

WOMEN AND THE LAW IN THE AGE OF MAGNA CARTA

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This is the full text of a lecture given by Dr Stevens at the Spring Conference of the Mortimer History Society in 2015



The legal world inhabited by women around the time of Magna Carta, in the late twelfth and early thirteenth centuries, was radically different from that of today. It was divided by dramatic differences of experience based on social station and, in the March of Wales, on ethnicity. Magna Carta contains at least three key clauses regarding women which would, in time, affect the position of all women in England and Wales. But when the document itself was sealed, in 1215, only a slender minority of free and relatively wealthy women would have felt its benefits. Magna Carta's effect on women's lives is but one strand in a bigger and longer history of the law slowly coming into the reach of, and eventually benefiting, most medieval women.

In this paper I will outline, in broad brush strokes:

1. the legal framework within which medieval women of different social stations, or classes, lived their lives;
2. the clauses of Magna Carta most directly affecting women and what they meant for the lucky few who benefited from them in the early thirteenth century;
3. the widening access to the benefits of Magna Carta in the centuries after King John's death.

Women and the Law before Magna Carta

Slavery

We begin our survey of women under the medieval law with those women who had no access at all to the law. When King John's great-grandfather, William the Bastard, conquered England in 1066 he came to control a realm of not only of nobles and peasant farmers, but also of slaves. William's famous survey of the lands and people he had conquered, compiled in the so-called 'Domesday Book' of 1086, shows us that slaves then made up as much as 10 per cent of the population of England. These enslaved men and women had, for all intents and purposes, no rights whatsoever.

Slavery is thought to have largely disappeared over the following century. William himself, while not banning slavery, outlawed the sale of English slaves abroad, and the English Church's 1102 Council of London decreed that people ought not be 'bought and sold like brute beasts', leading to the suggestion that by 1200 slavery was all but dead in England. But within King John's own lifetime and the lifetimes of the framers of Magna Carta, slavery and particularly *the buying of women slaves for sexual exploitation* remained a part of the cultural landscape of the British Isles. Irish churchmen attributed the 1169 Norman invasion of Ireland, when John was just two years old, to the sinfulness of the Irish, and their keeping of slaves. And even at the turn of the thirteenth century, as John's reign began, the sermons of English bishops sometimes decried the purchase of young women as slaves for pleasure.

Unfree Peasant Women

Mercifully, for most people, slavery gave way during the 1100s to the improved status of unfree peasant, or *serf* if you like. When John came to the throne, in April of 1199, as many as 80 per cent of the English people were living as unfree peasants on manors. These people were not slaves, but

instead held their lands from the lord of the manor in exchange for a certain number of days of hard labour for the lord each year, mostly at ploughing and harvest times.

Their lives, and particularly the lives of women, were closely regulated under the local law of the manor on which they lived. Neither unfree men nor women could leave the manor without permission, and failure to do the labour required of them could result in corporal punishment in the village stocks. While men could act as minor officials on the manor, women could not. While men had access to a manor court to resolve disputes with neighbours, women were legally in the keeping of a father, brother or husband, and normally required male representation to bring a lawsuit before the court. And yet, when a woman was fined by the court for misbehaviour or violence, she appeared alone before an all male jury, to answer for her actions.

An unmarried, unfree peasant woman caught living with a man, or rumored to have had sexual relations with a man, would be issued a fine called *leyrwite*. An unmarried woman giving birth to a child would pay an even heavier fine called *childwite*. If an unfree woman wished to marry, then her family would have to pay a fine to enable her to do so, called *merchet*. Most unfree peasant girls are thought to have married by about 18 years of age, at which point a woman's husband became her legal guardian. Only in widowhood did a woman gain a right to act, in law, on her own behalf. And yet, on some manors, such as those belonging to Glastonbury Abbey, unfree peasant widows were routinely compelled to remarry.

The Situation in Wales

Looking west, if we were to visit the Mortimer lands in the medieval March of Wales the situation would be different, but recognizable to an English landholder. On the one hand, in Wales like in Ireland, slavery, including the slavery of women, was by King John's day more common than in England. On the other hand, in Wales the number of unfree peasants was much smaller, perhaps a few as 15 per cent of the population. The Welsh had never embraced the institution of serfdom with such vigour as had their English neighbours.

Free Women

Returning to England, it is only the free peasant women, of families who had avoided unfreedom over the centuries, together with their genteel and aristocratic betters, who enjoyed the fullest access women could gain to the so-called 'common law' of England. These free women, the same who would stand to benefit from Magna Carta, represented just 20 per cent or less of the female population. And even they had extremely curtailed legal rights. They could inherit land, but only in the absence of any living brothers. Adult, unmarried women might sometimes bring lawsuits on their own behalf, but would have been contracted in marriage before reaching adulthood. As widows, these women might enjoy legal autonomy, and relative equality with men before the courts. By 'relative equality' I mean, for example, that although widows might initiate lawsuits, they were not normally allowed to act as witnesses, unless concerning violence done to themselves, or their husbands, to which marks on their own bodies or clothes could bear witness.

Married Women and Coverture

It is a truism that most medieval women, both free and unfree, spent most of their lives in marriage. Married women in medieval England, at all levels of society, both before and for centuries after the reign of King John, lived their lives under the legal condition of 'coverture' or, in French, *femme covert*, literally meaning 'covered woman'. A woman's affairs were legally covered, or represented by, her husband in virtually all things. So long-lived would the law of coverture be that in 1776 the famous English lawyer Sir William Blackstone could explain in his textbook –*Commentaries on the Laws of England*– that from time immemorial:

By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is

incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; ... Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities that either of them acquire by the marriage.

In theory, man and wife were one person, with two bodies, and the husband was the head. At one time historians attributed the adoption of this legal institution in England to the arrival the Normans, but its roots go much deeper. Medieval lawyers and theologians –often one and the same– were well familiar with St Paul’s passage in the book of Ephesians, chapter 5 versus 22–3, ‘Wives should be subject to their husbands as to the Lord, since the husband is the head of the wife as Christ is the head of the Church...’. And so lawyers set about making this a legal reality. We can only hope that medieval lawyers also took note that just two verses later in the book of Ephesians Paul advised ‘Husbands, love your wives even as Christ also loved the church and gave Himself for it’.

When a free woman married in medieval England she often received a marriage portion, or gift, from her family of birth. Additionally, under English law, she received the right to a designated ‘dower’. A dower was a measure of one third of the land her husband possessed on the day of their marriage –in Magna Carta, to be calculated as one third of the land held in his lifetime– to be kept by the wife should she outlive her husband into widowhood. This land was intended to support a woman financially in her widowhood. But under the rules of coverture, a married woman had no control over her marriage portion or dower while her husband lived. An unscrupulous husband might even sell off his wife’s dower lands against her will. In contrast, a wife could not make any binding contract or even purchase goods without the express consent of her husband, although free peasant women often ignored this latter, unworkable, restriction.

For many free women, and especially aristocratic women who often married a considerably older man while still an adolescent, their essential passport to legal and social independence was widowhood. But, as Magna Carta reminds us, being a relatively wealthy widow, or especially a wealthy young heiress, in the reign of King John was fraught with dangers.

Welsh Law

The legal condition of women who lived under Welsh law – the so called *Law of Hywell Dda*, for example – in the Mortimer Marcher lordships of Maelienydd and Elfael, was distinctly different from that of English women, but not necessarily either better or worse. On the one hand, during King John’s lifetime, slavery was more common in Wales than in England. On the other hand, unlike in England, most Welsh people were of free status. The unfree women in Wales probably lived a restricted life much like their English counterparts. Free women, under Welsh law, lived at home until married off. This was probably routinely at an even younger age than in England, when perhaps just 13 to 16 years old. At marriage, a free Welsh woman too was usually given a marriage portion, although this was a gift of goods not land, which she brought to the new couple’s household. But a Welsh woman received no right to a dower, or third of her husband’s lands, to support her as a widow. In fact, under Welsh law, women were expressly forbidden to own any land at all, at any stage of their lives. Instead, a Welsh woman was a dependent of her husband during marriage and, as a widow she was reliant on the obligation of her birth family to receive her back and to support her and these were people she may not have seen for many years. The only dower a Welsh widow took away from a marriage was a dower of goods and possessions, no land.

With respect to this key issue of owning land, Welsh law may seem to treat women harshly, but the law of Hywell Dda had its perks. Whereas divorce was illegal under English law, in Wales a woman could lawfully divorce her husband under certain conditions.

The most important grounds for divorce were:

- if her husband should become a leper
- if he should prove impotent
- or if he should cheat on her three times.

In fact, Welsh law took infidelity so seriously that if a Welsh wife should catch her husband in bed with a mistress, she could legally wound or kill the mistress! If a Welsh woman divorced before seven years of marriage she received back her marriage portion, or gift, and a compensation payment from her ex-husband for the loss of her virginity. After seven years of marriage, divorce resulted in an equal split of all the goods of the couple, but the man kept all the land

Lastly, Welsh women, like English women living under coverture, were legally represented by their husbands and could not make contracts. But, unlike English wives, Welsh women did have a right to intervene and veto contracts negotiated by a husband which they believed were patently contrary to the good of the household finances. One can only wonder of the heated conversations which must have taken place in the households of less financially astute Welsh husbands!

This then, was the legal landscape populated by women at the time of Magna Carta, a landscape which still included a small number of slaves without rights, a large English majority of unfree women living under the restrictive legal custom of the manor on which they toiled, and an English minority of free women who had a right to the so called 'common law' of England. And all of these women spent most of their lives in marriage under the restrictive, coverture, or legal representation, of their husbands. To these English women, we can add the Welsh women in Mortimer and other Marcher lordships, who could not own land, and who were also under the control of their husbands, but could at least intervene in financial matters and divorce if necessary.

Magna Carta and Women

So what difference did Magna Carta make to the lives of medieval women?

In 1215 Magna Carta was created overwhelmingly for the benefit of a relatively narrow cadre of land owning men, who felt their rights abused. If we translate the original Latin of the document into English, the word 'women' appears but once, 'widow' but twice and 'wife' but twice. As professor Carpenter has pointed out, when the charter speaks in terms of *homo*, or *homines* (a man, or men) the sense of the charter is almost certainly broader – *homo* meaning a free person of whatever gender. When the charter speaks of 'anyone' or 'no one', women are also included. For example, when Chapter 28 of Magna Carta states that 'no constable or other bailiff is to take anyone's corn or goods unless for immediate payment', the corn and goods of a free widow living on her dower lands would be protected as much those of her male neighbour. But, that said, Magna Carta was not much concerned specifically with the rights of women, except in a small but important number of instances. As women spent most of their lives married, and under the coverture of a husband, the position of unmarried girls and widowed women were the main points which drew the minds of King John's barons to feminine affairs.

Magna Carta and Unmarried Girls.

Feudal England operated on the principal that the king gave men lands in exchange for military services and taxes, and those men in turn gave some of their land to free men below them in exchange for service and taxes, and so forth. The richer men, towards bottom of this chain, owned the manors on which unfree peasants lived and worked. When a free landholder died in medieval England, leaving a child behind, be it boy or girl, the care of the child and most of the deceased chap's lands were put in the control of the next person up the hierarchy, from whom the deceased fellow had had his land and to whom he had paid his taxes. At the top of the chain, if the deceased man held land directly from the king, his land and child were put in the wardship of the king. The king, and indeed lesser men in a position to control wards, would sell the right to be the guardian of

the deceased fellow's lands, keeping the profits from them. And likewise, the king of lord with right of wardship, would sell the right to be guardian of the dead man's child, including the privilege to oversee whom the child might marry. Moreover, this might all take place while the deceased man's widow was alive, but denied guardianship of her own son or daughter.

Of course, a widow might purchase the guardianship of her own child herself, as Phillipa, the wife of Roger Mortimer, Earl of the March, would one day do, during the Reign of Edward III. This was probably fairly common for minor wardships far down the social hierarchy, but only 15 per cent of fines paid directly to King Richard and King John, for the purchase of wardships, were paid by widows. If a widow did not purchase the right to be her child's guardian, and refused to hand over the child to the appointed guardian who bought this privilege, the purchaser could sue the child's mother before the king's court for delivery of the child, using a so called 'writ of right to [a] ward'.

In theory, the rights of wardship existed to prevent a child heir, or widow, from the unscrupulous attentions of grasping relatives and the like; particularly those who might want to force the child into an arranged marriage helpful to themselves. In practice, those same unscrupulous parties often simply purchased the right to legally take control of the land and child. If the child was a boy, he would be free of wardship and might do as he liked, when he reached the age of 21, no matter whom he might already have been coerced to marry. But a girl child, having no brother and set to inherit, was another matter, because once married her husband would have full control of all the lands and estates to which she was heiress, under the custom of coverture. As a consequence, young heiresses were valued commodities, and their hand in marriage might be discreetly, or not so discreetly, sold off the highest bidder, or even married by the guardian himself. The crown too was happy to exploit this custom. During the months King Richard spent in England raising funds for the Third Crusade, guardianships of noble heiresses were sold to the highest bidder to finance his expedition to the Holy Land.

Where Magna Carta intervened in this system was to stop the practices of heirs being coerced into marriages to persons of a lower social rank. As Chapter 6 of Magna Carta puts it, 'heirs are to be married without disparagement'. The practice of wardship would continue through the end of the Middle Ages, but at least, thanks to Magna Carta, there was now legal oversight as to whom the guardians of young women might arrange for those heiresses to marry. This may sound like a very small victory indeed, but it would prove a long term curb on the worst excesses of a system which had seen young women all but, in the words of the Church Council of 1102, 'sold like a brute beasts' to the highest bidder, who might then use the girl's estate to lever himself up the social scale. At least in a marriage between two parties of the same social rank, money would less likely be the main motivation behind an arranged marriage.

Magna Carta and Widows

During a woman's married years she was subject to the control of her husband and Magna Carta has nothing to say of her. But when a woman was widowed, Magna Carta assured her strong protections. First, Chapter 7 states clearly:

'A widow, after the death of her husband, immediately, and without difficulty, is to have her full marriage portion and inheritance, nor shall she give anything for her dower, or for her marriage portion, or her inheritance... [and]...she is to remain in the house of her husband for forty days after his death, within which time her dower is to be assigned to her.'

As mentioned earlier, from the day an English woman married, she had a right to a one third share of her husband's land at his death, called her dower. Likewise, on the day of her marriage her own birth family usually gave her some more land and goods, called her 'marriage portion'. And lastly, a woman could inherit land from her father, if she had no living brothers. If there were several daughters, they split the inheritance equally. But the custom of coverture meant that a woman's

husband had control of all of his wife's land during marriage, and might well have chosen to sell some of it. Upon the husband's death, a widow, far from having the 'immediate' delivery of her marriage portion and any inheritance, as often as not found herself at the start of a long and fraught journey toward claiming these lands, which might take years. The settling of a widow's dower could be an even bigger problem, as the first hurdle was the identification of exactly *which* one third of her late husband's lands should comprise her dower. She, and any adult children, might well have very different ideas about what lands ought to be her dower, as might, should the children still be minors, an incoming guardian of the land, given wardship by the deceased husband's lord or the king. For example, here, on the border, the dower of the widows of Marcher lords was usually carved out of lands away from the principal part of the estate, and away from more turbulent frontier lands. To the question of which should be the dower lands was added the problem that they might have been sold off by the husband during marriage and would probably require litigation against the purchaser in order to claw them back.

Given the complexity of the situation, the statement of Chapter seven of Magna Carta that women ought to have these things in full '*immediately, and without difficulty*' was entirely aspirational. But the rest of this chapter is more practically-minded. First, let us consider the statement that a widow ought to stay in her husband's house for forty days 'within which time her dower is to be assigned'. This was to prevent an unscrupulous adult heir, or incoming guardian who had purchased the wardship of the land, from immediately turfing out the widow from the estate's main residence. And the *assignment* of the dower in this time was similarly a practical and achievable goal, even if actually attaining possession of the dower lands might well require years of litigation. Medieval lawyers often talk of a widow's '*reasonable dower*'; but who is to say for sure what is reasonable, at a time of fluctuating farm incomes, variable methods of measuring land, and so forth.

Among all things that Chapter 7 aspires to achieve, perhaps its most important statement is that no widow is to 'give anything for her dower, or for her marriage portion, or her inheritance'. A serious abuse had arisen by 1215, whereby widows were routinely coerced into paying entry payments, which we might fairly call ransoms or bribes, to have entry into their lands. King John's officials and favorites were themselves not above such things, but the problem of money demanded to grease the wheels went far down the landholding hierarchy. Even poor, free peasant women struggled against such fines in village and borough courts to have their dower, well after Magna Carta's issue.

Mixed Marriages

The struggle of widows to attain their dower had made women frequent litigants in the king's courts before Magna Carta, and would see them litigating with even greater frequency after Magna Carta. Here on the border, litigation could be even more complex than usual as English women, who expected a dower of land, sometimes married Welshmen. Such was the case of Emma d'Auldley of Shropshire, who married Gruffydd Maelor of northern Powis. At Gruffydd's death in 1269, Emma's son Llywelyn insisted that, in accordance with Welsh custom, she ought not receive land in dower. Indeed, it was not until 1277, after much litigation, that she received her dower, with the assistance of Edward I –against the backdrop of his military campaign against Prince Llywelyn ap Gruffydd.

More Support for Widows

The very next chapter of Magna Carta, Chapter 8, is perhaps of even greater importance. 'No widow is to be destrained to marry –that is forced to marry– while she wishes to live without a husband'. There is a second part, to this chapter, saying that a widow must have the assent of her lord, the king, to remarry, but this is often overlooked as insignificant against the backdrop of the assurance that a widow would, in effect, be guaranteed freedom of choice whether to remarry or not. In the years of King John's reign leading up to 1215, about 150 wealthy widows were made to pay for the privilege of remaining unmarried. One aristocratic widow alone, Margaret, the widow of Robert FitzRoger, had paid a staggering £1,000 to remain unmarried and receive other concessions. Magna

Carta gave this right freely to all women, in what one historian has dubbed 'one of the first great stages in the emancipation of women.'

At a time when many young women, especially from wealthy families, married older and warlike men, and became young widows, the capacity to remain a widow, in full control of one's own legal affairs for the greater part of one's life, was a revelation. Add to this the secured enjoyment of a reasonable dower, and within a generation of Magna Carta you get the creation of a class of female landholders who have been called the 'formidable widows' of medieval England. Prominently among these formidable widows numbers Isabel Mortimer, daughter of Roger Mortimer 1st Earl of March. Though she married three times, she spent long periods as a widow, holding key responsibilities under the King. In 1280 she was even appointed to the custody of her late husband's castle of Oswestry, a post she still held in 1282 –on the front line as it were– during Edward's the second Welsh war against prince Llywelyn ap Gruffydd.

Other References to Women

Magna Carta mentions women in two other chapters, but neither would have anything like the long term consequences of those about the disparagement of heirs, the guarantee of free access to inherited and dower lands as a widow, and the right to remain a widow. The more important of the remaining chapters is Chapter 54, which limits the power of women. It states that 'no one is to be arrested or imprisoned through the appeal of a woman for the death of anyone other than her husband.' This chapter can be a little misleading. In the reign of King John, the most serious of crimes, such as murder or rape, were not usually prosecuted by royal officials for the good of the public but, rather, a private person had to file a lawsuit –*an appeal for justice*– with the king's court. They then had to fight that lawsuit through the court in more or less the same way a determined money lender might sue a debtor. When an appeal was launched, most commonly seeking justice for a murder, the defendant was arrested and held in the county goal until trial. With this in mind, what chapter 54 says is that if the appeal for justice has been made by a woman, the defendant will not be arrested to await trial in the usual way, unless the victim was the woman's husband. Before Magna Carta, any person accused in any woman's appeal for justice could be so arrested until trial. Chapter 54 limited this to a wife's appeal against her husband's murderer.

Chapter 54 must have been a blow to women seeking justice, who feared the accused might flee, or menace his accuser, if not arrested. But this was of limited long-term significance because the system of appealing for justice, while living on in theory for centuries, was in practice largely replaced by the end of the thirteenth century with indictment and public prosecution. The routine reporting of serious crimes and criminals, or indictment, for public prosecution had existed since at least 1160, and would be dominant by 1300s. If a serious crime was known, and an appeal for justice not logged within a certain time frame –for example within forty days in a case of rape– a public indictment would be made by community notables, leading to the criminal's arrest and crown prosecution.

The second of the less important chapters of Magna Carta relating to women is Chapter 11, which stated that 'if anyone dies, and owes a debt to the Jews, his wife is to have her dower, and is to pay nothing of the debt'. This chapter reflects anxieties regarding the Jewish community in England, which resided in larger towns and cities, such as York and London, and acted as money lenders both to major landholders and to the crown. Landholders often offered estates as collateral, and defaulted on loans. The result could be that Jewish moneylenders might hold estates for a long time, to recoup loans, and this could potentially comprise part of a woman's dower. But this clause too would shortly be made redundant because, after decades of exploitation and heavy taxation by John's son, Henry III, and grandson Edward I, the entire Jewish community would be expelled from England by the royal edict of Edward I in 1290.

Widening Access to the Benefits of Magna Carta

Widening access to Magna Carta comes about as a result of two things, both of which would be well under way within a century and a half of John sealing the Great Charter. The first is the liberation of the unfree peasantry in England and Wales. The second is the spread of common law principles westwards into Wales.

First, by the time of King John's death, or shortly thereafter, it is likely that that slavery was finally completely extinguished, even in Wales and Ireland, with any remaining slaves thought to have been made unfree peasants. In 1215 perhaps 80 per cent of the peasantry of England were unfree men and women, who had access only to the local law of the lord of the manor, and not the common law of England. Both within the chapters of Magna Carta and over the decades that followed, landlords in England tried to define in increasingly clear, and often increasingly burdensome, terms the inferior position of unfree peasants. But, at the same time, the population grew, and the cost of hiring free men and women to work as farm labourers dropped. As a result, by the reign of the King John's grandson, Edward I, many landlords were allowing their unfree peasants to buy their freedom, as individuals, as families, or even whole villages. Added to this, when the Black Death arrived, in 1348–9, the population was so decimated that landlords became desperate for labourers to work the land, and so manumitted unfree peasants in order to keep them on their own land, lest they flee to another manor where they would be welcomed as new free peasants.

The result was that from the mid 1300s serfdom was in terminal decline, and month on month more of the women of England might consider themselves free women, with access to the king's common law and the benefits of Magna Carta, such as the right to have her inheritance and dower freely and the right to remain an unmarried widow. Indeed, by the late 1400s even the king's highest court, the Common Bench which sat in Westminster hall, was replete with cases brought by female litigants – in truth just particularly prosperous free peasants – seeking their reasonable dower.

Second, the English conquest of Wales brought there the introduction of English legal customs. As the Marcher barons, like the Mortimers, carved out their lordships in Wales they brought to the lowland districts their own version of English Common law, which ordinarily emulated the legal customs of England. The impact of English principles, such as that a free widow ought to have the right to remain unwed, travelled with them. Likewise, in 1284, in the wake of king Edward's 'final conquest' of Gwynedd, Edward issued the so called 'Statute of Wales' or Statute of Ruddlan. Edward had himself confirmed Magna Carta, and thus the rights it afforded women. As you'll recall, under Welsh law, women could neither inherit nor own land at any point in their lives. The Statute of Wales, which was to apply in the royal principality of Wales, rectified this. Women gained the right to inherit land, in the absence of living brothers, as in England. More importantly, women in Wales gained, for the first time, the right to a dower of one third of their late husband's lands, to support them in widowhood. The statute even set out legal actions for widows to use in the king's courts in Wales, at Caernarfon and Carmarthen, to sue for their reasonable dower when denied it.

After 1284, only the Welsh women of the upland parts of marcher lordships were left without the securities of Magna Carta, for it was up to the individual lords, like the Mortimers, to grant such rights to their Welsh tenants as they saw fit. Most did so, eventually. In the later fourteenth century, for a large fee paid by their own tenants, the Arundel lords of Bromfield and Yale issued, in their own name, a version of the Statute of Wales for the benefit of the lordship, including the rights it granted women. They then charged the tenants of the lordship a similar fee for its renewal every few years. Later still, in 1429, for a fee the earl of Arundel extended to women of the lordship of Oswestry the right to inherit and to own land in the English fashion. Generally speaking, by the end of the Middle Ages, most lordships had granted their Welsh women tenants the right to inherit and to have a reasonable dower. Finally, with Henry VIII's 1536 Act of Union of England and Wales, the laws of England formally became the laws of Wales; and where the laws of England went, so too went the guarantees of Magna Carta.

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