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WILLIAM MARSHAL, GREAT KNIGHT AND PROTECTOR OF MAGNA CARTA: THE UNKNOWN FOUNDER OF THE RIGHTS OF ENGLISHMEN AND AMERICANS!

ALLEN SHOENBERGER*

Few individuals are as important to the history of English rights and therefore American rights than the great knight of the Middle ages, William Marshal. Indeed, it would be fair to state that without Marshal, Magna Carta would be an obscure and unimportant footnote to history. It was Marshal who championed Magna Carta and in connection with that charter created and promulgated a sister charter, the Charter of the Forest, which eventually became the longest existent English statute. This year is the 800th anniversary of Marshal's repromulgation of Magna Carta as part of his effort to resist an invasion of England from France. It is hard to underestimate the impact of these two documents on the legal history of both England and the United States. Marshal was the grand champion of tournaments during his life. He won nearly 200 tournaments, thus increasing his wealth considerably. Indeed, it is fair to state that William Marshal was as skilled with a lance and sword as he was with a Charter. His use of weapons at hand was unsurpassed by any other knight of the era.

Appropriately enough, Marshal's effigy lies in the center of legal London, the Temple Church. That church, dedicated by the Patriarch of Jerusalem, and the church of the Knights Templar, was the site of many significant legal events. They include the prostration of King John to the Papal Legate, making England into a papal state in 1213!¹ It also was the site from which King John granted a corporate charter to the City of London, the oldest corporation in England.² John also confirmed the liberties of the church from the "New Temple." Marshal was the leading

* Professor of Law, Loyola Chicago University School of Law © 2016.

1. DAN JONES, *THE PLANTAGENETS, THE WARRIOR KINGS AND QUEENS WHO MADE ENGLAND*, 177 (2012). This obeisance followed a period of interdiction of England by the Pope that prevented the performance of religious weddings or burials in England for six years. However, it was the imminent invasion of England by French troops, not revocation of the interdiction, that prompted King John to act. The Pope, Innocent III, had sanctioned the invasion by Prince Louis of France who had a distant claim to the throne of England. King John's action made him into a "favorite son" of Rome, and resulted in the Pope's withdrawal of his sanction to the invasion. On the recommendation of William Marshal and Longsword, King John ordered a quick naval strike against the assembled French fleet at Damme, which secured a resounding victory with the burning of many French ships. *Id.* at 176-177. Several years later another French invasion was initially successful. *Id.* at 186. King John's effigy also now rests in the Temple Church.

2. The grant of this charter was an attempt to placate the citizens of London.

proponent for making John king of England upon the unexpected death of Richard the Lionheart.³

The legal events that took place from the Temple were part of King John's reactions to the threat of force from France. King John similarly acted in the face of threatened force when he affixed his seal to the Magna Carta at Runnymede in June, 1215. The barons, who were by then in revolt against John's despotism, came to Runnymede with several thousand knights, coercing his agreement.

However, immediately afterwards, King John successfully sought condemnation of Magna Carta by the Pope, who within two months did exactly that.⁴ Any person who claimed to act pursuant to Magna Carta faced excommunication. The Pope acted because he believed, rightly so, that Magna Carta had been extorted from King John by threat of force.

By the end of 1215, Magna Carta was dead. It would take actions by William Marshal to revive it. Revive it he did.

Civil war resumed, with the added threat of another invasion from France. Marshal was sent to France to try and dissuade the French king, but to no avail. The Pope excommunicated the French Prince as well, but that also failed to work. Some 7000 French soldiers led by Prince Louis invaded England on May 20, 1216 and were joined by rebellious barons.⁵ Prince Louis invaded London and took homage from the mayor. King John's attempt to pacify London by granting London a corporate charter in 1215 was thus in vain.⁶

However, King John died on the night of October 17-18 of 1216, and in accord with his pleas to the Pope, Henry III (then 9 years old) became his successor with William Marshal as his regent. Marshal reluctantly became regent and arranged that Henry III be crowned at Gloucester Cathedral (for Westminster was in the hands of the French)! Marshal and Guala Bichieri, then Papal Legate, then reissued Magna Carta under the name of the new King and under their seals (for the newly crowned King had no seal). The reissued Magna Carta omitted various provisions

3. JONES, *supra* note 1, at 133. Richard was killed by sepsis from a crossbow arrow wound during a siege. *Id.* at 130-131.

4. The papal bull announcing this arrived in London in mid September 1215. ANTHONY ARLIDGE & IGOR JUDGE, *MAGNA CARTA UNCOVERED*, 12 (2014).

5. THOMAS ASBRIDGE, *THE GREATEST KNIGHT: THE REMARKABLE LIFE OF WILLIAM MARSHAL, THE POWER BEHIND FIVE ENGLISH THRONES* 337 (2015). This rebellion included Marshal's son. *Id.*

6. However, that corporate charter persists until today, and is the longest existent English corporation charter. There continues an annual January procession headed by the splendidly gowned Lord Mayor of London to the Old Bailey court at the commencement of the new court year. *THE LORD MAYOR'S SHOW*, <https://lordmayorsshow.london/> (last visited Apr. 5, 2017).

from the first version of the charter, primarily to make it more palatable to the rebellious barons. However, much of the essence was retained. While there are other specific ways in which Marshal was connected to Magna Carta, including that his name was the first layperson listed in the 1215 version of the charter, this first reissuance of the charter is the most striking example of his connection.

The Magna Carta was again reissued in 1217 along with another important charter, the Charter of the Forest.⁷ Since this is the first uncoerced issuance of the Charter, this issuance is most notable. Both charters were repeatedly reissued multiple times in the following centuries, and both thus became mainstays of the rights of Englishmen.

Why did William Marshal champion the Magna Carta and the Charter of the Forest?⁸ Two primary motivating factors were likely afoot. First, Marshal had had excruciating pain delivered to him through the arbitrary rule of King John. One might posit that such experience convinced Marshal that limitations on the power of the King were a good idea. Second, Marshal, grand champion of knightly combat,⁹ was driven by a need to win. The two charters were weapons in a different form of combat; combat against the

7. ASBRIDGE, *supra* note 5, at 366. Both charters were sealed by William Marshal and Guala Bichieri.

8. See Allen Shoenberger, *Magna Carta, The Charter of the Forest and the Origin of the Jury System*, 24 NOTTINGHAM L. J. 156 (2015).

9. Marshal excelled in jousting tournaments (mostly in France), prevailing in several hundred such events. It was by success in such combat that he made his fortune, and also, made such a fierce reputation that when several times accused of treason, his demands for trial by battle remained unanswered, for no one would enter combat against him. Indeed, it is said that he is the only knight to ever have unhorsed Richard the Lionheart in combat. However, Marshal spared the future King, and killed only his horse. It is likely that this action cemented Marshal's fortune for after Richard became king, Richard permitted Marshal to marry a wealthy lady (Countess Isabel) through whose estate Marshal owned great swaths of land, including half of Ireland, as well as substantial estates in France. It was in connection with these French estates that he swore allegiance to the King of France and declined to participate in a war against France brought by King John. This was one of the treasonous actions for which he evaded trial by his demand for trial by combat. Marshal took oaths quite seriously and had refused to violate his oath to the French king. The History of William Marshal is recounted in a unique document from 1225 that consists of 19,215 lines of rhymed medieval French verse. (*L'Histoire de Guillaume Le Marechal*, (Librairie Renouard, 1901, in the medieval French with a modern French translation). That poem is the most extensive accounting of the life of a medieval knight who was not a king. It was uncovered after languishing, unread, for hundreds of years in a 60,000 manuscript private collection and first recognized and discovered by a librarian, Paul Meyer who had briefly seen it at a Sotheby's auction 20 years previously. It is quite possible that the manuscript had remained unread for 600 years. ASBRIDGE, *supra* note 5, at xiiv-xvii.

rebellious barons of England. They were tools, just like a good horse, tools at hand that were employed to win the contest.

Despite the fact that King John owed his kingship to Marshal's support, King John frequently mistreated Marshal by various outrageous actions. Included in this mistreatment is a set of actions in connection with what one biographer of Marshal describes as a "trap."¹⁰ John demanded that Marshal attend him at court. To refrain from complying would have been treason. Marshal went to court where he was forced to follow the king to various locations in England when the court moved. John treated Marshal with such public disdain at court that it is unbelievable that Marshal was able to remain impassive to the mistreatment. Meanwhile, John transferred ownership of various lands owned by Marshal to friends of the king and authorized attacks against various properties owned by Marshal. Marshal requested permission to leave the court to deal with these attacks but permission was refused. John later taunted Marshal with the supposed success of one of these attacks accompanied by the death of various knights supporting Marshal. It is a testament to Marshal's character that he took this news with equanimity.

It turns out, however, that the report was totally false. Indeed, Marshal's wife, Countess Isabel, and persons appointed by Marshal to defend his interests, were very successful in defending the holdings, and few of his supporters were killed. Instead various supporters of John were soundly defeated and one of the leading knights was captured along with his lieutenants. Three of the knights Marshal had entrusted with defending his interests had been summoned by John to come to England, but declined to do so although that action jeopardized their rights to retain their land. After seeking allies they confronted the King's leading representative and justicar in Ireland, Meiler FitzHenry and his forces, with 65 knights, all 'well armed and riding chargers,' 200 men-at-arms and around 1000 lightly equipped infantry. In the words of the History of William Marshal, "the damage that Mailer sought to do to the earl's lands was done to him by the earl's men, for they devastated his own property' and captured the justicar, along with a 'turncoat' whose property was also seized.

News of the actual events reached England in late February or early March at which the king was apparently 'not amused at all' but Marshal was said to have been 'overjoyed at heart.'¹¹ On March 5 1208, the King summoned Marshal to an audience in Bristol at which Marshal pretended to have heard nothing from Ireland. The King told him that 'his men are in good health and

10. ASBRIDGE, *supra* note 5, at 303. This history of William Marshal admitted that Marshal was 'greatly aggrieved at heart' from the false reports made by King John.

11. *Id.* at 300, 307-308.

spirits as is the countess herself.¹² The Marshal reportedly paid great attention to the words of the King and replied in a wise and moderate manner: "Sire, thanks be to the Lord our god, but not for a moment did I think, on the day I left my land, that I had an enemy who would wage war on me."¹³ Later that month a compromise was made with the king, which involved returning several properties to Marshal in return for recognition of the king's power to appoint Bishops and assert legal jurisdiction for the crown. Marshal reaffirmed his status as subject of the King but in fact ended up with more autonomy than most barons enjoyed in England.¹⁴

What an extraordinary demonstration of restraint! King John had authorized some of his subjects to make war on William Marshal, and also doled out some of Marshal's lands. Several knights loyal to Marshal refused to obey a royal summons, making themselves into traitors, and organized successful resistance to the King's forces, yet both King John and William Marshal pretended nothing was amiss! This was perhaps the worst mistreatment of Marshal by King John, but it was far from the only incident.

In 1205, King John had taken custody of Marshal's oldest son as a hostage. This occurred after Marshal swore an oath recognizing King Philip as liege-lord over him in France. Marshal had done this to preserve title to land he owned in France. King John was furious. King John was planning another attempt to reclaim his French lands in the Angevain heartland, but Marshal refused to join the 'fight against France.'¹⁵ King John accused Marshal of being 'the King of France's man,' and Marshal demanded trial by battle. No one would accept the challenge. John in revenge demanded that Marshal's oldest son (then 15) be turned over to him. This had the appearance of royal wardship, but was obviously a method of taking a hostage.¹⁶ There followed a period in which it was clear that Marshal was being frozen out of the royal court, or by one description, "the slow, but unmistakable, withdrawal of royal favour and support."¹⁷

12. *Id.* at 308.

13. *Id.*

14. *Id.*

15. *Id.* at 309.

16. *Id.* at 284-286.

17. Marshal had himself at age 5 been give as a hostage to King Stephen in 1152 in exchange for a truce in an attack on one of his father's castles. Marshal was then slated for execution, but appears to have been such a charming child that he was spared. One time when he was threatened with being catapulted into his father's castle Marshal apparently was about to hop into a catapult's sling, thinking it was a child's swing! On another occasion as he was being led to the gallows, he played with a guard's spear. Stephen halted the execution stating, "anyone who could ever allow him to die in such agony would certainly have a very cruel heart." *Id.* at 26-29.

In another instance, when King John was determined to punish William of Briouze and his family, for a brief time William Marshal failed to comply immediately with demands of King John. In the late spring of 1210, King John assembled a massive armada of 700 ships and 800 knights to invade Ireland and assert his authority.¹⁸ Marshal backed down and made a renewed submission to the king, despite the fact that William of Briouze was Marshal's friend. Marshal was obliged to feed and house John and his troops at massive expense.¹⁹ Briouze fled to exile in France, but his wife, Matilda and eldest son were captured and interred in Windsor Castle and slowly starved to death. Chroniclers later reported that their bodies were found in a chillingly gruesome pose. Matilda's corpse was found kneeling before the corpse of her son, having been driven by unbearable hunger to gnaw upon the flesh of his cheeks.²⁰ Marshal still was required to pay a price for his temporary harboring of the "traitorous" Briouze's. He offered to undergo trial by combat to prove his innocence, but despite his advanced age (60), no courtier was willing to engage him. The defense that he was unaware of the displeasure of the king was partially successful, but Marshal still was required to turn over Dunamase Castle and place a number of his most valued knights in crown custody. Several were released after a year's captivity, but one fell ill and died.²¹

Another example of King John's perfidy relates to his greatest, and only, major triumph in battle. In 1202, Philip Augustus of France launched a massive invasion of Upper Normandy (then English). After hearing of other actions, King John engaged in a forced march south from Le Mans alongside nobles such as William de Roche, and William of Briouze covering 80 miles in two days. His forces fell upon the unsuspecting troops of Arthur of Brittany on August 1, 1202. Briouze captured the young duke, and another 252 knights were taken captive. This should have been a major source of money for the English throne, for it was normal to ransom such captives. Indeed, knights were so well armored at that time that it was rare that one would die in combat, usually only if something untoward happened, such as a lance piercing the visor of a helmet. However, none of these 254 knights were ransomed. All were mistreated, instead of being treated with respect pending negotiations for their release. The vast majority simply disappeared including Arthur of Brittany. This merciless behavior created quite a scandal. One record states that John treated his captives "so vilely and in such evil distress

18. *Id.* at 287.

19. *Id.* at 313-14.

20. *Id.* at 314.

21. *Id.*

that it seemed shameful and ugly to all those who were with him and who saw his cruelty.”²²

With such episodes in King John’s reign, it is unsurprising that William Marshal feared and distrusted John. King John’s excesses and cruelty were legendary. One contemporaneous comment was that when John died and went to hell, hell was made even more foul by his presence. Limitations of such absolute use of power thus had obvious advantages to Marshal.

Magna Carta and the accompanying Charter of the Forest were precisely that, limitations on the power of the King. Marshal’s role, thus, in reissuing Magna Carta in 1216 and again in 1217, in both cases under only his seal and the seal of the papal legate on behalf of Henry III, was fundamental to limiting kingly power.

Over the following centuries, both charters were repeatedly reissued and worked in a rather synergistic way. Some of the provisions of the Charter of the Forest appear inconsequential today, but that was far from the case in Medieval England. The right to graze pigs in the forest meant that the common citizen of England was permitted access to their major source of protein, for cattle were simply too expensive for common folk. Moreover, the shade of the forest was essential to raising pigs, for pigs need shade in hot weather. Since nearly a third of England was officially forest land (afforested land, i.e. land directly owned and controlled by the King) this was quite important. Litigation against the King and his delegates frequently occurred over the following centuries, more frequently than not under the provisions of the Charter of the Forest, not as often under Magna Carta.

The list of limitations upon the King in Magna Carta are substantial, with the right to a jury trial of peers the best known.²³ John was also forced to agree that “no free man could be arrested, or imprisoned or disseized, or outlawed, or exiled, or in any other way ruined” except by the legal judgment of his peers or by the law of the land. The sale of justice was also prohibited. Moreover, the situs of major trials was no longer to follow the king’s court, but was to be fixed at one place (Westminster).²⁴ When the king was

22. *Id.* at 315.

23. *Id.* at 273-275.

24. The right to a jury trial has only faint glimmerings in Magna Carta but legends may have major impact as this one did. See Allen Shoenberger, *Magna Carta, The Charter of the Forest and the Origin of the Jury System*, 24 NOTTINGHAM L. REV. 156 (2015):

“In 1898 Justice John Harlan determined that the right to a jury trial meant what it meant at common law, a right to a jury of twelve men. Justice Harlan states that this is what Magna Carta meant when it declared that no freeman should be deprived of life, etc., ‘but by the judgment of his peers or by the law of the land.’

Not only did Justice Harlan but many other people believe that the jury

abroad, such as in the campaigns John fought in France, the wandering court was a great impediment to access to justice. Many of the grievances addressed in Magna Carta were seemingly petty from our perspective, although not so at the time. The ability to impose several taxes was limited, perhaps the most important being a limitation upon scutage, a military tax to enable the King to go to war. Scutage could now only be imposed at a reasonable rate and after taking "the common counsel of our realm." That counsel was defined by another section of the 1215 version of the charter – what this meant was that there was now a limitation upon the power of the king to make war, tempered not only by the power of the purse but a gesture towards democracy of sorts!

The first version of Magna Carta included several provisions relating to the forests owned by the King (about a third of the land of England at the time). The 1216 version omitted these, but they were reincorporated and expanded upon by the adoption in 1217 of the Charter of the Forest accompanying the reissuance of the 1217 version of Magna Carta.²⁵

In the 1215 version of Magna Carta a provision was made for a panel of 25 barons to enforce provisions of the charter against the king including action "in all ways possible, by taking castles, lands and possessions and in any other ways they can . . . saving our person and the persons of our queen and children." That provision did not appear in either the 1216 or the 1217 versions of Magna Carta, perhaps because the child king, Henry III was not culpable of any offenses or perhaps as a gesture to the rebellious barons. However, the essence of the provision was a stark limitation upon the king for it regularized the possibility of revolt by the barons.²⁶

The list of limitations upon the King in the Charter of the Forest is substantial although the limitation upon punishment for taking the King's deer is possibly the best known.²⁷ Many seem

emerged from Magna Charta. In fact, the jury did not evolve until more than a century later. Magna Charta provided for trial by peers, which meant barons by barons, etc. . . . Moreover, it was later that same year during a church conclave that trial by ordeal was ended. Priestly cooperation in trials by fire and water was forbidden by Pope Innocent III at the Fourth Lateran Council of 1215. Priests presided over such trials, where either a person sank into water or floated, or the accused's wounds festered or not, evidencing guilt (sinking or festering) or the opposite. Unless trial by combat was substituted the legal system of England was faced with a serious difficulty. Some alternative method of determining guilt had to be determined. . . . The only 'jury' existent contemporaneous with Magna Charta was a 'jury of presentment' (a kind of grand jury) that did not determine guilt or innocence."

Id.

25. The highest court is the Court of Common Pleas.

26. Again, this version was sealed by William Marshal and the Papal Legate on behalf of King Henry III. ASBRIDGE, *supra* note 5, at 366.

27. Needless to say it was also not included in the 1225 version of Magna

rather petty today, but they ran to the essence of life in contemporary England. By all accounts Marshal was an excellent landlord, and for years spent much time involved in the details of managing his enormous estate.²⁸

They include:

- 1) Conferring their liberties upon all of Archbishops, Bishops, Abbots, Priors, Earls, Barons and to all Freemen of this our Realm;²⁹
- 2) disafforesting all Forests which Henry II had afforested;³⁰
- 3) disafforesting all Forests made forest by Richard the Lionheart;³¹
- 4) limiting the abilities of Forresters (the king's agents) to confiscate pigs, or lambs, or oates except as of old right;³²
- 5) ensures the rights of Free-men to take his own Pannage (roots used to feed swine) within our Forest, and if a swine lies within the forest one night it shall not be confiscated;³³
- 6) limits punishment for taking deer and other animals in forest area, may lose neither life nor member;³⁴
- 7) permits Noblemen summoned to the King to take a deer or two on the way there or back;³⁵
- 8) permits Free-men to use their land in the forest areas;³⁶
- 9) Forresters are prohibited from exacting tolls and other taxes from persons going through forest land;³⁷
- 10) regularized a system of forest courts;³⁸

Carta.

28. EDWARD COKE, *THE GREAT CHARTER OF THE FOREST, DECLARING THE LIBERTIES OF IT MADE AT WESTMINSTER, THE TENTH OF FEBRUARY IN THE NINTH YEAR OF HENRY THE THIRD, ANNO DOM. 1224, AND CONFIRMED IN THE EIGHT AND TWENTIETH OF EDWARD THE FIRST, ANNO DOM. 1299* (1680). It is well to remember, however, that relatively few individuals in England at that time were Freemen. One estimate puts Freemen at from 10 to 20 percent of the adult population. DAN JONES, *MAGNA CARTA, THE BIRTH OF LIBERTY 2* (2015).

29. The first President of the United States, George Washington, also was deeply involved in managing his enormous land holdings. By one estimate Washington was the second most wealthy American President. See Abraham I., *The 10 wealthiest presidents in United states history – See who's number 1!*, *THE INFONG* (January 21, 2016), <http://theinfong.com/2016/01/the-10-wealthiest-presidents-in-united-states-history-with-pictures/10/>. Both leaders were adept at warfare, yet both paid similar attention to the land and its products.

30. COKE, *supra* note 28, Introduction Second paragraph.

31. *Id.* at Ch. I.

32. *Id.* at Ch. III.

33. *Id.* at Ch. VII.

34. *Id.* at Ch. IX.

35. *Id.* at Ch. X.

36. *Id.* at Ch. XI.

37. *Id.* at Ch. XII.

38. *Id.* at Ch. XIV.

11) ratified the systems of Liberties and Customs as in Magna Carta both within the Forest and without.³⁹

Besides the disappearance of the panel of 25 barons, the major provision of the first versions of Magna Carta that did not survive was the attempt made by Marshal to make Magna Carta applicable to Ireland. The 1216 version was widely circulated in Ireland (about half of which Marshal owned through his wife). This history of the centuries of conflict with Ireland might well have been different had this attempt been successful.

In short, Magna Carta and its companion charter, the Charter of the Forest, were repleat with limitations upon kingly power. All three of the first versions of Magna Carta,⁴⁰ 1215, 1216 and 1217 were issued in the hope of alleviating the military turbulence of the period. They were in effect weapons to forestall immediate conflict. However, both charters achieved legendary status in English (and American) legal history. One summation puts it well:

“From surprisingly early in the thirteenth century the document’s legend had begun to outgrow its terms, and that process has continued to the present day. The Magna Carta played an important role in the English Civil War and the Glorious Revolution of 1688. It provided a constitutional first principle for the rebellious colonists of New England who became the founding fathers of the United States, and it informed the drafting of the Constitution. Its words are echoed in the clauses of the U.S. Bill of Rights and the United Nations’ Universal Declaration of Human Rights, and it was cited by Nelson Mandela in his famous Rivonia speech in 1964.”⁴¹

Perhaps this is not so surprising, for each of these reacted against terrible violations of human rights. At the foundation of English and American rights, however, stands a towering figure: William Marshal, Earl of Pembroke, great knight of the middle ages.

The Bill of Rights of the U.S. Constitution in particular was a product of the despotic actions by King George III and his government. The parallel is startling.

39. *Id.* at Ch. XVI & Ch. VIII.

40. This may be the first textual reference to Magna Carta in the charters. Magna Carta was not named as such until a scrivener referred to it as the larger of two charters (i.e. Magna Carta and the Charter of the Forest).

41. JONES, *supra* note 28, at 4.