"MAGNA CARTA IS SUCH A FELLOW THAT HE WILL HAVE NO SOVEREIGN."

FIVE KNIGHTS FOR FREEDOM

THE STORY OF THE PETITION OF RIGHT 1628

In 1215 Magna Carta was not a statute but a treaty designed to prevent civil war – which it failed to do; it was immediately declared a nullity by the Pope on the grounds that it had been signed under duress – but, following the death of King John, it was re-issued several times, most notably in 1225[1] and re-enacted during the reigns of subsequent Monarchs.

Chapter 29 of the 1225 re-issue (previously Chapters 39 and 40 of the 1215 Charter), is still on the statute book, together with two other sections.[2] It is the oldest statutory provision still in force and is the nearest our law has to a sacred text. It is even more revered in America. According to Lord Bingham, between 1940 and 1960 the United States Supreme Court cited it in more than 60 cases and has done so again recently in the case of *Boumedienne v Bush* [2008], where it was held by a majority that the Guantanamo Bay detainees had a constitutional right to the writ of Habeas Corpus and that legislation purporting to remove that right was unconstitutional.

Since the original Charter was the product of negotiation, it embodied compromises and fudges and was plainly, as we say, open to interpretation. I suspect that King John was not particularly bothered by Chapters 39 and 40. When they spoke of "*iudicium parium*", they were not speaking of jury trial,

[1] Several of the original chapters or sections in the 1215 text were omitted in the 1225 re-issue with the result that Chapters 39 and 40 became Chapter 29.
[2] Which declare the independence of the Church and preserve the liberties of the City of London, without saying what they are.

which was in its infancy. When they spoke of "*lex terrae*", they did not mean due process. The King would probably regard whatever he did as "*per legem terrae*", since he was the source of law. Indeed precisely that view had been articulated by de Glanville writing in the 1190s:

> "*... it is the law that whatever pleases the prince has force of law;*"

and, as we shall see, it seems to have remained the view of the Stuart monarchs 400 years later. Such a view is also not unknown in modern times: as Richard Nixon said to David Frost: "*If the President does it, it is not illegal*". It is also worth noticing that "*iudicium parium"* and "*per legem terrae*" were arguably alternatives.

It was only subsequently, mainly as a result of six statutes passed during the reign of Edward III, that "*iudicium parium*" came to mean trial by jury, "*lex terrae*" came to mean due process and "*nullus liber homo*" came to apply to everybody. Magna Carta was certainly not forgotten; every monarch until Henry V was required to confirm his adherence to it upon his succession, but it was not top of the agenda during the Wars of the Roses and the Tudor despotism.

In the reign of James I, however, Magna Carta came to the fore. The reason, as so often in the law, was procedural.

There existed a number of writs which were essentially Royal commands to attend Court or bring something or somebody to Court; we used to call them subpoenas – now witness summonses. There were also writs which required a prisoner to be brought to Court for trial or to be transferred from one jail to another. These all contained the words "*habeas corpus*". But the Stuart

Justices began to make much freer use of a certain type of Habeas Corpus writ called "*Habeas corpus ad subjiciendum*".[3] The modern form of writ (in the Civil Procedure Forms) is almost identical to that in Coke's Institutes, save that the latter was in Latin.

Let's see how it works. It is a command from the Monarch to a jailer issued as a result of a complaint made to the Court that somebody is reported to be detained in custody. The jailer is required to do two things:

- bring the prisoner to Court in person – "habeas corpus"; and
- make a return stating the grounds of his detention with sufficient particularity to enable the Court to enquire into the legality of that detention.

It is a prerogative writ. It is issued by the Monarch's Judges as agents of the Monarch performing the Monarch's function – "*to no one will I deny right or justice; no free man shall be imprisoned save in accordance with the law of the land*". This is the King as the fount of justice, looking after his every subject. But suppose the reason for the prisoner's incarceration was the command of the King himself or his Government? Could the prerogative turn in on itself and control the King?

At the start of the 17th Century the notion of judicial independence, let alone the separation of powers, was unknown. The Judges were the Crown's agents. They went out on Assize as the King's eyes and ears and overseers of local administration. Their role was highly political. They held office "*de bene placito*" and could be sacked at the will of the King. They knew it and everyone knew it. Could they stand against the King? Not if they wanted to

[3] "Ad subjiciendum" means "to undergo".

keep their jobs. But they were lawyers, they had their professional pride and they were bound by custom and precedent. What would they do if their understanding of the law would not produce a result that the King had made clear that he wanted?

The King was all powerful. His role is described by Jenny Uglow in her book on Charles II, "A Gambling Man", as follows:

> "*Kingship was more than an office of state. The King was the heart that pumped blood and gave life to the nation: through his representatives his will flowed through all institutions of state and Church. He created peers and bishops, gave charters to Boroughs, appointed Judges, directed the Army and Navy, made war and declared peace. If he wished, he could confiscate all land, and he could levy taxes on all who walked upon it, on the crops and cattle in fields, the fish in the rivers, the riches in the mines. It was treason to curse him, and to wish, or even imagine, his death. He carried his subjects, as Hobbes said, like Jonah in the belly of the great Leviathan.*"

The King ruled through his Councils: the Privy Council, the Council of the Marches and the Council of the North. He exercised jurisdiction through a plethora of different Courts, not just Kings Bench, Common Pleas and Exchequer but the Chancery and the Star Chamber. These Courts competed for power and influence. The battle between Kings Bench and Chancery resulted in the famous Star Chamber Decree of 1616 following the Earl of Oxford's case.[4] That arose as a result of the Chancellor granting an injunction to prevent enforcement of an order of Chief Justice Coke and resulted in the King dismissing the Chief Justice. Another battleground was

[4] See my paper "**The Wicked Doctor and the Offended Earl**". James I's Star Chamber decree is the origin of the rule, now found in s.49 of the Senior Courts Act 1981, that, wherever there is any conflict between the rules of equity and the rules of the common law, the rules of equity shall prevail.

the use by the Kings Bench of the Prerogative Writs, notably Habeas Corpus and Prohibition.

It was not, however, until 1627 that the fat really hit the fire, resulting in a great constitutional, political and legal battle of no less importance than Magna Carta itself. Let me start a few years earlier. In 1624 King James' favourite, the Duke of Buckingham, conceived the idea that if Prince Charles was to marry the Spanish Infanta (thereby allying England with the dominant power in Europe) he had better go and woo her in person. The Prince and the Duke rode across Europe to Madrid incognito wearing false beards and, when they got there, managed to offend the Spanish nobility so greatly that they observed that they would rather drop the Infanta headlong into a well than hand her over to Buckingham. The Prince's suit failed. On such incidents does history turn.

Buckingham and Charles returned to England in a rage and encouraged the King to intervene against Spain in the Thirty Years War, something that all his reign he had wisely resisted. The people of England, who hated both the Duke and the Spanish, were delighted at the failure of the mission and the change of policy and celebrated in the streets. Parliament was summoned and voted a subsidy for a fleet. The country was now unknowingly set on the course which would lead to civil war. James died in March 1625 and passed the poisoned chalice to his son.

Charles thus inherited a war for which he needed money. He summoned his first Parliament. They voted him £130,000 (which was wholly inadequate) but declined to make him the usual lifetime grant of a customs duty called Tonnage and Poundage. The reason was the unpopularity of the King's

favourite, the Duke of Buckingham. Charles dissolved Parliament, only to call another the following year, which was equally unco-operative.

The King then resorted to extra Parliamentary fundraising. He issued a proclamation calling for a Forced Loan and used every device at the service of the State to enforce it – compulsory attendance at the Council for the great, forced drafting into the army for the lesser folk and ultimately, and on a wide scale, imprisonment for failure to cough up. To confirm the legality of it all, the King asked the Judges for a ruling. They refused to oblige. The King summoned the Chief Justice, Sir Randall Crewe, and sought his co-operation. When he refused, he was sacked and his place given to Sir Nicholas Hyde. The Judges' refusal merely emphasised the dubious legality of the loan and encouraged refuseniks. Over 100 of these were imprisoned by Royal Command.

Five Knights of the Shires decided to mount a legal challenge. On 3rd November 1627 they applied for writs of Habeas Corpus. Their objective was to get the Government to state in the return to the writ the ground of their detention, viz. refusal to pay the loan, so that the legality of the exaction could be made the subject of examination by the Court. The Crown was not going to play ball. The return simply stated that each prisoner was "*Detentus in prisona … per speciale mandatum Domini Regis* …" and stated no other cause. This switched the issue from the legality of the loan to the much more delicate question as to whether the King had power to commit Englishmen to prison simply because he saw fit. Was this what Magna Carta meant by "*per legem terrae*"?

The Judges were in a political bind. If they released the prisoners, they would displease the King, who would probably sack them for questioning his

prerogative. If they did not release the prisoners, they would probably have been impeached in Parliament for not doing their judicial duty. Prudently they remanded the prisoners in custody and adjourned the case to the following term. Shortly after Christmas, the King, having collected enough money, ordered the Knights released, so the case was never finally resolved.

When Parliament met in March, every loan refusenik who stood was returned. Twenty-seven MPs had been imprisoned on the King's command. They were cross as wasps. Not only had they and their friends been imprisoned or threatened or drafted into the army or hauled up to London to attend Council but Buckingham had recently conducted another disastrous expedition against the Island of Ré and troops had been forcibly billeted on householders. The big issue, however, was imprisonment without cause expressed.

It is difficult to convey to a modern audience the intensity of feeling in this Parliament or the gravity of the issues at stake. The reformers were determined to assert and to have established for good the principles of no taxation without consent and no imprisonment without due process and trial according to law. The traditionalists were content to accept that the sovereign could exercise extra judicial prerogative powers. Those who opposed the King were risking their liberty and perhaps their lives. In those days there was no "loyal opposition". Opposition was treason.

In Parliament Coke and Selden and others spoke out in defence of an Englishman's right to his property and his liberty. Coke, however, was caught out badly. In one of those forensic coups that we advocates can only dream about, the Solicitor General was able to refer to two cases: in the first in 1592 Coke, while himself Solicitor General, had advised the Council that a person committed by the Privy Council was not bailable; in the second in

1616 Chief Justice Coke had decided that in such a case the cause of imprisonment was to be taken to be "*arcana regni*" and need not be disclosed. Coke was thrown into confusion. He returned to the House two days later to say that his previous advice and decision had been mistaken and could not stand against a number of statutes which he had unfortunately overlooked.

The Commons then drew up four resolutions to the effect that no freeman was to be imprisoned without cause shown, even at the King's command; and that taxation except by consent of Parliament was unlawful. It was then necessary to get the Lords on board. Coke and Selden were sent to sell the need for some instrument declaratory of the law to the Lords in the light of the threat to everybody's liberty posed by the five Knights' case. While they waited for the Lords' reply, the Commons debated and resolved to give the King five subsidies but decided not to pass the Bill except for a quid pro quo. The House resolved "*that grievances and supply go hand in hand*".

What they got back from the Lords was a watered down version larded with reference to "*His Majesty's Royal prerogative, intrinsical to his sovereignty*". The Commons rejected it as useless. As Coke put it, "*Reason of State lames Magna Carta*".

It was now the end of April and the King had not got his money. He came to Parliament and addressed it through the Lord Chancellor. He accepted that Magna Carta and the other statutes were all in force; he would respect the freedom and property of his subjects; they could trust his word; would they now please proceed to his business? But the Commons stood firm. During the debate a message came from the King: "*Would they clearly state whether they would rest upon his Royal word and promise?*" That was a heart-stopper. The Commons could not say "*No*" but they could hardly

assent. Messages passed back and forth. Coke came up with a wonderfully ambiguous line:

> "*Not that I distrust the King; but that I cannot take his trust but in a Parliamentary way*".

Coke then proposed the idea of a petition of right[5] which would be voted on by both Houses and given the Royal Assent and thus have the authority of law. It was to:

- confirm an Englishman's right to liberty and security from imprisonment without cause;
- reaffirm Magna Carta;
- prohibit billeting of soldiers and martial law in peacetime; and
- prohibit taxation without consent of Parliament.

Again it had to be sold to the Lords. Again the King refused to give up the power of discretionary imprisonment. Again the Lords tried to insert weasel words to sugar the pill for the King: "*... with due regard to leave entire that sovereign power which etc ...*". Again Coke and the Commons' lawyers said "*No*", Coke with his famous aphorism:

> "*Magna Carta is such a fellow that he will have no sovereign.*"

For the time, those words were incredibly brave – only the sovereign had no sovereign.

The Lords capitulated. On 2nd June the King came to Parliament to assent to the petition. It was read. All waited for the traditional words of assent:

[5] To be contrasted with a petition of grace. By the former the petitioner sought relief as of right based on existing law: by the latter he sought a favour or indulgence to which he had no pre-existing entitlement.

"*Soit droit fait comme il est desire*".

But they did not come. Instead the Lord Chancellor delivered an agreeable but ambiguous formula which ended with the ominous word "*prerogative*".

At this point it is instructive to look at the text of the Petition to understand why it was provoking so much Royal resistance and why, as we shall see, Charles I found the whole affair so traumatic and humiliating. As so often, reference to the primary source material is revealing.

The Petition of Right is quite a short document containing only eight articles, the first seven of which are recitals describing all the unlawful acts done under the King's authority, emphasising in each case that they were indeed contrary to established law (including the Great Charter) and the eigth of which says very politely "*Please don't do any of these things ever again*".[6] By giving the Royal assent the King would in effect be acknowledging his unlawful conduct and giving that promise.

Next day the Commons sat again. They received a message from the King: they must proceed to business; they had one week. The Commons were in despair. Sir John Eliot rose to speak and was about to cast all the blame for the Royal intransigence on the Duke of Buckingham, when the Speaker rose and told the House that he was under command from the King "*to interrupt any that should go about to lay any aspersion on the Ministers of State*". Eliot sat down and the House fell silent. The silence was broken by Sir Nathanial Rich with the famous line:

"*We must speak now or forever hold our peace.*"

[6] You can read it in Appendix D of Anthony Arlidge and Igor Judge's book "Magna Carta Discovered" or in Halsbury's Statutes, Vol 10(1), p.108.

Catherine Drinker Bower in her splendid book on Coke, "The Lion and the Throne", describes the scene that followed:

> "*Pym rose, tried to speak and wept outright; Coke followed with a like dramatic result. "Overcome with passion, and seeing the desolation likely to ensue, Sir Edward Coke was forced to sit down when he began to speak, through the abundance of tears. Yea, the Speaker in his speech could not refrain from weeping and shedding of tears, beside a great many whose great griefs made them dumb and silent. Yet some bore up in that storm and encouraged others". "That black and doleful Thursday", a newswriter called it. "Such a spectacle of passions, as the like had seldom been seen in such an assembly, some weeping, some expostulating, some prophesying the fatal ruin of our kingdom; some playing the divines in confessing their own and country's sins, which drew those judgments upon it; some finding, as it were, fault with those who that wept. I have been told by a Parliament man that there were about a hundred weeping eyes.*"
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> *It was an extraordinary scene. These men who wept outright before their fellows were not the timid spirits of Parliament but members whose courage already had been tested, some of whom had suffered imprisonment for the cause. They wept from helplessness, frustration, a temporary loss of hope. By the King's message it would seem he stood against his subjects altogether and could not be separated from that man of evil who was at the root of all the kingdom's wrongs."*

Sir Edward Coke now rose to make his last speech in Parliament. He bravely and in defiance of the King's command named the Duke of Buckingham as the cause of all the country's miseries, calling him the grievance of grievances. The Lords were consulted and they dispatched a joint deputation to ask His Majesty for a "*clear and satisfactory answer*" to their Petition of Right.

The next day the speaker brought a message that the King wished again to meet with Parliament "*that all Christendom might take notice of a sweet parting between him and his people*". Two days later, the King came again to Parliament. The petition was read again and this time the Clerk to the House read the magic words of Royal Assent.

> "*As the words were pronounced, a great shout rang, and was repeated again and again. News spread to the street – "broke out", wrote a Privy Councillor, "into ringing of bells and bonfires miraculously". From steeple to steeple the joyous sound was echoed. The City heard, three miles away, and as the June dusk began to fall there were bonfires "at every door, such as were never seen but upon His Majesty's return from Spain".*"

So the Petition of Right became law. It is the link between Magna Carta and Article 5 of the European Convention, which says much the same as the Latin text but at much greater length. It is England's gift to the free world.

So scarred was he by the experience of his third Parliament, its readiness to bargain with the Government and its palpable distrust of his intentions, that the King did not call another Parliament for 11 years. He ruled by means of increasingly desperate fiscal devices to raise revenue without Parliamentary approval, thus stoking up a terrible anger in the populace. When he called his fourth Parliament in 1640, the situation rapidly deteriorated into civil war.

Later in 1628 another event occurred germane to our theme. I cannot improve on the words of Lord Hoffman in the case of the Belmarsh detainees[7]:

> "*My Lords, on 23rd August 1628 George Villiers, Duke of Buckingham and Lord High Admiral of England, was stabbed to death by John Felton, a naval officer, in a house in Portsmouth.*

[7] A v Secretary of State for the Home Department (No.2) [2005] 3 WLR 1249 at [81].

> *The 35 year old Duke had been the favourite of King James I and was the intimate friend of the new King Charles I, who asked the Judges whether Felton could be put to the rack to discover his accomplices. All the Judges met in Sergeants Inn. Many years later Blackstone recorded their historic decision: "The Judges, having consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England".*"[8]

So in 1628 were laid some of the foundations of our law of human rights.

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[8] There seems to be some doubt about the authenticity of Blackstone's account. See the speech of Lord Bingham at [11]. It is also odd that Coke makes no reference to Felton's Case in his Institutes Part III Ch 2 pp34 -36, where he wrote "There is no law to warrant torture in this land". The answer may be that 3 Inst was written before 1628 (which it was) but it was not published until 1641 and it would have been a simple matter for Coke to have added reference to the most recent and conclusive authority on the point while he was working on 4 Inst. See also Jardine, "The Use of Torture in the Criminal Law" (1836)