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KD
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1998

First published in 1998 by
Sutton Publishing Limited · Phoenix Mill
Thrupp · Stroud · Gloucestershire · GL5 2BU

Published in North America in 1998
by University of Toronto Press Incorporated
Toronto Buffalo

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Canadian Cataloguing in Publication Data

Bellamy, John G., 1930—

The English criminal trial in the middle centuries: felony before the courts from Edward I to the mid-sixteenth century

ISBN 0-8020-4295-3

1. Trials -- England -- History. 2. Criminal Courts -- England -- History. I. Title

KD370.B45 1998

345.42'07'0902

C97-932234-0

Typeset in 10/12pt Baskerville.
Typesetting and origination by
Sutton Publishing Limited.
Printed in Great Britain by
MPG Books, Bodmin, Cornwall.

THE
CRIMINAL TRIAL
IN LATER
MEDIEVAL ENGLAND

FELONY BEFORE THE COURTS
FROM EDWARD I TO THE
SIXTEENTH CENTURY

J.G. BELLAMY

UNIVERSITY OF TORONTO PRESS
TORONTO BUFFALO

must have known of sessions where a very high ratio of acquittals to convictions had resulted never thought fit to comment in writing. Thomas More's asperities were directed against the accusatory part of the trial process not the arraignment. He appears to have accepted, and he pointed out so did the judges, that it should never be enquired how a petty jury came to its verdict.¹⁸

Modern historians, naturally enough, have been less inclined to allow the decision-making process of the trial jurors to remain a mystery. They have chiefly attempted to throw light on the matter by analysing the membership of the juries, concentrating on the social status and place of domicile of the individual jurors. It has been argued that while it was rare for most of the jurors to be inhabitants of the accused's hundred very few felons were tried by juries which did not contain one juror from there. Two-thirds of the time, in fact, there were at least two such, this arrangement being standard when there was more than a single accused from the hundred in question. Jurors therefore, so the argument goes, must have placed a great deal of reliance on the information provided to them by those of their fellows who had some knowledge of the circumstances of the offences at issue through their familiarity with the 'common fame' in the locality where the misdeeds had been perpetrated: the garnering of local gossip in fact.¹⁹ Such information was, apparently, the more readily available because quite often the jurors were local petty officeholders and similar.²⁰

Parallel research has produced the argument that, on the contrary, the jurors were drawn from the relevant hundred not in ones and twos but as the major part of any trial jury although, admittedly, there seem to have been occasions when the jury as finally sworn, because of rampant absenteeism, might have to be composed of 'talesman' (substitutes) chosen from lesser officials who happened to be present at the sessions.²¹ These men, it seems reasonable to assume, would only rarely be inhabitants of the hundred where the offence had been committed. Now it is quite possible that these two views of jury composition are complementary rather than contradictory, since the second was formulated from a study of late fourteenth-century jurors while the first was based on an examination of jurors of the earlier fifteenth century. The difference in the findings could have been caused by the time-frame of each study, men from the neighbourhood of the crime becoming increasingly reluctant to fulfil their obligations as jurors, which compelled the crown to select local officials for the task more and more. Providing we accept the premise that jurors who did not live in the locality of the crime, because they were less certain of the circumstances, were less likely to find suspects guilty, then there is support for this argument in the fact that felony conviction rates appear to have declined quite considerably in the period between about 1380 and 1430.²²

Commissions of gaol delivery of the fourteenth and fifteenth centuries usually contained a section wherein the sheriff was instructed to produce at the sessions not only the prisoners in his charge but also, as petty jurors, twenty-four knights

or other proven and law-worthy men from each hundred, who were not related to the suspects.²³ The emphasis was on proximity of residence and substantial possessions, as commentators confirm. Fortescue held that petty jurors were to be drawn from the neighbourhood of the vill where the misdeed was committed, while Coke said the jurors should be dwellers in the town or parish involved, and Lambard referred to them as the accused's 'owne Countreymen, Neighbours and Peeres'. According to Sir Thomas Smith the jurors should be substantial yeomen living around the place, or at least the hundred, of the crime.²⁴ That in the later fifteenth and the sixteenth centuries the crown was not ready either in theory or practice to waive the requirements concerning the trial jurors' place of residence seems likely, even if there were individual sheriffs who ignored the rules. However, concessions may have been made in practice in regard to the wealth of jurors since the records of the later sixteenth century assure us that by then the juror of substance was becoming a rarity. Many petty jurors, it appears, were poor men serving for payment in one form or another, or men who had been dragooned into the job by sheriffs and their officers.²⁵

So far we have been considering trial juries in cases where the accused was indicted, but we must not omit to give attention to the jurors whose job it was to decide appeals. Historians of medieval English criminal law have tended to assume that the rules and practices concerning the status of petty jurors applied equally whether the accusation was made by indictment or by appeal yet, in fact, the matter is in some doubt. There are grounds for suspecting that in the later middle ages appeal cases were tried separately from indictment cases. A *Year Book* case of Easter term 1464 shows the justices trying appeals before lunch and the 'gaol delivery' cases after.²⁶ If appeals were tried apart then it is quite possible that the juries were of a different composition. There is evidence from the mid-thirteenth century of appellees having the opportunity to obtain a specially chosen trial jury. This they were allowed to return for a usual payment of half a mark. There are also in the same records, we should note, examples of persons, who had been indicted, similarly paying the crown in order to have inquests of a particular type.²⁷ From these indictment cases, which appear to have been peculiar to the thirteenth century, we learn something about the nature of such special juries. In one instance the indictee paid for one to be drawn from two hundreds, while in another he paid 'in order to have a good inquest', which presumably meant containing jurors of substance. In a third case a woman charged with larceny paid the big sum of twenty shillings for an extra large jury comprising two groups of twelve men plus the representatives of the four neighbouring vills. Similar instances of special juries paid for by indictees, appellees, or even appellors have not been reported by scholars working in fourteenth- or fifteenth-century records, but the matter is by no means closed. There is no evidence of indictees being able to obtain special juries, but the revival, or at least the continuing popularity, of appeals of felony in the later

middle ages may well have owed something to the fact that the selection of the members of the trial juries was influenced in some way by the appellor, who by that period must usually have been a fairly wealthy person. There is a case of particular significance in the *Year Books* of Edward II's reign. An appellor nonsuited and the appellee was then arraigned at the king's suit. Presumably because it was a point of law the accused was able to obtain counsel (a 'clerk'), who argued that the original panel of jurors had been summoned for a suit of party and that therefore his client should now be tried by a new jury since he was being arraigned at the suit of the king.²⁸ The plea was allowed and the accused was tried by a new jury. From this we may conclude that in the early fourteenth century juries in appeal cases, in contrast with those which tried indictees, were expected to favour the party suing rather than the accused.

The report of the case does not make it clear if the appellor had made a payment to obtain this favourable jury or if it was normal for special jurors, possibly of higher status, to be empanelled in appeal cases. It may have been the case that the cost of bringing an appeal included a fee for the provision of such a jury. If appellors were able, in some periods at least, to obtain juries different from those used at the arraignment of persons who had been indicted, it would help to explain one of the most noticeable trends in late medieval felony verdict statistics, the high conviction rate in appeal cases. With the employment of a 'special' jury and with the victim/accuser being of necessity present in court at the arraignment it is no wonder that petty juries inclined towards conviction. The number of appeals which came before the late medieval courts were, of course, never more than a fraction of the total of indictments heard there and we must attribute this largely to the expenses involved and the penalties for failure to secure a conviction for appellors.

The law allowed those who were arraigned for felony to challenge the jurors chosen to try them. The accused might base his challenge on the fact that the jurors were not drawn from the hundred where the crime had been committed, or that they had been members of the indicting jury, or that they were related to the victim, or that their wealth was insufficient.²⁹ However, there was no need for the person indicted of felony, nor an appellee, to state the reason for his challenge. He was allowed to make it against thirty-five potential trial jurors without saying why. The rule was that such a peremptory challenge was permissible when a person was on trial for his life. An oddity of the law was that the accused might challenge some of those selected for the jury peremptorily but others by giving cause.³⁰ Richard Littleton in his reading on the criminal law, given perhaps in 1493, implied that the peremptory challenge was the normal one. The accused, he said, did not have sufficient courage to show a particular cause because their lives were at stake.³¹ Thomas Smith does not mention the peremptory challenge. He merely states that the accused can say nothing against the jurors because he does not know them. In the gaol delivery records instances

of juror challenge are rare, as they are elsewhere. This may have been because they only secured a place in legal records if they were made by appellees. One of these, instructively, shows a challenge by an appellee against a jury of the hundred of Diss (Norfolk) on the grounds that several jurors did not come from or possess anything in the hundred where the crime had been committed.³² This is the only instance of a challenge to be found in some 300 Norfolk cases recorded in the gaol delivery rolls of 1433-41; there are no examples at all in the records of over 400 Yorkshire felony cases of 1439-60.³³

If the composition of the late medieval jury has not yet been explained totally satisfactorily by historians neither has the use made in criminal cases of witnesses and evidence. That witnesses were allowed to testify in criminal cases in the late middle ages is a thesis which has not yet gained general acceptance.³⁴ Until relatively recently it was widely held that witnesses only appeared at criminal trials after the middle of the sixteenth century, a view which derived from the absence of references to witnesses in medieval criminal court records. Yet for Thomas More, writing around 1530, witnesses and their testimony were a common feature of treason and murder cases, and also figured in instances of 'more single' (i.e. noteworthy) felony. He pointed out that they frequently appeared before justices of the peace (presumably when the latter examined victim and suspect) and that their depositions were given in evidence to the trial jurors, who would ask the witnesses at the bar to inform them. More went as far as to say that the jurors would ignore strong testimony by witnesses at their peril, since the king's council was ready to investigate obvious cases of such neglect.³⁵

There can be little doubt as to the accuracy of More's comments. A collection of documents relating to the trial of a band of Devonshire robbers sent to Thomas Cromwell in 1538 demonstrates the use of two confessions, four reported statements and five depositions taken at examination as evidence. No fewer than seventeen witnesses gave testimony against a suspected murderer in London early in 1533.³⁶ A Star Chamber case of 1516 refers to evidence about a homicide being given by five witnesses to, in turn, a coroner's jury, a petty jury at gaol delivery sessions, and then a similar jury in the king's bench. The conciliar record of a trial for perjury of jurors who had falsely acquitted a robber at a delivery of Oxford castle gaol in July 1498 noted that the jurors had done so despite proof by several trustworthy witnesses that the accused was guilty; and there is extant a reference to a similar acquittal at Bury St Edmunds (the witnesses being described as giving plain and manifest evidence) at about the same date.³⁷ Some indication that the use of witnesses was frequent rather than occasional in common law criminal procedure in the reign of Henry VII is offered by the statute 19 Henry VII c.4. This act stipulated that any person who gave 'open evidence' at sessions in regard to someone he had seen using a crossbow for the purpose of killing the king's deer, evidence which resulted in a conviction, should have ten shillings as a reward. 'Open evidence' we may take as

- 20 Fortescue implied that men might live a good distance away from where any crime occurred yet still, if they were attuned to the county 'grapevine', acquire good knowledge of the circumstances: Fortescue, p. 67. The crux, although Fortescue does not say so, seems to have been for the person to want to know and be known to want to know. Such a person would probably be one holding local office.
- 21 Post, 'Jury Lists', pp. 69-71.
- 22 Contrarywise it could be argued that those who held local or court offices, being 'establishment' figures, were more likely to be in general favour of a high rate of convictions than the normal jurymen.
- 23 See for example PRO JUST 3/126 m. 2, JUST 3/213 m. 18.
- 24 Fortescue, p. 65; J.B. Thayer, *A Preliminary Treatise on the Law of Evidence* (Boston, 1898), p. 91; Lambard, *Éirenarcha*, p. 436; Smith, ed. Alston, p. 98.
- 25 Cockburn, *Assize Introduction*, pp. 60-1.
- 26 *Year Books*, 4 Edward IV Pasch. pl. 18.
- 27 *Placita Corone*, p. xxvii; Clanchy, *Berkshire Eyre*, pp. 312, 346, 380, 387.
- 28 *Year Books*, 16 Edward II Trin. p. 493. In certain fourteenth- and fifteenth-century appeals in gaol delivery records the jurors are said to have been elected with the consent of the parties and not simply 'electi et triati': PRO JUST 3/145 mm. 7d, 8d and JUST 3/ 83/3 mm. 2, 3, 4, 7, 9, 10, 13.
- 29 *Year Books*, 11 Henry IV Mich. pl. 5; *ibid.*, 8 Henry IV Mich. pl. 4; *ibid.*, *Liber Assisarum*, 38 Edward III pl. 19.
- 30 Fortescue, p. 71; *Year Books*, 9 Edward IV Trin. pl. 40; *ibid.*, 32 Henry VI Hil. pl. 14. Appellees were also allowed to challenge peremptorily: *Year Books*, 3 Henry VI Hil. pl. 5. After 1530 only twenty petty jurors could be challenged peremptorily: 22 Henry VIII c.14.
- 31 Cambridge University Library MS Hh.3.6, ff.8-8v. Littleton's comment means, presumably, either that the victims were nervously perplexed by their situation or that they feared a challenge might increase the likelihood of their being found guilty. See also *Readings and Moots at the Inns of Court in the Fifteenth Century, II*, ed. S.E. Thorne and J.H. Baker (Selden Society, 105, 1990), p. 276.
- 32 PRO JUST 3/209 m. 7. The Diss challenge was at the Thetford gaol delivery sessions in February 1433.
- 33 PRO JUST 3/209-13.
- 34 See, however, Bellamy, *Criminal Law*, pp. 33-5 and particularly Powell, 'Jury Trial', pp. 105-11.
- 35 T. More, *The Complete Works of St. Thomas More*, X, ed. J. Guy, R. Keen, C.H. Miller and R. McGugan (New Haven and London, 1987), pp. 147-55.
- 36 *Letters and Papers, Henry VIII*, xiii (ii), no. 21. In 1537 the foreman of a petty jury was examined before the council because he and his fellow jurors had convicted merely on the 'noise of the country' and without actual evidence: *Letters and Papers, Henry VIII*, cii (ii), no. 303.
- 37 *William Salt Arch. Soc.*, New series, x (i), 5; *Select Cases in the council of Henry VII*, ed. C.G. Bayne and W.H. Dunham (Selden Society, 75, 1958), pp. 69, 74-5. Unlike the clerks who kept common law records, those who were concerned with conciliar justice were in no way inhibited about referring to witnesses used in common law criminal procedure.
- 38 The crime was, however, only rated a trespass/misdemeanour. A *Year Book* case (4 Henry VII, Pasch. pl. 1) notes that persons of one county might not give evidence in regard to a felony in that county at a sessions in another county.