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## NOTES

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### ANGLO-SAXON TRIALS

The main difficulty in attempting to discuss a subject of this sort is due to the fragmentary and obscure nature of the material from which information concerning it must be obtained. We are so accustomed to the habit of preserving written records of all matters of importance that it is extremely hard to realize that it is a habit acquired at a comparatively recent date and that practically all affairs were formerly carried on without it. As a result of this, there is the danger of placing too high a value upon those written records which have survived, and of forgetting the rather high probability that the subject of them was put into writing simply because it was unusual and contrary to the accustomed mode of procedure, thus making any conclusions

as to the manners and customs of the times exactly the opposite of the real facts. Therefore, much of the knowledge concerning the Anglo-Saxon method of administering justice, as well as our understanding of the substantive law, can only be derived by inference from the more complete information we have in regard to the procedure of the courts after the conquest, and such inferences are of value since it is known that changes and innovations in local customs proceeded very slowly under the first Norman kings.

The knowledge, as far as direct evidence is concerned, of Anglo-Saxon procedure, is obtained from several classes of documents, to a certain extent supplementary, but which do not in any way give a complete view of the subject. In the first place, there are a considerable number of the laws, ordinances, and decrees of the Saxon and English kings, from Aethelbert of Kent to Canute. While they are not all exactly alike, yet they are of the same general character and what is true of one is to a great extent true of all. They do not in any way resemble the modern codes, nor were they intended to be complete expositions of the customary or "common" law, since it was not until the century following the conquest that this second class of documents appear, *i. e.*, compilations of the ancient customs and formulæ, the most important of which is the tract or costumul called *Rectitudines singularum personarum*. Another kind of contemporary writings now extant consists of the charters or "land-books" which contain the records of the gifts of princes to religious houses and to their followers, and furnish some evidence as to the laws of real property and land tenure. Also, there are some incidental notices of Anglo-Saxon laws and customs in the chronicles and similar writings, but such information seems to be slight both in quantity and quality. Finally, there are legal and official documents written after the Conquest which tell much by implication. Of these, the foremost is, of course, the Domesday Book.

As for the courts in Anglo-Saxon times, there were three different ones in which the great bulk of the legal business was done,—the hundred court, the county court, and the witan, and here only the former two, which were the courts of the people, need be discussed. The question of private courts also need not be considered in this connection because there is no direct evidence, either of their predominance in England for any great length of time before the conquest, or of their general nature and procedure, although it is known that the country was covered with them at the time of or shortly after the coming of the Normans, and they existed on the continent at a much earlier date. Then, too, it should be noted that secular

and ecclesiastical courts were not sharply separated and the two jurisdictions were but slightly distinguished. There do not seem to have been any purely clerical courts of importance and the bishop of the church sat in the county court, it being very probable that he was the only one present who had had any systematic training in public affairs.

The hundred court was the judicial unit,—the court of original jurisdiction in all matters, civil and criminal, arising within the hundred—and met every four weeks. The country court, held twice yearly, had jurisdiction over all matters brought up for review from the hundred and also over all transactions taking place within the county and not limited exclusively to the hundred court. In case a suitor could not get justice in the local courts he might appeal to the witan, which had jurisdiction over such matters as well as over all questions concerning “book-land” and disputes between bishops or the heads of great houses of religion.

The most important fact about these courts—I refer to the hundred and county courts—is that they were of, for, and by the people and might be called a concrete embodiment of the notion of popular justice. They were not surrounded by an atmosphere of dignity or reserve and seem to have been always held in the open air. There was no real presiding officer, except that they were held under the general supervision of the bailiff or sheriff who was present in order to protect the king’s interest in the proceedings. Nor were there any judges, in our sense of the word, as men who presided over the court, decided questions of law, and gave out the judgment. On the contrary, the whole body of suitors and all of the freemen, who were required to be present, were the judges and the decision or judgment of the court was the opinion held by the whole assembly as to the justice of the plaintiff’s case or the guilt or innocence of the accused. The very nature of such gatherings, being mere noisy, turbulent assemblies of the freemen of the hundred or the county, unlearned either in letters or in law, with the high probability that the majority were directly or indirectly interested in one side or the other of every case, and under the influence of no oath or sense of responsibility, did not tend to produce really judicial decisions and serves to explain to a great extent the modes of proof and procedure followed by them.

At first sight it may seem strange that the legal affairs of a people could be carried on by such courts, but the difficulty disappears when the fact of the simple organization of society at this time is considered. In the first place, in small communities such as then existed,

every man knew, to a greater or less extent, just what his neighbor was doing, and, should one of their number suddenly become possessed of cattle for which he could give no satisfactory account, there might justly arise a strong presumption that he had stolen them. Then, too, the manorial system discouraged much shifting of population and strangers in a community were very likely to be there to no good purpose. Finally, and this is of the greatest importance, there was a minimum of commercial dealings, such as give rise to the large majority of law suits today, and with which the greatest part of the court's time is taken up. The result of this fact was that the courts devoted their time almost exclusively to cases of homicide, mayhem, and larceny, which last consisted mainly of cattle stealing and, judging from the number and severity of the laws against it, this crime seems to have been very prevalent in those days. When all of these things are considered, it will be seen that the task of administering justice could easily be undertaken by the courts before described and that, instead of being overcrowded with business, in all probability, there was often hardly anything to justify their assembling. In addition, there was often some difficulty in compelling the accused and suspected persons to submit to their authority. Not only would individuals accused of crime refuse to appear, but in many cases powerful lords would protect offenders who happened to be in their service or who for any reason applied to them for aid. The remedies for this abuse were seemingly of little value. The party's appearance in court might be obtained by the seizure of his goods, usually cattle, which were forfeited if he failed to submit. If this remedy were unavailing the offender might be declared an outlaw, *i. e.*, declared to be without the protection of the law, so that he was at the mercy of anyone who cared to injure him. Finally, in the case of an offender being protected by some lord, an expedition might be sent against them both by the king, but this was seldom resorted to except in those flagrant and notorious cases which amounted to open treason.

Keeping the above facts in mind, the methods of procedure, we may now consider the adjective law of the Anglo-Saxon courts. It might naturally be assumed, at first glance, that the procedure of these popular courts would be very loose and informal, but the fact is that it was governed by traditional rules of the most formal and unbending kind. There was an extreme technicality, a strict devotion to ancient customs, and a rigid adherence to prescribed archaic forms. "The body of the judicial business of the popular courts \* \* \* lay in administering rules that a party should follow this established formula or that, and, according as he bore the test should be punished or go

quit. The conception of the trial was that of a proceeding between the parties, carried on publically, under forms which the community oversaw." (Thayer's *Preliminary Treatise on Evidence*, 8-9).

Now, since the trial or proof of a case was likely to be a rather burdensome, if not a dangerous affair for the defendant, no man was allowed to accuse another unless he had something with which to support his accusation. If the defendant were accused of maiming the plaintiff, it was sufficient to exhibit the wound in court; but, in some cases, such as larceny, there would be nothing to exhibit. Then the complaint would have to be sustained by either the plaintiff's oath alone or the accompanying oaths of "complaint-witnesses," called also the *secta*, whose office was to support the plaintiff's case in advance of any answer by the defendant. The fact that they were called witnesses must not be allowed to give the impression that they were the kind that gave evidence as we now understand the word. They were merely guarantors of the plaintiff's good faith and might have nothing to do with the facts of the case. Originally one was sufficient but later two came to be the customary number and, in most cases were members of the complainant's family.

As will later be seen, where the method of proof or the trial proper consisted merely in going through certain prescribed forms which, in early Anglo-Saxon times, were not excessively difficult or complicated, the burden of proof was often an advantage to the party upon whom it rested and was something to be sought for rather than avoided. Thus, if A were trying to collect a debt from B and the trial or proof in such a case would, by the established custom of the community, consist simply in taking an oath with the assistance of a certain number of oath-helpers, it would be to the advantage of either if he were called upon to take the oath in order to make his case or disprove the charge. The result of this was that the real judgment in the case was the decision of the court as to which party should go through the prescribed form and would come before the trial itself. Here the party's reputation became of the greatest importance since the court might allow his adversary to have the burden of proof or might insist upon an especially difficult form of proof for a man of ill-repute, the general rule, however, being that this duty or burden rested upon the defendant and, merely for the sake of convenience, such will be assumed to be the case, in discussing the different modes of trial or proof.

After the question as to which party should be put to the test had been settled there arose another as to just what form the trial should take. The three methods of trial in general use, were: (1)

trial by witness; (2) trial by oath, with or without oath-helpers; (3) trial by ordeal. Here it might be well to note that trial by battle, while used on the continent and in England, after the conquest, was seldom if ever resorted to by the Anglo-Saxon courts and for that reason is not included in the above classification.

The first of these, trial by witnesses, "appears to have been one of the oldest kinds of 'one-sided' proof. There was no testing by cross-examination; the operative thing was the oath itself, and not the probative quality of what was said, or its persuasion on a judge's mind. Certain transactions, like sales, had to take place before previously-appointed witnesses. Those who were present at the church door when a woman was endowed, or at the execution of a charter, were produced as witnesses." (Thayer's *Preliminary Treatise on Evidence*, 17). Apparently, the law in the oldest period "did not often have recourse to this mode of proof, and the oaths which these witnesses proffered were radically different from the sworn testimony that is now-days given in our courts. For one thing, it seems to have been a general rule that no one could be compelled, or even suffered, to testify to a fact, unless when that fact happened he was solemnly 'taken to witness.' Secondly, when the witness was adduced, he came merely in order that he might swear to a set formula. His was no promissory oath to tell the truth in answers to questions, but an assetory oath." (Pollock and Maitland, *Hist. of Eng. Law*, 95).

The next form of trial, *i. e.*, by oath or compurgation, was seemingly the most common method used in Anglo-Saxon courts and the influence of it was felt for centuries. To really understand the nature of this mode of proof several things must be considered, the first of which is our idea of crime compared with that of the Anglo-Saxons. The conception of crime as an offense against society is too abstract for any but a highly civilized people to grasp and, accordingly, we find that in those times what we would call a crime was looked upon as an offense against individuals rather than against the state, the theory of the king's peace having but a very limited application. Correlative to this, there was the notion of the unity of the family and the responsibility of kindred which exists today in an even stricter form in India and the Far East. The family was looked upon as an entity and was responsible for the acts of any member, whom it was supposed to control and who, according to the theory, would not commit crimes if the rest of the family were not in some way at fault. Then too, an injury to any individual was considered an in-

jury to the whole family and the elaborate systems of compensation, from the wergild, or the price paid for the taking of a man's life, down to the sum to be paid for each eyelash, were the direct outgrowth of this belief.

In addition to the above, there is the fact that the question of evidence is one that has perplexed and taxed man's reasoning powers from the earliest times. That the subject is not only of extreme importance but also of exceeding difficulty is shown by "the subtle distinctions of the Roman law, with its *probatio praesumptio juris, praesumptio juris tantum*; the endless refinements of the glossators, rating evidence in its different grades, as *probatissima, evidentissima, apertissima, legitima, sufficiens, indubitata, dilucida, liquida, evidens, perspicua, and semiplena*; and the artificial rules of the common law, so repugnant frequently to common sense." (Lea *Superstition and Force*). Now, since the Anglo-Saxon courts had neither judges nor juries, attorneys nor clerks, to interpret and apply such subtle distinctions, and since they were essentially nothing more than mass-meetings of the citizens and therefore incapable of understanding and using such rules, they dispensed with evidence almost entirely and placed their reliance on some other mode of procedure such as the oath. If these two things be clearly understood it will readily be seen why the oath assumed such an important position in the trials of the period under consideration.

Originally, and this continued to be the rule through the whole Anglo-Saxon epoch in the case of a man of good character and reputation being charged with a minor offense, the oath of the defendant alone was sufficient to acquit him of the accusation, but it was soon realized that, in the case of more serious crimes, this was too great a temptation to perjury. The result was that the system of compurgation was developed. In the earliest times the compurgators or oath-helpers were the defendant's kindred, the number varying from one to a hundred or more, according to the gravity of the charge, the reputation of the defendant, etc., nor will the number seem excessive when the clan or tribal organization of the family is taken into consideration. Just as a man's family should protect him with their arms and seek revenge for his injuries, so, too, they should come to court and defend him with their oaths and help to punish his enemies by swearing against them. Now, for several reasons, the restriction that the compurgators should be of the accused's kindred was gradually abrogated. In the first place, it was recognized that the accused would always be acquitted unless, for some other reasons which will be considered later, he failed in the test. Besides, in various localities,

there were different laws concerning the number of oath-helpers required and in some cases it happened that the defendant was unable to produce any kindred or perhaps enough of them. With the growth of the belief that the oath of any "good man and true" was admissible it was seen that the defendant's chances of being freed were still greater and, accordingly, some method of choice had to be devised to prevent the result from being a foregone conclusion.

On this subject Lea, in his *Superstition and Force*, 48, says,—“The English law was the first to educe a rational mode of trial from the absurdity of barbaric traditions, and there the process finally assumed a form which occasionally bears a striking resemblance to trial by jury.”<sup>1</sup> This statement seems to me to be somewhat too broad in that the result was not a rational mode of trial but merely a limitation of the defendant's right to select his oath-helpers. This limitation generally took the form of allowing the defendant to select a certain number of compurgators as before and then, by means of some arbitrary and mechanical method, a part of this number were eliminated and those remaining were required to act as the defendant's oath-helpers. Thus in Ipswich, in the twelfth century, to decide questions of debt between the townsmen, “the party on whom proof was incumbent brought in ten men; these were divided into two bands of five each, and a knife thrown up between them; the band towards which the point of the knife fell was taken and one of the five was set aside, and the remaining four served as conjurators.” (Gross, *Modes of Trial in the Mediaval Boroughs of Eng.* XV. Har. Law Rev. 699). The case which shows the most strict limitation upon the defendant's right to choose his oath-helper is one, given in the laws of Canute. In some cases, “fourteen men were named to the defendant, among whom he was obliged to find eleven willing to take the purgatorial oath with him. The selection of these virtual jurors was probably made by the gerefa, or sheriff; they could be challenged for suspicion of partiality or other competent cause, and were liable to rejection unless unexceptional in every particular.” (Lea, *Superstition and Force*, 48-9). It must be remembered that this was the exceptional case and that, in general, the compurgators were selected by the defendant and not by the court and, therefore, were chosen on the very basis of partiality and favoritism.

The taking of the oath itself was governed by rules, following old and archaic forms, more strict and fixed in their nature and of greater technicality than the rules of the common law in the eighteenth century. First, the accused himself took the oath denying the whole charge of the plaintiff, there being nothing corresponding to our pleas

in abatement. The oath consisted in going through a set formula, of highly technical form, and any slip or mistake in repeating a single word was fatal and the taker of the oath stood convicted of the accusation. After the accused had taken his oath his oath-helpers proceeded to swear according to some such form as,—“By the Lord, the oath is clean and unperjured which N. has sworn,” (Thorpe’s, *Ancient Laws*, 180), or “The oath which William has sworn is true, so help me God and his saints.” (*Ancienne Cout de Normandie*, ch. LXXV.). Thus it will be seen that these, while they were not the statements of witnesses in the modern sense of the term, nor mere assertions of belief or protestations of confidence, were still unqualified assertions of the truth of the principal. If both the accused and his compurgators repeated the oaths without slip or mishap he was said to have “made his law” and accordingly was judged innocent of the charge against him. As for the plaintiff who had no other method of proving his case, there was no relief. He could only satisfy himself with the knowledge that the defendant and a dozen or so of his kindred or friends who had committed perjury would be condemned to eternal hell-fire and damnation, and, when we consider the nature and character of the times, there is but little doubt that such belief was strong enough to furnish lively satisfaction.

However, it must not be thought that making one’s law was a very simple matter. The forms were absolutely rigid and of high technicality and the whole case might be lost as the result of the slightest mistake on the part of the principal or anyone of his oath-helpers. In fact, there are numerous instances of failure, either on account of not having enough compurgators present, or because of some error in the form, and toward the end of the Anglo-Saxon period the formulae of asseveration had become so complicated that the party who had the burden of proof often preferred to take his chances with the ordeal or some other mode of trial.

The next form of trial, the ordeal, which originated in India and has been used by every people at one time or another, is still in use in a number of different forms among the uncivilized nations today. China, so far as is known, is the only exception to this rule. Nor is the prevalence of this custom difficult to understand when the fact is realized that the question of an accused’s guilt or innocence was regarded as something too obscure and beyond the powers of the human mind to solve and also when the intense superstition of the time is taken into consideration. It has always been man’s custom to cast his doubts upon God and there was the utmost faith that He would settle all such questions. However, it is not as difficult to understand

why the method of the ordeal was used as to discover just what was its position in the whole system of trials and upon this point the authorities disagree. Some say that it was used as a last resort to give a man another chance who had already failed in the oath or who, for some reason, was unable to take the oath, while others insist that it was used side by side with the oath and was not in any sense a final appeal. Still, it does seem that the oath was generally used in disputes over property and civil matters generally while in criminal cases it was supplemented by the ordeal to be used whenever the oath was unavailing because of the conflict of witnesses, the ill repute of the defendant, or for any other reason.

This test, in Anglo-Saxon England, took four main forms, the first of which was the ordeal of boiling water. This is one of the oldest ordeals and seems to have been favored both by the secular and ecclesiastical authorities, the reason for this popularity being shown in the commendation bestowed on it by Hincmar, Archbishop of Reims, in the ninth century, who said, "It combines the elements of water and of fire; the one representing the deluge—the judgment inflicted on the wicked of old; the other authorized by the fiery doom of the future—the day of judgment, in both of which we see the righteous escape and the wicked suffer." (Hincmar de *Divort Lothar. Interrog.*, VI.). There were very many minor variations in the administration, but none of them departed to a great extent from the original form as invented in the far East. A caldron of water was brought to the boiling point and the accused was obliged, with his bare hand to find and withdraw a ring or stone which had been previously thrown into it; sometimes the ring or stone was omitted and the hand was simply inserted a certain distance which was carefully regulated with regard to the magnitude of the crime; or in other cases, the ring or stone was suspended by a thread the length of which was similarly determined. After the accused had withdrawn his hand from the caldron it was carefully wrapped up in cloths and sealed with the signet of the presiding officer, who usually was a member of the clergy, and after three days it was unwrapped when the guilt or innocence of the patient was announced in accordance with the condition of the member. As a means of extra precaution, some rituals provided that holy water and blessed salt should be mixed with all of the food and drink given to the party, presumably to prevent any diabolic interference with the result of the test. These performances were generally conducted under the auspices of the church and were surrounded with all the solemnity of her most venerated rites, such as prayer, fasting, the celebration of mass, the

administering of the sacrament, etc., followed by an awe-inspiring exorcism of the water. Many cases have been reported where the above test was employed and, as to be expected, the guilty were always scalded, and the innocent were never harmed. A slight variation from this formula is seen in the reports of instances where the guilty parties were burnt by coming in contact with water in an ordinary stream or, in other cases, holy water.

Very similar to the ordeal of boiling water was the ordeal of red-hot iron. In almost all ages and among nearly all people there has existed a belief that the human body, with the aid of divine influence, was able to resist the action of fire and the convenience with which this test could be applied by means of iron made that the most usual form of the ordeal. Of this test there were two essentially different forms. One consisted in placing on the ground at stated intervals from six to twelve red-hot ploughshares, among which the accused walked barefooted, sometimes blindfolded, when it became nothing more than an ordeal of pure chance, and sometimes being compelled to touch each iron with his feet. The other form, and this was the more usual one, required the accused to carry in his hand, for a certain distance, usually about nine feet, a piece of red-hot iron, the weight of which varied with the crime and which was carefully regulated by law, the general rule being that the iron should weigh one pound in the "simple ordeal," three pounds in the "triple ordeal." Usually, as in the ordeal of boiling water, the hand was wrapped up and sealed and the decision rendered upon its condition three days later. These proceedings also seem to have been conducted by the clergy and were accompanied by the same solemn rites which have already been mentioned; the iron was itself exorcised in due form and God's intervention was invoked in the name of all the various manifestations of Divine mercy or wrath by the agency of fire. Also, just as Heaven at times intervened to punish guilty parties by reversing the hot-water ordeal, so there are numerous cases reported where miracles were performed in the hot-iron trial, especially where some diabolic influence had interfered with the appeal to God.

The next form of ordeal, that of cold water, differed from the above two in that it required a miracle to convict the accused, since in the natural order of things he escaped. The preliminary rites and solemnities were similar to those in the former tests; the reservoir of water, or pond, which was to be used was exorcised with elaborate formulas exhibiting a strange mixture of faith and impiety, and the accused, having been securely bound with cords, was lowered into it with a rope, to prevent any fraud or deceit if he were guilty, and to

keep him from drowning if innocent. By the laws of Aethelstan the length of rope allowed under water was an ell and a half; by another ritual a knot was to be made in the rope at a distance of a long hair from the body of the accused and it was necessary for him to sink so as to bring this knot down to the surface of the water in order to clear himself; but toward the end of the period nice questions arose as to the exact amount of submergence necessary for acquittal. This form of ordeal, based on the belief, handed down from the primitive Aryans, that water would not receive anyone guilty of perjury, just as the earth would not allow the corpse of a criminal to remain quietly interred, does not seem to have been very popular in England before the Conquest and gradually disappeared along with the others. The single exception to this rule is the class of cases connected with witchcraft and sorcery in which the ordeal of cold-water maintained its hold upon popular faith for centuries.

Finally, the ordeal of the corsnaed, the consecrated bit of bread or cheese, did not prevail to any great extent in England, being used mainly by the lower orders of the clergy who were often unable to procure oath-helpers. This ordeal was administered by giving to the accused a small piece of bread (usually of barley) or of cheese, over which prayers and adjurations had been said, and which, after certain religious ceremonies, the accused had to eat, his guilt or innocence being determined by his ability to swallow it without difficulty. Of course, this depended entirely upon the party's imagination and it can easily be seen how, in those times of faith, that would affect a person who, conscious of guilt, stood up at the altar of the church, and solemnly pledged his hopes of eternal salvation on the truth of his oath. Since the effect produced upon the mind of the patient was all important in determining the value of the test it is to be expected that the clergy exhausted their ingenuity in devising awe-inspiring exorcisms. Such a one as the following would hardly fail to terrify even the most hardened sinner:

"I exorcise thee, accursed and most filthy dragon, basilisk, evil serpent, by the Word of truth, by almighty God, by the spotless Lamb begotten by the Highest, conceived of the Holy Ghost, born of the Virgin Mary, whose coming Gabriel announced, whom when John saw he cried aloud 'This is the Son of the living God, that thou may'st have no power over this bread or cheese, but that he who committed this theft may eat in trembling, and vomit forth by Thy command, Holy Father and Lord, almighty and eternal God. . . . May he who has stolen these things or is an accomplice in this, may his throat and his tongue and his jaws be narrowed and constricted so that he

cannot chew this bread or cheese, by the Father and the Son and the Holy Ghost, by the tremendous Day of Judgment, by the four Evangelists, by the twelve Apostles, by the four and twenty elders who daily praise and worship Thee, by that Redeemer who deigned for our sins to stretch his hands upon the cross, that he who stole these things cannot chew this bread or cheese save with a swelled mouth and froth and tears, by the aid of our Lord Jesus Christ, to whom is honor and glory forever and forever." (*Martene de Antiq. Eccles., Ritibys, Lib. III., c, VII. Ordo 15*).

In conclusion, it will readily be understood why, with the outcome of trials so uncertain and in some cases dangerous, compromises were very frequent. The only forms of punishment were money fines and in serious crimes death, there being no system of imprisonment for offenders, and, in addition, where final judgment was obtained it could not be directly enforced. It was the duty of the successful party to gather the "fruits of judgment" for himself and, after taking his chances on the trial, it might become necessary for him to virtually wage war upon his opponent while the court, should it attempt to enforce its judgment, found its hands tied with the same adherence to archaic forms that governed its trial of the case. The whole subject is completely summarized in the words of Maine who, while speaking of the Hundred Court and the Salic Law, says: "I will say no more of its general characteristics than that it is intensely technical and that it supplies in itself sufficient proof that legal technicality, not of the old age, but of the infancy of societies." (*Maine, Early Law and Custom, ch. 6*).

R. H. McR.

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