(editor's note: This paper was transcribed from a handwritten cursive copy with various difficulties. For a perfect rendition, the reader might wish to consult the original, itself a copy, in the volume entitled *Literary Club Papers 2*, 1886 – 1887 June 5, '86 to May 21, '87)

# Old English Methods of Trial

At the Easter term in the 58th year of the reign of King George III one William Ashford appeared before the court of King's Bench to prosecute an appeal under an indictment for murder. The sheriff entered with his prisoner, delivered the writ with its formal instruments to the clerk, who proceeded in a loud voice [ ] it, after the manner then prevailing in the courts; and the parties were thereupon before that honorable bar to try the issues of the appeal. There was nothing to indicate that any unusual event was impending, and the appellant launched out upon the reading of the usual complicated, involved, and yet withal quaintly attractive count, "for that he, the said Abraham Thornton, not having the fear of God before his eyes but being moved and seduced by the instigation of the Devil, did feloneously, willfully, and violently and of his malice aforethought, cast, thrown, and push the said Mary Ashford into a pit of water, wherein there was a great quantity of water, by means of which said casting, throwing, and pushing of the said Mary Ashford into the pit of water aforesaid by the said A. Thorton in form aforesaid, she, the said M. Ashford in the pit of water aforesaid with the water, aforesaid, was then and there choked, suffocated, and drowned, of which said choking, suffocating, and drowning, she, the said M. Ashford then and there instantly died."

The court was probably found by diligent reading to have and [ ] and to it; and when that end was reached, doubtless court and bystanders relapsed into that mild state of expectancy with which people anticipate routine. But at this point the proceedings were rescued from the commonplace, and made forever memorable; for we read that the prisoner being thereupon placed at the bar did plead in these words: "Not guilty: and I am ready to defend the same by my body." and thereupon taking his glove off he threw it upon the floor of the court." The surprise created by this formal application for trial by battle can only be faintly appreciated. It is significant to note in the record of the case that the appellant's counsel "craved time" at this juncture. The prisoner's motion was contested in a long and learned debate, at the end of which the five justices of that high court, with no less a person than Lord Ellenborough in the chair, unanimously decided that trial by battle, though somewhat obsolete, was still the law of the land; and it was therefore adjudged that the prisoner be permitted to wage his battle and his plea to maintain per corpus suum. The event reads like a transcript from some old Norman Record; yet it occurred within the memory of men now living, and its exact place in the chronology of the history of procedure in England is fixed by its record in modern reports of Barnewall and Addison. It is the case of Ashford vs. Thornton, and forms a part of the furniture of very well equipped law-library. An interesting inquiry is raised by a reading of this case. The great march of reform which is sweeping our country has been largely directed to the institutions of the law. The body of the law itself is sought to be categorically defined; and codification has many and able advocates. With such an impetus, and with such a tendency, it is not strange that our methods of trial should be made the subjects of great controversy. Now it is the conservative argument in the jury

question that gives a practical bearing to the inquiry alluded to. Is the trial by jury so closely identified with the liberties of the English-speaking people that its disuse would impair their personal rights to "life, liberty, and the pursuit of happiness?" Is it a natural birthright, – unalienable? Whatever be the expediency of abolishing the system, it will be interesting to inquire whether or not that system is yet so engrafted upon our social institutions as that its removal would weaken their vitality.

In the first place, the right to a trial by jury is nowhere secured to the people by and of the great charters of British freedom, so that its existence in that country is not associated with them in commemorating those hard-earned conquests over tyranny by English yeomanry. Magna Charta, which is uniformly quoted as securing to all men the right to such a trial is to that extent misunderstood. The words judicium parenium quorum have reference according to a writer of high authority, notwithstanding Blackstone to the contrary to the judgment of a manorial court in trying title between adverse tenants; and it is the more a subject for surprise that they should be construed to mean the verdict of a jury, as the technical word "curates" is found in vigorous law Latin elsewhere in the same instrument. If therefore we dispel the substantial illusion that the right to a trial was distinctively made that "Bulwark of English liberty" which a conservative regard alone entitles it to be called, can we proceed with our inquiry in a most interesting field, by a sketch of the many curious methods of trial which have their origin in even a remote antiquity, and whose courses ran through the lapse of nearly so great a time as that system with which we are wont to believe justice and personal liberty will stand or fall.

In the earliest Saxon times, when juries were known only in the Germanic nations, the simple inhabitants of the British Isle applied for justice directly to its fountain-head, making their appeals to the supreme being. The form of the procedure was significantly called "The Ordeal." There were at least three kinds, – the severity of each being tempered to the condition of the person who sought justice by it. The water ordeal was for persons of low birth. Its operation is striking. I take the following description from a recent work – "A fast of three days duration was first submitted to in the presence of a priest; the accused was brought into the church where mass was chanted, followed by the communion. Before communion, however, the accused was abjured by the Father, Son, and Holy Ghost, by the Christian religion which he professed, by the only begotten son, by the Holy Trinity, by the holy gospels and by the holy relics, not to partake of the Communion if he was guilty. Prayers, reading of the Scriptures, intercessions, and benedictions followed. Communion having been partaken, adjuration axquae (sic) is made by the priest, in which the water is asked to cast forth the accused if guilty, and to receive him into its depths if innocent. –After these ceremonies the accused is stripped, kisses the book and the cross, is sprinkled with holy water and then cast into the depths. If he swam he was pronounced guilty." To sink did not necessarily mean to drown, as in the case of a similar ordeal to which witches in modern times have been subjected; for we have the comforting assurance from Glanvil that a rope was tied about the body so that it might be withdrawn from the water before death.

Hot water was resorted to in certain cases; but like the preceding was confined in its operation to villeins or serfs. By this ordeal the accused was required to plunge his bare arm into a cauldron of water heated to the highest temperature of which it was susceptible,

and to withdraw therefrom a stone or other object suspended in its depths by a string. The length of the string was determined by the nature of the accusation. If grave or triplex, the string was long, so that the arm should be immersed to the elbow; if simplex, then only to the wrist. In either event, unless the wound healed within three days, the accused was pronounced guilty.

For freedmen a less humiliating but no less painful test was provided: the ordeal by fire. Some writers have it that by this method the prisoner was required to walk a certain number of paces, holding in his hand a piece of heated iron; the weight of the iron and the distance to be traversed proportional to the enormity of the prisoner's supposed offense. (For it is interesting to note that, as the ordeal was awarded by the court at what was termed medial judgment, and not until the sincerity of the accusation had been guaranteed by giving security, the presumption at this stage of the procedure was always against the innocence of the accused. In this case as in the preceding, the wound resulting from the test must heal within three days, to secure an acquittal. Others tell us that the ordeal by fire was the same as the ploughshare test; where the accused must walk blindfolded over heated ploughshares, and suffer the question of his guilt or innocence to abide by that uncertain result. Considering that there were nine ploughshares which the accused was required to step over, there could not have been so much uncertainty in the result, as the person vitally interested might have wished. Indeed, the judgment of Heaven, when uttered by those “cloven tongues of fire” must have almost uniformly condemned; and as a matter of fact, I can find the record of but one case where innocence was by that means discovered. It was the case of the mother of Edward the confessor and must have been an isolated one, for it is the one familiar citation of all the commentators on English Law, on this subject. Crabb says however in his history that both methods with many others of a similar kind were practiced under the general title of “ordeal by fire;” and I see no difficulty in accepting the statement.

“The Corsuard” was the milder ordeal reserved for the clergy. A man in orders had but to swallow an ounce lump of barley bread with reasonable complacency to absolve himself from the greatest accusation, and to the credit of the clergy be it said that they rarely failed to acquit themselves honorably by any test which called for the exercise of so highly developed faculty. In all these cases the same solemn invocations to the Deity were made which were described as part of the Water Ordeal; so that, notwithstanding their total inadequacy as a means of trying an issue of fact they were cherished by the credulous people long after the Conqueror had established himself and his jury system among their simpler institutions. Indeed, even after what has been said of Magna Charta there remains any doubt as to whether the right to jury trial secured by it, there can be no uncertainty about this: that the privilege of the ordeal was there made constitutional and that, in the subsequent confirmation and new charter of Henry III that privilege was secured as a perpetual right to Englishman. We are greatly attached to the jury system, even though we hear its demerits openly discussed. It is associated with all our traditions of the redeeming common sense of our country's yeomanry.

There was the same affection among the Saxon remnant of the English population during that system's introduction by the Norman Conqueror, for the Trial by Ordeal. If Mr. Bigelow's inference is correct, the torture or peine forte et dure which was first

sanctioned by the courts in the 13th Century bears striking testimony to that affection. Mr. Bigelow is of opinion that the torture was resorted to by the courts to assist Saxon defendants in making their election in favor of a trial by jury, – the judiciary in its wisdom having long perceived the futility of the ordeal. Since, however, there was a constitutional right to its benefit, the courts could not compel an election for the more reasonable trial by jury. They therefore, in cases where the ordeal was demanded, were wont to adjudge that the prisoner be removed, that he be laid upon his back, with a great weight upon his chest and abdomen, and that he be suffered to remain in contemplation, in that wise with a morsel of bad bread each day until he should find himself of a mind to voluntarily elect to make formal traverse of the charges and placed himself upon the County; i.e. the jury. The reluctance to recognize the Norman innovation with which we are so loath to part could not have been more strikingly demonstrated. These methods by ordeal are undoubtedly of the greatest antiquity. They come to us from the very earliest traditions, not only of the successive peoples inhabiting Great Britain, but of the oldest governments at Athens and Rome. In England, they appealed with such singular power to the superstitions of the simple-minded people that even the great edict from the Lateran Council, abolishing the ordeal throughout Christendom and declaring its observation blasphemous, was fulminated in vain; and it was not until two centuries had passed after the conquest that the Saxon population was willing to give up their appeal to the judgment of God. The ordeal was abolished by act of Parliament in the reign of Henry III.

It was early therefore in the judicial history of England when this primitive administration of justice was formally abolished and for that reason, notwithstanding its great antiquity may not seem to have any great significance in this connection. We will reserve that point, however, and pass at present to a much better known and far more recent method of English trial, the trial by battle, the latest record of which has been described. The Mirror, that work which Lord Coke himself, writing to a past age calls "a very ancient treatise ——whereby this kingdom was governed about 1100 years past," tells us that "the law whereof (its substance) is made, is of ancient usages, warranted by holy scripture; and because it is generally given to all, it is therefore called Common." This curious introduction to that venerable book affords an explanation for the origin which its unknown writer ascribes to the custom of trial by battle. Endeavoring to discover the scriptural sanction which he declares to be the warrant for all of the institutions of the Common Law, he says that he finds the wages of battle justified in holy writ, where he discovers a precedent in the great case of David for the people of Israel of the first part versus Goliath on behalf of the Philistines of the second part. Whether we have scriptural precedents or not, certain it is that the same the credulity and superstition which led men to resort to the ordeal induced them later to wage their battle. There is an indication however that the misinformed faith which originated the ordeal was beginning to assume a more logical aspect. For the enlightened sense of our age adheres somewhat to the maxim that "might is with the right" and a great intellectual growth is indicated in the Saxon people by the introduction of trial by battle. It was employed in civil as well as criminal cases, the common sense of the age recognizing no greater difficulty in trying an issue of title to lands by that means, than by determining a question of guilt. Let us imagine a case where a title to the lands is in issue. The parties have been brought into court, the pleadings defining the exact point in controversy have been orally made, and the adverse claimants stand at the bar for medial judgment. The defendant declares that

he has the better title to the land in question, and begs the court that he may be allowed to maintain his plea “body to body” with the plaintiff. This is granted; the parties select their champion; the glove of the defendant's champion is thrown upon the floor, before all present, and accepted by the defender of the plaintiff's cause; the clerk in a loud voice announces that the honorable court is adjourned until sunrise of the morrow upon the common green; court, counsel, and bystanders depart eager for the judicial combat, and periwig is left alone with wool-sack awaiting sunrise.

During the night an enclosure is effected upon the common and at daylight the town is in active anticipation. Housewives are exerting themselves to clear their domestic dockets of the day's routine in order to be off to the green at sunrise. Here and there through the mists of morning can be seen a group of honest thegans, free-holders all engaged in the discussion of the law of real property in its practical aspects, and the conversation is wholly of brawn and thew. A faint streak of red is perceptible in the East. It seems as though the entire borough was afoot and on the way to the green and when the sun looks out over the fields a moment later he sees a spectacle that I would I could adequately describe. There, to the right of the enclosure are the learned judges elevated upon a great platform and robed in the scarlet of their high judicial office. Beyond is the bar reserved for the great counsel sergeants at law everyone, while the entire power of the county is pressed into the rows of seats on all sides. Here indeed is a forum for testing all the subtle distinctions between vested and contingent remainders for determining the right in matters of executory devise. Here the rule in Shelly's Case will have fair play. The clerk opens the court. He cries in a loud voice, makes proclamation for the champions and presently they appear, heralded by two knights from opposite sides of the lists. They wear coat of mail and red sandals their limbs bared. They carry the famous single-stick and leathern target. They approach, and each taking the other by the hand, makes statement of his claim, closing with this solemn oath against sorcery: “Here this ye Justices, that I have this day neither eat ne drank; and have upon me ne bone, stone, ne grass; nor any enchantment, sorcery nor witchcraft; whereby the law of God may be abased or the law of the Devil exalted. So help me God and his saints.” Whereupon they fall to and ply their murderous staves until victory awards a judgment to the victor, or until the stars come forth with their benignant light upon the contest which human endeavor has been unable to decide. “For, if the defendant maintainith the fight until the stars appear he shall return to his possession, for he hath maintained that which he hath; and victory can do no more.” If during the battle either party utter the frightful word Craven the judgment is with his adversary and he goes forth recreant infamous and “for that he hath abandoned his master's cause onto his adversary.”

And so, upon the breaking of a skull or two or at all events by nightfall the court pronounces it solemn judgment upon the issues as learnedly discussed before it; and the power of the County returns to its various freeholdings flushed with the excitement of the combat and complacent in the assurance that justice has been fairly administered. – Such is trial by battle in civil cases. It is different from criminal proceedings only in the fact that the contest cannot be waged by Deputy; the prisoner and his accuser personally doing battle; and that the weapons used are surely for mortal combat.

The antiquities of the Common Law afford us instance of other curious methods of trial

such as by compurgation and by witness. But I refrain from describing them for the reason that they were limited in their application to special cases, when the general practice would be manifestly inadequate or where summary treatment of a question was required. It should be borne in mind however that the two great systems of procedure by the various ordeals and by battle were during the period of their practice general methods for the trial of all questions of fact; that they took their origin in the very earliest human conceptions of right between men; and that primitive though they seem to us, it is but a generation or two that has intervened between our day and the day of their power.

To describe their operation, to dwell for a brief space in the day when “heaven re-echoed with the unavailing cry" of men praying miracles for justice, is not merely a diverting pastime. It is full of suggestion. If, after having lived a hundred decades, vs. having meted justice to generations from a time “whereof the memory of man runneth not to the contrary” these pillars of the law can, within a few years be superseded by a nobler structure so completely that their outline is but vaguely known to the next generation; if they can be removed wholly from a people in whose affections they had lived as an inheritance from the untold past, so that its memory is stored up only in the departments of curious learning – by what analogy can we be justified in saying that some better system which we now cherish is that upon which our liberties must stand or fall?

It is a physical truism that all matter contains a certain limited amount of potential energy; exhaust that energy and it will lie inert from that moment so long as law reigns in the physical universe. So it is with our social institutions. Liberated by necessities of their days, they operate with a vitality commensurate with the duration of the necessity out of which they sprang; then, having gravitated below the line of progress, they lie inert, inoperative until among the dust-heaps of the legislative field it is discovered and gently dissolved by enactment. No statute or constitution can live unless framed to meet some tendency of progress indicated by custom. When a time honored institution grows obsolete by the laws of inertia, then it is that legislation steps in; and, looking back through the vast thoroughfares of precedent, extends them by judicious statute into those regions of excellence toward which they tended.

My design has been to present a sketch rather than an argument. I have foreborne to touch upon the jury question, leaving its discussion to those better fitted for that test. But when the time comes for that question to be made one of statesmanship, if we will but return in memory back through these avenues of precedent, we will complete the retrospect with a more abiding faith in the redeeming sense of mankind, than to fear that its social relations will be vitally disturbed by the disuse of any one of its institutions.

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