

# Right to Trial by Jury: Is It Necessary?

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## Recommended Citation

Howard Frank & Bruce Rashkow, *Right to Trial by Jury: Is It Necessary?*, 15 DePaul L. Rev. 398 (1966)  
Available at: <https://via.library.depaul.edu/law-review/vol15/iss2/11>

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## RIGHT TO TRIAL BY JURY: IS IT NECESSARY?\*

## DEVELOPMENT OF THE CIVIL JURY SYSTEM

The State of Illinois has had three constitutions, all of which have provided for jury trials. The first was adopted in 1818, the year of admission to statehood, and provided that "[n]o freeman shall be . . . deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."<sup>1</sup> The constitution of 1848 provided "[t]hat the right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy."<sup>2</sup> The present provision states that "[t]he right of trial by jury as heretofore enjoyed, shall remain inviolate, but the trial of civil cases before a jury of less than 12 men, may be authorized by law."<sup>3</sup>

In order to discuss the consequences of this provision with respect to the necessity of the jury in civil cases, it is necessary to define and describe the meaning and nature of the term "jury." It has been defined as "[a] body of men, quite distinct from the law judges—summoned from the community, at large, to find the truth of disputed facts in order that the law may be properly applied by the court."<sup>4</sup> It has been said that the jury ideally consists of 12 impartial people.<sup>5</sup>

The origin of the jury trial system is shrouded in mystery, and legal historians cannot agree on any one theory. There are two major schools of thought as to the origin of the system. One contends that the system can be traced as far as the Britons and subsequently evolved through modification by both the Anglo-Saxon and later the Norman conquerors.<sup>6</sup> The other contends that although the Britons and the Anglo-Saxons contributed something to the system, it was the Normans who contributed most to the character of the system as it is known today.<sup>7</sup> The latter school is the more predominant.

Mr. Forsyth asserts that no trace, whatsoever, can be found, in the body of Anglo-Saxon laws and contemporary chronicles extending from the

\* The following three papers should be read together. They have been submitted to the Illinois Constitutional Study Commission, created by the Illinois Legislature in 1965.

<sup>1</sup> ILL. CONST. art. VIII, § 4 (1818).

<sup>2</sup> ILL. CONST. art. XIII, § 6 (1848).

<sup>3</sup> ILL. CONST. art. II, § 5 (1870).

<sup>4</sup> FORSYTH, TRIAL BY JURY 4 (Morgan's ed. 1875).

<sup>5</sup> MOSCHZISKER, TRIAL BY JURY 6 (1930). Blackstone, Nicolson, Coke, Spelman, Hume and Turner.

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.* at 8. Reeves, Palgrave, Hallman, Burke, Thayer, Maitland, Holdsworth and modern writers in general.

time of Ethelbert (A.D. 560–616) to the Norman Conquest (A.D. 1066), of the principle that a body of twelve impartial men, apart from the court, can intervene to determine conclusively the facts of the case. However, he goes on to say that we can recognize traces of the system which paved the way for its introduction and rendered its adoption at a later period neither unlikely nor abrupt.<sup>8</sup>

Prior to the Norman Conquest, the judicial system under the Anglo-Saxon scheme of government, could be considered under four principle headings, occurring at varying stages during varying periods: sectators; sectas; trial by official witness; and trial by compurgation or wager of law. Sectators were freemen or suitors of court, sometimes referred to as  *pares curiae* or “equals or peers of court,” whose decision was designated *judicium parium*, or “judgment of the peers.” The sectators were the whole court. The number of sectators varied according to the custom of different places. It does not appear that they were sworn.<sup>9</sup>

Trial by secta witnesses was a proceeding wherein the plaintiff summoned to testify on his behalf a certain number of persons who came from the area and who had knowledge of the facts of the controversy and the people involved. It was the office of the secta to support the plaintiff’s case in advance of any answer from the defendant. This raised a presumption in favor of the plaintiff. The defendant, on the other hand, rebutted this presumption by producing a stronger secta. The defendant was not allowed to resort to a trial by secta where the plaintiff introduced proof or evidence of a different character, such as, a charter or deed. Where the defendant was not permitted to resort to a trial by secta, or where the defendant’s secta was insufficient to rebut the plaintiff’s secta, defendant was called upon to wage his law. It should be noted that the defendant was not required to wage his law if the testimony given by plaintiff’s secta was found to be inconsistent or contradictory. If this occurred, the proceeding ended there.<sup>10</sup>

Defects incident to the proceeding by secta led to official witnesses being appointed for each district whose duty it was to attend all private bargains or transactions so as to testify thereto when the occasion arose. This was known as trial by official witness.<sup>11</sup>

When the plaintiff’s secta was found to be consistent, and defendant was either not permitted or unable to rebut the charge with his own secta, he was allowed to call witnesses known as compurgators or “oath helpers,” to whose testimony credit was attached according to their rank. This was known as trial by compurgation, or wager of law. These witnesses did not

<sup>8</sup> *Supra* note 4 at 45 *et seq.*

<sup>10</sup> *Id.* at 30–33.

<sup>9</sup> *Supra* note 6 at 29, 30.

<sup>11</sup> *Id.* at 33, 34.

testify to matters in their own knowledge, as did the secta witnesses, but only vouched for the trustworthiness of the oath of the party on whose behalf they appeared. They were character witnesses. The usual number of compurgators was 12, but might have run as high as 48, depending on the nature of the charge. If a defendant was unable to call a sufficient number of compurgators to rebut plaintiff's secta, he was deemed to have taken a false oath and lost his case. Later, when he failed to produce sufficient compurgators, he was forced to submit to trial by ordeal.<sup>12</sup>

Trial by wager of law differed from trial by secta in that the secta witnesses testified to facts and were not sworn, whereas, compurgators testified only as to the character of the defendant and were sworn. However, trial by wager of law fell into disuse for the very same reason that trial by secta had been replaced. Both were a test of quantity, rather than quality, in a period where perjury was not uncommon. Trial by wager of law was finally abolished by William IV.<sup>13</sup>

In Anglo-Saxon times, the "jurors" were called in only to give evidence. They were in fact witnesses. When the defendant failed to produce sufficient secta witnesses or a sufficient number of compurgators, he was permitted to submit to trial by ordeal. Where the crime was committed by the defendant openly, he was not even allowed to resort to wager of law first, but was required to suffer trial by ordeal immediately.<sup>14</sup> Ordeal was based upon a belief in divine justice. If innocent, the defendant would be protected by God from any harm.

An important institution which closely approached the English trial by jury was the system of "recognition" by sworn inquest.<sup>15</sup> This system was introduced into England by the Normans; and came directly from the Frank capitularies (or early French Code of laws). The Frank capitularies became Norman subsequent to 912 A.D. when Rollo conquered Normandy.<sup>16</sup> Originally, it was employed to ascertain facts in the interest of the crown or exchequer, but its use was gradually extended to settle disputes of fact between private parties.<sup>17</sup>

Recognitors were sworn witnesses, usually numbering 12 or multiples thereof. They were selected from the immediate area and, having knowledge of the facts, rendered their verdict under oath. This delegated body, unlike the compurgators, did not act without knowledge of the facts involved in the dispute, but such knowledge was not acquired by means of

<sup>12</sup> *Id.* at 34-36.

<sup>13</sup> CIVIL PROCEDURE ACT, 1833, 3 & 4 WILL. 4, c. 42, § 13.

<sup>14</sup> *Supra* note 4 at 65, 66.

<sup>15</sup> ROBERTSON, ENCYC. BRITANNICA, JURY (9th ed. 1924).

<sup>16</sup> *Supra* note 6 at 47.

<sup>17</sup> *Ibid.*

any evidence submitted to them or predicated upon argument heard by them. Their decision was based entirely upon their own personal knowledge and information. In the selection of the recognitors, care was taken in order that they would be acquainted with the circumstances of the case, with the litigants, and with the situation and ownership of the disputed property. Once appointed, they heard no evidence or allegations, and by comparing their knowledge of the facts and their opinions of character of the litigants, they rendered their verdict. They were a jury of witnesses testifying to each other.<sup>18</sup>

The extension of inquest by recognition began with the assize of novel disseisin through the statute of Henry II, whereby, the king protected by royal writ and inquest of neighbors all those recently disseised of land. This was followed by the grand assize applicable generally to questions affecting freehold.<sup>19</sup>

Originally, when a complainant had been disseised, the parties appeared in court and made respective claims which they offered to prove by champions who were obliged to testify from their own knowledge of the justice of the claims (similar to secta witnesses). The case might be decided by the outcome of a duel which followed as a sort of ultimate expedient to obtain a practical decision. When a defendant did not choose to accept an offer of combat, he could avail himself of the grand assize. In trial by grand assize, knights (later freemen) were named until twelve were found who agreed on the guilt or innocence of the defendant. This was called *af-forcing the assize*.<sup>20</sup>

The use of recognition was prescribed by the constitutions of Clarendon, 1166 A.D., for cases as to lay or clerical tenures, and in course of time, the judges who held assize were directed to entertain cases other than those involving land. In 1225, it was provided that instead of bringing parties to Westminster, inquisition of trespass and other pleas were to be determined before justices of assize.

The knights or freemen chosen as recognitors were still on the nature of witnesses in that to be a recognitor they were required to have been neighbors of the defendant and to have knowledge of the circumstances. They still passed a verdict from their own knowledge and information, not on independent evidence.

During the reign of Edward III, 1350 A.D., witnesses were added to or connected with the recognitors.<sup>21</sup> They communicated to the latter their knowledge of the facts but took no part in the decision. However, even then, recognitors were not required to base their decision on such testi-

<sup>18</sup> *Supra* note 6 at 49.

<sup>20</sup> *Supra* note 6 at 51.

<sup>19</sup> *Supra* note 4 at 104, 105.

<sup>21</sup> *Id.* at 54.

mony. They could completely disregard it if they so desired. Some historians insist that until the reign of Henry VI (1422-1461) trial by jury, to all intents and purposes, was but trial by witnesses. In the course of time, jurors became judges of the evidence submitted to them as well as witnesses and, from this, gradually evolved the system whereby they were solely judges of the evidence and were not supposed to have any personal knowledge of the facts involved. Finally, in *Bushnell's Case*,<sup>22</sup> Lord Ellenborough plainly said that a verdict based on the jurors' own knowledge, rather than on facts produced in evidence, ought not to be sustained. It is at this point in history that the concept of a jury trial became fixed.

There are several possibilities as to why the number of jurors was twelve. Among them are the following: "twelve" was chosen in analogy to the twelve prophets and twelve disciples; the twelve stones referred to in Bible history; the institution of twelve judges selected in ancient days to try and determine matters of law; the code of the XII tables or compilation of the customary law of Rome.<sup>23</sup> Another possibility on the origin of the requirement of twelve on a jury was presented by John A. Mathews, who stated, "[t]here are twelve on a jury because court astrologers who had charge of choosing juries used to select one name for each of the signs of the Zodiac. The idea was that, because this would bring every type of individual to consider the question, the verdict would be most fair."<sup>24</sup>

The institution of jury trial was looked upon by the settlers as their inalienable heritage. When the colonies became independent states, trial by jury was embodied in their several constitutions. However, trial by jury in civil cases was not originally guaranteed in the United States Constitution. This omission caused considerable opposition to the ratification, and the seventh amendment was subsequently added to the Constitution to ease ratification by the states.<sup>25</sup> The seventh amendment provided that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."<sup>26</sup> Thus jury trial, as it developed in England, became an integral part of the legal system of all the colonies and as each territory, in preparation for statehood, drew up its Constitution, it inserted a guaranty to a trial by jury. This guaranty usually took the form of either preserving the right as heretofore enjoyed or declaring that the right to jury trial shall remain inviolate.

However, it has been generally held by the appellate courts that these

<sup>22</sup> Vaughan 135, 6 How. St. Tr. 999.

<sup>23</sup> See *supra* note 6 at 290, 291.

<sup>24</sup> MATHEWS, *The Jury—Old Wine in New Bottles*, 70 CASE & COMM. 22 (Sept.-Oct. 1965).

<sup>25</sup> *Supra* note 6 at 266.

<sup>26</sup> U.S. CONST. amend. VII.