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THE REINVENTION OF MAGNA CARTA 1216–1616

This new account of the influence of Magna Carta on the development of English public law is based largely on unpublished manuscripts. The story was discontinuous. Between the fourteenth century and the sixteenth the charter was practically a spent force. Late-medieval law lectures gave no hint of its later importance, and even in the 1550s a commentary on Magna Carta by William Fleetwood was still cast in the late-medieval mould. Constitutional issues rarely surfaced in the courts. But a new impetus was given to chapter 29 in 1581 by the 'Puritan' barrister Robert Snagge, and by the speeches and tracts of his colleagues, and by 1587 it was being exploited by lawyers in a variety of contexts. Edward Coke seized on the new learning at once. He made extensive claims for chapter 29 while at the bar, linking it with *habeas corpus*, and then as a judge (1606–16) he deployed it with effect in challenging encroachments on the common law. The book ends in 1616 with the lectures of Francis Ashley, summarising the new learning, and (a few weeks later) Coke's dismissal for defending too vigorously the liberty of the subject under the common law.

SIR JOHN BAKER taught at the University of Cambridge from 1971 to 2011, latterly as Downing Professor of the Laws of England. He also served for thirty years as Literary Director of the Selden Society and was knighted for services to legal history in 2003. He is the author of *Collected Papers on English Legal History* (2013) and *Introduction to English Legal History* (4th edn, 2002).

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John Baker
Frontmatter
More Information

CONTENTS

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978-1-107-18705-4 — The Reinvention of Magna Carta 1216–1616
John Baker
Frontmatter
More Information

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Frontmatter
More Information

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Frontmatter
More Information

PREFACE

The year 2015 witnessed one of the most remarkable historical anniversaries ever celebrated, stretching across continents and civilisations. Every scholar with an interest in Magna Carta was expected to say or write something about it, and much was learned about the events in and around 1215. It was right, of course, to concentrate on 1215, since that was the occasion for the anniversary and it was the beginning of all that followed. But the Charter of Runnymede itself had a short life. The timelessness and ubiquity of what it came to represent can only be explained over the longer term. Its enduring spiritual force was nowhere more clearly demonstrated last year than by the decision of the Chinese authorities to ban the general public display of the 1217 charter sent on loan from Hereford Cathedral. There are few people with the ability to read such a charter, even in England, and yet its physical presence alone was enough to alarm an authoritarian regime on the other side of the world. Magna Carta has evidently acquired a symbolic power which transcends language and culture and even history. Such a remarkable phenomenon cannot be accounted for merely by the turbulent events of 1215. Indeed, were it not for its reinvention in the early-modern period, the charter would be known today only to a few medieval specialists. This obvious fact may be widely acknowledged, and yet the details of the later story have become lost in a shimmering haze, with flashes of sunlight in 1628 and 1787. Even the meticulous book by Faith Thompson, published in 1948 after decades of research, a work which opened up many of the topics pursued in the present book, did not fully bring out the legal context of the reinvention, or its chronology.

The reason why the story has not been fully unravelled before is that it is primarily a legal story. Political and constitutional historians have not generally cared to consult legal sources other than statutes, while most English legal historians in the century after Maitland have ignored public law completely. There has in consequence been a considerable lack of clarity about the story of the charter in the three centuries between

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John Baker
Frontmatter
More Information

Edward III and the Petition of Right. Some have assumed that its incandescence remained undimmed through the centuries, others that it sank into obscurity until it was rediscovered by Sir Edward Coke in the 1620s. Neither view is correct, but much of the story has been hidden away in legal manuscripts which no one reads.

The manuscripts are not written in English, and their substantive content is often embedded in procedural contexts which to the uninitiated can seem unfathomable. Leaving aside, however, the abbreviated hieroglyphs in which it was written, law French is not a particularly difficult language, compared with Latin, and in fact the law reports when deciphered make more sense and contain far more information than the garbled and often unintelligible English reports of what the same lawyers were saying in the House of Commons. The barrier in scholarship is professional rather than linguistic. Lawyer historians who grapple with the thoughts and arguments of lawyers in the past are liable to be dismissed by their non-legal colleagues as 'internalists' who accord too much weight to the doctrinal mysteries and arcane procedures of the legal world. There is no doubt that contingent remainders and *indebitatus assumpsit* will never compete on equal terms with kings and queens, parliaments and battles. But the history of the common law belongs on a different plane from the history of events because it is, at least in part, an intellectual history, and it is impossible to understand legal thinking, or indeed its practical effects in the real world, without understanding the procedures and technical concepts which set the terms of reference and often evolved over long periods of time.

This book is necessarily internalist, in that it is based heavily on sources which few people outside the law school have ever thought worth reading. Yet the story of Magna Carta cannot be reconstructed without them. Surprisingly little reference was made to the charter in popular literature or drama, or in philosophical writing. The core of the story – before, that is, the historians took it over in the seventeenth century – is the way lawyers thought about it and deployed it for forensic purposes in the courts, for political purposes in the House of Commons, and for educational purposes in the inns of court. The law which they found in the charter was far from static. In reality, the Magna Carta of 1616 was completely different from that of 1216, despite the fact that the words which still mattered were identical. This has sometimes led to misunderstanding. Heavy criticism has been heaped upon the lawyers who cultivated new perceptions of Magna Carta, represented first and foremost by Coke, for being bad historians. But that is to miss the point.

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John Baker
Frontmatter
More Information

Although the common lawyer's relationship with history is central to the present account, it was not the same as that of the historian. Lawyers were, in fact, more interested in history than almost anyone else was, and they were duly critical in evaluating historical evidence. But when they used old books for forensic purposes, they were looking for useful law rather than indulging in antiquarian curiosity for its own sake. Moreover, the thinking of lawyers has its own history, especially when it involves the development of traditional learning to meet the exigencies of the moment. It turns out that, when the legal sources are brought into play, more significant changes of thought can be discerned over time than the statute-book alone might lead the casual observer to suppose.

The book is based on a number of lectures given in 2014–15, as enumerated in the acknowledgements. Something of the tone of the lectures has been preserved, but the details have been augmented from further research in the huge corpus of early-modern legal manuscripts. Underlying both the lectures and the book were the four new discoveries revealed in the Selden Society volume for 2015, *Readings and Commentaries on Magna Carta 1400–1604*. The first, a negative discovery but a surprising one, was the absence of any coherent constitutional learning in the many lectures on Magna Carta which survive from the late-medieval and early-Tudor inns of court. The second was the legal and historical treatise on Magna Carta by William Fleetwood, which, though written as late as the 1550s, was still closer to the medieval learning than to the mentality of Coke. The third was the almost complete absence of Magna Carta from constitutional discussions in reported cases before the 1580s, when all of a sudden chapter 29 became common currency in forensic argument. This chronology suggested a possible link with the first known reading in an inn of court devoted entirely to chapter 29, that given by Robert Snagge in 1581. And the fourth discovery was the treatise on chapter 29 written by Sir Edward Coke, not when he was leading the opposition in the House of Commons in the 1620s, but when he was the king's principal law officer in 1604. These discoveries, especially in conjunction, pointed to a very different history of Magna Carta from that which has prevailed before now.

Instead of printing the original papers as a collection of separate essays, their content has been reworked into a chronological arrangement, ending with the dismissal of Coke from the office of lord chief justice in 1616. The story is preceded by a more general chapter straddling the centuries, the purpose of which is to examine different views about the legal character of Magna Carta and its special place in the

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John Baker
Frontmatter
More Information

common-law tradition. After further chapters exploring the legal profession's awareness and understanding of the great charter from the late-medieval period up to the sixteenth century, the central chapters show how most of the constitutional issues which came eventually to be linked with Magna Carta were initially addressed without drawing upon its assistance at all. The process of reinvention is then recounted, with some attempt at an explanation, in the later chapters. Religion played a crucial part in that story, because of the struggle for freedom of thought and the campaign by 'Puritan' members of Parliament against the ecclesiastical High Commission. Another preliminary chapter therefore surveys briefly the treatment of heresy in England, an unsavoury story of religious intolerance which continued to inform debates about the High Commission and due process. There were concurrent concerns also about secular liberty and the rule of law, concerns which within a single generation united conservative and progressive lawyers in a newfound devotion to the great charter. Magna Carta rapidly became a symbol of national glory and stability in the later years of Queen Elizabeth, and in the next reign a bulwark against the disturbing constitutional ideas which the new king brought with him from Scotland.

The main purpose of the book is to investigate how, when and why English lawyers began to think about connections between personal liberty, constitutional monarchy, the rule of law and Magna Carta, and the story is related from their point of view. The process of reinvention largely concerned a single provision, the world-famous chapter 29, the rest of the statute (with a few exceptions) having lost its practical relevance before Tudor times. The fine words had always been known to lawyers, but they were of little or no forensic consequence until they were resurrected for practical purposes in the 1580s and rapidly turned into holy scripture. Their apotheosis came in Francis Ashley's reading in the Middle Temple, delivered a few weeks before Coke's dismissal in 1616. Within this short period of under forty years, the exegesis of chapter 29 had stretched its reach almost to the limits. The present account therefore ends in 1616, rather than in 1628. There remained one high hurdle to overcome, the availability of *habeas corpus* to challenge an imprisonment by the king's immediate command. That would require a change of mind by Coke, and a great deal of debate. In other respects, however, the new implications of chapter 29 had all been settled before the end of Coke's chief justiceship. Coke played such a prominent role in the story that it has been related at some length, though it will be shown that he was responsible neither for the initial

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John Baker
Frontmatter
More Information

revival of Magna Carta nor for the myths which posterity has attributed to him.

Many of the sources used here have never been printed, and are not written in English, and so translations of a small selection of them are provided in the appendices. Quotations from English texts have throughout the book been rendered into modern orthography, with adjusted punctuation, even when taken from printed editions, since the language is that still in use. There is no merit in preserving exactly the immaterial features of transcripts of lost autograph texts, and no obvious merit even in the case of autograph material. Latin spelling has also been standardised, and one consequence of this is that Charta is rendered throughout as Carta. Quotations which have been translated from French or Latin are marked 'tr.'.

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John Baker
Frontmatter
More Information

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1 'The Legal Force and Effect of Magna Carta' in *Magna Carta: Muse & Mentor*, ed. R. J. Holland ([Washington, DC], 2014), pp. 65–84, (notes) 258–61.
2 'Chapter 29 of Magna Carta in the Fourteenth Century' in *Texts and Contexts in Legal History: Essays in Honor of Charles Donahue*, ed. J. Witte, S. McDougall and A. de Robilant (Berkeley, 2016), ch. 15, pp. 223–44.
3–4 *Selected Readings and Commentaries on Magna Carta 1400–1604* (132 SS, 2015), introduction, pp. xxxix–lxxxv.
5 'Magna Carta and Personal Liberty' in *Magna Carta, Religion and the Rule of Law*, ed. R. Griffith-Jones and M. Hill (Cambridge, 2015), pp. 81–108; *Reports from the Lost Notebooks of Sir James Dyer*, vol. i (109 SS, 1994), introduction, pp. lxii–lxxvi.
6 *Reports from the Lost Notebooks of Sir James Dyer*, vol. i (109 SS, 1994), introduction, pp. li–liv, lxxvi–lxxxv; 'Personal Liberty under the Common Law 1200–1600' (1991), reprinted in *Collected Papers on English Legal History* (Cambridge, 2013), ii. 871–900.
7–8 'Magna Carta: The Emergence of the Myth', lecture at the British Legal History Conference (on a boat starting from Runnymede), 8 July 2015, and in a revised form at a meeting of the American Inns of Court Foundation, Washington, DC, 23 October 2015; 'Magna Carta and the Templars 1215–1628', lecture in the Inner Temple, 23 November 2015.
9–10 *Selected Readings and Commentaries on Magna Carta 1400–1604* (132 SS, 2015), introduction, pp. lxxxviii–xci; 'Sir Edward Coke and Magna Carta', lecture delivered to the Stoke Poges Historical Society, 14 July 2015; 'The Common Lawyers and the Chancery: 1616' (1969) reprinted in *Collected Papers on English Legal History* (Cambridge, 2013), i. 481–512.

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John Baker
Frontmatter
More Information

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978-1-107-18705-4 — The Reinvention of Magna Carta 1216–1616
John Baker
Frontmatter
More Information

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John Baker
Frontmatter
More Information

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John Baker
Frontmatter
More Information

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John Baker
Frontmatter
More Information

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John Baker
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More Information

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John Baker
Frontmatter
More Information

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Frontmatter
More Information

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More Information

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More Information

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More Information

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Frontmatter
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Frontmatter
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