

Magna Carta: Destiny or Accident?

It was Sir Gerald Brennan who described Magna Carta as “An incantation of the spirit of liberty”. Among the very many descriptions which I have read and heard this year, this was one of the most apposite.

Here in Australia you own copy and have the physical evidence of the 1297 copy of the charter, bought in the early 50’s for the paltry sum of £12500. But you had it long before then. There was a principle of English colonial policy which was unique among the imperial powers, whether France or Spain or Portugal or the Netherlands. English and Welsh, and then Scottish and Irish people settled in colonial lands. They were not simply a ruling class sent abroad to supervise and organise ship loads of wealth back to the mother country. Indeed it was a principle of law that the colonists enjoyed the same rights as if they were English citizens. It is hard to believe it but Magna Carta came to Australia at the same time as the convict ships. It didn’t make the journey less ghastly or the conditions less inhumane. But along with the language which you still speak, for those who were not convicts, came the charter of Justice of 1787 and Magna Carta, which Sir Gerald obviously revered. And rightly so. But not to the extent that we should take it for granted.

I have chosen the title to this lecture quite deliberately. By definition history is only studied with the benefit of hindsight. It seeks to answer the questions “what happened?” and “why did what happened, happen?” I shall tell the story, or something of the story, and you can make up your own minds whether this was luck or judgment, accident or destiny, inevitable or fortuitous, or even, as some of us might arrogantly assume, the inevitable cause for the rousing tribute on the last night of the Proms to the determination of Britons, no less than Australians, never, never, never to be slaves. You see, whatever else they were, the people who gathered together at Runnymede in 1215 were not British. British did not exist, they were hardly English. The king and the barons were, at best, Anglo Norman, and the big wigs in the City of London were largely Anglo Saxon. They spoke different languages to each other, and none of them spoke our language.

In 1215 itself, a charter was not a matter of moment. This was a generation of charters. On the continent equivalent charters were being issued by other monarchs. The Golden Bull of Hungary of 1222 and 1231, charter concessions made by the Holy Roman Emperor in 1220 and 1231 and Grants by the king of Aragon in 1283 and 1287 were all typical. Yet although we know about them, none of them had the long-term impact of Magna Carta. To confirm that we are looking at an age when charters were dished out like confetti, we have simply to remember that what we describe as Magna Carta was in fact four charters: the charter sealed by John in 1215, two – one in 1216 and the next in 1217 – both sealed by the Regent, William Marshal, and the papal legate, and the 1225 charter when the infant king Henry III had reached an age where he could assume some regal powers and, importantly, traded his seal on the fourth charter in this series for the grant of tax by the counsel of the realm. But that is four charters in a decade, not one in 800 years. Indeed, by contrast with the charters on the continent, Magna Carta was confirmed over 50 times by English kings, until

well into the fifteenth century. At each confirmation its evolved meaning became embedded. Each new iteration confirmed what had become its current meaning. As the continental charters withered and decayed, Magna Carta emerged as the first, and still, to my way of thinking, the most important, of all legal codes meriting the description 'living instrument'. And its story established the wonderful flexibility of the common law.

For convenience I shall refer to Magna Carta as a single document, with particular focus on the 1215 edition. The document that we celebrate was never signed by King John. The books you looked at as at children, showing a furious king with a quill pen on hand, were wrong, at any rate about the quill pen. It was sealed on his behalf at Runnymede. Even the date is controversial. Leading scholars of the history of these turbulent years have argued that the correct date is 19th June although the document itself actually carries the date 15th June. As a lawyer I focus on the evidence. The document dates itself 15 June. That's enough for me. With the classical education I see gathered all around me, I know that you would all be able to read the Latin, if the script was fractionally more manageable, and if you did you would note that the word "parliament" cannot be found. Nor can the word "democracy". Nor can the words "trial by jury". Indeed perhaps most surprising of all, the two words Magna Carta themselves do not appear.

But for all that, there are other crucial words – constitutional words – political words – to be found in the 1215 Charter. They include "liberties" and "customs" and "rights" and "justice" and "lawful judgment" and "the law of the land" (which became due process) and "the common counsel of the realm" (which very shortly afterwards came to be known as "parliament") and "security", the crucial guarantee clause 61 (which was the "rule of law" in gestation). The constant reissuing of the charter itself demonstrates its gradual evolution. As examples of the living instrument, the title Magna Carta des Libertatibus Angliae was first used in a statute in 1297, and thus formally linked Magna Carta to what we would now describe as fundamental freedoms. That is the charter which is kept here in Canberra. By 1331, whatever the controversy may have been earlier, the justice and safety provisions were attached to every man in the land, whether a freeman or a villein or indeed a serf. The words "due process of law", an essential foundation for our rights and liberties, emerged in 1354. Gradually, in social conditions and societies which are remote from our own, Magna Carta and, at least as important, what Magna Carta was believed to stand for became part of the fabric of our political thinking. And as the centuries unfolded it came to be exported to places which none of those assembled at Runnymede had ever heard of, like the future United States of America, and Australia itself, America, and its ideas of constitutional legal freedoms came to be encapsulated in the Universal Declaration of Human Rights, which was described by Eleanor Roosevelt, one of its architects, "as a Magna Carta for the modern world".

This is portentous stuff. But the crucial fact to be grasped is that Magna Carta was sealed at the outbreak of a civil war, as a step to avoid its horrors. The apparently inevitable destiny was the scrap heap, not worth the vellum it was written on. Conceivably it would have provided an opportunity for a PhD for an excessively bright and geekish young man or woman on the way to an illustrious academic career. After all, how many of us have heard of the Charter of Liberties of Henry I? That is its title. It contains aspirations of firm peace and the restoration of good old law. How many

remember the Oxford Charter of King Stephen in 1136? There too there is a general clause promising peace and justice, and the King will get rid of all unjust practices and once again revert to the observation of good ancient and old customs. This was to have been the fate of the Charter of King John.

Medieval monarchs and monarchs all over the Continent swore to be good kings, to uphold the law and to do justice. But the Coronation Oath was made by the new monarch to God in heaven, and it was to God, not his subjects, that he was answerable. So when he died, he came before the judgment seat, and if he had not been true to his oath, heavenly damnation to hell fire would follow. But the sentence, however appalling for the dead monarch's immortal soul, would have had absolutely no alleviating impact for the suffering of his subjects left behind on this earth. The rule of law in heaven was not as much use to them as the rule of law on earth.

These were years of crisis and civil war. The anointed king against a group of rebel barons. The rights and wrongs do not really matter for today's purposes, although it can fairly be said that no one was fighting for the democratic right of each subject to vote in an election. Civil war is poisonous. And there were people still alive who had memories of the wars between Stephen and Matilda, King John's grandmother, and the murder of Thomas a Becket, all as recent to them as Winston Churchill is to me. Perhaps the final contemporary ingredient is that unlike our present secular age, we are reflecting on a time when life was short and cheap, and the immortal soul and the heavenly judgment which would follow death was vividly in mind. So Magna Carta did not emerge, Hollywood style, like a bright apparition, with reverberating violins playing ascending chords, from the muddy, misty field at Runnymede. It was set, as all historic events are set, within its own context.

Religion and politics were enmeshed. Dealing with it on a purely political front, although this impacted on the exercise of religious belief, England was placed under papal interdict by Innocent III just ten years before the charter was sealed. That meant that most of the holy sacraments, which mattered so much to medieval people, were not available. By January 1209 John himself was excommunicated. When neither the interdict on the country, nor the personal excommunication served to change his conduct, in January 1213 Innocent III pronounced sentence of deposition on him, and again, using a phrase with which we are sadly familiar, authorised the King of France, Philip Augustus to wage Holy War against him. More bothered by the impact of the papal order on the exercise of his power on earth than he had been by the potential consequences to his own immortal soul, John submitted to the Pope in May 1213. The political consequence of this submission was that John accepted the Pope not only as his spiritual lord, but as his feudal lord. His kingdom was surrendered and John became the Pope's vassal. In other words, quite apart from the Pope's spiritual authority, this was unadulterated political authority over John's kingdom. In feudal law John could not make any agreement which could bind his feudal lord without reference to his feudal lord.

Pope Innocent III was never someone who knowingly undersold himself. He was generous enough to acknowledge that he was lower in status than God, but he was "greater than man, judge of all men and judged by none". In England, Euro-sceptics of the day would have rent their garments, and when later the Pope directed the rebel barons how they were to pay taxes required by the king irrespective of their consent

which, to the Pope, was irrelevant, nowadays they would have donned sackcloth and ashes and gone into the television studios. Instead they donned weapons and armour. And then, into this turbulent mix came the catastrophic defeat of John's allies in France, just one more king of England adventuring in France, in the summer of 1214 at the Battle of Bovines. When John returned to England in autumn 1214 his treasury was empty and he had been utterly humiliated. Wars then as now involved huge expenditure. And John needed to replenish his funds, and there was no quantitative easing available for the purpose. Instead, John wanted to raise taxes, including scutage.

Scutage was shield money, an old form of taxation. When a feudal lord went on campaign he could summon you to join him bringing an appropriate number of men to fight with you and for him. It became pretty obvious that you had a better chance of victory in the forthcoming battle if you paid armed mercenaries rather than untrained yokels armed with bill hooks to fight. So instead of sending yourself, or your villeins, you paid for their equivalent in scutage or shield money so that the king could buy men at arms. If the king was entitled to claim scutage from you whenever he decided to do so, it was and was certainly seen as a form of taxation. So scutage, to pay for wars outside the country, was resisted.

And so the toing and froing towards civil war began. Attempts were made to achieve a negotiated peace. Many of those stages took place in the Temple, my legal home. John issued a charter to the Church in England in November 1214, and then another one in January 1215. He had not suddenly become holy. He was there seeking to get the Church – the most powerful institution – onto his side. The next most powerful organisation locally was the City of London and he tried to do a deal with it, in May 1215, with another charter issued from the Temple, granting the City power to have its own Lord Mayor, by contrast with the application by the city fifteen years earlier, costing the City nothing at all. In another modern word, it was appeasing the City, and like appeasement in our world, it did the king no good. The city gates were opened to the rebel barons. And those of you who visit London next November can have a grandstand view of the Lord Mayor's Show, as the new Lord Mayor is sworn in before the Lord Chief Justice. That is a direct consequence of this 1215 City charter.

And so the parties met at Runnymede. Armed forces on each side. The barons had their terms and conditions ready in the Articles of the Barons. The Church looked after itself, and the first clause of the charter simply reproduced the two charters already granted a few months earlier to the church. There are a couple of features to be noticed here. First, the Articles of the Barons made no reference to the Church, but nevertheless they were somehow persuaded to agree that the Church's interest should come first. What is more, this clause was expressly said in the charter to be granted "by our free and spontaneous will". It is noticeable that no such expression of voluntariness was attached to the grants to the barons. For a lawyer construing the document the omission is significant.

What this should bring home to us is that this was a tough negotiation over a four day period. You have to imagine the toing and froing. The conversations. The private discussions. The whispers. Can we rely on him? How far can we push him? Every lawyer has been party to a negotiated settlement. That's what this was.

John was in a hopeless position. His opponents had the largest forces, and London just up the road supported them. His own supporters among the nobility were simply being true to their obligation of fealty. Apart from his supporters from abroad, there was no personal loyalty. The throne of England had been offered by the rebel barons to Louis of France. Basically John had no cards to play. And so his seal was attached to the charter.

Let me identify four crucial areas addressed in the charter. First, our now well known “justice” provisions. Justice will not be delayed or denied or sold. The consequence of this provision, still with us, is that you were entitled to justice. It was a right. You could not be locked up on the whim of a king, or, as we shall see, a baron. You were answerable to the law of the land and your peers. You were entitled to “due process”, and before long the great writ of “Habeas Corpus” evolved from it. What is more, it was provided that the punishment should fit the crime, and that those responsible for enforcing any judgments, like the sheriff or the coroner, or bailiffs, were not to be judges, (embryonic separation of powers).

Then, there was to be no scutage or aid without the consent of the Counsel of the Realm, with provisions about how the Counsel was to be summonsed. If the king could live off his own estates and traditional sources, fine, but if he wanted anything extra, he could not take it without consent. That was a direct answer to the order of Pope Innocent. And during the regency for the boy king Henry, this principle was applied, and people became used to it.

The third crucial paragraph is the king’s agreement that he was required to rectify any failures to abide by the new agreement, and that if he did not, his subjects were absolved from their obligations of fealty and obedience to him. In other words the subject of the king did not owe him absolute and unconditional fealty. This was the security or enforcement clause. The right of resistance to the king was expressly authorised, an authorisation which extended to the “whole community of the land”. On the continent John was derided for agreeing to what were described as “over kings”. And Professor David Carpenter’s recent researches have revealed a contemporary poem copied into the Melrose Chronicle, for those of you who don’t know it, Melrose is in Scotland. It reads

*“England has ratified a perverse order;
who has heard such an astonishing event
For the body aspired to be on top of the head;
The people sought to rule the king”.*

the rule of law was on its way.

There is a fourth crucial provision, which I have not sufficiently emphasised on earlier occasions. It is the answer to the criticism that the common people were excluded from the benefits of the charter. Clause 60 required everyone, whether clerical or civilian, to ensure that they extended the rights granted by the charter to them, to “their men”, that is their own vassals, villeins and serfs. (an equality clause).Someone, somewhere, probably in view of his known political thought, Archbishop Langton, but possibly William Marshal, had a vision which was years ahead of its time. And,

by now, at Runnymede, probably everyone else was too tired to spot what was going into the draft and certainly much more attention would have been given to the structure of Clause 61, the security or enforcement clause.

Taken on their own, and more importantly together, these were critical provisions in this medieval document. But there was more. Chapter 45 required the judges to know the law of the land, so should the enforcement officials, and they should not be appointed unless they would observe that law well. Punishments must fit the crime, and the magnitude of the offence and the fine must not deprive a man of the ability to earn his living. Like trial before a partial judge, excessive punishment after the fairest of trials is not justice. Common pleas, that is civil cases, were to be heard in the king's courts in fixed or specified places. In other words you should know where to go for your remedies and no less important, it provided a very significant step away from a private court system, like the Hundred Court, or the Memorial Court, run by your feudal lord, who might not like you, or who might need to butter up your opponents.

This list is not compendious, but for a peace treaty in a civil war, for a document which was, so the naysayers argue, of no real value to the common man, the justice provisions and all the others taken together suggest that this was not a bad start.

So scribes wrote out copies of the charter, and then king and rebel barons and royal barons and archbishops and bishops, all stood around and took an oath to keep the terms of the Charter in good faith and without evil intent. As these oaths were being taken a number of immortal souls were in a state of mortal sin. John had not the slightest intention of abiding by the charter forced out of him.

In law the charter was unenforceable as a contract, sealed as it was under compulsion or duress. But to coin a modern phrase, "Peace in our time" was secured. For just a short time, even shorter than the Munich Agreement. As soon as the Pope heard of it, just a few weeks later, he immediately annulled it. And he did not use language which might have left any misunderstanding. The Bull described John's wickedness, and the consequent surrender of the crowns of England and Ireland to the Pope, and then having rubbed John's nose in it, his promises in the charter were annulled.

"We utterly reprobate and condemn any agreement of this kind, forbidding, under ban of our anathema, the fore said king to presume to observe it". It was declared void. The charter itself and the obligations and safeguards made in it were "entirely" abolished. They should have "no validity at anytime whatsoever".

From the pope's point of view, we should be utterly ashamed of ourselves for celebrating the survival of Magna Carta. But it was gone. The originator of all our liberties. Not worth the vellum it was written on. You would never have bet on it having any future at all. And worse was to come.

Civil war broke out in earnest. So did a French invasion, which everyone seems to forget. It is simply not true that the last invasion of England was in 1066 and resulted in the Norman Conquest. At the invitation of the rebel barons to become King of England, Louis, then Prince, but later King of France, arrived in England in May 1216 and the Lord Mayor and the City opened the gates and rendered homage to him. He

never promised to abide by the Charter. In military terms the rebel barons, supported by 7000 French troops, were in a very strong position. We were in danger of a Capetan King replacing the Plantagenets. It is reasonable to assume that that would have been the end of the common law, crushed before it had really begun, and however the English language might have developed, it is most unlikely that it would have developed as it did.

Then two deaths occurred. First Innocent III, and then in October 1216 John himself. To describe John's death as very fortunate is a privilege based on looking back at it, that is, the historians' privilege. At the time, to contemporaries, it was a catastrophe. His heir was a child, Henry III, a boy of nine. He had no uncles, born legitimately, to act as his Regent. In medieval times this was a desperate moment. Child kings with no uncles had no future. Even with uncles they were murdered. John had after all helped to dispose of his nephew Arthur, the son of an older brother, and we all know what happened to the Princes in the Tower some 260 years later.

So there we have it. The charter was annulled by the spiritual head of Christendom and the feudal lord of England. French soldiers and armed men loyal to Louis' cause were in a strong military position. And the king was a little boy of nine. Luck or judgment, destiny or accident?

Yet it survived. It should not have done so and the story is remarkable. The loyal barons, led by William Marshal, Earl of Pembroke, arranged for the boy's coronation. But not at Westminster Abbey, because London was occupied by the rebels and the French, so the little boy was crowned at Gloucester Abbey as Henry III. Within ten days of John's death William Marshal, now approaching 70 years, was elected by the loyal barons as Regent. If the Earl of Chester had wanted it, he would have had the office. Marshal was a new man. He had come up the ladder to advancement from virtually nowhere. At Runnymede he had been the main non-clerical negotiator for John. His great quality was that he was trusted on all sides, not least for his remarkable commitment to his personal oaths of fealty to successive vile tempered Plantagenets, and for his land in France, to the French king. But apart from these qualities, the situation was novel. Notice, Marshal was *elected* into this office. So he could be deselected. And his regency represented – as it had to – a serious first attempt at true council government.

With the Papal Legate, Marshal re-issued a new, different charter, Magna Carta in November 1216 using his own seal. My own assessment is that this was issued from his position of weakness in the hope of persuading the rebel barons back to the negotiating table. That indeed was the idea expressly referred to in the 1216 Charter. In modern language, it meant "let's sort this out". But, given the military strength of the opposition, this re-issue did not bring peace. In passing, we should notice that Marshal issued the charter in Dublin, on the basis that those in Ireland were entitled to the same rights as those who lived in England. Well, it did not work out quite so well there, did it? Luck or judgment? But it enabled Edmund Burke to argue that the rebellious colonists in the future United States of America were entitled to rely on Magna Carta. Its blessings were not confined to England. That is why it travelled across the world.

In 1217 Marshal himself led loyal forces into battle at Lincoln. I mean, literally. He was in such a hurry to lead a charge when the strategic opportunity arose he forgot his helmet. Luckily one of the squires reminded him to wear it, and just as well. After the battle it was heavily dented. A very heavy defeat was inflicted on French forces and the rebel barons. The French invasion floundered. Shortly afterwards in a sea battle French reinforcements were beaten off and peace was achieved.

So again, Marshal re-issued the charter, in yet different terms, in 1217, this time importantly, not under compulsion as John was when he sealed it at Runnymede, and not out of a position of weakness, as Marshal was when he issued the 1216 Charter. Now he was in a position of strength based on victory in battle. Showing the huge magnanimity in victory, lauded by Winston Churchill, and indeed paying Louis to leave the country and abjure his claim to the throne of England, the rebel barons were brought back into unity with the Crown. It was a remarkable achievement. Shortly afterwards, in 1219, he died. This was indeed peace in our time. He is one of the great heroes of our history, and we largely ignore him. In the three short years from 1216 until his death, if he had not stood by the boy king, and accepted the responsibilities which went with a regency, and re-issued, and again re-issued Magna Carta, and, by success in battle driving out the invading French, ruling by consensus and achieving a peaceful end to civil war our history, (and I mean your history and mine), and all the countries where the common law has taken root, would have been very different. He was given the equivalent of a state funeral, and described by the Archbishop of Canterbury as “the greatest Knight that ever lived”.

Henry III came, first, to partial majority, and then full majority. He needed money, and turned to a device employed by John much earlier, a tax on movables, that is to say personal property and rents. It was also a tax used to raise the sums to ransom Richard the Lionheart. At a council at Christmas 1224 a fifteenth of the value of all movables was sought for the king. The Great Council insisted that before it would be given the king should issue the charter himself. And in 1225 he did so. There are some important features to notice. This charter was granted freely of the king’s spontaneous goodwill to a whole class of the nobility and “all our realm”. The benefits were for everyone. The significance is that in the liberties and concessions granted by John in 1215, it was only those relating to the Church which expressly said that he was acting voluntarily. As we have seen, in relation to the other concessions, the assertion that he was acting voluntarily was omitted. Henry III, advised by Archbishop Langton was not under any compulsion of force of arms. This charter could not be said to be void for duress. It simply was a trading deal. You can have your tax provided you re-issue the charter, and, by implication, abide by it. And that pattern developed through the reign. There were occasions when the council refused the financial support, sought by the king, no less than three times in the 1240s. *Tallaigio non concedendo*, (we shall not concede taxation), led Edward I to agree that this required the common assent of all the kingdom. By then the word “parliamentum” was being used to describe assemblies of the council. It is noteworthy that this important Parliament now included knights and burgesses, that is, commoners, that is to say, Simon de Montfort’s vision of what a Parliament should be, the result of a civil war which broke out a few years earlier. There is poetic justice here. Henry had never ceased to criticise William Marshal for his generosity to the defeated barons and French. He never understood the value of peace settlement, particularly of a civil war. The precious peace dividend.

And this feature of our medieval constitutional arrangements, the link between tax and consent first of the council, and then of Parliament provided the basis for our constitutional struggle in the 17th century and the eventual establishment of the King in Parliament as the ruling authority, and the battle cry “No taxation without representation” adopted by the American colonists in the following century. Withholding of tax demanded by the king until the grievances of the council, and ultimately parliament represents one of the major reasons why we ended up with parliamentary government while the Estates General in France and the Cortez in Spain, together with all the other promises in all the charters issued in the 12th and 13th centuries, disappeared under absolute monarchies.

It is very easy for us eight centuries on to sneer at the Charter as no more than the barons looking after themselves, or to suggest that there are only three clauses of the charter currently in force, so what’s the fuss about it all. But, with respect to them, they are wrong. The charter made an immediate impact. By a way of example, we know from the records that by 1220 a baron from Northumberland defended his right to maintain his castle and sought judgment “in the court of the Lord King by the judgment of my peers”. By 1226 a huge dispute arose in Lincolnshire between the sheriff and four knights (notice they were not barons, nor members of the body responsible for enforcing the “security” clause). The argument against the sheriff was that his actions were “contrary to the liberty which they ought to have by the charter of the Lord King”. No printing press. No iPad. No email. No newspapers. No television. Just public proclamation. Yet, as we have seen, there is that vivid poem recorded in the Chronicle being written North of the Border. By 1234 the Great Council had decided a case against the king who admitted that he had dispossessed Gilbert Basset without court “lawful judgment of his peers and by the law of the land”, a direct lift from Magna Carta, and the Council ordered that the land should be returned to Basset. And at this time in a treatise attributed to the judge Henry Bracton, we find the statement that the king is “under God and under the law, because the law makes the king”. These were the very words used by Edward Coke to James I when he tried to give the new king a lesson in English constitutional history. It cost him his job as Chief Justice, and a spell in the Tower.

This Parliament became increasingly influential. Thus, and it is one example only, when Richard II was deposed by the future Henry IV, the victorious new king went to Parliament sitting at Westminster, justifying his assumption of the crown, where Articles of Deposition were promulgated. The Articles justifying Richard’s removal included his refusal to do justice according to law, his assertion that “the laws were in his mouth, or sometimes in his breast: and that he alone could alter and create the laws of his realm”, and perhaps even more obviously related to Magna Carta that the king had “wilfully contravened the statute of his realm” which provided that “no free man shall be arrested etc or in any way destroyed, nor should the king proceed, or order any process against him, unless by lawful judgment of his peers, or by the law of the land.” The new king, according to his spokesman the Archbishop of Canterbury, was determined “to be advised and ruled by the honourable, wise and prudent people of his realm” and by their “common advice, counsel and consent”. In short, the endorsement of parliament was regarded as an essential element in the legitimacy of the new reign. And so indeed it was, for example, when Henry VII succeeded Richard III. And those of you who look at Wolf Hall, will, I am sure, have begun to appreci-

ate the political mastery of Thomas Cromwell who made Parliament a party to the dramatic changes in the relationship between church and state, between England and Rome, between the lands of the monasteries and the new gentry which had acquired them, with unintended consequences arising from Parliament's new strength less than one hundred years later.

Parliament sovereignty, of course, was still a long way off. But it was becoming increasingly central in our arrangements. And although the Tudors managed the institution, the early Stuarts simply did not. The plain simple fact was that when James I succeeded to the throne he had a deep conviction that regal authority was bestowed by God on the monarch, and that it was to God that the king was answerable, and his subjects has to put up with him even if here another Nero. That was, on examination, precisely the problem which had to be faced in the early 13th century. If the king was answerable to God when he died, and would be judged accordingly, his subjects on earth would simply be left with hoping that he would be succeeded by a better, fairer, more just king. That was when Chief Justice Coke quoted Bracton to the king, and the king responded that it was, "treason to affirm "that the king was "under the law"". Coke was dismissed and sent to the Tower. He then entered Parliament. The Commons. And there with a forensic technique which made the blunderbuss seem an instrument of exquisite delicacy, he led the advance of what parliamentarians regarded as "rights" under the banner of Magna Carta. He had many supporters. This was not a one man show. But, for example, Coke challenged the use of the word "sovereign" in relation to royal power. It was no parliamentary word. "Magna Carta is such a fellow that he will have no sovereign". On another occasion he said "if my sovereign would not allow me my inheritance ("inheritance" in the sense of "birthrights"), I must fly to Magna Carta ... when the king says he cannot allow our liberties of right, this strikes at the root. We serve here for thousands and ten thousands". Even now it was not democracy as we know it, with a universal franchise. But Magna Carta was the banner, if you like it the trumpet call for the privileges of parliament and its authority. By emphasising "right",Coke was rejecting Royal munificence and favour.

We all know how the battle between parliament and the king ended. The finest moment of Charles I's life came in the last few hours before it ended on the scaffold in Whitehall. And those who judged him and condemned him to death, were later to suffer the most agonising deaths as traitors who were hanged, drawn and quartered.

By the end of the century, his son James had abdicated. We had new rulers. They were chosen by Parliament. Our constitution was irrevocably based on the sovereignty of Parliament. The ideas for which Magna Carta was the inspiration had triumphed here. It is just worth remembering, however, that although we know the outcome of the Civil War that outcome would not have been predicted in advance, and as to why James II simply fled the country without fighting for his crown, well, it is an example of how dependent history is on the workings of an individual's mind. But that is hardly destiny.

In the meantime the Eastern seaboard of the future United States of America was being colonised. Something like 350,000 men and women left England for the colonies between 1616 and 1700. All the colonists treated Magna Carta as the foundation for their constitutional ideas. It was not an accident that the first charter granted to Virginia in 1616 created by Edwin Sandys, of the Middle Temple, was called the Great

Charter. The colonists had the same rights as if they had been born in England. It was, as I said at the very beginning, a fundamental principle carried through the years of Empire. The assembly in Maryland legislated that all the inhabitants should have their rights and liberties “according to the Great Charter of England”. In Massachusetts a body “of grounds of law in resemblance to a Magna Carta” was framed. In 1680, an indication of trouble lying ahead, there was resistance to taxation by New York, only just recently a British colony, against taxation which was “contrary to Magna Carta and the Petition of Right”. The complaint did not realise that it was looking forward: at the time it was looking back.

Then our sovereign parliament exercised its authority over the colonies in one of the most foolish statutes ever enacted, the Stamp Act 1765, and then the Declaratory Act next year. Between them they sought to deprive the colonists of their right to trial by jury for breaches of the Stamp Act, and then declared that they were, in effect, mere colonials, who would have to do what they were told, without being represented in parliament. And so the citizens of the future United States of America rebelled relying on Magna Carta as embodying principles of their birthright as Englishmen. And so to another war, although my American friends do not like it, what in truth was another civil war.

And it was to the successful rebellion in the United States that young Thomas Wentworth, either born at the end of a convict ship cruise or born shortly afterwards, certainly one of the youngest babies to land in Australia, or one of the first convict babies to be born here, turned after education at Cambridge and the Middle Temple, and where he found inspiration to achieve for all Australians, that is all Australians, including convicts and their children, the liberties achieved in the United States. When you walk into Wentworth Street in Sydney you are celebrating this man. At that stage it was, of course, not democracy. The slavery issue in the USA was never resolved until a terrible civil war in which the flower of their young manhood was lost. More casualties than the entire cost to the United States of two World Wars.

Parliamentary sovereignty was established in Britain on the basis of Magna Carta. But it was parliamentary sovereignty that had produced the abhorrent Stamp Act and the Declaratory Act in the American colonies. If it was being said that they were entitled to be ruled without being represented, they relied on what they believed were their Magna Carta rights. They rejected the principle of parliamentary sovereignty, but just to make sure that parliamentary sovereignty did not prevail, by evoking John Locke and natural law, they turned to rights which had not been created by parchments and seals, but by rights “founded on immutable maxims of reason and justice”. They produced a constitutional arrangement which limited parliamentary sovereignty while simultaneously asserting the rights encompassed in and developed from Magna Carta. The constitution itself was supreme, and virtually immutable. It is a strange paradox that, inspired by the same source, two democracies, both of which, in different ways, inspired the foundation and principles of democracy throughout the world ended with fundamentally different constitutional arrangements. Yet both have Magna Carta as their foundation stones. Or putting it another way, Magna Carta is bred into the bones of their constitutional arrangements.

The short answer to this paradox is that yet all constitutions are creatures of their times, in just the same way as Magna Carta itself in the decade 1215 to 1225 was it-

self, and by its very terms, a product of its times. None of these great events simply emerged from a cloud of vapourless gas. For me, they have never dissipated into the air.

Nevertheless, even with 800 years of history behind it, I venture to suggest that this very condensed account of Magna Carta and its creation demonstrate the dangers of studying history, without remembering that what is history to us, was simply the future to those who were involved at the time. And by definition, as Shakespeare reminded us in *Twelfth Night*, in the simplest but most profound sentence he ever wrote, "What's to come is still unsure". Our histories would have been very different if John had lived, or Innocent had lived, or William Marshal had not lived into what by medieval standards was old age, and still had the energy to take on the burdens of the Regent to a boy King. Or indeed, if someone else had been elected instead of him. History is not made by events, but by the particular people at particular times and their responses to them.

One last word.

We have every reason to be proud of Magna Carta. For me it remains a living document. It is the banner, the symbol, of our liberties. Just because it is 800 years old, we can assume, and I suspect we have all noticed occasions when we have adopted a somewhat arrogant attitude to what I shall describe as the newer democracies, countries seeking to establish democracy, espousing the cause, and then, for one reason or another, being overtaken by authoritarianism and militarism and dictatorship. Where we are sometimes arrogant, can we be humble. Where we might be a little patronising, can we remember that the democracy which is now established in this country took hundreds of years to establish. And involved the shedding of much blood. And, perhaps most important of all, that even now, here in this country today, we should be careful never to assume that the liberties and "right" and "justice" and "consent" can be taken for granted. There is a warning direct from the first publication of Magna Carta in the United States in 1687 by William Penn, yes our William Penn, Old Bailey William Penn and the jury, their William Penn, in Pennsylvania.

"It is easier to part with or give away great privileges, but hard to be gained if once lost".

What William Penn called "privileges" we now call "rights". There are still many countries in the world where what we happily call our "rights" remain "privileges" waiting to be won and entrenched. And those of us who are blessed with them must guard them. If Magna Carta, and everything that it has meant to us, and continues to mean to us, is to survive as the incarnation of the spirit of liberty which so touched Gerald Brennan, it is no longer a question of luck. It is our continuing responsibility to make it so.

