TRIAL BY JURY.

Part I.

Concerning the origin of trial by jury, the hypothesis which presents the fewest difficulties, and which can be supported by important arguments, regards the British system of sworn inquests as being derived from Normandy. Whatever may be the remote source of this institution, out of which trial by jury unquestionably grew, two points are clear, viz: 1. The system of inquest by sworn recognitors, even in its simplest form, makes its first appearance in England, soon after the Norman conquest. 2. This system was, in England, from the first, worked in close combination with the previously-existing procedure of the shire-moots, the assemblies of the county, held by the sheriff aided by the bishop of the diocese.

No trace of such an institution as a jury can be found in Anglo-Saxon times, and if it had existed, distinct mention of it would have been made in the Anglo-Saxon laws and contemporary chronicles which we possess, extending from the time of Ethelbert A. D. 568-616 to the Norman Conquest; but no mention is made.

With reference to criminal trials, we meet in the ordinance of King Ethelred II 978-1016, with a sort of jury of accusation, resembling the grand jury of today, and possibly its direct progenitor. In the Gemot of every hundred, the twelve senior thegns (or thanes) with the reeve, were directed to go apart and bring accusation against all whom they believed to have been guilty of any crime. But this jury did not determine the guilt or innocence of the accused; that had to be decided by compurgation, or the ordeal. This primitive grand jury probably continued in use after the Norman conquest, until it was reconstructed by Henry II. For more than a hundred years after the conquest, the ancient Anglo-Saxon modes of trial, or forms of proof, by ordeal, by oath, by witnesses and production of charters, continued in general use alongside the Norman procedure—the wager of battle, and the occasional employment of the inquest by sworn recognitors.

The conqueror was evidently anxious that the English should still continue to enjoy the rights and customs with which they had become familiar. As a result, we find that the distinctive features of the Anglo-Saxon jurisprudence were retained by the conquerer. Nethertheless, he made some important changes in the judicial system. He separated the spiritual and temporal courts; he introduced the combat, or duel, as a means of determining civil actions and questions of guilt or innocence; and he appointed judges to administer justice throughout the realm.

Gradual Growth of Jury Trial.

But it was only by degrees that the advantages of the principle of trial by jury in its application to judicial matters, were realized. The sworn inquest appears to have been at first chiefly used for determining non-judicial matters, such as the ascertaining of the laws of King Edward, the assessing of feudal taxation under William II and Henry I, and the customs of the church of York, which the latter monarch, in 1106, directed five commissioners to verify by the oath of twelve of the citizens. On one occasion the conqueror ordered the justiciars to summon the shire moots, which had taken part in a suit touching the rights of Ely. A number of the English who knew the state of the lands in question, in the reign of Edward, were then to be chosen, and these were to swear to the truth of their depositions; action was then to be taken accordingly. In spite of this, there are equally early instances of strictly legal matters being decided by the recognition, on oath of a certain number of *probi et legales homines*, selected from the men of the county to represent the neighborhood, and to testify to facts of which they had special knowledge. The Normans generally abolished trial by conjurgators in criminal cases, and though the trial by ordeal long continued in force, it began to be looked upon as absurdity.

In the year 1215 (the date of Magna Charta), the ordeal was abolished throughout Western Europe by the fourth Lateran council, which prohibited the further use of that mode of trial, so that trial by jury became unavoidably general in England, in order to dispose of the numerous class of cases, when the charge was preferred, not by an injured individual against the culprit in the form of an appeal, but by the great inquest of the county (the modern grand jury) in the form of a presentment. Obviously it was only where there was an accusing appellant, that the trial by babble was possible. There was for a long time no mode of compelling a prisoner to submit the question of his guilt or innocence to twelve such men, summoned from the neighborhood.

Magna Charta.

The thirty-ninth section of Magna Charta says: 'No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled or anyways destroyed, nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land." This has been generally taken as establishing the institution of trial by jury. But such can hardly be the fact, for the same expression is found in a compilation of laws of earlier date than Magna Charta. It may be found in the *Leges Henrici Primi.*

The "judicium parium" of Magna Charta seems to be the enunciation of a general legal principle, rather than the technical definition of a mode of trial. According to Stubbs, "it lay at the foundation of all German law, and the very formula, here used is probably adopted from the laws of the Franconian and Saxon Caesars."

The use of a jury both for criminal presentment and civil inquests is mentioned for the first time in the English statute law in the constitutions of Clarendon (1164.) The manner in which the jury is referred to, gives the impression that it was already in common use. The statute declared that "by the recognition of twelve lawful men," the Chief Justice should decide all disputes as to the lay or clerical tenure of land.

Extension of Jury Trial by Henry II.

It was in the Grand Assize (the exact date of which is not known) that the principle of recognition by jury, having graduallly grown into familiar use in various civil matters, was applied by Henry II, in an expanded form, to the decision of suits to determine the right to land. This assize is called by Glanville, a contemporary, and the earliest judicial writer of importance, *a regalis institutio.* In it may be found the jury in its distinct form, but the elements of which it was composed were all familiar to the jurisprudence of the period. By the grand assize the defendant was allowed his choice between wager of battle and the recognition of a jury of twelve sworn knights of the vicinage, summoned for the purpose by the sheriff.

The Magna Assisa was a mode of trial confined to questions concerning the recovery of lands of which the complainant had been disseised; the rights of advowsons; claims of vassalage, affecting the civil status of the defendant. A writ was then addressed to the sheriff, commanding him to summon four knights of the district, in which the disputed property was, who were, after they were sworn, to choose twelve lawful knights who were most familiar with the facts, (*qui meluis veritatem sciant,*) and who were upon their oaths, to decide which of the disputants was entitled to the land. The defendant was summoned to hear the election of the twelve jurors made by the four knights, and he might object to any of them.

Jurors as Witnesses.

When the twelve were duly chosen they were summoned by writ to appear in court and testify on oath as to the rights of the parties. They took an oath that they would neither give false evidence nor knowingly conceal the truth; and, according to Glanville, knowledge meant what they had seen or heard by trustworthy information, and this demonstrates most clearly, how entirely they were looked upon, as mere witnesses, and how different the idea of their duties then was, from what it is now. If they were all ignorant as to the rightful claimant, they testified this