North Dakota Law Review

Volume 34 | Number 4 Article 3

1958

Judges of the Facts

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First, I express to you members of Order of the Coif my very sincere appreciation for the honor that is tonight being given to me. I understand that I have, indeed, been invited into rarified atmosphere and I am not much comforted by the delusion that if I had studied a great deal harder in law school I might just possibly have got here on my own.

This May 1st, 1958, has been proclaimed by the President to be "Law Day U.S.A." so "* * * that (in the words of the President) the people of this nation should remember with pride and vigilantly guard the great heritage of liberty, justice and equality under law which our forefathers bequeathed to us". There could be no more appropriate occasion than this first Law Day to bring to mind, to discuss and to pay tribute to the great cornerstones in the edifice of the law—the right to trial by jury. Blackstone said long ago, "Trial by jury is the glory of the law." It is of this right and of how jurors came to be judges of the facts, that I speak.

We judges of the law, protected by our bailiffs and deputies, waited on by law clerks and secretaries, sitting in the sanctums of our chambers or enveloped in the dignity of our black robes on the bench, are sometimes prone to forget that in the administration of justice there are other judges, of equal importance, of equal dignity, of equal intelligence and integrity, whose decisions determine questions of life, liberty and property and upon whose right to do so rests a great part of the freedom we today enjoy. These judges possess no tenure of office. They receive no adequate salary. Actually their service incurs financial loss. They are plucked willy-nilly from their home environments. They are plunged into a strange, new world, where they play tremendously important roles in the administration of justice. For most of them, the experience is new. The surroundings are unfamiliar and the conversations strange. Yet I know of no more thrilling thing in the processes making for self-government than the sight of twelve honest, conscientious jurors bending their every effort to decide justly between men and men, and between men and their government.

In man's age-old struggle for freedom there is no more important right than that to trial by jury. Trial by jury, together with the

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*Address given at the initiation for Order of the Coif, May 1, 1958, in Grand Forks, North Dakota.

writ of habeas corpus, representative government and freedom of speech are considered so vital as guardians of liberty and freedom that the loss of any one would destroy our existence as a free people.

The right to trial by jury was not won in a short, quick struggle and then recorded on the books for the protection of mankind. It evolved over centuries of time, finally culminating in our modern jury trials. The true roots of its beginning are probably buried in the mists of the past, beyond reach of historians or at least beyond proof. There are, however, many theories as to how and where the system originated. While the jury in its presently developed form is distinctly and exclusively of indigenous growth in England after the Norman Conquest, it is, nevertheless, in its primitive forms, of Anglo-Saxon and Continental origin.

The case of the grand jury is quite clear. An ordinance enacted in the reign of Ethelred II in 981 A. D. provided, "And that a gemot be held in every wapentake; and the XII senior thegns go out, and the reeve with them, and swear on the relic which is given them in hand, that they will accuse no innocent men nor conceal any guilty one."

Like a grand jury of today, the function performed by the 12 thegns was merely to accuse. The guilt or innocence of the accused persons was then determined, either by compurgation or trial by ordeal. Compurgation amounted to trial by character witnesses. Trial by ordeal rested in the belief of divine intervention to vindicate the just. The early Norman Kings did little to disturb the system of county courts as established at the time of the Conquest. It is probable, then, that this early jury of accusation, or grand jury, continued in use until it was specifically recognized by statute in the reign of Henry II.

The case of the petit jury is not so clear. On it, many scholars have speculated and great differences of opinion resulted. Some writers maintain that the petit jury is wholly of English origin, that it was not derived from any Continental institution. (Forsyth, History of Trial by Jury, 1852, page 13.) Others maintain that it was of Roman-British origin. The most widely accepted view, however, is that it derives from a system of investigation by sworn inquests, imported into England by the Normans. Such students of the subject as Stubbs, Pollock and Maitland, Palgrave, Brunner and more recently Winston Churchill have all adopted this theory.

The system of sworn inquests, a possible adaptation of the fiscal

regulations of the Theodosian Code, was established in France by the Carolingian Kings more than a hundred years before the Conquest. The Frank Capitularies provided detailed procedure and instructions for such inquisitions. In France, and in its earliest use in England, the sworn inquest was not applied to judicial matters. In France it was an administrative device to obtain information and to define royal rights. Perhaps its first use in England was in compiling the Domesday Survey, completed in 1086. This Survey listed every tract of land in England, its owner and its value. It was founded in large part upon agreed statements of groups of citizens in each county who were sworn to state the truth. The inquest also was used to assess taxes. From the reign of Henry II to Edward I it was the usual machinery for that purpose.

The use of the jury, both as a means of accusing persons of crime and of settling disputes in court, is first mentioned in the statutes of England and recorded in the Constitutions of Clarendon enacted by a Great Council held in 1164. Chapter 6 of the Constitutions provides that laymen be tried in the Bishop's Court only if accused by lawful and specific accusers and witnesses. If no one were willing, or dared, to appear as accuser against a powerful delinquent, the sheriff, at the request of the Bishop, empaneled and swore in 12 lawful men of the neighborhood to declare the truth. Chapter 9 provided that in disputes between laymen and cleric as to land which the cleric asserted to be held in frankalmoign, the Chief Justice should decide by the recognition of twelve lawful men whether it was held by eleemosynary tenure.

A statute, which was probably enacted at a council held at Windsor in 1179, provided that in the Grand Assize, in all actions to try the title to land, the defendant might elect beween trial by battle and trial by the recognition of twelve sworn knights of the neighborhood chosen by four other knights summoned for that purpose by the sheriff. Trial by battle was a Norman importation which the English detested. Henry II's contemporary, Glanville, wrote that the people welcomed as a royal boon the statute which relieved freeholders from this barbarous and uncertain method of trial. About this time recognition by a jury of twelve knights or freeholders of the neighborhood, chosen by the sheriff, was applied to determining issues of fact arising in actions which dealt with recent changes of seisin only and in which actual title to the land was not involved.

Henry II, in order to strengthen and centralize power in the

national government, saw to it that trials by jury were available only in the King's Court and in the courts of his justices itinerant. This limitation of jury use to the King's Courts, and the popularity of trial by jury, caused a rapid decline in the influence of the baronical and county courts. It also contributed much to the development of uniformity of the common law throughout the kingdom.

The Constitutions of Clarendon directed that, in certain cases, the principal of recognition by a jury should be used as a method of charging persons with the commission of crime. Later this was extended to all cases. By the Chapters of Eyre, issued in 1194 during the reign of Richard I, itinerant justices were given complete instructions about how to empanel such juries. This system became uniform throughout the country.

At this time the only methods of trying an accused were by ordeal or by battle. Trial by compurgation had been abolished as "the manifest fountain of unblushing perjury". Trial by battle was available only in those cases where an individual accuser or "appellant" came forward and demanded it. In most cases, therefore, after a jury had presented its accusation the accused was subjected to ordeal to determine his guilt or innocence. In 1215, however, trial by ordeal was abolished throughout Christendom by the Fourth Lateran Council. Thereafter, in cases where trial by battle was inappropriate, no method remained to determine the guilt or innocence of an accused. English ingenuity, however, adopted the practice of submitting the question of guilt or innocence to a second jury and the predecessor of the modern petit jury came into being. This practice was in general use by the time Henry III. Although persons accused of crime were not compelled to accept this method of trial, extreme measures were taken to persuade them to do so. If an accused refused to plead, he was remanded to prison. There he might remain indefinitely, only to be punished finally by being pressed to death by weights gradually put upon him. This method was known as *peine forte et dure*. The only advantage in refusing to consent to trial was that without trial there could be no conviction, therefore no attainder or corruption of the blood. Thus, the accused's property was not confiscated and his heirs could inherit.

The function performed by these early juries differed from that of the modern jury. They still were mere recognitors. Each took an oath to found his verdict upon his own knowledge "as an eye

witness or by the words of their fathers, or by such words as they are bound to have as much confidence in, as if they were their own." In case the first jury was ignorant of the facts, a new jury was empanelled. If some of them were ignorant of the facts or the jury disagreed, new members could be added until twelve members were agreed. This was called "afforcing" the jury.

The change to modern practice came slowly. During the time of Henry III special witnesses, such as witnesses to a deed, were sometimes added to the jury. The year book of 23 Edward III records that though witnesses were added to a jury to give their testimony, they had no voice in the verdict. This practice introduced a connecting link between the ancient and modern jury. Late in the reign of Henry IV it was required that all evidence be given in open court so that the judges might exclude whatever was improper. That practice had two very important consequences: First, the law of evidence came into being; and, second, the advocate became a necessary adjunct of the court. By 1470 the procedure of witnesses testifying "viva voce" had become what it is today. For a long time, however, juries were allowed to rely on their own knowledge, as well as on the evidence. Not until the reign of Queen Anne at the beginning of the 18th Century did the Court of the Queen's Bench hold that if a jury gave a verdict of their own knowledge, they ought to so inform the court and be sworn as witnesses. A later case in the reign of George I clearly declared for the modern practice that jurors reach a verdict on the evidence received in court and upon that alone.

While jurors were still mere recognitors, they were subject to punishment for bringing in a wrong verdict. The procedure was by writ of attaint issued at the request of a defeated litigant. In attaint, the issues of fact in the case were submitted to a second jury of 24. If the second jury brought in a verdict opposed to that of the first, members of the first jury were imprisoned and their property forfeited to the king. After jurors became judges of the facts in the modern sense, the writ of attaint gradually fell into disuse. Sir Thomas Smith in 1583 said, "Attaints be very seldom put in use." In 1757 Lord Mansfield said, "The writ of attaint is now a mere sound in every case." The procedure, however, was not abolished by statute until the reign of George IV.

After the attaint was discontinued, the Tudor and Stuart sovereigns, for political purposes, used the Court of the Star Chamber to intimidate juries. Juries which brought in verdicts considered

detrimental to the prerogatives of the crown were summoned before the Star Chamber, fined and imprisoned. After the Star Chamber was abolished, the crown convinced the servile judges of the time that they should take the matter into their own hands. They then countenanced prosecutions of jurors in the common law courts. This practice finally ended with Bushell's historic case in 1670, which vindicated the right of jurors to return verdicts according to their conscience. Edmund Bushell was foreman of the jury which acquitted the Quakers, William Penn and William Mead, of preaching to a large gathering of people in Grace Church Street in violation of the Conventicle Act (16 Car. 14, c. 4). In the Court of the Recorder of London the entire jury was prosecuted and each fined 40 Marks (£26, 13s, 4d). Bushell refused to pay the fine and was committed to prison. He petitioned for a writ of habeas corpus in the Court of Common Pleas. The return to the writ stated that Bushell had been committed for finding a verdict "against full and manifest evidence and against the direction of the court." Chief Justice Vaughan found the cause for imprisonment insufficient and discharged the prisoner. In this judgment, the Chief Justice affirmed the right of the jury to find a general verdict in criminal cases, that is, to determine not only the facts in the case but their quality of guilt or innocence as well.[1]

With the adoption in 1689 of the English Bill of Rights entitled "An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown," the judges, who in the past had served only during the pleasure of the king, were freed of the crown's domination by provision that they should serve during good behavior. Since that time there has been recorded no serious attempt to encroach upon a jury as a free and independent arm of the court.

Now our juries no longer may be questioned as to the correctness of their decisions. They may not impeach ther own verdicts. With certain exceptions, their deliberations in the jury room are inviolate. As Mr. Justice Cardozo said,[2] "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their argument and ballots were to be freely published to the world."

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1. Penn and Mead's case, 6 Howell's State Trial 951; Bushell's case, Vaughan 135; S. C. 6 Howell's State Trials 999; 1 Freeman 1; Jones, 13.

2. *Clark* v. *United States*, 1933, 289 U.S. 1, 12.

Today's juries are true descendents of man's desire and struggle for freedom and the right to be judged by his fellowmen. So long as our rights are determined by the balanced judgment of twelve honest citizens we are safeguarded against arbitrary dictatorship. Listen to the words of Chief Justice Thomas M. Cooley in 1868:[3] "The trial of criminal cases is by a jury of the country, and not by the court. The jurors, and they alone, are to judge of the facts, and weigh the evidence. The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice."

We have all watched these judges of the facts at work. For more than thirteen years I watched them from the Federal trial bench. Out of that close relationship there developed in me a deep and an abiding respect for the men and women who sit on our juries and in all solemnity and with high purpose judge of our deeds and of our misdeeds. I treasure, more than anything, in my experience in the law, the opportunities I have had to work with my fellow citizens as they were called into the jury box to become judges of the facts.

3. *The People* v. *Garbutt*, 17 Mich. 9, 27.