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Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind. *

By MORRIS S. ARNOLD**

As readers of plea rolls, we will have long since learned to be skeptical of the facts contained in our documents. Jurisdictional ruses, fictional procedural devices, and other non-traversable tricks are familiar; and even if the meaning of some allegations is not exactly clear, we know them when we see them, or at least think we do. Sometimes we can find comfort in thinking that the clerk who entered them did not know precisely what they meant either; or we may occasionally seek solace in the possibility—sometimes the sure knowledge—that they meant nothing at all.

A similar problem of interpretation presents itself to an investigator who is interested in medieval rules of tort liability, because most plea roll entries of trespass (of tort I may as well have said) are inscrutable. The questions which are uppermost in our minds when we turn to the plea rolls are obscured by an almost invariable pair of impenetrable devices: the general issue and the general verdict. A recent view¹ may allow us to blame this unfortunate state of affairs on the lack of trained men available to patrol what Maitland called “a much governed and a little England;”² and so our difficulty can be seen as merely symptomatic of a larger necessity for self-government on the local level.

Perhaps more striking is the proposition that Professor Milson has made famous: that the “not guilty” plea in trespass is a

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1. J. Dawson, *A History of Lay Judges* (1960) at 125 *et seq.*, attributes the group verdict to a lack of professional lawyers to administer a more complex system. The general verdict can also be seen as the result of the same difficulty.

2. F. Pollock and F. Maitland, *History of English Law*, v. 1 (1969), p. 688.

vestige of the ancient denial, a residual bequest from a legal system whose highest aspiration was merely to settle a dispute.³ If this is so, the argument runs, it may follow that the blank plea and the blank answer are not merely "procedural devices," not just pieces of bad luck that keep us from seeing the substantive rules that all professional lawyers knew: instead they are the remnants of the ancient pattern of a law suit in which no substantive law was involved because none could be. What this means, in a sense, is that it is not our records that are at fault for hiding the answers to our questions; it is we who are at fault for asking our records questions that had no answers. The real difficulty is not, according to this view, that we cannot see behind the records; it is that there is nothing there to see. I hope in this article to make some small and tentative contribution to the understanding of these theses; supplementing or modifying them as the evidence may seem to require.

I

Every first-year law student regards it as a trivial fact of life that facts in issue are essential to legal analysis; almost all the teaching techniques currently in vogue and collectively masquerading under the name "Socratic method" depend heavily on that elementary principle. Thirteenth-century lawyers appreciated that principle, too; and it will be argued here that in some circumstances they appreciated it with the same sophistication as do modern lawyers. The assize of novel disseisin furnishes the best proof.

By the late thirteenth century, the assize of novel disseisin had become the chief means of trying title to land. Because the question put to the jury, whether the plaintiff was "seised and disseised," was not very easily answered in real cases, assize juries obtained by the Statute of Westminster II, Chapter 30, the right to speak specially. The statute provides:

[I]t is ordained that the Justices assigned to take Assizes shall not compel the Jurors to say precisely whether there has been a disseisin or not when they want to speak the truth of the matter and seek the help of the Justices.

The device of a special verdict was very often employed as it allowed juries to avoid liability in an attain for misapplication of the law to the facts. The Year Books abound in examples of its use, and it is likely that the special verdict did more to develop the peculiar English rules of real property than any other single device.

3. See Milsom, "Reason in the development of the Common Law," 81 L.Q.R. 496 (1965); S. Milsom, *Historical Foundations of the Common Law* (1969) 253 *et seq.*; Milsom's Introduction to Pollock and Maitland, *op.cit.*, *supra* note 2, at lxix *et seq.*

Let me take one example to make this clear. In 1347 a plaintiff, claiming he has been disseised, brings a writ of novel disseisin.⁴ The jury, being sworn generally on the question of disseisin, returns and says that the plaintiff was the defendant's brother's apprentice and was owed eight marks which represented three years' back wages; that because the defendant's brother was unable to pay, the plaintiff secured from him a conveyance of land defeasible when he had levied from it the money owed; and that three weeks later his employer died without having paid and before the back wages had been levied, whereupon the defendant entered. Evidently the memorandum of the feoffment, if any, was absolute, but livery had been conditional. Now the difficulty which the jury faced is quite plain: was the plaintiff entitled to full seisin, seisin only until the debt was levied, or no seisin at all? The jury avoided its difficulty by stating the facts and asking the judges to decide the case. The court, incidentally, decided that the conditional delivery was good, thereby demonstrating that what we call an "equitable mortgage" may have very ancient roots indeed.⁵ But the point is that complex facts such as these must have been very commonly met by juries deciding questions of title, and the ability to give a special verdict was an important boon to them: they could simply speak the facts and ask the justices' help.⁶

Occasionally after a recital of special facts a jury will conclude generally; as, for instance, after giving the circumstances of a case they say that the plaintiff is disseised. For obvious reasons this kind of verdict occurs rarely, and the reporters note that jurors give it "at their peril."⁷ Assize judges were usually careful to allow juries the benefit of the statute;⁸ but sometimes it looks as though they violated its spirit by asking a jury to conclude generally after

4. *Liber Assissarum* (hereinafter cited as *Lib. Ass.*), f. 83v, pl. 18; same case, *Y.B. 21 Edw. 3*, f. 11, pl. 2 (1347).

5. Cf. *Lib. Ass.*, f. 27, pl. 24 (1336).

6. *Lib. Ass.*, f. 4v, pl. 5 (1329): "... et [le jurie] pria discrecioun"; *Lib. Ass.*, f. 31, pl. 16 (1337): "... et prieront discressioun de Court"; *Lib. Ass.*, f. 85, pl. 24 (1348): "... et frieront discrecion"; *Lib. Ass.*, f. 93, pl. 37 (1348): "... et super hoc petunt discretionem justiciariorum"; *Lib. Ass.*, f. 115, pl. 4 (1351): "... et priomus vostre discrecioun."

7. See, e.g., *Lib. Ass.*, f. 47, pl. 15 (1342); "il puet . . . doner expresse verdit a lour peril, et sic factum fuit ibi." Compare *Lib. Ass.*, f. 41v, pl. 12 (1340), where the assize's special verdict is followed by "issint sembloit a eux que el fuit disseise"; the court replies: "issint semble a nous. . . ."

8. See, however, *Y.B. 20 & 21 Edw. 3*, 10 (1346) (Rolls Series), an action of Entry *sur disseisin*, where the judge forced the jury to speak precisely to the question of seisin.

their special verdicts, or by asking how the case looks to them.⁹ For instance, in 1345 a complicated set of facts involving what we would call an executory devise was found by a jury; and the reporter says "the justices coaxed (*exciteront*) the assize as much as they could to hold for the plaintiff, so in the end they said that the plaintiff was seised and disseised."¹⁰ However, for the most part the assize jury's right simply to speak the facts and place the onus of deciding the law on the judges seems to have been respected; and the enormous number of special verdicts in actions of novel disseisin recorded in the Year Books attests the usefulness of the technique.¹¹ That technique was flexible enough that a trial judge will often respond to a special verdict with special interroga-

9. *E.g.*, Y.B. 16 Edw. 3, ii, 221 (1342) (Roll Series): "Al Assize. Quei vous semble, donques"; *Lib. Ass.*, f. 49, pl. 3 (1342); ". . . demande fuit del assize si lour semblit que ele fuit dysseise; ils disoyent que oye!"; *Lib. Ass.*, f. 11v, pl. 10 (1333): "Donques a vostre dit il est disseisi. Lassise dit oyl."

10. *Lib. Ass.* f. 159v, pl. 17 (1345).

11. See, for example, *Lib. Ass.*, f. 6, pl. 16 (1329); *Lib. Ass.*, f. 7, pl. 4 (1330); *Lib. Ass.*, f. 16, pl. 16 (1334); *Lib. Ass.*, f. 17, pl. 25 (1334); *Lib. Ass.*, f. 17v, pl. 28 (1334); *Lib. Ass.*, f. 20, pl. 37 (1334); *Lib. Ass.*, f. 23, pl. 20 (1336); *Lib. Ass.*, f. 29, pl. 6 (1337); *Lib. Ass.*, f. 30v, pl. 11 (1337); *Lib. Ass.*, f. 31, pl. 14 (1337); *Lib. Ass.*, f. 32, pl. 21 (1337); *Lib. Ass.*, f. 41v, pl. 11 (1340); *Lib. Ass.*, f. 52, pl. 21 (1343); *Lib. Ass.*, f. 64, pl. 9 (1345); *Lib. Ass.*, f. 83v, pl. 18 (1347); *Lib. Ass.*, f. 122v, pl. 17 (1352); *Lib. Ass.*, f. 124, pl. 36 (1352); *Lib. Ass.*, f. 127, pl. 39 (1352); *Lib. Ass.*, f. 132, pl. 66 (1352); *Lib. Ass.*, f. 140, pl. 50 (1353); *Lib. Ass.*, f. 143v, pl. 68 (1353); *Lib. Ass.*, f. 146v, pl. 11 (1354); *Lib. Ass.*, f. 151, pl. 28 (1354); *Lib. Ass.*, f. 152v, pl. 37 (1354); *Lib. Ass.*, f. 167, pl. 52 (1355); *Lib. Ass.*, f. 168v, pl. 59 (1355); *Lib. Ass.*, f. 169, pl. 60 (1355); *Lib. Ass.* f. 170, pl. 64 (1355); *Lib. Ass.*, f. 179, pl. 34 (1356); *Lib. Ass.*, f. 185, pl. 3 (1357); *Lib. Ass.*, f. 192, pl. 30 (1357); *Lib. Ass.*, f. 193v, pl. 33 (1357); *Lib. Ass.*, f. 199, pl. 15 (1359); *Lib. Ass.*, f. 201, pl. 42 (1359); *Lib. Ass.*, f. 202, pl. 1 (1360); *Lib. Ass.*, f. 202v, pl. 2 (1360); *Lib. Ass.*, f. 203, pl. 3 (1360); *Lib. Ass.*, f. 207, pl. 10 (1360) (*mort d'ancestor*); *Lib. Ass.*, f. 208, pl. 12 (1360); *Lib. Ass.*, f. 212v, pl. 8 (1361); *Lib. Ass.*, ff. 213 & v. pl. 11, 12, 14, & 15 (1361); *Lib. Ass.*, f. 214, pl. 2 & 3 (1362); *Lib. Ass.*, f. 216, pl. 4 (1363); *Lib. Ass.*, f. 217v, pl. 8 (1363); *Lib. Ass.*, ff. 221 & v. pl. 2 & 3 (1365); *Lib. Ass.*, f. 222v, pl. 7 (1365); *Lib. Ass.*, f. 228v, pl. 23 (1365); *Lib. Ass.*, f. 234v, pl. 12 (1365); *Lib. Ass.*, f. 235v, pl. 15 & 16 (1365); *Lib. Ass.*, f. 239, pl. 3 (1366); *Lib. Ass.*, f. 241, pl. 11 (1366); *Lib. Ass.*, f. 241v, pl. 13 (1360); *Lib. Ass.*, f. 249v, pl. 38 (1366); *Lib. Ass.*, f. 250v, pl. 1 (1367); *Lib. Ass.*, f. 251, pl. 2 (1367); *Lib. Ass.*, f. 266v, pl. 5 (1369); *Lib. Ass.*, f. 268v, pl. 9 (1369); *Lib. Ass.*, f. 270, pl. 17 (1369); *Lib. Ass.*, f. 280, pl. 45 (1369); *Lib. Ass.*, f. 281v, pl. 2 (1370); *Lib. Ass.*, f. 289, pl. 26 (1371); *Lib. Ass.*, f. 291, pl. 27 (1371); *Lib. Ass.*, f. 293, pl. 34 (1371); *Lib. Ass.*, f. 312, pl. 8 (1373); *Lib. Ass.*, f. 318, pl. 5 (1375).

tories of his own;¹² and sometimes additional questions will be suggested by the central court justices when the special verdict is adjourned *en banc* for discussion.¹³

The special verdict, by forcing facts out in the open, obliged professional lawyers to grapple with such recondite difficulties as contingent remainders and the duty of care owed by executors in dealing with the assets of the deceased;¹⁴ and it was this device that gave English property law the toughness it would need to survive relatively unscathed for four or five more centuries. The special verdict created for English property law the kind of finely-hewn distinction for which it is famous: that, for instance, for purposes of the assize a person who fails to enter for fear of death (*pur dout de mort*) was nevertheless "seised";¹⁵ but one who was merely afraid and dared not enter was not.¹⁶ Moreover, it was not only the common-law judges who made good use of the special verdict; it was used by the Chancery¹⁷ and the Council¹⁸ as well.

II

But when we leave the assize of novel disseisin behind we are on less sure ground. If we turn from the assize rolls, which are full of special verdicts, and look to the trespass cases in the rolls of the Court of Common Pleas and King's Bench, we find a striking contrast: the special verdict seems to be only rarely employed,¹⁹ and after about 1335 it is virtually unknown. Of special interrogatories I have seen only a very few examples. The impression, then, is that fact-discovering techniques were simply not regularly employed in tort actions and that the jury was often given free rein to decide the case as it pleased. But that may be imposing too modern a construction on the situation; we ought rather to say that the jury could be forced to bear the burden of the decision. For it was a clear burden in many instances, since the attainr was still a real threat in the fourteenth century as the rolls and Year Books attest.²⁰ At any

12. *E.g.*, *Lib. Ass.*, f. 151, pl. 28 (1344); *Lib. Ass.*, f. 169, pl. 60 (1355); *Lib. Ass.*, f. 207, pl. 10 (1360); *Lib. Ass.*, f. 217v, pl. 8 (1363).

13. *Lib. Ass.*, f. 199, pl. 15 (1359); *Lib. Ass.*, f. 209, pl. 15 (1360).

14. *See Lib. Ass.*, f. 221v, pl. 3 (1360).

15. *Lib. Ass.*, f. 228v, pl. 23 (1364).

16. *Lib. Ass.*, f. 234, pl. 11 (1365).

17. *Lib. Ass.*, f. 324, pl. 5 (1376).

18. *Lib. Ass.*, f. 228, pl. 22 (1364).

19. *E.g.*, CP/40/429/414; CP/40/384/109. Fuller documentation will be included in my study of fourteenth-century trespass currently being completed for the Selden Society.

20. For examples of attainr actions brought to a conclusion (most do not have results noted) see CP/40/321/63 (1340) (successful); CP/40/

rate an occasional Year Book case bears out the impression of the rolls: in cases involving writs of entry²¹ and *formedon*²² in the thirteenth and fourteenth centuries the justices refuse to allow juries to give special verdicts. It is clear that the courts were not disposed to expand the provisions of Chapter 30 of Westminster II to include actions other than novel disseisin.

Still, the evidence of the rolls is not conclusive as to actual practice as distinguished from what the statute required. What is enrolled in the *postea* clause is apparently only a transcript of what a *nisi prius* clerk thought worth jotting on the dorse of a transcript of pleadings; and behind its blank assertions may be obscured some rather lively give and take between judge and jury. While it is safe to conclude that juries could not claim a general right to speak specially, it does not follow that they never or only rarely were allowed to. There is, in fact, some Year Book evidence that special verdicts with interrogatories were employed in all sorts of actions.²³ The problem is that medieval *nisi prius* reports are so few, and our glimpses of the trial process so fortuitous, that it is hazardous to generalize. But one such fortuitous look in the year 1353 creates an impression entirely opposite from that of the plea rolls. In that year a reporter gives us a look at the work of the King's Bench while sitting in Kingston and elsewhere. In that one report alone combinations of special verdicts and special interrogatories in tort cases yield a number of very striking legal analyses. Examples of questions presented are: what circumstances charge a master for his servant's purchase,²⁴ what sorts of people can be called accessories,²⁵ whether threatening words alone can amount to an actionable assault,²⁶ whether baby hawks hatched and nesting in a tree belong to a vendee of the tree,²⁷ and whether a defendant is liable for damage done by cattle that escaped by virtue of his lack of due care.²⁸ There are also examples in this report of these kinds

411/232 (1363) (successful); CP/40/411/332v (1363) (unsuccessful); CP/40/425/356 (1366) (unsuccessful). For other successful attaints, see Y.B.B. 4 Edw. 3, f. 34, pl. 21 (1330); 11 & 12 Edw. 3, 474 (1338) (Rolls Series); Lib. Ass., f. 177v, pl. 24 (1357); Lib. Ass., f. 255, pl. 18 (1367); Y.B.B. 42 Edw. 3, f. 26, pl. 13 (1368); 46 Edw. 3, f. 23, pl. 5 (1372).

21. Y.B. 20 & 21 Edw. 1, 8 (1292) (Rolls Series); see also, Y.B. 13 & 14 Edw. 3, 12 (1339) (Rolls Series).

22. Y.B. 16 Edw. 3, ii, 440 (1342) (Rolls Series).

23. Lib. Ass., f. 145v, pl. 4 (1364) (dower); Lib. Ass., f. 221, pl. 1 (1363) (waste); Lib. Ass., f. 223v, pl. 9 (1363) (*ejectio custodia*).

24. Lib. Ass., f. 133v, pl. 5 (1353).

25. Lib. Ass., f. 133v, pl. 4 (1353).

26. Lib. Ass., f. 134, pl. 11 (1353).

27. Lib. Ass., f. 136, pl. 29 (1353).

28. Lib. Ass., f. 141, pl. 56 (1353).

of fact-finding techniques being employed in what we would call criminal actions.²⁹

It may be that juries often gave special verdicts or judges often used special interrogatories, and the nature of the enrollment has deceived us. I have in fact identified the record of the case, cited above,³⁰ which deals with the question of whether threatening words alone can amount to an actionable assault, and a comparison of the record with the report proves very instructive. The report reads:

A collector of the fifteenth of a vill sued for the king and himself against certain persons, claiming that while he was collecting the King's money they assaulted and battered him and by virtue of this [such?] menace chased him out of town. The defendant pleaded not guilty.

It was found [by the jury] that while the plaintiff was performing his office the defendants rebuked him with bad words so that for that reason he did not dare stay in town; but with regard to the battery, they were not guilty.

And because it was found that they had rebuked *etc.* and in that had committed an assault, it was awarded that the plaintiff recover his damages fixed by the inquest at 100 shillings. (*Query* the result if the King had not been a party).

The record, on the other hand, merely recites in typically blank fashion that the defendant was found guilty of an assault; no reference is made to the special verdict.³¹ It is the purest chance that a report survived in this instance to tell us that this record, which is identical to literally thousands of others, involved a case in which the jury was in doubt and gave a special verdict leaving the matter of law to the judges. It follows that we may not infer from the entry on the plea roll of a general verdict that the verdict was not special. This is a particularly subversive conclusion since it makes it virtually impossible for the historian of medieval tort liability and trial procedure to interpret the plea roll evidence.

There are other examples in the Year Books of special verdicts in trespass cases.³² But in 1407 when a jury asked in a writ of trespass to be able to speak at large, claiming specifically the benefit of Westminster II, Chapter 30, the judge refused. "You are not now in an assize," said Hankford, J., "for your charge is merely to say who was tenant of the freehold the day the trespass is alleged; thus you have nothing to do with whether the entry was congeable

29. *See, e.g., Lib. Ass., f. 137v, pl. 40 (1353).*

30. *Supra*, note 26.

31. KB/27/373/67v.

32. *E.g., Lib. Ass., f. 99, pl. 60 (1349); Lib. Ass., f. 94, pl. 43 (1349); Lib. Ass., f. 259v, pl. 9 (1368); Y.B. 48 Edw. 3, f. 25, pl. 8 (1374).*

or not.”³³ In 1348 the commons petitioned for general permission for all jurors “to tell the truth if they wish,” but the prayer was rejected.³⁴ So it seems that the taking of special verdicts in trespass cases was entirely discretionary with the trial judge; and we may never know enough to be able to say what the general practice was.

III

The medieval trial process itself, whether of trespass cases or of others, is in many respects obscure and may well remain in some particulars forever dark to us: the Year Books say very little about it. Yet there is some information there to be gleaned, and a general outline of the procedures followed at trial can be reconstructed. Perhaps I ought first to say something about the frequency of appearance at trial by counsel. That is, was it usual for a lawyer to be present representing the parties at a trial, say, in the fourteenth century? We may first vouch the existence of the *Liber Assisarum* as proof that lawyers were following the trial circuits in the counties;³⁵ it seems likely that assize practice constituted a large part of the work of apprentices. As the chief means of trying title in the fourteenth century, the workings of the assize of novel disseisin had become quite complex. Of course it bypassed the central courts altogether, since the issues were already framed in the writ. But while there was strictly speaking no counting to be done, there was a large amount of pleading involved; and it would be to the advantage of a litigant to hire counsel to do it. In fact, many of the serjeants at law and justices of Richard II's reign are first brought to our notice as trial counsel in the *Liber Assisarum*. We can hardly but think, then, that there was a rather large group of lawyers at the assizes in the more populated areas, and that part of their business would be handling the trial of cases submitted to those many assize justices who also held commissions of *nisi prius*.³⁶ Occasionally, we can in fact see a lawyer at work in the trial of issues reached at Westminster.³⁷ There were as well local counsel available for trial work.³⁸

33. Y.B. 7 Hen. 4, f. 11, pl. 3 (1407).

34. *Rotuli Parliamentorum*, ii, 203.

35. See generally Bolland, “The Book of Assizes,” 2 *Camb. L. J.* 192 (1924-6). But see Putnam, “Chief Justice Shareshull and the Economic and Legal Codes of 1351-52,” 5 *Toronto L. J.* 251, at 269 *et seq.* (1944), where Putnam doubts Bolland's conclusion that the *Liber Assisarum* was composed on circuit.

36. The rolls of the Court of Common Pleas show that a very large number of verdicts, perhaps a majority, were taken by assize justices.

37. For example, *Lib. Ass.*, f. 149, pl. 20 (1354).

38. For a writ of annuity brought by counsel of this sort for his retainer, see CP/40/396/58v (1360).

The next question that comes to mind is the kind of work these trial counsel did. At the trial itself, there would be jurors to be challenged; and the Year Books say that trial counsel also "give evidence."³⁹ The meaning of the phrase is fairly plain: counsel would recite his client's version of the facts to the assembled jury. There is such a speech in the Year Books as early as 1312.⁴⁰ There is even an example from the late fourteenth century of trial counsel telling the jury the law applicable to his facts: "Wadham said in evidence to this assize that if a man purchase land in fee simple and dies without heir on his father's side it will descend to the heir on his mother's side."⁴¹ There is some indication that that statement of the law was approved by the trial judge. Questions of law, moreover, could be raised more indirectly by the statement of pure facts by trial counsel speaking in evidence. Thus in 1440 counsel raises the objection that what his opponent is saying in evidence is irrelevant to the issue pleaded and asks that the judge "tell the jury what the law is in this case."⁴² So again Littleton says that if a certain kind of evidence is offered then "we who are judge here . . . will tell the jury what the law is in this case."⁴³ These are fairly late cases; and it is difficult to know whether instructions of this sort were at all common in the middle ages. I have no example of these sorts of instructions being employed in trespass cases. But it needs to be said that these kinds of discussions among judge, jury, and counsel seem more likely to have taken place under the general issue than otherwise; and that the law made at Westminster in deciding the issue to go to the jury may well have been complemented by the law made in the country in deciding what evidence could go to the jury under that issue.

That there was by the fifteenth century a clear notion of what we would call "relevance" at a medieval trial is beyond question: that is, the evidence offered must tend to prove the issue reached at Westminster; and even if the facts contained in a special verdict exonerated the defendant, if they were not admissible under the plea, they would be ignored.⁴⁴ Mr. Justice Holmes said that the rule of relevance was simply a concession to the shortness of human life. But to a medieval judge the rule probably rested on estoppel: a man may not say one thing and then say another. The general issue in trespass, however, will furnish an example of how elusive

39. Examples of "giving evidence" may be found in *Lib. Ass.*, f. 161, pl. 20 (1355) and in *Lib. Ass.*, f. 221, pl. 2 (1363).

40. *Y.B. 6 Edw. 2*, 197 (Selden Society, vol. 34).

41. *Y.B. 6 Rich. 2* (unpublished).

42. *Y.B. 20 Hen. 6*, f. 24, pl. 6 (1440).

43. *Y.B. 18 Edw. 4*, f. 28, pl. 27 (1478).

44. *Y.B. 22 Hen. 6*, f. 33, pl. 50 (1442).

that concept could be. The phrase "not guilty," if we look at it as an original proposition and with uneducated eyes, looks just like "no wrong"; "guilt" implies moral blameworthiness and "no wrong" could thus mean either that the facts alleged against the defendant are false or that what the defendant did constituted no legal wrong. More and more, however, the phrase "not guilty" seems to mean "I did not do it." So the later Year Books seem to indicate that self-defense must be pleaded specially.⁴⁵ This case is easy enough, but there are harder ones. The Year Books, for instance, say on the one hand that in false imprisonment an agreement cannot be pleaded specially but must be given in evidence under the general issue;⁴⁶ but that, on the other hand, license in trespass to land must be pleaded specially.⁴⁷ These last two cases are separated in time by almost a hundred years, so they may reflect some deliberate change of mind. But they may in fact reflect only the confusion inherent in a statement that looks very much like "I did no wrong": it is inherently double. One way that difficulties of this sort might be threshed out would be in adjournments to the central courts. But if what we have said before about trials is correct, then much of this work must have taken place in the country and hence out of sight for historians; but it was not out of mind for trial lawyers and trial judges.

Something ought to be said about the activities of trial judges. Before the evidence is given, the jury is charged and the record is read to them presumably in English.⁴⁸ It is quite clear, however, that the word "charge" did not mean then what it does now, that it was not a means of apprising the jury of the law applicable to its case. The charge was simply an admonition to them to speak the truth of the issue reached in the record, to answer the question in dispute. In the rolls the Latin word *onerare* does the work the French word *charger* performs in the Year Books,⁴⁹ and conveys something of the meaning of the word in the middle ages: it simply put the *onus* on the jury to decide the matter. The jury was, to put it simply, "charged" with the responsibility of "speaking the truth according to their knowledge."⁵⁰ The jury is then locked up until it reaches a verdict; and the rest of the trial takes the course al-

45. *Id.*

46. Y.B. 14 Hen. 6, f. 2, pl. 12 (1434).

47. Y.B. 12 Hen. 8, f. 1, pl. 1 (1520) (*waste*). See also G. D [uncombe], *Tryals Per Pais, or the law of England Concerning Juries by Nisi Puris* 192, 224 (2d ed. 1682).

48. See J. Fortescue, *De Laudibus Legum Anglie* 61 (ed. S. Chrimes, 1942).

49. *Lib. Ass.*, f. 71v, pl. 10 (1346).

50. *Lib. Ass.*, f. 34v, pl. 12 (1338).

ready described—in trespass a general verdict is perhaps expected, although a judge may at his discretion allow the jury to speak specially. No more certain statement than this can be made.

IV

It is sometimes said that in the old modes of trial, battle and ordeal for instance, questions of law and fact were merged.⁵¹ Of this there can hardly be any doubt. But with the abolition of the ordeal and the disuse of battle, professional lawyers were forced to confront a device which had not the advantages of infallibility and inscrutability. More than any other single event in our legal history, the advent of the jury as a general trial mechanism hastened the day when a professional lawyer class was necessary for the governance of England; and it must have been a shattering experience for many to see the sudden abolition of the old ways. However that may be, the distinction between law and fact was clearly seen by the practicing lawyers of the thirteenth and fourteenth centuries. Bracton, in a famous passage, alludes to it.⁵² The Year Books refer to it occasionally as well; I hope a few examples will not be too tedious. In 1353 Knivet, J. remarks: "When a matter is found by verdict, and it is not found expressly that the plaintiff was disseised but the judges adjudge the disseisin, the disseisin thus judged is the act of the judges and the matter found is the act of the jurors. Therefore it is more natural to assign a false oath in what is the act of the jurors than in what is the act of the judges; for if the judge is mistaken it should be corrected by way of error."⁵³ In 1354 the reporter alludes to a defendant who had "pleaded in law to certain points and to certain others in fact."⁵⁴ In 1364 Chief Justice Green says to a jury: "Tell us the whole case, and let us get together [*convenir*] on the law."⁵⁵ In the same case, when it is objected that Westminster II, Chapter 30 applies only to assizes, the Chief Justice simply replies that the statute does not prohibit the taking of special verdicts in any case—which is clearly correct. Green indicates throughout that he has squarely in mind the distinction between law and fact, and he is evidently anxious to save the jury from its difficulty. Finally, in 1373 Belknap maintains: "Every verdict in the world, be it ever so plain, when the facts [*mattre*] are argued the law [*may go*] for one party or the other."⁵⁶

51. For example, T. Plucknett, *A Concise History of the Common Law* 417 et seq. (5th ed., 1956).

52. Bracton, f. 186b.

53. *Lib. Ass.*, f. 142, pl. 61 (1353).

54. *Lib. Ass.*, f. 146v, pl. 12 (1354).

55. *Lib. Ass.*, f. 227v, pl. 22 (1365).

56. *Lib. Ass.*, f. 307v, pl. 1 (1373).

The plain truth is that even before the abolition and disuse of the more supernatural modes of trial, juries had asked to be relieved of the burden of deciding matters of law. In 1202, for instance, a very short time after the earliest of our surviving records, a special verdict is found.⁵⁷ And there is no reason to suppose that the jury was liable for mistakes and the judge came not to be simply because of the latter's governmental status; they were conceived of as different sorts of persons doing different kinds of jobs. A Year Book reporter will occasionally assert that an attain does not lie against the members of a grand assize in a writ of right because "they are, in a way, [en maner] judges." They are "judges" we may suppose, because in deciding issues on "the mere right," the broadest possible general issue, they had necessarily to decide matters of law. There are other examples, but these should be sufficient to convince most that the distinction was well known.

If, then, the distinction between law and fact was well known, why were devices aimed at driving a wedge between judge and jury in all cases not earlier developed? Why weren't special verdicts and similar procedural mechanisms for examining facts always employed? Why were jurors, so far as we can tell, only rarely charged on the law either by counsel or the trial judge? I can only offer a few tentative reasons why things were as they were. Perhaps a lack of trained personnel available for sitting at trials reduced the possibility of hard legal analysis in all cases at *Nisi Prius*.⁵⁸ Perhaps then the discretionary nature of fact-finding techniques in trespass is only an indication of what might be regarded a rather cynical proposition: that the law was assiduous to define relationships between man and things, but as between man and man it assumed a somewhat less anxious posture. Perhaps again—and I hope I have not already pushed speculation past the point of utility—perhaps the plebiscite-on-the-case which a general verdict amounts to was simply thought to be the fairest means of deciding a dispute that may seem to involve irreconcilable equities. In an accidental fire case, for example, one of the two parties will have been ruined, and it will be a nice legal question as to which it shall be.⁵⁹

But I think I can say something more positively about why allowing juries in effect to decide law was a good deal more tolerable to medieval people than it would be to us. Parenthetically it is perhaps well to note here that while today we deny juries the right to decide law, we in effect give them the power to do so, except

57. *Select Civil Pleas* 179 (Selden Society).

58. See J. Dawson, *supra* note 1 at *id.*

59. For a similar view, see Milsom, "Law and Fact in Legal Development," 17 *Toronto L. J.* 1, 10 (1967).

in those few jurisdictions which require special jury issues; and even there juries can in fact do what they please. The operative curb, of course, is the individual juror's conscience; he knows he is supposed to follow the judge's directions. The point is that conscience plays a different, almost procedural role in modern law; and this is illustrated by the sharp dichotomy which is often said today to characterize law and morals. In the middle ages, however, the two were virtually inseparable, and to suggest a difference would have been more or less unthinkable. Positive legislation played a very small part in medieval law, especially the law of wrongs; custom, derived from shared societal assumptions, was the legal norm, not what some sovereign or his agent decreed. Law, certainly the law defining everyday duties to one's neighbor, was less law than life; it was, in Maine's fine phrase, a habit. That being the case, what more logical result could follow than that the jury, the representatives of the community, should in the end decide the matter? In the fourteenth century, at least until the latter part of it, there seems not yet to have been an elite lawyer class, jealous of its prerogatives and insistent on preserving to itself the function of lawmaking and lawfinding. That time, however, was not far away; and it is probably not coincidental that in the sixteenth century, when the lawyers' guilds were in some ways at the height of their power, the struggle for control over the jury came to a head. But that gets ahead of the story. In the fourteenth century a man became a man of law the same way he learned to be a smith or a skinner or a bowyer: he watched master craftsmen at work, sought their advice, and did his best to imitate them. It would, of course, be a long time before the law of England became a learned law; it was not taught in the universities because as to much of it there was no need. Why teach life when all one had to do was simply to live it? For the same reason that law did not need to be taught it also did not, in the ordinary case, need to be told to jurors; likewise jurors would often have no need to inquire of professionals. Custom, or a "logical" extension of custom, only dimly, if at all, perceived as different from a concrete, natural, and inevitable fact, bottomed on the bedrock of universal acceptance, will supply the answer. Of course for many of us medieval legal rights flow from the power patterns cast by a rigid socio-economic structure which indulged every presumption in favor of the *status quo* and relied heavily for its rules on class-producing arrangements like property and privilege. But for medieval people, especially those who found themselves on the bench or on a jury in a common-law court, the law simply was not regarded as consisting of external commands but of enforceable rights discoverable by logic and observation. These rights were not beyond the ken of lay people but were there

for any and all to discover. "Law was once a fact," Max Radin wrote, "and a fact not too difficult to ascertain."⁶⁰ In such a world the distinction between law and fact in tort law is for the academic lawyer; and it would be four hundred years before one appeared.

60. Radin, "Ex Facto Ius: Ex Jure Factum," in *Interpretations of Modern Legal Philosophies: Essays in Honor of Roscoe Pound*, 578 at 588 (ed. P. Sayre, 1947).