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REQUIRED NUMBERS OF WITNESSES; A BRIEF HISTORY OF THE NUMERICAL SYSTEM IN ENGLAND.

IT is well known that in the civil law of Continental Europe, the great rival of the English common law system, the process of proof rested fundamentally on a numerical system, according to which a single witness to a fact was in general not sufficient, specific numbers of witnesses were in certain cases required, and in some regions, and for some purposes, the weight to be given to each witness' testimony was measured and represented in numerical values, even by counting halves and quarters of a witness; and this system continued in force down to comparatively recent times. In the English common law system of jury trial, on the other hand, it was completely otherwise. At common law there was but a single instance, and that a borrowed one, of almost accidental and of entirely anomalous origin (the rule in perjury), in which a numerical rule existed; what little else there is to-day of that sort has come into our system either by express statutes (all but one dating since 1800), or by the filtration of civil law rules through the court of chancery, or by local judicial invention. The reason of this contrast, and of our successful resistance to the civil law rules, and the causes of our freedom from a principle of evidence now generally acknowledged to be unsound and deleterious, form a history worth examining.

I. *The Numerical System in general.*

(1) It has been doubted whether the Roman law in its prime (that is, before 300 A. D.) proceeded upon a numerical system in its treatment of witnesses. But it is clear that by the time of the Emperor Constantine, and also in the later codification of the Emperor Justinian, which served as a sufficient foundation for the Continental civil law, the Roman law had adopted the general rule that one witness alone was insufficient upon any point.[1] This rule naturally came to be adopted in the Continental civil law, founded directly on the Roman law;[2] and in particular it became a part of the canon or ecclesiastical law, which for much of its material was accustomed to draw upon the Roman law. The ecclesiastical law developed the numerical principle freely, and elaborated many specific rules as to the number of witnesses necessary in various situations; against a cardinal, for example, twelve or perhaps forty-four witnesses were required. It is enough to note that its general and fundamental rule was that a single witness was in no case sufficient.[3] In the Church's system, however, this rule received an additional sanction, over and above the mere precedent of Roman law, from the law of God as revealed in Holy Writ; for passages in the Bible, both in Old and New Testaments, were confidently appealed to as justifying and requiring this rule by Divine com-

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[1] Digesta, xxii. 5, 12 (Ulpian: "Ubi numerus testium non adiicitur, etiam duo sufficiunt; pluralis enim elocutio duorum numero contenta est;") Codex, iv. 20, 4 (A. D. 283, "solam testationem prolatam, nec aliis legitimis adminiculis causa approbata, nullius esse momenti certum est;") ib. 9, § 1 (A. D. 334; "Simili modo sanximus ut unius testimonium nemo judicum in quocunque causa facile pitiatur admitti. Et nunc manifeste sancimus ut unius omnino testis responsio non audiatur, etiamsi præclare curiae honore præfulgeat").

[2] This had no direct influence on our own law, and need not be further noticed. Its tenor in the 1700's may be seen in Pothier, ed. 1821, Procedure Civile, pt. 1, c. iii., and it persisted on the Continent into the 1800's.

[3] Ante, 1400, Corp. Jur. Canon., Decret. Greg. lib. ii. tit. xx. de testibus, c. 23, ("licet quædam sint causæ, quæ plures quam duos exigant testes, nulla est tamen causa, quæ unius tantum testimonio, quamvis legitimo, rationabiliter terminetur;") see also, ib. c. 28, c. 4 (quoting the Bible); Decret. pars ii., causa iv., qu. ii. and iii., c. iv., § 26, reproducing Ulpian; 1713, Gibson, Codex Jur. Eccl. Angl. 1054, ("In the spiritual court, they admit no proof but by two witnesses at least; in the temporal court, one witness, in many cases, is judged sufficient;") 1726, Ayliffe, Parergon, 541, 544, ("Though regularly single witnesses make no proof according to the civil and canon law, nor yet so much as half proof by these laws," yet there are exceptions; in criminal causes, no exception is named except for a confession;) 1738, Oughton, Ordo Judiciorum, tit. 83, p. 127 ("Jura dicunt, quod regulariter duo testes sufficiunt").

For the modern ecclesiastical law, as keeping up these rules, see Hinschius (1897), System d. katholischen Kirchenrechts, vi. p. 101, § 364.

mand;[1] and this sanction sufficed to give to the numerical system of the ecclesiastical law an overbearing momentum and a sacred orthodoxy which must be considered in order to appreciate the force against which in due time the common law judges had to struggle.

The truth was, however, that at this time of the Papal Decretals, and long after the end of the middle ages, the rule precisely accorded with the testimonial notions of the time. It was not, in its spirit, an invention of the ecclesiastical lawyers, nor yet a mere continuance of Roman precedent; it was a natural reflection of the fixed popular probative notions of the time, — notions which prevailed as well in the sturdy, self-centred island of England as on the Continent at large. The prevalence and meaning of this underlying notion must now be examined.

(2) Civilization, needless to say, almost began over again with the invasion and settlement of southern and western Europe by the Gothic hordes in the 400s and 500s. Primitive notions prevailed once more, and the slow process of development had to be repeated, — repeated for the law as well as for other departments of life. Much Roman law remained in the South, and a large body of it was received in a mass in Germany in the 1500s; but this affected chiefly specific rules; the popular and general instinctive legal notions had to grow once more out of primitive into advanced forms. Now one of the universal and marked primitive notions is that of the oath as a formal act, mechanically and *ipso facto* efficacious (like the ordeal and the trial by battle), and quantitative in its nature. This notion is merely one particular phase of the entire system of formalism inherent in the stage of intellectual development at which our Germanic ancestors were at that epoch. It is a matter of the whole spirit of the times, not of a particular or local belief; and since the history with which we are now concerned is that of the growth and change of a radical and epochal conception, not easy to reproduce in our modern imaginations, it may be worth while (for obtaining a starting point) to

[1] Deut. 17, 6: ["The murderer shall be put to death;] but at the mouth of one witness [only] he shall not be put to death;" 19, 15: "For any iniquity . . . at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established;" Numb. 35, 30 (like Deut. 17, 6); Matt. 18, 16: ["If thy brother trespass against thee, and reject thy complaint,] then take with thee one or two more, that in the mouth of two or three witnesses every word may be established;" II. Cor. 13, 1 (similar); I. Tim. 5, 19; Hebr. 10, 28 (allusions to the foregoing ideas); John 8, 17: "It is also written in your law that the testimony of two men is true."

remind ourselves of its inherent and pervasive nature by the following passage of acute analysis from Professor Hensler's *Institutionen des deutschen Privatrechts*:[1] —

"From the side of spiritual and moral development, the legal life of every civilized people exhibits itself in a movement through three stages; these may be termed the divinational, the formal, and the intellectual stages. . . . The transition from one stage to the other does not occur abruptly and immediately; thus, for example, the judgments of God, in the form known to history, as well as the oath itself, are institutions which, in their deepest sense, belong to the first stage, but have been adopted in the second stage, that of legal formalism. . . . By 'legal formalism' I mean that condition of legal thought in which the sensibly perceivable is accepted as the only or at least the dominant element producing legal effects, and the inward circumstances of a spiritual sort — dispositions, volitions, purposes, and the like — are excluded or forced into the background. In this larger sense the term 'formalism' is ordinarily not taken; we are apt rather by that term to mean merely the notion that transactions which are to have legal significance must have a prescribed form, *i. e.* a certain mode of utterance or action which is alien to the speech or doing of ordinary life. This external aspect of 'formalism' is, however, only the half of that which I here include by that name; the other half is what may be called the inward formalism, and it consists in this, that the substantial effects, the intrinsic value of the incidents of legal life is estimated by (as it were) stencils fixed by law. Thus, for example, we contrast the formal and the rational theory of proof, and under the former we class the rule that for full proof a single witness does not suffice, but that two credible witnesses are necessary. Where lies the formalism here? This rule has nothing to do with 'form' in the narrow sense noted above; the real element of formalism in it is that (by reason of long experience with the untrustworthiness of witnesses) a rule of thumb has been made, which denies to the judge his free discretion in the estimation of testimony and lays down a fixed law, not trusting to the often deceptive valuation of each man's credibility, character, and the like, but finding its security in the external mark of numbers. And so, in general, we may properly use the term 'formalism' of the law to express that tendency which excludes from consideration inward qualities, motives, volitions, and the like, and founds legal rules on external phenomena. . . . The formalism of Germanic procedure lays the fullest stress on the parties' acts, and at the same time confines these to prescribed formalities. The summons is given by the one party to the other; the detailed steps of the proceeding, even to the judgment, are brought forth in formal manner by

[1] I. 45, 49, 52. This great thinker, in some respects surpassing Professor Brunner, in the value of his contributions to legal history, is now Chief Justice of the Swiss Court at Basel.

the demands of the parties; the judgment is itself primarily only a determination as to which party has the privilege of making proof, and the proof itself is effectuated either by the oath, the most formal method conceivable, and eventually by the *judicium dei.* One may thus perceive how hateful and obnoxious to the Germanic clansman were the innovations which the procedure of the royal courts introduced and sought also to bring into the popular courts, how unwillingly he suffered the mode of proof by inquisition [jury], and how he chose rather to avoid the royal court and obstinately to suffer the consequences of contumacy than to submit himself to a procedure in which the judge's discretion had free play in the valuation of proof."

The same formalistic conception of law in general and of proof in particular, with some further illustrative details, has also been plainly described by Professor Brunner, that greatest of Germanists; and the following passage of his may profitably be considered here:[1]—

["The domination of formalism and the narrow limits of judicial freedom of judgment were the marked features of Germanic procedure.] It was not to the Court, and with the object of persuading the Court, that proof was furnished, but to the opponent, and with regard to the persuasion or belief of the whole body. The general principle [of formalism] included the proof-procedure; here, too, was the judicial discretion replaced by the compulsion of form. Thus the proof was not submitted to the judge's valuation, but was prescribed once for all by rules which must be fulfilled before the proof tested by them could be regarded as efficacious. These rules consisted of forms, in which the proof-result must manifest itself or (so to speak) crystallize itself, while proof-material available informally or in other forms remains disregarded. . . . The formalism of the party's oath exhibits itself above all in the feature that the oath is 'staffed;' for the opponent of the swearer, holding in his hand a staff, pronounces to the latter the oath-formula, which contains the allegation presented for decision. The swearer is obliged to repeat word for word this 'staffed' formula, while touching the staff and calling upon God. A single error of word defaulted him. . . . [So also for proof by witnesses.] There was no questioning of them. The witnesses had to swear, word for word, to the allegation presented for decision. The probative force of the witnesses' doings lay exclusively in the oath-form of their utterance. Only by an error in this form (it would seem) could the witnesses be ineffective. . . . Apart from peculiarities of special tribal laws, the controversy was decided as soon as the witnesses had sworn their oath according to the necessary formalities. If the opponent of their party was unwilling to let it rest here, he had (by some customs) a single

[1] Die Entstehung der Schwurgerichte, ed. 1872, 48, 53.

means of overthrowing the witnesses, . . . [namely,] a duel with the impeached witnesses settled the result of the controversy."

The oath, then, in the Germanic epoch is but a single product of the pervading formalistic conception of procedure and of proof. All through the Saxon and Norman times, the oath is a verbal formula, which, if successfully performed without immediate disaster, is conceded to be efficacious *per se* and irrespective of personal credit. It follows, too, since the performance of this act is in itself efficacious, that the multiple performance of it, if persons can be obtained who can achieve this, must multiply its probative value proportionately. This numerical conception is inherent in the general formalism of it. Thus, again, all through these times, the oath is for greater causes, by greater numbers, sworn sometimes six-handed, or twelve-handed, or twenty-four-handed; that is, a degree of greater certainty is thought to be attained, not by analyzing the significance of each oath in itself and relatively to the person, but by increasing the number of the oaths. An oath was one oath; and though as between persons of inferior and superior rank certain differences were sometimes recognized, yet in general and between persons of the same rank one oath was equal to any other oath, with no distinctions based on their testimonial equipment for the case in hand. In short, whatever varieties of probative situations present themselves, the only expedient that suggests itself seems to be some change in the number of oaths.[1] Little by little, to be sure, a newer idea develops. Numerous oaths may be required to overcome certain strong masses of (what we should now call) presumptive evidence. The classes of cases in which oaths are allowed operative force *per se* are diminished. Most important of all, witnesses may be examined briefly before being allowed to take the oath, and witnesses showing a total lack of knowledge may not be allowed to swear;[2] and of a piece with this comes the separate examination of witnesses swearing on the same side, for a conflict in their stories when separately examined resulted in discrediting their oaths; even in this latter expedient the feebleness of the new reasoning process is seen, in that the oaths appear (at any rate when taken before the judges and not before a jury) merely to fail as formal acts, and little attempt is

[1] The rules here summarily referred to may be found in Brunner, *ubi supra*, c. iii.; Thayer, Preliminary Treatise on Evidence, 17–34; Lea, Superstition and Force, 4th ed. 21–100.

[2] Yet even here the innovation made little direct change in the formal effectiveness of the oath: Brunner, *ubi supra*, 67, 68, 85, 198.

made to decide upon the witnesses' relative personal credit.[1] Finally the spread of jury trial must have helped gradually to develop the more rational spirit of investigation of facts and to outlaw the more marked features of primitive formalism. But these steps of progress in popular conceptions of the nature of proof are only slow and gradual, — much more so than one might suppose. The early superstitious and extreme notion of a witness' oath dies out, but the mechanical, quantitative, formal conception persists for many centuries. Its purely quantitative and ponderative nature, at a much later period, may be seen, for example, in the treatment of opposing witnesses' contradictions : —

Thayer, Preliminary Treatise on Evidence, 23 : "We read [in a case of *cui in vita*, in 1308,] that they were at issue *issint cesti qui mieulx prove mieulx av.* and the tenant proves by sixteen men, etc., and the demandant by twelve ; and because the tenant's proof '*fuit greindr* than the demandant's, it was awarded, etc.' If we take Fitzherbert's account to be accurate, it might appear that the twelve men on each side cancelled each other and left a total of four to the credit of the tenant, a result which left his proof the better."

It is surprising to us to-day to note how long this conception of the oath (*i. e.* of a single testimonial assertion) persisted. What is material to our purpose is that as a popular notion and instinctive mental attitude it was still in almost full force in the 1500s, at the time when the conflict of the common law and the ecclesiastical system came upon the stage. The vital force of this quantitative view of a witness' testimony is seen pressing to the surface in abundant casual instances down into the 1700's ;[2] and it is only here and there that a protest is raised against its fallacy.[3] It

[1] See Thayer, *ubi supra*, 22, 98, 99 ; and an article on " Sequestration of Witnesses," 14 HARV. LAW REV. 475.

[2] 1571, Duke of Norfolk's Trial, Jardine's Crim. Tr. i. 178 (Richard Candish was sworn and testified to treasonable words of the accused, "when the Duke gave him reproachful words of discredit ;" upon which Serjeant Barham interjected, "He is sworn, there needeth no more proving") ; 1633, Massinger, in "A New Way to Pay Old Debts," act 5, sc. 1 (Sir Giles Overreach ; "Besides, I know thou art a public notary, and such stand in law for a dozen witnesses ") ; 1683, L. C. J. Pemberton, in Lord Russell's Trial, 9 How. St. Tr. 577, 618 (" If you cannot contradict them by testimony, it will be taken to be a proof") ; 1715, Parker, C. J., in R. *v.* Muscot, 10 Mod. 192 ("a credible and probable witness shall turn the scale in favor of either party") ; 1736, Lord Hardwicke, C. J., in R. *v.* Nunez, Lee cas. T. Hardwicke, 266 (" One witness is not sufficient to convict a man of perjury, unless there were very strong circumstances ; because one man's oath is as good as another's").

[3] See the remarks of Sir John Hawles, Solicitor-General (about 1700), in 8 How. St. Tr. 741.

is probable, indeed, that the long delay in abolishing the disqualification of witnesses by interest, and the popularity of those rules till the end of the 1700s was due to a lurking feeling that an "oath-assertion, merely as such, of anybody, no matter," who the person, was at least good for something, — counted one (let us say) as testimony. Only by a slow and comparatively recent development came the rational notion of analyzing and valuing testimony other than by numbers. Even to-day, among juries in some places, there is no doubt a mere counting of oaths or witnesses.[1] Impossible as it may be to note in any precise epoch the parting of the ways, and to put ourselves back fully into the mental condition of the former days, the living force of the old numerical conception as late as the 1500s and 1600s cannot be doubted. It appears plainly enough even on the dead printed pages of the State Trials; and its nature has been very well phrased by Sir James Stephen, in the following passage:—

Stephen, History of the Criminal Law, i. 400: "The opinion of the time [before 1700] seems to have been that, if a man came and swore to anything whatever, he ought to be believed, unless he was directly contradicted. . . . The juries seem to have thought (as they very often still think) that a direct unqualified oath by an eye- or ear-witness has, so to speak, a mechanical value, and must be believed unless it is distinctly contradicted. . . . If the Court regarded a man as a 'good' (*i. e.* a competent) 'witness,' the jury seem to have believed him as a matter of course, unless he was contradicted; though there are a few exceptions. . . . The most remarkable illustration of these remarks is to be found in the trial of the five Jesuits. . . . [Chief Justice Scroggs says:] 'Mr. Fenwick says to all this, "Here is nothing against us but talking and swearing." But, for that, he hath been told (if it were possible for him to learn) that all testimony is but talking and swearing; for all things, all men's lives and fortunes, are determined by an oath, and an oath is by talking, by kissing the book, and calling God to witness to the truth of what is said.' . . . Scroggs was right as to what it [the practice of juries] actually was, and to a certain extent still is. It is true that juries do attach extraordinary importance to the dead weight of an oath."

(3) There was, therefore (and this is at once the sum of the foregoing and the key to the ensuing history), in the English common law courts of the 1500s, nothing at all of repugnance to the numerical system already fully accepted in the ecclesiastical law. The same popular probative notion there prevailed among judges,

[1] Compare the measures taken in the Code Napoléon to educate juries out of this attitude; as noted by Mr. Best, Evidence, § 70.

juries, and counsellors as on the Continent. They were equally prepared and accustomed to weigh testimonies by numbers, and therefore would see nothing fallacious in a rule declaring one witness not enough, and requiring specified numbers of witnesses. And this adoption was in fact frequently demanded of the common law courts. It was a time when the conflict between the ecclesiastical and the common law courts was at its last and perhaps most violent stage, — a conflict important in other respects to the rules of evidence.[1] The methods of the ecclesiastical courts were forming those of the court of chancery; the ecclesiastical lawyers were a distinguished and powerful body; their influence was notably felt in politics and in political trials; and there was no way of yet knowing whether their system and not the common law system might ultimately preponderate in the shaping of English jurisprudence. When their rule declaring one witness insufficient was appealed to, the appeal had behind it the force of presumption due to the prestige of a great system, orthodox on the Continent, and not unequal in its rivalry in England. Add to this, the immense force of an appeal to the law of God, to the Scriptures sanctioning the rule of the Church's law, and protecting the innocent against condemnation by single witnesses. Such was the attempt now repeatedly made to fix upon jury trials at common law the fundamental rule of the ecclesiastical law; and it is apparent, from the utterances recorded as late as the early 1600s, that there was no certainty that the attempt would not succeed:

1620, Lord *Bacon's* Trial, 2 How. St. Tr. 1087, 1093; Sir Edward Coke: "It is objected that we have but one single witness, therefore no sufficient proof. I answer, that in the 37th of Eliz., in a complaint against soldier-sellers, for that having warrant to take up soldiers for the wars if they pressed a rich man's son they would discharge him for money, there was no more than *singularis testis* in one matter; but though they were single witnesses in several matters, yet, agreeing in one and the same third person, it was held sufficient to prove a work of darkness. . . . In this [charge of bribery] one witness is sufficient; he that accuseth himself [*i. e.* the bribe-giver] by accusing another is more than three witnesses."

1623, *R.* v. *Newton*, Dyer 99 *b*, note; information against a grocer for cheating: "It was agreed by the two chief justices concerning the testimony of one, as follows: When two or three offences are proved by single witnesses, sc., one witness to each offence, a single witness suf-

[1] Compare the history of the rule against self-crimination.

fices if they be both offences of the same species and against the same party, otherwise not."

1632, *Sherfield's* Trial, 3 How. St. Tr. 519, 542, 545; L. C. J. Heath: "A judge is bound ever to give sentence *secundum probata*, not *probabilia*. That he [the defendant] undertook to satisfy the bishop, this I think is proved by [only] one single witness."

1637, Bishop of *Lincoln's* Trial, 3 How. St. Tr. 769, 786; Lord Cottington, L. C.: "It is not always necessary in this Court to have a truth proved by two or three witnesses; men will be wary in bribery; . . . and *singularis testis* many times shall move and induce me verily to believe an act done, when more proofs are shunned."

1640, Earl of *Strafford's* Trial, 3 How. St. Tr. 1427, 1445, 1450; the defendant argues, "to the Primate's testimony, . . . he is but one witness, and in law can prove nothing;" such "therefore could not make faith in matter of debt, much less in matter of life and death." [1]

The traditional practice of the common law courts, at the time of this attempt, is revealed definitely in the controversy over certain prohibitions issued by them forbidding the ecclesiastical courts to take cognizance of matters temporal (*i. e.* not matrimonial nor testamentary). It is not clear that the former specifically acted on the ground of the latter's employing an improper rule of evidence; they apparently disputed the jurisdiction, not the mode of proof. But it seems to be conceded by the ecclesiastics that the common law judges in practice asked for no more than one witness. These had as yet probably not had the issue forced upon them in their own courts; but their orthodox practice is clear; they never required a number of witnesses before the jury:

1605, *Bancroft's Articuli Cleri*, and the *Judges' Answers*, 2 Co. Inst. 599, 608; 2 How. St. Tr. 131, 143: "*Objection* [by the Clergy]: There is a new devised suggestion in the temporall Courts commonly received and allowed, whereby they may at their will and pleasure draw any cause whatsoever from the ecclesiasticall court; for example, many prohibitions have lately come forth upon this suggestion, that the laws ecclesiasticall do require two witnesses, where the common law accepteth of one, and [that] therefore it is *contra legem terrae* for the ecclesiasticall judge to insist upon two witnesses to prove his cause"; *Answer* [by the Judges]: "If the question be upon payment or setting out of tithes, or upon the proofe of a legacy or marriage, or such like incidence [of strictly ecclesiastical jurisdiction], we are to leave it to the tryall of their law, though

[1] See, also, Adams *v.* Canon, (1622) Dyer 53 *b*; many other scattered instances might be found. The statutory rule for treason was said to have been enacted in direct imitation of the ecclesiastical law; see *post*, p. 101. The civil law rules actually obtained force in Scotland: 1705, Green's Trial, 14 How. St. Tr. 1199, 1235.

the party have but one witness; but where the matter is not determinable in the ecclesiastical court, there lyeth a prohibition, either upon or without such a surmise." [1]

It is about this time that the indications occur (in the passages already above quoted) of a judicial inclination to yield to the ecclesiastical principle, and of a general attempt to carry into the common law courts the fundamental rule that a single witness was not sufficient.

(4) But the attempt failed, and failed absolutely. After the middle of the 1600s there never was any doubt that the common law of England in jury trials rejected entirely the numerical system of counting witnesses and of requiring specific numbers.[2] The only exception to this — the case of perjury — "proves the rule," because it was not established until the early 1700s, when the rejection of the numerical system had been already definitively accomplished. Indeed, the reasons for this rejection had been already foreshadowed by Sir John Fortescue, in his treatise of the late 1400s; the problem and the conflict had not yet arisen practically in his time (the explanation of this will be noticed later); but when, in the late 1500s and the early 1600s, the issue was forced, this reason of his was as true as ever; and in spite of the indications of yielding (noted in the passages above) at times in the early 1600s, this reason, in the hands of the next generation of judges, was given full recognition and served to justify the common law system of evidence in its total repudiation of the numerical system.

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[1] The following are instances of prohibitions arising in this controversy: 1607, Chadron *v.* Harris, Noy, 12 (plea, payment of legacy; prohibition not granted); 1611, Roberts' Case, Cro. Jac. 269 (mere surmise in advance, not sufficient to secure a prohibition); 1629, Warner *v.* Barret, Hetley, 87 (plea of *plene administravit;* prohibition apparently granted); 1688, Richardson *v.* Disborow, 1 Ventr. 291 (legacy; prohibition issued); 1691, Shotter *v.* Friend, 3 Mod. 283 (payment of legacy; prohibition issuable); 1698, Breedon *v.* Gill, 1 Ld. Raym. 219, 221 (issuable for a legacy, but not for revocation of oral will).

[2] There is a foreshadowing of it in the previous century: 1551, Reniger *v.* Fogossa, Plowd. 1, 8, 12 (where the Court's opinion was for the defendant, without reasons given; but the defendant had argued that one witness sufficed in jury trials; Plowden published in 1578, and the case's significance dates from that time). But no positive deliverance seems to come till after the middle of the 1600s: 1662, Tong's Trial, 6 How. St. Tr. 226, Kelyng ("at common law, one witness is sufficient to a jury"); then Sir Matthew Hale and L. C. J. Holt, quoted *post*, emphasize this before the end of the century. Thereafter the matter is assumed on all hands: 1806, L. C. Erskine, in Clifford *v.* Brooke, 13 Ves. Jr. 131, 134 (the law of one witness's sufficiency "is uniform in principle and practice, with the single exception of the case of perjury").

(5) What, then, was the reason why the common law judges, in their system of evidence for jury trials, declined to number witnesses like the ecclesiastical court, and to lay down the rule that a single witness was insufficient? Briefly, the different nature of the tribunal. The situation which would call for such a rule simply did not exist for the common law judge. The case of having merely one witness could not arise; for the jurymen were already witnesses to themselves as well as triers. It is unnecessary here to do more than recall that vital circumstance which has in so many ways affected the history of our rules of evidence, namely, that the jury, until at least the early 1700s, were in legal theory entitled to avail themselves of information contributed personally by themselves and obtained independently of the witnesses produced in court; and that during the 1500s and 1600s this joint quality of witnesses and jurors still obtained practically for a more or less considerable part of their evidential material.[1] The situation was, therefore, radically different for the common law judge and the ecclesiastical judge. The former need not and could not measure the witnesses that appeared before him. He could not declare one insufficient and two or more necessary, for this was not all the evidence. There was always, besides the witnesses produced in court, an indefinite and supplementary quantity of evidence existing in the breasts of the jurors. There were (as Fortescue says) twelve other witnesses besides the one produced before the bar; and, as to the extent of the evidential contribution of these others, the judge did not know and had no right to know what it amounted to. It was therefore impossible and preposterous for him to attempt to declare insufficient and to reject the one or more witnesses produced in court. The jury might still go out and find a verdict upon no witnesses (of the ordinary kind) at all. Judicial rules of number would thus be wholly vain and out of place. Such was the logical and necessary answer to any attempt to introduce the numerical system in jury trials. This had been Fortescue's reasoning in the 1400s; and this was the answer of the judges in the late 1600s, when the question was forced upon them: —

Circa 1460, Sir John *Fortescue*, L. C., in his *De Laudibus Legum Angliae*, c. 33: "*Prince:* 'But, my good chancellor, though the method [of trial by jury] whereby the laws of England sift out the truth in mat-

[1] The demonstration of this has been made in Thayer's Preliminary Treatise on Evidence, 137–170.

ters which are at issue highly pleases me; yet there rests one doubt with me, whether it be not repugnant to Scripture. Our Blessed Saviour says to the Pharisees, "It is written in your law that the testimony of two men is true;" and, in confirmation, he subjoins in the very next verse, "I am one that bear witness of myself, and the Father that sent me beareth witness of me." The Pharisees were Jews, wherefore it is the same thing to say, "It is written in your law," as to say, "It is written in the law of Moses," which was no other than the law of God given by Moses to the children of Israel; wherefore, to contradict this law of Moses is in effect the same as to contradict the law of God; from whence it follows that the law of England deviates from this law of God, which it does not seem lawful in anywise to impugn. It is written also that our Saviour, speaking of offences and forgiving one another, among other things delivers himself thus: "If thy brother will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established." Now if in the mouth of two or three witnesses God will establish every word, why do we look for the truth in dubious cases from the evidence of more than two or three witnesses? No one can lay better or other foundation than our Lord hath laid. This is what in some measure makes me hesitate concerning the proceedings according to the laws of England in matters of proof; wherefore I desire your answer to this objection.'

"*Chancellor:* 'The laws of England, sir, do not contradict these passages of Scripture for which you seem to be so concerned; though they pursue a method somewhat different in coming at and discovering the truth. . . . If the testimony of two be true, *a fortiori* the testimony of twelve ought rather to be presumed to be so. The rule of law says "the more always contains in it that which is less." . . . The meaning of the [Jewish and civil] law is this, that a *less* number than two witnesses shall not be admitted as sufficient to decide the truth in doubtful cases; . . . and that the truth in some cases may be proved by two witnesses only, when there is no other way of discovering it, is what the laws of England likewise affirm.[1] . . . Wherefore the law of England does not call in question any other law which finds out the truth by witnesses, especially when the necessity of the case so requires; the laws of England observe a like method, not only in the cases already put, but in some others which it is not material now to enlarge upon. But it never decides a cause *only* by witnesses, when it can be decided by a jury of twelve men, the best and most effectual method for the trial of the truth, and in which respect no other laws can compare with it.' . . .

"*Prince:* 'I am convinced that the laws of England eminently excel, beyond the laws of all other countries, in the case you have been now

[1] Here he names the instances of "trial" by witnesses without jury, in admiralty, etc.

endeavoring to explain. And yet I have heard that some of my ancestors, kings of England, have been so far from being pleased with those laws that they have been industrious to introduce and make the civil laws a part of the constitution, in prejudice of the common law. This makes me wonder what they could intend or be at by such behaviour.' ".

1551, *Brook, arguendo*, in *Reniger* v. *Fogossa*, Plowd. 1, 12 (denying that any number are required) : "Witnesses are not necessary but where the matter is to be tried by witnesses only. For if witnesses were so necessary, then it would follow that the jurors could not give a verdict contrary to the witnesses, whereas the law is quite otherwise ;" *Atkins, arguendo :* "I may put the matter to the inquest without any witness, and their knowledge shall aid me, and not the knowledge of the witnesses; for they may give a verdict contrary to the witnesses ; and so the witnesses and their testimony is not very material when there is an inquest."

Ante 1680, Sir Matthew *Hale*, L. C. J., in his *History of the Common Law*, ch. 12 : "Indeed, it is one of the excellencies of this trial [by jury], above the trial by witnesses, that altho' the jury ought to give a great regard to witnesses and their testimony, yet they are not always bound to, . . . and may and do often pronounce their verdict upon one single testimony, which thing the civil law admits not of. . . . As I before said, they are not precisely bound to the rules of the civil law, viz. to have two witnesses to prove every fact (unless it be in cases of treason), nor to reject one witness because he is single, or always to believe two witnesses if the probability of the fact does upon other circumstances reasonably encounter them ; for the trial is not here simply by witnesses but by jury."

1696, *Vaughan's* Trial, 13 How. St. Tr. 485, 535, treason upon the high seas ; it was argued that the admiralty trial under the civil law was the proper one ; L. C. J. *Holt :* "There needs not two witnesses to prove him a subject [of the King] ; . . . I must tell you, as [to] the doctrine of the civil law, it is not universally received in all countries ; it is received in several countries as they find it convenient, and not as obligatory in itself ;" Dr. *Oldish :* "Yes, in all places, as to proof ; for it is the law of God and nations, 'ex ore duorum vel trium,' etc., and one witness is no witness ;" L. C. J. *Holt :* "Our trials by juries are of such consideration in our law that we allow their determination to be best and most advantageous to the subject ; and therefore less evidence is required than by the civil law. So said Fortescue in his commendation of the laws of England." Dr. *Oldish :* "Because the jury are witnesses in reality, according to the laws of England, being presumed to be 'ex vicineto ;' but when it is on the high and open seas, they are not then presumed to be 'ex vicineto,' and so must be instructed according to the rules of the civil law by witnesses ;" Baron *Powis :* "This is not a trial by the civil law." [1]

[1] Apparently the statute under which this trial was had, substituting the jury trial

That this was the actual and only reason for rejecting the numerical system is further to be seen in the circumstance that wherever the common law *had* preserved a "trial by witnesses," *i. e.* a determination by oaths made directly before the Court without the intervention of a jury, there the numerical system was found in force, — not in an elaborate form, but in its fundamental notion that one witness alone was not sufficient. "The laws of England," says Sir John Fortescue, "likewise affirm," with the civil law, "that a less number than two witnesses shall not be admitted as sufficient" in cases where a jury is not used. This was, indeed, the accepted tradition for "trial by witnesses" made directly to the Court in the manner of the civil and ecclesiastical law. There has been some difference of opinion as to the kinds of issue in which this was the proper mode of trial;[1] but there seems to be no doubt that whenever it was the proper mode, the witnesses must be at least two in number.[2] Moreover, when the classical commentators refer to the rule for this mode of trial, they expressly point out as the reason for the distinction the fact that the jurors are themselves also witnesses.[3] This reason, then, — the different nature of the jury as a tribunal, — was the reason for the failure of the numerical system to find a place in our common law rules of evidence.

(6) It remains only to ask why this question did not come up for practical settlement earlier than the 1600s? Why was not the contrast between the ecclesiastical system and the common law system forced to an issue before that comparatively late period in the history of jury trial? The jury had been in general use for at least three hundred years, and the ecclesiastical courts had had an

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for trial by the civil law, was passed chiefly for the very purpose of avoiding the latter's numerical rules; see the preamble to St. 27 H. VIII. c. 4 (1535); St. 28 id. c. 15; Hawkins, Pl. Cr., b. I., c. 37, § 3; c. 31, § 12.

[1] See Thayer, Preliminary Treatise on Evidence, 17–24; Best, Evidence, §§ 612–614.

[2] *Ante* 1726, Gilbert, Evidence, 151 (stating as an exception the case of a bastard's mother charging the father); Best, *ubi supra.*

[3] 1629, Coke upon Littleton, 6 *b* ("It is to be knowne that when a trial is by witnesses, regularly the affirmative ought to be proved by two or three witnesses, as to prove a summons of the tenant, or the challenge of a juror, and the like. But when the trial is by verdict of twelve men, there the judgment is not given upon witnesses or other kinde of evidence, but upon the verdict, and upon such evidence as is given to the jury they give their verdict"); 1726, Gilbert, Evidence, 151 ("for one man's affirming is but equal to another's denying, and where there is no jury to discern of the credibility of the witnesses, there can be no distinction made; . . . that must be left to the determination of the neighborhood").

even longer career in England. Why had not the attempt been earlier made to introduce the witness-rules of the latter into the procedure of the former? The answer is, simply, that there had before then been no witnesses to whom the ecclesiastical rules could be claimed to apply. It is perfectly well established that the extensive and habitual use of witnesses, in the modern sense, does not appear until the 1500s;[1] and it may be supposed that all through the 1500s the increase of importance in the witnesses' function, and the relative quantity of the information supplied by them as compared with that supplied by the jurors' own knowledge, was but of slow and gradual growth. In the previous history of the jury, and until this period of 1500–1650, there would be no suggestion of an analogy to the situation in the civil law courts; or, if the suggestion were made (as by Fortescue in the 1400s), it would be answered that there *were* in the jurors themselves more than the needed number of witnesses. But as the function of the jurors became more sensibly and markedly that of mere triers, or judges of fact, proceeding chiefly upon the evidence of witnesses in the modern sense, the analogy of the situation to that of the ordinary civil law judge would be fully perceived, and the propriety of applying the numerical system to the testimony upon which the jury now chiefly depended could fairly be claimed. This situation did not sensibly exist before the 1600s; and it was therefore not until that century that the question came to be pressed for practical solution.

In the matter of time, one more interesting consideration remains to note. If the change of the earlier conditions of jury trial had come about more rapidly, if before the 1500s the jurors had ceased to be also witnesses, and had come to decide chiefly upon the testimony of produced witnesses, the numerical system might after all have been grafted into our body of evidence-rules. The jury would then have been mere judges of fact, obliged to depend upon others' testimony and to weigh accurately its worth, while the popular quantitative conception of testimony would still have been in full force; there would thus have been every reason to expect the enforcement for juries of the general notions of testimony which were still in vogue among the common law judges and the people at large. This is, to be sure, only one of those contingencies which can easily be reconstructed in imagination;[2] but it

[1] This is fully expounded by the jury's historian, in Thayer, Preliminary Treatise, 122–132.

[2] That this possibility, however imaginary, is by no means fanciful, may be seen

illustrates at any rate the radical extent to which our common law rules of evidence have been fundamentally affected by the nature of the jury tribunal and by the condition in which its steps of historical progress happened to place it at a given period.

There did come into our law, however, sooner or later, a few specific rules of the numerical sort, all of them being of the simple type that declares a single witness insufficient and requires additionally either a second witness or corroborating circumstances. Some of these — namely, the Chancery rule requiring two witnesses to overcome a denial on oath, the rule requiring two witnesses to a will of personalty, and the rule requiring two witnesses to a cause for divorce — existed only in the practice of the ecclesiastical courts or that of Chancery founded upon it; and wherever they came over into American common law courts, they were direct borrowings. Others, namely, the rule requiring an accomplice or a complainant in rape, or the like, to be corroborated, are either express statutory inventions or plain judicial creations; in either case modern innovations as well as local in the United States, and not a part of the inherited common law. There remain two specific rules — the rule in treason and the rule in perjury — which do come down to us as inheritances; and though these also are in strictness not common law rules, the one being statutory in ori-

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from Professor Brunner's account of the fate that did befall in France, when one of the forms of jury trial — *the enquête par turbe*, consisting of ten men — came, in the course of its history, into competition with the ecclesiastical system; Schwurgerichte, ed. 1872, p. 393: "The *enquête par turbe* occupied a wholly exceptional position in relation to the principles which dominated French proof methods after the 1300's. The contrast between them lay in this, that in other cases [than trial by *enquête*] two witnesses sufficed to prove a fact [to the judge]. These two, however, were examined individually, while the *turbe* gave their verdict with a single utterance. . . . A way was therefore sought to bring this institution, now become alien, into harmony with the prevailing doctrine of proof. The *turbe* was now treated, for purposes of procedure, as a single person, and the verdict of the *turbe* was considered as equivalent to the assertion of a single witness. But since proof by witnesses, according to the well-known ecclesiastical rule, required at least two concurrent witnesses, it was prescribed, in 1498, by the Ordinance of Blois, art. 13, that for proving a custom [the chief issue for which the *turbe* was used], two agreeing verdicts of *turbes* should be necessary. . . . Whereas formerly the saying ran, 'a *turbe* is equivalent to two witnesses,' henceforward it went, 'A *turbe* is equivalent to but one witness.' Each *turbes* consulted by itself and gave a separate verdict; to effect proof, both *turbes* must agree. . . . After this change, the *enquête par turbes* survived some two centuries, though preserving only slight practical importance. . . . By tit. 13, art. 1, of the Civil Ordinance of 1667, the *enquête par turbes* was abolished; and thus disappeared from French legal life the proof method in which had been longest preserved the form of French *enquête* nearest related to the jury."

gin, and the other an indirect borrowing from the ecclesiastical law, yet their roots go some distance back in our law, and their history can best be understood in the light of the general survey just made of the history of the numerical system. The growth of these two rules we may now examine.

II. *The Treason Rule.*

It is clear enough that the rule requiring two witnesses to prove a charge of treason was not a common law rule, but had its beginning in the statutes of the 1500s.[1] Sir Edward Coke at one time ventured to advance the contrary assertion,[2] but his pretended authorities do not bear him out, and his utterances on this point appear by the circumstances to be of not the slightest weight.[3] There was no instance, before the 1600s, of a rule that the testimony of a single witness called before a jury at common law should be insufficient, as the history already examined amply indicates.

The rule begins, then, with the statutes of the 1500s; and the chief interest of its history lies in the controversy over the supposed repeal of the first statute, and in the true apportionment between the political parties of the blame of maintaining this repeal.

(1) The first statutory provision was that of Edward VI (1547 and 1552), by which two witnesses were declared necessary: —

1547, St. 1 Edw. VI, c. 12, § 22; no person is to be indicted or ar-

[1] 1762, Foster, Crown Law, 233 ("It hath been generally agreed, and I think upon just grounds (though Lord Coke hath advanced a contrary doctrine), that at common law one witness was sufficient in the case of treason as well as in every other capital case").

[2] 1629, Coke, 3 Inst. 26 ("It seemeth by the ancient common law one accuser or witnesse was not sufficient to convict any person of high treason; . . . and that two witnesses be required appeareth by our books, and I remember no authority in our books to the contrary").

[3] Coke's vacillation in legal tenets, when the interests of partisanship pressed, has often been noted upon other points (see an instance in 5 HARV. LAW REV. 73), and the present is merely another instance of his untrustworthiness. In 1603, in Raleigh's Trial (2 How. St. Tr. 15, 16), Coke as the King's Attorney-General, and on his way to be Chief Justice, had maintained that two witnesses in treason were unnecessary; his violent insistence upon Cobham's testimony, during his colloquy with Raleigh, supplied the most notorious instance, in all our annals, of unbridled forensic brutality and coarseness. But some years later, in 1629, when Coke had fallen from the favor of his royal master and was in opposition as a champion of popular liberties, he printed his Third Institute, and inserted in it a directly contrary assertion (above quoted); making no allusion to his own former doctrine nor to the repeated judicial decisions since 1555, and citing palpably irrelevant passages in support of his novel proposition. His authority on the present point is worthless.

raigned for treason, petty treason, or misprision, "unless the same offender or offenders be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same."

1552, St. 5 & 6 Edw. VI, c. 11, § 12; no person is to be indicted or arraigned for treason, "unless the same offender or offenders be thereof accused by two lawful accusers, which said accusers at the time of the arraignment of the party so accused, if they be then living, shall be brought in person before the party so accused and avow and maintain what they have to say against the said party . . . unless the said party arraigned shall willingly without violence confess the same."

The immediate circumstances leading to this step were probably the extreme methods used in some of the political trials with which the reign of Henry VIII. had just closed.[1] The law of treason had been by this monarch, as never before, wrested to his own personal and despotic ends; and (as Sir James Stephen has acutely remarked in another connection[2]) the dominant legislator class, who might not have cared how many a humble subject was unfairly convicted of petty thievery, were well alive to the possibilities of treason law if the rapid turn of the political wheel should chance to bring them underneath, and they probably were moved by the thought of self-protection against the future. As an expedient for this purpose, it was natural that they should seek aid in a rule of numbers. The numerical conception of testimony was then still an instinctive one among all; the ecclesiastical rules of that sort lay plainly in sight, in the spiritual practice; and a rule of numbers was perhaps not only the natural, but to them the only conceivable expedient for providing this protection. That this was in fact the source of the rule was at any rate the tradition as handed down a century later: —

1680, Lord *Stafford's* Case, T. Raym. 408: "Upon this occasion my lord chancellor in the Lords' House was pleased to communicate a notion concerning the reason of two witnesses in treason, which [reason] he said was not very familiar, he believed, and it was this: Anciently, all or most of the judges were churchmen or ecclesiastical persons, and by the canon law now and then in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses, . . . and

[1] Professor Willis-Bund (State Trials for Treason, 1879, vol. i. Introd. xxxix.) thinks that this statute "was probably the result of such cases as the Marquis of Exeter's and the Earl of Surrey's." For another explanation, not essentially different, see Rastel's Statutes, 102, as quoted in 1 How. St. Tr. 520, and Bishop Burnet, arguing in the House of Lords, in 13 How. St. Tr. 537, 752.

[2] History of the Criminal Law, i. 226.

anciently heresy was treason; and from thence the parliament thought fit to appoint that two witnesses ought to be for proof of high treason."

(2) But the reactionary times of Mary's reign arrived shortly; and the following statute, the foundation of two hundred years' controversy, was immediately passed: —

1554. St. 1 & 2 P. & M. c. 10, § 7; all trials for treason hereafter had "shall be had and used only according to the due order and course of the common laws of this realm and not otherwise."

What was the effect of this statute? It did not expressly repeal the statutes of Edward; but if the due order and course of trials included the modes of proof at a trial, then the new rule of proof introduced by the former statute now fell away, and the common law practice, which made no requirement of number, was restored. Such was the judicial construction now put upon the new act. Whether it was the correct one need not here be considered in detail. Arguments of various sorts have been advanced;[1] the most significant one to the contrary, perhaps, is that the very next statute, chapter 11, in the same session,[2] expressly restored the old evidence-rules (of one witness) for petty treason committed by forging the coin of the realm, and that the legislature would have used similar express words in chapter 10, had they intended the same thing.

On the whole, it may be supposed that the legislature did intend in chapter 10 to strike hard at treason, and to annul the recent innovation by which two witnesses were required. But the important thing is that this was the judicial construction of the statute of Mary from the very first, — beginning within a year after its enactment and continuing for a hundred years.[3] This was afterwards

[1] The arguments may be found in the following places: 1716, Hawkins, Pl. Cr. ii. c. 46, § 2; 1762, Foster, Crown Law, 237 (arguing forcibly for the view that there was no repeal); 1803, East, Pleas of the Crown, i. 128.

[2] 1554, St. 1 & 2 P. & M. c. 11, § 3 (all trials for offences connected with the coin of the realm may be tried "by such like evidence and in such manner and form as has been used and accustomed within the realm at any time before the first year of Edward the Sixth"); c. 10, § 12 (similar); 1697, St. 8 & 9 W. III. c. 26, § 7 (similar); these were applied, as needing only one witness, in the following cases: 1725, R. *v.* Anstruther, T. Jones 233 (impairing the coin); 1748, R. *v.* Gahagan, 1 Leach Cr. L., 4th ed. 42 (similar).

[3] 1555, Anon., Dyer, 132 *a* ("The intent of the Statute 1 & 2 P. & M. c. 10, was to remove the two accusers and two witnesses;" approved by the judges; perhaps the same case as the following): 1556, Anon., Brooke's Abridgment, "Corone," 219 (at a conference of all the justices, it was agreed that "for no treason under St. 25 Edw. III. was there need of accusers at the trial, because it is enacted by the statute of 2 M. c. 10, that all trials for treason shall be held according to the common law only and not

forgotten, during the political ascendency of the Whigs, after the Revolution of 1688 and during the early 1700s, when every reminiscence of the Stuarts was a dark one and all the doings of their times were anathematized. The trials of Sir Walter Raleigh in 1603, and of other noted victims of that time, were after the Revolution regarded by many as instances of unfair and corrupt political oppression by James the Second's judges. But time has vindicated the judges from such charges.[1] Whatever they were or did, they were not in this respect either unscrupulous or corrupt, and they did not distort the law for the pleasure of James. They merely applied, as in duty bound, the traditional and long-established construction of the statute of Mary, — a construction plainly laid down by the entire body of justices from the earliest moment after its enactment. Moreover, this construction was not even a mark of the Tudor and Stuart régimes as a whole. It continued under the Commonwealth, in the very heat of the passion of overthrow and reform. In the mean while a single statute requiring two witnesses for a specific kind of treason had been passed under a Tudor monarch ;[2] but during the whole of the century, from 1554 to 1659, under Tudor, Stuart, and Cromwell alike, the construction of the statute of Mary was uniform. The unjust judgment of the dominant party of the Revolution was merely a political dogma.

(3) Before the end of the first half of the 1600s, however, had come Coke's Third Institute, in which he now advanced the view that the statute of Mary had *not* repealed the statutes of Edward.[3]

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otherwise, and the common trial of the common law is by jury and by witnesses, and by no accusers ; " otherwise for treason charged under the same act of 2 M., " according to an article contained in the said statute at the end thereof "); 1586, Abington's Trial, 1 How. St. Tr. 1141, 1148; 1651, Love's Trial, 5 id. 43. A number of additional cases reaching the same result, but bearing only on the history of the hearsay rule, need not here be cited; the same statute of Edward had provided for confronting the accused with the two witnesses, and thus its repeal came into question also in that connection. So also in the history of confession law the same construction is found, the authorities are considered in an article by the present writer on " Confessions," 33 Amer. Law Rev. 378.

[1] Professor Willis-Bund, in his State Trials for Treason, cited *supra*, has demonstrated this for procedure in general and the substantive law of treason.

[2] 1558, St. 1 Eliz. c. 1, § 37 (no person to be arraigned for treason under this act, " unless there be two sufficient witnesses " produced if living and in the realm). The St. 13 Eliz. c. 1, has sometimes been said to make a similar provision; but this is a misunderstanding of it.

[3] 1629, Coke, 3 Inst. 26 (" for that act of 1 & 2 P. & M. extends only to trialls by the verdict of twelve men *de vicineto* . . . and the evidence of witnesses to the jury is no part of the trial, for by law the trial in that case is not by witnesses, but by the

His reasoning is apparently that the word "trial" in the statute meant merely the mode of decision, *i. e.* by a jury, as contrasted with a decision by judges hearing witnesses without a jury; to be sure, the word "trial" bore then that distinction,[1] but it is a forced meaning to put upon it in the statute, since nobody had ever thought of "trying" treason by witnesses to a judge without a jury (which is what the "otherwise" of the statute would mean, according to Coke). Moreover, Coke's *dictum* on this particular point was entirely valueless, for the reasons already noticed.[2] Nevertheless, his utterance in the Third Institute, like every other printed utterance of that man of prodigious learning, counted for a great deal. Professional opinion began to change, at any rate, not long after this time. The change must have been matured before the Restoration of Charles in 1660; for immediately upon the Restoration, and in the very first year of it, in spite of all the power of the restorers and of their bitter and dominating purpose to punish the death of Charles I., and in spite of the large grist of traitors upon whom to whet their appetite for revenge, the whole aspect of affairs changes. Foremost comes the statute of 1661, the first treason act passed after the restoration, in which the rule of two witnesses is deliberately established for all treasons defined by that act.[3] Next, but equally significant, came the judicial overthrow of the century-long construction of the statute of Mary. It was now affirmed by the courts, and assumed and practised when not expressly affirmed, that the statute of Mary had *not* repealed the statute of Edward; so that two witnesses were now to be required for treasons at large. The remarkable thing is that this decision was reached, in the first instance, in the very year of Charles's restoration, and in the trial of the regicides themselves, against whom the greatest license of judicial harshness might have been expected;[4] and it was repeated and maintained on all other

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verdict of twelve men, and so a manifest diversity between the evidence to a jury and a tryall by jury").

[1] Thayer, Preliminary Treatise, 17–24.

[2] *Ante*, p. 100.

[3] 1661, St. 13 Car. II, c. 1, § 1 (for treasons under this section, persons must be "legally convicted thereof upon the oaths of two lawful and credible witnesses, upon trial, or otherwise convicted or attainted by due course of law"); § 5 (no persons shall be convicted of the treasons in this act unless accused "by the testimony and deposition of two lawful and credible witnesses upon oath," produced face to face, etc., as in St. 5 & 6 Edw. VI, *supra*).

[4] May, 1660, Regicides' Case, Kel. 9 (it was assumed that the law for two witnesses was in force).

occasions during the remaining years that fate had allotted to the Stuart family under Charles II. and James II.[1] Here again is laid bare the fallacy of the Whig dogma of the 1700s, that all the evil judicial practices occurred under the Stuarts, while all the reforms came in with the Revolution. The reform in this instance came with the very first moment of the Stuart Restoration. Dangerous and unwholesome as was undoubtedly the restoration of this worthless family, the judges of the time must be redeemed from the reproach of an unscrupulous and tyrannous application of the law. On the contrary, it was through them that the change began. It is merely another instance out of several, in which we are to date the improvements in trial procedure from the Restoration, and not from the Revolution. Policy, no doubt, as well as a real growth of sentiment, and a sagacious perception of the wisdom of maintaining the restored power by abandoning the excesses of the earlier Stuarts, furnished in part the motives. But the fact remains, and deserves to be recorded.

(4) The ensuing legislation of William III,[2] after the Revolution, established the law, by continuing in a general statute that which the Restoration had instituted, partly by statute and partly by judicial action, a generation before. From the beginning of the

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[1] Dec. 1662, Tong's Case, Kel. 22 (though some of the judges believed that there had been a repeal, yet "they all agreed that *if* the law for two witnesses be in force," it was to be interpreted in a certain way; but at page 49, Kelyng expresses his own opinion in favor of the repeal; this was not later than 1671, the year of his death); 1679, Whitebread's Trial, 7 How. St. Tr. 405; 1680, Lord Castlemaine's Trial, ib. 1111; 1680, Lord Stafford's Trial, T. Raym. 407; 7 How. St. Tr. 1293, 1527. The same result on this point is seen in the interpretation of the statute (already noticed) against treason by false coining: 1673, R. *v.* Acklandby, 3 Keb. 68 (clipping the coin; two judges apparently differed in opinion); 1684, Anon., T. Jones, 233 (clipping the coin; at a conference of the judges it was resolved that by the statute of 1 & 2 M. "one witness is sufficient, for that restores the trial at common law for such case, which was altered generally for all cases of treason by 1 Edw. VI. and 5 & 6 Edw. VI., which required two witnesses where one was sufficient by the common law"). Lord Hale, writing some time before 1680, utters inconsistent views: Hale, Pl. Cr. i. 300 (after examining the *pros* and *cons*, he ends: "thus the reasons stand on both sides, and though these [for repeal] seem to be stronger than the former," yet it is safest to err on the side of mercy); ii. 286 (the early statute "is not altered by the statute of 1 & 2 P. M.;" citing Coke).

[2] 1696, St. 7 W. III. c. 3, § 2 (no person shall be indicted or tried for high treason working corruption of blood, or misprision, "but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to the one and the other of them to another overt act of the same treason," unless the accused "shall willingly, without violence, in open court confess the same, or stand mute or refuse to plead"); c. 7 (the foregoing provision is not to extend to counterfeiting the coin).

1700s there has never been any doubt or vacillation upon the rule that two witnesses at least are required upon a charge of treason.[1]

III. *The Perjury Rule.*

By the end of the 1600s it was decisively settled, as we have just seen, that the ecclesiastical rules about numbers of witnesses were not to be adopted into the common law. It was after that time that there arose the single exception to the common law doctrine that one witness alone may suffice in every case, namely, the rule that one witness, without corroborating circumstances, does not suffice on a charge of perjury. Yet even this rule was an indirect borrowing from the civil law.

First of all, it is fairly clear that there was no such rule of common law until towards the first half of the 1700s.[2]

That the quantitative conception of an oath still prevailed at that time has been already noticed, and in this respect the acceptance of the rule is not strange. But why should an exceptional step have been taken at that epoch for perjury trials which was not taken, either before or after, for any other kind of common law trials? The causes that answer this question are scarcely to be mistaken, and they were two: one may be called a mechanical, the other a moral cause.

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[1] There has, however, been some change as to the scope of the treason to which the rule applied: 1800, St. 40 Geo. III, c. 93 (in trials for treason by killing or doing bodily harm to the King, the trial may be "upon the like evidence as if such person or persons stood charged with murder"); 1821, St. 1 & 2 Geo. IV, c. 24 (extends the St. 7 W. III, to Ireland); 1842, St. 5 & 6 Vict., c. 51 (similar to St. 40 Geo. III); 1848, St. 11 & 12 Vict., c. 12, § 4 (in trials for compassing death or bodily harm to the King, etc., no conviction is to be had for this so far as expressed by "open or advised speaking," unless "upon his own confession in open court, or unless the words so spoken shall be proved by two credible witnesses"). Compare, also, the statutes *ante*, p. 102, as to treason by false coining.

[2] The following seem to be the earliest cases: 1693, R. *v.* Fanshaw, Skinn. 327 ("There being but the oath of the prosecutor, and so oath against oath, the defendant was acquitted"); 1714, Parker, C. J., in R. *v.* Muscot, 10 Mod. 192 ("There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent, and therefore a credible and probable witness shall turn the scale in favor of either party. But in the former, presumption is ever to be made in favor of innocence, and the oath of the party will have a regard paid to it until disproved. Therefore, to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant; for else there is only oath against oath;" this was said in charging a jury, and no precedent was cited); 1736, R. *v.* Nunez, Lee cas. t. Hardw. 265 (Lord Hardwicke, C. J. ["One witness is not sufficient], unless there were very strong circumstances; because one man's oath is as good as another's"); 1745, R. *v.* Broughton, 2 Str. 1229.

(1) The first of these lay in the important circumstance that in 1640, towards the end of Charles the First's reign, the Court of Star Chamber had been abolished[1] and its jurisdiction transferred to the King's Bench. Now the proceedings of the Star Chamber Court, being presided over by the Lord Chancellor, had always been conducted according to the ecclesiastical or civil law, by following or adopting its methods, much as did the Court of Chancery; and, in particular, the ecclesiastical rule of two witnesses obtained therein.[2] Furthermore, the crime of perjury, though also cognizable as a statutory crime in the ordinary criminal courts, was practically dealt with almost exclusively in the Star Chamber.[3] Hence, on the one hand, there was little or no occasion for any question to arise before 1640 as to proof of perjury in a common law court; while, on the other hand, after the transfer of jurisdiction at that date, the notions of proof as well as the definitions of substantive law peculiar to perjury were likely to pass over and be adopted as a whole in the subsequent common law practice. There was, therefore, by this change of mechanism, a tradition prepared, by the middle of the 1600s, for an exceptional doctrine to be established for proof of perjury; and by the end of the 1600s (as exhibited in the cases above cited) such a doctrine was making its appearance.

(2) But why did not the corrective consideration, already noted, which applied to prevent such a numerical rule in other common law trials, apply here also, namely, the consideration that the jurors were themselves twelve witnesses, as being capable of and entitled to contribute information of their own? In the first place, the living strength of this consideration had by the beginning of the 1700s substantially disappeared,[4] and in this must probably be sought the real explanation why the perjury rule was able to obtain a firm footing. In other words, the quantitative notion of an oath

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[1] St. 16 Car. I. c. 10.

[2] *Ante* 1635, Hudson, Treatise of the Star Chamber, 223, in Hargrave's Collectanea Juridica, vol. ii. ("they always require indifferent witnesses' clear proof, not by relation, and double testimony, or that which amounteth to double testimony").

[3] 1596, Damport *v.* Sympson, Cro. El. 520 ("Until the statute of 3 H. VII. c. 1, which gives power to examine and punish perjuries in the Star Chamber, there was not any punishment for any false oath of any witness at the common law"); 1883 Sir J. Stephen, History of the Criminal Law, iii. 245 ("The present law upon the subject . . . originated entirely, as far as I can judge, in decisions by the Court of Star Chamber"). Hudson, *ubi supra*, p. 71, says that perjury was "usually punished" there.

[4] Thayer, Preliminary Treatise, 174.

was still popular enough, while the corrective notion — that of the jury as witnesses — had practically disappeared, and thus the way was open. Furthermore, a charge of perjury was the one case where a plausible inducement for such a rule was presented; because in all other criminal cases the accused could not testify, and thus one oath for the prosecution was in any case something as against nothing; but on a charge of perjury the accused's oath was always in effect in evidence, and thus, if but one witness was offered, there would be merely (as Chief Justice Parker said) oath against oath. Thus, in a perjury case, the quantitative theory of testimony would present itself with the greatest force. Such seems to be the course of thought which made possible the tardy introduction of this rule.

It found a permanent place, however, in the common law; for, in spite of a perception of its incongruity with modern ideas, and of an occasional hesitation, the rule, persisting through the 1700s, was fully confirmed in England in the 1800s.[1]

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[1] 1831, R. *v.* Mudie, 1 Moo. & Rob. 128 (perjury in swearing to an insolvent schedule by omitting certain debtors; the debtors testified each to the existence of his own debt; Lord Tenterden thought it "difficult to give any other evidence," and said that on conviction a new trial might be moved; but there was an acquittal); 1839, R. *v.* Gardiner, 8 C. & P. 737 (rule applied); 1840, R. *v.* Virrier, 12 A. & E. 317, 324 (rule applied); 1842, R. *v.* Parker, Car. & M. 639, 646, Tindal, C. J. (similar to R. *v.* Mudie; rule applied).