

Reinventing the Charter: from Sir Edward Coke to ‘freeborn John’



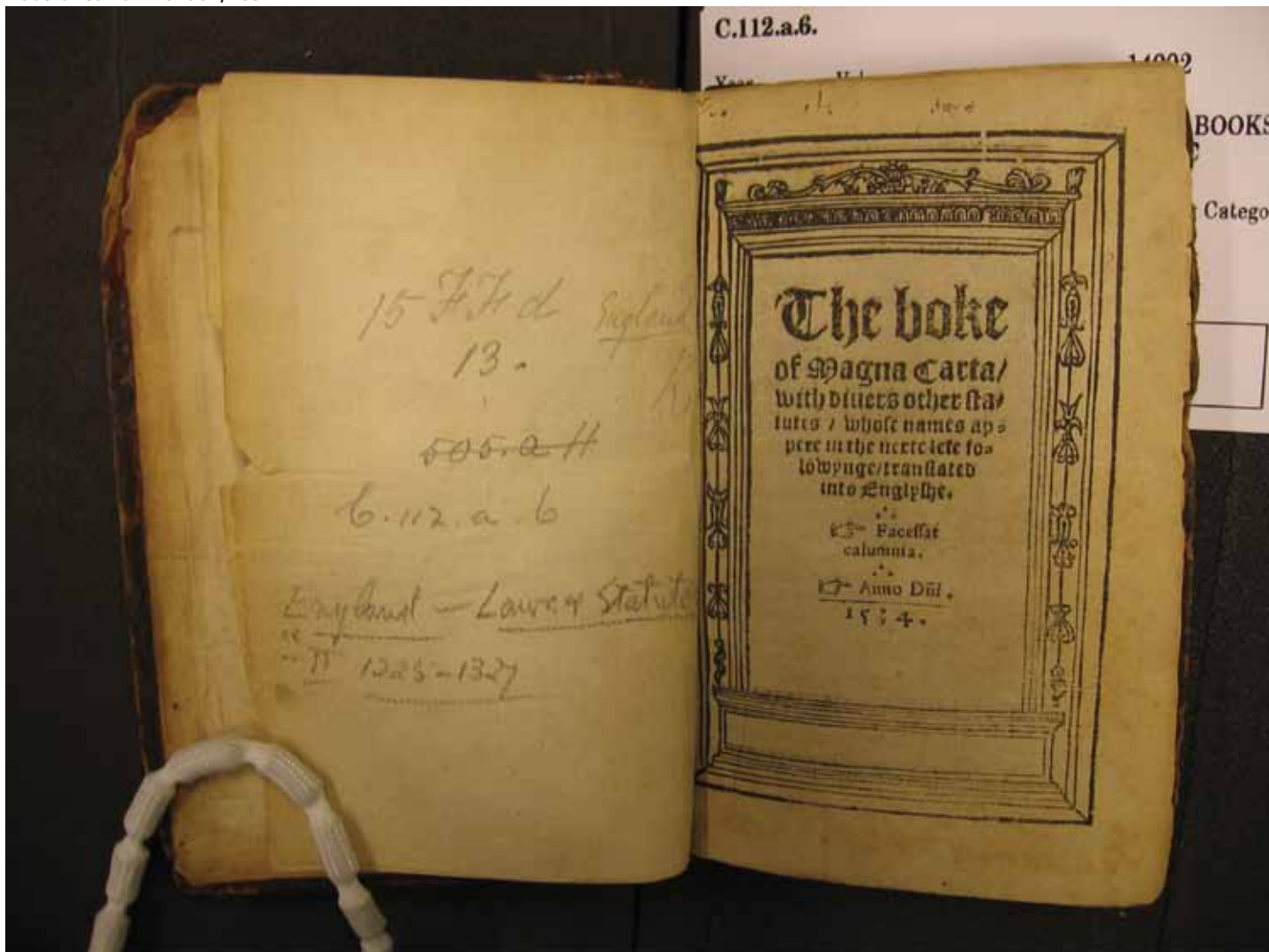
Facsimile engraving of the British Library's 'Burnt Magna Carta', by John Pine, 1733.
© The British Library Board, Stowe 1060, f.55

When was Magna Carta launched on its modern career as a symbol of freedom and liberty? **Justin Champion** looks at the role of the sixteenth- and seventeenth-century lawyers and politicians in shaping how we see the Charter today.

‘For every person who knows what the contents of Magna Carta actually were, there are hundreds who think that the civil liberties of today descend somehow from that document.’¹ So writes the historian of political ideas, Alan Ryan. For long it has been almost commonplace to claim that the constitutional history of England was shaped by the power of Magna Carta to define notions of political and individual freedom and liberty. If this ‘Magna Carta moment’ exists, its origins can be found in the seventeenth-century rediscovery of the Charter and its subsequent elevation to constitutional status. Arguably, in 1500 invoking Magna Carta may not have meant much to many people other than common lawyers. To do so in 1700, however, would have been appreciated by a public audience that included politicians, pamphleteers, princes and the common people.

In the seventeenth century Magna Carta became what modern historians have called a ‘real living document’ – one that was capable of exercising significant influence in contemporary debates and conflicts. The idea that the Charter provided the constitutional bedrock of the legitimate institutions of government and justice originated with the greatest common lawyer of the age, Sir Edward Coke (d.1634). The new interpretation of the Charter advanced by Coke provided a pedigree of political legitimacy: namely that conformity with the principles of this celebrated ancient document established that existing political institutions (most notably the authority of the law, the judiciary

The boke of Magna Carta, with diuers other statutes...translated into Englysh (by George Ferrers).
Robert Redman: London, 1534



and parliament) were valid. At the same time, the longevity of such ideas conferred prescriptive legitimacy.

This rebirth of an appreciation of the significance of Magna Carta in the sixteenth and seventeenth centuries may be attributed principally to two related circumstances.

The first of these was the publication of the printed text of the 1225 reissue of the Charter initially in Latin and then in the vernacular in the early sixteenth century. The reproduction of the Charter in the new medium of print meant simply that many more readers were able to encounter the medieval document. First produced in Latin by the London-based printer Richard Pynson (c.1449-1530) in 1508, these early editions took the form of legal textbooks used by those undertaking a study of the common law. Such *Antiqua statuta* (ancient statutes) were based on the manuscript collections commonly used in the Inns of Court and by the county gentry in their exercise of judicial office.

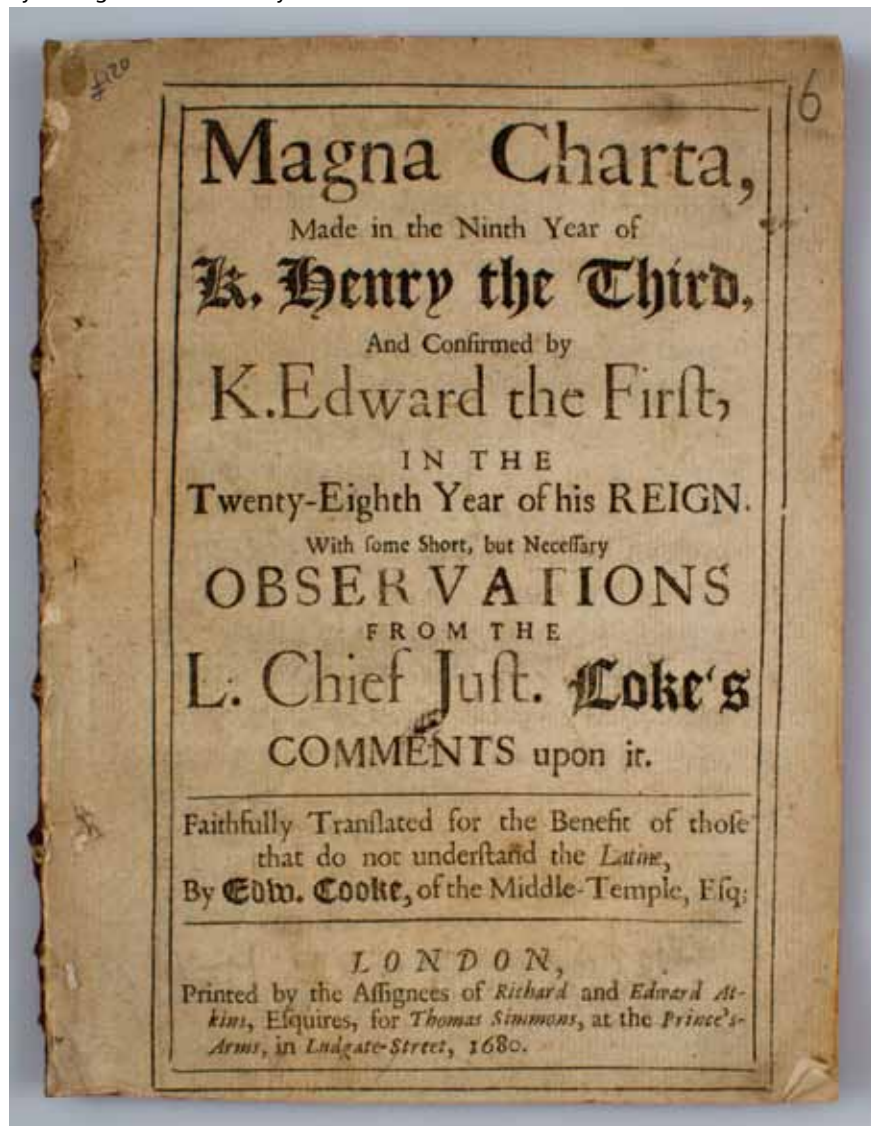
Pynson's publication formed part of his work as the king's printer in publishing parliamentary statutes

and royal proclamations. Indeed, his *Magna Carta* was published with the privilege of the Crown clearly marked. Reproducing the 37 chapters of Edward I's 1297 *inspeximus* of Henry III's reissue of 1225, it combined the text of the statutes in Latin and legal French to enable practical use of the work. The handbook was used by both professional working lawyers, and more generally by legally-minded gentlemen who might have trained briefly in the Inns of Court before returning to the provinces to act as officers of the state. Although exploiting the brand new print technology, Pynson's edition emulated the longstanding manuscript collections of the laws of the realm, which had also commenced with the 1225 reissue of the Charter. Such manuscript and printed collections underpinned the common-law legal culture of Tudor and Stuart England. The text of the Charter was regarded as the foundational statute of the realm; it was the first historical document which a young lawyer might read, or about which he might receive instruction. The 1508 edition was to be reissued, adapted, abridged and copied

by many later publishers over the next 300 years. As well as providing a good income for printers, it established the status of Magna Carta as foundational to the legal history of the British Isles. This tradition of printing the extant laws, known as the *Antiqua statuta*, continued into the nineteenth century, and became more recognisable under the title of *Statutes of the Realm* still published today.

If Pynson's editions were to constitute a foundational source for the legal profession, the publication of an English translation of the Charter in the early 1530s extended the audience for the tradition to a broader gentry culture. The court poet George Ferrers (c. 1510-1579), educated at Cambridge and Lincoln's Inn, produced *The Boke of Magna Carta* (London, 1534), which was the first printed English edition of the Charter. Printed in the popular black-letter font and so ensuring as broad a market as possible, Ferrers' translation was regarded as having a number of errors, some compounded by printer's mistakes. Subsequent editions took a 'great deal of care' to perfect the

A translation of the Magna Charta – for those that do ‘not understand the Latine’ by the legal writer and lawyer Edward Cooke.



text. Ferrers, an MP and Master of the King's Pastimes, also published in verse form the *Myrroure for Magistrates* (1555) which offered counsel for good government. His English translation of Magna Carta, and of other laws, ran to many editions in the sixteenth and seventeenth centuries.

These many printed editions provided the cultural foundations for the expansion of the value of the common law and the prescriptive authority of an ancient constitution in the national imagination. The practices of the courts, the inspiration of the judges, and the culture of political counsel, all in their different ways became informed and inflected by the haunting presence of Magna Carta. The significance of the tradition, by defining the proper relationship between monarchy and good government, went beyond the simple invocation of divine right principles. The idea of a prescriptive historical tradition embodied in the statute book, but capturing a longer immemorial tradition, would be central to the eventual conflicts between the major institutions of political society in the seventeenth century. Magna Carta may not on its own have provided the source for a written constitution, but through the diffusion of its principles by the medium of print it became an important and dominant resource for debate.

The second main circumstance which lay behind the new appreciation of Magna Carta is to be found in the writings of the great lawyer, Sir Edward Coke. Building on a lifetime of legal research and reflection on what was referred to as the 'Ancient Constitution', Coke almost single-handedly breathed new life into the Charter. As he commented in his *Fifth Report*, 'The auncient and excellent Lawes of England are the birth-right and the most auncient and best inheritance that the subjects of this Realm have, for by them he enjoyeth only his inheritance and goods in peace and quietnes, but his life and his most deare Countrey in safety'. Evidence of the enormous impact of Coke's commentaries on Magna Carta can be seen in the constitutional crises of the period, most notably in his own lifetime in the *Petition of Right* (1628) and then later the outbreak of the Civil War in the 1640s.

The touch-paper for the political combustion which saw Magna Carta become incendiary was the Five Knights Case of 1627. In the summer of 1626 King Charles I, seeking non-parliamentary prerogative means to raise revenue to pay for his expensive domestic and foreign policies, unilaterally imposed a Forced Loan, inviting his subjects to contribute funds 'lovingly, freely, and voluntarily'. Although most people paid, being fearful of disobeying the king, many too refused and were imprisoned. Five knights who refused issued legal writs of *Habeas corpus* to seek bail. By November 1627 in the Court of King's Bench, and despite John Selden's invocation of chapter 29 of the 1225 reissue of the Charter, *nullus liber homo*, the Judges of the King's Bench confirmed the monarch's discretionary powers to imprison. The initial defence of prerogative rights of taxation turned into an even more controversial question of the legality of discretionary imprisonment. The defence argued that the Crown was bound by the due process of law, or otherwise it would infringe and jeopardise the ancient liberties of free-born Englishmen. Refusal of bail to Sir Edward Hampden, after the submission of *habeas corpus*, invested the affair with constitutional significance. Sir Edward Coke took the lead, transforming the baronial charter of privileges into a declaration of the rights of free-born Englishmen. The new parliament, which was called in the late spring of 1628, condemned Charles' policies of illegal taxation, imprisonment without cause, and martial billeting. Coke made it clear that there were limits on kingly power, pronouncing his famous claim that 'Magna Charta is such a fellow, that he will have no Sovereign'. Charles I, under considerable duress, confirmed the petition in June 1628.

Magna Carta quickly became a live and powerful resource to the many lawyers who sat in the House of Commons. Its importance to the opposition to Charles I was not simply rhetorical; it provided an effective and legitimate means by which the monarchy could be brought to heel. The stakes, as Sir John Eliot put it, were high: 'Upon this dispute not alone our lands and goods are engaged, but all that we call ours. These rights, these privileges, which made our fathers freemen, are in question'. Coke's authoritative application of the Charter in the parliamentary debates lent it a powerful institutional voice. Transformed into the constitutional forms of the rule of law and the power of parliament, Magna Carta was mobilised to the defence of



Depicted on the Bronze Doors at the Supreme Court building in Washington, DC, is the evolution of Western law. In chronological order each panel of the door represents major events that had an impact on both the formation of justice and the rise of judicial power. Panel 7 depicts England's Lord Chief Justice Coke who bars King James I from the 'King's Court', making the court, by law, independent of the executive branch of government.

actually be seen as the starting point for the idea of the Charter as laying the foundations of fundamental law. It was also seminal in establishing how the judiciary and parliament had adapted the principles of the Charter to circumstances. Those 'Golden passages in the Great Charter of England', specifically *nullus liber homo*, were still being reprinted in aid of liberty as late as 1776.

Coke's account of the tradition of freedom embodied in Magna Carta became a vital resource for wider public use and political audiences after its publication in 1642. While Crown and parliament took their differences over which institution was the legitimate defender of the nation's liberty and property to the battlefield, pamphleteers and politicians in Westminster and the provinces sought to present their ideological arguments in terms of preserving the traditions of the Charter of Liberties.

Once again the printing press was the means by which contested interpretations of Magna Carta were made available to extensive audiences. Abridgements of Coke's commentary, and other short works such as *Briefe Collections out of Magna Charta: or the Knowne good old Lawes of England* (1643), promoted an account of government which insisted that the king and the nation were subjected to the rule of law, which were derived from the 'ancient Maximes and Customes' of the land. The eventual defeat of Charles I reinforced the triumph of the Colean account of Magna Carta.

Those soldiers who fought in the New Model Army against the divinely appointed monarch believed that they preserved the 'ancient constitution' in the name of Magna Carta. Out of the turmoil and conflict of the civil war, and all the complicated political manoeuvres at Westminster, grew other, more radical, aspirations which drew from the same stream of historical authority. Where politicians, such as John Pym and Henry Vane, used Magna Carta to defend the law and the representative institutions of a propertied elite (modern barons) against arbitrary prerogative, others were to invoke it to empower all free-born Englishmen with liberty.

the property and liberty of all free-born Englishmen. Charles I moved against both parliament and Coke. Governing without parliament for a decade, the king also impounded Coke's papers, as soon as an opportunity arose, so avoiding any further publicity regarding Magna Carta and English liberties.

As Sir John Baker has recently established, as early as 1604 Coke had written a private but extensive manuscript commentary on the *liber homo* clause of Magna Carta, prompted by a concern that the new king, James I, raised in the Scottish tradition, might not immediately conform to English principles of government. Although Coke was a holder of important juridical office, he was repeatedly involved in the courts in resisting the king's attempts to use his prerogative to achieve fiscal solvency. When Coke argued that he was acting in defence of property rights, James became increasingly exasperated. Eventually, after what he regarded as provocation, he condemned Coke's 'exorbitant and extravagant opinions', confiscating his papers and, in 1621, confining him to the Tower of London. Coke's bravery in resisting the royal prerogative was to be repeated a decade later, when it was rumoured that he was preparing 'a book concerning Magna Carta'. Charles I, who had succeeded to the throne, forbade publication, anxious, as he said, that it 'somewhat may be in prejudice of his prerogative, for Sir Edward is held too great an

oracle amongst the people'. In 1634, as Coke was expiring on his deathbed, his study was searched, and some 50 or so manuscripts were confiscated. It was this material, when it was published in 1642 in three substantial volumes of commentary, which was to constitute the standard set of textbooks on English common law for many later generations.

Magna Carta, a product of medieval political thinking, necessarily offered only prescriptions about the nature of governance, not specific constitutional proposals. Increasingly, however, Coke's contemporaries saw the legacy of the ancient statute embodied in the practices of law and in the institution of Parliament, which combined to protect, in the famous and much repeated phrase, the 'lives, liberties and estates' of the people. Freedom of the body from improper imprisonment, freedom of property from non-consensual taxation, and even the liberty of tender conscience from the improper persecution of prerogative courts, all became a canon of liberties which drew legitimation from the words of Magna Carta.

Coke's commentary in the second part of his *Institutes* (1642) provided the first comprehensive account which contextualised Magna Carta with a variety of relevant historical and legal materials. Although modern historians often accuse Coke of anachronism, given his quest for seventeenth-century ambitions in a document of an earlier and different period, his work may

The most dramatic manifestation of this new trend was the eruption of democratic discussion prompted by radical 'agitators' in the New Model Army, and the party of civilian pamphleteers known as the Levellers, at Putney church in November 1647. Here, in a unique moment in English history, the voices of the untutored foot-soldier engaged in fierce discussion with the 'grantees' of the Army. Parliament, dominated by the propertied, was regarded as an agent of the 'Norman Yoke': the Army would set the people free. Where such grantees as Henry Ireton argued that property was the foundation for the exercise of political birth-right, other men at Putney insisted that the freedoms which Magna Carta confirmed were natural rights extended to all men irrespective of wealth or poverty. Richard Overton's *Vox plebis, or, the peoples out-cry against oppression, injustice, and tyranny. Wherein the liberty of the subject is asserted, Magna Charta briefly but pithily expounded* (1647), promoted an account of the tradition that extended liberty as a birth-right to all: 'This Charter of our Liberties, or Freemens Birth-right, that cost so much blood of our Ancestors ... is that brazen wall, and impregnable Bulwark that defends the Common liberty of England from all illegall & destructive Arbitrary Power whatsoever, be it either by Prince or State endeavoured'. Drawing quite explicitly on Coke's commentaries (and especially on chapter 29), such popular works argued that, 'In these few words lies ... the liberty of the whole English Nation. This word, *liber Homo*, or free Man, extends to all manner of English people'. Such liberty from slavery was due, not just to elites, but to the common man too.

John Lilburne (1615-57) who had experienced brutal imprisonment by the prerogative Court of Star Chamber in the 1630s (he was whipped) and was imprisoned by parliament in the 1640s, contributed to this debate. Between 1646 and 1649 he published some 40 works defending the rights of the free-born Englishman – often focused on protecting his own circumstances and demanding, for example, the resurrection of trial by a jury of his peers. Exploiting Coke's interpretations, he turned the critical arguments of the Magna Carta tradition against the tyranny of parliament, not just kings. For Lilburne the *liber homo* of the Charter became all the 'free-born Englishmen' who were, importantly, not subjects but citizens. The privileges identified in the Charter were the equal 'Birth-right and inheritance' of all the

commons of England. The titles of Lilburne's various pamphlets reinforce the centrality of freedom and liberty: *The free-mans freedom vindicated* (1646), *Foundations of freedom* (1648), *Liberty vindicated against slavery* (1646), *The legal fundamental liberties of the people of England, revived, asserted and vindicated* (1649), and *England's birthright justified* (1645). Lilburne developed a sophisticated political theory combining natural law concepts with the historical authority of Magna Carta. In and through such works he reinforced the claim that the law itself was the fount of English freedoms. Magna Carta had reconfirmed the force of earlier laws, most notably those of the pre-Conquest King Edward the Confessor, which had been corrupted by William I. In more ambitious moments, Lilburne understood Magna Carta to enfranchise all adult men in active citizenship exercising their rights as citizens, holding political office, and legitimating politics by consent. It was, he argued, the constitutional right of free-men to petition, vote and choose parliamentary representation.

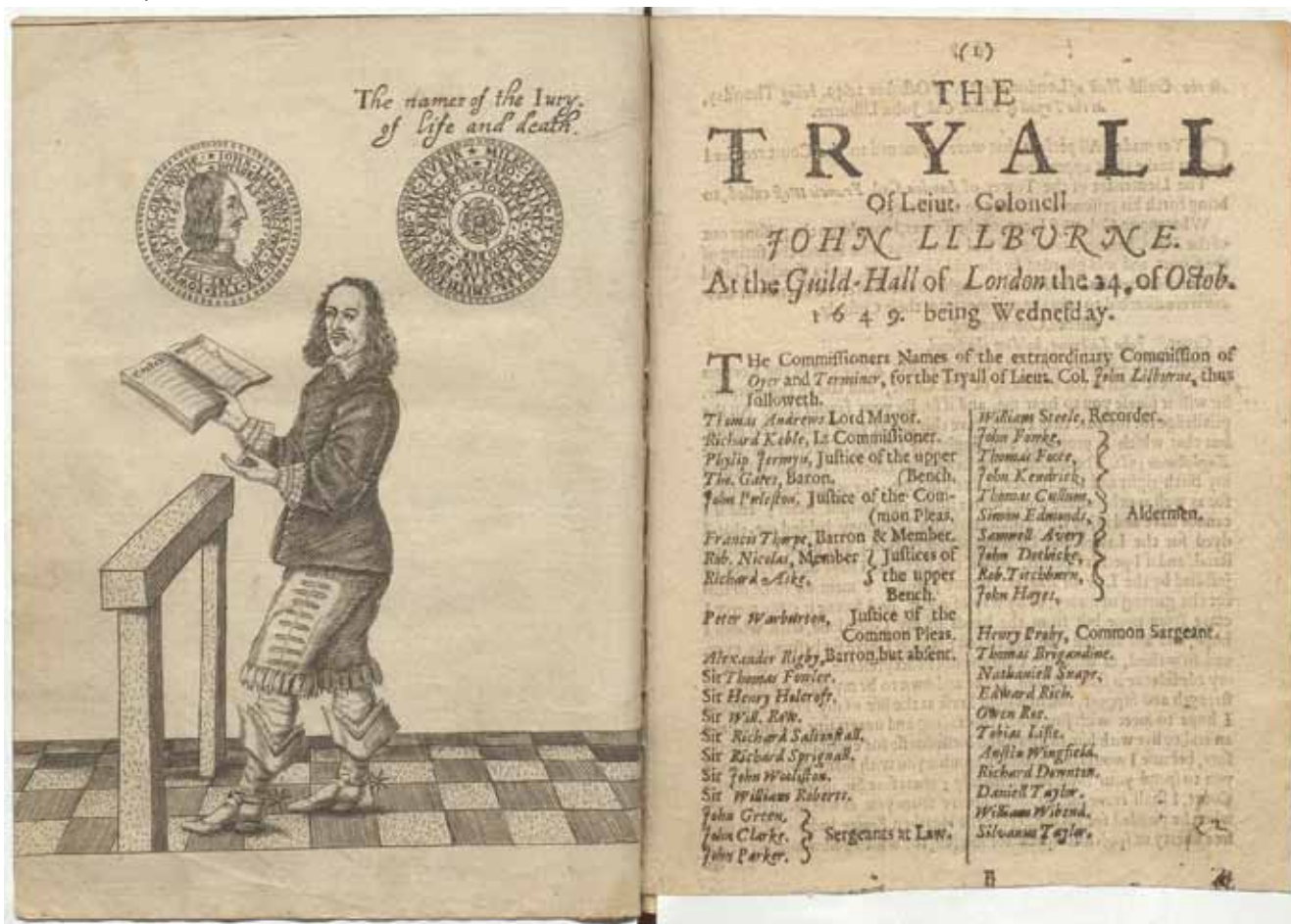
The symbolic power of appealing to the principles of Magna Carta was also significant in the context of religious liberty. From the early sixteenth century, the new-born Church of England had invoked the opening chapters of the Charter to defend Protestant liberties against the papacy. During the 1580s Puritans used arguments from Magna Carta for the liberty of religion against illegal *ex officio* oaths by prerogative courts of High Commission. By the 1640s the 'teeming freedom' of religious sectarianism also claimed the privileges of the liberty of conscience and worship under the same banner. Prophetic figures such as Thomas Tany (1608-59) applied arguments about civil freedoms to religious liberty. Magna Carta defended liberty of belief against the tyranny of the Church. A controversial work, *Tithes totally Routed by Magna Charta* (1653) condemned the 'oppression and lordly tyranny' of the 'pompous priests', insisting that church tithes were illegal unless voluntary. The 'Cobbler of Gloucester', Ralph Wallis, invoked Magna Carta against the claims to pastoral authority by the 'pityful stinking priesthood' in a series of polemical pamphlets.

Quaker authors, especially after the Restoration of the Church of England in 1660, repeatedly sought refuge in the legal liberties originating in Magna Carta as a means to protect themselves from the persecution of the established Church. Richard Farnworth (c.1630-66) argued in *The Liberty of the Subject by*

Magna Charta (1664) in defence of the legality of Quaker meetings and of the Quakers' rights as citizens. William Penn as late as 1688 claimed to have designed a 'New Magna Charta for liberty of Conscience' which aimed to ensure that all religious minorities would be allowed their full civil rights. Penn was the first to have an edition of the Magna Carta published in the American colonies.

Magna Carta was regarded as a 'brazen wall and impregnable Bulwark, that defends the common liberty from Arbitrary power'. It also legitimised the expression of popular freedom in the mass petitions of parliament: Levellers aimed, in their words, to make Magna Carta 'walk abroad again with new vigour and lustre'. The period from 1215 to the Large Petition of 1647 was regarded as an historical continuum, seeing what Richard Overton called the 'perpetual establishment of liberty'. Such performances of the principles of 1215 took people far from the original project. Much of the radical usage of Magna Carta did not simply invoke historical prescription, but argued that the antiquity of the tradition proved the fundamental rationality of freedom. The source of Magna Carta's appeal was that it embodied both historic rights and ancient custom: the powerful discourse that emerged – that freedom and liberty of person and estates were the natural birth-right of free-born Englishmen – was a dominant idiom of public political discourse into the nineteenth century.

The legacy of Magna Carta and free-born liberty was even more pronounced in the later seventeenth and eighteenth centuries, when it found expression in the promotion of the principles of consent, popular sovereignty, and in limitations on the exercise of royal prerogative, all eventually embodied in the legislation resulting from the Glorious Revolution such as the Bill of Rights of 1688-89. This legacy is persisting but there was also a more mundane, while nonetheless important tradition which connects with contemporary concerns about civil liberty. In 1680, at the peak of the conflict between king and parliament which prompted John Locke to write (if not publish) his *Two Treatises on Government*, a radical Whig journalist, Henry Care, produced a handbook of civil liberties: *English Liberties; or the Freeborn subject's inheritance* (London, 1680). Explicitly drawn from Magna Carta, this explained (for those suffering illegal persecution) the precise procedure for defending individual freedom from the tyrannical interference from kings or priests. Henry Care



(1646-88) was a propagandist notorious for his membership of the radical Green Ribbon Club, which campaigned to 'exclude' the Roman Catholic James, Duke of York, from the throne. A powerful polemic, written for Protestant audiences against tyrannous 'Popish' governors and magistrates, his *English Liberties* drew on a radical reading of Magna Carta to champion the personal freedom of 'free-born' Englishmen. Building on the authority of the Charter, the work vigorously defended trial by jury (an important freedom which defended even elite politicians from persecution in the 1680s). The book conveniently extracted the appropriate writs and procedures which might be used in defence of personal freedoms which were historically rooted in the Charter. Although initially condemned as seditious, the work, frequently reproduced into the eighteenth century, became a standard handbook of civil liberties against all forms of tyranny. Editions were even produced in the American colonies in Boston and Providence, Rhode Island, between 1721 and 1774. From the eighteenth century this invented tradition of the Magna Carta, made more popular with the new editions of William Blackstone (1759), and cheap facsimiles for hanging on walls, became global. Magna Carta provided an historical continuity for a constitutional past, which operated alongside, and sometimes in opposition to, the enduring monarchical tradition.

After the Glorious Revolution of 1688, 'Magna Carta', embodying the core principles of the 'Ancient Constitution', was regarded as evidence of the legitimate contractual relationship between government and people. A free British polity, such as that secured in the successful Hanoverian accession after 1714, was built upon the values of personal freedom and property rights derived from Magna Carta, embodied in the Statutes of the Realm, and reaffirmed in the Bill of Rights (1689) and the Act of Succession (1701). At different times, therefore, different

men clothed their claims for political and personal freedom in the universal authority of the Charter. The events of 1215 became not simply a legal and historical precedent but an enduring and almost unchallengeable symbol or myth.

Further reading

The classic essay is Herbert Butterfield, *Magna Carta in the historiography of the 16th and 17th centuries* (Reading University, Stenton Lecture, 1969), still in print and very inexpensive.

R.V. Turner, *Magna Carta through the Ages* (Harlow: Pearson, 2003)

A. Pallister, *The Heritage of Liberty* (Oxford, 1971)

A very good, and free access, collection of essays is Ellis Sandoz, (ed.) *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* (1993) <http://oll.libertyfund.org/titles/2180>

The writings of Edward Coke are also available on **The Liberty Fund** online library at <http://oll.libertyfund.org/titles/coke-selected-writings-of-sir-edward-coke-vol-i--5>

REFERENCES

¹ A. Ryan, *On Politics. A History of Constitutional Thought* (2 vols., London, 2012), ii, p. 811.

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