

# Magna Carta and the Development of the Common Law

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### I

We are about to commemorate the eight hundredth anniversary of the granting by King John on 15 June 1215 of a 'charter of liberties' in favour of all the free men of his kingdom [of England] and their heirs. That charter was **not** initially called *Magna Carta* (or 'the Great Charter', in English). It only acquired that name **after** it had been revised and reissued twice and after the second reissue had been accompanied by the issuing of a separate, but related, Charter of the Forest. The revised version of 1217 was called 'The Great Charter' simply to distinguish it from the shorter, and therefore smaller, Forest Charter, but the name stuck.

To call it a 'charter of liberties' granted by king John to 'all the free men of his kingdom' of England is, however, in certain respects misleading. The term 'liberty' or 'liberties', particularly in the context of a royal grant, did not in 1215 bear the modern meaning of a recognised human right or human rights. 'Liberty' in the singular could mean something closer to that, in the general sense of the 'freedom' or the 'free status' of a free man, as opposed to the 'unfreedom' of a villein. 'Liberties', though, were something different (otherwise known as 'franchises'), generally specific privileges granted by the king, particular rights such as the right to hold a fair or a market or a particular kind of private court, the right to have a park or a rabbit warren which excluded others from hunting or an exemption such as freedom from tolls at markets or fairs. This may tell us something about how king John thought of the key concessions he had made in the 'charter of liberties'. Although John's grant is said at the beginning to be one made to all the *free* men of his kingdom at the end the grant is said to be one made to the 'men in our kingdom' (not just the *free* men) and certain of the provisions were indeed specifically intended to cover the unfree as well as the free. Nor, it should be added, was the charter something only for **men**. The term 'men' in the charter was clearly intended to cover, and the charter to benefit, women as well as men. This becomes particularly clear in those chapters (7 and 8) which applied, and could only have applied, to women (in this case to widows). They promised that in future widows would gain possession of their inheritances, their marriage portions and their dower lands as soon as possible after the death of their husbands and without any payment, and also that no widow would in future be compelled to remarry against her will. It is also perhaps worth emphasising in the light of the way that some of the chapters of the charter were worded as restrictions on what the king could do in respect of the earls, barons and others of his tenants in chief the fact that chapter 60 stipulated that all the 'customs and liberties' which the king had granted by the charter were to be observed in respect of *nostros* (the king's 'men'), all of **them** were in turn to observe in respect of their men (*observent quantum ad se pertinet erga suos*). There was a clear intention

to turn as many of the chapters as possible into provisions that were of general application, into generally applicable legislation, a hybrid of general law and a grant of privileges to all the members of specific groups.

For the legal historian one of the obvious points of interest in the contents of the 1215 charter is what it shows and has to tell us about the attitude of king John's opponents to one of the most significant legal developments of the previous forty years, the development of an English common law administered in the main through new 'royal' courts with a nationwide jurisdiction run by royal justices appointed by the king. These courts required royal authorisation for the hearing of individual civil cases given in writing by royal writs of a limited (but gradually expanding) number of standard forms, and also general authority and instructions for the hearing of serious criminal cases. They had also begun to use jury trial to assist in fact-finding in civil litigation, but not as yet to determine innocence or guilt in criminal trials (that began only in 1219 and had nothing to do with Magna Carta originally), though presentment juries were already being used to uncover major offences and the names of those suspected of committing them, who were then tried on the basis of those presentments but by one of the older modes of proof (ordeals of cold water or hot iron). These had also begun for the first time to make a full written record of their proceedings and were beginning to develop a consciously national legal custom, a set of legal rules of procedural and substantive law generally applicable to all the cases they heard and the ways in which they were dealt with. It is clear, for example, that John's opponents had no difficulties at all with accepting the idea of a general 'English law', what we would call the Common Law, which was in large part a product of this new system of regular and nationwide royal courts. This was something which was called in different places in the charter 'the law of the land', 'the law of the kingdom' and 'the law of England'. Chapter 45 was a promise on the king's behalf not to appoint as justices, or as local officials, except such men as 'know the law of the kingdom and will gladly observe it'. In effect, the king's opponents were faulting the king for inadequate commitment to the law which his father (Henry II), his brother (Richard I) and he and their advisers and judiciary had been creating over the years since 1176. A further sign of just how much the king's opponents thought in terms of civil justice being (in all important respects) something which the king (though his chancery) provided was chapter 40 of the charter. In this the king promised that **he** would not in future sell, deny or delay 'right or justice' (*rectum aut justiciam*) to anyone. But even in 1215 the sheer vagueness and imprecision of this chapter would have been clear. Could the king really not charge anything for the obtaining of writs? Was it not sometimes necessary for the king and/or his justices to delay judgment in a case while they considered it? Was it denial of justice to refuse to re-open a case already decided? This chapter at best expressed an aspiration,

something whose precise meaning would have to depend on subsequent practice.

Enthusiasm for the royal courts created by Henry II and his sons seems also to be the obvious deduction from chapter 17. This conceded that 'common pleas' (not a technical term, but apparently meaning ordinary civil litigation) were not to 'follow our court but be held in some certain place'. Prior to 1209 there had been two king's courts or types of king's court which were held in 'a certain place' in which civil litigation had been heard. One was the Bench (or Common Bench) which heard mainly civil cases from all over the country and which normally held its sessions only at Westminster (in Westminster hall). The other was the General Eyre, the collective name historians use for the groups of royal justices (justices in eyre/itinerant justices) who visited individual counties, holding sessions (eyres/assizes) in each county, normally at one main location, for a number of days or weeks, but with subsidiary sessions at other locations. Nationwide visitations had begun in the middle of Henry II's reign (in 1176) and were held every two years down to around 1200. John's reign, however, saw just one countrywide visitation in 1201-3 and then a second but incomplete one in 1208-9. But for a period of just under five years from the summer of 1209 to early 1214 civil litigation which came (and in some cases **had** to come) to one of the king's courts could only come to a single court, the court *coram rege*. This court, as its name suggests, held its sessions and did its business somewhere close to the king (and sometimes with him being personally present in the court) and so moved around the country with him, without remaining in any fixed place. Anyone suing or defending such a plea had indeed to 'follow' the 'king's court', not in the narrower sense of a law court run by justices appointed by the king and doing justice in his name, but in the broader sense of the fluctuating group of individuals (some grand, some menial) accompanying the king as he moved round the country. This meant discovering where the court was and going there for each appearance. It might also mean that when the king left England (as he did in the summer of 1210 to visit Ireland) the court held no sessions at all. Such a court had existed from time to time under Henry II, but not under Richard I, and it had only become a regular part of the judicial machinery under John, but prior to 1209 side by side with the Bench and with the Eyre. Historians have speculated about the reasons for the suspension of the Bench in 1209. There has been less speculation about the effective suspension of the General Eyre at around the same time. A partial explanation for both is the papal interdict placed on England in 1209 because of king John's refusal to accept Stephen Langton as archbishop of Canterbury and only lifted in 1213, which may have limited the number of men (especially clerics) willing to serve John in the courts. The main point here is that John's opponents were sufficiently enthusiastic about the justice offered in the king's courts to want to ensure that there was no possibility of going back to the situation which had existed between 1209 and 1214 where that justice

was available only in the inconvenient court *coram rege* in a court in which the king himself might sit.

It was also more royal justice, and more frequent royal justice, that the king's opponents were seeking to obtain in chapters 18 and 19 (really a single chapter) of the charter. This conceded that assizes of novel disseisin, mort d'ancestor and darrein presentment would be taken only in their counties and by two royal justices sent out to each county four times a year, who were to take the assizes on the same day the county court had its meeting, and in association with four knights of the county chosen by the county court. The distinctive feature of these so-called 'petty assizes' was that in them a jury from the locality was asked in advance to answer certain specific questions: whether such a person had been dispossessed of real property 'unjustly and without a judgment' by other named persons (including the current holder of the land) since a specific limitation date (in the recent past) [novel disseisin]; whether a certain person now dead (a relative of the claimant) had been in possession of a heritable interest in certain land and whether the claimant was his closest heir and whether he had died since a specific limitation date (much more generously defined) [mort d'ancestor]; which patron in time of peace had presented the last rector to a specific church (by whose death that church was now vacant) and had that rector accepted and admitted by the local bishop [darrein presentment]. As far as we can see, it had been the normal practice prior to 1215 to take such assizes in the counties concerned but this had normally been something done by the justices in eyre when they visited a county. Prior to 1200 this had allowed such assizes to be taken at least once every two years. What the king's opponents apparently wanted and obtained in 1215 was an even more frequent visitation of each county by royal justices specially commissioned to hear such business.

An enthusiasm for the Common Law and legal process is also one of the messages to be taken from the famous chapter 39. This divides into two distinct parts. The first part covers measures which were or might be part of the normal legal process. No free man was to be 'taken' (*capiat*) (meaning arrested), imprisoned (*imprisonetur*), or disseised (*dissaisiat*) (have his property taken) or outlawed (*utlagetur*) or 'exiled' (*exuletur*). The second part covers measures which were outside the scope of normal legal process: [no free man] 'is to be destroyed in any way' (*aut aliquo modo destruat*) nor 'will we go against him' (*nec super eum ibimus*) nor 'will we send against him' (*nec super eum mitemus*) (apparently referring to any kind of extra-legal measures up to a full military expedition against an individual and his property). Such measures were, however, not totally excluded. They were still to be allowed, but only if authorised by the 'lawful judgment of his peers' (*per legale iudicium parium suorum*) or by the 'law of the land' (*vel per legem terre*). The clause envisages an end to the unlimited and uncontrolled use of violence and force by the king (and his officials and others acting in his name) against the property or persons of any of his English subjects, except where this was

justified as being part of legal process or as something specifically authorised by the proper judgment of a duly constituted court. The king and his agents were being made subject to the same kinds of legal constraint as his courts had come to exercise over his subjects.

If the charter of liberties of 1215 was meant to bring peace and to last, it failed. Although John had promised to do nothing to procure its annulment he obtained a bull from Pope Innocent III on 24 August 1215 (just over two months later) doing exactly that and given the speed of travel between England and Rome the request must have been started on its journey to Rome shortly after the original Charter was granted. The bull had probably arrived in England by the end of September. By that time England was in any case descending into civil war, and John's opponents had already purported to remove him from the throne and replace him with the eldest son of Philip Augustus, the king of France, the future king Louis VIII. By then the 1215 charter was for most purposes a dead letter.

## II

But the charter lived on. Not long after the untimely, but in some respects fortunate, death of King John in October 1216 and the succession of his nine year old son, Henry III, to the English throne, a first revised version of Magna Carta was issued. This followed the first, hurried coronation of king Henry III not at Westminster (under the control of the rebels) but at Gloucester and a meeting of the regency council at Bristol where revision of the charter was discussed, and it was issued not under the royal seal of the child king (there was no such seal) but under the seals of the papal legate (Guala Bicchieri) and William Marshal (earl of Pembroke), the *rector* of the king and his kingdom. The November 1216 reissue was from the first intended as an interim measure, committing the young king and his supporters to the continuation of many of the royal concessions contained in Magna Carta, but revising some of them and reserving other chapters which were contentious (*gravia et dubitabilia*), about such matters as consent for taxation and the procedure for obtaining it, freedom of movement in and out of the country, and local administrative grievances, for fuller consideration later. The reissue also removed permanently from the charter the provisions about the enforcement of its chapters by a baronial group of twenty-five.

After peace had been made with prince Louis of France and his supporters and the civil war came to an end and Louis had gone back to France, there was a second and more definitive reissue of the 'charter of liberties', probably in November 1217. Now, for the first time, the 'charter of liberties' was paired with a separate 'charter of the forest' and thus became the 'Great' Charter. There were further changes in the chapters inherited from earlier versions of the charter and six new chapters

were added. These included a temporary one (chapter 47) authorising or requiring the destruction of all castles built or rebuilt since the beginning of the civil war between John and his barons.

There was another reissue of the charter of liberties, the third revised reissue in less than a decade, in February 1225. Textually this was close to the 1217 revised reissue, minus the clause about the demolition of castles but plus an additional clause promising that neither Henry III nor his heirs would ever seek any authorisation for infringing or annulling the liberties contained in the charter (a promise that Henry, unlike his father, kept). There were two other distinctive features of this reissue. One was that it was the first to be sealed by the seal of the young king Henry III, rather than those of his guardians. The charter itself also emphasised in its preamble that it had been made 'spontaneously and of the **king's** good will' (*spontanea et bona voluntate nostra*). The second is that there was an explicit *quid pro quo* for the re-granting of the charter of liberties and the charter of the forest. This was the granting by the king's subjects of one fifteenth of all their movable goods by way of a one-off 'subsidy' (taxation).

Three further reissues of Magna Carta took place in the second half of the thirteenth century. One took place in mid-March 1265. This took the form of an *inspeximus* (a full reissue) and confirmation of the 1225 charter. The first among the lay witnesses to this reissue was Simon de Montfort, earl of Leicester, and this reissue dates from the period when Henry III (in whose name it was issued) was a virtual prisoner and de Montfort, not the king, the man in control of the English governmental machinery. It is hardly surprising that no original copies of this reissue survive. Much better known (perhaps especially in Australia and in the USA) is the next reissue and confirmation. This was issued on 9 October 1297 under the attestation not of the king, Edward I, who was then in Flanders, but of the regent, his thirteen year old son Edward (the future Edward II). It was again an *inspeximus* reciting the 1225 charter in full but this time with an additional clause at the end promising observance of all of the 'articles' (chapters) of the Charter, even if some of them had not hitherto been observed. Four original copies of this *inspeximus* survive. One is now in the Parliament House here in Canberra. A second formerly belonged to the American businessman and independent presidential candidate Ross Perot. This was sold at auction in 2007 for over \$21 million. It is now once more on display (but on loan) at the US National Archives in Washington. The other two are held in English archives. The 1297 *inspeximus* (like the 1225 reissue) was quite explicitly something granted by the king (or his son) in return for a grant of tax, in this case a ninth, as the mandate for publication attached the London copy makes plain. An *inspeximus* and confirmation issued in the name of the king but attested only by his son as regent did not look as good, or perhaps as binding, as one attested and confirmed by Edward I in person. The issuing and publication of just such an

inspeximus and confirmation of Magna Carta seems to have been among the demands made of the king at the parliament which met in the New Temple in London and at Westminster in March 1300. The demand was met on 28 March, after the representatives of the towns and counties had left parliament but while parliament remained in session. This is the first of the reissues to be enrolled (together with the reissue of the Forest Charter) on the Charter Roll of the king's chancery.

### III

Magna Carta was significant in English law in the thirteenth century not just because of what it said but because it also served as the starting point for the discussions which led to various other pieces of legislation, often legislation that gave teeth to what clauses of Magna Carta said or helped to spell them out in more detail.

This is a process that begins in the 1230s. Among the legislation of this period is a mandate of August 1234 which spelled out in more detail how chapter 39 of the 1215 charter was to be applied. The only direct hint of this is in the marginal heading *de libertatibus*. The mandate is addressed to a single sheriff but seems to have been intended to apply generally, and it imposed specific controls on the king's power of disseisin of his subjects. It laid down that in future no one who had been arrested for homicide or any other felony for which imprisonment was appropriate (as a pre-trial measure) was to be disseised of his lands, tenements *or chattels* until he was convicted. As soon as a suspect was accused a record was to be made of all his chattels by a group consisting of the coroners, the sheriff and other lawful men and a value set on them. They were then to be entrusted to an agent of the suspect on his finding sureties to answer for them, but the suspect and his household were to be allowed reasonable maintenance while he was in prison. Only if he was convicted were they or their value to go to the king; if acquitted, they were to be returned to the former suspect. In essence this balanced the safeguarding of the king's right to the chattels of a convicted felon with the suspect's right to be treated as innocent until he had been found guilty. The Statute of Merton of January 1236 also took up certain of the provisions of Magna Carta. Chapter 1 in particular took up, extended and gave teeth to that part of chapter 7 of Magna Carta which had promised that widows would be assigned their dower within 40 days of the death of their husbands and in the interim have their quarantine. In future any widow expelled from her dower (this must, I think, refer to pre-assigned specific or nominated dower) or who needed to bring litigation to gain her dower and quarantine (this was for the more common 'reasonable' dower) and who afterwards recovered her dower from tenements which her husband had held at the time of his death (as opposed to tenements which he



had granted away but from which she was still entitled to dower), was to be entitled to damages for the value of the land as from the time of her husband's death.

Engagement with some of the issues dealt with by Magna Carta is also evident in the so-called 'Petition of the Barons', a miscellaneous collection of requests for legislative action and administrative changes presented to the reforming Oxford parliament of the summer of 1258. Clause 1 took up chapter 2 of Magna Carta which dealt with hereditary succession to land when an heir was of full age. All that chapter had said was that such an heir was to have his inheritance in return for the payment of relief. The 1258 clause had two parts. One seems directed specifically at lords other than the king and requested that in future, provided the heir was a close relative (a son or daughter) and offered to do what he was obliged to do, the lord should be allowed only a 'simple' (nominal) seisin, without the lord taking any of the profits of the land. If the heir was more distant (a brother or sister or nephew or niece or more distant relative) and offered relief and homage, the lord was to be allowed to keep the land in his hands (and take some profits) but could commit no waste in the land and, if he did, should have to pay damages and be amerced. The second was specifically about the king's rights at such a succession. Here there was no challenge to the king's right to have possession of the land in all cases until the heir had done homage. What was challenged was the queen's assertion of the right to a payment of queen's gold in addition to the relief paid by the heir which amounted to one tenth of the amount paid as relief. Clause 1 of the Petition was taken up in clauses 9-10 of the Provisions of Westminster of October 1259 which allowed the lord only to take simple seisin (without taking or removing anything) if the heir was of age and known to be the heir and on the land and gave the heir damages if the lord kept him out of seisin (and extended the same principle to the heir who had been in wardship once he came of age).

The final inspeximus and confirmation of Magna Carta of 1300 was also accompanied by the issuing of a separate but related statute on the same day conventionally referred to as the *Articuli Super Cartas*. This commenced with a first chapter (to which I will return) creating new special commissioners in each county for the enforcement of Magna Carta and the Charter of the Forest. Some of the remaining chapters also seem to have been inspired by Magna Carta provisions but to have developed them further. Chapter 3, for example, is an attempt to confine the jurisdiction of the king's travelling household court (which was quite distinct from the court *coram rege*) to stop it hearing any pleas relating to freehold or any pleas relating to debt or contract or trespass unless they were between members of the household and could be seen as an updating and clarification of chapter 17 of the 1215 charter (and its later descendants) restricting the hearing of 'common pleas' by courts following the king; and chapter 4 specifically relates its prohibition of the hearing of common pleas in

the exchequer (though this was no more or less mobile than the Common Bench) to that same clause. Chapter 18 apparently for the first time gave a remedy by the normal writ of waste for any waste or destruction in the lands of children who had fallen into the **king's** wardship against the king's local officials (escheators and sub-escheators) who administered such wardships (unless the king granted them away). Chapter 19 can perhaps be seen as a follow up to part of chapter 39 of the 1215 Magna Carta (and its descendants in the later reissues) in the promise that no one would be 'disseised' without the judgment of peers or by the law of the land. It provided that where a sheriff or escheator had seized land belonging to others into the king's hands where there was no reason to do so and when a subsequent enquiry had found there to be no cause, the profits of the land so seized were in future to be returned with the land (so that the person from whom the land had been seized would suffer no loss from the unjustified seizure).

#### IV

The 1215 version of Magna Carta provided for enforcement of Magna Carta against the king and his officials through a group of twenty five barons, but this mechanism disappeared in the 1216 reissue and was not revived. For enforcement of Magna Carta rights against others (but not against the king) there were a variety of possible mechanisms available. One was through the making available through the king's chancery of writs against those breaching the clauses, citing the specific clauses and ordering compliance with them or seeking damages for their breach. The earliest such writs only began to appear in the 1250s. The first appears in 1253 (enrolled on the Close Rolls of chancery) and ordered the sheriff of Hampshire to not allow a specific local lord (Pain de St Philibert) or his bailiffs to distrain a named individual (John le Fraunceys) for any amercement 'contrary to the [unspecified] terms of the great charter of liberties' (*contra tenorem magne carte de libertatibus*) and to have any animals so taken released. A second such writ appears the following year. Such writs probably went on being available through chancery but later ones are not recorded. For a period in the later 1270s and early 1280s a number of actions against lord or their bailiffs who had disregarded such mandates did reach the central courts of justice.

In chapter 7 of the 1215 charter king John had promised that in future widows were to be allowed to remain in their husband's house for (up to) forty days after his death (the widow's 'quarantine') and within that period were to be assigned their dower. There are also two cases, but only two, from the last quarter of the thirteenth century, which suggest that chancery had by then drafted and made available to widows a writ reciting this part of Magna Carta against anyone ejecting them from their quarantine and allowing them to claim damages. Such actions never became

common and, given the relatively small amount of harm that could be caused in this way, it would be more surprising if they had been; moreover, as we have seen, there was also a remedy for the same thing given by the 1236 Statute of Merton.

A second, but often less obvious, way in which the courts could ensure (or go some way to ensuring) the application of individual clauses of Magna Carta was through the addition of questions to those asked of local presentment juries at sessions of the general eyre in individual counties of England. The earliest of these was added in 1218 and a second in 1221 and both asked (different questions) about sheriffs and other bailiffs who held pleas of the crown. Other Magna Carta related questions were only added over half a century later, among the many new articles in 1278-9, when there was a large-scale reorganisation of the eyre system.

Much more diffuse is the evidence for Magna Carta or its individual clauses being cited in passing by litigants and their lawyers or by individual justices or the courts. A statement of the widow's customary general entitlement under English law to one third of the land which had belonged to her husband unless she had been endowed with less at the church door, was first added to the 1217 reissue version of chapter 7 of Magna Carta. This part of the clause was quoted or used by litigants in a number of different ways. It could be used to attack any attempt by a widow to claim more than one third. It might also be used by litigants and their lawyers and by justices in the opposite context: where the widow's opponent had argued that she had no entitlement to common law dower at all. In 1274 Beatrice of Falkenburg, who had married Richard of Cornwall, Henry III's brother and king of Germany, in 1269 at Kaiserslautern in southern Germany, sued for her dower share of some of his lands in England. Her opponent was her (slightly older) step-son, Edmund earl of Cornwall. His claim was that she had agreed to receive a dower in money if she had no issue by Richard, and that was all she could claim. Beatrice invoked both the common law of England and the provisions of Magna Carta (meaning our clause) as supporting her entitlement to dower. She (or rather her lawyers) attacked his claim that she had ever agreed to the monetary endowment and to the idea that any endowment could ever be conditional. Eventually they reached an agreement under which she did indeed receive some lands and renounced her claim to the money. She died only three years later and was buried in the Franciscan church at Oxford.

In general principle dower could be claimed only if the husband had held an interest in land that was longer or greater than his own lifetime. It did not arise if he had only a life interest or a leasehold for a term of years. That interest was most commonly an interest in fee (or, as it came to be called from the later thirteenth century onwards, fee simple), an interest that was in principle one that could last for ever. Increasingly common over the course of the thirteenth century, however, were

interests in 'fee tail', a kind of restricted fee simple where the land could (in theory at least) be inherited only by descendants of the original grantee (heirs of his or her body) or descendants of the grantees (most commonly a particular man and his wife), and which reverted, if there were none, to the original grantor and his heirs. The courts took various different views about whether and when such land could ever be validly granted away to a third party in such a way as to bar any claims by the heir or by the reversioner. In 1285 the statute of Westminster II, c. 1 (*de donis conditionalibus*) decided that in future the intentions of the original grantor were to be treated as paramount in such cases. No attempt to grant land away was (in principle) to bar a claim by the heir to the entail or, if there were none, by the reversioner. The statute dealt with a number of potential practical difficulties that might arise, but not quite all. One of these arose in a case heard in the Common Bench in Trinity term 1291 involving a smallish holding in a village just outside the city of Worcester. Philip of Bredicot had held land under an entail that settled the land on him and his issue and he had died without issue. His widow now sued for her dower. One possible understanding of the position was that his interest had never been more than a life interest. If the grantor's intention was to be the paramount guide, as the 1285 statute suggested, the land should at once revert to the original grantor. The other view was that when she had married him the estate had been a greater one than a life estate and one to which any children she had born to him would have succeeded. It was not her fault that she had no children and she should not be punished for it by the loss of her dower (and, it might have been added, the reversioner's interest was merely being postponed for her lifetime). It is only the law reports of this case, and not the official record, which tell us of the part played in the case by Magna Carta. The widow's lawyer (serjeant) William of Harle cited the Great Charter as providing that the widow was to have one third of the land that had belonged to her husband in his lifetime and added that the charter said nothing of this having to be held 'in fee'. Chief Justice Mettingham, in giving his judgment in the lady's favour, went back to the intention of the statute: 'statute was provided to avoid disinheritance because before the making of the statute those to whom tenements were given on such terms when they had issue alienated the tenements so that the issue were excluded and also the donor's issue. It was to avoid this hardship that the statute was provided and not to take dower away from ladies contrary to Magna Carta.' Magna Carta trumped the much more recent Westminster II, particularly perhaps in the absence of any evidence of a contrary intention to restrict the right of dower in these circumstances.

On two separate occasions an additional approach to the enforcement of Magna Carta was envisaged. The first was when arrangements were being made for specially commissioned justices to hear grievances against the sheriffs and their bailiffs and lords and their officials and various other

matters in various counties in England in 1260 as part of the 'baronial reform' process. They were given a general power to hear any complaint of wrongs committed 'contrary to the liberties contained in Magna Carta' (*magna carta de libertatibus*) but only in the very recent past, since the reforming parliament of Oxford of June 1258. But this was only a one-off exercise. The second occasion was when the 1300 *inspeximus* and confirmation of Magna Carta was issued and as part of the separate *Articuli super Cartas* issued on the same day. This established that in future in each county three men (knights or others) were to be chosen as justices appointed under the great seal to hear and determine complaints of breaches of any of the chapters of Magna Carta (or the charter of the Forest) without the need of any kind of royal writ and without any of the normal delays, and to punish convicted offenders by imprisonment, ransom or amercement as the gravity of the offence required. They were not, however, given any power to award damages and they were specifically debarred from exercising jurisdiction over any case where there was an existing remedy by writ. The resulting commissions to three named individuals in each county for all of the counties of England other than Durham or Cheshire were issued on 10 May 1300.

## V

England had a long tradition of legislation prior to 1215. Rulers of at least two of the separate Anglo-Saxon kingdoms (Kent and Wessex) which had existed prior to the creation of a single kingdom of England (in the tenth century) are known to have issued law codes in Anglo-Saxon and in the later pre-Conquest period after the unification of England its kings (Anglo-Saxon as well as Danish) continued this tradition. After the Norman Conquest of 1066 the issuing of law codes came to an end but England's Norman rulers did not abandon the practice of issuing legislation (though this was no longer in Anglo-Saxon) and various pieces of genuine and possibly genuine legislation are known from the reigns of William I and Henry I. King Henry II (1154-1189), the first of the Angevin rulers of England, was the creator of the English Common Law and royal legislation in the form of 'assizes' played an important part in creating the procedures and some of the substantive rules associated with the creation of this legal system. Some legislation is also known from the much shorter reign of his son king Richard I (1189-1199) and from the reign of king John before the issuing of the 'charter of liberties' in 1215. But none of this pre-1215 legislation was known to, or used by, the royal justices and professional lawyers of later thirteenth century England. This is clear both from the volumes of legal material that were being made for them by the last quarter of the thirteenth century and from the legislation which they cited in court in making legal arguments or giving judgment. For these lawyers and their successors (down to the present day) Magna Carta in its 1225 (or in its

1297/1300) form turned into the earliest piece of legislation they knew, the first item in the canon of English legislation. It is thus that it appears in the manuscript legal compendia containing complete sequences of English legislation and thus also in the first printed books of statutes which appear in the early sixteenth century (the earliest was printed by Richard Pynson in 1508) and were frequently reprinted. The printed volume which contains Magna Carta is entitled *Magna Carta cum aliis antiquis statutis* ('Magna Carta with other old statutes').

Magna Carta also found its way into the heads and minds of English lawyers of the later Middle Ages and the Tudor and early Stuart period in another way. Legal education had been provided, probably in or close to Westminster, from at least the last quarter of the thirteenth century and it looks as though this may already by 1300 have included lectures based on commenting on the specific words of legislation, since there is a surviving fragment of such a lecture on part of the statute of Westminster II, c. 1 in a manuscript now in the British Library. But we know nothing of who organised such education and where exactly the lectures were held. Three of the four inns of court in London had come into existence by the middle of the fourteenth century and the fourth (Lincoln's Inn) early in the fifteenth century and Sir John Baker has argued convincingly that from the first they were not simply places to sleep and to eat and drink but also places where education was carried on. By the fifteenth century we begin to get evidence of a regular cycle of 'readings' (lectures) on the major thirteenth century legislation being given in each of these inns of court. These always started (chronologically) with Magna Carta. There is a large quantity of reports of these readings still surviving but as yet, although they have been listed, they have not been edited. When they have been edited they will be an invaluable source for what later medieval and early modern lawyers understood the individual chapters of Magna Carta to mean and how that understanding changed over the course of time. Sir Edward Coke's *Second Part of the Institutes of the Laws of England* was written by a prominent lawyer and judge who had himself been a reader at the Inner Temple and can be seen as a modern version of the traditional readings, their latest descendant, even if written for publication and not for oral lecturing, and written in English with an English translation of the individual chapters of Magna Carta and the other statutes. It had been written by 1628 but was not published till 1642. It is to Coke that we can ascribe the myth that *Magna Carta* was so called not from its size nor because it is bigger than the charter of the forest but 'in respect of the great importance, and weightiness of the matter ...', and we can already find in Coke a close link being drawn between the right to *habeas corpus* as a way of challenging any kind of imprisonment or detention of a person and Chapter 29 of Magna Carta. It was also at around the time Coke was writing that Coke and others helped to draft the Petition of Right from the Lords and Commons in the 1628 parliament

attacking the use of imprisonment to enforce the payment of forced loans and the refusal to certify any reason for that imprisonment when it was challenged by *habeas corpus* other than the king's special command as certified by the Privy Council as being contrary to (Chapter 29) of Magna Carta (and a subsequent statute of 28 Edward III) and a similar attack on the use of executions under martial law in England in peace time as being contrary to the same chapter (and a subsequent statute of 25 Edward III).

Edward Coke was writing for lawyers, not for laymen. The *Commentaries on the Laws of England* of William Blackstone, a fellow of my own Oxford college (All Souls), first published between 1765 and 1769, were intended for the layman and started life as lectures delivered at Oxford (initially in 1753) for lay students in the university of Oxford, who wanted or needed to know something of English law, not law students. In the first chapter of the First Book of the *Commentaries* Blackstone followed Coke's view that, even if the great charter of liberties had been obtained 'sword in hand from king John' and then 'with some alterations, confirmed in parliament by king Henry the third his son' it contained 'very few new grants' but 'was for the most part declaratory of the principal grounds of the fundamental laws of England'. He did not follow Coke in a chapter by chapter discussion and analysis of the charter, but cited it where relevant in his much more analytically arranged discussion of English Law. Blackstone is also responsible for the first scholarly work on Magna Carta, putting the charter and its reissues into their contemporary context and providing an edition with variants of the different texts and reissues of Magna Carta and other related documents. His *The Great Charter and the Charter of the Forest* was printed at the Clarendon Press in Oxford in 1759 and it is a very handsomely printed volume.

## VI

Magna Carta in its various thirteenth and early fourteenth century forms was only on its face in general applicable in England and to the king's subjects in England. I say 'in general' because there were in the 1215 charter of liberties certain specific chapters promising the return of hostages and charters of loyalty given to king John by Llewelyn of Wales and Alexander king of the Scots, and promises to do justice in respect of lands, franchises and other claims made by the Welsh. Nothing was, however, said about the lordship of Ireland, the area conquered by the 'English' in Ireland which John had controlled before he became king and which he had visited in 1210, when some kind of decision was made that the law of the 'lordship' should be the English Common Law. The charter was not sent to Ireland until 1217. There is certainly evidence of Magna Carta being applied in Ireland in the later thirteenth and early fourteenth centuries, though we know from the endorsement to a

petition submitted to the king and his council (perhaps in 1297) from the 'people of Ireland' asking Edward I among other things for a grant of Magna Carta under his seal that he refused unless they were willing to make a grant like his English subjects (*pro magna carta habenda contribuant secundum quod illi de Anglia*). Scholars have disagreed about *Magna Carta Hiberniae*, a version of Magna Carta as reissued in 1216, which purports to be an adaptation of the Charter to Irish circumstances. It substitutes 'Ireland' for 'England', 'Dublin' for 'London' and 'the Liffey' for 'the Thames' and 'the Medway' throughout, but otherwise differs in no significant respect from its English counterpart. Although it was copied into the semi-official 'Red Book of the Irish Exchequer' (now destroyed) and was printed by Berry in 1907 among the genuine legislation of the Irish lordship, it is generally now believed that the 'adaptation' was only made as late as the early fourteenth century and without any official authorisation. It seems likely that when later medieval Irish parliaments at the beginning of their sessions confirmed Magna Carta what they were confirming was the 1216 version (or perhaps a later version) but not the supposed Irish adaptation. Magna Carta thus became a part of the legislative inheritance of the separate, but related, Irish version of the English Common Law, which became the legal system of the whole of the island of Ireland only with the final suppression of independent Irish rulers and the separate system of brehon law in the early seventeenth century.

Magna Carta has never applied in Scotland. The position in regard to Wales is more complicated. The final conquest of the remaining parts of independent Wales in the early 1280s led to the introduction of some of the institutional structures of English law and some of the substance of English law into west and north Wales through the Statute of Wales of 1284. But the statute did not state that English legislation or statute law should apply in those areas and it is not clear (to me at least) whether it did. Greater integration of the Welsh legal system with that of England was produced only by the 1536 Act of Union, ironically passed during the reign of the second of the Tudor monarchs of England (themselves of mainly Welsh descent), which stated that 'the Laws, Ordinances and Statutes of this realm of England for ever and no other Laws, Ordinances and Statutes from and after the said feast of All Saints next coming shall be used, practised and executed in the said country or dominion of Wales and every part thereof ...'

When English settlers began to colonise the eastern coastal areas of North America in the later sixteenth and seventeenth centuries they took their laws and legal system and assumptions about law with them even if they had to be modified somewhat in the light of their particular circumstances. This meant not just the heritage of the unwritten common law but also the body of statutory law enacted in England up to that point (going back to Magna Carta). Once settled they began to add their own local state legislation. By 1687 there was even an American printed edition of an English



translation of Magna Carta published (as part of a larger work) by William Penn, the Quaker founder of Pennsylvania. The American Revolution and the creation of a United States of America did not change this; indeed various of the articles of the Bill of Rights of 1791 (especially the fifth and eighth articles) can and have been seen as extending and filling out clauses of Magna Carta. Something similar happened in the southern hemisphere as well, but about that this audience will know much more than I do.

Little remains of Magna Carta on the English statute book. Just three chapters of the 1297 reissue and confirmation remain in force: chapter 1 granting freedom to the *Anglicana ecclesia* (tendentiously translated as the 'Church of England') and granting all the free men of the kingdom of England all the liberties below written; chapter 9 confirming that the city of London is to keep all its ancient liberties and free customs and other cities and boroughs and towns and the barons of the Cinque Ports and all other ports likewise; chapter 29 the guarantee against arrest, imprisonment and dispossession or other measures except as authorised by the lawful judgment of peers or the law of the land and a promise that right and justice would not be sold, denied or delayed. This last chapter is indeed a fundamental right or set of rights and no constitutional government is likely to want to incur the odium of repealing it; the other two chapters are hardly that. But our celebration of Magna Carta in this year of its eight hundredth centenary is, I think, celebrating more than just the survival of a small part only of this veteran piece of medieval legislation (and there is technically older legislation of 1267 on the statute books). Magna Carta stands as a foundational document in the history of the English Common Law, something close enough to the origins of the Common Law that we can reasonably celebrate this particular piece of legislation as the beginning of the English Common Law and of all its daughters and half-daughters in so many countries round the world, and (at the same time) as the document recording the continuing bargain between the ruler and his (or her) subjects (initially extorted at the point of a sword from an unwilling king John but subsequently freely granted by his son and his grandson in return for their subjects' loyalty and taxes) which placed the king and his officials (the government) under the control of the law and of legislative restraints on their power. And within a generation of 1215 there had begun the slow process towards making all taxation and all legislation matters requiring parliamentary approval (something partially foreshadowed in chapters 12 and 14 of the 1215 charter but which had no direct descendants in later reissues) and towards giving the representatives of local communities (counties and cities and towns) a say in parliament (something which had become the norm by the early fourteenth century). Here lie the distant roots of our modern democratic states.