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MAGNA CHARTA AND THE JURY SYSTEM*

JOHN H. HATCHER**

Becoming intrigued by the imputed connection of Magna Charta with the jury system, I asked a recent law school graduate if he thought a discussion of that subject would be of interest to the legal novitiates. He was doubtful, because, as he said, the students are more interested in the *what* than in the *why* of law. I am fully appreciative of that attitude. However, when law or legal procedure comes to us from the past, we can not fully appreciate its present significance without understanding its origin and development. Mr. Justice Holmes disposed of the subject in one of his striking epigrams, saying: "Continuity with the past is not a duty, but a necessity." Therefore, I feel justified in braving whatever impatience you may have with the *why* of the jury system, and inviting your attention to its association with Magna Charta.

Trial by jury is now said to be guaranteed by the constitutional provision, (common to all the states,) that no man shall be deprived of life, liberty or property without the judgment of his peers. The phrase "the judgment of his peers" is a literal translation of the Latin words "*judicium parium suorum*" occurring in Magna Charta. For this reason the Supreme Court of the United States, accredited the jury system to Magna Charta, saying: "When Magna Charta declared that no freeman should be deprived of life, etc. 'but by the judgment of his peers or by the law of the land' it referred to a trial by twelve jurors."¹ Fourteen

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¹ Thompson v. Utah, 170 U. S. 343, 349, 18 S. Ct. 620 (1897).

years before that opinion the same court, in *Hurtado v. California*, stated: "The words *nisi per legale iudicium parium* (Magna Charta) had no reference to a jury."² As the two statements are diametrically opposite, it would therefore seem "*Quandoque bonus dormitat Homerus*."³

Other courts and authorities from Coke down have also nodded in regard to the connection of Magna Charta with the jury system. The early authorities generally support *Thompson v. Utah*.⁴ The later writers generally support *Hurtado v. California* and scoff at the so-called guaranty of trial by jury in the Charter as a "most persistent fallacy," "an unpardonable anachronism," etc. In their great work on English law Pollock and Maitland say: "In after days it was possible to worship the words '*nisi per legale iudicium parium suorum vel per legem terrae*' because it was possible to misunderstand them."⁵ Such division of authority points our attention at once to the historical setting of Magna Charta.

That instrument was executed by King John of England in the year 1215. The deep darkness of the Middle Ages was breaking then, but the dawn was not at all luminous. Much of the history of those times is indefinite and much is tintured by tradition. Hence, in commenting on that period, some generalization is unavoidable. John was one of the so-called Norman Kings, being a great-grandson of William the Conqueror. At that time the feudal system was in flower. The King was then what Louis XIV. of France later termed himself — "the State." All the land in England was, in theory, held under the King. He apportioned it among the greater lords who were responsible to him for a certain number of fighting men. Those lords sublet portions of their land to tenants of greater or less degree, who rendered military service in part payment of their fiefs. The sub-tenants were freemen, and were usually knights or classed as such. They consti-

² *Hurtado v. California*, 110 U. S. 516, 529, 4 S. Ct. 111 (1883).

³ Sometimes even good Homer himself nods.

⁴ See 1 Co. INST. (1809) 45; 3 BL. COMM. (1768) c. 23; CRABB, HISTORY OF ENGLISH LAW (1829) 134; HARE, AMERICAN CONSTITUTIONAL LAW (1889) 863-4. 16 R. C. L. § 3; 35 C. J. § 12.

⁵ 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1898) 173. *Accord*: HYATT ON TRIALS § MCKECHNIE, MAGNA CARTA (1905) 158, 451; LESSER, HISTORICAL DEVELOPMENT OF THE JURY SYSTEM (1894) 163-4; REEVES, HISTORY OF THE ENGLISH LAW (Finlason ed. 1869) 42-3; 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (1922) 59; MACCLACHLAN, ENGLISH CYCLOPEDIA 111, article on Jury; FORSYTH, HISTORY OF TRIAL BY JURY (1852) 91-2; 17 ENC. BRIT. (11th ed. 1910) 317; HANNIS TAYLOR, AMERICAN CONSTITUTION 75-6, 363, 366.

tuted the main fighting force of the realm. They did no work. That was done by the underclasses, chief among which were the villeins, composing five-sixths of the population of England.⁶ Every baron of consequence had a castle from which he was practically "lord of all he surveyed," until his survey was interrupted by some greater lord or the King.

There were no professional lawyers then, what knowledge there was of law being possessed by a few churchmen. The primitive state of the law is demonstrated by the legal procedure. Strange to say, in view of the declaration of the Supreme Court in *Thompson v. Utah*, that procedure bears no likeness to the modern jury trial. The usual — perhaps the only — modes of trial were by witnesses, compurgation, ordeal and combat. In trial by witnesses the litigation was decided by all the people in the neighborhood who knew anything about the dispute either personally or from neighborhood talk. In trial by compurgation the decision went to the litigant who could produce the greater weight of oaths. The weight of an oath depended upon the wergild of the witness. Wergild was the value set by law upon a man's life. In case of murder, the murderer's family paid to the family of the dead man a certain sum of money in settlement of the crime. That sum was wergild. The plan was not without merit. The dead man's family was compensated. The expense and hysteria of trial were eliminated. No fuss — no feathers. Wergild varied according to a man's station in life. For example, the wergild of an ordinary churl or freeman was two hundred shillings. So the oath of a knight whose wergild was one thousand shillings was equal to that of five churls. It is naively recorded, however, that the oath of any English churl was considered as weighty as that of two Welshmen.⁷ In trial by ordeal, the ordinary person was submitted to a shocking test such as contact with boiling water or red-hot iron. An ordeal was supposed to be under Divine supervision, and preparation for it was made by fasting and prayer. If the accused was innocent, it was thought that God would preserve him through the ordeal. Since the ordeal was conducted by churchmen, they imposed on an accused of their own number a very mild test, called "the ordeal of the accursed morsel." "This," says Lesser, "consisted in making the accused person swallow a piece of bread placed on the

⁶ CROSS, HISTORY OF ENGLAND (1914) 94.

⁷ Shades of Lloyd George!

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altar with great ceremony . . . and accompanied with a prayer that it might choke him if he was guilty.’⁸

In trial by personal combat judgment went for the victor. This mode of trial was introduced in England by the Normans, was highly favored by the barons, who were men of war, and was used to settle practically all manner of legal disputes.⁹ It does seem strange that the Englishmen of that period had not the ability to develop an efficient mode of trial. We are gazing backward, however, from the vantage of inherited information. The heir should not regard his lineage with disdain. All prior ages have been ignorant of matters which are now quite commonplace. A striking illustration of this statement is furnished by the Central American civilizations which flourished at or near the date of Magna Charta. The Mayas, the Taltecs and Aztecs attained high levels of culture, and possessed great proficiency in architecture, stone carving, pottery and the textile arts. Yet, they were completely ignorant of iron, of the principle of the wheel and of the true arch.¹⁰ The Englishmen of 1215 made common use of iron, the wheel and the arch, but they had no conception of determining a law suit solely on its merits.

The protection of the law at best was poor enough then; but without resorting to any legal process, King John had been proceeding with force of arms against such barons as he pleased for purposes of pillage and oppression. Consequently, a majority of the barons banded together for their own preservation, cornered John at Runnymede and forced him to stipulate that he would proceed against them no more except upon the judgment of their peers or by the law of the land. Runnymede is pictured by an old chronicler as “a pleasant meadow by the Thames, where rushes grow in the clear water of the winding river and its banks are green with grass and trees.”¹¹ John’s capitulation there was written in Latin and was entitled Magna Charta (Great Charter).

In a burst of enthusiasm over the Charter, the great historian Green says: “The rights which the barons claimed for themselves, they claimed for the nation at large.”¹² That quotation was selected because the assertion it makes is the thread suspending the jury system from Magna Charta. At that period, generally speak-

⁸ LESSER, *op. cit. supra* n. 5, 82. There is more than a hint in the old records that the ordeals were frequently faked in favor of those having influence.

⁹ LESSER, *op. cit. supra* n. 5, 91.

¹⁰ 5 ENC. BRIT. (14th ed. 1929) 130.

¹¹ A charming gray-green color still bears the name Runnymede Green.

¹² I GREEN, HISTORY OF THE ENGLISH PEOPLE (1905) 255.

ing, the sovereign oppressed the barons, and they in turn oppressed the common people. In an age of barbarous practices, the barons were notoriously rapacious. The chronicles of that time indicate no uprising of the people against the barons or the King. The people were prostrate. Only the barons themselves were in revolt. The people had no representation in the preparation of Magna Charta. The liberties of the insurgent barons and even the lives of their leaders were at stake. For them, under such stress voluntarily to have exacted concessions in favor of the common people, whom they contemptuously regarded as legitimate prey, would have exhibited a humanity having no support whatsoever in feudal history. It is true that the Charter uses the phrase "*liber homo*" meaning *freeman*, as the one whose rights were thereby assured. The dictionaries agree, however, that the word *freeman* "has had various meanings at different stages of history," and that "in old English law, the word described a freeholder or tenant by free services; one who was not a villein."¹³ The annals further disclose that only the dukes, earls, barons, knights and others who held knights' fees were classed as freeholders at the time of the Charter. "The general body of freeholders were all *pares* (peers) Indeed apart from that privilege of peerage, which applied as against the crown, every freeholder was a baron, and in early times was so called."¹⁴ The Encyclopaedia Britannica, after criticizing the foregoing assertion of Green, says: "The villeins, who formed the majority of the population, got very little from it (Magna Charta); in fact the only clauses which protect them do so because they are property — the property of their lords — and therefore valuable. They get neither political nor civil rights under Magna Charta."¹⁵ It therefore appears that Mr. Green was wrong; that Magna Charta was designed to protect the baronial class alone, and that any protection afforded the common people was incidental.

The Latin word *par* means an equal, and the ordinary translation of the phrase *judicium parium* would be *the judgment of equals*. *Judicium parium*, being a legal term, has a special or idiomatic meaning at law, just as many other legal phrases have. Take, for instance, the expression "he puts himself upon the

¹³ BLACK'S LAW DICTIONARY (3d ed. 1933).

¹⁴ REEVES, *op. cit. supra* n. 5, 42(n), 64. *Accord*: PROFFATT, TRIAL BY JURY (1877) § 24; McKECHINIE, *op. cit. supra* n. 5, 435-439.

¹⁵ 17 ENC. BRIT. (11th ed. 1910). *Accord*: HYATT and REEVES, *op. cit. supra* n. 5.

country." That expression is unintelligible to anyone not familiar with its idiomatic significance. At law it means that he submitted his case to a jury. The expression arose from the fact that originally the jury was impaneled exclusively from knights who resided in the country. *Judicium parium* is commonly construed now to refer to the *verdict of a jury*. But at the time of Magna Charta, *judicium parium* had a different meaning which was thoroughly understood throughout England and feudal Europe. That term then applied solely to the judgment of a feudal court. Every baronial proprietor of importance, attended by his knights (*pares*) had his court. The knights who were acquainted with facts relating to the litigation applied the law of the fief thereto, and pronounced the judgment.¹⁶ That judgment was the *judicium parium* of Magna Charta — a judgment of equals, it is true, but the equals were always knights.¹⁷ At no time in the history of English jurisprudence has a *jury* ever rendered a *judgment*. And for a legal instrument such as Magna Charta to term the verdict of a jury a *judicium* (judgment) — the word used in the Charter — "would have been as gross a blunder in 1215 (the date of the Charter) as it would be at the present time."¹⁸ A vestige of *judicium parium* in its original significance still lingers in England in the right of a peer to be tried by the House of Lords on a charge of treason or felony.^{18a}

Hare, Crabb and other nodding authorities would strengthen their position through the words in Magna Charta "*per legem terrae*" (by the law of the land). They claim the words referred to the common law system, which comprehends trial by jury. They apparently believed the story that the common law came from that mystical period when the memory of man runneth not to the contrary. Evidently they had the conception, entertained by some, that the common law was so named because it was the law of the common people, and that the nucleus of the common law was formed sometime during the Dark Ages and of its own force grew, and grew, and grew, until it dominated the entire realm. Their conception is legendary, just as legendary, in fact, as the myth

¹⁶ Jenks, *The Development of Teutonic Law* (1907) 1 SELECT ESSAYS IN ANGLo-AMERICAN LEGAL HISTORY 44.

¹⁷ LESSER, *op. cit. supra* n. 5, 166, 167; 1 POLLOCK & MAITLAND, *op. cit. supra* n. 5, 43; McIlwain, *Due Process of Law in Magna Carta* (1914), 14 COL. L. REV. 27, 43; PROFFATT, TRIAL BY JURY.

¹⁸ 1 POLLOCK & MAITLAND, 173.

^{18a} Note, for example, the recent trial of Lord de Clifford by the House of Lords, a fortnight or so ago, when the defendant sought a trial *by his peers* on a charge of manslaughter.

that William Tell shot the apple off the head of his red-cheeked boy, or that George Washington chopped the cherry tree and refused to fib about it.

While I harry that conception, your thought should travel slowly — very slowly. It should travel not by days, years or generations, but by centuries. The following narration of events will require but a few minutes. An equal number of centuries was required for the progression of those events. The common law did not spring from and did not derive its name from the common people; and there was no system of law common to all of England when that country emerged from the Dark Ages (and commenced to have a national memory).¹⁹ The laws were then tribal instead of territorial.²⁰ In fact, every fief had its own customs and usages which were respected as laws in the local courts. There was no court with general jurisdiction over the local courts. There was in fact no unifying juridical agency until the subsequent ascendancy of the King's Court (of which more later) under the Norman Kings.²¹ The jurisdiction of that court though very limited at first did extend over the entire kingdom. Such extensive jurisdiction made that court the only legal institution ever in position to unify nationally the variant laws of the fiefs. That court after a long period of time did finally weld the local laws into a fairly uniform system. That system was common to all of England and for that reason became entitled *the common law of England*. Professor Jenks says the common law is "the law of the royal court. . . . It is judiciary law; the men who declared it were judges, not legislators, nor wise men of the shires."²² "The custom of the King's court is the custom of England and becomes the common law," say Pollock and Maitland. That result was not accomplished until long after the date of the Charter.²³ The *lex terrae* referred to in Magna Charta was the law of the fiefs in contradistinction to the arbitrary will of the King. That law as against his will was the real issue between the barons and John.²⁴

Lex terrae naturally embraced trial by witnesses, compurgation, ordeal and battle. Some writers take the position that only

¹⁹ Zane, *The Five Ages of the Bench and Bar of England* (1907) 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 625.

²⁰ Maitland, *Materials for the History of English Law* (1907) 2 SELECT ESSAYS IN ANGLO-AMERICAN LAW 66-67.

²¹ Zane, *op. cit. supra* n. 19, 647-8.

²² Jenks, *op. cit. supra* n. 16, 50-3.

²³ 1 POLLOCK & MAITLAND, 176 and 184-5.

²⁴ Mellwain, *op. cit. supra* n. 17.

those four modes of trial were comprehended in the phrase of the Charter, *per legem terrae*.²⁵ That position does not seem tenable. Certain sections of the Charter contain specifications relating to the assizes of the King's court (established by Henry II, John's father), which at that time tried certain questions affecting real property.²⁶ By those specifications the barons recognized²⁷ trial by the assize as *lex terrae*, along with *judicium parium*. The assize deserves consideration because later it played some part in the formation of the jury system. "*Assisa vertitur in juratam*." (The assize is converted into a jury.)²⁸ The main differences between the *judicium parium* of the feudal courts, and the verdict of the assize in the King's court were in names and formalities. For, mind you, the assize consisted originally of a body of knights "girt with swords" selected by four other knights — all of whom were fellow barons (*pares*) and the assize decided the case not as a jury, but upon the personal knowledge of its own members.²⁹ The judiciaries of the King's court were usually ecclesiastics, and were regarded by the barons as inferiors. So there is no thought that the judiciaries then overawed the assize as they later did the jury. The assize was essentially a baronial tribunal though acting under warrant of the King, and in certain, if not all, litigations affecting real estate, the defendant could elect between trial by assize and trial by combat.³⁰ In passing, it is interesting to note the tenacity with which trial by combat adhered to English law. "Wager of battel" as a mode of trial was recognized by a high court of England as late as 1818, as still "the law of the land."³¹ (That mode of trial was abolished at the succeeding session of Parliament in 1819.)

The jury system is not even the offspring of popular assemblies, but is an emanation of royal power. Modern investigation has proved that the system is mainly the outgrowth of a Frankish inquisition or inquiry, which was the prerogative right of the Frankish rulers. That prerogative was introduced into England in 1066 by William the Conqueror, whose Duchy of Normandy

²⁵ See Clark, *Magna Carta and Trial by Jury* (1924) 58 AM. L. REV. 24.

²⁶ Magna Carta §§ 17, 18 and 19; §§ 11, 12 and 13 of Coke's arrangement. Coke's Second Institute follows the fourth edition (1225 ed.) of Magna Carta as set forth in 1 Stat. at L. 6, 7. Coke was apparently not familiar with the original or earlier editions of the Great Charter.

²⁷ "Enshrine", say 1 POLLOCK & MAITLAND, at 146.

²⁸ HOLDSWORTH, *op. cit. supra* n. 5, 151.

²⁹ LESSER, *op. cit. supra* n. 5, c. 9.

³⁰ 1 POLLOCK & MAITLAND 148.

³¹ See *Ashford v. Thornton*, 1 B. & A. 405, 460, 106 Eng. Rep. R. 149 (1818).

was a part of the Frankish Empire.³² The royal prerogative consisted simply in the right of the King to have determined, by a body of his own appointees, any fact in connection with the public administration. That proceeding was not a trial in any sense, but merely an investigation. It was similar to that of an investigating committee appointed by our Legislature or Congress. When first introduced in England, the inquisitorial body was not composed of any definite number of men. Twelve was not even a preferred number until long after the date of the Charter.³³ As the burden of government increased, the Kings were unable to handle personally the details of necessary governmental investigations. So they would send trusted representatives throughout the kingdom to have the investigations conducted. A most notable exercise of that prerogative occurred in the reign of William the Conqueror. He had a genius for government as well as for military enterprise. In order to learn the resources of his kingdom, he had commissions impaneled in every hundred throughout England. A *hundred* was a territorial division of old England, so-called because the division comprised a hundred hides. A *hide* was enough land to support a family and in William's time was normally reckoned at 120 acres. A mark of his statesmanship appears in his requirement that one-half of the members of each commission be native Englishmen and the other half Normans, thus insuring fairness to each class. Those commissions obtained the information from which "the great fiscal record known as Domesday Book was compiled." The Domesday book ("Doomsday Book") contains a list of England's landed proprietors with a description of their properties, liabilities, *etc.* The book is comparable generally to one of our modern land books and is said to have been given its name because William made it a book of final authority, — as final, it was said, as the Day of Doom. A succession of steps led the Crown to appoint those who were learned in the law as its representatives to procure those investigations, then to make their appointments permanent, and then to arrange for them stated times and fixed places of visitation throughout all the kingdom. By those steps was formed a most important extension of *curia legis* — "the King's Court." There, we find for the first time in the history of English jurisprudence

³² The inquisition here referred to is not to be confused with the Spanish Inquisition. That was a religious proceeding; this was political.

³³ THAYER, DEVELOPMENT OF TRIAL BY JURY (1896) 85.

a professional lawyer guiding the investigations of a fact-finding body. There, is the foundation of our modern common law court.

Legal procedure progressed slowly during the period roughly estimated at three hundred years following the establishment of the King's court. But at the end of that period, trials by ordeal and by the witnesses themselves had been abolished; the indefinite number comprising the inquisition had been stabilized in a *jurata* of twelve; and the *jurata* (or jury) was trying a case — in theory — upon the evidence.

The inquisition was first used exclusively to facilitate the King's business. Its use to settle private litigations was later permitted by the King "as a royal boon" to certain preferred subjects who besought it. In suits wherein the Crown had no interest the justice of the King's court — first with its inquisition, and then with both inquisition and assize, and finally with the *jurata* — was found to be preferable to that of the manorial courts. Therefore, the popularity of the King's court increased and its jurisdiction was extended upon the petition of the parties "bit by bit, now for this class of cases and now for that," until in the course of time that jurisdiction over all law cases was voluntarily conceded.³⁴ It was wholly through consent of the litigants to be tried in the King's court by its fact-finding body and not through Magna Charta that trial by jury became established. And to this very day the formal expression of that consent, though now unnecessary, persists in the conventional phrase of our common law orders, "The plaintiff puts himself upon the country and the defendant doth the like."

The judges of the King's court were appointed by the King and were removable at his pleasure. The natural result was that for centuries royal partisans were appointed judges, and that they executed the royal will as far as possible. The records show that the *jurata* was not constituted until about 1485; and for the next two hundred years it was so completely dominated by the judges that only a few instances occurred of verdicts contrary to judicial pleasure. In those instances, the refractory jurors were either imprisoned or fined heavily, or both.³⁵ You who have read Sabatini's masterful description of the arbitrary tactics of Lord Chief Justice Jeffreys in the fictitious trial of Peter Blood, have doubtless wondered if the novelist did not indulge his imagination

³⁴ 1 POLLOCK & MATTLAND 93, 140, 141, 144, 149, 153.

³⁵ PROFFATT, TRIAL BY JURY §§ 35-38.

to some extent. I find that Sabatini's fiction is supported in every particular by the official record of the trial of Lady Alice Lisle in 1685.³⁶ She was convicted of high treason for having entertained, unwittingly, a Presbyterian minister who had taken part in the rebellion against James II. The King was set on her execution, and agreed with his Chief Justice before the trial, not to pardon her. Jeffreys presided. Besides giving hearsay testimony himself, Jeffreys continuously harangued and berated both witnesses and jury against Mrs. Lisle,³⁷ using the blasphemous language of a madman. The record shows that before the jury returned its verdict of guilty, the foreman had three times in open court expressed dissatisfaction with the evidence against her, and each time had been contemptuously reprimanded by Jeffreys. The public prints of that period go further — they say that the jury found her *not guilty* three times, and then because of terror at the mounting fury of Jeffreys and his threats to attain the jury of treason, it changed the verdict. The *per legem terrae* of Magna Charta, says Proffat, "afforded but a slight shield to the innocent at that time, when the royal will or wish was at all hazards and without opposition carried into effect." The early English writers who attributed the jury system to Magna Charta should have known of the initial and long continued domination of juries by judges. Those writers were extremely inadvertent when they would have the insurgent barons at Runnymede perpetuating a tribunal, which, had it really existed, would have been dominated through partisan judges by a King whom the barons feared and detested. The barons may have been dumb, but not so dumb.

Five centuries passed after Magna Charta before the jury system was finally perfected. The bare foundation of the system may be traced to King Henry II and his justiciars. The development of the system is due to no one man or set of men, but to the general development of English civilization. Magna Charta did set the law (theoretically) above the Crown, and for that reason is "a fundamental statute."³⁸ For that reason, also, it merits the veneration of Englishmen as "a sacred text" and as "the palladium of English liberty." But Magna Charta had no formative part in either the foundation or the perfection of the jury system.

³⁶ 11 How. St. Tr. 297 (1811).

³⁷ From the report of the case in Howell's State Trials it would appear that the defendant should more properly be addressed as Mrs. Lisle rather than as Lady Alice Lisle.

³⁸ 1 POLLOCK & MAITLAND 173.

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Why then was it so held, you ask? Judge Clark said: "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." I would amplify that explanation. The English people have always been obsessed with admiration for the ancient institutions of England. Even the barons in 1215 were clamoring for "the good laws" of Edward the Confessor, who lived two hundred years before. Coke and Blackstone exhausted language in lauding the customs and usages of a by-gone age. After the jury was finally rid of judicial domination, it became so highly appreciated by the English nation that the people were not content to attribute it to procedural evolution. An antecedent must be found worthy of the exalted position it had acquired. It must have been confirmed by the Crown. So, yielding to the national obsession, the English judges gave an unnatural construction to the words in Magna Charta, in order to have that venerable instrument generate the jury system. Whether or not my amplification is correct, it may be said with assurance that some popular reason was the cause of this misconstruction, a misconstruction so flagrant that it has been termed "the great distortion of history."³⁹

The misconstruction of *judicium parium* illustrates most forcibly the habit of courts, on occasion, to discard the literal meaning of a constitutional provision. Dictionary and idiom are ignored. Judicial perception finds in the provision, though hitherto unsuspected, what the popular needs require. For that reason Finley Peter Dunne, a leading American humorist thirty years ago, had his "Mr. Dooley" say, in fun, that the Supreme Court of the United States followed the election returns. There is much philosophy in that satire. The Constitution is but an expression of the will of the people. The election returns likewise express the will of the people and carry a later message than the Constitution. Therefore, in so far as election returns clearly reflect the popular will upon a constitutional matter, I see no reason why they should not receive judicial consideration. My attitude on this subject has been called radical. The accusation is not particularly distasteful, but I am advocating nothing novel. My views are patterned merely on what representative courts have consistently done. I observe nothing more than was observed by that great

³⁹ 1 POLLOCK & MAITLAND 594.

commentator, Viscount Bryce, in his work on *Constitutions*: "But experience has shown that where public opinion sets strongly in favour of the line of conduct which the Legislature has followed in stretching the Constitution, the Courts are themselves affected by that opinion, and go as far as their legal conscience and the general sense of the legal profession permit — possibly sometimes even a little farther — in holding valid what the Legislature has done."⁴⁰ That judicial attitude has been the despair of teachers of constitutional law. Professor Gray gave up the attempt, saying constitutional law "was not law at all, but politics." If Professor Gray used the word "politics" in its uncorrupted sense, meaning the science of civil government, I agree with him.

There can be no fixed construction of a constitutional provision, general in its terms. John Marshall himself said that such a provision must be adapted "to the various *crises* in human affairs."⁴¹ One hundred years later, the pronouncement of Marshall is paralleled by the formula of Brandeis: "The logic of words should yield to the logic of realities." Such adaptations and such capitulations are essentially matters of statecraft, rather than law. Professor Frankfurter grasped the situation when he wrote: "The Supreme Court has long ceased to be merely a legal tribunal; today it passes upon great social and economic issues." The Constitution exists to protect the people — not to repress them. When, through financial or social changes, the letter of the Constitution chafes the people, the Constitution fails its purpose, unless the courts through liberal construction relieve the attrition. A statesmanlike editor warns: "Government should not be so inflexible that it makes man a victim of the machinery he has set up for his own protection."⁴² In fact, no government under a written constitution can endure, if the courts regard it as a national strait-jacket. The constitutional garment must be stretched by the courts to fit growth unforeseen when the garment was fashioned; else it will be scorned as outmoded or it will be rent by revolution. And if this be heresy, it was fostered by that amazing fabrication of the courts — the kinship of Magna Charta and the jury system.

⁴⁰ BRYCE, *THE AMERICAN CONSTITUTION* 197.

⁴¹ *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 415, 4 L. Ed. 579 (1819).

⁴² *Huntington Advertiser*, Jan. 18, 1934, editorial.