THE MAGNA CARTA LECTURES: FREEDOM UNDER THE LAW

LECTURE V : THURSDAY 11 JUNE 1998

HIS HONOUR JUDGE COLIN COLSTON QC: THE CRIMINAL LAW

This series of lectures might have been sub-titled "Four Professors and a Common Lawyer": you have had your four professors; I hope you will not feel that this is the funeral.

1. In 1765 Blackstone described Magna Carta as "the Great Charter of Liberties, which was obtained, sword in hand, from King John". As Macaulay might have said: "Every schoolboy knows" that the date of Magna Carta is 15 June 1215 and the place Runnymede. But I suspect that only a small part of today's population knows much about the events in the early part of the 13th Century which led up to it. Until the last few months I confess that I would have been hard pressed to tell a Hertfordshire jury, here in St Albans, anything worthwhile about it.

2. For that reason, before I turn to look with you at some of the Chapters in Magna Carta, I want to digress to try and put those momentous days of June 1215 in some kind of setting. As a mere common lawyer I ask the indulgence of the academics and historians among you if I do so with a broad brush.

3. When King John came to the throne in 1199, England did not have a central system of government in any sense which we would recognise today - save in the vital field of finance. The Exchequer embraced, as Professor Holt has pointed out, a centralised accounting system for the revenues of the counties, yields of the royal estates and the profits of justice. Those were the great days of so called classical feudalism with great magnates - the barons - holding their lands directly from the King in return for fealty and homage and the obligations which their tenure of land carried with it - chief among them the provision of knights to fight the King's wars. Those same barons had their own tenants, (called "mesne" tenants), whose holding of land was likewise subject to fealty and service. At each level of the feudal pyramid there were local courts where the justice was not that of the Crown but the local feudal lord. The right to hold a court was a valuable asset: fees and fines were there to be collected. The decisions of those courts were open to manipulation and, inevitably, to corruption. The beginnings of a formal kingdom-wide system of justice had only recently begun with the system of a regular pattern of judicial sittings created by Henry II at the Assize of Clarendon in 1166 and the Assize of Northampton ten years later.

4. The great officials of State - the Chancellor, the

Justiciar and the Treasurer - were royal officials who were part of the Court and dealt with business of all kinds - as necessary if the King were absent, but as directed by him if he was in the Kingdom. And, unlike his Crusader brother, Richard I (the Lionheart), King John was in England for the greater part of his reign. He travelled extensively throughout the Kingdom and where he went there went the Court and the great officials also. In a very real sense it was government on the move. Justice was also on the move - many cases were heard by the King himself - coram rege. In the previous reign, during the long absences abroad of Richard I, the Justiciar (we would say Chief Justice) had sat at Westminster: now litigants were forced to follow the royal court.

5. King John's position in the period prior to his great confrontation with the Barons had been greatly weakened by two matters: his dispute with the Church and his attempt to hold on to his ancestral possessions in France (Aquitaine, Anjou and Poitou) and to regain possession of Normandy which had been lost in 1204.

6. The dispute with the Church began when, in 1207, John refused to accept Stephen Langton as the new Archbishop of Canterbury. He argued that the King of England was entitled to choose the successor to St Augustine. The Pope disagreed. At first there was stalemate. Then, on 24 March 1208, the whole kingdom was placed under a papal interdict: no church services could be held, a matter of real significance in those days. King John seized the revenues of the Church which were considerable (and much needed by him). One wonders to what extent the papal interdict and the seizure of the income of the church influenced the view of later events which were recorded in the great Abbey here in St Albans by the Chroniclers Roger of Wendover and Matthew Paris. Professor Holt and other distinguished historians believe that there was marked bias in the St Albans view of history. About that I shall have more to say in due course.

7. The following year, in November 1209, King John was excommunicated by the Pope. That was a significant move in the dispute between the King and the Church and, (as it seems to me,) inevitably diminished John's authority and standing within his own realm and in particular in relation to the Barons. Events were to prove that even the King could not withstand the power of the papacy. In February 1213, the Pope wrote to the King, warning him that if he did not submit, he would have to take the consequences - deposition and ruin. Faced with that stark choice, (if I may use a famous phrase from the 1980s) "there was no alternative". On 15 May 1213, at Temple Ewell near Dover, King John was forced into a humiliating climb down: he resigned his Kingdoms of England and Ireland to the Pope and received them back under the bonds of fealty and homage of a vassal together with an annual tribute of 1,000 marks

to the Holy See.

8. On 20 July 1213, Archbishop Stephen Langton, who had been in exile in France, was in Winchester and it was there that he absolved King John from his excommunication. At the same time the King took an oath that justice would be administered according to the law of Henry I.

9. On 4 August 1213 a Council was held at St Albans, almost certainly in the Abbey Chapter House. [Next Sunday (in the presence of the Master of the Rolls) - a great service will be held in the Abbey to commemorate Magna Carta.] A key item under discussion at that Council was the restoration to the Church of possessions which the King had forfeited, but for our purposes, another event of importance occurred. According to Roger of Wendover, Geoffrey Fitz Peter, the Justiciar, repeated the promises which the King himself had made at Winchester the previous month. The Council at St Albans also issued directions requiring Sheriffs (and others) to refrain from unjust dealing.

10. I turn now to an event which may be of importance. On 25 August, 1213, a Council was held in London at St Paul's - a mere three weeks after the Council here in St Albans. At St Paul's Archbishop Langton proposed that King John be asked to confirm the Charter of Liberties granted by Henry I at the time of his coronation "**by which, if you desire, you can recall your long lost liberties to their pristine state**": the Barons swore that they would fight for those liberties even unto death. I said that that event may be of importance for this reason: it may never have happened at all. The source is Roger of Wendover - a monk at the great Benedictine Abbey of St Albans. He was a prolific chronicler but, as a judge I need to warn you - my jury - that his historical accuracy is disputed by the highest academic authority, Professor Sir James Holt, to whom I am indebted for and advice in the preparation of this lecture. Whatever the truth about that incident may be, Holt has pointed out that "[t]his appeal to tradition is of the greatest importance in understanding the crisis of 1215... [The Barons] appealed to pre-Angevin conditions in order to condemn or review the practices and methods of government of all three" Angevin kings. "They accepted the whole of the legal work of Henry II and his sons, simply confining themselves in the Charter to providing detailed improvements. They wanted more, not less, of the kind of justice which the English courts had come to provide."

11. The dispute with Rome was brought to an end the following year. On 21 April 1214 Pope Innocent III issued a papal bull accepting King John as his vassal and in July the Interdict was raised.

12. Important as those events were, 1214 was not a good year for King John. His plans for a great military operation in France to regain control of Normandy and secure his

position in Aquitaine and Anjou met with resistance especially from the northern Barons. They contended - contrary to previous practice and the terms of their land tenure - that their obligations to the king by way of military service and the provision of knights was limited geographically to the realm of England and that they were under no duty to fight with their King in Poitou.

The strategy for the military campaign of 1214 was simple. The French King, Philip Augustus, was to be defeated as two armies - King John from Poitou in the south and his allies from the north - carried out a pincer movement against the heartland of France. Confident of victory, King John sailed for Poitou in February 1214. The reality was very far from the plan. On 27 July, 1214, the French won a famous victory at the battle of Bouvines which effectively caused the subsequent loss of all the Plantagenet possessions in Aquitaine, Anjou and Poitou (except Gascony) and ensured that Normandy would never be recovered.

13. On 15 October, 1214, John returned from his disastrous campaign in France and the pace of events leading to Runnymede quickened. The King's coffers were empty and he demanded a new scutage (money paid in lieu of actual military service in the field) at the unprecedented rate of three shillings for each knight's fee. The Barons - particularly those in the North - were outraged and determined to obtain what they regarded as justice. G.R.C. Davies sums up their complaints against the king neatly: **"His financial demands in aid of his foreign wars were held to be excessive; the methods by which taxation was assessed and collected were arbitrary and extortionate; reprisals against defaulters were ruthless and brutal; for wrongs suffered there was no redress."**

According to Roger of Wendover (whose accuracy in this point has also been questioned) the Barons met at Bury St Edmunds on 20 November, 1214,

> **as if for prayer; but there was something else in the matter for, after they had held much secret discourse, there was brought forth in their midst the Charter of King Henry I** - that is the same Charter which Roger of Wendover records as having been referred to by Archbishop Langton at St Paul's Cathedral some fifteen months previously. The Barons swore to take united action against the King. According to Roger of Wendover, their oath (taken at the High Altar) was that, if the King refused to grant them the said liberties, they would withdraw their allegiance and go to war with him until he should confirm by Charter under his own seal everything that they should require. The names of those involved are recorded at Bury St Edmunds where you can see them still.

14. What is not in dispute is that in January, 1215, a number of Barons, in armour, appeared before King John at the

Temple in London. They presented a demand for a charter - in fact they had taken an oath to fight for the Charter of Henry I. The King said he would give the Barons his answer on the Sunday after Easter. Meanwhile, he sent off envoys to Rome to seek the Pope's support in his confrontation with the Barons.

15. On Ash Wednesday 4 March 1215 King John took the Cross as a Crusader. It was a masterstroke which gained for him and for his possessions the Church's special protection.

16. In Easter week the Barons gathered at Stamford in Lincolnshire. The Sunday after Easter was 26 April, 1215, and the King was due to meet them at Northampton. He did not turn up. The Barons moved to Brackley where they met the King's representatives, Stephen Langton and William Marshal, Earl of Pembroke, and, in writing, repeated the demands which, in January, they had made to the King himself at the Temple. Roger of Wendover lists the names of the forty two barons whom he describes as "the chief promoters of this pestilence". Twenty of them - the largest group - came from the north of England and the next largest group was from East Anglia.

17. The King was at Wallingford when he received these latest demands. He rejected them saying: **"Why do not the Barons, with these unjust exactions, demand my Kingdom?"** At about the same time, John accepted the Pope's solution to the confrontation - in today's terms it was probably some form of arbitration. That, however, was not enough to satisfy his adversaries.

18. The response of the Barons was immediate. On 5 May they renounced their oaths of fealty to King John - an act of exceptional gravity in the feudal context and without which they could not, save with dishonour, wage war against their feudal overlord and sovereign. They appointed Robert Fitzwilliam as "Marshal of the Army of God and the Holy Church" and laid siege to the royal castle at Northampton. Civil war had begun.

19. On 10 May, 1215, the King put forward to the Barons formal proposals for arbitration by Pope Innocent III and undertook that, meanwhile, he would **"not take them or their men ... except by the law of the realm or by the judgement of their equals and in his court"**. Those words were, as we shall see, significant but the proposals were rejected and within two days the King ordered the seizure of the estates of the rebel barons.

20. Five days later, on Sunday 17 May 1215, the position of the Barons became impregnable: the City of London opened its gates to them and they controlled the capital. Towards the end of that month further proposals for peace, made by the King, were rejected by the Barons. Negotiations continued, the key intermediaries between the two sides being Stephen

Langton and William Marshal, Earl of Pembroke.

21. A truce was declared for a period of five days from 10 June 1215 and so it was that the parties met at Runnymede - the King coming from Windsor and the Barons from their base at Staines.

22. The Barons presented their detailed demands - 49 in all - in a document we call **"The Articles of the Barons"**. You can see it in the British Library - a piece of parchment 21¾ inches long and 10½ inches wide. It is in the form of a check list - each item starting with what (if it had been produced by a computer in 1998 and not written on vellum by a scribe) we might call "bullet points". There is no date, no introduction, no formality: one can see it for what it was, a list of non-negotiable demands. At the top of it is written in Latin **"Ista sunt capitula quae barones petunt et dominus Rex concedit"** - "These are the articles which the Barons seek and the Lord King concedes". (It appears, as a lawyer, to me that those words were added after the document had been written and when it was known that the Articles would be accepted - but that is a personal view which is not accepted by academic authority.) The Great Seal of King John was attached to the document - you can see it, too, at the British Library, though it has now become detached. On one side King John is seated on his throne, on the other he is on horseback.

23. It was capitulation by the King in the face of overwhelming force. In modern terminology one might argue that the Great Seal was affixed to the Articles of the Barons under duress of circumstance. The format of the Articles of the Barons was unique: the demands made by the King's subjects were acknowledged by the fixing to <u>their</u> document of the Great Seal, thereby demonstrating, for all the world to see, the extent of his climb down in the face of overwhelming odds.

24. In 1215 there was no Parliament and therefore no means of turning the Articles of the Barons into Statute Law. The most solemn form of grant known in 1215 was a charter and so time was required for the clerks and scribes in the royal Chancery to convert that which the Lord King had conceded into Charter form. For that purpose the truce was extended by four days.

25. By Friday 19 June, 1215, the Great Charter had been engrossed and it was on that day that the Barons again submitted to the authority of the Crown. They paid homage and fealty to King John and writs were sent out to the Sheriffs to inform them that peace had been restored. Exemplifications - copies - of the Great Charter, probably about 40 in all, were subsequently prepared, sealed with the Great Seal, and sent out around the Kingdom - to Bishops, Sheriffs and perhaps others. Only four remain: two in the British Library, one at Lincoln Cathedral and

one at Salisbury Cathedral. Of the two in the British Library, one is almost certainly that which was sent to Dover to the Barons of the Cinque Ports. Such was the position of strength of the Barons that the King was forced to accept, in the Great Charter itself, provisions for its enforcement by 25 Barons and, ultimately, by the (authorised) levying of war against him and the seizure of all his possessions "saving only our own person and those of the Queen and our children".

26. That King John never intended to regard himself as bound by the terms of the Great Charter despite those enforcement provisions in Chapter 61, seems clear. By 23 July, 1215, at the latest, the king had decided to seek the annulment of the charter and sent envoys to Rome for that purpose.

27. The Pope was determined that there should be another Crusade to the Holy Land and civil war in England would, inevitably, prevent King John from being one of its champions. Accordingly, on 24 and 25 August, 1215, two papal bulls - that is edicts with the lead papal seal attached - were issued by Pope Innocent III. He declared that the agreement between the Barons and the King was null and void of all validity for ever because the King had had to agree to it as a result of "force or fear". Magna Carta, so revered in later centuries, was condemned by the Pope as **"unlawful and unjust as it is base and shameful... whereby the Holy See is brought into contempt, the royal prerogative diminished, the English outraged and the whole enterprise of the Crusade gravely imperilled"**. That is why, earlier, I described John's decision to take the Cross as a masterstroke. His position was further strengthened when, at the Lateran Council later in 1215, the Pope excommunicated the Barons who had risen against their King.

28. What was so special about this document (which had legal force, if any, for about eight weeks) which calls for celebration in a grand and solemn manner every three years?

29. For the most part Magna Carta dealt with the issues of the day - feudal landholding, inheritance, wardship, the marriage of heirs and widows, the building of bridges, the upkeep of castles and the rights of London and other cities. At a time in our history when politicians are striving to ensure lasting peace in Northern Ireland, we do well to remember that peace within the whole Kingdom was high on the agenda at Runnymede: three of its Chapters (56, 57 and 58) dealt with the situation in Wales and provided for the release of a key hostage - the son of Llewelyn the Great who was married to King John's illegitimate daughter, Joan. Key Chapters also dealt with the pre-eminence of the English Church - and we can note with due local pride that the Abbot of St Albans was one of those named as being present at Runnymede.

30. I will concentrate, not on any of those issues, but on Chapters which are relevant to Criminal Law and Procedure and the operation of Royal Courts. I shall begin by looking at the terms of those Chapters and then turn to reflect, briefly, on how some of them came to be used in later centuries to bolster the case against a resurgence of royal power and how some still have relevance for us today.

We need to remember that the Great Charter of Liberties was not just for the Barons: it reads

> **"To all <u>free men</u> of our Kingdom we have granted, for us and for our heirs forever, all the liberties written out below...."**

I want to look with you at the specific provisions of parts of this Great Charter.

<u>Chapter 17</u> [Cap XI of 1225 and Article 8 of the Articles of the Barons]

> **Common Pleas shall not follow our court, but shall be held in some fixed place.**

I have already highlighted the difficulty caused to litigants by the need to follow the royal court to obtain justice. This Chapter represents a landmark in making the King's justice less costly and more readily available and accessible in some cases - today we would call them civil actions. Because the interests of the Crown were not at stake, henceforth these actions were to be heard in some fixed place - it came to be at Westminster - rather than at whatever place the King happened to be. We should remember that, at the time of his accession, Henry III was a lad of nine and so there was no question then of him travelling the land with the court following him: according to R.V. Turner that practice did not re-emerge until 1234. The establishment of the separate Court of Common Pleas owes its origin to this Chapter which may, therefore, properly be regarded as a milestone on the way to the creation of an independent judiciary. As we are gathered here in St Albans, it is right that I should mention that even the place of justice has to move occasionally when superior forces compel it to do so. Under the west window of the abbey - less than a hundred yards from the original great monastic gatehouse which, for centuries served as the St Albans gaol - there is a Latin inscription. Translated it reads: **Because of the position of the neighbourhood and the ample size of this temple, convenient for receiving the great number of those gathered together in the times of King Henry VIII and again of Queen Elizabeth, while the plague was raging in London, the judicial assizes were held here in the years 1543, 1589 and 1593.** That, no doubt would have been convenient to Sir Francis Bacon, in 1589 and 1593, with his home at Gorhambury.

Access to Justice is, of course, high on the agenda in the 1990s and time will tell to what extent the reforms advocated by Lord Woolf are adopted by the Government.

Chapter 18 [Cap. 12 of 1225 and Article 8]

> **Inquests of novel disseisin, mort d'ancester and darrein presentment shall be taken only in their proper county court. We .... will send two justices to each county four times a year who shall .... hold the said assizes in the county court ....**

These three inquests - petty assizes - relate not to the criminal law but to recent dispossession from land, inheritance and advowsons - the right to present to an ecclesiastical benefice or living. They are, however, important for us because those charged with the task of answering the questions on the inquisition were twelve local landowners. There is a connection therefore, for us, with the origins of trial by jury.

It is also noteworthy that the convenience of litigants is highlighted in this Chapter. These three types of petty assize were to be held only in the county where the issue arose. Quarterly visits by Judges of Assize were also to become a key feature of the administration of justices for centuries: assizes only came to an end with the creation of the Crown Court in 1972. Many in this audience will have heard the Clerk of Assize read out those solemn and resonant phrases, addressed to the individual judges who, in a given county, were given the commission of Oyer and Terminer and General Gaol Delivery.

Chapter 20 [Cap. 14 of 1225 and Article 9]

> **A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence ... and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.**

Comparable provisions relating to amercements to be paid by barons and clergy were also provided for [see chapters 21 and 22].

An **amercement** is not a fine in the sense which we use that word today. Rather, it was the sum to be paid by a wrongdoer as the price of once again being brought back within the protection of the law. As McKechnie puts it, a man

> "had to satisfy the claims of the victim's family, of the victim's lord, of the lord within whose territory the crime had been committed ... and finally of the King as lord paramount".

Those of you who, as lawyers, magistrates or judges had to grapple with the concept of unit fines during their short and controversial appearance on the judicial stage in the early 1990s may not have realized that punishments commensurate to the offence were important 783 years ago.

Public confidence in the administration of justice depends, at least in part, on a general perception that the punishment fits the crime. So, in spirit at least, the concept behind Chapter 20 lives on for us today.

Chapter 24 [Cap. 17 of 1225 and Article 14]

> **No sheriff, constable, coroners, or other of our bailiffs, shall hold pleas of our Crown.**

Pleas of the Crown are, for our purposes, criminal trials involving serious cases. The purpose of this Chapter is clear: to reserve all such matters for trial before the King's judges. The need for this specific provision arose from the fact that other "officers of the Crown" - chiefly Sheriffs - had abused their position and tried cases outwith their jurisdiction. Accordingly the application of the law in the field of serious crime had not been uniform; in some cases it was arbitrary. So here, as in Chapter 17, we can see the beginnings of an independent judiciary.

This provision did not however reserve all criminal cases to the King's justices. Coroners and Sheriffs continued to conduct preliminary enquiries into Pleas of the Crown. Sheriffs remained the judges for minor offences during their tourn - that is, their judicial progress through the hundreds (that is the subdivisions) of the county. As a footnote to this Chapter, we should note that in 1199, much earlier than had once been thought, Richard I appointed Commissioners of the Peace - forerunners to those appointed in the generations following the Justice of the Peace Act 1361.

Chapter 34 [Cap. of 1225 and Article 24]

> **The writ which is called præcipe shall not in future be issued to anyone in respect of any holding of land if a freeman may thereby be deprived of his right of trial in his own Lord's court.**

This Chapter illustrates graphically two vital issues. First, the importance which the Barons attached to the feudal law which reserved all issues relating to disputed title to land (other than that held directly of the King) to the exclusive jurisdiction of the lord of that land (fief). If that exclusive jurisdiction were eroded, the Lord would lose both revenue and authority over his tenants. The Barons were determined to reverse the erosion of the jurisdiction of manorial and other feudal courts.

Under Henry II the use of Writs of Præcipe had grown greatly. It was a method of by-passing the feudal Lord's jurisdiction and bringing the case into the royal court. This was done by ordering the sheriff to direct the tenant to restore the land to the plaintiff or else appear before the royal court to explain why he had not done so. There was, however, an important potential disadvantage to the Plaintiff. He could only obtain

a Writ of Præcipe if he were prepared to offer trial by battle: the defendant had the option to decide whether to accept that method of trying the issue or to opt for the alternative of the grand assize .

Secondly, Chapter 34 also demonstrates the weakness of King John's position at Runnymede: he was forced to concede the reversal of a successful policy of the centralisation of royal jurisdiction which had gone on for the previous half century. The devices used in later years to get round this provision in Magna Carta are fascinating, but outside the scope of this lecture.

Chapter 36 [Cap. 26 of 1225 and Article 26]

> **Nothing in future shall be given or taken for a writ of inquisition of life or limbs, but it shall be granted freely, and never denied.**

In the early 13th century there was, as yet, no centralised system for bringing criminals to justice. Trial by combat was common. If a private individual made an appeal (an accusation) of felony the normal procedure was for the matter to be fought out, in person, in judicial combat. So it was the wronged person, not the state, who took the initiative in avenging crime.

The Writ of Life and Limb was a device by which, if an "appeal of homicide" was not brought bona fide or was without probable cause, a man accused might escape personal combat without having to take the alternative drastic course of becoming a monk.

This Writ could be purchased from the royal Chancery and the issue of whether the accuser acted out of hate or spite was then referred to an inquisition of twelve local men for a verdict which they gave on oath. The royal exchequer benefited greatly from the revenue raised from Writ of Life or Limb. So here we see, in Magna Carta, a significant blow struck for free, or at least affordable, justice.

We should note in passing what occurred in 1817 after a trial at Warwick Assizes. William Ashford was dissatisfied with the acquittal by a jury at Warwick of Thornton, the man accused of raping and murdering his sister. As you will know, there is no appeal against a verdict of Not Guilty returned by a jury. Accordingly in an attempt to get round that rule, Ashford made an appeal of felony (a formal accusation) against Thornton. But Abraham Thornton must have been advised by industrious lawyers for he threw down a glove as a wager of battle and offered to defend himself in single combat with Ashford. Faced with that prospect Ashford declined. Two years later Parliament abolished trial by battle in all civil and criminal cases.

Chapter 38 [Cap. 28 of 1225 and Article 28]

> **No bailiff for the future shall, upon his own unsupported complaint, put anyone on (judicial) trial without producing**

credible witnesses brought for this purpose.

The word bailiff is here used in a wide sense and includes Sheriffs and their officers. Pollock and Maitland support the view that this Chapter is aimed against the unfair treatment of those accused in criminal cases. Accordingly no one ought to be put to this "ordeal" (lex) on the unsupported complaint of the King's bailiff.

If that interpretation be correct (and it is not universally accepted) it was an important advance in criminal procedure.

It is convenient to deal now, out of order, with another Chapter which deals with procedure.

Chapter 54 [Cap 34 of 1225]
No one shall be arrested or imprisoned upon the appeal (the accusation) of a woman for the death of any (one) other than her husband

To us, in 1998, this Chapter appears to be significantly lacking in political correctness and to be demeaning to women. If we could go back in a time machine, and listen to the arguments in favour of Chapter 54, we might be surprised.

It would be suggested to us that, far from making women into second class citizens, what was being done was to ensure that men had equality with women.

How could this be? The answer lies in the 13th century procedures for dealing with civil and criminal cases. As Holt has stressed, Magna Carta came into existence against a legal system of thought which was already sophisticated and reliant on its own logic. In civil cases, both parties were required to be represented by champions if the issue was to be resolved by "duellum" - that is by ordeal by battle. In criminal cases, by contrast, both accuser and accused had to fight in person. It is immediately apparent that, in any case where the accuser was a woman, such a system would be ungallant and grossly unfair. Accordingly, women were allowed to appoint a champion to fight on their behalf. It had long been held that a woman could "appeal the murder" of her husband because, as Glanvil argued, husband and wife are one flesh.

There could, however, be positive disadvantages to men if this exception were to be extended and, in Chapter 54, the Barons ensured that the power to arrest and imprison a man on the word of a woman alone should be confined, so far as murder was concerned, to this single case.

Ordeal by battle fell into disuse shortly after 1215 and, thereafter, a man accused of the murder of a woman's husband could opt for the issue to be resolved by other means - for example, ordeal by water or hot irons. Later such cases were most frequently dealt with by the decision of a jury.

Again, taking things out of order, I want to draw your attention to

Chapter 45 [Article 42]

> **We will appoint as justices, constables, sheriffs or bailiffs only such as know the law of the realm and mean to observe it well.**

On one reading, this Chapter appears to provide that judges and other royal officers should only be appointed from the ranks of those who know the law. No-one would argue against that proposition today, certainly not in relation to judges.

For that reason it is interesting to note that Chapter 45 vanished without trace in the 1216 and all subsequent issues of the Great Charter. The reason for its disappearance is that its objective was not to secure a professional and learned judiciary; rather it was to prevent the king from appointing his foreign favourites - from his possessions in France - to high office in England. Some of them were so hated that, in Chapter 50, they are mentioned by name and King John undertook to remove them and "all their followers" from all royal offices.

Chapter 39 [Cap. 29 of 1225 and Article 29]

> **No freeman shall be taken and imprisoned or disseised or outlawed or exiled or in any way destroyed nor will we proceed with force against him or send others to do so except by the lawful judgement of his peers or [and] by the law of the land.**

In later centuries, and particularly during the clashes between Charles I and Parliament, this Chapter has been interpreted as prohibiting arbitrary government and providing for trial by jury for all Englishmen. That is part of the myth which has grown up round Magna Carta: and it is the myth rather than the detail of this Great Charter of Liberties which has made it a document of fundamental importance in this Country and in many others around the globe. McKechnie argues that

> "it was in accord with the practical genius of the Charter that it should here direct its energies, not to the enunciation of vague platitudes, but to the reform of specific abuse ... it forbade [King John] for the future to place execution before judgement".

There had grown up a practice of writs of execution being issued without trial and the king had proceeded - or threatened to proceed - against individuals by force of arms before judgment had been obtained.

The phrase "judgment of peers" needs to be read as involving a decision by the "equals" of the man accused. It was not a privilege claimed only for earls and barons: it was the right of all free men. So, for example, judgement against a Crown tenant would be given by others holding directly from the Crown

whereas the tenant of a mesne (intermediate) Lord would receive judgment from other tenants of that Lord. Prior to 1215 it had already been established, by analogy, that the Jews of Normandy and England were to be tried by their own race. We need to remind ourselves, however, that "judgement of peers" does not mean trial by jury.

That phrase "**judgment of peers**" (judicium parium) is linked (probably conjunctively) to "**the law of the land**" (lex terrae). In 1215 the relevant "law of the land" would have involved the trial or "test" by ordeal, compurgation (the confirmation, on oath, of a litigant's version of the relevant events) or by battle and it was this "test" which was to be subject to the judgment of equals as to its outcome. The Lateran Council of 1215 condemned the use of trial by ordeal and so, gradually, it was replaced by the verdict of a petty jury. Professor Holt argues that trial by one's peers was of feudal (and probably French) origin and was superimposed on the Anglo-Saxon "law of the land" after "1066 and all that" so that the two systems existed side by side. So perhaps the Latin "vel" in Chapter 39 should be translated as "or" - thus approving both existing systems of justice. That is another issue of fact for you, my jury, to determine because - as you know - "all issues of fact are for you alone".

In later years the "law of the land" of 1215 came to be read as "due process of law". Glosses on this famous Chapter are legion. By the mid-14th century "judgment of peers" had come to mean trial by peers for the aristocracy and trial by jury in crime.

In later generations it was claimed that this famous Chapter of Magna Carta made it clear that arbitrary arrest and imprisonment - often used by King John - was to cease. Nor, henceforth, was the king to use force of arms against those who had neither been tried or convicted. The Crown itself was to be subject to the law.

Contrary to later interpretations by high authority of men like Coke, it seems reasonably plain that this Chapter did not extend its protection to all: villeins were not within the class of "**free men**" to whom it refers. (Free men were only a small percentage of the male population.) It was, however, a significant extension beyond the concession made by King John in August, 1213, to "the barons who are against us" that he would not take them or their men.

Chapter 40 [Cap. 29 of 1225 and Article 30]

> **To no one will we sell, to no one will we deny or delay right or justice.**

Coke, in his Second Institute, wrote of this Chapter

> **"as the gold-finer will not out of the dust, threads or shreds of gold, let pass the least crumb, in respect of the excellency of the metal; so ought not the learned reader**

to pass any syllable of this law, in respect of the excellency of the matter".

The difficulty with that is that it attributes to this Chapter in the Great Charter qualities which no-one in the early 13th century would have claimed for it. King John was neither agreeing nor conceding the principle that all payments for judicial writs and court fees should be abolished. However, in a decade when the cost of the litigation is rising, legal aid is available to a smaller percentage of the population and the government is considering a policy of making courts pay their way, we would do well not to neglect the more modest aims with which Chapter 40 was really concerned.

Justice did not come for nothing in 1215 nor, as far as I am aware, has it ever done so in any civilised society. Litigants in those days had to pay for writs to commence litigation - just as they are required to do 783 years later in 1998.

However, as McKechnie has pointed out,

> **"Sums customarily received by [the Crown] at every stage of the legal process were not always the wages of deliberate injustice. Many such payments were not bribes to an unjust judge but merely expedients for hastening the laws delays..."** (An interesting distinction!)

We need to remember that in the early 13th century the system of royal justice did not hold a monopoly position in the legal market place. But it did constitute a better system and Henry II's policy of opening royal courts to all was both popular and successful.

Different writs commanded different prices and special "writs of grace" were costly. Some of the worst examples of the royal exploitation of justice are to be found in King John's treatment of individual Barons. What then did this Chapter aim to achieve? Article 30 of the Articles of the Barons (which became Chapter 40 in the Great Charter) sought reform, not abolition, of the existing system and it was that which the Lord King conceded. Henceforth only reasonable fees should be charged for ordinary writs. In some parts of the Kingdom the royal justice was not freely available (even at a price) because the power of the local barons was such that they were able to ensure that their own feudal courts were not by-passed: that denial of justice was ended. There were also delays in the King's system of justice which needed to be addressed.

The Crown's right to charge substantial fees for writs of grace was not abolished by Magna Carta. In the reign of Richard II, for example, it was made plain that

> **"Our Lord the King does not intend to divest himself of so great an advantage, which has been continually in use in Chancery as well before as after the making of the said [Great] Charter, in the time of all his noble progenitors**

who have been Kings of England".

Accordingly, we need to recognise that Chapter 40 did not in fact either seek, or achieve, that which was later claimed for it. But of course that scarcely matters for, as has so often been the case in the history of "this sceptred isle", the myth counts for more than the substance.

In the 1990s all of us who work in the Criminal Justice system are familiar with efforts to reduce delay in criminal trials - for example custody time limits, Plea and Directions Hearings, the fast-tracking of cases involving the sexual abuse of children. And, in the civil field, Lord Woolf's great blueprint for the overhaul of the system has attracted wide attention - as has the fate of the Chancery judge who delayed too long in delivering a judgment. Treasury restraints on the appointment of additional High Court judges to deal with the ever-increasing workload in the criminal field have led to changes under which Circuit Judges like me are, with the personal approval of the Lord Chief Justice, allowed to try murder cases and even sit in the Court of Appeal Criminal Division.

Events after 1215

As Professor Holt has pointed out, "the Charter was conceived in political crisis". But even when that immediate crisis was over, it does seem to have been recognised very rapidly that, despite the Pope's action to annul it, the granting of the Great Charter had been an event of major importance. When King John died at Newark on 18 October, 1216, (shortly after that disastrous short-cut journey across the Wash when the Crown Jewels and much of his baggage train was lost) urgent steps were taken to have the boy king, Henry III, crowned at Gloucester before the month was out. The Barons immediately elected William Marshal as Regent, despite the fact that he had not sided with them at Runnymede.

[It is worth pausing for a moment to remind ourselves that this man, William Marshal, was one of the truly great men of English history. In 1217, when he was nearly 70 years old, he was at the head of the army which, under the Exchequer Gate in Lincoln, routed the last of the French troops who had come to England in the last months of John's reign when Prince Louis, the son of the French King, had led an invading force in the hope of securing for himself the throne of England. If you go to the Temple Church in London you will see the magnificent effigy of William Marshal, Earl of Pembroke, in Crusader armour. He died in 1219.]

We need to go back to events of late 1216. Within two weeks of the coronation of the young Henry III, William Marshal was responsible for a new Charter which was issued at Bristol on 12 November, 1216, in Henry's name, but signed by Marshal, as Regent, and by the Papal Legate. Following the defeat of the French at Lincoln, a peace treaty was concluded at Lambeth on 20 September, 1217, and later that year another revision of the Charter of Liberties was issued together with the Charter of Forests: both were signed by Marshal. Of the original Great Charter of 1215 nearly one third of the clauses were omitted in

all later versions, no doubt because they had dealt with temporary problems which had evaporated after the death of King John. It is, however, somewhat surprising to find that Chapters 12 and 14 of the 1215 Charter - which had required the general consent of the realm before a general aid (to us, tax) could be levied - also vanished without trace. It is no wonder, therefore that those who, in later centuries fought for the principle of "no taxation without representation" should have based their arguments on the concessions forced from King John at Runnymede.

In 1225 the Charter of Liberties was re-issued by Henry III himself in return for a grant of taxation of one fifteenth on moveables. It was not identical to the Great Charter of 1215 - for example, Chapters 39 and 40 were run together and became Chapter 29. [You can see the Laycock Abbey exemplification at the British Library: it had originally been sent to the Sheriff of Wiltshire.] It was this 1225 version of Magna Carta which, in 1297, entered the Statute Book under Edward I. You will find it still (insofar as it has not been repealed) as the first statute of the realm in today's edition of Halsbury's Statutes of England as 25 Edw I. The wording of the 1297 statute is, to my mind, significant in that it shows that, within 82 years of that historic meeting at Runnymede, Magna Carta had already taken on mystical qualities. Edward I's statute is dated 28th March and begins as follows:

> **Edward, by the grace of God, King of England, Lord of Ireland and Duke of Guyan .... We have seen the Great Charter of the Lord Henry, sometime King of England, our Father, of the Liberties of England in these words...**

The text of 1225 is then recited verbatim before the statute continues

> **We, ratifying and approving these gifts and grants aforesaid, confirm and make strong all the same for us and our Heirs perpetually.**

The King himself was in Flanders at the time and so that Statute, in the form of Letters Patent, was witnessed by his son, Edward. It is often called "**Inspeximus**" because of those words "... We have seen the Great Charter ..." It is kept in the Public Record Office and used to be paraded at the triennial celebrations of Magna Carta such as that which will take place here in St Albans next Sunday, 14 June.

Later in the same year, 1297, another statute, known as Confirmatio Cartarum was passed. Chapter I provides that the Great Charter **shall be kept in every point without breach.** Chapter II is instructive:

> **And We will that if any judgment be given henceforth contrary to any points of the [Charter of Liberties] by the Justices, or by any other our Ministers who hold Plea before them, against the points of the [Charter], it shall be undone and holden for nought.**

So that appears to put Magna Carta into a special position - akin to an entrenched constitutional provision - which was to take precedence over other statutes - at least until 1863 when that provision was itself repealed by the Statute Law Reform Act.

By 1354 Edward III was on the throne and in Chapter III of the Statute of Westminster (28 Edw III Cap 3) we find words which echo down the ages - both in this country and around the world.

> **Item, that no man of what estate or condition that he may be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.**

So, 114 years after Runnymede, the successor provision to Chapter 39 was extended to all men and the phrase "due process of law" was born.

In 1416, the year after his famous victory at Agincourt, Henry V confirmed that "**the Great Charter .. shall be firmly holden and kept in all points.**" This was the last time that Magna Carta was confirmed by successive monarchs - some of them had confirmed it many times, the record being held by King Edward III with no less than fifteen confirmations.

It may be that it is a reflection of the comparative stability of the times, but it is worth noting that in his play **"King John** written in 1596, Shakespeare makes no mention at all of Magna Carta.

The 17th century saw a new battle between the King and Parliament. That is outside the scope of this lecture, but it is worth observing that Sir Benjamin Rudyerd said at the time: **"For my own part I shall be very glad to see that good old decrepit Law of Magna Carta which hath been so long kept in and lain bed-rid as it were; I shall be glad I say to see it walk abroad again, with new Vigour and Lustre...: For questionless, it will be a general heartening to all."** It is also significant that the draftsmen of the Petition of Right of 1627 thought it necessary to refer both to Magna Carta and the 1352 statute of Edward III as the foundation for the principle that no offender should be dealt with other than by the law of the land and that, accordingly, Charles I had no right to operate a system of justice by order of commissions under the Great Seal which had not been approved by Parliament.

It was at about this time when, in answer to the King's assertion that it was treason to assert that He was under the law, Sir Edward Coke, the famous Lord Chief Justice and Parliamentarian, replied that Bracton had said that **the King ought not to be under man, but under God and the law.** Not for nothing was he described as "tough old Coke, the toughest man England ever knew"! He had been dismissed from his office as Chief Justice by James I in 1616 - a fact remembered in the Act of Settlement of 1701 which specifically provided that High Court judges should hold office during good behaviour and not during the King's pleasure.

Echoes of some of the key provisions of Magna Carta are to be found in the complaints listed in the **Bill of Rights**, passed in 1688 under William and Mary: among those complaints we find that:

* partial, corrupt and unqualified persons had served on juries;

* excessive fines had been imposed; and
* illegal and cruel punishments had been inflicted.

In the mid-18th century Blackstone, writing of Chapter 39 of Magna Carta had this to say:

> **And, lastly, (which alone would have merited the title it bears of the Great Charter) it protected every individual of the nation in the free enjoyment of his life, his liberty and his property unless it be declared forfeited by the judgment of his peers or the law of the land."**

Those words were picked up, almost verbatim, in the **American Bill of Rights** of 1791. In this country we tend to think of the Fifth Amendment to the Constitution as being concerned with the provision against self incrimination in criminal cases. But it was that Amendment which also enshrined for the New World the principle that

> **No person ... shall ... be deprived of life, liberty, or property without due process of law**

words used in an English Act of Parliament 437 years earlier.

Just over 200 years ago we find that the spirit of Magna Carta had crossed the Channel. Article 5 of the French **Declaration of the Rights of Man** provides

> **No one shall be accused, arrested or imprisoned, save in the cases determined by law, and according to the forms which it has prescribed.**

A whole lecture might easily be given over to the influence of Magna Carta in the field of Human Rights which are of enormous importance at this time - but that is outside the scope of this talk.

Magna Carta is certainly alive and well so far as lawyers are concerned: it is still cited in cases on both sides of the Atlantic.

In February 1963, only weeks into the Presidency of John F Kennedy, the United States Supreme Court decided the case of **Kennedy v Mendoza-Martinez** (372 US 144) which dealt with the issue of nationality. The court ruled unconstitutional an Act of Congress which purported to deprive of his US nationality a man who had left the USA in order to evade military service in Vietnam. The opinion of the Court includes these words:

> **Dating back to Magna Carta ... it has been an abiding principle governing the lives of civilised men that 'no man shall be taken or imprisoned or disseised or outlawed or exiled ... without the judgment of his peers or by the law of the land ...' What we hold is only that, in keeping with this cherished tradition, punishment cannot be imposed without 'due process of law'. Any lesser holding would ignore the constitutional mandate upon which our essential liberties depend."**

I have time for only three examples from this country: all come from the last decade of this millennium.

In **Attorney-General's Reference (No. 1 of 1990)** 1992 95 Cr.App.R 296, a case concerning the alleged abuse of the process of the court, counsel argued that any delay beyond that required to prepare a criminal case was contrary to Magna Carta. Giving the judgment of the Court of Appeal, Lord Lane, the Lord Chief Justice, said

> **We disagree with the whole basis of that argument. In the context of the rest of clause 29 [of Magna Carta] (he was using the 1297 version) delay or deferment means ... wrongful delay ... such as is not justified in the circumstances.**

In **R v Home Secretary ex p Wynne,** 1992 2 AER 301, the issue was whether a convicted prisoner had the right to be transferred, at taxpayers' expense, from one prison to another and escorted, free, to court so he could argue his case in person. Counsel argued that Chapter 40 of the Great Charter of 1215 gave him that right - otherwise justice would be denied to him. The Court of Appeal disagreed. Part of the judgment of Lord Justice Staughton reads as follows (at p. 315)

> **Chapter 40 was, as it seems to me, a statement of broad general principle, such as one now finds not in English but in European legislation. It was not intended to apply literally and in every case where other considerations were involved. Thus justice is, unfortunately, constantly delayed by pressure of business on the courts and the waiting time that litigants must endure. Court fees are charged, although they are modest in amount compared with the cost incurred and can be waived in cases of poverty. I do not think that the general principle in Chapter 40 requires that, in the particular case of a prisoner, he must have exactly equal access to courts of law on the same condition as somebody who is not in prison. If an officious bystander at Runnymede had asked the Prince-Bishop of Durham whether a prisoner in his gaol was entitled to be transported free of cost to a civil court in London ... I assume he would have received a terse and negative reply.**

The latest authority I have been able to find on Magna Carta is in the judgment of the present Lord Chief Justice, Lord Bingham of Cornhill. In **Re SC (Mental Health Patient: Habeas Corpus)** (1996 1 AER 532), as Master of the Rolls, he was dealing with a case under the Mental Health Act and said

> **No adult citizen of the United Kingdom is liable to be confined in any institution against his will, save by the authority of the law. That is a fundamental constitutional principle, traceable back to Chapter 29 of Magna Carta 1297 [25 Edw 1 C1] and before that to Chapter 39 of Magna Carta [1215]. There are, of course, situations in which the law sanctions detention. The most obvious is the case of those suspected or convicted of crime. Powers then exist to arrest and detain. But the conditions in which those powers may be exercised are very closely prescribed by statute and the common law.**

So, despite the passage of the centuries, what happened at Runnymede in 1215 does still have relevance for us today. And, if you happen to drive along the Thames from Old Windsor to Staines, you, too, can stop in that meadow, take in the scene, and ponder upon our great good fortune to live in a country where the rule of law has been enshrined for 783 years and remember those lines of Rudyard Kipling:

"And still when mob or monarch lays
Too rude a hand on English ways,
A whisper wakes, the shudder plays
Across the reeds at Runnymede."

1.6.98.

SOURCES

Adams and Stephens: Select Documents of Constitutional History, MacMillan, 1921

Baker J H: Introduction to English Legal History, 3rd Edn 1990

Beloff, Lord:
Atlantic Charter Lecture, 1997: From Magna Carta to Atlantic Charter. (University of St Andrews)

Bingham of Cornhill: Lord Chief Justice of England 1996-:
Magna Carta: The St Albans Dimension: lecture to the Cellarer's Feast: 11/96

Blackstone: Commentaries on the Laws of England: 1765 - 1769

Coke: (2nd) Institutes of the Laws of England: 1797 Edn.

Davies, C.R.G.: Magna Carta: The British Library Board (4th reprint - revised 1982)

Denning, The Rt Hon Lord, Master of the Rolls 1962-1982
Freedom under the Law: Hamlyn Lecture 1949
Letter: Central Office of Information 3.2.65 and enclosures (5)
Order of Service at St Paul's Cathedral: 750th Anniversary of Magna Carta, 1965 (6)
The Times: Article: 9.6.1965: Runnymede, Fount of English Liberty: (1)
Transcript: Broadcast and Speeches: RCJ: 28.6.1965 (4)
Speech at Runnymede 18.7.71 (9)

Donaldson of Lymington, The Rt Hon Lord: Master of the Rolls 1982-1992 Letters: 10.3.97 and 22.5.98

English Historical Documents: Gen Ed D C Douglas, Vol. 2
Ed: G N Garnaway

Hindley, Geoffrey:
The Book of Magna Carta: Constable & Co, London 1990

Holt, Professor Sir James Holt:
Magna Carta: Cambridge University Press: 1965
Magna Carta & Medieval Government: Hambledon Press 1985
The Making of Magna Carta: University Press of Virginia, Charlottesville 1965 (7)
Magna Carta: "Why Celebrate?" 1994 (Lecture to City of London)
St Albans Chronicles & Magna Carta: Royal Historical Society: Transactions: Vol 14, 1964

Howard, A E Dick:
Magna Carta Text & Commentary: Magna Carta Commission of Virginia, University Press of Virginia: 1964 (8)

Jennings, Sir Ivor:
Magna Carta & Its Influence on the World Today: C.O.I. 1965
The Law & The Constitution, University of London Press 4th Edn. 1952

Judge, The Rt Hon Lord Justice: letter 12.5.98

Magna Carta Commemoration Essays: Royal Historical Society: 1917

Magna Carta: Icon of Liberty, Dean and Chapter of Lincoln 1988

Maitland: Constitutional History of England: Cambridge University Press: 1941

W S McKechnie: Magna Carta: 2nd Ed - 1914 Glasgow, New York Brit Franklin, reprinted New York 1958

Poole, A L: From Doomsday Book to Magna Carta 1087-1216; 2nd Edn Clarendon Press, 1954

Runnymede: A Pictorial History

Spencer, Professor John: letter 14.5.98

W.L. Warren: Biography of King John

Williams, Professor Sir David, QC: letter 22.5.98