

# THE WELSH AND SCOTTISH PART IN THE MAKING OF MAGNA CARTA<sup>1</sup>

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Magna Carta was engrossed, sealed and issued by King John at Runnymede, between Staines and Windsor, on 15 June 1215,<sup>2</sup> following five days of intensive discussion and negotiation, during which many of the Articles of the Barons (which King John had accepted in principle) were extended, or re-arranged, or had their contents broken up and redistributed, while gaps in their coverage were filled.<sup>3</sup>

## INTRODUCTION

To put what was going on in the negotiations around Magna Carta into a context that makes sense of the role Wales and Scotland played in its creation, it is necessary briefly to consider the wider European position and the part that shifting ideas about monarchy and liberty played there. This is not simple. Most of the substantial recent works discussing the growth of intellectual ideas in the twelfth century are mainly concerned with the more abstract issues of philosophy and theology and make few direct references to legal ideas even though it is philosophy that underlies the changing

<sup>1</sup> The term Britain is deliberately chosen in this article because in 1215 it was more than the future of England alone that was at stake.

<sup>2</sup> Well, that is the date on the charter—but some historians, never willing to accept the obvious, have argued that it was actually finalized on 19 June.

<sup>3</sup> The Magna Carta Project: <http://magnacarta.cmp.uea.ac.uk>. Accessed 31 December 2017. Just one Article (no. 13 Assizes of novel disseisin and mort d'ancestor are to be expedited, and other assizes likewise) has no equivalent in Magna Carta, but six chapters of Magna Carta (1, 14, 19, 21, 24, and from our point of view most importantly 57) have no equivalents among the Articles of the Barons.

definitions of the nature of law.<sup>4</sup> Reference to philosophy in the studies of Roman law and Canon law which were becoming common in most universities including Oxford and Cambridge and interacted at some levels with the secular law are equally passing<sup>5</sup> although they contributed to establishing the role of the papacy as the final arbiter in difficult legal issues.<sup>6</sup>

### *STATES AND THEIR JUSTIFICATION IN 1200*

Conceptual ideas about government in Europe had substantially altered by 1200. In a dramatic presentation Keith Stringer describes it as the period that saw ‘the birth of the modern West European state.’<sup>7</sup> It has to be said, however, that at that time the definition of state was not uniform across Europe. Although all areas were influenced by the newly rediscovered Roman and canon law, Aristotle and other Roman philosophers, the states of Europe were developing varying and quite different constitutional systems and alternative ways of incorporating customary practices—from the French and Spanish, where localities clung to customary laws that

<sup>4</sup> For example, Marcia L. Colish, *Medieval Foundations of the Western Intellectual Tradition 400–1400* (New Haven, CT: Yale University Press, 1997), esp. pp. 160–70.

<sup>5</sup> James A Brundage, ‘The Teaching and Study of Canon Law in the Law Schools’, in Wilfred Hartmann and Kenneth Pennington (eds), *The History of Medieval Canon Law in the Classical Period 1140–1234* (Washington, DC: Catholic University of America Press, 2008), pp. 98–121.

<sup>6</sup> Charles Duggan, ‘Decretal Collections from Gratian’s *Decretum* to the *Compilationes antiquae*: the making of the new case law’, in Wilfred Hartmann and Kenneth Pennington (ed.), *The History of Medieval Canon Law in the Classical Period 1140–1234* (Washington, DC: Catholic University of America Press, 2008), pp. 246–292.

<sup>7</sup> Keith Stringer, ‘The Emergence of a Nation-State, 110–1300’, in Jenny Wormald (ed.), *Scotland: A History* (Oxford: Oxford University Press, 2005), p. 38.

were eventually written down,<sup>8</sup> to the Holy Roman Empire with its hundreds of entities represented in the Reichstag and with a legal existence where a culture of compromise and negotiation, checks and balances governed flexible connections between the centre and strong local sub-states over which the emperor had little authority.<sup>9</sup>

Academic ‘lawyers’ in Europe were beginning to articulate the implications of these shifts in the perceptions of kingdoms. For them a king did not simply wield political power he also exercised jurisdiction as the ultimate authority for making and maintaining the law. This was based on two civil law ideas that were new to scholars in the 1100s: first, that a king should have no superior; and second, that a king had as much authority in his kingdom as the Holy Roman Emperor. The Emperor—seen as the successor of Roman emperors—was the embodiment of all authority: he was ‘lord of the world.’<sup>10</sup> But the position of the pope was in opposition to this.

By applying these new ideas about kingship to a kingdom, the king’s authority over his people was recast as jurisdiction over a territory. The seed of this idea of national sovereignty had been sown even in places as geographically remote as Scotland.<sup>11</sup> The relationship between the regime and the people was complex and the basis of royal authority and the relationship of ruler and vassal could differ from one place to another—whether the ruler was

<sup>8</sup> J. H. Elliott, ‘The Cultural and Political Construction of Europe. A Europe of Composite Monarchies’, *Past and Present*, Vol. 137, Part 1 (1992), pp. 48–71.

<sup>9</sup> In his introduction Joachim Whaley, in *Germany and the Holy Roman Empire* (Oxford: Oxford University Press, 2013), Vol. 1, shows something of the complexity here.

<sup>10</sup> See Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), Chapter 3; Manlio Bellomo, *The Common Legal Past of Europe 1000–1800*, 2<sup>nd</sup> edition, translated by Lydia G. Cochrane (Washington DC: Catholic University of America Press, 1985), Chapter 5.

<sup>11</sup> Dauvit Broun, ‘Scottish Independence: Roots of the Thistle’, *History Today*, Vol. 64, No. 3 (2014). At: <http://www.historytoday.com/archive/history-today/volume-64-issue-3-march-2014>. Accessed 6 December 2017.

bound to amend the state of the morals and laws of those he ruled, or whether the law as accepted was above the ruler whose God-given role was to have authority over those who did evil.

### *POSITION IN BRITAIN AT THE TIME OF MAGNA CARTA*

These ideas have been widely adopted as contemporary historians' interpretations of the foundations of the state shifted. Alan Harding stresses the relationship of the term when applied to ruler and ruled together to ideas that relate to status, *état*, and so on and a much more particular sense that while society might have a fundamental sense of order—and so law—how relations between people were governed by private interests and selfish ends.<sup>12</sup> The major authors of books on Western legal theory, however, rarely use Irish, or Scottish legal developments in their arguments,<sup>13</sup> and it is difficult to be certain of the state of ideas there at the time. One cannot rely on the assertions made in the charters and letters on either side. When it came to issues such as the laws and customs of England John was as likely to claim that his actions were in conformity to them as were the barons. There was also, it is true, what John called the Law of the Exchequer but even this was presented as clearly derived from the laws and customs.<sup>14</sup>

<sup>12</sup> Alan Harding, *Medieval Law and the Foundations of the State* (Oxford: Oxford University Press, 2002).

<sup>13</sup> J. M. Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press, 1992), does not mention Scotland or Wales at all, and Ireland only after the eighteenth century; R. C. van Caenegem, *An Historical Introduction to Private Law* (Cambridge: Cambridge University Press, 1992), pp. 40, 69, claims that Scotland and Germany had opted for learned law in the sixteenth century; Peter Stein, *Roman Law in European History*, (Cambridge: Cambridge University Press, 1999), p. 87, claims that Scottish customary law was similar to that of England and that in the sixteenth century it took up Roman law.

<sup>14</sup> *Dialogus De Scaccario The Course of the Exchequer* by Richard FitzNigel, ed. and trans. by the late Charles Johnson with corrections by F. E. L. Carter and D. E. Greenway (Oxford: Clarendon Press, 1983), p. 26.

What then was Britain like in 1215? What were the accepted laws and customs? Realistically, we should see it as a patchwork of small provinces, each a little distinct. While the monarch of England had certain prerogatives and privileges John, in some ways, was no different from the ordinary lords and barons in Britain.<sup>15</sup> He too employed marriage and treaties to advance his position. Many of the lords were too powerful for him to subdue for long: Walter de Lacy for instance.<sup>16</sup> His authority in the north was also problematic as the monarchs of England and Scotland fought over the act of homage for some lands.<sup>17</sup>

Thus, the much-vaunted central government of England with its growing bureaucracy was faced with virtually independent areas, provinces that held onto their traditional practices. Marcher Lords were given special powers to bring adjacent parts of Wales under Norman control. They fought the Welsh, absorbed towns and villages and lay down their own laws and customs. They kept these lands along the March as rights of conquest, and they were areas where 'the King's writ does not run.' A Marcher Lord could set taxes, administer justice, and build castles. The 'Law of the Marches', created a buffer zone between England and Wales in which a few favoured nobles in effect exercised unfettered sovereign powers. This was periodically disputed by the monarchs but all too often affairs elsewhere required concessions to the Marcher lords.<sup>18</sup>

<sup>15</sup> S. D. Church (ed.), *King John: New Interpretations* (Woodbridge: Boydell Press, 1999).

<sup>16</sup> Colin Veach, *Lordship in Four Realms: The Lacy Family, 1166–1241* (Manchester: Manchester University Press, 2014).

<sup>17</sup> A. A. M. Duncan, 'King John and the King of Scots', in Church (ed.), *King John: New Interpretations*, pp. 247–271.

<sup>18</sup> Frederick C. Suppe, *Military Institutions on the Welsh Marches: Shropshire, A.D. 1066–1300, Parts 1066–1300* (Woodbridge: Boydell Press, 1994); Brock W. Holden, *Lords of the Central Marches: English Aristocracy and Frontier Society 1087–1265* (Oxford: Oxford University Press, 2008), pp. 166–168.

The position on the borders with Scotland was not dissimilar. Other areas with considerable independence included Durham and Cornwall. It was not yet clear where England ended and Scotland began as the Scottish monarch had a claim to the northern counties of what was eventually England.

At this time, nevertheless, the English monarchs were pressing their claim to 'imperial high-kingship' power over their 'Celtic' neighbours but those neighbours, influenced by developments in Europe were claiming similar ideas and resisting any overlordship. Their support for the articles the barons were presenting for incorporation in an agreement with John shows how their leaders had taken on such ideas even though neither had yet a university of their own.

For the five to six years before 1215 both Wales and Scotland had been deeply involved in a struggle with John to retain this independent status and their customary law, a struggle that sought to resist the Plantagenet aim to subject them to sovereignty and not mere overlordship. Both had sought French support for their resistance.<sup>19</sup> The issue at this point was not local law and customs but the final authority of the central English court over adjoining states that aspired to similar government structures and social organisation.<sup>20</sup> Princes or monarchs in Scotland and Wales had major claims to authority and distinctive law but their boundaries and relationship to England were not yet fixed.

<sup>19</sup> For the Welsh side see R. R. Davies, *Conquest, Co-existence and Change: Wales 1063-1415* (Oxford: Oxford University Press, 1987), especially pp. 128-9; for a brief account of John and Llywelyn Fawr see Kari Maund, *Welsh Kings: Warriors, Warlords and Princes* (Stroud: The History Press, 2011), Ch. 5; for some light on the relationship between Welsh charters and Magna Carta see J. Beverley Smith, 'Magna Carta and the Charters of the Welsh Princes', *The English Historical Review*, Vol. 99, No. 391 (1984), pp. 344-362. For the Scots see Richard Oram, *Alexander II 1214-1248: King of Scots* (Edinburgh: Birlinn, 2012).

<sup>20</sup> For a controversial expression of this for Scotland see Patrick Wormald, 'Anglo-Saxon law and Scots law' *Scottish Historical Review*, Vol. 88 (2009), pp. 192-207.

*WALES*

Wales was not recognized as a state in the wider polity of Western Europe and it was subdivided into small princedoms, including Gwynedd, Powys, Ceredigion, Deheubarth, Glamorgan, Gwent and Brecheiniog, which were in constant dispute and often at open war with each other. The murder of their rulers was frequent and bloody.<sup>21</sup> The unity that had been achieved briefly under Hywel Da did not survive. The people may have been a *gens* or *nation* but they were not an indivisible lordship.

Parts of Wales were under English control. The English monarchs did not want to see the Welsh rulers as kings, even sub-kings—they attempted to treat them as the equivalent of the English magnates with homage due even though their culture was very different.<sup>22</sup>

Welsh law (*Cyfraith Hywel*) was in theory long established and it was not dependent on princely authority as it had evolved from the people and was implemented by the people. The earliest written evidence of what was claimed to have been law by the tenth century was not written down until the twelfth to thirteenth centuries when Welsh lawbooks made by practicing lawyers appeared,<sup>23</sup> and some argue that this was in part the creation of a myth created by Llywelyn to bolster his position. The eight manuscripts in the Iorwerth redaction, which form a close group, are mostly in Latin and it is not clear whether the Latin is translated from the Welsh or vice versa. Imaginatively named ms A.B.C.D.E.G.K and L, they were possibly written down for the benefit of incoming continental trained lawyers and may rather reflect the law in Gwynedd during

<sup>21</sup> Roger Turvey, *The Welsh Princes: The Native Rulers of Wales, 1063–1283* (London and New York: Longman, 2002), pp. 1–4.

<sup>22</sup> Thomas Glyn Watkin, *The Legal History of Wales*, 2<sup>nd</sup> edition (Chicago, IL: University of Chicago Press, 2007).

<sup>23</sup> Watkin, *The Legal History of Wales*, quoting A. W. Wade-Evans, *Welsh Medieval Law* (Oxford 1909).

the reign of the two Llywelyns than long established widespread practice.<sup>24</sup>

Certainly, they come at a point where ‘sharp breaks in customary continuity had appeared in all parts of Wales, and not merely in those areas where the Norman had secured a permanent foothold’, a new territorial framework appearing all over Wales. Their purpose was to ‘reconcile new usage with an older fundamental law and custom with which deviations from accepted principle were expected ... to conform.’<sup>25</sup> Llywelyn ap Iowerth, Prince of Gwynedd, in the 1180s and 1190s had embarked on an expansion and consolidation program with the intention of creating an independent Wales through a state administrative system and the creation of offices of state. Ednyfed Fychan, his seneschal, was the founder of a dynasty of administrators, which continued into Tudor times. Nevertheless, Wales was not a unitary state even to the extent that Scotland was. Welsh resources were not adequate to support the moves towards European bureaucratic structures.<sup>26</sup> In Richard I’s absence, some Welsh leaders had negotiated alliances with Prince John of England, since Llewelyn ap Iorwerth had begun to move against the other Welsh kingdoms. In 1200 John had in his personal right as his wife’s inheritance Carmarthen, Pembroke, Glamorgan and Gwynllwg and Gower in the south and west plus the homage and fealties of the Marcher lords. By 1211 John (now king of England) had become sufficiently concerned about Llewelyn’s activities to invade Wales to force Llewelyn off his throne. Llewelyn

<sup>24</sup> Llywelyn ap Iorwerth, c.1194–1240 and Llywelyn ap Gruffudd, 1246–1282), particularly Llywelyn ap Iorwerth; see Sara Elin Roberts, *Llawysgrif Pomffred: An Edition and Study of Peniarth MS 259B* (Leiden and Boston: Brill, 2010), p. 2. The Iorwerth manuscripts are not only the oldest in date but the most developed version of the laws. A revised version of Iorwerth is found in Col NLW Peniarth 30, ‘Llyfr Colan’. This redaction, previously the Venedotian code, is named after Iorwerth ap Madog, the lawyer who is named as the compiler of the Test Book.

<sup>25</sup> T. Jones Pierce, ‘Social and Historical Aspects of the Welsh Laws’, *Welsh History Review* (1963), special issue, ‘The Welsh Laws’, pp. 33–49.

<sup>26</sup> Ifor W. Rowlands, ‘King John and Wales’, in Church (ed.), *King John: New Interpretations*, pp. 273–287.

was forced to seek terms and to give up all lands east of the River Conwy, but was able to recover them the following year in alliance with the other Welsh princes who no longer trusted John. Luckily for Llywelyn John's increasingly interventionist policy and the cruelties inflicted, notably by Robert de Vieuxpont, had driven the Welsh into the arms of Gwynedd.

They realized they risked disinheritance if the English prevailed—a sense of emergency throughout *pura Wallia* resulted in the rapid politicization of the concept of Welsh nationality in the early thirteenth century and Powys and Deheubarth came to recognize that complete independence of action no longer possible. This triggered another full-scale Welsh rebellion against King John and the Marcher Lords followed by a Franco-Welsh alliance in 1212. Llewelyn ap Iorwerth secured the political support of Pope Innocent III, and Shrewsbury fell to the Welsh in 1215. By 1215 the confederation of 1212 revived and the Welsh made a pact with the English barons swearing not to make peace with the king until they all received back the castles, lands and rights of which they had been unlawfully deprived an objective achieved in theory by Magna Carta.

Rees Davies thought John's was the reign when the English monarchy had put together the theory and the military means of subjugating Wales. Rowlands however thinks that Llywelyn after 1213 'had established an ascendancy in Wales not enjoyed by a Welsh ruler since 1060' especially by his taking in 1215 the castles in the south that belonged to the Marcher lords. This might indeed have created a Welsh state. It was, in short, a moment of crisis and one to which Magna Carta was to contribute part of the outcome.

### SCOTLAND

Scotland had had centralising kings earlier on and although they had not been wholly successful, it was a recognised kingdom in Europe in the eleventh and twelfth century although one could equally see it as a number of virtually autonomous petty kingdoms that did not seriously acknowledge the authority of the central kingdom. All the Canmore kings in the twelfth century had had to re-assert their authority over outlying areas. David had 'subdued'

Moray and the isles, Galloway and Argyll but his successors had to 'subdue' them all over again. The nature of resistance to monarchs in Scotland was more formidable than the resistance the kings of England experienced in England because it was based on a belief that it was justified by the traditional claims being promoted.<sup>27</sup> Some of the rebels also looked to the rulers of Norway for their source of authority. William had had to fight to exert his mastery in the far north, where the Macwilliams and McHeths the Moray based descendants of Lulach were still asserting their claim to the throne, in a series of 'rebellions'. He also had to resist invasions by the Lord of the Isles, Somerled, and his successors who were looking to claim the kingdom of Man.<sup>28</sup> Another opponent was Harald Maddadsson (c. 1134–1206) earl of Orkney and Mormaer of Caithness a descendant of Scots kings. He also needed to move against the Galloway lords who were looking to the English kings for assistance.<sup>29</sup>

These semi-independent if not fully independent people thus challenged on the basis of their own inheritance. Although the Scottish kings took armies to repress them moreover they were not the main Canmore preoccupation. William's eyes in particular were more turned southwards looking to make good a claim to Northumberland and Cumberland, which was William's principal pre-occupation. Thus, he married his illegitimate daughter Isabella to Robert de Ros, lord of Wark on Tweed, and another illegitimate daughter to Eustace de Vescy, who were to be the two key players in the opposition to John. While the 1249 setting down in writing the border laws by a group of Scottish and English knights convened for the purpose suggests that border custom went back to time

<sup>27</sup> R. Andrew McDonald, *Outlaws of Medieval Scotland: Challenges to the Canmore Kings, 1058–1286* (East Linton: Tuckwell Press, 2003).

<sup>28</sup> R. Andrew McDonald, *The Kingdom of the Isles: Scotland's Western Seaboard 1100–1356* (Edinburgh: Birlinn, 2011).

<sup>29</sup> Douglas David Roy Owen, *William the Lion, 1143–1214: Kingship and Culture* (East Linton: Tuckwell Press, 1997), pp. 153, 219.

immemorial there is no reason to believe that this enshrined the line of the borders from before that time.<sup>30</sup> At the same time the Lords of the Isles and Manx and the rulers of Galloway were prepared to negotiate with the king of Norway and the English kings in support of their claims.<sup>31</sup>

In the late twelfth century, the relationship between the king of Scots and the king of England had been set down in writing, in a document known as the Treaty of Falaise, which was concluded in December 1178 and which subordinated the Scottish to the English king.<sup>32</sup> Under the treaty Henry II then wielded his newly defined authority in 1186 to interfere in the succession to the lordship of Galloway. When Henry II's successor, Richard I, was crowned in September 1189 William lost no time in getting the Treaty of Falaise rescinded. Richard I was willing to agree to this in December 1189 for the considerable sum of 10,000 marks, although William did homage for the 'English' counties. William and his son Alexander had no intention of allowing the treaty to be repeated.

Scotland in 1215 was probably not a kingdom that had a firm sense of its boundaries or its Scottish identity. King David I (1124–53) addressed the men of the area as 'Francis, Anglis, Scotis, Cumbrians and Galwegians.' There were also Scandinavians; Gordon Donaldson speaks of a multi-racial and also a multi-lingual country 'French and English and Welsh, Irish and Norwegians and Flemings, as well as the official languages, French and Latin'.<sup>33</sup> Gaelic-speaking Buchan, Fife, Carrick and Galloway were not the only areas with different languages from the court. If one of the powerful men in Scotland had been asked about their identity, most

<sup>30</sup> Cynthia J. Neville, *Violence, Custom and Law The Anglo-Scottish Border Lands in the Later Middle Ages* (Edinburgh: Edinburgh University Press, 1998), pp. 5–8.

<sup>31</sup> Richard Oram, *Domination and Lordship: Scotland 1070–1230*, Vol. 3 (Edinburgh: Edinburgh University Press, 2013).

<sup>32</sup> Broun, *Scottish Independence*, see fn. 11.

<sup>33</sup> Gordon Donaldson, *Scotland's History, Approaches and Reflections*, ed. James Kirk (Edinburgh: Scottish Academic Press, 1995), p. 111.

with lands in England and France and perhaps Ireland might not have been able to answer. They were part of the Europeanisation of Scotland bringing in outside ideas. On the other hand, some of them had royal blood somewhere in their ancestry and saw themselves as more than that. Sommerled, for example (from whom Clan Donald comes), was descended from kings and able to challenge the Crown itself.<sup>34</sup>

In Scotland, the monarchs from king David I on had been developing the law –the earliest records known being the *leges inter Brettos et Scottos*.<sup>35</sup> At the same time the Scottish monarchs had little authority over areas like Argyll and Galloway.

### *THE POSSIBILITIES IN 1215*

Perhaps, had things gone differently, a system not unlike the later Holy Roman Empire might have emerged in Britain, with a weak central power with subordinate territories in control of regulating society, raising armies and the like. Such territories might have included Wales and Scotland and here Magna Carta probably played a role in the development of states with a sense of identity. It has been shown that canon law ideas and ideas from the *ius commune* are implicit in Magna Carta, and find parallels in imperial privileges.<sup>36</sup> It is usually thought that the archbishop of Canterbury Stephen Langton was responsible for this.<sup>37</sup>

<sup>34</sup> Edward J. Cowan and Lizanne Henderson (ed.), *A History of Everyday Life in Medieval Scotland* (Edinburgh: Edinburgh University Press, 2011).

<sup>35</sup> Alice Taylor, 'Leges Scocie and the lawcodes of David I, William the Lion and Alexander II', *Scottish Historical Review*, Vol. 88 (2009), pp. 207–288; Alice Taylor, *The Shape of the State in Medieval Scotland* (Oxford: Oxford University Press, 2016), p. 123; *leges inter Brettos et scottos*, p. 132: promulgation of written law in late twelfth and thirteenth centuries; David M. Walker, *A Legal History of Scotland*, Vol. 1 (Edinburgh: W. Green, 1988).

<sup>36</sup> Richard H. Helmholz, 'Magna carta and the *ius commune*', *University of Chicago Law Review*, Vol. 66 (1999), pp. 297–370; Kenneth Pennington, 'Magna

The question of the justified resistance to authority was as much critical to the position of the Welsh and Scots as it was to the great English barons. About 1214 Wales and Scotland had joined in a movement by which the great Norman barons were attempting to resist attempts to subject them to unpredictable demands. In 1215 all the leading Welsh princes, the northern barons in association with Scotland and a powerful group of English barons had associated to oppose John. In May the barons publicly repudiated their vassal status. On 17 May the barons seized London. Negotiations that included the Welsh and the Scots followed.<sup>38</sup>

Nevertheless, when John met the magnates of Britain at Runnymede<sup>39</sup> on 15 June 1215 none can have thought that the charter to be sealed there would be more than an episode in the struggle for control of government in Britain, a struggle that critically involved both Wales and Scotland and to a lesser extent Ireland.<sup>40</sup> Sir James Holt, who wrote on Magna Carta in the 1960s, a study which still remains a major account, saw the Charter and the other documents like the demands of the barons as ‘complex records which bear the imprint of nearly three years of political

Carta and Fourth Lateran Council Reform in 1215’, *Bulletin of the Medieval Canon Law*, Catholic University of America Law repository. At: <http://scholarship.law.edu/cgi/viewcontent.cgi?article=1929&context=scholar>. Accessed 16 February 2017.

<sup>37</sup> John W. Baldwin, ‘Master Stephen Langton ... the Paris Schools and Magna Carta’, *English Historical Review*, Vol. 123 (2008), pp. 811–846.

<sup>38</sup> Nicholas Vincent, *Magna Carta: A Very Short Introduction* (Oxford: Oxford University Press, 2012).

<sup>39</sup> The Barons were Eustace de Vesci; Robert de Ros; Richard de Percy; William de Mowbray; Roger de Montbegon; John FitzRobert; William de Forz; John de Lacy; Saer de Quincy, Earl of Winchester; Richard de Montfichet; William de Huntingfield; Roger Bigod and Hugh Bigod; Robert de Vere; Geoffrey de Mandeville; Henry de Bohun; Richard de Clare and Gilbert de Clare; William D’Albini; Robert Fitzwalter, William Hardel; William de Lanvallei; William Malet; William Marshall II; Geoffrey de Say.

<sup>40</sup> See David Carpenter, *The Struggle for Mastery: Britain 1066–1284* (Harmondsworth: Penguin, 2003).

crisis and protracted, discontinuous negotiation' but not as potentially durable.<sup>41</sup> The king's supporters in the vicious developments immediately after it was sealed saw it as 'a disturbance, wilfully engineered, contrary to law, and destructive of the interests and peace of the realm.' The papal bull of annulment said it was 'exacted by force, shameful, demeaning, illegal, unjust and derogatory to the king's rights and dignity.'<sup>42</sup> We should perhaps see this in context of the Fourth Lateran Council.

Only one thing set England's Magna Carta apart from the rest of the European charters of the time: its survival in the form in which it was re-issued in 1225 and its re-issuing periodically throughout the century at times of crisis.<sup>43</sup> Neither the 1217 re-issue nor these later ones included the Scottish and Welsh clauses and so its relevance to their history has been overlooked.

The original charter was probably seen principally as a peace treaty and it was one that the monarch could more easily than most repudiate. The contents of this first version of the Charter included requirements for Wales and Scotland. At a further session called for 16 July at Oxford some of the outstanding issues were discussed but many were not resolved. The later re-issues including 1217 do not, as the relationships with the two Celtic kingdoms had changed. This is not surprising as the negotiators, on both sides suspicious and mistrustful, were focused on the immediate.

Nicholas Vincent suggests that the Scottish and Irish clauses in the 1215 Charter were John's attempts to separate them from the

<sup>41</sup> J. C. Holt, *Magna Carta*, 2<sup>nd</sup> edition (Cambridge: Cambridge University Press, 1992).

<sup>42</sup> Holt, *Magna Carta*, p. 374.

<sup>43</sup> 1225, 1237, 1253, and 1265 as the need to levy new taxes arose. Henry's successor, King Edward I (reigned 1272–1307), reissued Magna Carta and the Charter of the Forest in his Confirmation of the Charters (1297) to gain funds to support his war in Flanders.

English, but this seems unlikely.<sup>44</sup> The demands of the two countries were already included in the articles of the Barons. Article 46 of the articles of the barons read:

Let the king deal with the king of Scots for the returning of hostages, and over his liberties and right, in accordance with the terms he comes to with the barons of England, unless it should be otherwise under the charters which the king has, by judgment of the archbishop and such others as he wishes to convoke to act with him.

By Article 59 in the Charter John promised slightly differently:

we shall deal with Alexander concerning his sisters, the return of hostages and his liberties and rights in the same manner as we will deal with our other barons of England, unless it ought to be otherwise because of the charters which we have from William his father previous King of Scots and this shall be determined by the judgment of his peers in our court.<sup>45</sup>

Holt suggested that this gave Alexander II an opening to renew his dynasty's claim to the three border shires. Certainly, after the twenty five adjudged them to him the northern baronage paid homage to him.<sup>46</sup>

Articles 44 and 45 of the Barons were for Wales—effectively what was included in the Charter as articles 56 and 57:

56 If we have deprived or dispossessed any Welshmen of land, liberties, or anything else in England or in Wales, without the

<sup>44</sup> See both Nicholas Vincent, *Magna Carta: A Very Short Introduction* (Oxford: Oxford University Press, 2012); and N. C. Vincent, *Magna Carta: The Foundation of Freedom 1215–2015* (London: Third Millennium Publishing, 2015).

<sup>45</sup> *Nos faciemus Alexandro regi Scottorum de sororibus suis, et obsidibus reddendis, et libertatibus suis, et jure suo, secundum formam in qua faciemus aliis baronibus nostris Anglie, nisi aliter esse debeat per cartas quas habemus de Willelmo patre ipsius, quondam rege Scottorum; et hoc erit per iudicium parium suorum in curia nostra.*

<sup>46</sup> Holt, *Magna Carta*, p. 365.

lawful judgment of their equals, these are at once to be returned to them. If dispute on this point arises it shall be determined in the Marches by the judgment of equals. English law shall apply to holdings of land in England, Welsh law to those in Wales, and the law of the Marches to those in the Marches. The Welsh shall treat us and ours in the same way.<sup>47</sup>

(57) In cases where a Welshman was deprived or dispossessed of anything, without the lawful judgment of his equals, by our father King Henry or our brother King Richard, and it remains in our hands or is held by others whom we should warrant, we shall have respite for the period commonly allowed to Crusaders, unless a lawsuit had been begun, or an enquiry had been made at our order, before we took the Cross as a Crusader. But on our return from the Crusade, or if we abandon it, we will at once do full justice according to the laws of Wales and the said regions.<sup>48</sup>

(58) We will at once return the son of Llywelyn, and all Welsh hostages, and the charters delivered to us as security for the peace.<sup>49</sup>

<sup>47</sup> In the original, p. 56: Si nos disseisivimus vel elongavimus Walenses de terris vel libertatibus vel rebus aliis, sine legali iudicio parium suorum, in Anglia vel in Wallia, eis statim reddantur; et si contencio super hoc orta fuerit, tunc inde fiat in Marchia per iudicium parium suorum; de tenementis Anglie secundum legem Anglie; de tenementis Wallie secundum legem Wallie; de tenementis Marchie secundum legem Marchie. Idem facient Walenses nobis et nostris.

<sup>48</sup> De omnibus autem illis de quibus aliquis Walensium disseisitus fuerit vel elongatus, sine legali iudicio parium suorum, per Henricum regem patrem nostrum vel Ricardum regem fratrem nostrum, que nos in manu nostra habemus, vel que alii tenent que nos oporteat warrantizare, respectum habebimus usque ad communem terminum cruce signatorum, illis exceptis de quibus placitum motum fuit vel inquisicio facta per preceptum nostrum ante suscepcionem crucis nostre; cum autem redierimus, vel si forte remanserimus a peregrinatione nostra, statim eis inde plenam justitiam exhibebimus, secundum leges Walensium et partes predictas.

<sup>49</sup> Nos reddemus filium Lewelini statim, et omnes obsides de Wallia, et cartas que nobis liberate fuerunt in securitate pacis.

The inclusion of Welsh and Scottish demands in the negotiations is not surprising. Both Llywelyn Fawr for Wales and Alexander II of Scotland had their representatives at Runnymede and their interest in the outcome was considerable. Alexander's two brothers-in-law (husbands to two of his illegitimate sisters), Robert de Ros and Eustace de Vescy, were key players in the 'English' baronial opposition. On the other side, Alan of Galloway was one of John's advisors.

After agreeing to the charter and arranging for its circulation, however, John had no intention of adhering to it and was already appealing to the pope to disallow it. As a result, it proved necessary for Wales and Scotland to realize their claims by violence. Llewelyn was therefore presented with a further opportunity to enhance his position as a national leader. In December 1215 he led an army, which included all the lesser princes of Wales, to capture the castles of Carmarthen, Kidwelly, Llanstephan, Cardigan and Cilgerran. He also successfully insisted on the consecration of Welshmen to two vacant sees that year. Gwenwynwyn's revolt in 1216 allowed him to reinforce his position. By the Agreement at Worcester in 1218 Llywelyn did homage and fealty and he was seen as the English king's deputy thereafter at least in the north, although Hubert de Burgh was extending his authority in the south.<sup>50</sup>

At the same time Alexander II of Scotland advanced into England and a 'baronial judgement' (the 25 named to enforce Magna Carta) probably in September awarded the lands of Northumberland, Cumberland and Westmorland to him. At the siege of Norham, probably on 22 October 1215, the barons of Northumberland did him homage.<sup>51</sup> To the Scottish kings the clauses in Magna Carta were part of their assertion of independence and ambition to move the borders southwards. At first it seemed to have succeeded but in retaliation for Alexander's role John invaded

<sup>50</sup> R. F. Walker, 'Hubert de Burgh and Wales 1218–1232' *English Historical Review*, Vol. 87 (1972), pp. 465–494.

<sup>51</sup> Duncan, 'King John and the King of Scots', p. 267.

Scotland in January 1216 and burned Berwick, Roxburgh, Dunbar and Haddington. Later when the dauphin Louis's arrival led to Alexander again invading England, agreeing with the marriages of his sisters, and a treaty with the barons and the city of London. He accepted Louis as king of England but all this fell apart with John's death. Technically, once the pope's veto had arrived until it was re-issued by Henry III's government, in altered form and without the Scottish and Welsh clauses in 1217 the charter had no authority and without them what it had secured was again problematic.

### *LATER DEVELOPMENTS*

After Magna Carta, then, Llywelyn was able to unite major parts of Wales as effectively independent, even if under a distant English overlordship. There was no need for further inclusion in later versions of Magna Carta as the specific problems had been resolved. His newly created chancellor and chancery clerks used great and privy Seals to authenticate Llywelyn's acts and taxation was systemised through the position of treasurer. Lawyers developed a common law code from the complex customs and laws that prevailed in the new areas now under the control of the Prince of Gwynedd. Revolutionizing traditional relationships demanding homage, hostages, oaths, pledges charters and chirographs and his supremacy bolstered by patronage of ecclesiastical foundations in a way similar to developments in Europe.

Llywelyn's problem was that although the authority of Gwynedd was concentrated in the prince and his officers of state he had too few resources to develop the political institutions that were becoming standard in other states. The circumstances of small government and small wealth limited the patronage system, which the princes could accommodate, and only small clientage networks, which were by nature semi-permanent, evolved<sup>52</sup>. While integration

<sup>52</sup> James Given, *State and Society in Medieval Europe Gwynedd and Languedoc under Outside Rule* (Ithaca, NY: Cornell University Press, 1990), pp. 27–35.

of social and political spheres had begun and the new concept of a landed gentry class arose Welsh land law complicated the creation of a new patronage system. The dynastic problems that Welsh inheritance law created also created problems where a unified Welsh state was envisaged.

Throughout his life, Llywelyn Fawr remained politically and militarily powerful enough to side step the oath of allegiance to King John as overall Prince of Wales but his son David was not so powerful. The English made considerable inroads into Welsh territory during David's reign and although unsettled conditions in England and on the Marches brought unprecedented land acquisition and political power for Wales, power consolidated in the 1267 Treaty of Montgomery signed between Llywelyn and Henry III of England, it was not to last Edward I's ambitions.<sup>53</sup> Seventy years of virtual independence after Magna Carta, however, probably ensured that Welsh law remained distinct for the next seven centuries. Welsh law, although essentially the customs of the people, required royal authority to be valid and only 'precede' the law if so confirmed. The authority and structures inherent within English law were concepts with which Welsh people were very unfamiliar and the period ensured that English law was not imposed in crucial matters such as property rights.<sup>54</sup>

### SCOTLAND

What Magna Carta meant to Scotland was rather different, although with John's death and a minority in England the worst immediate threat was removed. In any case, there was no need to

<sup>53</sup> On this topic Sally Parkin's doctoral thesis *Women, Witchcraft and the Law in Early Modern Wales (1536–1736): A Continuation of Customary Practice* (University of New England, 2002) is an invaluable resource. My thanks are due to Sally for her friendship and scholarly assistance over many years.

<sup>54</sup> Thomas Glyn Watkin, *The Legal History of Wales*, 2<sup>nd</sup> ed. (Chicago, IL: University of Chicago Press, 2007), Chapter 2.

repeat the Scottish clauses in the later versions as in Wales the specific issues were resolved. The Carta as renewed however did not acknowledge Scotland's independence. During Henry III's reign Alexander had to agree that the northern English counties would be held by homage and the Anglo-Scottish border was established nearer what it is today.<sup>55</sup> The relationship between the king of Scots and the king of England remained ambiguous, neither side before Edward I came to the throne pressing the issue of overlordship too hard.

Nevertheless, Magna Carta simply by providing a period in which the monarchy could strengthen its European position helped the Scottish monarchs. Richard Oram says the thirteenth century was 'a period of decisive change during which a new self-confidence in the nature and identity of Scottish kingship became apparent and relationships with external powers were redefined',<sup>56</sup> and current scholarship sees the institution of important new relationships between Scotland and Europe in the thirteenth century as significant for Scotland's domestic development and her position in Britain.

The first sign of change was in 1222 when Alexander II began to add his regnal year to the dating clause at the end of his charters. He had also recently discussed the possibility of a coronation with a papal legate visiting Scotland. A more formal attempt to gain the pope's approval for this in 1233 was blocked by Henry III, who, not unnaturally, perceived the suggestion as a threat to the king of England's dominant position. While a coronation oath as was common in England and on the continent wherein the king

<sup>55</sup> Sybil Jack, 'Margins or Heartlands: Nationality on the Borders of England and Scotland', in Pamela O'Neill (ed.), *Nation and Federation in the Celtic World* (Sydney: Sydney Series in Celtic Studies, 2003), pp. 35–51; Sybil Jack, 'The 'Debatable' Lands, Terra Nullius and Natural Law in The Sixteenth Century' *Northern History*, Vol. XLI, No. 2 (2004), pp. 289–300.

<sup>56</sup> Oram, *Alexander II*, 'Introduction', pp. 1–47.

undertook to uphold peace and justice, the coronation ritual did not require this.<sup>57</sup>

In the continuing confrontation over relations between the kings, between the English claim that homage was owed for Scotland and not just for the king of Scots' lands in England, and the Scottish assertion that the king of Scots was fully a king and therefore of equal standing with his English counterpart the Scots were able to strengthen their position. In practice, this continued to be tempered by political common sense. For example, in 1237, when Alexander II signed the Treaty of York formally renouncing all claims to northern England, which he had inherited from his father William, he did not swear in person to keep the terms of the treaty but gave his oath by proxy, out of respect of his royal dignity.<sup>58</sup>

Scottish law was already more like English law and much influenced by European ideas. Walker thinks that from 1100 English law was the major external influence on the law of Scotland 'subject to qualifications in respect of the northern isles, the western isles and western parts of the mainland and Galloway'.<sup>59</sup> There is scant evidence of the law of the Picts and the Britons (although that may have been similar to the Welsh laws of Hywel Dda) and the Celtic law may have been similar to the early Irish where there were little formal law courts. Much may have been absorbed into what became the mainstream of Scots law although in the Lordship of the Isles Celtic law continued a separate existence until the kingdom fell. But while the Scottish kings borrowed from English practice—such things as writs (brievés) and the assize, and a formal structure of courts emerged the men at the time recognised that it was distinct both from English and Continental practice.<sup>60</sup>

<sup>57</sup> Walker, 'Hubert de Burgh and Wales 1218–1232', p. 135.

<sup>58</sup> Broun, *Scottish Independence*, see fn. 11.

<sup>59</sup> David M. Walker, *A Legal History of Scotland*, Vol. II (Edinburgh: W. Green, 1990), p. 12.

<sup>60</sup> Michael Lynch (ed.), *The Oxford Companion to Scottish History* (Oxford: Oxford University Press, 2001), pp. 381–383.

*CONCLUSION: WHAT WAS THE IMPORTANCE OF MAGNA CARTA FOR THE FUTURE OF WALES AND SCOTLAND?*

How important was their inclusion in the first Magna Carta to the survival of a separate Welsh and Scottish nation and of their distinct customary laws? Sir James Holt argued that the Magna Carta was, in its time, neither unique nor successful. This however does not mean that it was not important. Many of the broad concepts, such as judgment by peers and protection against arbitrary disseisin (seizure of property) were hot topics all over Europe in the thirteenth century. Similar charters were issued in Germany, Sicily and France in the thirteenth and early fourteenth centuries. This was law-making—and lawmaking was ‘the working together of the edicts of rulers and the customs of the people’.<sup>61</sup> Although later versions of Magna Carta no longer specifically referred to Welsh and Scottish affairs their role was not wholly forgotten.

Law was part of the ongoing argument amongst the socially powerful which was going on in Wales and Scotland as well. Magna Carta may or may not have been directly related to the growth of the English common law but ‘a number of provisions in the document refer favourably to developments in the common law and its court system or regulate certain common law procedures’.<sup>62</sup> Paul Brand says it seems ‘a codification and reaffirmation of existing rules and principles’<sup>63</sup> and this made it important not only to England’s ability to resist the continent common law based on the revival of Roman law, but also to the Welsh and Scottish ability to retain considerable parts of their original customary law since they had been recognized as existing in 1215. That some of the clauses

<sup>61</sup> Alan Harding, *Medieval Law and the Foundations of the State* (Oxford: Oxford University Press, 2002), p. 191.

<sup>62</sup> Katherine Fischer Drew, *Magna Carta: The Greenwood Guides to Historic Events of the Medieval World* (Westport, CT: Greenwood Press, 2004), pp. 43–45.

<sup>63</sup> Paul Brand, *The Making of the Common Law* (London: Hambledon Press, 1992), p. 447.

relate back to Henry I coronation oath gave them further symbolism of custom and tradition. Magna Carta was not directly related to the development of Welsh or Scottish law but the stress on maintaining long established customs may have helped prevent the wholesale imposition of English law. That common law did not wholly replace Welsh or Scottish law, although it was taken to Ireland where it became the basis of the present system, is probably partly due to the struggle over Magna Carta. Paul Brand thinks that the Irish position was settled in 1210 when John issued a charter now lost, but which was read to all the assembled magnates in 1228, with the consent of the magnates of Ireland that the laws and customs of England would be observed there.<sup>64</sup> In Wales and Scotland no such event ever occurred and such absorption of English common law practices as took place came about in a more pragmatic manner.

<sup>64</sup> Brand, *The Making of the Common Law*, Chapter 19.