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## THE HISTORICAL BACKGROUND OF ADMINISTRATIVE LAW: THE INQUEST PROCEDURE\*

"No conception may be understood save through its history." COMTE.

"Acquaintance with legal history is almost totally lacking (among judges) . . . whenever there is an expounding of history, Blackstone still usually suffices." WIGMORE.

Our legal historians have long pointed out how the procedural (adjective) branch precedes the substantive, in juridical evolution.<sup>1</sup> That rule holds good for administrative law. There, too, procedural machinery, and the rules governing it, are the first to appear.

The earliest administrative procedure was an inquest or inquisition — a term which has come, in modern times, to have a sinister meaning.<sup>2</sup> Yet to the Romans, and the civilians generally, *inquisitio* meant no more than "investigation" which has become so prominent a feature of current legislative activity. In Magna Carta the "Writ of Inquisition of Life or Limb" formed the subject of an entire clause (36) in order that it might "be granted freely and not denied."

"It is certain," says Dicey,<sup>3</sup> "that, in the 16th and 17th centuries the jurisdiction of the Privy Council, and even of the Star Chamber, odious as its name has remained, did

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<sup>1</sup> "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms." MAINE, *EARLY LAW AND CUSTOM* (1891) 389.

". . . Whenever we trace a leading doctrine of substantive law far enough back, we are likely to find some forgotten circumstance of procedure at its source." HOLMES, *COMMON LAW* (1938) 253.

"The earliest part of a primitive body of law to attain fixity is the law of procedure." HOLDSWORTH, *HISTORY OF ENGLISH LAW* (3d ed., 1922) I, 316.

<sup>2</sup> "Even to this day the word 'inquisitorial' bears the burden of historical unpopularity." JENKS, *A SHORT HISTORY OF ENGLISH LAW* (5th ed., 1938) 48.

<sup>3</sup> *Law of the Constitution* (1924), 374-5.

confer some benefits on the public.<sup>4</sup> It should always be remembered that the patriots who resisted the tyranny of the Stuarts, were fanatics for the common law and, could they have seen their way to do so, would have abolished the court of chancery no less than the Star Chamber."

## ROME

As with many other modern institutions, both the term and the procedure for which it stands, hark back to ancient Rome, where, especially with the advent of the Empire, important legal changes were constantly occurring. Augustus, the first Emperor, directed that questions regarding *fidei commissa* (somewhat resembling the "trusts" of Anglican law) "should be handled, not by the Praetor, and the usual judicial machinery, but by the Consuls<sup>5</sup> — *i. e.* administratively."<sup>6</sup> He also established the  *Fiscus*<sup>7</sup> *Caesaris*, which took over certain functions of the Censor, to whom, under the republic, fell the collection of revenue ( *vectigalia*) which "consisted in farming out the taxes to the highest bidder (*maximis pretiis*)."<sup>8</sup>

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<sup>4</sup> *E. g.* the dying declarations rule, of which HOLDSWORTH, (*ante* n. 1 at V, 183) says "the earliest statement . . . is to be found in a *dictum* of Coke in the Star Chamber." So of the privilege of professional communications to counsel. *Berd v. Lovelace* (1576-7) and other cases cited. *ib.* 333 n. 6.

<sup>5</sup> These were continued, though no longer heads of the state.

<sup>6</sup> BUCKLAND, *THE MAIN INSTITUTIONS OF ROMAN LAW* (1931) 386.

<sup>7</sup> "Originally the rope basket into which the public moneys were put, which the Romans applied to the treasury and which is used on the Continent in the same sense." SELIGMAN, *ENCYC. SOC. SCIENCES*, VI, 266.

The  *Fiscus* was a juridical person in its proprietary capacity. See SHERMAN, *ROMAN LAW IN THE MODERN WORLD*, II, p. 118 n. 13; *COD. THEOD.* X, 1; PAULUS, *Sententiae*, V, XII; *DIG.* XLIX, 14.

The  *Fiscus* might sue; but if on a document, it must have been the original. PAULUS, *Sententiae*, XII, 10, 11; *COD.* X (II).

<sup>8</sup> ABBOTT, *ROMAN POLITICAL INSTITUTIONS* (3d ed., 1911) 194.

Exercise of the power to enforce collection was regulated by imperial legislation, collected in *COD. LIB. X*: c. g.:

"It has been forbidden to seize without imperial authority the property of one thought to be indebted to the  *Fiscus* (*ib.* I, 5).

"The right of defence is granted to those whose property is subject to interference by the  *Fiscus*" (*ib.* 6).

"The management of (the *fiscus*) was entrusted to an official known successively as the *patronus* or *procurator fisci*," the *procurator a rationibus* and, toward the close of the second century, as the *rationalis*."<sup>9</sup>

According to this author<sup>11</sup> "the *procuratores* sat in judgment on questions arising between the state and an individual, just as the Censor had under the republic."

The Emperor Claudius (A. D. 41-54) was somewhat of a law reformer<sup>12</sup> and Arnold<sup>13</sup> thinks it was he who brought about the grant of jurisdiction to the *procuratores*. But whatever the date and source of the grant, the fact seems to be established that, at least as early as the first Christian century, a purely administrative official was vested with judicial functions in an important branch of the police power — the public revenues.<sup>14</sup> Moreover, the combination of judge and prosecutor, so much a subject of controversy today, was thus fully realized although the ordinary courts continued to function as before. What the procedure was before these administrative tribunals, must be left largely to conjecture; but already the regular courts were in a period of transition

<sup>9</sup> Cf. the *promotor fiscal* (public attorney) of Spanish law.

<sup>10</sup> Abbott, *ante n.* 8 at p. 366.

<sup>11</sup> *Id.*

<sup>12</sup> "The Emperor's honest zeal for good government was displayed by an active attention to the law courts which the regular lawyer found most embarrassing." HAMMERTON & BARNES, *WORLD HISTORY* (1937) 272-3.

A translation of the Claudian decree concerning citizenship of the Ananni is found in HARDY'S *ROMAN LAWS AND CHARTERS* (1912) 126.

<sup>13</sup> "These officials, as constituted by Augustus, had properly speaking no judicial authority . . . It was, however, doubtless found inconvenient that officials entrusted with such important duties should not have wider powers; and at Claudius' request the Senate gave them authority to decide suits — a power which must have extended at all events to all cases connected with the *fisc*." ARNOLD, *ROMAN PROVINCIAL ADMINISTRATION* (3d ed., 1914) 124-5, citing Suetonius, Claudius, 12.

<sup>14</sup> "The procurators who played the part of quaestores in imperial provinces, had full judicial authority in disputes between the taxpayer and the . . . *fiscus* ever since Claudius, and their real power is frequently described as superior to that of the legate (proconsul)." ARNOLD, *ROMAN IMPERIALISM* (1906), 73-4.

" . . . His revenue officers in the provinces (*procuratores*) received the most distinctive prerogative of public magistrates — jurisdiction." Pelham, *The Early Roman Emperors*, 202 *QUAR. REV.* 538.

toward centralized control and both machinery and procedure were undergoing marked changes, the results of which could scarcely fail to affect these new tribunals. One of their procedural innovations was the *inquisitio*.<sup>15</sup>

### THE MEDIEVAL FRANKISH EMPIRE

Voltaire's jibe that the "Holy Roman Empire" was "neither holy, Roman nor an empire," seems to have fixed its place in the average reader's estimation. Yet it lasted a thousand years (longer, by far than most governments), attracted outstanding rulers who strove to occupy its throne and held sway over a goodly portion of Europe.

More important in our present quest is the new empire's preservation and transmission to posterity of certain institutions and legal ideas bequeathed by the older one,<sup>16</sup> and which otherwise might have perished in the sleep of the Middle Ages. Among these was the inquest procedure, a revival of which appears to have occurred under the eighth century Frankish kings, whose *Missi Dominici*<sup>17</sup> (Royal Commissioners) visited (usually in pairs — a layman and a cleric) districts of the Frankish realm in which they were strangers, inspected officials and even the clergy,<sup>18</sup> and ad-

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<sup>15</sup> "In the later Roman Empire, the imperial treasury had found itself at a loss in dealing with fiscal questions in the provinces. It was not unnatural that the imperial claims should often be met, especially in districts remote from centers of administration, with professions of ignorance, very hard to prove. Was a particular farm, or was it not, part of the property of the deceased person who had bequeathed all his belongings to Caesar? To solve this and similar problems, the imperial officials used to sieze upon a certain number of the most responsible persons in the neighborhood and compel them to find an answer." Jenks, *ante* n. 2 at p. 47.

<sup>16</sup> ". . . in his effort to weld discordant elements into one body, to introduce regular gradations of authority, to control the Teutonic tendency to localization by his *missi*-officials commissioned to traverse, each some part of his dominions, reporting on and redressing, the evils they found — as well as by his oft repeated personal progresses. Charlemagne was guided by the traditions of the old Empire." BRYCE, *THE HOLY ROMAN EMPIRE* (rev. ed. 1904) 69.

<sup>17</sup> "The *missi dominici* were Charlemagne's principal instruments of order and administration, throughout the vast territory of his empire." GUIZOT, *HISTORY OF FRANCE* (Masson's ed.) 47.

<sup>18</sup> See *infra*, n. 26 *sq.*

ministered justice.<sup>19</sup> For while they did not displace the ordinary courts, "the king could, on appeal, withdraw any case from the (latters') jurisdiction . . . for decision by the king's court . . . or . . . by a royal official."<sup>20</sup>

The *Missi Dominici* possessed most of the advantages claimed for modern administrative tribunals — expert knowledge, acquired previously or indirectly, greater expedition and a simplified and more rational procedure.<sup>21</sup> For the *Missi* could, and regularly did, discard the "older modes of trial"<sup>22</sup> and proceed by inquest.<sup>23</sup> This method, em-

<sup>19</sup> See generally BRUNNER, *DIE ENSTEHUNG DER SCHWURGERICHTE* (Berlin, 1872), 74, 75, the pioneer work in this field. The author, a Darwin in legal history, worked out his discovery mainly by a painstaking perusal of the public archives in Paris.

"That the English jury is historically traceable to the Frank inquest, was first demonstrated by Brunner. His conclusions have been accepted by all modern English historians." SMITH (Munroe), *DEVELOPMENT OF EUROPEAN LAW* (1928), 146.

"Such is now the prevailing opinion and it has triumphed in this country over the natural disinclination of Englishmen to admit that this 'palladium of our liberties' is, in its origin, not English but Frankish — not popular but royal." POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1923) I, 141-2.

See also BRISSAUD, *MANUAL D'HISTOIRE DU DROIT FRANCAISE* (2d ed., 1900); GARNER'S Trans., *Continental Legal Hist. Ser.* (1915) I, 96, 97.

<sup>20</sup> Smith, *ante* n. 19 at p. 144.

<sup>21</sup> "In the beginning the inquest was a form of administrative, rather than judicial, procedure." CARPENTER & STAFFORD, *READINGS IN EARLY LEGAL INSTITUTIONS* (1932), 346.

"The *capitula missorum* were instructions issued to royal commissioners, containing rules which they were to observe" and "enforce; and when, in Charlemagne's reign, royal commissioners rode circuit throughout the empire, holding what amounted to royal courts, these ordinances became important instruments for the development of substantive, as well as procedural law." SMITH, *ante* n. 19 at pp. 132-3.

"The Karolingian kings issued instructions to their *Missi* very much as Henry II issued them to his itinerant justices." STUBBS, *CONSTITUTIONAL HISTORY OF ENGLAND*, I, 656.

Fiscal inquests were "possibly a survival of Roman administrative practice." SMITH, *ante* n. 19 at p. 143.

<sup>22</sup> See TRAYNER, *PRELIMINARY TREATISE ON EVIDENCE* (1898) Ch. I.

<sup>23</sup> "Imitating, it may be, the procedure of the Roman *fiscus*, he (the Frankish king) assumes to himself the privilege of ascertaining and maintaining his own rule by means of an inquest . . . He orders that a group of men, the best and most trustworthy of the district, be sworn to declare what lands, what rights he ought to have" therein. "He uses this procedure for many purposes . . . in his litigation he will rely on the verdict of the neighbors instead of on battle or the ordeal — in order that he may learn how he is served by his subordinates . . . in order that he may detect those grave crimes which threaten his peace . . . The procedure which he employs in support of his own rights, he can and does grant as a favor to others." POLLOCK & MAITLAND, *ante* n. 19 at I, 141.

ployed especially in cases involving status and boundaries of the royal demesne,<sup>24</sup> etc., consisted in summoning a group ("usually more than six, frequently more than twelve") of the leading men of the vicinity (hence the surviving requirement as to vicinage) supposed to be informed on the subject matter and who, after being sworn (hence called *jurati*)<sup>25</sup> gave their conclusions (which, if harmonious, constituted their *veredictum*, upon which the *Missi* based their report) as to the disputed points.

*Ecclesiastical Inquests.* We have seen that one of the *Missi* was usually a cleric and that the clergy, like others, were subject to the inquest.<sup>26</sup> Ultimately they became a part of the system; for Charlemagne, in the last year (814) of his life, made his bishops virtually *Missi Dominici* by directing them to investigate, on their official visitations, complaints of offenses within the diocese. A successor, Charles *le Chauve*, in 876 repeated the commission and the system, as eventually developed, has been described as follows:

"As the bishop reached each parish in his visitation, the whole body of the people was assembled in a local synod. From among these he selected seven men of mature age and approved integrity who were then sworn on relics to reveal, without fear or favor, whatever they might know or hear, then or subsequently, of any offense requiring investigation. These *testes synodales*<sup>27</sup> became an institution established,

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<sup>24</sup> The grantee of land might evade the challenge to which a private deed was subject, by suing his grantor and, upon the latter's admission, obtain a judgment which had the force of a royal document. See SMITH, *ante* n. 19 at pp. 144-5.

<sup>25</sup> "The royal commissioner, if cause were shown him to suspect perjury, . . . could require of them that they clear themselves by ordeal." SMITH, *ante* n. 19 at p. 143.

<sup>26</sup> "Bishops and abbots are as essential a part of rising feudalism as counts and dukes. Their benefices are held under the same conditions of fealty and the service in war of their vassal tenants, not of the spiritual person himself; they have similar rights of jurisdiction and are subject alike to the imperial *missi*." BRYCE, *ante* n. 16 at p. 67.

<sup>27</sup> These were recognitors or jurors — not witnesses.

"In the early part of the 10th century, the canonist, Regius of Prüm describes the bishop holding his synod, selecting a number of trustworthy men from among

theoretically at least, in the church; and long lists of interrogatories were drawn up to guide the bishop in examining them; so that no possible sin or immorality might escape the searching inquisition."<sup>28</sup>

It was this phase of the inquest which survived longest in France<sup>29</sup> and Pollock & Maitland<sup>30</sup> even thought that "it would not be wonderful if this procedure spread from the Frankish church to the English;" for the latter "was borrowing ideas and institutions" from the former, "in the days of Dunstan and Oswald."

*Subsequent History.* Less than 30 years after Charlemagne's death, his "great empire was partitioned<sup>31</sup> into three distinct and independent kingdoms . . . Germany, Italy and France."<sup>32</sup> Each naturally retained something of Frankish institutions, among them the inquest procedure, of which we find traces in all. "Even in Germany it will appear from time to time," observe Pollock & Maitland,<sup>33</sup> as if looking forward from the Middle Age.

To Italy the empire had been extended by Charlemagne's conquest of the Lombard kingdom and the overthrow of Desiderius, its last ruler, in 774. Whether as a result of such extension, or as an inheritance from the older Roman state, the inquest procedure seems to have found a place in various parts of the peninsula, and its adjacent islands.<sup>34</sup> It certainly

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the assembled laity, administering to them an oath that they will tell the truth and conceal nothing for love or hate, reward or kinship, asking them to report their suspicions of their neighbors and compelling to the ordeal or to compurgation those against whom bad tales are told." POLLOCK & MAITLAND, *ante* n. 19 at I, 142.

<sup>28</sup> LEA, HISTORY OF THE INQUISITION OF THE MIDDLE AGES (1888), I, 312, Cf. the same author's STUDIES IN CHURCH HISTORY, 85.

<sup>29</sup> See n. 52 *infra*.

<sup>30</sup> *Ib.* I, 142.

<sup>31</sup> By the Verdun Treaty of 843, between Charlemagne's grandsons.

<sup>32</sup> GUIZOT, *ante* n. 17 at p. 58.

<sup>33</sup> *Ante* n. 19 at I, 141.

<sup>34</sup> "Similar in character were the 'Inquisitors and Manifestors' whom we find in Verona in 1228, employed by the state for the detection and punishment of blasphemy; and a still stronger resemblance is seen in the *Jurados* of Sardinia in the 14th century-inhabitants selected in each district and sworn to investigate



obtained in southern Italy, although another possible source there was the Norman kingdom of Sicily.<sup>35</sup>

In France<sup>36</sup> there was the most remarkable development of all; but before discussing it, let us turn to a country not usually considered as within the Frankish "axis," though to some extent dominated by it, *viz.*:

### SPAIN

Contacts between the Frankish and Moslem (Spanish) empires, occurred intermittently during Charlemagne's reign and after. The latter, invited by a rebel against the khalif, led an army across the Pyrenees into Spain in 778, and though initially successful, its rear guard was decimated on the homeward march. Under his son, Louis, however, the war was renewed in 785; and in 812, Emir el Hakim ceded to the Franks the territory between the Ebro and the Pyrenees. Northern Spain was thus regained for Christendom long before the southern and that may account for the

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all cases of crime, to capture the malefactor and to bring him before court for trial." LEA, *ante* n. 28, first citation at I, 311-12.

<sup>35</sup> "While it is true that no examples have been found in the South before the Norman conquest, it is also true that the information for this period is extraordinarily scanty . . . Examples of the use of old men of the region — in determining boundaries — are found at Mileto in 1091, at Squillace in 1098 and in various Sicilian cases of the 12th century, where it is regularly stated that Saracens and Christians served together in this capacity. In the more specific account of a boundary dispute between Grumo and Bitetto in 1136, the (latter's) *boni senes homines* were called *unus ante alium*, although at the end, they took a collective oath as to the term of possession. In 1158, near Bari, what looks like a collective verdict has to be confirmed by a party oath of 12 *juratores*. On the other hand an unmistakable inquest appears in 1140 at Atina, where King Roger orders his chamberlain to make diligent inquiry by suitable men concerning boundaries and royal rights, which were sworn on the Gospels by 12 of the older men of the city. Under William I, the phrase *isti jurati dixerunt* points to a sworn inquest in a dispute touching the boundaries of the dioceses of Patti and Cefalù and a sworn inquest is held by the master chamberlain of Calabria to determine the losses of the church of Carbone. In the same reign we find a clear account of a jury of eight men who are sworn before the king's chamberlain to tell the truth respecting the possessions San Bartolomeo di Carpineto. In 1183 the justiciars of William II hold a formal inquest to recover lost portions of the king's domain in the vicinity of Gravina." HASKINS, *NORMAN INSTITUTIONS*, (Harvard Historical Studies, XXIV, 1918), 232-4.

<sup>36</sup> See *infra* n. 51 sq.

infiltration of Frankish ideas. At any rate, when the great Spanish law book<sup>37</sup> of the 13th century came to be drafted, it included a title (XVII of Partida III), devoted to royal inquisitions;<sup>38</sup> and it seems from the details there set forth that the system was a transplantation of the Frankish. There was usually the same number (two) of inquisitors (*missi*), although the parties might agree on one, or, if royal interests were not involved, each might select one and "the king should appoint a third,"<sup>39</sup> thus providing for arbitration. The Chief *Merino*<sup>40</sup> or presiding magistrate of the district might, under certain conditions, appoint inquisitors.<sup>41</sup> They were required to be "moral men who fear God and are of good reputation" but "diligent in ascertaining the truth . . . prudent and zealous in all their inquiries."<sup>42</sup> No one could escape such service except on some valid excuse.<sup>43</sup> Inquisitors and their clerks were obliged to "swear that they will conduct the investigation faithfully and that neither through

<sup>37</sup> LAS SIETE PARTIDAS (Edition of Scott, Lobingier & Vance, 1931).

<sup>38</sup> "*Pesquisa* in Castilian means the same as *inquisitio* in Latin, and it is advantageous in many respects; for, by means of it, the truth is ascertained concerning evil deeds, which can be proved or established in no other way. And, moreover, kings, by means of it, are informed with certainty of the acts done in their country and punish false and insolent men who, through deficiency of evidence, expect to escape punishment for their misdeeds." *Ib.* III (XVII, i) p. 685.

<sup>39</sup> *Ib.* v, p. 687.

<sup>40</sup> "The *merino* (from the Latin *mayorino regis*) was an official dating, possibly from before the 11th century. His functions were at first limited to the collection of taxes and rents. Later he was given judicial, political and military functions, formerly reserved to the count, and was in fact the representative of the royal authority in the *comarca*." MADDEN, POLITICAL THEORY AND LAW IN MEDIEVAL SPAIN (1930) 129 n.

<sup>41</sup> PARTIDAS III (XVII, ii).

<sup>42</sup> *Ib.* iv. Disqualified are those "who are disreputable, or subject to suspicion or enemies of those under investigation." *Ib.* ix. Moreover "no member of the clergy, or of a religious order — even though he be of good reputation — may act as an inquisitor in a criminal case . . . nor in any other investigation, except such as pertain to matters ordered by the law of holy church nor . . . in any secular dispute except . . . by consent of both parties." *Ib.* ix. The contrast between this exclusion of the clergy and the prominence given them by Charlemagne (*ante n.* 26 sq.) may have been due to the arrival in Spain (some 20 years before completion of the PARTIDAS) of the papal inquisitorial system (see my *Lex Christiana*, 20 GEORGETOWN L. J., 19) and the desire to keep the two systems distinct. Lea, however, thought that the papal inquisition was "not recognized in the PARTIDAS." (*Ib.*).

<sup>43</sup> *Ib.* XVII, vi.

love, fear nor for any gift promised, will they change, enlarge, or minimize what they really ascertain, nor fail to put such interrogatories as will better enable them to learn the truth." <sup>44</sup>

They were entitled to "be honored and protected, just as are the judges of the King's court;" <sup>45</sup> which must furnish the notaries who accompany the inquisitors; <sup>46</sup> but if the latter became corrupt, they incurred the same penalties as their victims did or were designed to. <sup>47</sup>

*Procedure.* The inquiry must be opened within nine days (three, if possible) after receipt of the commission; witnesses must be sworn, examined separately, and cautioned not to disclose their testimony (which was taken in secret) "until the record of the investigation has been read;" clerks must swear "to take down the testimony faithfully, and without change;" <sup>48</sup> and the authorities must furnish "a transcript of it, including the names of the witnesses, and their statements, to the parties interested . . . that they may defend their rights." <sup>49</sup> The inquisitors' report was forwarded under seal to the king and if it involved a complaint against individuals, "they should be summoned to come and hear it." <sup>50</sup>

<sup>44</sup> *Ib.* ix.

<sup>45</sup> *Ib.* viii.

<sup>46</sup> *Ib.* x.

<sup>47</sup> *Ib.* xii, *i. e.* the "rule of equivalence." See my *Jus Talionis*, 9 CHINA L. REV. 335.

<sup>48</sup> PARTIDAS, III (XVII, IX).

*Form of Commission.* "From the King to those whom he orders to make the inquiry: By this he informs them that, on account of a complaint which a certain man made to him regarding a crime which had been committed; (or with reference to some dispute between certain parties, concerning which the favor is asked of the King to ascertain the truth by means of an investigation; or on account of some other matters which have been communicated to him that he may direct an investigation) the King commands that those of whom the inquisitors ask the truth shall tell it and those who say that they saw the act in question, must state how they saw it; and those who heard it, how they heard; and those who believe, how and why; and that they tell the truth so that the King may not learn later that their statements are false; and if they act otherwise that they shall be responsible for it; and that the King orders that the report of the investigation be sent him in writing, closed and sealed with their seals; and that they also return this letter." *Ib.* XVIII, xxiv.

<sup>49</sup> *Ib.* XVII, xi. Cf. SMITH, *ante* n. 19 at p. 144.

<sup>50</sup> *Ante* n. 48, at IX.

## FRANCE

"For a long time to come," say Pollock & Maitland,<sup>51</sup> writing again as from the Middle Age, "the sworn inquest of the neighbours, will not be utterly unknown in France; it will only be finally overthrown by the romano-canonical procedure." In fact so late as 1257 the royal saint, Louis IX, promulgated an "important ordinance . . . substituting for trial by battle an *enquête* of witnesses."<sup>51a</sup> Yet, while in most parts of the country it seems to have disappeared,<sup>52</sup> that portion which was least French (because it had been conquered in the 9th century by Norse invaders) retained the inquest and provided a stage for its further development and expansion whose results extend down to our own age and land.

*Normandy.* Even there, however, its history, for a long period, is far from clear<sup>53</sup> and needs to be studied in conjunction with its parallel evolution in England.<sup>54</sup> The author last quoted, who has delved most deeply into this phase of our subject, has traced the "sworn inquest" under Dukes William (the Conqueror),<sup>55</sup> whose ducal reign in Normandy

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<sup>51</sup> *Ante* n. 19 at I, 141

<sup>51a</sup> "The ordinance will be found in VIOLLET, ESTABLISSEMENTS, I, 487. It is dated in 1257 by J. TARDIFF, NOUV. REV. HIST. DE DROIT, 1887, p. 163." *Ib.* II 604 n.

<sup>52</sup> See THOMPSON, DECLINE OF THE MISSI DOMINICI IN FRANKISH GAUL (1903) for causes of the decline.

" . . . the almost total disappearance in France of the old *enquête du pays* in favour of the *enquête* of the canon law, at the very time when the *inquisitio patriae* is carrying all before it in England, is one of the grand problems in the comparative history of the two nations." POLLOCK & MAITLAND, *ante* n. 19 at II, 604 n.

<sup>53</sup> " . . . the obscure stage in the growth of the jury lies . . . between the close of the 9th century, when 'the deep darkness settles down' and the assizes of Henry II." HASKINS, *ante* n. 35 at 196.

<sup>54</sup> "The existence of the sworn inquest has mainly to be inferred from its appearance in England shortly after the conquest and in Normandy in the 12th century." *Ib.* 56 Cf. Ch. VI.

<sup>55</sup> *Ib.* 47, 56, 58n., where he mentions as "the clearest cases . . . the ordeal held at Bayeux *precepto regis* and reported to the king 1067-1079" and "the inquest held at Caen *juxta oraeceptum regis* by Richard, vicomte of Avranches 1070-1079." Both of these were after William's invasion of England.

lasted fifty-two years; his sons, Robert II;<sup>56</sup> William Rufus (1096-1104)<sup>57</sup> and Henry I,<sup>58</sup> Geoffrey,<sup>59</sup> Count of Anjou and conqueror of Normandy (who married Henry's daughter, Matilda); and their son Henry II,<sup>60</sup> with whose death

<sup>56</sup> *Ib.* 65, 78.

<sup>57</sup> *Ib.* 78, 83.

"... the norm taken for inquiry is the practice of the Conqueror's time, not of Robert's; and it is probable that the method to be employed by the king was the sworn inquest." *Ib.* 83.

<sup>58</sup> *Ib.* 83, 84, Ch. III.

At least as early as 1133, Henry as Duke of Normandy, "ordered an inquest to be held, on the oath of ancient men who knew the facts, to ascertain the holdings of the church" of Bayeux. *Ib.* 201-2.

"The great Bayeux inquest of 1133 is essentially a fiscal inquest, since the see was then in the duke's hands and its revenues were . . . a matter of interest to him." *Ib.* 222.

"Henry II has been regarded as the inventor of the system of itinerant judges; but the examination of the Great Roll of the Pipe of 31 Henry I, shows that, during his reign, the practice was observed, both for financial and judicial purposes." STUBBS, *SELECT CHARTERS* (1929), 141.

<sup>59</sup> HASKINS, *ante n.* 35 at pp. 149 *sq.*

"Geoffrey's reign as duke of Normandy extends from 1144 to early in 1150 when he handed the duchy over to his son, Henry (II), the heir of Matilda and Henry I." *Ib.* 130.

Haskins, following Brunner, inclines to the conclusion that "it was Geoffrey Plantagenet who first established the recognition as a regular form of procedure in Normandy." (*Ib.* 201.) For "Geoffrey provided for a general recognition of the demesne, fiefs and other rights of the see, as well as for the determination by inquest of neighbors, of disputes between the bishop and any of his tenants and he added special writs to individual justices with reference to particular estates vicinage and each of the justices in charge made a written return to the duke, four such returns having survived as detailed evidence of the procedure employed. The sworn recognition was also used under Geoffrey to determine the rights of the bishop of Coutances over Tourlaville and those of the chapter of Rouen in the forest of Aliermont; and its diffusion is further shown by the practice of submitting the question of a champion's professionalism to the oath of ten citizens of Rouen, selected by the duke's justice, and by a case in the baronial court of the count of Meulan where the parties put themselves on the verdict of eight lawful knights." *Ib.* 149-50.

Smith (*ante n.* 19, at p. 146) found that "in the reign of Duke Geoffrey [the inquest procedure] was made a general right of all Normans in those matters to which it could be applied."

<sup>60</sup> Also duke of Normandy during the most of his reign (1154-1189).

"Very likely the king's court administered some form of procedure by sworn inquest; such inquests were certainly held by Henry's command and within ten years of his death had developed into regular assizes." HASKINS, *ante n.* 35 at pp. 104-5. *Cf.* Ch. VI.

"The courts held by the justiciars are called assizes." *Ib.* 165.

"The *assisa* (assize) was a body of jurors summoned to answer certain specific questions in accordance with positive law . . . The *jurati* usually decides the case." HOLDSWORTH, *HISTORY OF ENGLISH LAW* (3d ed., 1922) at I, 330.

"... writs ordering the determination of questions of possession and owner-

"the creative statesmanship of the Norman dukes . . . so far as we can discern, was completed."<sup>61</sup>

### BRITAIN

The inquest procedure "survived in the provinces conquered by the Normans and was brought by them to England," says Holdsworth,<sup>62</sup> summarizing the expert conclusions of our time, and he might have added that they brought it also to Scotland.<sup>62a</sup> For there seems to have been no semblance of it in the Anglo-Saxon period,<sup>63</sup> when tribunals were of the primitive or popular type; but while he retained these for local administration, the Conqueror soon introduced the inquest on a national scale and its first result was the famous Domesday Survey.<sup>64</sup> Naturally its purpose was

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ship, in accordance with the duke's (Henry's) assize, (*secundum assisiam meam*) are found in 1156 as well as in Geoffrey's reign, while we find an ordinary litigant demanding an assize against St. Etienne before 1159. In that year a question concerning tithes and presentation on the duke's court, while at Christmas, Henry issued a formal ordinance directing the use of the evidence of neighbors in his local courts. Accordingly it would appear that the recognition had become the normal procedure in certain types of actions concerning land, while the testimony of the vicinage had been prescribed in ecclesiastical courts, much as in the Constitutions of Clarendon." HASKINS, *ante n.* 35 at p. 169.

". . . in 1171, the income of the duchy was almost doubled by an inquest held throughout Normandy to ascertain the lands, forest and other portions of the demesne which had been occupied since the death of Henry I." *Ib.* 160.

<sup>61</sup> *Ib.* 193.

<sup>62</sup> *Ante n.* 60 at I, 312.

<sup>62a</sup> *Scotland.* ". . . there is no doubt that from the time of David I (1084-1153) onwards, the kings made use of the inquest procedure . . . On the whole, we take it that the jury has much the same history in Scotland and in England; it spreads outwards from the King; it is an 'assize,' an institution established by ordinance." POLLOCK & MAITLAND, *ante n.* 19 at 144 n.

<sup>63</sup> "It is certain that, of the inquest of office, or of the jury of trial, the Anglo-Saxon dooms give us no hint." POLLOCK & MAITLAND, *ante n.* 19 at I, 142.

<sup>64</sup> *Domesday.* "The great fiscal record known as DOMESDAY BOOK (IV, 497) was compiled out of the verdicts of juries." *Ib.* II, 143.

". . . it would not be surprising if [Bishop Geoffrey of Coutance] served Norman apprenticeship for his work as judge and domesday commissioner in England." HASKINS, *ante n.* 35 at 57.

The "domesday juratores" were about half native and half Norman. ROUND, *FEUDAL ENGLAND* (1909), 120.

"Over the whole face of the land most manors were burthened with their own 'customs', or special dues to the Crown; and it was for the purpose of ascertaining and recording these that William sent into each county, the commissioners whose inquiries are preserved in Domesday Book. A jury, impanelled in each

primarily fiscal, one of the early phases of police power; but the principle was soon applied in other fields. Here, too, the course of development paralleled that of Normandy. After extensive use in fiscal inquiries, the inquest came to be employed in land disputes, which were then abundant.

"In the earliest case <sup>65</sup> in which there is, to our knowledge, anything that could be called trial by jury, the Conqueror directs his justiciars . . . to summon to one place the moots of several shires to hear a plea between the abbott of Ely and divers other persons. Certain of the English, who know what lands were held by the church of Ely on the day of [Edward] the Confessor's death, are to declare their knowledge upon oath. This will be a verdict—not a judgment. The justices are to restore to the church not all the lands that she had at the date thus fixed, but only such of them as no one claims under the Conqueror. A particular question . . . about possession at a given moment . . . is thus singled out as one that should be decided by a sworn inquest of neighbours." <sup>66</sup>

From what we have seen of Henry I's administration of the Norman duchy <sup>67</sup> we would naturally expect to find the inquest procedure employed in England during his reign; "in fact on several occasion *juratores* are mentioned on the Pipe Roll of 31 Henry I." <sup>68</sup>

hundred, declared on oath the extent and nature of each estate, the names, number, condition of its inhabitants, its value before and after the Conquest and the sums due from it to the Crown." GREEN, A SHORT HISTORY OF THE ENGLISH PEOPLE (1902), 85. Cf. HASKINS, NORMAN INSTITUTIONS (1918), 207, 234.

But, according to Jenks,

"The 'inquests' which resulted in the compilation of DOMESDAY BOOK, made a vivid and unfavorable impression on the country. A similar effect was produced by the 'inquests' of 1166 and 1170, providing for a presentment of crime by 'twelve sworn men'." A SHORT HISTORY OF ENGLISH LAW (9th ed., 1938) 40, 41.

<sup>65</sup> "At the very end of William I's reign." HOLDSWORTH, *ante* n. 60 at II, 161.

<sup>66</sup> POLLOCK & MAITLAND, *ante* n. 19 at I, 144, citing HAMILTON, INQUISITIO COM. CANTAB. p. xviii. Cf. HAMILTON, FEUDAL ENGLAND (1876). 129.

<sup>67</sup> *Ante* n. 58.

<sup>68</sup> POLLOCK & MAITLAND, *ante* n. 19, at I, 144. Cf. STUBBS, *ante, ib.*, following BRUNNER, *ante* n. 19 at pp. 465 sq.

"In . . . 1101 Rollo of Avranches and the abbott of Abingdon were disputing the title to three virgates of land in Oxfordshire. The King, instead of summoning his Great Council, sent a writ to Hugh of Buckland (? sheriff of Berks) and

"A story comes to us from the abbey of St. Albans which describes a law suit of Stephen's day, in which the question 'Lay fee or alms' [in a dispute like that just mentioned] was submitted to a jury, charged to tell the truth, both by the King and by the bishop of the diocese."<sup>69</sup>

Under Henry II,<sup>70</sup> whose expansion of the system as Duke of Normandy, we have already traced, "the exceptional becomes normal" in England. "The King concedes to his subjects as a royal boon his own prerogative procedure. This is done bit by bit, now for this class of cases and now for that."<sup>71</sup> His Constitutions of Clarendon<sup>72</sup> ("a declaration of king's customs" by a council of the nobles called by Henry in 1164) which, according to Green<sup>73</sup> "initiated the rule [reign] of law," gave the system written recognition.<sup>74</sup> Two years later, probably at the Council of Clarendon, the King instituted his "assize of novel disseisin," which entitled one who had been dispossessed of his free tenement without a judgment, to a royal writ and a jury to answer who had the right of possession.<sup>75</sup> At the same council, one more of the barbaric modes of trial<sup>76</sup> was abolished and a decade later,

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the sheriff of Oxford, bidding the men of the two counties, 'on the part of the King' say the truth as to the title . . . In 1122, a dispute between the monks of St. Stephen of Brideton and the tenant of the royal manor of Bridgport, was, on the King's command, referred to a sworn jury of the men of the neighborhood, who found that the land belonged to the manor of Brideton." JENKS, *ante* n. 2 at pp. 48, 49. The Frankish *jurati* likewise reappeared in the twelve sworn men of every hundred and four of every township, whose answers the justices took as to whether anyone had been guilty of crime, or of harboring criminals during the current reign.

<sup>69</sup> POLLOCK & MAITLAND, I, 145, citing *Gesta Abbatum* I, 113-115.

<sup>70</sup> Whose "reign is of supreme importance in the history of our law . . . due to the action of the central power, to reforms ordained by the King." *Ib.* 136.

<sup>71</sup> *Ib.* I, 144.

<sup>72</sup> Latin text in STUBBS, *SELECT CHARTERS* (1929) 162.

<sup>73</sup> *Ante* n. 64 at p. 110.

<sup>74</sup> "The notice of the use of a jury (art. 6) and of the principle of recognition by twelve lawful men in case of a dispute, as to the tenure of an estate alleged to be held in frank-almoign, (art. 9) is the earliest case of such mention in anything like statute law." STUBBS *ante* n. 72.

<sup>75</sup> POLLOCK & MAITLAND, *ante* n. 19 at I, 46, term it "one of the most important laws ever issued in England."

<sup>76</sup> "Compurgation was not regarded by the king as a proof of innocence and the Assize of Clarendon required those" who had thus proved it "to abjure the realm." HOLDSWORTH, *ante* n. 1, at I, 323.



at the Council of Northampton, the "assize of *mort d'ancestor*" was instituted, giving the heir of one who died in seisin, the right to possession as against every one who had no judgment.<sup>77</sup>

Under the Constitutions of Clarendon, actions for advowsons of churches are reserved for the king's court; must be commenced by the royal "writ of right of advowson;" the claimant must offer battle; his adversary may choose between battle and "the grand assize." Then the "assize of *darrein presentment*" gave possession to him who "presented the last parson" and "an inquest of neighbours is summoned to declare who it was."<sup>78</sup> Thus the results of Henry II's reign could be summarized<sup>79</sup> by saying "that the whole of English law is centralized and unified by the institution of a permanent court of professional judges, by the frequent mission of itinerary judges,<sup>80</sup> throughout the land, by the inquest or 'recognition'<sup>81</sup> and the 'original writ'<sup>82</sup> as normal parts of the machinery of justice."

The English "jury" of the late 12th century, then, was "a body of neighbours . . . summoned by some public officer

<sup>77</sup> "Another and a heavy blow is thus struck at feudal justice . . . Another use is found for the inquest of neighbors; for . . . whether the dead man died seised and whether the claimant is his heir, will be decided by verdict." POLLOCK & MAITLAND, *ante* n. 19, at I, 148.

<sup>78</sup> *Ib.* 148-9.

<sup>79</sup> *Ib.* 138.

<sup>80</sup> The *missi* of the Frankish monarchs in this way were transformed into itinerant justices, which the Assize of Clarendon recognized and whose "journeys were the substitute under the Norman kings for the progresses of the earlier sovereigns, who, whilst moving from one of their estates to another, heard complaints of the defects of justice in the courts." STUBBS, *ante* n. 72 at p. 167.

". . . in the *justitarii itinerantes* of Normandy and of England, it is not difficult to recognize the ancient *missi* of the Carolingians." BRISSAUD, *ante* n. 19 at p. 97.

<sup>81</sup> See *ante* n. 19. "Whether the grand jury . . . is of purely continental origin, is, however, disputed. A somewhat similar procedure, for bringing . . . accused . . . to trial seems to have been employed in the Anglo-Saxon period." SMITH, *ante* n. 19 at p. 146.

<sup>82</sup> "At some unknown date the King, while admitting the principle of feudal jurisdiction, in land suits, added, as a new rule, of administration, that no suit touching a freehold should be commenced, even in a feudal court without the royal writ." JENKS, *ante* n. 2 at p. 49

to give upon oath a true answer to some question.”<sup>83</sup> They were “neighbours” (*i. e.* of “the vicinage”) because the “question” almost always involved local knowledge. They were, however, neither witnesses nor triers of fact; rather were they technical advisers, of the “public officer” (usually an itinerant justice) who summoned them. They were thus in a real sense “experts,” who might, under wise planning and proper supervision, have developed into “professional assessors,”<sup>84</sup> like those who now function in the British courts in admiralty, patent and trademark and workmen’s compensation cases. At least it should have been possible to keep the “recognitors” as a “special jury,”<sup>85</sup> to pass upon concrete and fairly simple questions within their own personal knowledge. According to Holdsworth<sup>86</sup> the process by which these “recognitors” were changed from technical advisers into triers of fact, was initiated to meet a temporary emergency; but the new role was one for which they were fitted neither by nature nor by training. Moreover there were other possible solutions of the problem of criminal trials. The continental systems provided models and in any event the function of the civil jury could have been kept distinct.

The process of transformation was indeed “gradual” — and also difficult;<sup>87</sup> it was at least five centuries after Henry II before personal knowledge on the part of jurors finally became tabu;<sup>88</sup> but at last it marked the end of inquest procedure, both civil and criminal. In its place came, ul-

<sup>83</sup> POLLOCK & MAITLAND, *ante* n. 19 at I, 138.

<sup>84</sup> See ENCYC. BRITANNICA (14th ed.) II, 558.

<sup>85</sup> “. . . a good special jury is admitted to be a very competent tribunal.” HOLDSWORTH, *ante* n. 1 at I, 347.

<sup>86</sup> “It was the need to find some new means of determining the guilt or innocence of a suspect . . . that led to the gradual evolution of the petit jury.” *Ib.* 323-4.

<sup>87</sup> *Ib.* 332 *sq.*; *Ib.* IX, 131 *sq.*

<sup>88</sup> In *Bushell’s Case*, Vaughan’s Rep., 135, 6 How. St. Trials, 999 (1670) “the right of the jury to base its verdict on personal knowledge is still recognized; even so late as the reign of Geo. I, the courts refused to disturb such verdicts in certain classes of cases. *Seymour v. Day*, 2 Str. 899; *Mattison v. Allanson*, *ib.* 1238.” Lobingier & Pizey, *Directing Verdict*, 6 ENCYC. PL. & PR., 670.

timately, the "common jury," which, as even Holdsworth<sup>89</sup> reluctantly recognizes, "may be composed of persons who have neither the desire nor the capacity to weigh evidence or to arrive at a conclusion upon the facts in issue." So far, indeed, are modern jurors from familiarity with the subjects of their deliberation, that any suspicion thereof would probably insure a challenge. And, in order to protect them from being "mised,"<sup>90</sup> a highly technical and complicated law of proof has grown up, differing from that of any other civilized system and presenting continual problems and obstacles for the administrative tribunals which have since arisen. Is it not significant that none of the jury's eulogists appears to have suggested its adaptation to such tribunals? They, it is tacitly conceded, require the assistance of what the jurors once were, but ceased long since to be — expert advisers. To provide such assistance, — to restore the good features of the inquest procedure — is one of the most important tasks of the makers of administrative law.

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<sup>89</sup> *Ante* n. 1 at p. 348.

Dean Wigmore is one of the few legal scholars who, like Holdsworth, defends the modern jury. See his article, *A Program for the Trial of Jury Trial*, 14 JNL. AM. JUD. SOC., 167. Following are some of the contrary opinions: "Trial by jury is open to much criticism; . . . will in the near future be considered an absurdity as patent as ordeal by battle." DICEY, *LAW OF THE CONSTITUTION*, 389.

"The traditional jury has never given satisfaction anywhere." Morris Ploscowe in 48 HARV. L. REV. 433.

"On all hands it can be seen that the jury system no longer answers the needs of the administration of justice." Francois Gorphe in 27 AM. JNL. OF CRIMINAL LAW & CRIMINOLOGY, 479 (cf. *ib.* 473 by the same author).

". . . its use is certainly not impressive." Clark & Shulman in 43 YALE L. J. 867.

See also, *Where the Jury Fails*, 9 JNL. AM. JUD. SOC. 71; *What Shall We Do With the Civil Jury?* 12 *ib.* 134; *Jury Trial Today*, 6 CAMBRIDGE L. JNL., 367 (Jackson) *Group Interests on Juries*, 16 ORE. L. REV. 293 (J. D. Barnett); "Gentlemen, Are You Satisfied With the Jury?", OHIO L. REPORTER, 65 (Morris); *Restrictions on the Right of Jury Trial*, 3 OHIO ST. UNIV. L. JNL., 184 (L. M. Goerlich who finds "an apparent trend away from restriction"); *The Ways of the Hour* (James Fenimore Cooper); *The Jury, An Appraisalment*, (in *PRINCIPLES OF JUDICIAL ADMINISTRATION*, WILLOUGHBY); *The Criminal Jury in France and its Recent Reform*, A. B. A. Comparative Law Bureau Bulletin (1933) 199-209 (L. M. Summers).

<sup>90</sup> See Morgan, *The Exclusionary Rules of Evidence*, 4 U. OF CHICAGO L. REV. 247.