver instruments of evidence to the jury.[126] But the rule was very clearly laid down and enunciated that instruments of evidence should be produced in open court and not be delivered to the jury privately.[127] Still much evidence was allowed to appear in the pleadings for fear that they might be overlooked by the jury, if not thus pleaded. Counsel, in presenting their cases, assumed personal responsibility for the statements they made touching facts put to the jury.[128] The practice of adjudicating a case by the sworn testimony of witnesses, may be said to have come into general vogue in the sixteenth century.

The mode of trial by witnesses was very untrustworthy and unreliable. In consequence, the courts visited such heavy penalties on those who were found guilty of the two then prevalent offenses of maintenance and conspiracy, that persons were afraid to come forward as witnesses and risk proceedings against themselves, or personal violence from the other side. In 1450, Fortescue, C. J., said: "If a man be at the bar and say to the court

123. Holdsworth, ubi supra, p. 332.
124. Vaughan's Rep. 147-149.
125. 8 State Trials 803.
126. Y. B. 6 Ed. II (S. S.) 235.
127. Y. B. 11 Henry IV Michaelmas Pleas 41.
128. Y. B. 6 Ed. II (S. S.) p. 198.

that he is for the defendant or plaintiff, that he knows the truth of the issue, and prays that he may be examined by the court to tell the truth to the jury, and the court asks him to tell it, and at the request of the court he says what he can in the matter, it is justifiable maintenance. But if he had come to the bar out of his own head, and spoken for one or the other, it is maintenance and he will be punished for it. And if the jurors came to a man where he lives, in the country, to have knowledge of the truth of the matter, and he informs them, it is justifiable; but if he comes to the jurors, or labors to inform them of the truth it is maintenance, and he will be punished for it; so Fortescue said, and it was admitted by the court."[129] The dual capacity in which the juries of old acted in the trials before them began to show a definite cleavage as time went on. While they lost their character as witnesses, they gained in importance as judges of the fact. By the middle of the seventeenth century, these two functions had become so separate and distinct that it was remarked by the court that "If either of the parties to a trial desires that a juror may give evidence of something of his own knowledge to the rest of the jurors, that the court will examine him openly in court upon his oath, and he ought not to be examined in private by his companions."[130] And in 1702 it was held that "If a jury give a verdict of their own knowledge they ought to tell the court so that they may be sworn as witnesses .... the fair way is to tell the court before they are sworn that they have evidence to give."[131]

According to Holdsworth,[132] "The process of divesting the jury of their character as witnesses was assisted by the growth of the law as to the persons to whom the parties might object as jurors." It had long become the custom to challenge a juror of the petty jury, if he had been a member of the jury of presentment. And this procedure was gradually enlarged for various causes. Fortescue[133] and Coke[134] give numerous instances of persons challenging jurymen. The varying forms of challenge, i. e., (a) propter defectum; (b) propter affectum; (c) propter delictum; (d) on account of having been convicted of certain of-

129. Y. B. 28 Henry VI Paschal (Easter) pl. 1.
130. Bennet v. Hundred of Hartford Style 233 (1650).
131. Salkeld's Reports 405.
132. Holdsworth, ubi supra, p. 336.
133. De Laudibus C. 27.
134. Coke's Littleton 156-158.

fenses; (e) on account of the relationship either of the sheriff summoning the jury to one of the parties, or of one of the jurors to either of the contending parties, may be said to be based on the judicial character of the jury.

(4) Methods of Controlling the Jury

The writ of attaint was one of the most effective means of punishing a juryman who had perjured himself, in the olden days. That was, of course, when the part he played as a witness was more prominent than that of a judge of the facts. But as the two functions came to be separate and distinct, with the witness portion of it falling into desuetude, other means of control had to be created. Glanvil informs us that a special punishment had been devised for the members of a grand assize who had sworn falsely.[135] They were to lose their chattels, to be imprisoned for a year at least, and to be accounted infamous.[136] He, however, does not mention the writ of attaint, although it appears close to his time.[137] Under this writ, not only was the punishment visited on the guilty jurors, but the verdict was quashed.[138] "This remedy of attaint is discussed at some length by Bracton. In his days the law relating to it was not quite the same as it afterwards became under the combined influence of legislation and judicial decision."[139]

In time, it became settled law that the writ could be issued by the chief justice at a general Eyre as well as by the chancellor.[140] And later, a prima facie case had to be made out before it was issued.[141] Also, no second attaint was possible on the same set of facts.[142] The venue of the attaint was governed by the rules of Y. B. 12 Richard II.[143] So was the mode of choice.[144] As the jury grew in importance, the writ of attaint was extended by various statutes. But these statutes had no reference to criminal proceedings. In a criminal appeal, i. e., a criminal charge made by a private person, it was not possible to secure a writ of attaint; nor was it obtainable against a jury that had

135. Glanvil ii. 3.
136. Glanvil ii. 19.
137. Select Civil Pleas (S. S.) No. 216 (1202).
138. Bracton, folio 292.
139. Holdsworth, ubi supra, p. 338.
140. Eyre of Kent i. 158; Y. B. 30, 31 Ed. I (R. S.) 124.
141. The Eyre of Kent i. lxxix. 51.
142. The Eyre of Kent i. 156.
143. Pp. 159 and 160.
144. The Eyre of Kent i. 166.

returned a verdict of guilty on an indictment. Sir Matthew Hale seems to think that it could lie against a jury that had acquitted.[145] In Bushell's case, where certain jurors, amongst whom was Bushell, were fined for setting free Penn and Mead, Vaughan, C. J., held that a jury could not be fined on this score.[146] This case finally fixed the law on this point. It differentiated between the ministerial and the judicial acts of juries, in which they could be punished for the former but not for the latter. So cogent was Vaughan's reasoning, so conclusive and convincing was his argument, that the practice of fining and imprisoning juries for judicial acts was then and there brought to an end. Nevertheless, the courts continued to control the jury in divers ways. They were liable to punishment for contempt of court and, if they could not agree, the power to discharge them rested with the presiding judge. On this last point, there was some difference of opinion. The *Doctor and Student*[147] upholds this view: "I think that then justices may set such order in the matter as shall seem to them by their discretion to stand with reason and conscience by awarding of a new inquest, and by setting fine upon them that they shall find in default, or otherwise as they shall think best by their discretion, like as they may do if one of the jury die before verdict, or if any other like casualties fall in that behalf." Coke, however, disagrees.[148] In Winsor v. The Queen,[149] Cockburn, C. J., finally set this question at rest, by deciding that it was a necessary power in order to ensure the proper working of the jury system.

(5) The Legal and Political Effects of the Jury System

Obviously, there are defects in the jury system. After all, juries are only mortal; and being such, are not infallible. Besides, they give no reason for the verdicts at which they arrive, by which it may be judged whether or not a proper basis lay for their decisions. They are also subject to the charge that in times of political stress and excitement, they are apt to reflect the popular prejudices of the day. Added to all this, it can scarcely be denied that though a good special jury is an admirable, able, competent tribunal, the same cannot be said of

145. Hale, *Pleas of the Crown*, ii. 310.
146. Vaughan's Reports 146.
147. Part II, C. 52.
148. Coke, *Third Institute* 110.
149. (1866) L. R. 1 Q. B. 289, 390.

the common jury which is mostly composed of persons having neither the capacity, the inclination, nor the desire to weigh the mass of evidence that is usually put before them.

Yet, in spite of all these patent defects, judges who have worked for any length of time with juries come to praise the jury system. Hale and Blackstone believed in it. So did Coke, Fortescue and countless others. Besides, it relieved the judges of assuming the responsibility of deciding the facts. Hale says: "It were the most unhappy case that could be to the judge if he at his peril must take upon him the guilt or innocence of the prisoner,"[150] while Sir James FitzJames Stephen states: "It saves judges from the responsibility—which to many men would appear intolerably heavy and painful—of deciding simply on their own opinion upon the guilt or innocence of the prisoner."[151]

But these are not all the advantages of the jury system. According to Holdsworth, "The jury itself is educated by the part which it is required to take in the administration of justice. The jury system teaches the members of the jury to cultivate a judicial habit of mind. It helps to create in them a respect for law and order. It makes them feel that they owe duties to society, and that they have a share in its government."[152]

De Tocqueville adds this thought, "We should regard it as a school which gives instruction gratuitously and continuously, where each juryman can learn his rights, where he mixes day by day with the best educated and most enlightened of the upper classes, where the law is taught to him in the most practical way, and is explained in a manner which he can understand by the efforts of the bar, by the direction of the judge, and even by the passions of the parties."[153]

Unquestionably, the fact that persons are frequently called upon to share civic responsibility in the form of performing jury duty invests them with a new sense of pride in their community, and tends to make them better citizens, with a greater respect for law.

Thus it is, that the institution of trial by jury, after the vicissitudes of centuries, in which it was subjected to legal and

150. Hale, *Pleas of the Crown*, ii. 313.
151. Stephen, *History of Criminal Law* i, 573.
152. Holdsworth, *History of English Law* (1931), Vol. I, pp. 348-349.
153. *Démocratie en Amerique* ii, 190.

judicial control in varying degrees, and having undergone a metamorphosis which has left it hardly recognizable by its originators, stands today, in all the vast ramifications of its procedure, as the firmest pillar of a democratic body politic. And its presence or absence in any modern, organized state is one of the unfailing indicia of guaranteed liberty against tyranny and oppression.

Kogel

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Trial by Jury – History

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