

**Remarks of Cecil D. Quillen III to the
International Committee of the City of Westminster & Holborn
Law Society
Friday, May 1, 2015**

Jeffrey, Professor Chandler, Mr. Caplen and distinguished guests, may I first thank you for the opportunity to come before you today. It is a great pleasure and privilege.

As has been pointed out, one of the mysteries of the legacy of Magna Carta is the extent to which Magna Carta seems to be held in considerably greater regard – even in sanctity – in the United States than in England. A lesser mystery is the competence, or lack thereof, of a commercial lawyer whose professional engagement with the courts and the public law of rights is very limited indeed, to try to solve the first mystery. In this connection and in the interest of paying intellectual debts, I should say at the outset that I was very fortunate over 25 years ago at the University of Virginia Law School to study constitutional law under Dick Howard, who, among many other things, was and is America's foremost scholar of Magna Carta and its impact on constitutionalism, and for the purpose of this talk I have

shamelessly ransacked his fine book “The Road From Runnymede”, which remains the standard work on the subject.

That said, I will try today briefly to shed some light on Magna Carta in the United States and, in so doing, offer a few thoughts on the continuing relevance of Magna Carta to the life and law of commerce, which I hope will go some way to explaining why the Great Charter is of deep interest to me personally as a lawyer whose working life is devoted to helping businesses and governments outside the United States raise capital in the United States, and why it is of deep interest to my firm, which is a proud sponsor of the extraordinary exhibition at the British Library commemorating its 800th anniversary.

The story of the Magna Carta and the United States begins not at Runnymede but, really, with Sir Edward Coke. Now of course, the role of Lord Chief Justice Coke in the revival of the idea of Magna Carta as an important intellectual tool against arbitrary royal power in the contentious English political environment in the seventeenth century is well known. Coke’s career at the bar and in the judiciary, as well as his *Institutes* and in particular his *Second Institute*, with its high praise and clause-by-clause analysis of Magna Carta, enshrined in English law and politics of the time the importance of Magna Carta as a way of objecting to certain kinds of royal power while professing loyalty to the

realm. But Coke's thought and legacy thereby takes on even greater importance for the American colonies.

There are at least three reasons for this. And because Magna Carta was understood to be central to Coke's legacy, these reasons also help explain the hold that Magna Carta acquired over the Americans.

First, there is the basic idea, voiced by many but vouchsafed most famously to legal history by Coke, that there are rights that may be vindicated even as against the Crown. Coke asserted that these arose from the common law. But he also was responsible more than any other lawyer or public figure before the settlement of the American colonies for the idea that these rights travelled across the Atlantic.

Coke was not only the main popularizer of his era in Britain of the idea that there was such a thing as the "liberties of Englishmen" – he was the first to suggest that these liberties travelled into the colonies *with* Englishmen. This is literally true – Coke was one of the draftsmen of the Virginia Charter of 1606, which, along with the inevitable provisions relating to mining, fishing, farming and the like, was careful to provide that Virginians would "enjoy all liberties, franchises and immunities" as those born and living in England. Close variants of this language thereafter appear in almost all the colonial charters, even down to the last one, in 1732, for Georgia.

Now why does this matter to the Americans? The story is familiar. One hundred fifty years and more after the Virginia Charter, things began to go sour between Britain and her American colonies, spurred particularly by Britain's need to pay for the Seven Years' War. As the tensions intensified, it became terribly important for the American colonists to define themselves as free British subjects who sought only to vindicate their traditional liberties, not as a treasonable rabble in armed defiance of the King. The fundamental right of trial by jury, together with the bundle of ancillary rights we would later come to identify as "due process" and, especially, that famous right, which Coke and others extrapolated from Magna Carta, promising "no taxation without representation", in this view, belonged to Englishmen from time immemorial and had been vindicated as fundamental law by Magna Carta.

The story of how this happened and how Magna Carta was important in its happening has many many strands. A quite fundamental one – our second reason, if you will - was the influence of legal education in the American colonies. And this story takes us straight back to Sir Edward Coke. It is almost impossible to exaggerate the importance of Coke to the education of lawyers in the American colonies, particularly in the eighteenth century. Coke's *Institutes* were by far the most

frequently seen text in every nascent American law library. In a world where the theoretical portion of legal education was undertaken literally by *reading* law rather than by university lecturing or Socratic discussion of leading cases – and where the first American edition of Blackstone's *Commentaries* was not published until 1771-72 - Coke was universal and was rivalled only by Henry Care's *English Liberties*, another rehabilitation and exaltation of Magna Carta, as a fundamental text. Moreover, many of the people who read Coke and Care closely did not necessarily become lawyers. Edmund Burke commented, at the time of the American War of Independence, not only on what he observed to be the very high proportion of lawyers in the Continental Congress but also on what seemed to be the high degree of awareness among literate laypeople of Coke's idea of the rights of Englishmen enforceable from Magna Carta.

But the rights of Englishmen can only take the Americans so far. What happens when, as Jefferson famously wrote, "it becomes necessary for one people to dissolve the political bands which have connected them with another"? This leads to the third reason for the American affinity for Magna Carta. Although it was not evident when those words appeared in the Declaration of Independence, it soon after became clear that the United States would be defined by its written constitution.

There are many reasons why this happened. But one of the most interesting starts with William Penn. Penn, to my mind, is one of the most remarkable personalities of the late seventeenth and early eighteenth centuries – Quaker, agitator, rebel and pamphleteer, perhaps anomalously the son of an admiral, a hugely successful businessman as well as the proprietor and founder of Pennsylvania -- all in all one of the great figures of the early Enlightenment. But I want to dwell briefly on his role as one of the forerunners of constitutionalism in the American colonies.

Penn, you will recall, received the royal grant of Pennsylvania in 1682 in settlement of a £16,000 debt he was owed by the Crown, which if nothing else will indicate unsurprisingly that the Pound Sterling took one rather further in the seventeenth century than today! Penn was already a well known proponent of the proposition that Magna Carta, particularly as interpreted by Coke, guaranteed procedural and substantive rights inside and outside the courtroom. His famous, tumultuous trial at the Old Bailey in 1670, which ended with a furious judge jailing the jury that returned a verdict of “not guilty” against a charge which the Crown found difficult to formulate exactly but amounted to an allegation of a breach of the King's peace for unlawful assembly for political speaking, had already established him as a

leading public voice linking Magna Carta to the increasingly strong movement to enunciate the rights of Englishmen against their monarch that culminated in the Glorious Revolution and the *English Bill of Rights*.

By the time Penn set out for the New World, he had decided that what was needed was a *written* charter of liberties as worked out in the structure of government. The document, which he called “The Frame of Government of Pennsylvania”, to a greater extent and in greater detail than the earlier colonial charters, was a self-consciously political, rather than commercial, document, setting out judicial processes, and containing many references to and extrapolations from Magna Carta. Subsequently, Penn implemented a “Charter of Liberties” for Pennsylvania, and the Pennsylvania Assembly established a code of laws which enshrined certain “super-statutes” relating to fundamental liberties that could only be amended with the approval of “six sevenths” of the free men of the Pennsylvania Colony – an early precursor of American constitutionalism. No coincidence, then, that Penn was responsible for the first American publication of Magna Carta, at Philadelphia in 1687.

Ninety years later, during the American War of Independence, well before the adoption of the Federal constitution, America’s intellectual

journey from Britain's unwritten constitution to the idea of written ones was very nearly complete. Beginning with the Virginia constitution of 1776 and following in the Massachusetts constitution of 1780 and state constitutions in most of the other former colonies, written enumerations of specific rights, as well as the more general notion, more or less direct from Magna Carta, of general liberties as the "law of the land", became the order of the day. This culminated in the United States constitution and, in particular, its first ten amendments, known popularly as the Bill of Rights, into which twenty-seven specific and enumerated provisions of right are set out.

It is a fair question why the American founders settled so firmly on the idea of a written constitution, especially when viewed from a mother country which, Magna Carta or no, has never set down in one document, or even in many, its plan of government. One answer is that the founders were very greatly concerned about the separation of powers as a concept that would operate in effect to limit the powers of government – the so-called system of "checks and balances". This is far away from the concerns of Magna Carta. But more fundamentally – and especially in the adoption of the Bill of Rights – the influence of Magna Carta becomes clear. When Magna Carta is understood to stand for individual rights and liberties against the state, it becomes a

hugely convenient symbol for justifying that idea by suggesting that it is timeless and is part of the historical heritage of the people forming the constitution.

The Bill of Rights provoked great debate. Many of the framers resisted the idea that it would be necessary to enumerate individual liberties in the constitution. But, in part because of a strategy to procure ratification of the constitution, the proponents of the Bill of Rights prevailed, invoking Magna Carta in their debates as they did so. But the meaning of Magna Carta to them was strikingly different from its general use in its earlier English revival. Rather than using the idea of the “rights of Englishmen” to justify the power of individuals and Parliament against the Crown, in its American constitutional incarnation, Magna Carta became enshrined as a key text for the proposition that a minority needed express protection against the tyranny of a political majority, even if that majority is expressing its will through an elected legislative body. Here, the Americans returned to their Coke – this time, the Coke of Dr. Bonham’s Case, and the proposition – never until very recently to gain currency in a Britain where Parliamentary supremacy is assumed – that there is a law superior to that passed by Parliament.

In this conception, Magna Carta acquires its full symbolic meaning to the Americans – constitutional liberties that may not be infringed even by a duly constituted majority in a legislative body. The idea of a single written repository of all important liberties is a powerful one for a country made by immigration. Even early in the life of the United States, it was the idea, and ideal, of the constitution that would be the rallying point of a polity that was otherwise wildly diverse in most important ways.

It is this role of the constitution as the national rallying point that has ensured the survival in America of Magna Carta as a symbol and ideal. Throughout American history, every contending political group has invoked the constitution as its ideal and Magna Carta as its ancestor. The constitution is an ideal the meaning of which is always up for argument. Does it protect the rights of all Americans? But it was also key to the arguments of the proponents of slavery. Does it stand for implied as well as express rights? Can it also be read, even in modern times, to restrict the regulation of the economy by the federal government? Whatever its American proponents conceive of as “freedom” – and these conceptions are sometimes wildly divergent – the one thing they agree on is that it is protected by the constitution. Because it is a document and a symbol, the constitution is the

authority to which all appeal. The constitution is critical as a symbol because it represents the point of unity – perhaps the only point of unity – as to the power and authority of which all the contenders can agree, even if they agree on nothing else. And the idea that a **document** is the expression of freedom and the bearer of such power and authority also invests Magna Carta with its symbolic appeal to the Americans.

But I told you I would also try to relate that ideal to commercial life – the sphere in which my practice and my firm's move. It is easy to have fun with Magna Carta's archaic preoccupations with financial arrangements, types of property, measures and descriptions of land and types of farming, and instruments of inheritance. Just to say "socage, burgage and scutage" is to provoke a giggle, and it would be easy to think that mort d'ancestor is a 1950s nightclub comedian or an obscure character in *The Once and Future King*. But to ignore these aspects of Magna Carta is both to misunderstand its historical context and to minimize an aspect of its legacy as a symbol of the rule of law.

To be sure, the uses of the language of liberty in pursuit of property can obscure injustice – it is always salutary to remember that the group of Englishmen whose liberties were originally secured by Magna Carta was a very small group indeed. And the uses of the

U.S. constitution and the embedded symbol of Magna Carta in defense of human slavery were grotesque. But the rule of law to procure the protection of creativity and the reward of innovation makes modern life possible. The rule of law to enforce contracts so that infrastructure may be built, that money may be borrowed for worthy projects, that international trade may occur – these uses show that the rule of law is essential to human progress and economic activity.

The wonderfully named economist Hernando de Soto has argued – convincingly, to my mind – that the rule of law is essential to facilitating the escape from poverty of people and nations. Only in a place where property rights are recognized and enforced, he writes, can the poor acquire assets with their labor and deploy those assets as security to create capital to help lift themselves economically. Now I do not mean to view the world through rose-colored glasses in this regard. There is great and crushing poverty that will not be remedied by Magna Carta! But in the final analysis, without investment, there is no progress, and without the rule of law, there is no investment. I have spent substantial portions of my career working on transactions in various emerging markets, and I can attest without reservation that in parts of the world where the rule of law is outweighed by force and political

interest, investment will be impaired and ordinary people will be poorer and have fewer life choices and chances than would otherwise be the case.

Magna Carta is an imperfect symbol of the significance of the rule of law. But it remains a powerful one – as we've seen, an historically very powerful one in the United States in particular. And its significance as a symbol for values that are critical to modern society and its economic life explain why I am here today, and why Linklaters has sponsored the marvellous anniversary exhibition of Magna Carta.

Thank you.