

THE LEGACY OF MAGNA CARTA

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Magna Carta is more famous than read.¹ It has come down to us despite its unpromising beginning. As an English agreement (it was never the law in Scotland) extracted by the threat of force² from King John it only survived from the 15 June to the 24 August 1215, when the Pope annulled it. It re-emerged after John's death in 1216 and again in 1217. There was also a version for Ireland. None of these versions had statutory status until the enactments of 1225 and 1297.³

PERSISTENCE

Although Magna Carta survived by being re-issued by 40 English parliaments by the 19th century, most of its provisions had disappeared, and between 1863 and 1969 it was stripped from the statute book. Today only three chapters, as its divisions came to be called by William Blackstone in his edition of 1759, remain part of the law of England. Two of these have no relevance to Australia since they refer to the English Church and to the liberties of London.

Despite this, the 1297 statute became part of South Australian law by virtue of the rule that English statutes in existence on 28 December 1836 were automatically part of our law. This principle is subject to two qualifications. First, The South Australian parliament may remove an inherited imperial enactment from our law. Second, subsequent South Australian legislation might by implication override a provision in an imperial statute. Despite a recommendation in 1980 that the State

should adopt an Imperial Acts Application Act that included Chapter 29 of Magna Carta 1297 this has not been done.⁴

So why is it famous and why are we celebrating its existence? The answer lies in not what was done or what survived in a formal sense from the 13th century, but in what was made of the Charter by subsequent generations - a point made by Senator O'Sullivan, afterwards an Attorney-General of the Commonwealth, during the debate on the acquisition of a copy of the 1297 Magna Carta by the Commonwealth in 1952.⁵ The great Jacobean Chief Justice Sir Edward Coke did much to link Magna Carta to contemporary constitutional struggles in the 17th century and in so doing, though he wrote bad history, he did change the perception of the Charter from one concerning medieval liberties to an icon of a general right of Englishmen to liberty.⁶

PART OF OUR INTELLECTUAL INHERITANCE

In time Magna Carta became part of the intellectual culture brought by English settlers to Australia. There is abundant evidence that educated South Australians and lawyers were aware of the accumulated constitutional landmarks that had emerged since 1215. This was in part a consequence of their education in history, which meant then constitutional history,⁷ and the requirement that the study of English constitutional history was as part of the admission requirement

for the South Australian legal profession.⁸ The transformation of Magna Carta into a modern context meant that it now stands for two major propositions: that the King (now the executive) is bound by the law of the land and that there is a general right to freedom, subject to the law.⁹

MYTHS

A number of myths have grown up around the Charter since 1215. The first, still taught in high schools in Australia, is that John signed the document. He did no such thing as an examination in 1924 of the four surviving copies of 1215 showed. Kings caused others to attach their seal to such documents and in any case there is some doubt whether King John could write. Second, that Magna Carta created a right to trial by jury. The concept of a jury trial emerged much later as Justice Blue showed in *R v J(SM)* in 2013¹⁰ in which he reviewed the history of trial by jury. Third, that Magna Carta created habeas corpus.¹¹ Actually writs of habeas corpus existed in 1203 and 1214 and in any case the *ad subjiciendum* version of the writ only fully developed after 1670. Fourth, that due process of law may be traced back to the Charter. The phrase actually was only added to the law in 1354 and, as scholars have shown, the process due in the 15th century was radically different from any due process we know today.¹² Fifth, that human rights got their start in 1215. The term human rights actually only entered

Exhib



King Edward I (1272–1307) Inspeximus issue of Magna Carta, 1297. Photo: Parliament House Art Collection, Department of Parliamentary Services, Canberra ACT

the English language in the late 1620s and the liberties mentioned in the charter did not have universal application. The term was used frequently in the 19th century press in Australia, first in Sydney in 1817 and in South Australia in 1843.

The problem is that the common lawyer's habit of searching for precedents often produces bad history. Claims that Magna Carta laid the foundation for our present system of liberties is historical nonsense, as skeptical Australian writers on the Charter pointed out in the early 1920s.¹³ The error lies in supposing that the King and the Barons thought that they were laying foundations for what came later. But they did not know what came later and in any case their concerns were with immediate medieval grievances. They knew nothing of written constitutions, federalism, judicial independence, and the separation of powers, let alone parliamentary democracy, universal suffrage and the secret ballot.

USES IN LEGAL ARGUMENT

The better view is that while the Charter is of constitutional significance it does not enjoy enhanced constitutional status and like any ordinary statute may be removed or superseded by later legislation. The High Court has made this point several times beginning in 1905.¹⁴ In a somewhat quixotic argument in 1986, for example, a litigant before the High Court tried to argue that as Magna Carta only authorised coins as legal tender, the litigant's opponents in a forthcoming election should be disqualified because they paid their fees in paper money and with other forms of legal tender such as credit cards. The argument was that all Australian legislation on currency that conflicted with Magna Carta was invalid. Unsurprisingly Justice Wilson rejected this argument, which has a strange persistence in the minds of the self-represented in Australia.¹⁵ In a South Australian case in 2007 Justice David rejected an argument, based on Magna Carta, that the requirement to pay filing fees was a breach of Chapter 29.¹⁶

Even where the local statutes apply that

courts sometimes refer to the origins of a legal concept said to be rooted in the Charter, in the end these points do not matter or are actually irrelevant given the state of South Australian law. Thus one judge thought that the right to bail may have been based on Magna Carta,¹⁷ while others have noticed that the office of coroner may have preceded Magna Carta, though the case, of course, turned on the local statute.¹⁸ The difficulty with a medieval statute is how to adapt it to modern circumstances especially since Magna Carta did not lay down remedies for its enforcement. One approach suggested by Chief Justice Bray in 1971 is to regard Magna Carta as an expression of the common law and as such is capable of being adapted to modern arrangements.¹⁹

USES IN POLITICAL ARGUMENT

In time Magna Carta came to stand for a founding document and thus came to be applied to the Constitution Act of 1856, which was described as South Australia's Magna Carta.²⁰ The forthcoming Federal Constitution was described by the South Australian lawyer and delegate J H Symon QC in 1897 as 'our Magna Carta'.²¹ Similarly, important statutes were referred to in the same manner. An Animals' Protection bill introduced in 1912, for instance, was described in the press as 'A Magna Carta For Animals'.²²

From the beginning Magna Carta was employed as a touchstone to criticise either the lack of a legal measure or to attack a legal proposal. In the 1820s in New South Wales it was claimed that the Charter required trial by jury at a time when civilian juries did not operate there. In 1838 the South Australian press attacked the legality of the appointment of Governor Hindmarsh and claimed that his acts were illegal, null and void in part because it showed a contempt "for all that is sacred in the Magna Charta of our province".²³ There was also an attempt to argue in the 1860s that local statutes were invalid in part because they conflicted with Magna Carta.²⁴ One petition in 1850 opposed to a transport tax argued that the tax was being imposed without representation, something the memorialists alleged was a

"species of oppression unheard of since the concession of the Magna Charta".²⁵

The Charter has also been invoked by women in South Australia to press for equal rights with men. In 1914 a group of women in South Australia called for a 'Woman's Magna Charta' pointing out that in law at that time women were deprived of citizens' rights and were classed by the law with lunatics and criminals. The group promised that in June 1915 they would issue a woman's reminder of the anniversary and the work that still had to be done in its name.²⁶

WHY IT MATTERS.

Australia has a world class constitutional order and Australians have mastered the art of civil peace under the law. This is not mere romanticism, but an historic achievement to which we have made notable contributions. Our form of federalism is unique and we have for nearly 160 years managed to run our affairs in peace under the rule of law. To the extent that Magna Carta came to be seen as representing that idea the Charter and its later history are worth remembering in a clear-eyed manner. **B**

(Endnotes)

- 1 A copy of the 1215 version is on a wall in the State Parliamentary library, South Australia, Parliamentary Research Library, *Historical Items of Interest Held by The Library*, August 2014, 8-9.
- 2 *South Australian Register*, 4 August 1857 page 3.
- 3 David Clark, 'Magna Carta Unchained: The Great Charter in Modern Commonwealth Law', in Daniel Magraw et al (Eds), *Magna Carta and the Rule of Law* (Chicago: American Bar Association, 2014) 247, 253-255.
- 4 South Australia, *61st Report of the Law Reform Committee* (1980) 3. The 1215, 1225 and 1297 versions of the Charter have now been published in South Australia: David Clark and Andrew Groves, 'Research Note: Imperial Acts of Constitutional Significance in South Australia', (2014) 16 *Flinders Law Journal* 267, 270-301.
- 5 Commonwealth, *Parliamentary Debates*, Senate, 11 September 1952, 1281.
- 6 Edward Coke, *The Second Part of the Institutes of the Laws of England* (W Clark Ed 1817) 45. For his mythology see W H Dunning, 'Truth in History', (1914) 19 *American Historical Review* 217, 224-225.
- 7 'The Law of the Constitution', *South Australian Register*, 25 May 1886 page 5.
- 8 South Australia, 'Rules for Admission of

- Practitioners of Supreme Court'. Parliamentary Paper No 202 of 1876, page 2, paragraph 17.
- 9 *Ex parte Walsb and Johnson, In re Yates* (1925) 37 CLR 36, 79 (Isaacs J).
 - 10 (2013) 117 SASR 535, 541-542 [36]-[39] (Blue J).
 - 11 'Keystones of English Liberty', *Murray Pioneer and Australian River Record*, 28 May 1926 page 6.
 - 12 *Adler v District Court of NSW* (1990) 19 NSWLR 317, 346-353 (CA).
 - 13 Ernest Scott, 'Myth of Magna Carta', *The Argus* (Melbourne), 27 November 1920 page 6.
 - 14 *Chia Gee v Martin* (1905) 3 CLR 649, 653 (HCA).
 - 15 *Re Cusack* (1986) 60 ALJR 302, 304 (HCA).
 - 16 *Daniels v Deputy Commissioner of Taxation* [2007] SASR 114 [50]
 - 17 *R v Adam* [1924] SASR 252, 253 (Poole J).
 - 18 *Perre v Chivell* (2000) 77 SASR 282, 288 [25] (Nyland J)
 - 19 *R v Wright, ex parte Klar* (1971) 1 SASR 103, 108. (Bray CJ)
 - 20 'The New Constitution', *South Australian Register*, 5 August 1853 page 3.
 - 21 'Mr J H Symon QC: The Federal Convention, 1897', *South Australian Register*, 17 February 1897 page 1. The spelling was officially changed to Magna Carta by the *British Museum Act 1946* (UK); "H" Cut out of Magna Carta', *News* (Adelaide), 10 May 1946 page 5.
 - 22 *The Register*, 18 November 1912 page 6.
 - 23 *South Australian Gazette and Colonial Register*, 10 November 1838 pages 3,4.
 - 24 *Hutchinson v Leeworthy, The South Australian Advertiser*, 13 April 1860 page 3.
 - 25 'Anti-Dray Tax League', *South Australian*, 14 June 1850 page 2.
 - 26 'A Woman's Magna Carta', *The Register*, 28 July 1914 page 6.

Experts dissect Magna Carta

About 120 people attended a free CPD session on Magna Carta at the Law Society on 27 May.

The session was chaired by Adelaide Law School's Dr Matthew Stubbs and featured presentations by Professor David Clark from Flinders University and Emeritus Professor Wilfrid Prest from University of Adelaide.

Prof Prest also presented a paper entitled "Magna Carta: A Medieval Historian's Perspective" by University of Adelaide's Frank McGregor, who could not attend due to illness.

Prof Clark's presentation "The Current Status and Uses of Magna Carta in Australian Law" demonstrated the contemporary relevance of Magna Carta.

Professor Prest's presentation paid tribute to William Blackstone, who was

responsible for the first scholarly edition of Magna Carta, *The Great Charter and the Charter of the Forest* (Oxford, 1759). Printed on high-quality rag paper, with wide margins, illustrated capital initials depicting Oxford University landmarks and equally fine engraved tailpieces, it is an outstanding example of handpress-era typography and book-making.

The book also constitutes a major work of pioneering historical scholarship, as the first systematic examination of the various different existing manuscript texts of the great charter in its many 13th-century versions.

Blackstone was the first person to number the clauses of the charter and his numbering scheme is still used today.

Blackstone is best known for writing one of the most influential law books

in the history of the English language, *Commentaries on the Laws of England*, the first volume of which appeared in mid-November 1765. This year marks the book's 250th anniversary.



Dr Matthew Stubbs (left), Professor David Clark and Emeritus Professor Wilfrid Prest.

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One of the Law Society's goals is to deliver a balanced CPD program that meets the needs of all of our Members and in doing so we aim to deliver at least one session of CPD each year in every area of practice and at the appropriate level/s (basic, intermediate and advanced). If there is an area of law that we are not addressing we invite you to let us know. In fact if you have any feedback about how we can improve the CPD program please let us know via cpd@lawsocietysa.asn.au.

Can't make it to a CPD Event but don't want to miss it?

Most of the Law Society's CPD events are available to attend live via webinar from the comfort of your office, home or anywhere else you have access to the internet. If you can't attend live many of these events are recorded and are available for purchase following the event along with the relevant papers. Pre-recorded seminars meet the MCPD requirements. Note however, that there is a cap for these of 5 MCPD units. Log onto our website www.lawsocietysa.asn.au for details or call one of the CPD Officers on 8229 0222 for further details.

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