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## The Legal Character of Magna Carta

Magna Carta is universally considered to be one of the world's great documents, 'worthy to be written in letters of gold',<sup>1</sup> treasured syllable by syllable,<sup>2</sup> quoted on the walls of law schools and courts, perhaps even on official notepaper,<sup>3</sup> taught to all schoolchildren and so forth. There is no doubt that it has had an immense influence on hearts and minds around the world. Yet it is not always understood that this influence has been achieved more by reputation than by the operation of positive law. The charter was not a constitutional document.<sup>4</sup> It did not address the law-making process at all, because it did not contemplate future legislative change. It did not specify in general terms what kinds of authority the king's government could exercise; nor did it provide any remedies by way of an action at law against the crown if the government acted despotically.<sup>5</sup> Its purpose was more immediate: to restore, declare and preserve the previous common law. In many respects this was achieved rapidly and without the need for sanctions, in that Henry III did much of what was promised and stopped doing things which had been the source of complaint.<sup>6</sup> Whether it had a future was a very different matter. It was

<sup>1</sup> So said Coke in the *Case of Purveyance* (c. 1605), cited in Ashley's reading, fo. 24v ('cel statute fuit digne d'estre escript en lettres de or'). It was actually the first English book to be printed in gold: Blackstone's edition of 1759 was reprinted in gold on vellum, with hand-painted decoration, in 1816.

<sup>2</sup> Co. Inst. ii. 57: '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 let pass any syllable of this law, in respect of the excellency of its matter.'

<sup>3</sup> Lord Bingham suggested that the wording of c. 29 should be inscribed on the stationery of the Ministry of Justice and Home Office: *The Rule of Law* (2010), p. 10.

<sup>4</sup> Cf. W. H. Dunham, 'Magna Carta & British Constitutionalism' in *The Great Charter: Four Essays on Magna Carta and the History of our Liberty* (New York, 1965), pp. 26–50.

<sup>5</sup> No action at law could be brought against the crown until 1947. The elaborate enforcement system in clause 61 of the 1215 charter had no parallel in the statutory version.

<sup>6</sup> For a measured assessment of the thirteenth-century effects see D. Carpenter, *Magna Carta* (2015), ch. 14.

certainly not a document to be forgotten. But some of the wording was unclear, and within a century open reference was being made in high places to its doubts and obscurities.<sup>7</sup> This was not merely a tactful way of complaining that the king was ignoring it. Doubts about the true meaning of the most fundamentally important chapter led to its being adjusted in 1331 and completely reworded in 1354,<sup>8</sup> though the original text remained on the statute-book alongside the recensions, and the texts had to be read together.<sup>9</sup> In 1377 the Commons asked for the whole charter to be expounded, point by point, with the help of the judges and serjeants at law,<sup>10</sup> though this attempt to turn Parliament into a law school was quietly ignored. By that time much of it was obsolete anyway, and the phrase-by-phrase commentaries provided in the inns of court lectures were probably well on their way to becoming highly technical and destructively critical. Generations of lawyers and students sharpened their wits exploring its intricacies, and in so doing identified many more doubts and obscurities.<sup>11</sup> It is truly remarkable, in view of all this, that Magna Carta achieved such lasting and widespread fame in later periods. The stages by which this became possible will be explored in this book, in chronological order. But first it may be helpful to make some general observations about the legal character of the charter as seen across the centuries.

### Magna Carta as a Statute

The charter of 1215 might have been seen fleetingly as a statute, in the sense of a declaration or enactment intended to lay down rules for the future.<sup>12</sup> Yet it was clearly never a statute in the sense which has prevailed among English lawyers since the fourteenth century, namely an

<sup>7</sup> E.g. the New Ordinances (1311) Rot. Parl. i. 281 (doubtful points to be clarified by the lords ordainers), 286 (doubtful points to be clarified in the next parliament by the barons, justices 'et autres sages gentz de la lei'); *Statutes of the Realm*, i. 158, no. 6; and i. 167, no. 38. In 1327 the Commons petitioned that those points of 'la chartre du franchises' which were in need of clarification should be clarified in Parliament: Rot. Parl. ii. 7, no. 3. This probably referred to the *Earl of Lancaster's Case*, discussed below, p. 54.

<sup>8</sup> Below, p. 33. For the obscurity of its wording see below, pp. 32–40.

<sup>9</sup> The late-medieval inns of court largely ignored the 1354 version, no doubt because it gave less scope for destructive analysis: below, p. 92.

<sup>10</sup> Rot. Parl. iii. 15, nos. 44–5. <sup>11</sup> See Chapter 3, below.

<sup>12</sup> For the early forms of English legislation and their various descriptions see T. F. T. Plucknett, *Statutes and their Interpretation in the First Half of the Fourteenth Century* (Cambridge, 1922), pp. 1, 8–12.

enactment made by the king with the advice of the peers and commons in Parliament assembled.<sup>13</sup> Not only was there nothing resembling Parliament at the time,<sup>14</sup> but only a few weeks after it was agreed the charter was repudiated by King John, with the blessing of Pope Innocent III. The beleaguered king had an arguable case for treating it as void for duress, and for the avoidance of doubt he procured a bull from the pope forbidding him, on pain of eternal anathema, from keeping his solemn promises.<sup>15</sup> The charter was a dead letter, and it failed even as a means of securing a peace. The importance of the 1215 document was not that it ever had any legal effect itself, but that it inspired modified versions extracted from King Henry III. For centuries Magna Carta was almost universally understood to be the charter which Henry III granted in 1225,<sup>16</sup> and which Edward I and subsequent kings confirmed, rather than the Charter of Runnymede, which was a passing historical event.<sup>17</sup> It is surprising how many reputable historians have been careless about this, referring to the clauses of the 1215 charter – clause 39, in particular<sup>18</sup> – as if they operated as law in later periods.

<sup>13</sup> T. F. T. Plucknett, *The Legislation of Edward I* (Oxford, 1949), pp. 10–15; J. H. Baker, *Introduction to English Legal History* (4th edn, 2002), pp. 203–6.

<sup>14</sup> There was an assembly of bishops and barons at Runnymede, but they were there to negotiate terms rather than deliberate, and no mention is made of participation by commoners.

<sup>15</sup> The pope, who was an advocate of absolutism (below, p. 120), also regarded it as shameful and demeaning for a king to make such concessions to his people. Both grounds were expressed in the bull (*Etsi karissimus*, 24 August 1215), which survives in the British Library and is printed in C. Bémont, *Chartes des Libertés Anglaises* (Paris, 1892), pp. 41–4.

<sup>16</sup> Two sixteenth-century readers, however, thought it was John's charter which was later turned into a statute: *Rights and Liberties*, pp. 87 (made a statute by Edward I), and 140 (made a statute at Marlborough). They were in error, since it was not the 1215 charter which was confirmed in 1267 and 1297. They had probably not seen the 1215 text. Only one reader is known to have lectured on a clause of the 1215 charter, presumably relying on an old manuscript: *Selected Readings on Magna Carta*, p. 210 (Baldwin Malet, 1512, on cl. 27, *Si quis liber homo intestatus decesseri*).

<sup>17</sup> See this distinction drawn by William Fleetwood, below, p. 243. Cf. J. Cowell, *The Interpreter* (1607), sig. Ss4v: 'Magna Carta . . . is a charter containing a number of laws ordained the ninth year of Henry the third . . . I read in Holinshed that King John to appease his barons yielded to laws or articles of government much like to this great charter.'

<sup>18</sup> The original charters were not written with distinct paragraphs, let alone divided into numbered chapters. In medieval texts and citations the numbering varies, but it became fixed in the printed editions. There were fewer clauses in the later versions, and clauses 39–40 of the 1215 charter became c. 29 of the 1225 statute.

The 1225 version was the text usually found in statute-books, both manuscript and printed,<sup>19</sup> and was the basis of Coke's commentary four centuries later.<sup>20</sup> Although the 1215 charter was occasionally copied out for reference purposes, or in the hope that it might somehow be of use,<sup>21</sup> it was usually distinguished from the great charter by a special title.<sup>22</sup> There was no proper edition of it before Blackstone.<sup>23</sup> It was little more than a footnote to history. The despicable King John could hardly be given credit for something which had turned out so well, particularly since he was against the very idea of it. When Shakespeare wrote a play in the 1590s about King John, first published in 1623, he did not see fit to mention the episode at Runnymede at all.<sup>24</sup> Obviously Shakespeare knew about Magna Carta – even Justice Shallow would have heard of it, as a student in Clement's Inn – but it was not associated with King John.<sup>25</sup>

<sup>19</sup> In fourteenth-century manuscripts the text was often copied from the 1297 confirmation of the 1225 charter, but only because it was the most authentic evidence of what had been enacted in 1225: see below, pp. 8–10. In a few manuscripts the text is a conflation of the 1217 and 1225 texts.

<sup>20</sup> Co. Inst. ii. 1–78.

<sup>21</sup> The 'magna carta Johannis Regis de Ronemede' (cl. 56) was pleaded in *Mortimer v. Tony* (1290) in an unsuccessful attempt to prevent the justices at Hereford from entertaining a suit relating to land in the marches of Wales: KB 27/129, m. 61 (formerly m. 58); abridged in *Placitorum Abbreviatio* (1811), p. 58. Some other examples are given in F. Thompson, *The First Century of Magna Carta* (Minneapolis, 1925), p. 65; J. C. Holt, *Magna Carta* (3rd edn), pp. 47, 328–30. See also Carpenter, *Magna Carta*, pp. 432–4.

<sup>22</sup> E.g. CUL MS. Ee.6.1, fos. 154–156v ('Carta Johannis Regis que vocatur Runnemede'); MS. Ee.2.19, fos. 1–5 ('Carta Johannis'); MS. Gg.1.12, fos. 21–25v ('Provisio de Ronnemede'). Richard Hesketh referred to the 'charter of Runnymede' in his Gray's Inn reading (c. 1506): *Selected Readings on Magna Carta*, p. 362. But cf. Co. Inst. ii, proeme: 'King John in the 17. year of his raigne had granted the like, which was also called Magna Carta, as appeareth by a record before this Great Charter made by King H. 3' (citing Matthew Paris); below, p. 532.

<sup>23</sup> W. Blackstone, *The Great Charter* (Oxford, 1759). Before then it was generally known only from Matthew Paris (printed in 1571), or Roger of Wendover, whose account of it (as Blackstone revealed) was badly garbled. A facsimile of one of the Cottonian charters, with hand-painted coats of arms, was engraved by John Pine, Bluemantle Pursuivant, and published in 1733; a copy was sold at Bonham's on 12 November 2013, lot 227, for £32,500.

<sup>24</sup> Cf., however, William Fleetwood's remark in the 1550s that the story of King John and Magna Carta was well known even to those who knew nothing of history: *Rights and Liberties*, p. 133.

<sup>25</sup> It is true that the readers in the inns of court usually noted that the charter was originally granted by John, but they immediately explained that it was not a statute until Henry III: *Rights and Liberties*, pp. 71, 83, 87, 97, 139. They probably knew about the 1215 charter only from chronicles, not from direct access to a copy, and were unaware of textual differences.

This cannot be dismissed as a playwright's inattention to historical detail, for no less a historical scholar than John Selden wrote in 1610, without a hint of irony, that little of relevance to legal history occurred in John's reign.<sup>26</sup> As will be shown later, Magna Carta was already, by the time of Shakespeare and Selden, a topic of great and growing interest; but it was Henry III's charter, not John's, which went by the epithet 'Magna'.<sup>27</sup> Coke once went so far as to suggest that John's charter was of no more significance than that of Henry I (1100), though he may not at that time have been closely familiar with either of them.<sup>28</sup>

The resurrection of Magna Carta began on 12 November 1216, a month after King John's death, with the so-called 'reissue' under the seals of the king's regent William Marshal and the papal legate Guala. It is misleading to call it a reissue, since it was a substantially pared down and carefully redrafted revision.<sup>29</sup> If the original document was in essence a peace treaty,<sup>30</sup> this was now a charter freely agreed by the government and sanctioned from the outset by papal authority,<sup>31</sup> even if (as seems certain) the new pope himself knew nothing about it.<sup>32</sup> This, then, was

<sup>26</sup> J. Selden, *Janus Anglorum* (1610), preface, sig. A6v.

<sup>27</sup> Coke said that this reflected its importance: *La Huictieme Part des Reports* (1611), sig. §§5 ('not in respect of the quantity but of the weight'); cf. Co. Litt. 81 ('it is called the great charter in respect of the great weightiness and weighty greatness of the matter contained in it in few words . . . it is *multum in parvo*'); Co. Inst. ii, proeme. As a matter of history, however, it seems that the adjective 'Magna' at first merely distinguished the charter from its little sister, the *Carta de Foresta*: Cowell, *The Interpreter*, sig. Ss4v; A. B. White, 'The Name Magna Carta' (1915) 30 EHR 472–5; Carpenter, *Magna Carta*, pp. 4–8.

<sup>28</sup> *Bulthorpe v. Ladbrook* (1607) CUL MS. Gg.5.6, fo. 52; translated below, p. 532. Four years later he went still further and said that the laws of William I, confirming those of Edward the Confessor, were 'a Magna Carta, the groundwork of all those that after followed': *La Huictieme Part des Report* (1611), preface, sig. §§4v. Cf. Co. Litt. 81, citing Fitz. Abr., *Mordauncester*, pl. 53, dated Pas. 5 Hen. III (1221), which refers to the 'statute of Magna Carta'; Coke thought this must have been John's charter, but the entry is more probably misdated and belongs to the last decade of Henry III's reign.

<sup>29</sup> The first serious discussion of this charter, and of the changes which it made, was in Blackstone, *The Great Charter*, pp. xxvii–xxx. Only one sealed version survives, in Durham cathedral.

<sup>30</sup> This is a controverted point: see, e.g., Holt, *Magna Carta*, pp. 224, 228. But the charter itself said (cl. 61) that it was (tr.) 'for the better settling of the discord which has arisen between us and our barons'. Cf. F. Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I* (2nd edn, Cambridge, 1898), i. 171 ('In form a donation . . . in reality a treaty').

<sup>31</sup> N. Vincent, *Magna Carta: A Very Short Introduction* (Oxford, 2012), p. 82; Carpenter, *Magna Carta*, pp. 406–11; Holt, *Magna Carta*, pp. 316–17.

<sup>32</sup> Innocent III, who had damned the 1215 charter, died in July 1216 and was succeeded by Honorius III.

the first revival, without which nothing else would have followed. With further revisions made in 1217, it was the basis of the great charter issued under the seal of the seventeen-year-old King Henry III at a major assembly of prelates, barons and knights on 11 February 1225.

The 1225 charter was free from the coercion which vitiated the charter of John. It said so itself.<sup>33</sup> But was it a statute? The king was a minor at the time, but this did not invalidate the charter in the eyes of succeeding generations. Many things were done in the name of infant kings. If explanation were needed, the later solution was to say that the king had two bodies, and in his ‘royal and politique capacity’ (as Coke was to put it) he was deemed always to be of full age.<sup>34</sup> For this reason, Coke considered the later confirmations of the 1225 charter to have been politically understandable but legally unnecessary.<sup>35</sup> A more difficult question for the later observer was its form. It was not cast in the form of a parliamentary statute. In its operative words, at the beginning and end, it was phrased like a conveyance. It was a grant and gift of liberties from the king to the people, to be ‘held’ within his realm for ever.<sup>36</sup> The only known reading on the *Articuli super Cartas* (1300) taught that the *Articuli* were not statutory, because they took the form of a grant and confirmation by the king, prelates and peers, without mention of the commons.<sup>37</sup> Coke took a similar view of the *Carta de Foresta*.<sup>38</sup> The great charter of 1225, however, seemed on its face to have been more than

<sup>33</sup> This was noted by a fifteenth-century reader: HLS MS. 13, p. 7; *Rights and Liberties*, p. 82. Likewise Co. Inst. ii. 2, gl. *spontanea et bona voluntate nostra*.

<sup>34</sup> Co. Inst. ii, proeme; explained more fully in *Calvin’s Case* (1608) 7 Co. Rep. 1 at fos. 10–12. This had been settled in *Earl of March v. Earl of Salisbury* (1352) 26 Edw. III, Lib. Ass., pl. 54. Cf. *Anon.* (1332) YB Mich. 6 Edw. III, fo. 50, pl. 49, *per* Shardelow J. (‘Our lord the king is always under age when it suits him (*a son avauntage*), and always of full age when it suits him’); *Case of the Duchy of Lancaster* (1562) Pl. Com. 212v; Dyer 209; *Dyer’s Notebooks*, i. 30; KB 27/1181, m. 156 (identifiable as *Bunye v. Stubley*); *Le Case pur Prender de Apprentices* (c. 1585/90) BL MS. Harley 1693, fo. 95v, *per* Fleetwood sjt (something granted ‘during the king’s pleasure’ does not expire on the king’s death, because he is a body politic); Fleetwood, *Itinerarium ad Windsor*, p. 37.

<sup>35</sup> *Bulthorpe v. Ladbroke* (1607) CUL MS. Gg.5.6, fo. 52; translated below, p. 532. See also Co. Litt. 43.

<sup>36</sup> The word *tenendas* does not necessarily denote feudal tenure, as in grants of real property, but might be better translated here as ‘kept’ or ‘retained’. The 1215 charter was defective in having no operative words of grant (except in cl. 1) until cls. 60–1.

<sup>37</sup> *Selected Readings on Magna Carta*, p. 350. But Snede (in 1511) thought the *Articuli* were statutory: *Rights and Liberties*, p. 97. So did Coke: 10 Co. Rep. 74; Co. Inst. ii. 600.

<sup>38</sup> He argued that the *Carta de Foresta* was only an ordinance and not a statute: *Anon.* (1596) BL MS. Add. 25201, fo. 121v (anonymous case).

simply a unilateral gift from the king, or a pact between the king and the barons. The expressed consideration for it was a fifteenth granted to the king by the bishops, abbots, priors, barons, knights, freeholders and ‘everyone of our realm’, comprehensive words which seemed to imply a major assembly in which everyone in the realm was somehow represented.<sup>39</sup> This was, surely, a parliament of some sort.<sup>40</sup> Some have dismissed this as ‘bad history’,<sup>41</sup> and yet it is difficult to see why the assemblies at Merton (1236) or Marlborough (1267) were parliaments if this was not.<sup>42</sup> It is a matter of definition.<sup>43</sup> At any rate, the charter was close enough to the concept of parliamentary legislation for it to be received, as a matter of law, as the first statute in the notional ‘statute-book’. Even if not a parliamentary statute *ab initio*, it was confirmed many times by undoubted parliaments, beginning with that held at Marlborough in 1267,<sup>44</sup> and that would have given it statutory

<sup>39</sup> Selden made a similar point in 3 St. Tr. at col. 169 (1628): ‘some have published that Magna Carta is but a charter and no law. But it is an Act of Parliament; and let men speak what they will, that was the fashion of statutes till printing came in . . . Also the body of Magna Carta is, that it is consented to by all the earls etc. and for the assent there was a fifteenth granted, and clearly that cannot be without an Act of Parliament.’

<sup>40</sup> R. Holinshed, *Chronicles of England, Irelande and Scotlande* (1577), p. 626; Lambarde, *Archeion* [c. 1591], pp. 136–7; Owen, *Common Law* (c. 1615) BL MS. Harley 6604, fo. 313v (‘The great charter of England established by Act of Parliament in the 9th year of Henry the third’); Ashley’s reading, fos. 2v–3; Co. Litt. 81; Co. Inst. ii, proeme, and p. 77.

<sup>41</sup> Dunham in *The Great Charter*, p. 36.

<sup>42</sup> It was widely held that Merton was not. An anonymous reader of Gray’s Inn c. 1515 held that Marlborough was the first statute: *Rights and Liberties*, p. 131. Serjeant Fleetwood said in 1582 that Merton was never a statute, but was now taken to be one: below, Appendix 5, p. 478. William Hakewill said in his speech on impositions (1610) that Merton was no other than an ordinance, lacking the consent of the Commons, but ‘yet hath it by continuance of time gotten not only the strength but the name of a statute’: *The Libertie of the Subject against the pretended Power of Impositions* (1641), p. 61. Camden, likewise, held that the assembly at Merton was not a parliament because the commonalty were not mentioned: F. S. Fussner, ed., ‘William Camden’s “Discourse concerning the Prerogative of the King” [c. 1615]’ (1957) 101 *Proceedings of the American Philosophical Society* 204–15, at p. 215. Cf. Co. Inst. ii. 99 (that the dissent of the bishops from c. 9 did not prevent it being an Act of Parliament).

<sup>43</sup> Cf. James Morice in his Middle Temple reading (1578) BL MS. Add. 36081, fo. 269, criticising the dictum of Saunders CB in 1560 (Pl. Com. 209) that the Statute of Rhuddlan was not a statute but a constitution made by the king without Parliament: ‘yet can I see no cause at all why the same . . . should not have the force and authority of a law, in such sort as the liberties of England contained in the Great Charter before the same were confirmed by Act of Parliament’.

<sup>44</sup> Statute of Marlborough, c. 5. The statute was repealed in 1881; but, by virtue of the Interpretation Act (below, p. 11 n. 60), this repeal should not itself have any effect on what the statute confirmed.

force anyway. That was the view taken by earlier Tudor lawyers.<sup>45</sup> The 1225 charter contained the final text, but it became a permanent statute at the latest by confirmation in 1267.<sup>46</sup>

Some took the later confirmation by Edward I, in 1297, to be the ultimate statutory form, though this was a matter of evidence rather than of substantive law. It was certainly an authentic text, being enrolled in Chancery, albeit the roll was not an official statute roll as later understood.<sup>47</sup> Yet it was only a confirmation of the earlier statute, not a new one.<sup>48</sup> There was no doubt that the statute of Magna Carta dated from 1225, not from the reign of Edward I. When Edward I confirmed Magna Carta again, in 1301, without setting out the text, it was his father's charter which he mentioned in the patent of confirmation, not his own.<sup>49</sup> This had never been a matter of contention, and it was finally settled for legal purposes in 1607, when the Court of Common Pleas held that the 1225 charter was itself an Act of Parliament. An action had been brought on chapter 29, reciting the charter of Henry III rather than its confirmation, and an objection on the ground that it was not a statute

<sup>45</sup> Cf. the 'Ordinary Gloss' of c. 1400/25 (below, p. 71), which says that until Henry III the charter was only a treaty or treatise ('trete') made at Runnymede, implying that it became a statute in 1225: *Rights and Liberties*, p. 71. George Willoughby, in his Inner Temple reading (1549), held that before the 1267 confirmation Magna Carta was no more than a treatise on the common law: BL MS. Harley 1691, fo. 197; cited in M. McGlynn, *The Royal Prerogative and the Learning of the Inns of Court* (Cambridge, 2003), p. 76.

<sup>46</sup> So said the elusive Hervy of the Inner Temple, in the last quarter of the fifteenth century: HLS MS. 88, fo. 1; BL MS. Hargrave 87, fo. 195; *Rights and Liberties*, p. 87. It became the orthodoxy in the early sixteenth century, though some readers began the story with John: see *Rights and Liberties*, pp. 97, 131, 139; reading on Marlborough, c. 5, in Gray's Inn MS. 25, fo. 92 (tr. 'before this statute Magna Carta was only a charter and no statute').

<sup>47</sup> It is the version often found in manuscript statute-books, indicated by the first word *Edwardus* rather than *Henricus*. One fifteenth-century reader attributed the statutory character to both confirmations: HLS MS. 13, p. 7; *Rights and Liberties*, p. 83 (cf. *ibid.* 78, where the reader used the Edwardian version as his text). For a valuable study of the 1297 charter see [N. Vincent], *The Magna Carta* (Sotheby's catalogue 8461, New York, 2007), especially at pp. 21–48.

<sup>48</sup> It contained one discrepancy, the correction of an error in c. 2 as to the amount of a relief due from a barony (£100 corrected to 100 marks). It has been said that this was 'either a deliberate falsification or a mistake': S. Reynolds, 'Magna Carta 1297 and the Uses of Literacy' (1989) 62 *Historical Research* 233–44, at p. 233. It is true that a mere confirmation could not change the text confirmed, but this could perhaps be understood as a concession by the king (*non obstante* the confirmation) that he would not take advantage of the error and claim the unintended larger sum.

<sup>49</sup> *Statutes of the Realm*, i. 44 (14 February 1301). Cf. the confirmation of the 1225 charter on 28 March 1300: *ibid.* 38.



was overruled.<sup>50</sup> Coke CJ said the fact that it had been confirmed – by thirty-two parliaments at least<sup>51</sup> – was no argument to prove that it was not an Act of Parliament prior to confirmation.

Although it is the royal confirmation of 1297 which is now treated as an Act of Parliament, and as the only official version of the few parts that remain, the instrument itself made no mention of any kind of legislative assembly. It began in the usual form of an *inspeximus* charter,<sup>52</sup> setting out a transcript of the 1225 text, and concluded with words of grant, confirmation and renewal, ‘willing and granting for our self and our heirs that the aforesaid charter shall be firmly and inviolably observed in all its articles for ever’. The king himself was at Ghent, in Flanders, when the charter was sealed on the authority of his regency council, and witnessed by his thirteen-year-old son Prince Edward.<sup>53</sup> Although the regency council had summoned a parliament to discuss the reissue of the charter, there is no indication in the 1297 charter itself or in any other record that it was an Act of Parliament.<sup>54</sup> The king was personally against it, and in 1305 he emulated King John by obtaining a papal dispensation from his oath to observe it, with a purported annulment of his confirmation. Pope Clement V no more approved of constitutional monarchy than did Innocent III (another notable canonist), declaring that the presumed concessions by Edward were ‘a loss of his honour and to the detriment of his royal supremacy’.<sup>55</sup> But it was too late this time to undo a document of such force, and no king would ever again presume to do so. The pope was simply ignored.

<sup>50</sup> *Bulthorpe v. Ladbrook* (1607) CUL MS. Mm.1.21, fo. 92; printed in translation below, Appendix 10, pp. 531–3. Sixteenth-century actions on c. 29 had all been framed on the charter of 9 Hen. III as ‘a statute lately made in Parliament’: see Appendix 1, below.

<sup>51</sup> Cf. below, pp. 264, 352, 396.

<sup>52</sup> I.e. a charter or patent exemplifying an earlier charter, setting out the original text in full, preceded by the phrase *Inspeximus . . . in haec verba* (‘We have inspected . . . in these words’). The prime purpose of an exemplification was to serve as an authentic transcript of a royal document, certified under the great seal.

<sup>53</sup> Richard Snede pointed out in his reading that the king had been overseas at the time of the grant: *Rights and Liberties*, p. 96. The patent was tested at Westminster, but the king was in Flanders.

<sup>54</sup> The further confirmation of 28 March 1300 was granted in Parliament, but this too was not cast in the form of an Act of Parliament: *Statutes of the Realm*, i, Charters of Liberties, p. 38.

<sup>55</sup> By the bull *Regalis devotionis integritas*, dated 29 December 1305: Bémont, *Chartes des Libertés Anglaises*, p. 110, at p. 111 (‘in tui honoris dispendium et regalis excellentie detrimentum’).

Although the supposed primacy of the 1297 text resulted from its being the first version of Magna Carta to be enrolled in Chancery, which made it more reliable than the variable versions found in private statute-books, whether it was evidentially more reliable than the sealed charters was another matter. Blackstone took the view that the 1297 text was necessarily inferior to those found in the contemporary charters.<sup>56</sup> But the latter had probably not been available to the editors of the old *Statutes at Large*, and they may have been unfamiliar even to historical scholars such as Selden.<sup>57</sup> When they became available, their legal superiority was not universally acknowledged, since it was apparently considered that for legal purposes a Chancery enrolment took precedence over a sealed engrossment.

The editors of the *Statutes of the Realm* (1810) departed from the earlier tradition of the *Statutes at Large* by putting the Provisions of Merton 1236 first in the main text and relegating the various charters of liberties to a preliminary section, separately paginated. The reason given, in respect of Magna Carta, was that there was no text of the Henry III charter on the statute roll, and that previous printed editions – while placing Magna Carta first, as a statute of 1225 – had been based on the enrolled Edwardian text.<sup>58</sup> They therefore printed the 1297 text, in its chronological position, as the best version. This was sensible enough as an archival or evidential reason, since they were setting out the texts they had used in the order of their creation as records, though it was not a legal decision about the nature of the 1297 charter. The sub-commissioners did include in the main body of statutes – in their appropriate chronological place – the Provisions of Merton and the other statutes made between 1225 and 1278, even though they were not enrolled. But they had not been confirmed in the same way as Magna Carta, and so it was necessary to have recourse for the texts to ‘inferior

<sup>56</sup> Blackstone, *The Great Charter*, p. i.

<sup>57</sup> *Ibid.*, p. xlv. Selden was aware that the 1215 charter was different from the Magna Carta of 1225 but confused the texts (by relying on the Matthew Paris version) in his earlier works. He was indeed to be faulted by Sir Robert Heath, Att.-Gen., for relying on Matthew Paris, though Heath had not seen the original either: *The Five Knights' Case* (1627) 3 St. Tr. 1 at 38; CUL MS. Mm.6.63, fo. 190v. By 1631 he had seen an original from 1215, possibly one of Camden's: *Titles of Honor* (1631), p. 671 ('I have used an original of it that had been sealed by King John'). At some stage he acquired a full transcript of the text: LI MS. Hale 12, fo. 184. (Professor D. Carpenter, who drew attention to the Hale manuscript, thinks it may have been taken from a damaged version no longer extant.)

<sup>58</sup> *Statutes of the Realm*, i, introduction, pp. xxix, xxxiii.