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MAGNA CHARTA.

The History of an Evolution.

Recent public utterances have aroused increased interest in Magna Charta.

Governor William E. Russell, in speaking at the Yale Law School Commencement upon "The Proper Province and Office of Constitutional Law," refers to the tendency in many of our states to make frequent changes in their constitutions. This tendency, I may say, finds expression in Ohio by a constitutional provision for voting every twenty years whether or not to make a new constitution.

He argues that everything which has power to win obedience and respect must have its roots deep in the past, that there is little in the American constitution that is absolutely new and much that is as old as Magna Charta, and quoting a recent writer, concludes: "And thus it came to pass that Magna Charta, the acts of the Long Parliament, the Declaration of Independence and the Constitution of 1787, constitute the record of an evolution."

Conceding to Greece and to Rome some influence, he adds: "We know that our constitutional law comes not so much from these classic sources as from our fighting Anglo-Saxon forefathers. * * * Out of their contests came right by consent to supplement control by authority and make a well rounded government. * * * Thus came Magna Charta, the basis of liberty and self-government of the seven succeeding centuries."

The volume containing Judge Dillon's lectures at Yale on "The Laws and Jurisprudence of England and America," is an inspiring book with the significant sub-title, (I may call it) "Our Law and Its Old Home and in Its New Home." Let us follow him in the path by which he leads us back to Magna Charta.

As a result of our civil war came the Fourteenth Amendment. This, among other things, ordained " * * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment provided, among other things, " * * * nor shall any person * * * be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." It protected life, liberty and property from invasion by Congress or the federal government.

The Fourteenth protected each from invasion by state legislatures or by the people of the states in any form.

Judge Dillon says of the Fifth: "This was not new language or language of uncertainty. It was taken purposely from the Magna Charta." And of the Fourteenth, he adds: "I believe it will hereafter more fully than at present be regarded as the supplement of the great charter and be to us as the great charter was and is to England, the source of perennial blessings." And he adds, quoting from another, "The whole constitutional history of England is but little more than a commentary on Magna Charta."

A still greater authority, the Supreme Court of the United States, (1) quoting freely with approval from Mackintosh, ascribed to Magna Charta the principle of development, *i. e.*, flexibility and capacity for growth and adaptation. Justice Harlan, in the dissenting opinion, quotes Hallam's reference to the signing of it as the most important event in English history and to the instrument as still the key-stone of English liberty, and Mackintosh's statement, "to have produced it, to have preserved it, to have matured it, constitute the immortal claim of England upon the esteem of mankind." Pointing out that the colonists claimed as an inheritance the institutions and guarantees established in England, he recalls that the Congress of 1774, speaking for the twelve colonies, published the journal of their proceedings with a medallion on the title page, "representing Magna Charta as the pedestal on which was raised the column and cap of liberty, supported by twelve hands, and containing the words 'Hanc Tuemur, Hac Nitimur!'"

Thus one is led to desire to know more fully the story of this wonderful charter, the production of what seems to be almost the dark ages.

To the English mind, as voiced by a recent writer, (2) it justly seems remarkable that one of the most unprincipled, wicked kings should have promulgated in systematic form a declaration of personal rights, which is regarded with so much reverence in this century, and that a body of rough, unlettered barons surrounded by slaves, engaged in continual petty wars with each other and with the Crown, who knew little law beyond the right of the strongest, and whose morals were under no restraint but that of a slavish fear of the church, should have deliberately dictated a declaration which affected, not only their own privileges and immunities, but those of the future citizens of a constitutional monarchy. To us it seems

(1) *Hurtado v. California*, 110 U.S. 516; *Holden v. Hardy*, 169 U. S. 388.

(2) 27 Law Reporter, 185.

also remarkable that these robber barons, the slaveholders of that cruel time, could also set a precedent for a republic of the 18th and 19th centuries.

I think we shall find that Magna Charta was itself only one step in an evolution already commenced, that it was not the sudden springing into life of a new creation.

Knight argues that if the charter had been extorted by men in advance of their age, if it was not consistent with society at its date, it would not have stood against the regal power, which again and again assailed it, that it was built as all English freedom had been built, upon something which had gone before it, and that it demanded nothing which had not been acknowledged in theory at least by every King who had taken the coronation oath. (3).

The charter established testamentary power over part of the personal estate and provided that the rest of it should go to the wife and children; established dower; uniformity of weights and measures; gave encouragement to commerce by protecting strangers; protected tenants and sub-tenants from illegal distresses by the Crown; limited the right of the King's officers to take necessaries for his household; fixed the Court of Common Pleas at Westminster in order that suitors should not be compelled to follow the King's person on his course through the island; directed trial to be had in the proper counties, thus bringing justice home to the people; corrected some abuses of trial by wager of law and of battle; fixed a definite time and place for holding courts; put an end to the curious system of corruption by which litigants were compelled to pay to the King large sums of money to procure a hearing in his courts; confirmed the liberties of London and all other cities; and, lastly, protected every individual in the free enjoyment of life, liberty, and property, unless declared to be forfeited by judgment of his peers or the law of the land.

Centuries after followed the Petition of Right; the Habeas Corpus Act and the Bill of Rights of 1689, which supplemented but did not do away with or replace the great charter.

Who were the people that gave to all time this model for bills of rights and constitutions?

The prior history of the island is that of a series of conquests, beginning with that of the Romans, who found a rude, savage people, whom they left four centuries later, more civilized, but less brave and warlike, to become an easy prey to foreign invasion.

To protect themselves from the Picts and Scots of the north they called in the aid of the Anglo-Saxons, who drove out not only the

(3) History of England, 347.

Picts and Scots, but the majority of those who had invited them there.

They founded the Heptarchy, which 450 years of Danish invasion and other exciting causes gradually welded into one kingdom, whose people were to remain the same Anglo-Saxon people through Danish invasions and Norman Conquest.

For the Normans did much killing, but they did not drive out. They assimilated with and intermarried with the Saxons, who still survived as a people. Some of their ancient families possessed wealth and power, although they were exceptions to the condition of the race in general.

Harold seized upon the throne, although he had by solemn oath renounced the succession in favor of William, Duke of Normandy. William invaded England, defeated and slew Harold, and on Christmas Day was crowned in Westminster Abbey. There was a nominal submission of his right to the votes of those present which recognized the right of both races to a voice in the matter.

Blackstone draws this picture of the condition of England after the Conquest: "The nation groaned under as absolute a slavery as was in the power of a warlike and ambitious and politic prince to create. The consciences of men were enslaved by four ecclesiastics devoted to a foreign power and unconnected with the civil state under which they lived. The laws, as well as the prayers, were administered in an unknown tongue. The ultimate property of all lands and a considerable share of the present profits were vested in the King or by him granted out to his Norman favorites, who by a gradual progression of slavery were absolute vassals to the Crown and as absolute tyrants to the commons. Unheard-of forfeitures, talliages, aids and fines were extorted from the pillaged landholders."

The nation consisted wholly of clergy, who were also the lawyers, the barons, the knights or soldiery, and the burghers or inferior tradesmen, who, from their insignificance, retained some points * * * of their ancient freedom. All the rest were villeins or bondmen."

In the year 1215, one hundred and forty-nine years after the Conquest, Magna Charta was wrested from a King who was a craven and a dastard as well as a tyrant, by his nobles and barons.

Blackstone pronounces it impossible to trace from what particular people Britons, Roman, Scots, Picts, Danes, Saxons or Norman, have been derived the English ideas and usages as to individual rights and liabilities. The Romans left very little, if any, traces of their influence. Alfred, the Saxon, established judicial

system and a code of laws. King Edgar attempted to establish a code or digest of laws for the whole country, a task to be afterwards completed by Edward the Confessor.

Blackstone considers that the latter's code was no more than a revival of Alfred's, with some improvements suggested by necessity and experience, with the addition of some approved British and Danish usages. This appears to him to be the best supported and most plausible conjecture of the rise and origin of that admirable system of maxims and unwritten customs which is now known by the name of the common law, and which is doubtless, he says, of Saxon parentage.

The Danish invaders may have had more influence than is generally supposed. Kent quotes from Bishop Muller's historical work on Denmark the suggestion that the free spirit of the English nation at the time was not peculiar to the Anglo-Saxons in that island, for he says Christopher II, of Denmark, at the demand of the diet which elected him, signed a charter "taken from preceding models," which secured the clergy and nobility in their privileges and exemptions and forbade any tax upon the free peasants, contrary to established laws and customs, that any man should be imprisoned or deprived of life and property without public trial and conviction according to law, and that no law should be made or altered without the consent of the prelates and best men of Parliament, and provided for an annual Parliament.

Perhaps the Magna Charta of one hundred years before inspired some of the provisions of this Danish charter of 1319.

The Saxon laws provided, among other things, for Parliaments of the principle men, election of magistrates by the people, descent of lands to all sons in equal shares, for county courts of ecclesiastical and civil jurisdiction, trial by ordeal, by wager of law and by jury of some kind, the exact nature of which is not known.

William the Conqueror separated the ecclesiastical courts from the civil, doing so in order to win the favor of the Pope and the support of the priests, who were men of ability and powerful influence, possessed of the only learning then existing.

He narrowed the jurisdiction of the county courts, extended that of the King's justiciaries to all kinds of cases in all parts of the island, and established the "aula regis," whose constitution and judges were brought from Normandy, in which the Norman language only was used. He introduced trial by combat, which Blackstone characterizes as "clearly an unchristian as well as uncertain method of trial." He sought occasion to forfeit all land titles of the leading Saxons and granted them to his chief barons, attaching to them the fiction and burdens of feudal tenure.

William Rufus extended in some respects the changes introduced by his father, but his brother, Henry I, restored some laws of the Confessor, abolished the *crufew*, and gave up some of the great grievances of feudal tenure. His code provided for punishment of certain crimes, and compromised between the Saxon law, by which land descended to all sons and the Norman which gave it to the eldest son, by giving to the eldest son only the principal estate. He gave to the clergy the free election of bishops and united again (but for a time only) the civil and ecclesiastical courts.

Stephen introduced some points of the Roman or civil law and provisions for appeals to the Court of Rome as a part of the canon law.

Primogeniture and some abuses of feudal tenure which had been removed by Henry I, were restored by Henry II. He, however, did much to remedy the evils of the times, checked the power of the Pope and priests, divided the kingdom into six circuits, appointed judges to sit in each, and established trial by jury in certain cases.

But little was accomplished in the reign of Richard II. He was too busy in the crusades, too fond of hunting. While he saw to the rigorous execution of the forest laws established by William, he modified some of the severer penalties.

By John's time the evils of the forest laws, the exactions and hardships of the feudal system resulted in many insurrections of the barons. The interests of the people and of the barons, as Stubbs says, were drawn into the closest harmony. Both, he says, suffered from arbitrary and excessive taxation, from delay of justice, exactions of military service, and outrages of every kind, both public and domestic.

Writers do not consider any language too strong to use, in denouncing John. Green introduces the story of his treachery, ingratitude and perfidy, of his cruelties and of his cowardice and superstition, with the words, "Foul as it is, Hell is defiled by the fouler presence of John."

His coronation oath bound him to preserve the liberties of the Church and the laws of the land. Not satisfied with outraging his people, he dared to oppress the Church. He confiscated all the possessions of the Archbishop of York and extorted large sums from the churches and convents as well as the barons. He forced the election of his favorite, John de Grey, as Archbishop of Canterbury. The Pope annulled this election and caused Stephen Langton to be elected by the monks. John refused to recognize Langton and banished the monks and confiscated their property. The Pope laid an interdict upon the kingdom. John confiscated more church

property and tortured more ecclesiastics and imposed new burdens and laws upon the people. They appealed to the Pope, who excommunicated John, deposed him, and directed Philip of France to execute the sentence of deposition, who proceeded about it with great vigor. But not wishing either France or England to be too powerful, the Pope sent Pandulf to terrify John into yielding, with the result that he acknowledged Langton and resigned his kingdom to the Pope to hold it thereafter as his tributary. But although he thus made his peace with the Church and the interdict was removed, the barons and people were still suffering from his oppressions and his disregard of his oath to restore the laws of Edward and Henry I. Nor did he keep his promise to compensate the Church for its losses by his extortions and seizures.

The crisis came at a meeting of the barons at St. Edmundsbury, with Archbishop Langton at their head. Urged by his eloquence and his production, it is said, of the charter of Henry I, each baron took an oath to demand a solemn charter of rights and liberties from the King and to wage war against him unto the death unless he should restore their *ancient liberties*. They made the demand at London and received his promise to answer by Easter. But in the meantime he appealed secretly to the Pope, with the promise that he would undertake a crusade.

The Pope wrote to the barons disapproving their attempt, but fortunately his letter came too late. In April, 1215, John was at Oxford. The barons marched with a large army in that direction and sent to him a list of grievances, saying, "These he must redress, or we will do it for ourselves." He replied, with an oath, that he never would grant liberties which would make him a slave. They continued their march, and, as one writer says, "The whole land, tired of the tyrant, seemed to flock to join them." Seven knights only remained with him. Broken in spirit, yet furious with rage, he yielded and asked them to fix the time and place for him to sign their charter. They named Runnymede, and there they met June 15, 1215. The session continued until the 19th, when the articles, based partly upon the charter of Henry I and partly on the laws of Edward, were reduced to a charter and sealed with his great seal.

Thomson (4) suggests that the barons, because of their overwhelming array, were led to increase their demands, that John finally conceded all on the theory that the more extensive their demands the less blame could be attributed to him when he should withdraw from a covenant made under such circumstances.

(4) Essay on Magna Charta, London, 1829.

Runnymede, the council meadow, is about eighteen miles from London, near Windsor Park. It is still a meadow, and is used as a racing ground in August of each year. A small island in the Thames is said to be the exact spot upon which the charter was actually sealed. Upon the opposite bank of the river still stands the famous tree, "The Ankerwyke Yew," whose vigorous life remains a fitting emblem of the great work there wrought.

John at once set about trying to annul his action. He waged war with his people and destroyed many towns and villages. He appealed to the Pope, who annulled the charter and again laid the kingdom under an interdict.

The barons offered the crown to Louis, son of the French King. He came to England and carried on war with varying success, but fortunately it was terminated by the death of John.

With his death the struggle to annul the charter seemed at an end. His successor, Henry III, nine years old when crowned, solemnly renewed and ratified it then, and again and again during his reign. Successive kings did the same, so that by the time of Henry V (1400), it had thus been confirmed more than thirty times.

Down through ages of intrigue, conflict and revolution, of attempts on the one side to evade it and on the other to re-affirm it, bearing various appropriate names, none dearer to the English than "The Great Charter," it has come to us intact, still defining in its brief, general, simple and easily understood language, the rights of the people of a mighty empire.

We have seen that the Pope annulled the charter and forbade the King, barons and people to observe it under pain of excommunication, quashing, he said, "as well the charter as its obligations and engagements whatsoever they be and altogether depriving them of all obliging force." This has given rise to much controversy, one phase of which is an article by Cardinal Manning, "The Pope and Magna Charta." (5)

He argues that the Pope condemned the mode in which the charter was obtained, and not the contents or merits of the charter itself; that those who use it to make men believe that the Catholic Church is a friend of despotism and the enemy of liberty shut their eyes to history.

I shall not attempt to follow his argument. He quotes from the Pope's letters and bulls, language to show that it was the manner, and not the matter, which induced his action. One or two extracts will show how difficult a task in casuistry the Cardinal thus undertook.

(5) Contemporary Review, 128, Littell, 74.

The letters refer to the charter as "turpis et villis, illicita et iniqua," and contain this language: "Since, therefore, the compage of whatever kind it be to which by force and fear you constrained him, is not only vile and base, but unlawful and wicked, so as to be reprobated by all, chiefly because of the manner in which it was made."

It is difficult to see that in all this there is no attack upon the subject matter of the charter.

Further insight into the Pope's state of mind is given by his answer to Archbishop Langton, who asked that he be relieved from the excommunication pronounced against all disturbers of the King and realm of England—"Not so, brother. You will not so easily get absolution for all the harm you have done, not to the kingdom of England only, but to the Roman Church."

In this connection it will be interesting to note the following, from a recent lecture on the subject, "Why am I a Catholic?"

"I am a Catholic because I love liberty. The Catholic Church has ever been the friend of the oppressed, and has been ever the ablest champion of liberty; has been ever found to stand between arbitrary power or tyranny and the people.

"Did not the Catholic barons wring from King John the very corner-stone of constitutional government, the Magna Charta?"

Both the preliminary articles and the charter were engrossed upon parchment. There were thus two documents. Neither was signed by either King or the barons. Both were sealed with the great seal of King John, while the charter was sealed by some of the barons. Many copies of each were made and executed as originals, and some of these are still carefully preserved. The British Museum has an original of the Articles, which seems to have been in the possession of Archbishop Laud. It has also two originals of the charter, which belonged to Sir Robert Cotton. The story is that Sir Robert, early in the 17th century, purchased one of these from a tailor who had bought it with a lot of old papers found in a scrivener's room. He was about to cut it up into measures when Sir Robert noticed it and seized it just in time to prevent its destruction.

The story first appears in "Disraeli's Curiosities of Literature," as having been told by Colomies.

These originals have been published in fac-simile, embellished by adding the arms of the knights on the blank margins. That taken from the Cotton manuscript shows that it was probably an original, actually sealed at Runnymede, because of the omission of three phrases in the body, which are added beneath.

The charter applied only to freemen, while a large portion of the people were either villeins or slaves. Knight refers to the article requiring guardians to so care for their wards' lands as to avoid "waste and destruction of the men and things," as showing that these slaves or serfs were considered simply as chattels which went with the land.

While the charter was mainly in the interest of the great barons, yet it contained certain provisions intended for the benefit of the villeins and the under tenants. In limiting amercements or fines, it saved to the villein his carts and plough, while the barons or chief tenants agreed that every liberty or custom which the King had granted to his tenants should be observed by the clergy and laity towards their tenants.

And thus we are forced to approve the following passage in Knight:

"To that great meeting of Runnymede came some citizens of London with the mailed knights. Perhaps there were some servile tenants amongst the crowd who wondered if for them any blessing would arise out of the differences between the King and their lords. Yet the iron men who won this Charter of Liberties dreamt not of the day when a greater power than their own, the power of the burgher and the villein, would maintain what prelate and baron had sworn to win upon the altar of Saint Edmundsbury. Another order of men, who gradually worked their way out of that state in which they were despised or neglected, have kept and will keep, God willing, what they of the pointed shield and masled armour won on the 15th day of June, in the year of grace 1215."

THORNTON M. HINKLE.