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MAGNA CARTA AND TRIAL BY JURY WALTER CLARK

CHIEF JUSTICE OF THE NORTH CAROLINA SUPREME COURT

THE GREATEST muniment of popular rights beyond all question, second only to that greater instrument issued at Philadelphia on the Fourth of July 1776, is that which is known as Magna Carta—the Great Charter. It is so well known and its provisions have been so often cited that it is unnecessary to set forth its chief and best known characteristics.

The object of this article is in the interest of truth to show that broad as are the provisions of Magna Carta and great as has been its effect upon the course of history, it has no claim however to be styled, as it often has been, the origin and guarantee of Trial by Jury with which it had nothing whatever to do.

Writers have endeavored to find the origin of Trial by Jury in the forests of Germany and in other directions more or less remote but the truth is that Trial by Jury was utterly unknown in the shape in which we now have it until it appeared in England nearly a century and a half after the adoption of Magna Carta. The first authentic instance of trial by jury was in England and the year 1351. It is true that Coke and Blackstone have credited Magna Carta with the origin of jury trial but neither of those writers had the full access to historical records and legal documents which have become more accessible of recent years.

There has also been much misunderstanding as to the expression in Magna Carta of the "law of the land." At the time that the Barons and the King had their meeting at Runnymede and for some years afterwards the law of the land as to trials was embraced under three heads:

(1) Trial by ordeal, such as walking barefoot over hot bars of iron or submersion in water. In that superstitious age it was thought the Deity was so

interested in the petty squabbles of men that he would interfere by suspending the natural laws for the purpose of proving which of two contestants had the better cause;

(2) There was trial by battle by which two persons in deadly conflict with sword and shield and spear and often on horse-back, would prove by divine interposition that the survivor had right on his side and that the dead man was wrong. Certainly he could not assert anything to the contrary;

(3) The third and most civil method of trial was by compurgation. That is, each side would summon as many as it could who would swear that they believed that the litigant whose cause they espoused was correct and the other was wrong. These compurgators were not witnesses and trial by compurgation was simply a test as to how many of the neighbors and friends would swear to their belief in the truth of the claim of the litigant whose cause they espoused.

McKechnie, speaking of the traditional relation of Magna Carta to trial by jury says:

"One persistent error, universally adopted for many centuries, and even now hard to dispel, is that the Great Charter granted or guaranteed trial by jury. This belief, however, which has endured so long and played so prominent a part in political theory is now held by all competent authorities to be entirely unfounded. Not one of the three forms of a modern jury trial had taken definite shape in 1215 (the year of Magna Carta) although the root principles from which all three subsequently grew had been in constant use since the Norman Conquest. Henry II indeed had done much towards developing existing tendencies of all three of its forms, namely of the Grand Jury, the Petty Criminal Jury and the Jury of Civil Pleas."¹

Indeed the foundation of modern law in England may be said to date from Henry II. Up to that time the ecclesiastical courts of the Catholic Church had jurisdiction not only of all men in clerical orders and monks but had jurisdiction of many things which subsequently passed over to the jurisdiction of the civil courts.

Then there were the local courts and especially the Baronial Courts in which the representative of the Barons had jurisdiction of life and death. Indeed at one time in a single county (Berkshire) there were no less than 35 courts which possessed jurisdiction of imposing punishment of death. Then there were city courts which by usage and custom possessed jurisdiction to various extent. It was Henry II who first instituted the Superior Courts of law which had jurisdiction throughout the Kingdom and which by administering one system of laws made that system the Common Law of the Kingdom and the courts were styled "Common Law Courts." The administration of justice in these courts trespassed very much upon the jurisdiction in Baronial Courts and Manor Courts and aroused opposition not only in that quarter but from the ecclesiastical and other ancient courts and there arose conflict of jurisdiction.

The Barons in their combination against King John were not only anxious to protect themselves against the arbitrary power of the King but to fence off and prohibit the jurisdiction of the Common Law Courts of the Kingdom as to themselves and hence arose the much misunderstood expression in Magna Carta

¹ McKechnie, *Magna Carta*, p. 158.

that they should be tried solely by the judgment (not a jury) of their peers. The King's judges were appointed and removable by him at will. They were not the peers (i.e. the equals) of the Barons and they wished to guarantee therefore that when the King assumed any cause of complaint against them they should be tried not by judges appointed by the king, but should be investigated and judgment rendered by their own associates and they should be under the jurisdiction of *judicium parium*, that is they were entitled to demand the judgment of their peers.

It is worth notice just here that all the judges of England down to Magna Carta were ecclesiastics for there were no lawyers in that Country until 1291 in the reign of the grandson of John, in the 18th year of Edward I, when an Act of Parliament authorized the licensing of 40 lawyers, a number which was thought sufficient to do the legal work of the Kingdom. But even then it was rarely the case that any lawyer in the next two centuries was appointed a judge. The first Lord Chancellor who was not a clergyman was Sir Robert Bouchier in 1341, a soldier and layman, and there was no other exception to the Lord Chancellor being a priest or bishop down to and including Sir Thomas More, except only a woman, Eleanor of Provence.

Investigations of the last 100 years and the opening up of the archives have proven the correctness of the above statements and authorities can be quoted to the same uniform effect by all modern writers. It may be sufficient however, to mention the following few authorities on the subject:

It may be repeated that the much vaunted doctrine that trial by jury was guaranteed by Magna Carta, which was agreed to A.D. 19 June 1215, is without the slightest foundation in fact. There was no grand jury until about forty years before when it was established in a crude form by the Assizes of Clarendon in 1166, and there was no such thing as trial by a petty jury until 135 years after Magna Carta in 1351, and at first the juries were composed of the witnesses to the crime. They were not limited even then, at first, to twelve in number, nor was unanimity required.

The history of this famous Article 39 of Magna Carta, which it was once supposed created trial by jury or recognized its previous existence, has had a flood of light thrown upon it by the examination of the records, and there is now universal agreement by scholars that it had no reference at all to what we know as trial by jury. Scattered references to a trial by jury by writers and documents of that day have been shown to refer solely to trial by compurgators, which was simply the summoning of witnesses for either side who swore only as to their belief as to which party was right and the matter was decided, not by a jury as we know it, but by the judge.

Yet even as good authority as should be the Supreme Court of the United States, without scrutiny of the historical evidence, which indeed at that time had not become thoroughly known, on one occasion actually held that trial by jury was instituted by Magna Carta.

Magna Carta was a contract between King John and thirteen barons and twelve bishops made at Runnymede, 3 miles below Windsor Castle on the Thames, on Friday 19 June, 1215. The object of this contract was to restrict the power of King John and for the protection of the feudal privileges of the bishops and barons who had been pillaged and oppressed by the king through his judges who were appointed and removable at will by him, and who, of course, did his bidding without scruple.

The language of Chapter 39 of Magna Carta, which like all legal instruments of that day and for hundreds of years later, was written in Latin, is as follows:

“Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae.”

It has been translated as follows:

“No freeman shall be arrested or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.”

Prof. McKechnie in his admirable work on Magna Carta, says in regard to this chapter that though it has occupied a prominent place in law books, its meaning has been grossly misunderstood. He says:

“It has been usual to read it as containing a guarantee of trial by jury to all England; as absolutely prohibiting arbitrary commitment; and as undertaking solemnly to dispense to all and sundry equal and exact justice, full, free and speedy. The traditional interpretation has thus made it, in the widest terms, a promise of law and liberty, and good government to every one. A careful analysis of the words 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 this great document that it should direct its energies, not to the enunciation of vague platitudes and well-sounding generalities, but to the reform of a specific and clearly defined group of abuses. Its main object was to prohibit John from resorting to what is sometimes whimsically known in Scotland as “Jeddart justice.” It forbade him for the future to place execution before judgment. Three aspects of this prohibition may be emphasized.”

“These three were: First, that judgment must precede execution, therefore it forbade John from proceeding without judgment, that is without legal procedure; it called for a *judgment* of peers, not a jury.

“Second, it required *per iudicium parium* i.e. that the judgment must be rendered by one’s peers. This was a stipulation that while the King might dispense justice to the common people through his judges, as to proceedings against the barons, the judgment should be rendered only by their peers. The King’s judges were not peers of the barons and therefore this much misunderstood stipulation was a contract for their protection that they should be tried, both civilly and criminally, by their peers and not by the King’s judges. A fragment of this provision still remains in the English law by which peers of the realm are tried in certain cases on the criminal side of the docket by the House of Lords. Therefore, instead of being as so often construed, a guarantee for a trial by jury, it was a stipulation for the special privilege that in matters affecting the barons they were to be tried by men of their own order. It was a stipulation for a special privilege and not a guarantee of equality.

Another instance of this stipulation was that for centuries under John's Charter, 10 April 1201, in all action against Jews, they were entitled to *judicium parium* by Jews, and by later statutes a foreign merchant was entitled to a jury, half of whom should be alien to his own country—*de medietate linguac.*. In the case of a proceeding against a Welshman, he was entitled to a trial by men drawn equally from both sides of the boundary line between Wales and England."

The third provision, that the trial should be *per legem terrae* i.e. by the "law of the land" meant not as is now generally understood, but it meant trial by battle or ordeal or compurgators. No other method of trial was known. This stipulation of Magna Carta promises that no plea, civil or criminal, could henceforth be decided against any freeman until he had failed to claim or had waived his right to a trial by one of those methods.

The scope of the protection afforded that he should not be taken nor imprisoned did not mean literally that he could not be provisionally arrested and detained, but merely that he was entitled to a trial before condemnation.

The barons intended to prevent the arbitrary arrests to which they had been subjected by an arbitrary king. The words that the King "will not set forth nor send against him" was also clearly intended for the purpose of preventing attacks by forces in arms against men unjudged and uncondemned.

The main cause of the misconstruction of this Section is the use of the words "No freeman should be molested in ways above made illegal." But it is very clear from a history of the times and from the conditions of society that the word "freeman" which is the translation given to the term *liber homo* applied only to owners of a knight's fee. It included in the protection neither the property nor the persons of villeins or those holding unfree lands. The whole subject is so fully discussed in McKechnie on Magna Carta pp. 435-439 and in other treatises upon the history of the early English law that it is not necessary to say more.

The identification of *judicium parium* with trial by jury evidently owed its origin to a not unnatural tendency of a later generation of lawyers to explain what was unfamiliar in the great Charter by the surroundings of their own day. They found, as Prof. McKechnie says, "Nothing in their own day to correspond with the *judicium parium*² of 1215 or to correspond with their own trial by jury. Therefore they identified the two, interpreting this Chapter 39 as a general guarantee of the right to trial by jury. Mr. Reeves, Dr. Gneist and other writers long ago exposed this error, but the most conclusive refutations are those recently given by Prof. Maitland and Mr. Pike." They conclusively prove that "judgment by peers" is one thing, and the verdict of the jury is quite a different thing.³

"They show conclusively that the criminal petty jury had not been invented in 1215 and to introduce trial by jury into John's great Charter is an unpardonable anachronism."⁴

² McKechnie, *Magna Carta*, p. 456.

³ I Pollock and Maitland, *History of English Law to the Time of Edward I*, p. 152, note; II Pollock and Maitland 622-3 note; Pike, *House of Lords* 169.

⁴ McKechnie, *Magna Carta* 451.

It is well said that "the barons would have repudiated trial by jury if they had known of such a thing. They desired that all questions affecting them should be "judged" before fellow barons and ordinarily in a trial by battle. They would have scorned to submit to the verdict of twelve good men of their own locality. Their inferiors must have no voice in determining their guilt or innocence."⁵

Besides judgment "*judicium*" and verdict were essentially different. The function of a petty jury (after it had been invented) was to answer the specific question put to it. The insurgent barons demanded decision of the whole case, and by men of their order, their peers.⁶

Pike says: "From the time when trial by jury first commenced, either in civil or in criminal cases, to the present day in the nineteenth century, no jury ever did or could give judgment on any matter whatever."⁷

What the barons really stipulated for was a special privilege for themselves. They bargained that if the King had any cause of complaint against them, they should not be tried by his judges, like the common people, but that they should be tried *per judicium parium suorum* i.e. they were stipulating for a special privilege for themselves and in derogation of the doctrine of "equality before the law and equal right for all" if such doctrine had existed at that time. The agreement was that as to themselves they should be tried "*per judicium*" by the judgment (not by jury) which should be rendered by men of their own order and not by the judges of the King, the judges not being their peers or equals but of inferior rank.

This was a most essential element for the protection of the barons or those owning a knight's fee against the rapacity of a lawless king at a time when his judges were appointed and removed at his will.

Sir Frederick Pollock, one of the most accomplished lawyers in England, visited this country a few years ago and made many friends. In the well-known work by Pollock & Maitland, *History of the English Law*, it is said: "Even in the most famous words of the Charter we may detect a feudal claim which will only cease to be dangerous when in the course of time men have distorted their meaning—a man was entitled to the judgment of his peers; the King's justices are no peers for earls or barons . . . in after days it became possible for men to worship the words '*nisi per legale judicium parium suorum vel per legem terrae*' . . . because it became possible to misunderstand them."

McKechnie on *Magna Carta* says: "The clause was, after all allowance has been made, a reactionary one, tending to the restoration of feudal privileges and feudal jurisdiction, inimical alike to the Crown and to the growth of really popular liberties."

Prof. McIlwaine, in a very illuminating article,⁸ has discussed the subject so fully, with citation of all the best authorities, that it is impossible to add to it.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Pike, *House of Lords* 169.

⁸ *Due Process of Law in Magna Charta*, C. H. McIlwain, 14 Col. L. Rev. 27 (January 1914).

He well says that Magna Carta is now regarded by eminent historians "not as a document of popular liberty but rather as one of feudal reaction. They consider it a concession to the demands of the barons for a return to the feudal anarchy of Stephen's time and a repeal of the great administrative measures by which Henry II and his predecessors were moulding a national judicial system and thus preparing the way for a common law."

These authorities further demonstrate that the words "*nullus liber homo*" referred to those who held by military or knight service—that is, earls, barons, knights and others who held knight's fees.

As to the other words "*lex terrae*," i.e., "law of the land," the phrase they say meant merely "the former law" of feudal tenures which had prevailed during the feudal anarchy in Stephen's time, and the feudal barons demanded thereby a repeal of the measures by which Henry II was preparing a national judicial system. This "*lex terrae*" was trial by wager of battle, compurgation, and ordeal. How some later courts have misconstrued its meaning!

Some one has, inadvertently of course, referred to "the great lawyers who drafted Magna Carta," but in fact at that time there were no lawyers, either great or small, in all England. Everyone was required to appear in court in his own behalf, both in civil and criminal cases, and no one could be represented in court by another, by an agent or proxy of any kind, until the statute of Merton in 1236, 21 years after Magna Carta. Professional lawyers were first authorized in England by the statute of Edward I in 1291, more than three-quarters of a century after the barons and bishops met King John at Runnymede.⁹

But even if Magna Carta had in it the meaning which has been read into it by judges in later times in violation of all historical authority, it was at most a restriction upon the power of the King. By no sort of logic could it therefore be used, as some courts have used it, as a restriction upon the people of this day, speaking through their agents in the legislature and in Congress, in the enactment of laws for the betterment of the masses.

So well-settled is it in England that the "law of the land" as used in Magna Carta meant the right of trial by combat, trial by ordeal or by compurgation, that as explained by Pollock & Maitland:

"Trial by jury, in the narrowest sense of that term, trial by jury as distinct from trial by an assize, slowly creeps in by another route. The principle from which it starts is simply this, that if in any action the litigants by their pleadings come to an issue of fact, *they may agree* to be bound by the verdict of a jury and will be bound accordingly . . . In the course of time the judges will in effect drive litigants into such agreements by saying 'You must accept your opponent's offer of a jury or you will lose your cause' but in theory the jury only comes in after both parties have consented to accept its verdict."¹⁰

"The accusing jury which was the basis of the grand jury of our day preceded the petty jury by nearly two centuries. It was instituted by Henry II in 1166. He required that in every county "twelve men of every hundred and four men of every township had to swear to make true answer to the question whether any man is reputed to have been guilty of murder, robbery, larceny or of harboring criminals since the King's coronation. Those who

⁹ Ridge's *Cons. Law of England*, 245; I Pollock and Maitland 190-196.

¹⁰ I Pollock and Maitland 128.

were thus accused must go through the ordeal (i.e. trial by the ordeal of fire or water) and even if successful there even, that is to say, though the judgment of God is in their favor, they must adjure 'the realm.' Ten years later at Northampton a sharper edge was given to this new weapon. Forgery and arson were added to the list of crimes for which inquisition was to be made; the criminal who failed at the ordeal was to lose a hand, besides the foot, of which the early ordinance deprived him. The new ordinance (thus prescribed by the King) was to endure during the King's good pleasure. Such inquisitions were to be taken before the itinerant justices of the King. They were also to be taken before the sheriffs. Here we see the origin of those inquisitions into crime which the sheriff makes twice a year as he takes his 'turn' through the hundreds."¹¹

It was over this and other institutions created by Henry II to establish a legal system that he had his famous controversy with Thomas a'Becket which resulted in the assassination of the latter who was contending for the exemption of the ecclesiastics from subjection to the authority of the King's court, though at the time the King had three bishops who were his arch-justiciars and all of his judges were popish clergymen, the names of the chief of whom can be found in I Pollock & Maitland 112.

As proof that the old "law of the land," i.e. trial by battle, trial by ordeal or by compurgators was still the right of litigants unless they agreed to the new trial by jury, we have the full statement in the argument of counsel and the opinions of the judges in the well-known case of *Ashford v. Thornton*,¹² decided in the King's Bench, Easter Term 1818. In that case Thornton who had murdered a young girl by drowning, demanded his wager of battle and the court, after the fullest discussion by counsel and in the opinions of the court, each of the judges giving an opinion, held that Thornton was entitled thereto, and the girl's brother not accepting the challenge, Lord Ellenborough, Chief Justice, announced the result after several days consideration as follows: "The general law of the land is in favor of the wager of battle, and it is our duty to pronounce the law as it is and not as we may wish it to be. Whatever prejudice may therefore justly exist against this mode of trial, still as it is "the law of the land" the court must pronounce judgment for it," and Thornton was discharged thereupon. The next session of Parliament, 59 George III, by Chap. 46, (1819) abolished the right of trial by battle under the "law of the land" and later "the right to prove by oath helpers," that is trial by compurgators, was also abolished,¹³

A reminder of this is still seen today in North Carolina when on a solemn occasion like a trial for a capital offense, the defendant is asked still "How will you be tried?" and he still replies as of old, "By God and my country"—the words in which the right to trial by the "law of the land" was waived for ages—and the officer for the State, from immemorial usage, and often perhaps without understanding why, says to the jury "The prisoner has pleaded guilty, and

¹¹ I Pollock and Maitland 131, quoting from *Select Pleas in Manorial Courts* (Selden Soc.) pp. XXVII-XXXVIII.

¹² 1 B. and Aid. 405, reprinted in *English Reports, King's Bench* 35.

¹³ Statutes 3 & 4, William IV, Chap. 42, Sec. 13 (1833).

being asked how he will be tried, answers by God and my Country, which Country you are."

There is no necessity for this formality, but it is simply the survival of what for centuries was necessary in England in order to waive the "law of the land" which was trial by battle or by ordeal or by compurgators in all cases unless trial by jury was agreed to by the defendant.

Forsyth on *Trial by Jury*, pp. 91, 92 says:

"It is a common but erroneous opinion, that the *judicium parium*, or trial by one's peers, had reference to the jury. This expression has misled many, and amongst others Reeves, and one of the greatest of our legal authorities—Blackstone—who thought that in the palladium of the early liberties of England, Magna Carta, trial by jury was provided for, because it was there declared that every freeman should be tried by the legal judgment of his peers, or by the law of the land."

Blackstone charmed by the beauty of his style which was till then almost unknown in legal treatises and was in strong contrast to the crabbed style and illogical arrangement of Coke and other writers. Blackstone's arrangement of his subject was far from being logical though it was orderly. No small part of his Commentaries was devoted to treatment of the feudal law and system which had been abolished more than a century before in 1660 by statute 12 Charles II. As to his ideas of the criminal law, it is sufficient to refer to a passage, written within 10 years of the American Revolution, where he says: "To deny the possibility, nay actual existence of witch-craft and sorcery, is at once flatly to contradict the revealed word of God in various passages both of the Old and New Testament and the thing itself is the truth to which every nation in the world hath in turn borne testimony."¹⁴ The greater part of his Commentaries is now of course obsolete learning. Much of it was incorrect at the time it was written, from the lack of material which has since been disinterred and printed and we can give no credit, as will be seen above, to his statement as to the origin of trial by jury.

In Lesser's *History of the Jury System*, p. 163, it is said:

"It is a popular fallacy, and one shared even by some legal writers and tacitly acquiesced in by others, that trial by jury owes, if not its institution, at least its permanent establishment as a feature in our judicial system, to the following clause in Magna Carta, that great charter of English liberties forced on King John by his barons at Runnymede in 1215," here quoting the latin sentence, (c. 39), which is translated: "No man shall be deprived of life, liberty or property, save by the judgment of his peers and the law of the land." Hence the purpose of this chapter is to demonstrate if the delineation of the growth of the jury has not already been made clear—the utter baselessness of this theory and to prove that the mode of trial referred to in, and sustained by, this much abused clause was none other than the judicial determination of questions, in the feudal courts of that time, by the *sectatores* heretofore considered. Any other view is a mere chimerical delusion—a delusion, however, entertained by Blackstone, and which that high authority did much to nourish and foster when he wrote of trial by jury. "In Magna Carta it is more than once insisted on as the principal bulwark of our liberties; but especially by Chap. 39, that no freeman shall be

¹⁴ 4 Blackstone Com. 50.

hurt in either his person or property,—*Nisi per legale iudicium parium suorum vel per legem terrae.*"

Lesser further says:

"It is easy, however, aside from the intrinsic defect of this view (which must be manifest to the reader of the preceding pages) to adduce authorities to the contrary. Reeves already seems to have had a correct view of this matter, when, after remarking that the trial by *sectatores* survived the Conquest for many years, he states that "these are the persons meant by the terms *pares curiae*, and *iudicium parium*," the latter being the one employed in Magna Carta. "Successive attempts gradually introduced jurors to the exclusion of the *sectatores*; and a variety of practice, no doubt, prevailed till the Norman law was thoroughly established. It was not till the reign of Henry VI that the trial by jurors became general; and by that time the king's itinerant courts, in which there were no *pares curiae* had attracted so many of the country causes, that the *sectatores* were rarely called into action."

So, too Coke in his commentary on Magna Carta draws a clear distinction between the trial by peers and the trial by jury.

In the most recent and one of the most valuable works on the common law, it is said: "It is also clear that the words 'judicium parium' do not refer to trial by jury. A trial by royal judge and a body of recognitors who found the facts was exactly what the Barons did not want. What they did want was firstly a tribunal of the old type in which all the suitors were judges both of law and fact and, secondly, a tribunal in which they would not be judged by their inferiors. Some of them did not consider that the royal judges, and none of them would have considered that the body of recognitors, were their peers. It is in this respect that the 39th Section of Magna Carta is reactionary."¹⁵ Holdsworth further says that the words "by the law of the land" referred only to the previous mode of trial by battle, ordeal or compurgation; that is, the Barons were seeking for a trial for themselves by their peers, that is by other Barons;" and on p. 84 of the same volume,¹⁶ he says: "There is no historical justification for the identification of trial by jury with the judgment of their peers." Indeed Lesser says, quoting Macclachlan Eng. Cyc. 326, that "until about the reign of Henry VI (1442-1461) trial by jury to all intents and purposes was a trial by witnesses."

Sir James Stevens in his History of the Criminal Law, says, "The steps by which the jury ceased to be witnesses and became judges of the evidence given by others, cannot now be traced without an amount of labor out of proportion to the value of the result . . . Trial by jury as we know it now was well-established, at least so far as civil cases were concerned, in all its essential features in the middle of the 15th century;"¹⁷ and in criminal trials, it seems, that while the jurors themselves were the witnesses, other witnesses might be and sometimes were, called.

"In the reign of Henry VI, with the exception of the requirement of personal knowledge of the jurors derived from near neighborhood or residence, the jury

¹⁵ Holdsworth's *History of the English Law*, Vol. I, p. 59.

¹⁶ *Ibid.*, p. 84.

¹⁷ Stevens, *History of the Criminal Law*, Vol. I, p. 260-263, citing Fortescue.

system had become in all its essential features similar to what now exists;”¹⁸ but this was two centuries or two and a half centuries after Magna Carta.

Macclachlan Engl. Cyc. III, 26 says: “Introduced originally as a matter of favor and indulgence, the jury thus gained growth with advancing civilization, gradually superseded the more ancient and barbarous customs of trial by battle, ordeal and wager of law, until it became both in civil and criminal cases, the ordinary mode of determining facts for judicial purposes.”

The jury system was fairly well-established at the time of the early colonization of this Country and one of the charges in the Declaration of Independence is that the king had deprived them “in many cases of the benefit of trial by jury.” It may be noted that while in the body of the U. S. Constitution there was no provision guaranteeing a civil jury, there is a provision that “the trial of all crimes, except in cases of impeachment, shall be by jury; and such trials shall be held in the State where the said crimes shall have been committed” and this provision was made clearer and more forcible by the 6th Amendment to the Constitution and the 7th Amendment extended right of trial by jury to civil cases wherever the amount exceeded \$20.

It may be of some interest to make a short statement concerning the criminal jury in other countries where it had been adopted in imitation of the English system.

In Scotland the criminal jury always consisted of 15 persons, a majority of whom was sufficient to convict. “A civil jury was reintroduced into Scotland by 15 George III, Chap. 42 in a special court established for the purpose” but was subsequently abolished. Since 1815 it has consisted of 12 men who were required to be unanimous until a statute passed in the reign of Victoria prescribed that a verdict by three-fourths was sufficient in civil cases in that country. In Ireland and in almost all the colonies of Great Britain, the jury exists substantially as in the Mother Country.

In Portugal the number of the jury was limited to six by the Act of 1838 which introduced it and a verdict must receive the assent of at least two-thirds.

In Belgium, trial by jury for all criminal and political charges and offenses of the press was guaranteed in 1830 though not in civil cases. The trial by jury in criminal cases was introduced in 1834 in Greece and is guaranteed by the Constitution of 1844.

In Italy there is also a jury provided in criminal cases, a majority being sufficient to convict, but not in civil cases.

In Sweden the jury consists only of a judge and seven to twelve assessors elected by the people who if they are unanimously of an opinion different from the judge, can out-vote him. The verdict can be given by one-half of its members. In Norway trial by jury in criminal cases was established 1 July 1887 and a majority may render a verdict.

In Switzerland all crimes against the Confederation must be tried by jury but the trials of other crimes depend upon the law of each Canton. But in the

¹⁸ Forsyth on *Trial by Jury*.

countries above mentioned as well as in the South American states, trial by jury exists only in criminal cases. In civil cases the trial is based on the Roman civil law in which a judge finds the facts as well as the law.

In France no civil jury or Grand Jury exists while in criminal cases jury trial is constitutionally guaranteed in cases of felony only and a verdict can be found by a bare majority.

In Germany trial by jury in criminal cases was generally established in that country and Austria about 1850 but its jurisdiction extends only to felonies and eight jurors must concur to convict.

The right of trial by jury in other than English speaking countries is therefore practically confined to criminal cases and in none of them is unanimity required for a verdict of guilty.

The use of the words "trial by jury" and *judicium parium* appears long before the modern trial by jury was fairly well established, which occurred about the middle of the 15th century though even then witnesses were often impanelled as a jury and at first unanimity was not required as a verdict but as above stated, the words *judicium parium* and also the word "jury" bore no significance similar to that of our modern trial by jury.

Macclachlan says that it is a "popular and remarkable error that the stipulation for the *judicium parium* in Magna Carta referred to the trial by jury It was a phrase perfectly understood at that time and that mode of trial had been in use long before in France and in all parts of Europe where feuds prevailed. It was essentially different from the trials by jury, which could never be accurately called *judicium parium*. We read frequently in the records of those times (and even in Magna Carta itself) of *juratores*, of *veredictum* or *juramentum legalium hominum*, and *jurata vicineta* or *patriae*, all of which expressions refer to a jury; but not a single instance can be found in any charter, in which the jury are called *pares* or their verdict *judicium*."¹⁹

"The term *pares* properly applies to the members of the feudal and county courts who were nothing more than the suitors in the baronial or other local courts and discharged the functions of both judge and jury—being in fact the whole court presided over by an officer similar to the lawman of the Swedish and Norwegian tribunals. In all these courts the opinion of the *pares* who were the judges of the county and baronial courts, decided by a majority."²⁰

Judge Cooley says that there is no connection between the system of trial by jury and the *judicium parium* which "was the peculiar and well-known feudal process by which the lord with his vassals anciently sat to try questions of title between others of his vassals, who were their *pares*."²¹

As heretofore stated, at the time of Magna Carta (A.D. 1215) and for a long time afterwards, the judges of England were priests or bishops with now and then a layman. Few others indeed could read or write and as the Scriptures at

¹⁹ Macclachlan Eng. Cyc. III, Art. *Jury*.

²⁰ Forsyth, Trial by Jury, p. 302, who cites this as additional proof that they were entirely distinct from the system of trial by jury in which unanimity is required.

²¹ Cooley, Am. Cyc. III, Art. *Jury*.

that time, and long afterwards, were not translated into the common tongue, and when translated, could be read by only a few, many erroneous principles crept into the common law for the common law was simply the decisions of the judges at a time when there had been few statutes, if any, enacted. There were no official reporters and for hundreds of years, down indeed to the time of Henry VIII, the debates in courts and the decisions of the judges were rendered orally and in Norman French, and the decisions in the courts therefore were often misconceived by the reporters as has been conclusively shown by researches. And the records of the courts were kept in Latin down until the time of Blackstone who loudly deplores the change by which they were required to be kept in English.

In this connection, though not entirely pertinent, it may be observed that at a time when the ecclesiastics who were the judges had restricted access to the Scriptures, the doctrine was created in the common law by the judges, that "the wife and the husband were one and he was that one, that her property became his by the fact of marriage and that he had the right to chastise her at will," for the reason given by a North Carolina judge as late as since the Civil War that it was "the husband's duty to make the wife behave herself."²²

This doctrine of the unity of the husband and wife was stated to be based, even until the last few years, upon the assumption that God had so decreed in Genesis, Chap. 2, Verse 23, even long after the Scriptures had been translated and had been made accessible and anyone could read that the exact language is "and *Adam* said this is now bone of my bones and flesh of my flesh." The inertia of the human mind and the persistence of error was never more clearly shown than by the substitution of the Deity as the author of this language which was used by a man who had just fallen from his high estate by disobedience to the divine law, and who in the opinion of the orthodox was the greatest malefactor whom the world has ever known for it is said that "by Adam came sin and death into the world."²³

Yet it is upon this mistaken origin that has rested for long centuries the inferiority of married women and their incapacity to own property and other disabilities. This misconception is paralleled only by the age-long tradition that Trial by Jury owed its origin to the Barons who at Runnymede forced Magna Carta to be granted by King John.

Raleigh, N. C.,
November 1923.

²² *State v. Black* (1864) 60 N. C. 262.

²³ *Romans*, Chap. V, v. 12.