1890

Trial by Jury

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Thesis

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by

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On account of the diversity of opinion concerning the origin of trial by jury, I shall not undertake to enter very minutely into its details, but shall present a few conjectures of the leading historians, and leave the vacant places to be filled in by minds of greater range and particularity. In fact I can hardly say that that is my object, but rather to express myself as being in entire disfavor of jury trial and in favor of its speedy abolition.

When the Romans were settled in Britain as a province, they carried with them their laws and customs which was a practice essential to all colonies, and hence the Britains and inhabitants of Germany, learned from them the Roman laws and customs; and hence upon
the invasion of the northern nations into the southern kingdoms of Europe the laws and institutions of the Romans remained when the power that introduced them was withdrawn.

Montesquieu in his work says that under the first race of kings in France about the fifth century, the Romans that remained and the Burgundians their new masters, lived together under the same Roman laws and police, and the same forms of judicature. How reasonable then is it to conclude that in the Roman courts of judicature continued among the Burgundians the form of a jury remained in the same state it was used at Rome. Mr. Montesquieu in speaking of those times mentions the parics or peers, which in the same chapter he calls judges or jurymen. So we can see the men of the fief were called peers and those peers were
judges or jurymen. These are the same as were called in the time of Edward the Confessor, "peers of the tenure" out of whom the jury of peers were chosen to try a matter in dispute between the lord and his tenant in capite or any other controversy in the manor. Suits before the King between his tenants in capite, as well as other suits of great importance were decided by the peers of this court. Those in the County Court were tried by the Suitors or Sectatores of the Court whilst in the courts of inferior jurisdiction belonging to various manors and other franchises, questions were also decided before the parties or suitors of the particular court or franchise. So likewise in all other parts of Europe where the Roman colonies had been, the Goths succeeding
them continued to make use of the same laws and institutions which they found to be established there by the first conquerors.

Under Canute the Danes and Angles were united. He took the whole government of England, A. D. 1017, and divided it into four parts. He restored the Saxon customs in a general assembly of the States, and made no distinction between Danes and English in the distribution of justice. He took care by a strict execution of the law to protect the lives and property of all his people. The Danes were gradually incorporated with his new subjects; and both were glad to obtain a little rest from those multiplied calamities from which they had experienced such fatal consequences. In times so
unsettled and involved in so much ignorance, it is scarcely creditable that an Institution, the offspring of matured legislation should have existed. But could its semblance be traced in the Saxon administration of justice, we should in vain look for any information as to the precise limits assigned to a jury in the exercise of its duties.

Pecuniary fines were the ordinary atonement for every species of crime and generally speaking, were the ordeal by fire or water. The criminal was ordered, at the option of the judge, to prove his innocence or guilt by the ordeal of cold water, of boiling water or red hot iron. He was thrown into a pool to sink or swim: He was made to fetch a ring from the bottom of a vessel of
boiling water, or to walk bare-footed over burning plough
shares. I must conclude then a summary mode of inflict-
ing punishment without the intervention of a jury, was
not extraordinary; and, from the encomium of the histo-
rian, as to the perfect justice of the proceedings,
they appear at that time, to have been considered con-
stitutional and legal. A word or two now as to the ad-
mirable institutions of Alfred, which were the foundation
of the jurisprudence of the Saxons. It is not necessary
to describe his wise and politic division and subdivis-
ion of England into counties, hundreds, and tithings;
a scheme admirably adapted to the circumstances of the
people, and calculated to preserve internal peace, and to
secure the proper administration of justice. The laws
administered during his reign appear to have been plain, simple, and easily enforced. Civil injuries and criminal offenses were alike reduced to a scale of pecuniary penalty, according to their nature and degree. It was the object of the penal laws to make amends for injuries rather than to punish the criminal intention; for instance the infliction of a wound an inch long on the head was punished with the payment of one shilling; if on the face by the payment of two shillings. The loss of an ear was estimated at thirty shillings; but if the hearing was lost at sixty shillings and so on. Mr. Hume says Alfred attempted to make murder a capital offense, but that the law remain uninforced. The suitors of the court or the sectatores, were the judges who transacted
the business; but says Mr. Hume they were also admitted as witnesses, and generally consisted of the friends or acquaintances coming from the vicinage. Their number was various according to the custom of different places and it seems depended on chance and convenience. Some histories assert that there is no reason to believe the number was confined to twelve. The sectatores were called upon to declare from their personal knowledge, the truth of the fact alleged on the hearing of the cause. Compurgators were also admitted in the court on behalf of an accused person, and justified his innocence by their oaths. If the requisite number of compurgators took the oath of credulity, or belief as it was called, the criminal was acquitted; otherwise he was condemned.
Their number varied according to the nature of the crime with which the suspected individual was charged; and in some cases they were multiplied to the number of three hundred.

From what I can gather from the books I am convinced that these answered the same purpose as our juries of to-day, differing only in their number according to circumstances and place. The Sectatores certainly have the appearance of similarity to juries. Sir Mathew Hale says that the trial by jury of twelve men was in use in England before the conquest. But other writers seem to think that he has reference to the office of compurgators rather than jurors. In England before the conquest various modes of trial by ordeal were in use, and those
modes which were more common than the rest have already been alluded to. These modes of determining questions of civil right or of criminal offense, show how uncertain and difficult it was to obtain justice in the courts of judicature in which they prevailed, and naturally produced conviction of the non existence of juries or certainly the difference between the office of juriors and that of sectatores and compurgators. William the First established the Aula Regis or the court held in the King's palace. This court was composed of the King's great officers of state, who resided in his palace, and the barons of the realm, to whom were associated five or six justicarii. The justices were persons learned in the laws; it was their duty to declare to other members
the law of the land in every case. Mr. Blackstone seems to think that this court was erected on the ruins of the inferior Saxon Courts of Justice and he says a capital justiciary was appointed with powers so large, that he became at length a tyrant to the people, and formidable to the crown itself. According to Mr. Madox, Cited in Reeves history, the high justiciary was an officer of very great authority, and not merely of the judicial kind: as he used in the King's absence beyond sea, to govern the realm as viceroy. The constitution of this court, and the judges who presided there, according to Blackstone, were fetched from the Dutchy of Normandy, and the consequence was the ordaining that all proceedings in the Kings Court should be carried on in Norman instead of
the English. "With respect to his supreme court, that as the old establishment of the Saxons for determining common pleas in the county court was continued, very few of those causes were brought into the Curia Regis.

While men could have justice administered so near their houses, there was no temptation to undergo the expense and trouble of commencing actions before this high tribunal; but the partiality with which justice was administered in the courts of arbitrary lords, often left the King's subjects without any prospect of redress in the inferior jurisdictions. The King and this superior court then became an asylum to the weak. It is not remarkable that suitors coming to a court under such circumstances should consent to purchase the means of re-
dress by paying a fine. Suits were eagerly encouraged by the officers of that court (Reeves Hist. P. 50.) Consequently the business increased so rapidly in this court that it became necessary to appoint itinerant justices who were given the authorities and powers of the original court.

From the decisions of these justices appeals could be taken to the King's court. How trials were conducted in this court, I cannot ascertain, but there seems to be no appearance of a jury. The dissolution of this supreme court took place gradually; that is it was divided into the three other superior courts i.e. Common pleas, Exchequer and Court of the King's Bench which still exists.
The first clear mention of a jury was in the time of William the conqueror, and it occurred in the County Court of Kent where Gundolph, Bishop of Rochester was plaintiff, and Pichot the sheriff was defendant. The King commanded that all the men of the county should be assembled, that they might decide to whom the land belonged; that is he referred the matter to this Court. Through fear of the sheriff they decided in his favor; but the Bishop of Bayeaux, who presided, not being satisfied with the opinion, commanded that if they knew what they spoke was the truth, they should choose twelve from among themselves, who should confirm by their oaths what they had all said. Trial by jury thus coming into use by slow degrees, and naturally arising from the con-
stitution of the courts, and not from any legislative enactments on the part of the government, advanced in improvement by various slow gradations. It was adapted to the then existing state of society. But with the increase of population and prosperity of the country and the extending connections resulting therefrom, it is plain there must be like changes in the functions of juries.

It is doubtful whether justices itinerant appeared in the reign of Henry First or Henry Second. Mr. Blackstone fixes the establishment of this tribunal to the latter, who divided the kingdom into six circuits and commissioned these new created judges to administer justice in the several counties. Henry's reign although
turbulent, and his administration was impeded by continual dissensions, still his accession to the throne can be pointed out as the commencement of the auspicious era in the history of the laws and judicature. He struggled with the clergy and as a result produced the constitution of Clarendon; he established the grand assize which seem to be the cause of the decline of the duel. The constitution of Clarendon, 1164, may be hailed by historians to be the first appointment of a trial bearing a resemblance to our modern trial by jury, and in them is also the first of an assize.

The ninth declares "if there shall rise any dispute between an ecclesiastic and a layman or between a layman and an ecclesiastic, about any tenement which the eccle-
siastic pretends to be held in frankalmoigne; and the layman pretends to be a lay fee, it shall be determined before the king's chief justice, by the trial of twelve lawful men, whether the tenement belongs to frankalmoigne or is a lay fee; and if it be found to be frankalmoigne, then it shall be pleaded in the ecclesiastical court, but if a lay fee, then in the king's court unless both parties shall claim to hold under the same bishop or baron; but if both shall claim to hold the said fee under the same bishop or baron, the plea shall be in this court; provided that by reason of such trial the party who was first seized, shall not lose his seisin till it shall have been finally determined by the plea.

Constitution of Clarendon mentions trial by jury in
general terms only but its principle object was to curtail the power of the clergy and to raise a barrier against their usurpations. They had refused to appear in the courts of law on criminal accusations, and frequently made claims of exemption in civil cases.

In a parliament held at Northampton, A. D. 1176, the constitution of Clarendon was confirmed; and at the same time other constitutions or assizes were renewed and enlarged. It had been declared by one of these that if any person was arraigned before the Justices of the Lord the King, of murder or theft, or robbery, or of harbouring those who had committed such crimes; or of forgery or of felonious house-burning, by the oath of twelve knights of the hundred, or if the knights were
not present, by the oaths of twelve free and lawful men he should undergo the trial of the ordeal by water; and if he was convicted he should lose one foot. To this law it was added, at Northampton, for the rigour of justice, that he should likewise lose his right hand, as well as one foot, and should abjure the realm, and within forty days should be banished therefrom. But if he were shown to be innocent by the ordeal, he should find pledges and remain in the kingdom, unless he had been arraigned of murder or other base felony by the community of the country, and of the lawful knights of the country; of which he had been arraigned in manner aforesaid, (although he had been shown to be innocent by the ordeal) he should nevertheless, within forty days depart
the kingdom, and carry with him his chattels, and should abjure the kingdom, according to the King's mercy.

Although the present jury law has no doubt been greatly improved by a series of gradual changes, to the most important of which I have adverted, and which have been adopted as convenience dictated to suit the exigencies of justice, it must not be supposed that the institution is not capable of great improvement, or even that it does not contain some considerable imperfections; and further still, that the country could not do as well without it as with it. I think the most serious aspect of trial by jury, is the mode of their selection, and the rule requiring unanimity in its verdict. Formerly where jurors could not agree in their
verdict upon an assize, they were afforded, that is, an addition was made to their knowledge and means of judging by adding to their number others acquainted with the fact, and the decision depended on the opinion of the majority. This practice being inconvenient, fell into disuse, and it became a settled rule that the verdict should be the unanimous verdict of the original twelve jurors, and in case of disagreement means should be used to compel them by confining them together without allowing food or fire or conversation with others until they had agreed; and if not before agreed, by conveying them in carts after the judge in his progress on the circuit to the border of the country. This we will all agree was an unreasonable practice and attended with
great trouble and inconvenience; but still we cling to it with the same amount of unreasonableness as was found in that practice itself. When a peer is tried before the House of Lords on a charge of felony to-day, a bare majority is sufficient to convict. Where a President of the United States is tried on an impeachable charge, two thirds of the members of the Senate must concur or there can be no conviction. Why would it not then answer the same purpose in other cases on trial before a jury,? 'Judge Miller, after an experience of twenty-five years on the Supreme Court Bench of the United States, says, "I am of the opinion that the system of trial by jury would be much more valuable, much shorn of many of its evils, and much more entitled to the
confidence of the public as well as of the legal and judicial minds of the country, if some number less than the whole should be required to render a verdict. I would not myself be willing that a bare majority should be permitted to do this. There could be little difference in the confidence which would be reposed by the Court, the public, or the parties in the opinion of five men or of seven. It should be something more than a bare majority. If the jury is to consist of twelve men, I certainly would not be willing that its verdict should represent less than eight which is two-thirds, or preferably nine, which is three-fourths. Many of what are called mistrials, produced by a faction of the jury to render a verdict would be avoided, if the power were
given to nine or eight to render a verdict instead of requiring them all to unite in it, and such a verdict would be entitled to as much confidence as if it were unanimous."

The manner of selecting jurors is another very serious objection to its continued existence. In most cases the jurors are selected from the least informed portion of the community,—men without employment, street corner loungers in many instances and who go into the jury box, not for the purpose of administering justice but for the purpose of getting that dollar and a half or two dollars a day, or else farmers who are in a sense shut out from the busy scenes of life and know nothing of current events of the day. Thrifty enterprising busi-
ness men, who are wide awake and in keeping with the time; men who read the papers and know what is going on, know too much to act as jurors. Few, if any of the states, require an educational qualification. It is no ground for challenge that a juror cannot read or write his own name. The bright side of trial by jury is a theme that has occupied the time and received the attention of some of our ablest men. Blackstone declares after summing up its numerous excellencies, "the trial by jury to be the palatium of British liberty, the glory of the English law and the most transcendent privilege which any subject can enjoy or wish for." (Book III, 397)

Such is the language we have long been familiar with, associated closely with our earliest education, and to
impeach it makes one feel like profaning the wisdom of our ancestors. Yet this is an age of law reform, an age of universal change, the transition period of our history. At present, according to the regulation of our courts and right of appeal, the trial by jury is actually abolished in practice in nine out of every ten cases. The time has come when the trial by jury must itself be tried.

By a little reflection, it will strike the mind that there is a remarkable contrast between the manner of conducting a legal dispute and that which is followed in the ordinary affairs of life. If a man breaks his leg, he employs a surgeon, who has spent the greater part of his life in the business. If he wants a
house built he will be careful to employ the builder who has had much experience in that line. If he happens to be involved in a difficult question of law, he wants a man who has grown gray in the study of reports and statutes; and yet with all this, if his property, his reputation, his liberty or life is at stake he must entrust it to the voice of twelve men who may not ever have entered the court room before.

At the summons of the law our jury quit their shops for the courts of justice; they march straight from the weighing of flour to the weighing of testimony; from dealing in lard, hams and liquor to dealing with the lives, properties and liberties of men. These are the judices facti,—the favorites of the law. Often dis-
tions in separate instructions, which might to the pro-
fessional mind be cognate and harmonious.

Ever since the institution of the Court of Chancery
in England and the United States the Chancellor, or
judge in Equity cases under the code system has been
entrusted with the decision of questions of fact as
various and as complicated as arise in cases at law which
must be submitted to a jury.

Take for instance, matters pertaining to trust, as
to their creation, execution, etc., which involve many
questions of fraud, due diligence, and sometimes ques-
tions of damages as well; matters pertaining to the
notice which should put a party upon inquiry in cases
of constructive trust and fraud, and a variety of
other facts in respect to bequests and testamentary trusts; awarding of damages in injunction cases, and in cases of incidental damages for breaches of contract where the equitable jurisdiction has been invoked upon other ground, and in many other cases.

It is useless to enumerate further. These will suffice to indicate how extensive is the scope of inquiry into facts in cases of Equitable Cognizance,—as extensive as the range of human controversies themselves, which can be brought into Courts of Justice for settlement. In many of the states there are constitutional provisions authorizing the waiving of a jury.

In Pennsylvania the constitution provides that the parties in all civil cases may dispense with a jury.
The practice of waiving a jury is constantly exercised, and the probability is that in a few years trial by jury in civil cases in the Courts of that State will be a thing of the past.

Some claim that the superiority of jury trial arises from the opportunity it gives for deliberation. The comparison of views on the part of twelve men will contribute greatly to the correct determination of the facts. Of course, this feature of the jury has its advantages; but too often the interchange is an interchange of prejudices or of unwarranted sympathies; often instead of honest consultation, with the single purpose of arriving at the truth, it becomes a contest of will power in which stubbornness has more to do with shaping
We therefore suggest that the better plan would be to dispense with the jury trial altogether and in its place substitute the judge or judges whose large experience, superior intellectual training and discipline, and better knowledge of the law, all of which he brings to the consideration of the testimony, and to the application of the law to his findings of fact. The judge is impressed with a higher sense of responsibility than impresses twelve men called in for the time being from the busy scenes of life to pass upon the issues of fact in a peculiar case and then to disappear from view again.

His position is permanent; theirs temporary. His office is one of prominence and dignity. He knows that
his highest claims upon the profession and the people who elevated him to this position is to be found in the qualities of honor and impartiality, coupled with ability to comprehend and apply the law, which he exhibits in his judicial career. The very character of his office thus begets an exalted responsibility and a sensitive appreciation of the obligation resting upon him to deal out even handed justice to the litigants without fear or favor.

Nothing conduces more to a correct determination of the facts than this high sense of obligation to decide the issues in every case according to the very truth and justice of the matter under the rules of the law, uninfluenced by every other consideration.
It has been urged against substituting the judges for the jury that where influential men of wealth or citizens are suitors the independence of the judge is threatened and the rights of the more obscure litigants thereby imperiled, if the contested facts must be submitted to him, that he is apt to lean to the side of that party whose influence may be the most valuable to him. But such influence has never been found to have weight in that vast class of cases in which the facts are tried by the judge without the intervention of a jury; and the best evidence that this objection is without foundation is that there is not one equity case in a hundred where a jury is requested in those states where the right to a jury in equity cases exists. It
is the constant practice in all the courts to waive a jury in cases at law.

These few facts in the history of our courts, furnish a reasonable vindication of our judges from the imputation of a lack of independence.

Let trial by jury be abolished and the wheels of government would move more swiftly. Cases would be disposed of more expeditiously. Delay consequent on mistrials would be at an end.

The actual expense for the administration of the courts would not be so great as under the present system of jury trials.

Under the code system we have but one form of pleading and one method for the introduction of evidence in
all cases. The true object of the code as we understand it is to bring the trial of all cases out of the bondage of the law and into the liberty of the equity mode of procedure. It is a step in the advance, and will work out its full results only when this liberty is made perfect by the abolition of all the artificial distinction which require one mode of procedure for one class of cases and another mode for the determination of another class of cases, while no distinction in principle as to the mode of trial exist between them.