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LEGAL HISTORY: ORIGINS OF THE PUBLIC TRIAL

The story of the public trial begins with the invasion of England by William the Conqueror in 1066. Although the Norman legal system differed from that of the Anglo-Saxons, William assured his new subjects that they were to be governed by the laws that had existed during the reign of Edward the Confessor.¹ Except for a few changes in the substantive law and the establishment of a more centralized judicial system this promise was substantially fulfilled.² There were at least two reasons for this policy of following the Anglo-Saxon legal customs. First, William had purported to be the lawful heir to the throne of Edward the Confessor.³ By maintaining the legal status quo there was always the slight possibility of convincing the conquered subjects of the truth of this assertion.⁴ Secondly, in this newly acquired kingdom he had the task of keeping the peace. There was nothing that resembled a public police force, nor did there exist, at that time, any machinery by which such a body could be established. By accepting the Anglo-Saxon customs and laws William was able to build upon an already existing system of law. By allowing this judicial system to remain as it was before the conquest the problem of policing the vast new kingdom was partially solved.

In early England the most common form of justice was carried out by the tribe or the community.⁵ Whenever a person committed a wrong against another member of the community he was considered as having

1. 1 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 67 (2d ed. 1898) [hereinafter cited as POLLOCK & MAITLAND]; JENKS, *A SHORT HISTORY OF ENGLISH LAW* 17 (5th ed. 1938) [hereinafter cited as JENKS].

2. POTTER, *ENGLISH LAW AND ITS INSTITUTIONS* 10 (2d ed. 1943).

3. ". . . William, on more than one occasion . . . promised to the English . . . their 'law,' . . . the rights they held, 'on the day when King Edward . . . was alive and dead.'" JENKS, *THE BOOK OF ENGLISH LAW* 13 (5th ed. 1953).

4. In addition it may be recalled that the Norman law was largely unrecorded. That which was recorded was French. The English had a relatively sound body of recorded law. The laws of Edward the Elder, Edgar, and Cnut had been recorded. Upon his arrival in England William found a body of customs and laws in existence. 1 POLLOCK & MAITLAND 65, 67.

5. "These old customary rules were the ancient custom observed by the people for countless generations. They were administered only as such rules could be in a general meeting, or court, composed of all the freemen of the neighborhood. . . ." POTTER, *op. cit. supra* note 2, at 7.

had committed a wrong against the entire community. Thus, the individual was tried by the whole community and judged by communal law and custom.⁶ These tribunals were known as the County, the Hundred, and the Manor Courts. Under this system each of the subjects belonged to a specific community and had to seek justice from that community. The procedure in these courts was quite simple. The freemen, who composed the tribunals were judges of both law and fact. There were no professional lawyers and many of the trials were held in the open air.⁷ Thus, from the earliest times the English trials were held in public. All of this did not stem from the concept that a public trial was a right. The English did not think of themselves as conducting a public trial in its modern legal sense. This form of trial existed in early England because of the manner in which the courts were conducted. This was by necessity a public trial.

In 1166 the Assise of Clarendon was passed. This act, the forerunner of the modern day indictment, required that in every criminal trial a full court be assembled and at least twelve freemen be present who could charge the accused with a specific offense.⁸ The act made attendance at a trial one of the principal duties of the English freeman and as a result the community trial appears to have become a burden rather than a right of the people. There were instances when fines were levied against a person who did not attend a trial or send a qualified representative.⁹ If a wrong-doer was not tried or a false judgment was rendered the entire Hundred was forced to pay a penalty.¹⁰ In addition to attending the Hundred Court there was the duty to attend the County Court.¹¹ The courts were frequently a great distance from the homes of the parties held responsible for attendance. Farm and business obligations were often sacrificed to make court attendance possible.¹²

During the sixteenth and seventeenth centuries continental judicial procedure had exerted a marked influence upon the English law.¹³ The

6. JENKS 5.

7. It has been indicated that private courts were held in the house of the lord who had jurisdiction. But the early Hundred and County Courts appear to have been held in the open. *Id.* at 37, 38; PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 91 (5th ed. 1956) [hereinafter cited as PLUCKNETT].

8. JENKS 40.

9. Apparently a party had the right to send a servant or representative. This would relieve him of his duty to attend court. 1 POLLACK & MAITLAND 532-46.

10. PLUCKNETT 88.

11. *Id.* at 90.

12. 1 POLLOCK & MAITLAND 538. Evidently the framers of the Magna Carta did not feel the community trial a right. A clause in that instrument limits the terms of the courts. *Id.* at 539.

13. Many of the continental practices violated the common law. "But it is also clear from the works of Fortesque, Smith & Coke . . . that the use of torture was

most usual continental abuses were the use of torture, the secret trial, and the violation of the right against self-incrimination.¹⁴ While the English adopted the use of torture and had denied the right against self-incrimination, the secret trial was not used. There were several reasons for this. There was a necessity for a community trial in early English history. This was true even after the courts had begun to be administered by lawyers. The community trial was a useful tool in the hands of the Crown.¹⁵ Later, when the primitive form of jury trial began to appear there again existed the necessity for having members of the community participate in the trial.¹⁶ The philosophy of the English monarchs constituted another reason why the community trial was never abandoned. Unlike the monarchs of other countries, the English monarchs purported to act within the tenor of the law.¹⁷ The king may have acted absurdly, but by the use of a community trial the people were, in effect, invited to examine the legal proceedings. This would also have a psychological effect upon the people in two ways. It would give the people the opportunity to observe the courts in action while making it appear that they had some power over the king. Secondly, by convicting the accused in front of the populace, a would be wrong-doer would give much thought to the predicament of the accused before placing himself in a similar situation.

Although some form of community participation in criminal trials has existed in every period of English judicial history this convention for centuries provided little or no protection for the accused. Even though the concept of the public trial may have taken the nature of a fundamental right, it was valueless at a time when the populace had no power to curb infringements of their basic rights. The situation existing in the sixteenth and seventeenth centuries is illustrated by the opera-

wholly contrary to the common law." 5 HOLDSWORTH, A HISTORY OF ENGLISH LAW 184, 185 (1924) [hereinafter cited as HOLDSWORTH].

14. ESMEIN, HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 130 (1913).

15. "The open examination of witnesses *viva voce* in the presence of all mankind, is much more conclusive to the clearing up of the truth than the private and secret examination. . . ." 3 BLACKSTONE, COMMENTARIES *372. This is also the position taken by Professor Wigmore. 6 WIGMORE, EVIDENCE 1834 (3d ed. 1940).

16. The court would receive a verdict from this body, and from this verdict the court would form its conclusions. It was not uncommon to have as many as eighty-four jurors sitting at a trial. PLUCKNETT 120-24. Thus, the early jury trial was in and of itself a public trial.

17. The conduct of the English king was always clothed with some form of legal efficacy. In this kind of atmosphere a community trial would always give the conduct of the king the appearance of legality. JENKS, THE BOOK OF ENGLISH LAW 45 (5th ed. 1953).

tion of the Star Chamber.¹⁸ Although the Star Chamber has been historically associated with the *in camera* proceeding, secret trials were not held in that tribunal.¹⁹ On the other hand, the effective right to a trial by jury was denied. The defendant was not allowed the privilege of being confronted by witnesses. There was no privilege against self-incrimination. The defendant was denied the effective aid of counsel. The accused was unable to call witnesses in his own behalf. In many cases torture was used to exact a confession.²⁰ The accused was often questioned in private.²¹

For a nation that purported to be governed by a rule of law, practices such as those which existed in the Star Chamber could not long be tolerated.²² Public opinion began to run high against the tribunal with the result that the common law lawyers and judges united with parliament to achieve the abolition of the Star Chamber in 1641.²³ Many of its unfair practices remained, however and the people were still dissatis-

18. In early English legal history the king had a body of learned men to aid him in answering questions of law and to formulate legislative policy. This body was known as the King's Council. The Council had both legislative and judicial power. Eventually the division between the legislative and judicial duties of the Council became more pronounced. When the Council sat as a judicial body it came to be known as the Court of the Star Chamber. CARTER, A HISTORY OF THE ENGLISH COURTS 79, 80 (5th ed. 1927); 5 HOLDSWORTH 156; 1 POLLOCK & MAITLAND 93. See also, Note, 12 AM. L. REV. 21.

19. This concept of the Star Chamber's secret procedure is reflected in some of the modern cases. See *Davis v. United States*, 247 F.2d 394 (8th Cir. 1917). This is incorrect as Professor Holdsworth points out. "It is true that the prisoner was prevented from calling witnesses and preparing his defense. . . . But the trials were at least public." 5 HOLDSWORTH 195.

20. *Id.* at 185.

21. "1.) The prisoner was kept in confinement more or less secret till his trial, and could not prepare for his defense. He was examined and his examination was taken down.

2.) He had no notice beforehand of the evidence against him. . . . He had no counsel either before or at the trial . . . the witnesses were not necessarily . . . confronted with the prisoner. . . .

5.) It does not appear that the prisoner was allowed to call witnesses in his own behalf. . . ." 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 350 (1883).

However, the actual proceedings of the Star Chamber were open to the public. 5 HOLDSWORTH 195.

22. Among the first to attack the power of the Star Chamber were the common law lawyers and judges. here was much apprehension among the members of the legal profession in regard to the Star Chamber usurping the power of the common law. CARTER, A HISTORY OF THE ENGLISH COURTS 87 (5th ed. 1927); 1 HOLDSWORTH 508, 509.

23. The Star Chamber was not the only court that existed during this period that incurred the wrath of the public. For example, the council of Wales, Marches and the council of the North used many of the same techniques as the Star Chamber. 1 HOLDSWORTH 512-14.

fied with the existing procedure.²⁴ Many other reforms soon followed, some of which merely strengthened existing traditions while others introduced new concepts.²⁵

The most important new concept to evolve from the era of the Star Chamber was that of a completely independent jury.²⁶ During the period of the Star Chamber there were many instances where a jury was threatened with a fine, imprisonment, or the ordeal of facing the Star Chamber if it failed to bring in a verdict as directed by the court.²⁷ In 1670 the famous decision in *Bushel's* case freed the jury from any interference and coercion by the court.²⁸ Other fundamental rights which an accused began to enjoy included the right to call witnesses in his own behalf, the right to be represented by counsel and the right against self-incrimination.²⁹

It was during this evolutionary period that the public trial came to be thought of as a right of a free citizen.³⁰ Much of the power of the Crown had been wrested into the hands of the people and important new rights and liberties had been acquired. The public trial, although it had always been the custom, acquired new significance. It gave the individual protection against being denied any of his other fundamental rights. A public trial would make it difficult for a judge to abuse a jury or the accused. Any such abuses would cause much public indignation. Thus, it must have seemed implicit that the public trial was as much an essential element of a fair trial as any of the newer conventions.

In the light of Blackstone's argument for the public trial it would be incorrect to think of the public trial as having evolved into an exclusive right of the subjects.³¹ It was also a benefit to the Crown, but in a different manner than it had been previously. This form of trial assured justice to all parties. Thus, the public trial came to serve a dual

24. The jury was still coerced by the courts, and the accused was not allowed to be represented by counsel. For some interesting illustrations of these practices see FORSYTH, *HISTORY OF TRIAL BY JURY* 331-53 (1875).

25. For instance, the jury trial had existed in some form or another since the thirteenth century. PLUCKNETT 120.

26. The early jury trial like the public or community trial was not considered a right of the individual. Such a trial at that time was in fact thought of as a denial of a right. *Id.* at 125.

27. *Id.* at 125-35.

28. Vaughan 135, 124 Eng. Rep. 1006 (1670).

29. 1 HOLDSWORTH 336; JENKS, *THE BOOK OF ENGLISH LAW* 72 (5th ed. 1953); 3 WIGMORE, *EVIDENCE* 2250 (3d ed. 1940). By the beginning of the eighteenth century the English had developed most of the legal concepts that today are considered necessary ingredients of a fair trial.

30. During this period we find individuals demanding a public trial. It is inferred from this that these individuals felt that their rights would be assured if the public was admitted to the proceedings. See *The Trial of Lieutenant-Colonel John Lilbourne*, 4 How. St. Tr. 1270 (1649).

31. See 3 BLACKSTONE, *COMMENTARIES* *372.

purpose. It insured the integrity of the judicial system, and protected the rights of the accused.

At the dawn of the American Revolution the English subjects were enjoying a fair trial. Many of the elements of a fair trial can be found in the Sixth Amendment to the United States Constitution. The framers of that amendment had the same motives as their English forefathers had when they were formulating these legal concepts. They believed that in a nation which was to be governed by a rule of law, formulated by the people, the public trial was essential in order to assure the accused a fair trial. Further, it is not unsound to assume that the concept had a dual purpose in the United States as it did in England, maintaining judicial integrity and assuring the people as well as the accused a fair trial.

Modern courts have had much difficulty formulating a workable legal standard for the public trial. It is agreed that a public trial does not entitle admittance to all members of the public, *e.g.*, the courts do not deny a trial judge the privilege of excluding unruly members of the public.³² Problems have, however, arisen when the public has been excluded from the courtroom for other reasons. Also, questions develop in regard to the precise point in a trial at which the public may be excluded, how many members of the public can lawfully be excluded, whether the accused can waive a public trial or demand that the public not be admitted to his trial, and what effect the courts will give to the fact that a person has been denied a public trial.³³

As to the right of the accused to waive the public trial some courts have decided that the right belongs solely to the accused,³⁴ thus, to waive it is his privilege. At least one court has argued that the public trial is a right belonging to the public as well as to the accused,³⁵ therefore, it cannot be waived at the mere whim of the accused. In the latter jurisdiction the defendant is not deemed to have waived his right by failure to have raised a timely objection.³⁶ In the former jurisdictions the right has been deemed to have been waived by failure to raise the issue at the trial.³⁷

32. *Davis v. United States*, 247 Fed. 394, 395 (8th Cir. 1917); *People v. Hartman*, 103 Cal. 242, 37 Pac. 153 (1894); 1 COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927).

33. Annot., 48 A.L.R.2d 1436 (1956).

34. *United States v. Sorrentino*, 175 F.2d 721 (3d Cir. 1949); *Henderson v. State*, 207 Ga. 206, 60 S.E.2d 345 (1950).

35. *Neal v. State*, 86 Okla. Crim. 283, 192 P.2d 294 (1948).

36. An attorney cannot waive a defendant's right to a public trial without the defendant being present. *State v. Delzoppo*, 86 Ohio App. 381, 92 N.E.2d 410 (1949).

37. *Baker v. Utecht*, 221 Minn. 145, 21 N.W.2d 328 (1946); *State v. Smith*, 90 Utah 482, 62 P.2d 1110 (1936).

The courts have not always been in accord as to what effect should be given to the outcome of a trial where the defendant has shown that he has been denied a public proceeding. It has been held that even when the accused can show that his trial was not public he still must be able to show an injury resulting from the denial of such a trial or the court should refuse a reversal.³⁸ Other jurisdictions have considered the denial reversible error *ipso facto*.³⁹

A problem which is central to all of these questions is the determination of what constitutes a public trial. In obscenity cases where the general public have been excluded it has been held that the requirement has been met in so long as the proceedings are not secret.⁴⁰ Other courts have held that in special instances the right to have spectators present might be curtailed, but these courts have said that this curtailment cannot be total except in extraordinary circumstances.⁴¹ The courts have not been precise in defining a legal standard for the public trial. In light of its historical development, and its purpose for being in the Constitution, a legal standard should be developed keeping within the tenor of this purpose. In keeping with the spirit and purpose of the public trial the trial judge should be allowed to exclude certain classes of the public upon the showing of a necessity for such. The denial of such a trial should be considered a prejudicial error unless there is a proper showing of a necessity. There should be no precise definition as to how many members of the public must be present to constitute a public trial.⁴² The legal standard should be a standard that would be applied in each individual case according to the facts in that case. The question should be whether the accused and the people, in light of all circumstances, were afforded a public trial to the extent that there was reasonable assurance that a fair trial was carried out.

The purpose of the public trial is to insure the individual those fundamental rights which are requisite ingredients of a fair trial. When,

38. Callahan v. United States, 240 Fed. 683 (9th Cir. 1917); Reagan v. United States, 202 Fed. 488 (9th Cir. 1913).

39. Davis v. United States, 247 Fed. 394 (8th Cir. 1917). But in Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944), the 9th Circuit adopted the same views as held by the 8th Circuit. The state courts still appear to be split on this point. People v. Kerrigan, 73 Cal. 222, 14 Pac. 849 (1887); People v. Harris, 302 Ill. 590, 135 N.E. 75 (1922); State v. Rime, 209 Iowa 864, 226 N.W. 925 (1929); People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954).

40. Scott v. State, 249 Ala. 304, 30 So.2d 689 (1947); Keddington v. State, 19 Ariz. 457, 172 Pac. 273 (1918).

41. People v. Byrnes, 84 Cal. App. 2d 192, 190 P.2d 290 (1948); Neal v. State, 86 Okla. Crim. 283, 192 P.2d 294 (1948).

42. "It is for the protection of all persons accused of crime . . . that they may be awarded a fair trial." People v. Murray, 89 Mich. 276, 286, 50 N.W. 995, 998 (1891).

by the circumstances of the individual case, the public trial is found to undermine a fair trial it should be modified to conform with its original purpose.