

MAGNA CARTA

A COMMENTARY ON THE GREAT CHARTER OF KING JOHN

WITH AN
HISTORICAL INTRODUCTION

BY

WILLIAM SHARP McKECHNIE

M.A., LL.B., D.PHIL.

LECTURER ON CONSTITUTIONAL LAW AND HISTORY IN THE UNIVERSITY OF GLASGOW

AUTHOR OF

'THE STATE AND THE INDIVIDUAL,' 'THE REFORM OF THE HOUSE OF LORDS'

'THE NEW DEMOCRACY AND THE CONSTITUTION,' ETC.

SECOND EDITION

REVISED AND IN PART RE-WRITTEN

GLASGOW

JAMES MACLEHOSE AND SONS

PUBLISHERS TO THE UNIVERSITY

1914

identified with ordeal;¹ and the purport of the whole was that accused men could not be put to ordeal except in presence of two lawful men who had been present at the indictment and had come before the justices specially to bear witness thereof. In other words, the sheriff's own report of the indictment "*sine testibus fidelibus ad hoc inductis*" was not sufficient. The "county" and the "hundred" which had heard the prisoner accused, must send representatives to bear record of the facts.²

The ordeal was a solemn affair, and every precaution must be taken against its abuse. Sheriffs or other royal bailiffs must be present, as well as members of the accusing jury. Lords of feudal courts, claiming this franchise, required apparently royal warrant for its exercise.³ Practice, however, was loose: the King's justices would seem to have had a right to put suspects to the ordeal *ex officio* without the intervention of the accusing jury:⁴ sheriffs and others, with the Crown's approval or connivance, exercised a similar privilege. In condemning these practices, Magna Carta would appear to have been, to some extent, modifying previous usage.⁵ It was not enough thereafter that indictment should precede ordeal; members of the presenting jury, who had made the accusation at the first diet, must accompany the sheriff before the justices at the final diet, there to bear testimony both as to the nature of the crime and as to the fact of the indictment. Before anyone could

¹ See Article 12 where "*eat ad aquam*" is contrasted with "*non habeat legem*" of Article 13 (*Select Charters*, 144).

² The "*ad portandum recordationem comitatus et hundredi*" of the ordinance is exactly opposed to the "*simplex loquela sua*" of the Charter.

³ Thus in 1166 (the year of the Assize of Clarendon) the "*Soca*" of Alverton was amerced because of a man placed "*ad aquam sine serviente*" (*Pipe Roll*, 12 Henry II., p. 49). In 1185 the "*villata*" of Preston paid 5 marks for putting a man "*ad aquam sine waranto*" (*Pipe Roll*, 31 Henry II., cited Madox, I. 547). In the same year a certain Roger owed half a mark for being present at an ordeal "*sine visu servientum regis*": and heavy fines were exacted from those who had put a man "*injuste ad aquam*" (*ibid.*).

⁴ See Miss Bateson, *Eng. Hist. Rev.*, XVII. 712.

⁵ Miss Bateson (*Borough Customs*, II. xxxi.) speaks of the "right of accusation '*ex officio*' which belonged to the King's officers until Magna Carta, Art. 38, deprived them of it."

be put "to his law," the sheriff's formal report must be corroborated by the testimony of representative jurors.

The Charter of 1216 repeated this provision without alteration. In 1217 a change occurred, which was undoubtedly a consequence of the virtual abolition of the ordeal by the Lateran Council in 1215. The framers of Henry's second reissue found leisure to adjust points of administrative detail. The simple reference to ordeal was inappropriate now that new forms of trial were taking its place. The justices, indeed, scarcely knew what test to substitute for ordeal. They seem sometimes to have resorted to compurgation and sometimes to battle; but the sworn verdict of neighbours was fast occupying the ground left vacant. The Charter of 1217, then, made it clear that the provisions applied in 1215 to ordeal were to be extended to other tests. The "*ad legem*" of John's Charter became in the new version "*ad legem manifestam nec ad juramentum*." A "manifest law" might well mean either ordeal or any other actual physical test such as "battle,"¹ while "*juramentum*" points to the sworn testimony of the jury, which was slowly taking the place of the discredited ordeal.²

CHAPTER THIRTY-NINE.

NULLUS liber homo capiatur vel imprisonetur, aut disseisiat, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terre.

No freeman shall be taken or [and] imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land.³

¹ See Thayer, *Evidence*, 37 n., for a case of 1291, where "*ad legem manifestam*" can only mean trial by combat. Cf. *legem apparentem purgandus est* in Glanvill, XIV. ff. 112-114.

² Westminster I. (c. 12) described men refusing to put themselves on a jury's verdict, "*come ceaus qui refusent la commune ley de la terre*."

³ The usual English rendering has here been followed: Mr. Harcourt (*Steward*, 219) was possibly right in holding that "interpretation under the guise of translation

This chapter occupies a prominent place in law-books, and is of considerable importance, although its value has sometimes been exaggerated.¹

I. *Its Main Object.* It has been usual to read it as a guarantee of trial by jury to all Englishmen; as absolutely prohibiting arbitrary commitment; and as solemnly undertaking to dispense to all and sundry an equal justice, full, free, and speedy.² The traditional interpretation has thus made it, in the widest terms, a promise of law and liberty and good government to every one.³ A careful analysis of the clause, read in connection with its historical genesis, suggests the need for modification of this view. It was in accord with the practical genius of the Charter that it should here direct its energies, not to the enunciation of vague platitudes, but to the reform of a specific abuse. Its object was to prohibit John from resorting to what is sometimes whimsically known in Scotland as "Jeddart justice."⁴ It

is in this case an inevitable snare." This does not, however, absolve the commentator from explaining the text. The Articles of the Barons (29) add "*vi*" ("*nec rex eat vel mittat super eum vi*" suggesting the fuller contemporary "*per vim et arma*"). This shows the inadequacy of the translation contained in the *Statutes at Large*, "nor will we pass upon him nor condemn him." The *Statutes of the Realm*, I. 117, suggest "deal with him" as an alternative. Coke, as explained *infra*, originated the error which thus connected "going" and "sending" with legal process.

¹ For a valuable discussion of alternative interpretations, see Adams, *Origin*, 256-274; also Pike, *House of Lords*, c. X. Mr. Harcourt's learned discussions (*Steward*, cc. VII. and VIII.) are worthy of careful study, though they are more useful in suggesting difficulties than in finding solutions.

² See, e.g. Coke, *Second Institute*, 55.

³ Thus Blackstone, *Commentaries*, IV. 424: "It protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land." Hallam, *Middle Ages*, II. 448, speaking of cc. 39 and 40 together, says they "protect the personal liberty and property of all freemen by giving security from arbitrary imprisonment and arbitrary spoliation." Creasy, *Eng. Const.*, p. 151 n.: "The ultimate effect of this chapter was to give and to guarantee full protection for person and property to every human being that breathes English air."

⁴ The same grim tradition applied to Lidford as to Jedburgh:

"I oft have heard of Lydford law,
How in the morn they hang and draw,
And sit in judgment after."

See Neilson, *Trial by Combat*, 131, and authorities there cited.