ON THE TRIAL BY JURY

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THOMAS STARKIE.

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1880.

NOTE.

STARKIE'S well-known article on the Trial by Jury was published in the Law Review in August, 1845. It early attracted the notice of scholars, and it has been praised and relied upon by the best English and German writers on the subject of which it treats.[1] Messrs. Little, Brown, & Co. have now kindly consented to reprint it, — for the convenience, primarily, of the classes in evidence at the Law School of Harvard University.

This article is but a fragment, yet, having regard to the writer's main purpose, I know of nothing upon the subject, within so small a compass, which is so well worth reading. Had time permitted, some notes would now have been added, containing further illustrations and connecting Starkie's researches with others of a more recent date; but since it was impracticable to do all that I wished, I have preferred to leave the article precisely as it was left by the author.

I will venture to suggest to students of our law of evidence that there is a special advantage for them in growing familiar with certain leading features of the historical development of the jury. Sir Henry Maine has said that "the English law of evidence would probably never have come into existence but for one peculiarity of English judicial administration — the separation of the judge of law from the

[1] E. g. Hallam in his "View of the State of Europe during the Middle Ages," chapter viii., note viii.; Spence in "The Equitable Jurisdiction of the Court of Chancery," Vol. I., p. 128; Forsyth in his valuable "History of Trial by Jury"; Biener in "Das Englische Geschwornengericht," Vol. I., p. 170, and Vol. III., p. 81.

judge of fact, — of the judge from the jury."[1] When a man perceives the full significance of that remark in its application to a few leading rules, he is in a way to master that very peculiar system, — unlike anything that has existed in other parts of the world, easy to criticise, but hard to understand, — which English-speaking people have inherited as their law of evidence.

JAMES B. THAYER.

CAMBRIDGE, Oct. 20, 1880.

[1] Field's Law of Evidence in India, 23, note. See also Maine's very instructive article entitled "The Theory of Evidence," originally printed, under another name, in the Fortnightly Review for January, 1873, and reprinted in "Village Communities and Miscellanies" (Henry Holt & Co., 1876), p. 295.

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THE trial by jury may be considered, 1st, as regards its origin and history; 2dly, its present practical state and use; 3dly, its capabilities. It cannot be doubted that, however valuable this institution may be, for legal purposes as an instrument for the investigation of truth, and for political purposes as a bulwark of civil liberty, it is not at present enjoyed without some attendant inconveniences, of such a nature as to warrant earnest endeavor to ascertain whether the system may not be rendered more perfect, whether its defects may not be remedied without the sacrifice of any of its advantages.

In purposing, on this occasion, to advert to the history of this mode of trial, we scarcely need to premise that it would far exceed our present limits to undertake any specific and systematic detail of the changes which it has undergone. Our statements and observations must at present be confined, principally, to a selection of such references and authorities as prove and illustrate transitions of a marked specific character. In order to point out these the more clearly, it will be necessary, in the first place, briefly to consider in what the functions of a jury, as now constituted, consist; and also to distinguish the prin-

cipal forms of which a popular mode of trial is susceptible. A jury, then, as now constituted, may be defined to consist of "twelve men *selected* from the body of the community, and *sworn* to decide any disputed matter of fact by *judging* upon evidence lawfully submitted to them."

It will easily be seen, from this description of the present trial by jury, of what various forms the trial by a merely popular tribunal is capable. Such a one, in its most primitive and simple state, may consist simply of a class or body of persons, indefinite in point of number, and not sworn, and who are to decide, either upon their own personal knowledge or upon evidence laid before them, as in the case of a trial by a body of *suitors*, *pares curiæ*, or *resiants* within any local district.

Again, such a generality may be limited as to number; a further qualification may be added, that the persons so limited in point of number, and selected for the office, shall act under the obligation of an oath. In such case, that is, where the trial is had before a definite number selected for the purpose, and also sworn, they may be termed generally a jury, or, if selected by reason of locality, a *jurata patriæ*. The jury, then, or *jurata patriæ*, may be distinguished as regards the functions which it is appointed to discharge, as a jury of mere *conusance* or *recognition*, for the finding of facts on the mere personal knowledge of the jurors; as a jury of mixed functions acting partly on their own knowledge, and partly on evidence laid before them; and lastly, as a jury, such as has already been described, judging merely on evidence of the facts laid before them.

These four distinctions have been made, not because they embrace all possible forms of which a popular tribunal is capable, but because they correspond with those actually exhibited at different periods of our legal history, and also because they are necessary, in order the more easily to point out the changes which have occurred in that history, and corresponding with it in order of time.

It is here to be observed that there is another very important function, in respect of which tribunals which exercise a judgment upon facts may be distinguished from each other: such a tribunal may either be limited to the deciding upon mere matter of fact, or may be further entrusted also to decide upon the law as applied to such facts. In order, however, to confine the subject of present consideration within clear and distinct limits, we have endeavored to avoid any discussion arising out of this latter distinction.

The principle of decision by classes indefinite in point of number, and unsworn, pervaded the legal constitutions of our Saxon ancestors. Suits before the king, between his tenants *in capite*, as well as other suits of great importance, were decided by the *pares* of his court. Those in the County Court or Hundred 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 pares or suitors of the particular court or franchise.

The wisdom and policy manifested by the Anglo-Saxons in framing laws for the manifestations of right was not less admirable than the order and symmetry observable in the construction of their courts of jus-

tice. They aimed at, and to a great extent established, a testimonial system, founded on just and simple principles, and of great practical utility. Many matters of importance of a public nature, and capable of notoriety by public attestation, were transacted openly in the face of the *comitatus*. Grants, agreements, and fines or concords of disputes, were commonly made and transacted in the County Courts, in the presence of the whole *comitatus*, attested often besides by many particular witnesses. Wills, also, were frequently recorded there.[1] Consequently, when questions arose concerning such transactions, the whole *comitatus* was appealed to in case the transaction had taken place *coram comitatu;* and the proof was by witnesses in the case of a charter or other writing, or a matter transacted before appointed witnesses. With respect to matters of a more private nature, and of minor importance, many wholesome ordinances were made, — that they should be transacted in fairs, markets, and other public places, before bailiffs and others who, in case of need, might be vouched to prove the fact.

Two very interesting memorials have descended to us, illustrative of the course of decision in the ancient Saxon County Courts. Although these occurred in the reign of William the Conqueror, it cannot be doubted that they were conducted in conformity with the practice anterior to the Conquest.[2] It may be proper to remind the reader that the general appellation of County Courts included two descriptions of courts, one of which, the ordinary County Court,

[1] Reg. de Ely, f. 4. Dugdale's Orig. Jur. 30.

[2] With one exception, which will presently be noticed.