CHAPTER II

The Trial by Jury as Defined by Magna Carta

That the trial by jury is all that has been claimed for it in the preceding chapter, is proved both by the history and the language of the Great Charter of English Liberties, to which we are to look for a true definition of the trial by jury, and of which the guaranty for that trial is the vital, and most memorable, part.

SECTION I

The History of Magna Carta

In order to judge of the object and meaning of that chapter of Magna Carta which secures the trial by jury, it is to be borne in mind that, at the time of Magna Carta, the king (with exceptions immaterial to this discussion, but which will appear hereafter) was, constitutionally, the entire government; the sole *legislature, judicial,* and executive power of the nation. The executive and judicial officers were merely his servants, appointed by him, and removable at his pleasure. In addition to this, "the king himself often sat in his court, which always attended his person. He there heard causes, and pronounced judgment; and though he was assisted by the advice of other members, it is not to be imagined that a decision could be obtained contrary to his inclination or opinion." [1Hume, Appendix 2.] Judges were in those days, and afterwards, such abject servants of the king, that "we find that King Edward I. (1272 to 1307) fined and imprisoned his judges, in the same manner as Alfred the Great, among the Saxons, had done before him, by the sole exercise of his authority."[Crabbe's History of the English Law, 236.]

Parliament, so far as there was a parliament, was a mere *council* of the king. It assembled only at the pleasure of the king; sat only during his pleasure; and when sitting had no power, so far as *general* legislation was concerned, beyond that of simply *advising* the king. The only legislation to which their assent was constitutionally necessary, was demands for money and military services for *extraordinary* occasions. Even Magna Carta itself makes no provisions whatever for any parliments, except when the king should want means to carry on war, or to meet some other *extraordinary* necessity. He had no need of parliaments to raise taxes for the *ordinary* purposes of government; for his revenues from the rents of the crown lands and other sources, were ample for all except extraordinary occasions. Parliaments, too, when assembled, consisted only of bishops, barons, and other great men of the kingdom, unless the king chose to invite others. There was no House of Commons at that time, and the people had no right to be heard, unless as petitioners.

Even when laws were made at the time of a parliament, they were made in the name of the king alone. Sometimes it was inserted in the laws, that they were made with the *consent* or *advice* of the bishops, barons, and others assembled; but often this was omitted. Their consent or advice was evidently a matter of no legal importance to the enactment or validity of the laws, but only inserted, when inserted at all, with a view of obtaining a more willing submission to them on the part of the people. The style of enactment generally was, either *"The King wills and commands,"* or some other form significant of the sole legislative authority of the king. The king could pass laws at any time when it pleased him. The presence of a parliament was wholly unnecessary. Hume says, "It is asserted by Sir Harry Spelman, as an undoubted fact, that, during the reigns of the Norman princes, every order of the king, issued with the consent of his privy council, had the full force of law." [Hume, App 2] And other authorities abundantly corroborate this assertion.

The king was, therefore, constitutionally the government; and the only legal limitation upon his power seems to have been simply the *common law*, usually called *"the law of the land,"* which he was bound by oath to maintain; (which oath had about the same practical value as similar oaths have always had.) This "law of the land" seems not to have been regarded at all by many of the kings, except so far as they found it convenient to do so, or were constrained to observe it by the fear of arousing resistance. But as all people are slow in making resistance, oppression and usurpation often reached a great height; and, in the case of John, they had become so intolerable as to enlist the nation almost universally against him; and he was reduced to the necessity of complying with any terms the barons saw fit to dictate to him.

It was under these circumstances, that the Great Charter of English Liberties was granted. The barons of England, sustained by the common people, having their king in their power, compelled him, as the price of his throne, to pledge himself that he would punish no freeman for a violation of any of his laws, unless with the consent of the peers--that is, the equals--of the accused.

The question here arises, Whether the barons and people intended that those peers (the jury) should be mere puppets in the hands of the king, exercising no opinion of their own as to the intrinsic merits of the accusations they should try, or the *justice* of the laws they should be called on to enforce? Whether those haughty and victorious barons, when they had their tyrant king at their feet, gave back to him his throne, with full power to enact any tyrannical laws he might please, reserving only to a jury ("the country") the contemptible and servile privilege of ascertaining, (under the dictation of the king, or his judges, as to the laws of evidence), the simple *fact* whether those laws had been transgressed? Was this the

only restraint, which, when they had all power in their hands, they placed upon the tyranny of a king, whose oppressions they had risen in arms to resist? Was it to obtain such a charter as that, that the whole nation had united, as it were, like one man, against their king? Was it on such a charter that they intended to rely, for all future time, for the security of their liberties? No. They were engaged in no such senseless work as that. On the contrary, when they required him to renounce forever the power to punish any freeman, unless by the consent of his peers, they intended those peers should judge of, and try, the whole case on its merits, independently of all arbitrary legislation, or judicial authority, on the part of the king. In this way they took the liberties of each individual--and thus the liberties of the whole people--entirely out of the hands of the king, and out of the power of his laws, and placed them in the keeping of the people themselves. And this it was that made the trial by jury the palladium of their liberties.

The trial by jury, be it observed, was the only real barrier interposed by them against absolute despotism. Could this trial, then, have been such an entire farce as it necessarily must have been, if the jury had had no power to judge of the justice of the laws the people were required to obey? Did it not rather imply that the jury were to judge independently and fearlessly as to everything involved in the charge, and especially as to its intrinsic justice, and thereon give their decision, (unbiased by any legislation of the king,) whether the accused might be punished? The reason of the thing, no less than the historical celebrity of the events, as securing the liberties of the people, and the veneration with which the trial by jury has continued to be regarded, notwithstanding its essence and vitality have been almost entirely extracted from it in practice, would settle the question, if other evidences had left the matter in doubt.

Besides, if his laws were to be authoritative with the jury, why should John indignantly refuse, as at first he did, to grant the charter, (and finally grant it only when brought to the last extremity,) on the ground that it deprived him of all power, and left him only the name of a king? *He* evidently understood that the juries were to veto his laws, and paralyze his power, at discretion, by forming their own opinions as to the true character of the offences they were to try, and the laws they were to be called on to enforce; and that *"the king wills and commands"* was to have no weight with them contrary to their own judgments of what was intrinsically right.

[These things show that the nature and effect of the charter were well understood by the king and his friends; that they all agreed that he was effectually stripped of power. *Yet the legislative power had not been taken from him; but only the power to enforce his laws, unless juries should freely consent to their enforcement.*]

The barons and people having obtained by the charter all the liberties they had demanded of the king, it was further provided by the charter itself that twenty-five barons should be appointed by the barons, out of their number, to keep special vigilance in the kingdom to see that the charter was observed, with authority to make war upon the king in case of its violation. The king also, by the charter, so far absolved all the people of the kingdom from their allegiance to him, as to authorize and require them to swear to obey the twenty-five barons, in case they should make war upon the king for infringement of the charter. It was then thought by the barons and people, that something substantial had been done for the security of their liberties.

This charter, in its most essential features, and without any abatement as to the trial by jury, has since been confirmed more than thirty times; and the people of England have always had a traditionary idea that it was of some value as a guaranty against oppression. Yet that idea has been an entire delusion, unless the jury have had the right to judge of the justice of the laws they were called on to enforce.

T IS FOR TEACHER

There are "teachers" and Teachers. The former exist by the thousands; the latter are few and far between.

The term "teacher" is a self-proclaimed label while Teacher is a title bestowed by others. The Teacher is one who is in search of Truth and to whom, if he achieves enlightenment, others of us look for the Truth he perceives. The Teacher is a seeker, for that which he knows not; the "teacher" is a preacher attempting to insinuate into the minds of others that which he "knows."

We need only bear in mind that learning is a taking-from, not an injection-into, process. Each individual is in charge of his own doors of perception and admits only that which he chooses. Thus, to qualify as a Teacher, one must achieve those intellectual heights that will attract others seeking to advance.

The free market, private ownership, limited government way of life, with its moral and spiritual antecedents, would be featured by Teachers. As it is now, "teachers" abound in all walks of life; they retard rather than advance the freedom philosophy.

Let each of us try to be a Teacher for freedom's sake!

--Leonard E. Read

SECTION II

The Language of Magna Carta

The language of the Great Charter establishes the same point that is established by its history, viz., that it is the right and duty of the jury to judge of the justice of the laws.

The chapter guaranteeing the trial by jury is in these words:

"Nullus liber homo capiatur, vel imprisonetur, aut disseisetur, aut utlagetur, aut exuletur, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae." [The laws were, at that time, all written in Latin, in the fashion of the church.]

The corresponding chapter in the Great Charter, granted by Henry III., (1225,) and confirmed by Edward I., (1297,) (which charter is now considered the basis of the English laws and constitution,) is in nearly the same words...

The most common translation of these words, at the present day, is as follows:

"No freeman shall be arrested, or imprisoned, or deprived of his freehold, or his liberties, or free customs, or outlawed, or exiled, or in any manner destroyed, *nor will we (the king) pass upon him, nor condemn him,* unless by the judgment of his peers, or the law of the land."

"Nec super eum ibimus, nec super eum mittemus."

There has been much confusion and doubt as to the true meaning of the words, *"nec super eum ibimus, nec super eum mittemus."* The more common rendering has been, *"nor will we pass upon him, nor condemn him."* But some have translated them to mean, *"nor will we pass upon him, nor commit him to prison." Coke* gives still a different rendering, to the effect that "No man shall be condemned at the king's suit, either before the king in his bench, nor before any other commissioner or judge whatsoever."

But all these translations are clearly erroneous. In the first place, *"nor will we pass upon him,"*--meaning thereby to decide upon his guilt or innocence *judicially*--is not a correct rendering of the words, *"nec super eum ibimus."* There is nothing whatever, in these latter words, that indicates *judicial* action or opinion at all. The words, in their common signification, describe *physical* action alone. And the true translation of them, as will hereafter be seen, is, *"nor will we proceed against him," executively.*

In the second place, the rendering, *"nor will we condemn him,"* bears little or no analogy to any common, or even uncommon, signification of the words *"nec super eum mittemus."* There is nothing in these latter words that indicates judicial action or decision. Their common signification, like that of the words *nec super eum ibimus*, describes *physical* action alone. *"Nor will we send upon (or against) him,"* would be the most obvious translation, and, as we shall hereafter see, such is the true translation.

But although these words describe *physical* action, on the part of the king, as distinguished from judicial, they nevertheless do not mean, as one of the translations has it, *"nor will we commit him to prison;"* for that would be a mere repetition of what had been already declared by the words *"nec imprisonetur."* Besides, there is nothing about sending *him* anywhere; but only about sending (something or somebody) *upon* him, or *against* him--that is, *executively.*

Coke's rendering is, if possible, the most absurd and gratuitous of all. What is there in the words, *"nec super eum mittemus,"* that can be made to mean *"nor shall he be condemned before any other commissioner or judge whatsoever?"* Clearly there is nothing. The whole rendering is a sheer fabrication. And the whole object of it is to give color for the exercise of a *judicial* power, by the king, or his judges, which is nowhere given them.

Neither the words, *"nec super eum ibimus, nec super eum mittemus,"* nor any other words in the whole chapter authorize, provide for, describe, or suggest, any *judicial* action whatever, on the part either of the king, or of his judges, or of anybody, *except the peers, or jury.* There is nothing about the king's *judges* at all. And there is nothing whatever, in the whole chapter, *so far as relates to the action of the king*, that describes or suggests anything but *executive* action.

But that all these translations are certainly erroneous, is proved by a temporary charter, granted by John a short time previous to the Great Charter, for the purpose of giving an opportunity for conference, arbitration, and reconciliation between him and his barons. It was to have force until the matters in controversy between them could be submitted to the Pope, and to other persons to be chose, some by the king, and some by the barons. The words of the charter are as follows...

"Know that we have granted to our barons who are opposed to us, that we will neither arrest them nor their men, nor disseize them, *nor will we proceed against them by force or by arms*, unless by the law of our kingdom, or by the judgment of their peers in our court, until consideration shall be had," &c., &c.

A copy of this charter is given in a note in Blackstone's Introduction to the Charters. [See Blackstone's Law Tracts, page 294, Oxford Edition.]

Mr. Christian speaks of this charter as settling the true meaning of the corresponding clause of Magna Carta, on the principle that laws and charters on the same subject are to be construed with reference to each other. See 3 *Christian's Blackstone*, 41, *note*.

The true meaning of the words, *nec supe eum ibimus, nec super eum mittemus*, is also proved by the *"Articles of the Great Charter of Liberties,"* demanded of the king by the barons, and agreed to by the king, under seal, a few

days before the date of the Charter, and from which the Charter was framed. Here the words used are these:

"Ne corpus liberi hominis capiatur nec imprisonetur nec disseisetur nec utlagetur nec exuletur nec aliquo modo destruatur *nec rex eat vel mittat super eum vi* nisi per; judicium parium suorum vel per legem terrae."

That is, "The body of a freeman shall not be arrested, nor imprisoned, nor disseized, nor outlawed, nor exiled, nor in any manner destroyed, *nor shall the king proceed or send (any one) against him* WITH FORCE, unless by the judgment of his peers, or the law of the land."

The true translation of the words *nec super eum ibimus, nec super eum mittemus*, in Magna Carta, is thus made certain, as follows, *"nor will we (the king) proceed against him, nor send (any one) against him* WITH FORCE OR ARMS." ["The words, *'We will not destroy him, nor will we do upon him, nor will we send upon him,'* have been very differently expounded by different legal authorities. Their real meaning may be learned from John himself, who the next year promised by his letters patent...nec super eos *per vel per arma* ibimus, nisi per legem regni nostri, vel per judicium parium suorum in curia nostra, (nor will we go upon them *by force or by arms*, unless by the law of our kingdom, or the judgment of their peers in our court.) Pat. 16 Johan, apud Drad. 11, app. no. 124. He had hitherto been in the habit of *going* with an armed force, or *sending* an armed force on the lands, and against the castles, of all whom he knew or suspected to be his secret enemies, without observing any form of law."--3 Lingard, 47 note.]

It is evident that the difference between the true and false translations of the words, *nec super eum ibimus, nec super eum mittemus*, is of the highest legal importance, inasmuch as the true translation, *nor will we (the king) proceed against him, nor send (any one)* against *him by force or arms*, represents the king only in an *executive* character, *carrying the judgment of the peers and "the law of the land" into execution;* whereas the false translation, *nor will we pass upon him, nor condemn him*, gives color for the exercise of a *judicial* power, on the part of the king, to which the king had no right, but which, according to the true translation, belongs wholly to the jury.

"Per legale judicium parium suorum."

The foregoing interpretation is corroborated, (if it were not already too plain to be susceptible of corroboration,) by the true interpretation of the phrase *"per legale judicium parium suorum."*

In giving this interpretation, I leave out, for the present, the word *legale*, which will be defined afterwards.

The true meaning of the phrase, *per judicium parium suorum*, is, *according to the sentence of his peers.* The word *judicium, judgment*, has a technical meaning in the law, signifying the decree rendered in the decision of a cause. In civil suits this decision is called a *judgment*; in chancery proceedings it is called a *decree*; in criminal actions it is called a *sentence*, or *judgment*, indifferently. Thus, in a criminal suit, "a motion in arrest of *judgment*," means a motion in arrest of *sentence*.*

In cases of sentence, therefore, in criminal suits, the words *sentence* and *judgment* are synonymous terms. They are, to this day, commonly used in law books as synonymous terms. And the phrase *per judicium parium suorum*, therefore, implies that the jury are to fix the sentence.

The word *per* means *according to*. Otherwise there is no sense in the phrase *per judicium parium suorum*. There would be no sense in saying that a king might imprison, disseize, outlaw, exile, or otherwide punish a man, or proceed against him, or send any one against him, *by force or arms, by* a judgment of his peers; but there is sense in saying that the king may imprison, disseize, and punish a man, or proceed against him, or send any one against him, by force or arms, *according to* a judgment, or *sentence*, of his peers; because in that case the king would be merely carrying the sentence or judgment of the peers into execution.

The word *per*, in the phrase *"per* judicium parium suorum," of course means precisely what it does in the next phrase, *"per legem terrae,"* where it obviously means *according to*, and not *by*, as it is usually translated. There would be no sense in saying that the king might proceed against a man by force or arms, *by* the law of the land; but there is sense in saying that he may proceed against him, by force or arms, *according to* the law of the land; because the king would then be acting only as an executive officer, carrying the law of the land into execution. Indeed, the true meaning of the word *by*, as used in similar cases now, always is *according to*; as, for example, when we say a thing was done by the government, or by the executive, *by law*, we mean only that it was done by them *according to law*; that is, that they merely executed the law.

Or, if we say that the word *by* signifies *by authority of*, the result will still be the same; for nothing can be done *by authority of* law, except what the law itself authorizes or directs to be done; that is, nothing can be done by authority of law, except simply to carry the law itself into execution. So nothing could be done *by authorityof* the sentence of the peers, or *by authority of* "the law of the land," except what the sentence of the peers, or the law of the land, themselves authorized or directed to be done; nothing, in short, but to carry the sentence of the peers, or the law of the land, themselves into execution.

"Nations die by suicide. The sign of it is the decay of thought."

--Ralph Waldo Emerson

Doing a thing *by* law, or *according to* law, is only carrying the law into execution. And punishing a man *by*, or *according to*, the sentence or judgment of his peers, is only carrying that sentence or judgment into execution.

If these reasons could leave any doubt that the word *per* is to be translated *according to*, that doubt would be removed by the terms of an antecedent guaranty for the trial by jury, granted by the Emperor Conrad, of Germany, two hundred years before Magna Carta. Blackstone cites it as follows:--(3 *Blackstone*, 350.)

"Nemo beneficium suum perdat, nisi *secundum* consuetudinem antecessorum nostrorum, et judicium parium suorum." That is, No one shall lose his estate, [*Beneficium* was the legal name of an estated held by a feudal tenure.] unless *according to* ("*secundum*") the custom (or law) of our ancestors, and (*according to*) the sentence (or judgment) of his peers.

The evidence is therefore conclusive that the phrase *per judicium parium suorum* means *according to the sentence of his peers*; thus implying that the jury, and not the government, are to fix the sentence.

If any additional proof were wanted that juries were to fix the sentence, it would be found in the following provisions of Magna Carta, viz.:

"A freeman shall not be amerced for a small crime, (*delicto*,) but according to the degree of the crime; and for a great crime in proportion to the magnitude of it, saving to him his *contentment*; and after the same manner a merchant, saving to him his merchandise. And a villein shall be amerced after the same manner, saving to him his waynage, [*Waynage* was a villein's plough-tackle, carts, and implements of husbandry.] if he fall under our mercy; *and none of the aforesaid amercements shall be imposed, (or assessed, ponatur,) but by the oath of honest men of the neighborhood. Earls and Barons shall not be amerced but by their peers,* and according to the degree of their crime."

Pecuniary punishments were the most common punishments at that day, and the foregoing provisions of Magna Carta show that the amount of those punishments was to be fixed by the jury.

Fines went to the king, and were a source of revenue; and if the amounts of the fines had been left to be fixed by the king, he would have had a pecuniary temptation to impose unreasonable and oppressive ones. So, also, in regard to other punishments than fines. If it were left to the king to fix the punishment, he might often have motives to inflict cruel and oppressive ones. As it was the object of the trial by jury to protect the people against all possible oppression from the king, it was necessary that the jury, and not the king, should fix the punishments.

Because juries were to fix the sentence, it must not be supposed that the king was *obliged* to carry the sentence into execution; *but only that he could not go beyond the sentence.* He might pardon, or he might acquit on grounds of law, notwithstanding the sentence; but he could not punish beyond the extent of the sentence. Magna Carta does not prescribe that the king *shall punish* according to the sentence of the peers; but only that he shall not punish *"unless according to" that sentence*. He may acquit or pardon, notwithstanding their sentence or judgment; but he cannot punish, except according to their judgment.

"Legale."

The word *"legale,"* in the phrase *"per legale judicium parium suorum,"* doubtless means two things. 1. That the sentence must be given in a legal manner; that is, by the legal number of jurors, legally empanelled and sworn to try the cause; and that they give their judgment or sentence after a legal trial, both in form and substance, has been had. 2. That the sentence shall be for a legal cause or offence. If, therefore, a jury should convict and sentence a man, either without giving him a legal trial, or for an act that was not really and legally criminal, the sentence itself would not be legal; and consequently this clause forbids the king to carry such a sentence into execution; for the clause guarantees that he will execute no judgment or sentence, except it be *legale judicium*, a legal sentence. Whether a sentence be a legal one, would have to be ascertained by the king or his judges, on appeal, or might be judged of informally by the king himself.

The word *"legale"* clearly did not mean that the *judicium parium suorum* (judgment of his peers) should be a sentence which any law (of the king) should *require* the peers to pronounce; for in that case the sentence would not be the sentence of the peers, but only the sentence of the law, (that is, of the king); and the peers would be only a mouthpiece of the law, (that is, of the king,) in uttering it.

"Per legem terrae."

One other phrase remains to be explained, viz., *"per legem terrae," "by the law of the land."*

All writers agree that this means the *common law*. Thus, Sir Matthew Hale says:

"The common law is sometimes called, by way of eminence, *lex terrae*, as in the statute of *Magna Carta*, chap. 29, where certainly the common law is principally intended by those words, *aut per legem terrae*; as appears by the expositon thereof in several subsequent statutes; and particularly in the statute of 28 Edward III., chap. 3, which is but an exposition and explanation of that statute. Sometimes it is called *lex Angliae*, as in the statute of Merton, cap. 9, "Nolumus leges Angliae mutari," &c., (We will that the laws of England be not changed). Sometimes it is called *lex et consuetudo regni* (the law and custom of the kingdom); as in all commissions of oyer and terminer; and in the statutes of 18 Edward I., cap.--, and *de quo warranto*, and divers others. But most commonly it is called the Common Law, or the Common Law of

England; as in the statute *Articuli super Chartas*, cap. 15, in the statute 25 Edward III., cap. 5, (4,) and infinite more records and statutes."--1 *Hale's History of the Common Law*, 128.

This common law, or "law of the land," *the king was sworn to maintain.* This fact is recognized by a statute made at Westminster, in 1346, by Edward III., which commences in this manner:

"Edward, by the Grace of God, &c., &c., to the Sheriff of Stafford, Greeting: Because that by divers complaints made to us, we have perceived that *the law of the land, which we by oath are bound to maintain,"* &c.--St. 20 *Edward* III.

The foregoing authorities are cited to show to the unprofessional reader, what is well known to the profession, that *legem terrae, the law of the land,* mentioned in Magna Carta, was the common, ancient, fundamental law of the land, which the kings were bound by oath to observe; *and that it did not include any statutes or laws enacted by the king himself, the legislative power of the nation.*

If the term *legem terrae* had included laws enacted by the king himself, the whole chapter of Magna Carta, now under discussion, would have amounted to nothing as a protection to liberty; because it would have imposed no restraint whatever upon the power of the king. The king could make laws at any time, and such ones as he pleased. He could, therefore, have done anything he pleased, *by the law of the land*, as well as in any other way, if his own laws had been *"the law of the land."* If his own laws had been "the law of the land," within the meaning of that term as used in Magna Carta, this chapter of Magna Carta would have been sheer nonsense, inasmuch as the whole purport of it would have been simply that "no man shall be arrested, imprisoned, or deprived of his freehold, or his liberties, or free customs, or outlawed, or exiled, or in any manner destroyed (by the king); nor shall the king proceed against him, nor send any one against him with force and arms, unless by the judgment of his peers, *or unless the king shall please to do so."*

This chapter of Magna Carta would, therefore, have imposed not the slightest restraint upon the power of the king, or afforded the slightest protection to the liberties of the people, if the laws of the king had been embraced in the term *legem terrae*. But if *legem terrae* was the common law, which the king was sworn to maintain, then a real restriction was laid upon his power, and a real guaranty given to the people for their liberties.

Such, then, being the meaning of *legem terrae*, the fact is established that Magna Carta took an accused person entirely out of the hands of the legislative power, that is, of the king; and placed him in the power and under the protection of his peers, and the common law alone; that, in short, Magna Carta suffered no man to be punished for violating any enactment of the legislative power, unless the peers or equals of the accused freely consented to it, or the common law authorized it; that the legislative power, *of itself*, was wholly incompetent to *require* the conviction or punishment of a man for any offence whatever.

Whether Magna Carta allowed of any other trial than by jury.

The question here arises, whether *"legem terrae"* did not allow of some other mode of trial than that by jury.

The answer is, that, at the time of Magna Carta, it is not probable, (for the reasons given in the note,) that *legem terrae* authorized, in criminal cases, any other trial than the trial by jury; but, if it did, it certainly authorized none but the trial by battle, the trial by ordeal, and the trial by compurgators.

The trial by battle was one in which the accused challenged his accuser to single combat, and staked the question of his guilt or innocence on the result of the duel. This trial was introduced into England by the Normans, within one hundred and fifty years before Magna Carta. It was not very often resorted to even by the Normans themselves; probably never by the Anglo-Saxons, unless in their controversies with the Normans. It was strongly discouraged by some of the Norman princes, particularly by Henry II., by whom the trial by jury was especially favored. It is probable that the trial by battle, so far as it prevailed at all in England, was rather tolerated as a matter of chivalry, than authorized as a matter of law. At any rate, it is not likely that it was included in the *"legem terrae"* of Magna Carta, although such duels have occasionally occurred since that time, and have, by some, been supposed to be lawful. I apprehend that nothing can be properly said to be a part of *lex terrae*, unless it can be shown either to have been of Saxon origin, or to have been recognized by Magna Carta.

The trial by ordeal was of various kinds. In one ordeal the accused was required to take hot iron in his hand; in another to walk blindfold among red-hot ploughshares; in another to thrust his arm into boiling water; in another to be thrown, with his hands and feet bound, into cold water; in another to swallow the *morsel of execration;* in the confidence that his guilt or innocence would be miraculously made known. This mode of trial was nearly extinct at the time of Magna Carta, and it is not likely that it was included in *"legem terrae,"* as that term is used in that instrument. This idea is corroborated by the fact that the trial by ordeal was specially prohibited only four years after Magna Carta, "by act of Parliament in 3 Henry III., according to Sir Edward Coke, or rather by an order of the king in council."-3 *Blackstone* 345, *note.*

"What I do say is that no man is good enough to govern another man without that other's consent."

--Abraham Lincoln

I apprehend that this trial was never forced upon accused persons, but was only allowed to them, *as an appeal to God,* from the judgment of a jury. Hallam says, "It appears as if the ordeal were permitted to persons already convicted by the verdict of a jury." -2*Middle Ages,* 446, *note.*

The trial by compurgators was one in which, if the accused could bring twelve of his neighbors, who would make oath that they believed him innocent, he was held to be so. It is probable that this trial was really the trial by jury, or was allowed as an appeal from a jury. It is wholly improbable that two different modes of trial, so nearly resembling each other as this and the trial by jury do, should prevail at the same time, and among a rude people, whose judicial proceedings would naturally be of the simplest kind. But if this trial really were any other than the trial by jury, it must have been nearly or quite extinct at the time of Magna Carta; and there is no probability that it was included in "*legem terrae.*"

These were the only modes of trial, except by jury, that had been known in England, in criminal cases, for some centuries previous to Magna Carta. All of them had become nearly extinct at the time of Magna Carta, and it is not probable that they were included in "legem terrae," as that term is used in that instrument. But if they were included in it, they have now been long obsolete, and were such as neither this nor any future age will ever return to. For all practical purposes of the present day, therefore, it may be asserted that Magna Carta allows no trial whatever but trial by jury.

Whether Magna Carta allowed sentence to be fixed otherwise than by the jury.

Still another question arises on the words *legem terrae, viz.,* whether, in cases where the question of guilt was determined by the jury, the amount of *punishment,* may not have been fixed by *legem terrae,* the Common Law, instead of its being fixed by the jury.

I think we have no evidence whatever that, at the time of Magna Carta, or indeed at any other time, *lex terrae,* the common law, fixed the punishment in cases where the question of guilt was tried by a jury; or, indeed, that it did in any other case. Doubtless certain punishments were common and usual for certain offences; but I do not think it can be shown that the *common law,* the *lex terrae,* which the king was sworn to maintain, required any one specific punishment, or any precise amount of punishment, for any one specific offence. If such a thing be claimed, it must be shown, for it cannot be presumed. In fact, the contrary must be presumed, because, in the nature of things, the amount of punishment proper to be inflicted in any particular case, is a matter requiring the exercise of discretion at the time, in order to adapt it to the moral quality of the offence, which is different in each case, varying with the mental and moral constitutions of the offenders, and the circumstances of temptation or provocation. And Magna Carta recognizes this principle distinctly, as has before been shown, in providing that freemen, merchants, and villeins, "shall not be amerced for a small crime, but according to the degree of the crime; and for a great crime in proportion to the magnitude of it;" and that "none of the aforesaid amercements shall be imposed (or assessed) but by the oaths of honest men of the neighborhood;" and that "earls and barons shall not be amerced but by their peers, and according to the quality of the offence."

All this implies that the moral quality of the offence was to be judged of at the trial, and that the punishment was to be fixed by the discretion of the peers, or jury, and not by any such unvarying rule as a common law rule would be.

I think, therefore, it must be conceded that, in all cases, tried by a jury, Magna Carta intended that the punishment should be fixed by the jury, and not by the common law, for these several reasons.

1. It is uncertain whether the *common law* fixed the punishment of any offence whatever.

2. The words "*per judicium parium suorum,*" *according to the sentence of his peers,* imply that the jury fixed the sentence in *some* cases tried by them; and if they fixed the sentence in some cases, it must be presumed they did in all, unless the contrary be clearly shown.

3. The express provisions of Magna Carta, before adverted to, that no amercements, or fines, should be imposed upon freemen, merchants, or villeins, "but by the oath of honest men of the neighborhood," and "according to the degree of the crime," and that "earls and barons should not be amerced but by their peers, and according to the quality of the offence," *proves* that, at least, there was no common law fixing the amount of *fines,* or, if there were, that it was to be no longer in force. And if there was no common law fixing the amount of *fines,* or if it was to be no longer in force, it is reasonable to infer, (in the absence of all evidence to the contrary,) either that the common law did not fix the amount of any other punishment, or that it was to be no longer in force for that purpose.

Under the Saxon laws, fines, payable to the injured party, seem to have been the common punishments for all offences. Even murder was punishable by a fine payable to the relatives of the deceased. The murder of the king even was punishable by fine. When a criminal was unable to pay his fine, his relatives often paid it for him. But if it were not paid, he was put out of the protection of the law, and the injured parties, (or, in the case of murder, the kindred of the deceased,) were allowed to inflict such punishment as they pleased. And if the relatives of the criminal protected him, it was lawful to take vengeance on them also. Afterwards the custom grew up of enacting fines also to the king as a punishment for offences. And this latter was, doubtless, the usual punishment at the time of Magna Carta, as is evidenced by the fact that for many years immediately following Magna Carta, nearly or quite all statutes that prescribed any punishment at all, prescribed that the offender should "be grievously amerced," or "pay a great fine to the king," or a grievous ransom," —

with the alternative in some cases (perhaps *understood* in all) of imprisonment, banishment, or outlawry, in case of nonpayment.

Judging, therefore, from the special provisions in Magna Carta, requiring *fines*, or amercements, to be imposed only by juries, (without mentioning any other punishments;) judging, also, from the statutes which immediately followed Magna Carta, it is probable that the Saxon custom of punishing all, or nearly all, offences by *fines*, (with the alternative to the criminal of being imprisoned, banished, or outlawed, and exposed to private vengeance, in case of non-payment,) continued until the time of Magna Carta; and that in providing expressly that *fines* should be fixed by the juries, Magna Carta provided for nearly or quite all the punishments that were expected to be inflicted; that if there were to be any others, they were to be fixed by the juries; and consequently that nothing was left to be fixed by *"legem terrae'*

But whether the common law fixed the punishment of any offences, or not, is a matter of little or no practical importance at this day; because we have no idea of going back to any common law punishments of six hundred years ago, if, indeed, there were any such at that time. It is enough for us to know-*and this is what it is material for us know*-that the jury fixed the punishments, in all cases, unless they were fixed by the *common law*; that Magna Carta allowed no punishments to be prescribed by statute-that is, by the legislative power-nor in any other manner by the king, or his judges, in any case whatever; and, consequently, that all statutes prescribing particular punishments for particular offences or giving the king's judges any authority to fix punishments, were void.

If the power to fix punishments had been left in the hands of the king, it would have given him a power of oppression, which was liable to be greatly abused; which there was no occasion to leave with him; and which would have been incongruous with the whole object of this chapter of Magna Carta; which object was to take all discretionary or arbitrary power over individuals entirely out of the hands of the king, and his laws, and entrust it only to the common law, and the peers, or jury-that is, the people.

What lex terrae did authorize.

But here the question arises, What then did *"legem terrae"* authorize the king, (that is, the government,) to do in the case of an accused person, if it neither authorized any other trial than that by jury, nor any other punishments than those fixed by juries?

The answer is, that, owing to the darkness of history on the point, it is probably wholly impossible, at this day, to state, *with any certainty or precision*, anything whatever that the *legem terrae* of Magna Carta did authorize the king, that is, the government, if, indeed, it authorized him to do anything, in the case of criminals, other than to *have them tried and sentenced by their peers, for common law crimes;* and to carry that sentence into execution.

The trial by jury was a part of *legem terrae*, and we have the means of knowing what the trial by jury was. The fact that the jury were to fix the sentence, implies that they were to *try* the accused; otherwise they could not know what sentence, or whether any sentence, ought to be inflicted upon him.Hence it follows that the jury were to judge of the nature of the offence, of the admissibility and weight of testimony, and of everything else whatsoever that was of the essence of the trial. If anything whatever could be dictated to them, either of law or evidence, the sentence would not be theirs, but would be dictated to them by the power that dictated to them the law or evidence. The trial and sentence, then, were wholly in the hands of the jury.

We also have sufficient evidence of the nature of the oath administered to jurors in criminal cases. It was simply; that they *would neither convict the innocent, nor acquit the guilty*. This was the oath in the Saxon times, and probably continued to be until Magna Carta.

We also know that, in case of *conviction*, the sentence of the jury was not necessarily final; that the accused had the right of appeal to the king and his judges, and to demand either a new trial, or an acquittal, if the trial or conviction had been against law.

So much, therefore, of the *legem terrae* of Magna Carta, we know with reasonable certainty.

We also know that Magna Carta provides that "No bailiff (*balivus)* shall hereafter put any man to his law, (put him on trial,) on his single testimony, without credible witnesses brought to support it." Coke thinks "that under this word *balivus*, in this act, is comprehended every justice, minister of the king, steward of the king, steward and bailiff." (2 Inst. 44.) And in support of this idea he quotes from a very ancient law book, called the Mirror of Justices, writen in the time of Edward I., within a century after Magna Carta. But whether this were really a common law principle, or whether the provision grew out of that jealousy of the government which, at the time of Magna Carta, had reached its height, cannot perhaps now be determined.

We also know that, by Magna Carta, amercements, or fines, could not be imposed to the ruin of the criminal; that, in the case of a freeman, must be saved to him; that, in the case of a merchant, his merchandise must be spared; and in the case of a villein, his *waynage*, or plough-tackle and carts. This also is likely to have been a principle of the common law, inasmuch as, in that rude age, when the means of getting employment as laborers were not what they are now, the man and his family would probably have been liable to starvation, if these means of subsistence had been taken from him.

We also know, *generally* that, at the time of Magna Carta, *all acts intrinsically criminal*, all trespasses against persons and property, were crimes, according to *lex terrae*, or the common law.

Beyond the points now given, we hardly know anything, probably nothing *with certainty*, as to what the *"legem terrae"* of *Magna Carta* did authorize, in regards to crimes. There is hardly anything extant that can give us any real light on the subject.

It would seem, however, that there were, even at that day, some common law principles governing arrests; and some common law forms and rules as to holding a man for trial, (by bail or imprisonment;) putting him on trial, such as by indictment or complaint; summoning and empanelling jurors, &c., &c. Whatever these common law principles were, Magna Carta requires them to be observed; for Magna Carta provides for the whole proceedings, commencing with the arrest, ("no freeman shall be *arrested,"* &c.,) and ending with the execution of the sentence. And it provides that nothing shall be done, by the government, from beginning to end, unless according to the sentence of the peers, or *"legem terrae,* and we have seen that the peers must necessarily have governed the whole proceedings at the trial. But all the proceedings for arresting the man, and bringing him to trial, must have been had before the case could come under the cognizance of the peers, and they must, therefore, have been governed by other rules than the discretion of the peers. We may *conjecture,* although we cannot perhaps know with much certainty, that the *lex terrae,* or common law principles, on the same points, at the present day. Such seem to be the opinions of Coke, who says that the phrase *nisi per legem terrae* means *unless by due process of law.*

Thus, he say;

"Nisi *per legem terrae. But by the law of the land.* For the true sense and exposition of these words, see the statute of 37 Edw. III., cap. 8, where the words, *by the law of the land,* are rendered *without due process of law;* for there it is said, though it be contained in the Great Charter, that no man be taken, imprisoned, or put out of his freehold, *without process of the law; that is, by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law.*

"Without being brought in to answer but by due process of the common law.

"No man be put to answer without presentment before justices, or thing of record, or by due process, or by writ original, *according to the old law of the land."*-2 Inst. 50.

The foregoing interpretations of the words *nisi per legem terrae* are corroborated by the following statutes, enacted in the next century after Magna Carta.

"The kingdom of God is within you!"

--Jesus of Nazareth

"That no man, from henceforth, shall be attached by any accusation, nor forejudged of life or limb, nor his land, tenements, goods, nor chattels, seized into the king's hands, against the form of the Great Charter, *and the law of the land."-St. 5 Edward III., Cp. 9 (1331.)*

"Whereas it is contained in the Great Chapter of the franchises of England, that none shall be imprisoned, nor put out of his freehold, nor of his franchises, nor free customs, *unless it be by the law of the land;* it is accorded, assented, and established, that from henceforth none shall be taken by petition, or suggestion made to our lord the king or to his council, *unless it be by indictment or presentment of good and lawful people of the same neighborhood where such deeds be done in due manner, or by process made by writ original at the common law;* nor that none be put out of his franchises, nor of his freehold, *unless* he be duly brought into answer, and forejudged of the same by the course of the law; *and if anything be done against the same, it shall be redressed and holden for none."* —St. 25 Edward III., Ch. 4 (1350.)

"That no man, of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer *by due process of law."-St. 28 Edward III., Ch.* 3 (1354.)

"That no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the *old law of the land.* And if anything from henceforth be done to the contrary, it shall be void in law, and holden for error." *St. 42 Edward III., Ch.* 3. (1368.)

The foregoing interpretation of the words *nisi per legem terrae*-that is, *by due process of law*-including indictment, &c., has been adopted as the true one by modern writers and courts; as, for example, by Kent, (2 *Comm.* 13,) Story, (3 *Comm.* 661,) and the Supreme Court of New York, (19 *Wendell,* 676; 4 *Hill,* 146.)

The fifth amendment to the constitution of the United States seems to have been framed on the same idea, inasmuch as it provides that "no person shall be deprived of life, liberty, or property, *without due process of law."*

Whether vel be rendered by or and.

Having thus given the meanings, or rather the applications, which the words *vel per legem terrae* will reasonably, and perhaps must necessarily, bear, it is proper to suggest, that it has been supposed by some that the word *vel,* instead of being rendered by *or,* as it usually is, ought to be rendered by *and,* inasmuch as the word *vel* is often used for *et,* and the whole phrase *nisi per judicium parium suorum, vel per legem terrae,* (which would then read, unless by the sentence of his peers, *and* the law of the land) would convey a more intelligible and harmonious meaning than it otherwise does.

Blackstone suggests that this may be the true reading. (*Charters*, p. 41.) Also Mr. Hallam, who says:

"Nisi per legale judicium parium suorum, *vel* per legem terrae. Several explanations have been offered of the alternative clause; which some have referred to judgment by default, or demurrer; others to the process of attachment for contempt. Certainly there are many legal procedures besides trial by jury, through which a party's goods or person may be taken. But one may doubt whether these were in contemplation of the framers of Magna Carta. In an entry of the Charter of 1217 by a contemporary hand, preserved in the Town-clerk's office in London, called Liber Custumarum et Regum antiquarum, a various reading, *et* per legem terrae, occurs. *Blackstone's Charters*, p. 42 (41). And the word *vel* is so frequently used for *et*, that I am not wholly free from a suspicion that it was so intended in this place. The meaning will be, that no person shall be disseized, &c., except upon a lawful cause of action, found by the verdict of a jury. This really seems as good as any of the disjunctive interpretations; but I do not offer it with much confidence."-*2Hallam's Middle Ages, Ch. 8, Part 2, p. 449, note.*

I cite the above extract from Mr. Hallam solely for the sake of his authority for rendering the word *vel* by *and*; and not by any means for the purpose of indorsing the opinion he suggests, that *legem terrae* authorized "judgments by default or demurrer," *without the intervention of a jury*. He seems to imagine that *lex terrae*, the common law, at the time of Magna Carta, included everything, even to the practice of courts, that is, *at this day*, called by the name of *Common Law;* whereas much of what is *now* called Common Law has grown up, by usurpation, since the time of Magna Carta, in palpable violation of the authority of that charter. He says, "Certainly there are many legal procedures, besides *trial* by jury, through which a party's goods or person may be taken." Of course there are *now* many such ways, in which a party's goods or person *are* taken, besides by the judgment of a jury; but the question is, whether such takings are not in violation of Magna Carta.

He seems to think that, in cases of "judgment by default or demurrer," there is no need of a jury, and thence to infer that *legem terrae* may not have required a jury in those cases. But this opinion is founded on the erroneous idea that juries are required only for determining contested *facts*, and not for judging of the law. In case of default, the plaintiff must present a *prima facie* case before he is entitled to a judgment; and Magna Carta, (supposing it to require a jury trial in civil cases, as Mr. Hallam assumes that it does,) as much requires that this ***prima facie* case, both law and fact be made out to the** satisfaction of a jury, as it does that a contested case shall be.

As for a demurrer, the jury must try a demurrer (having the advice and assistance of the court, of course) as much as any other matter of law arising in a case.

Mr. Hallam evidently thinks there is no use for a jury, except where there is a "trial"-meaning thereby a contest on matters of *fact*. His language is, that "there are many legal procedures, besides *trial* by jury, through which a party's goods or person may be taken." Now Magna Carta says nothing of *trial* by jury; but only of the *judgment*, or sentence, of a jury. It is only *by inference* that we come to the conclusion that there must be a *trial* by jury. Since the jury alone can give the *judgment*, or *sentence*, we *infer* that they must *try* the case; because otherwise they would be incompetent, and would have no moral right, to give *judgment*. They must, therefore, examine the grounds (both of law and fact,) or rather *try* the grounds, of every action whatsoever, whether it be decided on "default, demurrer," or otherwise, and render their judgment, or sentence, thereon, before any judgment can be a legal one, on which "to take a party's goods or person." In short, the principle of Magna Carta is, that no judgment can be valid *against a party's goods or person*, (not even a judgment for costs,) except a judgment rendered by a jury. Of course a jury must try every question, both of law and fact, that is involved in the rendering of that judgment. They are to have the assistance and advice of the judges, so far as they desire them; but the judgment itself must be theirs, and not the judgment of the court.

As to "process of attachment for contempt," it is of course lawful for a judge, in his character of a peace officer, to issue a warrant for the arrest of a man guilty of a contempt, as he would for the arrest of any other offender, and hold him to bail, (or in default of bail, commit him to prison,) to answer for his offence before a jury. Or he may order him into custody without a warrant when the offence is committed in the judge's presence. But there is no reason why a judge should have the power of *punishing* for contempt, any more than for any other offence. And it is one of the most dangerous powers a judge can have, because it gives him absolute authority in a court of justice, and enables him to tyrannize as he pleases over parties, **counsel, witnesses, and jurors. If a judge has power to** punish for contempt, and to determine for himself what is a contempt, the whole administration of justice (or injustice, if he choose to make it so) is in his hands. AND ALL THE RIGHTS OF JURORS, WITNESSES, COUNSEL, AND PARTIES, ARE HELD SUBJECT TO HIS PLEASURE, AND CAN BE EXERCISED ONLY AGREEABLY TO HIS WILL. He can of course control the entire proceedings in, and consequently the decision of, every cause, by restraining and punishing every one, whether party, counsel, witness, or juror, who presumes to offer anything contrary to his pleasure.

This arbitrary power, which has been usurped and exercised by judges to punish for contempt, has undoubtedly had much to do in subduing counsel into those servile obsequious, and cowardly habits, which so universally prevail among them, and which have not only cost so many

clients their rights, but have also cost the people so many of their liberties.

If any *summary* punishment for contempt be ever necessary, (as it probably is not,) beyond exclusion for the time being from the court-room, (which should be done, not as a punishment, but for self-protection, and the preservation of order,) the judgment for it should be given by the jury, (where the trial is before a jury,) and not by the court, for the jury, and not the court, are really the judges. For the same reason, exclusion from the court-room should be ordered only by the jury, in cases when the trial is before a jury, because they, being the real judges and triers of the cause, are entitled, if anybody, to the control of the court-room. In appeal courts, where no juries sit, it may be necessary-not as a punishment, but for self-protection, and the maintenance of order-that the court should exercise the power of excluding a person, for the time being, from the court-room; but there is no reason why they should proceed to sentence him as a criminal, without his being tried by a jury.

If the people wish to have their rights respected and protected in courts of justice, it is manifestly of the last importance that they jealously guard the liberty of parties, counsel, witnesses, and jurors, against all arbitrary power on the part of the court.

The idea that the word *vel* should be rendered by *and*, is corroborated, if not absolutely confirmed, by the following passage in Blackstone, which has before been cited. Speaking of the trial by jury, as established by Magna Carta, he calls it,

"A privilege which is couched in almost the same words with that of the Emperor Conrad two hundred years before: 'nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum, *et* judicium parium suorum." (No one shall lose his estate unless according to the custom of our ancestors, *and* the judgment of his peers.)-3 *Blackstone*, 350.

If the word *vel* be renderd by *and*, (as I think it must be, at least in some cases,) this chapter of Magna Carta will then read that no freeman shall be arrested or punished, "unless according to the sentence of his peers, *and* the law of the land."

The difference between this reading and the other is important. In the one case, there would be, at first view, some color of ground for saying that a man might be punished in either of two ways, viz., according to the sentence of his peers, *or* according to the law of the land. In the other case, it requires both the sentence of his peers *and* the law of the land (common law) to authorize his punishment.

If this latter reading be adopted, the provision would seem to exclude all trials except trial by jury, and all causes of action except those of the *common law*.

But I apprehend the word *vel* must be rendered both by *and*, and by *or;* that in cases of a *judgment*, it should be rendered by *and*, so as to require the concurrence both of "the judgment of the peers *and* the law of the land," to authorize the king to make execution upon a party's goods or person; but that in cases of arrest and imprisonment, simply for the purpose of bringing a man to trial, *vel* should be rendered by *or*, because there can have been no judgment of a jury in such a case, and "the law of the land" must therefore necessarily be the only guide to, and restraint upon, the king. If this guide and restraint were taken away, the king would be invested with an arbitrary and most dangerous power in making arrests, and confining in prison, under pretence of an intention to bring to trial.

Having thus examined the language of this chapter of Magna Carta, so far as it relates to criminal cases, its legal import may be stated as follows, viz.:

No freeman shall be arrested, or imprisoned, or deprived of his freehold, or his liberties, or free customs, or be outlawed, or exiled, or in any manner destroyed, (harmed), nor will we (the king) proceed against him, nor send any one against him, by force or arms, unless according to that is, in execution of the sentence of his peers, *and* (or *or*, as the case may require) the Common Law of England, (as it was at the time of Magna Carta, in 1215.)

"It is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle."

--James Madison

A Memorial and Remonstrance

1785