MAGNA CARTA'S ROUNDABOUT RELEVANCE TO THE CONVICT COLONY OF NSW

A paper presented to the Magna Carta Symposium at the State Library of NSW on 7 May 2015

By Andrew Tink AM

According to the philosopher and jurist, Jeremy Bentham, the detention of what he called 'expired convicts' in the colonies was a breach of Magna Carta, which, he said, applied in NSW as well as in England.[i] Such was Bentham's prominence in the late 18th and early 19th centuries that I expected to find numerous references to Magna Carta in the early colonial records of New South Wales, especially the early court cases.

However I could find no mention of Magna Carta in either *The Kercher Reports* or *Dowling's Select Cases*, which between them cover many of the key court reports between 1788 and 1843.[ii] Given that the Australian Senate's website claims 'Magna Carta is much quoted by Australians when they are representing themselves in court cases', [iii] I wondered why their ancestors did not appear to do likewise.

At one level it can be argued that Bentham was wrong, and that there was nothing in either the *Transportation Act* of 1784 or the Act of Parliament establishing NSW, which prevented a convict whose term of transportation had expired, from returning to England – other than the extreme distance and great expense involved. [iv] But that does not necessarily explain the absence of other references to the Great Charter in early NSW.

What may help to do so is the fact that, from as early as July 1788, the Common Law as applied in the convict colony had in a key respect leapt ahead of that applied in England. So if by clause 39 of Magna Carta as agreed to by King John in 1215, there was an acknowledgment of the primacy of the Common Law, and this was recognised as one of the main ongoing legacies of the settlement

between the king and his barons at Runnymede, then in some ways from its earliest colonial days, NSW was ahead of England when it came to fundamental rights.

How can this be so when an examination of other early colonial records, such as newspaper reports and dispatches between NSW officials and the British government, reveals that there is nothing about Magna Carta until 1827, and then only a few mentions, which peter out by 1831? In my view, the answer lies principally with Lord Sydney, who was primarily responsible for sending the First Fleet to Botany Bay, and with the convict colony's first and fifth governors, Arthur Phillip and Lachlan Macquarie. Like Sydney, they were enlightened men.

Over the last 800 years, the importance of Magna Carta has waxed and waned. For some, it continues to be the defining recognition of ancient liberties, reaching back at least to the time of Edward the Confessor. For others, the Great Charter was never more than a tenuous peace treaty between King John and his rebellious barons. [v] But even this more restricted view implied a direct challenge to King John's claim to rule by divine right. And it was the Stuart kings' claim to rule by the will of God alone in the seventeenth century which gave Magna Carta renewed relevance.[vi] When Charles II asserted in the 1680s that God had put him on the throne and only God could remove him, it was Lord Sydney's great-great uncle, Algernon Sidney, who countered in *Discourses Concerning Government* that 'the power originally in the people of England is delegated into the Parliament… and we may therefore change or take away kings'.[vii]

In *Discourses*, Sidney relied specifically on Magna Carta. To support his proposition that 'To depend on the Will of a Man is Slavery' he said 'the intention of our ancestors was, without doubt, to establish this among us by *Magna Carta*'. Similarly, to ground his assertion that 'Laws are not made by Kings…because Nations will be governed by Rule, and not arbitrarily', Sidney wrote 'the Great Charter that recapitulates and acknowledges our ancient inherent liberties, obliges… [the king] to swear that he will neither sell, delay, nor deny justice to any man, according to the laws of the

land'.[viii] For writing *Discourses* and thereby daring to challenge King Charles II's claim to rule by divine right, Sidney was found guilty of treason. And on 7 December 1683, he was beheaded. Thereafter he became a martyred hero to those who believed that the will of the monarch should be subject to the will of Parliament, among them Tommy Townshend. 'A drop of the blood of [Algernon] Sidney is in my veins', Townshend proudly told the House of Commons ninety years after his future namesake's execution.[ix]

After suffering setbacks during his early parliamentary career as a government hack, Townshend began to support radical causes, among them that of John Wilkes, who had been repeatedly expelled from Parliament for defaming King George III, only to be repeatedly re-elected by his constituents. 'My aim is to perfect the plan of securing and guarding the liberties of the freest nation in the world, against the future attacks of wicked ministers', Wilkes proclaimed, 'built on the firm basis of Magna Carta'.[x] Backing Wilkes to the hilt, Tommy Townshend addressed the Commons. 'The members of this House must not ask whether the man whom the electors have chosen is fit company for them', Townshend said. 'He acquires an indisputable title to admission by that election and that election alone'.[xi]

As the author of the American Declaration of Independence, Thomas Jefferson, later acknowledged, Algernon Sidney had been one of his inspirations. In *Discourses*, Sidney had asserted 'nothing can be more evident than that if many [men] had been created they had all been equal'. Mirroring this in his Declaration, Jefferson famously proclaimed: 'we hold these truths to be self-evident; that all men are created equal'.[xii] And during the American Revolutionary War, Tommy Townshend remained true to Algernon Sidney's principles, being among just a handful of members of the House of Commons who strongly backed 'the revolted American colonists', as George III liked to call them. [xiii]

Ironically, in the new British government which emerged after the war, Tommy Townshend became Home Secretary, responsible for negotiating a peace treaty with the Americans. Grateful for Townshend's efforts to provide for American loyalists, the king offered him a peerage. And in that way, Tommy Townshend became Lord Sydney.[xiv] Then, after the United States refused to accept any more British convicts, it fell to Lord Sydney to find an alternative. Refusing to adopt Jeremy Bentham's proposal to build a giant penitentiary or Panopticon, so called because it allowed a single watchman to observe all the inmates without the inmates being able to tell whether they were being watched, Sydney settled on a resumption of transportation, this time to Botany Bay.[xv]

Pursuant to the Transportation Act of 1784 which Lord Sydney had helped to sponsor through the British Parliament, convict overseers 'could inflict…such moderate punishment…as may be inflicted by law on persons committed to a House of Correction'. So the convicts had substantial rights under British law, just as their overseers had substantial responsibilities. And as has now been generally accepted by historians, generous provision was made for the First Fleet.[xvi] While Governor Phillip, as Marine Captain Watkin Tench put it, was left 'to act entirely from his own judgment', without the benefit of a council, other legal arrangements, more in the spirit of Magna Carta, had been agreed to by Sydney and Phillip, to the consternation of the First Lord of the Admiralty. [xvii] Among these was an instruction that the convicts would be subject to the ordinary criminal law and not to the harsher military law which applied to the Marines. And pursuant to Letters Patent, Lord Sydney established a Court of Civil Jurisdiction which could hear an action 'upon complaint to be made in writing to the said Court by any person or persons against any other person or persons residing or being within the said place of any cause or suit'.[xviii]

As the First Fleet was being made ready, three female convicts were handed over to the master of their convict transport, by their jailer, John Simpson. One of them, Susannah Holmes, was accompanied by her infant son who the master refused to allow on board. Appalled that mother and

child would be separated, Simpson took the infant and rode up to London where he hoped to remonstrate with someone in the Home Office. Upon arrival, Simpson bumped into Lord Sydney himself who was quickly convinced to sign the papers which would allow the infant to accompany its mother. And almost as an afterthought, he signed papers allowing the baby's father, a convict by the name of Henry Cable, to go too. The press soon got hold of this story and Cable, Holmes and their baby quickly became celebrities, so much so that the public donated to a trust fund to help them on their way to Botany Bay. In their wisdom, the trustees purchased clothes and books which were placed in a Hessian sack and loaded onto the transport, *Alexander*; the Cables sailed on another vessel.[xix]

When Cable went to collect his sack after arriving at Sydney Cove, he was told by the *Alexander's* master, Duncan Sinclair, that the clothes had gone missing and only the books could be found. Meanwhile, the Court of Civil Jurisdiction had been established and so, after taking advice, Cable sued Sinclair for damages. And following a three day hearing in early July 1788, presided over by the Judge Advocate, David Collins, Cable was awarded damages of 15 pounds. So it was that in *Cable v Sinclair*, the first civil suit brought in Australia, a convict successfully sued the master of a First Fleet transport for lost luggage. As a convict under sentence, Cable would have been unable to bring his claim for damages in England. But in the convict colony, different rules were applied. In this way, the Common Law, which lies at the heart of Magna Carta, was more advanced in the convict colony than it was in the old country.[xx]

Even in the face of general starvation, Governor Phillip exercised his enormous powers wisely. And this, combined with his personal example, such as accepting the convict ration, helped the colony to survive. Just as important, was his judicious use of the power Lord Sydney had given him to emancipate well behaved convicts and to grant them land.[xxi]

However when Phillip departed in 1792, he handed over temporary control to the Rum Corps commander. This ushered in years of instability, as later naval governors struggled to assert their authority over the by now politically entrenched Corps and its fellow travellers. [xxii] These simmering tensions finally climaxed on 26 January 1808 when the Rum Corps commander, Major Johnston, arrested Governor Bligh and assumed government. At a time when Britain was fighting for its life against the French, this was a risky strategy. And so, unsurprisingly, Johnston made no specific reference to Magna Carta to justify himself. Even so, his dispatch to Viscount Castlereagh had a familiar ring to it:

> Governor Bligh has betrayed the high trust and confidence reposed in him by his sovereign, and acted upon a predetermined plan to subvert the laws of his country, to terrify and influence the courts of justice, and to bereave those persons who had the misfortune to be obnoxious to him of their fortunes, their liberty, and their lives…one act of oppression was succeeded…by a greater, until a general sensation of alarm and terror prevailed throughout the settlement'.[xxiii]

If King John had not signed Magna Carta in 1215, the barons might well have drawn up something similar.

Notwithstanding the shenanigans between the early governors and the colony's political factions, many inhabitants had been doing well, in no small part due to the policy Lord Sydney had set in train, of emancipation and land grants. And thanks to the enlightened insight of the colony's fifth governor, Lachlan Macquarie, they were recognised in a new policy which had no precedent in England. On 30 April 1810, Macquarie wrote to Viscount Castlereagh:

> I have taken upon myself to adopt a new line of conduct, conceiving that emancipation, when united with rectitude and long-tried good conduct, should lead a man back to that rank in society which he had forfeited, and do away, in as far as the case will admit, all retrospect of former bad conduct. This appears to me to be the greatest inducement that can be held out towards the reformation of the manners of the inhabitants, and I think it is consistent with the gracious favour of this class of people. [xxiv]

Macquarie then explained that he had allowed four ex-convicts to dine with him: the principal surgeon D'Arcy Wentworth, his assistant William Redfern, the prosperous farmer and landowner Andrew Thompson, and the wealthy merchant Simeon Lord. While Wentworth had never in fact been convicted of anything, it was widely believed that he was an ex-highway man. 'They have long conducted themselves with the greatest propriety', Macquarie said, 'and I find them at all times ready to come forward in the most liberal manner to the assistance of government'. To reward this, Macquarie advised that he had appointed Thompson as a magistrate in the Hawkesbury and that he would soon appoint Wentworth and Lord as magistrates in Sydney.[xxv]

Had Jeremy Bentham's Panopticon been built, it is difficult to imagine that it could ever have delivered fully reformed convicts on the scale now contemplated by Governor Macquarie. Nor would ex-convicts have been allowed to sit as magistrates in England. In this way, the administration of law in the colony had over-leaped that of England. But the prospect of being judged by ex-convicts offended many of the so-called 'exclusive' free settlers. And although it seems that they never couched their objections in terms of Magna Carta, clause 39 would have allowed them to do so. 'No freeman shall be proceeded against', it says, 'except by the lawful judgment of his peers'.[xxvi] Nevertheless, the exclusives objected to London about ex-convict magistrates in their own way. And as a result, Commissioner John Bigge was appointed to inquire into the Macquarie administration.

But the governor did not help himself when he defied the commissioner and appointed another ex-convict, William Redfern, to the bench. [xxvii]

It was D'Arcy Wentworth's son, W.C. Wentworth, who made the first comprehensive pitch for constitutional reform of the convict colony. In *A Statistical, Historical, and Political Description of The Colony of New South Wales*, a book written and published in England in 1819, Wentworth proposed the introduction of trial by jury, a free press, an elected legislature, and an independent Supreme Court. But nowhere in this book of almost 500 pages is there a reference to Magna Carta. Rather, his arguments were put in more general terms. 'It is a fundamental maxim of the British constitution', Wentworth wrote, 'that no taxes shall be levied on the subject without his consent, expressed by his representatives'.[xxviii] Even so, this maxim derives indirectly from clause 12 of the Great Charter which begins: 'no scutage [a military tax] nor aid shall be imposed on our kingdom, unless by common counsel of our kingdom'.[xxix]

Following on from Commissioner Bigge's reports in 1822, an independent Supreme Court was established, limited trial by jury was implemented, and an appointed Legislative Council was established. [xxx] Macquarie's successor, Thomas Brisbane, also introduced what he called 'the experiment of full latitude of freedom of the press'.[xxxi] Anticipating these concessions in the second edition of his book, Wentworth had written:

> It is probable that all the privileges, which the author has contended for will be conceded excepting perhaps [full] trial by jury and the establishment of a House of Assembly; and if these privileges are withheld a little longer…it will only be from a conviction…that the colony has not yet arrived at a sufficient degree of maturity for the reception and exercise of them.[xxxii]

The granting of these further constitutional concessions was ultimately an issue for the British government and Parliament. And having been taught a lesson by the revolted American colonists less than half a century earlier, it was a matter of when not if full trial by jury and an elected legislature would be introduced. However while emancipists were eager for these changes as soon as possible, some exclusives fought a vigorous rear-guard delaying action, motivated especially by the prospect of being judged by juries of ex-convicts. Another complication was Governor Brisbane's successor, Ralph Darling, a prickly military martinet, who bridled at any criticism of his administration in the colony's now often pointed newspaper editorials. Indeed it was the conflict between Darling and those pushing for reform, which triggered the only direct official reference I could find to Magna Carta, up to 1844.

To petition the king and both houses of Parliament for full trial by jury and an elected legislature, a public meeting was held at Sydney's court house on 26 January 1827. There a large crowd was addressed by William Charles Wentworth. 'These constitutional rights belonged as much to the people as the crown belonged to the king', he said. 'They were the birth-right of the people and nothing but the strongest necessity could justify withholding them an instant'. So the petition itself set out to show that there was no such necessity.[xxxiii]

In relation to jury trials, the petitioners were careful to point out that 'the competency for trial by jury has been proved by upwards of two years' experience of that mode of trial in the Court of Quarter Sessions'. Therefore the inference was that to extend it to all trials carried very little risk; it would be an incremental change. It was in relation to the call for an elected legislature that the petition invoked the Great Charter. Referring to the colony's annual revenue of 60,000 pounds, the petitioners argued that 'this enormous sum has hitherto been levied on your Majesty's humble Petitioners by authority of Parliament and otherwise without their consent, contrary to Magna Carta'. While the editor of Sydney's *Monitor* newspaper described it as 'contrary to an express

clause in Magna Carta', my view is that it is, at best, an oblique reference to clause 12 which I mentioned earlier. Whatever the case, the petition then addressed itself to the practical matter of whether there were enough people in the colony qualified to stand for election. 'There are eighty eight gentlemen who have been raised to the magistracy', the petition argued, 'and three times as many gentlemen…who are equally fitted by their wealth and talents to act as members of a legislative assembly'.[xxxiv]

Such arguments left Governor Darling unimpressed. And in his covering despatch which accompanied the petition to the Colonial Secretary, Lord Bathurst, for presentation to the king, Darling said: 'Its state of infancy must at present render New South Wales unfit for those Institutions, which in England are the result of its advancement and maturity'. [xxxv] No doubt anticipating this, Wentworth had seen to it that copies of the petition would be taken to London by Gregory Blaxland and there presented to sympathisers in both houses of Parliament.[xxxvi] As the editor of the Sydney *Monitor* put it, 'Lord Bathurst is not as cordial towards a House of Assembly as he ought to be. We are glad therefore that Parliament has been petitioned as well as the king'.[xxxvii]

Although this campaign for constitutional reform had some years left to run, I could only find two later references to Magna Carta up to 1843, by which time trial by jury and a partially elected legislature had been introduced into New South Wales. The first was in a letter which *The Sydney Gazette* published on 13 August 1829. After quoting the Latin version of Magna Carta's clause 39, the writer argued that the freeborn children of emancipists should have the benefit of unlimited trial by jury.[xxxviii] And the second reference appeared as an article in *The Australian* of 30 July 1830. Claiming that 'upon the principle of Magna Carta, a verdict of twelve men is to be a verdict of law', the paper criticised an unidentified court judgment on the basis that a positive jury verdict for the defendant had been replaced by a special verdict of the judge.[xxxix] This was in fact a reference to the 1830 case of *R v Payne [No.2]*. According to the official court report:

> The Attorney General [had] allowed the case to go to the jury and they found a verdict for the defendant against the direction of the Judges who ruled that upon the pleadings the crown was entitled to judgment…[The defendant's barristers] Wardell and Wentworth admitted [on appeal] that in strictness of law the defendant had not made out any title against the crown, but insisted that in equity the verdict ought not to be disturbed.[xl]

As the colony's two finest barristers, Richard Wardell and William Charles Wentworth must have known that their argument would not succeed. So perhaps it is no coincidence that the appeal to Magna Carta appeared without attribution, in a newspaper which they had founded back in 1824.

Although specific references to Magna Carta during the convict colony's first few decades are few and far between, the name of the last man to be executed for invoking it has been celebrated here since 22 January 1788 when Governor Phillip named Sydney Cove after the Home Secretary, Lord Sydney.[xli]

How so? Well, five years earlier, when he had been offered a peerage for his role in securing a peace treaty with the revolted American colonists, the Home Secretary, then still known as Tommy Townshend, chose the name Sydney for his title in honour of his revered ancestor, Algernon Sidney. So why is there a difference in the spelling? In fact Townshend had first proposed Sidney with an 'i' to George III. But then he discovered what he called 'the elder branches' of his family might have a claim on it. So he wrote to the king as follows:

> The consideration of the title itself occupies my thoughts no farther than to avoid taking any one which might clash with the pretensions of any other family…If your majesty…will allow me to change the title to Sydney of Chislehurst…neither of which are claimed by anybody

> and to which I am allied…by the Sydneys and the Veres I hope my relatives will be satisfied and that I shall offend no one else.[xlii]

In this roundabout way then, the name of our great city celebrates Algernon Sidney – the last man to be martyred for invoking Magna Carta against an absolutist British king.

---

[i] A. Pallister, *Magna Carta the heritage of Liberty*, Oxford at the Clarendon Press, 1971 [*Pallister*] p. 85.
[ii] B.Kercher and B.Salter (eds) *The Kercher Reports*, Francis Forbes Society for Australian Legal History, Sydney, 2009 [*Kercher*]; T. Castle and B. Kercher (eds) *Dowling's Select Cases*, The Francis Forbes Society for Australian Legal History, Sydney, 2005 [*Dowling*].
[iii] www.magnacarta.senate.gov.au/index.php/law/ accessed 13 March 2015.
[iv] 27 George III, 1787, in *Historical Records of NSW*, [*HRNSW*] Volume I, Part 2, pp. 67-70; A Atkinson, *The Europeans in Australia*, Volume I, Oxford University Press, Melbourne, 1998 [Atkinson] p. 75.
[v] *Pallister*, pp. 2-3; W. McKechnie, *Magna Carta*, Burt Franklin, New York, 1914 [*McKechnie*] pp. 105, 111.
[vi] *Pallister*, p. 39.
[vii] A. Tink, *Lord Sydney: the life and times of Tommy Townshend*, Australian Scholarly Publishing, Melbourne, 2011 [*Tink1*] p. 3.
[viii] T. West (ed.) *Discourses Concerning Government by Algernon Sidney*, Liberty Classis, Indianapolis, 1990, pp. 17, 392, 394.
[ix] *Tink1*, pp. 1, 53, 135-136.
[x] *Pallister*, p. 61.
[xi] *Tink1*, p. 47.
[xii] *Tink1*, p. 65.
[xiii] *Tink1*, pp. 65-106.
[xiv] *Tink1*, p. 135.
[xv] J. Plamenatz, 'Jeremy Bentham', www.britannica.com/EBchecked/topic/61103/Jeremy-Bentham/8166 accessed 14 March 2015; *Tink*, p. 205.
[xvi] *Tink1*, pp. 218, 238.
[xvii] W Tench, *1788*, Text Publishing, Melbourne, 2009, p. 47; *Tink*, pp. 221, 224.
[xviii] *HRNSW*, Volume I, Part 2, pp. 70-71.
[xix] W. Windeyer, 'A Birthright and Inheritance', *Tasmanian Law Review*, Volume 1, 1958, p. 659.
[xx] *Kercher*, pp. 15-20.
[xxi] D. Clune & K. Turner (eds) *The Governors of New South Wales* 1788-2010, Sydney, 2009 [*Clune & Turner*], p. 39; *Tink1*, p. 225-226.
[xxii] *Clune & Turner*, pp. 44-102.
[xxiii] *Historical Records of Australia* [*HRA*] Volume VI, pp. 208-209.
[xxiv] *HRA*, Volume VII, pp. 275-276.
[xxv] *HRA*, Volume VII, p. 276.
[xxvi] *McKechnie*, p. 375.
[xxvii] M. Ellis, *Lachlan Macquarie*, Angus and Robertson, Sydney, 1952, p. 474.
[xxviii] W.C. Wentworth, *A Statistical, Historical, and Political Description of the Colony of New South Wales etc.* G & W.B. Whittaker, London, 1819, p. 357.
[xxix] *McKechnie*, p. 232.
[xxx] A. Tink, *William Charles Wentworth*, Allen and Unwin, Sydney, 2009 (*Tink2*) pp. 65-66.

[xxxi] *Tink2*, p. 72.
[xxxii] *Tink2*, p. 52.
[xxxiii] *The Sydney Gazette*, 27 January 1827.
[xxxiv] *HRA*, Volume XIII, pp. 52, 56.
[xxxv] *HRA*, Volume XIII, p. 99.
[xxxvi] *The Sydney Gazette*, 27 January 1827.
[xxxvii] *The Monitor*, 3 February 1827.
[xxxviii] *The Sydney Gazette*, 13 August 1829.
[xxxix] *The Australian*, 30 July 1830.
[xl] *Dowling*, pp. 681-682.
[xli] *Tink1*, pp. 228-229.
[xlii] *Tink1*, pp. 135-136.