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PERSPECTIVE

## Literature's first courtroom drama: Brennu-Njáls Saga

By Mark Yohalem

“There was a man named Mord whose surname was Fiddle; he was the son of Sigvat the Red, and he dwelt at the ‘Vale’ in the Rangrivers. He was a mighty chief, and a great taker up of suits, and so great a lawyer that no judgments were thought lawful unless he had a hand in them.”

So begins *The Saga of Burnt Njal*, an Icelandic tale of murder and mayhem, written in the thirteenth century and set in the tenth, featuring what is likely the first courtroom drama in literature. The saga conjures a world in which wealth and warrior prowess – what we consider the hallmarks of a successful Viking chief – are weighed no more heavily than skill in the law. Thus, the titular Njal is not merely “rich in goods and handsome in face;” he is also “so great a lawyer that his match was not to be found,” a peerless attorney who “unraveled every man’s knotty problems.” For those who think that Chambers was the first lawyer-ranking service, consider Njal’s protégé Thorhall: “a strong man, hardy in both body and mind” who “had learned so much law that he was the third greatest lawyer in Iceland.” And lest clients believe that rate shock is a modern phenomenon, consider this exchange, in which a warrior-chief first cautions a kinsman who “knew nothing about who were the best lawyers” against retaining one Thorkel Geitisson (“though he knows the law well enough, he is far too wary”). He recommends instead “a man named Eyjolf” who

“is the best lawyer in the Westfjord’s Quarter” and is, confusingly, also identified as the “third greatest lawyer in Iceland.” But, the chieftain warns, “you will need to give Eyjolf much money if you are to persuade him to take the case.” Plus ça change, as the Normans say.

That high-price lawyers were once featured as combatants in a near-peer work to *Beowulf* is so extraordinary a proposition that one might declare “dayenu” and call this article done. But the truly unbelievable aspect of the saga is its climax in a soup-to-nuts courtroom drama that turns, ultimately, on a mastery of civil procedure and legal precedent.

The scene is the Althing (literally: “all thing”), a large folk gathering for trading, lawmaking, and litigation. In an act of escalation in a long-running feud, the villains have burned Njal and his family alive in their home. Njal’s faction decides to try and resolve by law what brawling and slaughter have thus far failed to settle, and one of them brings a lawsuit on the decedent’s behalf. After picking a jury, the good guys enlist Thorhall to advise them. The bad guys, offering a spectacular golden arm ring as retainer (“worth twelve hundred yards of the best homespun cloth” or about 19 cows), hire the aforementioned Eyjolf. At last, it seems, we will see who truly is the third greatest lawyer in Viking Age Iceland.

They meet at the Law Rock. The good guys make their opening statement, and the bad guys worry how the case is going. Eyjolf proposes that the villains’ leader resign his chieftaincy in favor of

his brother and change his residency to create a venue defect. “If your opponents do not get word of this, they will probably make a fatal error by pleading the case in the East Quarter Court rather than the North Quarter Court. This is a possibility they will overlook, and a Fifth Court charge can be lodged against them for pleading in the wrong court.” The client replies, “It could be that we are already repaid for that arm ring.” Holding this secret defect in reserve, he returns to the trial.

The protagonists put on their witnesses, and all seems to be going well. A series of direct examinations paints a damning picture of the villains. Then Eyjolf rises and declares that two of the jurors should be disqualified and a mistrial declared: one is second cousin to the plaintiff, the other sponsored the plaintiff’s baptism. “This caused a great stir; everyone said that the plaintiff’s case had been ruined, and all agreed that the defense had the upper hand over the prosecution.”

Thorhall, irritated that his clients had failed to warn him of this issue, assures them that “they should not let themselves be beaten down by a lawyer’s tricks and quibbles – this time, Eyjolf’s cleverness has failed him.” Thorhall explains to the gathered throng that the jurors are related “not to the plaintiff himself” (after all, the suit is brought on behalf of a dead man) “but only to the pleader” who had stood in for the suit. He instructs the jurors “to take their seats again because they were rightful jurymen.” Now, “everyone felt that the prosecution now had the upper hand over the defense.”

The villains ask Eyjolf whether “this is a valid point of law.” “Certainly,” he replies. “It was something we overlooked. But the game isn’t over yet.”

Eyjolf then challenges two other jurors, this time because they do not own the requisite land to serve on a jury. “I disqualify you in accordance with the procedural rules of the Althing and the common law of the land!” he cries, adding to his clients that “he would be greatly surprised if they could refute this point.” At this, “everyone praised Eyjolf highly, and said that no one could compete with him in legal skill.”

But Thorhall is not to be beaten. He makes an inquiry into the jurors’ personal property and learns that while they might not own much acreage, they do tend considerable herds of livestock. He pounces, invoking an obscure precedent under which “any man has the right to be on a jury if he owns milch animals, even though he owns no land.”

The villains ask Eyjolf if this is good law, and Eyjolf – revealing himself far from the third best lawyer in Iceland – is simply stumped. He rushes a messenger to the great law-speaker Skapti, who answers “it was surely good law, though few know it.”

Eyjolf makes a final challenge: four of the nine jurors should not have been seated because there were other jurors “still at home who live closer to the scene” of the slayings at issue. That leaves only five jurors, when the law prescribes nine. Eyjolf and his clients exult, but one of the good guys reminds another that “Njal once said that he taught Thorhall law

so well that he would prove to be the best lawyer in Iceland if it ever came to the test.”

Thorhall rises to the deceased Njal’s prediction. He invokes a harmless-error doctrine under which the plaintiff can pay a fine for the mis-seated jurors, then still proceed to verdict if the five remaining jurors find in his favor, as that would constitute a majority of a properly composed jury.

From the crowd come cheers for Thorhall and the plaintiff. The heroes were “giving a good account of themselves in the case,” whereas the villains “were resorting to mere lawyers’ quibbles and cheating.”

Eyjolf again reaches out to Skapti the law-speaker, who answers, “More men are great lawyers now than I thought. I must tell you that this is such good law in all points that there is not a word to say against it. But still I had thought that I alone would know this obscure rule, now that Njal was dead, for he was the only man I ever knew who knew it.”

Thorhall, it seems, has proved himself a worthy pupil and heir, and an indomitable attorney.

But it is now that Eyjolf springs the venue trap that he had so carefully prepared. Thorhall has no ready parry, so he advises his clients simply to charge Eyjolf and his clients with violating the rules of evidence and procedure, and to demand that they be outlawed for three years, during which time they would be fair game for anyone to kill with impunity. (Talk about terminating sanctions!) But, Thorhall advises, there will be a race to court – his clients must file their sanctions request in the Fifth Court before Eyjolf’s clients

seek to collaterally attack the initial litigation for its venue defect. Off rush the heroes, without Thorhall.

The shenanigans now climax in the Fifth Court, where the heroes are in fact first to file. The rules are that 36 judges (jurors, really) must hear the case, but 48 are initially gathered, so each side can have a chance to peremptorily challenge six of them. The good guys strike six, but Eyjolf tells his clients not to exercise their own challenges. The heroes accept the remaining panel as constituted – meaning that 42 judges, not 36, hear the case. This procedural defect results in “the verdict being null and void and the whole action invalidated.” Eyjolf’s venue challenge can now go forward, and it is the heroes and their lawyer Thorhall who are set to be outlawed. “We have blundered terribly by making this error. This is disastrous ill luck.”

They send desperate word to Thorhall via a messenger. “When Thorhall heard this he was so shocked that he could not speak a word. He sprang out of bed, snatched with both hands the spear his friend had given him, and drove it deep into his own leg. The flesh clung to the spearhead as he gouged it out of his leg, and a torrent of blood gushed across the floor like a stream. Then, striding without a limp, he hurried to the Fifth Court, so fast the messenger could not keep up.”

And that is the end of the litigation, for Thorhall decides to take more direct action. On arrival, he spears one of the villains to death, and a general melee ensues. In the end, it is said, “there have been harsh happenings here, in loss of life and lawsuits.” The two sides settle, and that is that (mostly).

What are we to make of this 160-chapter-long Viking epic of raids, romances, duels, deaths, and litigation? It is a saga that luxuriates in battlefield details like a warrior who slays a foe, “hews out his jaw tooth,” and later throws that tooth in the face of his victim’s friend. And it is also a saga that luxuriates over a direct examination, a peremptory challenge, and a venue motion. The work’s medieval author sought to evoke his nation’s heroic era of great men and women, and its greatest heroes of all were lawyers.

The Saga of Burnt Njal is immensely entertaining, but like most epics, it was meant not only to entertain but also to instill heroic values. Before his death, the eponymous Njal – a figure of fascination for the famed legal realist Karl Llewellyn – warns the blood-feuding factions that “by law alone shall our land be built up, and by lawlessness, laid waste.” The saga’s insight, however, is that law and lawlessness are not actually opposing forces. They are instead the same forces – such as anger, hierarchy, and the love of battle – directed down different channels. As deep as the channel of law has been dug in Njal’s brilliant disciple Thorhall, those forces at last overflow its banks and return to the old course of lawlessness. Through Njal’s warning, the saga’s author tries to teach us that for society to thrive, we must always work to turn those violent currents back into the rule of law. Through Njal’s fate, the author is also warning us, alas, that we often will fail.

But aside from this political wisdom, what practical advice can the tale of these Viking lawyer-warriors offer us softer lawyers of a latter day?

First, that metaphors of “lawfare” or “litigation as war” are not modern coinages but instead the inheritance of our Norse-Anglo common-law legal culture. Litigation is about resolving conflict, but it is also a centuries-old form of conflict. The key is that it is a conflict with rituals of civility. As Thorhall’s finale shows us, the system fails when the barbs start flying.

Second, that human psychology has long been able to take a wry delight in legal hijinks (like Eyjolf’s maneuvers) while still perceiving the superior presentation of evidence and the bottom-line truth (such as is submitted by the good guys). Both the author and the crowd observing the trial take Viking Age Iceland’s rather ridiculous procedural rules very seriously, and they appreciate a lawyer who has mastered motions practice and legal precedent. But they are not blind to the case’s merits. This tension between procedural law and substantive justice is no less present in courtrooms today. Now, as then, the judge and jury are happiest when an advocate can harness law to justice, as Thorhall did in the first trial.

Third, that you should treat *voir dire* like your life depends on it.

In closing, let us wonder what a Thorhall or Eyjolf would have made of themselves in an American courtroom, or how a Joe Jamail or Clarence Darrow would have fared at the Althing’s Law Rock. Other than the policies on bringing weapons into court, I suspect they would all have quickly found themselves at home, wielding the law to build up the land.

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