

TRIAL BY JURY.

"He begins with determining the meaning of the word *δικασαι* in the Greek, and *judices* in the Roman writers. "The common acceptation of these words (says he), and the idea generally annexed to them, is that of *presidents of courts*, or, as we call them, *judges*; as such they are understood by commentators, and rendered by critics. Dr. Middleton, in his life of Cicero, expressly calls the *judices, judges of the bench*; and Archbishop Potter, and in short all modern writers upon the Greek or Roman orators, or authors in general, express *δικασαι* and *judices* by such terms as convey the idea of *presidents in courts of justice*. The propriety of this is doubted of, and has given occasion for this enquiry; in which is shown, from the best Greek and Roman authorities, that neither the *δικασαι* of the Greeks, nor the *judices* of the Romans, ever signified *presidents in courts of judicature*, or judges of the bench; but, on the contrary, they were distinguished from each other, and the difference of their duty and function was carefully and clearly pointed out by the orators in their pleadings, who were the best authorities in those cases in which the question related to forms of law and methods of proceeding in judicial affairs and criminal process.

"The presidents of courts in criminal trials at Athens were the nine archons, or chief magistrates, of which whomever presided was called *ηγεμων δικαστηρις* president of the court. These nine presided in different causes peculiar to each jurisdiction. The archon, properly so called, had belonging to his department all pupillary and heritable cases; the *βασιλευς* had charge of the public worship, and the conduct of criminal processes; exercised authority over strangers and sojourners, and attended to various other matters; and the *thesmothetai*, the six junior archons, judged causes assigned to no special court, &c. (See *Liddell & Scott*.)

"Wherever then the *ανδρες δικασαι*, or judicial men, are addressed by the Greek orators in their speeches, they are not to be understood to be the presiding magistrates, but another class of men, who were to inquire into the state of the cause before them, by witnesses heard, to report their opinion and, after inquiry made and witnesses heard, to report their opinion and verdict to the president, who was to declare it.

"The several steps and circumstances attending this judicial proceeding are so similar to the forms observed by our jury, that the reader cannot doubt but that the nature, intent, and proceedings of the *δικαστηριον* among the Greeks were the same with the English jury; namely, for the protection of the lower people from the power and oppression of the great, by administering equal law and justice to all ranks; and therefore when the Greek orators directed their speeches to the *ανδρες δικασαι*, as we see in Demosthenes, Æschines, and Lysias, we are to understand it in the same sense as when our lawyers at the Bar say, *Gentlemen of the Jury*."

"So likewise among the Romans, the *judices* in their pleadings at the Bar, never signified judges of the bench, or presidents of the court, but a body or order of men, whose office in the courts of judicature was distinct from that of the prætor or *judex* questionis, which answered to our judge of the bench, and was the same with the archon, or *ηγεμων δικαστηρις* of the Greek; whereas the duty of the *judices* consisted in being empanelled, as we call it, challenged, and sworn to try uprightly the case before them; and when they had agreed upon their opinion or verdict, to deliver it to the president who was to pronounce it. This kind of judicial process was first introduced into the Athenian polity by Solon, and thence copied into the Roman republic, as probable means of procuring just judgment, and protecting the lower people from the oppression or arbitrary decisions of their superiors.

"When the Romans were settled in Britain as a province, they carried with them their *jura* and *instituta*, their laws and customs, which was a practice essential to all colonies; hence the Britons, and other countries of Germany and Gaul, learned from them the Roman laws and customs, and upon the irruption of the northern nations into the southern kingdoms of Europe, the laws and institutions of the of the Romans remained, when the power that introduced them was withdrawn; and Montesquieu tells us, that under the first race of kings in France about the fifth century, the Romans that remained, and the Burgundians their new masters, lived together under the same Roman laws and police, and particularly the same forms of judicature. How reasonable then is it to conclude, that in the Roman courts of judicature continued among the Burgundians, the form of a jury remained in the same state as it was used at Rome. It is certain, Montesquieu, speaking of those times, mentions the *paires*, or *hommes de fief*, homagers or peers, which in the same chapter he calls *judges, judges*, or jurymen: so that we hence see how at that time the *hommes de fief*, or 'men of the fief,' were called *peers*, and those peers were *judges* or jurymen. These were the same as are called in the laws of the Confessor, *pers de la tenure*, the 'peers of the tenure, or homagers' out of whom the jury of peers were chosen, to try a matter in dispute between the lord and his tenant, or any other point of controversy in the manor. So likewise, in all other parts of Europe, where the Roman colonies had been, the Goths succeeding them, continued to make use of the same laws and institutions, which they found to be established there by the first conquerors. This is a much more natural way of accounting for the origin of a jury in Europe, than having recourse to the fabulous story of Woden and his savage Scythian companions, as the first introducers of so humane and beneficent an institution."

Such are the opinions of eminent writers, but, as will be seen, we do not entirely agree with them.